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

EAGLE BEAR, INC., Plaintiff, vs. THE BLACKFEET INDIAN NATION and DARRYL LaCOUNTE, DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS, Defendants.	Cause No. 4:22-cv-00093-BMM **PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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Plaintiff Eagle Bear, Inc. ("Eagle Bear") submits this brief in support of its Motion for Summary Judgment ("Motion").

INTRODUCTION

The Blackfeet Indian Nation's ("Nation") latest theory in its five-year effort to take Eagle Bear's business is that the lease Eagle Bear has operated under for the past twenty-five years was somehow cancelled back in 2008. The parties' conduct, the context of the 2008 proceedings, and the testimony of the BIA and Nation officials involved all confirm that the lease was never cancelled and remains in full force and effect. The Court should reject the Nation's argument and recognize the continuing validity of the Lease.

BACKGROUND

1. The Lease and Eagle Bear's development of the Campground.

Eagle Bear operates a Kampgrounds of America ("KOA") campground and recreational facility ("Campground") in St. Mary, Montana pursuant to a Recreation and Business Lease Agreement ("Lease") with the Nation. (Plaintiffs' Statement of Undisputed Facts ¶¶1-2 ("SUF")). The BIA administers the Lease on behalf of the Nation. (SUF ¶4).

Eagle Bear and the Nation entered the Lease in April 1997. (SUF ¶¶2-3). The Nation agreed to give Eagle Bear the exclusive right to possess and operate the Campground for an initial twenty-five year term and the option to extend the Lease

for a second twenty-five year term. (SUF ¶6). In exchange, Eagle Bear agreed to improve the Campground, to pay the Nation $250,000 up front, and to make annual rental and royalty payments to the Nation. (SUF ¶7).

The Campground was in poor condition when the Lease began. (SUF ¶8). Campground buildings had collapsed, Campground plumbing had frozen and burst, and there were garbage dumps and noxious weeds throughout the Campground. (*Id.*) As a result, the Campground business was faltering. The Campground's camper-nights per year was less than a quarter of its historical high and KOA had cancelled the Campground's franchise agreement for failure to meet KOA standards. (SUF ¶9). As Mark Magee, the Director of the Nation's Land Department put it, the Campground "was trash" before Eagle Bear took over. (SUF ¶¶10-11; SUF Ex. 3, Magee Dep. 12:24-13:11).

From 1992 to 1995, the Nation repeatedly asked KOA to find a franchisee to bring the campground back into the KOA system. (SUF ¶ 112). In 1997, Eagle Bear stepped up to the challenge. Eagle Bear invested significant money, time, and energy to turn the Campground around. (SUF ¶12). It replaced water, sewer, plumbing, and electrical facilities. (SUF ¶13). It rebuilt collapsed buildings and Campground roads and installed new cabins. (SUF ¶14). It removed the garbage dumps and noxious weeds and planted hundreds of trees and shrubs. (SUF ¶15). It also built a swimming pool, hot tub, and water park. (SUF ¶16).

As a result of Eagle Bear's efforts, the Campground business grew. By 2006, Eagle Bear had more than doubled the Campground's camper-nights per year and was receiving above average KOA inspection scores. (SUF ¶17). By 2017, Eagle Bear had more than quadrupled the Campground's camper-nights per year and achieved a perfect KOA inspection score. (SUF ¶18). By 2017, the Campground was one of the premier KOAs in the country and one of the Nation's most significant sources of revenue. (SUF ¶¶19-20).

Because of its significant investments into the Campground, however, Eagle Bear's historic cash flow was tight. (SUF ¶22). In addition, wildfires near the Campground, two associated evacuations in four years, and a crippling recession also hurt cash flow. (*Id*.) As a result, Eagle Bear did not turn a profit or pay its owners anything for their work until 2013, and it was often behind in its payments to the Nation and other creditors. (SUF ¶¶23-24). Although Eagle Bear's royalty payments to the Nation were higher than ever, Eagle Bear was often late making its annual rental payments. (SUF ¶21).

Despite these challenges, Eagle Bear and the Nation had an "excellent working relationship" and were able to work cooperatively through Eagle Bear's tough financial times. (SUF ¶¶25, 30; SUF Ex. 3, Magee Dep. 29:5-8, 35:22-25). The success of the Campground was beneficial to both the Nation and Eagle Bear. (SUF ¶¶ 26-28). Eagle Bear worked closely with the Nation's Land Department

Director, Mark Magee, and with the BIA's realty specialist, Tracy Tatsey, to ensure that any issues or disputes were resolved to the Nation's and the BIA's satisfaction. (*Id.*)

As a result of Eagle Bear's, the Nation's, and the BIA's cooperative efforts, Eagle Bear's payments under the Lease were one of the Nation's most significant sources of revenue by the late 2000s and early 2010s. (SUF ¶29). In the Nation's estimation, Eagle Bear was a "good tenant." (SUF ¶30; SUF Ex. 3, Magee Dep. 35:22-25).

2. The Nation's efforts and evolving theories to cancel the Lease and take possession of the Campground.

Nevertheless—or perhaps *because* Eagle Bear had turned the Campground into such a valuable asset—Eagle Bear's "excellent" relationship with the Nation began to deteriorate in 2016 and 2017. A new set of Nation leaders became interested in taking back the Campground and either running it themselves or entering a new lease with a different tenant. (SUF ¶31).

However, Eagle Bear had the exclusive right to possess and operate the Campground through at least April 2022 and, upon Eagle Bear's election, through April 2047. (SUF ¶6). Additionally, only the BIA could accept payments, issue default notices, decide whether Eagle Bear's performance complied with the Lease, or declare a material breach and cancel the Lease. (SUF ¶4). Nevertheless, when BIA Superintendent Thedis Crowe reminded the Nation about Eagle Bear's

"valid lease agreement," one councilman told her, "we're going to chain that gate up and we're going to prevent anybody from coming in and out of there. . . . [T]hat is our property. We can do what we want with it." (*Id*. at 85:2-13).

In 2017, the Nation began presenting an evolving set of theories to various courts and administrative bodies about why it should be allowed to take possession of the Campground and the business Eagle Bear had worked so hard to build. Those theories and efforts have culminated in the Nation's present claim to this Court that the Lease was cancelled in 2008, but they began with the Nation lobbying the BIA to cancel the Lease in 2017.

In April 2017, the Nation alleged that Eagle Bear had defaulted on the Lease by failing to pay annual royalty payments "from 2008 - 2011," by failing to pay the Nation's accommodation tax from 1997-2017, by failing to submit certified audit reports, and by failing to receive approval for improvements to the Campground. (SUF ¶32). The Nation asked the BIA to cancel the Lease effective in 2017 for these reasons. (*Id*.).

BIA Superintendent Thedis Crowe initially concluded that Eagle Bear had cured many of the alleged defaults and that the remaining issues were subject to mandatory arbitration before the Lease could be cancelled. (SUF ¶33). She subsequently retracted that decision and cancelled the Lease effective October 17, 2017. (SUF ¶34). On appeal, the BIA Regional Director decided that the

Superintendent's initial decision was correct, overturned the cancellation, and ordered the Nation to arbitrate its remaining allegations. (SUF ¶35).

Unwilling to arbitrate and still dedicated to retaking the Campground, the Nation appealed to the Interior Board of Indian Appeals ("IBIA"). (SUF ¶36). The Nation asked the IBIA to reinstate the October 17, 2017 decision cancelling the lease. (SUF ¶36).

In its appeal briefing, the Nation also began floating a new theory. In its Factual Background section, the Nation wrote that it "appear[ed]" that the "Lease was cancelled in 2008." (SUF ¶37). The Nation conceded, however, that the administrative record on the issue was "not clear." (*Id*.).

The Nation did not develop this argument or rely on this allegation in any part of its argument to the IBIA. It continued only to argue that the IBIA should reverse the BIA Regional Director's decision to require arbitration and affirm the BIA Superintendent's decision to cancel the Lease effective October 17, 2017. (SUF ¶38).

While the IBIA appeal was pending, the Lease's initial 25-year term expired. On October 1, 2020, Eagle Bear exercised its option to extend the Lease for a second twenty-five year term. (SUF ¶39). The Nation responded by belatedly sending notice of its intent to purchase the second twenty-five year term pursuant to the very lease the Nation previously claimed was cancelled. (*Id*.)

This exchange triggered the next evolution of the Nation's attempt to reacquire the campground. The Nation never made a purchase offer or attempted to negotiate with Eagle Bear. Instead, it made an "emergency motion for expedited consideration and decision" to the IBIA, and it asked the IBIA to promptly decide the pending appeal "so that the parties may avoid further dispute over the" extension of the Lease. (SUF ¶40). When the IBIA rejected that motion on the basis that "the Lease has not been cancelled in any decision that is final for BIA," the Nation switched tactics. (*Id*.) It abandoned its arguments that the Lease should be cancelled effective October 2017, and instead focused on the 2008 cancellation theory.

The Nation argued that the BIA Superintendent had issued a cancellation letter in June 2008, that Eagle Bear had appealed the letter to the Regional Director, and that no decision from the Regional Director had been issued resolving the appeal. On that basis, the Nation argued that the Lease was finally and forever cancelled in 2008, regardless of the parties' actions over the next dozen years.

The Nation presented that argument to both the Blackfeet Tribal Court ("Tribal Court") and the IBIA. (SUF ¶41). It argued the Tribal Court should evict Eagle Bear from the Campground based on the alleged 2008 cancellation and that the IBIA should dismiss the 2017 cancellation and arbitration appeal as moot. (*Id*.)

The Tribal Court did not resolve the Nation's complaint or Eagle Bear's motion to dismiss before the Tribal Court matter was stayed and removed to bankruptcy court. (SUF ¶42). The IBIA, on the other hand, rejected the Nation's argument. (SUF ¶43). It decided the record before it was insufficient to determine whether the Lease was cancelled in 2008 and that the BIA should have the first opportunity to resolve the question. (*Id*.) The IBIA remanded to the BIA and directed it to consider the Nation's 2008 cancellation argument. (*Id*.).

Apparently unhappy with this outcome, the Nation once again changed tactics. Rather than awaiting a decision from the pending BIA, District Court, Tribal Court, or Ninth Circuit proceedings, the Nation resorted to self-help. Just before Eagle Bear opened for the 2022 summer season, Tribal police officers closed the road leading to the Campground, locked the Campground gates, patrolled the Campground entrances, and prevented guests from entering the Campground. (SUF ¶44)

The Nation's self-help crippled Eagle Bear's ability to operate the Campground and would have prevented Eagle Bear from honoring thousands of reservations worth millions of dollars for the 2022 season or paying creditors with over $1 million dollars of debt secured by the Lease and assets on the Campground. (SUF ¶45). Consequently, Eagle Bear filed a petition for bankruptcy in May 2022. (SUF ¶46). Eagle Bear filed the present adversary proceeding as part

of the bankruptcy process. Eagle Bear asked the bankruptcy court to resolve the Nation's 2008 cancellation arguments, to decide that the Lease was not cancelled in 2008, and to decide that the Lease remained in full force and effect as an asset of the bankruptcy estate. The adversary proceeding and these claims are now pending before this Court as a result of this Court's withdrawal of the reference.

3. The alleged 2008 cancellation.

Despite written discovery requests and production, depositions, subpoenas, and FOIA requests, memories and recollections have faded, relevant documents have been lost or destroyed, and the record related to the BIA's alleged cancellation of the Lease in 2008 remains incomplete. (SUF ¶¶47-48). There is no question that the available evidence constitutes an incomplete record of the events concerning the BIA's actions in 2008, but the record leaves no doubt that the Lease was not cancelled. (*Id*.)

Under the Lease, Eagle Bear's annual $15,000 rent payment for 2007 was due on November 30, 2007. (SUF ¶49). Eagle Bear did not make the payment by that date. (SUF ¶50). As in years past, Eagle Bear's continued investments in the Campground during difficult economic conditions left Eagle Bear without enough funds to make the payment on time. (SUF ¶¶22-24). As in years past, Eagle Bear expected to work with the Nation and the BIA to make the payment once it began receiving revenue from the 2008 summer season. (SUF ¶51). It had been the

BIA's practice during prior years to send a bill and 10-day cure letter regarding past due rent in June, July, or August of the following year, and it had been Eagle Bear's practice to promptly pay the bill after receiving such a letter. (SUF ¶27; SUF Ex. 4, Brooke Dep. 127:5-8; SUF Exs. 13 & 17). Eagle Bear expected that practice to continue. (SUF ¶51). In 2008, however, the BIA acted much earlier.

The BIA sent its first bill and cure letter on January 15, 2008. (SUF ¶52). Eagle Bear never received the letter. (SUF ¶55). It was directed to the Campground address, but the Campground was unoccupied and closed during the winter. (SUF ¶53). The letter was never delivered and was returned to sender. (SUF ¶54).

The BIA sent its next letter on March 27, 2008. (SUF ¶56). It appears the BIA intended to direct the letter to the Campground's address, but the letter contained an incorrect zip code. (SUF ¶57). Regardless, the Campground was still unoccupied and closed for the winter. (SUF ¶59). Again, the letter was returned to sender and never delivered to Eagle Bear (SUF ¶¶58, 60).

The BIA dated its next letter on April 4, 2008. (SUF ¶61). The letter recited the Campground's correct address, but the BIA's files do not contain a signed copy of the letter and do not contain any certified mailing receipts or any other evidence that the letter was mailed. (SUF ¶¶62-64). Eagle Bear never received the letter. (SUF ¶65).

On June 10, 2008, the BIA wrote Eagle Bear and purported to cancel the Lease because the BIA had not received the $15,000 annual rent payment for 2007. (SUF ¶66). Eagle Bear received the letter on June 12, 2008. (SUF ¶67). The letter was Eagle Bear's first notice that the BIA was demanding the 2007 annual rent payment. (SUF ¶68). As in years past, Eagle Bear promptly paid the amount demanded upon receiving the letter. (SUF ¶69). It paid $15,000 to the BIA on or about June 16, 2008, and the BIA received the payment by June 20, 2008. (*Id*.)

Eagle Bear also appealed the June 10, 2008 cancellation letter. (SUF ¶71). On June 18, 2008, Eagle Bear served a notice of appeal and statement of reasons on the BIA and the Nation. (SUF ¶¶71-72). Although the Nation now claims it was not aware of the appeal or cancellation, Eagle Bear mailed copies of both to the Nation and the Nation employee responsible for receiving mail signed a certified mailing receipt for the documents. (SUF ¶¶73-74).

The BIA Regional Director accepted the appeal and directed the Nation to submit its own statement of reasons if it agreed with the cancellation decision or opposed the appeal. (SUF ¶¶75-76). The Nation did nothing. (SUF ¶77).

Although the Regional Director said he would issue a decision within 60 days after receiving the administrative record from the Superintendent on August 22, 2008, he never did so. (SUF ¶¶78-79, 89-96). Unsure about the status of its appeal, Eagle Bear inquired with both the Nation and the BIA. Mark Magee, the

Nation Land Department director, told Eagle Bear that the Nation was aware that the BIA had accepted Eagle Bear's $15,000 payment and felt there was no problem with the Lease or Eagle Bear's performance under the Lease. (SUF ¶80).

Likewise, the BIA informed Eagle Bear that the Lease was current and any default and cancellation had been cured by Eagle Bear's $15,000 payment in June 2008. (SUF ¶81). The BIA, therefore, asked Eagle Bear to withdraw its appeal. (*Id.*) The BIA Superintendent at the time, Stephen Pollock, believes the Regional Director directed this course of action and directed the BIA to "move forward with the lease in effect." (SUF ¶82).

The last document in the BIA's records concerning the 2008 cancellation and appeal is the January 5, 2009 conditional withdrawal letter that the BIA directed Eagle Bear to send. (SUF ¶¶83, 89). Per its discussion with the BIA, Eagle Bear wrote that BIA realty staff had notified Eagle Bear that the Lease was current and the cancellation was resolved. (SUF ¶¶84-86). Eagle Bear wrote that it was withdrawing its appeal "[p]ursuant to [its] discussions with [BIA] realty staff" and based on its understanding from the discussion that the Lease was current and valid. (*Id.*)

Eagle Bear sent the January 5, 2009 letter to both the BIA and the Nation's Land Department Director. (SUF ¶82). The BIA Superintendent and Deputy Superintendent each reviewed the letter, and the Regional Director was sent the

letter. (SUF ¶87). The BIA never refuted or responded to the letter. (SUF ¶88). Likewise, no written decision resolving the appeal, disputing Eagle Bear's letter, or critically, terminating the Lease and directing Eagle Bear to vacate the Campground, was ever issued by the BIA. (SUF ¶¶89-93). According to its officers at the time, if the BIA had cancelled the Lease following Eagle Bear's appeal and withdrawal, it would have issued a decision saying so and would not have demanded and accepted payments in subsequent years and in subsequent cure letters. (SUF ¶¶94-96).

As BIA Superintendent Pollock testified:

> Q. Is it your understanding that until you retired in 2013 . . . Eagle Bear made payments and the BIA accepted those and paid them to the Tribe?
> A. Yeah. You know, it seemed like once . . . the appeal decision was decided, that this whole issue kind of just faded into the background . . . .
> Q. The BIA, the Tribe and Eagle Bear went forward under the lease?
> A. Yeah. Yeah.

(SUF Ex. 53, Pollock Dep. 86:5-16).

Eagle Bear, the Nation, and the BIA all proceeded knowing that the Lease was valid and in effect. (SUF ¶¶97-102; SUF Ex. 53, Pollock Dep. 80:1-21, 86:14-16; SUF Ex. 3, Magee Dep. 31:23-32:14, 33:3-5 (stating his "understanding that the lease remained in full force and effect" after 2009); SUF Ex. 8, Crowe Dep. 45:18-22 (stating her "understanding . . . that the lease with Eagle Bear was in full force and effect")). For the next eight years, Eagle Bear openly and obviously

operated the Campground and made significant investments into the property. (*Id*.) Eagle Bear continued to make annual rent and royalty payments, which the BIA continued to accept and pay to the Nation. (SUF ¶100). When there occasionally were disputes, the BIA would send show-cause letters threatening to terminate the Lease, and Eagle Bear would cure the alleged defaults and work with the BIA and the Nation to address any concerns. (SUF ¶101). In other words, Eagle Bear, the Nation, and the BIA all continued to operate under the Lease.

The first time any party acted in any way inconsistent with the Lease's continuing effect was when, as part of its continuing effort to retake the Campground, the Nation began suggesting in November 2019 that the Lease had been cancelled in 2008. (SUF ¶108). The Nation asks the Court to ignore over a decade of continued performance under the Lease and to interpret the foregoing record and the BIA's actions as effectively cancelling the Lease in 2008.

STANDARD OF REVIEW

A party is entitled to summary judgment if it can demonstrate that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In deciding whether there is a genuine dispute as to a material fact, the Court must view the evidence "in the light most favorable to the opposing party." *Tolan v. Cotton*, 572 U.S. 650, 657 (2014). However, the opposing party cannot avoid summary judgment by "mere

allegations or denials" and must, instead, "set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

DISCUSSION

This is not a typical administrative appeal. The primary question before the Court is not whether the BIA's decision in 2008 was *correct*. Instead, the primary question before the Court is *what* decision the BIA reached.

1. The Lease was not cancelled. Resolving the 2008 appeal, the BIA decided that the Lease was valid and remained in effect.

Typically, an appeal of a BIA Superintendent's order is resolved by a written decision of the BIA Regional Director regardless of whether the appeal is resolved on the merits, by an appellant's withdrawal, or otherwise. (SUF ¶96). No such written order exists in the BIA's 2008 cancellation and appeal files. (SUF ¶¶89-93). This does not mean, however, that the 2008 appeal was not resolved. Although there was no *written* order, there was an order from the BIA resolving the 2008 appeal and deciding that the Lease remained in effect.

The definition of "order" under the Administrative Procedure Act is not limited to written decisions of an agency. It also encompasses any "final disposition" with determinate consequences for the party to the proceeding. 5 U.S.C. § 551(6); *Int'l Tel. & Tel. Corp. v. Local 134, Int'l Brotherhood of Electrical Works, AFL-CIO*, 419 U.S. 428, 443 (1975); *Venetian Casino Resort,*

LLC v. EEOC, 530 F.3d 925, 929, 931 (D.C. Cir. 2008); *Al Otro Lado, Inc. v. Nielsen*, 327 F.Supp.3d 1284, 1319 (S.D. Cal. 2018). Despite the lack of a written order resolving the 2008 appeal, there was a "final disposition" in which the BIA accepted Eagle Bear's late rental payment, overturned the cancellation, and proceeded with the Lease.

Upon Eagle Bear's appeal of the June 10, 2008 letter, the cancellation was rendered "ineffective" until such time as the appeal was resolved by the Regional Director. 25 C.F.R. § 162.621 (2008); *see* 25 C.F.R. § 2.19(a) (2008). This was both the effect of the appeal by operation of law and also the understanding of the BIA Superintendent that issued the June 10, 2008 letter and his staff. (SUF ¶¶94-96). The Superintendent's office knew that the Lease would remain in effect unless it was cancelled on appeal by the Regional Director. (*See id*.)

No written decision cancelling the Lease was ever issued by the Regional Director. (SUF ¶¶89-93). Instead, following discussions with BIA Superintendent staff, which were directed by the Regional Director, the parties agreed that the Lease was current, Eagle Bear withdrew its appeal and continued operating, and neither the BIA nor the Nation attempted to remove Eagle Bear from the Campground. (SUF ¶¶81-86, 97-102, 108-110). Notably, Eagle Bear sent a letter memorializing this decision to the BIA Regional Director, BIA Superintendent,

and the Nation, each of whom received the letter and never issued any decision to the contrary. (SUF ¶¶87-88).

This conduct constituted an order resolving Eagle Bear's appeal. As Superintendent Pollock testified:

> A. You know, I'm thinking that Parisian [the Regional Director] had a hand in this . . . . I wonder if it was one of those situations where he had directed me via phone call perhaps or some, you know, not written correspondence, but to basically take this action.
> Q. Move forward?
> A. Move forward?
> Q. Move forward with the lease in effect?
> A. Yeah. And I believe that his decision was from, on high, the all mighty for us here at the Agency level, so, you know, we couldn't really question his decision.

(SUF Ex. 53, Pollock Dep. at 80:5-21). The "determinate effect"—or order—resulting from the BIA's acknowledgment that the Lease was current, direction to Eagle Bear to withdraw the appeal, and acquiescence to Eagle Bear's continuing performance under the Lease was that the Lease was valid and remained in effect. *See* 25 C.F.R. §§ 2.19(a) & 162.621 (2008). The Lease was not cancelled in 2008.

2. The context of the BIA's actions and the parties' subsequent conduct confirm that the BIA did not cancel the Lease.

"[A]gency orders are not to be read in a vacuum." *S. Utah Wilderness All. v. Off. of Surface Minding Reclamation & Enforcement*, 620 F.3d 1227, 1238-39 (10th Cir. 2010). Courts must, instead, "look to the plain language and context" of an order to "guide [their] understanding." *Id*. The facts relevant to deciding what

an agency order means or what effect agency action was intended to have can include "the entire context of the original order" and "subsequent agency conduct, especially further orders." *Id*.

All such context, further orders, and conduct confirm that the BIA did not cancel the Lease in 2008. For example:

- Eagle Bear paid the $15,000 the BIA demanded within days after receiving the June 10, 2008 letter, and the BIA cashed the check. (SUF ¶69).
- The Nation did not oppose Eagle Bear's appeal from the June 10, 2008 cancellation. (SUF ¶¶72-77, 80).
- After Eagle Bear filed its appeal, the Nation's Land Department Director told Eagle Bear that the Nation knew that BIA had accepted Eagle Bear's $15,000 payment and believed there was no problem with the Lease or Eagle Bear's performance. (SUF ¶80).
- After Eagle Bear filed its appeal, the BIA's realty specialist, Tracy Tatsey, who the BIA directed Eagle Bear to contact with any questions, told Eagle Bear that the lease was current, any default was cured, and Eagle Bear's appeal could be withdrawn. (SUF ¶81).
- Eagle Bear was led to believe this resolution came from the BIA Superintendent or Regional Director. (SUF ¶¶81, 85).

- The BIA Superintendent believed the decision to allow Eagle Bear to withdraw its appeal and proceed with the Lease was initiated by the Regional Director. (SUF ¶ 82).
- The BIA Regional Director, Superintendent, and Deputy Superintendent and the Nation's Land Department Director all received and reviewed Eagle Bear's withdrawal letter and did not dispute or deny that the Lease was in full force and effect. (SUF ¶¶87-97).
- At all times since 2009, the BIA and Nation knew that Eagle Bear was operating the Campground. (SUF ¶¶98-99; *e.g.* SUF Ex. 3, Magee Dep. 32:4-33:5 ("You understand that Eagle Bear stayed on the property and continued operating the campground, right? A. Yes. . . . Q. Was it your understanding that the lease remained in full force and effect? A. That's my understanding, yes.").
- The BIA has never claimed the Lease was cancelled in 2008 or acted to remove Eagle Bear from the Campground. (SUF ¶109).
- Likewise, the Nation never claimed the Lease was cancelled until November 2019, over 10 years after the alleged 2008 cancellation. (SUF ¶108).
- Every year since 2009, Eagle Bear has made payments under the Lease to the BIA, the BIA has accepted and cashed those payments, and the BIA

has transferred the payments to the Nation. In October of this year, the BIA requested and accepted "payment due on [the] Lease." (SUF ¶100).

- Since 2009, the BIA has written other letters and issued orders demanding payment under the Lease, threatening to terminate the Lease for other issues, and taken similar actions that only make sense if the Lease remained in full force and effect. (SUF ¶¶101-102).
- Since 2009, the BIA has issued orders indicating it would not have cancelled the Lease in 2008 without first ordering arbitration, as required under the Lease. (SUF ¶¶33, 35).
- The Nation and all BIA personnel involved with the Lease believed the Lease remained in full force and effect after 2009. (SUF ¶¶97-102; SUF Ex. 53, Pollock Dep. 80:1-21, 86:14-16; SUF Ex. 3, Magee Dep. 31:23-32:14, 33:3-5 (stating his "understanding that the lease remained in full force and effect" after 2009); SUF Ex. 8, Crowe Dep. 45:18-22 (stating her "understanding . . . that the lease with Eagle Bear was in full force and effect")).

The foregoing context, conduct, and subsequent orders all confirm that the Lease was not cancelled in 2008. Every item of evidence in the record confirms that the BIA reversed the June 10, 2008 cancellation and allowed Eagle Bear to continue operating the Campground with the Nation's consent.

3. The BIA's interpretation of its record confirms that the BIA did not cancel the Lease.

"An agency's interpretation of its own orders is entitled to great weight" and "significant deference." *Phillips Petroleum Co. v. FERC*, 902 F.2d 795, 805 (10th Cir. 1973); *Gutkowski v. U.S. Postal Serv.*, 505 F.3d 1324, 1328 (Fed. Cir. 2007); *S. Utah Wilderness All.*, 620 F.3d at 1241-42. "When an agency order is ambiguous, a court will uphold the agency's interpretation unless it is arbitrary and capricious." *Phillips Petroleum Co.*, 902 F.2d at 805.

In fact, "agency orders do not have the force and effect of law unless" and until they are affirmed by a court. *Timken Co. v. United States*, 630 F. Supp. 1327, 1332 (Ct. Int'l Trade 1986). "Prior to such affirmation, an agency, like a court, can undo what is wrongfully done by virtue of its order" or can "clarify" the terms of its orders. *Id.*; *S. Utah Wilderness All.*, 620 F.3d at 1241-42; *see also United Gas Imp. Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965); *TNA Merchant Projects, Inc. v. FERC*, 857 F.3d 354, 361 (D.C. Cir. 2017). It would make little sense to interpret an order in a way inconsistent with an agency that, by its very actions, can undo or change the terms of its order.

Here, the BIA's actions were inconsistent with any final decision that the Lease was cancelled. As this Court advised, "[I]f it's a final agency action, it's a funny way of revealing itself in the fact that the tenant stayed on the property for another ten – they're still there." (Transcript of Motion Hearing at 8:22-25 (Doc.

89 in 4:21-cv-88-BMM). The BIA administered the Lease for over a decade knowing and believing that the Lease was in effect, and all BIA personnel that have been questioned on the topic have resoundingly denied that the Lease was forever cancelled. (SUF ¶¶98-108).

The BIA Superintendent that issued the June 10, 2008 letter, Stephen Pollock, testified that the Lease was not cancelled in 2008 and that, if it had been cancelled, the BIA would not have allowed Eagle Bear to remain on the Campground or sent Eagle Bear show cause letters in subsequent years. (SUF ¶103; *e.g.* SUF Ex. 53, Pollock Dep. 79:21-25 ("Q. . . Would you have typically allowed Eagle Bear to remain on the campground if their lease had been cancelled? A. I believe not."). Mr. Pollock believes the Regional Director at the time, Edward Parisian, likely directed him to resolve the appeal by allowing Eagle Bear to "[m]ove forward with the lease in effect." (SUF ¶82).

The BIA Deputy Superintendent that signed the June 10, 2008 letter for Superintendent Pollock, Cliff Hall, also never believed the Lease was cancelled. (SUF ¶104). Deputy Superintendent Hall testified that the June 10, 2008 letter did not result in cancellation of the Lease because the letter was appealable and because, even if the letter had not been appealed, final cancellation would have required a subsequent letter from the Regional Director. (*Id.*). Mr. Hall further

testified that, in his experience with the BIA, it was typical to treat a non-payment or late payment issue as "resolved" if "payment was made." (*Id.*).

The BIA Superintendent's Realty Specialist at the time of the June 10, 2008 letter also never believed the Lease was cancelled. (SUF ¶105). Tracy Tatsey testified that it was her understanding the lease remained in effect through at least January 2012 when she retired. (*Id.*). She also believed that although she could not make an agreement to resolve the 2008 cancellation appeal herself, the BIA Superintendent and Regional Director may have. (*Id.*)

The BIA Superintendents that have sent and collected bills from Eagle Bear since 2008 also believed that the Lease was in full force and effect. The BIA sent bills, show-cause letters, and notices of default to Eagle Bear after 2009. (SUF ¶101). As BIA officials have testified, these documents indicate the continuing force and effect of the Lease after 2008. (SUF ¶102; *e.g.* SUF Ex. 53, Pollock Dep. 82:21-23 ("Q. And you wouldn't send a show cause letter on a canceled lease, would you? A. No.").

Thedis Crowe, the BIA Deputy Superintendent from 2009 to 2013 and the BIA Superintendent from 2013 through 2021 never believed the Lease was cancelled. (SUF ¶106). She reviewed the Nation's 2017 arguments to cancel the Lease and the entire administrative appeal, including the 2008 cancellation proceedings, before deciding that the Lease was in full force and effect. (*Id.*) She

reasoned that the alleged Lease violation "had been cured" in 2008 when Eagle Bear made its $15,000 payment and that without a decision from the Regional Director affirming the June 10, 2008 cancellation, the cancellation was invalid and never in effect. (*Id*.).

Ms. Crowe repeatedly reminded the Nation that the Nation and Eagle Bear "have a valid lease agreement. That lease agreement is in place, it is valid and you need to abide by the terms of that lease agreement." (SUF ¶107).

Finally, the BIA has admitted that it was "at all times" aware that Eagle Bear was operating the Campground between 2009 and 2021 and that it "received payments under the Lease" from Eagle Bear each year since 2009 - 2021. (SUF ¶¶98, 100). Likewise, the BIA recently confirmed that "[t]o date, Eagle Bear, Inc. is current on all annual payments. All annual audits have been filed per the lease agreement and the Gross Registration Receipt payments have been made in accordance with annual audit findings. No outstanding amount of money is owed by Eagle Bear, Inc. as of this date." (SUF ¶110). Indeed, the BIA most recently requested and received $25,000 for "payment due on [the] Lease" in October 2022. (SUF ¶100).

The BIA's position on the alleged 2008 cancellation is and always has been that the Lease was not cancelled and that it remains in full force and effect. The

BIA's interpretation, which should be given "significant deference," confirms that the Lease has never been cancelled.

4. The errors in the June 10, 2008 cancellation letter confirm that the only correct decision the Regional Director could have made was to reverse the cancellation and not cancel the Lease.

Any cancellation of the Lease by the BIA would have been contrary to the terms of the Lease and applicable regulations. The only correct decision the Regional Director could have made on Eagle Bear's appeal was to reverse the June 10, 2008 cancellation. This fact further confirms that the Lease was not cancelled in 2008.

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

The BIA was required to give Eagle Bear and its creditor, Independence Bank, notice of Eagle Bear's alleged defaults by certified mail prior to cancelling the Lease. 25 C.F.R. § 162.618 (2008); SUF Ex. 1, Lease at 19-21. It was required to give 30 days' notice under the Lease and 10 days' notice under the applicable regulations. *Id*. The purpose for such notice was to give Eagle Bear and the Bank an opportunity to cure any alleged default.

The BIA's files contain letters dated January 15, 2008, March 27, 2008, and April 4, 2008 that reference Eagle Bear's failure to timely make its 2007 rent payment. (SUF ¶¶52, 56, 61). These letters were not, however, properly addressed

or mailed in compliance with the Lease and Eagle Bear never received them. (SUF ¶¶52-65; *see also* Background § 3, *supra*). Consequently, the BIA's June 10, 2008 "cancellation decision" was ineffective because it was not preceded by proper notice and opportunity to cure. The only correct decision the Regional Director could have made on appeal was to reverse the June 10, 2008 decision.

b. The Lease was not cancelled in 2008 because Eagle Bear timely cured the alleged default identified in the June 10, 2008 letter.

After Eagle Bear first received notice of its alleged default with the BIA's June 10, 2008 cancellation letter, Eagle Bear was entitled to cure that default within 30 days under the terms of the Lease or 10 days under the terms of the BIA's regulations. 25 C.F.R. § 162.618 (2008); SUF Ex. 1, Lease at 19-21. Eagle Bear paid the $15,000 on June 16, 2008, well-within even the 10-day period allowed under the regulations. (SUF ¶69). In light of that timely cure, the only correct decision the Regional Director could have made on appeal was to reverse the cancellation. 25 C.F.R. §§ 162.618 & .619 (2008).

c. The Lease was not cancelled in 2008 because the BIA failed to follow the Lease's dispute resolution procedures.

As the BIA decided when it rejected the Nation's request to cancel the Lease in 2017, "mediation and arbitration must be pursued before the lease can be cancelled for breach of contract." (SUF ¶33). The Nation 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. (SUF Ex. 1, Lease at 1, 23, 35-38).

As the BIA decided, this arbitration agreement is applicable to allegations of default under the Lease. (SUF ¶33). Consequently, the BIA could not have cancelled the Lease in 2008 before the parties arbitrated the alleged late payment. *Patencio v. Deputy Assistance Secretary*, 14 IBIA 92, 98 (1986) ("Where the terms of the lease set forth specific revocation or cancellation procedures, such terms are binding on the parties, including BIA in its capacity as trustee.") The only correct decision the Regional Director could have made on appeal was to reverse the cancellation.

CONCLUSION

The BIA's administrative record does not contain a written decision affirming or reversing the June 10, 2008 cancellation. Nevertheless, the BIA did issue an "order" resolving the appeal and deciding that the Lease remained in full force and effect. This conclusion is clear from the context of the order, the parties' conduct following the order, and the testimony of the relevant BIA officials regarding their beliefs about the Lease's continuing validity. The Court should,

therefore, grant Eagle Bear's motion for summary judgment and decide that the Lease remains in full force and effect.

Dated this 23rd day of November, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(d)(2)(E), I certify that this brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Office Word, is 6,447 words long, excluding the Caption, the Certificates of Service and Compliance, Tables of Contents and Authorities, and Exhibit Index.

Dated this 23rd day of November, 2022.

CROWLEY FLECK PLLP

By /s/ Neil G. Westesen
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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of November, 2022, a true and correct copy of the foregoing was delivered by the following means to the following:

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