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**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 RESPONSE BRIEF TO THE BUREAU OF INDIAN AFFAIRS MOTION FOR SUMMARY JUDGMENT**

COMES NOW the Blackfeet Nation, by and through counsel, and hereby submits its Response Brief to the Bureau of Indian Affairs' Motion for Summary Judgment, as follows:

INTRODUCTION

Plaintiff Eagle Bear, Inc. filed its Second Amended Complaint against the Blackfeet Nation and Darryl LaCounte, Director of the Bureau of Indian Affairs seeking a determination that a former lease between Eagle Bear and the Blackfeet Nation was not cancelled in 2008.

The Bureau of Indian Affairs has moved for Summary Judgment against the Plaintiff Eagle Bear on the grounds that the government's sovereign immunity remains in effect. Without citation to any factual or legal authority, BIA mistakenly asserts that it has not taken final action on the 2008 lease cancellation, and there is no final agency action to review. Doc. 25, at 5. The United States' position that the BIA has not made a final decision on the 2008 lease cancellation is not supported by the facts and is contrary to the law. It is also inconsistent with its opening statement that it does not take a position whether the lease was cancelled in 2008.

1. BIA's June 10, 2008 Cancellation of the Former Lease Between Eagle Bear, Inc. and the Blackfeet Nation Was A Final Agency Action.

Without citation to any factual basis or legal authority, the Bureau of Indian Affairs incorrectly asserts that "[it] has not taken final action on the 2008 lease cancellation". Doc. 25 at 5. As a matter of law, BIA's June 10, 2008 cancellation of the former lease became final on or about February 5, 2009, 30 days after Eagle Bear withdrew its appeal on January 5, 2009 and the cancellation was still in effect. 25 CFR § 2.6(b); 25 CFR §2.9(a); 25 CFR §162.621. The June 10, 2008 cancellation was never withdrawn, reversed, rescinded, modified, amended or otherwise overturned by the proper BIA official – the Regional Director. 25 CFR §2.4. BIA's time to do so has long since passed. 25 CFR § 2.6(b).

As the Blackfeet Nation has argued in its opening Brief (Doc. 28 at 21-23) and the United States agrees, two conditions must be satisfied for agency action to be "final": "First, the action must mark the "consummation" of the agency's decision-making process --it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow."" *Bennett v. Spear,* 520 U.S. 154, 177-178 (1997) (citations omitted).

BIA's June 10, 2008 cancellation letter clearly meets this two-part test. Once Eagle Bear withdrew its appeal and 30 days passed, that marked the consummation of the BIA's decision-making process – lease cancellation is not tentative or interlocutory in nature. When BIA cancelled the former lease on June

10, 2008 it had clearly made a determination of Eagle Bear's legal rights and legal consequences flowed from that determination. Eagle Bear had to successfully appeal the cancellation or the lease was ended and it no longer had a legal right to occupy Blackfeet Nation land. 25 CFR §§ 2.6(b), 2.7, 2.9 and 2.10.

While Eagle Bear initially filed a timely but meritless appeal of the June 10, 2008 cancellation, it subsequently withdrew its appeal on January 5, 2009 with the cancellation still in effect. At that point, the administrative clock on the June 10, 2008 began to run. 25 CFR §§ 2.9 and 2.6(b). Pursuant to the law, the cancellation became final on February 5, 2009. *Id.*

The United States also fails to acknowledge that pursuant to controlling administrative law, the applicable statute of limitations ran on Eagle Bear's right to file a court challenge to the 2008 cancellation on or about February 5, 2015 or six-years after the cancellation decision became final. In *Big Lagoon Rancheria v. California*, 789 F. 3d 947 (9th Cir. 2015), the Ninth Circuit held that 28 U.S.C. § 2401(a) creates a general six-year statute of limitations for actions brought against the United States. See 28 U.S.C. § 2401(a) ("Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."). This rule "applies to actions brought under the APA." *Wind River*

Mining Corp. v. United States, 946 F.2d 710, 713 (9th Cir.1991) (footnote omitted).

Consequently there is no legal basis for the BIA to go back 14 years to review an administrative decision which long ago became final and on which the statute of limitations has run. As this Court has already acknowledged, by filing its appeal and then withdrawing that appeal, Eagle Bear both pursued and exhausted its administrative remedies. *Eagle Bear, Inc. et al v. Blackfeet Nation et al, Case No. 21-cv-88-BMM, Doc. 27 at 19* ("The Blackfeet Nation must exhaust no further administrative remedies before bringing its complaint in tribal court."). Importantly and dispositively, BIA has failed to cite any legal authority for its position that the 2008 lease cancellation is not a final agency action.

2. BIA's Reliance on Eagle Bear, Inc.'s Baseless Legal Arguments is Contrary to the Law and the Regulations and in Gross Violation of Its Trust Responsibility to the Blackfeet Nation.

Strangely, the Bureau of Indian Affairs cites Eagle Bear's arguments as its authority for the claim that BIA had not made a final decision on the 2008 lease cancellation. The BIA quotes a clear misstatement of the law from Eagle Bear's Second Amended Complaint, that "no final decision of the Regional Director affirmed the 2008 cancellation letter". Doc. 25 at 5. Amazingly, BIA also quotes Eagle Bear's brief in opposition to the Blackfeet Nation's motion to dismiss in the main case, for the proposition that there "was no final decision regarding the 2008

lease cancellation". *Id.* Both of Eagle Bear's statements relied upon by BIA are factually and legally incorrect.

As the Blackfeet Nation has pointed out, according to the applicable administrative law, which BIA is charged with knowing and carrying out, BIA Blackfeet Agency's June 10, 2008 cancellation of the former lease was a final decision on the 2008 lease cancellation. Once Eagle Bear withdrew its appeal and the Agency Superintendent's decision remained in effect, there was no legal basis or need for the Regional Director to take any further action on the June 10, 2008 cancellation letter. That is not the law. Neither Eagle Bear or BIA offer any legal authority for the baseless assertion that further action by the Regional Director was necessary for the cancellation to become final – not one regulation, not one Federal statute, not one case from the Interior Board of Indian Appeals and not one Federal case at any level. No legal authority supports that claim.

Indeed, if what BIA and Eagle Bear were saying was true (which it is not), that the Regional Director has to take action on every lease cancellation even when an appeal is not pending for the cancellation to become final, then no lessee would have to appeal a lease cancellation and no lease cancellation would become final until affirmed by the Regional Director. Such a requirement would surely clog the BIA's already incompetent lease enforcement process to the point of non-

functionality. Thankfully for Indian Nations and Indian individual lessors, that is not the law.

The Blackfeet Nation should not have to remind BIA that its trust responsibility and its duty is to enforce Indian leases for the benefit of the Indian lessor, not the non-Indian lessees. *Hollywood Mobile Estates v. Seminole Tribe,* 641 F.3d 1259, 1267-69; (11th Cir. 2015); *Candelaria v. Sacramento Area Director, BIA,* 27 IBIA 137 139 (1995). That BIA systematically and negligently failed to carry out its statutory and trust duty to the Blackfeet Nation by failing to take enforcement action against Eagle Bear for the many violations of the lease is not the fault or responsibility of the Blackfeet Nation. Even after the lease was cancelled in 2008 and BIA failed to act, Eagle Bear still willfully failed to pay the gross receipts royalty payment for 2008, 2009, 2010 and 2011. Yet BIA did nothing.

When BIA did finally write Eagle Bear a letter in 2012 on the delinquent gross receipts royalty payments (negligently omitting 2008)(*Eagle Bear et al. v. Blackfeet Nation et al.,* Doc. 82-5 at 753, USA-AR_0753), Eagle Bear responded by admitting that it had not paid the required payments. *Id.* at 800, USA-AR_800. Then for the next 5 years Eagle Bear still failed to make these payments and BIA did nothing. Not until the Blackfeet Nation discovered the delinquent payments

and requested that BIA cancel the lease again did the BIA act to carry out its trust responsibility and legal duty.

It is deeply disturbing to the Blackfeet Nation, to whom the BIA owes a trust responsibility, that BIA would cite to completely baseless legal statements from the non-Indian former lessee who clearly violated the lease, in an attempt to cover up or deflect from its own gross negligence. In other cases which the Blackfeet Nation has examined, when appraised of their errors, BIA Agency officials immediately took action to enforce the law and carry out their trust responsibilities. *See David M. Jackson, M & M Farms v. Portland Area Director, Bureau of Indian Affairs*, 35 IBIA 197 (9/25/2000)(Issue of Jackson's lack of a lease after 5 years was brought to the attention of the Agency Superintendent, notwithstanding Jackson's payment of rent, Supt. gave Jackson notice of eviction for trespass and assessed damages). Here, agency officials are in complete denial and refuse to accept responsibility for the obvious failure to enforce the law and the lease.

In *Hollywood Mobile Estates v. Seminole Tribe,* 641 F.3d 1259, 1267-69; (11th Cir. 2015), the Eleventh Circuit discussed the purposes and interests protected by the Indian Long-term Leasing Act, 25 U.S.C. §415, and the federal regulations promulgated thereunder at 25 CFR part 162, Subpart F – Non-Agricultural Leases. Articulating the role of the Secretary of the Interior in leases of Indian trust land and the purpose of 25 U.S.C. Sec. 415, the Eleventh Circuit said:

> The Secretary's approval of leases of Indian land "is consistent with the long-standing relationship between Indians and the government **in which the government acts as a fiduciary with respect to Indian property**." *Saguaro Chevrolet, Inc. v. United States*, 77 Fed.Cl. 572, 577-78 (2007). **That fiduciary relationship requires the federal government to act for the benefit of Indian landowners because Congress intended section 415 "to protect Indian tribes and their members**." *San Xavier Dev. Auth.*, 237 F.3d at 1153; *see also Utah v. U.S. Dep't of Interior*, 45 F.Supp.2d 1279, 1283-84 (D.Utah 1999).

Hollywood Mobile Estates v. Seminole Tribe, 641 F.3d 1259, 1269 (11th Cir. 2011)(emphasis supplied).

Consistent with its analysis of the purpose of 25 U.S.C. Sec. 415, the Eleventh Circuit found that the same was "true of the corresponding regulations, which charge the Bureau of Indian Affairs with regulating leases under section 415." *See generally* 25 C.F.R. pt. 162, Subpart F (2008 ed.). *Hollywood Mobile Estates v. Seminole Tribe*, 641 F.3d 1259, 1269 (11th Cir. 2011). Those regulations address the responsibilities of the BIA in administering and enforcing Indian leases and provide that the Bureau acts to protect the interests of Indian tribes. *Id.* at 1269. Indeed, "Section 415 and its accompanying regulations protect Indian landowners, not nontribal lessees." *Id.* at 1270.

Fortunately, Indian Nations and Indian People are not bound by BIA's negligence. Upholding the cancellation of a lease of Indian trust land, the Ninth Circuit Court of Appeals, stated:

> "we need not consider the consequences of the B.I.A.'s failure to faithfully discharge its responsibilities toward the Indians in the management of the trust obligations. Nevertheless, we doubt that the B.I. A.'s negligence can be imputed to the Indians so as to estop them from exercising their rights under contract. *See United States v. Forness*, 125 F.2d 928, 932-933 (2d Cir.), *cert. denied sub nom., City of Salamanca v. United States*, 316 U.S. 694, 62 S.Ct. 1293, 86 L.Ed. 1764 (1942).

Sessions, Inc. v. Morton, 491 F.2d 854, 857 n.5 (9th Cir. 1974)(Honorable Russell E. Smith sitting by designation).

BIA's negligent administration and enforcement of the former lease between the Blackfeet Nation and Eagle Bear, Inc. cannot prevent the Blackfeet Nation from exercising its right to evict Eagle Bear from Blackfeet Nation trust land when it has no legal right to occupy that land. The former lease was cancelled on June 10, 2008 and that cancellation was never reversed, rescinded, withdrawn, modified, amended or otherwise overruled. It became a final agency action on February 5, 2009 and the statute of limitation ran six years later.

CONCLUSION

There is no legal basis for BIA to review the 2008 lease cancellation. By operation of law, BIA's June 10, 2008 cancellation of the former lease between the Blackfeet Nation and Eagle Bear, Inc. became a final agency action 30 days after Eagle Bear withdrew its meritless appeal on January 5, 2009. The applicable six-

year statute of limitations ran on Eagle Bear's right to seek judicial review on or about February 5, 2015.

DATED this 14th day of December, 2022.

Respectfully Submitted,

_____/s/_Joseph J. McKay_____

_____/s/_Derek E. Kline_____

Attorneys for 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 2,182 words, excluding the Caption, Certificate of Compliance and Certificate of Service.

_____/s/_Joseph J. McKay_____

_____/s/_Derek E. Kline_____

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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify under the penalty of perjury that on the 14th day of December, 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