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

EAGLE BEAR, INC. and WILLIAM BROOKE,	
Plaintiffs,	**Cause No. 4:21-cv-00088-BMM**
v.	
THE BLACKFEET INDIAN NATION and THE BLACKFEET TRIBAL COURT,	**DEFENDANTS' BRIEF IN RESPONSE TO THE QUESTION SET FORTH IN THE COURT'S MAY 26, 2022 ORDER**
Defendants.	

COMES NOW the Blackfeet Nation Defendants and respectfully submit their Brief in Response to the questions posed in the Court's May 26, 2022 ORDER, as follows:

BACKGROUND

After extensive litigation in this court and one day before the Court was to

conduct a hearing on the Plaintiffs' Second Motion for a Preliminary Injunction and Temporary Restraining Order, the Plaintiffs filed a Petition for Chapter 11 Bankruptcy. *In re Eagle Bear, Inc.*, No. 22-40035 (BK Mont. 2022). In so doing, the Plaintiffs sought to invoke the "automatic stay" provision of 11 U.S.C § 362, and in essence, obtain the injunctive relief from the Bankruptcy Court that they were unable to get in this Court. Their forum shopping effort succeeded.

After an abbreviated hearing, the Bankruptcy Court issued its ORDER finding that the Debtor (the Plaintiffs herein) had a conceivable interest in the Lease, that the Lease was part of the Debtor's estate in bankruptcy, and that the automatic stay provisions of 11 U.S.C § 362 applied. *Id.*, Doc. 30. In finding that the Debtor had a "conceivable interest in the lease" the Bankruptcy Court relied on the BIA's continued acceptance of Debtor's rental payments and Debtor's operation of the campground. *Id*. However, foremost was the Bankruptcy Court's conclusion that the record did not contain a final decision from the IBIA, the BIA or this Court finding that the former lease was cancelled in 2008. *Id*.

The Bankruptcy Court's conclusion that the Debtor (Plaintiffs herein) have a conceivable interest in the former lease based on bankruptcy law is contrary to the principles of Federal Indian leasing law and regulations.

The Blackfeet Nation Defendants hereby respond to the issue of

completeness of the record before this Court of the 2008 lease cancellation, and the questions posed by the Court in its May 26, 2022 ORDER as follows:

A. The Record Before this Court of the BIA's 2008 Lease Cancellation is A Complete Administrative Record of the Cancellation.

The record which is currently filed with this Court and which is identified by the Court in its Order on Preliminary Injunction (Doc. 27, page 2) is the complete administrative record of the 2008 lease cancellation. The primary documents are: 1) the BIA's June 10, 2008 letter to Eagle Bear, Inc. cancelling the former lease; 2) Eagle Bear's check dated June 16, 2008 which represented the delinquent payment for which the former lease was cancelled; 3) the BIA payment history for Eagle Bear, Inc.; 4) Eagle Bear, Inc.'s June 18, 2008 letter appealing the cancellation of the former lease; and, 5) Eagle Bear, Inc.'s January 5, 2009 letter to the Blackfeet Agency Superintendent withdrawing Eagle Bear, Inc.'s appeal of the leases cancellation.

There are no other documents in the administrative record related to the 2008 lease cancellation which were created contemporaneously with the lease cancellation or as part of or in response to the 2008 lease cancellation.

Plaintiffs have suggested from the first hearing on their Motion for Preliminary Injunction that there could be more of an administrative record supporting the claim that the 2008 lease cancellation was withdrawn. They claimed to be searching their own records and that the BIA was reviewing the

matter. In the hearing on the Blackfeet Nation Defendants' Motion to Dismiss, the Plaintiffs advised the Court that they had submitted a Freedom of Information Act request to the BIA for all the records of the 2008 lease cancellation. Doc. 42-Exhibit #1 (Eagle Bear FOIA request). The Court asked the Plaintiffs to keep it advised of the BIA's response.

As a result of their FOIA request, Plaintiffs have since received over 1,000 documents from the BIA related to the former lease. Not one of those documents was a decision reversing, withdrawing, rescinding, overruling or otherwise amending the 2008 lease cancellation. Nor was there a document even confirming the claims made in Eagle Bear's January 5, 2009 letter withdrawing its appeal, nor confirming some unwritten agreement by a BIA staff person.

Plaintiffs in fact no longer claim that there are more documents from the BIA related to the 2008 lease cancellation. Rather the Plaintiffs advance two arguments, one already rejected by this Court. First the Plaintiffs continue to make their failed argument that a BIA Blackfeet Agency employee called Plaintiff Brooke and told him to withdraw the Eagle Bear appeal. Relying on *Moody v. United States*, 931 F.3d 1136, 1142 (Fed. Cir. 2019), this Court has already rejected that argument. Doc. 27-12. Then, in a related argument, Plaintiffs attempt to equate the supposed call from the BIA Blackfeet Agency employee and Plaintiff Brooke's January 5, 2009 letter withdrawing the appeal as a record decision of the

BIA. *See In re Eagle Bear, Inc.,* Case No. 22-40035, Doc. 8-4. After reciting its claim that it withdrew its appeal at the request of a BIA Agency employee, the Plaintiffs baselessly assert, "Neither the BIA nor the Blackfeet Nation challenged that decision, and the BIA never issued a decision affirming or otherwise reinstating the lease cancellation." *Id.* Considering Federal Indian trust land leasing law and regulations, that statement is absurd. There was no decision to challenge, and there was no need for the BIA to issue a new decision affirming or reinstating the lease cancellation because the lease cancellation was never withdrawn. Other than the BIA's June 10, 2008 letter decision to Eagle Bear, Inc. cancelling the former lease, there are no other documents from the BIA related to, withdrawing, rescinding, reversing, amending or changing the cancellation decision. The full record is before the court.

BIA was first asked by the Blackfeet Nation on June 18, 2021 to produce any further documents related to the 2008 lease cancellation. It produced nothing. The IBIA invited the BIA to produce any additional documents (Aug. 10, 2021) and then ordered BIA to produce any additional documents related to the 2008 lease cancellation. Doc. 31-5(*IBIA Order dated December 13, 2021).* Still the BIA produced no additional documents.

In its MOTION TO REMAND IN RESPONSE TO POST-BRIEFING SUBMISSIONS, the BIA Regional Solicitor falsely asserted that, "[b]ecause the

post-briefing submissions were not part of the original appeal, the administrative record in the current matter before the Board does not contain a complete record of the documents that are the subject of the post-briefing submissions." Doc. 45-1(BIA Remand Motion). It must be immediately noted that the Rocky Mountain Regional Director was a party to the proceedings before the IBIA and received a copy of the parties' post-briefing submissions along with all the exhibits. All the exhibits submitted by both parties came from the record of the lease produced by the BIA in response to an IBIA order in that proceeding. See *Blackfeet Nation Defendants' Exhibit A (List of Exhibits submitted by Blackfeet Nation to IBIA in Support of Motion to Dismiss for Mootness); Exhibit B (List of Eagle Bear, Inc. Exhibits submitted to IBIA in response to Blackfeet Nation's Motion to Dismiss for Mootness).*

Since BIA's remand motion was granted on March 3, 2022, the BIA Rocky Mountain Reginal Director has produced nothing and done nothing. After the BIA Blackfeet Agency's June 10, 2008 decision cancelling the former lease, there is no record decision by the BIA reversing, rescinding, withdrawing or modifying the cancellation decision. That decision was the final decision of the agency. There is no further record related to the 2008 cancellation decision made between June 10, 2008 and February 5, 2015.

1. Would termination by the BIA in 2008 be considered a "terminat[ion] under applicable nonbankruptcy law prior to the

order for relief" for the purposes of bankruptcy code 11 U.S.C. 365(c)(3)? If so, is the automatic stay applicable to this proceeding?

Because the former lease was cancelled in 2008 and that cancellation became final in 2015, the BIA's cancellation was a "terminat[ion] under applicable nonbankruptcy law prior to the order for relief" pursuant to 11 U.S.C § 365(c)(3). The automatic stay does not apply to this proceeding. *See also* 11 U.S.C. § 362(b)(10)(automatic stay not applicable to action by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case . . . to obtain possession of such property); 11 U.S.C. § 541(b)(2)(debtor's estate does not include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case). Blackfeet Nation Defendants could find no case in bankruptcy law or otherwise which holds that a former lessee of Indian trust land acquires any type of interest in a lease of trust land cancelled 14 years earlier.

Various sections of the Bankruptcy Code evidence Congressional intent to safeguard the interests of landlords of nonresidential commercial property. *In re Lakes Region Donuts, LLC,* No BR 13-13823, 2014 WL 1281507. Those sections, including 11 U.S.C. §§ 362(b)(10), 541(b)(2) and 365(c)(3), were added as specifically protecting the interests of commercial lessors. *Id*. That protection

would seem to be even greater in the context of Indian trust land for which the United States is the trustee and has a duty to manage Indian land in the best interest of the Indian beneficiary.

While 11 U.S.C. § 362 provides a general automatic stay of action against the debtor, *Hills Motors, Inc v Haw Auto Dealers' Ass'n,* 997 F.2d 581 (9th Cir. 1983), § 362(b)(10) specifically excludes from the stay any act by a lessor to a debtor under a lease of nonresidential commercial property that has terminated by the expiration of the stated term of the lease before commencement of or during a case under title 11 to obtain possession of such property. 11 U.S.C. Sec. 362, 362(b)(10). The "terminated by the expiration of the stated term" language of 362(b)(10) has been interpreted to apply to situations where a lease has been terminated under applicable nonbankruptcy law prior to the expiration of the stated term. *See In re Policy Realty Corp.*, 242 B.R. 121, 127-128 (S.D.N.Y. 1999); *Robinson v. Chicago Hous. Auth.*, 54 F.3d 316, 320 (7th Cir. 1995)(the Bankruptcy Code draws no meaningful distinction between unexpired and terminated in the context of 365).

11 U.S.C. Section 541 establishes what constitutes the property of the debtor's estate, which generally is all the property of the debtor at the time of the filing of the petition, with some exceptions. 11 U.S.C. §541(a). Citing *Moody v.*

Amoco Oil Co., 734 F.2d. 1200, 1204 (7th Cir. 1984), the Montana Bankruptcy Court has held that:

> "When a contract has been validly terminated pre-bankruptcy, the debtor's rights to continued performance under the contract have expired. The filing of a petition under Chapter 11 cannot resuscitate those rights. *See In re Triangle Laboratories, Inc.*, 663 F.2d [463] at 467-468 [3rd Cir. 1981] * * *".
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> *Moody* further holds in discussing Section 541(a) of the Code:
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> "Similarly, Section 541(a) provides that a debtor's estate consists of `all legal or equitable interests of the debtor in property as of the commencement of a case.' Thus, whatever rights a debtor has in property at the commencement of the case continue in bankruptcy — no more, no less. Section 541 `is not intended to expand the debtor's rights against others more than they exist at the commencement of the case.' H.R. Rep. No. 595, 95th Cong., 1st Sess., reprinted in 1978 U.S. Code Cong. Ad. News 5787."

In re Welborn, 75 B.R. 242, 244 (Bankr. D. Mont.1987)(rejecting attempt to revive interest in ranch terminated pre-petition).

An exception to the broad definition of the Debtor's estate in Sec. 541(a) is any interest of the debtor as lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of a case under Title 11 of the United States Code. 11 U.S.C. Sec. 542(b)(2). In such case, the Debtor's estate ceases to include any interest of the debtor as a lessee. *See In re T.A.C. Grp.*, 294 B.R. 199, 202 (A lease that has been terminated prior to the filing of a bankruptcy petition is not property of the estate).

Section 365 of 11 U.S.C. provides that the debtor may assume an unexpired lease. However, Section 365(c)(3) prohibits the assumption by the debtor if the lease is of nonresidential real property and has been terminated by operation of nonbankruptcy law prior to the order for relief. 11 U.S. C. Sec. 365(c)(3). A settled principle of bankruptcy law is that once a lease has been terminated, there is nothing for a debtor to assume. *In re Maxwell,* 40 B.R. 231, 236-37 (N.D.Ill. 1984); *In re Player's Pub Inc*., 45 B.R. 387, 394 (Bankr, Dist.Mas.1985); *Welborn; Id*. Once terminated, a bankruptcy court cannot revive lease, even by its equitable powers, notwithstanding the debtors present ability to cure. *In re Neville,* 118 B.R. 14, 18 (Bankr.E.D.N.Y. 1990).

It has been conclusively established that a bankruptcy court cannot resurrect a lease that has been terminated prior to the filing of bankruptcy. *In re Maxwell,* 40 B.R. 231, 236-137 (N.D.Ill. 1984) citing, *In re Foxfire Inn of Stuart Florida Inc.*, 30 B.R. 30, 31-32 (Bkrtcy.S.D.Fla.1983); (citations omitted). Courts will not revive a terminated lease simply because of the lease's importance to the reorganization efforts. *Maxwell, Id.* at 238. Leases terminated before bankruptcy are simply not assumable by the trustee. *Maxwell, Id*. It should be noted that a canvas of cases cited in the *Maxwell* case demonstrates that there is no case where a court to try to find any type of conceivable interest in a lease cancelled 14 years

earlier; in most cases the lease had been terminated in the year or less prior to the filing of the petition.

In determining whether a lease was in effect as of the petition date, courts look to the terms of the lease itself as interpreted by the governing state's law. *In re Gateway Investors, LTD.*, 113 B.R. 564, 567 (Bankr.D.N.D. 1990). In this case, the governing law, as required by Federal law and the former lease, was federal law and the regulations contained at 25 CFR Sec. 162.

Applying the foregoing provisions of Federal Bankruptcy law and Federal Indian leasing law, to the facts of this proceeding compels the conclusion that BIA's 2008 cancellation of the former lease was a prepetition termination pursuant to applicable nonbankruptcy law. As a result the automatic stay does not apply and that Plaintiffs have no right to assume a long terminated lease.

As evidenced by the procedural history of the underlying lease dispute (before the Bureau of Indian Affairs, the Interior Board of Indian Appeals, and this Court) and the legal arguments made by the parties, resolution of the question of the 2008 lease cancellation and the applicability of the automatic stay in 11 U.S.C. § 1162 requires consideration of Title 11 and Title 25 along with the accompanying regulations in 25 C.F.R Sec. 162 (2008). See 28 U.S.C. § 157(d). It also involves regulation of activities involving Indian and interstate commerce. Id.

Because the 2008 lease termination by the BIA was a termination under applicable nonbankruptcy law prior to the filing of the Plaintiffs' Petition in Bankruptcy the former lease is not part of the Plaintiffs/Debtor's estate in bankruptcy. The former lease not being part of the Plaintiffs'/Debtor's estate, the automatic stay in 11 U.S.C Sec. 362 does not apply to this proceeding which has to do with jurisdiction over the Plaintiffs' conduct on the formerly leased property and the Blackfeet Nation's sovereign right to exclude people from its trust land and retake possession of that land.

2. Section 21 of the 1997 Lease Agreement provides that a "bankruptcy act shall constitute a default of this lease." Is the lease terminated as a result of the Eagle Bear filing for Chapter 11 Bankruptcy? If so, should this case be dismissed?

The former lease was terminated by the BIA on June 10, 2008; there is no lease and under the former lease the Plaintiffs acquired no rights by holding over notwithstanding the BIA's acceptance of rent. Doc. 1-2, lease Sec. 43. However to the extent that the Plaintiffs (and the Bankruptcy Court) incorrectly assert that they had some conceivable interest in the former lease, Eagle Bear, Inc.'s filing of bankruptcy triggered the Blackfeet Nation's residual right under Section 21 of the former lease to immediately take re-take control of its land.

11 U.S.C. §365(e)(1)(B), which prohibits enforcement of a clause in a lease which allows the lease to be terminated upon the filing of a petition in bankruptcy

(a so-called "ipso facto" clause), applies by its terms only to "unexpired" leases. Here the lease was terminated (expired) 14 years ago.

Because the former lease was terminated by the BIA in 2008, the former lease was not part of the Debtor's estate in bankruptcy and the automatic stay does not apply, this matter should be dismissed. The Blackfeet Nation Court clearly has jurisdiction over Eagle Bear, Inc. and Brooke, as the Court has already determined, considering that there is no lease.

Pursuant to Section 21 of the former lease, Eagle Bear, Inc.'s bankruptcy filing triggered the Blackfeet Nation's unilateral right to retake possession of its land. While the Blackfeet Nation does not agree with the Bankruptcy Court's conclusion that Eagle Bear Inc./Debtor had a conceivable interest in the land subject to the former lease, any supposed interest which may have remained was terminated by the bankruptcy filing. The matter before this court should be dismissed on that additional ground. Enforcement of the Blackfeet Nation's residual right to re-take its land under Section 21 of the former lease is not prohibited by 11 U.S.C. §365(e)(1)(B).

The Blackfeet Nation Defendants believe that the Court's next three (3) questions are interrelated. A direct response will be given to each of the questions and then those responses will be discussed together.

3. If this proceeding presents a question of the appropriateness of tribal court jurisdiction and not a question of the tribe's

sovereign power to recover debt against Eagle Bear, is the automatic bankruptcy stay applicable to this proceeding?

No. 11 U.S.C. § 362(a) acts to automatically stay any action against a debtor, including a proceeding against the debtor to obtain possession of property of the estate or property from the estate or to exercise control over property of the estate. 11 U.S.C. § 362(a)(3). This action was commenced by the Debtor, it is not against the debtor; it is not an action to obtain possession of property of the estate or property from the estate or to exercise control over property of the estate and is therefore not subject to the automatic stay.

Because this proceeding was brought by the Debtor to question of the appropriateness of tribal court jurisdiction and not a question of the tribe's sovereign power to recover debt against Eagle Bear, this matter is not stayed by 11 U.S.C. § 362(a).

4. If the automatic stay applies to any of the claims in Blackfeet Tribal Court, does it apply to the entirety of the Blackfeet Tribal Court proceedings?

Because the former lease was cancelled prepetition pursuant to applicable nonbankrutpcy law the former lease is not property of the Plaintiffs'/Debtor's estate in bankruptcy. While the automatic stay may apply to the Blackfeet Nation's creditor action in the Blackfeet Nation Court, the automatic stay does not apply to the action for trespass, eviction and recovery of Blackfeet Nation land.

5. Is the case before this Court stayed only if the Blackfeet Tribal Court proceeding is also stayed?

No. This case before this Court is not subject to the automatic stay because it is a case brought by the Debtor (it is not an action against the Debtor) to determine the jurisdiction of the Blackfeet Nation and its Court over the Debtor/Plaintiffs. This Court's determination of whether the Blackfeet Nation and its Court have jurisdiction over the Plaintiffs based on the claims made in the Tribal Court is not prohibited under any subsection of 11 U.S.C. § 362. Rather this Court's determination that the Blackfeet Nation has jurisdiction over the creditor claims made by the Blackfeet Nation in that court may result in application of the automatic stay of the Blackfeet Nation's adjudication of those creditor claims in the Tribal Court.

Because the former lease is not part of the Plaintiffs'/Debtor's bankruptcy estate, the automatic stay does not apply to that part of the Blackfeet Nation's claims in the Blackfeet Tribal Court which seek recovery of the Blackfeet Nation's own trust land. The Blackfeet Tribal Court proceeding related to Blackfeet Nation's trespass and eviction claims are not stayed if this Court finds that the Tribal Court has jurisdiction over those claims.

DATED this 9th day of June, 2022.

____Joseph_J._McKay____
Joseph J. McKay, Attorney for Blackfeet Nation