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
Facsimile: (406)294-9500
Email: apatten@ppbglaw.com
mconsidine@ppbglaw.com

Counsel for Debtor

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

Special Counsel for Debtor

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

IN RE EAGLE BEAR, INC., Debtor.	Cause No. 4:22-bk-40035-WLH **EAGLE BEAR, INC.'S POST-HEARING BRIEF OPPOSING BLACKFEET NATION'S CLAIM**

Pursuant to the Court's order following the August 14 and 15, 2023 hearing on the Blackfeet Nation's ("Nation") amended claim (Doc. 229-1 & Claim 11) ("Claim"), Eagle Bear submits this brief opposing the Nation's Claim.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

REQUESTED RELIEF

For the reasons identified below, the Nation's Claim is contrary to the record and controlling law. Eagle Bear, therefore, requests that the Court:

1. For the portion of the Claim related to the Contractors' Excise Tax: (a) Decide that no Contractors' Excise Tax is owed; or, in the alternative, if the Tax somehow applies to Eagle Bear and applicable taxable contracts can somehow be identified, (b) order the parties to calculate the tax and interest owed using a 3% tax rate and a 1% per month simple interest rate running from the 60th day following each contract to the date of the petition in this matter, and (c) order that the portion of the Claim related to the Contractors' Excise Tax is not entitled to priority.

2. For the portion of the Claim related to the TERO Fee: (a) Decide that no TERO Fee is owed; or, in the alternative, if the Fee somehow applies to Eagle Bear and contracts subject to the Fee can somehow be identified, (b) order the parties to calculate the Fee with no interest owed by applying a 2% rate to the subject contracts, and (c) order that the portion of the Claim related to the TERO Fee is not entitled to priority.

3. For the portion of the Claim related to the Lodging Tax: (a) Decide that no Lodging Tax is owed; or, in the alternative, (b) limit the Nation's claim to the years 2017-2022 and order the parties to calculate the tax and interest owed for those years by applying a 5% tax rate to the accommodation charges listed on the "Revenue Per Year" row of Doc. 229-1, p. 7, allocating half of that amount between the second and third quarters of the relevant year, and then applying a 1% per month simple interest rate running from the July 30 and October 30 quarterly due dates to the date of the petition in this matter; and (c) order that only the portion of the claim for the years 2018-2022 is entitled to priority.

4. For the portion of the Claim related to interest on allegedly past due rent: (a) Decide that no interest is owed on any alleged past due rent; or, in the alternative, if interest is for some reason owed and the applicable prime rates, rental due dates, and rental payment dates are identified, (b) order the parties to calculate the interest owed for those years by applying a simple interest rate equal to the applicable prime rate plus three percent to the allegedly past due rent from the rental due dates to the rental payment dates, and (c) order that the portion of the Claim related to the allegedly past due rent is not entitled to priority.

BACKGROUND

Eagle Bear operates a KOA campground and recreational facility ("Campground") in St. Mary, Montana pursuant to a Recreation and Business Lease Agreement ("Lease") with the Nation. (Ex. 5, Lease). In accordance with its trust responsibilities, the Bureau of Indian Affairs ("BIA") administers the Lease on the Nation's behalf. (Joint Statement of Stipulated Facts at ¶ 9, *Eagle Bear, Inc. v. Blackfeet Indian Nation*, 4:21-cv-00088-BMM (D. Mont.) (Doc. 37)).

Eagle Bear and the Nation entered the Lease in April 1997, following extensive and detailed negotiations over its terms. (Ex. 5, Lease; *see* Ex. 39, Transcript of Evidentiary Hearing Day 1 at 93:23-24; *see also id.* at 50:20-51:13, 52:8-16, 147:12-14).[1] In relevant part, the Nation agreed to give Eagle Bear the exclusive right to possess and operate the Campground and, in exchange, Eagle Bear agreed to improve the Campground, to pay the Nation $250,000 up front, and to make annual rental and royalty payments to the Nation. (Ex. 5, Lease at pp. 1, 4-6, 8-9 §§ 1, 5, 6, 8, 9). Eagle Bear's rental payments escalated from $5,000 per year at the beginning of the Lease term to $25,000 per year by the end of the first term of the Lease, and Eagle Bear's

[1] References herein to lettered exhibits refer to the Nation's exhibits for the August 14-15, 2023 hearing in this matter. (*See* Docs. 212-215, 218). References to exhibits 1 through 38 are to Eagle Bear's exhibits for the hearing. (*See* Doc. 210). Exhibits 39-41 are attached to this brief.

royalty payment escalated from 4% of Eagle Bear's "gross registration receipt income" at the beginning of the Lease term to 6% by the end of the first term of the Lease. (*Id*. at p. 4, § 5). Pursuant to the Lease, Eagle Bear was obligated to make these rental payments to the BIA by November 30 of each year. (*Id*.)

The Campground was in poor condition when the Lease began. Campground buildings had collapsed, plumbing had frozen and burst, there were garbage dumps throughout the Campground, neighbors complained of sewage running on top of the ground, and there was an illegal rodeo ground on the Campground. (Ex. 25, Mark Magee Dep. 12:21-13:11; Ex. 39, Transcript of Evidentiary Hearing Day 1 at 39:22-40:12, 41:11-18, 93:23-24, 54:15-11, 55:17-22). As a result, the Campground's business had failed. (*See* Ex. 39, Transcript of Evidentiary Hearing Day 1 at 55:12-56:1). As Mark Magee, the Director of the Nation's Land Department put it, the Campground "was trash" before Eagle Bear took over. (Ex. 25, Mark Magee Dep. 12:21-13:11).

Eagle Bear turned the Campground around. Eagle Bear invested significant money, time, and energy to make the Campground a profitable business for both Eagle Bear and the Nation. (Ex. 39, Transcript of Evidentiary Hearing Day 1 at 56:3-5, 52:8-23). Eagle Bear replaced water, sewer, plumbing, and electrical facilities. (*Id*. at 54:15-55:11, 55:17-22, 93:23-24). Working on its own and through tribal contractors, Eagle Bear rebuilt collapsed buildings and Campground roads, installed new cabins, and eventually built a swimming pool, hot tub, and water park after receiving approval from the Nation. ((*Id*. at 54:4-12, 54:15-55:11, 55:17-22, 93:23-24; Ex. 6, Excerpt of Blackfeet Land Committee Minutes (Apr. 3, 2007)). As Mr. Brooke summarized: "[W]e were drinking out of a fire hose, we were chasing our tail, and we were working as hard as we could." (Ex. 39, Transcript of Evidentiary Hearing Day 1 at 55:9-11).

As a result of Eagle Bear's efforts, the Campground business grew. (Ex. 39, Transcript of Evidentiary Hearing Day 1 at 55:18-56:1). By 2017, the Campground was a successful business and a significant source of revenue for the Nation. (Ex. 40, Transcript of Evidentiary Hearing Day 2 at 125:13-127:4; *see* Exs. 8-16, Auditor Reports (showing that Eagle Bear's royalty payments to the Nation grew from under $8,000 in 2004 to over $133,499 by 2022 and resulted in nearly $2 million dollars of revenue to the Nation)).

Because of its significant investments into the Campground, however, Eagle Bear's cash flow was tight for many years. (Ex. 39, Transcript of Evidentiary Hearing Day 1 at 55:12-56:1; Ex. 40, Transcript of Evidentiary Hearing Day 2 at 33:12-34:1). It was difficult for Eagle Bear to overcome the Campground's negative reputation. (Ex. 39, Transcript of Evidentiary Hearing Day 1 at 55:12-56:1). Additionally, wildfires near the Campground, associated evacuations, and a crippling recession hurt Eagle Bear's business. (Ex. 40, Transcript of Evidentiary Hearing Day 2 at 33:12-34:1). As a result, Eagle Bear was often behind in its payments to the Nation and other creditors. (Ex. 40, Transcript of Evidentiary Hearing Day 2 at 33:12-34:1). Although Eagle Bear's royalty payments to the Nation were higher than ever, Eagle Bear was often late making its annual rental payments. (*Id.*)

Despite these challenges, Eagle Bear and the Nation had an "excellent working relationship" and were able to work cooperatively through Eagle Bear's tough financial times. (Ex. 25, Mark Magee Dep. 29:5-8, 35:22-25). Eagle Bear worked closely with the Nation's Land Department Director, Mark Magee, and with the BIA to ensure that any issues or disputes were resolved to the Nation's and the BIA's satisfaction. (Ex. 39, Transcript of Evidentiary Hearing Day 1 at 40:13-19, 49:18-25; Ex. 25, Mark Magee Dep. 33:25-34:5, 35:22-25; Ex. 22, BIA's

Responses to Eagle Bear's First Discovery Requests at 6). In the Nation's estimation, Eagle Bear was a "good tenant." (Ex. 25, Mark Magee Dep. 35:22-25).

Nevertheless, in 2017, the Nation began attempting to get out of its Lease and take back the Campground. The Nation has since pursued an evolving set of theories to various courts and administrative bodies, but it began in April 2017 by alleging that Eagle Bear had defaulted on the Lease by, in relevant part, failing to make timely rental payments and by failing to pay the Nation's Lodging Tax from 1997-2017. (Ex. 17, Letter from Barnes to Brooke at 1-2 (Apr. 26, 2017)). The Nation claimed that Eagle Bear owed the Nation $728,076.68 in Lodging Taxes, penalties, and interest. (*Id*. at p. 2). The Nation asked the BIA to cancel the Lease effective in 2017 for these reasons. (*Id*. at pp. 3-4).

The BIA refused to cancel the Lease and instead, pursuant to the Dispute Resolution section of the Lease, ordered the Nation to arbitrate its claims. (Ex. 19, Letter from Crowe to Brooke & Barnes at 3-4 (Sep. 7, 2017); Ex. 20, Letter from Camrud to Westesen (Apr. 4, 2019)). The Nation appealed that decision to the IBIA. (Doc. 30, Order at 2 (citing Doc. 18-6 at 7)). While that appeal was pending, the Nation brought claims related to an alleged cancellation of the Lease to the Blackfeet Tribal Court and the United States District Court for the District of Montana. (*Id*.). While those actions were pending, the Nation resorted to illegal and improper self-help and used Tribal Police to lock the Campground's gates and prevent Eagle Bear from conducting business. (*See* Doc. 37, Stipulation at ¶¶ E-G). Faced with the prospect of being unable to fulfill thousands of reservations for which it had taken deposits, and over $1 million in debt to creditors and with no ability to generate revenue from its business, Eagle Bear filed its Petition in this matter on May 23, 2022. (Doc. 1)

The Nation filed its Claim in this matter on November 18, 2022. Initially, it alleged that Eagle Bear owed the Nation $7,219,243.89 for a "tax debt" and "interest on past due rent" (Claim 11). Following three subsequent amendments to that Claim and the evidentiary hearing in this matter, the Nation now seeks $5,441,940.18. (Doc. 229-1 at p. 3). Of this total, over $4,275,000 is alleged interest. (Doc. 229-1 at pp. 5-9; Ex. 40, Transcript of Evidentiary Hearing Day 2 at 171:22-172:5).

Each iteration of the Nation's Claim has included four components: (1) the Nation's Lodging Facility Tax, (2) the Nation's Contractor's Excise Tax, (3) the Nation's TERO Fee, and (4) interest on rental payments under the Lease. The Nation had never alleged or attempted to collect the Contractors' Excise Tax, TERO, or rental interest prior to the Nation's Claim. (Ex. 39, Transcript of Evidentiary Hearing Day 1 at 60:4-10, 61:1-12, 71:25-72:7, 73:20-24, 74:15-17, 150:24-153:24, 158:13-19, 203:21-24; Ex. 40, Transcript of Evidentiary Hearing Day 2 at 127:9-16). Likewise, when the Nation first raised the issue of the Lodging Facility Tax in 2017, the Nation's claim was $728,076.68. By the time the Nation filed its amended Claim, that number had inexplicably jumped to an alleged $4,066,817.73 liability. (Doc. 229-1). With respect to the Lease itself, according to the BIA, Eagle Bear had made all necessary payments such that "[n]o outstanding amount of money [was] owed by Eagle Bear" under the Lease as of November 11, 2022. (Ex. 22, BIA's Responses to Eagle Bear's First Discovery Requests at 6).

JURISDICTION AND CHOICE OF LAW

"[T]he Bankruptcy Code unequivocally abrogates the sovereign immunity of any and every government that possesses the power to assert such immunity," including "[f]ederally recognized tribes" like the Nation. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 143 S.Ct. 1689, 1696 (2023). The Nation's Claim is, therefore, subject to the

jurisdiction of this Court and governed by the procedural bankruptcy rules. The Nation's Claim is substantively controlled by the relevant Tribal and Federal laws under which it arises. *See Barnhill v. Johnson*, 503 U.S. 393, 398 (1992); *Travelers Cas. & Sur. Co. of Am. v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 450-51 (2007).

BURDEN OF PROOF

A proof of claim constitutes "prima facie evidence of the validity and amount of the claim." F. R. Bankr. P. 3001(f). However, "[i]f [Eagle Bear] produces sufficient evidence to negate one or more of the sworn facts in the proof of claim, the burden reverts to the [Nation] to prove the validity of the claim by a preponderance of the evidence." *Lundell v. Anchor Const. Specialists, Inc.*, 223 F.3d 1035, 1039 (9th Cir. 2000) (internal quotation marks omitted). "The ultimate burden of persuasion remains at all times upon the [Nation]." *Id*. The Nation agrees with these statements of the law. (Ex. 39, Transcript of Evidentiary Hearing Day 1 at 13:9-19).

DISCUSSION

As the Court has noted, there are four components to the Nation's Claim: (1) Contractors' Excise Tax, (2) TERO Fees, (3) Lodging Tax, and (4) Rental Penalties. (Ex. 39, Transcript of Evidentiary Hearing Day 1 at 8:14-9:10). For each of these components, there are three issues that the Court must decide: (a) whether the Nation has an enforceable right to payment, (b) the proper amount if any of that right to payment, and (c) whether the components are entitled to priority under Bankruptcy Code § 507. (*Id*.) Each of these components and issues is address below in turn using section numbering and lettering that matches the above component numbers and issue letters.

1. <u>The Nation's claim for Contractors' Excise Tax and interest should be denied, reduced, and given no priority.</u>

a. The Nation has no enforceable right to payment under the Contractors' Excise Tax.

i. By its plain language, the Contractors' Excise Tax does not apply to Eagle Bear or to any of its activities.

The Nation's Contractors' Excise Tax is "on contractors engaged in realty improvements contracts and various types of construction activity." (Ex. 32, Contractors' Excise Tax at p. 3). In particular, the Contractors' Excise Tax imposes "an excise tax of three percent (3%) upon the gross receipts of all prime contractors engaged in realty improvement contracts within the Blackfeet Indian Reservation." (*Id*. at p. 9 § 2).

For the purposes of the Contractors' Excise Tax, the term "Contractors" is defined to mean "any prime and sub-contractors engaged in realty improvement contracts," including contractors and subcontractors engaged in "building construction," "other construction" or "environmental clean-up activity." (*Id*. at p. 8, § 1(1)). As Joseph Gervais, the Nation's Tribal Treasurer, explained: "the excise tax applies to contractors" and the tax is on a contractor's gross receipts, which are "not the amount of money paid by somebody" but instead the "amount received by the contractor." (Ex. 40, Transcript of Evidentiary Hearing Day 2 at 134:1-135:4).

The Contractors' Excise Tax does not apply to Eagle Bear because Eagle Bear is neither a "prime" contractor nor a "sub-contractor" that has engaged in any "realty improvement contracts" on the Reservation. (*Id*.; Ex. 39, Transcript of Evidentiary Hearing Day 1 at 58:1-59:7). Eagle Bear has not been contracted by anyone to perform "building construction," "other construction," or "environmental clean-up." (Ex. 32, Contractors' Excise Tax at p. 8 § 1(1); Ex. 39, Transcript of Evidentiary Hearing Day 1 at 58:1-59:7). As Will Brooke testified:

> Q. Does Eagle Bear perform any real property improvements on behalf of another landowner or another lessee?
> A. No.
> Q. Is Eagle Bear a contractor?
> A. No.
> Q. Does Eagle Bear generate any income, whatsoever, from performing construction services for other parties?
> A. I recently got a berry pie for helping a neighbor put in an electric line. . . . We've never charged for -- we don't act as contractors, we're not a contractor. I don't have a contractor's license. We're -- we don't do contract work on the Reservation, except on a rare occasion we will help a neighbor out when somebody asks us to . . . do something. . . . A neighborly accommodation. "Good neighbor policy," we call it.

(Ex. 39, Transcript of Evidentiary Hearing Day 1 at 58:1-59:7).

When Eagle Bear has conducted building activities or improvements on the Campground, it has either (a) self-performed such work, in which case there was no applicable "realty improvement contract[]" entered, or (b) contracted building professionals to perform the work for Eagle Bear, in which case the building professionals and not Eagle Bear were the relevant "prime contractors" subject to the tax. (Ex. 32, Contractors' Excise Tax at pp. 8-9 § 1(1) & 2; Ex. 39, Transcript of Evidentiary Hearing Day 1 at 57:11-25; *see id.* at 54:22-55:11, 58:1-9). The Excise Tax does not, by its terms, apply to Eagle Bear. This conclusion is further confirmed by the fact that the Nation never attempted to apply or enforce the Contractor's Excise Tax on Eagle Bear until it filed its Claim in this action.

That the Excise Tax does not apply to a property owner and does not apply unless there is a relevant contract under which a "prime contractor" has been "engaged," is especially clear considering that the Contractors' Excise Tax specifies that the tax is "due and payable on or before the sixtieth (60th) day after the contract signing or notice to proceed." (Ex. 32, Contractors' Excise Tax at p. 9 § 4). Here, there are no relevant contracts under which Eagle Bear agreed to "engage[] in realty improvement contracts" as a "prime contractor," and Eagle

Bear has no "gross receipts" from any such building activities. (Ex. 32, Contractors' Excise Tax at pp. 8-9 § 1(1) & 2; Ex. 39, Transcript of Evidentiary Hearing Day 1 at 58:1-59:7).

Thus, the Contractors' Excise Tax does not apply to Eagle Bear or to any activity Eagle Bear engaged in. The Nation's claim otherwise is contrary to the plain language of its Contractors' Excise Tax. As the Nation's Tribal Treasurer succinctly summarized upon examination by the Nation's attorney:

> Q. Now, Eagle Bear, itself, is not a contractor, and would typically be not liable for construction and TERO taxes.
> A. Correct

(Ex. 40, Transcript of Evidentiary Hearing Day 2 at 179:22-24).

ii. The Nation has no enforceable right to payment because the tax may very well have been paid by the "prime contractors" Eagle Bear contracted.

As Joseph Gervais, the Nation's Tribal Treasurer, acknowledged during the August 2023 hearing in this matter, the Contractors' Excise Tax may already have been paid for construction projects Eagle Bear undertook with the assistance of contractors. Mr. Gervais testified:

> Q. You would agree that it's possible that contractors working on the Eagle Bear Campground could have paid the construction tax, right?
> A. Potentially.

(Ex. 40, Transcript of Evidentiary Hearing Day 2 at 171:4-7; *see also* Ex. 39, Transcript of Evidentiary Hearing Day 1 at 57:14-19 ("Q. Do you understand if the contractors included the tax into their bids or their costs charged to Eagle Bear? A. [By Will Brooke] . . . I don't know if they paid it, or if they included it in their work for us. I -- I don't know that.")).

In other words, the Nation simply has no idea whether the Contractors' Excise Tax amounts it is claiming for construction projects on Eagle Bear's Campground have already been paid or not. The taxes may very well have been paid by Eagle Bear's contractors—i.e. the parties subject to the tax and that are responsible to pay the tax—but the Nation simply does not

know whether that is the case. The Nation cannot say whether there is truly some outstanding Contractors' Excise Tax liability, or whether the Nation is merely seeking to be paid twice for the same tax liability.

Consequently, the Nation cannot carry its burden of proof with respect to its Contractors' Excise Tax Claims. Its own testimony admitting that it does not know whether the tax has already been paid reverses the presumption of validity to which the Claim would otherwise be entitled, and the Nation has failed to present any evidence that the Claim represents amounts that were actually unpaid and that are due and owing. Again, it may very well be that the contractors Eagle Bear hired already paid the amounts the Nation is claiming, and the Nation cannot show otherwise. (Ex. 40, Transcript of Evidentiary Hearing Day 2 at 171:4-7; *see also* Ex. 39, Transcript of Evidentiary Hearing Day 1 at 57:14-19). Consequently, the Nation cannot carry its burden of proof and its Claim should be denied.

This conclusion is especially true given the significant passage of time between the events allegedly giving rise to the alleged Excise Tax liability. All of the alleged activities on which the Nation bases its Contractors' Excise Tax claims occurred between 15 and 26 years ago. (Doc. 229-1 at p. 9 (calculating Contractors' Excise Tax for the years 1997-2008). Since that time, evidence of whether and to what extent Contractors' Excise Taxes were paid has grown stale, and Eagle Bear lacks reasonable access to the evidence necessary to prove whether the tax may have been paid. Indeed, likely for this reason, the Nation's Comprehensive Tax Code only required Eagle Bear and its contractors to retain tax records for four years. (Ex. 34, Comprehensive Tax Code at p. 17 § 3.1).

The Nation is not entitled to baldly claim that it is entitled to a tax and thereby shift the burden on Eagle Bear. The Nation cannot turn its poor recordkeeping and timeliness problems

into Eagle Bear's problem. The Nation's claim for Contractors' Excise Tax must be denied because the Nation has failed to carry its burden of proof. *Lundell*, 223 F.3d at 1039.

iii. The Nation has no enforceable right to impose the Contractors' Excise Tax on activities conducted or expenses incurred before 2002.

Pursuant to the Lease between Eagle Bear and the Nation, the Nation agreed not to collect the Contractors' Excise Tax until 2002. Specifically, the Nation agreed that it would "waive all construction taxes for the first five years of the lease in order to encourage [Eagle Bear] to make improvements and investments in the Campground." (Ex. 5, Lease at pp. 28-29 § 27). The Nation cannot, therefore, claim any amounts related to a Contractors' Excise Tax during those years. (Ex. 40, Transcript of Evidentiary Hearing Day 2 at 57:10-25). The Nation appears to concede this point, considering that its combined calculation of TERO fees and Contractors' Excise Tax does not seem to include an alleged Contractors' Excise Tax amount for the years 1997-2001. (*See* Doc. 229-1 at p. 9).

Thus, even if Eagle Bear were a contractor with gross receipts subject to the Contractors' Excise Tax, Eagle Bear would have no tax liability on its gross receipts during 1997-2001.

b. The Nation's Contractors' Excise Tax claims are significantly overstated.

i. Even if Eagle Bear were subject to the Contractors' Excise Tax, it would have no liability to the Nation. The statutes defining and limiting the Contractors' Excise Tax set the correct amount of the Nation's claim at $0.00.

Calculation of any Contractors' Excise Tax liability involves three steps: (1) identifying the principal amount of any tax liability; (2) identifying the interest, if any, that has accrued on that principal liability; and (3) identifying the years for which such principal tax liability and interest are recoverable in this matter.

The first step, namely calculating the principal amount of any Contractors' Excise Tax liability, is simple. The tax is a flat "three percent (3%)" of "the gross receipts of prime contractors engaged in realty improvement contracts." (Ex. 32, Contractors' Excise Tax at p. 9 § 4). Thus, once all applicable "gross receipts" are identified, the principal Contractors Excise Tax liability can be calculated.

Here, Eagle Bear has no gross receipts to which the Contractors' Excise Tax applies. As discussed above, Eagle Bear is not a "prime contractor," has not contracted to perform "realty improvements," and has no "gross receipts" related to its work constructing "realty improvements." (Ex. 39, Transcript of Evidentiary Hearing Day 1 at 58:1-59:7). Thus, Eagle Bear's gross receipts are zero and Eagle Bear's Contractors' Excise Tax liability is also zero.

Assuming for the sake of discussion, however, that Eagle Bear had some gross receipts subject to the Contractors' Excise Tax, the second step in calculating a Contractors' Excise Tax liability would be to identify any interest that has accrued on the principal amount of the tax. Because the Contractors' Excise Tax does not identify any specific interest terms, the general interest terms identified in Section 4.1(a) of the Blackfeet Comprehensive Tax Code apply.

Section 4.1(a) states that, in the case of any failure to remit a tax "within the time prescribed," interest "shall be computed from the date the tax was due to the date of payment" "at the rate of one percent (1%) per month or fraction thereof." (Ex. 34, Comprehensive Tax Code at p. 19 § 4.1(a)). In this case, if there were any gross receipts and Contractors' Excise Tax to apply interest to, interest would be calculated from the due date identified in the Contractors' Excise Tax: "on or before the sixtieth (60th) day after the contract signing or notice to proceed." (Ex. 32, Contractors' Excise Tax at p. 9 § 4). Because as a matter of bankruptcy law, unmatured, post-petition interest is not recoverable, interest on the Contractors' Excise Tax would stop

running on May 23, 2022, the date of Eagle Bear's bankruptcy petition. (Doc. 1; 11 U.S.C. § 502(b)(2); *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 163-65 (1946)). Using those dates, interest could then be calculated by multiplying the principal Contractors' Excise Tax liability by the difference between the petition date and tax due date in months and by the 1% interest rate. (Ex. 34, Comprehensive Tax Code at p. 19 § 4.1(a)). Because Eagle Bear's principal tax liability in this matter is zero, interest is also zero.

Assuming for the sake of argument, however, that liability and interest were not zero, then the final step in calculating interest would be to identify the years for which such principal tax liability and interest are recoverable in this matter. It is axiomatic that, whether as a matter of laches or statutes of limitation, a claimant cannot pursue a stale claim. It would be unfair to both the alleged debtor and the debtor's other creditors if a creditor like the Nation could remain silent on a claim for years—or, in this case, decades—allow interest to accrue at a significant rate, and then only finally raise the claim once interest far exceeds the principal debt and the debtor's ability to defend itself has grown stale. *See, e.g.*, *Artis v. Dist. of Columbia*, 138 S.Ct. 594, 608 (2018) ("Statutes of limitations are fundamental to a well-ordered judicial system" and are "vital to the welfare of society."); *Gabelli v. S.E.C.*, 568 U.S. 442, 448-49 (2013) (Statutes of limitation "provide security and stability to human affairs" and "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.")

Here, statutes of limitation prevent the Nation from reaching back indefinitely to resurrect stale claims. Section 5.1 of the Nation's Comprehensive Tax Code restricts the Nation's power to "collect" any "delinquen[cy] in the payment of any amount" to a period of "five (5) years after any person is delinquent." (Ex. 34, Comprehensive Tax Code at p. 20 § 5.1).

The Nation's general statute of limitations further limits the time for bringing any claim for less than $5,000. Specifically, the Nation has declared that:

> The period prescribed for commencement of civil actions, other than for the recovery of real property, shall be within two (2) years from the date when the obligation becomes due and owing . . . . All actions . . . brought on behalf of the Tribe to recover a debt owing to the Tribe in the amount of $5,000.00 or over shall have no prescribed period of limitations.

(Ex. HHHH, Ordinance No. 51 at p. 1).

Thus, the Nation is barred from bringing any Contractors' Excise Tax claim for a principal amount under $5,000 that accrued prior to November 18, 2020, which was two years before the Nation filed its Claim. The Nation is also barred from bringing any Contractors' Excise Tax claim for an amount over $5,000 that predates November 18, 2017, which was five years before the Nation filed its Claim. (Claim 11; Ex. 34, Comprehensive Tax Code at p. 20 § 5.1; Ex. HHHH, Ordinance No. 51 at p. 1). This means that the entirety of the Nation's Contractors' Excise Tax Claim is barred because the Nation only seeks payment for Contractors' Excise Tax liabilities allegedly arising between 1997 and 2008. (Doc. 229-1 at p. 9). All of those claims were barred no more than five years after they arose, by 2013 at the latest, and they had been barred for nearly a decade by the time Eagle Bear filed its bankruptcy petition and the Nation filed its proof of claim.

This result is fair and accords with the equitable doctrine of laches that would apply even in the absence of any statute of limitations. *See, e.g.*, *Holberg v. Armbrecht*, 327 U.S. 392, 396 (1946); *see also City of Sherrill, N.Y., v. Oneida Indian Nation of NY*, 544 U.S. 197, 217 (2005); *see also* Discussion § 2.b.i., *infra* p. 34. This is not a case where the Nation was ignorant of its alleged Contractors' Excise Tax claim until shortly before it filed its proof of claim. Instead, the Nation was well-aware of the yearly construction activity taking place on the Campground and

much of the activity took place with the Nation's approval and input. Mark Magee, the Nation's Land Department Director, visited the Campground every year to review and discuss the projects Eagle Bear was undertaking. As Mr. Magee testified:

> Q. Okay. I was going to ask if you have ever been to the Eagle Bear campground. It sounds like you described one trip early on and then did you, have you visited since?
> A. Oh yeah.
> Q. How often do you go out or did you when you were head of the land department?
> A. I tried to make it out there once a year. There's probably been years that I was out there more than once. There might have been years that I didn't make it at all, but --
> Q. So you would try to visit annually? . . .
> A. Yes.
> Q. And you would go sort of before and after major projects were being built?
> A. Yes.
> Q. Do you recall discussing sort of plans for development of the campground with Will Brooke?
> A. Yes.
> Q. And did he share those plans with you?
> A. Yes.

(Ex. 25, Mark Magee Dep. 15:5-16:2).

Likewise, with respect to the pool project that Eagle Bear undertook beginning in 2008, the Nation specifically reviewed Eagle Bear's proposal and authorized the $500,000 mortgage Eagle Bear took out from Independence Bank to finance the project. (Ex. 6, Excerpt of Blackfeet Land Committee Minutes (Apr. 3, 2007); *see* Claim 4 Part 2 at p. 3). The pool construction project was extensively publicized in the local newspaper. (Ex. 7, Glacier Reporter: Swimming, camping and outdoor adventures await at St. Mary KOA (June 19, 2008); Ex. 40, Transcript of Evidentiary Hearing Day 2 at 167:7-18).

The Nation was well-aware that Eagle Bear was improving the Campground and well-aware of the facts that form the basis for its Claim. Nevertheless, the Nation never sent any assessment, any notice, any communication, or otherwise attempted to collect the Contractors'

Excise Tax from Eagle Bear. (Ex. 39, Transcript of Evidentiary Hearing Day 1 at 60:4-10, 61:1-12; Ex. 40, Transcript of Evidentiary Hearing Day 2 at 127:14-16). Instead, the Nation let its alleged interest grow to over 20 times the alleged principal amount of its Contractors' Excise Tax claim (*see* Doc. 229-1 at p. 9; Ex. 40, Transcript of Evidentiary Hearing Day 2 at 171:22-172:6). The Nation let the relevant evidence and memories grow stale, before raising its Contractors' Excise Tax for the first time in its November 18, 2022 claim. (Claim 11; Ex. 39, Transcript of Evidentiary Hearing Day 1 at 60:4-10, 61:1-12; Ex. 40, Transcript of Evidentiary Hearing Day 2 at 127:14-16). By that time, the claims were barred by the applicable statutes of limitation and/or laches.

ii. The Nation's claim is significantly overstated because the Nation's calculations are not based on Eagle Bear's relevant "gross receipts."

The alleged gross receipts from which the Nation calculates Eagle Bear's alleged Contractors' Excise Tax liability are identified in the first row below the years on page 9 of the Nation's Claim. (Doc. 229-1 at 9). Those alleged gross receipts are identified in the bolded row directly below the dates in which the gross receipts were allegedly incurred. These numbers are incorrect and do not reflect any "gross receipts" of Eagle Bear subject to the Contractors' Excise Tax.

As discussed above, Eagle Bear does not have any gross receipts resulting from its construction of a realty improvement pursuant to a real estate improvement contract. It, therefore, has no gross receipts subject to the tax. Nevertheless, the Nation claims that Eagle Bear had $916,023 of gross receipts subject to the Contractors' Excise Tax—$148,917 in 2002, $144,974 in 2006, $418,830 in 2007, and $203,302 in 2008. (Doc. 229-1 at 9).

The Nation has explained that these numbers come from Eagle Bear's Exhibit 38, one of the several spreadsheets calculating different hypothetical tax and interest amounts based on

different assumptions about gross receipt amounts, tax rates, and interest rates. (Doc. 229-1 at 9 at ¶ 1; Ex. 40, Transcript of Evidentiary Hearing Day 2 at 58:12-59:25, 88:6-90:16). In the particular hypothetical scenario identified in Exhibit 38, the "Alleged Taxable Amount" numbers on which the Nation's gross receipt numbers and calculations are based included all of the amounts in the depreciation schedule entered in this matter as Exhibit 2. (Doc. 229-1 at pp. 10-11 n. 4). That depreciation schedule includes the entire cost-basis of all of Eagle Bear's assets, regardless of whether they were created pursuant to a construction contract subject to the Contractors' Excise Tax or, on the other hand, they were purchased, constructed off-Reservation, or otherwise not subject to the Contractors' Excise Tax. (Ex. 39, Transcript of Evidentiary Hearing Day 1 at 32:16-21, 33:4-34:3). Thus, the Nation has calculated its Contractors' Excise Tax claim based on all of Eagle Bear's capital expenditures, including expenditures that are plainly not subject to the Contractors' Excise Tax. (*Id*.) The Nation makes no provision for, yet still claims a tax on, work that Eagle Bear self-performed, capital assets that Eagle Bear purchased from a manufacturer outside of the Blackfeet Indian Reservation, and work that contractors performed for Eagle Bear. (*Id*.; Doc. 229-1 at 9). The Nation has, therefore, claimed a Contractors' Excise Tax on expenditures to which the Contractors' Excise Tax plainly does not apply.

Critically, the Nation must prove that Eagle Bear has accepted "gross receipts" to which the Contractors' Excise Tax applies and must prove the extent of such gross receipts in order to prove its claim. *Lundell*, 223 F.3d at 1039; Ex. 32, Contractors' Excise Tax at p. 9 § 2. The Nation has completely failed to carry this burden. There is no evidence in the record showing that Eagle Bear has any gross receipts to which the Contractors' Excise Tax applies, let alone

evidence supporting the $916,023 figure that the Nation bases its calculations on. (Doc. 229-1 at p. 9).

The Nation's Claim is significantly overstated because it applies the Contractors' Excise Tax to amounts that are not subject to the Tax. The Nation's Claim should be denied because the Nation has presented no evidence of expenditures subject to the Tax on which a calculation of the Contractors' Excise Tax can be based.

As the Nation's Tribal Treasurer, who performed the Nation's calculations for its Claim, testified:

> Q. You don't know the gross receipts of any prime contractor engaged in any realty improvement contract on the Eagle Bear Campground in any given year, do you.
> A. No.
> Q. Your claim just assumed an amount of money, and then assumed that the amount was all receipts for realty improvement contracts and then applied a percentage to it, right?
> A. Correct.
> Q. But you don't have any actual receipts reflecting work done on the Eagle Bear Campground by a general contractor to improve the realty.
> A. Originally, we didn't have any information, so we made assumptions.
> Q. And if the assumptions are wrong, the conclusion's wrong.
> A. Could be.

(Ex. 40, Transcript of Evidentiary Hearing Day 2 at 139:13-24).

iii. The Nation's claim is significantly overstated because the Nation applies interest over an incorrect period.

The precise period over which interest is calculated in the Nation's Claim is unclear. The Nation claims total amounts of principal and interest due in any particular year, but it is not clear whether that amount is the amount due at the beginning of the identified year, at the end of the identified year, or some interim date. (Doc. 229-1 at 9). In any event, the Nation's calculations ignore the requirements of its own code that interest be calculated "from the date the tax was due to the date of payment." (Ex. 34, Comprehensive Tax Code at p. 19 § 4.1(a)).

Likewise, the Nation's interest calculations wholly ignore the due date of the Contractors' Excise Tax. Again, any tax liability would have been due "on or before the sixtieth (60th) day after the contract signing or notice to proceed." (Ex. 32, Contractors' Excise Tax at p. 9 § 4). The Nation's calculations ignore this 60-day period, likely because it has been unable to carry its burden of producing or identifying any contracts to which the Contractors' Excise Tax could be applied. (*See* Doc. 229-1 at 9; Ex. 40, Transcript of Evidentiary Hearing Day 2 at 139:13-24). Without any contracts and without knowing the "day after the contract signing or notice to proceed," interest on the Nation's Contractors' Excise Tax claim cannot be accurately calculated. (Ex. 32, Contractors' Excise Tax at p. 9 § 4). The Nation ignores this fact by apparently assuming that all expenditures in a particular year relate to a contract signed on the first or the last day of each calendar year, but that assumption finds no support in the record and results in miscalculation of the Nation's Claim. (Doc. 229-1 at 9).

Finally, the Nation was required to end its interest calculation on May 23, 2022, the day Eagle Bear filed its petition in this matter. (Doc. 1; 11 U.S.C. § 502(b)(2); *Vanston Bondholders Protective Committee*, 329 U.S. at 163-65). The Nation did not do so. It appears to have calculated interest through the end of 2022. (Doc. 229-1 at 9). Again, the Nation's Claim is incorrect and improperly calculated.

iv. The Nation's claim is significantly overstated because the Nation uses the wrong interest rate and improperly compounds interest.

The Nation is attempting to increase its Contractors' Excise Tax claim over twenty-fold. (*See* Doc. 229-1 at 9). It does so by applying an incorrect interest rate and then improperly compounding that interest over the decades it sat on its claim.

To begin with, the interest rate the Nation uses in its calculation is incorrect. It identified a 12.68% annual interest rate for the Contractors' Excise Tax in its calculation, which it

calculated by compounding a 1% per month interest rate into an annualized rate. (Doc. 229-1 at 9; *cf.* Ex. 40, Transcript of Evidentiary Hearing Day 2 at 104:19-24). The Nation did not actually perform its calculation using this rate, however. Instead, in its unified calculation of TERO Fees and Contractors' Excise Tax, it appears that the Nation applied a 15.34% interest rate to the total alleged TERO Fees and Contractors' Excise Tax liabilities. (*See* Doc. 229-1 at 9 (Compare successive entries in each column for the years 2002-2008. For example, looking at the 2002 column and dividing 9,905.45 by 8,588.04 yields 0.1534)).

The Nation apparently arrived at 15.34% because it is the simple average of the 12.68% rate it was using for the Contractors' Excise Tax and the 18% rate it was using for the alleged TERO Fee. But, applying that simple average rate to a combined TERO Fee and Contractors' Excise Tax results in overestimation of the interest on the Contractors' Excise Tax because the alleged TERO Fee was not equal to the alleged Contractors' Excise Tax. (Doc. 229-1 at p. 9 (identifying the TERO Fee as 2% and the Contractors' Excise Tax as 3% of the same taxable sum)). Instead, 60% of the principal to which the amalgamated 15.34% rate was applied was Contractors' Excise Tax. In other words, the Nation attempted to take a mathematical shortcut by combining its TERO and Contractors' Excise Tax calculations, but the shortcut resulted in errors, miscalculation of interest, and overstatement of the Nation's claim.

The impact of this error was exacerbated by the Nation's incorrect decision to compound interest. The Contractors' Excise Tax and the Blackfeet Nation's Comprehensive Tax Code only allows the Nation to collect simple interest. By its plain language, the Codes allow the Nation only to "add to the amount of such tax . . . interest at the rate of one percent (1%) per month or fraction thereof computed on the total amount." (Ex. 34, Comprehensive Tax Code at p. 19 § 4.1(a)). This is a simple interest rate. It is 1% of the "amount of such tax"—i.e. the principal—

for every month. It is not a compound interest rate, which would have been 1% of both the amount of the tax and any accrued interest every month. *See Cherokee Nation v. U.S.*, 270 U.S. 476, 481, 490 (1926) (noting that compound interest is "interest on interest," interpreting "interest at the rate of five per centum per annum" as a simple interest rate, and denying a claim for compound interest); Black's Law Dictionary 935-36 (10th ed. 2014) (contrasting "compound interest," which it defines as "[i]nterest paid on both the interest and previously accumulated interest," and "simple interest," which it defines as interest that "accrues only on the principal balance regardless of how often interest is paid").

"The general rule . . . is that, in the absence of a contract therefor or some statute, compound interest in not allowed to be computed upon a debt." *Cherokee Nation*, 270 U.S. at 490. Here, there is no such statute or contract allowing for compound interest and, instead, the applicable statute specifies a simple interest rate. Because the Nation's calculation of its claim uses a compound interest rate—and thereby increases the alleged principal amount of its Contractors' Excise Tax over twenty-fold—the Nation's Claim is incorrect and should be denied.

c. The Nation's Contractors' Excise Tax claims are not entitled to priority.

11 U.S.C. § 507(a)(8) gives priority treatment to certain taxes. The Nation claims that its entire Claim, including the portion of its Claim for alleged Contractors' Excise Taxes and interest, is entitled to priority under Section 507(a)(8). However, the Contractors' Excise Tax is a regulatory fee, not a tax, and is not entitled to any priority under Section 507(a)(8).

Claims for priority status must be narrowly construed because preferences derogate from the principle of equality of distribution among unsecured creditors. *Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 667 (2006). A governmental taxing authority is given priority for a limited period after the obligations first arise. *Collier*, ¶ 507.11[b]. If the authority

does not act quickly in that time to obtain payment or secured status, the interest of the authority must be balanced against the interests of other creditors and of the debtor. *Id.* Because priorities grant special rights to the holders of priority claims, they are to be narrowly construed. *Id.* ¶ 507.1. When enacting the Bankruptcy Code, Congress recognized the tensions between the competing interests of general creditors, the debtor, and tax collectors raising revenue. *In re* Taylor, 81 F. 3d. 20, 24 (3d Cir. 1996) (citing S. Rep. No. 95-989, 95th Cong., 2d Sess. 14 (1978), *reprinted in* U.S. Code Cong. & Admin. News 5787, 5800). Accordingly, the party seeking to establish a priority claim bears the burden of proving that the party's claim qualifies for priority status. *In re Terra Distrib., Inc.*, 148 B.R. 598 (Bankr. D. Idaho 1992) (citing *Bonner v. Allman (In re Heritage Village Church & Missionary Fellowship)*, 137 B.R. 888, 892 (Bankr. D.S.C. 1991)).

The priority granted by Section 507(a)(8) applies only to taxes and does not extend to all penalties, fees, general debts, or other obligations owed to governmental entities. *Collier on Bankruptcy*, ¶ 507.11. Although the Bankruptcy Code does not define "tax," the Supreme Court has held that courts must use a "functional analysis" to determine whether an obligation to a government constitutes a tax. *United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 224 (1996). As such, when determining what constitutes a "tax," denominations imposed by state or tribal law are not controlling. *Industrial Comm'n v. Camilli*, 94 F.3d 1330, 1331 (9th Cir. 1996).

To determine whether a claim qualifies as an excise tax for bankruptcy purposes, the Ninth Circuit developed a four-part test. A payment is an excise tax if it is: (1) an involuntary pecuniary burden, regardless of name, laid upon individual or property; (2) imposed by or under the authority of the legislature; (3) for public purposes, including the purposes of defraying

expenses of government or undertakings authorized by it; and (4) under the police or taxing power of the state. *In re Lorber Industries of Cal. Inc.*, 675 F.2d 1062, 1066 (9th Cir. 1982). In 2004, the Ninth Circuit added a fifth element to the *Lorber* test, holding that if a private creditor similarly situated to the government can be hypothesized under the relevant statute, the claim cannot be considered an excise tax. *In re George*, 361 F.3d 1157, 1162 (9th Cir. 2004).

In *Lorber*, the Los Angeles County Sanitation District argued that sewer use fees assessed against a debtor prior to their bankruptcy petition were a "tax" entitled to priority. *Lorber*, 675 F. 2d at 1065. The Ninth Circuit Court of Appeals held that the charges were better classified as non-tax fees. *Id.* at 1067. The Court instructed that a determination of the compulsoriness of a charge must focus "on the inherent characteristics of the charges" rather than on the motivations of the individual. *Id.* at 1066. The debtor's decision to discharge high volumes of water into the system triggered the surcharge's imposition. The assessment flowed from the debtor's voluntary acts and the services it received pursuant to its contractual agreement. The assessment was, therefore, classified as a fee rather than a tax. *Id*. at 1067.

The same is true of the Contractors' Excise Tax in this case. The Contractors' Excise Tax depends on Eagle Bear's decision to engage in construction on the reservation. (Ex. 32, Contractors' Excise Tax at pp. 8-9 §§ 1(1) & 2; Ex. 40, Transcript of Evidentiary Hearing Day 2 at 133:21-135:4, 138:22-139:8). Any obligation Eagle Bear as the contracting property owner might have—an obligation that is contrary to the terms of the Contractors' Excise Tax—would result from Eagle Bear's voluntary decision to contract for construction work. The Contractors' Excise Tax is not a tax at all, but instead a fee that is not entitled to any priority.

Moreover, even if the Contractor's Excise Tax were truly a tax, the Nation's claim would be limited in scope to events or circumstances occurring within a short period prior to the

bankruptcy petition in order to be eligible for priority under Section 507(a)(8). Although Congress wanted to ensure that taxing authorities had a "fair opportunity to collect taxes due," it imposed a time limit for priority because "the taxing authority should not be given priority for taxes that are unassessed or uncollected through a lack of due diligence." *In re Taylor*, 81 F. 3d at 24 (citing H. Rep No. 595, 95th Cong., 1st Sess. 191 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6151.); *Waugh v. IRS (In re Waugh)*, 109 F.3d 489, 492–94 (8th Cir. 1997). Consequently, each category of 507(a)(8) priority taxes, except trust fund taxes, are temporary and measured by specified lookback periods of 240 day to three years. 11 U.S.C. § 507(a)(8)(A) through (F). Taxes older than the lookback periods are non-priority claims that do not necessarily have to be paid in full in a Chapter 11 case and do not automatically give rise to nondischargeable debts. *Carpenter v. Montana Dep't of Labor & Indus., Unemployment Ins. Div., Contributions Bureau (In re Carpenter)*, 540 B.R. 691, 694 (B.A.P. 9th Cir. 2015).

Here, the Nation is seeking Contractors' Excise Taxes that allegedly accrued before 2008. The alleged taxes arose well-before even the most liberal, three-year lookback period allowed under Section 507(a)(8). No part of the Nation's Contractors' Excise Tax is, therefore, entitled to priority treatment.

2. <u>The Nation's claim for TERO Fees and interest should be denied, reduced, and given no priority.</u>

a. The Nation has no enforceable right to payment under TERO.

TERO is the Blackfeet Tribal Employment Rights Ordinance and Safety Enforcement Act. (Ex. FFF). The Act established a TERO Office and a TERO Director and charged them with "enforce[ing] Indian preference with all enterprises, businesses, and projects operated or undertaken within or near the Blackfeet Indian Reservation." (*Id*. at p. 16 § 2-101). In order to

fund the TERO Office, the Act imposes a "Construction Fee" that is referred to herein as the TERO Fee. (*Id*. at p. 21 § 2-201).

The TERO Fee is imposed on "[e]very Employer or Entity with a construction contract (which includes architect and engineering contracts) in the amount of $100,000 or more." (Ex. FFF, TERO at p. 21 § 2-201.A.) The TERO Fee is imposed a rate of 2% "of the total amount of all phases of the contract." (Ex. 27, Nation Resolution No. 126-82 at p. 4 § 7.a.; Ex. 28, Nation Resolution No. 191-95; Ex. FFF, TERO at p. 21 § 2-201.A.) Although the rate of the TERO Fee was increased to 4% in 2010, the rate was 2% from 1995 through 2010, and the Nation agreed to freeze the rate applicable to Eagle Bear's activities on the Campground at 2%. (Ex. 28, Nation Resolution No. 191-95; Ex. FFF, TERO at p. 21 § 2-201.A.; Ex. 5, Lease at p. 28 § 37(a)).

Like the Contractors' Excise Tax, the TERO Fee is a "rate imposed upon construction contractors doing business on the reservation" and, like the Contractors' Excise Tax, the TERO Fee does not apply to "work done off the reservation." (Ex. 40, Transcript of Evidentiary Hearing Day 2 at 129:20-22, 133:15-20). The primary difference between the Contractors' Excise Tax and the TERO Fee is that, unlike the Contractors' Excise Tax which has no minimum dollar threshold, the TERO Fee "only applies to construction contractors with a contract of $100,000 or more." (*Id*. at 133:2-4; Ex. FFF, TERO at p. 21 § 2-201.A.) As the Nation's Tribal Treasurer explained, "if a construction contract has a value of less than $100,000, there's no TERO fee." (Ex. 40, Transcript of Evidentiary Hearing Day 2 at 133:12-14).

Thus, for the very same reasons that the Contractors' Excise Tax does not apply to Eagle Bear or its activities, the TERO Fee also does not apply. Eagle Bear is not a construction contractor and has never been paid to perform any building or construction activity under a construction contract, let alone a contract worth "$100,000 or more." (Ex. FFF, TERO at p. 21 §

2-201.A.; Ex. 39, Transcript of Evidentiary Hearing Day 1 at 58:1-59:7 ("Q. Does Eagle Bear perform any real property improvements on behalf of another landowner or lessee? A. No. Q. Is Eagle Bear a contractor? A. No.")).

As with the Contractors' Excise Tax, the Nation has offered no evidence to the contrary. The Nation's TERO Fee claim is based on the same assumptions as its Contractors' Excise Tax, rather than on evidence of any relevant contracts or construction work:

> Q. I'm focusing on the TERO and excise fee, those are not based on actual records of construction work performed by contractors.
> A. No. They're based on a couple of emails from Mr. Brooke, and, also, a letter, I believe. Stating that he had put in 2.8 million, up to 2008, maybe.

(Ex. 40, Transcript of Evidentiary Hearing Day 2 at 154:10-15; *see also id*. at 139:13-24).

The Nation cannot prove that Eagle Bear ever performed a construction contract exceeding $100,000 in value. The Nation cannot prove that the TERO Fee applies to Eagle Bear and cannot carry it burden to prove its Claim. The Nation's Claim for TERO Fees and interest should be denied.

b. The Nation's TERO Fee claims are significantly overstated.

i. Even if Eagle Bear were subject to the TERO Fee, it would have no liability to the Nation. The statutes defining and limiting the TERO Fee set the correct amount of the Nation's claim at $0.00.

Like the Contractors' Excise Tax, calculation of any TERO Fee liability involves (1) identifying the principal amount of any tax liability; (2) identifying interest, if any, that has accrued on that principal liability; and (3) identifying the years for which such principal tax liability and interest are recoverable in this matter.

The first step, calculating the principal tax obligation, is performed by applying the 2% fee to the total amount of all relevant "construction contract[s] . . . in the amount of $100,000 or more." (Ex. FFF, TERO at p. 21 § 2-201.A.; Ex. 5, Lease at p. 28 § 73 (setting the TERO rate at

2%)). Here, Eagle Bear was not the contractor on any construction contracts and, therefore, has no construction contracts to which the TERO Fee can apply. (Ex. 39, Transcript of Evidentiary Hearing Day 1 at 58:1-59:7). Likewise, the Nation has not carried its burden of proving that Eagle Bear has entered any construction contracts over $100,000. Thus, there are no construction contracts to which the TERO Fee can be applied and Eagle Bear's TERO Fee liability is zero.

Assuming for the sake of discussion, however, that Eagle Bear had some TERO Fee liability, the second step in calculating the Nation's Claim would be to identify any interest that has accrued on the principal amount of the tax. TERO does not, however, impose interest or identify an interest rate, except in one particular instance. If the TERO Director "authorize[s] a construction contractor to pay [the TERO Fee] in installments over the course of the contract," then "an interest rate of 18% per annum, compounded daily on all amounts owed" is imposed. (Ex. FFF, TERO at pp. 21, 23, §§ 2-201.A. & 2-204; Ex. 40, Transcript of Evidentiary Hearing Day 2 at 131:22-132:7).[2] TERO does not apply any interest under any other circumstances and, because TERO is not a tax but a fee, it is not subject to the general 1% per month simple interest rate stated in the Nation's Comprehensive Tax Code. (Ex. 34, Comprehensive Tax Code at p. 19 § 4.1(a)). Thus, there is no interest rate applicable to the TERO Fee at all.

Finally, the calculation of the TERO Fee must be limited in time, for the same reasons as discussed above with respect to the Contractors' Excise Tax—fairness to the debtor and other creditors and the necessity that claims be prosecuted before evidence becomes stale. *Artis*, 138 S.Ct. at 608; *Gabelli*, 568 U.S. at 448-49. Like the Contractors' Excise Tax, the TERO Fee is

[2] TERO's specification of an interest rate "compounded daily" in this particular circumstance is further evidence that the interest rate stated in the Nation's Comprehensive Tax Code, which applies to the Contractors' Excise Tax and the Lodging Tax, is a simple interest rate.

subject to the Nation's general statute of limitations, which prevents the Nation from pursuing any claim after "two (2) years from the date when the obligation becomes due and owing" unless the amount of the claim is $5,000.00 or over." (Ex. HHHH, Ordinance No. 51 at p. 1). However, unlike the Contractors' Excise Tax, the TERO Fee is not subject to the five-year limitations period for collection of taxes, because the TERO Fee is not a tax. (*See* Ex. 34, Comprehensive Tax Code at p. 20 § 5.1). That does not mean that the Nation may make claims for allegedly past-due TERO Fees of more than $5,000 at any time it chooses. Such claims in excess of $5,000, which are not expressly subject to any statute of limitations, are still limited by the doctrine of laches.

Laches is an equitable doctrine and, as a court of equity, this Bankruptcy Court should invoke equitable principles and doctrines so long as doing so is not "inconsistent" with the Bankruptcy Code. *Graves v. Myrvang (In re Myrvang)*, 232 F.3d 1116, 1124 (9th Cir. 2000) (citing *SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 455 (1940)). Where a creditor has "inexcusably slept on his rights so as to make a decree against the defendant unfair," the creditor's claim should be barred. *Holberg*, 327 U.S. at 396; *see also City of Sherrill, N.Y.,* 544 U.S. at 217.

Here, the Nation was silent for decades about its alleged TERO Fee claim. It knew that significant improvements were being made to the Campground and it actively reviewed and approved those improvements. (Ex. 25, Mark Magee Dep. 15:5-16:2; Ex. 6, Excerpt of Blackfeet Land Committee Minutes (Apr. 3, 2007); Ex. 7, Glacier Reporter: Swimming, camping and outdoor adventures await at St. Mary KOA (June 19, 2008); Ex. 40, Transcript of Evidentiary Hearing Day 2 at 167:7-18). It knew that Eagle Bear and its creditors, like Independence Bank, relied on the plain terms of TERO, which does not apply to Eagle Bear, and

were making business and lending decisions under the reasonable belief that no TERO Fee was due or owing. (*See* Claim 4; Ex. 40, Transcript of Evidentiary Hearing Day 2 at 164:10-166:19; Ex. 6). Nevertheless, the Nation remained silent for over twenty years and never asserted any claim that Eagle Bear owed any TERO Fee. The first time that the Nation asserted a claim to TERO Fees from Eagle Bear was when it filed its proof of claim in this matter. (Ex. 39, Transcript of Evidentiary Hearing Day 1 at 60:4-10, 61:1-12; Ex. 40, Transcript of Evidentiary Hearing Day 2 at 127:9-16).

The Nation is now attempting to capitalize on its silence. Without evidence of Eagle Bear's particular construction contracts or the value of any particular improvement, which evidence has faded and been lost in the last twenty years, the Nation is attempting to apply the TERO Fee to all of Eagle Bear's capital expenditures, regardless of whether the expenditures meet the criteria for the TERO Fee or the $100,000 contract threshold. (Doc. 229-1 at 9; Ex. 40, Transcript of Evidentiary Hearing Day 2 at 139:13-24). Not only that, but it is attempting to apply an exorbitant 18% interest rate compounded yearly for decades to increase its claim over twenty-fold. (Doc. 229-1 at 9).

Eagle Bear and its creditors both relied on the plain terms of TERO, which does not impose a TERO Fee on Eagle Bear or its activities, and on the Nation's silence regarding any claim to payment of a TERO Fee. The Nation is now barred from asserting, years later, that a TERO Fee was in fact owed and that the TERO Fee has now increased over twenty-fold as a result of an exorbitant interest rate. Equity dictates that the Court deny the Nation's TERO Fee claim out of fairness to Eagle Bear and its other creditors. *Graves*, 232 F.3d at 1124; *Holberg*, 327 U.S. at 396; *see also City of Sherrill, N.Y.*, 544 U.S. at 217.

ii. The Nation's claim is significantly overstated because the Nation's calculations are not based on Eagle Bear's actual contracts exceeding $100,000.00.

The Nation uses the very same numbers and very same assumptions to calculate its TERO Fee Claim that it used to calculate its Contractors' Excise Tax claim. (Doc. 229-1). Therefore, the Nation's TERO Fee Claim is incorrect and overstated for the very same reasons that its Contractors' Excise Tax claim is incorrect and overstated. (*See* Discussion § 1.b.ii *supra* p. 22). In short, the Nation has failed to carry its burden to prove the value of Eagle Bear's relevant realty improvement contracts and incorrectly bases its calculation on all of Eagle Bear's capital expenditures, including on amounts that plainly are not subject to the TERO Fee.

The problems with and lack of evidence supporting the Nation's Contractors' Excise Tax claim are only compounded with respect to the TERO Fee Claim, considering that the TERO Fee only applies to contracts of over $100,000. The Nation's calculation of its TERO Fee Claim does nothing to take that threshold into account. The Nation cannot prove that Eagle Bear ever entered *any* contract of more than $100,000 that is subject to the TERO Fee, and it certainly has provided no evidence of any specific contract that would trigger the TERO Fee.

Absent such evidence, the Nation cannot carry its burden to prove its TERO Fee claim, and the Nation's improper calculation of its TERO Fee using all of Eagle Bear's total capital expenditures is contrary to the terms of TERO.

iii. The Nation's TERO Fees claim is significantly overstated because the Nation uses the wrong interest rate and improperly compounds interest.

As discussed above, TERO does not authorize the collection of interest, nor does any other statute authorize collection of interest on any TERO obligation. Although TERO does identify an "interest rate of 18% per annum, compounded daily" if the TERO Director "authorize[s] a construction contractor to pay [the TERO Fee] in installments over the course of

the contract," no such authorization was sought or occurred in this case. (Ex. FFF, TERO at pp. 21, 23, §§ 2-201.A. & 2-204; *see also* Ex. 40, Transcript of Evidentiary Hearing Day 2 at 131:22-132:7 (confirming that this is the only "circumstance under which 18 percent interest is to be applied"). Thus, the 18% interest rate does not apply, based on TERO's plain language.

Nevertheless, the Nation applied an 18% per annum interest rate to the alleged principal TERO Fee liability and compounded that interest rate on a yearly basis. (Doc. 229-1 at p. 9). This approach resulted in a significant overstatement of the claim, increasing the Nation's Claim to an amount over twenty times the alleged principal. There simply is no basis for applying an 18% interest rate or for compounding that interest rate on a yearly basis. The Nation's decision to do so is incorrect.

c. The Nation's TERO Fees claims are not entitled to priority.

The Nation's TERO Fees claim is not entitled to priority under 11 U.S.C. § 507(a)(8) for the very same reasons that its Contractors' Excise Tax claim is not entitled to priority. (*See* Discussion § 1.c., *supra*, pp. 27). Like the Contractors' Excise Tax, the TERO Fees are not taxes. To the extent they exist at all, the TERO Fees are the result of voluntary obligations flowing from Eagle Bear's voluntary actions. *See Lorber*, 675 F.2d at 1065-67; Ex. FFF, TERO at p. 21 § 2-201.A. Additionally, the Nation's TERO Fees claims are for fees that allegedly arose before 2008, well-before the most liberal, three-year lookback period under Section 507(a)(8). Thus, no part of the Nation's TERO Fees claim is entitled to priority.

3. <u>The Nation's claim for Lodging Taxes and interest should be denied, reduced, and given only limited priority.</u>

a. The Nation has no enforceable right to Lodging Taxes from Eagle Bear.

The Lodging Tax is a pass-through tax. It is "imposed on the user of a lodging facility within the Reservation . . . at a rate equal to six percent (6%) of the accommodation charges

collected by the facility." (Ex. Q, Blackfeet Lodging Tax Code at p. 2 § 1.5(a)). The "owner or operator of a facility" is required to collect this tax from the user, to remit 5% of the accommodation charge to the Nation, and to "retain one percent (1%) of the lodging tax for administrative costs and expenses." (*Id*. at p. 3, §§ 1.5(b) & 1.8(a); *see also* Ex. 30, Blackfeet Lodging Tax: Tax Reporting Form at p. 10; Ex. 40, Transcript of Evidentiary Hearing Day 2 at 143:19-144:10 (testimony of the Nation's Tribal Treasurer in which he explained that the 1% the operator is entitled to retain is "1 percent of the gross" collection and not "1 percent of the 6 percent" tax)).

Although Eagle Bear is the operator of a facility for the purposes of the Lodging Tax, the Lodging Tax does not apply to Eagle Bear because the Nation agreed to waive the Tax under the Lease and because, to date, the Nation's attempt to collect the Tax from Eagle Bear has been discriminatory and in violation of Eagle Bear's Due Process and Equal Protection rights.

i. Under the Lease, the Nation agreed not to collect Lodging Taxes from Eagle Bear.

The Nation and Eagle Bear specifically negotiated the terms of the Lease. (Ex. 39, Transcript of Evidentiary Hearing Day 1 at 93:23-24; *see also id.* at 50:20-51:13, 52:8-16, 147:12-14). Both parties understood that the Campground was "trash" at the time Eagle Bear took over and that it would take significant development of and investment into the Campground to turn the Campground into a profitable enterprise for Eagle Bear and the Nation. (Ex. 5, Lease at pp. 7, 29 §§ 7, 37; *see also* Ex. 25, Mark Magee Dep. 12:21-13:11; Ex. 39, Transcript of Evidentiary Hearing Day 1 at 39:22-40:12, 41:11-18, 50:20-51:13, 54:15-11, 55:17-22, 93:23-24). In order to ease the financial burden on Eagle Bear and to encourage Eagle Bear's investment into the Campground, the parties agreed to very specific financial arrangements and the Nation agreed to waive certain fees that it would otherwise have been entitled to. (Ex. 39,

Transcript of Evidentiary Hearing Day 1 at 50:20-51:13). For example, the Nation waived construction taxes for the first five years of the Lease term and the Nation agreed to escalate Eagle Bear's rental payments over the first five years. (*Id.*; Ex. 5, Lease at pp. 4-7 §§ 5 & 7). Most notably for the purposes of this matter, the Nation agreed to collect a royalty rental payment from Eagle Bear in lieu of the Lodging Tax it had enacted but had not yet begun collecting. (Ex. 39, Transcript of Evidentiary Hearing Day 1 at 70:4-13, 147:5-14; *see* Ex. 5, Lease at p. 4 § 5). The parties agreed that Eagle Bear would begin by paying 4% of its "gross registration receipt income"—the same income on which the Lodging Tax was based—as a royalty payment and that, over the first twenty years of the Lease term, the royalty would be escalated to the same 6% as the Lodging Tax. (*Id.*) Both parties understood that this royalty payment would be in lieu of any Lodging Tax.

As Will Brooke, the only witness that participated in negotiation of the Lease and the only witness to testify about the meaning of the Lease explained:

> [W]hen we negotiated this [Lease] we knew things were going to be particularly difficult. We thought in the first five years, but, certainly, the first 25 years. And we believed that the amount of investment it would take to get this to a viable business would take a significant amount of time, particularly given the short season that you have to work in up there.
>
> And, so, the notion was to go easy in the early years. So, [the royalty payment under the Lease] starts at, I believe, 4 percent, and every five years it would adjust on the royalty rate a half-a-percent. . . . Until it got to the rate of 6 percent. . . . And we negotiated that we didn't want to start at 6 percent, and we would get there over time.
>
> . . .
>
> [T]he royalty was 6 percent . . . . And the Tribe, although it hadn't done it at the time, was talking about putting in place a bed tax, accommodation tax, of 6 percent. So, we negotiated a 6 percent graduated royalty based on that 6 percent notion. That's where that number came from. It didn't come out of thin air.
>
> . . .

We believed that the royalty was in lieu of a tax.

(Ex. 39, Transcript of Evidentiary Hearing Day 1 at 50:19-51:9, 147:7-14, 173:21-22).

This interpretation was memorialized in the Lease. Again, the royalty payment was tied to the same tax base as the Lodging Tax, and it escalated to the same rate as the Lodging Tax over the course of the first term of the Lease. (*Compare* Ex. 5, Lease at p. 4 § 5.A *with* Ex. Q, Blackfeet Lodging Tax Code at p. 2 § 1.5(a)). Additionally, the Lease was particular about what taxes and fees would apply to Eagle Bear's operation of the Campground, but it was silent regarding the Lodging Tax. For example, the Lease specified that the campground might be subject to TERO, to any construction taxes after the first 5 years of the Lease term, and subject to "all taxes . . . levied upon or against the leased land, all interests therein and property thereon." (Ex. 5, Lease at pp. 18, 28-29, §§ 19, 37). The Lease was, however, silent regarding any Lodging Tax that could be applied to Eagle Bear.

Critically, the Nation agreed that this silence would preclude enforcement of the Lodging Tax:

> Lessor [the Nation] agrees to, and hereby does, waive any right it might have to regulate the construction, operation, maintenance, and use of the Campground/Recreation Facility and/or Complex except as otherwise provided in this [Lease]. This waiver does not apply to any matters covered by the Tribal Employment Rights Ordinance [TERO], except as otherwise modified by Paragraph 28, Employment Preference for Indians.

(Ex. 5, Lease at p. 24 § 27).

To be clear, the Lodging Tax is not, as the Nation argues, a tax "levied upon or against the leased land, all interest therein and property thereon" under Section 37 of the Lease. Instead, the Lodging Tax is, by its plain terms, "imposed on the user of a lodging facility" and the "accommodation charges" that user pays. (Ex. Q, Blackfeet Lodging Tax Code at p. 2 § 1.5(a)

(emphasis added)). Just like the royalty payment under the Lease, the Lodging Tax is a tax on the gross accommodation income of a campground. The tax is on the campground's business and not on the campground itself. In other words, the Lodging Tax is a regulation of the "operation" and "use of the Campground" that is prohibited by Section 27 of the Lease. Thus, the Lease does not allow the Nation to apply the Lodging Tax to Eagle Bear.

It makes sense that this is a term that Eagle Bear would negotiate for and that the Nation would agree to. Again, Eagle Bear and the Nation both knew that it would be difficult, time consuming, and expensive for Eagle Bear to turn the Campground around and that, in light of Eagle Bear's royalty payment, it was in the Nation's best interests to help Eagle Bear to develop the Campground into a profitable asset. (Ex. 5, Lease at p. 4 § 5; Ex. 39, Transcript of Evidentiary Hearing Day 1 at 50:20-51:13). It made sense for the parties to negotiate an alternative to the Lodging Tax in order to ease and to more specifically define Eagle Bear's financial burden under the Lease. Indeed, the Nation itself recognized that double taxation could chill investment in the reservation. (Ex. 31; Ex. 40, Transcript of Evidentiary Hearing Day 2 at 141:18-142:5).

Likewise, the certainty of a defined royalty, in lieu of a tax that the Nation could unilaterally adjust at will, made Eagle Bear's investment and agreement to the Lease significantly more attractive. Eagle Bear would not have agreed to allow the Nation to unilaterally re-write the terms of the Lease. (*See* Ex. 5, Lease at p. 24 § 27). If it believed that the Nation could simply increase the percentage of Eagle Bear's business that it was taking—i.e. unilaterally adjust Eagle Bear's negotiated rental payments—at any time following entry of the Lease by simply imposing or increasing the tax rate, Eagle Bear would not have agreed to the Lease. Such an agreement would have been illusory and would have allowed the Nation to

unilaterally re-write the parties' royalty agreement, take all of Eagle Bear's profits, force Eagle Bear into default, or force Eagle Bear to give up the Lease—just as the Nation is attempting to do here. *See M & G Polymers USA, LLC v. Tackett*, 574 U.S. 427, 440 (2015) (courts must "avoid constructions of contracts that would render promises illusory"). After all, "the power to tax involves the power to destroy." *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819). The Nation agreed not to exercise that destructive, Lease-altering power in Section 27 of the Lease.

In addition to the terms of the Lease, this understanding that the royalty was negotiated in lieu of the Lodging Tax was further confirmed by the parties' performance under the Lease. Although the Nation knew that Eagle Bear was operating the Lease and, by virtue of Eagle Bear's royalty payments, knew that Eagle Bear was receiving income from accommodation charges, the Nation never attempted to collect the Lodging Tax from Eagle Bear in any of the first 19 years of the Lease.

Although it contends that it sent several form letters to Eagle Bear and other accommodations operators on the Blackfeet Indian Reservation about the Lodging Tax between 1997 and 2002, it always assured Eagle Bear that no Lodging Tax was being collected when Eagle Bear inquired. (Ex. U; Ex. 39, Transcript of Evidentiary Hearing Day 1 at 71:25-72:7, 73:20-24, 74:15-17, 150:24-153:24, 158:13-19, 203:21-24). The first time that the Nation began claiming that a Lodging Tax was due was in 2016, when it asked Eagle Bear to "begin assessing, collecting and remitting the Blackfeet Tribe's Lodging Facility Tax for the 2016 season." (Ex. X, Letter from McKay to Brooke (June 21, 2016)). The Nation only subsequently began claiming that Eagle Bear owed back-taxes when it asked the BIA to cancel Eagle Bear's Lease in 2017 and raised Eagle Bear's alleged failure to pay the Lodging Tax as one of several alleged defaults under the Lease. (Ex. 17, Letter from Barnes to Brooke (Apr. 26, 2017)). When the

BIA ordered the Nation to arbitrate this dispute under the Lease, Eagle Bear did not hear about the Lodging Tax again until the Nation filed this claim. By then, the $728,076.68 the Nation initially sought had swelled to the Nation's current $4,066,817.73 claim. (Doc. 229-1 at p. 7).

The plain language of the Lease, Mr. Brooke's testimony, and the parties' course of conduct all confirm that the Nation agreed to a specifically-defined royalty in lieu of the Lodging Tax. The Nation has no right to now re-write the parties' contract and take all of the profit Eagle Bear made on the Campground and more, by collecting both the Lodging Tax and a staggering amount of interest that no one ever thought Eagle Bear was responsible to pay.

As the Nation's Rule 30(b)(6) witness testified at her deposition, before 2016, the Nation never contended that Eagle Bear had breached the Lease by failing to pay taxes, or in any other fashion, to anyone at all. (Ex. 40, Transcript of Evidentiary Hearing Day 2 at 160:22-161:1; Ex. 24, Dep. of Gray as 30(b)(6) Designee of the Nation 17:7-12). That testimony is binding on the Nation and further precludes any recovery now.

ii. The Nation's attempted application of the Lodging Taxes against Eagle Bear for the years 1997 through 2022 is discriminatory and violates Eagle Bear's Due Process and Equal Protection rights.

Pursuant to 25 U.S.C. § 1302(a)(8), which subjects tribal governments to terms of the Equal Protection Clause of the Fourteenth Amendment, the Nation is prohibited from "denying to any person within its jurisdiction the equal protection of its laws." *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess. . . . In 25 U.S.C. § 1302, Congress acted to . . . impos[e] certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment.")

There are several ways in which governmental action may deny a person the "equal protection of the laws" and there are several species of equal protection claims. Of relevance to the present case, a party can establish a "class of one" or "selective enforcement" equal protection claim by "demonstrating that it has been intentionally treated differently from others similarly situated" and either (a) that "there is no rational basis for the difference in treatment" or (b) that the alleged rational basis is "a pretext for an impermissible motive" unrelated to "any legitimate state objective." *Village of Willowbrook v. Olech*, 528 U.S. 562, 563 (2000); *Squaw Valley Development Co. v. Goldberg*, 375 F.3d 396, 944 (9th Cir. 2004) (internal quotation marks omitted).

Eagle Bear has been denied Equal Protection as a "class of one" subject to "selective enforcement" of the Lodging Tax. Specifically, the Nation is attempting to use the Lodging Tax as a tool to deprive Eagle Bear of the benefit of the Lease and to punish Eagle Bear for resisting the Nation's attempts to take back the Campground. The Nation does not apply the Lodging Tax to Eagle Bear's similarly-situated competitors. (Ex. 26; Ex. 39, Transcript of Evidentiary Hearing Day 1 at 64:18-69:16, 71:25-72:7, 152:8-18, 222:23-223:5; *see also* Ex. 40, Transcript of Evidentiary Hearing Day 2 at 114:15-24). Indeed, the Nation did not even believe the Lodging Tax applied to Eagle Bear until its 2016 letter. The Nation is, instead, arbitrarily and unfairly using the Lodging Tax to single-out and target Eagle Bear and its business. Because the Nation's application of the Lodging Tax in this case is inconsistent, unfair, and discriminatory, the Nation's claim should be denied. As applied, the claim violated Eagle Bear's Due Process and Equal Protection rights.

To be clear, the Nation could possibly collect the Tax from Eagle Bear in a non-discriminatory fashion in the future if it began consistently and equally applying the Tax to all

similarly situated campgrounds, other accommodations, and patrons. Eagle Bear is not asking the Court to decide that the Tax is facially unconstitutional. Instead, Eagle Bear is asking the Court to decide that the Tax is unconstitutional as applied to Eagle Bear during the years of the Nation's Claim, 1997-2022.

The United States Supreme Court's holding in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), is instructive. *Village of Willowbrook* involved a city's discriminatory behavior in conditioning a property owner's connection to a municipal water supply on the owner's granting of an easement. 528 at U.S. 563. The property owner brought suit, alleging that the Village of Willowbrook treated her differently from other property owners in the Willowbrook area because of ill will generated by a previous unrelated lawsuit she had filed against the Village. *Id*. The district court dismissed the suit for failure to state a claim because membership in a protected class was not alleged. *Id*. at 564. The Seventh Circuit reversed and the Supreme Court affirmed the Seventh Circuit and held that Olech, although a "class of one," had stated a claim for relief under the Equal Protection Clause by alleging that the Village treated her differently than others similarly situated and that there was no rational basis for the difference in treatment. *Id*. at 564-65.

The only difference between *Village of Willowbrook* and this case is that the plaintiff in *Village of Willowbrook* merely stated a prima facie Equal Protection case, while Eagle Bear has proven its claims. Like the plaintiff in *Village of Willowbrook*, Eagle Bear has been treated differently than other similarly situated campground operators and, as in *Village of Willowbrook*, there is no rational basis for this difference in treatment.

As Will Brooke testified:

> Q. Have you ever been told by an official of the Blackfeet Nation that no one pays the lodging tax?

A. Yes.
Q. Who, and when?
A. Mark Magee, several times over the course of the history of the last 28 years.
Q. And his role with the Blackfeet Nation was as the --
A. Head of Leasing and Lands.

. . .

Q. It's a -- it's a letter dated September 2nd, 2003, this time from Roland Kennerly, Compliance Specialist, Department of Revenue.
A. I do remember this, because I did go into the office after Susan gave me this letter and said, "You know, what's going on? We understand it's not being collected by anybody." So, I went into Mark McGee's office and I said, "Are they collecting this tax from anybody?" And he said, "No." I specifically asked if they were collecting it from Chewing Blackbones, a competing tribal campground five miles down the road, and he said, "No."

(Ex. 39, Transcript of Evidentiary Hearing Day 1 at 71:25-72:7; 152:8-18). This testimony is confirmed by receipts from other, similar campgrounds establishing that those campgrounds are not collecting the Lodging Tax. (Ex. 26). Likewise, the testimony is confirmed by the Nation's own spreadsheet of its Lodging Tax collections. (Ex. GGGG; Ex. 39, Transcript of Evidentiary Hearing Day 1 at 219:12-223:5).

Most notably, Mr. Brooke's testimony is further confirmed by the testimony of the Nation's Tribal Treasurer, who confirmed that the Lodging Tax is not applied uniformly or consistently:

Q. I'd like to continue some questions or your knowledge of, you know, just general enforcement of the Tribe's lodging tax, and your -- your knowledge of the history of it.
A. As I said, I was the Revenue Director, you know, in -- in the '90s, and, then, in the 2000s. A lot of it kind of depended on who your compliance people were, and, you know, what -- there were so many -- the Tribe's taxation. You know, and a lot of it would be pushing -- pushing the Revenue Department to -- to get out there and make that effort.

. . .

Q. And you testified that the Tribe periodically gets more aggressive about trying to enforce these taxes?

A. It's -- it's kind of a function of the overall tribal government, and -- and, really, the Tribal Council and what they are -- you know, what their priorities are. And, uh -- and it -- it -- it ebbs and flows.
Q. Yeah. I think you said they push sometimes, and they don't push other times?
A. Yes.
Q. Correct?
A. Correct?

(Ex. 40, Transcript of Evidentiary Hearing Day 2 at 114:15-24, 149:22-150:16).

Eagle Bear is the victim of a specialized "push." Eagle Bear is a "class of one" that has been singled out for "selective enforcement" of the Lodging Tax under the Nation's Claim. The Nation is not requiring any Campgrounds other than Eagle Bear to pay the Lodging Tax back to 1997. Like the plaintiff in *Village of Willowbrook*, Eagle Bear has been singled out for unfair and discriminatory treatment "because of ill will generated by a previous lawsuit" in which Eagle Bear has resisted the Nation's attempts to take back the Campground. The Court should, therefore, deny the Nation's claim for Lodging Taxes and interest.

b. The Nation's Lodging Tax claims are significantly overstated.

i. Even if Eagle Bear were subject to the Lodging Tax, its liability to the Nation would be limited to the years 2017-2022 and it would be responsible only for simple interest from the appropriate quarterly due dates.

Like the Contractors' Excise Tax and TERO Fees, calculation of any Lodging Tax liability involves (1) identifying the principal amount of any tax liability; (2) identifying interest, if any, that has accrued on that principal liability; and (3) identifying the years for which such principal tax liability and interest are recoverable in this matter.

The first step, calculating the principal tax obligation, is performed by calculating 5% of the "accommodation charge" Eagle Bear collected from its guests. (Ex. Q, Lodging Tax Code at p. 2 §§ 1.5(a) & (b)). Although the Lodging Tax is assessed against the "user of a lodging facility" at a rate of "six percent (6%)" and the operator is required to collect that full 6%, the

operator is only obligated to remit 5% of the accommodation charge to the Nation. (*Id.*; Ex. 30, Blackfeet Lodging Tax: Tax Reporting Form at p. 10; Ex. 40, Transcript of Evidentiary Hearing Day 2 at 143:19-144:10 (testimony of the Nation's Tribal Treasurer in which he explains that the 1% the operator is entitled to retain is "1 percent of the gross" collection and not "1 percent of the 6 percent" tax)). Thus, the principal tax obligation can be calculated by multiplying the "Revenue Per Year" numbers on page 7 of the Nation's claim by 0.05. (Doc. 229-1 at 7).

The second step in calculating the Nation's claim is to identify any interest that has accrued on the principal amount of the tax. The Lodging Tax identifies a particular interest rate for any "unpaid tax." Section 1.13(d) states that "[a]ny amount of tax required to be paid shall accrue interest at the rate of one percent (1%) per month, or part thereof, from delinquency until paid." (Ex. Q, Lodging Tax Code at p. 5 § 1.13(d)). The delinquency date is "thirty (30) days following the end of each calendar quarter." (*Id*. at p. 3 § 1.8(b)). Because the Lodging Tax is only applicable "from April 1 and October 31 of each year" and because, in any event, Eagle Bear does not operate its business before April 1 or after September 30 of each year, this means that there were two Lodging Tax due dates per year: July 30, which is 30 days following the end of the second quarter on June 30, and October 30, which is 30 days following the end of the third quarter on September 30. Interest for any particular quarterly Lodging Tax payment would, therefore, run from such due date. It would cease running on May 23, 2022, the date of Eagle Bear's bankruptcy petition, because unmatured, post-petition interest is not recoverable in bankruptcy. (Doc. 1; 11 U.S.C. § 502(b)(2); *Vanston Bondholders Protective Committee*, 329 U.S. at 163-65).

Interest for any particular quarterly Lodging Tax payment can, therefore, be calculated by multiplying the principal liability for that quarter, by the difference between the petition date and

quarterly due date in months, by the 5% interest rate. (Ex. Q, Lodging Tax Code at p. 2 §§ 1.5(a) & (b)). The approximate result of this calculation is reported in the "Simple Interest" column of the table attached hereto as Exhibit 41.[3]

The final step in calculating the Nation's claims is to identify the quarters for which such principal tax liability and interest are recoverable in this matter. As with the Nation's TERO Fee and Contractors' Excise Tax claims, the Nation's Lodging Tax Claim must be limited in time both as a matter of statute and out of fairness to Eagle Bear and its creditors. *Artis*, 138 S.Ct. at 608; *Gabelli*, 568 U.S. at 448-49.

Like the Contractors' Excise Tax and TERO Fees, the Nation's Lodging Tax Claim is subject to the Nation's general statute of limitations, which prevents the Nation from pursuing any claim for less than "$5,000" after "two (2) years from the date when the obligation becomes due and owing." (Ex. HHHH, Ordinance No. 51 at p. 1). This applies to and bars the Nation's claims for the second and third quarters of 1997 and 2003, both of which were for principal amounts less than $5,000. (*See* Doc. 229-1 at p. 7).

Additionally, like the Contractors' Excise Tax, the Lodging Tax is subject to the Nation's general five-year limitations period for collection of taxes. (Ex. 34, Comprehensive Tax Code at p. 20 § 5.1). Because the Nation filed its Claim after Eagle Bear's May 23, 2022 petition, the Nation is barred from bringing any claim for Lodging Taxes due before May 23, 2017. 11 U.S.C. § 108(a) (tolling the statute of limitations upon filing of the petition). This means that all of the Nation's claims for taxes including and predating the second quarter of 2017 are barred.

[3] This calculation is only approximate, because the Nation has not made quarterly data part of the record. The $484,357.40 figure reflected is the maximum amount of Lodging Tax and interest Eagle Bear might be subjected to.

This is a fair result and accords with the equitable concept of laches that would apply in the absence of an applicable statute of limitations. This is not a case where Eagle Bear was operating the Campground in secret, hiding its revenue, or actively attempting to circumvent the Lodging Tax. Until 2016, all parties believed that the Lodging Tax did not apply to Eagle Bear by virtue of the terms of the Lease, and the Nation did not begin asserting a right to back-taxes until 2017. (Ex. 39, Transcript of Evidentiary Hearing Day 1 at 71:25-72:7, 73:20-24, 74:15-17, 150:24-153:24, 158:13-19, 203:21-24; Ex. X, Letter from McKay to Brooke (June 21, 2016); Ex. 17, Letter from Barnes to Brooke (Apr. 26, 2017)). If the Nation had wanted to collect the tax at any time during the previous 20 years, it could have. It had all of the data—most notably, Eagle Bear's royalty payments—on which it now bases its Claim. (Doc. 229-1 at 7; Ex. 40, Transcript of Evidentiary Hearing Day 2 at 169:20-170:11 (admitting that "when [the royalties] were paid" the Nation "at that point" knew what its alleged Lodging Taxes were). Instead, the Nation neglected to enforce the Lodging Tax against Eagle Bear and, instead, expressly represented to Eagle Bear that the Lodging Tax was not being collected and did not apply. (Ex. 39, Transcript of Evidentiary Hearing Day 1 at 71:25-72:7; 152:8-18).

By that silence, the Nation knowingly allowed relevant evidence to fade. Under the Lease, the Nation had implicitly agreed that it would pursue any claim related to Eagle Bear's gross receipts within 4 years, and it agreed that Eagle Bear had no obligation to keep, and could destroy, its financial records after 4 years:

> [The Nation] or the [BIA] shall be entitled at any time within 4 years after the receipt of any such percentage rental payment to question the sufficiency of the amount thereof and/or the accuracy of the audit report or reports furnished by [Eagle Bear] to justify the same and shall have the right to examine and/or audit as hereinbefore described. Therefore, [Eagle Bear] shall for and said four (4) year period keep safe and intact all of Lessee's records, books accounts, and other data which in any way bear upon or are required to justify in detail any such report . . . .

(Ex. 5, Lease at p. 27 § 32 (emphasis added)).

Thus, out of fairness to Eagle Bear and its creditors and in recognition of the passage of time that has let relevant evidence grow cold and made the Nation's claims grow stale, the Court should deny the portion of the Nation's Lodging Tax Claim for quarters predating the second quarter of 2017.

ii. The Nation's claim is significantly overstated because the Nation claims that Eagle Bear owes the full 6% tax to the Nation, rather than the 5% that is due.

The Nation's Claim calculates Eagle Bear's alleged principal Lodging Tax liability as 6% of Eagle Bear's accommodation receipts. However, Eagle Bear was only ever obligated to pay 5% of its accommodation charges to the Nation, as demonstrated by the plain language of the Lodging Tax, the Nation's Lodging Tax forms, and the admission of the Nation's Tribal Treasurer. (Ex. Q, Lodging Tax Code at p. 2 §§ 1.5(a) & (b); Ex. 30, Blackfeet Lodging Tax: Tax Reporting Form at p. 10; Ex. 40, Transcript of Evidentiary Hearing Day 2 at 143:19-144:10.

iii. The Nation's claim is significantly overstated because the Nation used incorrect due dates for the alleged tax liabilities.

The Nation's Claim does not account for the quarterly due dates of the Lodging Tax. (Ex. Q, Lodging Tax Code at pp. 3, 5 § 1.8(b) & 1.13(d)). The delinquency date is "thirty (30) days following the end of each calendar quarter." (*Id*. at p. 3 § 1.8(b)). Instead, it treats all alleged Lodging Tax due as due during year as a lump sum due on a particular due date. (*See* Doc. 229-1 at 7). This results in miscalculation of the Nation's Claim.

iv. The Nation's claim is significantly overstated because the Nation improperly compounds interest.

The Nation is attempting to turn $1,104,046.22 of alleged principal Lodging Tax liability into a $4,066,817.73 claim. (Doc. 229-1 at 7). It does so by improperly compounding the 1%

simple interest rate identified in by the Lodging Tax on a monthly basis. (Ex. 40, Transcript of Evidentiary Hearing Day 2 at 104:17-24, 105:13-20).

Like the interest rate specified in the Blackfeet Nation's Comprehensive Tax Code and applicable to the Contractors' Excise Tax, the Lodging Tax's 1% monthly interest rate allows the Nation only to "accrue interest" on the "tax required to be paid" at "the rate of one percent (1%) per month, or part thereof, from delinquency until paid." (Ex. Q, Lodging Tax Code at p. 5 § 1.13(d)). Like the Comprehensive Tax Code's rate, this is a simple interest rate. It is 1% of the "tax required to be paid," and not a compound rate of 1% on both the "tax required to be paid" and on accrued interest. *See Cherokee Nation*, 270 U.S. at 481, 490 (noting that compound interest is "interest on interest," interpreting "interest at the rate of five per centum per annum" as a simple interest rate, and denying a claim for compound interest); Black's Law Dictionary 935-36 (10th ed. 2014) (contrasting "compound interest," which it defines as "[i]nterest paid on both the interest and previously accumulated interest," and "simple interest," which it defines as interest that "accrues only on the principal balance regardless of how often interest is paid"). Notably, the Lodging Tax does not specifically allow interest to be compounded like the TERO Fees interest rate applicable to certain contractors who enter into payment plans with the TERO Director. If the Nation wanted to impose a compound interest rate, it knew how to do so and would have specifically noted that interest was compounded in its Code. (*See* Ex. FFF, TERO at pp. 21, 23, §§ 2-201.A. & 2-204).

"The general rule . . . is that, in the absence of a contract therefor or some statute, compound interest in not allowed to be computed upon a debt." *Cherokee Nation*, 270 U.S. at 490. Here, there is no such statute or contract allowing for compound interest and, instead, the applicable statute specifies a simple interest rate. Because the Nation's calculation of its claim

uses a compound interest rate—and thereby nearly quadruples the alleged $1,104,046.22 principal amount of its Lodging Tax claim into a $4,066,917.73 claim—the Nation's Claim is incorrect and should be denied. Even if the Nation had any claim against Eagle Bear for the Lodging Tax, the Nation would be required to calculate its claim with simple interest running from the correct due date and to thereby significantly reduce its claim.

c. The Nation's Lodging Tax Claim is entitled only to limited priority.

For the same reasons as discussed above with respect to the Contractors' Excise Tax claim and the TERO Fee claim, any portion of the Lodging Tax Claim that is given priority should be limited in time. The Lodging Tax Claim is a "tax on or measured by income or gross receipts." (Ex. Q, Blackfeet Lodging Tax Code at p. 2 § 1.5(a)). Therefore, the tax obligations can be given priority for no more than three years preceding the date of the petition in this matter. 11 U.S.C. § 507(8)(A). Thus, to the extent any portion of the Lodging Tax Claim is allowed or given priority, only the Nation's claims for Lodging Tax obligations that accrued during or after May 23, 2019 can be given priority. (Doc. 1).

4. <u>The Nation's claim for interest on rental payments should be denied, reduced, and given no priority.</u>

a. The Nation has no enforceable right to payment of interest on rental payments.

The Nation's claim for interest on rental payments derives from the Lease. The Lease defines an "annual rental" payment that Eagle Bear was obligated to make "for the use and occupancy of" the Campground." (Ex. 5, Lease at p. 4 § 5.B.). That annual rental payment was between $5,000 and $25,000 per year, depending on the particular year of the Lease term. (*Id*.) The annual rental payment was due on "November 30th of each year." (*Id*.)

In the event that Eagle Bear did not make any annual rental payment "within 30 days" after it became due, Eagle Bear agreed that it would pay interest on the rental payment. (Ex. 5, Lease at p. 6 § 6). Specifically, Eagle Bear and the Nation agreed:

> Past due rental shall bear interest at the prime rate of interest as published in the Wall Street Journal plus three percent (3%) per annum from the due date until paid . . . . It is understood and agreed between the parties hereto that, if any installment of rental is not paid within 30 days after becoming due, interest will be assessed at the existing prime rate, plus three (3) percent, times the amount owed for the period during which payments are delinquent. Interest will become due and payable from the date such rental becomes due and will run until said rental is paid.

(Ex. 5, Lease at p. 6 § 6).

This is the interest the Nation seeks in its rental payment interest claim. (Doc. 229-1 at 5). The Nation does not allege that any rental payment under the Lease is outstanding. (Ex. 40, Transcript of Evidentiary Hearing Day 2 at 162:5-20). Instead, the Nation only claims that there is interest that Eagle Bear never paid on late rental payments going back to 1997 and that, after Eagle Bear made the late rental payments, interest compounded and continued to accrue. (Doc. 229-1 at 5).

However, the BIA, which is responsible for collecting the rental payments and interest, disagrees with the Nation. It has confirmed that no interest is due. Only the BIA, and not the Nation, has the right to make that determination, and only the BIA, and not the Nation, has the right to pursue any interest on allegedly late rental payments.

i. The Nation lacks standing to pursue, and is not the real party in interest of, its claim for payment of rental interest.

"Standing is a threshold question in every federal case, determining the power of the court to entertain the suit." *In re Veal*, 450 B.R. 897, 906 (B.A.P. 9th Cir. 2011) (internal quotation marks omitted). In order to have standing, a plaintiff must have suffered "an injury in fact" and "must assert its own legal rights and may not assert the rights of others." *Id*. at 906-

907. Similarly, only the "real party in interest"—that is, the party that "owns or has rights that can be vindicated—can file a proof of claim. Fed. R. Civ. P. 17(a)(1); Fed. R. Bankr. P. 7017 & 9014(c); *In re Veal*, 450 B.R. at 906-08.

The BIA is the real party in interest and the only party with standing on the Nation's claims for payment of rental interest. The Nation cannot pursue those claims. The Lease is clear that the BIA, and not the Nation, is responsible for administering the Lease and that Eagle Bear was required to make all payments under the Lease to "the Superintendent, Blackfeet Agency" of the BIA. (Ex. 5, Lease at p. 4 § 5.A.; *see also id*. at pp. 19-20, 23, §§ 21, 25 (investing the BIA with the exclusive power to terminate the Lease or take other action upon any default of the Lease by Eagle Bear)). In fact, under BIA regulations, lease payments can only be made to the Nation or any other "Indian landowners" if certain conditions are met and the parties specifically elect to do so. 25 C.F.R. § 162.424(a) & (b). The parties did not elect for Eagle Bear to make payments to the Nation in this matter and, instead, agreed for rental payments to be made to the BIA. As the Nation acknowledged during the hearing in this matter:

> Q. . . . I'm going to shift gears to your interest on late rental payments' contention.
> A. Sure.
> Q. Those aren't taxes, are they?
> A. No.
> Q. They're not entitled to tax treatment?
> A. A late rental?
> Q. Yeah.
> A. It's interest.
> Q. And is it your understanding that those are amounts that, under the lease, the BIA was responsible to collect from Eagle Bear?
> A. For the lease?
> Q. Yeah.
> A. Yes. The BIA is in charge of the lease.
>
> . . .
>
> Q. . . . [H] ow would you know that any royalties are paid?
> A. Only through the BIA. If royalties are being paid, payments go to the BIA.

Q. They don't go to the Tribe.
A. No. It's trust income.

(Ex. 40, Transcript of Evidentiary Hearing Day 2 at 154:16-155:6, 185:9-16).

Any payments Eagle Bear was obligated to make under the Lease were to be made to the BIA, and not to the Nation. The Nation cannot now pursue its claim for payment, because it never had a right to payment. The BIA, and not the Nation, must pursue any allegedly delinquent amount under the Lease and the BIA has concluded that no interest is due.

ii. Eagle Bear owes no interest on rental payments to the Nation.

On November 11, 2022, the BIA responded to discovery requests from Eagle Bear and represented that "[t]o date, Eagle Bear, Inc. is current on all annual payments. . . . No outstanding amount of money is owed by Eagle Bear, Inc., as of this date." (Ex. 22, BIA's Responses to Plaintiff's First Discovery Requests at pp. 5-6). As the real party in interest for any claims for payment under the Lease, including the Nation's present claim for interest on late rental payments, and as the party that is responsible for administering the Lease, the BIA is entitled to make this determination and its decision is dispositive. It has decided that no amount is due under the Lease. Accordingly, it decided not to pursue the claim for payment in this matter. No amount is due under the lease for interest on late rental payments, and the Nation's claim should be denied.

iii. The Nation's claims are barred by applicable statutes of limitation.

The Nation's claims for interest on allegedly past due rental payments, which are claims arising under the Lease, are either subject to the Nation's general two-year statute of limitations applicable to "debt[s] owing to the Tribe" for less than $5,000 (Ex. HHHH, Ordinance No. 51 at p. 1) or, considering that the BIA is the real party in interest, are subject to the six-year statute of

limitations for United States agencies to bring an "action for money damages . . . which is founded upon any contract." 28 U.S.C. § 2415(a).

In either case, the Nation's claims are barred because they are based on rental payments that allegedly became due between 1997 and 2007 and that were all paid between 1997 and 2008. The right to the interest that the Nation claims became due, if it became due at all, by 2007 at the latest, and all of the interest that the Nation claims—other than the interest on that interest—finished accruing in 2008. Thus, the Nation's claims were barred by 2014, at the latest, and had been barred for over eight years by the time the Nation filed its proof of claim in this matter. 28 U.S.C. § 2415(a).

b. The Nation's late rental claims are significantly overstated.

Even if the Nation were entitled to pursue its claim for interest on rental payments and even if there were some amount that Eagle Bear owed, the Nation would not be entitled to recover the full amount of its Claim. The Nation's calculation of $24,922.33 of interest on late rental payments is inconsistent with the terms of the Lease and is in error.

The Lease identifies exactly how any interest is to be calculated. It identifies the interest rate: "the prime rate of interest as published in the Wall Street Journal plus three percent (3%) per annum." (Ex. 5, Lease at p. 6 § 6). It identifies the period over which interest will accrue: "Interest will become due and payable from the date such rental becomes due and will run until said rental is paid." (*Id.*) And, finally, it specifies that interest will not be compounded and identifies how to calculate any interest that is due: "if any installment of rental is not paid within 30 days after becoming due, interest will be assessed at the existing prime rate, plus three (3) percent, times the amount owed for the period during which payments are delinquent." (*Id.*; *See Cherokee Nation* 270 U.S. at 481, 490; Black's Law Dictionary 935-36 (10th ed. 2014). It does

not state that interest will continue to run until paid, as the Nation claims, but instead specifies that interest will run only while "any installment of rental" remains unpaid and "delinquent." (Ex. 5, Lease at p. 6 § 6).

Thus, to carry its burden of proof the Nation must identify the applicable "prime rate of interest as published in the Wall Street Journal." The Nation has failed to do so. It has reported an interest rate in its calculations, but it has presented no evidence supporting those rates. (*See* Doc. 229-1 at 5). And, in fact, it has admitted that even the interest rates it reported were incorrect, considering that they were the interest rates "at the start of the year," rather than at the time the rental payments became due and began accruing interest. (Ex. 40, Transcript of Evidentiary Hearing Day 2 at 99:5-15). The Nation has, therefore failed to carry its burden of proof on its claim and it has significantly overstated its claim.

To carry its burden of proof, the Nation must also identify the due dates and payment dates of rental payments that were made more than 30 days after the applicable due date. It purports to do so through Exhibit B, which it claims is a spreadsheet prepared by the BIA. However, as the Court noted, there are some oddities about Exhibit B that present "legitimate concerns" about its veracity, including crooked and apparently altered fonts and highlighting. (Ex. 39, Transcript of Evidentiary Hearing Day 1 at 128:8-14). Indeed, as the Nation's Tribal Treasurer acknowledged, the spreadsheet contains significant errors in the rental payment due dates, those errors were incorporated into the Nation's own calculations, and the Nation's claim is erroneous as a result:

> Q. And you testified that you did your calculations based on the due dates in Exhibit B, right?
> A. Yes.
> Q. And if you'll look on the first page at the bottom, there's an entry "1/18/2000, 5,000," and it says, "Rent due 11/1/99," right? . . . .
> A. Yes.

> Q. Rent wasn't due on November 1, 1999, was it?
> A. On November 30. I don't know why they --
> Q. And, then, if you'll turn the page, the entry on June 4th, 2001, it's "11/1/2000," isn't it?
> A. Yes.
> Q. And they've got the same mistake for October 30th, March 8th, November 5th?
> A. Yes.
> Q. So, again, if you use those figures, which are incorrect under the lease, your calculations will be incorrect, right?
> A. Yeah.

(Ex. 40, Transcript of Evidentiary Hearing Day 2 at 156:17-157:20; *see also id.* at 97:19-99:3). Again, the Nation has failed to carry its burden of proof with respect to its claim and it has significantly overstated its claim.

The Nation has also significantly overstated its claim in that it calculated the simple interest owed under the Lease and then proceeded to improperly compound that interest after Eagle Bear made its relevant rental payment and interest stopped running under the terms of the Lease. (*Id*. at 98:9-25). The Nation claimed that it did so because "that's what the BIA does," but it subsequently admitted that it has "no knowledge of the way the BIA calculates their interest." (*Id*. at 117:10-12, 149:6-7, 170:21-171:3).

In truth, the Lease makes no provision for any interest to accrue after the allegedly delinquent rental payment is made. (Ex. 5, Lease at p. 6 § 6). As the Nation's Tribal Treasurer explained:

> Q. And same at the bottom of that paragraph [of the Lease], "Interest is due and payable from the date such rental becomes due, and will run until said rental is paid," right? And so, once the payment has been made, interest should stop?
> A. Correct.
> Q. Your calculations didn't stop accruing interest once payment was made, did they? They kept accumulating interest on the amounts unpaid?
> A. Yes.

(Ex. 40, Transcript of Evidentiary Hearing Day 2 at 156:8-16).

In the Nation's spreadsheet offered in support of its late rental claim, the (erroneous) figure the Nation calculates for the interest that accrued by the time of the delinquent payment is the top number in each column. (Ex. 40, Transcript of Evidentiary Hearing Day 2 at 171:22-172:3). All of the numbers below that number represent interest on that interest, compounded annually. (*Id*. at 98:15-17). Thus, for the Nation's calculations to be accurate, the Nation would need to identify the proper due dates and payment dates, identify the proper payment dates on which interest stopped running, and limit its claim to the resulting top numbers in its spreadsheet. By making errors in those figures and then claiming compounding interest on interest, the Nation is significantly overstating its claim.

c. The Nation's late rental interest claims are not entitled to priority.

The Nation's late rental interest claim is not entitled to priority under 11 U.S.C. § 507(a)(8) for the very same reasons that its Contractors' Excise Tax and TERO Fees claims are not entitled to priority. (*See* Discussion § 1.c., *supra*, p. 27). Like the Contractors' Excise Tax and the TERO Fees, the late rental interest claims are not claims for taxes. To the extent they exist at all, the claims are for interest amounts that the Nation—actually the BIA—is entitled to collect under the Lease. They are, therefore, contract fees and not taxes. (*See* Ex. 5, Lease at p. 6 § 6). As the Nation acknowledged:

> Q. . . . I'm going to shift gears to your interest on late rental payments' contention.
> A. Sure.
> Q. Those aren't taxes, are they?
> A. No.
> Q. They're not entitled to tax treatment?
> A. A late rental?
> Q. Yeah.
> A. It's interest.

(Ex. 40, Transcript of Evidentiary Hearing Day 2 at 154:16-25).

Additionally, the Nation's interest on late rental claim is for interest that allegedly arose before 2008, well-before the most liberal, three-year lookback period under Section 507(a)(8). Thus, no part of the Nation's interest on late rental claim is entitled to priority.

CONCLUSION

For the foregoing reasons, the Court should deny the Nation's Claim entirely or, in the alternative, specify the ways in which the Claim amounts should be calculated and deny or limit any priority the various amounts of the Claim are given under Section 508(a)(8).

DATED this 11th day of September, 2023.

PATEN, PETERMAN, BEKKEDAHL & GREEN, PLLC
PO Box 1239
Billings, MT 59103

By: /s/JA Patten
James A. Patten
Counsel for Debtor

CROWLEY FLECK PLLP
900 N Last Chance Gulch #200
Helena, MT 59601

By: /s/Neil Westesen
Neil Westesen
Uriah J. Price
Griffin B. Stevens
Special Counsel for Debtor

CERTICATE OF SERVICE

I, the undersigned, do hereby certify, under penalty of perjury, that on the 11th day September, 2023, a copy of the foregoing was served by electronic means pursuant to LBF 9013-1(d)(2) on the parties noted in the Court's ECF transmission facilities and/or by mail on the following: None

By: /s/JA Patten
For Patten, Peterman, Bekkedahl & Green, PLLC