Derek E. Kline
Attorney at Law
P.O. Box 1577
Center Harbor, NH 03226
Phone: (603) 707-1721
Email: derekekline@gmail.com

Evan M.T. Thompson
BROWNING, KALECZYC, BERRY & HOVEN, P.C.
800 N. Last Chance Gulch, Suite 101
P.O. Box 1697
Helena, MT 59624
(406) 443-6820
(406) 443-6883 (fax)
evan@bkbh.com

Attorneys for Defendant Blackfeet Indian Nation

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

EAGLE BEAR, INC. Plaintiff, v. THE BLACKFEET INDIAN NATION, BUREAU OF INDIAN AFFAIRS Defendants.	Cause No. 4:22-cv-00093-BMM **BLACKFEET NATION'S RESPONSE IN OPPOSITION TO EAGLE BEAR INC.'S MOTION FOR STAY PENDING APPEAL** **(Doc. 139)**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutes

Federal Regulations

Other Authorities

EXHIBIT INDEX

Defendant Blackfeet Nation hereby submits its Response in Opposition to Eagle Bear Inc.'s ("Eagle Bear") Motion for Stay Pending Appeal as follows:

INTRODUCTION

Eagle Bear's Motion for Stay Pending Appeal is a continued effort by Eagle Bear to illegally occupy Blackfeet land for monetary gain and to the exclusive financial detriment of the Blackfeet Nation. Eagle Bear has disregarded the unique sovereign status of the Blackfeet Nation as well as the rigid federal regulatory framework governing leasing of Indian land. The Blackfeet Nation should not bear the burden of Eagle Bear's failures while it awaits a decision on appeal. The status quo is that the Lease was cancelled 15 years ago. Eagle Bear should not be allowed to continue its illegal occupation of, and profiteering from, Blackfeet Land indefinitely.

Important to the Motion before the Court is that after the Blackfeet Nation locked the gates to its campground in May 2022, Eagle Bear was still able to generate millions of dollars in revenue from illegally occupying Blackfeet Nation land for two more tourist seasons – because of its artful use of the Chapter 11 Bankruptcy filing and automatic stay provision of the Bankruptcy Code. Now, Eagle Bear is again attempting to leverage its Bankruptcy filing to continue its holdover tenancy, alleging "[e]nforcement of the Court's Order during Eagle Bear's appeal presents an existential risk of harm to Eagle Bear, especially in light

of its ongoing Bankruptcy proceedings." The Bankruptcy Court, however, was awaiting a decision by this Court on the 2008 Lease cancellation matter because it would be "tremendously consequential" to Eagle Bear's bankruptcy estate and pave the way on a wide-variety of issues – Eagle Bear's bankruptcy would not remain in limbo pending appeal.

On November 17, 2021, this Court analyzed the four-part preliminary injunction test to determine whether a preliminary injunction should apply to the Blackfeet Nation exercising jurisdiction over eviction proceedings involving Tribal Court Defendants, Eagle Bear and William Brooke. The Court previously held, Eagle Bear/Brooke did not meet the four-part injunction test. As this Court previously observed, "[g]iven that the record currently before the Court appears to establish that the BIA cancelled the lease between Eagle Bear and the Blackfeet Nation in 2008, Plaintiffs do not raise serious questions going to the merits." CV-21-88-BMM, Doc. 27 at 20 (citation and internal quotations omitted). The record has not materially changed since November 17, 2021 – there is still no document that reverses, amends, modifies, or sets aside the 2008 Lease cancellation. Allowing Eagle Bear to illegally holdover on Blackfeet Nation land is contrary to the federal regulations, contrary to Indian Nation self-government, and contrary to the public interest.

The same four-part test that is used to determine whether an injunction should be granted, is the same four-part test that is used to determine whether a stay should be granted pending appeal. Under the circumstances, the same outcome should occur: Eagle Bear does not meet the four-part test and its Motion for Stay Pending Appeal should be denied.

STANDARD OF REVIEW

Courts have discretion when deciding whether to stay an order pending appeal. *See Nken v. Holder*, 556 U.S. 418, 433 (2009). A stay is not a matter of right, even if irreparable injury might otherwise result. *Leiva-Perez v. Holder*, 640 F.3d 962, 965 (2011) quoting *Nken*, 556 U.S. at 433. The decision to grant a stay depends "upon the circumstances of the particular case." *Id.* (quoting *Virginia Ry. Co. v. United States*, 272 U.S. 658, 672-73 (1926). Stay decisions cannot be based on "assumptions and blithe assertions," thus, the party requesting a stay bears the burden of showing that circumstances justify an exercise of that discretion. *Leiva-Perez v. Holder*, 640 F.3d at 970 quoting *Nken*, 556 U.S. at 433-34, 436 (internal citations omitted).

Courts analyze the circumstances of a case under the following four-factor test: "(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." *Id.* at 434. The first two factors "are the most critical" and Court's consider the last two factors "[o]nce an applicant satisfies the first two factors." *Id.* at 433-34.

It is not enough that the chance of success on the merits be "better than negligible." *Id.* at 434. While an applicant for a stay "need not demonstrate that it is more likely than not they will win on the merits," the applicant must show a "reasonable probability" or "fair prospect" of success. *Fed'l Trade Comm. v. Qualcomm Inc.,* 935 F.3d 752, 755 (2019) citing *Leiva-Perez v. Holder*, 640 F.3d at 962.

To justify a stay, the Ninth Circuit has held that, at a minimum, the movant must show irreparable harm is probable and either: (a) a strong likelihood of success on the merits and that the public interest does not weigh heavily against a stay; or (b) a substantial case on the merits and that the balance of hardships tips sharply in the petitioner's favor. *Leiva-Perez v. Holder*, 640 F.3d at 970. In close cases, the court "will weigh the relative harms to the applicant and to the respondent in determining whether to grant a stay pending appeal." *See id.* (quoting *Hollinsworth v. Perry*, 588 U.S. 183 (2010)).

FACTUAL BACKGROUND

The Blackfeet Nation owns 53.6 acres of commercial property that is held in trust with the United States and designed to be a campground. (Doc. 136 at 15). In

1996, Eagle Bear began occupying Blackfeet Nation land, and in 1997, the Parties entered into a Lease Agreement. (*Id.* at 14-15). William Brooke, Eagle Bear's principal and agent, admits he did not review the Code of Federal Regulations when negotiating the Lease. (*Id.* at 15).

Eagle Bear was in violation of the terms of the Lease from the outset when it failed to post the required performance bond. (Doc. 32 at 9, ¶ 71). Eagle Bear engaged in subsequent violations of the Lease terms beginning in 1997, culminating in the BIA cancelling the lease for non-payment of rent in 2008. (Doc. 136 at 59-60).

Eagle Bear timely appealed the 2008 cancellation decision and based its appeal on one ground: that it paid the delinquent rent before receiving the June 10, 2008 cancellation decision. (Doc. 32 at 19, ¶ 92; Doc. 34-6). Eagle Bear did not allege in its notice of appeal that it failed to receive the show cause letters. *Id.* Notably, it discussed the April 4, 2008 show cause letter with Independence Bank's President, and informed the Bank it would pay the rent. (Doc. 32 at 16-17, ¶¶ 80-82; Doc. 33-25). Eagle Bear finally paid the delinquent rental payment after it received the cancellation letter on June 16, 2008, without the required interest payment. (Doc. 32 at 18, ¶ 88; Doc. 34-5).

During pendency of appeal, BIA Realty Specialists began internally discussing Eagle Bear's appeal, but were unable to obtain any documentation in

writing from the Blackfeet Nation stating its position, despite making a request. (Doc. 136 at 22-23).

On January 5, 2009, Eagle Bear withdrew its appeal on its own accord based on discussions with a BIA Realty Specialist. (Doc. 34-13 at 1). While it sent its appeal withdrawal to BIA via certified mail, it did not send its appeal withdrawal to the Blackfeet Nation via certified mail. (Doc. 32 at 21, ¶ 102, Doc. 34-15 at 2, 161:20-23). Nothing in the record indicates that BIA took any action at any level to rescind its decision to cancel the Lease. (Doc. 136 at 25). However, Eagle Bear continued to occupy the Blackfeet Nation's land without a legal right.

In 2017, the Blackfeet Nation complained of several new material breaches of the former Lease by Eagle Bear and requested that BIA cancel the Lease. (Doc. 136 at 26). While the BIA Superintendent cancelled the Lease for a second time, the Regional Director overturned the cancellation on appeal, and the Regional Director's decision was appealed to the Interior Board of Indian Appeals (IBIA). (*Id.* at 26-27). It was after the IBIA ordered the BIA to produce the administrative record of the former Lease, that the Blackfeet Nation discovered the Lease was cancelled in 2008. (Doc. 32-1 at 3 ¶ 14). The Blackfeet Nation, believing that the BIA's 2008 cancellation became final following Eagle Bear's appeal withdrawal, filed a complaint in Blackfeet Tribal Court and a Motion to Dismiss its appeal with the IBIA as moot. (Doc. 136 at 27-28).

The IBIA remanded the proceedings to the Rocky Mountain Regional Director to act on the Blackfeet Nation's request that the BIA either honor the June 10, 2008 cancellation or produce evidence that the cancellation had been reversed. *Id.* at 28. Throughout these proceedings, the U.S. Attorney's Office (representing the BIA) has asserted that BIA was awaiting a determination by this Court on the 2008 lease cancellation. Doc. 29-16 at 18, 19, 25, 27-35. And on December 8, 2023, this Court confirmed the Lease was cancelled in 2008 as a matter of law. Doc. 136 at 34.

PROCEDURAL BACKGROUND

The procedural history is critical in resolving the Motion for Stay.

Because BIA failed to uphold its trust responsibility to the Blackfeet Nation and evict trespassers Eagle Bear and Brooke from Blackfeet land, on July 21, 2021, the Blackfeet Nation filed an eviction action in Blackfeet Tribal Court. *See* CV-21-88-BMM, Doc. 1-3 (Tribal Court Complaint).

On August 10, 2021, Eagle Bear and Brooke responded by suing the Blackfeet Nation and Blackfeet Tribal Court in this Court seeking injunctive relief and declaratory judgment that the Blackfeet Nation could not exercise jurisdiction over Brooke and Eagle Bear because there allegedly was a valid Lease. (*Id*. at Doc. 1). Eagle Bear also filed a Motion for a Preliminary Injunction asking this Court "to preliminarily grant such relief in order to preserve the status quo until

such time as this Court finally resolves the question of the Tribal Court's authority over the subject matter of this dispute and over Will Brooke personally." (Doc. 5 at 7).

On November 17, 2021, this Court evaluated Eagle Bear/Brooke's Motion based on the four-part preliminary injunction test. (Doc. 27). Addressing the first prong, the Court held that the Blackfeet Nation, rather than Eagle Bear, was likely to succeed on the merits because "[t]he record before the Court contains no document to indicate that the BIA Rocky Mountain Regional Director took any step to overturn the lease cancellation. No lease would exist between Eagle Bear and the Blackfeet Nation under the circumstances." (*Id.* at 11). This Court held:

> [g]iven that the record currently before the Court appears to establish that the BIA cancelled the lease between Eagle Bear and the Blackfeet Nation in 2008, Plaintiffs do not raise "serious questions going to the merits." *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003). Likelihood of success on the merits thus weighs heavily in favor of the Blackfeet Nation. *See Grand Canyon Skywalk,* 715 P.3d at 1205.

Id. at 20 (emphasis added).

In weighing the factors of the four-part test, this Court held that "[a] preliminary injunction proves inappropriate at this point." *Id.* at 24.

On May 6, 2022, Eagle Bear and Brooke filed a Second Motion for Preliminary Injunction before this Court, after the Blackfeet Nation locked the

gates to its campground. (Doc. 50). Eagle Bear's Brief cites to a notice and letter from the Blackfeet Nation, stating in part:

> Eagle Bear and its agents will no longer be allowed to illegally occupy Blackfeet Nation Land as it has for the past 13 years. Be advised the Blackfeet Nation will secure the 54-[acre] commercial property…and will prevent Eagle Bear and its agents from entering the campground.
>
> The Blackfeet Nation stands by and will enforce the notice to Eagle Bear that it will not be allowed to operate the campground during the 2022 season or thereafter.

Id. at 9, 11 (internal citations omitted)

Eagle Bear and Brooke, again, requested this Court enjoin the Blackfeet Nation from retaking possession of its campground. *See generally, id.* In response, this Court scheduled a hearing for May 24, 2022 to decide Eagle Bear's Motion, (Doc. 50), and ordered "the Parties to come [to the hearing] prepared to discuss how the Court should obtain the BIA's records pertaining to the lease, and in particular any records regarding the 2008 lease cancellation." (Doc. 53 at p. 3).

This Court, however, did not decide Eagle Bear's Second Motion for Preliminary Injunction because the day before the scheduled hearing, Eagle Bear filed for Chapter 11 bankruptcy, and filed a Motion to Vacate the May 23, 2022 Hearing. (Doc. 56). In its Brief, Eagle Bear/Brooke asserted that Eagle Bear's Second Motion for Preliminary Injunction is moot, and "[a]s a result of Eagle Bear's petition for relief under the Bankruptcy Code, the Tribe's efforts to obtain possession of the Campground have been automatically stayed." (Doc. 57 at 2,

citing 11 U.S.C. § 362(a)).

On May 24, 2022, Eagle Bear filed with the Bankruptcy Court, a Motion to Determine the Extent of the Automatic Stay so that the automatic stay would cover the former leased premises. *In re Eagle Bear*, 22-bk-40035, Doc. 8.

On May 31, 2022, the Bankruptcy Court ordered the Blackfeet Nation "to remove any impediments affecting the ability for Debtor or its customers to access Debtor's business on or before May 31, 2022." (*Id.* at Doc. 30).

On June 9, 2022, Eagle Bear filed two adversary proceedings in Bankruptcy Court against the Blackfeet Nation, the first sought declaratory relief that allegedly the 2008 lease cancellation "is void and of no effect" and that "Eagle Bear Inc. is current in all respects with its obligations to the Blackfeet Nation under the Lease for all time periods prior to January 1, 2022." *In re Eagle Bear, Eagle Bear v. Blackfeet Nation*, Case No. 4:22-ap-04001-WLH, Doc. 1 at pp. 7-8. The second adversary proceeding was a removal action, attempting to remove the Tribal Court proceeding against Eagle Bear and Brooke to Bankruptcy Court. *In re Eagle Bear, Eagle Bear v. Blackfeet Nation*, Case No. 4:22-ap-04002-WLH.

On June 15, 2022, the Blackfeet Nation filed a Motion to Withdraw the Reference from the Bankruptcy Court pursuant to 28 U.S.C. § 157(d) because the Bankruptcy Court exercised jurisdiction over the 2008 lease cancellation issue. CV-21-88-BMM, Doc. 68.

On September 26, 2022, this Court granted the Blackfeet Nation's Motion to Withdraw the Reference and opened a new docket, CV-22-93, to address the 2008 lease cancellation issue. CV-22-93 at Doc. 1.

On November 23, 2022, all Parties filed cross-motions for summary judgment. (Docs. 22, 24, 27 & 43).

On April 19, 2023, the Court reopened discovery due to new evidence produced by BIA, and the Parties filed supplemental briefing, (Docs. 98, 105-11), which the Court accepted as part of the record. (Doc. 112).

On October 12, 2023, this Court held a second hearing on the Parties' motions for summary judgment.[1] (Doc. 121).

On December 8, 2023, this Court found that Eagle Bear's Lease was cancelled in 2008 and never reinstated. (Doc. 136).

On December 20, 2023, Eagle Bear filed its Motion for Stay Pending Appeal of this Court's Order to estop the Blackfeet Nation from beneficial use of its own land so Eagle Bear could continue to substantially profit from its holdover

[1] At the time of hearing, the Blackfeet Nation had not received the Bankruptcy Court Order allowing the Blackfeet Nation a prepetition unsecured claim of $1,740,910.81 against Eagle Bear with statutory priority pursuant to 11 U.S.C. § 507(a)(8)(C) for past due lodging taxes. The Order demonstrates the Blackfeet Nation may have liens in the personal property located on the former leased premises under operation of Blackfeet law, *see In re Eagle Bear*, 22-bk-40035-WLH, Doc. 248 at 10, and such property could remain on Blackfeet land to satisfy, in part, Eagle Bear's debt. *See also* CV-21-88-BMM, Doc. 14 at 28.

occupancy. (Doc. 139).

Critical to this matter is relevant procedural history of Eagle Bear's Bankruptcy, as follows:

On February 14, 2023, the Bankruptcy Court acknowledged that a decision from this Court would be "extremely consequential" to the Bankruptcy and "its going to frame the fork in the road on a -- on a wide array of different issues." Exhibit A, Bankr. Status Conference Transcr., 6:7-8; 33:17-20 (February 14, 2023).

Indeed, at the February 14, 2023 Bankruptcy Status Conference, Eagle Bear's counsel stated:

> If Judge Morris rules in favor of the Blackfeet Nation and there is no lease, then there are a significant number of, I'll say, substantial items of personal property that are located on the lease. There's a number of movable cabins that can be loaded onto a trailer and trucked away. There is a large lodge, a fairly large lodge, that was purchased from someone in the Big Sky, Montana area, taken apart, and then reassembled, on the -- the lease, that would be removed. So, I think, in the event of -- that Judge Morris rules for the Blackfeet Nation, Eagle Bear would want to remove all of its items of personal property, and then probably have a liquidating plan.

Ex. A, Bankr. Status Conference Transcr., 15:21-16:8 (February 14, 2023).

As a result, the Bankruptcy Court continued all pending matters *sine die* "until there has been a decision by the District Court regarding the underlying putative lease..." *In re Eagle Bear*, 22-bk-40035, Doc. 179.

On December 21, 2023, the Bankruptcy Court held a Status Conference and

continued to hold all matters in abeyance pending a decision by this Court on Eagle Bear's Motion for Stay. *Id.* at Doc. 268. Eagle Bear's bankruptcy remains in limbo.

ARGUMENT

I. EAGLE BEAR INC. HAS NOT SHOWN A REASONABLE PROBABILITY OR FAIR PROSPECT OF SUCCEEDING ON THE MERITS.

Eagle Bear asserts the "likelihood of success on the merits of its appeal is no less than equal to the Nation" because "this 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." (Doc. 140 at 6). Moreover, Eagle Bear asserts "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." *Id.* at 7, citing Doc. 136 at 19-20 and *Tolan v. Cotton*, 572 U.S. 650, 657 (2014). Eagle Bear is wrong on all fronts.

The Court's determination was not one of first impression – it was based on settled law, demonstrated below:

- The BIA's "cancellation authority exists regardless of whether a tenant, such as Eagle Bear, attempts to cure its violation outside the regulatorily-defined timeline or process for so doing." Doc. 136 at 36 (citing *Tuttle v. Jewell,* 168 F.Supp. 3d 299, 309-10 (D.D.C. 2016) *aff'd sub nom. William Tuttle v. Ryan*

Zinke, et al. (Apr. 27, 2016) see also 25 C.F.R. §§ 162.618, 162.619(a)(2008)). Thus, Eagle Bear's payment eighty-one days after the March 27, 2008 show cause letter, on June 16, 2008, "does not allow it to circumvent the requirement it was under to cure violations within ten business days of the notice of violation." *Id.* at 36-37 (citing 25 C.F.R. § 162.251 (2008)).

• Taking the testimony of Mark Magee, Jodi Wagner, Tracy Tatsey and Bernadine Pease at face value – that the former Lease remained in effect after 2008 – would "imbue hazy memory, on-the-ground status quo appearances, and historical innuendo with the force of law when federal statutory law applies to a question," and "would conflict with the promise of the federal trust responsibility." *Id.* at 38 (citing *McGirt v. Oklahoma,* 591 U.S. ___, 140 S. Ct. 2452 (2020)).

• Eagle Bear's proposed construction of 25 C.F.R. 162.621 – that its appeal rendered the BIA' decision "ineffective" even after appeal withdrawal – "would run contrary to the purpose of 25 C.F.R. (2008)." *Id.* at 41. "[A] Court must carefully consider the text, structure, history, and purpose of a regulation" in the process of regulatory construction." *Id.* (citing *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415, 204 L. Ed. 2 841 (2019)). "For example, to allow a party to a lease, first, unilaterally to stay a BIA decision merely by filing an appeal and, second, unilaterally to make that stay de facto permanent by withdrawing the appeal would

destroy the regulatory framework built to facilitate leasing from Native nations." *Id.* Moreover, because the federal regulations do not address appeal withdrawal "[t]he Court looks to the text of other sections of 25 C.F.R. (2008) to resolve this apparent oversight in the regulatory scheme." Doc. 136 at 44 (citing *Kisor,* 139 S.Ct. 2400 at 2415); *see also* Doc. 119 at 3-4 (cases cited therein). It is clear that the 25 CFR 162.621 is essentially a stay until a decision is rendered. But once the appeal is withdrawn, there is no longer a reason to stay. Otherwise, the appellant would succeed in its appeal simply by withdrawing it.

• BIA staff testified they believed the Lease remained in effect after Eagle Bear withdrew its appeal. (Doc. 136 at 46). This belief proved both mistaken and contrary to law as "[a]ctions by the local [BIA] agency contrary to the regulations and contrary to the best interest of [a tribe] do not create a vested right in [a] lease." *Id.* at 47 (quoting *Gray v. Johnson*, 395 F.2d 533 (10th Cir. 1968)).

• The BIA lacks authority to revive a cancelled lease without the consent of the Blackfeet Nation. Doc. 136 at 47 (citing *Moody v. United States*, 931 F.3d 1136, 1142 (Fed. Cir. 2019). "Eagle Bear's actions based on the record presented mirror those of the plaintiffs in *Moody*." Doc. 136 at 49. "Eagle Bear made payment after the BIA had cancelled the lease and appears to have entered into an implied-in-fact contract similar to the one in *Moody*. *Id.*

• **"**Erroneous advice from a BIA superintendent's office cannot grant legal rights to a lessee inconsistent with the applicable regulations." *Id.* (citing *Flynn v. Acting Rocky Mountain Regional Director*, 39 IBIA 27, 30 (2003)(citing *Billco Energy v. Acting Albquerque Area Director*, 35 IBIA 1, 7 (2000)).

• "The general principles of contract law allowing for implied-in-fact contracts remain inapplicable here because federal regulations unequivocally govern Indian trust leasing." *Id.* at 50-51 (citing 25 C.F.R. 162.600 (2000) *et seq.; Jackson, M & M Farms v. Portland Area Director, BIA,* 35 IBIA 197 (2000)). "The unapproved lease of Indian land is void and grants no rights to any party." *Id.*

• "Eagle Bear's argument that its singular late payment to cure the default identified in the BIA's June 10, 2008 letter saved the lease from cancellation parallels that of the lessee's failed argument in *Tuttle.*" *Id.* at 58-59.

• "Although recognizing that legal doctrines such as laches may be deployed to protect individuals who have labored under a mistaken understanding of the law, *McGirt* squarely rejected any notion that reliance interests could undermine the enforcement of a federal statute." *Id.* at 65 (quoting *Oklahoma v. United States Dep't of the Interior*, 577 F.Supp. 3d 1266, 1276 (W.D. Okla. 2021)(citing *McGirt*, 140 S. Ct. 2452 at 2478)).

• Individuals or corporations seeking to purchase or lease Indian trust property are "responsible for complying with the applicable regulations and [are]

not relieved of that responsibility by representations made by the [BIA]. *Id.* at 67 (citing *Flynn,* 42 IBIA at 212-13; *see also Blackmore v. Billings Area Director*, 30 IBIA 235, 239 (1996)).

Contrary to Eagle Bear's assertion, this is not a case of first impression. There are other individuals and entities like Eagle Bear/Brooke that failed to appreciate (1) the federal regulations governing Indian land, (2) the sovereign status of Indian Nations, and (3) lease disputes concerning Indian land are not run-of-the-mill lease disputes. Moreover, interpreting ambiguous federal regulations is not one of first impression. *Kisor,* 139 S.Ct. 2400 at 2415; *see also* Doc. 119 at 3-4 (cases cited therein). At bottom, because the record before the Court establishes that BIA cancelled the Lease at issue in 2008, Eagle Bear does not raise "serious questions going to the merits." *See* CV-21-88-BMM, Doc. 27 at 20 citing *Clear Channel Outdoor, Inc.*, 340 F.3d at 813.

Furthermore, Eagle Bear's assertion that this Court "failed to interpret the facts regarding BIA's alleged show-cause letters" in accordance with the summary judgment standard established in *Tolan v. Cotton* is misplaced.

The evidence demonstrates Eagle Bear actually received the show cause letters because (1) the certified letters were forwarded to Eagle Bear's Bozeman address (Doc. 32 at 13-14); (2) the letters were also sent to Eagle Bear via First Class mail and were not returned to BIA undelivered (*id.* at 14); and (3) Eagle Bear

discussed the show cause letter with Independence Bank's President, and represented to the Bank it would pay the delinquent rent, which it did not. (*Id.* at 16-17). Eagle Bear does not identify any direct contradictory evidence that the Court failed to acknowledge. *Tolan,* 572 U.S. at 659. More importantly, it is presumed as true that Eagle Bear received the show cause letters of January 15, 2008, March 27, 2008, and April 4, 2008 because it never raised the claim it did not receive them in its notice of appeal, and, therefore, that claim is waived. *See Benally v. Acting Navajo Regional Director*, BIA, 57 IBIA 91, 97 (2013). Eagle Bear's evidence was properly credited, and all factual inferences were reasonably drawn in its favor. Again, Eagle Bear does not raise serious questions going to the merits.

II. EAGLE BEAR WILL NOT SUFFER IRREPARABLE HARM WITHOUT A STAY.

Eagle Bear alleges that it will likely suffer irreparable harm absent a stay because the "[o]perations 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." (Doc. 140 at 9)(citations omitted). However, in a similar case involving a bankrupt debtor who is a holdover tenant like Eagle Bear, the District Court (S.D.N.Y.) found that the debtor's business would not be irreparably harmed absent a stay on his eviction because "the debtor has not shown that it cannot reopen in another location." *In re T.R. Acquisition Corp.*, 208 B.R.

635, 637 (S.D.N.Y.1997). Here, the same can be said of Eagle Bear: there is nothing stopping Eagle Bear from leasing another campground property in Montana, or focusing on William and Susan Brooke's sister KOA campground in Three Forks, Montana. *See Aff. of Scott Kipp,* ¶ 8 (attached as Exhibit B).

Eagle Bear cites to *Federal Trade Commission* for the proposition that "Eagle Bear will be forced to enter into new contractual relationships and renegotiate existing ones on a large scale" if the Order is not stayed pending appeal. (Doc. 140 at 11, citing *Federal Trade Commission v. Qualcomm Inc*., 935 F.3d 752, 756 (9th Cir. 2019)). However, *Federal Trade Commission* is not applicable here. It is an injunction case under the Sherman Act involving a nationwide leader in cellular standard technology, Qualcomm, and the licensing of its standard essential patents (SEP) and sale of its code division chip technology. *Id.* at 765-76. The injunction order subject to a stay required Qualcomm to make SEP licenses available to competitors and prohibit certain sales of chip technology, among other things. *Id.* Eagle Bear is not a technology chip manufacturing company. This Court's Order does not require Eagle Bear to do business with competitors or prohibit it from engaging in the campground business, generally. Simply, *Federal Trade Commission* is not applicable or controlling here.

Next, Eagle Bear's cites to *NCAA* for the misplaced proposition that enforcement of the Court's Order will put Eagle Bear's next tourist season "at

risk." Doc. 140 at 11, citing *NCAA v. Board of Regents of Univ. of Oklahoma,* 463 U.S. 1311, 1312 (1983). However, the "risk" in *NCAA* involved a risk of "major impact countrywide" and "would be a risk not only for the NCAA but for many, if not most, of the schools which it represents…". *Id.* at 1313. Here, the "risk" of Eagle Bear absconding with the revenue of another tourist season as a holdover tenant on Blackfeet land does not present "major impact countrywide" risk. Rather, the risk only represents the pecuniary interests of Eagle Bear. The only nationwide risk at stake is to the Blackfeet Nation if the stay is granted – as Eagle Bear will once again reap the benefits of its illegal holdover and deprive the Blackfeet Nation of the same. Eagle Bear's representation that the risk in *NCAA* is similar to the purported risk here is meritless.

Finally, Eagle Bear cites to *American Trucking* for the proposition that absent a stay, it would cause Eagle Bear to 'incur large costs, disrupt and change the whole nature of its business, there would be a loss of customer goodwill and it would potentially lose the entire business.' (Doc. 140 at 9). Eagle Bear's 'sky is falling' assertions are borderline ridiculous and are the exclusive result of its own business mismanagement. Moreover, they are not akin to the factual circumstances in *American Trucking.*

In *American Trucking,* concession agreements regulating trucks procuring goods from cargo ships at the Port of Los Angeles and Port of Long Beach were at

issue, which required trucks to engage in the Ports' Clean Truck Program, which, in the case of the Port of Los Angeles, required trucking companies to transition from independent-contractor drivers to employees of each licensed motor carrier, and further implemented truck parking restrictions. *American Trucking Assoc., Inc. v. City of Los Angeles,* 559 F.3d 1046, 1049 (9th Cir. 2009). The Ninth Circuit found that if the trucking companies were required to sign the concession agreements, it would force them to adhere to "unconstitutional conditions" and if they did not sign, they could not retrieve customer goods at the Ports. *Id.* at 1057. That was the Hobson's Choice at issue, and a far stretch from facts in this case.

This Court's Order does not place Eagle Bear in a Hobson's Choice to either engage in "unconstitutional conditions" or require that it not serve customers. This Court's order held there is no Lease. Period. –It does not prohibit Eagle Bear from leasing another campground and it does not require Eagle Bear to adhere to unconstitutional conditions. In fact, Eagle Bear's Articles of Incorporation do not require that it lease Blackfeet Nation land or even operate a campground. (Doc. 32-4). Rather, the purpose of Eagle Bear's corporation is "to own and operate recreational properties." *Id.* As a non-Indian company, Eagle Bear could never own Indian trust land, and the former lease of Indian trust land is not essential to Eagle Bear's corporate structure and existence. *See id.* Thus, the facts of *American Trucking* are wholly unrelated to this case.

Eagle Bear's claim of alleged irreparable harm equates to alleged economic harm, that can be remedied with monetary relief. It has long been established "that economic injury alone does not support a finding of irreparable harm, because such injury can be remedied by a damage award." *Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991). Thus, Eagle Bear will confidently not suffer irreparable harm absent a stay.

The Blackfeet Nation's campground will not change when Eagle Bear leaves – the Blackfeet Nation will operate the campground in 2024. Ex. B, ¶¶ 9-10. The Blackfeet Nation's land and infrastructure are not going anywhere, and it will be steadily maintained and remain consistent with Eagle Bear's occupancy. *Id.* at ¶ 6, 9. Again, any purported harm to Eagle Bear can be resolved with money damages, although the Blackfeet Nation strongly contests any such entitlement.

The Blackfeet Nation, rather than Eagle Bear, will be irreparably harmed absent a stay as it will continue to be estopped from enjoying the economic fruits of its own land. The Blackfeet Nation's harm is irreparable. Unlike Eagle Bear, the continued lack of income from the property impacts the Blackfeet Nation as a whole, including its membership, in the form of withholding significant resources, which would substantially increase the Blackfeet Nation's ability to provide much needed essential services.

Finally, Eagle Bear claims it will be forced to liquidate personal property if

this Court's order is enforced. (Doc. 140 at 10). Eagle Bear, however, already represented to the Bankruptcy Court that if this Court determines there is no Lease, it would convert its bankruptcy from reorganization to liquidation. Ex. A, 6:7-8; 33:17-20. Moreover, Eagle Bear may not even have to liquidate to pay its debts because the past three tourist seasons demonstrate revenues of $3,465,420 (2023), $2,590,070 (2022), and $2,590,070 (2021). *In re Eagle Bear,* 22-bk-40035, Doc. 259 at 10. Finally, Eagle Bear's allegations that "without Eagle Bear's ongoing maintenance efforts" there is "significant risk to campground assets" is irrational and discriminatory. (Doc. 140 at 12). The Blackfeet Nation can take care of its own land. Ex. B, ¶ 9.

Finally, this Court notes on pages 63-64 of its Order that Eagle Bear can pursue claims of unjust enrichment against the Blackfeet Nation and/or BIA: Eagle Bear can file counterclaims against the Blackfeet Nation in the Blackfeet Tribal Court action, and it can file claims against the BIA in the Court of Federal Claims. Eagle Bear will not be irreparably harmed absent a stay.

III. THE BALANCE OF EQUITIES TIPS IN FAVOR OF THE BLACKFEET NATION.

A stay pending appeal would cause the Blackfeet Nation to experience further delay, in using its own lands for the benefit of its membership. Eagle Bear's purported lease payments are pennies on the dollar compared to what Eagle Bear is generating under the terms of the former Lease. Ex. B, ¶ 12. The

Blackfeet Nation is one of "the poorest and most rural tribal nations in the United States, and economic development faces many hurdles." *Letter from Congressman Ryan K. Zinke to U.S. House of Representative Appropriations Committee*, dated March 31, 2023 https://zinke.house.gov/sites/evo-subsites/zinke.house.gov/files/evo-media-document/blackfeet.pdf (last accessed January 3, 2024). It should be allowed to immediately enjoy the economic fruits of its own land that it has been improperly deprived of for the last 15-years. Such revenues are invaluable to provide essential services to the Blackfeet Nation's membership. Unlike the purported impact to private business Eagle Bear, the Blackfeet Nation's decreased ability to provide such services represents irreparable harm that cannot be remedied with money damages. Millions of dollars are at issue which the Blackfeet Nation desperately needs to promote and provide mental and physical health services, youth homelessness services, drug counseling services, address the public housing crisis, public safety, and so on and so forth.

Moreover, Eagle Bear seeks equitable relief with unclean hands. The doctrine of unclean hands bars relief to a plaintiff who has violated good faith or other equitable principles at issue. *Seller Agency Council, Inc. v. Kennedy Ctr. For Real Estate Educ., Inc.,* 621 F.3d 981, 986 (9th Cir. 2010). At minimum, the concept of "good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." *Story v. City of Bozeman,* 242

Mont. 436, 450 (1990). Certainly, a party to a transaction, who has historically refused to pay its fair share of rent, royalties, interest, and taxes, and has occupied Indian nation land without a valid lease for over decade, is not acting in good faith in the transaction.

More importantly, Eagle Bear filed for bankruptcy on the day before a hearing in this Court on Eagle Bear's Second Motion for a Preliminary Injunction, as to whether the Blackfeet Nation could continue to lock the gates to its campground. As this Court observed, "the timing raises the question whether Eagle Bear used the automatic stay provision provided by the Bankruptcy Court, rather than continuing to pursue its motion before this Court, as a procedural means to effectuate its interests rather than pursuing a merits-based determination." (Doc. 1 at 12). Given Eagle Bear's historical revenue stream, there can be little doubt that Eagle Bear's bankruptcy filing was to avoid a merits-based ruling from this Court and its actions are therefore "tainted with inequitableness or bad faith relative to the matter in which [it] seeks [equitable] relief. *See Jarrow Formulas, Inc. v. Nutricion Now, Inc.,* 304 F.3d 829, 841 (9th Cir.2002). The balance of equities weighs in the Blackfeet Nation's favor.

IV. THE PUBLIC INTEREST WILL BE HARMED IF A STAY IS ISSUED.

As this Court recognized, the principal asset of the Blackfeet Nation is its land, and the United States government has tasked itself with the affirmative duty

of protecting this land. (Doc. 136 at 4, 9). To continue allowing Eagle Bear to remain in possession of Blackfeet Indian land without a legal right would be contrary to the public interest of safeguarding and protecting Indian lands.

Eagle Bear asserts that "[t]he 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." (Doc. 140 at 14). Eagle Bear seems to think a non-Indian occupying Indian Nation trust land without a legal right and at exclusive financial detriment of the Indian nation is in the public interest. It is not.

The public and the federal government have an interest, if not an obligation, in promoting Indian Nation self-government. Congress has demonstrated a policy of supporting tribal self-government and self-determination. Granting a stay would be contrary to tribal self-governance and self-determination, as the Blackfeet Nation would continue to be deprived of using its land. Moreover, as noted above, the public interest of the Blackfeet Nation's membership is undoubtedly harmed by a stay. A stay is not in the public interest.

V. IF A STAY IS CONSIDERED EAGLE BEAR SHOULD BE REQUIRED TO POST AN APPEAL BOND IN THE AMOUNT OF $3,634,498.76.

Eagle Bear requests a stay of enforcement of this Court's Order in equity, but offers no equity in return. While the Blackfeet Nation adamantly opposes a stay of this Court's Order and has demonstrated Eagle Bear does not meet the four-

factor test for 'stay pending appeal,' in the event this Court finds otherwise, the Blackfeet Nation requests that Eagle Bear be required to post a $3,634,498.76 appeal bond – which is the amount of cash flow Eagle Bear projects in 2024 on the Blackfeet Nation's land. *In re Eagle Bear*, 22-bk-40035-WLH, Doc. 259-4. This is especially important where, such as here, Eagle Bear is currently in Bankruptcy. If an appeal bond is not required, it is very likely that the Blackfeet Nation will never see a dime from Eagle Bear for loss of use for the 2024 season.

CONCLUSION

The status quo is that the Lease has been cancelled for approximately 15 years, and that is the status that should be maintained pending appeal. Eagle Bear's Motion for Stay Pending Appeal should be denied.

DATED this 3rd day of January, 2024.

Respectfully Submitted,

_____/s/_Derek E. Kline_____

_____/s/_Evan M.T. Thompson_____

Attorneys for Defendant
Blackfeet Nation

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2), I hereby certify that this brief is printed with proportionately spaced Times New Roman text typeface of 14 point; is double-spaced; and consists of 6,476 words, excluding the Case Caption, Table of Contents and Authorities, Certificate of Compliance and Certificate of Service.

/s/ Derek E. Kline

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify under the penalty of perjury that on the 3rd day of January, 2024, a copy of the foregoing was served by electronic means to the parties noted in the Court's ECF transmission facilities.

/s/ Derek E. Kline