DOCKET NO. 21-36033

UNITED STATES COURT OF APPEALS
FOR 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

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Eagle Bear, Inc. states that it has no parent corporation and that no publicly held corporation owns ten percent (10%) of more of its stock.

Dated this 13th day of January, 2022.

CROWLEY FLECK PLLP

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

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INTRODUCTION

This matter concerns Plaintiff Eagle Bear, Inc.'s ("Eagle Bear") longstanding Lease of a campground located on tribal trust land. For four years, beginning in 2017, the Blackfeet Indian Nation ("Tribe") argued to the Bureau of Indian Affairs ("BIA") and the Interior Board of Indian Appeals ("IBIA") that the Lease should be cancelled because Eagle Bear allegedly breached the Lease between 2009 and 2017. For four years, the BIA told the Tribe that it was required, pursuant to the Lease, to mediate and arbitrate its dispute before the Lease could be cancelled. The Tribe's appeal of the BIA's decision to require arbitration is pending, and no final decision cancelling the Lease has been issued.

Unsatisfied with the direction of its BIA and IBIA proceedings, the Tribe changed course in mid-2021 and began alleging that the Lease was cancelled in a 2008 BIA proceeding. Treating that allegation as fact, the Tribe filed a complaint for trespass and breach of the Lease in Blackfeet Tribal Court ("Tribal Court"), asked the Tribal Court to evict Eagle Bear from the Campground, asked for damages under the Lease from Eagle Bear and its president, William Brooke ("Brooke"), and asked the Tribal Court to preliminarily attach Eagle Bear's Campground equipment and property. It also moved to dismiss the BIA and IBIA proceedings as moot.

Seeking to prevent the Tribe and Tribal Court from undoing the previous four years of BIA and IBIA proceedings, from evicting Eagle Bear, and from destroying Eagle Bear's 25-year investment in the Campground, Eagle Bear and Brooke filed a complaint in the United States District Court for the District of Montana and a motion to enjoin adjudication of the Tribal Court Complaint ("Motion"). In part, Eagle Bear and Brooke explained that the Tribal Court lacked jurisdiction over the question on which the Tribal Court Complaint was predicated: whether the BIA cancelled the Lease in 2008. As the IBIA explained when it denied the Tribe's motion to dismiss the IBIA proceedings as moot, the "Tribe has not exhausted its administrative remedies within BIA concerning the purported 2008 cancellation of the Lease." (2-ER-81).

The District Court acknowledged that the Tribal Court action posed a significant risk of irreparable harm to Eagle Bear and its business, especially considering the Tribe's eviction threat. Nevertheless, the District Court denied Eagle Bear and Brooke's motion for a preliminary injunction after prematurely concluding that the BIA "likely" cancelled the Lease in 2008.

The District Court abused its discretion, committed clear errors of law, and made clearly erroneous findings. Notably, the question of whether the BIA cancelled the Lease in 2008 was not, and is not, before the District Court. That question is before the BIA. The only question presented to the District Court in

Eagle Bear and Brooke's Complaint and Motion is whether the *Tribal Court* is able to adjudicate the Lease cancellation question. The Tribal Court is not able to do so. The Lease cancellation question is squarely before the BIA and IBIA and the Tribe's related claims are committed to arbitration. Allowing concurrent Tribal Court jurisdiction interferes with the federal administrative review process which requires an orderly review and is intended to ensure that only one forum at a time has authority to act. (*Cf.* 2-ER-75 at n.2).

Nevertheless, even if the District Court correctly determined that the Lease cancellation question is resolvable by the District Court—or any other body except the Tribal Court—it should have stayed the Tribal Court proceeding and only considered the merits of the question *after* the BIA was joined to a District Court action, after opportunity for discovery, after development of the record on the cancellation question, and after the parties actually presented the Lease cancellation question to the District Court. The District Court abused its discretion when it considered the question, and then on the basis of an admittedly incomplete record and its likely resolution, refused to enjoin the Tribal Court proceeding.

JURISDICTIONAL STATEMENT

Pursuant to Fed. R. App. P. 28(a)(4) and Circuit Rule 28-2.2, Eagle Bear, Inc. and Will Brooke state:

(a) The District Court has subject matter jurisdiction under 28 U.S.C. § 1331 because this matter involves a challenge to tribal court jurisdiction over non-Indians. *Elliott v. White Mountain Apache Tribal Ct.*, 566 F.3d 842, 846 (9th Cir. 2009).

(b) The District Court's Order on Preliminary Injunction ("Order") is appealable to this Court pursuant to 28 U.S.C. §§ 1292(a)(1) & 1294(1).

(c) The District Court's Order was entered on November 17, 2021. Eagle Bear and Brooke filed their Notice of Appeal on December 16, 2021. This appeal is timely pursuant to Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF ISSUE

Did the District Court abuse its discretion when it failed to preliminarily enjoin the Blackfeet Tribal Court from adjudicating claims predicated on the alleged breach and cancellation of a federally-administered lease of tribal trust land?

STATEMENT OF CASE

Eagle Bear operates a KOA campground and recreational facility ("Campground") located on trust land within the boundaries of the Blackfeet Indian Reservation. (2-ER-106). Eagle Bear operates the Campground pursuant to a Recreation and Business Lease Agreement ("Lease") with the Blackfeet Tribe. (*Id.*; 2-ER-28).

Before entering the Lease, the Tribe operated the Campground itself.[1] Between 1985 and 1992, however, the Campground fell into disrepair and, by the end of the 1992 camping season, KOA cancelled the Tribe's franchise agreement for failure to meet KOA standards.

From 1992 to 1996, the Tribe entered into various one-year leases. These short-term leases proved unsuccessful and the Campground continued to deteriorate. By 1995, the number of camper-nights per year had plunged from a high of 17,000 to less than 4,000.

Seeking to rehabilitate the Campground and to reestablish the Campground as a source of revenue, the Tribe approached Loren Smith, Will Brooke, and Susan Brooke about taking over the Campground. Agreeing to do so, Smith and the Brookes established Eagle Bear Inc. and negotiated a long-term lease with the Tribe.

In April 1997, after over a year of negotiations, Eagle Bear and the Tribe entered the Lease. (2-ER-28, 59-61, 100). The Lease was approved by the Secretary of the Department of the Interior, who is responsible for administering the Lease for and on behalf of the Tribe. (*Id.*; *see also* 25 C.F.R. Part 162 Subparts

[1] The following facts on this page unsupported by citation to the record are not included in the record. They are offered only for general background pursuant to Circuit Rule 28-2.8.

A & D). The Department of the Interior administers the Lease through the Bureau of Indian Affairs ("BIA").

In exchange for a 25-year lease with an option to renew for a subsequent 25-year period, Eagle Bear agreed to make substantial improvements to the Campground and to pay an upfront payment, an annual payment, and a portion of its annual revenue to the Tribe. (2-ER-28, 30-37). The Lease was lengthy and included detailed provisions regarding every aspect of the Lease relationship, including Lease termination. (*Id*.) Of particular relevance here, the Lease included an agreement to submit to arbitration "*any* breach, dispute, controversy or claim between the Parties regarding the rights, adequacy of performance, breach, or liabilities of a party under any provision" of the Lease. (2-ER-28, 50, 62-65 (emphasis added)). The parties also agreed that the exclusive judicial venue for "enforcement of the terms" of the Lease and its arbitration provision would be the "United States Federal District Court, Great Falls Division." (*Id*.)

After entering the Lease, Eagle Bear made significant improvements to the Campground. (*See* 2-ER-294). It replaced water, sewer, plumbing, and electrical facilities. It rebuilt buildings that had collapsed. It rebuilt Campground roads and constructed new cabins. It removed garbage dumps and noxious weeds and planted over 100 trees and shrubs. And, it built a swimming pool, hot tub, and water park. (*Id*.)

As a result of Eagle Bear's efforts, the Campground regained its reputation and the business grew. (*See id*.) By 2006, the Campground had nearly 10,000 camper nights and received above average inspection and review scores from KOA. (*See id*.)

The infusion of capital into the Campground facilities caused a strain on Eagle Bear's finances and, as a result, Eagle Bear was occasionally late in its rental payments. (*See* 2-ER-293-294). In 2008, in light of these late payments, the BIA purported to cancel Eagle Bear's Lease. On June 10, 2008, the BIA informed Eagle Bear that it was cancelling the Lease because $15,000 of rent was allegedly past due. (2-ER-300). Although Eagle Bear was entitled to at least 10 days' notice and an opportunity to cure before cancellation, this was the first notice Eagle Bear received of the allegedly deficient rent payment or of the BIA's intent to cancel the Lease. BIA records reflect three prior letters between January 15 and April 4, 2008 in which it apparently intended to provide Eagle Bear notice of the alleged default and intended cancellation, but Eagle Bear never received those letters because many of them were addressed to the wrong ZIP code. (*Compare* 2-ER-294 *with* 2-ER-300-303).

Upon receiving notice of the past-due rent and the BIA's intention to cancel the Lease, Eagle Bear promptly paid the amount demanded. (2-ER-299; *see also* 2-ER-294). It is undisputed that Eagle Bear delivered a $15,000 check to the BIA

on or before June 16, 2008, well-within the 10-day period during which Eagle Bear was entitled to cure the alleged default. (2-ER-294 & 299).

Eagle Bear also appealed the June 10, 2008 cancellation letter to the BIA Regional Director. (2-ER-294). Eagle Bear timely served a notice of appeal and statement of reasons on June 18, 2008. (*Id*.) Eagle Bear explained that it had been the parties' practice to make and accept payment of the rent under the Lease in late May or early June after the summer camping season began. (*Id*.) It further explained that it had, by that time, made all payments due under the Lease and had thereby cured any breach of the Lease. (*Id*.)

The record regarding Eagle Bear's administrative appeal is unclear and appears to be incomplete. (*See* 1-ER-4-5; 2-ER-229). For example, it is unclear based on the available BIA records, Eagle Bear's records, and the records the Tribe has provided to date, whether the Tribe responded to, or the BIA Superintendent ever considered, the merits of Eagle Bear's appeal. (*See id*.) What is not unclear, however, is that the BIA received the Notice of Appeal, as did the Tribe. (2-ER-294, 296, 298).

Following Eagle Bear's Notice of Appeal, the next written record related to the merits of the appeal is a January 5, 2009 letter from Eagle Bear to the BIA. (2-ER-293). The letter memorialized an agreement Eagle Bear reached with the BIA, in which the BIA acknowledged that Eagle Bear had cured any breach of the Lease

due to the alleged late payment, acknowledged that Eagle Bear had made the payments due under the Lease, agreed that the Lease remained in full force and effect, and directed Eagle Bear to withdraw its appeal and continue performing under the Lease. Eagle Bear did so.[2] (*Id.*)

> 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 19, 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.

(*Id.*) Eagle Bear sent copies of the letter to the BIA Superintendent, the BIA Regional Director, and to the Tribe. (*Id.*)

The BIA never responded to the January 5, 2009 letter nor issued any further final decision related to its alleged June 10, 2008 cancellation or Eagle Bear's appeal. (*See* 1-ER-4-5; 2-ER-229). The BIA has *never* asserted nor concluded that the Lease was finally and forever cancelled in 2008. The Tribe also never responded to the letter. (*See* 2-ER-153, 229). The Tribe *never* asserted that the Lease had been cancelled in 2008 until after the parties became involved in the 2017 dispute.[3] (2-ER-153). Instead, Eagle Bear, the BIA, and the Tribe performed under the Lease for over a decade. (*E.g.*, 2-ER-219, 221, 250, 265, 282, 289).

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[2] Eagle Bear's withdrawal letter was directed to the BIA Superintendent, rather than the Regional Director before whom the appeal was pending.

[3] Even then, the Tribe did not actually claim that the Lease was cancelled in 2008 and instead pursued new alleged breaches of the Lease and cancellation in 2017.

Since 2009, Eagle Bear has continued to improve and maintain the Campground, has continued to invest millions of dollars in the Campground, and has continued to pay rent and royalties to the Tribe, which the BIA and the Tribe have accepted. Both the Tribe and the Campground benefitted significantly from Eagle Bear's continued operation. In fact, by 2017, the Campground saw 18,000 camper nights and was one of a very few KOA campgrounds nationally to achieve a perfect score in KOA inspections and reviews. Those perfect scores have continued. This is not a case of the lessee mistreating the leased property.

Nevertheless—or perhaps *because* Eagle Bear had turned the Campground into such a valuable asset—the Tribe again attempted to cancel the Lease in 2017. (2-ER-289). On April 26, 2017, Eagle Bear received a "Notice of Default" from the Tribe in which the Tribe alleged that Eagle Bear had materially breached the Lease and declared that the Lease would be terminated. (*Id*.) The Tribe did not claim that the Lease was already breached or cancelled in 2008. (*Id*. at 289-292). Instead, the Tribe only claimed that Eagle Bear had: (1) failed to pay royalties under the Lease from 2008 to 2011; (2) failed to submit audit reports under the Lease; (3) failed to obtain approval for construction of improvements to the

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For example, when the tribe mentioned the 2008 proceedings in a November 7, 2019 brief it filed with the IBIA, it noted that "it is not clear how the cancellation was resolved, if at all." (2-ER-226).

Campground; and (4) failed to "Follow Tribal Laws, Ordinances, and Pay Taxes." (*Id.*)

Eagle Bear responded to the Tribe's allegations on April 28, 2017. (2-ER-285). Eagle Bear denied the Tribe's allegations, denied that it had breached the Lease, and informed the Tribe that it intended to invoke the arbitration provisions of the Lease in order to resolve the dispute between the Lease parties. (*Id.*) Eagle Bear also noted that, under the Lease and the applicable federal regulations, only the BIA has the power to terminate the Lease. (2-ER-287).

Eagle Bear, the Tribe, and the BIA exchanged correspondence about the Lease, Eagle Bear's obligations thereunder, and the Tribe's allegations of breach through July 2017. Ultimately, despite attempts to mediate, the parties were not able to resolve their differences and, on July 7, 2017 and July 13, 2017, Eagle Bear served the Tribe and the BIA with demands to arbitrate the breach of Lease allegations pursuant to Exhibit A of the Lease. (2-ER-279, 282).

On September 7, 2017, the BIA acted on the Tribe's allegations and Eagle Bear's arbitration demand. (2-ER-269, 274, 278). BIA Superintendent Thedis B. Crowe ("Superintendent") found that Eagle Bear had cured several of the alleged breaches identified in the Tribe's April 26, 2017 letter. (2-ER-270-271). The Superintendent further concluded that, with respect to the Tribe's remaining allegations: "mediation and arbitration must be pursued before the lease can be

canceled for breach of contract." (2-ER-271). The Superintendent directed the parties to mediate their dispute. (*Id.*)

On October 17, 2017, however, the Superintendent unexpectedly "retracted" the September 7, 2017 decision and "canceled" the Lease. (2-ER-267). The October 17 decision lacked any explanation or reasoning for the Superintendent's actions. (*Id.*)

Eagle Bear appealed the Superintendent's October 17 decision to the BIA Regional Director ("Regional Director"). (2-ER-252). On April 4, 2019, the Regional Director reversed the Superintendent's October 17 decision. (2-ER-250). The Regional Director explained that the Superintendent's initial September 7, 2017 decision was correct and that "mediation and arbitration must be pursued before the lease can be cancelled for breach of contract." (*Id.*) The Regional Director again ordered the parties to "carry out the mediation and arbitration actions" required under the Lease. (*Id.*)

The Tribe appealed the Regional Director's April 4, 2019 decision to the Interior Board of Indian Appeals ("IBIA"). (2-ER-225). The parties submitted briefs to the IBIA in December 2019 and January 2020. (*See* 2-ER-205). The IBIA has not issued a final decision on the appeal. (2-ER-79).

The initial term of the Lease was set to expire while the IBIA appeal was pending. Pursuant to the terms of the Lease, the initial 25-year Lease term expired

on April 4, 2021. (2-ER-30). However, the Lease gave Eagle Bear the option to "extend the term of the lease . . . for one additional period of twenty-five (25) years" by giving written notice to the Tribe and the BIA. (*Id*.) This option to extend was subject only to the Tribe's "right to purchase" the "additional twenty-five (25) year extension term," which the Tribe could exercise by giving notice to Eagle Bear within 60 days of Eagle Bear's extension. (*Id*.)

Eagle Bear exercised its option to extend the Lease on October 1, 2020. (2-ER-221). The BIA and the Tribe received Eagle Bear's notice of such extension on October 5, 2020. (2-ER-223-224). On December 9, 2020—65 days after its receipt of Eagle Bear's extension notice—the Tribe sent Eagle Bear notice of its intent to purchase the additional lease term. (2-ER-219).

Eagle Bear responded to the Tribe's notice on December 11, 2020. (2-ER-218). Eagle Bear explained that the Tribe had waived its right to purchase the twenty-five year lease term by failing to provide notice within 60 days, as required by the Lease. (*Id*.) Eagle Bear wrote that it was nevertheless willing to consider purchase offers from the Tribe. (*Id*.)

In response, the Tribe claimed that it had timely provided notice of its intent to purchase the extended Lease term and alleged that Eagle Bear would be required to "vacate the Leased Premises by April 4, 2021." (2-ER-212-214). The Tribe then made an "emergency motion for expedited consideration and decision" to the

IBIA. (2-ER-205). It notified the IBIA of Eagle Bear's Lease extension, of the Tribe's attempt to purchase the extension, and asked the IBIA to promptly decide the pending appeal "so that the parties may avoid further dispute over the timeliness of the Tribe's notice to purchase." (*Id.*)

The IBIA denied the Tribe's motion on February 23, 2021. (*Id.*) The IBIA explained:

> The Tribe's motion is predicated on the Board issuing a decision on the merits that the Lease "has been properly cancelled" by BIA. But the Regional Director's decision concluded that the Tribe and Eagle Bear must first pursue mediation and/or arbitration before BIA may cancel the lease, and thus the Lease has not been cancelled in any decision that is final for BIA.

(2-ER-206).

On March 1, 2021, the BIA Superintendent met with the Tribe. (2-ER-202). The Superintendent reminded the Tribe that "the terms outlined in the approved Lease are in effect" and that "the Lease requires the parties to the Lease must first pursue mediation and/or arbitration before BIA may cancel [the Lease]." (2-ER-203). The Tribe expressed its disagreement with that conclusion and claimed that Eagle Bear should not be allowed to extend the Lease for a second 25-year period while the Tribe's allegations of a breach and purported cancellation of the Lease in 2017 were unresolved. (*Id.*) The BIA reports that the Tribe also suggested to the Superintendent that the Lease be extended for a 3-year period, rather than the 25-year period specified in the Lease, to allow the parties time to resolve their conflict

regarding the continued validity of the Lease. (*Id.*) The Superintendent adopted this suggestion and, on March 17, 2021, decided to make "[a]n Administrative Modification to extend the Lease for an additional 3 years" for the purpose of allowing "the appellant, the Lessee and BIA to obtain a decision on the pending appeal before IBIA." (2-ER-203-204).

Both Eagle Bear and the Tribe appealed this decision to the BIA Regional Director on April 14, 2021. Eagle Bear explained that the Superintendent's "decision to unilaterally extend [the Lease] for a three-year term disregards the agreed upon and approved Lease terms." (2-ER-122).

Thus, by April 2021, Eagle Bear, the Tribe, and the BIA were involved in multiple lines of administrative disputes. First, the Tribe had appealed the Regional Director's April 4, 2019 decision to require arbitration of the Tribe's 2017 allegations that Eagle Bear had breached the lease. (2-ER-226; *see also* 2-ER-74). That appeal was pending before the IBIA. (2-ER-74). Second, the parties were in the midst of resolving a dispute regarding Eagle Bear's extension of the Lease for a second term. (2-ER-212 & 215). Third, the Tribe had—according to the BIA Superintendent—requested that the BIA extend the Lease for three years, the BIA had done so, and Eagle Bear and the Tribe had appealed that decision. (2-ER-121 & 203). That appeal was pending before the Regional Director. (2-ER-118-203).

However, in July 2021—after Eagle Bear, the Tribe, and the BIA had committed significant time and resources to over four years of administrative decisions and appeals—the Tribe took a new approach. On July 19, 2021, the Tribe filed a complaint in Blackfeet Tribal Court ("Tribal Court"). (2-ER-178). That Tribal Court Complaint is the subject of this action. (2-ER-104). In the Tribal Court Complaint, the Tribe abandoned its argument that Eagle Bear had breached the Lease in 2017 and instead argued that the BIA cancelled the Lease way back in 2008. (2-ER-187-190; *see also* 2-ER-160-164, 168-170). On that basis, the Tribe sought to evict Eagle Bear from the leased premises and to recover damages under the Lease from both Eagle Bear and Will Brooke personally. (2-ER-200-201). More specifically, the Tribe sought the very same damages and pursued the very same alleged injuries that the BIA had ordered the Tribe to arbitrate. Just as in its April 26, 2017 Notice of Default, the Tribe sought (1) royalties under the Lease, (2) an audit pursuant to the terms of the Lease, (3) damages related to allegedly unapproved improvements to the Campground, and (4) allegedly unpaid taxes related to the Campground. (*Compare* 2-ER-289-291 *with* 2-ER-193-194, 199-201).

Together with the Tribal Court Complaint, the Tribe filed a "Petition for Pre-Judgment Attachment of Personal Removable Property" in which the Tribe sought "pre-judgment attachment" of Eagle Bear's "36 Kamping Kabin[s]" and "[a]ll

other movable personal property located on the [Leased] premises." (2-ER-174). The Tribe allegedly sought such attachment to ensure that it would be able to satisfy the judgment it expected to receive from the Tribal Court Complaint. (*Id.*)

Eagle Bear opposed the petition for prejudgment attachment and filed a motion to dismiss the Tribal Court Complaint. (*See* 2-ER-85). To date, the Tribal Court has not taken any action on the petition or the motion to dismiss.

After filing its Tribal Court Complaint, the Tribe moved to dismiss the IBIA appeal as "moot" in light of its alleged 2008 Lease cancellation argument. (2-ER-153). In that motion, the Tribe argued that because the Lease was cancelled in 2008, the BIA's actions on the Tribe's 2017 breach of lease claims and the preceding 4 years of BIA and IBIA proceedings were meaningless. (2-ER-160-164, 168-170).

The IBIA denied the Tribe's motion on August 10, 2021. (2-ER-81). The IBIA reasoned that the "Tribe has not exhausted its administrative remedies within BIA concerning the purported 2008 cancellation of the Lease." (*Id.*) The IBIA directed the BIA to consider and take action on the Tribe's 2008 lease cancellation allegations and it stayed the IBIA appeal so that the BIA could do so. (2-ER-82)

Following the Tribe's petition for reconsideration of the IBIA's decision, the IBIA noted that the record before it was incomplete with respect to the alleged 2008 cancellation and that the BIA had not had the opportunity to address the

Tribe's arguments regarding the alleged 2008 cancellation. (2-ER-78). Accordingly, the IBIA vacated its order for the sole purpose of allowing the BIA "an opportunity to respond to the Tribe's Motion to Dismiss for Mootness" before the IBIA issued an order. (*Id.*) The IBIA directed the BIA to file a response to the briefing on the alleged 2008 cancellation "on or before January 14, 2022." (2-ER-79). On January 7, 2022, the BIA requested a 30-day extension, explaining that it needed additional "time to research and gather documents" related to the 2008 cancellation question. (2-ER-72). The IBIA granted that request. (2-ER-69).[4]

Eagle Bear and Brooke filed their Complaint in the present action on August 10, 2021. (2-ER-103). They filed a motion for preliminary injunction ("Motion") on the same day. By their Complaint and Motion, Eagle Bear and Brooke asked the Court to prevent the Tribe and the Tribal Court from pursuing the Tribal Court Complaint and thereby disrupting the ongoing BIA and IBIA proceedings, circumventing the parties' agreement to arbitrate, and exceeding the tribal court's jurisdiction at the risk of inconsistent decisions. (2-ER-104, 117-118).

[4] Because the IBIA's December 17, 2021 order, the BIA's January 7, 2022 request for an extension, and the IBIA's January 10, 2022 order were issued after the District Court denied Eagle Bear and Brooke's Motion for Preliminary Injunction and after Eagle Bear and Brooke filed their Notice of Appeal in this matter, the documents were not made part of the record before the District Court. Eagle Bear and Brooke have moved this Court to take judicial notice of the documents and refer to them in this brief pursuant to Circuit Advisory Committee Note (7) to Rule 27-1.

Following a hearing and supplemental briefing requested by the District Court, the District Court denied the Motion. (1-ER-2). Although the District Court determined that Eagle Bear and Brooke were at risk of irreparable harm, it decided that the balance of the preliminary injunction factors weighed in favor of denying the Motion. This conclusion was based primarily on the Court's erroneous decision to prematurely resolve the very question that prevents the Tribal Court from exercising jurisdiction. (*E.g.*, 1-ER-10). The District Court erroneously decided that because the BIA likely cancelled the Lease in 2008, the Tribal Court could exercise jurisdiction over Eagle Bear and Will Brooke. (1-ER-14).

The Tribe has filed a motion to dismiss the federal court action. That motion is pending before the District Court with a hearing set for January 19, 2022 in Great Falls.

SUMMARY OF ARGUMENT

The District Court's order denying Eagle Bear and Brooke's Motion for Preliminary Injunction is predicated on an assumption that Eagle Bear and Brooke's "arguments rely primarily on the continued existence of the lease." (1-ER-10). Working from that assumption, the District Court determined that the Lease was "likely" cancelled in 2008 and, therefore, that Eagle Bear and Brooke were unlikely to succeed on the merits of their Complaint. (1-ER-10-17). In

conducting this analysis and resolving Eagle Bear and Brooke's Motion in this way, the District Court exceeded its authority. The District Court's decision threatens to disrupt the ongoing IBIA and BIA proceedings and Eagle Bear's right to arbitration under the Lease in the very same way that Tribal Court adjudication of the Tribal Court Complaint would.

Eagle Bear and Brooke's Complaint and Motion do not, as the District Court concluded, rely on the continued existence of the Lease, and Eagle Bear does not ask the District Court to decide whether the Lease was cancelled in 2008. Instead, Eagle Bear asks the District Court to decide that *the question* of whether the Lease was cancelled is not a question that the *Tribal Court* can resolve. That question is subject first to a decision by the IBIA and BIA and is then subject to arbitration and potential judicial review. Only after the BIA has reached a final decision and the parties have arbitrated can either the Tribal Court or the District Court exercise authority over the underlying dispute or consider the claims in the Tribal Court Complaint.

Because the question of whether the BIA cancelled the Lease in 2008 is outside the Tribal Court's authority, because that question is properly before the BIA and IBIA, because the Tribe's claims must be arbitrated, and because the Tribal Court does not have personal jurisdiction over Will Brooke, the Tribal Court plainly lacks jurisdiction over the matters presented in the Tribal Court Complaint

and Eagle Bear and Brooke are likely to succeed on the merits of their Complaint. Considering Eagle Bear and Brooke's likely success and the risk of irreparable harm from prejudgment attachment or an order of the Tribal Court inconsistent with the ongoing IBIA and BIA proceedings, the District Court abused its discretion when it failed to preliminarily enjoin the Tribal Court proceedings.

STANDARD OF REVIEW

Generally, a "plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Nat'l Resource Defence Council, Inc.*, 555 U.S. 7, 20 (2008). However, a lesser showing of "serious questions going to the merits" will also "support issuance of a preliminary injunction" if there is a "balance of hardships that tips sharply towards the plaintiff." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011).

This Court reviews a district court's denial of a preliminary injunction for abuse of discretion. *Id*. at 1131. A district court abuses its discretion when its decision is based on "an erroneous legal standard or clearly erroneous finding of fact." *Id*. This Court reviews the district court's decisions of law de novo and its

findings of fact for clear error. *Id*.; *Karnoski v. Trump*, 926 F.3d 1180, 1198 (9th Cir. 2019).

ARGUMENT

1. Eagle Bear and Brooke are likely to succeed on the merits of their claim for injunctive relief.

Eagle Bear and Brooke are likely to succeed on the merits of their claim because the Tribal Court plainly lacks jurisdiction over the claims and issues presented by the Tribal Court Complaint. The District Court's decision otherwise relies on errors of law and clearly erroneous findings of fact.

In the Tribal Court Complaint, the Tribe seeks to evict Eagle Bear, to obtain an accounting under the Lease, and to recover damages under the Lease. (2-ER-187-190, 193-194, 199-201; *see also* 2-ER-160-164, 168-170). It seeks to do so based on its allegation that the BIA cancelled the Lease in 2008 and that Eagle Bear has been a trespasser since 2008. (*Id*.)

Likewise, the Tribe argues that the Tribal Court has jurisdiction over the Tribal Court Complaint because, despite the parties' conduct over the last 13 years, there is no Lease between Eagle Bear and the Tribe. Relying on this Court's decision in *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802 (9th Cir. 2011), the Tribe argued—and the District Court concluded—that the Tribal Court has the power to adjudicate the Tribe's trespass claims by virtue of

the Tribal Court's "sovereign authority over tribal land" and its "power to exclude" persons from that land. 1-ER-14-16.

Unfortunately, this analysis and conclusion entirely presuppose the truth of the Tribe's allegation that the Lease was cancelled in 2008 and that Eagle Bear is a trespasser. The Tribe's power to exclude only becomes relevant to the extent the Lease was cancelled. *Water Wheel*, 642 F.3d at 805-06, 811, 816 n.8. Unlike in *Water Wheel*, where there was *no* dispute that the defendant's lease had expired and that the defendant had "failed to vacate" the leased premises before the tribes brought a trespass and eviction action (*id*. at 805), the Lease in this case did not expire by its terms. (2-ER-30). Unlike in *Water Wheel*, it is far from undisputed that Eagle Bear is a "trespasser," that Eagle Bear has "violated the conditions of [its] entry," or that the Tribe has the "power to exclude" Eagle Bear from the Leased premises. *Water Wheel*, 642 F.3d at 811.

Instead, there is a genuine dispute in this case about whether the Lease was cancelled in 2008 and, therefore, whether Eagle Bear is a holdover tenant subject to the Tribal Court's jurisdiction. (*See* Argument *infra* Parts 1.c.i-iv.) That genuine dispute is presently before the BIA. As the District Court noted, there are "significant gaps" in the record that impeded the District Court's or the parties' ability to assess the merits of that question. (1-ER-5). Likewise, the Tribe previously acknowledged that "it is not clear how the cancellation was resolved, if

at all." (2-ER-229). Indeed, there is no record related to the alleged 2008 cancellation decision following Eagle Bear's appeal other than Eagle Bear's January 5, 2009 letter and the parties' continuing performance under the Lease. (*See* 1-ER-3; *see also* 2-ER-77 ("it is unclear whether the record contains all documents relevant to whether the 2008 cancellation decision had been reversed or withdrawn")). There is certainly no final decision from the BIA Regional Director cancelling the Lease. (*See* 2-ER-189 at ¶ 45).

On that basis alone, the District Court should have recognized that the Tribe's allegation about BIA cancellation in 2008 is unresolved. And, for the reasons discussed below, the District Court should have determined that the cancellation question is a federal question squarely before the BIA, that the Tribal Court could not adjudicate the question or the Tribe's Claims, and that Eagle Bear and Brooke were likely to succeed on the merits of their Complaint. (*See* Argument *infra* Parts 1.a-e). Instead, the District Court decided to prematurely consider the question and then wrongly concluded that "[t]he record suggests that the lease [was] cancelled in 2008." (1-ER-14).

a. Whether the Lease was cancelled in 2008 is a federal question outside the Tribal Court's Jurisdiction.

The Tribal Court lacks adjudicative authority over federal questions. Unlike state courts, Tribal Courts are not courts of general jurisdiction that can "adjudicate cases invoking federal statutes" or involving "questions of federal law" absent

express statutory authority to do so. *Nevada v. Hicks*, 533 U.S. 353, 366-68 (2001). There is no such statutory authority allowing the Tribal Court to determine whether the Lease was cancelled in 2008.

Unlike "routine contracts" that are "governed by general common law principles of contract" and may be adjudicated by Tribal Courts, leases of tribal trust land are comprehensively regulated by the federal government. *Kodiak Oil & Gas (USA) Inc. v. Burr*, 932 F.3d 1125, 1136-37 (8th Cir. 2019); *Comstock Oil & Gas Inc. v. Alabama & Coushatta Indian Tribes of Texas*, 261 F.3d 567, 573-575 (5th Cir. 2001); *see also Gaming World Intern., Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 847-48 (8th Cir. 2003). With respect to business leases of tribal trust land, like the Lease at issue, "[t]he Federal statutory scheme for Indian leasing is comprehensive. . . . Federal regulations cover all aspects of leasing," including "[t]respass," "[w]hat laws apply to leases," "[l]ease duration," "[a]mount, time, form, and recipient of rental payments," "[i]nvestigation of compliance with a lease," "[n]egotiated remedies," "delinquent payments," and "[s]ecretarial cancellation of a lease for violations." *Residential, Business, and Wind and Solar Resource Leases on Indian Land*, 77 Fed. Reg. 72,440, 72,447 (Dec. 5, 2012); *see also* 25 C.F.R. Part 162, Subpart D. As a result of such comprehensive regulation, the interpretation and adjudication of questions

concerning leases of tribal trust land present federal questions that cannot be decided by Tribal Courts.

As discussed below, the Tribal Court Complaint turns entirely on the Tribe's allegation that the Lease was cancelled in 2008, and the District Court incorrectly decided that the Lease was likely cancelled in 2008. (*See* Argument *infra* Parts 1.c.i-iv.) More critically, however, the *question* of whether the Lease was cancelled in 2008 is a federal question that the *Tribal Court* cannot answer.

As proof that the 2008 Lease cancellation allegation is a federal question, the Court need look no further than the District Court's analysis of the issue in its order. In deciding whether it believed the BIA had cancelled the Lease in 2008, the District Court interpreted federal regulations and federal caselaw, it analyzed the BIA's actions and authority, and it determined whether the BIA likely cancelled the Lease. (1-ER-10-14). Such issues are issues of federal law beyond the authority of the Tribal Court.

In concluding otherwise—after effectively resolving the issues itself—the District Court erroneously relied on the titles the Tribe gave the claims in its Complaint without regard to the nature of those claims. It reasoned that the "Blackfeet Tribal Court possesses authority to hear cases of trespass on tribal land and may determine damages for unauthorized use of tribal land if so established." (1-ER-20). It further reasoned that claims of "trespass," "[f]raudulent

misrepresentation," and "failure to follow Blackfeet tribal law likewise pose no questions of federal law." (1-ER-20-21). The District Court ignored, however, the Tribal Court's inability to adjudicate the predicate question underlying all of those claims: whether the BIA cancelled the Lease in 2008. The District Court was only able to reach its conclusion because it undertook to prematurely analyze the truth of the 2008 Lease cancellation allegations. (1-ER-6-10). In other words, it was only able to reach its conclusion by purporting to exercise authority over and eliminate the federal question on which the Tribal Court Complaint is based.

The question of the Lease's validity is not, however, before the District Court. (*See* 2-ER-103-118). That question is currently before the BIA where it belongs. The only question Eagle Bear has presented in its Complaint or by its Motion for Preliminary Injunction is whether the *Tribal Court* can decide that the Lease was cancelled by the BIA. It cannot. That question is a federal question beyond the scope of the Tribe Court's authority.

b. Whether the Lease was cancelled in 2008 is a question that must be resolved by the BIA.

Whether the Lease was cancelled in 2008 is a question presently and properly before the BIA. It is an issue that the BIA must, as a matter of administrative exhaustion, or should as a matter of primary jurisdiction, resolve before any court considers the Tribe's trespass claims.

i. The Tribe has not exhausted its administrative remedies concerning the alleged 2008 cancellation of the Lease.

By the Tribe's admission and the Lease terms, only the BIA can cancel the Lease. On April 4, 2017, the Regional Director decided that the Lease had not been cancelled and that the Tribe was required to arbitrate its allegations before the Lease could be cancelled. (2-ER-250). An appeal of that decision is pending before the IBIA. (2-ER-74). Likewise, on July 26, 2021, the Tribe presented its 2008 Lease cancellation arguments to the IBIA. (2-ER-153, 155-158, 160-164). On August 10, 2021 and again on December 17, 2021, the IBIA decided that "the Tribe has not exhausted its administrative remedies within the BIA concerning the purported 2008 cancellation of the Lease," decided that the record regarding the purported 2008 cancellation was incomplete, and directed the BIA to respond to the 2008 cancellation allegations. (2-ER-78-79, 81-82).

In light of the Regional Director's decision and the BIA's and IBIA's present consideration of the 2008 Lease cancellation arguments, a decision by the Tribal Court—or the District Court—that the Lease was cancelled in 2008 would be inconsistent with the Regional Director's decision and the ongoing administrative proceedings. (*See* 2-ER-168 (expressing the Tribe's position that "[t]here is no case or controversy [for the IBIA to consider] regarding the 2017 cancellation decision, as the lease was already cancelled in 2008")). Such a decision would have the effect of undoing four years of nearly-final administrative

proceedings. (*Id*.) Indeed, the Tribe has alleged that a decision from the Tribal Court that the BIA cancelled the Lease in 2008 would undo the BIA's decision that the "Lease has not been cancelled" and render the IBIA and BIA proceedings moot. (*See id*.) The Tribe is, therefore, effectively seeking Tribal Court judicial review of the ongoing federal administrative proceedings.

Moreover, the Tribe requests the very same relief from the Tribal Court that it requested from the BIA and that the BIA ordered the Tribe to arbitrate. (*Compare* 2-ER-289-292 *with* 2-ER-193-194, 199-201). The Tribal Court Complaint is nothing more than an attempt to circumvent the BIA and IBIA administrative process and to obtain the relief the Tribe wants without mediating or arbitrating as the BIA has required. (2-ER-250). Again, a decision by the Tribal Court that the Lease was cancelled in 2008 and that Eagle Bear is a trespasser would be inconsistent with the Regional Director's decision and the ongoing administrative process.

Before seeking any such relief from the Tribal Court, the Tribe is required to complete the administrative proceedings it started in 2017. Lease cancellation, lease disputes, and redress of lease violations are all subject to BIA administrative review and are subject to judicial review only upon exhaustion of administrative remedies. 5 U.S.C. § 704; 25 C.F.R. §§ 2.6, 162.466, .467, .470; *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072, 1074 n. 4, 107-76 (9th Cir. 1983); *McNabb v.*

U.S., 54 Fed. Cl. 759, 772-73 (2002); *Saguaro Chevrolet, Inc. v. U.S.*, 77 Fed. Cl. 572, 581 n. 15 (2007) ("all allegations of lease violations are subject to an agency appeals procedure" and "after agency appeals have been exhausted and a final BIA decision is issued, judicial review is not to this court, but to federal district courts for an APA review"); *see* 25 U.S.C. §§ 177, 348, 415(a); *Brown v. U.S.*, 86 F.3d 1554, 1561-62 (Fed. Cir. 1996) ("an allottee cannot cancel a lease without the Secretary's prior approval"). As the Tenth Circuit has determined, failure to exhaust administrative review "prevents [parties] from asserting a breach of lease claim" to any court. *Burrell v. Armijo*, 456 F.3d 1159, 1174 (10th Cir. 2006).

Critically, these principles were expressly incorporated into the Lease. The Lease specifically states: "In the event of a breach of the lease, the [BIA] shall issue a 10 day show cause letter pursuant to 25 C.F.R. § 162.14. Appeal rights of any decision thereto are provided for by 25 C.F.R. Part 2. The parties *shall exhaust all administrative appeals* before filing with the United States District Court, Great Falls Division." (2-ER-50).

The question of whether the Lease is valid and whether it was cancelled in 2008 is squarely before the BIA. The BIA has not reached a final decision and, as the IBIA ruled when it refused to consider the Tribe's 2008 cancellation arguments and directed the Tribe to present the arguments to the BIA: "[T]he Tribe has not exhausted its administrative remedies within the BIA concerning the purported

2008 cancellation of the Lease." (2-ER-81; *see* 2-ER-79). The Tribe is the party that first brought the controversy to the BIA, the BIA is the only entity that may cancel the parties' Lease, and the BIA must resolve the question of the Lease's validity before the Tribal Court could possibly exercise jurisdiction to resolve a purported trespass.[5]

ii. The alleged 2008 cancellation of the Lease is subject to the BIA's primary jurisdiction.

"The doctrine of primary jurisdiction . . . is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulation duties." *United States v. Western Pac. R.R.*, 352 U.S. 59, 63 (1956). Primary jurisdiction applies "whenever enforcement of the claim requires resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *Id.* "The advisability of invoking primary jurisdiction is greatest when the issue is already before the agency, and the agency's informed opinion will be of material aid to the district court in the resolution of remedial issues." *Chase v. Andeavor Logistics, L.P.*, 12 F.4th 864, 870 (8th Cir. 2021) (quoting *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412, 420 (5th Cir. 1976)) (internal quotation marks omitted).

[5] To be clear, Eagle Bear denies that the Tribal Court could properly exercise jurisdiction over this matter even if the BIA had resolved this question. As explained below, all controversies arising from the Lease are also subject to mandatory arbitration and the exclusive jurisdiction of the District Court.

In *Chase v. Andeavor Logistics, L.P.*, the Eighth Circuit Court of Appeals decided to defer to BIA primary jurisdiction under circumstances strikingly similar to this case. In *Chase*, the Three Affiliated Tribes claimed that Andeavor Logistics was liable for trespass following the alleged expiration of Andeavor Logistics' lease of tribal lands. 12 F.4th at 866-67. The BIA instituted administrative proceedings to determine whether Andeavor Logistics was trespassing and, if so, to determine the appropriate remedies. *Id*. at 867. While those proceedings were ongoing, landowner members of the Tribe that were allegedly affected by Andeavor Logistics' trespass sued Andeavor Logistics in federal district court. *Id*. at 868.

The Eighth Circuit ordered the district court to stay the case pending a final decision by the BIA. *Id*. at 877. The court offered three bases for this decision. First, it recognized that "[t]he BIA's role as trustee is the core of the many protections Congress has provided for . . . Indian lands" and that the BIA is responsible for administering and protecting "lands held in trust" from those "invading" the lands, "including holdovers." *Id*. at 876. Second, it recognized that the BIA had not "simply been involved in th[e] controversy" and, instead, had "taken action." *Id*. Notably, the "Acting Secretary of the Interior ha[d] directed the Regional Director to 'issue a new decision, as may be necessary and appropriate.'" *Id*. Finally, it recognized that the case before it was "within the

BIA's area of expertise" and that the BIA "may have or may be able to efficiently develop, facts that may be relevant to one or more legal issues." *Id*. at 877. For these reasons, the Eighth Circuit concluded that "the views of the BIA on [the] legal issues would obviously be important" and that the "BIA's extensive authority, protective role, and prior involvement in the controversy" made the case "a prime example of when deferring to an agency's primary jurisdiction is appropriate." *Id*.

Deference to the BIA's primary jurisdiction in this case is appropriate for the same reasons as in *Chase*, especially considering that *Chase* is consistent with this Court's interpretation of the primary jurisdiction doctrine. *E.g.*, *Reid v. Johnson & Johnson*, 780 F.3d 952, 966-67 (9th Cir. 2015); *Davel Comm'ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1086-1087 (9th Cir. 2006). As in *Chase*, the question of whether the Lease was cancelled in 2008 is already before the BIA. (2-ER-78-79, 81-82, 153, 155-158, 160-164). The IBIA has directed the BIA to respond to the Tribe's 2008 cancellation allegations. (2-ER-78-79, 81-82).

Also as in *Chase*, the BIA has "extensive authority, [a] protective role, and prior involvement in the controversy." 12 F.4th at 876. Notably, the BIA regulations governing leases of tribal trust land are comprehensive, the BIA is charged with administering the Lease on behalf of the Tribe, and according to federal regulation, the terms of the Lease, and the Tribe's own admission, only the

BIA could cancel the Lease. *Residential, Business, and Wind and Solar Resource Leases on Indian Land*, 77 Fed. Reg. 72,440, 72,447 (Dec. 5, 2012); 25 C.F.R. Part 162, Subpart D; 2-ER-32-33 ("The parties agree and recognize the Blackfeet Indian Nation cannot unilaterally cancel this lease without approval of the Bureau of Indian Affairs"). Indeed, the BIA is intimately involved in this controversy considering that the question on which the Tribe's claims are predicated is whether the *BIA* cancelled the Lease in 2008. (2-ER-187-189).

Most critically, allowing the BIA to reach a conclusion on whether the Lease was cancelled in 2008 will allow the most efficient development of a record in this matter. As the Tribe, the District Court, and the IBIA have each acknowledged, the circumstances surrounding the alleged 2008 cancellation are unclear. (1-ER-5 (noting "significant gaps" in the record); 2-ER-229 (stating the Tribe's former position that "it is not clear how the cancellation was resolved, if at all."); *see also* 2-ER-78 (According to the IBIA, "it is unclear whether the record contains all documents relevant to whether the 2008 cancellation decision had been reversed or withdrawn before the Regional Director's April 4, 2019 decision was issued.") It is, for example, unclear what, if anything, occurred in the appeal between the June 18, 2008 notice of appeal and Eagle Bear's conversation with the BIA that led to Eagle Bear's January 5, 2009 letter. (*See* 1-ER-3). Allowing the BIA and IBIA to exercise primary jurisdiction and complete their administrative process will

efficiently develop the record surrounding the BIA's alleged 2008 cancellation by allowing the BIA to review its records and offer an explanation about how the appeal was resolved. *See Chase*, 12 F.4th at 877. As in *Chase*, such development is necessary before any court or any arbitrators could efficiently resolve the Tribe's claims.

c. The District Court's clearly erroneous findings that the BIA likely cancelled the Lease in 2008 underscore the fact that the Tribal Court cannot decide the Lease cancellation allegations.

The very fact that there is a question about whether the Lease was cancelled in 2008, and that the record merely "suggests" cancellation, is the reason why the Tribal Court cannot adjudicate the Tribe's claims. The following errors in the District Court's analysis of the question further underscore the point that the Tribe's allegation that the BIA cancelled the Lease in 2008 is unresolved, and unresolvable by the Tribal Court.

i. The Lease was not cancelled in 2008 because the BIA failed to follow the cancellation procedures identified in the Lease and applicable regulations.

The BIA was required to give Eagle Bear notice of its alleged defaults and an opportunity to cure prior to cancelling the Lease. 25 C.F.R. § 162.618 (2008); 2-ER-50. However, the BIA's letters dated January 15, 2008, March 27, 2008, and April 4, 2008, which the District Court identifies as satisfying such notice requirements, were never received by Eagle Bear. Many of those letters were not

properly addressed to Eagle Bear. (1-ER-7, 2-ER-294, 300-303). Additionally, the BIA was required to send the letters by certified mail, but no party has produced evidence of certified mailing or of Eagle Bear's receipt of any such certified letters. 25 C.F.R. § 162.618(a) (2008). The District Court's identification of these letters as providing notice and opportunity to cure was, therefore, clearly erroneous. (1-ER-6).

The BIA was also required under the 2008 Leasing regulations and the terms of the Lease to give at least 10 days' notice and an opportunity to cure to Eagle Bear's surety and 30 days' notice and an opportunity to cure to encumbrancers of Eagle Bear's property on the Campground before the BIA could cancel the Lease. 25 C.F.R. § 162.618(a); 2-ER-46-47. The BIA never did so. (*See* 2-ER-300-303). The BIA's June 10, 2008 "cancellation decision" was, therefore, ineffective from the beginning because it was not preceded by proper notice and opportunity to cure.

ii. The Lease was not cancelled in 2008 because Eagle Bear timely cured the alleged default.

Eagle Bear first received notice of its alleged default with the BIA's June 10, 2008 "cancellation decision." (*See* 2-ER-294 & 300). Eagle Bear was entitled to cure within 10 days after receiving such notice. 25 C.F.R. § 162.618 (2008); 2-ER-50. It is undisputed that Eagle Bear paid the precise amounts of 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. (2-ER-294, 299, 300). In light of that cure, the Lease was never finally cancelled. 25 C.F.R. §§ 162.618 & .619 (2008); 2-ER-50.

iii. The Lease was not cancelled in 2008 because Eagle Bear timely appealed the BIA's cancellation letter.

Eagle Bear timely appealed the BIA's June 10, 2008 "cancellation decision" by its June 18, 2008 Notice of Appeal and Statement of Reasons. 25 C.F.R. § 2.9(a) (2008); 2-ER-294. The 2008 leasing regulations were clear: once Eagle Bear filed its appeal, the BIA's "cancellation decision . . . remain[ed] ineffective" until the appeal was resolved by an order of the Regional Director. 25 C.F.R. § 162.621 (2008); *see* 25 C.F.R. § 2.19(a) (2008). To date, there is no final decision from the Regional Director resolving the appeal or cancelling the Lease. (2-ER-157, 189). Thus, even if Eagle Bear had not cured its alleged default and the BIA had initially cancelled the Lease, Eagle Bear's Notice of Appeal and Statement of Reasons rendered the cancellation decision ineffective. 25 C.F.R. § 162.621 (2008).

The District Court disagreed and concluded that the June 10, 2008 cancellation decision became final upon Eagle Bear's withdrawal of the appeal, but that conclusion is contrary to the BIA's regulations.[6] (1-ER-12). Code of Federal

[6] It is also unclear whether Eagle Bear ever effectively withdrew its appeal, considering that the withdrawal letter was directed to the BIA Superintendent, rather than to the Regional Director before whom the appeal was pending. (2-ER-293).

Regulations sections 2.6(b) and 162.621 (2008)—the only relevant regulations that the District Court cites—state that a decision "shall be effective when the time for filing a notice of appeal has expired *and no notice of appeal has been filed*" and that "cancellation decision will remain ineffective *if the tenant files an appeal*." (Emphasis added). Because Eagle Bear undisputedly filed a notice of appeal, the June 10, 2008 cancellation decision "remain[ed] ineffective" absent a final decision resolving the appeal and cancelling the Lease. (2-ER-294). No such final decision has been found.

Notably, if the Tribe or any other party believed that the Regional Director should have issued a decision cancelling the Lease, that party could have made the Regional Director's failure to timely act the subject of appeal. 25 C.F.R. § 2.8(a) (2008). Neither the Tribe nor any other party did so, likely because they knew that the Lease was not, and could not properly be, cancelled.

iv. The Lease was not cancelled in 2008 because the BIA acknowledged that the Lease was in full force and effect and because the parties acted in accordance with the Lease for the next 12 years.

Lacking any decision from the BIA regarding Eagle Bear's appeal, the next available written record regarding the alleged 2008 cancellation following Eagle Bear's notice of appeal is Eagle Bear's January 5, 2009 letter memorializing Eagle Bear's conversations with the BIA. (*See* 1-ER-3-4, 2-ER-293). 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 did so in reliance on the BIA's representations. (*See* 2-ER-293).

By January 5, 2009, the BIA, the Tribe, and Eagle Bear all understood that the Lease was not cancelled and was in full force and effect. (*See id.*) For the next 12 years they all acted in accordance with that understanding. Eagle Bear continued to operate the Campground, the Tribe continued to collect rent, and upon subsequent alleged defaults in 2017, the Tribe pursued termination of the Lease through the BIA. (*E.g.*, 2-ER-219, 221, 250, 265, 282, 289). The Tribe also asked the BIA to extend the Lease for 3 years in March 2021. (2-ER-203). Neither the BIA nor the Tribe responded to the January 5, 2009 letter, claimed that the letter was inaccurate, or claimed that the Lease was finally and forever cancelled in 2008 until the Tribe filed its Tribal Court Complaint in July 2021. (*See* 1-ER-4-5, 2-ER-153, 229).

It is telling that the Tribe did not make its 2008 cancellation arguments until after the Tribe was ordered to arbitrate its Lease termination claims (2-ER-250), waived its right to purchase the second 25-year Lease term (2-ER-218), belatedly attempted to purchase that second 25-year Lease term (2-ER-219), and the IBIA denied expedited consideration of the Tribe's appeal in light of the renewal of the Lease. (2-ER-206). For the 12 years prior to raising the 2008 cancellation

arguments in its Tribal Court Complaint, the Tribe never once suggested or acted as if the Lease was cancelled.

Contrary to the Tribe's allegations and the District Court's findings, the Tribe's actions were not undertaken in ignorance of the 2008 cancellation letter or Eagle Bear's appeal. (1-ER-8 (finding that "[t]hrough the production of the administrative record for the appeal to the IBIA, the Blackfeet Nation became aware of the BIA's 2008 lease termination"), 2-ER-153). The Tribe was undeniably aware of and involved with the 2008 appeal and nevertheless continued to act in accordance with the Lease for the next twelve years. Notably, the Tribe received a copy of the BIA's 2008 cancellation decision on or before June 23, 2008. (2-ER-294, 295, 298). It also received a copy of Eagle Bear's 2008 Notice of Appeal and Statement of Reasons on June 23, 2008. (*Id*.) Additionally, the Tribe received a copy of Eagle Bear's January 5, 2009 withdrawal letter. (2-ER-293). The Tribe knew of the proceedings, knew that the Lease had not been cancelled, knew that the Lease was in full force and effect, and acted in accordance with the Lease for the next 12 years.

The Tribe and the District Court mistake the importance of this evidence of the agreed-upon withdrawal of the appeal and of the parties' course of conduct. Eagle Bear does not presently argue, as the District Court decided, that the discussions between the BIA and Eagle Bear "revived" the Lease. (*See* 1-ER-12).

For the reasons identified above, the Lease was never cancelled in a final decision of the BIA in 2008 or at any other time. The BIA's representation and its agreement with Eagle Bear did not, therefore, *create* or *revive* a Lease. Rather, it merely acknowledged that the alleged default had been cured and that the existing Lease remained in full force and effect.

The BIA was empowered to do exactly this. 25 C.F.R. §§ 162.618 & .619 (2008); 2-ER-46-48; *see also Dobins v. Acting Eastern Oklahoma Regional Director*, 59 IBIA 79, 93-94 (2014); *Gourneau v. Acting Rocky Mountain Regional Director*, 50 IBIA 33, 43 (2009); *Delgado v. Acting Anadarko Area Director*, 27 IBIA 65, 80 (1994). In fact, the Lease specifically authorized the BIA to decide whether to terminate the Lease in the event of default and failure to cure or, alternatively, to allow Eagle Bear to "[r]e-let the premises without terminating the lease" in the event of a default by Eagle Bear. (2-ER-46).

The Federal Circuit's decision in *Moody v. United States*, 931 F.3d 1136 (Fed. Cir. 2019) does not indicate otherwise. The District Court's conclusion that it did was in error. (1-ER-12-14). *Moody* involved agricultural leases of tribal trust land. 931 F.3d at 1137-38. After the BIA sent letters cancelling the leases for nonpayment of rent and other alleged breaches of the leases, the lessor delivered a check to the BIA. *Id*. at 1138. The BIA accepted the check and "informed the [lessors] that they did not need to appeal [the cancellation decisions], could

continue farming the land according to the leases, and did not require written confirmation." *Id*. at 1139. Nevertheless, the BIA subsequently sent trespass notices to the lessors who were eventually instructed to vacate the leased premises. *Id*. The lessors voluntarily left the premises and, although the Federal Circuit noted that they likely had grounds to do so, they did not appeal to "the BIA for cancellation of any of the leases." *Id*.

Instead, the lessors "filed a complaint *against the United States*" for damages. *Id*. at 1139-40 (emphasis added). They claimed that the BIA had breached the leases, had "revive[d] the leases thereby creating implied-in-fact contracts," breached those implied contracts, and committed "uncompensated takings." *Id*. After the Court of Federal Claims dismissed the claims because the United States "was not a party to the leases," the Federal Circuit affirmed. *Id*. at 1140. The Federal Circuit reasoned that because the United States "was not a party to the lease," it could not be liable for breach of contract. *Id* at 1140-41.

The Federal Circuit did not hold, as the District Court below suggested, that the BIA is prohibited from settling an appeal or accepting curing lease payments during appeal. *Id*. at 1142. It also did not hold that the BIA is unable to extend or continue a lease upon oral representations that the appellant need not pursue the appeal, as the District Court also decided. *Id*. Instead, the Federal Circuit held only that an oral agreement with the BIA about continuation of the lease would not

support a breach of lease claim against the United States because the United States would not be a party to such a revived lease. *Id*. It reasoned that any oral agreement reviving a lease would be on the "same terms as the previous lease," that the United States would not, therefore, be a party to the agreement, and the lease would not support a breach of contract claim against the United States. *Id*.

Thus, *Moody* does not indicate, as the District Court and Tribe suggest, that the BIA could not accept Eagle Bear's cure, withdraw its cancellation, and allow Eagle Bear to continue under the Lease terms. (1-ER-12-14). *Moody* was not about the validity of leases, the effect of purported cancellations, the effect of BIA agreements, or the acceptance of a cure. 931 F.3d at 1139-40, 1142. It only concerned the validity of a breach of contract claim against the BIA for lease cancellation. *Id*. The only part of *Moody* remotely relevant to the present matter was the Federal Circuit's indication that any oral revival or continuation of a lease would be on the "same terms as in the previous lease." *Id*. at 1142. That statement is perfectly consistent with Eagle Bear's, the Tribe's, and the BIA's continued performance under the Lease and the Lease's continued validity.

Ultimately, however, the precise meaning of *Moody*, the effect of Eagle Bear's January 2009 letter, and the meaning of the parties' subsequent decade of performance of the Lease are not presently at issue. As explained above, the District Court should not have decided whether *Moody* controls this case or

whether Eagle Bear's January 2009 letter supports the conclusion that the Lease was not cancelled in 2008. The only conclusion relevant to Eagle Bear's Complaint and Motion for Preliminary Injunction is that the *Tribal Court* cannot resolve those questions of federal law and, therefore, that the *Tribal Court* cannot adjudicate the Tribe's Complaint.

d. The Tribal Court cannot adjudicate the Tribe's claims because the parties have agreed to arbitrate the claims.

It is well-settled that tribal courts may not consider disputes that the parties have agreed to arbitrate. Where a tribe has unequivocally agreed to arbitrate a dispute, courts are required to enforce the agreement to arbitrate according to its terms and to abstain from exercising jurisdiction over the dispute except to enforce the arbitration agreement and the arbitrators' decision. 9 U.S.C. § 2; *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418-23 (2001); *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67-68 (2010); *see Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 346 (2008) (Ginsburg, J. dissenting).

In the Lease, the Tribe and Eagle Bear expressly agreed to arbitrate any proceeding "for the purpose of declaring, determining or enforcing the rights, duties or liabilities of a Party under the Lease" and agreed to arbitrate "any breach, dispute, controversy or claim between the Parties regarding the rights, adequacy of performance, breach, or liabilities of a Party under any provision" of the Lease. (2-

ER-28, 50, 62-65). The parties specified that such disputes would be arbitrated by the American Arbitration Association pursuant to its rules. (2-ER-64-65).

The claims the Tribe raised in the Tribal Court Complaint are subject to this arbitration agreement. They involve "declaring, determining or enforcing the rights, duties or liabilities" the Tribe alleges to have under the Lease and are predicated on the Tribe's allegations regarding the "rights, adequacy of performance, breach or liabilities" under the terms of the Lease. (2-ER-28, 50, 62-65). More specifically:

- The Tribe's Trespass and "Unauthorized Use of Blackfeet Nation Land" claims involve a determination that the Lease was breached and cancelled. (2-ER-192, 194).
- The Tribe's Accounting claim is predicated on an alleged right to an accounting under "Section 32 of the . . . RECREATION AND BUSINESS LEASE between Blackfeet Nation and Eagle Bear." (2-ER-193).
- The Tribe's Fraudulent Misrepresentation claim asks the Tribal Court to determine that the BIA "appropriately and properly cancelled" the Lease. (2-ER-195).
- The Tribe's "Failure to Follow Blackfeet Nation Laws" claim involves "operation of the campground," payments that Eagle Bear was allegedly

obligated to make under the Lease, and alleged tax liabilities that the Tribe waived in the Lease. (2-ER-199-200).

Notably, the Tribe has already presented to the BIA the same basic claims for damages under the Lease, for an audit or accounting under the Lease, and for failure to follow Blackfeet Nation laws in the operation of the Campground. (2-ER-289-291). And the BIA has already decided that such claims are subject to arbitration. (2-ER-250). The Tribe's appeal of that decision is pending before the IBIA.

Despite the foregoing facts and the plain language of the Tribal Court Complaint, the District Court decided that the parties' arbitration agreement likely does not apply to the Tribe's claims. (1-ER-19). In conclusory fashion and without explanation, the District Court declared that the Tribe's "claims would not arise out of the terms of the cancelled lease." (*Id.*) Considering the express allegations in the Tribal Court Complaint concerning the validity of the Lease and the plain language of the parties' arbitration agreement discussed above, that decision is incorrect.

The District Court further decided that the arbitration agreement did not survive cancellation of the Lease. (*Id.*) That decision is also conclusory, unsupported, and incorrect. The Tribe's obligation to arbitrate these disputes would have survived cancellation, even if the Lease had been cancelled in 2008. The

arbitration provisions of a lease are presumed to survive cancellation unless the Lease "manifest[ed] an intention to have arbitration obligations cease with the agreement." *See Nolde Bros. v. Loc. No. 358, Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. 243, 254 (1977) (discussing collective bargaining agreement); *see also Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. N.L.R.B.*, 501 U.S. 190, 208-11, 208 n.7 (1991) ("duty to arbitrate survives termination of lease" (citing *West Virginia v. Lilly*, 267 S.E.2d 435, 437-48 (W. Va. 1980))); *Buena Vista Homes, Inc. v. Acting Pacific Regional Director*, 36 IBIA 194, 200 n.4 (2001). No such intention to end the Tribe's arbitration obligations upon termination of the Lease is expressed in the Lease. On the contrary, the Lease expressly specifies survival of the arbitration requirement: "Subsequent to any termination of the lease, this arbitration remedy shall remain available to the Parties with respect to disputes arising under the lease prior to or subsequent to the termination date." (2-ER-73). The Tribe is obligated to arbitrate its claims regardless of whether the Lease has been cancelled.

e. The Tribal Court cannot adjudicate the Tribe's claims because the District Court is the sole judicial forum for any claims related to the Lease.

Even if the Tribe's claims were not subject to arbitration, the Tribe would be obligated to bring its claims in the District Court and not in the Tribal Court. In the Lease, the Tribe "specifically and unequivocally waived its sovereign immunity for

[arbitration]" and agreed that "venue and jurisdiction for enforcement of the terms of the [Lease and any arbitration] lie in the United States Federal District Court, Great Falls Division." (2-ER-50, 62). Such a forum selection clause is "presumptively valid" and should be enforced "absent some compelling and countervailing reason." *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1140 (9th Cir. 2004) (quoting *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972)). Because there is no "compelling and countervailing reason," such as "fraud or over-reaching" in the creation of the Lease, or any other reason that "enforcement would be unjust," the forum selection clause must be enforced. *Id*. The Tribe's claims must be brought in federal court, to the extent they are not arbitrable. The Tribal Court plainly lacks jurisdiction over the matter.

f. The Tribal Court plainly lacks jurisdiction over Will Brooke.

In addition to suing Eagle Bear, the Tribe has brought claims against Will Brooke individually. (2-ER-179, 187, 190-200). The Tribe seeks to hold Will Brooke personally liable for Eagle Bear's actions. The Tribe does not allege in the Complaint that any action of Will Brooke, separate and apart from the business of Eagle Bear and Will Brooke's role as an agent of Eagle Bear, is independently actionable. (*Id*. at ¶¶ 5, 7, 39, 49-51, 53-63, 65-72, 74-90, 92-97 (all paragraphs mentioning Will Brooke)).

"Tribal jurisdiction is limited: For powers not expressly conferred upon them by federal statute or treaty, Indian tribes must rely upon their retained or inherent sovereignty," which is limited to the Indian tribes' "members and their territory." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650-51 (2001). Consequently, the United States Supreme Court has recognized the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Id*. at 651.

This general proposition is subject to two exceptions. *Id*.; *Plains Commerce Bank*, 554 U.S. at 329-30. First, a tribe may exercise "civil jurisdiction over non-Indians on their reservation" with respect to such nonmembers who "enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Plains Commerce Bank*, 554 U.S. at 329-30. Second, it may exercise authority over nonmembers whose "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id*. at 329-30. These exceptions are "limited" and when attempting to exercise authority over nonmembers, "the burden rests on the tribe to establish one of the exceptions." *Id*. at 330. The Tribe cannot meet this burden with respect to its claims against Will Brooke.

Will Brooke is not a member of the Tribe and there is no allegation that he has individually entered any "consensual relationships with the tribe or its

members," whether through "commercial dealing, contracts, leases, or other arrangements," relevant to the Tribal Court Complaint. (*See id*.) He signed the Lease on behalf of Eagle Bear as Eagle Bear's president. He has not entered any relevant contracts or dealings with the Blackfeet or its members in the individual capacity in which he has been sued. (*See id*.) Will Brooke was acting as an agent of Eagle Bear at all times relevant to the actions alleged in the Tribal Court Complaint. (*See id*.)

Likewise, Will Brooke's allegedly actionable conduct does not directly affect the "political integrity, the economic security, or the health or welfare of the tribe." *Plains Commerce Bank*, 554 U.S. at 329-30. In order for conduct to affect politics, economics, health, or welfare in a way sufficient for a tribe to exercise authority over a nonmember, the conduct must "imperil the subsistence of the tribal community." *Id*. at 341. "[T]he elevated threshold for application of the second . . . exception suggests that tribal power must be necessary to avert catastrophic consequences." (*Id*. (internal quotation marks and alterations omitted)).

Here, the Tribe's claims all arise out of the Lease with Eagle Bear. The Tribe claims that, on behalf of Eagle Bear, Will Brooke breached the Lease, has wrongfully caused Eagle Bear to remain in possession of the Lease premises, and has made misrepresentations related to the Lease. (2-ER-179, 187, 190-200). Even

if true, those allegations do not rise to the level of conduct that can be said to "imperil the subsistence of the tribal community." *Plains Commerce Bank*, 554 U.S. at 341. The allegations do not suggest anything more than "injur[y] [to] the tribe" and do not "suggest that tribal power must be necessary to avert catastrophic consequences." *Id*. The conditions alleged by the Tribe have existed since at least 2008, and the Tribe's existence has certainly not been imperiled as a result.

Because Will Brooke is not a member of the Tribe and because his allegedly actionable conduct on behalf of Eagle Bear does not support any exception to the "general proposition" that the Tribe cannot exercise authority over a non-Indian, the Tribal Court lacks jurisdiction over the Tribe's claims against Will Brooke personally and any judgment against Will Brooke by the Tribal Court would be "null and void." *Plains Commerce Bank*, 554 U.S. at 324.

The District Court incorrectly concluded otherwise. It reasoned that this Court had "squarely addressed" the foregoing arguments in *Water Wheel* and that "Brooke stands subject to tribal jurisdiction to the extent he is not protected by the corporate structure of Eagle Bear as the alleged holdover tenant." (1-ER-18). The District Court did not, however, offer any analysis or opinion about whether Brooke was likely to succeed in proving that he is protected by the corporate structure of Eagle Bear. (*See id*.)

In *Water Wheel*, this Court recognized tribal court jurisdiction over a corporate officer that entered and performed a lease of tribal trust land on behalf of a corporation. 642 F.3d at 818. This Court reasoned that, following a discovery sanction, it was "a matter of established fact that [the officer] was [the entity's] 'alter ego' and, thus, 'corporate separateness [was] illusory." *Water Wheel*, 642 F.3d at 818. The lower court had found, again as a discovery sanction, that the entity was an alter ego of the officer because the entity was "inadequately capitalized," "failed to maintain separate financial records," "failed to keep formal corporate board meeting minutes," and had "comingled corporate money with [the officer's] personal assets." *Id*. at 806.

There are no such "established fact[s]" in this case. More critically for the purposes of the preliminary injunction analysis, the Tribe is unlikely to succeed in proving that Eagle Bear is the alter ego of Will Brooke. (*See* 2-ER-179). The Tribe has not alleged any facts indicating that Eagle Bear is inadequately capitalized, commingles funds, or otherwise failed to maintain corporate formalities and separateness. (*Id*.) Indeed, any such allegation would be false and would not be supported by evidence. Will Brooke is likely to succeed on the merits of his claim that he is entitled to the protection of the "corporate form" and that he is not subject to personal jurisdiction of the Tribal Court.

2. The District Court correctly determined that Eagle Bear and Brooke are likely to suffer irreparable harm absent preliminary injunctive relief.

The District Court correctly found that Eagle Bear and Brooke "would suffer irreparable harm if sued in a court that plainly lacked jurisdiction" and that this "prong weighs in favor of [Eagle Bear and Brooke]." (1-ER-18). More specifically, if the Tribal Court is allowed to exercise authority over Eagle Bear and Brooke, even temporarily, the BIA, the arbitrators that should decide this case, and the District Court may be deprived of the power to render a meaningful decision. Notably, the Tribe is seeking prejudgment attachment of the cabins on Eagle Bear's campground. (2-ER-173-174). Such attachment of one of Eagle Bear's primary business assets would result in serious damage and irreparable harm to Eagle Bear's ongoing business operations. (*See* 2-ER-119; *see also Stuhlbarg Int'l Sales Co. v. John D. Brush and Co.*, 240 F.3d 832, 841 (9th Cir. 2001) (evidence of loss of customer goodwill supports finding of irreparable harm)). This likelihood of irreparable harm indicates that the District Court should have issued a preliminary injunction.

3. Equity favors a preliminary injunction.

In issuing an injunction, the District Court must "balance the interests of all parties and weigh the damage to each." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009) (internal quotations omitted). Here, Eagle Bear and Brooke are exposed to a greater potential for harm from having to litigate in the Tribal

Court than the Tribe would be from cessation of Tribal Court litigation until its authority can be decided. While Eagle Bear and Brooke may suffer irreparable damage at the hands of the Tribe and the Tribal Court if the Tribal Court improperly exercises authority over this matter, the Tribe will, at most, suffer a delay in receipt of their alleged damages if the Tribal Court matter is stayed until the Tribal Court's authority is resolved.

Notably, the Tribe seeks eviction of Eagle Bear and monetary damages in their Tribal Court complaint. (2-ER-200-201). There is no significant risk that the monetary damages the Tribe seeks will be inadequate following a preliminary injunction. By the terms of the Lease, Eagle Bear is required to account for all campground revenue and to pay a royalty on the same, which it has done for the past 25 years. There is no indication that the Tribe will suffer irreparable or even any damage if eviction of Eagle Bear, which the Blackfeet claims is already 12 years overdue, is delayed by the preliminary injunction.

Thus, weighing the risks to the Tribe and to Eagle Bear and Brooke, the balance of harms and considerations of equity support a preliminary injunction. The potential harms to Eagle Bear and Brooke absent a preliminary injunction are irreparable, while any delay a preliminary injunction would cause in the Tribe's receipt of damages or use of lands is fully compensable.

Although the District Court gave more weight to the potential harm to the Tribe from a preliminary injunction and, in fact, gave such potential harm the same weight as the irreparable harm Eagle Bear is likely to suffer without a preliminary injunction, it did so in a conclusory fashion. (1-ER-22-23). It did not address the irreparable nature of Eagle Bear's claims or the compensable nature of potential delays to the Tribe. (*Id*.) In failing to account for the compensable nature of the potential delays when it weighed the equity of a preliminary injunction, the District Court abused its discretion. Equity favors a preliminary injunction.

4. A preliminary injunction is in the public interest.

Public policy favors a preliminary injunction. A preliminary injunction in this case will, by recognizing the BIA's authority over this dispute and the necessity of administrative exhaustion, promote the "twin purpose of protecting administrative agency authority and promoting judicial efficiency." *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992); *see also Woodford v. Ngo*, 548 U.S. 81, 89 (2006). It will also promote the public interest by enforcing the parties' forum selection and arbitration agreements, thereby protecting the parties' "legitimate expectations" and furthering "vital interests of the justice system." *Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 62-63 (2013); *see M/S Breman v. Zapata Off-Shore Co.*, 407 U.S. 1, 11-12, 15 (1972); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (the

Federal Arbitration Act expresses "a liberal federal policy favoring arbitration agreements").

Only the principals of comity underlying tribal court exhaustion might be said to weigh against a preliminary injunction. *See Strate v. A-1 Contractors*, 520 U.S. 438, 451-52 (1997); *Atwood v. Fort Peck Tribal Court*, 513 F.3d 943, 948 (9th Cir. 2008). However, the United States Supreme Court has clearly held that such principals are outweighed by the interests of efficient judicial resolution when, as here, the tribal court "plain[ly]" lacks jurisdiction over the dispute. *Strate*, 520 U.S. at 459 n.14; *Nevada*, 533 U.S. at 369.

The District Court reached the opposite conclusion, but it predicated that conclusion on its premature determination that the "BIA appears to have cancelled the lease in 2008." (1-ER-24). As discussed above, however, that conclusion does not mitigate the Tribe's obligation to arbitrate or its agreement to the District Court as the sole judicial forum for Lease-related disputes. More critically, the Lease cancellation question is not before the District Court, and the District Court's analysis at this stage should have been limited to deciding that the Tribal Court cannot determine whether the Lease was cancelled. As discussed above, the District Court erred when it decided that the BIA's authority and the parties' arbitration agreement are not at issue and that the Tribal Court can exercise jurisdiction over this matter.

The District Court further erred when it decided that the public policy of "protecting administrative agency authority and promoting judicial efficiency" are not implicated in this dispute. (1-ER-24). Considering the parties' arbitration agreement, the BIA's interests in this matter, and the risk that a decision of the Tribal Court will undermine the BIA's authority, public policy weighs in favor of a preliminary injunction.

CONCLUSION

Each of the factors relevant to determining whether a preliminary injunction should be granted weigh in favor of a preliminary injunction in this case. The District Court abused its discretion when it determined otherwise. The Court should reverse the District Court's Order on Preliminary Injunction and direct the District Court to enjoin the Tribe from pursuing, and the Tribal Court from considering or resolving, the claims and reliefs sought in the Tribal Court Complaint, pending exhaustion of the administrative process presently before the BIA and the IBIA.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Eagle Bear, Inc. and William Brooke state that no cases pending before this Court are known to be related to the present case.

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Dated this 13th day of January, 2022.

CROWLEY FLECK PLLP

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

ADDENDUM OF REGULATIONS

Note: The following copies of the above-referenced regulations were taken from the April 1, 2008 Edition of 25 C.F.R. Ch. 1.

§ 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.

[54 FR 6480, Feb. 10, 1989; 54 FR 7666, Feb. 22, 1989]

§ 2.8 Appeal from inaction of official.

(a) A person or persons whose interests are adversely affected, or whose ability to protect such interests is impeded by the failure of an official to act on a request to the official, can make the official's inaction the subject of appeal, as follows:

(1) Request in writing that the official take the action originally asked of

him/her;

(2) Describe the interest adversely affected by the official's inaction, including a description of the loss, impairment or impediment of such interest caused by the official's inaction;

(3) State that, unless the official involved either takes action on the merits of the written request within 10 days of receipt of such request by the official, or establishes a date by which action will be taken, an appeal shall be filed in accordance with this part.

(b) The official receiving a request as specified in paragraph (a) of this section must either make a decision on the merits of the initial request within 10 days from receipt of the request for a decision or establish a reasonable later date by which the decision shall be made, not to exceed 60 days from the date of request. If an official establishes a date by which a requested decision shall be made, this date shall be the date by which failure to make a decision shall be appealable under this part. If the official, within the 10-day period specified in paragraph (a) of this section, neither makes a decision on the merits of the initial request nor establishes a later date by which a decision shall be made, the official's inaction shall be appealable to the next official in the process established in this part.

[54 FR 6480, Feb. 10, 1989; 54 FR 7666, Feb. 22, 1989]

§ 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).

§2.19 Action by Area Directors and Education Programs officials on appeal.

(a) Area Directors, Area Education Programs Administrators, Agency Superintendents for Education, Presidents of Post-Secondary Schools and the Deputy to the Assistant Secretary—Indian Affairs/Director (Indian Education Programs) shall render written decisions in all cases appealed to them within 60 days after all time for pleadings (including all extensions granted) has expired. The decision 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.

(b) A copy of the decision shall be sent to the appellant and each known interested party by certified or registered mail, return receipt requested. Such receipts shall become a permanent part of the record.

§ 162.618 What will BIA do in the event of a violation under a lease?

(a) If we determine that a lease has been violated, we will send the tenant and its sureties a notice of violation within five business days of that determination. The notice of violation must be provided by certified mail, return receipt requested.

(b) Within ten business days of the receipt of a notice of violation, the tenant must:

(1) Cure the violation and notify us in writing that the violation has been cured;

(2) Dispute our determination that a violation has occurred and/or explain why we should not cancel the lease; or

(3) Request additional time to cure the violation.

§ 162.619 What will BIA do if a violation of a lease is not cured within the requisite time period?

(a) If the tenant does not cure a violation of a lease within the requisite time period, we will consult with the Indian landowners, as appropriate, and determine whether:

(1) The lease should be canceled by us under paragraph (c) of this section and §§ 162.620 through 162.621 of this subpart;

(2) We should invoke any other remedies available to us under the lease, including collecting on any available bond;

(3) The Indian landowners wish to invoke any remedies available to them under the lease; or

(4) The tenant should be granted additional time in which to cure the violation.

(b) If we decide to grant a tenant additional time in which to cure a viola-

tion, the tenant must proceed diligently to complete the necessary corrective actions within a reasonable or specified time period from the date on which the extension is granted.

(c) If we decide to cancel the lease, we will send the tenant and its sureties a cancellation letter within five business days of that decision. The cancellation letter must be sent to the tenant by certified mail, return receipt requested. We will also provide actual or constructive notice of a cancellation decision to the Indian landowners, as appropriate. The cancellation letter will:

(1) Explain the grounds for cancellation;

(2) Notify the tenant of the amount of any unpaid rent, interest charges, or late payment penalties due under the lease;

(3) Notify the tenant of its right to appeal under part 2 of this chapter, as modified by §162.620 of this subpart, including the amount of any appeal bond that must be posted with an appeal of the cancellation decision; and

(4) Order the tenant to vacate the property within 30 days of the date of receipt of the cancellation letter, if an appeal is not filed by that time.

§ 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.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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