LYNSEY ROSS
Assistant U.S. Attorney
U.S. Attorney's Office
2601 Second Ave. North, Suite 3200
Billings, MT 59101
Phone: (406) 247-4632
Email: lynsey.ross@usdoj.gov

JOHN M. NEWMAN
Assistant U.S. Attorney
U.S. Attorney's Office
P.O. Box 8329
Missoula, MT 59807
101 E. Front Street, Suite 401
Missoula, MT 59802
Phone: (406) 829-3336
FAX: (406) 542-1476
Email: john.newman@usdoj.gov

ATTORNEYS FOR DARRYL LaCOUNTE,
DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS

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

EAGLE BEAR, INC., Plaintiff, vs. BLACKFEET INDIAN NATION, and DARRYL LaCOUNTE, DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS, Defendants.	CV 22–93–GF–BMM REPLY BRIEF IN SUPPORT OF DEFENDANT BUREAU OF INDIAN AFFAIRS' MOTION TO DISMISS INTERVENOR COMPLAINT
INDEPENDENCE BANK, Intervenor-Plaintiff, vs. EAGLE BEAR, INC., BLACKFEET INDIAN NATION, and DARRYL LaCOUNTE, DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS, Intervenor-Defendants.	

The United States submits this reply brief in support of its motion to dismiss the Intervenor Complaint filed by Independence Bank.

Independence Bank, as the intervening plaintiff, has the burden of demonstrating "an unequivocal waiver" of the United States' sovereign immunity. *United States v. Park Place Assocs., Ltd.*, 563 F.3d 907, 924 (9th Cir. 2009) (citation omitted).

Independence Bank asks the Court to find jurisdiction over the United States when there is no privity between Independence Bank and the United States. To find a waiver of sovereign immunity, Independence Bank's claims would require that the Court find both that the United States was a party to the Lease *and* that Independence Bank is an intended third-party beneficiary. "We may not treat sovereign immunity so cavalierly" and Independence Bank must meet the high burdens of both overcoming the presumption of no waiver of immunity and a clear intent that it is an intended third-party beneficiary. *Id.* at 927.

I. Assuming the Bank can bring any claim at all to enforce the Lease, the Court does not have jurisdiction over any claims against the United States because the United States is not a party to the Lease.

"Of course, the Government cannot be haled into court on a contract claim where privity of contract is absent." *See Erickson Air Crane Co. v. United States*, 731 F.2d 810, 813 (Fed. Cir. 1984) ("The government consents to be sued only by those with whom it has privity of contract...."); *Hardie v. United States*, 19 F. App'x

899, 903 (Fed. Cir. 2001) (unpublished). There is no dispute that the United States is not a party to the Lease. Independence Bank acknowledged as much in its motion for summary judgment against the Blackfeet Nation. (Doc. 44 at 1-2.) "Therefore, to establish jurisdiction over its breach of contract claim in this case, [the Bank] must adequately plead contractual privity with the United States." *Id.* (citing *Total Med. Mgmt., Inc. v. United States*, 104 F.3d 1314, 1319 (Fed. Cir. 1997)).

Moreover, Independence Bank's arguments regarding the exclusive jurisdiction of the Court of Federal Claims are unpersuasive. (Resp. at 8-9.) On one hand, Independence Bank argues that the Tucker Act does not apply because the United States is not a party to the Lease, but on the other objects to dismissal of its breach of contract claim. The former begets the latter. Because the United States is not a party to the Lease, there can be no breach of contract claim (even if Independence Bank could be considered an intended third-party beneficiary, which it cannot). If the Court finds the United States is a party to the Lease, any breach of contact claim falls in the exclusive jurisdiction of the Court of Federal Claims.

The Ninth Circuit explained Tucker Act jurisdiction of the Court of Federal Claims: "In other words, because there was a contract to which the United States was a party, Congress had waived its sovereign immunity in the Tucker Act for suits on the contract brought in the Court of Federal Claims." *Park Place*, 563 F.3d at 926 (emphasis added). "The terms of its consent to be sued in any court define that

court's jurisdiction to entertain the suit." *United States v. Mitchell*, 445 U.S. 535, 538 (1980). If it had a valid claim, Independence Bank could only bring its claim in the Court of Federal Claims. 28 U.S.C. §§ 1346(a)(2), 1491(a).

Going further, the Intervenor Complaint insufficiently alleges any subject matter jurisdiction for recovery against the United States, even in the Court of Federal Claims. The Tucker Act provides a waiver of sovereign immunity for covered contractual claims, but does not provide a basis for Independence Bank to recover for its breach of contract claim. Tucker does not "create any substantive right enforceable against the United States" and Independence Bank must have some source of law allowing recovery. *United States v. Mitchell*, 463 U.S. 206, 216 (1983) (citation omitted). The Intervenor Complaint provides none. "There can be no claim against the government for money damages unless there is a statute that expressly grants a damages remedy." *See United States v. Testan*, 424 U.S. 392, 400-01 (1976).

The fact that the Tucker Act does not preclude Independence Bank's claims over Eagle Bear and/or the Blackfeet Nation is immaterial. Without jurisdiction over the United States, the Court must dismiss Independence Bank's Claims against the United States. "In a long and venerable line of cases, this Court has held that, without proper jurisdiction, a court cannot proceed at all, but can only note the jurisdictional defect and dismiss the suit." *Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 84 (1998) (citing cases). "For a court to pronounce upon a law's meaning or

constitutionality when it has no jurisdiction to do so is, by very definition, an ultra vires act." *Id.*[1]

II. Independence Bank's Intervenor Complaint does not plausibly suggest that it is an intended third-party beneficiary of the Lease.

There is no dispute that the United States is not a party to the Lease. However, even if the Court finds that the United States is a party subject to a breach of contract suit, the Bank has not met its burden to prove that it was an intended third-party beneficiary to the Lease.

"Parties that benefit from a government contract are generally assumed to be incidental beneficiaries rather than intended beneficiaries, and so may not enforce the contract absent a clear intent to the contrary." *GECCMC 2005-C1 Plummer St. Off. Ltd. Partn. v. JPMorgan Chase Bank, Nat. Ass'n*, 671 F.3d 1027, 1033 (9th Cir. 2012) (cleaned up). Clear intent is a high hurdle for the Bank to overcome and cannot be satisfied by, among others, "explicit reference to a third party or even a showing that the contract operates to the third parties' benefit and was entered into with them in mind." *Id.* (cleaned up).

---

1 Independence Bank continues to assert jurisdiction pursuant to 11 U.S.C. § 106. This section of the bankruptcy code only provides a waiver of sovereign immunity in limited circumstances in the context of a bankruptcy proceeding. This removed cause of action is not based on the bankruptcy code nor proceeding in bankruptcy court, therefore 11 U.S.C. §106 does not apply. Independence Bank's arguments do not differ from those of Eagle Bear in its motion for summary judgment. Rather than duplicate its response here, the United States incorporates its response to Eagle Bear. *See* Doc. 69 at 4-6.

The Ninth Circuit has repeatedly found no intended third-party beneficiary in government contracts much more favorable to the claimant than here:

> *Orff [v. United States*, 358 F.3d 1137 (9th Cir. 2004)] provides an even starker example of the heightened standard required of third-party beneficiaries to government contracts. In *Orff*, we declined to extend enforceable rights to a group of California farmers, who were not parties to the contract but were nevertheless end users of water brought to their land under a federal allocation project. 358 F.3d at 1141, 1145. We reached this decision despite the fact that the farmers were explicitly referred to in and benefitted by the contract and were clearly "in [the] mind" of the contracting parties. *Id.* at 1145–47. Similarly, in *Smith [v. Cent. Ariz. Water Conserv. Dist.*, 418 F.3d 1028 (9th Cir. 2005)], despite at least six provisions in the underlying master and subcontracts that purportedly extended enforceable rights to end users, we declined to find that Arizona landowners were intended third-party beneficiaries to contracts involving a water reclamation project. 418 F.3d at 1036–37. Again, our decision turned on the landowners' failure to show a "clear intent" to benefit them and the difficulty of reconciling third-party beneficiary status with the express objectives of the contracts. *Id.* at 1037; *cf. Cnty. of Santa Clara [v. Astra USA, Inc.]*, 588 F.3d [1237,] 1245–46 (conferring intended third-party beneficiary status where a "specific responsibility" was undertaken by the contracting parties to benefit the third parties in an "unambiguous," "concrete" way).

GECCMC, 671 F.3d at 1034.

The Court must give preference to reasonable interpretations of the contract and give its terms their ordinary meaning. *Klamath Water Users Prot. Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999). The only reasonable interpretation here is that the Bank is a secured lienholder in Eagle Bear's leasehold, with the rights of a secured party as to the collateral. To allow all secured parties to act as intended third-party beneficiaries ignores that there is an entire body of law dedicated to the

rights and obligations of secured parties and instead yields the absurd result of providing *any* lienholder with substantial rights to *any* contract terms—far beyond the specific rights created by virtue of their secured lien.

The Bank's argument relies solely on the Lease provision recognizing encumbrancers, notice to said encumbrancers, and an encumbrancer's right to cure the lessee's default. (Resp. at 6-7.). The very limited "rights" granted to an encumbrancer are confined to the opportunity to exercise its security interest against its collateral. "In the event of a default by the Lessee under the terms of an approved encumbrance, the encumbrancer may exercise any rights provided in the agreement or by law for discharging said encumbrance . . . ." (Doc. 40-1 at 17 (emphasis added).) This language does nothing more than memorialize the common understanding of secured liens: when the obligor defaults *to the secured lienholder*, that lienholder may exercise its rights to enforce its lien *against the collateral*. This is not at issue in this case.

Further supporting the United States' position, the Lease requires any encumbrancer who satisfies a monetary default to "be bound to comply with all of the obligations and conditions of the lease" but provides no concomitant rights or benefits. (Doc. 40-1 at 20.) The Bank has not shown that "the circumstances indicate that the promise intends to give the beneficiary the benefit of the promised performance." *Klamath Water*, 204 F.3d at 1211 (citing Restatement (Second) of

Contracts § 302 (1979)). Nothing in the Lease states or even implies that the Bank could have any of the benefits afforded to Eagle Bear as the lessee. The Bank—or any other lienholder—could not reasonably believe that it would have the benefit of occupying the land, building improvements, or earning income from using the property.

This "plain language" of the Lease (especially in light of the limited consideration of encumbrances) only "establishes enforceable rights between the contracting parties" which, in this case, are Eagle Bear and the Blackfeet Nation—and neither the Bank nor the United States. *GECCMC*, 671 F.3d at 1035. The mere reference to the idea that Eagle Bear may want to seek to use its leasehold as collateral is not enough to create an expectation of third-party rights to enforce. "That a government contract was written with a particular group in mind is not sufficient to demonstrate the contracting parties' intent to benefit that group." *Smith*, 428 F.3d at 1038.

Even taking the allegations of the Intervenor Complaint as true, the Bank has not met its burden to show (and only in the event the United States is a party) that it can succeed on its claim that it is an intended third-party beneficiary.

CONCLUSION

Independence Bank has failed to properly plead a waiver of sovereign immunity against the United States because neither the United States nor

Independence Bank is a party to the Lease. This Court lacks jurisdiction over any and all claims against the United States in the Intervenor Complaint and the case should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1). Because Independence Bank has not established jurisdiction, the Intervenor Complaint also fails to state a claim that could be granted against the United States and should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

Further, even if the Court could find the United States was a party to the Lease, the Lease does not provide a clear intent that Independence Bank is an intended third-party beneficiary of the Lease as a government contract. Even if the Intervenor Complaint is construed as true, Independence Bank can prove no facts that would entitle it to relief and the case should be dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

DATED: March 6, 2023.

JESSE A. LASLOVICH
United States Attorney

/s/ Lynsey Ross
Assistant U.S. Attorney
Attorney for BIA

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the attached brief is proportionately spaced, has a typeface of 14 points and contains 2,038 words, excluding the caption and certificates of service and compliance.

DATED: March 6, 2023.

JESSE A. LASLOVICH
United States Attorney

/s/ Lynsey Ross
Assistant U.S. Attorney
Attorney for BIA