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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re EAGLE BEAR INC. Debtor.	Case No. 4:22-bk-40035-11-WLH Chapter 11 **BLACKFEET INDIAN NATION'S POST-HEARING BRIEF IN SUPPORT OF PROOF OF CLAIM**

COMES NOW the Blackfeet Indian Nation, by and through counsel, and pursuant to the Order of the Court at the hearing on August 15, 2023, and hereby submits this Post-Hearing Brief in Support of its Proof of Claim.

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INTRODUCTION

1. At the two-day evidentiary hearing on August 14 and 15, 2023, testimony by William Brooke, Eagle Bear Inc.'s principal and agent, demonstrates that throughout the past 26-years, Eagle Bear capitalized on the incompetence and dysfunction of the United States Bureau of Indian Affairs (BIA), Trustee of the Blackfeet Indian Nation's land, to the exclusive financial detriment of the Blackfeet Nation. BIA's fundamental incompetence was raised at the hearing multiple times with Blackfeet Treasurer, Joe Gervais, testifying that through his work with Eloise Cobell he affirmatively knows BIA has "been wrong, very, very, very often." BIA's incompetence underscores the Blackfeet Nation's Proof of Claim and demonstrates why Eagle Bear has been able to get away with usurping Blackfeet Nation resources for so long, and why such a large amount of debt is owed, stemming back to year 1997.

2. Evidence presented at the hearing documented Eagle Bear's failure to pay past due interest on annual rent; failure to pay lodging facility tax; and failure to pay construction excise/TERO tax. Evidence demonstrated an assortment of rent/tax avoidance schemes Eagle Bear orchestrated over the years – the most obvious being Eagle Bear's promise to fund an escrow account with all prospective Lodging Facility Tax payments beginning in July 2017 until its dispute with the Blackfeet Nation was resolved. Under Eagle Bear's own calculations $539,276.17 should be currently funded and available in the escrow account. Yet, William Brooke testified under oath, the escrow account was never funded as promised by his attorney, Neil Westesen, on his behalf. At the time of Eagle Bear's commitment to fund an escrow account, Crowley Fleck Attorney Neil Westesen had actual and presumptive authority to bind Eagle Bear to this commitment and the Blackfeet Nation relied upon this representation.

3. Because the former Lease between the Blackfeet Indian Nation and Eagle Bear was cancelled on June 10, 2008, and such cancellation is final as a matter of law, the Blackfeet Nation's debt is based, in part, on the terms of the former Lease up to the date of cancellation – February 5, 2009 [1]; and in part, based on Blackfeet law, during Eagle Bear's illegal holdover tenancy on Blackfeet Indian Nation land following that date. [2] Even if Eagle Bear had a valid lease after February 5, 2009, which it does not, it would still be required indebted to the Blackfeet Nation in the latter period.

4. Starting with past due rent interest from 1997-2008, testimony at the hearing demonstrates there is no dispute that Eagle Bear did not pay this debt, and the applicable federal regulations, 25 C.F.R. § 162.614, require interest to run on past due rent until paid. Instead, Eagle Bear asserts that because the BIA did not issue an invoice for past due interest, it was waived. However, BIA and Eagle Bear cannot waive the interest requirement as they remain beholden to mandatory operation and requirements of the federal regulations which must be followed. The Blackfeet Nation proved by a preponderance of the evidence that Eagle Bear is liable for past due interest on annual payments from 1997-2008, amounting to $24,922.33.

5. Next, testimony at the hearing demonstrates that Eagle Bear was required to pay the Blackfeet Nation lodging tax for operations on Blackfeet Indian Nation trust land, but neglected to do so and instead, paid the wrong sovereign: the State of Montana. Evidence demonstrates that in late 2016 and early 2017 William Brooke wrote to the Blackfeet Nation

[1] Eagle Bear withdrew its appeal on January 5, 2008 and 31-days thereafter the cancellation became final – on or about February 5, 2009. See 25 CFR §§ 2.6(b), 162.621. Because the BIA failed to carry out its legal duty pursuant to the applicable law and regulations to evict Eagle Bear, Inc. after the lease cancellation became final, Eagle Bear continued to operate the campground under the pretense of the cancelled lease. The Blackfeet Nation was never consulted by the BIA after the 2009 withdrawal of Eagle Bear's appeal.

[2] From the Blackfeet Nation's inherent sovereign right to exclude, flow lesser powers, including the power to regulate non-Indian Eagle Bear's on its own Indian Nation Trust land, within the exterior boundaries of the Blackfeet Reservation. *See Water Wheel Recreational Area v. LaRance*, 642 F.3d 802, 809 (2011)

multiple times and represented that Eagle Bear should have been paying the Blackfeet Lodging tax since 1997. Eagle Bear even filed a lawsuit against the State of Montana alleging similar arguments here – that it doesn't have to pay the State lodging tax – basing its case on the applicability of the Blackfeet Nation's tax on Eagle Bear's operations. Eagle Bear's lawsuit against the State waived the legal arguments it presents today against the Blackfeet Nation. Eagle Bear is not being singled out as it alleges. As demonstrated, other campgrounds and lodging establishments pay the Blackfeet Nation's lodging tax. The Blackfeet Nation proved by a preponderance of the evidence that Eagle Bear owes the Blackfeet Nation $4,107,896.60 in past due lodging facility tax.

6. Finally, Eagle Bear contracted to pay Blackfeet Construction Excise/TERO taxes under the former Lease. Because those taxes are based on contract – the former Lease – which was terminated after the 2008 construction season, the Blackfeet Nation seeks to collect past due taxes up until February 5, 2009. While typically these Blackfeet taxes are paid by the contractor, there is a miscellaneous provision in the former Lease requiring Eagle Bear to insure payment for taxes on construction on Blackfeet land. The Blackfeet Nation used Eagle Bear's own numbers to determine the amount of tax owed. Eagle Bear failed to present enough probative facts to overcome its burden to counter the Blackfeet Nation's proof of claim. Rather, Eagle Bear simply relies on its interpretation of Blackfeet Law because it is not a contractor while ignoring the binding commitment it made in the former Lease to assume the obligation of those construction related taxes. Eagle Bear should not be authorized to ignore its contractual obligations for which it owes the Blackfeet Nation $1,375,122.45 in past due Construction/TERO taxes.

7. The Blackfeet Nation demonstrated by a preponderance of the evidence that former lessee Debtor Eagle Bear owes the Blackfeet Nation $5,466,862.51 in past due taxes and rent interest. There is no statute of limitations under Blackfeet law for the Blackfeet Nation's recovery of debt. Eagle Bear is bound by the laws of the Blackfeet Nation for its operations on Blackfeet Indian Nation land, which includes Ordinance 51.

8. Because Blackfeet lodging facility tax and construction excise/TERO taxes are based on gross revenue of the amounts collected, and are collected by Eagle Bear from third parties for the governmental unit Blackfeet Nation, Eagle Bear tax debt is subject to priority in this bankruptcy estate under 11 U.S.C § 507(a)(8)(c). Moreover, Eagle Bear's dispute over past due taxes is not subject to arbitration, nor is it stayed by this bankruptcy.

9. The Court should overrule Eagle Bear's Objection to the Blackfeet Nation's Proof of Claim and require that Eagle Bear pay monies due and owing to the Blackfeet Nation since 1997, as set forth herein.

BURDEN OF PROOF

10. A proof of claim is deemed allowed unless a party in interest objects under 11 U.S.C. § 502(a) and constitutes *prima facie* evidence of the validity of the claim" pursuant to Bankruptcy Rule 3001(f). *See also* Fed. R. Bankr.P. 3007. The filing of an objection to a proof of claim "creates a dispute which is a contested matter" within the meaning of Bankruptcy Rule 9014. *See Adv. Comm. Notes* to Fed. R. Bank.P. 9014. Upon objection, the proof of claim provides "some evidence as to its validity and amount" and is "strong enough to carry over a mere formal objection without more." *Wright v. Holm (In re Holm)*, 931 F2d 620, 623 (9th Cir. 1991)(quoting 3 L. King, Collier on Bankruptcy § 502.02, at 502-22 (15th Ed, 1991).

11. To defeat the claim, the objection must come forward with sufficient evidence and "show facts tending to defeat the claim by probative force equal to that of the allegations of the proofs of claim themselves." *In re Holm*, 931 F.2d at 623. If the objector produces sufficient evidence to negate one or more of the sworn facts in the proof of claim, the burden reverts to the claimant to prove the validity of the claim by a preponderance of the evidence. *Ashford v. Consolidated Pioneer Mort. (In re Consol. Pioneer Mort.)*, 178 B.R. 222, 226 (9th Cir. BAP 1995) *aff'd* 91 F.3d 151, 1996 WL 393533 (9th Cir. 1996). The burden of persuasion remains at all times upon the claimant.

DISCUSSION

12. Eagle Bear failed to introduce sufficient evidence at the evidentiary hearing to defeat the Blackfeet Nation's Proof of Claim. As shown below, the Blackfeet Nation demonstrated by a preponderance of the evidence that Eagle Bear owes the Blackfeet Nation for (I) past due interest on past due annual rent; (II) past due Lodging Facilities Tax; and (III) past due Construction Excise/TERO taxes. Eagle Bear's Objection should be overruled.

I. PAST DUE INTEREST ON ANNUAL RENT (1997-2008)

a. Terms of the Former Lease and Applicable Federal Regulations

13. Under Sections 5 and 6 of the former Lease, rent was due on November 30th of each year without notice or demand. Doc. 211-1 at 5-6 (Exhibit A, §§ 5(B) & 6); Exhibit LLLL, Day 1 Hearing Transcr. 97:5-7. Any past-due rental payments bear interest at the Wall Street Journal prime rate, plus 3%, and interest runs from the date the payment is due until the payment is made. Doc. 211-1 at 5-6 (Exhibit A, § 6); Exhibit LLLL, Day 1 Hearing Transcr., 97:25 - 98:5.

14. Under the federal regulations, interest charges and late penalty will apply in absence of any specific notice to the tenant from [BIA] or the Indian landowners, and the failure to pay such amounts will be treated as a lease violation…". 25 C.F.R. 162.614. Eagle Bear agreed interest would be due on past due annual rental without notice or demand, Exhibit LLLL, Day 1 Hearing Transcr., 99:2-4, and that Eagle Bear was obligated to know the past due interest amount to pay on late rent. Id. at 101:20-22.

15. Indeed, the Bankruptcy Court must follow and apply federal Indian leasing law when dealing with Indian trust land. *In re Shape*, 25 B.R. 356 (Mont. B.R. 1982). That includes 25 C.F.R. 162.614, and the terms of the cancelled Lease.

b. Evidence Demonstrates that Eagle Bear owes outstanding interest on past due annual rent.

16. On November 17, 2021, the Federal District Court found that Eagle Bear failed to pay annual rent on time, leading up to the 2008 cancellation, as follows:

> It appears from the record that Eagle Bear failed to uphold the terms of the lease. The lease required an annual payment of rent and royalties on November 30 of each year. (Doc. 1-2 at 4-5.) The record before the Court shows that Eagle Bear's 1997 rent payment was 32 days delinquent; the 1998 rent payment was 269 days delinquent; the 1999 rent payment was 272 days delinquent; the 2000 rent payment was 259 days delinquent; the 2001 rent payment was 229 days delinquent; the 2002 rent payment was 907 days delinquent; the 2003 rent payment was 207 days delinquent; the 2004 rent payment was 260 days delinquent; and the 2005 rent payment was 202 days delinquent. (Doc. 14-1 at 6-8.)…
>
> When Eagle Bear failed to pay the 2007 rent…on the 193rd day without Eagle Bear's payment—75 days after the initial 10-day notice—the BIA finally took action. The BIA superintendent cancelled the lease between Eagle Bear and the Blackfeet Nation on June 10, 2008. (Doc. 14-1 at 3.) The BIA Superintendent informed Eagle Bear "that this lease is hereby cancelled." (Id.)

Doc. 214-1 at 4-5 (Exhibit FFFF, 4-5).

17. At the evidentiary hearing, Eagle Bear confirmed the District Court's calculation of past due annual rent late from 1997 through 2007 was correct. BIA's accounting of rent payments under the former Lease confirms this testimony and demonstrates that Eagle Bear paid rent late without paying the required interest. Doc. 211-2 at 1-3 (Exhibit B).

18. Consistent with its practice in prior proceedings, Eagle Bear does not take responsibility for its failures but blames someone else – this time the BIA. William Brooke testified that because he did not receive a bill or demand from BIA on past due rent interest, Eagle Bear did not have to pay it. Exhibit LLLL, Day 1 Hearing Transcr. 101:2-4. However, when cross-examined about Eagle Bear's requirements under the former Lease, he testified it was Eagle Bear's obligation to pay rent on-time and calculate interest when due, and that he never calculated the interest due on late annual rent payments. *See* Exhibit LLLL, Day 1 Hearing Trancr., 99:2-4; 101:20-22; 142:7-9. Moreover, Mr. Brooke testified that Eagle Bear's 2022 payment of $105,870 on past due interest for failure to pay royalty payments in 2004, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014 was made without ever receiving an invoice from BIA demanding payment for past due interest. Id. at 137:10 – 22; *see also* Doc. 211-45 (Ex. SS). There is no probative force to the assertions Eagle Bear has presented in feeble attempt to escape its obligations. Eagle Bear would like to cover its eyes and pretend that it had no contractual obligations because it cannot see them – a practice this Court should not condone. Simply, Eagle Bear owes the Blackfeet Nation $24,922.33 in past due interest.

c. BIA cannot waive the Federal Regulations and the Blackfeet Nation is Not Bound by BIA's Negligence

19. Eagle Bear asserts that it does not have to pay interest because BIA made the baseless assertion in a discovery response that Eagle Bear is "current" on all rent payments. Exhibit LLLL, Day 1 Hearing Transcr. 86:2-4. However, Eagle Bear and the BIA remain

beholden to the federal regulations. *See* Doc. 214-1 at 13 (Exhibit FFFF) *citing* 25 C.F.R. § 162.001 et seq.; *see also Moody v. United States,* 931 F.3d 1136, 1142 (2019). Eagle Bear cannot use BIA's baseless and incorrect assertion to waive the federal regulations governing the former Lease. See Id.

20. Put another way, Eagle Bear cannot use the BIA's incompetence to justify nonpayment of debt. The Presidential Commission on Indian Reservation Economies found "incompetent BIA Asset Management" of tribal resources and "[BIA] exercises a monopoly power over leasing which interferes with tribal decision making." Doc. 212-29 at 7 (Exhibit CCCC). Most alarming is that the Presidential Commission found "the [BIA] system is designed for paternalistic control and thrives on the failure of Indian tribes." Id. at 3. The Select Committee on Indian Affairs, United States Senate, similarly found that "BIA's mismanagement is manifest in almost every area the Committee examined." Doc. 212-30 at 2 (Exhibit DDDD). And the Court observed that these problems, although in a different context, "are still happening today" with regards the instant case. Exhibit MMMM, Day 2 Hearing Transcr., 12:12-23.

21. Fortunately, Indian Nations and Indian People are not bound by BIA's negligence. *Sessions, Inc. v. Morton*, 491 F.2d 854, 857 n.5 (9th Cir. 1974)(Honorable Russell E. Smith sitting by designation); *Strom, et al. v. Northwest Regional Director*, 44 IBIA 153, 165-166 (2007)("If in fact BIA employees gave erroneous advice, that advice does not override applicable laws and regulations") *citing Flynn v. Acting Rocky Mountain Regional Director*, 42 IBIA 206, 213 (2006)(erroneous advice by BIA could not operate to grant rights not authorized by law or inconsistent with the regulations). Moreover, individuals dealing with the government are presumed to have knowledge of the duly promulgated regulations. *Flynn*, 42 IBIA at 212.

22. Here, BIA's baseless assertion that Eagle Bear is "current" and its failure to enforce payment of past due interest on annual rentals is an example of BIA's fundamental incompetence and gross negligence in managing Blackfeet Nation resources. The BIA's failures do not create any rights for Eagle Bear or otherwise allow them to escape their contractual obligations to the Blackfeet Nation. There is no probative force in the purported evidence Eagle Bear has offered to object to the Blackfeet Nation's claim. Eagle Bear and Brooke should have known the applicable federal regulations affecting the former Lease and the requirement to pay interest. They are presumed to have knowledge of the duly promulgated regulations and should have known that if they did not pay interest on past due rent, such failure would be treated as a lease violation. *Flynn*, 42 IBIA at 212 *compare with* 25 C.F.R. 162.614.

23. Eagle Bear is required to pay past due interest pursuant to the federal regulations and terms of former lease: the actions of BIA officials did not waive the federal regulations or terms of the former lease. A tenant acquires no rights for holding over after a lease is cancelled; the tenant is considered a trespasser. 25 CFR § 162.623; *see also* Doc. 211-1 at 30 (Exhibit A Lease § 43)(holding over by the Lessee after the termination or expiration of this lease shall not constitute a renewal or extension thereof or give the Lessee any other rights). Therefore, Eagle Bear remains responsible to pay interest on past due rent and did not acquire any rights during its holdover tenancy to withhold payment. Further, Eagle Bear was not absolved of its financial obligations under the Lease following cancellation. As such, it remains due and owing to the Blackfeet Nation

II. PAST DUE LODGING FACILITY TAX

a. ***William Brooke's quid pro quo testimony that 'royalties were paid in lieu of taxes' is excluded from evidence under the Parol Evidence Rule as the former Lease clearly requires Eagle Bear to follow all Blackfeet Ordinances and laws and pay all taxes.***

24. Eagle Bear negotiated the terms of the former Lease and understood Eagle Bear's obligations thereunder. Exhibit LLLL, Day 1 Hearing Transcript, 94:18-24.

25. Under Section 11 of the former Lease, entitled "RESERVATION LAWS AND ORDINANCES," Eagle Bear agreed that it "shall abide by all laws, regulations, and ordinances of the Blackfeet Nation, in force and effect during the term of this lease and any extension thereafter." Doc. 211-1 at 10 (Exhibit A § 11). And under Section 19 of the former Lease, entitled, "LIENS, TAXES, ASSESSMENTS, AND UTILITY CHARGES" Eagle Bear agreed that it "shall pay, when as the same become due and payable, all taxes, assessments, licenses, fees, and other like charges levied during the term of this lease upon against the leased land, all interests therein and property thereon for which either the lessee or lessor may become liable." *Id.* at 17-18 (Exhibit A § 19). When read together, Sections 11 and 19 of the former Lease affirmatively require Eagle Bear to pay the Blackfeet Nation's lodging tax.

26. Documents introduced into evidence demonstrate that BIA believed Eagle Bear was required to pay the Blackfeet lodging tax under the former Lease. On August 7, 2017 the former BIA Superintendent Thedis Crowe sent a letter to William Brooke, stating numerous violations of the former Lease, including the following violations:

Section 11	Reservation Laws & Ordinances	Failure to abide by Laws & Ordinance promulgated by the Blackfeet Tribe including Ordinance 86 – Blackfeet Comprehensive Tax Code and Tribal Resolution no. 162-92 Lodging Facilities Use Tax
Section 19	Liens, Taxes, Assessments and Utility Charges	Failure to Pay Taxes per the lease agreement.
Section 32	Accounting and Audits	Failure to provide lessor and Secretary a **CERTIFIED** audit report of gross registration receipts, annually, 45 days after the 31st days of December, each year.

Doc. 211-49 at 2.

27. The letter provides that Eagle Bear "has 10 days from receipt of this notice to cure the violations" which included the requirement to "[p]rovide proof of payment of taxes paid to the Tribe." *Id.* Eagle Bear never paid the required taxes to the Blackfeet Nation, and on October 17, 2017, BIA cancelled this lease for a second time. Doc. 211-51 (Exhibit WW); *see also* Exhibit MMMM, Day 2 Hearing Transcr. 36:19-37:6.

28. William Brooke repeatedly testified that he believed royalty payments were made in lieu of taxes, but nowhere in the four corners of the Lease does it say this. The former Lease clearly requires "all taxes" to be paid and all Blackfeet laws and ordinances followed. William Brooke admitted during his testimony that the former Lease was "silent" on his purported *quid pro quo* waiving the Blackfeet lodging tax. Exhibit MMMM, Day 2 Hearing Transcr. 25:8-12. Brooke's current belief that Eagle Bear should be relieved from contractual obligations because of an alleged agreement made in negotiations is misplaced because the former Lease is clear: Eagle Bear was required to pay "all taxes." William Brooke's *quid pro quo* testimony is precluded from evidence under the Parol Evidence Rule.

29. The Parol Evidence Rule prohibits the introduction of any evidence which adds to or varies the terms of a written agreement if the agreement appears to be complete and unambiguous, *In re Crystal Palace Gamling Hall, Inc.*, 36 B.R. 947, 955 (9th Cir. BAP 1984) *citing Sims v. Grubb,* 75 Nev. 173, 336 P.2d 759 (1959), and applies to written leases. *In re Crystal Palace Gamling Hall, Inc.*, 36 B.R. at 955 *citing DeRemer v. Anderson*, 41 Nev. 287, 169 P. 737 (1918).

30. In this case, the former Lease is clear and unambiguous and states that Eagle Bear "shall pay, when as the same become due and payable, all taxes…". In addition to the plain operation of the laws of the Blackfeet Nation requiring Eagle Bear to pay taxes, the BIA's show

cause letter on August 7, 2017 further demonstrates that Eagle Bear was required to pay Blackfeet lodging taxes. In light of this affirmation, it cannot be inferred from the four corners of the former Lease that Eagle Bear was not required to pay lodging taxes. Moreover, since William Brooke signed the former Lease as principal and agent of Eagle Bear, and testified contrary to the clear express terms of the former Lease, the Parol Evidence Rule bars his *quid pro quo* testimony from evidence, and it cannot be considered. *See In re Crystal Palace Gambling Hall, Inc.*, 36 B.R. at 955 citing *Anderson v. Simmons,* 90 Nev. 23, 24, 518 P.2d 160 (1974). Eagle Bear has failed to provide the probative evidence or facts to overcome the Blackfeet Nation's Proof of Claim for past due lodging tax.

b. <u>The Blackfeet Nation has regulatory authority to collect lodging taxes from Eagle Bear for commercial activities on Blackfeet Indian Nation Trust Land during its holdover tenancy.</u>

31. Based on its inherent power to exclude as "gatekeeper" of its own land, the Blackfeet Nation has regulatory jurisdiction to assess taxes on Eagle Bear for its commercial activities on Blackfeet Indian Nation land, both before and after February 5, 2009 -- during Eagle Bear's tenancy and holdover tenancy.

32. As the United States Supreme Court recently acknowledged, it long ago:

> described Indian tribes as "distinct, independent political communities" exercising sovereign authority. *Worchester v. Georgia,* 6 Pet. 515, 559 (1832). Due to their incorporation into the United States, however, the "sovereignty that the Indian tribes retain is of a unique and limited character." *United States v. Wheeler*, 435 U.S. 313, 315 (1978). Indian tribes may, for example, determine that tribal membership, regulate domestic affairs among tribal members and **exclude other from entering tribal land**. *See, e.g., Plains Commerce Bank v. Long Family Land & Cattle Co.,* 544 U.S. 316, 327-328 (2008). On the other hand, owing to their "dependent status," tribes lack any "freedom independently to determine their external relation" and cannot, for instance, "enter into direct commercial or governmental relations with foreign nations." *Wheeler*, 435 U.S., at 326.

United States v. Cooley, 141 S.Ct. 1638, 1642 (2021) (emphasis added).

33. In *Montana v. United States*, 450 U.S. 544 (1981), the U.S. Supreme Court announced a general rule that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana*, 450 U.S. at 565. This prohibition on tribal authority is strongest when the non-member activity occurs on non-Indian fee simple land (as opposed to land held in trust for Indians or an Indian Nation). *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 328 (2008); *Strate v. A-I Contractors*, 520 U.S. 438, 446 (1997). The status of the land is the determinative factor: if the land has not been alienated (that is the Indian Nation retains the right to exclude), then the Indian Nation retains "considerable control" over non-member conduct on its own lands. *Strate*, 420 U.S. at 454.

34. When the Indian Nation possesses authority to regulate the activities of non-members, civil jurisdiction presumptively lies with the Indian Nation unless affirmatively limited by a specific treaty or statute. *Strate*, 520 U.S. at 453. Where the non-Indian conduct occurs on Indian land, the Indian Nation's inherent power to exclude provides a basis for jurisdiction. *Water Wheel Camp Recreation Area v. LaRance*, 642 F.3d 802, 809 (9th Cir. 2011); *Grand Canyon Skywalk Development LLC v. Sa Nyu Wa Incorporated*, 715 F.3d 1196 (9th Cir. 2013).

35. In *Water Wheel Camp Recreation Area v. LaRance*, a non-Indian corporation owned and controlled by a non-Indian, had a lease with an Indian Nation for a portion of the Nation's land within its reservation. *Water Wheel Camp Recreation Area*, 642 F.3d at 805. When the lease expired and the non-Indian corporation and its non-Indian owner held over, the Indian Nation filed a lawsuit in the Indian Nation court against both the corporation and the owner. Id. The non-Indian corporation and its non-Indian owner filed a jurisdictional challenge in the Federal court. Id. at 506.

36. On appeal, the Ninth Circuit Court of Appeals held because the non-Indian conduct occurred on Indian Nation land the general rule of *Montana* did not apply, and that because there was no overriding state interest *(Nevada v. Hicks*, 533 U.S. 353 (2001)), the Indian Nation had jurisdiction pursuant to its inherent power to exclude. Id. at 814. *See also Grand Canyon Skywalk Development LLC v. Sa Nyu Wa Incorporated*, 715 F.3d 1196 (9th Cir. 2013).

37. The Ninth Circuit went on to state:

> In this instance, where the non-Indian activity in question occurred on tribal land, the activity interfered directly with the tribe's inherent powers to exclude and manage its own lands, and there are no competing state interests at play, the tribe's status as landowner is enough to support regulatory jurisdiction without considering Montana. Finding otherwise would contradict Supreme Court precedent establishing that land ownership may sometimes be dispositive and would improperly limit tribal sovereignty without clear direction from Congress.

Water Wheel Camp Recreation Area, 642 F.3d at 811-812.

38. The Ninth Circuit closed its discussion of Indian Nation jurisdiction based on the inherent power to exclude by holding as follows:

> Here, the land is tribal land and the tribe has regulatory jurisdiction over Water Wheel and Johnson. While it is an open question as to whether a tribe's adjudicative jurisdiction is equal to its regulatory jurisdiction, the important sovereign interests at stake, the existence of regulatory jurisdiction, and long-standing Indian law principles recognizing tribal sovereignty all support finding adjudicative jurisdiction here. Any other conclusion would impermissibly interfere with the tribe's inherent sovereignty, contradict long-standing principles the Supreme Court has repeatedly recognized, and conflict with Congress's interest in promoting tribal self-government. Accordingly, we hold that in addition to regulatory jurisdiction, the CRIT has adjudicative jurisdiction over both Water Wheel and Johnson.

Id. at 816.

39. The only difference between *Water Wheel Camp* and the instant case, is that in *Water Wheel* the lease expired, and the non-Indians were holding over; and in this case the lease was cancelled, and the non-Indians are holding over. Under either scenario, the Indian Nation

retains regulatory and adjudicatory jurisdiction over its own land, which includes the inherent sovereign right to assess and collect taxes for commercial activities thereon. And because there are no overriding state interests at play – Eagle Bear asserts that 25 C.F.R. 162.017 preempts any State taxation – the Blackfeet Nation unequivocally has the sovereign right, based on its power to exclude, to collect lodging tax from Eagle Bear for commercial activities under the terms of the former lease and during its holdover tenancy. See Doc. 211-29 (Ex. CC) & Doc. 211-31 (Ex. EE).

c. The Blackfeet Lodging Facility Tax Code requires that taxpayer Eagle Bear pay 6% tax on gross registration receipts for lodging taxes less 1% of past due obligation at time of payment, and Eagle Bear's failure to complete any tax reporting or audit reports since 1997, prevented the Blackfeet Nation from calculating an estimated tax.

40. Under the Blackfeet Lodging Tax Code, there is a tax imposed on the "user of a lodging facility within the Reservation…at a rate equal to 6% of the accommodation charges collected by the facility." Doc. 211-17 at 2 (Exhibit Q, Section 1.5(a)). The owner or operator of a facility shall be allowed to retain 1% of the Lodging Tax due for administrative costs and expenses on the amount due at the time of payment. Id. at 3, (Section 1.5(b)). The Blackfeet Nation's Revenue Department has interpreted the 1% administrative fee to be 1% of the tax owed at the time of collection. Exhibit MMMM, Day 2 Hearing Transcr.143:19-144:3.

41. The Code defines "Lodging" as a "means for accommodation intended for the purpose of sleeping or resting" and specifically includes accommodations at "campgrounds." Id. at 1-2 (Sections 1.4(f) and (b)). This tax is a "fee charged by the owner or operator of a facility **for use of the facility** for lodging…". Id. (Section 1.4(a) (emphasis added)). In other words, in this case, the tax is for use of the Blackfeet Nation's land and facilities thereon. *See id. compare with* Exhibit MMMM, Day 2 Hearing Transc. 79:3-11; 80:16-20.

42. The "owner or operator" of a facility is "a person or organization who rents a lodging facility to the public and is ultimately responsible for the financial affairs of the facility." As such, Eagle Bear is the "operator" of the campground pertaining to the tax debt at issue in this case. Doc. 211-17 at 2 (Exhibit Q, Section 1.4 (g)). Because "[e]very owner or operator of a facility shall be liable for all amounts required to be collected as a tax under this Code, and with respect thereto, the owner or operator shall be considered the taxpayer" Eagle Bear is solely responsible for the past due lodging tax that should have been assessed on all guests. Id. at 3, (Section 1.8(b)).

43. Under the tax code, any 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. Id. at 5 (Section 1.13(d)). It is the practice of the Blackfeet Nation and BIA to compound interest on past due rent and taxes. Exhibit MMMM, Day 2 Hearing Transc. 117:10-12 *compare with* Doc. 211-45 (Exhibit SS). And the Blackfeet Nation's Proof of Claim for past due tax is conservative as it did not include a Penalty for Failure to File Report or Penalty for Failure to Pay Tax. Doc. 211-17 at 5 (Exhibit Q, Sections 1.13(a) and (b)); *see also* Exhibit MMMM, Day 2 Hearing Transcr. 120:9-19, referencing Doc. 211-23 (Exhibit W); Id. at 119:21-120:7 referencing Doc. 211-22 (Exhibit V).

44. Because Eagle Bear never submitted its required audits, it operated under the radar, and precluded the Blackfeet Nation from calculating what was due to it. These required audit reports were only provided to BIA and the Blackfeet Nation in August 2017 *after* Eagle Bear made the promise to the Blackfeet Nation in July 2017 that it would fund an escrow account of all prospective lodging tax payments due, until its dispute with the Blackfeet Nation was resolved. Exhibit MMMM, Day 2 Hearing Transcr. 81:3 – 83:3, referencing Doc. 211-37

(Exhibit KK) Letter from BIA to William Brooke, received by Brooke on 3/23/2017, and Doc. 211-49 (Exhibit WW – Show cause letter of 8/7/2017); *compare with* Doc. 211-44 (Exhibit RR) Letter from Eagle Bear's counsel to Blackfeet Tribal Tax Department dated July 31, 2017.

45. These audits reports provide the basis for the Blackfeet Nation's Proof of Claim from 2004-2021 [3], and the basis for the amount of funds that Eagle Bear was required to pay into the escrow account: $539,276.17. Exhibit MMMM, Day 2 Hearing Transcr. 17:22-18:9.

d. Eagle Bear is legally obligated to pay at least $539,276.17 to the Blackfeet Nation in lodging tax – the sum of the required escrow account – under Eagle Bear's counsels' authority to bind its client.

46. William Brooke and the Crowley Fleck firm enjoyed an agent-principal relationship for tax matters regarding its commercial activities on Blackfeet Nation land, and therefore, Crowley's representation that a tax escrow account was formed and funded beginning in July 2017 is binding on Eagle Bear, even though it was never funded. The Blackfeet Nation relied on this representation to mean that Eagle Bear would be remitting payment voluntarily for the lodging tax obligations, which Eagle Bear acknowledged should have been paid to the Blackfeet Nation.

47. Because the attorney serves as a special agent, the scope of his authority is confined to only those actions necessary to accomplish the specific purpose for which he is employed. *McCoy, Carol A., An Attorneys Implied Authority to Bind His Client's Interests and Waive His Client's Rights, The Journal of the Legal Profession, University of Alabama, p.138, retrieved from https://www.law.ua.edu/pubs/jlp_files/issues_files/vol03/vol03art09.pdf citing Loftberg v. Aetna Cas. & Sur. Co.* 264 Cal. App. 2d 306, 308, 70 Cal, Rptr 269, 270 (1968), and

[3] Because Eagle Bear never submitted any audit reports from 1997-2003, the Blackfeet Nation used the BIA's accounting to assess lodging facility tax. Exhibit 2, Day 2 Hearing Transcr. 101:11-16.

State ex rel. Montgomery v. Goldstein, 109 Or. 497, 220 P. 565, 567 (1923). Under the Rules of Professional Conduct, the lawyer may take such action on behalf of the client as is implied authority to carry out the representation. *Montana Rules of Professional Conduct, Rule 1.2.* Within this scope, the client is bound by not only by his attorney's affirmative acts or commissions but also by his attorney's omissions. *McCoy, Carol A., An Attorneys Implied Authority to Bind His Client's Interests and Waive His Client's Rights, The Journal of the Legal Profession, p.140* (citations omitted).

48. The lawyer's implied and apparent authority is binding on the client if representations are made within his scope of his authority. *Montana Rules of Professional Conduct, Rule 1.2.* Apparent authority exists when two elements are met: (1) manifestation by the principal that the agent has authority and (2) reasonable reliance on that manifestation by the person dealing with the agent. *In re Mathews*, 565 B.R. 662, 667-68 (D. Idaho 2017). Indeed, lawyers have an imply an authority to speak on behalf of a client in certain occasions. *Hanson v. Waller*, 888 F.2d 806, 814 (11 Cir. 1989)

49. Here, Crowley Fleck had implied, apparent, and actual authority to bind Eagle Bear to fund the escrow account for all prospective lodging tax payments beginning in July 2017, pending resolution of the Blackfeet Nation's dispute with Eagle Bear. Indeed, leading up to the proclamation by Crowley Fleck that Eagle Bear would fund an escrow account with all prospective tax payments, the Blackfeet Nation had been receiving various forms of correspondence from Crowley Fleck regarding Eagle Bear's tax dispute and intent to pay the Blackfeet Nation. *See* Doc. 211-32 (Exhibit FF) attaching Doc. 211-31 (Exhibit EE). Indeed, three (3) attorneys at Crowley Fleck were copied on William Brook's email dated January 23, 2017 to undersigned and the Blackfeet Revenue Director (kboy@blackfeetnation.com) that said:

> Our counsel at Crowley Fleck advises me that Mike Green with Crowley's Helena office met with the Montana Department of Revenue (Kory Hofland) on Firday (sic) to discuss the prior letters sent on our behalf concerning the issue of dual taxation and **our request for a refund of monies paid that should have been paid to the Tribe.**

Doc. 211-33 (Exhibit GG)(emphasis added).

50. At this time in January 2017, William Brooke admitted, and Crowley Fleck did not object, to the statement that Eagle Bear should have paid all lodging taxes to the Blackfeet Nation since the inception of the cancelled lease in 1997, for commercial activities on Blackfeet Nation land. *Id.;* Exhibit LLLL, Day 1 Hearing Transcr. 178:9-179-3.

51. On April 28, 2017, after the Blackfeet Nation sent a Notice of Default to William Brooke for failure to pay lodging taxes among other things, William Brooke informed the Blackfeet Chairman that Eagle Bear turned this matter over to its attorneys for a response. Doc. 211-40 (Exhibit NN) *compare with* Doc. 209-17 at 2-3 (Exhibit 17). In other words, there was a manifestation by the principal, William Brooke, that the agent Crowley Fleck had authority over the matters contained within the Notice of Default, which included Eagle Bear's failure to pay lodging taxes. Moreover, William Brooke testified that he gave his attorney actual authority and that "every letter" sent by his attorney "is authorized by [Brooke] to send." Exhibit LLLL, Day 1 Hearing Transc. 208:12-17. Based on the correspondence between the Blackfeet Nation and Eagle Bear regarding lodging taxes, which directly involved Crowley Fleck, there was reasonable reliance by the Blackfeet Nation on the manifestation by Crowley Fleck that an escrow account would be formed and funded beginning in July 2017.

52. Therefore, Crowley Fleck bound its client Eagle Bear to fund the escrow account after notifying the Blackfeet Revenue Director and BIA [4] of this remedy to deal with all

[4] The BIA stamp on the lower left-hand corner of the letter shows that BIA Blackfeet Agency Browning Montana received this letter, and the cc: to Superintendent Thedis Crowe. Doc. 211-44 (Exhibit RR)

prospective Blackfeet lodging facility tax payments from Eagle Bear during its dispute with the Blackfeet Nation. Doc. 211-44 (Exhibit RR) *Letter from Eagle Bear's counsel to Blackfeet Tribal Tax Department dated July 31, 2017*. Crowley Fleck, as the special agent for Eagle Bear regarding all tax matters on Blackfeet Nation land had implied, apparent and actual authority to bind Eagle Bear to fund the escrow account. The Court should order that Eagle Bear fund the escrow account and release it to the Blackfeet Nation pursuant to Eagle Bear's unequivocal duty and responsibility to pay the Blackfeet Nation's lodging tax for commercial activities on Blackfeet Indian Nation Trust land.

e. Eagle Bear is not being "singled out" and admits that it is required to pay the Blackfeet lodging tax for commercial activities on Blackfeet Indian Nation land.

53. The Blackfeet Nation introduced documentary evidence demonstrating that other campgrounds and lodging facilities located within the exterior boundaries of the Reservation pay the Blackfeet lodging tax. Doc. 215-1 at 1-6 (Exhibit GGGG). The Blackfeet Treasurer testified that just because an owner or operator may not be on the list produced by the Blackfeet Revenue Department does not mean they are not required to pay. Exhibit MMMM, Day 2 Hearing Transcr. 118:22-25. The Treasurer also testified and produced evidence demonstrating that the Blackfeet Nation treats lodging taxation at Blackfeet owned and operated campgrounds like the State of Montana treats lodging taxation at State owned and operated campgrounds. Id. at 119:1-20; see Docs. 218-1, 218-2, 218-3 (Exhibits IIII, JJJJ, KKKK). In this regard, the Treasurer testified that it would create more administrative burden for the Blackfeet owned campgrounds to pay a separate line item for lodging taxes where all revenues generated by these campgrounds were being paid into the Blackfeet Nation's coffers anyway. Exhibit MMMM, Day 2 Hearing Transc. 119:1-20.

54. Moreover, Blackfeet law does not require that there be a line item for taxation on an accommodations invoice, and there are some private owners and operators on the Reservation who pay the Blackfeet Lodging tax without separating it in the invoice. Exhibit MMMM, Day 2 Hearing Transcr. 118:9-11. Eagle Bear is clearly not being singled out as it protests.

55. William Brooke further testified that other lodging facility establishments are actually paying the lodging tax. Exhibit LLLL, Day 1 Hearing Transcr. 215:15-17. But he testified that Eagle Bear is still being singled out because "the tribal campgrounds don't pay it, don't collect it. And, yet, [it] want[s] us to." *Id.* at 215:17-22; *see also id.* at 219:12-15. It appears that William Brooke was so desperate to gin up evidence that Eagle Bear was being singled out that he perjured himself, testifying that the State of Montana "absolutely does" charge lodging taxes when it affirmatively does not. Exhibit LLLL, Day 1 Hearing Transcr. 216:8-10 *compare with* Docs. 218-1, 218-2, 218-3. The Blackfeet Nation has modeled its lodging tax off the State of Montana's system and the Blackfeet Nation treats taxation at its campgrounds like the State. Doc. 211-16 at 1 (Exhibit P). Mr. Brooke failed to provide any probative evidence demonstrating that Eagle Bear is being singled out or that other similar entities are not responsible to pay the required lodging tax.

56. Contrarily, William Brooke admits Eagle Bear paid the wrong sovereign – it should not have paid the State of Montana any lodging taxes for commercial operations on Indian Trust land – and it was seeking return of the some $1,400,000 of lodging taxes "that should have been paid to the Tribe." Doc. 211-33 (Exhibit GG) *compare with* Doc. 212-31 at 4 ¶ 15. Indeed, Mr. Brooke testified as follows:

a. "That [lodging tax] money belongs to the Tribe not [the State] and the [State] can't double tax us." Exhibit LLLL, Day 1 Hearing Transcr. 3-6.

b. "What prompted [Eagle Bear] to file suit with the State was there was a CFR on point that said the State could not double tax when the Tribe had elected to collect the tax." *Id.* at 203:17-20 referencing 25 C.F.R. § 162.017.

c. Eagle Bear paid the State's tax under protect since 2013 "in light of the Tribe's tax." *Id.* at 204:18-20 *compare with* 201:4-7.

d. "[W]e should be paying the Tribe instead of the State…We want to pay the Tribe, instead, and still do today... Exhibit MMMM, Day 2 Hearing Trancr. 48:23-49:3.

e. Eagle Bear made lodging tax payments to the Blackfeet Nation in 2022 because "we did not want to run afoul of the Bankruptcy Court. That if there had been a decision that we owed that money, and we hadn't collected it, that would be a problem for us." Exhibit LLLL, Day 1 Hearing Transcr. 193:16-20.

57. However, Mr. Brooke's declared ambition to avoid dual taxation by suing the State while not paying the Blackfeet Nation tax, rings hollow. Eagle Bear's active lawsuit against the State of Montana seeks to enjoin State lodging tax on Eagle Bear's operations because it believes it is required to pay the Blackfeet Lodging Tax under the federal regulations for "activities conducted in and on Indian trust lands located entirely within the Blackfeet Reservation." Doc. 212-31 at 3-5, ¶¶ 16, 19, 22, 23 (Exhibit EEEE). The Blackfeet Nation agrees with Eagle Bear's lawsuit against the State that Eagle Bear owes back taxes to the Blackfeet Nation. However, Eagle Bear would have its cake and eat it too by its attempt to avoid any taxation by either sovereign. Telling of its tactics, Eagle Bear argues it is being singled out **by the State**. Id. at 4,7-8, ¶¶17,33-39 (emphasis added). Eagle Bear should be estopped from

making the same arguments against the Blackfeet Nation, that it currently maintains in active litigation against the State, as it readily admits it should have paid, and is required to pay, the Blackfeet Nation lodging tax.

58. Eagle Bear's Complaint against the State of Montana references Blackfeet Nation Resolution 162-92 enacting a mandatory lodging facility tax. Exhibit LLLL, Day 1 Hearing Transcr. 202:11-18 referencing Doc. 212-31 (Exhibit EEEE). However, Eagle Bear's Objection to Proof of Claim filed in this Court, Eagle Bear falsely alleges that the same Resolution states "Accommodation Tax should not be paid [to the Blackfeet Nation] if the taxpayer is also paying the State of Montana accommodation tax." Doc. 144 at 3, ¶ 14. In other words, Eagle Bear maintains in its active case against the State of Montana in Montana State Court that it is required to pay the Blackfeet Nation tax because of Blackfeet Resolution No. 162-92 but argues the opposite before this Bankruptcy Court.[5] Eagle Bear is talking out of both sides of its mouth. Eagle Bear has utterly failed to demonstrate it is allegedly being singled out and further admits it should be paying the mandatory Blackfeet Nation's lodging tax under clear operation of the laws of the Blackfeet Nation.

f. The Bankruptcy Automatic Stay does not apply to Eagle Bear's demand for arbitration regarding the Lodging Tax or its prosecution of the State of Montana regarding Lodging Tax, and this Court has the authority to resolve the Lodging Tax dispute between Eagle Bear and the Blackfeet Nation.

59. Eagle Bear's counsel and William Brooke appear to have represented to this Court that Eagle Bear did not move forward with the State of Montana litigation on the State accommodations tax or arbitration against the Blackfeet Nation because they are stayed by Eagle Bear's Chapter 11 bankruptcy filing. Exhibit LLLL, Day 1 Hearing Transcr. 169:25-3; 204:18-

[5] The BIA also references "Blackfeet Resolution 162-92 Lodging Facilities Use Tax" as requiring Eagle Bear under Section 11 of the former Lease to pay Blackfeet Lodging Tax. *See* Doc. 211-49 at 2 (Exhibit WW).

205:1; 83:5-18. However, the automatic stay provision set forth in 11 U.S.C. § 362(a) does not apply to those proceedings. The automatic stay provision only applies under the following circumstances:

> the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding **against the debtor** that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

11 U.S.C. § 362 (emphasis added).

60. The bankruptcy stay provision applies only to claims against the debtor. Eagle Bear's claims rests against the Blackfeet Nation and the State of Montana. The State of Montana and the Blackfeet Nation assert no counterclaims against Eagle Bear. The outcome of Eagle Bear's pursuit to avoid taxation does not present a proceeding against Eagle Bear. Indeed, "Eagle Bear conceded that the automatic stay would not apply to [its plaintiff] proceeding [against the Blackfeet Nation and Blackfeet Tribal Court] at the hearing on the Motion to Withdraw Reference." *Eagle Bear v. Blackfeet Nation*, Case No. 22-cv-93, Doc. 1, at 4-5. The same analysis can be made, and the same conclusions can be drawn here – the automatic stay does not apply to Eagle Bear's plaintiff cases. This Court has broad authority to decide the tax dispute between Eagle Bear and the Blackfeet Nation in accordance with Indian Nation leasing law. *See In re Shape*, 25 B.R. at 358. This is especially so when the Blackfeet Tribal Court issued an order, transferring all financial matters between Eagle Bear and the Blackfeet Tribe to the Bankruptcy Court. Doc. 155-1 at 3 ("As to the monetary part of this case, this Court…will set that portion, of this case aside as the Bankruptcy Court will be taking care of the money portion."). And Eagle Bear's Bankruptcy Counsel represented at the hearing that this tax dispute is "in this Court's purview" to decide. Exhibit LLLL, Day 1 Hearing Transcr. 170:6-16.

61. For edification of the Court, Eagle Bear informed the Federal District Court that "Eagle Bear intends to use any proceeds from the Tax Litigation [against the State] to resolve the Tribe's claims that Eagle Bear has failed to pay the Tribal Tax." *See Eagle Bear v. Blackfeet Nation et al.*, Case No. 21-cv-88, Doc. 23 at 9, dated September 30, 2021).

g. <u>Arbitration would not be available to Eagle Bear under the terms of the former Lease to resolve its failure to pay Blackfeet lodging tax because it is the breaching party, and not entitled to arbitration.</u>

62. Ignoring the plain language of the former Lease, Eagle Bear's falsely asserts they are entitled to arbitrate their failure to pay Blackfeet Nation taxes as required under the former lease. Even if a claim to arbitration could be asserted 14 years after the lease was cancelled, Eagle Bear is not entitled to arbitration under the terms of the former Lease.

63. Eagle Bear's arbitration argument fails because the terms of the former Lease and the Remedies addendum do not support Eagle Bear's claims for arbitration. Consistent with their approach of denial and distortion, in support of their failed arbitration argument, William Brooke insisted that Eagle Bear could arbitrate the tax dispute, while failing to address the requirements for triggering arbitration. <u>Exhibit LLLL</u>, Day 1 Hearing Transcr. 204:20-205:1. The applicable provisions of the former Lease and the Remedies addendum are as follows:

> . . .
> In the event of any dispute, controversy, or claim between the parties arising out of the terms of this agreement, **upon written notice to the breaching party** of the substance of the alleged dispute, controversy, or claim, and the remedies sought, **the nonbreaching party shall be entitled to suspend any of its obligation hereunder to the extent of the dispute, controversy, or claim,** and petition the United States Federal District Court . . . for relief as set forth in Exhibit "A" attached hereto and incorporated herein by reference.

Doc. 211-1 at 23, (Exhibit A, Lease § 24).

64. The applicable provisions of the remedies addendum to the former lease read as follows:

> 4. NOTICE OF NONCOMPLIANCE.
>
> **If a party ("Complaining Party") concludes that the other Party ("Responding Party") has failed to comply with, or is proposing to take action which will breach, any term or condition of the lease agreement ("Noncompliance"), the Complaining Party may give written notice to the Responding Party ("Notice of Noncompliance"),** which specifies: (a) the Noncompliance; (b) the corrective action which must be taken to remove, or where appropriate, to commence removal of, the Noncompliance ("Corrective Action") and, (c) a reasonable time limit within which the Corrective Action must be commenced. No remedial proceedings for a claimed Noncompliance may be commenced by a Party unless prior Notice of Noncompliance and opportunity to take Corrective Action have been given as provided herein.
>
> Id. at 37-38 (Exhibit A, Lease, Ex. A, Sec. 4).

65. Read together, the two referenced provisions of the former Lease clearly provide that only the nonbreaching party could have sought arbitration. Eagle Bear was the breaching party in its failure to pay taxes as required by Sections 11 and 19 of the former Lease. Doc. 209-17 at 2-3 (Exhibit 17); *see also* Doc 211-49 (Exhibit WW). Eagle Bear is not entitled to arbitration, especially since the Lease has been cancelled for over 14 years. Moreover, Eagle Bear's arbitration claim was made on July 13, 2017, and has since been abandoned, as it has failed to proceed with arbitration for over six (6) years. Doc. 211-43, 1-3 (Exhibit QQ); *see* Exhibit MMMM, Day 2 Hearing Transcr. 23:7-9. Eagle Bear's claim it is entitled to arbitrate the past due lodging tax fails and must be rejected.

h. Eagle Bear owes $4,107,896.60 in past due Blackfeet Lodging Tax and in the alternative, owes at least $1,943,753.23 in past due Blackfeet Lodging Tax.

66. Eagle Bear did not introduce any probative facts that counter the Blackfeet Nation's Proof of Claim for past due lodging taxes. Eagle Bear owes $4,107,896.60 in past due Blackfeet lodging tax minus 1% administrative fee for collecting the tax from third parties for the Blackfeet Nation. Doc. 229-1 at 7. In the alternative, if the Court believes that simple interest is applicable instead of compounding interest, and that the administrative fee for collecting tax is 1% of the overall tax rather than 1% of the tax money collected, than Eagle Bear's accounting should apply, and Eagle Bear should pay at least $1,943,753.23 in past due lodging tax to the Blackfeet Nation. Doc. 209-37 (Exhibit 37); see also Exhibit LLLL, Day 1 Hearing Transcr., 231:20-22.

67. Indeed, the Blackfeet Treasurer confirmed that the only difference between Eagle Bear's calculations and the Blackfeet Nation's calculations, is 5% tax instead of 6% tax, and simple interest instead of compounding interest. Exhibit MMMM, Day 2 Hearing Transcr. 106:11-14. However, Eagle Bear has not provided any valid arguments, let alone supported such arguments with competing evidence or testimony, to deny the Blackfeet Nation's interpretation of its own laws and its calculations of the taxes due and owing. As such, the Court should award the Blackfeet Nation the full amount of $4,107,896.60 in past due Blackfeet lodging tax less 1% administrative fee of that amount for the total amount of $41,078.97.

III. PAST DUE CONSTRUCTION EXCISE/TERO TAXES (1997-2008)

68. Because Eagle Bear never received any approval for improvements to Blackfeet Nation land, or otherwise notified the Blackfeet Nation of its improvement projects, the Blackfeet Nation was never provided with any information regarding the costs of Eagle Bear's improvements to accurately assess Construction Excise/TERO taxes until Eagle Bear produced its theoretical construction tax numbers in these proceedings. *See* Doc. *Doc*. 209-38 (Exhibit

38); Exhibit MMMM, Day 2 Hearing Transcr. 60:1-4; *see also* Doc. 211-49 (Exhibit WW)(demonstrating that Eagle Bear never complied with Section 8 of the former Lease as it failed to receive approval for improvements).

69. When read together Sections 11 and 19 of the former Lease require that Eagle Bear follow all Blackfeet laws and ordinances and pay all taxes. Doc. 211-1 at 1, 17-18, (Exhibit A § 11 & 19).

70. Section 37A of the former Lease further provides:

> The Lessor has a 2% TERO tax presently in place for all new construction as well as 3% construction tax for new construction. The parties agree that the TERO tax shall remain applicable to all new construction on the premises, however, Lessor shall waive all construction taxes for the first five years of the lease in order to encourage Lessee to make improvements and investments in the Campground/Recreation Facility and/or Complex.

Doc. 211-1 at 28, (Exhibit A § 37(A)).

71. Therefore, the terms of the Lease required that Construction Excise/TERO taxes were applicable to Eagle Bear, but that construction taxes were waived for the first five years of the former Lease in order to encourage the Lessee to make improvements and investments to the Blackfeet Nation's campground. Id.

72. Blackfeet Treasurer, Joe Gervais, testified that with regards to Construction Excise/TERO taxes, "time and time again, the Tribe has actually worked with the owner, because the owner is the person who knows what they're paying. And usually is the person that ultimately pays the tax." Exhibit MMMM, Day 2 Hearing Transcr. 136:12-15.

73. Prior to the evidentiary hearing, William Brooke testified that Eagle Bear paid the Construction Excise/TERO taxes on electrical permits, but other than those payments, Brooke testified any other construction taxes were "waived." Doc. 212-25, 65:4-25 (Exhibit YYY); Id. at 67:15-68:8. In other words, Brooke acknowledged that Eagle Bear was contractually required to

pay this tax. See Id. However, he asserts that the tax was "waived" due to the Blackfeet Nation's failure to enforce, even though he never provided notice to the Blackfeet Nation of any improvements being made after the initial five-year exemption period under the former Lease.

74. Because there is no evidence that this contractual tax obligation was waived, under the terms of the former Lease, Eagle Bear plainly agreed to pay Construction and TERO taxes. The Blackfeet Nation used Eagle Bear's theoretical calculation of its tax obligation to develop the past due amount of Construction Excise and TERO taxes. Doc. 209-38 (Exhibit 38) *compare with* Doc. 229-1 at 9. The Court should require that Eagle Bear pay this past due tax.

IV. STATUTE OF LIMITATIONS

75. Blackfeet Nation statute of limitations law, Ordinance 51, is applicable to this proceeding.

76. To avoid duplicative argument, for the reasons set forth in Section II(a) & (b) herein – terms of former Lease and under the Blackfeet Nation's sovereign right to exclude – Blackfeet Ordinance 51 is applicable in this debt collection to recover Eagle Bear's past due taxes and rent interest it accrued while occupying Blackfeet Indian Nation trust land.

77. Moreover, the Bankruptcy Court must follow and apply federal Indian leasing law when dealing with Indian trust land, which requires observance of tribal laws on Indian Nation trust land, which would include Ordinance 51. *In re Shape*, 25 B.R. at 358 *compare with* 25 CFR 162.016. And the Bankruptcy Court has recognized that a federally recognized tribe is autonomous and should be treated with deference given to a sovereign entity. *In re Adams*, 133 B.R. 191, 197 (1991) *citing Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). "Tribes have the power and should be allowed to make their own substantive law and to enforce that law in their own forums." *Id.*

78. Under Ordinance 51, the Blackfeet Tribal Business Council amended the Blackfeet Law and Order Code of 1967 to provide that:

> all actions brought on behalf of the Tribe to recover a debt owing to the Tribe in the amount of $5,000 or over **shall have no prescribed period of limitations.**

Doc. 215-2 at 1-2 (emphasis added).

79. Therefore, under Blackfeet law, the Blackfeet Nation has full authority and legal right to seek payment of taxes and past due interest from Eagle Bear, beginning in 1997.

80. The Ninth Circuit has stated that "[i[n federal cases with exclusive jurisdiction in federal court, such as bankruptcy, the court should apply the federal, not forum state choice of law rules." *Lindsay v. Beneficial Reinsurance Co. (In Re Lindsay)*, 59 F.3d 942, 948 (9th Cir. 1995). The first paragraph of the Restatement (Second) of Conflict of Laws §142 provides the question of whether a claim will be maintained against the defense of the statute of limitations "is determined under the principles stated in § 6, i.e. the local law with the most significant relationship to the limitations issue will govern. *In re Copelan*d, 2019 WL 1139800 *6 (Okla. B.R. 2019); *see also Sierra Diesel Injection Service v. Burroughs Corp., Inc.*, 648 F.Supp 1148, 1152 (D. Nev. 1986) *citing Santana v. Holiday Inns, Inc.*, 686 F.2d 736, 738 (9th Cir. 1982); *Asian American Entertainment Corp., Ltd. v. Las Vegas Sands*, Inc., 324 Fed. Appx. 567, (9th Cir. 2009) (citations omitted)(not reported). Indeed, when it comes to an issue of procedural law, the general rule is the law of the forum sovereign applies. *In re Copelan*d, 2019 WL at *5 *citing Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988).

81. Here, that forum with the most significant relationship to the issues is the Blackfeet Nation and the law that must be applied is Blackfeet Nation law. The Blackfeet Tribal Court set aside the Blackfeet Nation's debt collection action against Eagle Bear, and "instead it will set that portion, of this case aside as the Bankruptcy Court will be taking care of the money

portion." Doc. 155-1. Moreover, Eagle Bear describes its activities taking place "exclusively…in and on Indian trust lands located entirely within the Blackfeet Reservation." Doc. 212-31 at 3-5, ¶¶ 16, 19, 22, 23 (Exhibit EEEE). Under federal choice of law principals, the Blackfeet Nation Ordinance 51 applies as the local law of the forum and is determinative of whether this action is barred by the statute of limitations. Under Blackfeet law, this question is answered in the affirmative and the Blackfeet Nation can seek collecting past due tax and rent interest beginning in 1997.

82. Under the Blackfeet Nation's inherent sovereignty, Congress's interest in promoting tribal self-government, and these long-standing principles that the Supreme Court has repeatedly recognized, Blackfeet law applies: Ordinance 51 governs. Eagle Bear's activity directly interferes with the Blackfeet Nation's inherent powers to exclude and manage its own lands, and since there are no competing state interests at play, the Blackfeet Nation's status as landowner is enough to support the applicability of Ordinance 51 here. *See Water Wheel Camp Recreation Area v. LaRance*, 642 F .3d 802, 811-812 (9th Cir. 2011).

83. It is important to note that the Blackfeet Nation was unaware of BIA's gross incompetence under the former Lease until it began looking at ways to maximize revenue from its own lands in 2016, which led to the discovery of Eagle Bear's past due debt, including the BIA's 2008 lease cancellation decision in October 2019 -- when the Interior Board of Indian Appeals required BIA to produce the entire administrative record of the former Lease to the Blackfeet Nation. Doc. 211-24; Doc. 214-1 at 6-7. Moreover, no audits were ever produced by Eagle Bear until August 2017 (Exhibit LLLL, Day 1 Hearing Transcr. 103:3-5) and not until the hearing on August 14, 2023 was the Blackfeet Nation ever aware of Eagle Bear's construction expenses on Blackfeet Nation land.

84. It should be mentioned that various sections of the Bankruptcy Code evidence Congressional intent to safeguard the interests of landlords of nonresidential commercial property. *In re Lakes Region Donuts, LLC*, No BR 13-13823, 2014 WL 1281507. Those sections, including Sections 362(b)(10), 541(b)(2) and 365(c)(3), were added as specifically protecting the interests of commercial lessors. *Id.* That protection should be even greater in the context of Indian trust land for which the United States is the trustee and has a duty to manage Indian land in the best interest of the Indian beneficiary.[6]

85. The Blackfeet Nation is the landlord of its own land and has the sovereign right to pursue debt collection in accordance with its own laws. Ordinance 51 applies. The Blackfeet Nation has the undeniable right to seek debt beginning in 1997.

V. EAGLE BEAR'S PAST DUE TAXES ARE SUBJECT TO PRIORITY UNDER 11 U.S.C. § 507(a)(8)(C).

86. Because Blackfeet lodging facility tax and construction excise/TERO taxes are based on gross revenue of the amounts collected, *i.e.* gross receipts, they are subject to priority in this bankruptcy under 11 U.S.C. § 507(a)(8)(C).

87. Section 507(a)(8) provides in pertinent part:

> "[t]he following expenses and claims have priority in the following order:
>
> (8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for—
>
> (C) a tax required to be collected or withheld and for which the debtor is liable in whatever capacity."

11 U.S.C. § 507(a)(8)(C).

[6] It should be noted that part of this bankruptcy estate seeks to improperly substitute the Bankruptcy Trustee for the Federal Trustee of Indian land.

88. The type of taxes referred to in 11 U.S.C. § 507 (a)(8)(C) are "trust fund" taxes and the same are not dischargeable in bankruptcy irrespective of the age of the debt pursuant to 11 U.S.C. §§ 523(a)(1)(A) and 507 (a)(8)(C). See 11 U.S.C. §§ 523(a)(1)(A) and 507 (a)(8)(C). *See In re Calabrese,* 689 F.3d 312, 314 (3rd Cir. 2012) "It should be noted that, in contrast to all of the other portions of section 507 (a)(8) there is no time limit applicable to trust fund taxes. A claim for trust fund taxes will be eligible for priority no matter what the age of the claim." *In re Serrano*, 545 B.R. 447, 452 (Puerto Rico B.R. 2016) citing Alan N. Resnick & Henry J. Sommer, 4 *Collier on Bankruptcy* ¶ 507.11[4] (16th ed.2015).

89. For a claim to be afforded priority under section 507)(a)(8)(C) it must satisfy all of the following five (5) factors: (i) the claim is held by a governmental unit; (ii) it is a tax claim; (iii) the tax is owed by a party other than the debtor; (iv) the tax must be withheld or collected from another party and then transmitted to a governmental unit; and (v) the debtor must be liable for the tax payment in some capacity. *In re Serrano*, 545 B.R. at 452 *citing* Alan N. Resnick & Henry J. Sommer, 4 *Collier on Bankruptcy* ¶ 507.11[4] (16th ed.2015).

90. Thus, if the tax at issue is actually owed by a taxpayer other than the debtor, and the debtor has the responsibility to withhold and/or collect monies (funds/tax receipts/revenues) and then remit the same to a taxing authority, then it is a trust fund tax and falls under the scope of section 507(a)(8). *In re Serrano*, 545 B.R. at 452-453 *citing Ill. Dep't of Revenue v. Hayslett/Judy Oil, Inc.,* 426 F.3d 899, 902 (7th Cir. 2005). Trust fund taxes, therefore, include use taxes collected from customers, *Rosenow v. Illinois,* 715 F.2d 277, 282 (7th Cir. 1983); and excise taxes the taxpayer is required to collect from a third party, *In re Fields*, 926 F.2d 501, 503 n.3 (5th Cir. 1991), *cert. denied*, 502 U.S. 938, 112 S.Ct. 371, 116 L.Ed.2d 323 (1991).

91. Interest on a priority trust fund tax claim is treated as a compensatory penalty and and therefore subject to priority. *In re Garcia*, *supra,* 955 F.2d 16, 18 (5th Cir. 1992); *In re Divine*, 127 B.R. 625, 630 (Bankr. D.Minn. 1991); *In re Stonecipher Distributors*, 80 B.R. 949, 950 (Bankr. W. D.Ark. 1987)(interest on a priority claim accorded priority as part of the claim); *In re Brinegar*, 86 B.R. 176, 178 (Bankr D.Colo. 1987)(interest on a priority claim accorded priority as part of the claim).

92. Here, under the express language of the Blackfeet Lodging Tax code, it is owed by a users of the Campground – not the operator Eagle Bear – and Eagle Bear has the responsibility to withhold and/or collect monies (funds/tax receipts/revenues) and then remit the same to the taxing authority Blackfeet Nation. Doc. 211-17 at 2-3, (Exhibit Q Section 1.5, Section 1.8(a)).

93. The lodging tax is clearly a trust fund tax and falls under the scope of section 507(a)(8). William Brooke correctly describes it as such: where the taxpayer – Eagle Bear - is required to collect the tax from a third party and remit the tax to the Blackfeet Nation, but keeping an administrative fee for processing the tax for the Blackfeet Nation. Exhibit LLLL, Day 1 Hearing Transcr. 211:24-212:14 referencing Doc. 211-17 at 2-3 (Exhibit Q, Section 1.5(a) and (b)). The Blackfeet Nation Treasurer also testified that the Blackfeet Lodging Tax is based on gross receipts reported by Eagle Bear. Exhibit MMMM, Day 2 Hearing Transcr. 117:16-24; 118:7-8. *Id.* at 152:20-23, 104:25-106:1.

94. Moreover importantly, the claim for lodging tax is held by a governmental unit – the Blackfeet Nation; it is a claim for lodging tax; the lodging tax owed is by users of the Blackfeet Nation's campground – not the debtor; the lodging tax is required to be collected from such users of the Blackfeet Nation's campground and then transmitted to the governmental unit

Blackfeet Nation by Eagle Bear; and Eagle Bear is "liable for the amounts required to be collected as a tax under this Code…" Doc. 211-17 at 3. And William Brooke previously testified that he was aware the taxation system that the Blackfeet Nation implemented for its Blackfeet lodging facility tax "is a trustee tax." Doc. 212-25, 50:16-23 (Exhibit YYY).

95. Therefore, Eagle Bear's lodging tax debt, including interest, is subject to priority under 11 U.S.C. § 507 (a)(8)(C).

96. Moreover, the Blackfeet Treasurer testified that the Construction Excise and TERO taxes are based on gross receipts. Exhibit LLLL, Day 1 Hearing Transcr. 134:18-20. And under the terms of the former Lease, Eagle Bear has the responsibility to collect monies taxes from third parties and remit the same to the taxing authority Blackfeet Nation. They too, are trustee taxes and subject to priority under 11 U.S.C. § 507 (a)(8)(C).

CONCLUSION

97. Eagle Bear's Objection to the Blackfeet Nation's Proof of Claim should be overruled and the Blackfeet Nation's claim should be awarded in the total amount sought. At the two-day evidentiary hearing, the Blackfeet Nation demonstrated by a preponderance of the evidence that Eagle Bear owes the Blackfeet Nation $5,466,862.51 in past due taxes and rent interest. Because Eagle Bear was required to collect accommodations taxes from third parties on behalf of the governmental unit Blackfeet Nation, such debt is subject to priority.

98. Testimony by William Brooke, Eagle Bear Inc.'s principal and agent, demonstrates that throughout the past 26-years, Eagle Bear capitalized on the incompetence and dysfunction of the BIA, and engaged in an assortment of rent/tax avoidance schemes – the most obvious being Eagle Bear's broken promise to fund an escrow account with all prospective Lodging Facility Tax payments beginning in July 2017 until its dispute with the Blackfeet Nation

was resolved. Furthermore, because Eagle Bear's activities occurred entirely on Blackfeet Indian Trust land, the Blackfeet Nation is the forum sovereign and its laws are applicable here. The Bankruptcy Court has recognized that a federally recognized tribe is autonomous and should be treated with the deference given to a sovereign entity. Blackfeet Ordinance 51 applies, and the Blackfeet Nation has the sovereign right to collect debt from Eagle Bear accruing since 1997.

WHEREFORE, based on the foregoing, the Blackfeet Nation respectfully requests the following affirmative relief:

1. Overrule Eagle Bear's Objection to the Blackfeet Nation's Proof of Claim and award the Blackfeet Nation the total amount of $5,466,862.51.

2. Give priority to Eagle Bear's past due Blackfeet taxes and interest under 11 U.S.C. § 507(a)(8)(C).

3. For any and all relief the Court deems fair and just under the circumstances.

DATED this 11th day of September 2023.

Respectfully submitted,

/s/ Derek E. Kline

Attorney for the Blackfeet Indian Nation

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify under the penalty of perjury that on this 11th day of September, 2023, a copy of the foregoing was served by electronic means pursuant to LBR 9013-1(d)(2) on the parties noted in the Court's ECF transmission facilities.

DATED this 11th day of September, 2023

/s/ Derek E. Kline