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

EAGLE BEAR, INC. and WILLIAM BROOKE, Plaintiff, vs. THE BLACKFEET INDIAN NATION and THE BLACKFEET TRIBAL COURT, Defendants.	Cause No. 4:21-cv-00088-BMM-JTJ **REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

Plaintiffs Eagle Bear, Inc. and William Brooke (collectively "Plaintiffs") submit the following reply brief in support of their Motion for Preliminary Injunction (Doc. 4).

INTRODUCTION

If this matter involved an undisputedly cancelled lease like the lease in *Water Wheel*, a non-Bureau of Indian Affairs ("BIA") administered contract like the contract in *Becker*, or a lease that did not eliminate the Blackfeet Tribe's authority to cancel the lease like the one in *Takeda*, the Blackfeet Tribal Court might not "plainly lack" jurisdiction over this matter. That is not the case. The Blackfeet Tribe's arguments concerning the Tribal Court's jurisdiction are all predicated on the invalidity of a BIA-administered lease ("Lease") that can *only* be cancelled by the BIA, that the BIA decided was not cancelled, and that the Blackfeet Tribe has been asking the BIA to cancel for the last four years in as-yet unresolved administrative proceedings. The Blackfeet Tribe's new tactic of claiming to the BIA and the Blackfeet Tribal Court that the Lease was cancelled in 2008 is merely an attempt to avoid the ongoing BIA proceedings, usurp the BIA's jurisdiction over questions concerning the lease's validity, and seek relief in a more favorable forum. Considering that the Blackfeet Tribe's claims are predicated on Lease cancellation and the BIA has not made a final decision on cancellation, the Blackfeet Tribal Court plainly lacks jurisdiction over the Tribal Court complaint.

DISCUSSION

1. Will Brooke is not subject to the jurisdiction of the Blackfeet Tribal Court.

Will Brooke is not a member of the Blackfeet Tribe, was at all relevant times acting as an agent of Eagle Bear, and is not subject to the authority of the Tribal Court. The Blackfeet Tribe does not offer any argument otherwise.[1] The Court should prevent the Tribal Court from exercising jurisdiction over Will Brooke for the reasons identified in Plaintiffs' Initial Brief.

2. The Blackfeet Tribe's claims turn on whether the parties' Lease was cancelled by the BIA, a question that must be resolved by the BIA.

The Blackfeet Tribe argues that because the Lease "was cancelled in 2008," "there is no lease for the [BIA] to administer," "there is no dispute to arbitrate," and this matter falls within its right to exclude Eagle Bear from trust land and the Tribal Court's corresponding jurisdiction (Doc. 14 at 6, 12).

This argument is factually incorrect because the Lease has not been cancelled. As the BIA decided in April 2019, "mediation and arbitration must be

[1] The Blackfeet Tribe cited and discussed *Water Wheel* for a different issue. However, that case discusses tribal court jurisdiction over entities' agents. The Ninth Circuit recognized tribal court jurisdiction over a corporate officer that acted at all times as an agent of the relevant entity because it was "a matter of established fact that [the officer] was [the entity's] 'alter ego' and, thus, 'corporate separateness [was] illusory." *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 818 (9th Cir. 2011). There is no similar "established fact" in this case nor even evidence that Will Brooke is Eagle Bear's alter ego.

pursued before the lease can be cancelled for breach of contract." (Doc. 1-11, Letter from Camrud to Westesen (Apr. 4, 2019)). Likewise, as the IBIA ruled in December 2020: "the Lease has not been cancelled in any decision that is final for BIA." (Doc. 1-13, Order Denying Expedited Consideration, *Blackfeet Tribe v. Acting Rocky Mountain Regional Director*, IBIA 19-082 (Feb. 23, 2021) (emphasis added)). The reasons for these decisions are explained in the BIA and IBIA rulings. Eagle Bear previously addressed the Blackfeet Tribe's 2008 cancellation arguments when the Blackfeet Tribe made the very same arguments to the IBIA. A copy of Eagle Bear's briefing to the IBIA was filed in this matter as Doc. 5-3, and Eagle Bear will not reiterate those responses in this brief. Suffice it to say that the Blackfeet Tribe's arguments are incorrect for the reasons identified in Docs. 1-11, 1-13, and 5-3.

More critically, the validity of Eagle Bear's Lease is not an issue that the Tribal Court can decide. *Only* the BIA may cancel the Lease pursuant to its terms, and a BIA cancellation decision is only final upon exhaustion of all administrative remedies. (Doc. 1-2, Lease at ¶¶ 21, 24, 25, Ex. A ¶¶ 2, 4, 7, 15, 19). The Blackfeet Tribe implicitly acknowledges this point by alleging that Eagle Bear is trespassing precisely because the BIA allegedly cancelled Eagle Bear's Lease in 2008. (Doc. 14 at 6-13).

Whether the Lease was cancelled in 2008 is a question presently and properly before the BIA. (*See* Doc. 1-13; 12-1). It is an issue the BIA must resolve before any court—including the Blackfeet Tribal Court and this Court—may consider the issue and before the Blackfeet Tribe may predicate a trespass action on BIA cancellation. (*See* Doc. 5 at 15-17, 20-23). As the IBIA ruled when it refused to consider the Blackfeet Tribe's 2008 cancellation arguments and directed the Tribe to present the arguments to the BIA, "the Tribe has not exhausted its administrative remedies within the BIA concerning the purported 2008 cancellation of the Lease." (Doc. 12-1, Order Denying Motion to Dismiss, *Blackfeet Tribe v. Acting Rocky Mountain Regional Director*, IBIA 19-082 (Aug. 10, 2021)). The BIA's administrative review plainly prevents the Tribal Court from exercising jurisdiction and resolving the question of the Lease's validity.

The Blackfeet Tribe does not argue or present any authority to the contrary. Instead, its analysis begins by presupposing cancellation of Eagle Bear's Lease and the right to exclude Eagle Bear necessary for the Tribal Court to exercise jurisdiction under *Water Wheel*. That right to exclude and the jurisdictional authority recognized in *Water Wheel* only become relevant to the extent the BIA decides that the Lease has been cancelled. *See Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 805, 811-813 (9th Cir. 2011). Unless the

BIA does so, the Tribal Court plainly has no jurisdiction to hear the Blackfeet Tribe's trespass claims.

3. The cases cited in the Blackfeet Tribe's brief do not involve unexpired, BIA-administered leases.

The Blackfeet Tribe argues that this Court and the Court of Appeals for the Ninth and Tenth Circuits have determined that the Blackfeet Tribe's ownership of trust land at issue is dispositive of any question regarding the Blackfeet Tribal Court's jurisdiction. That is not the case. Each of the cases on which the Blackfeet Tribe relies is distinguishable from the present matter because they did not involve unexpired, BIA-administered leases and because the relevant parties' rights to access, use, or exclude others from the land was not in dispute.

a. *Water Wheel* is inapposite.

Many of the facts giving rise to the dispute in *Water Wheel* are similar to the facts the Blackfeet Tribe has alleged in this case: there was a business lease of trust land by a non-Indian, Water Wheel Camp Recreational Area, Inc. ("Water Wheel"); there were allegations that Water Wheel failed to pay rent under the lease; and the Colorado River Indian Tribes brought a trespass action. 642 F.3d at 805-806. Critically, however, there was no dispute that the lease at issue had expired and Water Wheel "failed to vacate the property" before the tribes brought a trespass and eviction action in tribal court. *Id*. at 805. There was no alleged cancellation of the lease before the lease term expired. *Id*.

This distinction is critical. The Ninth Circuit's reasoning in *Water Wheel* depended on the fact that the tribes "had power to exclude Water Wheel" because Water Wheel was a "trespasser[] on the tribe's land and had violated the conditions of [its] entry." *Id*. at 811. In a footnote, the Ninth Circuit explained that any protections or limitations on the tribes' authority in Water Wheel's lease were immaterial because "Water Wheel's rights under the lease terminated when it expired in 2007." *Id*. at 816 n. 8.

Here, on the other hand, the Lease did not expire by its terms. The initial term of the Lease extended through "April 4, 2021" and the subsequent term extends through April 4, 2046. (Doc. 1-2, Lease at ¶ 3; Doc. 1-14). Unlike the lease in *Water Wheel*, the Lease in this case did not naturally expire by its terms in 2008 or at any other time before the Blackfeet Tribe brought its claims. Unlike in *Water Wheel*, it is far from undisputed that Eagle Bear is a "trespasser," that Eagle Bear has "violated the conditions of [its] entry," or that the "power to exclude" is implicated. *Water Wheel*, 642 F.3d at 811.

Eagle Bear recognizes that the Blackfeet Tribe contends otherwise, arguing that the Lease was cancelled in 2008, but such contention is contrary to law and fact as Eagle Bear has explained in its pleadings to the BIA. (Doc. 5-3). More critically, the question of whether the Lease was cancelled in 2008 is squarely before the BIA and the Blackfeet Tribe has not exhausted its administrative

remedies in that forum. (Doc. 5 at 20-23). The Blackfeet Tribe is the party that first brought the controversy to the BIA, the BIA is the only entity that may cancel the parties' Lease, and the BIA must resolve the question of the Lease's validity before the Blackfeet Tribal Court could possibly exercise jurisdiction.[2] (*Id*.)

Moreover, unlike in *Water Wheel*, where the extent of the BIA's involvement with the lease was "policing . . . contractual obligations," the BIA lacked "authority to take action" under the lease, and nothing in BIA regulations or the terms of the lease "limit[ed]" the "remedies available to" the tribe, the Lease in this matter expressly delegated cancellation authority to the BIA, expressly identified arbitration as the sole dispute resolution method, and expressly identified this Court as the only judicial forum for disputes related to the Lease. *Water Wheel*, 642 F.3d at 816 n. 8; Doc. 1-2, Lease at ¶¶ 21, 24, 25, Ex. A ¶¶ 2, 4, 7, 15, 19. Again, the BIA must resolve the question of the Lease's validity before the Blackfeet Tribal Court can possibly exercise jurisdiction.

[2] To be clear, Eagle Bear denies that the Tribal Court could properly exercise jurisdiction over this matter even if the BIA had resolved this question. As Eagle Bear explained in its Initial Brief, all controversies arising from the Lease are also subject to mandatory arbitration and the exclusive jurisdiction of this Court. (Doc. 5 at 24-27). The Blackfeet Tribe has not argued otherwise except to claim in a conclusory, unsupported fashion that the arbitration and forum-selection clauses of the Lease are invalid because the Lease was cancelled. (Doc. 14 at 26).

b. *Takeda* is inapposite.

Takeda involved the provision of pharmaceuticals at an Indian Health Service ("IHS") clinic on leased Blackfeet Tribe trust land. Order Granting Defendant's Motion to Dismiss at 3-4, 12-13, *Takeda Pharmaceuticals America, Inc. v. Connelly*, CV 14-50-GF-BMM (Apr. 24, 2015). When the Indian plaintiff brought claims that he contracted cancer as a result of IHS's prescription of certain pharmaceuticals, the defendant pharmaceutical company claimed that the "leased status of the land that the IHS clinic occupie[d] deprive[d] the Blackfeet Tribe" of its authority over the plaintiff's claims. *Id*. at 2-3, 7. This Court rejected that argument in reliance on *Water Wheel*, explaining that the Blackfeet Tribe "retains the authority to regulate activities that take place on tribal land based on the tribe's inherent power to exclude." *Id*. at 10.

In its decision in *Takeda*, this Court recognized that the Secretary of the Interior "grants and terminates leases involving tribal land" and that a "tribe may contract or compact . . . to administer any portion of the lease, including its cancellation." *Id*. at 7-8 (citing *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072, 1073 (9th Cir. 1983) and 25 C.F.R. § 162.018). It decided, however, that the Blackfeet Tribe retained the ability to regulate activities on the IHS land because nothing in the status of the IHS land as leased "diminish[ed] the Blackfeet Tribe's landowner status" to the point of negating jurisdiction. *Id*. at 8-9. Notably, the

Blackfeet Tribe retained, in that case, the "authority to commence, administer, and cancel the lease." *Id*. at 9. Consequently, the Court decided that the fact that the "IHS facility sits on leased Indian land" was "by itself" enough to allow the Tribal Court a "colorable claim of jurisdiction." *Id*. at 13.

Here, the Blackfeet Tribe has no such authority under the Lease nor any such colorable claim of jurisdiction. As discussed above, cancellation is a power that the Blackfeet Tribe delegated to the BIA in the Lease. (Doc. 1-2, Lease at ¶¶ 21, 24, 25, Ex. A ¶¶ 2, 4, 7, 15, 19). Unlike in *Takeda*, the Lease does diminish the Blackfeet Tribe's ownership and regulatory authority and its power to cancel the Lease and exclude Eagle Bear. *See* Order Granting Defendant's Motion to Dismiss at 9, *Takeda Pharmaceuticals America, Inc. v. Connelly*, CV 14-50-GF-BMM (Apr. 24, 2015). The Lease diminishes the Blackfeet Tribal court's authority to the same extent. *Id*. at 9-13. Again, cancellation is a question left to the BIA and the Tribal Court cannot exercise jurisdiction over that question or over the Blackfeet Tribe's trespass claims.

c. *Grand Canyon Skywalk*, *Becker*, and *Big Horn* are also inapposite.

The other cases the Blackfeet Tribe cites did not involve BIA-administered leases or agreements that required dispute resolution by any entity other than the relevant tribal courts. *Grand Canyon Skywalk*, for example involved an "agreement related to the development, operations, and management of . . . an

asset located in Indian country" and the relevant Hualapai Tribe's exercise of eminent domain over that agreement. *Grand Canyon Skywalk Development, LLC v. 'Sa' Nyu Wa Inc.*, 715 F.3d 1196, 1204-1205 (9th Cir. 2013). *Becker* involved an independent contractor agreement between the Ute Indian Tribe and a non-Indian. *Becker v. Ute Indian Tribe*, ___ F.4th ___, 2021 WL 3361545 at *1-*8 (10th Cir. 2021). *Big Horn* involved a dispute over termination of electrical service to certain Crow Tribe members and entities. Order Adopting Findings and Recommendations at 1, *Big Horn County Electric Cooperative, Inc. v. Big Man*, CV 17-65-BLG-SPW (D. Mont. Feb. 26, 2021).

None of these decisions involved trespass actions or allegations regarding cancellation of a federally granted and administered lease over tribal trust land. Instead, the cases simply turned on the relevant tribes' ownership of land on which the relevant activities took place and the tribes' right to regulate activities on such land, which right was unimpaired by any leases, contracts, regulations, or statutes. As Judge Waters wrote in *Big Horn*, "[d]etermining the status of the land at issue [was] key." Order Adopting Findings and Recommendations at 6, *Big Horn County Electric Cooperative, Inc. v. Big Man*, CV 17-65-BLG-SPW (D. Mont. Feb. 26, 2021). The tribal court had jurisdiction in *Big Horn* because the relevant lands to which electrical service was provided had "not been alienated" and "the

tribe retain[ed] 'considerable control' over non-member conduct" on such lands. *Id*.

Here, on the other hand, the Blackfeet Tribe contractually limited its right to exclude. It alienated a leasehold interest and its right to regulate the leasehold in Tribal Court when it entered the Lease, agreed to arbitrate, identified this Court as the sole judicial forum for Lease-related disputes, and confirmed that the right to cancel the Lease was vested in the BIA. (Doc. 1-2, Lease at ¶¶ 21, 24, 25, Ex. A ¶¶ 2, 4, 7, 15, 19). Neither the Blackfeet Tribe nor the Blackfeet Tribal Court have any jurisdiction over whether the Lease has been cancelled.

4. Eagle Bear will likely suffer irreparable injury absent a preliminary injunction.

As Eagle Bear explained in its Initial Brief, subjecting Eagle Bear to the Tribal Court's authority would result in irreparable harm because the Tribal Court plainly lacks jurisdiction, because of the risk of inconsistent judgments between the BIA and Tribal Court, and because of the potential impact of Tribal Court pre-judgment remedies on Eagle Bear's business. (Doc. 5 at 29). In response, the Blackfeet Tribe merely alleged that Eagle Bear's concerns that the Tribal Court "is going to attach the Kamping Kabins and prevent their occupancy this summer are borderline ridiculous." (Doc. 14 at 27-28).

The Tribe ignores the impact of inconsistent judgments while the BIA considers the question of whether the Lease was cancelled in 2008. The Tribe also

ignores its own petition for attachment. The only evidence in this matter indicates that the Blackfeet Tribe is attempting to attach and take possession of Eagle Bear's Kamping Kabins via a tribal court that lacks jurisdiction, which would disrupt the over 10,000 nights of reservations that were left in the summer 2021 season as of August 10. (Doc. 5-1; Doc. 5-2 at ¶ 4; *see* Blackfeet Tribal Code Chapter 2, Section 9). That threat is far from ridiculous.

5. Eagle Bear does not have unclean hands.

Eagle Bear's alleged breach of the Lease is the sole basis for the Blackfeet Tribe's claim that Eagle Bear has unclean hands and is not entitled to any equitable relief. Effectively, the Blackfeet Tribe is claiming that this Court cannot enjoin the Blackfeet Tribe from pursuing its trespass claims because the Blackfeet Tribe's claims are unquestionably correct on their merits. (Doc. 14 at 28-29).

Not only does the Blackfeet Tribe fail to cite any evidence in support of this allegation, the Blackfeet Tribe misapplies the unclean hands doctrine. For actions of a party to rise to the level of "unclean hands" so as to preclude equitable relief, the party must have "dirtied his hands in acquiring the right he now asserts." *Institute of Cetacean Research v. Sea Shepherd Cons. Soc.*, 725 F.3d 940, 947 (9th Cir. 2013). The issues of whether Eagle Bear performed its obligations under the

Lease and whether the Lease was cancelled in 2008[3] have nothing to do with how Eagle Bear acquired the Lease or how it acquired its rights under the Lease, including the right to have all cancellation decisions made by the BIA, an arbitrator, or this Court. Under the plain terms of the Lease, the Blackfeet Tribe expressly delegated cancellation decisions to the BIA, agreed to arbitrate Lease-related disputes, and agreed to this Court as the sole judicial forum for Lease-related disputes. There is nothing inequitable about requiring the Blackfeet Tribe to honor those agreements.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court grant their motion for preliminary injunction enjoining the Blackfeet Tribe from pursuing the claims and reliefs sought in their Tribal Court Complaint and enjoining the Tribal Court from considering or resolving the Blackfeet Tribe's claims.

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[3] Again, Eagle Bear performed the Lease and the Lease was not cancelled in 2008, as Eagle Bear explained to the IBIA. (Doc. 5-3).

Dated this 31st day of August, 2021.

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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 3,121 words long, excluding the Caption and the Certificates of Service and Compliance.

Dated this 10th day of August, 2021.

CROWLEY FLECK PLLP

By /s/ Neil G. Westesen
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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 2021, a true and correct copy of the foregoing was delivered by the following means to the following:

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