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

EAGLE BEAR, INC. and WILLIAM BROOKE, Plaintiffs, vs. THE BLACKFEET INDIAN NATION and THE BLACKFEET TRIBAL COURT, Defendants.	Case No. CV-22-93-GF-BMM **INDEPENDENCE BANK'S REPLY BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNT 1**

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.	

Independence Bank (the "Bank") respectfully submits its Reply Brief in Support of its Motion for Partial Summary Judgment on Count 1 ("Motion").

INTRODUCTION

Pursuant to the Court's Order granting leave, the Bank filed its Complaint in Intervention seeking in Count 1 a judicial declaration that the purported June 10, 2008, termination of the Lease was null and void. (Doc.40,¶32) Eight days later, the Bank filed its Motion. (Doc.43) Plaintiffs did not oppose the motion, while Defendant Blackfeet Indian Nation (the "Nation") opposed it. Subsequently, the Nation filed its opposition brief (Doc.62.) and a Statement of Disputed Facts (Doc.63.)

The Bureau of Indian Affairs ("BIA"), however, did not indicate whether it objected to the Bank's Motion. (Doc.43.) Nor has the BIA filed an opposition to the Bank's Motion. *See* LR56.1(d) ("Failure to file a Statement of Disputed Facts

will be deemed an admission that no material facts are in dispute"). Thus, the Nation's is the only opposition to summary judgment. As outlined below and in other briefing, the Nation's opposition is not grounded in either the uncontroverted facts or applicable law.

ARGUMENT

A. COUNT 1 IS NOT BARRED BY THE STATUTE OF LIMITATIONS.

The Nation argues that IB's Count 1 seeks declaratory relief under the Administrative Procedures Act ("APA") and the statute of limitations ("SOL") for such an action is 28 U.S.C. §2401(a) [1], which states that "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." The Nation's reliance on this statute is misplaced for multiple reasons.

First, the statute provides a defense to a claim "*commenced against the United States*," not the Nation. The Nation does not cite any authority for the proposition that it can invoke another party's SOL to have a claim dismissed against it. Indeed, it is axiomatic that the Nation cannot assert a defense belonging

[1] Older case law treated 28 U.S.C. §2401(a) as a jurisdictional pre-requisite to waiver of sovereign immunity. However, under *United States v. Kwai Fun Wong*, 575 U.S. 402, 409 (2015), the statute as drafted is procedural only and "imposes no jurisdictional barrier." B*ar K Ranch, LLC v. US*, 2019 U.S. Dist. LEXIS 181722, *6-7 (D. Mont.), *citing Herr v. USFS*, 803 F.3d 809 (6th Cir. 2015).

to another party. *See, e.g., Boumaiz v. Charter Communs., LLC*, 2021 WL 2189481, * 6–7 (C.D. Cal. 2021) (a non-party to an arbitration agreement "lacks standing to assert defenses" belonging to those who did).

Nor has the Nation preserved such defense. After the Bank filed its Complaint, the Nation filed a pre-answer motion to dismiss but did not raise any SOL defense. (Docs. 58–59.) Any SOL defense belonging to the Nation had to be raised in its Answer. Fed. R. Civ. P. 8(c)(1). In its Answer, the Nation only asserted the Bank's claim was barred by the SOL cited above, which, as explained only governs claims against the United States. (Doc. 61 at 2–3.) Consequently, not only has the Nation failed to cite any provision of law that would render the Bank's claim against the Nation time-barred, but any such defense was also waived when the Nation omitted it from its 12(b)(6) Motion and Answer.

Moreover, nothing in IB's Complaint states that the basis for the declaratory relief requested in Count 1 is *exclusively* the APA. On the contrary, this Court has the general power to render declaratory relief against the Nation under 28 U.S.C. §2201.[2] Doc.40,¶6. So, even if declaratory relief against the BIA under the APA

[2] As explained in both the BIA's and the Plaintiffs' briefing, a party generally seeks declaratory relief against the U.S. government under the APA to avail itself of the waiver of sovereign immunity at 5 U.S.C. §702. *See* Doc.48 at 8; Doc.25 at 4. Moreover, as Plaintiffs point out, waiver is also provided under the Bankruptcy Code (11 U.S.C. §706). Finally, it is the Bank's position that the BIA contractually waived sovereign immunity in the underlying lease. *See* Lease §26

is barred by the SOL, it does not mean that declaratory relief against the Nation under 28 U.S.C. §2201 is likewise barred.

Second, even if the Nation can avail itself of 28 U.S.C. §2401(a), the six-year period does not commence until the cause of action "accrues." In the context of the APA, accrual generally occurs when the agency action becomes final. *Aguayo v. Jewell*, 827 F.3d 1213, 1226 (9th Cir. 2016). However, as the BIA itself acknowledges, it's termination decision in 2008 was not a final agency action that would trigger judicial review under the APA. (Doc.25, 5-6) ("This continues to be the case—the Bureau of Indian Affairs has not taken final action on the 2008 lease cancellation, meaning there is no 'final agency action' reviewable under the APA"). Until there is final agency action, the six-year period under 28 U.S.C. §2401(a) has not commenced.

Third, the SOL at 28 U.S.C. § 2401(a) remains subject to equitable tolling doctrines, such as the discovery rule. *See Kwai Fun Wong v. Beebe*, 732 F.3d 1030, 1047–51 (9th Cir. 2013). Under the discovery rule, a cause of action does not accrue until a plaintiff "knows or has reason to know of the injury which is the

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(Doc.46-2,pg.24) ("Lessor hereby makes this limited waiver of sovereign immunity…") and Lease pg. 1 (defining "Lessor" as both "the BLACKFEET INDIAN NATION ***and*** the SECRETARY OF INTERIOR through the Bureau of Indian Affairs acting for and on behalf of the BLACKFEET INDIAN NATION). Regardless, since the BIA has raised no opposition, its waiver of sovereign immunity is not at issue for the Bank's Motion.

basis of the action." *Lyons v. Michael & Assocs.*, 824 F.3d 1169, 1171 (9th Cir. 2016); *Acri v. International Ass'n of Machinists*, 781 F.2d 1393, 1396 (9th Cir.) ("Under federal law a cause of action accrues when the plaintiff is aware of the wrong and can successfully bring a cause of action."). Furthermore, even if the claimant is aware of the wrong, the cause of action does not accrue if at the time of acquiring knowledge, damages are not certain to occur or too speculative to be proven. *Acri*, 781 F.3d at 1396.

Here, it is uncontroverted that the Bank never received any notice that the Lease had been terminated. Eagle Bear continued servicing its loans, providing documentation to the Bank establishing the Campground's continued operation, and actually did operate the Campground from 1997 to 2021. (Doc. 63 at 11–12)[3]; Doc.46-1, ¶17. In fact, it was not until after July 2021, when the Nation first asserted that the Lease was cancelled back in 2008 (Doc.29, ¶41) that the Bank even learned of the BIA's termination notice. In the interim thirteen years, since neither the BIA nor the Nation made any attempt to enforce the purported Lease

[3] The Tribe strains to create a dispute of fact by claiming it is disputed whether Eagle Bear continued servicing its loans or provided documents to the bank evidencing its continued operation of the Campground because the Tribe is unaware whether that is true. But a party cannot avoid summary judgment by simply feigning ignorance of relevant facts. L.R. 56.1(b)(1)(B). The Bank has supported such facts through a declaration and without contrary evidence provided by the Tribe, such facts are undisputed. Fed. R. Civ. P. 56(c); 28 U.S.C. § 1746; *see also Lechowski-Mercado v. Seeley Swan High School*, 2022 WL 3357419, *1 n.1 (D. Mont. 2022).

termination and, instead, continued collecting rent from Eagle Bear in the ordinary course, damage to the Bank was not certain. The Bank's December 2022 Complaint was therefore timely filed within six years of it first having knowledge of the purported 2008 termination.

B. AN "APPROVED ENCUMBRANCER" IS A THIRD-PARTY BENEFICIARY.

The Nation argues that the Bank has no standing as a third-party beneficiary to enforce the Lease's notice and cure terms. However, to address this argument, it is first necessary to review the Lease's plain language to understand the rights it expressly confers upon the Bank as well as the obligations the Bank assumes if it exercises its contractual rights. "An Indian lease is a contract and the principles of contract construction apply to ascertain its meaning." *Dobbins v. BIA*, 59 IBIA 79, 88 (2014). "The starting point for understanding any contract is the language of the document itself." *Nevaco, Inc. and Pyramid Lake Paiute Tribe of Indians v. BIA*, 24 IBIA, 157, 164 (1993).

The Lease acknowledges financing may be necessary for the Lessee to operate and improve the leasehold, providing a benefit not only to the Lessee but also the Nation as Lessor. Lease §18 (Doc.46-2,pg.16). Thus, the Lease is specifically drafted to provide certain contractual rights and impose certain obligations to a future, yet-to-be determined, encumbrancer that obtains Secretary of Interior and Nation approval. Lease §21 (Doc.46-2,pg.20). To incentivize and

protect a lender providing a Lessee needed financing, the Lease gives an approved encumbrancer the express contractual right to foreclose on the leasehold and have the purchaser at such foreclosure sale "succeed to all of the rights, title and interest of the Lessee." *Id.* (Doc.46-2,pg.17).

Upon Lease termination due to breach by the Lessee, the Lease also gives the approved encumbrancer the contractual right to receive a 30-day notice and the right to cure the Lessee's breach. Lease §21 (Doc.46-2,pg.20). However, "[w]henever 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." *Id.* In other words, if the approved encumbrancer exercises its right to cure, it steps into the Lessee's shoes. Even if the encumbrancer elects not to cure, but instead commences foreclosure, it still must perform all the Lease obligations in the interim. *Id.*

It is undisputed that the Bank was subsequently approved as the encumbrancer referenced in the Lease on the grounds that its leasehold mortgage "is subject to the terms and provisions of the lease…." (Doc.46-4,pg.2.) In reliance upon that approval and the rights conferred to it in the Lease as an approved encumbrancer, the Bank then issued loans to Eagle Bear for capital improvements. (Doc.46-1,¶¶5,15.)

Notwithstanding the Lease's plain language, the Nation argues that the Bank is not an intended third-party beneficiary of the Lease. To accept this argument, the Court would have to ignore large portions of sections 18 and 21, rendering any rights conferred to the Bank under those terms illusory, violating fundamental tenets of contract interpretation. There is nothing unique about Indian Law that would justify the Court simply ignoring the Lease terms expressly granting rights to an approved encumbrancer.

> Contracts entered into by an Indian tribe and approved by the BIA are generally subject to the same rules of construction as contracts between private parties. In construing an Indian contract, the Board will presume that the parties intended for all of its provisions to have meaning. It will, therefore, attempt to give effect to all of those provisions.

White Sands Forest Products, Inc. v. Acting Deputy Ass't Sec. Indian Affairs, 11 IBIA 299, 303 (1983).

In its moving brief, the Bank cited *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir. 1999) for the general common law requirements for third-party beneficiary status. The Nation asserts that this case does not support the Bank's position but provides no analysis distinguishing what it contends is "applicable Federal Indian law" from otherwise binding 9th Circuit authority. In fact, the IBIA decisions cited by the Nation rely on the same general common law principles for third-party beneficiaries. *See Gillette v. Navajo Area Director*, 14 IBIA71, 75 n.9 (1986) (*quoting* Blacks Law Dictionary) and *Plumage*

v. Billings Area Director, 19 IBIA 134, 141 (1991) (citing cases from Idaho and Washington, neither of which deal with Indian law issues).

Under the common law principles adopted in *Klamath Water Users*, the contract must reflect "the express or implied intention of the parties to the contract to benefit the third party." 204 F.3d at 1211 (*citing* Restatement (Second) of Contracts §302). While the intended beneficiary does not have to be specifically identified, it must "fall within a class clearly intended by the parties to benefit from the contract." *Id.* "One way to ascertain such intent is to ask whether the beneficiary would be reasonable in relying on the promise as manifesting an intention to confer a right on him or her." *Id.*

Here, the Lease identifies an "approved encumbrancer" and expressly grants that party with specific benefits and protections to incentivize financing. Based upon that express language in the Lease, and its approval as an encumbrancer by both the Nation and the Secretary of the Interior, the Bank reasonably relied on its right to receive a 30-day notice and opportunity to cure to protect its security in its loans to Eagle Bear. No prudent lender would finance a lessee unless it could contractually enforce those contractual protections. The current form BIA lease acknowledges this reality by expressly stating: "The covenants and obligations set forth in this lease are to benefit the parties hereto, *and the Approved Encumbrance as specified in this lease*, and shall not be for the benefit of any third party." BIA

Proc. Handbook, Chap.4, Ex. A, Attachment 4-B, Art.52(K) (emphasis added), attached as Ex. A.

C. THE BANK IS A CONDITIONAL GUARANTOR OF EAGLE BEAR'S PERFORMANCE.

In addition to its contractual notice rights under the Lease, the Bank also has notice rights under 25 C.F.R. §§162.618 and 162.619 if it is Eagle Bear's "surety". The Nation correctly defines surety as "one who guarantees the performance of another." 25 C.F.R. §162.003. The Nation, however, argues the Bank does not meet this definition because, while the Lease gives the Bank the opportunity to cure and assume Eagle Bear's obligations, it has no obligation to do so. This argument understates the realities of the situation.

Under the Lease, if the Bank exercises its right to cure a breach, it assumes the Lessee's duty of performance by becoming "bound to comply with all of the obligations and conditions of the lease." Lease §21 (Doc.46-2,pg.20.) On the other hand, even if the Bank declines to cure the breach and instead pursues foreclosure, it still assumes the Lessee's duty of performance while the foreclosure is pending and, if it becomes the purchaser of the leasehold at the foreclosure sale, it again assumes the Lessee's duty of performance. *Id.* "[w]henever 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"). The only scenario where the Bank is not a guarantor of the Lessee's performance is if it

declines to exercise any of its rights under the Lease and completely walks away from its security in the leasehold for repayment.

A guarantee can either be absolute or conditional, depending on whether there is a condition precedent before liability is imposed upon the guarantor. *Western Indus. v. Chicago Mining Corp.*, 926 P.2d 737, 739-740 (Mont. 1996). The Bank's guarantee in this case is conditional, as its obligation to assume the Lessee's performance is conditioned upon it first exercising either its right to cure a breach or to foreclose its security interest. Regardless, there is nothing in the definition of "surety" that limits the regulatory notice requirements to just absolute guarantors and not conditional guarantors. The Nation's argument for why the Bank is not entitled to the regulatory notices provided to a surety fails. It is uncontroverted that the Bank was not provided those notices.

D. ACCEPTANCE OF RENT FOR FOURTEEN YEARS AFTER THE PURPORTED TERMINATION CONSTITUTES WAIVER.

As the uncontroverted facts establish, the Bank did not receive the proper notices as an approved encumbrancer and surety that were a condition precedent to the BIA terminating the Lease. Thus, the purported 2008 termination for delinquent payments is null and void. Notwithstanding, even if proper notice was sent, the BIA and the Nation's acceptance of Eagle Bear's rent for fourteen years thereafter constitutes a clear waiver of the termination notice.

In *Sessions, Inc. v. Morton*, 491 F.2d 854, 867 (9th Cir. 1974), the Ninth Circuit held as follows:

> While it is a generally stated rule that the lessor's acceptance of rent after the lessee's breach implies a waiver of that breach, this concept, involving the knowing relinquishment of a right, is a matter of intent which necessarily depends on the factual circumstances of each case. Thus, "acceptance of rent is evidence to be considered by the trier of fact, but it is not necessarily conclusive."

(internal citations omitted); *see also Small v. Comm. of Indian Affairs*, 8 IBIA 18, n.9 (adopting *Sessions* and holding that payment of nominal ground rent does not waive breach for failure to develop the property).[4] While there could be a question of material fact on intent to waive, neither the Nation nor the BIA presents any evidence to raise such a question of fact.

Instead, the Nation attempts to avoid the issue entirely by arguing that waiver does not apply since it ultimately accepted Eagle Bear's rent without knowledge of the June 2008 termination. There is irony in the Nation's position, given that it is quick to assert that the Bank should have become aware of the June 2008 termination after receiving the April 2008 letter from BIA. Just like the Bank, the Nation was also copied on that very letter. (Doc.46-5.)

[4] It is important to note that in cases like *Sessions* and *Small*, where courts have concluded that acceptance of rent did not establish an intent to waive rights for breach, the breach was of other lease provisions (like development or bonding) and not breach due to delinquent rental payments. Here, however, the breach was payment of rent and the BIA accepted the delinquent rent and continued accepting rent for fourteen years thereafter.

In any event, the Nation cannot avoid imputed knowledge of the 2008 termination. There is no question the BIA knew about the 2008 termination but continued collecting rents from Eagle Bear for payment to the Nation despite that knowledge. In administering the Lease, the BIA was clearly acting in an agency/trustee capacity on behalf of the Nation. (Doc.46-2,pg.1) ("the SECRETARY OF INTERIOR through the Bureau of Indian Affairs acting for and on behalf of the BLACKFEET INDIAN NATION"). The BIA's knowledge of its 2008 attempted termination is therefore imputed to its principal, the Nation. Restatement (Third) of Agency §5.03; *Schlenz v. John Deere Co*., 511 F.Supp. 224, 228 (D. Mont. 1981) ("It is the general rule that notice to the agent in matters within the scope of his business is notice to his principal"). The Nation cannot avoid its agent's actions to avoid waiver of the 2008 termination.

CONCLUSION

The Bank should be granted summary judgment on Count 1 seeking a declaration that the BIA's 2008 termination of the Lease was null and void due to lack of proper notice to the Bank. Count 1 is not barred by the SOL applicable to the Nation and the Bank has standing – both as a third-party beneficiary to the Lease and as a surety under the regulations – to seek to enforce the notification requirements for termination. Those notification requirements are a condition

precedent to Lease termination and there is no dispute that the notification requirements were not fulfilled.

Regardless, even if the Bank did receive proper notice, the BIA's actions in accepting rent on behalf of the Nation for fourteen years constitutes a waiver of the Lease termination.

DATED this 3rd day of January, 2023.

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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 3248 words long, excluding the Caption and Certificates of Service and Compliance. Pursuant to L.R. 7.1(d)(2)(C), given the brief is less than 4,000 words, no Table of Contents and Authorities or Exhibit Index are required.

Dated this 3rd day of January, 2023.

HANSBERRY & JOURDONNAIS, PLLC

/s/ Jenny M. Jourdonnais
Jenny M. Jourdonnais

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify under penalty of perjury that on the 3rd day of January, 2023 a copy of the foregoing was served by electronic means pursuant to LBR 9013-1(d)(2) on the parties noted in the Court's ECF transmission facilities.

/s/ Jenny M. Jourdonnais
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