THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM C. TUTTLE	)	
	)	
Plaintiff,	)	
v.	)	Civil Action No.
	)	1:13-cv-00365-RMC
SALLY JEWELL, et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This Rule 56 Motion for Summary Judgment is filed by Plaintiff Tuttle for the reason that there is no genuine dispute as to any material fact and Plaintiff is entitled to judgment as a matter of law. The following Statement of Facts is predicated on Plaintiff's Declaration based on his personal knowledge and materials contained within the Administrative Record and the Supplemental Administrative Record filed by the federal Defendants.

This Administrative Procedures Act litigation challenges the termination of Tuttle's federal lease that was ostensibly ordered and implemented by the United States Department of the Interior. However, as is discussed in detail below, there are multiple grounds for reversing the termination and restoring Tuttle's leasehold title.

The Lease and Lease Addendum at issue dictate the process for their termination, with the clear mandate that any termination be executed by the Secretary of the Interior and then only under clear guidelines and restrictions that are discussed below. However, the process followed in the termination at issue ignored the requirements of the Lease documents and, consequently, was simply unlawful. Thus, any application of the facts to the written requirements for termination necessitates reversal of the administrative decision to terminate since the process followed sidestepped the Lease requirements and systematically rejected Plaintiff's actions to cure defaults when they were identified. Indeed, the decision-makers simply ignored the periods for cure established by the Lease documents by imposing shorter deadlines and even refusing to accept lease payments timely made by Plaintiff.

Normally, such actions by the Secretary and her Bureau of Indian Affairs would merit the relief sought here in and of themselves. However, it became clear to Plaintiff during review of the Administrative Record that many documents that should have been in the files were not. With that, Plaintiff filed his Motion to Supplement the Administrative Record. Despite

Defendants' aggressive opposition, the Court granted the motion and directed Defendants to revisit the records and produce material that should have been included in the first submission. The documents then produced were astonishing.

The Supplemental AR revealed that the federal defendants did not conduct the termination decision-making and preparation of any termination documents. Rather, every decision and action document was written by the Lessor Colorado River Indian Tribes and forwarded to the federal Defendants who rotely endorsed every action proposed. Specifically, CRIT's former Attorney General and his legal team made every decision and coordinated the drafting of every document relevant to the Lease Termination. The seriousness of this documented activity is underscored by the fact that the preparer of the AR withheld from inclusion any document disclosing these facts. It goes without saying that the Lease documents' requirement that the Secretary conduct any termination process did not include CRIT officials.

Many other elements to this case discussed below further undermine the validity of the termination. However, suffice it to say here that when the Lease's required actions were ignored *in toto* – to the point that they were not even referenced or reconciled with the actions being taken – the application of the words "arbitrary and capricious" should be automatic. However, when the tasks assigned to the Secretary were secretly delegated to CRIT and then concealed from Plaintiff at every stage of the matter, the application of much stronger words would be in order.

The resulting wrong suffered by Plaintiff should be reversed.

STATEMENT OF MATERIAL FACTS

A. Plaintiff's Fee Title to Property Demanded by Federal Officials in Exchange for 50 Year Lease.

1. On January 27, 1949, Plaintiff purchased the property ("the Property") and received a deed conveying fee simple title to Plaintiff and Plaintiff's brother Robert E. Tuttle, which deed was recorded March 9, 1949, in Book 1057, Page 425 of the County of Riverside, State of California. The Property consists of 98.24 acres on the Colorado River riverfront. *See* attached Exhibit 1, *Tuttle Chain of Title Documents*. Robert Tuttle subsequently died and Plaintiff inherited his ownership interest in the Property. Tuttle Decl. ¶ 1.

2. In early 2007, Plaintiff retained Real Estate Title Specialist Steven Andrews with offices in Arcadia, California to examine his title to the Property, and on March 30, 2007, Title Specialist Andrews completed a Chain of Title determination and transmitted the same to the Riverside County Assessor's Office, stating that unbroken fee title to the Property traced back to 1888 and that the Property had never been in trust or reservation status. Tuttle Decl. ¶ 2.

3. In the Report described at Paragraph 2, Title Specialist Andrews reported to Plaintiff and demonstrated through official government documents that Plaintiff's fee title to the land traced directly to a federal transfer of title to the land from federal public domain status to the State of California for public school use by School Land Clearance No. 3024, dated January 30, 1888. Tuttle Decl. ¶ 3.

4. On April 8, 1977, the United States District Court for the Central District of California entered a Stipulated Judgment that the United States was the owner of certain lands – including Plaintiff's land – and that the land was held "in trust" for CRIT by the United States. The Stipulated Judgment was rendered in a quiet title action styled *United States v. Brigham*

Young University, William C. Tuttle, and Robert E. Tuttle, No. CV 72-3058-DWW. Tuttle Decl. ¶ 4.

5. In declaring Plaintiff's land to be Indian trust land through a quiet title lawsuit rather than a land condemnation lawsuit, the Stipulated Judgment did not award Plaintiff any money damages as compensation for the value of his fee title being taken by the federal government through the Stipulated Judgment and implementing orders. Tuttle Decl. ¶ 5.

6. Notwithstanding the fact that his fee simple title to the Property traced directly from the January 30, 1888, title transfer by School Land Clearance No. 3024 described at ¶ 3 above, Plaintiff was forced in 1977 to (a) agree to the Stipulated Judgment and (b) surrender his land title under (c) both legal and financial pressure from the United States government. He was advised by his attorney that he had no option other than to agree to the Stipulated Judgment. Tuttle Decl. ¶ 6.

7. As the sole consideration for his executing the Stipulated Judgment described at ¶ 4, Plaintiff entered into Lease No. B-509-CR ("Lease"), which was a fixed-term 50-year lease with CRIT pursuant to which Plaintiff agreed to make the first rental payment to the BIA and subsequent payments to CRIT on the following fixed-rate basis: (a) years 1-5: $491.20 annually; (b) years 6-20: $982.40 annually; and (c) years 21-50: $1,473.60 annually. The Lease provided for rental adjustments under certain conditions, none of which have ever arisen. Tuttle Decl. ¶ 7.

8. The Lease provisions constituted the sole consideration Plaintiff received in exchange for his surrendering fee simple title to the Property in settlement of the federal quiet title litigation discussed at ¶ 4. Tuttle Decl. ¶ 8.

9. The Lease's 50-year term was fixed by the document itself – see AR 0000078 – and contained only one provision for any termination – with or without cause – prior to the

expiration of the 50 year leasehold term, which was dependent upon the Secretary satisfying the prerequisite imposed by ARTICLE 17(B) of the Lease Addendum at AR 0000100.

10. The Secretary has never satisfied the ARTICLE 17(B) prerequisite for Lease termination described at Paragraph 9.

11. Lease Section V is entitled "PAYMENTS OF RENTS" and provides only that the Lessee's failure to make payments in strict accord with Section V "shall not be construed to relieve the Lessee from his obligation to make timely rental payments." AR 0000082.

12. Lease Section VI is entitled "PUBLIC LIABILITY INSURANCE" and it provides no penalty for the Lessee's delay or even failure in delivering the described evidence of insurance to the Secretary. *Ibid.*

13. The Lease and its Addendum were approved on behalf of the Secretary ostensibly in accordance with federal law and regulation on March 31, 1977. AR 0000077.

14. In 1986, Plaintiff entered into a Lease Modification. The Lease Modification specifically provided that it did not "change any of the terms, conditions or stipulations of Lease No. B-509-CR except as specifically set forth herein." Tuttle Decl. ¶ 9.

15. The Lease Modification contained no new provision for any termination – with or without cause – prior to the expiration of the 50 year leasehold term.

16. In addition to the Lease payments described at Paragraph 7, the Lease Modification amended Lease Section IV – RENTALS to impose rent payments of three (3) percent of the gross receipts of all business conducted on the leased property, without amending or modifying the Lease provision concerning lessee's failure to make payment described at ¶ 11. This additional rent payment was imposed despite the absence of the changed conditions permitting lease adjustments described at ¶ 7. AR 0000075.

17. The Lease Modification added a new Lease Section IX entitled "ANNUAL ACCOUNTING," without amending or modifying the Lease provision concerning lessee's failure to make payment described at ¶ 11. *Ibid.*

18. The Lease Modification was approved on behalf of the Secretary on June 10, 1986, ostensibly in accordance with federal law and regulation. AR 0000074.

19. The Lease Modification was agreed to by Plaintiff as the result of legal and financial pressure from Department of Interior officials and CRIT. Tuttle Decl. ¶ 10.

20. CRIT is a recognized Indian tribe located in Arizona and its enrolled membership consists primarily of residents of Arizona, and not California.

21. Through a timely appeal to the IBIA, Plaintiff challenged the validity of the 1986 Lease Modification, which resulted in an IBIA decision of 2008 that (a) the Lease Modification was valid, but that (b) Plaintiff had been overcharged for, and had paid, certain interest charges. Tuttle Decl. ¶ 11.

22. As part of the 2008 IBIA ruling described at ¶ 21, the Acting Regional Director calculated the overcharges to be $10,504.79. Tuttle Decl. ¶ 12.

23. On September 30, 2009, BIA and CRIT jointly issued a Default Notice to Plaintiff declaring a failure to pay rent of $4,420.80. Following negotiations, BIA and CRIT agreed to credit the overpayment of interest against the rent and waive the alleged default based on unpaid rent. BIA and CRIT refused to waive three other alleged technical violations of the Lease. Tuttle Decl. ¶ 13.

24. The Default Notice described at ¶ 23 alleged that Plaintiff had failed to pay the annual percentage rent based on gross receipts since 1991 in violation of the Lease Modification. Tuttle Decl. ¶ 14.

25. The Default Notice described at Paragraph 23 further alleged that Plaintiff had failed to submit statements of receipts to BIA and CRIT so that they could calculate the percentage rent. Tuttle Decl. ¶ 15.

26. The Default Notice described at Paragraph 23 further alleged that Plaintiff had failed to provide acceptable evidence of insurance for the property. Tuttle Decl. ¶ 16.

27. The Default Notice allowed Plaintiff only 10 days to cure or dispute the alleged violations or to request additional time to cure, in derogation of the 30-day period for cure guaranteed by Addendum ARTICLE 17. Tuttle Decl. ¶ 17.

28. On October 14, 2009 − only 15 days after promulgation of the Default Notice − Plaintiff transmitted a letter to CRIT responding to the Default Notice by reporting estimated annual receipts of $11,000 and an estimated percentage rent amount of $5,600, and requested that the base rent and percentage rent be deducted from the overcharges calculated by the Acting Regional Director described at ¶ 22. Tuttle Decl. ¶ 18.

29. In his letter described at ¶ 28, Plaintiff requested that the requirement of a formal statement from a CPA be waived due to the personal expense that such a statement would require. Tuttle Decl. ¶ 19.

30. In his letter described at ¶ 28, Plaintiff furnished new proof of insurance. Tuttle Decl. ¶ 20.

31. On March 2, 2010, the Superintendent of the BIA's Colorado River Agency issued a Notice of Cancellation, stating that the Superintendent had determined that Plaintiff's efforts were insufficient to cure the alleged violations for the following reasons: (a) his estimate of receipts did not meet the reporting requirements of the Lease Modification, (b) the amount of unpaid percentage rent could not be calculated and, thus, could not be deducted from the

remaining interest overpayment on account with the BIA, and (c) the insurance policy submitted was insufficient. Tuttle Decl. ¶ 21.

32. The Notice of Cancellation described at ¶ 31 did not cite Lease Addendum ARTICLE 17 and neither satisfied, nor explained how it did satisfy, the requirements of Lease Addendum ARTICLE 17(A) or 17(B). Tuttle Decl. ¶ 22.

33. By letter dated March 11, 2010, Plaintiff timely notified the BIA of his intent to cure all violations and requested 45 days to do so as provided at Addendum ARTICLE 17. Tuttle Decl. ¶ 23.

34. On April 1, 2010, Plaintiff appealed the Superintendent's Lease termination to the Acting Regional Director. Tuttle Decl. ¶ 24.

35. On May 6, 2010, Plaintiff submitted a Statement of Reasons to the Acting Regional Director that included the following elements: (a) Plaintiff would furnish proof of insurance in a form and substance acceptable to the Acting Regional Director; (b) advising that Plaintiff's accountant was then preparing and would soon produce an accounting statement of gross receipts; (c) Plaintiff's ability to adequately respond to the Default Notice had been substantially impaired by serious medical emergencies he had experienced; and (d) Plaintiff was delivering a rental payment check to BIA in the amount of $4,800. Tuttle Decl. ¶ 25.

36. By letter dated May 17, 2010, the Acting Regional Director acknowledged receipt of the check described at ¶ 35, and informed Plaintiff that she had deposited it into a BIA "Special Deposit Account." However, the Acting Regional Director then informed Plaintiff that she considered his Statement of Reasons insufficient to explain why Lease termination would be erroneous. Tuttle Decl. ¶ 26.

37. On May 25, 2010, Plaintiff submitted another Statement of Reasons to the Acting Regional Director reiterating the reasons for delay in curing the violations, including further explanation of Plaintiff's health emergencies and serious health issues, and characterizing the allegedly uncured violations as both *de minimus* and not a legitimate basis for Lease termination. Tuttle Decl. ¶ 27.

38. The Statement of Reasons described at ¶ 37 enclosed (a) a Compilation Report from Plaintiff's Certified Public Accountant for the years 1992-2009 estimating the percentage rent owed at $16,970.36 and (b) a check for $5,408.10. Tuttle Decl. ¶ 28.

39. When coupled with the remaining credit for overpayment on account with the BIA, Plaintiff's unpaid rent was paid in full with delivery of the check described at ¶ 35.

40. On July 19, 2010, the Acting Regional Director affirmed the Agency Superintendent's decision to terminate the Lease. Tuttle Decl. ¶ 30.

41. In the Termination decision described at ¶ 40, the Acting Regional Director did not cite Lease Addendum ARTICLE 17, nor did she explain how her decision satisfied the requirements to terminate imposed by Lease Addendum ARTICLE 17, as well as 17(A) and/or 17(B). Tuttle Decl. ¶ 31.

42. On August 19, 2010, Plaintiff filed a Notice of Appeal in this matter with the IBIA seeking review of the Lease termination. Subsequent briefing followed in that matter in accordance with a schedule ordered by the IBIA. Tuttle Decl. ¶ 32.

43. On December 18, 2012, the IBIA rendered its Order affirming the Acting Western Regional Director's termination of the Lease on the grounds that Plaintiff "was not in compliance with the Lease," "failed to timely cure or excuse [Plaintiff's] noncompliance," and failed to "establish that BIA's decision to cancel the lease was unreasonable." Tuttle Decl. ¶ 33.

44. In the IBIA Order, the Board cited no provision of the Lease or Lease Modification providing for termination, did not reconcile its decision with Addendum ARTICLE 17, and did not explain how the Decision satisfied the requirements of Lease Addendum ARTICLE 17(A) or 17(B). Tuttle Decl. ¶ 34.

45. At no time has the Secretary cited Lease Addendum ARTICLE 17(A) establishing the Secretary's discretion to pursue legal and equitable remedies for resolving alleged Lease violations as follows: "the Secretary may … Proceed by suit or otherwise to enforce collection or to enforce any other provision of this lease." Tuttle Decl. ¶ 35.

46. At no time did the Secretary even purport to comply with the express termination provisions of Lease Addendum ARTICLE 17(A) to "Proceed by suit or otherwise to enforce collection or to enforce any other provision of this lease." Tuttle Decl. ¶ 36.

47. At no time did the Secretary comply with the express termination provisions of Lease Addendum ARTICLE 17(B) requiring the Secretary to first "Re-enter the premises and remove all persons and property therefrom, except for authorized sublessees and the personal property thereof" before terminating the lease. Tuttle Decl. ¶ 37.

48. Lease Addendum ARTICLE 17 precludes termination if the default or breach can be cured by payment or expenditure of money and cure is received within 45 days of written notice. Tuttle Decl. ¶ 38.

49. At no time did the Secretary comply with the express termination provision of Lease Addendum ARTICLE 17 requiring the Secretary to give notice to all approved sublessee encumbrancers at least 45 days prior to termination of the lease and allowing 45 days for cure of any default or breach. Tuttle Decl. ¶ 39.

50. In purporting to terminate the Lease, the Secretary, the Acting Regional Director and the Agency Superintendent all failed to comply with the requirements of either Addendum ARTICLE 17(A) or 17(B), a fatal flaw in the process they followed in a rush to terminate the Lease rather than respect the fact that the Lease is the only consideration Plaintiff received in return for forfeiture of his fee simple land title.

51. The Secretary and Assistant Secretary are the government officials responsible for enforcing IBIA Orders, and the relief sought herein properly can be ordered as to them and the Department.

B. Additional Facts Revealed By The Supplemental Administrative Record.

52. The Supplement Administrative Record ("Supplemental AR") reveals a series of e-mail communications between the CRIT Legal Team, consisting of former CRIT Attorney General Eric Shepard[1], CRIT Law Clerk Douglas Bonamici, and CRIT Attorney Rebecca Loudbear, and the BIA team consisting of Regional Realty Officer Stan Webb, Realty Specialist Gloria Koehne, and Colorado River Agency Superintendent Janice Staudte between March 2, 2009 and January 19, 2010.

53. The e-mails in the Supplemental AR indicate that BIA officials asked the CRIT Legal Team to prepare, and the CRIT legal team did prepare, the September 30, 2009 Notice of Default, and the March 2, 2010 Tuttle Lease Cancellation. The e-mails also indicate that BIA officials asked the CRIT legal team to prepare the Administrative Record to be used in the IBIA appeal of the Lease Cancellation.

[1] Mr. Shepard now serves as Acting General Counsel for the National Indian Gaming Commission in Washington, D.C.

C. Preparation Of Notice Of Default By CRIT.

54. On September 21, 2009, CRIT Law Clerk Bonamici drafted a Notice of Default letter for the Tuttle lease and e-mailed the document to BIA Regional Realty Officer Webb for his review. AR SUPP 263.

55. On September 30, 2009, CRIT and BIA issued a letter to Tuttle entitled "Determination of Regional Director, Interest Refund / Credit, and Notice of Default – Lease No. B-509-CR." The letter was issued on CRIT letterhead and jointly signed by CRIT Chairman Eldred Enas and Janice Staudte, BIA Colorado River Agency Superintendent. AR 14. The September 30 letter was substantially identical to CRIT's September 21 draft.

D. Preparation Of Notice Of Cancellation By CRIT.

56. On February 2, 2010, CRIT Law Clerk Bonamici e-mailed BIA Realty Officer Webb for his review a draft of the Tuttle lease cancellation letter prepared by CRIT. AR SUPP 220. Between February 2 and February 25, the CRIT legal team and the BIA realty office exchanged emails and comments on CRIT's lease cancellation letter. AR. Supp. 221-236. On February 25, CRIT Attorney General Eric Shepard e-mailed what appears to be the final draft of the Notice of Cancellation to the BIA team. AR SUPP 273. That draft is at AR Supp. 370.

57. On March 2, 2010, Janice Staudte, BIA Colorado River Agency Superintendent, issued a letter to Tuttle entitled "Notice of Cancellation – Lease No. B-509-CR" on BIA Colorado River Agency letterhead with copies to CRIT Chairman Eldred Enas, CRIT Attorney General Shepard, CRIT Commercial Realty Manager Herman Laffoon, BIA Realty Officer Webb and Attorney Tim Moore. AR 007. The final Notice of Cancellation was virtually identical to the draft prepared by CRIT five days before on February 25.

E. Preparation Of Administrative Record By CRIT.

58. On April 23, 2010, 8:02 AM, BIA Realty Specialist Gloria Koehne e-mailed CRIT Law Clerk Bonamici, copying CRIT General Counsel Shepard, declaring that BIA expected CRIT to prepare the Administrative Record for the Tuttle litigation: "We'll be requesting an administrative record from you." AR SUPP 23.

59. CRIT General Counsel Shepard immediately responded to Koehne that preparation of the Administrative Record by the Tribe would be inappropriate and explained that "the record must be developed by the Bureau itself as it is the record of the Bureau's own administrative decision" but nonetheless offering to assist the BIA in "reviewing that record and ensuring it is complete." AR SUPP 23.

60. Shortly thereafter, Koehne replied to Shepard explaining that her expectation that CRIT would prepare the Administrative Record was based on CRIT's earlier preparation of the Lease Cancellation letter. AR SUPP 25.

61. Shepard responded to Koehne at 9:24 AM with the following email:

> Yes, the Tribe assisted the Bureau in preparing the cancellation letter. However, the Tribe did this only after it became apparent, to the Tribe, that this was the ONLY way the Bureau was going to uphold its obligations to the Tribe and take action in the Tuttle matter.
>
> In February 2008, the IBIA issued its decision in the Tuttle appeal.[2] That decision upheld a number of the actions taken by the Bureau but remanded to the Regional Director a recalculation of the interest owed on past due rent. The Bureau failed to do the recalculation or take any action directed by IBIA. In early 2009, after waiting a year for Bureau to take action, the Tribe inquired as to the status. When it became apparent to the Tribe that the Bureau had no immediate plan to take the required action, the Tribe offered to draft the necessary letters. That is why and how the Tribe got involved in preparing the Determination of Regional Director dated September 23, 2009, Notice of Violation dated September 30, 2009 and Notice of Cancellation dated March 2, 2010.

[2] This refers to the IBIA ruling in the previous Tuttle challenge that was rendered in February 2008. *See* ¶¶ 21-22 *supra.*

> While the Tribes participated in the drafting of these documents, this is a Bureau process. We remain ready to assist but we object to the Bureau's continued efforts to shift its responsibilities onto the Tribe.

AR SUPP 25. (Emphasis added).

62. At 9:28 AM, Shepard e-mailed Koehne, Webb and Staudte requesting a telephone meeting to "get on the same page" regarding preparation of the Tuttle Administrative Record and reiterating that "CRIT is happy to assist the Bureau in preparing the Record, but we are not willing, nor do we think it is appropriate for us, to take ownership of it." AR SUPP 28 (emphasis added).

63. The Supplemental AR reflects a series of emails regarding scheduling of a meeting between CRIT and BIA officials to coordinate final preparation of the Tuttle Administrative Record. AR SUPP 29-37. On September 8, 2010, Koehne e-mailed Webb and Hill − with a copy to Attorney General Shepard − informing them that the Western Regional Office had "prepared" an AR to be sent to the IBIA. AR SUPP 171.

F. Lack Of Factual Or Legal Analysis By BIA Officials.

64. Neither the Administrative Record nor the Supplemental AR contain any record of any deliberative process on behalf of the BIA reflecting any − let alone substantive − consideration of the lease termination provisions or the historical facts surrounding the lease cancellation, including Tuttle's efforts to contact the Tribe and BIA and pay the lease.

65. The Supplemental AR demonstrates that the BIA team wholly abdicated its responsibility to (a) make the decision which was solely to be made by the Secretary, (b) ensure that the Lease Cancellation conformed to United States leasing laws and implementing regulations and (c) protect the rights of Plaintiff and his sublessees. The Supplemental AR documents the BIA's total delegation of the factual analysis, legal interpretation, enforcement and even the legal defense of the Lease Cancellation to CRIT.

STANDARD OF REVIEW

"[T]he agency must articulate a 'rational connection between the facts found and the choice made [by the Agency].'" *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc*., 419 U.S. 281, 285, 42 L. Ed. 2d 447, 95 S. Ct. 438 (1974) (citation omitted). Therefore, as the D.C. Circuit has made clear, "where the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, [this Court] must undo its action." *Petroleum Communications, Inc. v. F.C.C*., 306 U.S. App. D.C. 82, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (emphasis supplied). However, this Court has noted that, in considering APA challenges to agency action, "the Court does not have to give deference to interpretations not made by an agency." *Lake Pilots Ass'n v. United States Coast Guard*, 257 F. Supp. 2d 148, 170 (D.D.C. 2003) (emphasis supplied) (internal quotations omitted).

ARGUMENT

I. BECAUSE PLAINTIFF CURED ALL SUBSTANTIAL VIOLATIONS AND REMAINING VIOLATIONS WERE *DE MINIMUS,* LEASE CANCELLATION WAS AN ABUSE OF DISCRETION.

The basis of Defendant's allegations of Lease default and subsequent cancellation was Tuttle's alleged failure to make rental payments, provide an accounting of sublessee rents satisfactory to Defendants, and provide proof of insurance. In fact, Tuttle tendered the entire amount of back rent, which Defendants refused to accept; he provided an accounting provided by a CPA to calculate percentage rent owed, which Defendants refused to accept, and he provided proof of insurance, which Defendants deemed insufficient. Plaintiff Tuttle is almost 92 years old, and life-threatening health problems have at times prevented him from making timely payments and speedy responses to Defendants' demands. Tuttle Decl. ¶ 40. However, the abject refusal of Defendants to accept Tuttle's earnest attempts to cure the alleged default indicate a sustained and collaborative effort between Defendants and CRIT to deprive Tuttle of his property rights in the remaining 13 years of his 50-year Lease.

The joint efforts of Defendants and CRIT to prematurely remove Tuttle from his leased property accelerated after Tuttle challenged the legality of the 1986 Lease Modification he was forced to accept under financial and legal pressure from Defendants. Tuttle Decl. ¶ 10.

The Lease Modification imposed additional obligations including a new requirement that he pay 10 percent of all rent received from sublessees. AR 0000074.

A 2008 ruling from the IBIA denied his challenge to the Lease Modification, but determined that Tuttle was due thousands of dollars in interest overpaid to CRIT. AR 0000036. BIA Regional Director Anspach determined that, in fact, CRIT did owe Tuttle the sum of $10,504.79 for overpayments and interest. AR 00000035. Following negotiations, BIA and CRIT

agreed to credit a portion of the overpayment of interest against the rent and waive the alleged default based on unpaid rent. AR 0000025.

Defendants refused to waive, or accept Tuttle attempts to cure, three other violations of the Lease: an alleged failure to (1) pay annual percentage rent required by the forced Lease Modification during Tuttle's challenge to the legality of that Modification, (2) submit rent receipts to Defendants and (3) provide evidence of insurance for the property. AR 0000026-27.

Tuttle's attempts to cure the remaining violations were met with no accommodation by Defendants, indicating a predetermined strategy to refuse the proffered rent from Tuttle and instead drive him from his leased property. Tuttle provided estimated receipts and requested that any percentage rents owed be deducted from the remaining balance of his previous overpayment. AR 0000155. Tuttle also furnished proof of insurance. AR 0000158. Defendants rejected Tuttle's attempts and issued a Notice of Cancellation stating, *inter alia*, that "the Tribe cannot and will not apply this overpayment to any additional Percentage Rent you may owe." AR 0000022. After the BIA Western Regional Director affirmed the Lease Cancellation, Tuttle timely appealed the Cancellation to the IBIA, which affirmed the illegal action. AR 0000274.

It is clear from the record that Defendants could have obtained the entire back percentage rent from Tuttle had they chosen to accept it. Defendants did not dispute, or offer any evidence, that Plaintiff's calculations of percentage rent due were incorrect. Rather, they asserted that his estimation accounting "fell short" of the Lease's standards. When Tuttle attempted to accommodate Defendants by submitting a Compilation Report submitted by a Certified Public Accountant, AR 0000166, Defendants summarily rejected that report as well.

Any deprivation suffered by CRIT for failure to accept Tuttle's proffered rent was the product of CRIT and Defendants, not Mr. Tuttle.

The Supreme Court has echoed the oft-cited legal maxim that "the law abhors a forfeiture." *Webb v. O'Brien*, 263 U.S. 313 (U.S. 1923). If the Lease Cancellation is not reversed by this Court, Tuttle will suffer a total forfeiture of the value of the remaining lease. "A forfeiture is not favored by the law; and a forfeiture that can be invoked or not, according to the election of only one of the parties to a contract, should meet with especial disfavor." *Western Union Tel. Co. v. Brown*, 253 U.S. 101 (U.S. 1920).

Tuttle purchased this property in fee simple in 1949. Tuttle Decl. ¶ 1. His fee title traced back to 1888, and the Property had never been in trust or reservation status. Tuttle Decl. ¶ 2. When the United States filed its quiet title suit to extinguish that title, the Lease was the sole consideration Tuttle received for entering a Stipulated Judgment forfeiting his lawful fee simple title to the Property. Tuttle Decl. ¶ 6.

With this history, Lease cancellation would be the last stage in a series of government actions designed to rob Tuttle of his rights to his own property. The cancellation justified by the above *de minimus* lease violations resulting from Tuttle's health problems and amplified by the uncompromising refusal by CRIT and the Defendants' rote acceptance of CRIT's decisions and written implementation thereof rejecting Tuttle's attempts to cure is a devastating forfeiture and an abuse of discretion.

II. DEFENDANTS' FAILURE TO FOLLOW REQUIRED LEASE TERMINATION PROVISIONS WAS ARBITRARY AND CAPRICIOUS, MANDATING JUDGMENT FOR PLAINTIFF.

Defendants at no time have purported to act in accordance with the express termination provisions of Lease No. B-509-CR. That lease, executed March 31, 1977 between (1) Plaintiff William C. Tuttle and his now-deceased brother Robert E. Tuttle and (2) CRIT and approved by the United States incorporates a form Lease Addendum containing specific and express terms which provide for an orderly and fair termination upon alleged default by Lessees.

A. The Lease Designates the Secretary, and Not CRIT, as the Sole Decision Maker For Default Remedies.

CRIT had no right to initiate Lease cancellation as is clearly stated in the express terms of the Lease, which pointedly designates the Secretary as the sole decision-maker and enforcer of any cancellation activity. AR 0000100.

Lease Addendum ARTICLE 17 provides, in pertinent part, as follows:

> **17. DEFAULT**
>
> Should Lessee default in any payment of monies as required by the terms of this lease … then the Secretary may either:
>
> > A. Proceed by suit or otherwise to enforce collection or to enforce any other provision of this lease; or
> >
> > B. Re-enter the premises and remove all persons and property therefrom, except for authorized sublessees and the personal property thereof, and either:
> >
> > > (1) Re-let the premises without terminating this lease…[or]
> > >
> > > (2) Terminate this lease at any time even though Lessor and the Secretary have exercised rights as outlined in (1) above.

AR 0000100 (Emphasis Added). The lease default provisions at Lease Addendum ARTICLE 17 are the sole provisions providing for lease termination in the lease, and they were not modified by the 1986 Lease Modification. AR 0000074.

ARTICLE 17 provides the Secretary only two specific remedies in case of default, and the choice of which remedy to pursue is at the discretion of the Secretary as indicated by the inclusion of the term "may."

Lease Addendum ARTICLE 17(A) allows the Secretary – not CRIT – to "[p]roceed by suit or otherwise" to enforce lease provision. The prescribed process in the case of default allows enforcement but not termination of the Lease, and even provides the Secretary a remedy to avoid termination by pursuing collection of back rent or enforcement of other provisions in a

court of law. It does not authorize the substitution of its terms for the BIA termination procedures promulgated at 25 CFR Part 162 which CRIT purported to follow in promoting Lease termination.

Lease Addendum ARTICLE 17(B) allows the Secretary – not CRIT – to "[r]e-enter the premises and remove all persons and property therefrom, except for authorized sublessees and the personal property thereof."

Thus, the Lease Addendum provisions unambiguously place the entire responsibility for handling an alleged default and proceeding to termination in the hands of the Secretary – not CRIT. Indeed, they authorize no role for CRIT.

Despite the Lease Addendum's unambiguous specification of the Secretary as the party with responsibility to pursue and prosecute any lease termination, the Secretary – acting by and through the BIA – abdicated this responsibility and allowed CRIT to proceed as the sole author of the decisions and formal documents proposing to remove Tuttle from his home through a Lease cancellation by proxy. CRIT's role was then concealed until this Court ordered Defendants to provide the documents in the Supplemental Administrative Record. See *supra*, ¶¶ 52-57.

This Court has noted that, while an agency's interpretation of its own rules are entitled to deference, that deference does not apply to interpretations made by third parties. *Lake Pilots Ass'n v. United States Coast Guard*, 257 F. Supp. 2d 148, 170 (D.D.C. 2003). Equally, this Court owes no deference to the outcome of Lease termination procedures conducted (1) in violation of the Lease itself and (2) executed by an unauthorized decision-maker: CRIT. In fact, as explained below, CRIT's execution of the Lease termination did not only violate the Lease itself – it violated BIA regulations as well.

In improperly delegating all of the Lease cancellation actions, the agency failed to meet the low burden required of it to survive review by this Court – that the agency must, at the minimum, articulate a rational basis for its decision. "[T]he agency must articulate a 'rational connection between the facts found and the choice made [by the Agency].'" *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc*., 419 U.S. 281, 285, 42 L. Ed. 2d 447, 95 S. Ct. 438 (1974) (internal citation omitted). Because the Defendants were separated from the actions improperly delegated to CRIT, they could not possibly have known the basis for decisions made by former CRIT attorney General Shepard and his legal team. Under these circumstances, this Court must reverse the termination. *Petroleum Communications, Inc. v. F.C.C*., 306 U.S. App. D.C. 82, 22 F.3d 1164, 1172 (D.C. Cir. 1994).

B. BIA Regulations Prohibit the Performance of Lease Cancellations by Tribes in the Absence of Lease Provisions Allowing Tribal Involvement.

BIA regulations allow certain agency responsibilities to be transferred for administration by Indian tribes pursuant to the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450f, *et seq.* However, even when there is a self-determination contract executed between the Agency and the Tribe related to residential leases – and neither the Tribe nor the Defendants have even suggested that such a contract exists in this case – BIA regulations specifically prohibit residential lease cancellations from being performed by Indian tribes:

> **§ 162.018 May tribes administer this part on BIA's behalf?**
>
> A tribe or tribal organization may contract or compact under the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450f, *et seq.*) to administer any portion of this part that is not an approval or disapproval of a lease document, waiver of a requirement for lease approval (including but not limited to waivers of fair market rental and valuation, bonding, and insurance), cancellation of a lease, or an appeal.

25 C.F.R. § 162.018 (emphasis added). Even if a "self-determination" contract provides for Tribal administration of residential leases, it cannot devolve performance of lease cancellations onto the tribe.

If a residential lease expressly provides for negotiated remedies between the lessee and a tribe, the tribe may address lease violations independently of BIA:

> § 162.365 May a residential lease provide for negotiated remedies if there is a violation?
> . . . .
> (e) A residential lease may provide that lease violations will be addressed by the tribe, and that lease disputes will be resolved by a tribal court, any other court of competent jurisdiction, or by a tribal governing body in the absence of a tribal court, or through an alternative dispute resolution method. We may not be bound by decisions made in such forums, but we will defer to ongoing actions or proceedings, as appropriate, in deciding whether to exercise any of the remedies available to us.

Lease No. B-509-CR contains no such provision. So, while BIA regulations do provide for tribal involvement in certain residential lease cancellations, such involvement must be agreed to between the lessee and the tribe and expressly provided for in the lease itself. Even then, the Secretary is not bound to follow the outcome of any tribal cancellation process, reinforcing the spirit of the regulations: that these regulations are meant to be enforced by BIA except in very limited circumstances.

Because Tuttle never agreed to a tribal lease cancellation, no reference to such a process appears in the Lease, and BIA's own regulations prohibit a tribal lease cancellation in the absence of (1) a contractual specification of a tribal cancellation procedure or (2) a "self-determination" contract delegating such responsibilities to CRIT, the purported lease termination lacks any force or effect.

C. BIA Regulations Cannot Supersede the Sole Default Remedies Provided in the Lease Addendum.

Rather than proceed in accordance with the express default procedures in the Lease Addendum and (a) sue for enforcement of lease provisions or (b) enter the property, Defendants and CRIT jointly issued a Notice of Default without disclosing CRIT's primary role in formulating and drafting the termination documents, AR 0000025, and Defendants issued the Notice of Cancellation, also written by CRIT. AR 0000020. Both the Notice of Default and the Notice of Cancellation cited − and purported to be issued in accordance with − various regulations within 25 CFR Part 162. To reemphasize the duplicitous manner in which Tuttle's Lease was terminated, it was only through Plaintiff's successful Motion to Supplement that CRIT's primary role in the authorship of these documents in violation of the Lease's express provisions and BIA regulations came to light. As this Court knows, the Defendants aggressively opposed the Motion to Supplement in what appears to have been an effort to conceal the extent of CRIT's involvement.

When the terms of an approved lease predating January 4, 2013 conflict with BIA's lease termination procedures in 25 C.F.R. Part 162, the regulations specifically provide that the lease terms control. Part 162 states, in pertinent part:

> § 162.008 Does this part apply to lease documents I submitted for approval before January 4, 2013?
>
> This part applies to all lease documents, except as provided in § 162.006. If you submitted your lease document to us for approval before January 4, 2013, the qualifications in paragraphs (a) and (b) of this section also apply.
>
> (a) If we approved your lease document before January 4, 2013, this part applies to that lease document; however, if the provisions of the lease document conflict with this part, the provisions of the lease govern.

25 C.F.R. § 162.008 (emphasis added). The Lease was executed in 1977 and modified in 1986 – well before January 4, 2013, and therefore conflicting Lease terms control. Here, BIA

regulations related to lease termination – 25 C.F.R. Part 162 Subpart C – Residential Leases – conflict with the express terms of Lease Addendum ARTICLE 17.

BIA regulations provide for the issuance of a Notice of Violation "if we [BIA] determine there has been a violation of the conditions of a residential lease." 25 C.F.R § 162.366. The regulation does not provide for a Notice of Violation upon a determination by the tribe that a violation has occurred, or the issuance of a Notice of Violation by the tribe.

If the alleged violation is not cured, BIA regulations provide that BIA will consult with the tribe when the Lease concerns tribally-owned land:

> § 162.367 What will BIA do if the lessee does not cure a violation of a residential lease on time?
>
> (a) If the lessee does not cure a violation of a residential lease within the required time period, or provide adequate proof of payment as required in the notice of violation, we will consult with the tribe for tribal land or, where feasible, with Indian landowners for individually owned Indian land, and determine whether [BIA should cancel the lease, invoke other remedies, or grant additional time to cure the alleged violation.]

25 C.F.R. § 162.367 (emphasis added). Even if Part 162 applied to the Lease, Section 162.367 requires BIA to consult with the tribe, but the determination of the lease violation remains the exclusive province of the agency. However, BIA officials elected to ignore that process and issue the Notice of Default that was written by CRIT and a Notice of Violation that was written by CRIT instead of complying with the Lease's provisions.

III. DEFENDANTS' UNAUTHORIZED AND IMPROPER DELEGATION TO CRIT OF THE SECRETARY'S EXCLUSIVE AUTHORITY TO MAKE AND IMPLEMENT THE LEASE TERMINATION DECISION WAS ARBITRARY AND CAPRICIOUS.

The Administrative Procedure Act provides that those suffering legal wrong because of agency action are entitled to judicial review in the federal district courts. 25 U.S.C. § 702. The

Act is clear regarding the types of agency conduct that are reviewable, providing, in pertinent part, that the reviewing district court shall:

> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

25 U.S.C. § 706. In this case, Defendants actions were beyond arbitrary, capricious, an abuse of discretion and excess of authority. Given these facts, this Court has no choice but to reject the entire process and set the cancellation aside.

A. Defendant's Effective Delegation to CRIT Exceeded Statutory Grant of Authority And The Resulting Decision Must Be Set Aside.

The statutory authority for the approval of leases of Indian lands is delegated by Congress to the Secretary of the Interior by the Indian Long-Term Leasing Act of 1955, 25 U.S.C. § 415:

> Any restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior…

The Secretary has subsequently redelegated that authority, as recited by the Lease preamble, which reads:

> THE WITHIN LEASE is hereby approved pursuant to authority delegated from the Secretary of the Interior to the Commissioner of Indian Affairs in Order 230 DM 1 (10 BIAM 2), 39 F.R. 32166-3216:7 redelegated to the Phoenix Area Director by 10 BIAM 3, and further redelegated to the Superintendent of the Colorado River Agency by 10 BIAM 11.

AR 0000086. BIA meticulously recites the *provenance* of its authority in the preamble to each lease approval. That authority cascades directly from the Secretary to the Commissioner of Indian Affairs to the Area Director to the CRIT Superintendent, with each delegation noticed in

the BIA Departmental Manual and Federal Register to ensure an open and reviewable process. Conspicuously absent from the recitation is any further delegation from BIA to CRIT.

As revealed by the Supplemental AR and described at ¶¶ 52-57 *supra*, Defendants' wholesale delegation of the Lease cancellation process to CRIT without supervision was an act in excess of the specific statutory authority of the Indian Long-Term Leasing Act as delegated to Defendants and must be set aside.

B. Defendants' Improper Delegation Violated Plaintiff's Right to Due Process

The Lease's recital of the chain of delegation is a recognition of the vital importance of government accountability and express limits on government power when individual property rights are at stake, as procedural due process imposes constraints on governmental decisions which deprive individuals of property interests guaranteed by the Due Process Clause of the Fifth Amendment. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Id*., quoting *Armstrong v. Manzo*, 380 U. S. 545, 552 (1965). CRIT's execution of the Lease termination robbed Plaintiff of that meaningful opportunity.

Plaintiff's eventual hearing, after his Lease cancellation, before the Interior Board of Indian Appeals ("IBIA") was procedurally defective because it is now clear from the Supplemental AR that the entire factual record before the IBIA was tainted by CRIT's unsupervised analysis. Plaintiff was never afforded a meaningful hearing because the record was based on decisions made and documents authored by CRIT. The December 18, 2012, Order Affirming Decision stated plainly:

> We affirm the Decision because the record supports BIA's findings that Appellant was not in compliance with the lease and failed to timely cure or excuse his noncompliance, and Appellant has not established that BIA's decision to cancel the lease was unreasonable.

AR0000274 (emphasis supplied). The IBIA's decision was purportedly based on "BIA's findings" but the IBIA did not know that BIA never made any "findings," having instead abandoned its independence and abdicating its authority to CRIT. The Defendants' concealment of these facts was contemptuous and tainted every stage of this matter.

Due to the fact that the IBIA decision was based on a factual record developed by CRIT and not BIA, IBIA review did not satisfy Plaintiff's right to due process before his property rights were forfeited.

C. BIA Failed to Supervise or Maintain Independence from CRIT in approving Lease Cancellation.

Agency decisions must be made at "arm's length" − independently and insulated from the biases of regulated entities. Accordingly, decisions made by third parties must be independently and extensively reviewed before an agency may lend the decision its *imprimatur*. *Assocs. Working for Aurora's Res. Env't v. Colo. Dept. of Transp*., 153 F.3d 1122 (10th Cir.1998). In an opinion reviewing the actions of the Colorado Department of Transportation in approving an Environmental Assessment prepared by a private environmental consultant pursuant to NEPA, the Tenth Circuit outlined the kind of independent review necessary to preserve the agency's integrity and objectivity and insulate it from the biases of the third-party preparer. *Id*. at 1129. The Tenth Circuit reasoned that the (1) the agency must exercise substantial supervision over the preparation of the analysis; (2) agency managers must make all major decisions related to the analysis; (3) the agency must independently and extensively review all of the third-party analysis, give direction to the third party's work, and require the third party to gather more facts and perform supplemental analysis if necessary. *Id*.

In this case, the Supplemental AR makes clear that BIA made no effort to maintain independence from CRIT in the performance of its duties, as evidenced by the lack of decision

documents generated during the flawed process. There is no evidence that (1) BIA officials "exercised substantial supervision" over CRIT's cancellation process, (2) made "all major decisions" regarding the cancellation (in fact, BIA simply accepted CRIT's decision, despite CRIT's inherent conflict of interest presented by the simultaneous roles of lessor and regulator); or (3) conducted an independent review or investigation into the factual circumstances of the Tuttle lease. As a result, the BIA's production of the Administrative Record for the IBIA and Supplemental AR for this litigation revealed no mention whatsoever of the controlling lease termination provisions in Lease Addendum ARTICLE 17. Indeed, there is no indication that CRIT or BIA officials ever read − let alone examined − the substantive provisions of the Lease.

Instead of exercising supervision over the preparation of the Notice of Default and the Notice of Cancellation, BIA left the drafting of those documents entirely to CRIT and its former Attorney General Shepard.

D. This Court Owes No Deference to CRIT's Lease Cancellation Decision.

The usual standard for judicial review of agency action under the APA is narrow: "Although the Court must make a detailed inquiry into the facts and circumstances underlying the defendant's actions, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Lake Pilots Ass'n v. United States Coast Guard*, *supra* (internal quotations omitted). However, this Court went on to emphasize that, in considering APA challenges to agency action, "the Court does not have to give deference to interpretations not made by an agency." *Id.* at 170.

Here, because the BIA improperly delegated the lease cancellation and substituted the Tribe's judgment for its own, this Court owes that cancellation decision no deference and must review the circumstances of the lease cancellation *de novo*.

CONCLUSION

For the reasons state above, Tuttle respectfully requests this Court (1) enter an order for Summary Judgment in his favor, (2) enter a declaratory judgment that Lease termination was void *ab initio* as the outcome of a procedure violative of the BIA regulations and the Lease itself and therefore ultra vires, arbitrary and capricious, and (3) enter a mandatory injunction directing Defendants to reverse and vacate the Lease termination and restore it retroactive to its termination date. Furthermore, Plaintiff respectfully requests that his costs, attorney's fees and other expenses of this litigation be awarded to him.

DATED this 27th day of June, 2014.

WILLIAM C. TUTTLE

By Counsel

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