

LYNSEY ROSS  
Assistant U.S. Attorney  
U.S. Attorney's Office  
2601 Second Ave. North, Suite 3200  
Billings, MT 59101  
Phone: (406) 247-4632  
Email: lynsey.ross@usdoj.gov

JOHN M. NEWMAN  
Assistant U.S. Attorney  
U.S. Attorney's Office  
P.O. Box 8329  
Missoula, MT 59807  
101 E. Front Street, Suite 401  
Missoula, MT 59802  
Phone: (406) 829-3336  
FAX: (406) 542-1476  
Email: john.newman@usdoj.gov

ATTORNEYS FOR DARRYL LaCOUNTE,  
DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
GREAT FALLS DIVISION

<p>EAGLE BEAR, INC.,</p> <p>Plaintiff.</p> <p>vs.</p> <p>BLACKFEET INDIAN NATION, and DARRYL LaCOUNTE, DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS,</p> <p>Defendants.</p>	<p>CV 22-93-GF-BMM</p> <p>REPLY BRIEF IN SUPPORT OF DEFENDANT BUREAU OF INDIAN AFFAIRS' MOTION FOR SUMMARY JUDGMENT</p>
---	---

## INTRODUCTION

The United States files this reply brief in support of its motion for summary judgment. Defendant Blackfeet Indian Nation has no standing to oppose the government's motion and its response has no bearing on the government's jurisdictional arguments. Likewise, while the Court appears to have jurisdiction over Plaintiff's declaratory claims under the Administrative Procedure Act, 5 U.S.C. § 702, the bankruptcy code does not supply a valid waiver of sovereign immunity for those claims in this forum.

## ARGUMENT

**A. The Blackfeet Indian Nation lacks standing to oppose the BIA's motion for summary judgment and its response brief should be disregarded.**

The Blackfeet Indian Nation opposes the United States' motion for summary judgment on the basis that Eagle Bear's lease was cancelled—and final agency action therefore occurred—in February 2009. Doc. 52 at 2–5. But the Blackfeet Nation has no claims against the United States in this action, does not argue that the government's presence is necessary to its defense against Eagle Bear's claims, and therefore lacks standing to oppose the United States' motion for summary

judgment.<sup>1</sup> Consequently, the Court should disregard the Blackfeet Nation's response brief.

A defendant lacks standing to oppose a co-defendant's motion for summary judgment in the absence of a crossclaim, or if the co-defendant's dismissal has no adverse consequences for the remaining defendant. *See, e.g., D.F. by and through Amador v. Sikorsky Aircraft Corp.*, 2017 WL 4922814, \*\*11–12 (S.D. Cal. Oct. 30, 2017) (collecting cases). Adverse consequences may exist, for example, in the context of joint and several liability in tort, *see Wood v. Millar*, 2015 WL 12661926 (D.N.M. Feb. 19, 2015), or when the plaintiff and moving co-defendant stipulate to the percentage of liability attributable to the movant, *see Stone v. Marten Transport, LLC*, 2014 WL 1666420 (M.D. Tenn. Apr. 25, 2014).

Here, the Blackfeet Nation has not asserted a crossclaim against the United States, so dismissing the government does not prejudice the Blackfeet Nation's ability to prosecute any claim. Moreover, considering Eagle Bear seeks only declaratory relief in this action, the Blackfeet Nation would not be subject to additional liability (or liability at all) if the government was no longer a party. Because neither circumstance justifying a defendant's opposition to a co-

---

<sup>1</sup> While certainly inflammatory, the Blackfeet Nation's allegations that the "BIA systematically and negligently failed to carry out its statutory and trust duty by failing to take enforcement action against Eagle Bear" are irrelevant to the parties' claims and defenses in this case, and do not in themselves provide the Blackfeet Nation with standing to oppose the government's motion.

defendant's motion for summary judgment exists, the Court should disregard the Blackfeet Nation's response brief.

**B. The bankruptcy code does not vest the Court with subject matter jurisdiction over Plaintiff's claims in withdrawn Count I.**

Eagle Bear's arguments opposing the government's motion for summary judgment relative to APA jurisdiction are well taken, and the United States acknowledges the Court has subject matter jurisdiction over Plaintiff's non-monetary claims under 5 U.S.C. § 702. However, to the extent Plaintiff argues that 11 U.S.C. § 106 applies and waives sovereign immunity because the claims at issue in this separate cause of action were originally filed in the bankruptcy court as an adversary proceeding, such argument cannot be sustained. *See, e.g., Welt v. United States*, 2022 WL 17652629, at \*3 (S.D. Fla. Sept. 29, 2022) (citing *In re Straight*, 143 F.3d 1387, 1390 (10th Cir. 1998)) (noting that 11 U.S.C. § 106 "permits litigation against the Government only in federal bankruptcy court" and did not find waiver of immunity in an Assignment for Benefit of Creditors proceeding) (emphasis added).

Furthermore, even the bankruptcy court lacks jurisdiction over the United States under 11 U.S.C. § 106 because none of the bankruptcy code sections cited in Plaintiff's Second Amended Complaint or response brief are at issue. Plaintiff cites to several bankruptcy code sections for a waiver of sovereign immunity

without identifying how any could apply to the issues before this Court. *See* Doc.

48 at 12. Each of those code sections is addressed briefly:

- 11 U.S.C. § 363: Plaintiff does not cite to an applicable subsection. The BIA does not have an interest in any property subject to any use, sale, or lease. The BIA is not a party to the lease at issue in this proceeding.
- 11 U.S.C. § 365: The BIA is not a party to the real property lease and therefore has no position or standing to object or consent to assumption or rejection of the lease.
- 11 U.S.C. § 502: The BIA is not a creditor of Eagle Bear and has not filed a proof of claim in any capacity.
- 11 U.S.C. § 541: The BIA does not have an interest any property. To the extent Plaintiff argues that the lease at issue is property of the estate, no such determination can be made by the bankruptcy court until this Court makes a legal determination as to the lease cancellation.
- 11 U.S.C. §§ 542 and 543: The BIA does not have an interest in any property, is not a party to the lease at issue, and has no property subject to a turnover order.
- 11 U.S.C. §§ 1141 and 1142: The BIA does not have an interest in any property of the estate or a claim against Eagle Bear and will not be entitled to vote on the Chapter 11 plan of reorganization once such plan is proposed. Absent a confirmed plan, there can be no implementation to enforce.

While some of the above issues *may* arise in the underlying bankruptcy and *could* create a waiver of sovereign immunity, no such waiver under the bankruptcy code currently exists. The bankruptcy issues Plaintiff cites are not at issue in the case at bar and, importantly, are not yet at issue before the bankruptcy court.

What claims may arise in the bankruptcy are entirely dependent upon this Court's

decisions regarding the withdrawn Count I and whether the lease was cancelled. Only upon final determination of that issue can Plaintiff raise any waiver of sovereign immunity in bankruptcy court. Until that decision is made, any asserted waiver under 11 U.S.C. § 106 is entirely speculative and anticipatory.

### CONCLUSION

Again, the United States takes no position on whether the lease was effectively cancelled in 2008, but to the extent subject matter jurisdiction in this case hinges on the bankruptcy code, the United States should be dismissed from this case.

DATED this 28th day of December, 2022.

JESSE A. LASLOVICH  
United States Attorney

/s/ John M. Newman  
Assistant U.S. Attorney  
Attorney for BIA

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the attached brief is proportionately spaced, has a typeface of 14 points and contains 1,078 words, excluding the caption and certificates of service and compliance.

DATED this 28th day of December, 2022.

/s/ John M. Newman  
Assistant U.S. Attorney  
Attorney for BIA

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of December, 2022, a copy of the foregoing document was served on the following person by the following means.

<u>1-4</u>	CM/ECF
_____	Hand Delivery
_____	U.S. Mail
_____	Overnight Delivery Service
_____	Fax
_____	E-Mail

1. Clerk of Court

2. James A. Patten (ID #1191)  
Molly S. Considine (ID #13800)  
PATTEN, PETERMAN,  
BEKKEDAHL & GREEN, P.L.L.C.  
2817 2nd Avenue North, Ste. 300  
P.O. Box 1239  
Billings, MT 59103-1239  
Telephone (406) 252-8500  
Email: apatten@ppbglaw.com  
mconsidine@ppbglaw.com  
*Attorneys for Eagle Bear, Inc.*

3. Neil G. Westesen

Uriah J. Price  
Griffin B. Stevens  
CROWLEY FLECK PLLP  
P.O. Box 10969  
Bozeman, MT 59719-0969  
Telephone: (406) 556-1430  
Fax: (406) 556-1433  
Email: nwestesen@crowleyfleck.com  
uprice@crowleyfleck.com  
gstevens@crowleyfleck.com  
*Attorneys for Eagle Bear, Inc.*

4. Derek E. Kline

P.O. Box 1577  
Center Harbor, NH 03226  
Email: derekekline@gmail.com  
*Attorney for Blackfeet Indian Nation*

/s/ John M. Newman  
Assistant U.S. Attorney  
Attorney for BIA