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

<p>EAGLE BEAR, INC.,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>THE BLACKFEET INDIAN NATION and DARRYL LaCOUNTE, DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS,</p> <p style="text-align: center;">Defendants.</p>	<p style="text-align: center;">Cause No. 4:22-cv-00093-BMM</p> <p style="text-align: center;"><b>PLAINTIFF’S BRIEF IN SUPPORT OF ITS MOTION FOR LEAVE TO CONDUCT ADDITIONAL DISCOVERY, TO FILE SUPPLEMENTAL BRIEFING ON MOTIONS FOR SUMMARY JUDGMENT, AND TO DEFER RULING ON MOTIONS FOR SUMMARY JUDGMENT</b></p>
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Plaintiff Eagle Bear, Inc. (“Eagle Bear”) submits this brief in support of its Motion for Leave to Conduct Additional Discovery and to File Supplemental Briefing on Motions for Summary Judgment.

## INTRODUCTION

A central component to the story the Nation has been telling as part of its effort to cancel Eagle Bear's Lease is that the Nation had no knowledge of and never participated in the 2008 cancellation or appeal. The Nation claims that Eagle Bear concealed the cancellation from the Nation and that Eagle Bear then fabricated a story about withdrawing its appeal at the direction of the BIA and the Nation.

Eagle Bear has, time and again, refuted this version of events; first by the text of its notice of appeal and January 5, 2009 letter, both of which were copied to the Nation; then by the certified mailing receipts showing the appeal was signed for by the Nation; next by the testimony of Superintendent Stephen Pollock, Realty Specialist Tracy Tatsey, and other BIA officials; and then by the testimony of the Nation official in charge of leasing for the Nation who Eagle Bear was working with at the time, Mark Magee. Each of these officials confirmed what the documentary evidence had already made plain: Eagle Bear timely appealed the June 10, 2008 cancellation, timely paid the \$15,000 due to the BIA and thereby cured the alleged breach on which the cancellation was based, worked with the Nation and the BIA to ensure that every party was comfortable moving forward with the Lease in effect, and ultimately withdrew its appeal on the direction of the BIA

and with the knowledge and consent of the Nation that the Lease would remain in full force and effect.

Nevertheless, the Nation argued that it was a mere bystander and victim in the BIA's and Eagle Bear's back-room dealing. It continued to claim that the BIA had no involvement in Eagle Bear's withdrawal of its appeal and continued to paint Will Brooke as a liar. It also attempted to distance itself from its own land department director, Mark Magee, who it described as not having any authority to work with Eagle Bear or to make representations that the BIA or Eagle Bear could rely upon.

Even more so than ever before, that position is not tenable. On March 31, 2023—over 6 years into the Nation's evolving effort to cancel the Lease and take back the Campground and years after the Nation and Eagle Bear began asking the BIA for its files related to this matter—the BIA produced further documentary evidence vindicating Will Brooke. Emails that the BIA produced for the first time on March 31, 2023 (“Pease Emails”) demonstrate that Will Brooke was correct that the BIA directed Eagle Bear to withdraw its appeal and asked Eagle Bear to send its January 5, 2009 letter, that Will Brooke was correct that Mark Magee and the Nation had full knowledge of the proceedings and agreed that the Lease should not be cancelled, and that Will Brooke was correct that the Nation wished to preserve and continue its mutually-beneficial relationship with Eagle Bear rather than to

cancel the Lease. (Docs. 91-1 through 91-4). In short, the Pease Emails prove that Will Brooke and Eagle Bear are not the liars that the Nation has repeatedly described them to be and, instead, that the Nation is the only party attempting to rewrite history.

It is unclear why it has taken the BIA years to produce this information, but it is clear that the information has a significant impact on this case. As indicated in Eagle Bear's contemporaneously filed Notice of Supplemental Authority, the Pease Emails bear on dozens of points in the parties' summary judgment briefing and statements of fact and directly on the Nation's central theory in this case, namely that it had no part in the 2008 cancellation proceedings and therefore is not bound to them.

Likewise, this information would have been important to the depositions that Eagle Bear took last fall. Eagle Bear undoubtedly would have used the email exchanges in the depositions of Tracey Tatsey, Mark Magee, and the Nation. Eagle Bear also would have taken the depositions of Bernadine Pease and Jodi Wagner if any party had realized that they played a role in this case prior to production of the Pease Emails. In short, the Pease Emails are valuable in and of themselves, but they would also have very likely led to the discovery of additional relevant information that Eagle Bear would have used in its summary judgment briefing.

In order to mitigate the effect of the BIA's belated disclosure of this information, Eagle Bear requests the opportunity to conduct the discovery it would have conducted and incorporate the Pease Emails into its briefing in the ways it would have done if the BIA had timely disclosed the Pease Emails.

## **BACKGROUND**

The Nation and Eagle Bear have both been requesting the BIA's files, including the Pease Emails it produced for the first time on March 31, 2023, since 2019. (*See, e.g.*, Doc. 32-1 at ¶¶ 13-16). For example, in 2019 the IBIA directed the BIA to produce its administrative records related to the Lease and between December 2021 and September 2022 Eagle Bear and the Nation served the BIA with FOIA requests, subpoenas, and discovery requests for all BIA files related to the Lease. (Doc. 42-2, *Eagle Bear, Inc. v. Blackfeet Indian Nation*, 21-CV-88-BMM (D. Mont. Jan. 24, 2022) (requesting "All records pertaining to the Business Lease between Eagle Bear, Inc. and the Blackfeet Tribe"); Doc. 82-2, *Eagle Bear, Inc. v. Blackfeet Indian Nation*, 21-cv-88-BMM (D. Mont. Sept. 8, 2022) (requesting the "complete file for . . . Lease No. 5B033889621 (Eagle Bear Lease)."); Doc. 29-16 at 16 (seeking all documents relating to the "Lease, the Campground, or the Alleged 2008 Cancellation"). In response to each of these requests, the BIA made production and represented that it had fully and fairly responded to Eagle Bear's and the Nation's requests. (*E.g.*, Doc. 29-16; Fed. R.

Civ. P. 26(g)(1)). By the time it was responding to Eagle Bear's written discovery in this matter, the BIA seemed to be producing only documents that it had previously produced to the parties.

Likewise, the Nation has been consistently arguing for years that further discovery in this case is unnecessary and that Eagle Bear's discovery efforts are obstructive and dilatory. (*E.g.*, Doc. 26 at 13, *Eagle Bear v. Blackfeet Indian Nation*, CV-21-88-GF-BMM (D. Mont. Oct. 14, 2021); Transcript of Motion Hearing at 15:3-9, *Eagle Bear v. Blackfeet Indian Nation*, CV-21-88-GF-BMM (D. Mont. July 11, 2022); Transcript of Motion Hearing and Pretrial Conference at 36:13-37:2, *Eagle Bear, Inc. v. Blackfeet Indian Nation*, CV-21-88-GF-BMM (D. Mont. Jan. 19, 2022) (“[T]here are no further records to produce. The record of the lease was produced already. There are no documents. The BIA’s not going to produce another document changing anything during that [2008-2009] time period. The record has been produced.”); Doc. 17 at 20:22-21:13 (“It’s our position that the record is now fully developed. The paper chase is over.”).

In reality, obtaining documents relevant to this matter has been a struggle despite the diligence of Eagle Bear. (*See, e.g.*, Doc. 17 at 6:11-12 (“THE COURT: . . . [The BIA] has been less than forthcoming in producing information that’s relevant here.”) First, Eagle Bear was met with the Nation’s objections, and then it was met with the Nation’s alleged destruction of relevant files years before

this dispute began. Next, it was met with the BIA's representations of full and complete production of its file. Only once Eagle Bear was finally able to take depositions last fall did it become clear that additional documents might exist. (*E.g.*, Doc. 29-10 at 8:4-9:10). Then, after the Court ordered the BIA to share a description of its search protocols, Eagle Bear noted several deficiencies in the breadth of the BIA's searches for relevant documents. (*See* Doc. 80). After Eagle Bear conferred with the BIA in January and February 2023, the BIA promised to perform additional searches and to supplement its responses. (Ex. 1, Email from Ross to Westesen (Feb. 1, 2023)). Its March 31, 2023 supplementation is apparently the result of that broadened search effort. (Ex. 2, Letter from Ross to Westesen (Mar. 31, 2023)).

Included in the BIA's supplemental production are several emails exchanged between employees of the BIA Superintendent's office and the BIA Regional Director's office about Eagle Bear's appeal from the BIA's June 10, 2008 cancellation letter. (Docs. 91-1 through 91-4). More specifically, the emails are between Tracy Tatsey, who was the realty specialist in the Superintendent's office; Bernadine Pease, who appears to have been in the Regional Director's office but whose precise position is unknown; and Jodi Wagner, who appears to have supervised Pease at the time. (*Id.*; Doc. 29-16 at 10).

On October 27, 2008, Pease asked Tatsey about the status of Eagle Bear's appeal. (Doc. 91-1). Later that day, Tatsey responded that she had heard "unofficially from the Tribe that they are currently[ ]in negotiations with Mr. Brook on another lease and the cancellation of this lease may hinder those negotiations." (*Id.*) The "other lease" was a reference to the Chewing Blackbones campground which, despite Eagle Bear's alleged defaults, the Nation had asked Eagle Bear to consider leasing. (Doc. 29-14). In any event, Tatsey promised to "write to the B[lackfeet] Tribe and ask for an official standing" related to the appeal. (Doc. 91-1).

Pease followed up on November 18, 2008. (Doc. 91-2). She asked for the status of the communications and appeal "ASAP" and asked Tatsey to "[e]ither send the administrative record or documentation from the tribe stating their intentions." (*Id.* at USA\_0729). Tatsey responded later that day by reminding Pease that the administrative record for Eagle Bear's appeal had been sent to the Regional Director's office on August 22, 2008. (*Id.* at USA\_0728). She then wrote that "the Blackfeet Tribe had told me that they were in support of Eagle Bear, (Through Mark Magee), but I have been unsuccessful in getting that in writing. . . . I will contact the Tribe once again and if I cannot get documentation, I will let you know." (*Id.*) After Pease checked in again in December 2008, Tatsey wrote that she "called Mark Magee once again. He is going to talk to one of the



Council today and get back to me.” (*Id.* at USA\_0727). Pease thanked Tatsey. (*Id.*)

A day passed and presumably some conversations occurred between Tatsey and Magee and Tatsey and Pease. (*See id.* at USA\_0726). Pease then emailed Tatsey and told her, “All I need is a statement from Will Brooke indicating he has decided to cancel his appeal.” (*Id.*) Considering that this email provided an answer to a question that was never asked in writing, it seems likely that some conversation prompting the email had occurred. (*See id.*) Considering the emails that followed, it seems clear that Tatsey had confirmed with Magee and Brooke that the appeal could be withdrawn and the Lease would continue in full force and effect before Pease sent her email. (*Id.*) Unfortunately, it is difficult to conclude that these assumptions are true without depositions of Tatsey or Pease, or other discovery on these topics.

Following Pease’s email requesting “a statement from Will Brooke indicating he has decided to cancel his appeal,” Tatsey spoke to Brooke. (*Id.*) In a December 16, 2008 email to Pease, she wrote: “I just got off the telephone with Mr. Brooke, he will send in this statement, and I will forward it to you.” (*Id.*) Pease forwarded that email to Jodi Wagner without comment. (Doc. 91-3). On January 7, 2009, Tatsey confirmed that she had received Eagle Bear’s letter and

would be sending it on to Pease. (Doc. 91-4). The letter is Eagle Bear's withdrawal of its appeal, exactly as the BIA regional office had requested.

### STANDARD OF REVIEW

This Court is “invested with inherent powers that are ‘governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.’” *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992) (quoting *Chambers v. NASCO, Inc.*, 111 S.Ct. 2123, 2132 (1992)). This inherent power includes “broad discretion to make discovery and evidentiary rulings conducive to the conduct of a fair and orderly trial.” *Id.* Such discretion should be exercised to ensure “that the parties have an opportunity to engage in appropriate discovery and that the parties are adequately and timely prepared.” *U.S. v. W.R. Grace*, 526 F.3d 499, 509 (9th Cir. 2008).

Although the Court's discretion to control discovery is broad, it is an abuse of this discretion to deny a motion to reopen discovery if “the movant diligently pursued previous discovery opportunities, and if the movant can show how allowing additional discovery would have precluded summary judgment.” *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1026 (9th Cir. 2006). Under Rule 56(d), the Court should allow parties to conduct additional discovery before ruling on a motion for summary judgment if the movant “shows by affidavit

that, for specified reasons, it cannot present facts essential to justify its opposition” to summary judgment. F. R. Civ. P. 56(d); *Matabolife Intern., Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (Rule 56(d) “require[s], rather than merely permit[s]” further discovery “where the nonmoving party has not had the opportunity to discover information that is essential to its opposition.”)

## DISCUSSION

### **1. Through no fault of its own and despite its diligence, Eagle Bear has not had the opportunity to conduct discovery related to the Pease Emails.**

The BIA has been obligated to produce the Pease Emails since no later than 2019 and Eagle Bear has been specifically requesting them since December 2021. Eagle Bear relied on the completeness of BIA’s September 2022 response to the Nation’s subpoena and on the completeness of BIA’s responses to Eagle Bear’s discovery requests in setting depositions and in preparing its summary judgment briefing. (*E.g.*, Doc. 29 at ¶¶ 27, 47-48, 69, 81). Eagle Bear believed that the BIA had fully and fairly produced all relevant information in its possession, custody, or control, and it proceeded with conducting depositions, questioning BIA officials, and structuring its summary judgment arguments based on the information that had been produced. (*See id.*; Doc. 29-20, Tatsey Dep. at 5:21-6:1, 37:10-16, 42:7-10).

Only now, months later and after the parties have devoted countless hours and hundreds of thousands of dollars in legal fees towards filing and briefing several motions and cross motions for summary judgment, has Eagle Bear learned

that its reliance was misplaced. (Ex. 3, Stevens Aff. at ¶¶ 6-8). The BIA has belatedly produced the Pease Emails and thereby belatedly identified Pease and Wagner as individuals with potentially relevant information and belatedly produced documents that Eagle Bear would have used in its depositions, would have used to obtain further relevant information, and would have relied upon in its briefing. (*See* Doc. 29-16 at 2 (Int. 2)).

Eagle Bear was diligent in its efforts to obtain this information. Indeed, the information was only finally produced because Eagle Bear questioned the BIA's search protocols within one day of receiving those protocols. (Doc. 80; Ex. 1; Ex. 2). Eagle Bear should not have to bear the prejudice caused by the BIA's lack of diligence in complying with years of discovery, FOIA, and administrative records requests.

Now that the BIA has belatedly produced the Pease Emails, Eagle Bear should be allowed to conduct and complete its discovery and to supplement its summary judgment briefing before the Court rules on the motions for summary judgment. Most notably, Eagle Bear should be allowed to depose Pease (who was never identified as someone involved with this matter or any underlying transaction prior to March 31, 2023), Tatsey, Wagner, and others related to the information in the Pease Emails. (*See* Doc. 29-16 at 2 (Int. 2); Ex. 3, Stevens Aff.

at ¶¶ 6-8). Eagle Bear should then be allowed to use what information it obtains to supplement its summary judgment briefing.

**2. The Pease Emails and information related to the Pease Emails are material to the pending summary judgment motions.**

The Pease Emails reveal that—consistent with Will Brooke’s, Mark Magee’s, and Tatsey’s testimony and contrary to the Nation’s arguments—the BIA Superintendent’s office, the BIA Regional Director’s office, and the Nation were all involved in the appeal from the June 10, 2008 cancellation, in the decision to move forward with the lease in full force and effect, and in directing Eagle Bear to write its January 5, 2009 appeal withdrawal so that the parties could move forward.

That these points, the Pease Emails, and related facts are important to the pending summary judgment motions is demonstrated by the wide array of the Nation’s arguments and allegations directly contradictory to the information in the Pease Emails. A selection of those arguments and allegations are identified below. Eagle Bear expects further discovery will reveal further facts consistent with the Nation’s and BIA’s involvement with the January 5, 2009 letter and would further undermine the Nation’s summary judgment position. (Ex. 3, Stevens Aff. at ¶ 8).

For example, Tatsey’s and Pease’s email exchanges indicate that the BIA specifically directed Eagle Bear to withdraw its appeal so that the parties could move forward with the Lease in full force and effect. (Doc. 91-4). This fact is directly contrary to the Nation’s following arguments in this matter:

- “[T]he facts do not support Eagle Bear’s claims regarding its January 5, 2009 letter withdrawing their appeal . . . . No BIA official confirmed Eagle Bear’s claim of an agreement or even a conversation regarding an agreement to withdraw their appeal.” (Doc. 28 at 34, 36).
- “Tatsey specifically denied telling Brooke that he would withdraw his appeal . . . .” (Doc. 28 at 33; *see also* Doc. 54 at 10)
- “BIA Reality [sic] Officer Tracey Tatsey, denied ever reaching out to Brooke about any issues regarding the lease, or advising him to withdraw his appeal of the June 10, 2008 cancellation decision.” (Doc. 51 at ¶ 111; Doc. 55 at ¶ 81).
- “[U]nder oath, both Tracy Tatsey and Blackfeet Agency Superintendent Stephen Pollock denied having any such discussion with Eagle Bear Representative William Brooke . . . .” (Doc. 28 at 33)
- “No BIA employees discussed or advised Will Brooke to withdraw Eagle Bear’s appeal.” (Doc. 51 at ¶ 115).
- “All former BIA Blackfeet Agency employees deny ever discussing Eagle Bear Inc.’s appeal withdrawal with Eagle Bear Inc.” (Doc. 55 at ¶ 85).
- “The BIA denies ever assisting Eagle Bear Inc. with its appeal withdrawal.” (Doc. 55 at ¶ 86).

- The January 5, 2009 letter “is not a BIA letter, nor is it an agreement or recite an agreement of any kind.” (Doc. 51 at ¶ 105).

The Pease Emails also demonstrate—even further than the other evidence already did—that the Nation was aware of and participated in the appeal and Eagle Bear’s withdrawal of that appeal so that the parties could move forward with the Lease in full force and effect. (Doc. 91-4). They demonstrate that the following arguments and allegations by the Nation are incorrect:

- “[T]he Blackfeet Nation did not request, took no part in, and had no knowledge of BIA’s decision to cancel the lease.” (Doc. 28 at 20).
- “The Blackfeet Nation . . . did not participate in the appeal as it had no knowledge of it.” (Doc. 51 at ¶ 96).
- “The Blackfeet Nation was unaware of the June 10, 2008 cancellation decision. The Blackfeet Nation was not aware that the lease was cancelled and believed that the lease was still valid.” (Doc. 55 at ¶ 99).
- “The Blackfeet Nation did not mention the 2008 cancellation in the [2017] Notice of Default because it was unaware of the 2008 cancellation at the time.” (Doc. 51 at ¶ 123).
- “THE COURT: Did the tribe receive notice of the BIA’s termination of the lease? MR. MCKAY: No, it didn’t . . . . [T]here should have been a consultation with the Blackfeet Nation . . . to ask them ‘What do you

want us to do? Do you want us to negotiate with him? Do you want us to do something?’ There’s no record that that ever took place.”

(Transcript of Motion Hearing and Pretrial Conference at 10:2-10, *Eagle Bear, Inc. v. Blackfeet Indian Nation*, CV-21-88-GF-BMM (D. Mont. Jan. 19, 2022)).

- “In that letter, January 5th, 2009, [Eagle Bear] alleges that they were in discussion with agency staff. . . . They allege that agency staff told them that they have a deal, and they could withdraw their appeal . . . . That’s a bogus argument. That doesn’t follow the law or the facts.” Transcript of Motion Hearing and Pretrial Conference at 13:17-14:5, *Eagle Bear, Inc. v. Blackfeet Indian Nation*, CV-21-88-GF-BMM (D. Mont. Jan. 19, 2022)).

As further example, Tatsey’s and Pease’s emails indicate that, despite the Nation’s attempts to characterize its Leasing Department head, Mark Magee, as some rogue actor and to disavow the consequences of Magee’s actions, Magee was acting at the behest of the Nations’ Business Council. Contrary to the Nation’s following argument, Tatsey and Pease indicate that Magee was “going to talk to one of the Council” before confirming that the Nation did not want to cancel Eagle Bear’s Lease. (Doc. 91-4 at USA\_0740).



- “Mark Magee had no responsibility or authority to revise the former Lease, to make decisions on behalf of the Blackfeet Tribal Council regarding the former lease or to reinstate the cancelled Lease. Moreover, Mark Magee did not testify that he spoke with Eagle Bear Inc. about their appeal ‘during the summer or fall of 2008.’ In fact, he said the opposite. Furthermore, William Brooke’s statement . . . regarding a purported conversation with Mark Magee is hearsay and was not confirmed by Mark Magee in Magee’s deposition.” (Doc. 55 at ¶ 80).

In sum, the Pease Emails corroborate much of Will Brooke’s, Mark Magee’s, and Tracy Tatsey’s testimony and contradicts the Nation’s arguments in its summary judgment briefing. Eagle Bear suspects that using the Pease Emails in depositions and follow-up discovery would lead to further support for its position and would further undermine the Nation’s arguments. (Ex. 3, Stevens Aff. at ¶ 8). Eagle Bear should be allowed both to use the Pease Emails to conduct follow up discovery and to supplement its summary judgment briefing.

### **CONCLUSION**

For the foregoing reasons, Eagle Bear requests that the Court grant its motion, allow Eagle Bear to conduct discovery and supplement its summary judgment briefing based on the Pease Emails, and defer any ruling on the pending

motions for summary judgment until after such supplemental briefing has been completed.

Dated this 4th day of April, 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 3,804 words long, excluding the Caption and the Certificates of Service and Compliance.

Dated this 4th day of April, 2022.

CROWLEY FLECK PLLP

By /s/ Neil G. Westesen  
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### CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April, 2023, a true and correct copy of the foregoing was delivered by the following means to the following:

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