DOCKET NO. 21-36033

UNITED STATES COURT OF APPEALS
OR THE NINTH CIRCUIT

EAGLE BEAR, INC.; WILLIAM BROOKE,

Plaintiffs-Appellants,

v.

BLACKFEET INDIAN NATION; BLACKFEET TRIBAL COURT,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Montana, Great Falls Division; D.C. No. 4:21-cv-00088-BMM

APPELLEE'S ANSWERING BRIEF

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INTRODUCTION

This matter arises out of the June 10, 2008 cancellation by the Bureau of Indian Affairs ("BIA") of a Business and Recreation lease between the Blackfeet Nation and Eagle Bear, Inc. ("Eagle Bear") of a campground owned by the Blackfeet Nation located on trust land within the Blackfeet Indian Reservation. BIA cancelled the lease for non-payment of an annual rental payment due on November 30, 2007.

In 1997 the Blackfeet Nation entered into a 25 year lease Eagle Bear with an option to renew for an additional 25 years. The lease required a $250,000 initial payment, plus an annual rental payment and an annual gross receipts royalty payment (collectively the annual rental), which annual rent was due on November 30 of each year. Issues regarding Eagle Bear's payment of the required annual rental arose early in the lease. On June 10, 2008 the BIA Blackfeet Agency cancelled the lease for non-payment of the November 2007 annual rental payment of $15,000.00.

Eagle Bear initially filed a timely Notice of Appeal and Statement of Reasons in which it raised only one reason for appealing the lease cancellation: the provably false claim that it paid the delinquent annual rental on June 6, 2008 before it received the cancellation notice. Eagle Bear did not make a demand for arbitration, nor did it claim a lack of notice and opportunity to cure the default.

By check dated June 16, 2008 and not received by the BIA until June, 20, 2008, Eagle Bear paid the principal amount of the delinquent November 2007 payment. Eagle Bear did not include the required interest on that payment. Eagle Bear's appeal stayed the cancellation of the lease and allowed it to operate the campground for the 2008 tourist season. Which, in turn, meant that it would owe the Blackfeet Nation a gross receipts royalty payment on November 30, 2008.

After acknowledging receipt of Eagle Bear's appeal, the Rocky Mountain Regional Office of the BIA took no immediate action on the appeal. On January 5, 2009 Eagle Bear voluntarily withdrew its appeal. In its letter withdrawing its appeal, Eagle Bear falsely unilaterally claimed that the lease was current at the time. When Eagle Bear withdrew its appeal, the BIA Rocky Mountain Regional Office had not issued a decision on the appeal, and the Blackfeet Agency's cancellation decision remained in effect.

Thereafter the BIA failed to take steps to remove Eagle Bear from the lease premises and the BIA failed to notify the Blackfeet Nation of the cancellation and Eagle Bear's withdrawal of its appeal. Eagle Bear has been a holdover tenant since 2008. Neither the former lease nor the applicable federal regulations grant any rights to a holdover tenant of Indian trust land.

As the result of ongoing issues with Eagle Bear's lack of payment under the former lease, not knowing that it was already cancelled, the Blackfeet Nation

pushed the BIA Blackfeet Agency to again cancel the Eagle Bear lease in 2017. The Blackfeet Agency responded by cancelling the lease. As a result of the administrative appeals resulting from that 2017 cancellation decision, the Blackfeet Nation became aware of the 2008 cancellation.

Based on the 2008 BIA cancellation decision, the Blackfeet Nation brought suit in the Blackfeet Nation Court against Eagle Bear and William Brooke for trespass and eviction, an accounting, illegal use of Blackfeet Nation land, fraudulent misrepresentation and failure to follow Blackfeet Nation laws. Eagle Bear and Brooke responded by filing a motion to dismiss the Blackfeet Nation Complaint in the Blackfeet Nation Court. That motion is still pending.

Eagle Bear and Brooke then brought this action in the Federal District Court seeking a declaratory judgment and injunction challenging the Blackfeet Nation's jurisdiction over them. Eagle Bear and Brooke also filed a motion for a preliminary injunction. After hearing and briefing, the District Court found that the former lease was likely cancelled by the BIA in 2008 and that therefore the Blackfeet Nation court's jurisdiction was not plainly lacking. Applying the preliminary injunction factors, the District Court concluded that Eagle Bear was not likely to succeed on the merits of its jurisdictional challenge, and that while there was a possibility that Eagle Bear may suffer irreparable injury if evicted before it could pursue its challenge, the District Court concluded that the balance

of the equities did not favor either party and that the public interest favored allowing the Blackfeet Nation. The District Court denied Eagle Bear and Brooke's motion for preliminary injunction.

Eagle Bear and Brooke now appeal. Their appeal is premised on the mistaken belief that the lease was not cancelled in 2008. That belief is premised on the gross distortion of their own evidence and their attempt to manufacture an agreement out of a few sentences in a letter. Eagle Bear and Brooke'a argument is built on a foundation of three provably false statements: The first false statement is contained in Eagle Bear's Notice of Appeal and Statement of Reasons wherein they falsely claim that they paid the delinquent payment for which the lease was cancelled before receiving the cancellation decision. The second false statement is in the letter withdrawing Eagle Bear's appeal wherein Eagle Bear (Brooke) unilaterally falsely claims that as of that date, the lease was current. The third false statement is that there was some unwritten, verbal agreement between Eagle Bear/Brooke and unnamed employees of the BIA Blackfeet Agency for Eagle Bear to withdraw its appeal and for the lease to be reinstated.

Eagle Bear and Brooke's arguments lack factual and legal merit and should be rejected. Based on the record before it, the District Court's finding that the former lease had been cancelled in 2008 was not clearly erroneous. Applying the

correct legal standard, the District Court did not abuse its discretion in denying Eagle Bear and Brooke's motion for preliminary injunction.

JURISDICTIONAL STATEMENT

The Appellee's agree with the Appellant's jurisdictional statement.

STATEMENT OF THE ISSUE

Whether the District Court properly denied the Appellant's motion for a preliminary injunction.

STATEMENT OF THE CASE

In April of 1997, the Blackfeet Nation entered into a Business and Recreation Lease with the Plaintiff Eagle Bear, Inc. acting through its principal owner and managing agent Plaintiff William Brooke, for approximately 54 acres of the Blackfeet Nation's trust land on St. Mary Lake on the Blackfeet Indian Reservation. (ER-38). Because the lease was for Indian nation trust land, the Bureau of Indian Affairs ("BIA") was responsible for administering the lease. (Id.; 25 CFR Sec. 162.001 et seq.)

While the lease contained numerous provisions, of importance here are the requirements that Eagle Bear, Inc., 1) post a performance bond, 2) pay an annual rental payment and an annual gross receipts royalty payment (the latter two referred to collectively as "rent" in the lease), and 3) that interest and penalty automatically accrued on any late rental payment. (ER-38, 41-43). Failure to post

the bond or make the rental payments on time were the only grounds for cancellation of the lease. (ER-38, 56). Pursuant to the agreement, only the BIA could cancel the lease. (ER-38, 42-43, 56). In accordance with both the lease and appliable Federal regulations, once the lease was cancelled, the tenant (Eagle Bear, Inc.) acquired no rights by holding over. (ER-38, 67).

Because it failed to post the required performance bond, Eagle Bear, Inc. was in default under the lease from the moment the lease was approved by the BIA. (ER-38, 48 & 56). Thereafter in 2001 and again in 2004 the BIA sent Eagle Bear, Inc. default notices for failure to pay the rental payments in a timely manner.[1] While Eagle Bear ultimately paid both late payments, it failed to pay the interest on the late payments and on several others prior to 2008. (ER-38, 43; ER-3, 6-7). Interest on those late payments continued to accrue at a rate of prime plus 3% from 30 days after the due date, up to the time of cancellation in 2008 (and thereafter). (ER-38, 43).

Eagle Bear failed to pay the 2007 annual rental payment due on November 30, 2007. (ER-37). As required by the lease and by the applicable Federal regulations, the BIA sent Eagle Bear notices of default and an opportunity to cure

[1] Any fact not supported by a reference to the record in this Statement of the Case is not in the record. Those facts are offered as general background pursuant to Circuit Rule 28-2.8.

the default, and further advised Eagle Bear that failure to cure the default would result in the lease being cancelled. (ER-35, 36, 37).

On June 10, 2008, when Eagle Bear still had not paid the November 2007 annual rental payment, the BIA Blackfeet Agency sent Eagle Bear, Inc. a certified letter advising it that the lease had been cancelled for non-payment of the November 2007 annual rental payment. (ER-3, 7; ER-34). Eagle Bear was advised of its appeal rights and that it was required to send a copy of any Notice of Appeal to all interested parties and to certify to the BIA that it had done so. (*Id).* Eagle Bear received the cancellation notice on June 13, 2008. (ER-32).

The Blackfeet Nation did not request that the BIA cancel the Eagle Bear lease for non-payment and the BIA did not copy the Blackfeet Nation with the June 10, 2008 cancellation letter. Nor was the Blackfeet Nation consulted about the cancellation decision. While the Blackfeet Nation was clearly an interested party, it had no duty under the law to defend the BIA's cancellation decision.

Eagle Bear sent a check in the amount of $15,000, dated June 16, 2008, to the BIA representing the principal amount of the unpaid November 2007 annual rental payment; the required interest was not included. (ER-33). The BIA received this payment on June 20, 2008. (ER-29, 30, 31).

Plaintiff William Brooke, acting on behalf of Eagle Bear, Inc. filed a Notice of Appeal and Statement of Reasons with the BIA Blackfeet Agency and Rocky

Mountain Regional Office on June 18, 2008, whereby Eagle Bear appealed the cancellation of the lease. (ER-32). Eagle Bear's appeal stayed the lease cancellation thereby allowing it to continue to operate the lease pending the appeal. (25 C.F.R. § 162.621).

The only claim made by Eagle Bear in its Notice of Appeal and Statement of Reasons as to why the lease should not be cancelled was its demonstrably false claim that it had paid the past due annual rental payment on June 6, 2008, before it received the lease cancellation letter. (ER-34). Eagle Bear made no claim in its appeal regarding lack of notice and opportunity to cure, or that its' surety was not notified. (*Id.*). It also failed to make any claim that the cancellation was subject to arbitration. (*Id.*). Nor did Eagle Bear demand arbitration. (*Id.*).

There is no record of any action by the Rocky Mountain Regional Office on the Eagle Bear lease cancellation between July 25, 2008 (when the Regional office sent an acknowledgment letter to Eagle Bear) and January of 2009.

On January 5, 2009, Plaintiff William Brooke, acting on behalf of Eagle Bear, Inc. sent a letter to the Superintendent of the Blackfeet Agency withdrawing Eagle Bear's appeal. (ER-28). The letter claims that Brooke, as Eagle Bear's business agent, had been in discussion with BIA Blackfeet Agency staff, who advised him that Eagle Bear's payments had been received by the BIA and cashed by the BIA. (*Id.*). Brooke then unilaterally declares that the lease is current. (*Id.*).

The Blackfeet Nation was not aware of and did not participate in any discussions between Brooke and unknown, unnamed employees of the BIA Blackfeet Agency. Importantly, the Blackfeet Nation did not consent to and was not a party to any purported agreement between Eagle Bear (Brooke) and the BIA to withdraw the 2008 lease cancellation and reinstate the lease or create a new lease.

At the time that it withdrew its appeal, Eagle Bear, Inc. was not current on the lease: interest was still running on the numerous late payments (ER-3, 6; ER-38, 43), it had failed to pay the required interest on the delinquent November 2007 annual rental payment (ER-33), and because it was legally allowed to operate the campground under the lease based on its appeal, Eagle Bear had already defaulted on the annual gross receipts royalty payment that was due in November of 2008 and the interest on that payment. (ER-29, 30, 31).

After Eagle Bear, Inc. withdrew its appeal, the June 10, 2008 decision of the Blackfeet Agency cancelling Eagle Bear lease was never reversed, rescinded, withdrawn, modified, amended, recalled or changed in any action by the BIA after the cancellation decision letter was issued. (ER-3, 8). While William Brooke on behalf of Eagle Bear, Inc. claimed in the January 5, 2009 letter that he had discussion with BIA staff regarding the late payment and more recently Brooke has claimed that unnamed individuals at the BIA requested that he withdraw his appeal and that he had an agreement to do so, neither Eagle Bear, Brooke or the BIA have

ever produced anything in writing evidencing this alleged agreement. (*Id.*) Eagle Bear now admits that no written document exists. Eagle Bear Brief at pg. 15-16.

Once Eagle Bear withdrew its appeal, there was no appeal and the cancellation became final on or about February 5, 2009. (25 CFR §§ 2.6(b), 162l.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. (ER-3, 8). The Blackfeet Nation was never consulted by the BIA after the 2009 withdrawal of Eagle Bear's appeal.

Notwithstanding its claims that it had brought the lease current, Eagle Bear failed to pay the 2008, 2009, 2010 and 2011 gross receipts royalties that were due on November 30 of each year. (ER-29, 30, 31). It had also failed to pay the required interest on those payments. (*Id.*) Based on Eagle Bear's numerous violations of the lease, in the mistaken belief that the lease was still in effect, in 2017, the Blackfeet Nation asked the BIA to cancel the lease again. (ER-3, 8).

The BIA Blackfeet Agency initially required mediation between the parties, and then reversed itself and cancelled the lease. (*Id.*). Eagle Bear appealed that cancellation to the Rocky Mountain Regional Director who reversed the Agency and ordered mediation. (*Id.*). The Blackfeet Nation appealed that decision to the Interior Board of Indian Appeals ("IBIA"). (*Id.*). Through an order from the IBIA

to produce the record of the lease, the Blackfeet Nation became aware of the 2008 lease cancellation. (*Id.*).

Having determined that that the lease was cancelled in 2008, that Eagle Bear timely appealed and then withdrew that appeal, and that the lease cancellation became a final agency action for which the applicable statute of limitations had elapsed, the Blackfeet Nation brought an action in the Blackfeet Nation court against Eagle Bear, Inc. and William Brooke. (ER-3, 9). The Blackfeet Nation predicated its claims in the Nation's court on Eagle Bear's 13 years (2008-2021) of illegal operation of the campground, through its principal agent Brooke, on Blackfeet Nation trust land within the Blackfeet Indian Reservation. (*Id.*).

The Blackfeet Nation's complaint in the Nation's court alleges trespass and seeking eviction; unauthorized use of Blackfeet Nation lands seeking illegally gained profits; an accounting of the Plaintiffs' rents and profits from June 10, 2008, fraud seeking damages, and failure to follow Blackfeet Nation laws. (ER-3, 9). The Blackfeet Nation also sought pre-judgment attachment of certain cabins located on the property to prevent Eagle Bear and Brooke from removing the property pending the litigation. (*Id.*)

Eagle Bear and Brooke responded by filing a COMPLAINT in the Federal District Court against the Blackfeet Nation Defendants seeking declaratory and injunctive relief to prevent the Blackfeet Tribal Court from exercising jurisdiction

over their dispute with the Blackfeet Nation. (ER-3). Eagle Bear and Brooke also filed a motion for preliminary injunction. (*Id.*). Asserting, alternatively, that the underlying former lease was not cancelled in 2008, or that they cured the cancellation, or that the BIA failed to follow the proper procedures for cancellation of the lease, that the issue of the lease cancellation was not before the District Court, and that in no circumstances did the Blackfeet Nation court have jurisdiction over William Brooke because he is a non-Indian, Eagle Bear and Brooke claimed that they met the requirements for a preliminary injunction. (ER-3, 10-11).

After a hearing on Eagle Bear and Brooke's motion for preliminary injunction, the District Court issued its Order on Preliminary Injunction denying the motion. (ER-3). Applying the standards set forth in *Winter v. Nat. Res. Def. Council. Inc.*, 555 U.S. 7, 22 (2008), in concert with the Ninth Circuit's sliding scale approach to preliminary relief, *All. For the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011), the District Court concluded that a balance of the factors weighed against a preliminary injunction. (*Id.*) (*Winter,* a plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest).

Interpreting controlling Federal Indian Law principles, the District Court concluded that the likelihood of success on the merits that the Blackfeet Nation court had jurisdiction over the underlying dispute, weighed heavily in favor the Blackfeet Nation Defendants. (ER-3, 10-19). The District Court determined that record before it appeared to establish that the former lease between Eagle Bear and the Blackfeet Nation had been cancelled by the Bureau of Indian Affairs in 2008, and that Eagle Bear and Brooke raised no serious questions going to the merits. (ER-3, 11-15).

Balancing the Blackfeet Nation court's apparent jurisdiction over Eagle Bear and Brooke against the possibility that Eagle Bear would suffer irreparable harm if it were wrongly evicted from Blackfeet Nation land, the District Court determined that the irreparable harm prong of the preliminary injunction test went to Eagle Bear and Brooke. (ER-3, 22-23). The District Court further determined that equitable considerations favored both parties, that equities pushed against each other and the balance did not favor either party. (*Id.*, 23-24).

Focusing on the long-standing principles of Federal Indian law favoring Indian Nation court jurisdiction and based on its determination that the underlying lease was cancelled by the BIA in 2008, the District Court concluded that the public interest factor of the preliminary injunction test favored the Blackfeet Nation Defendants. (ER-3, 25-26). Weighing all the relevant factors,

acknowledging that a preliminary injunction represents an extraordinary remedy, the District Court concluded that a preliminary injunction was not appropriate. (ER-3, 26-27). The District Court pointed out that record appeared to show that the BIA cancelled the former lease in 2008 and that Eagle Bear and Brooke had failed to show a likelihood of success on the merits. (ER-3, 26). The Court further found that while irreparable harm prong tilted slightly to Eagle Bear and Brooke, the public interest favored the Blackfeet Nation Defendants. (*Id.*).

Eagle Bear and Brooke appeal from the District Court's Order. They incorrectly assert that the District Court abused its discretion, committed errors of law and made erroneous factual findings. Because the Bureau of Indian Affairs in fact cancelled the former lease between Eagle Bear and the Blackfeet Nation in 2008, and that cancellation is now final as a matter of law, the District Court did not abuse its discretion, it made no errors of law and the factual findings on which its decision was based were not clearly erroneous.

SUMMARY OF ARGUMENT

Because there are no serious questions going to the merits (i.e whether the Blackfeet Nation court has jurisdiction over Eagle Bear and Brooke), the balance of the hardships do not tip sharply in favor Eagle Bear and Brooke, and the public interest favors the Blackfeet Nation Defendants, the District Court did not abuse its discretion in denying Eagle Bear and Brooke's motion for a preliminary injunction.

Based upon the record before it, the District Court's determination that the underlying former lease between Eagle Bear and the Blackfeet Nation was cancelled was not clearly erroneous. Because the lease was in fact cancelled in 2008 and that cancellation became final for agency purposes, the District Court did not exceed its authority or abuse its discretion in its preliminary legal conclusion that the lease was likely cancelled in 2008. Because the lease was cancelled in 2008 and Eagle Bear (and Brooke) exhausted their administrative remedies, the current proceeding before the IBIA is moot; nothing turns on the outcome of that proceeding.

Having correctly determined that the former lease was cancelled in 2008, the District Court properly applied principles of Federal Indian law enunciated in *Water Wheel Camp Recreation Area v. LaRance*, 642 F.3d 802 (9th Cir. 2011) to conclude that pursuant to the sovereign power to exclude people from its lands, the Blackfeet Nation court had jurisdiction over both Eagle Bear and Brooke and the Blackfeet Nation's claims brought in that court. The District Court correctly determined that based on the 2008 lease cancellation there were no serious questions going to the merits, and properly concluded that Eagle Bear and Brooke are not likely to succeed on the merits of their claim that the Blackfeet Nation court lacks jurisdiction over them.

Assuming for the purposes of this discussion that the District Court's determination of the remaining *Winter's* factors was correct, applying the Ninth Circuit's sliding scale approach to a preliminary injunction, the District Court did not abuse its discretion when it properly denied Eagle Bear and Brooke's motion for a preliminary injunction. Applying the three (3) remaining factors of the *Winter's* test, the District Court concluded that the irreparable harm factor tipped slightly in favor of Eagle Bear and Brooke, that the balance of the equities did not favor either party, and that the public interest favored the Blackfeet Nation Defendants.

Based on its analysis the District Court correctly denied the motion for preliminary injunction. Eagle Bear and Brooke failed to show that there were serious questions going to the merits and that the balance of the hardships tipped sharply in their favor.

Eagle Bear (and Brooke) now seek to re-litigate the 2008 BIA lease cancellation 13 years later, and essentially ask the Federal Courts to revive the cancelled lease or to create a new lease to replace the cancelled lease. No legal authority exists to support that request and it must be rejected. Eagle Bear and Brooke's remaining arguments incorrectly presume that the lease was still in effect and have no relevance here.

Because the former lease was cancelled in 2008 and the claims of the Blackfeet Nation in the Blackfeet Nation court do not arise out of an existing lease, the Blackfeet Nation court has both actual and plausible jurisdiction over those claims and the parties. The District Court's denial of the motion for preliminary injunction was not an abuse of discretion and should be affirmed.

STANDARD OF REVIEW

A plaintiff seeking a preliminary injunction must meet four (4) elements: 1) that it will likely succeed on the merits; 2) that it will suffer irreparable harm if a preliminary injunction is not granted; 3) that the balance of the equities tips in its favor; and, 4) that an a preliminary injunction will serve the public interests. *Winter v. Natural Resources Defense Council,* 555 U.S. 7, 22 (2008). A preliminary injunction is an extraordinary remedy that should not be awarded as a matter of right, "but only upon a clear showing that the plaintiff is entitled to such relief". *Id.*

This Circuit has determined that the "serious questions" version of the sliding scale test for preliminary injunctions remains viable after the Supreme Court's decision in *Winter*. However the "serious questions" sliding-scale approach survives *Winter* only when applied as part of the four-element *Winter* test. "That is, "serious questions going to the merits" and a balance of hardships that tips sharply towards the plaintiff can support issuance of a

preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest."

Alliance for the Wild Rockies v. Cottrell, 632 F.3d at 1136.

A district court's denial of a preliminary injunction is reviewed for abuse of discretion. *Id.* at 1132, *citing Lands Council v. McNair*, 537 F.3d 981, 986 (9th Cir.2008) (en banc). The district court abuses its discretion when its decision is based "on an erroneous legal standard or clearly erroneous finding of fact." *Lands Council v. McNair, Id.* The District Court's conclusions of law are reviewed de novo and its findings of fact for clear error. *Id.* at 986-87.

This Court will not reverse the district court where it "got the law right," even it "would have arrived at a different result," so long as the district court did not clearly err in its factual determinations. *Id.* at 987.

ARGUMENT

1. The District Court Properly Determined that the Defendant Blackfeet Nation Court's Jurisdiction Was Not Plainly Lacking, and that Eagle Bear and Brooke Were Not Likely to Succeed On the Merits.

Because the former lease between Eagle Bear and the Blackfeet Nation was cancelled in 2008, the District Court's conclusion that Eagle Bear and Brooke would not likely succeed on the merits of their challenge was correct. The District Court applied the correct legal standard and its determination that the former lease had likely been cancelled in 2008, which was supported by the record before it,

was not clearly erroneous. Having determined that the lease was likely cancelled in 2008 and that Eagle Bear and Brooke had no legal right to be on Blackfeet Nation land, the District Court properly applied the rules of Federal Indian law and concluded that the Blackfeet Nation's inherent power to exclude individuals from its own land supported the Blackfeet Nation court's jurisdiction over both the claims and parties in that court, and that therefore Eagle Bear and Brooke would not likely prevail on the merits of their jurisdictional challenge.

Contrary to Eagle Bear and Brooke's claims, the record is clear that the former lease was cancelled in 2008, that Eagle Bear initially appealed the cancellation and then voluntarily withdrew its appeal. In so doing Eagle Bear both pursued and then exhausted its administrative remedies. There are no administrative remedies to exhaust and the matter pending before the IBIA which arises out of the 2017 cancellation is moot. Nothing turns on the outcome of that appeal.

Because the former lease was cancelled in 2008 by the BIA, Eagle Bear and Brooke's remaining arguments which are predicated on the continued existence of the lease are irrelevant. There are no administrative remedies left to exhaust, Eagle Bear is not entitled to arbitration, and the Federal Court has no jurisdiction over the claims brought by the Blackfeet Nation in that court.

a. The Record before the District Court Supports Its Conclusion that the Former Lease Was Likely Cancelled in 2008.

As a threshold matter in its analysis, the District Court characterized Eagle Bear and Brooke's arguments for a preliminary injunction as relying on the continued existence of the lease, and therefore whether they were likely to succeed on the merits was dependent upon whether the BIA cancelled the lease in 2008. (ER-3, 11). Based upon the record before it, considering the applicable federal regulations, the District Court correctly concluded that the former lease was likely cancelled in 2008.

Incorrectly claiming error in the District Court's preliminary finding that the former lease was likely cancelled in 2008, Eagle Bear and Brooke make two lines of attack: on one line Eagle Bear and Brooke baselessly attempt to re-litigate the BIA lease cancellation 13 years after the fact, raising issues for the first time which were not raised in their original administrative appeal. On the second line of attack Eagle Bear and Brooke make arguments that rely on the continued existence of the former lease. Because the lease was cancelled in 2008 Eagle Bear and Brooke's remaining arguments are both inapposite and without legal merit.

b. That the Former Lease Was Cancelled by the BIA in 2008 is beyond dispute.

Appeals from adverse decisions by officials of the BIA in 2008 were governed by the regulations found at 25 Code of Federal Regulations (CFR), Part 2. The provisions of 25 CFR, Part 2, were appliable to all appeals from decisions

made by officials of the BIA by persons who may have been adversely affected by such decisions. 25 CFR 2.3. An "appeal" is a written request for review of an action of the BIA that is claimed to have adversely affected the interested party making the request. 25 CFR 2.2.

A BIA official making a decision is required to give written notice of the decision to all interested parties known to the decision maker by personal delivery or by mail. 25 CFR 2.7(a). A person wanting to challenge an adverse action of a BIA official, must file a written notice of appeal in the office of the official who made the adverse decision within 30 days of receipt by the appellant of the notice of administrative action. 25 CFR 2.9.

Filing an appeal effectively stays the adverse decision. 25 CFR 2.6(a). Decisions of BIA officials become effective when the time for filing a notice of appeal has expired and no notice of appeal has been filed. 25 CFR 2.6(b), 25 C.F.R. 162.621.

"As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decision making process --it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997) (citations omitted).

In *Big Lagoon Rancheria v. California*, 789 F. 3d 947 (9th Cir. 2015), the Ninth Circuit held that 28 U.S.C. § 2401(a) creates a general six-year statute of limitations for actions brought against the United States. See 28 U.S.C. § 2401(a) ("Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."). The Ninth Circuit has held that this rule "applies to actions brought under the APA." *Wind River Mining Corp. v. United States*, 946 F.2d 710, 713 (9th Cir.1991) (footnote omitted).

Applying these rules to the 2008 BIA cancellation of the former Eagle Bear lease results in the conclusion that the lease was cancelled, that the BIA's cancellation decision became final and is now no longer subject to administrative or judicial review.

The record before the District Court demonstrates clearly that the BIA cancelled the former lease between Eagle Bear, Inc. and the Blackfeet Nation in 2008 for non-payment of the annual rental payment which was due on November 30, 2007. (ER-34). The Blackfeet Agency Superintendent's June 10, 2008 letter to Eagle Bear states:

> This is in regards to lease 5B03389621. Payment of rent due for this lease has not been received. The payment was due November 30, 2007 in the amount of $15,000.00.
>
> You are advised that this lease is hereby cancelled.

(*Id.*).

There is no dispute that Eagle Bear received the cancellation letter. By a letter dated June 18, 2008, William Brooke, as President and principal agent of Eagle Bear, filed a Notice of Appeal and Statement of Reasons with the Blackfeet Agency Superintendent whereby he appealed the cancellation. (ER-32). In that Notice of Appeal and Statement of Reasons, Eagle Bear/Brooke made only one claim: that it "paid the annual payment on June 6, 2008, before we received your notice." (*Id.*). Based upon that demonstrably false claim, Eagle Bear asked the BIA to "reverse or amend your decision . . . ." (*Id.*). The record before the District Court of Eagle Bear's payment history showed that the payment for which the lease was cancelled was made by Eagle Bear by a check dated June 16, 2008 (not June 6, 2008), and not received by the BIA until June 20, 2008. (ER-33; ER-29, 30, 31).

Importantly, Eagle Bear made no claim in its Notice of Appeal and Statement of Reasons that the BIA had failed to follow the regulations. (ER-34). Nor did it claim that the cancellation decision was subject to arbitration. (*Id.*). However, Eagle Bear's appeal effectively stayed the cancellation of the lease and allowed it to operate the campground for the 2008 season, thereby generating an obligation to pay a gross receipts royalty payment on November 30, 2008. 25 CFR

§ 2.6(a); 25 CFR § 162.621; (ER-30, 41-43). Eagle Bear failed to make this payment when due. (ER-29, 30, 31).

The record of the 2008 lease cancellation showed that the BIA took no action on Eagle Bear's appeal after that appeal was filed on June 18, 2008. The next record action in the 2008 lease cancellation is a letter dated January 5, 2009, from William Brooke, on behalf of Eagle Bear to the BIA Blackfeet Agency Superintendent voluntarily withdrawing Eagle Bear's appeal of the 2008 lease cancellation. (ER-28).

That letter reads in pertinent part:

> Pursuant to my discussions with your realty staff, I hereby withdraw the Notice of Appeal dated June 18, 2008 which appealed your decision of June 10, 2008. A copy of the Notice of Appeal is attached for your convenience.
>
> I am withdrawing the Notice of Appeal since I have been advised by the Bureau that all of our annual payments required under the lease have been made to the Bureau and cashed by the Bureau. Accordingly, the lease is current.

(*Id.*)

Eagle Bear's withdrawal of its appeal meant that there was no longer an appeal for the next level of administrative review, the Rocky Mountain Regional Director, to act upon. 25 C.F.R. § 2.6(b). There has never been a written decision from the BIA reversing or amending the June 10, 2008 cancellation of the lease. (ER-3, 8). Nor has the BIA ever issued a letter or decision even acknowledging

Eagle Bear/Brooke's claim that the lease was current. (ER-3, 8). The June 10, 2008 cancellation decision became final 31 days after Eagle Bear withdrew its appeal and stands as a final agency action. 25 CFR § 162.621.

Importantly, Eagle Bear's self-serving unilateral declaration that "the lease is current", is also false. At the time that Eagle Bear withdrew its appeal (Jan. 5, 2009) it owed the 2008 gross receipts royalty payment which was due on November 30, 2008. It also owed interest on the 2007 late payment, the 2008 gross receipts royalty payment which was past due, and it owed interest on numerous other late payments. (ER-3, 4-5). Interest was required without demand based on both federal regulation and the former lease agreement. (ER-30, 43).

Based upon the record that it had before it, the District Court's conclusion that the former lease was likely cancelled in 2008 was not clearly erroneous.

c. Eagle Bear and Brooke's Claims that the BIA Failed to Follow the Applicable Regulations and That It Timely Cured Its Default, Are Untimely and Must Be Rejected.

In a failed effort to dispute that the former lease was cancelled in 2008, Eagle Bear attempts to re-open and re-litigate that cancellation. Eagle Bear's effort is 13 years too late and is barred by the IBIA governing case law.

The long-standing principle of the IBIA is that it won't consider arguments or issues raised for the first time on appeal to the Board. "This rule is based on the regulatory provision limiting the Board's scope of review to those issues that were

before the Regional Director, *See* 43 CFR Sec. 4.318, and on the principle that a party who did not afford BIA an opportunity to respond to an issue should not be allowed on appeal, to challenge BIA's decision as defective for failing to address that issue." *Wind River Alliance v. Rocky Mountain Regional Director*, 52 IBIA 224, 227 (2010) (Citations omitted). Because Eagle Bear failed to raise the issue of lack of notice and an opportunity to cure in its Notice of Appeal and Statement of Reasons dated June 18, 2008, it is barred from attempting to re-open the 2008 appeal and raise those issue today – 13 years later.

While Eagle Bear's June 18, 2008 Notice of Appeal and Statement of reasons were timely and effectively stayed the lease cancellation pending the appeal, Eagle Bear did not cure the default for which the lease was cancelled. Relying on its own incorrect claim (13 years after the fact) that it did not receive appropriate notice, Eagle Bear falsely asserts that it cured the default which caused the lease to be cancelled. In support of its untimely claim that it did not get appropriate notice, Eagle Bear falsely claims that "[i]t is undisputed that Eagle Bear paid the precise amounts of the allegedly past due payments the BIA requested on or before June 16, 2008, well-within the 10 day period during which Eagle Bear was entitled to cure the alleged default." Eagle Brief at pg 14-15. That statement is provably false. Eagle Bear's check in the amount of $15,000 for the delinquent November 2007 annual rental payment is dated June 16, 2008 and

was not received by the BIA until June 20, 2008, (ER-29, 30, 31), and it did not include the required interest due on that payment. (ER-43). That lack of accuracy regarding the facts surrounding the 2008 lease cancellation is inherent in Eagle Bear and Brooke's arguments throughout this action.

Eagle Bear and Brooke did not pay the delinquent 2007 annual rental payment on June 6, 2008 as claimed in the June 18, 2008 Notice of Appeal and Statement of Reasons. (ER-32, 33). It is not "undisputed" as Eagle Bear claims that they paid their payment on June 16, 2008 – that payment was not received by the BIA until June 20, 2008. (ER-29, 30, 31). Eagle Bear and Brooke did not raise any issue regarding lack of notice or a claim for arbitration in their June 18, 2008 Notice of Appeal and Statement of Reasons. (ER-34). Eagle Bear's payment of $15,000 on June 20, 2008 did not bring the lease current; even with respect to just the delinquent 2007 annual rental payment, Eagle Bear failed to pay the required interest on that payment. When Eagle Bear withdrew its appeal on January 5, 2009 and made the self-serving unilateral declaration that the lease was current, that too was false. Because it operated the campground for the 2008 season Eagle Bear owed the 2008 gross receipts royalty payment for 2008 due on November 30, 2008, and the interest on that payment and others. Because it has never paid the required interest on the past due payments, Eagle Bear never brought the lease current – those payments are still delinquent and owing today.

Eagle Bear and Brooke's effort to re-open and re-litigate the lease cancellation 13 years later is contrary to established IBIA law, is based on provably false statements, and must be rejected. Because they failed to raise those issues in their actual Notice of Appeal and Statement of Reasons, controlling law of the IBIA bars that attempt now.

d. Eagle Bear's Claims Regarding the Effect of the January 5, 2009 Letter Withdrawing Eagle Bear's Appeal Are Not Supported by the Letter, the Record or the Law.

Making its determination that the BIA likely cancelled the former lease in 2008, the District Court interpreted Eagle Bear's January 5, 2009 letter withdrawing its appeal, as just that: a voluntary withdrawal of Eagle Bear's appeal. The District Court correctly concluded that the effect of Eagle Bear's withdrawal of its appeal meant that the June 10, 2008 cancellation letter remained in effect and that there was no appeal. (ER-3, 12-13; 25 CFR § 2.6(b)). Based on that interpretation of Eagle Bear's January 5, 2009 withdrawal letter, citing *Moody v. United States*, 931 F.3d 1136 (Fed. Cir. 2019) the District Court concluded that the BIA had no authority to revive the cancelled lease or enter into a new lease without the consent of the Blackfeet Nation. (ER-3, 13-15).

Eagle Bear and Brooke now claim that the January 5, 2009 letter withdrawing its appeal memorialized its conversations with the BIA wherein the BIA "represented and agreed with Eagle Bear that the Lease was not cancelled,

that the June 10, 2008 cancellation letter was ineffective, and that Eagle Bear could withdraw its appeal." Eagle Bear brief pg.45-46. Eagle Bear further claims that it withdrew its appeal in reliance on the BIA's representations. *Id.*

Eagle Bear and Brooke's blatant attempt at gross distortion of their own evidence is not supported by the language of the January 5, 2009 letter, the record before the District Court or the law. It is important to note that Brooke has never provided an affidavit setting forth the exact content of his supposed agreement with the BIA and with whom in the Blackfeet Indian Agency he supposedly had discussions and an agreement. Eagle Bear attempts to re-write the withdrawal letter and create an agreement where none exists. The pertinent parts of the January 5, 2009 Eagle Bear letter withdrawing its appeal read as follows:

> Re: Withdrawal of Notice of Appeal for Lease No. 5B03389621
>
> Dear Superintendent Pollock:
>
> Pursuant to my discussions with your realty staff, I hereby withdraw the Notice of Appeal which appealed your decision of June 10, 2008. . . . .
>
> I am withdrawing the Notice of Appeal since I have been advised by the Bureau that all of our annual payments required under the lease have been made to the Bureau and cashed by the Bureau. Accordingly, the lease is current.

(ER-28).

The problems with Eagle Bear and Brooke's attempt to distort the language and meaning of the January 5, 2009 withdrawal letter begin with who they claim

that they apparently had an agreement with at the BIA. Pursuant to the language of the letter, Brooke was supposedly having discussions with realty department staff at the Blackfeet Agency. (*Id.*). He was not talking to the Agency Superintendent and, most importantly, he was not talking to the BIA Rocky Mountain Regional Director who was the decision maker once Eagle Bear appealed the Superintendent's decision cancelling the lease. (ER-3, 13; 25 CFR § 2.4). The unnamed, anonymous Blackfeet Agency staff people to whom Brooke claims to have been in discussions with did not have the authority to enter into any agreement with Eagle Bear regarding the appeal.

Because the Notice of Appeal and Statement of Reasons which Eagle Bear/Brooke filed on June 18, 2008 makes no claim of lack of notice and opportunity to cure, the supposed discussions that Brooke was having with the Blackfeet Agency realty staff would have had to include allowing Eagle Bear to re-write the Notice of Appeal to make a claim that the BIA failed to give it give it the required notice of default and an opportunity to cure. Not only would Agency Staff have no authority to take such action, if they had done so, it would have created a new appeal and required new notice to interested parties.

Contrary to Eagle Bear and Brooke's assertions, nothing in the plain language of the January 5, 2009 withdrawal letter says that the BIA agreed that the lease was not cancelled. (ER-28). Nothing in the letter says that the BIA agreed

that the June 10, 2008 cancellation letter was ineffective. (*Id.*). And nothing in the Eagle Bear appeal withdrawal letter says that it is being done at the request of and pursuant to an agreement with the Bureau of Indian Affairs that the default had been cured and that the lease was still in full force and effect. (*Id.*). Eagle Bear's January 5, 2009 letter withdrawing their appeal would have to be entirely re-written to be given the interpretation Eagle Bear now asserts.

The record before the District Court does not support Eagle Bear's assertions of the substance and effect of Eagle Bear and Brooke's claims. As the District Court pointed out, there is nothing in the record showing the BIA has never even acknowledged Eagle Bear's assertions that the lease was current. (ER-3, 13). There is no record of the BIA ever withdrawing, reversing, amending, or otherwise modifying the June 10, 2008 decision cancelling the Eagle Bear lease. (ER-3, 8).

And as the District Court properly concluded, based on the facts supported by the record before it, the BIA had no authority to revive the cancelled lease or enter into a new lease for Eagle Bear under the same terms as the cancelled lease. The District Court relied on the Federal Circuit Court's decision in *Moody v. United States*, 931 F.3d 1136 (Fed. Cir. 2019) in which the Federal Circuit Court, on similar facts, concluded that the BIA had no authority to enter a lease of Indian Nation trust land without the consent of the Indian Nation owner.

Eagle Bear ignores one of the essential holdings in *Moody*. In *Moody*, the Plaintiffs brought suit in the Court of Claims against the Federal Government arising out of cancelled farming leases on the Pine Ridge Reservation of Indian trust land owned by the Oglala Sioux Nation. The Moodys alleged that: 1) the United States was a party to contracts with the Moodys and breached those contracts; 2) that they had an implied-in-fact contract with the United States; and, 3) that the United States had committed uncompensated takings under the Fifth Amendment. *Moody*, 931 F.3d at 1137.

Similar to the facts here, the Moodys had agricultural leases of Indian Nation owned trust land. After issues relating to payment, the BIA sent the Moodys notice of cancellation of their leases and advised them of their right to appeal the cancellation decisions within 30 days. *Moody*, 931 F.3d at 1138-1139. Rather than filing a notice of appeal, the Moodys went to the BIA Agency office and paid the amount that they owed. *Id*. The BIA accepted their late payment and the Moodys claimed that the BIA Agency officials advised them that they could continue farming the leases, that they did not need to file an appeal, and did not need written confirmation. *Id*. Thereafter the BIA sent the Moodys eviction notices.

The Moodys still did not file an administrative appeal of the BIA's cancellation decisions. *Moody*, 931 F.3d at 1139. Instead, they brought suit against the United States in the Court of Claims which dismissed their complaint. *Id.* at

1140. On appeal to the Federal Circuit Court of Appeals, the Moodys claimed, among other things, that they had implied in-fact contracts with the United States when the BIA told them to continue farming the land after sending the cancellation notices (and apparently accepting the Moodys' payments made after the leases were cancelled). *Id.* at 1142.

Addressing the Moodys' argument that they had implied in-fact contracts with the United States, the Federal Circuit held stated:

> The BIA does not have general authority to lease land held for the benefit of a tribe unless it receives direct authorization from the tribe. See 25 C.F.R. § 162.207(a). ("Tribes grant leases . . . subject to [BIA's] approval.") id. § 162.209 (identifying limited circumstances, . . ., where BIA can grant . . . leases without direct authorization). . . . It is difficult to see how the United States, without specific authorization, could enter into an implied in-fact contract with the Moodys on behalf of the Tribe. The Moodys only response appears to be that the earlier cancelled leases, which were signed by the Tribe, were revived by the BIA's oral representations and thus did not require new tribal authorization. The Moodys do not present any salient support for their proposition that the BIA can revive a cancelled lease without tribal authorization.

Moody v. United States, 931 F.3d at 1142.

As noted, to give the January 5, 2009 withdrawal letter the effect that Eagle Bear and Brooke now ascribe to it, the BIA would have to agree to allow Eagle Bear to amend its Notice of Appeal and Statement of Reasons filed on June 18, 2008 to make a claim that it never received the required notice and opportunity to

cure, that the BIA was therefore withdrawing the cancellation letter, and accepting Eagle Bear's incomplete payment (it failed to pay the required interest) as a cure and re-instate the cancelled lease. Because Eagle Bear never raised lack of notice and opportunity to cure in its Notice of Appeal, its claim amounts to an implied in-fact agreement to allow them to amend their appeal and for the BIA to admit that it failed to give appropriate notice. That is what the Federal Circuit Court in *Moodys* found that the BIA had no authority to do without the consent of the affected Indian Nation. As with the Moodys, Eagle Bear and Brooke offer no salient legal support for that proposition.

The only other way to interpret the January 5, 2009 Eagle Bear appeal withdrawal letter, given the actual Notice of Appeal which Eagle Bear filed, wherein the only basis for its appeal was the false claim that it had paid the past due rental payment before receiving the cancellation letter and the undeniable fact that the BIA never reversed, amended, rescinded or otherwise modified the June 10, 2008 cancellation letter, is that Eagle Bear is asserting an implied in-fact contract with the BIA to revive the cancelled lease. That is precisely what the Federal Circuit Court in *Moody* said the applicable federal regulations prohibited.

The Federal Circuit Court of Appeals analysis and holding in *Moody* is consistent with the rulings of the IBIA. With limited exceptions, pursuant to 25 CFR § 162.104, a written lease is required before taking possession of Indian trust

land. *Emm v. Western Regional Director*, 50 IBIA 311, 312 (2009) (citations omitted). The IBIA has held that verbal representations or advice by the BIA do not create a lease or legal rights, and such advice and representations do not override applicable laws and regulations. *Strom, et al. v. Northwest Regional Director*, 44 IBIA 153, 165-166 (2007); *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). Individuals dealing with the government are presumed to have knowledge of duly promulgated federal regulations. *Flynn* at 212.

Eagle Bear and Brooke should have known the applicable Federal regulations affecting the lease and their appeal rights in the event of lease cancellation. They should have known that if they did not, as they claim, receive the appropriate notice of default and opportunity to cure the default, that they could have and should have raised that issue in their Notice of Appeal and Statement of Reasons, thereby preserving their right to cure the default. They should have known that any issues that they did not raise in their initial Notice of Appeal and Statement of Reasons could not be raised 13 years later. They should have known that the only level of authority that could reverse, withdraw or amend the cancellation decision was the Rocky Mountain Regional Director; not some staff person in the Blackfeet Agency.

A related argument which Eagle Bear and Brooke characterize as "course of conduct" must also be rejected. In essence, Eagle Bear and Brooke argue that because they were a holdover tenant for more than 13 years, they acquired some right of continued occupancy. That argument is contrary to the former lease agreement and the regulations. A tenant acquires no rights for holding over after a lease is cancelled; the tenant is considered a trespasser. 25 CFR § 162.623. The former lease in this case specifically provided that Eagle Bear acquired no rights as a hold over. (ER-30, 67).

In sum, Eagle Bear and Brooke's claims regarding the substance and effect of the January 5, 2009 letter withdrawing Eagle Bear's appeal are beyond the bounds of credibility and must be rejected. Those claims are not supported by the plain language of the letter itself, the record or the law.

e. Because the Former Lease Was Cancelled in 2008, Applying Accepted Principles of Federal Indian Law, the District Court Correctly Determined That the Blackfeet Nation Court's Jurisdiction Was Not Plainly Lacking and That Eagle Bear and Brooke Were Therefore Not Likely to Succeed on the Merits of Their Jurisdictional Challenge.

The District Court analyzed the issue of the Blackfeet Nation court's jurisdiction from the standpoint that the former lease between the Blackfeet Nation and Eagle Bear had been cancelled and that Eagle Bear (and Brooke) were trespassers on Blackfeet Nation trust land. Analogizing to the Ninth Circuit Court

of Appeals decision in *Water Wheel Camp Recreation Area v. LaRance,* 642 F.3d 802 (9th Cir. 2011), the District Court found because the former lease had been likely cancelled by the BIA in 2008 and Eagle Bear continued to operate the campground on tribal land, the Blackfeet Nation court would possess jurisdiction to hear the trespass claims against both Eagle Bear and Brooke. Applying the jurisdictional analysis set forth in *Water Wheel*, the District Court concluded that Brooke was subject to tribal court jurisdiction to the extent that he was not protected by the corporate structure of Eagle Bear as the alleged holdover tenant. (ER-3, 19). As in *Water Wheel*, the question of whether Brooke is protected by Eagle Bear's corporate structure is a question for the tribal court to determine in the first instance. *See Water Wheel*, 642 F.3d at 606 (discussing the proceedings in the tribal court).

As they did before the District Court, Eagle Bear and Brooke attempt to ignore the analysis and holding in *Waterwheel Camp* and instead rely on *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U. S. 316 (2008) and the two-prong test for Indian Nation jurisdiction over non-Indians on non-Indian land within a reservation which was first articulated in *Montana v. United States,* 450 U.S. 544 (1981). Mistakenly applying that analysis, Eagle Bear and Brooke erroneously concluded that the Blackfeet Nation court has no jurisdiction over Brooke because he is a non-Indian, has no consensual commercial relationship

with the Blackfeet Nation, and his conduct does not imperil or have direct effect on the political integrity, economic security or health and welfare of the Blackfeet Nation. Relying on *Water Wheel*, the District Court rightly rejected Brooke's argument. Brooke's argument should be rejected here too.

In *Water Wheel Camp Recreation Area v. LaRance*, 642 F.3d 802 (9th Cir. 2011) the Colorado River Indian Tribal court exercised jurisdiction over a closely held corporation and its non-Indian owner in an unlawful entry and detainer action and for trespass brought by the Colorado Indian tribe. The tribal court entered a judgment in favor of the tribe. *Id.* at 804. Examining the extent of an Indian tribe's civil authority over non-Indians acting on tribal land within the reservation, the Ninth Circuit held, under the circumstances presented in that case, where there are no sufficient competing state interests at play, *Nevada v. Hicks*, 533 U.S. 353, 359-60 (2001), the tribe has both regulatory and adjudicatory jurisdiction through its inherent authority to exclude, independent from the power recognized in *Montana v. United States*, 450 U.S. 544 (1981). *Water Wheel*, 642 F.3d at 804-805. Applying traditional personal jurisdiction principles, the Ninth Circuit held that in the case before it, the tribal court has personal jurisdiction over a non-Indian agent acting on tribal land. *Water Wheel*, 642 F.3d at 804-805.

The same analysis must be applied, leading to the same outcome in the present case. In *Water Wheel*, Johnson, a non-Indian owner, operated a

campground on trust land owned by the CRIT. When the lease expired, Johnson held over. The CRIT brought suit in the CRIT court. Johnson and Water Wheel went to the Federal Court challenging the tribe's jurisdiction.

After first discussing U.S. Supreme Court precedent regarding Indian Nation jurisdiction over non-Indians, the Ninth Circuit held;

> 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 v. LaRance, 642 F.3d 802, 811-812 (9th Cir. 2011). *See also Grand Canyon Skywalk Development LLC v. Sa Nyu Wa Incorporated*, 715 F.3d 1196 (9th Cir. 2013).

Pursuant to the controlling principles of Federal Indian law, considering the ownership status of the land as Blackfeet Nation trust land, based upon the Blackfeet Nation's inherent power to exclude, the Blackfeet Nation has jurisdiction over the parties (including Brooke) and claims in the Blackfeet Nation court. The Blackfeet Nation court's jurisdiction is not plainly lacking.

Because the Blackfeet Nation court's jurisdiction is not plainly lacking, Eagle Bear and Brooke must exhaust their tribal court remedies. *National Farmers*

Union v. Crow Tribe, 471 U.S 845, 856 (1985); *Crawford v. Genuine Parts Co. Inc.*, 947 F.2d 1405, 1415 (9th Cir. 1991); *Grand Canyon Skywalk Development LLC v. Sa Nyu Wa Incorporated*, 715 F.3d 1196 (9th Cir. 2013). The requirement of exhaustion of tribal remedies is not discretionary, it is mandatory. *Crawford v. Genuine Parts Co. Inc*., 947 F.2d 1405 (9th Cir. 1991). For this additional reason the District Court did not abuse its discretion in denying the motion for preliminary injunction.

As the District Court determined, the two-prong jurisdictional analysis of *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U. S. 316, 327–328 (2008) and *Montana v. United States*, 450 U.S. 544 (1981) applies only to the activities of non-Indians on non-Indian land within a reservation. However, relying on *Water Wheel*, the District Court correctly determined that the lease agreement by which Eagle Bear and Brooke formerly occupied the land was sufficient to vest the Blackfeet Nation court with jurisdiction pursuant to the first prong of that test. (ER-3, 17).

The District Court correctly determined that Eagle Bear and Brooke were not likely to succeed on the merits of their jurisdictional challenge. The Blackfeet Nation's jurisdiction over both Eagle Bear and Brooke is not plainly lacking. Because the District Court correctly determined that the former lease was likely

cancelled in 2008, there are no serious questions going to the merits of Eagle Bear and Brooke's jurisdictional challenge.

f. Eagle Bear's Remaining Arguments Incorrectly Assume That the Former Lease Was Not Cancelled in 2008, And Are Therefore Irrelevant and Without Merit.

In their failed attempt to avoid Blackfeet Nation jurisdiction, Eagle Bear and Brooke make several other challenges, all of which are based on their incorrect assumption that the former lease is still in effect and was not cancelled by the BIA in 2008. The District Court rejected Eagle Bear and Brooke's challenges based on the continued existence of the lease; those arguments should be rejected here also.

Relying on the incorrect assumption that the lease is still in effect, Eagle Bear and Brooke assert that Blackfeet Nation court is precluded by an arbitration requirement and that the parties agreed that the Federal District Court would have jurisdiction over any claims arising from the lease. Addressing the claim that the federal court had exclusive jurisdiction the District Court determined that none of the Blackfeet Nation's claims in the Blackfeet Nation court arose out of the lease and adjudication of those claims did not involve determinations of federal law. The District Court further concluded that the parties prior agreement as to jurisdiction did apply to the claim for a preliminary injunction.

In no circumstances supported by the record would Eagle Bear (and Brooke) be entitled to arbitration. Their assertion in that regard is truly specious. The

Plaintiffs arbitration argument fails for two separate reasons. First, the arbitration agreement by its terms applies only to disputes between the parties. The Secretary of the Interior/BIA is not a party to the lease. The BIA cancelled the lease in 2008; not the Blackfeet Nation. Because the cancellation was a BIA action and the BIA is not a party to the lease, the BIA's cancellation decision is not subject to arbitration.

Second, the terms of the former lease and the remedies addendum do not support the Plaintiffs' claims for arbitration. 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.

(ER-38, 60) (Emphasis supplied).

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.

(ER-38, 73-74). (Emphasis supplied).

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 the 2008 lease cancellation. It failed to make the November 2007 annual rental payment in a timely manner and has not made that payment in full to this day (Eagle Bear admitted in oral argument on their Motion for Preliminary Injunction that it had not paid the interest on that payment and that it was attempting to arbitrate that issue). Eagle Bear, Inc. was not entitled to arbitration when the lease was cancelled in 2008 and it is not entitled to arbitration now.

Eagle Bear and Brooke failed to make any claim to arbitration in the June 18, 2008 Notice of Appeal and Statement of Reasons. They are definitely not entitled to claim arbitration of the 2008 lease cancellation 13 years after the fact. Eagle Bear and Brooke's claim to arbitration fails and must be rejected.

As the District Court correctly determined, the Blackfeet Nation's claims in the Blackfeet Nation court raise no federal questions. Trespass, an accounting of all rents and profits taken from the campground from June 10, 2008, unauthorized use of Blackfeet Nation land, fraudulent misrepresentation and failure to follow Blackfeet Tribal law, do not present federal questions which would preclude Blackfeet Nation court jurisdiction. See *Water Wheel*, 642 F.3d at 811 (tribe's adjudicatory authority included claims of eviction, unpaid rent, damages from the tribe's loss of use of their property, and attorneys' fees).

Eagle Bear and Brooke also make a failed claim that the Blackfeet Nation has failed to exhaust its administrative remedies related to the 2008 lease cancellation. That argument is based entirely on the proceedings pending before the IBIA which arise out of the 2017 lease cancellation. As the Blackfeet Nation has asserted, that proceeding is moot as nothing turns on its outcome – the lease was cancelled in 2008.

Analyzing and applying controlling federal regulations, the District Court found that the Blackfeet Nation and Eagle Bear (Brooke) had already exhausted the administrative remedies with respect to the 2008 lease cancellation. The District Court was correct. As set forth extensively above (1.a.-d.), on June 10, 2008 the BIA cancelled the lease for non-payment of the required 2007 annual rental payment. Eagle Bear appealed that cancellation raising only one

demonstrably false reason: that it paid the delinquent rental payment before receiving the cancellation notice. On January 5, 2009, before the BIA Rocky Mountain Regional Office acted on its appeal, Eagle Bea withdrew the appeal.

Applying the controlling federal regulations, Eagle Bear first exercised its appeal rights, and then withdrew its appeal, thereby exhausting any appeal that it had. When Eagle Bear withdrew its appeal, the BIA cancellation had not been withdrawn, rescinded, revoked, overruled or otherwise modified. Pursuant to 25 CFR § 2.6(b), decisions of the BIA become effective when the time for filing a notice of appeal has expired and no notice of appeal has been filed. *Id.* If an appeal is not filed, the cancellation notice becomes effective 31 days after the tenant receives the cancellation letter. 25 CFR § 162.621. The effect of Eagle Bear withdrawing its appeal and the BIA not withdrawing the cancellation decision is that there was no longer an appeal. Which meant the cancellation decision became final 31 days after Eagle Bear withdrew its appeal or on about February 5, 2009. At that point the cancellation decision was a final agency action, *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997), on which the applicable six-year statute of limitations ran in 2015. *Big Lagoon Rancheria v. California*, 789 F. 3d 947 (9th Cir. 2015); *Wind River Mining Corp. v. United States*, 946 F.2d 710, 713 (9th Cir.1991). Eagle Bear's administrative remedies have long since been exhausted.

In that sense, the Blackfeet Nation had no administrative remedies to exhaust. The Blackfeet Nation's lease was not cancelled. It was not appealing any aspect of the BIA's 2008 lease cancellation. It is not appealing any aspect of the 2008 lease cancellation now. The Blackfeet Nation's motion before the IBIA is to dismiss that proceeding as moot because the lease was cancelled in 2008 and nothing turns on the outcome of that matter. That the lease was cancelled in 2008 is an undisputed fact.

Relying on the Eighth Circuit Court of Appeals decision in *Chase v. Andeavor Logistics, L.P.*, 12 F.4th 864, Eagle Bear and Brooke assert for the first time that the District Court should have deferred to the Bureau of Indian Affairs primary jurisdiction. Eagle Bear and Brooke assert that deferring to the BIA's primary jurisdiction and allowing the proceedings pending before the IBIA which revolve around the BIA's 2017 cancellation of the lease, will create an efficient record and allow the BIA to reach a conclusion on whether the lease was cancelled in 2008.

The instant case is clearly distinguishable from the Eighth Circuit's decision in *Chase v. Andeavor*. In that case, the pipeline company (Andeavor) had been operating on individual Indian trust land for 15 years after their right-of-way expired. Andeavor negotiated a new right-or-way with the resident Indian Nation and had begun the process of negotiating with individual allotees. When

negotiations broke down the individual Indian landowners brought a class action against Andeavor. While that case was in litigation in the Federal Court, the Great Plains Regional Director sent Andeavor a trespass notice and assessing $187 million in damages. Andeavor appealed to the IBIA. Before the IBIA could reach a decision, the Assistant Secretary of the Interior for Indian Affairs assumed jurisdiction over the case and remanded it back to the Regional Office. The Regional Director issued a new directive advising Andeavor of their trespass and significantly reducing the amount of damages to $4 million and ordering Andeavor to immediately cease operating the pipeline. Both Andeavor and the individual Indian landowners appealed to the IBIA.

The Assistant Secretary again assumed jurisdiction over the matter, affirmed the second Regional notice and declared the case subject to judicial review. The IBIA dismissed its proceeding. Thereafter a new administration took office and a new Acting Assistant Secretary issued a new decision vacating all prior administrative actions and remanding the matter back to the Regional Director with instructions. As of the date of the Eighth Circuit decision, the BIA had apparently taken no further action. The *Andeavor* case was complicated by the question of whether the individual Indian landowners had a federal common law cause of action for trespass.

In the present case, Eagle Bear and Brooke already appealed the cancellation and then withdrew their appeal. The BIA has not been actively involved in the proceeding regarding the 2008 cancellation. In fact, the BIA declined to be involved until ordered to respond by the IBIA in December 2021. Contrary to Eagle Bear and Brooke's continued baseless assertions, there is no further record to be developed regarding the 2008 lease cancellation. Whatever may have happened or not happened between the time Eagle Bear filed its appeal on June 18, 2008 and the date that it withdrew that appeal on January 5, 2009, is irrelevant. It is not part of the administrative record of the 2008 cancellation. As already set out, verbal agreements between BIA Blackfeet Agency staff members and Eagle Bear are not legal or enforceable against the Blackfeet Nation. There is no special expertise not already possessed by the District Court to analyze the applicable law and facts of this case and arrive at a correct conclusion regarding the 2008 lease cancellation. Eagle Bear's assertion of primary jurisdiction is just another failed attempt to re-open and re-litigate the 2008 lease cancellation.

In the Ninth Circuit, the "primary jurisdiction doctrine allows courts to stay proceedings or to dismiss a complaint without prejudice pending the resolution of an issue within the special competence of an administrative agency." *Clark v. TimeWarner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008). It "is a prudential doctrine under which courts may, under appropriate circumstances, determine that

the initial decision making responsibility should be performed by the relevant agency rather than the courts." *GCB Commc'ns, Inc.v. U.S. S. Commc'ns, Inc.,* 650 F.3d 1257, 1263–64 (9th Cir.2011) (internal quotation marks omitted). "It is useful . . . in instances where the federal courts do have jurisdiction over an issue, but decide that a claim requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency." *Id*. at 1264 (internal quotation marks omitted). It applies in "limited circumstances" and is "not designed to secure expert advice from agencies every time a court is presented with an issue conceivably within the agency's ambit." *Clark*, 523 F.3d at 1114 (internal quotation marks omitted). The "deciding factor" in determining whether the primary jurisdiction doctrine should apply is "efficiency." *Rhoades v. Avon Prods., Inc.*,504 F.3d 1151, 1165 (9th Cir.2007).

Applying the Ninth Circuit's test of primary jurisdiction results in the conclusion that the District Court did not need to defer to the BIA primary jurisdiction as the present case does not involve a case or question of first impression, nor does it present a particularly complicated issue which Congress has committed to the Agency. At base, this is a garden-variety administrative appeal, where the lessee first filed a timely appeal and then withdrew it before the Agency withdrew, reversed or affirmed the decision from which the lessee had

appealed. There is nothing complicated about a party trying to re-open and re-litigate an appeal after 13 years.

Because Eagle Bear and Brooke already exhausted their administrative remedies 13 years ago, efficiency dictates that the Federal Court need not defer to the present IBIA proceedings. Through the IBIA proceedings now pending, Eagle Bear merely seeks to delay the inevitable conclusion that the lease was cancelled in 2008 and attempt to take a second bite at the apple, re-open the 2008 appeal, change the Notice of Appeal and Statement of Reasons, and re-litigate the appeal. That effort must be rejected.

2. The District Court's Application of the Remaining Preliminary Injunction Factors Was Not an Abuse of Discretion.

While the Blackfeet Nation Defendants may not agree with the District Court's analysis and application of the remaining preliminary injunction factors, the District Court's determinations regarding those factors was not an abuse of discretion.

a. Based on Possibility That Eagle Bear Could Be Evicted Before Its Jurisdictional Challenge is Resolved, The District Court's Determination That Eagle Bear May Suffer Irreparable Injury Was Not An Abuse of Discretion.

The District Court determined that the possibility that Eagle Bear would irreparable injury if it were evicted from the campground by the Blackfeet Nation court before its jurisdictional challenge was fully litigated. While the Blackfeet

Nation may not agree with that finding, it was not abuse of discretion. The Blackfeet Nation court has not yet ruled on Eagle Bear's Motion to Dismiss, and the District Court had determined that the Blackfeet Nation court's jurisdiction was not plainly lacking, i.e. it had authority to evict Eagle Bear and Brooke if they were found to be in trespass.

Eagle Bear and Brooke grossly mischaracterize the District Court's finding on the issue of irreparable injury. Contrary to Eagle Bear and Brooke's assertion, the District Court did not predicate its finding of possible irreparable injury on the assertion that Eagle Bear and Brooke would suffer irreparable harm if sued in a court that plainly lacked jurisdiction. Eagle Bear brief at pg. 60. The District Court specifically rejected Eagle Bear and Brooke's claim reaffirming its own conclusion that the record demonstrated that the Blackfeet Nation Court maintains proper jurisdiction and that they would not suffer irreparable harm by being hailed into a court that properly exercises jurisdiction. (ER-3, 21.)

b. The District Court's Finding That the Balance of the Equities Favored Neither Party Was Not An Abuse of Discretion.

Weighing the harm that Eagle Bear and Brooke may suffer against the harm to the Blackfeet Nation of issuing the preliminary injunction, the District Court concluded that the equities push against each other and that the balance does not favor either party. *Citing Weinberger v. Romero-Barcelo,* 456 U.S. 305, 312

(1982). The District Court balanced the potential harm to Eagle Bear and Brooke from being evicted from Blackfeet Nation land, against the harm to the Blackfeet Nation which the District Court articulated as delay in using its own land for its benefit, delay in recovering damages from the illegal use of that land, and not being able to prohibit Eagle Bear from removing property from the land (pending the litigation). (ER-3, 22).

Eagle Bear and Brooke assert that they are exposed to greater potential harm for having to litigate in the Tribal Court until the tribal court's authority is determined, than the Blackfeet Nation would suffer from a cessation of tribal court proceedings. That statement ignores the District Court's finding on the merits of the jurisdictional claim that the Blackfeet Nation court likely does have jurisdiction over both the Blackfeet Nation claim in that court and over both Eagle Bear and Brooke. Importantly, it also ignores the fundamental principle behind the requirement of exhaustion of tribal court remedies; that the tribal court be given the first opportunity to develop a record and determine its own jurisdiction. *National Farmers Union Ins. Co. v. Crow Tribe of Indians,* 471 U.S. 845, 856 (1985) (exhaustion requirement rooted in Congress's commitment to policy of supporting tribal self-government and self-determination, which allows the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge and judicial economy, which will best be served by

allowing a full record to be developed in the Tribal Court); *Grand Canyon Skywalk Development LLC v. Sa Nyu Wa Incorporated*, 715 F.3d 1196 (9th Cir. 2013). After which, just as in *Water Wheel*, the tribal court's jurisdiction is still subject to Federal Court review.

Eagle Bear and Brooke's continued assertions that they will suffer irreparable injury if the Blackfeet Nation Court exercises jurisdiction over them are simply false. The District Court's analysis of the balance of the equities and its conclusion that the equities did not favor either party, was not an abuse of discretion.

c. The District Court Properly Determined That the Public Interest Favoring Tribal Self-Government Weighed In Favor of the Blackfeet Nation Defendants and Against the Issuance of a Preliminary Injunction.

Weighing the principles of comity as applied to Indian Nations, as expressed by the United States Supreme Court and the Ninth Circuit Court of Appeals, against Eagle Bear and Brooke's claims based on the mistaken belief that the former lease was not cancelled in 2008, the District Court properly concluded that the public interest favored the Blackfeet Nation Defendants. *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985); *Grand Canyon Skywalk Development LLC v. Sa Nyu Wa Incorporated*, 715 F.3d 1196 (9th Cir. 2013). In reaching its conclusion, the District Court rejected Eagle Bear

and Brooke's arguments premised on the continued existence of the former lease. Those arguments should be rejected here also.

As set forth above, the District Court began its analysis of the preliminary injunction issue by determining based on the record before it that the former lease was likely cancelled by the BIA in 2008. That finding is not clearly erroneous. Proceeding from that finding, the District Court concluded that the Blackfeet Nation Court's jurisdiction was not plainly lacking.

The District Court's correct conclusion that the Blackfeet Nation Court's jurisdiction is not plainly lacking, triggers the requirement of exhaustion of tribal court remedies. *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985); *Grand Canyon Skywalk Development LLC v. Sa Nyu Wa Incorporated*, 715 F.3d 1196 (9th Cir. 2013). The exhaustion requirement is a prerequisite to a federal court's exercise of its jurisdiction. *Burlington Northern Railroad Company v. Crow Tribal Council, et al., 940 F.2d 1239, 1245 n.3.* "Therefore under National Farmers, the federal court should not even make a ruling on tribal court jurisdiction until tribal remedies are exhausted." *Stock West, Inc. v. Confederated Tribes of the Colville Reservation, 873 F2d 1221, 1228 (9th Cir. 1989).* That includes full review by the tribe's appellate court if one exists. *Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 19 (1987)* (holding that until appellate review is complete, the Blackfeet Tribal Courts have not had a full

opportunity to evaluate the claim and federal courts should not intervene). *Iowa Mutual, 480 U.S. at 16-17.*

The exhaustion requirement is based on the Federal Courts' long recognized respect for comity and deference to the tribal court as the appropriate court of first impression to determine its jurisdiction. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians,* 471 U.S. 845, 856–57 (1985)*; Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 15–16 (1987)*; Burlington N. R.R. Co. v. Crow Tribal Council,* 940 F.2d 1239, 1244–47 (9th Cir. 1991). Strong federal policy, representing the public interest, supports the requirement of exhaustion of tribal court remedies including: (1) Congress's commitment to "a policy of supporting tribal self-government and self-determination;" (2) a policy that allows "the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge;" and (3) judicial economy, which will best be served "by allowing a full record to be developed in the Tribal Court." *National Farmers Union,* 471 U.S. at 856; *Grand Canyon Sky Walk,*715 F.3d at 2000.

Against these strong and long-standing federal policies, Eagle Bear and Brooke rely on their rejected claim that the former lease was not cancelled. Thus, Eagle Bear and Brooke assert that the public interest in exhaustion of administrative remedies, judicial economy and enforcing arbitration agreements weighs in their favor. As the District Court correctly concluded, the public has no

interest in enforcing arbitration agreements arising from a terminated contract where the underlying lawsuit does not arise from the terms of the terminated contract. Nor does the public have an interest in protecting the BIA's authority and in enforcing administrative procedures where the BIA has already acted, and Eagle Bear and Brooke have already exhausted their administrative remedies. There is no public interest in enforcing authority of an administrative agency which does not exist.

As for the claim that the public interest in judicial economy supports issuing a preliminary injunction and allowing the BIA and IBIA proceedings to go forward, then followed by judicial review in the federal courts, that assertion is clearly outweighed by the expressed federal interest in comity and allowing the court whose jurisdiction is being challenged to make the first determination and allowing a full record to be developed in the tribal court. *National Farmers Union, Id.; Grand Canyon Sky Walk, Id.*

3. The District Court Balance of The Preliminary Injunction Elements and Denial of the Motion for Preliminary Injunction Was Not An Abuse of Discretion.

Weighing the factors in determining whether to issue a preliminary injunction, the District Court did not abuse its discretion in denying Eagle Bear and Brooke's motion for preliminary injunction. The District Court correctly determined that there were no serious questions going to the merits of Eagle Bear

and Brooke's jurisdictional challenge, that the Blackfeet Nation Court's jurisdiction was not plainly lacking and that Eagle Bear and Brooke were not likely to prevail on the merits. The District Court further determined that the balance of the hardships did not tip sharply in favor of Eagle Bear and Brooke. While the District Court determined that Eagle Bear and Brooke may suffer irreparable injury if evicted from the campground before having the opportunity to litigate their jurisdictional challenge, the Court properly determined that the public interest weighed in favor of the Blackfeet Nation Defendants and against a preliminary injunction.

The District Court's determinations were not clearly erroneous, and it did not apply an erroneous legal standard. The District Court did not abuse its discretion in denying Eagle Bear and Brooke's motion for a preliminary injunction.

CONCLUSION

Because the District Court's Order denying Eagle Bear and Brooke's motion for a preliminary injunction was supported by the record before it, the District Court correctly applied the law, and it was not an abuse of discretion to deny Eagle Bear and Brooke's motion for preliminary injunction. The District Court Order should be affirmed.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, the Blackfeet Nation Defendants are not aware of any cases pending before this Court that are related to the present case.

DATED this 10th day of February, 2022.

By /s/ Joseph J. McKay
Joseph J. McKay

ADDENDUM OF FEDERAL REGULATIONS

Regulation Page

(Note: All copies of the regulations contained in this Addendum were taken from the Code of Federal Regulations in effect in 2008.)

§ 2.2 Definitions.

Appeal means a written request for review of an action or the inaction of an official of the Bureau of Indian Affairs that is claimed to adversely affect the interested party making the request.

Appellant means any interested party who files an appeal under this part.

Interested party means any person whose interests could be adversely affected by a decision in an appeal.

Legal holiday means a Federal holiday as designated by the President or the Congress of the United States.

Notice of appeal means the written document sent to the official designated in this part, indicating that a decision is being appealed (see § 2.9).

Person includes any Indian or non-Indian individual, corporation, tribe or other organization.

Statement of reasons means a written document submitted by the appellant explaining why the decision being appealed is in error (see § 2.10).

§ 2.3 Applicability.

(a) Except as provided in paragraph (b) of this section, this part applies to all appeals from decisions made by officials of the Bureau of Indian Affairs by persons who may be adversely affected by such decisions.

(b) This part does not apply if any other regulation or Federal statute provides a different administrative appeal procedure applicable to a specific type of decision.

§ 2.4 Officials who may decide appeals.

The following officials may decide appeals:

(a) An Area Director, if the subject of appeal is a decision by a person under the authority of that Area Director.

(b) An Area Education Programs Administrator, Agency Superintendent for Education, President of a Post-Secondary School, or the Deputy to the Assistant Secretary—Indian Affairs/Director (Indian Education Programs), if the appeal is from a decision by an Office of Indian Education Programs (OIEP) official under his/her jurisdiction.

(c) The Assistant Secretary—Indian Affairs pursuant to the provisions of § 2.20 of this part.

(d) A Deputy to the Assistant Secretary—Indian Affairs pursuant to the provisions of § 2.20(c) of this part.

(e) The Interior Board of Indian Appeals, pursuant to the provisions of 43 CFR part 4, subpart D, if the appeal is from a decision made by an Area Director or a Deputy to the Assistant Secretary—Indian Affairs other than the Deputy to the Assistant Secretary—Indian Affairs/Director (Indian Education Programs).

§ 2.6 Finality of decisions.

(a) No decision, which at the time of its rendition is subject to appeal to a superior authority in the Department, shall be considered final so as to constitute Departmental action subject to judicial review under 5 U.S.C. 704, unless when an appeal is filed, the official to whom the appeal is made determines that public safety, protection of trust resources, or other public exigency requires that the decision be made effective immediately.

(b) Decisions made by officials of the Bureau of Indian Affairs shall be effective when the time for filing a notice of appeal has expired and no notice of appeal has been filed.

(c) Decisions made by the Assistant Secretary—Indian Affairs shall be final for the Department and effective immediately unless the Assistant Secretary—Indian Affairs provides otherwise in the decision.

§ 2.7 Notice of administrative decision or action.

(a) The official making a decision shall give all interested parties known to the decisionmaker written notice of the decision by personal delivery or mail.

(b) Failure to give such notice shall not affect the validity of the decision or action but the time to file a notice of appeal regarding such a decision shall not begin to run until notice has been given in accordance with paragraph (c) of this section.

(c) All written decisions, except decisions which are final for the Department pursuant to § 2.6(c), shall include a statement that the decision may be appealed pursuant to this part, identify the official to whom it may be appealed and indicate the appeal procedures, including the 30-day time limit for filing a notice of appeal.

§ 2.9 Notice of an appeal.

(a) An appellant must file a written notice of appeal in the office of the official whose decision is being appealed. The appellant must also send a copy of the notice of appeal to the official who will decide the appeal and to all known interested parties. The notice of appeal must be filed in the office of the official whose decision is being appealed within 30 days of receipt by the appellant of the notice of administrative action described in § 2.7. A notice of appeal that is filed by mail is considered filed on the date that it is postmarked. The burden of proof of timely filing is on the appellant. No extension of time shall be granted for filing a notice of appeal. Notices of appeal not filed in the specified time shall not be considered, and the decision involved shall be considered final for the Department and effective in accordance with § 2.6(b).

(b) When the appellant is an Indian or Indian tribe not represented by counsel, the official who issued the decision appealed shall, upon request of the appellant, render such assistance as is appropriate in the preparation of the appeal.

(c) The notice of appeal shall:

(1) Include name, address, and phone number of appellant.

(2) Be clearly labeled or titled with the words “NOTICE OF APPEAL.”

(3) Have on the face of any envelope in which the notice is mailed or delivered, in addition to the address, the clearly visible words “NOTICE OF APPEAL.”

(4) Contain a statement of the decision being appealed that is sufficient to permit identification of the decision.

(5) If possible, attach either a copy of the notice of the administrative decision received under § 2.7, or when an official has failed to make a decision or take any action, attach a copy of the appellant's request for a decision or action under § 2.8 with a written statement that the official failed to make a decision or take any action or to establish a date by which a decision would be made upon the request.

(6) Certify that copies of the notice of appeal have been served on interested parties, as prescribed in § 2.12(a).

§ 162.104 When is a lease needed to authorize possession of Indian Land?

(a) An Indian landowner who owns 100% of the trust or restricted interests in a tract may take possession without a lease or any other prior authorization from us.

(b) An Indian landowner of a fractional interest in a tract must obtain a lease of the other trust and restricted interests in the tract, under these regulations, unless the Indian co-owners have given the landowner's permission to take or continue in possession without a lease.

(c) A parent or guardian of a minor child who owns 100% of the trust interests in the land may take possession without a lease. We may require that the parent or guardian provide evidence of a direct benefit to the minor child. When the child reaches the age of majority, a lease must be obtained under these regulations to authorize continued possession.

(d) Any other person or legal entity, including an independent legal entity owned and operated by a tribe, must obtain a lease under these regulations before taking possession.

§ 162.207 When can the Indian landowners grant an agricultural lease?

(a) Tribes grant leases of tribally-owned agricultural land, including any tribally-owned undivided interest(s) in a fractionated tract, subject to our approval. Where tribal land is subject to a land assignment made to a tribal member or some other individual under tribal law or custom, the individual and the tribe must both grant the lease, subject to our approval.

(b) Adult Indian owners, or emancipated minors, may grant agricultural leases of their land, including undivided interests in fractionated tracts, subject to our approval.

(c) An agricultural lease of a fractionated tract may be granted by the owners of a majority interest in the tract, subject to our approval. Although prior notice to non-consenting individual Indian landowners is generally not needed prior to our approval of such a lease, a right of first refusal must be offered to any non-consenting Indian landowner who is using the entire lease tract at the time the lease is entered into by the owners of a majority interest. Where the owners of a majority interest grant such a lease on behalf of all of the Indian owners of a fractionated tract, the non-consenting Indian landowners must receive a fair annual rental.

(d) As part of the negotiation of a lease, Indian landowners may advertise their land to identify potential tenants with whom to negotiate.

§ 162.621 When will a cancellation of a lease be effective?

A cancellation decision involving an agricultural lease will not be effective until 30 days after the tenant receives a cancellation letter from us. The cancellation decision will remain ineffective if the tenant files an appeal under § 162.620 of this subpart and part 2 of this chapter, unless the decision is made immediately effective under part 2. While a cancellation decision is ineffective, the tenant must continue to pay rent and comply with the other terms of the lease. If an appeal is not filed in accordance with § 162.620 of this subpart and part 2 of this chapter, the cancellation decision will be effective on the 31st day after the tenant receives the cancellation letter from us.

§ 162.623What will BIA do if a tenant holds over after the expiration or cancellation of a lease?

If a tenant remains in possession after the expiration or cancellation of a lease, we will treat the unauthorized use as a trespass. Unless we have reason to believe that the tenant is engaged in negotiations with the Indian landowners to obtain a new lease, we will take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) ____No. 21-36033_____.

I am the attorney or self-represented party.

This brief contains ____13,765_____ **words,** excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[x] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:

[ ] it is a joint brief submitted by separately represented parties;

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[ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature _/s/ Joseph J. McKay_____ **Date** __February 10,2022____