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

EAGLE BEAR, INC.,

Plaintiff,

vs.

INDEPENDENCE BANK,

Intervenor Plaintiff,

vs.

THE BLACKFEET INDIAN NATION  
and DARRYL LaCOUNTE,  
DIRECTOR OF THE BUREAU OF  
INDIAN AFFAIRS,

Defendants.

Cause No. 4:22-cv-00093-BMM

**EAGLE BEAR INC.'S BRIEF IN  
SUPPORT OF MOTION FOR  
STAY PENDING APPEAL**

Plaintiff Eagle Bear, Inc. (“Eagle Bear”) submits this brief in support of its Motion for Stay Pending Appeal (“Motion”).

## **INTRODUCTION**

Enforcement of the Court’s Order during Eagle Bear’s appeal presents an existential risk of harm to Eagle Bear, especially in light of the Order’s implications to Eagle Bear’s ongoing bankruptcy proceedings. If Eagle Bear is forced to proceed assuming that its Lease is not part of its bankruptcy estate and that it has no way to operate its business going forward, then Eagle Bear will be forced to liquidate. It will likely be obligated to do so before its appeal in this matter is resolved. Success on appeal will, in turn, have little practical effect if Eagle Bear is forced to liquidate in the meantime. Especially considering that the Court’s Order resolved several issues of first-impression that present “serious questions” on appeal, Eagle Bear should not be forced to abandon its business while its appeal is pending. The Court should stay its order and preserve the status quo during the pendency of Eagle Bear’s appeal.

## **BACKGROUND**

The Court and parties are familiar with the facts giving rise to this matter and with the procedural posture of this case. In summary, Plaintiff Eagle Bear, Inc. has operated a campground (“Campground”) pursuant to its lease with Defendant Blackfeet Indian Nation (“Nation”) since 1996. Beginning in 2017, the

Nation began arguing that Defendant Bureau of Indian Affairs (“BIA”) cancelled the Lease in 2008. Eagle Bear denied the Nation’s arguments and the parties asked the Court to resolve their dispute.

In its December 8, 2023 Order (Doc. 136) (“Order”), the Court resolved the parties’ cross-motions for summary judgment and adopted the Nation’s arguments. The Court decided that the Lease had been cancelled in 2008. For that reason, the Court denied Eagle Bear’s motion for summary judgment, granted the Nation’s motion for summary judgment, denied the other pending motions as moot, and dismissed Eagle Bear’s claims in this case and its companion case, *Eagle Bear, Inc. v. Blackfeet Indian Nation*, 4:21-cv-00088-BMM (D. Mont.).

Eagle Bear has appealed the Order. It filed its Notice of Appeal (Doc. 138) on December 20, 2023. Eagle Bear now asks the Court to stay the Order pending Eagle Bear’s appeal.<sup>1</sup>

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<sup>1</sup> Eagle Bear is initially required to ask this Court for a stay. Fed. R. App. P. 8(a)(1). Consequently, although the Court usually loses jurisdiction over a matter following a notice of appeal, the Court retains jurisdiction to enter a stay pending appeal after a notice of appeal is filed. *E.g., In re Ho*, 265 B.R. 603, 605 (9th Cir. B.A.P. 2001); *Nat’l Resources Defense Council v. Sw. Marine, Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001) (“The district court retains jurisdiction during pendency of an appeal to act to preserve the status quo.”); *see also* Wright & Miller, 11 Fed. Prac. & Proc. Civ. § 2904 (3d ed.) (“[E]ven after notice of the appeal has been filed, the trial court still has jurisdiction to make an order under Rule 62(c).”)

## STANDARD OF LAW

The Court is authorized to stay and “to hold an order in abeyance” pending appeal under Rule 62. F. R. Civ. P. 62; *see Nken v. Holder*, 556 U.S. 418, 426 (2009). The purpose of this authority is to preserve the parties’ rights during the pendency of an appeal when necessary to prevent the appeal from becoming an “idle ceremony.” *Nken*, 556 U.S. at 426.

Whether to impose a stay is a matter of discretion for the District Court. *Nken*, 556 U.S. at 433. In determining how to exercise that discretion, the Court’s “judgment is to be guided” by the following four factors:

- (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;
- (2) whether the applicant will be irreparably injured absent a stay;
- (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and
- (4) where the public interest lies.

*Nken*, 556 U.S. at 426 (formatting altered). The first two factors are “the most critical.” *Id.* at 434; *Al Otro Lado v. Wolf*, 952 F.3d 999, 1006 (9th Cir. 2020) (per curiam). In addition, the factors should be assessed on a “sliding scale.” *Al Otro Lado*, 952 F.3d at 1007; *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (2011) (per curiam). “[A]s long as a certain threshold showing is made on each factor,” a “stronger showing of one element may offset a weaker showing of another.” *Al Otro Lado*, 952 F.3d at 1007; *Leiva-Perez*, 640 F.3d at 962; *Arizona Democratic Party v. Hobbs*, 976 F.3d 1081, 1086 (9th Cir. 2020).

Although these factors and the above rules are similar to the factors the Court considers when ruling on a motion for preliminary injunction, there is a significant difference between a stay pending appeal, a preliminary injunction, and the showing required for each. Unlike a preliminary injunction, a stay is not an “extraordinary remedy.” *Nken v. Holder*, 556 U.S. at 428-29. A stay “simply suspends judicial alteration of the status quo, while injunctive relief grants judicial intervention.” *Id.* at 429 (internal quotation marks omitted). Ultimately, “stays are typically less coercive and less disruptive than are injunctions.” *Leiva-Perez*, 640 F.3d at 966 (per curiam). Stays are accordingly more susceptible to a “flexible approach” and require a more lenient showing of the above factors than a preliminary injunction. *Id.*; *Al Otro Lado*, 952 F.3d at 1007.

## DISCUSSION

Each of the four factors supports issuance of a stay and preservation of the status quo pending appeal in this case.

### **1. Eagle Bear has a substantial case for appeal.**

In order to show likelihood of success on appeal and to satisfy the first factor of the stay analysis, an applicant “need not demonstrate that it is more likely than not they will win on the merits.” *Leiva-Perez*, 640 F.3d at 966-67 (emphasis added). Instead, the factor is satisfied and weighs in favor of granting a stay “upon demonstration of a substantial case on the merits.” *Id.* (quoting *Hilton v.*

*Braunskill*, 481 U.S. 770, 778 (1987)) (internal quotation marks and alterations omitted). In other words, in “the presence of serious questions on the merits,” this factor is satisfied. *Fed. Trad Comm’n v. Qualcomm Inc.*, 935 F.3d 752, 756 (9th Cir. 2019).

There are “serious questions” in this case, and Eagle Bear’s likelihood of success on the merits of its appeal is no less than equal to the Nation’s. Critically, the Court’s Order turned on several legal issues of first impression, and the Court did not have the benefit of the type of administrative review that ordinarily would have preceded the Court’s decision.

For example, the Court was asked to and did decide the effect of Eagle Bear’s letter purporting to withdraw its appeal. The Court’s decision on that issue was not completely circumscribed by the applicable rules and regulations. Instead, as the Court noted, the regulations provided that a cancellation decision would “remain ineffective” following an appeal, but were silent regarding the effect of any appeal withdrawal. (Doc. 136, Order at 40-45). To determine the effect of Eagle Bear’s withdrawal, the Court was forced to analogize to other parts of the BIA’s regulations because neither any regulation, decision of the BIA, nor caselaw had previously analyzed this issue. (*Id.*)

Likewise, the Court was asked to decide the effect of the BIA’s undelivered show-cause letters on its ability to cancel Eagle Bear’s Lease or to accept Eagle

Bear's cure. Again, the Court's decision on that issue was not completely circumscribed by the applicable rules and regulations, and the Court was forced to analogize to other BIA regulations and the intentions underlying the BIA's regulatory framework. (*Id.* at 35-37, 53-62). Respectfully, the Court appears to have failed to interpret the facts regarding BIA's alleged show-cause letters in the light most favorable to Eagle Bear as part of that analysis. (*Compare id.* at 19-20 with *Tolan v. Cotton*, 572 U.S. 650, 657 (2014)).

The Court's decisions on these issues will be reviewed *de novo* for correctness, rather than under a more deferential standard of review. *E.g.*, *Animal Legal Defense Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987, 988 (9th Cir. 2016). Considering the arguments Eagle Bear raised in its briefing and the Court's first-impression decisions, Eagle Bear's appeal will present "serious questions on the merits." *Fed. Trade Comm'n*, 935 F.3d at 756.

## **2. Eagle Bear will suffer irreparable injury absent a stay.**

The focus of the irreparable injury factor is whether a stay is necessary to preserve the status quo pending appeal lest the appellate court be made to choose "between justice on the fly or participation in what may be an idle ceremony." *Nken*, 556 U.S. at 427-429. Where the appellant is likely to suffer irreparable harm during pendency of appeal such that the appellate court will be unable to grant effective relief if the appellant succeeds on appeal, a stay should be granted. *See*

*id.* Accordingly, the Ninth Circuit has found a sufficient probability of irreparable injury to support a stay where enforcement of an order during appeal would cause “fundamental business changes that . . . cannot be easily undone should [the appellant] prevail on appeal.” *Fed. Trade Comm’n*, 935 F.3d at 756.

In *Federal Trade Commission*, for example, the Ninth Circuit stayed a district court’s order finding that the appellant violated antitrust laws and ordering the appellant to “negotiate or renegotiate its license agreements.” 935 F.3d at 755. The Ninth Circuit reasoned that the appellant had “demonstrated a probability of irreparable harm” because the district court’s injunction required the appellant to “enter new contractual relationships and renegotiate existing ones on a large scale.” *Id.* at 756.

Likewise, in *NCAA v. Board of Regents of University of Oklahoma*, the United States Supreme Court Justice White, sitting as a Circuit Justice for the Tenth Circuit, stayed a district court’s order voiding the NCAA’s broadcast contracts. 463 U.S. 1311, 1312 (1983) (cited by the Ninth Circuit with approval in *Fed. Trade Comm’n*, 935 F.3d at 756). Justice White reasoned that “unless the judgment [was] stayed” pending appeal the appellant’s business would be put “at risk” for an entire season. *Id.*

Similarly, in *American Trucking Associations, Inc. v. City of Los Angeles*, the Ninth Circuit found irreparable harm sufficient to support even the more



“extraordinary remedy” of a preliminary injunction where a business would be put at risk during pendency of the suit. 559 F.3d at 1057-59. The Ninth Circuit reasoned that, absent an injunction, the plaintiff would be “faced with a Hobson’s choice.” *Id.* at 1057. It would be forced either (1) to sign agreements that would cause it to “incur large costs” and “disrupt and change the whole nature of its business” or (2) to refuse to sign the agreements, incur a “loss of customer goodwill,” and potentially lose the entire business. *Id.* at 1051-52, 1058.

Eagle Bear is likely to suffer irreparable harm during the pendency of this appeal for the same reasons as in *Federal Trade Commission, NCAA*, and *American Trucking*. Once the Court’s Order is given effect, Eagle Bear will no longer be a going concern. Operation of the Campground is Eagle Bear’s sole business activity, and Eagle Bear will be unable to conduct that activity if the Order is given effect and the Lease is cancelled. Ex. 1, Brooke Aff. at ¶ 4; *see also* Disclosure Statement at 8-12, *In re Eagle Bear Inc.*, 4:22-bk-40035-WLH (Bankr. D. Mont. Nov. 22, 2023) (Doc. 259). In light of the Nation’s past conduct, it is likely that the Nation will lock the gates and exclude Eagle Bear from the Campground. *See, e.g.*, Brief in Support of Second Motion for Preliminary Injunction and Temporary Restraining Order at 6-12, *Eagle Bear, Inc. v. Blackfeet Indian Nation*, No. 4:21-cv-00088-BMM-JTJ (May 6, 2022) (Doc. 51); Notice of Non-Compliance, *In re Eagle Bear Inc.*, No. 4:22-bk-40035-BPH (May 31, 2022)

(Doc. 31); Stipulation, *In re Eagle Bear Inc.*, No. 4:22-bk-40035-BPH (June 2, 2022) (Doc. 37).

Unless the Order is held in abeyance, Eagle Bear is certain to lose at least its business from the 2024 camping season and the associated customer goodwill that it has generated over the past 27 years. Ex. 1, Brooke Aff. at ¶¶ 9-10. It will also be forced to cancel the \$500,000 worth of reservations it has accepted for the season so far. *Id.* at ¶¶ 6, 10. Eagle Bear will be forced to take these actions and to lose this business without a stay because Eagle Bear's appeal is unlikely to be resolved before Eagle Bear's anticipated 2024 camping season is set to begin in May 2024, or perhaps even by the time the season ends in September 2024. *See id.* at ¶¶ 5-6, 10.

Most critically, if Eagle Bear is forced to proceed in bankruptcy under the assumption that it will no longer be allowed to continue to operate the Campground and that the Lease will not be an asset of the bankruptcy estate, then, Eagle Bear will be forced to modify its proposed chapter 11 plan from a restructuring plan to a liquidating plan. *See* Disclosure Statement at 8-12, *In re Eagle Bear Inc.*, 4:22-bk-40035-WLH (Bankr. D. Mont. Nov. 22, 2023) (Doc. 259). In other words, Eagle Bear will be compelled to liquidate its remaining property in order to fund the revised chapter 11 plan payments.

Again, Eagle Bear’s sole money-making activity is operating the Campground. *Id.* at 12; Ex. 1, Brooke Aff. at ¶ 4. Without that revenue stream, Eagle Bear will be forced to liquidate. *See* Disclosure Statement at 8-12, *In re Eagle Bear Inc.*, 4:22-bk-40035-WLH (Bankr. D. Mont. Nov. 22, 2023) (Doc. 259). It will be obligated to remove and sell all personal property from the Campground, including the 40 Kamping Kabins and various mobile homes, manufactured homes, vehicles and equipment that are integral to the operation of the Campground. *See id.*; Ex. 1, Brooke Aff. at ¶ 7. Selling these assets and liquidating the business are actions that will be virtually impossible to unwind if Eagle Bear prevails on appeal, even assuming that the Nation does not attempt to take possession of or enter a new lease related to the Campground in the meantime. *See* Ex. 1, Brooke Aff. at ¶ 7. As in *Federal Trade Commission*, Eagle Bear will be forced to “enter new contractual relationships and renegotiate existing ones on a large scale” if the Order is not stayed pending appeal. 935 F.3d at 756. As in *NCAA*, Eagle Bear’s business for an entire season and, indeed for the foreseeable future, will be put “at risk” if the Order is not stayed. 463 U.S. at 1312. And, as in *American Trucking*, Eagle Bear’s will incur “large costs,” will lose significant “customer good will,” and will be forced to “disrupt and change the whole nature of its business” if the Order is not stayed. 559 F.3d at 1057-59.

The most significant distinguishing factor those cases present only underscores the probability of irreparable harm in this case. Unlike the appellants in those cases, Eagle Bear is faced with an ongoing bankruptcy procedure. If the Order is not stayed, Eagle Bear will be forced to proceed to liquidate essential campground assets to pay its creditors and will suffer irreparable injury. Further, absent a stay, nothing will prevent the Tribe from re-leasing the campground or taking over operations. If the Tribe enters a new Lease while the appeal is pending, Eagle Bear will undoubtedly face legal and practical hurdles to moving forward with its operation of the Campground, even if Eagle Bear prevails on appeal. Regardless, there is significant risk of damage to critical campground assets including the waterpark, swimming pool, camping structures, electrical and water systems without Eagle Bear's ongoing maintenance efforts. *See* Ex. 1, Brooke Aff. at ¶ 8, 11. Eagle Bear has invested millions of dollars installing and maintaining these campground assets and systems. *Id.*

In order to ensure that the Ninth Circuit can grant effective relief if Eagle Bear succeeds on appeal and to ensure that the Ninth Circuit's review will not be reduced to a mere "idle ceremony," the Court should grant Eagle Bear's motion and hold its Order in abeyance pending Eagle Bear's appeal. *Nken*, 556 U.S. at 427-429.

**3. Staying the Order will not substantially injure the Nation or any other party.**

The third factor—“whether issuance of the stay will substantially injure the other parties interested in the proceeding”—is entitled to less weight than likelihood of success and irreparable injury to the applicant. *Nken*, 556 U.S. at 434; *Al Otro Lado*, 952 F.3d at 1006-07. Even putting that fact aside, however, the factor does not counsel against issuance of a stay in this case.

The Nation will not be injured in any significant way by a stay pending appeal. A stay will result in preservation of the status quo and Eagle Bear’s operation of the Campground under the Lease for its 2024 season. The Nation will receive the royalties, rental payments, and taxes it negotiated under the Lease. *See* Disclosure Statement at 5-7, 12, App’x 4, *In re Eagle Bear Inc.*, 4:22-bk-40035-WLH (Bankr. D. Mont. Nov. 22, 2023) (Docs. 259 & 259-4). The parties will also move forward with a plan that will likely result in Eagle Bear’s payments of the debts the Nation proved during the bankruptcy proceeding. *Id.*

As in *NCAA*, the Nation will at most lose one season of operation of the Campground and the difference between Eagle Bear’s payments under the Lease and what the Nation might hypothetically be able to garner by alternate use or operation of the Campground. 463 U.S. at 1313. This is a minor potential injury relative to the existential harms enforcement of the Order presents to Eagle Bear. The insignificance of the injury is underscored by the Nation’s acquiescence to

Eagle Bear’s operation of the Campground for over a decade after the alleged Lease cancellation. (*See* Doc. 136, Order at 65-66, 69 (finding that “[t]he Blackfeet Nation unmistakably stands as no idle spectator in this case”; “[t]he Blackfeet Nation itself sent a series of mixed signals”; “the Blackfeet Nation knew of Eagle Bear’s ongoing operation of the Campground during the period after the lease cancellation between 2008 and 2017”; and “[i]t was aware of Eagle Bear’s construction of new amenities—indeed, the Blackfeet Nation continued to inspect Eagle Bear’s work on the property.”)) One more year of Eagle Bear’s operation of the Campground and payment of royalties, rent, and taxes, will not significantly harm the Nation.

**4. The public interest weighs in favor of a stay.**

This fourth factor—“where the public interest lies”—is also entitled to less weight than likelihood of success and irreparable injury to the applicant. *Nken*, 556 U.S. at 434; *Al Otro Lado*, 952 F.3d at 1006-07. However, the factor only further supports issuance of a stay, because the public interest is best served by a stay.

The primary public policy potentially applicable to this case is, as the Court noted in its Order, “protection of trust resources.” (Doc. 136, Order at 42). The trust resource at issue in this case—namely the Campground—will be put at risk if the order is enforced during Eagle Bear’s appeal. The destruction of Eagle Bear’s

business and removal of Kamping Kabins and other property to fund Eagle Bear's chapter 11 plan payments will harm the reputation of the Campground and the Campground's ongoing money-making potential. Ex. 1, Brooke Aff. at ¶¶ 10-11. Holding the Order in abeyance during pendency of the suit will not, on the other hand, put anything at risk. As discussed above, the Campground will continue to operate and the Nation will continue to receive the royalties, rental income, and taxes that it negotiated under the Lease while the Order is stayed. Thus, the public interest is best served by holding the Order in abeyance because doing so will create the least risk to the trust asset at issue, the Campground.

### **CONCLUSION**

For the foregoing reasons, Eagle Bear requests that the Court grant Eagle Bear's Motion for Stay Pending Appeal. The Court should stay execution on the Order, stay any proceeding to enforce the Order, and hold the Order in abeyance while Eagle Bear's appeal is pending.

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Dated this 20th day of December, 2023.

CROWLEY FLECK PLLP

By /s/ Neil G. Westesen

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## CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(E), I certify that this brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office Word, is 3,239 words long, excluding the Caption, the Certificates of Service and Compliance, Tables of Contents and Authorities, and Exhibit Index.

Dated this 20th day of December, 2023.

CROWLEY FLECK PLLP

By /s/ Neil G. Westesen  
Neil G. Westesen

## CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 2023, a true and correct copy of the foregoing was delivered by the following means to the following:

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