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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 EAGLE BEAR, INC.'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW the Blackfeet Nation, by and through counsel, and hereby submits its Response Brief to Eagle Bear, Inc.'s Motion for Summary Judgment, as follows:

INTRODUCTION

Plaintiff Eagle Bear, Inc. has moved for Summary Judgment asserting that the former lease between Eagle Bear and the Blackfeet Nation was not cancelled because BIA agreed that Eagle Bear's late payment after the lease was cancelled brought the lease current; that the parties' actions and subsequent conduct confirm that the former lease was not cancelled; that BIA Agency employees' interpretation of the record confirms that the lease was not cancelled; and, that purported errors in the June 10, 2008 cancellation confirm that the only correct decision that the Regional Director could have made was to reverse the lease cancellation and not cancel the lease.

BIA has moved for summary judgment alleging that its June 10, 2008 cancellation decision was not a final agency action. BIA relies on statements made by Eagle Bear in its pleadings as legal authority for this questionable assertion. *See* Doc. 25 at 5. Blackfeet Nation has responded separately to the BIA's incorrect assertion. Those arguments will not be repeated in full here.

Both Eagle Bear and the United States are wrong. BIA's June 10, 2008 lease cancellation became a final agency action as a matter of law on February 5,

2009, 30 days after Eagle Bear withdrew its appeal on January 5, 2009 and the Agency's cancellation remained in effect.

Eagle Bear's assertions in support of its motion for summary judgment can be divided into 2 parts: First, Eagle Bear claims that lease was not cancelled in 2008; that it timely cured the default for which the lease was cancelled; and BIA's conduct supports that the lease was not cancelled. Second, Eagle Bear claims that while the lease was cancelled, the cancellation was improper. For the reasons set forth herein and in the Blackfeet Nation's Motion for Summary Judgment, Eagle Bear's motion for summary judgment must be denied.

1. BIA's 2008 Cancellation of the Former Lease Was A Final Agency Action.

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).

BIA's June 10, 2008 cancellation letter clearly meets the two-part test for an agency action to become final. *Bennett v. Spear,* 520 U.S. 154, 177-178 (1997) (citations omitted). Once Eagle Bear withdrew its appeal and 30 days passed, that

marked the consummation of BIA's decision-making process – lease cancellation is not tentative or interlocutory in nature. BIA had made a determination of Eagle Bear's rights, and legal consequences flowed from that determination. Eagle Bear had to successfully appeal or the lease was terminated 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 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 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. *Big Lagoon Rancheria v. California*, 789 F. 3d 947 (9th Cir. 2015)(28 U.S.C. § 2401(a) creates a general six-year statute of limitations for actions brought against the United States). 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). Eagle Bear's challenges are time-barred.

2. Because the Material Facts Upon Which Eagle Bear, Inc. Bases its Claims Are Unsupported By or Contrary to the

Evidence and Those Claims Are Foreclosed By the Law, Eagle Bear's Motion for Summary Judgment Must Be Denied.

When you don't have the facts, argue the law; when you don't have the law, argue the facts. When you don't have either, make it up. That is what Eagle Bear has done here. Eagle Bear has made up facts and law to support its failed position.

Ignoring the facts, the record, the express language of the former lease agreement and the law, Eagle Bear baselessly asserts that the lease was not cancelled in 2008 because its appeal resulted in a determination by BIA that the lease was valid and remained in effect, and that BIA's erroneous interpretation of its own record and the parties subsequent conduct confirmed that BIA did not cancel the lease in 2008. Alternatively, Eagle Bear asserts that the errors in the 2008 lease cancellation rendered it invalid. Eagle Bear's claims are not supported by undisputed material facts and are contrary to the actual evidence. Even if true (which they are not), the assertions made by Eagle Bear are foreclosed by the law.

In order to grant summary judgment for Eagle Bear based on the claims which Eagle Bear has put forth, the Court would have to re-write or completely ignore the former lease, re-write the facts, re-write BIA's June 10, 2008 cancellation letter, re-write Eagle Bear's June 18, 2008 Notice of Appeal and Statement of Reasons, re-write Eagle Bear's January 5, 2009 letter withdrawing their appeal, and ignore the entire body of law and regulations governing the leasing of Indian trust land.

As it has throughout this matter, Eagle Bear begins by stating a false premise, both distorting the facts and making up facts to support that premise, and then making up its own purported rules of law or borrowing rules from unrelated areas of the law. The issue before this Court based on Eagle Bear's Second Amended Complaint, is whether the 2008 lease cancellation was valid (or as the Blackfeet Nation asserts, whether the 2008 cancellation is even reviewable today). Ignoring the express language of BIA's June 10, 2008 cancellation letter, Eagle Bear asserts that the issue is what decision the BIA reached. Doc. 23 at 22. Eagle Bear furthers this effort by making up the law which applies to leasing of Indian trust land. In furtherance of this failed effort, Eagle Bear attempts to rely on general principles of Federal Administrative law which have no application to the regulations governing the leasing of Indian trust land.

a. The Former Lease Was Cancelled in 2008, And No Decision of the BIA Determined Otherwise.

It is beyond dispute that on June 10, 2008, BIA reached a decision to cancel the former lease between the Blackfeet Nation and Eagle Bear. *See* Doc. 34, BIA Cancellation Decision. While the Blackfeet Nation agrees that Eagle Bear appealed and that Eagle Bear's appeal stayed the application of the cancellation decision, when Eagle Bear withdrew its appeal on January 5, 2009, the administrative clock on the finality of BIA's cancellation began to run. 25 CFR § 2.6(b); 25 CFR §2.9(a); 25 CFR §162.621.

In a failed attempt to deflect this outcome, Eagle Bear relies on purported representations by BIA Blackfeet Agency officials that the lease was supposedly current and Eagle Bear could withdraw its appeal. That claim is contrary to the testimony of the former BIA officials who Eagle Bear claims made the statements. Even if the statements were true, the claim that those official could or did resolve the appeal is foreclosed by the law.

Under oath, former BIA Blackfeet Agency Superintendent Pollock and Leasing Specialist Tracy Tatsey, both denied telling William Brooke, President of Eagle Bear, that he could or should withdraw Eagle Bear's appeal. Doc. 32 at 22-23, Blackfeet SUF ¶¶111-112. Critically, as this Court has already acknowledged, pursuant to the law, those BIA officials had no authority over the appeal once it was filed. *Eagle Bear, Inc. et al v. Blackfeet Nation et al, Case No. 21-cv-88-BMM, Doc. 27 at 6* ("The Rocky Mountain Regional Director of the BIA possessed the sole authority to overturn the lease cancellation. See 25 C.F.R. § 2.4.").

Eagle Bear asserts without citation to authority, that an appeal of a BIA Superintendent's decision is typically resolved by a written decision of the BIA Regional Director regardless of whether the appeal is decided on the merits, by an appellant's withdrawal, or otherwise. Doc. 23 at 22. Eagle Bear is correct that decisions of BIA officials must be written (25 CFR § 2.7(a)), it is completely wrong in the assertion that a decision of the Regional Director is required when an

appellant withdraws an appeal. Eagle Bear offers no authority for this statement, and there is none. When an appeal is withdrawn, there is nothing for the Regional Director to act on. The decision of the agency becomes final as a matter of law. *See* Sec. 1, infra.

Eagle Bear's claim that there was a decision on its appeal by the BIA Superintendent or some other BIA Blackfeet Agency official but that the decision just was not a written order, is contrary to both the law and the facts. Pursuant to 25 CFR § 2.7(a), a BIA decision maker must give "written notice" of the decision to all interested parties. Pursuant to 25 CFR § 2.2 the Blackfeet Nation was an interested party once Eagle Bear filed its appeal. *Id*. There was no written decision on Eagle Bear's appeal withdrawing, reversing or overruling the June 10, 2008 cancellation decision. If there had been such a decision (which there was not), BIA would have been required to give notice to the Blackfeet Nation. 25 CFR § 2.7(a). No written decision was ever made, no notice was given to the Blackfeet Nation, and the lease cancellation remains in effect.

b. BIA's June 10, 2008 Cancellation Order Is Clear And Must Be Read and Enforced According to Its Plain Meaning.

Relying on general administrative law, Eagle Bear makes two related arguments which are premised on the false characterization of BIA's June 10, 2008 lease cancellation letter as ambiguous. Eagle Bear argues that the Court should

look to the BIA's actions and parties subsequent conduct, and to BIA's subsequent interpretation of the record to confirm that the lease was not cancelled.

Eagle Bear relies on the 10th Circuits' decisions in *S. Utah Wilderness All. v. Off. of Surface Minding Reclamation & Enforcement*, 620 F.3d 1227, 1238-39 (10th Cir. 2010) and *Phillips Petroleum Co. v. FERC*, 902 F.2d 795, 805 (10th Cir. 1973) and other administrative law cases in support of its misplaced claims. The cases relied on by Eagle Bear have two similarities which distinguish those cases from the current case and render those cases inapplicable here.

First, and most importantly, the rules referred to in *S. Utah Wilderness* and *Phillips Petroleum Co*., apply only if an administrative agency's order is ambiguous. *S. Utah Wilderness*, 620 F.2d at 1238-39; *Phillips Petroleum*, 902 F2d at 805. If not ambiguous, an administrative order must be enforced according to its plain meaning. *S. Utah Wilderness*, 620 F.2d at 1238, *citing U.S. v. Hinckley*, 550 F.3d 926, 940 (10th Cir. 2008). BIA's June 10, 2008 cancellation order is clear and unambiguous.

The language of an administrative order is ambiguous if it "is capable of being understood in two or more senses or ways." *Chickasaw Nation v. United States*, 534 U.S. 84, 90 (2001). BIA's June 10, 2008 letter cancelling the former lease states in pertinent part:

> This is in regards to lease 5B0338962. Payment of rent due for this lease has not been received. The

> payment was due November 30, 2007 in the amount of $15,000.
>
> You are advised that **this lease is hereby cancelled**.

Doc. 34, BIA Cancellation Decision.

There is nothing ambiguous about the phrase, "this lease is hereby cancelled." The language of BIA's June 10, 2008 order is clear and unambiguous, and it is not capable of being understood in two or more senses or ways. Because BIA's June 10, 2008 letter cancelling the former lease is clear and unambiguous, the cases relied upon by Eagle Bear have no application on these facts.

Eagle Bear's reliance on the conduct or alleged statements of BIA Agency officials after the lease was cancelled on June 10, 2008 suffers from other flaws. First, the BIA officials dispute that they told Eagle Bear that it could withdraw its appeal. Blackfeet Agency employee Tracy Tatsey specifically denied telling Eagle Bear President and agent William Brooke that Eagle Bear could withdraw its appeal because the lease was current. Former Superintendent Pollock denied having any conversation with Brooke after the cancellation letter was issued.

Second, erroneous advice from BIA officials does not create legally enforceable rights, nor do actions of BIA officials which are contrary to the law have the effect of changing the law. *Flynn v. Acting Rocky Mountain Regional Director*, 42 IBIA 206, 213 (2006); *Strom, et al. v. Northwest Regional Director*, 44 IBIA 153, 165-166 (2007). Even if the agency officials said what Brooke

claims that they told him (which they expressly deny), their erroneous advice created no rights and could not change the law or the regulation.

Similarly, the BIA's negligence in failing to carry out requirements of the lease and the regulations after the 2008 lease cancellation became final did not reinstate or revive the cancelled lease or create a new lease to replace the cancelled lease. *David M. Jackson, M & M Farms v. Portland Area Director, Bureau of Indian Affairs*, 35 IBIA 197 (9/25/2000). Nor did those actions somehow negate the lease cancellation. *Id.* 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).

3. Eagle Bear's Arguments That the BIA Did Not Follow the Correct Procedure In Cancelling the Former Lease in 2008, Are Time-barred, Unsupported By the Facts and Foreclosed by the Law.

As it has from the outset of this litigation, Eagle Bear attempts to challenge BIA's June 10, 2008 lease cancellation decision 14 years after the fact. The

Blackfeet Nation has addressed Eagle Bear's arguments in depth in its Brief in Support of Summary Judgment and won't repeat the entire argument here. Doc. Doc. 28 at 18-39. From the outset, Eagle Bear, Inc.'s attempt to relitigate its appeal of the 2008 lease cancellation is time-barred. *See* Section 1, above.

Even if there were some legal basis for reviewing BIA's 2008 lease cancellation (which there is none), Eagle Bear failed to raise any issues related to BIA's failure to give notice to either it or Independence Bank or that it was entitled to arbitration in its original June 18, 2008 Notice of Appeal and Statement of Reasons and it is precluded from doing so now. *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.

Contrary to Eagle Bear's false claims, the record shows that BIA's January 15, 2008 letter and its March 27, 2008 letter were forwarded to Eagle Bear's Bozeman, Montana address consistent with Eagle Bear's action in filling out a forward form with the U.S. Post Office each fall when it left the St. Mary area. *See* Doc. 32, Blackfeet SUF, ¶¶61, 71-73. The record is also clear that Independence Bank received a copy of BIA's April 4, 2008 letter and that a representative of the Bank discussed that letter with William Brooke of Eagle Bear. *Id.* at ¶¶80-82.

Once the former Lease was cancelled, Eagle Bear had no right to "cure" the default and reinstate the lease. If Eagle Bear actually believed that both it and the Bank had not received proper notice, then it had a duty to raise those issues in its Notice of Appeal and Statement of Reasons. It failed to do so. Further if Eagle Bear believed that BIA had failed to give it proper notice and that its payment of the delinquent amount for which the lease was cancelled "cured" the default after the cancellation decision was rendered, why didn't it simply stand on its appeal and allow the Regional Director to rule? So long as the appeal was pending, the lease cancellation was stayed. However, the lease could not be cured once it was cancelled.

Eagle Bear once again re-asserts that it was entitled to arbitration before the lease was cancelled in 2008. This claim is an example of how Eagle Bear's arguments in this matter have been a moving target. In its original complaint in the Federal Court action (*Eagle Bear, Inc., et al. v. Blackfeet Nation, et al*., Case No. 21-cv-88-BMM), Eagle Bear made the claim that it was entitled to arbitration. Then as that litigation proceeded, Eagle Bear focused on its claims that the lease was not cancelled because it withdrew its appeal at the advice of BIA employees and the lack of notice issue; arbitration was no longer mentioned. In its Second Amended Complaint Eagle Bear once again claims that the 2008 lease cancellation

was deficient because of lack of notice to it and the Bank, but did not raise arbitration. Now, it its brief in support of its motion for summary judgment on Count I of its Second Amended Complaint, Eagle Bear once again raises its bogus arbitration argument.

Eagle Bear is not entitled to arbitrate the 2008 lease cancellation for several reasons, including that it failed to raise that issue in its original Notice of Appeal and Statement of Reasons. Under the lease, only the non-breaching party could seek arbitration. Eagle Bear's breach by not paying the 2007 minimum annual rental payment was the reason BIA cancelled the former lease. Importantly, BIA was not a party to the former lease and the arbitration provision only applied to disputes between the parties. BIA's lease cancellation was not subject to the arbitration agreement by the terms of the agreement. Pursuant to applicable Interior Board of Indian Appeals law, a party cannot seek arbitration after a lease is cancelled. *Franks v. Acting Deputy Assistant Secretary – Indian Affairs*, 13 IBIA 231, 234 (1985) (Appellant's right to arbitration, which was created by the leases, was lost when the leases were canceled).

CONCLUSION

There are no genuine issues of material fact – the lease was cancelled on June 10, 2008 and never reinstated. Eagle Bear's Motion for Summary Judgment

should be DENIED, and the Blackfeet Nation's Motion for Summary Judgment should be GRANTED.

DATED this 14th day of December, 2022.

Respectfully Submitted,

_____/s/_Joseph J. McKay_____

_____/s/_Derek E. Kline_____

Attorneys for Defendant
Blackfeet 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 3,230 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