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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 BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT RE COUNT 1 OF INTERVENOR INDEPENDENCE BANK'S COMPLAINT IN INTERVENTION**

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.	

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COMES NOW the Blackfeet Nation, by and through counsel, and hereby submits its Brief in Support of Motion for Partial Summary Judgment re Count 1 of Intervenor Independence Bank's Complaint-in-Intervention, as follows:

INTRODUCTION

This Brief in Support is largely the same as the Blackfeet Nation's Response Brief to Intervenor-Plaintiff's Motion for Partial Summary Judgment.

This matter arises out of the former lease between Eagle Bear, Inc. and the Blackfeet Nation which was cancelled by the Bureau of Indian Affairs in 2008. As with Eagle Bear, the Bank's efforts to challenge BIA's administrative decision and raise notice arguments 14 years afterward is too late. The Bank was not a third-party beneficiary of the former lease, and it was not Eagle Bear's surety. The Bank's only interest was as the holder of an approved encumbrancer.

It is beyond dispute that the Bank received actual notice of the BIA's intent to cancel the former lease, and that it had more than 30-days to take advantage of its opportunity to cure Eagle Bear's default, and agree to be bound by all the terms and conditions of the former lease, but chose not to. There is no genuine issue of material fact that the BIA properly cancelled the former lease in 2008 after due notice and an opportunity to cure or show cause. Summary Judgment should be entered for the Blackfeet Nation on Count 1 of the Bank's Complaint-in-Intervention.

LEGAL STANDARD – SUMMARY JUDGMENT

Summary judgment is appropriate when the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). *Victor Processing LLC v. Fox*, 307 F.Supp.3rd 1109, 1112 (D. Mont. 2018), *rev'd on other grounds,* 937 F.3d 1218 (9th Cir. 2019). The movant bears the initial burden as to the elements of the causes of action about which there are no genuine issues of material fact. *Celotex Corp. v. Catrett* , 477 U.S. 317, 323 (1986). *Id.* The burden then shifts to the non-movant to establish the existence of a genuine issue of material fact. *Id.* The non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts" by "com[ing] forward with 'specific facts showing that there is a *genuine* issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* , 475 U.S. 574, 586-87 (1986) (quoting Fed.R.Civ.P. 56(e) (1963) (amended 2010). *Id.* However, bare assertions standing alone are insufficient to create material facts. *Anderson v. Liberty Lobby*, 477 U.S. 424, 247-48 (1986). If the burden shifts, the non-moving party must produce "significant probative evidence," and "may not rely merely on the unsupported or conclusory allegations of [his] pleadings." *Coverdell v. Dep't of Soc. & Health Servs.*, 834 F.2d 758, 769 (9th Cir. 1987).

ARGUMENT

Leases of Indian trust land are governed by Federal statutes and the regulations promulgated pursuant to those statutes. Leases of Indian trust land made pursuant to 25 U.S.C. § 415 and its accompanying regulations are for the benefit of the Indian Nation or the individual Indian landowner. Decisions of the Bureau of Indian Affairs in its capacity as administrator of Indian leases that are not appealed are final agency actions. 25 CFR 2.6. Challenges to final agency actions under the Administrative Procedures Act (APA) are subject to the general six-year statute of limitations contained in 28 U.S.C. 2401(a).

A "third-party" beneficiary is someone for whose benefit a contract is made by two or more other persons. *Plumage v. Billings Area Director*, 19 IBIA 134, 141 ("A third-party beneficiary is a person for whose benefit a lease or contract is made by two or more other persons."). A surety is one who guarantees the performance of another. 25 CFR § 162.101 (2008 ed.)("surety means one who guarantees the performance of another"). A lease of Indian trust land may contain a provision allowing the lessee to encumber the leasehold interest with approval of the Secretary of the Interior (BIA). *See* 25 CFR § 162.610(c). The rights of the holder of an approved encumbrance are governed by the provisions of the lease itself. *Id.*

Like Plaintiff Eagle Bear, Intervenor Plaintiff Independence Bank seeks to overturn a decision of the Bureau of Indian Affairs. The Bank pleads no basis for re-opening a decision of the BIA which became final 14 years ago.

The former lease between the Blackfeet Nation and Eagle Bear, Inc. was made for the benefit of the People of the Blackfeet Nation, not Independence Bank. The Bank is not a third-party beneficiary of the former lease. Nor did the Bank guarantee Eagle Bear's performance under the former lease. The Bank was not Eagle Bear's surety.

The Bank's status was that of the holder of an approved encumbrance under the former lease. Its rights were governed by the lease, not the Federal regulations. The Bank had a right to foreclose on its mortgage if Eagle Bear defaulted under the loan, Doc. 32-8 at 16-17, Lease § 18, and it had an opportunity to cure any default by Eagle Bear under the former lease for which the lease was going to be cancelled, after 30 days notice of intent to cancel from the BIA. *Id.* at 19-21, Lease § 21. The Bank received actual notice of the BIA's intent to cancel the former lease more than 30 days before the cancellation action and failed to take advantage of the opportunity granted to it as the holder of an approved encumbrance under the lease. *See* Doc. 33-25, April 4, 2008 letter in Bank files, *compare with* Doc. 34, June 10, 2008 BIA cancellation decision.

Actions or statements by BIA officials contrary to the law and which those officials had no authority to make or take, could not revive the cancelled lease, create a new lease or somehow negate the cancellation of the former lease. *See e.g., David M. Jackson, M & M Farms v. Portland Area Director, Bureau of Indian Affairs*, 35 IBIA 197, 200 (9/25/2000)(course of conduct between parties and BIA for over 5 years did not create a lease of Indian land as 25 U.S.C. § 415 requires express Indian landowner consent and BIA approval); *Flynn v. Acting Rocky Mountain Regional Director*, 42 IBIA 206, 213 (2006)(If the Superintendent in fact gave erroneous advice, that still could not operate to grant Appellant rights not authorized by law or inconsistent with the regulations); *Moody(s) v. United States*, 931 F.3d 1136, 1142 (D.C. Cir. 2019)(a cancelled lease cannot be revived by oral agreement with the BIA, and a new lease could not be created by oral agreement with BIA, especially where the Indian Nation landowner did not consent).

1. The Six-Year Statute of Limitations For Bringing Claims Against the Federal Government Bars Independence Bank's Attempt to Challenge BIA's June 10, 2008 Cancellation of the Former Lease.

Count 1 of Intervenor Independence Bank's Complaint in Intervention seeks to have this Court declare BIA's June 10, 2008 cancellation of the former lease null and void based on BIA and the Blackfeet Nation's purported failure to give

the Bank "30-day notice and an opportunity to cure" Eagle Bear's default for which the lease was cancelled.

Like Eagle Bear, the Bank pleads no statutory or equitable basis for bringing this challenge 14 years after the cancellation. Rather by intervening in this action, the Bank accepts Eagle Bear's arguments on that issue. The Bank makes no independent argument as to why the statute of limitations does not apply to its challenge.

Pursuant to 28 U.S.C. § 2401(a) " . . . , 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." *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). Independence Bank has pled no legal reason for avoiding the effect of the general six-year statute of limitations on its challenge to BIA's 2008 lease cancellation action. The Blackfeet Nation's motion for summary judgment should be granted on this ground alone.

Even if there were a legal basis for examining Independence Bank's claim 14 years after-the-fact (which there is none), the Bank is not a third-party beneficiary of the former lease, it was not Eagle Bear's surety and it received

actual notice and an opportunity to cure Eagle Bear's default. The Bank chose to contact and believe Eagle Bear Inc., rather than the agency that had the authority to cancel the lease – the BIA. The Bank's attempt to shift responsibility to the Blackfeet Nation or BIA, for its own failure and inaction to cure Eagle Bear Inc.'s default, are without merit.

2. The Former Lease Was Entered For the Benefit of the Blackfeet Nation, Not Independence Bank.

As a predicate for its claim that it is entitled to enforce the terms of the former lease against the Blackfeet Nation, Independence Bank makes the unfounded assertion that it was a third-party beneficiary of the former lease. For this proposition and a corollary (that a promisor owes a duty of performance to any intended beneficiary of the promise, and the intended beneficiary may enforce the duty")(citing Restatement of Contracts § 304), the Bank relies on *Klamath Water Users Prot. Ass'n. v. Patterson,* 204 F.3d 1206 (9th Cir. 1999) and *Caltex Plastics, Inc. v. Lockheed Martin Corp.,* 824 F.3d 1156 (9th Cir. 2016). Neither case supports the Bank's position.

Pursuant to applicable Federal Indian law and Interior Board of Indian Appeals case law, Independence Bank is not a "third-party" beneficiary of the former lease between the Blackfeet Nation and Eagle Bear. In accordance with the terms and intent of the former lease, Eagle Bear was the promisor, not the Blackfeet Nation.

"In order for one not privy to a contract to maintain an action thereon as a 'third party beneficiary,' it must appear that the contract was made and intended for his benefit. * * * And the benefit must be one that is not merely incidental, but must be immediate in such a sense and degree as to indicate the assumption of a duty to make reparation if the benefit is lost." *Gillette v. Navajo Area Director*, 14 IBIA 71, 74-76, nt. 9(1986)(quoting Blacks Law Dictionary); *Plumage v. Billings Area Director*, 19 IBIA 134, 141(A third-party beneficiary is a person for whose benefit a lease or contract is made by two or more other persons).

"Congress first authorized the long-term leasing of Indian lands in order to bring Indians much needed income that they could not receive under short-term leases." *Red Mountain Machinery Co. v. Grace Inv. Co.,* 29 F.3d 1408, 1412 (9th Cir. 1994) citing 25 U.S.C. § 415; H.R. Rep. No. 1093, 84th Cong. 1st Sess. U.S. Code Cong. & Admin. News 2691, 2692 (1955); *Hollywood Mobile Estates v. Seminole Tribe*, 641 F.3d 1259, 1270 (11th Cir. 2011) ("Section 415 and its accompanying regulations protect Indian landowners, not nontribal lessees").

Appling the correct analysis, Independence Bank is clearly not an intended beneficiary of the former lease between the Blackfeet Nation and Eagle Bear. The Bank's reliance on a single section in the contract authorizing the lessee to encumber the leasehold to claim third-party beneficiary status is grossly misplaced. Any perceived "benefit" to the Bank is merely incidental to its status as a holder of

an approved encumbrance. Nothing in the lease evidences an intent by the Blackfeet Nation or the BIA to "make reparations" to the Bank if its opportunity to cure Eagle Bear's default and assume Eagle Bear's obligations under the lease is lost.

The Bank was not a third-party beneficiary of the former lease. All the arguments which the Bank asserts from this status are without merit.

3. Independence Bank Was Not Eagle Bear's Surety.

Independence Bank also mistakenly claims status as a "surety" to Eagle Bear and that it was therefore entitled to notice pursuant to various Federal regulations.

Pursuant to the applicable Federal regulation, "surety means one who guarantees the performance of another". 25 CFR § 162.101 (2008 ed.). The Bank asserts that the provision in Section 21 of the former lease which gives it the "opportunity", but not the duty, to cure Eagle Bear's default and assume all Eagle Bear's obligations under the lease, elevates the Bank to the status of a surety. The Bank is wrong.

The obvious flaw in the Bank's reasoning is that it had an opportunity to cure Eagle Bear's default, but it was not obligated to do so. The Bank was NOT the guarantor of Eagle Bear's performance – it did not issue a surety bond for Eagle Bear – in fact no surety bond was even issued at the time of the June 10, 2008 cancellation although one was required. The terms of the former lease did

not make the Bank a surety of Eagle Bear's performance. The Bank was not entitled to notice pursuant to 25 CFR §§ 162.618(c) or 162.619(c).

4. The Bank's Received Notice and an Opportunity to Cure Eagle Bear's Default And Failed To Act.

Admitting that it received notice of the BIA's intent to cancel the former lease between the Blackfeet Nation and Eagle Bear but that it failed to make any effort to contact the BIA, the Bank argues that because it was a third-party beneficiary of the former lease, proper notice to it was a condition precedent to terminating the lease.

The Bank was not a third-party beneficiary of the former lease. Importantly the Bank gave no consideration to the Blackfeet Nation as a part of the 2007 mortgage. And the Bank received all the payments due to it under that 2007 mortgage up through the period of the original lease, expiring April 4, 2021. The Bank had no right to an expectation of an interest in the former leasehold after that date. It was not a certainty when Bank gave the mortgage in 2007 that the former lease would be renewed at the end of the initial term.

As to the Bank's argument on notice as set forth in Section 21 of the former lease, it can be boiled down to "form over substance". The Bank attempts to add to the actual notice requirement and incorporate a clause in the lease related to bankruptcy which has already been determined inapplicable under bankruptcy law. *See* Doc. 32-8 at 21, Lease § 21.

The Bank's status under the former lease was as the holder of an approved encumbrance, and nothing more. Doc. 32-8, Lease, §§ 18 & 21; 25 CFR § 162.610(c); Doc. 39 at 10-11. As the holder of an approved encumbrance, the Bank had a right prior to termination of the lease, to foreclose its mortgage according to its terms if Eagle Bear defaulted on the mortgage. Doc. 32-8 at 16-17, Lease § 18. If Eagle Bear defaulted and the BIA intended to cancel the lease, the Bank's rights were set forth in Sec. 21 of the former lease.

Pursuant to the applicable part of Section 21 of the former lease, if the BIA intended to terminate the lease for non-payment of money, the Bank had an opportunity to cure the default after 30 days notice, provided that if the Bank determined to pay the money, it also had to agree to be bound by all the terms and conditions of the lease. If the default could not be cured with the payment of money, then the Bank had 45 days after notice to commence cure activities. It is the former provision at issue here.

The applicable part of Section 21 of the former lease reads in pertinent part:

> At least thirty (30) days prior to termination of this lease for default by Lessee, the Lessor or the Secretary shall give notice in writing to any encumbrancer expressing Lessor's intention to terminate and describing said default [sic] to breach. . . . When the default or breach can be cured by the payment or expenditure of money, this lease will not be terminated if within thirty (30) days after receipt of such written notice to terminate the encumbrancer shall cure the default or breach. Whenever the encumbrancer exercises any right on a default

> situation, the encumbrancer shall be bound to comply with all of the obligations and conditions of the lease.

Doc. 32-8 at 19-21, Lease § 21.

The Bank admits that between April 5 and April 7, 2008, it received a copy of a letter from the BIA to Eagle Bear dated April 4, 2008, advising Eagle Bear that it was delinquent under the lease, that prior notices had been sent and that the lease would be cancelled if the delinquent rental payments were not made. The Bank further admits that upon receipt of this letter, it did not contact the BIA (or the Blackfeet Nation). Rather the Bank contacted the lessee/borrower and relied on the lessee's misrepresentations as to the status of payments. The Bank now wants to shift responsibility for its failure to the Blackfeet Nation and the BIA.

The Bank makes several attacks on the April 4, 2008 letter which it admits that it received. Improperly borrowing from a different paragraph of Sec. 21 of the lease dealing with the Bank's right in the case of insolvency or bankruptcy of Eagle Bear, the Bank first asserts that it was entitled to notice by registered mail and that the notice had to be directed to the Bank. The Bank further asserts that the April 4, 2008 letter was fatally deficient because it failed to describe the breach or default and failed to advise the Bank of the 30 days to cure Eagle Bear's default. The Bank concludes by asserting that nothing in the April 4, 2008 letter sufficiently describes the default including: 1) how much rent is owned; 2) for

what period rent was owed; and, 3) whether there were any associated fees or interest due and owing on such unpaid rent.

The Bank's arguments regarding how the notice was to be sent and that it was supposed to be directed to the Bank, are without merit. Regardless of how the letter was addressed, the Bank actually received the letter and was on notice of the pending termination of the lease. As to notice to an encumbrancer, the applicable clause of Sec. 21 reads in pertinent part: . . . Lessor or the Secretary shall give notice in writing to any encumbrancer expressing Lessor's intention to terminate and describing said default [sic] to breach . . .." Nothing is said about sending the notice by registered mail. As noted, that requirement comes from a different clause in Sec. 21. Even if it was required that the notice be sent by registered mail, the purpose of sending a letter via registered mail is simply to provide proof that it was sent and received. Here, the Bank admits that it received BIA's April 4, 2008 letter. *See Curtis Laducer v. Acting Great Plains Regional Director,* 48 IBIA 294, 302 (2009)(since appellant had actual notice, he cannot show prejudice by any failure to receive letter via certified mail); *Duenas v. Kallingal, P.C.*, 2012 Guam 4, 9 (2012)("notice is sufficient if it is actually received, despite failure to comply with the lease's specifications on the type and manner of notice."). Regardless of how the letter was addressed or directed, the Bank was on notice and, according to it, it acted by contacting the Lessee/Borrower instead of the BIA. *Laducer,* 48

IBIA at 302 (appellant's rights were not adversely impacted by not getting certified letter, he had actual notice).

Also without merit are the Bank's arguments that the April 4, 2008 letter was deficient because it failed to advise the Bank that it had 30 days to cure the breach/default, how much rent was owed, for what period it was owed, and whether there any associated fees or interest owed on the past due rent. The Bank had a copy of the former lease agreement. That agreement was clear as to how much time the Bank had to cure a default that could be cured by paying money, what amounts were owed (the minimum annual rent for 2007 was $15,000), when rent was due (November 30 of each year), and it was clear that rent not paid within 30 days of November 30 accrued interest at a rate of WSJ Prime plus 3% until paid. The Bank asserts that it was entitled to rely on written the lease; that would include the terms related to the 30 day limit to cure the default, the amount of rental payment, when payment was due, and that late payments accrued interest at a specified rate.

As a licensed and regulated banking entity, the Bank had a duty of due diligence to its depositors and investors. That duty included the duty to conduct customer due diligence on Eagle Bear when Eagle Bear applied for the loan which resulted in the May 2007 mortgage. Had the Bank performed its duty of customer due diligence it would have known that Eagle Bear was delinquent on the loan for

the 2006 minimum annual rental payment when the loan was issued. For its part, Eagle Bear had a duty of disclosure and honesty. Eagle Bear had a duty to disclose to the Bank that it was delinquent on the 2006 minimum annual rental payment. The Bank failed to carry out its duty of due diligence and Eagle Bear failed to carry out its duty to honestly disclose the status of the lease payments to the Bank. That would appear to be a material misrepresentation.

Read literally, the applicable clause of Section 21 does not state that the BIA will send a notice to the encumbrancer advising it that it had 30 days to cure the lessee's default or that it would detail the amount necessary to cure the default. The pertinent language of the lease is: "At least thirty (30) days prior to termination . . . the Lessor or the Secretary shall give notice in writing to any encumbrancer expressing Lessor's intention to terminate and describing said default [sic] to breach. . . . When the default or breach can be cured by the payment or expenditure of money, this lease will not be terminated if within thirty (30) days after receipt of such written notice to terminate the encumbrancer shall cure the default or breach."

The April 4, 2008 letter clearly states BIA's intention to terminate the lease, and that the default for which the lease would be terminated was failure to pay rent. That statement meets the simple requirements of Sec. 21. While the letter advises Eagle Bear (and the Bank) that the lease would be terminated in 4 days, or

on April 8, 2008, it also provided the names and phone number of 3 BIA Blackfeet Agency employees who could be contacted for further information, and the lease was not terminated for over 60 days after the Bank received the letter.

In *Benally v. Acting Navajo Regional Director*, 57 IBIA 91 (2013), the IBIA upheld a lease cancellation notwithstanding that the BIA cancellation letter, issued pursuant to 25 CFR § 162.618(a) failed to advise the lessee that it had 10 days to either: cure the violation, dispute BIA's determination that there was a violation or request additional time to cure the violation as set out in 162.618(b). BIA's letter did contain a copy of the regulations which included 162.618(b) containing the lessee's rights. Finding that 162.618(a) did not expressly state what a notice requirement must contain, the IBIA determined that the notice sent to the lessee was not deficient as a matter of law. *Id.* at 95. It found that while BIA's notice was imperfect, it was not constitutionally insufficient. *Id.* at 96. The same is true in this case.

The notice provision in Sec. 21 of the former lease as it relates to an encumbrancer, states: "At least thirty (30) days prior to termination . . . the Secretary shall give notice in writing to any encumbrancer expressing Lessor's intention to terminate and describing said default [sic] to breach." There is no requirement in this clause that the notice advise the encumbrancer, that (1) it had 30 days to act or (2) that the monetary amount necessary to cure the default be set

out in the notice. Sec. 21 then goes on to recite the encumbrancer's opportunity to cure the default by paying money within 30 days.

Like the lessee in *Benally*, the Bank had the lease and knew or should have known by reasonable diligence what its rights were. BIA's April 4, 2008 letter made clear that the lessee was delinquent, that rent was owed, that the lessee had been previously warned, and that BIA intended to cancel the lease. The Bank made no effort to exercise its right to cure by contacting the BIA within 30 days after receiving the April 4, 2008 letter to determine how much was necessary to cure the default. The Bank had a copy of the lease and the ability to determine the amount of minimum annual rent, the date due, and that interest was due on all payments more that 30 days past due. A simple phone call to the BIA at the number listed in the letter would have given the Bank all the information that it needed.

It is undisputed that BIA did not cancel the lease until June 10, 2008, which was more than 30 days after the Bank received a copy of the April 4, 2008 letter. It was the BIA who had the authority to cancel the lease, not the Blackfeet Nation or the lessee. A reasonably prudent person, or in this case a reasonably prudent licensed banking entity, would have contacted the agency that issued the letter, had the information about the delinquency for which the lease was going to be

cancelled and the authority to cancel the lease. The Bank had the information to do so.

Instead, according to it, on April 7, 2008, after receiving the BIA Show Cause letter and before the purported April 8 deadline for lease cancellation, the Bank contacted Eagle Bear. The Bank could just as easily and just as quickly have called the BIA. Eagle Bear apparently told the Bank that the payment had been made, that the BIA always got it wrong and that the matter was going to be resolved. Doc. 33-25, *April 4, 2008 letter with handwritten note by Bank*.

Eagle Bear did not send the April 4, 2008 letter; BIA sent the letter. Eagle Bear did not have the authority to cancel the lease; BIA had that sole authority. Eagle Bear apparently provided the Bank with no proof that it had made the payments or that the issue was going to be resolved; BIA had the information to verify that claim. Nevertheless, accepting Eagle Bear's misrepresentation, the Bank made no effort thereafter to verify the information provided by Eagle Bear.

The undisputed facts are that upon receipt of notice that BIA intended to cancel the former lease for non-payment of rent, the Bank made no effort within thirty (30) days thereafter to contact the BIA to assert its rights, to clarify what amount of money was necessary to cure Eagle Bear's default, or to verify that Eagle Bear had made the required payments it said it made. It is further

undisputed that the Bank had more than 30 days to do so before the lease was cancelled.

5. No Action By The BIA or the Blackfeet Nation After the Lease Was Cancelled in 2008 Constituted a Waiver of Eagle Bear's Default Or Termination of the Former Lease.

In an argument similar to Eagle Bear's course of conduct argument, the Bank attempts to argue that the BIA's acceptance of payments after the 2008 lease cancellation and Eagle Bear's continued investment in improvements to the leased premises was evidence of intent to waive Eagle Bear's default.

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).

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, 200 (9/25/2000). Nor did those actions somehow negate the lease cancellation. *Id.*

In *Sessions, Inc. v. Morton*, 491 F.2d 854, 857 n.5 (9th Cir. 1974)(Honorable Russell E. Smith sitting by designation), the Ninth Circuit upheld the cancellation of a lease of Indian trust land. The lessee argued that acceptance of payments constituted waiver of the default. The Ninth Circuit stated that waiver by acceptance of rent was a question of the lessor's intent. There is no evidence that the Blackfeet Nation knew of the 2008 lease cancellation or accepted rent from Eagle Bear knowing the former lease had been cancelled. In this analysis the conduct of the lessee is irrelevant as to the intent of the lessor. The Blackfeet Nation did not waive Eagle Bear's default or the lease termination.

CONCLUSION

The Blackfeet Nation's Motion for Partial Summary Judgment on Count 1 of Independence Bank's Complaint in Intervention must be granted. The Bank's effort to challenge BIA's 2008 lease cancellation which became a final agency action in 2009, is barred by the six-year statute of limitations on civil claims against the government. Assuming *arguendo* the BIA's action was reviewable, there is no genuine issue of material fact, that the Bank received notice and an opportunity to cure Eagle Bear's default and waived that right. The Bank's remaining arguments are without merit. Summary Judgment must be granted for the Blackfeet Nation on Count 1 of Independence Bank's Complaint in Intervention.

DATED this 23rd day of December, 2022.

Respectfully Submitted,

_____/s/_Joseph J. McKay_____

_____/s/_Derek E. Kline_____

Attorneys for the Defendant
Blackfeet Indian Nation

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2), I hereby certify that this brief is printed with proportionately spaced Times New Roman text typeface of 14 point; is double-spaced; and the word count, calculated by Microsoft Office Word, is 5054 words, excluding the Caption, Table of Contents, Table of Authorities, Exhibit Index and the Certificate of Compliance.

/s/ Joseph J. McKay

/s/ Derek E. Kline

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify under the penalty of perjury that on the 23rd day of 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