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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 REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT (DOC. 22)**

Plaintiff Eagle Bear, Inc. ("Eagle Bear") submits this reply brief in support of its Motion for Summary Judgment (Doc. 22) ("Motion").

INTRODUCTION

BIA decided to "move forward with the lease in effect" following Eagle Bear's appeal of BIA's erroneous June 10, 2008 cancellation letter. (EB-SUF ¶82).[1] BIA did so with both the Blackfeet Indian Nation's ("Nation") and Eagle Bear's knowledge and consent. (EB-SUF ¶¶97-102). The Nation now attempts to rewrite history by urging the Court to consider the June 10, 2008 letter and the January 5, 2009 appeal withdrawal in a vacuum. In its brief, which is largely unsupported by citation to law or the record, the Nation ignores the plain language of BIA's regulations, BIA officials' testimony that they did not cancel the Lease, the testimony of the Nation's Land Department Director that the Lease was not cancelled, and the parties' subsequent decade of performance.

These facts cannot be ignored. *S. Utah Wilderness All. v. Off. of Surface Minding Reclamation & Enforcement*, 620 F.3d 1227, 1238-39 (10th Cir. 2010) ("agency orders are not to be read in a vacuum"). The context, subsequent performance, and controlling law establish that the Lease was not finally and forever cancelled. The Court should, therefore, order that the Lease remains valid and in effect.

[1] "EB-SUF" refers to Doc. 29. "EB-SDF" refers to Doc. 51.

DISCUSSION

1. The Nation is correct that BIA reached a final decision, but BIA decided to "move forward with the lease in effect" and not to cancel the Lease.

The Nation incorrectly argues that "BIA's June 10, 2008 lease cancellation became a final agency action . . . 30 days after Eagle Bear withdrew its appeal" because "the Agency's cancellation remained in effect." (Doc. 54 at 2-3). The primary problem with this argument is that it is not supported by the regulations the Nation cites, namely 25 C.F.R. §§2.4, 2.6(b), 2.9(a), and 162.621 (2008). (Doc. 54 at 2-4). In fact, those regulations compel the opposite conclusion: when Eagle Bear withdrew its appeal, BIA's June 10, 2008 cancellation had never taken effect and certainly did not "remain[] in effect" as the Nation argues.

The Nation first incorrectly relies on 25 C.F.R. § 2.4. That section merely identifies which BIA "officials may decide appeals." It says nothing about the effect of an appeal on a decision or the effect of an appeal withdrawal. It does not support the Nation's argument.

The Nation next relies on 25 C.F.R. § 2.6(b), which while more on-point, still does not support the Nation's argument. To the contrary, the regulation confirms that the June 10, 2008 letter never became "effective." Section 2.6(b) reads: "Decisions made by officials of the [BIA] shall be effective when the time for filing a notice of appeal has expired and no notice of appeal has been filed." (emphasis added). As the Nation acknowledges, Eagle Bear timely filed an appeal.

(Doc. 54 at 4). Therefore, the June 10, 2008 letter never became effective. The Nation's argument to the contrary is incorrect.

25 C.F.R. § 2.9(a) also does not support the Nation's argument. Section 2.9(a) merely identifies the procedures parties must follow to appeal a BIA decision. It describes who may file an appeal, to whom the appeal must be sent, and similar procedural requirements. It says nothing about the effect of an appeal or an appeal withdrawal on the decision being appealed. Again, because there is no dispute that Eagle Bear properly filed its appeal, section 2.9(a) has no bearing on this matter.

The final regulation the Nation cites is again more on-point, but once again the regulation is directly contrary to the Nation's argument. 25 C.F.R. § 162.621 (2008) reads: "A cancellation decision . . . will not be effective until 30 days after the tenant receives a cancellation decision from us. The cancellation decision will remain ineffective if the tenant files an appeal . . . ." Like section 2.6(b), section 162.621 confirms that Eagle Bear's appeal caused the June 10, 2008 decision to "remain ineffective."

Despite the plain language of the foregoing regulations, the Nation simply assumes that the withdrawal of an appeal somehow revives any underlying cancellation decision and automatically cancels the Lease. (Doc. 54 at 2-4). This assumption is not supported by the regulations the Nation cites, by any other BIA

regulations, or by any cited case law. Instead, consistent with the understanding of the BIA officials actually involved with the June 10, 2008 letter, the regulations confirm that an appeal renders a cancellation "ineffective" once filed. If BIA wishes to reinstate that decision, it must issue a new decision directing cancellation of the Lease. (EB-SUF ¶¶94-96).

Thus, it is immaterial that no BIA official ever "reversed, rescinded, modified, amended, or otherwise overturned" the June 10, 2008 cancellation letter in a written decision. (Doc. 54 at 3). Because the appeal rendered the June 10, 2008 letter "ineffective" as a matter of law, the more important fact is that there was no BIA decision fully and finally cancelling the Lease following Eagle Bear's appeal. 25 C.F.R. §§2.6(b) & 162.621. Instead, the parties' conduct confirms the opposite outcome.

2. BIA's actions and the parties' conduct all confirm that BIA decided to "move forward with the Lease in effect" and not to cancel the Lease.

Even assuming for the sake of argument that the absence of any written decision from BIA "reversing, rescinding, or modifying" the June 10, 2008 cancellation letter has some effect on this matter, at most the lack of a written decision resulted in an ambiguous record and not in Lease cancellation. Without a written decision from BIA following Eagle Bear's withdrawal, BIA's decision on the Lease is simply not as obvious from the written record as it could be.

To be clear, Eagle Bear is not suggesting that the June 10, 2008 cancellation letter is ambiguous, as the Nation claims. (Doc. 54 at 8). To the extent there is any ambiguity—a conclusion that Eagle Bear denies considering that the June 10, 2008 letter was rendered "ineffective" by Eagle Bear's appeal and never revived—the ambiguity is in BIA's subsequent lack of a written decision expressly resolving the appeal.

However, any such ambiguity or confusion has been repeatedly resolved over the past decade. *S. Utah Wilderness All.*, 620 F.3d at 1241-42; *Phillips Petroleum Co. v. FERC*, 902 F.2d 795, 805 (10th Cir. 1973). The context of the June 10, 2008 letter, the context of the January 5, 2009 withdrawal, the parties' subsequent decade of performance, BIA's subsequent written orders, and BIA officials' testimony about how they intended to resolve Eagle Bear's appeal all confirm that the June 10, 2008 letter never became effective and BIA decided not to cancel the Lease. As this Court noted, if cancellation was really the final agency action, "it's a funny way of revealing itself in the fact that the tenant stayed on the property for another ten – they're still there. They've been making payments all of these years." Doc. 89, January 19, 2022 transcript at 5, 8-9.

This context, subsequent performance, subsequent orders, and testimony is discussed in detail in Eagle Bear's previous briefing. (Doc. 23 at 24-32; Doc. 50 at

15-32; EB-SUF ¶¶33, 35, 69, 72-77, 80-110).[2] In summary, BIA decided that Eagle Bear cured its alleged defaults of the Lease, accepted that cure, and decided to "move forward with the lease in effect." (Doc. 31-3, Pollock Dep. 79:21-80:21, 82:13-23, 91:23-92:3; Doc. 29-10, Crowe Dep. 11:45-12:6, 45:18-46:16, 85:9-13, 94:14-95:7, 97:10-15, 108:12-109:12). BIA did so at the Regional Director's direction and with the knowledge and consent of Eagle Bear and the Nation. (Doc. 31-3, Pollock Dep. 79:21-80:21, 82:13-23, 91:23-92:3; EB-SUF ¶¶97-102). As the Nation's Land Department Director[3] noted, Eagle Bear was a "good tenant" for another decade following its appeal withdrawal. (EB-SUF ¶30).

The Nation offers two arguments otherwise, both of which are incorrect. First, the Nation argues that Eagle Bear was not entitled to rely on "advice from BIA officials" regarding the status of the Lease and the effect of its appeal withdrawal. (Doc. 54 at 10). This mistakes the importance of Ms. Tatsey's conversation with Mr. Brooke. Ms. Tatsey did not give mere "advice" or offer

[2] Contrary to the Nation's assertion, which is unsupported by citation or explanation, this discussion is supported by extensive citation to the record. (Doc. 54 at 5). It was not "made up." (*Id.*) The Nation, on the other hand, takes significant liberty with the record. For example, the Nation characterizes Brooke as wealthy without respect to the success or failure of the Campground, when in fact Brooke's net worth is "tied directly to the value of the campground." (Doc. 29-4, Brooke Dep. 20:2-10; Doc. 55 at ¶¶22, 46, 51).

[3] In light of his damaging testimony, the Nation now describes this Director as having no "responsibility or authority" to take any actions "on behalf of" the Nation (Doc. 55 at ¶¶30, 51, 80).

opinions contrary to "the law or regulation" as the Nation claims. (*Id.*) Instead, Ms. Tatsey's conversation conveyed the order and decision of the BIA Regional Director. (*See* Doc. 31-3, Pollock Dep. 79:21-80:21, 91:23-92:3; EB-SUF ¶¶81-82). According to Superintendent Pollock, Regional Director Parisian directed him to allow the parties to "move forward with the lease in effect." (*Id.*) Superintendent Pollock's realty officer, Ms. Tatsey, conveyed that decision to Will Brooke and asked him to withdraw his appeal. (*Id.*) Regardless of whether Eagle Bear was entitled to rely on "advice" from BIA, as the Nation argues, Eagle Bear was entitled to rely on the BIA and the Regional Director.

The second argument the Nation offers is that both Superintendent Pollock and Ms. Tatsey "denied telling [Brooke] that he could or should withdraw Eagle Bear's appeal." (Doc. 54 at 7, 10). This characterization is incorrect. Although Ms. Tatsey denied a specific recollection of her conversation with Will Brooke, she believed that the conversation 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.") Likewise, Superintendent Pollock believes that the conversations with Eagle Bear occurred, and 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." (EB-SDF ¶¶111-113; Doc. 31-3, Pollock Dep. 78:11-80:21, 91:23-92:3, 104:16-105:8).

3. Errors in the June 10, 2008 cancellation decision confirm that the Lease was not cancelled.

As Eagle Bear has explained, BIA failed to give Eagle Bear notice and opportunity to cure the alleged default and failed to follow mandatory arbitration procedures before issuing its June 10, 2008 letter. (Doc. 23 at 32-34). Consequently, BIA never properly cancelled the Lease and Eagle Bear timely cured the alleged default after it first received notice in June 2008. Thus, the only correct decision the Regional Director could have made on Eagle Bear's appeal was the one the Regional Director actually made: to "move forward with the lease in effect." (EB-SUF ¶82). This fact confirms that the Lease was not cancelled. It would also justify reversing any cancellation of the Lease now even if the Nation were correct that the Lease was cancelled in 2008.

a. The statute of limitations does not prevent the Court from considering BIA's errors.

Even if the Nation were correct that 28 U.S.C. § 2401(a) prevents the Court from reversing any BIA decision from 2008, the Court would not be prevented from considering BIA's failures as contextual evidence that BIA reached a correct decision and decided not to cancel the Lease. *S. Utah Wilderness All.*, 620 F.3d at 1238-39. The Court is not prevented by any statute of limitations from deciding

what decision BIA reached or from declaring the present state of the parties' rights with respect to the Lease. *See* 28 U.S.C. § 2401(a); *Wind River Min. Corp. v. U.S.*, 946 F.2d 710, 713 (9th Cir. 1991).

Moreover, the statute of limitations would not prevent the Court from reversing BIA's decision, even if BIA had decided to cancel the Lease. Pursuant to the discovery rule and equitable tolling, the statute of limitations will not prevent review of a cancellation decision until the parties discover that an incorrect decision was made. The statute is tolled while the parties reasonably believe a correct decision is in place. *Andersen v. U.S. Dep't of Housing and Urban Dev.*, 678 F.3d 626, 628-29 (8th Cir. 2012) (discovery rule applies to § 2410(a)); *Socop-Gonzalez v. I.N.S.*, 272 F.3d 1176, 1184-85, 1193-96 (9th Cir. 2001) (tolling §2410(a) based on INS officer's incorrect advice about matter status); *see also Moody v. United States*, 931 F.3d 1136, 1143 (Fed. Cir. 2019) (leaving open the possibility of equitable tolling following misrepresentations by BIA); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) (allowing equitable tolling "where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass")

Here, every party believed and behaved as if the Lease was in full force and effect from January 2009 through October 2019. (EB-SUF ¶¶97-102). The Nation only began arguing otherwise once its other theories for taking possession of the

Campground failed. (EB-SUF ¶¶37, 41). Because no party believed the Lease had been cancelled until October 2019 at the earliest, and because that theory remains in dispute, the six year statute of limitations in 28 U.S.C. § 2401(a) has not expired.

b. Eagle Bear's Notice of Appeal to BIA does not limit the scope of the Court's review.

The Nation argues that Eagle Bear cannot discuss BIA's failure to give adequate notice and opportunity to cure, Eagle Bear's timely cure, BIA's obligation to arbitrate, or any other deficiency in BIA's cancellation process because Eagle Bear did not raise these arguments in its original notice of appeal. (Doc. 54 at 12-13).

As an initial matter, Eagle Bear did raise some of these issues and was effectively precluded from raising others as a result of BIA's conduct. For example, Eagle Bear expressly notes in its appeal that it had made the $15,000 payment BIA demanded. (Doc. 29-13). It also indicated that the June 10, 2008 notice it had received was inconsistent with the notice and opportunity to cure it had received in the past. (*Id.*) Although Eagle Bear did not expressly argue that it had failed to receive BIA's January 15, March 27, and April 4, 2008 letters, it would have been impossible for Eagle Bear to do so at the time because it had not received and had no knowledge regarding those letters. (EB-SUF ¶¶55-65, 68). Notably, this is an argument that Eagle Bear could have raised in a supplemental

pleading during the appeal process, but it was never given an opportunity to do so because BIA did not produce the administrative record to Eagle Bear during the appeal. (EB-SUF ¶78; Doc. 31-12; *see Jamul Indian Village v. Sacramento Area Director*, 29 IBIA 90, 90 (1996)).

Regardless, the Court may now consider the propriety of BIA's June 10, 2008 cancellation decision. The Nation only relies on IBIA decisions for its argument otherwise and conflates the scope of the IBIA's review with the scope of this Court's review as a result. (Doc. 54 at 12). Unlike the IBIA, this Court may "review any issue addressed on the merits" by BIA, "regardless of whether the petitioner raised it before the agency." *Parada v. Sessions*, 902 F.3d 901, 914 (9th Cir. 2018) (considering a claim not raised to the Bureau of Immigration Appeals).

Eagle Bear could not and would not have raised many of the above arguments because BIA did not cancel the Lease. However, assuming for the sake of argument that BIA had cancelled the Lease, then the Court could now consider the errors in BIA's decision. This is especially true considering the odd procedural history of this matter, which largely precluded Eagle Bear from developing its arguments. *See SSA Terminals v. Carrion*, 821 F.3d 1168, 1174 (9th Cir. 2016) ("[W]aiver [is] not designed to extinguish claims which, although not comprehensively or artfully presented in the early stages of the administrative process, are presented fully before the process ends."); *Barron v. Ashcroft*, 358

F.3d 674, 677 (9th Cir. 2004) (We "apply the exhaustion doctrine with a regard for the particular administrative scheme at issue.")

c. Eagle Bear did not receive adequate notice and opportunity to cure.

Initially the Nation argued that Eagle Bear had received all three of BIA's letters—the January 15, March 27, and April 4 letters. It now seems to acknowledge that there is no evidence the April 4 letter was ever mailed to Eagle Bear or that Eagle Bear ever received the letter. (*See* Doc. 54 at 12; Doc. 55 at ¶64). The Nation also does not deny that Eagle Bear never received the January 15 or March 27 letters. (Doc. 54 at 12-13). Instead, the Nation argues only that the January 15 and March 27 letters constituted notice to Eagle Bear because they may have been forwarded to a Bozeman address and that an alleged call from Independence Bank inspired by the April 4 letter put Eagle Bear on notice. (*Id.*)

As Eagle Bear explained in its Brief Opposing the Nation's Motion for Summary Judgment, neither of these facts would remedy BIA's failure to provide adequate notice and opportunity to cure, even if the Nation's arguments were supported by the evidence. (Doc. 50 at 25-30). BIA cannot terminate a Lease if, as in this case, there is no delivery, notice, or opportunity to cure. 25 C.F.R. §§2.7, 162.615, .618 (2008); *see also Whiting v. United States*, 231 F.3d 70, 76 (1st Cir. 2000); *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, and BIA is

obligated to retain and produce signed certified mailing receipts to prove adequate notice. *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).

BIA failed to do so with respect to the January 15, March 27, and April 4, 2008 letters, and the Nation cannot remedy that failure by inuendo and speculation that the letters were sent to, but never received at, an address other than the Campground. (Doc. 50 at 25-30). The simple facts are that BIA never mailed the April 4, 2008 letter to Eagle Bear, that BIA sent the January 15 and March 27 letters to the wrong address while the Campground was closed, and Eagle Bear never received notice or opportunity to cure before June 10, 2008. (EB-SUF ¶¶52-65, 68). When it finally received the June 10, 2008 letter and its first notice of BIA's claims, Eagle Bear made the payment BIA demanded well within the 30 days it was allowed under the Lease and even within the 10 days it was allowed under BIA regulations. (EB-SUF ¶¶68-69; Doc. 50 at 23). BIA accepted that cure as timely and decided to "move forward with the lease in effect." (Doc. 31-3, Pollock Dep. 79:21-80:21).

CONCLUSION

The context of the June 10, 2008 letter and January 5, 2009 withdrawal, the parties' conduct, BIA's subsequent orders, and BIA officials' testimony establish

that BIA never cancelled the Lease. The Court should grant Eagle Bear's motion for summary judgment and decide that the Lease remains in full force and effect.

Dated this 28th 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 3,250 words long, excluding the Caption and the Certificates of Service and Compliance.

Dated this 28th day of December, 2022.

CROWLEY FLECK PLLP

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th 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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