IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM C. TUTTLE	)	
	)	
Plaintiff,	)	
	)	Civil Action No.
v.	)	1:13-cv-00365-RMC
	)	
S.M.R. JEWELL, Secretary, United States Department of the Interior; KEVIN WASHBURN, Assistant Secretary –Indian Affairs, United States Department of the Interior; and UNITED STATES DEPARTMENT OF THE INTERIOR	)	
	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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Defendants, S.M.R. Jewell, Secretary, United States Department of the Interior, Kevin Washburn, Assistant Secretary – Indian Affairs, United States Department of the Interior, and the United States Department of the Interior (collectively, "Defendants"), respectfully submit this memorandum in opposition to Plaintiff's Motion for Summary Judgment (ECF No. 24) and in support of Defendants' Cross-Motion for Summary Judgment being filed herewith.

I. INTRODUCTION

This case involves a dispute concerning the terms of Lease No. B-509-CR ("the Lease"), which is a Business Lease that was entered into by and between the plaintiff, William C. Tuttle ("Plaintiff" or "Mr. Tuttle") and his brother, Robert E. Tuttle, and the Colorado River Indian Tribes ("CRIT" or "Tribes") and approved by the Bureau of Indian Affairs ("BIA") in 1977. For the past thirty-seven years since he entered into the Lease, Mr. Tuttle has lived on and developed the leased premises, and he has consistently refused to provide an accounting of his profits from development and subleasing of the property despite his agreement to do so pursuant to a Lease Modification that he signed in 1986. He also has not paid the rental amounts as required by the terms of the Lease Modification or provided a sufficient accounting of his annual income from the property so that it is possible to determine the amount of business rent that he owes. He has also consistently refused to submit proof of insurance coverages for the property as the Lease Modification requires. Moreover, throughout this time, he has continued to contest the ownership status of the land and to assert his alleged ownership rights, even though the status of the land as owned by the United States in trust for the Tribes has long since been established.

In September 2009, after the conclusion of protracted administrative litigation with Mr. Tuttle concerning these issues, the Superintendent of the Colorado River Agency of the BIA, in consultation with the Tribes, issued a Notice of Default and gave Mr. Tuttle one final

opportunity to cure the ongoing violations. Five months later, in March 2010, when Mr. Tuttle had failed to do so, the Superintendent issued a Notice of Cancellation of the Lease in accordance with the BIA's then-effective regulations. Mr. Tuttle appealed the Notice of Cancellation, first, to the Acting Regional Director of the BIA, who affirmed the Superintendent's decision in July 2010. Mr. Tuttle then appealed to the Interior Board of Indian Appeals ("IBIA"), which affirmed the Acting Regional Director's decision in December 2012. Thereafter, in March 2013, Mr. Tuttle initiated this case.

In his complaint, Mr. Tuttle challenges the Superintendent's decision to issue the Notice of Default and the Notice of Cancellation based on the lease violations and the subsequent affirmances of that decision by the Acting Regional Director and the IBIA. He contends in reaching these decisions, the BIA failed to comply with the requirements in Article 17 of the Lease Addendum concerning lease termination and thus, were arbitrary and capricious and an abuse of discretion in violation of the Administrative Procedure Act, 5 U.S.C. §§ 701-706, ("APA'). Compl. ¶¶ 53, 57, 58. In his summary judgment motion, he belatedly attempts to broaden his claims to allege that, in issuing the Notice of Cancellation, the BIA violated the Indian Long-Term Leasing Act, 25 U.S.C. § 415, and its corresponding regulations in 25 C.F.R. Part 162. This effort is, however, unavailing. Mr. Tuttle's claims, whether as originally articulated in his complaint or as augmented in his motion for summary judgment, should be dismissed because he lacks prudential standing to bring them under the APA. Alternatively, if the Court nevertheless finds Mr. Tuttle's claims to be justiciable, the record shows that the BIA's lease cancellation decisions were reasonable and based on a consideration of all relevant factors, and therefore, the Court should reject Mr. Tuttle's claims on their merits.

II. FACTUAL BACKGROUND

In this case, Plaintiff seeks judicial review of an agency action under the APA. Plaintiff's Compl., ECF No. 1 ("Compl.") ¶ 6. Under the APA, judicial review is normally confined to the administrative record already in existence, and does not contemplate a factual record developed *de novo* in federal district court. *Community for Creative Non-Violence v. Lujan*, 908 F.2d 992,998 (D.C. Cir. 1990). Local Rule 7(h)(2) provides that "[i]n such cases, motions for summary judgment and oppositions thereto shall include a statement of facts with references to the administrative record."[1] Accordingly, in accordance with Local Rule 7(h)(2), and in order to facilitate the Court's review and adjudication of Defendants' Cross-motion for Summary Judgment, Federal Defendants submit the statement of facts below, which sets forth facts drawn from the Administrative Record and the Supplement to the Administrative Record that have been lodged and served in this matter.

In response to Plaintiff's Statement of Material Facts included in his memorandum in support of his summary judgment motion, ECF No. 24-1, Defendants do not believe there can be any issue of disputed fact that could preclude entry of judgment on cross-motions in an APA case, where de novo review is not permitted. Here, there is substantial evidence to support material findings in the record, and therefore, the findings must be sustained and judgment entered accordingly. Although there are no issues of material fact to be litigated in this case, this does not mean, however, that Plaintiff's statements of fact are conceded. Many of Plaintiff's

[1] *See also* Cmt. to LCvR 7(h) (recognizing that in such cases, "the court is not called upon to determine whether there is a genuine issue of material fact, but rather to test the agency action against the administrative record, [and] [a]s a result the normal summary judgment procedures requiring the filing of a statement of undisputed material facts is not applicable.").

statements are incorrect, and Defendants dispute such statements based on references to the administrative record, as outlined in Defendants' statement of facts set forth below.

A. Status of the Land and the Lease

1. Thirty-seven years ago in *United States v. Brigham Young Univ., et al*., No. CV 72-3058-DWW (C.D. Cal. 1977), the United States District Court for the Central District of California issued findings of fact and conclusions of law. AR 0000387-391. There, the Court found, inter alia, that the United States was the owner in trust for CRIT of the subject property, AR0000390; that the possession by Mr. Tuttle and his brother (collectively, "the Tuttles"), of a portion of the property was "without any right, title, or interest therein"; and that the Tuttles had wrongfully occupied the property. AR0000390-391.

2. In order to resolve the dispute, the Tuttles agreed to a Stipulated Judgment,[2] AR0000363-366, and entered into the Lease with CRIT, AR 0000239-269, which allowed the Tuttles to remain on the subject property pursuant to terms and conditions of the Lease.

3. The Lease recites that it was "made and entered into" on March 31, 1977 by and between CRIT as "Lessor" and the Tuttles as "Lessee" "under the provisions of the Act of April 30, 1964 (78 Stat. 188), as supplemented by Part 131, Leasing and Permitting, of the Code of Federal Regulations, Title 25 – Indians, and any amendments thereto relative to business leases on restricted Indian lands, all of which by reference are made a part hereof." AR00239.

[2] Defendants do not concede that Mr. Tuttle was "forced" to enter into the Stipulated Judgment, or to "surrender his land title under . . . legal and financial pressure from the United States government." *See* ECF 24-1 at 4, ¶ 6.

4. Pursuant to the Lease, CRIT leased to the Tuttles for a term of 50 years certain premises "containing 98.24 acres, more or less," ("the Property"), for which the complete legal description is provided in Section I of the Lease. AR0000239-240.

5. The Lease is denominated as a "Business Lease." AR0000239. Section III of the Lease gave the Tuttles the right to use the subject premises for various purposes, including both residential and "commercial or community development and all uses necessary to community development," although it specifically prohibited industrial uses. AR0000240.

6. Pursuant to Section IV of the Lease, the Tuttles agreed to pay base rent annually in advance as follows: $491.20 for the first five years following execution of the Lease; $982.40 for years six through twenty; and $1,473.60 thereafter throughout the term of the Lease. AR0000240-241.[3]

7. With respect to payment of the annual rentals, Section V of the Lease provides that:

> All rents shall be paid without prior notice of demand. Past due rental shall bear interest at ten percent (10%) per annum from the due date until paid, but this provision shall not be construed to relieve the Lessee from his obligation to make timely rental payments.

AR0000244.

8. Section VI of the Lease requires the Tuttles as "Lessee" to carry a public liability insurance policy with specifically prescribed minimum coverages for personal injury and property damage. This section further provides that the policy is "to be written jointly to protect Lessee and Lessor" and that "[e]vidence of insurance shall be furnished to the Secretary." *Id.*

[3] Section IV clarifies that "[s]aid annual rentals are based upon . . . [a] per acre rate" computed based upon the entire 98.24 acres set forth in section I, and starting from a rate of five dollars per acre for the first five years, with increases to ten dollars per acre, and then fifteen dollars per acre for each of the subsequent time intervals. AR0000241.

9. A Lease Addendum consisting of Articles 1 through 32 is also incorporated in the Lease. AR0000244. The Addendum contains additional provisions concerning insurance (Article 3, AR0000250) and addressing default by the Lessee (Article 17, AR0000262-264).

10. With respect to insurance, Article 3 of the Lease Addendum requires that, in addition to the public liability insurance required under section VI of the Lease, the Lessee also shall carry fire insurance and shall furnish evidence of such insurance to the Secretary. AR0000250.

11. With respect to default, Article 17 of the Lease Addendum provides that

> [s]hould the Lessee default in any payment of monies as required by the terms of this lease, and if such default shall continue uncured for the period of thirty (30) days after written notice thereof by the Secretary to Lessee, or should Lessee breach any other convenant [sic] of this lease, and if the breach of such other covenant shall continue uncured for a period of sixty (60) days after written notice thereof by the Secretary to Lessee, 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

AR0000262-263.

12. At some time after entering into the Lease, the Tuttles began to develop the property for commercial purposes as permitted by Section III of the Lease. *See* AR0000039.

B. The Lease Modification

13. In June1986, CRIT and the Tuttles voluntarily executed a Lease Modification AR0000074-76. The Modification added a paragraph at the end of Section IV of the Lease, which provided that

> [i]n addition to the foregoing rental, Lessee shall pay to Lessor not later than thirty (30) days after each anniversary date of the terms of this lease, commencing March 31, 1986, THREE PERCENT (3%) of the gross receipts of all business conducted on the leased premises, including Lot Sales, Lot Rentals, and any other business or businesses operated on the leased premises, whether such business is conducted by Lessee, sublessee, or assignee.

AR0000075.

14. The 1986 Lease Modification also added an additional Article to the Lease, Article IX entitled "ANNUAL ACCOUNTING." Article IX requires, in pertinent part, that

> [t]he Lessee shall not later than sixty (60) days after the ending date of each calendar year of the term of this Lease, . . . submit to the Lessor and the Secretary, certified statements of gross receipts. With said statements, Lessee shall tender payment of the amount due under Rental provision IV (PERCENTAGE RENT) above. Said statements shall be prepared by an independent certified public accountant, duly licensed in either the State of Arizona, or the State of California, in conformity with standard accounting procedures, accompanied by an opinion rendered by the certified public accountant.

AR0000075.

C. Previous Administrative Litigation

15. In 1994, approximately six years after he entered into the Lease Modification, Mr. Tuttle stopped making basic rent payments to CRIT. *See* AR0000040.

16. Mr. Tuttle resumed making payments in 1999, *id.*, but the Tribes took the position

that by not paying rent, he had repudiated the Lease and the Lease was no longer valid. Therefore, the Tribes refused to accept the payments. *See* AR0000041.

17. Mr. Tuttle also challenged the validity of the Lease Modification and in 2001, he asked the BIA to declare the Lease Modification invalid. AR0000040. He later claimed that the Tribes and/or the BIA had coerced him into signing it. *Id.*

18. In 2004, the parties reached a partial resolution of the dispute concerning rental payments, and in September of that year, Mr. Tuttle paid the basic annual rental amounts that were then due. *Id.* He also paid the interest required on the past due amounts under protest. *Id.*

19. On May 18, 2005, the Regional Director issued a decision addressing Mr. Tuttle's various claims against the BIA including the alleged invalidity of the Lease Modification and his payment obligations under the Lease. *See* AR0000036-38.

20. The Regional Director concluded that the Lease Modification was valid and declared that the BIA intended to enforce it. *See* AR0000040.

21. With respect to Mr. Tuttle's payment obligations, the Regional Director concluded that because Mr. Tuttle had paid his outstanding obligations for basic rent in full and no notices of default had been delivered to him, his nonpayment of basic rent had been cured and the Lease remained "in full force and effect," *See* AR0000042.

22. The Regional Director also concluded that Mr. Tuttle should be required to pay interest on all previously unpaid rentals, including the payments he had tendered to the Tribes, but which the Tribes had refused. *Id.*

23. Mr. Tuttle appealed the Regional Director's Decision to the IBIA.

24. On February 7 2008, the IBIA issued an Order concerning the Regional Director's decision. AR0000036-63.

25. The IBIA upheld the Lease Modification as valid. AR0000052-53.

26. With respect to Mr. Tuttle's obligation to pay interest on unpaid lease rentals, the IBIA reversed the Regional Director's decision that Mr. Tuttle was liable for interest on the payments he had timely tendered to the Tribes, but which the Tribes had refused. AR0000054.

27. The IBIA remanded the matter to the Regional Director "to determine what remedy . . . in the form of a refund, offset, or other appropriate remedy" might be available to Mr. Tuttle for the interest that he had paid under protest. *Id.*

D. The Notice of Default

28. On September 23, 2009, the Regional Director advised Mr. Tuttle by letter that his office had determined that a refund, credit, or offset would be the appropriate remedy for the interest on payments Mr. Tuttle had tendered but the Tribes had refused. AR0000033.

29. The Regional Director determined that Mr. Tuttle had first tendered timely payment to the Tribes on March 7, 2000 and that, pursuant to the IBIA's Order, he should be relieved of liability for interest on rent payments tendered after that date. AR0000034. Accordingly, the Regional Director calculated the refund, credit or offset due to Mr. Tuttle as totaling $10,504.79, and he advised Mr. Tuttle that CRIT and/or the Colorado River Agency would notify Mr. Tuttle by separate letter of the proposed manner in which that amount would be paid or credited. *Id.*

30. By separate letter dated September 30, 2009, the Superintendent of the Colorado River Agency and the Tribes also informed Mr. Tuttle that the Tribes had calculated that Mr. Tuttle was owed a credit, refund, or offset of $10,504.79 toward his outstanding balance due under the Lease. AR0000026.

31. The September 30, 2009 letter also included a Notice of Default, in which the

Tribes wrote to inform Mr. Tuttle that he was in violation of certain terms and conditions of the Lease. AR0000026-29.

32. The Notice of Default first informed Mr. Tuttle that he was in arrears in his rental payments for the years 2005, 2006, and 2009, but that the Tribes would apply money from the offset Mr. Tuttle was owed and waive this aspect of his default. AR0000027

33. The Notice of Default also informed Mr. Tuttle that he continued to be in default under three other provisions of the Lease, however, in that he had not submitted any payment of percentage rent as required by the Lease Modification since March 1991; had not provided sufficient, certified statements of gross receipts for fiscal years 1992 through 2008 as required by Article IX of the Lease, added by the Lease Modification; and had not provided current evidence of Public Liability Insurance or Fire and Damage Insurance as required by the Lease. AR0000027-29.

34. Finally, the Notice of Default advised Mr. Tuttle that, in accordance with 25 C.F.R. § 162.118,[4] he had ten business days from his receipt of the Notice of Default to either cure the violations and provide written notice to the Tribes that they had been cured, dispute the Tribes' determinations and/or explain why the Lease should not be canceled, or request more time to cure the violations. AR0000029.

35. In an undated letter, which is stamped as having been received by the Tribes on October 13, 2009, Mr. Tuttle initially responded to the Notice of Default and requested additional time to respond due to "health problems." AR0000401.

36. In a subsequent letter, which is stamped as having been received by the Tribes on

[4] The applicable provision of the then-effective regulations was 25 C.F.R. § 162.618, which was incorrectly cited in the Notice of Default.

October 16, 2009, Mr. Tuttle submitted an uncertified estimate of his gross receipts, together with payment of three percent (3%) of the estimated gross receipts, which he calculated as a deduction from the offset he was owed and stated was being paid under protest. AR0000227; AR0000156. In the letter, Mr. Tuttle also stated that, because "[t]he financial records of the sublessees are simple and not complicated, [w]e would prefer not to incur the expense of having a Certified Public Accountant verify this . . . information." AR0000228; AR0000157.

37. An invoice for a policy of public liability insurance effective from September 18, 2009 through September 18, 2010 was enclosed with the October 2009 letter, AR0000158, and Mr. Tuttle stated that he was enclosing the insurance verification information the Tribes had requested. AR0000228; AR0000157.

38. Mr. Tuttle also stated that he intended to appeal the IBIA's February 2008 opinion in federal court. AR0000227; AR0000157.

E. The Superintendent's Notice of Cancellation

39. On March 2, 2010, approximately five months after issuing the Notice of Default, the Superintendent of the Colorado River Agency of the BIA sent a Notice of Cancellation of Lease No. N-509-CR to Mr. Tuttle by certified mail. AR000020-24.

40. In the Notice of Cancellation, the Superintendent acknowledged receipt of Mr. Tuttle's response to the prior Notice of Default but advised Mr. Tuttle that the response "did not . . . indicate that you have cured the violations of the Lease identified in the Notice of Default as required by 25 C.F.R. 162.618. AR00000021. The Superintendent then reiterated the violations of the Lease that had been identified in the Notice of Default as: 1) "[f]ailure to pay rental amounts due as required under the Lease"; 2) "[f]ailure to pay Percentage Rent as required under the Lease; 3) "[f]ailure to provide certified statements of gross receipts"; and 4) "[f]ailure to

provide evidence of Public Liability and Fire insurance coverage – including documentation of coverage 'with extended coverage endorsements, jointly in the name of the Lessee and Lessor' as required under the Lease." *Id.*

41. The Superintendent then provided further explanation concerning each of the grounds for the cancellation of the Lease. AR0000021-24.

42. The Superintendent first explained that Mr. Tuttle remained in default under Article IX of the Lease ("Annual Accounting") because he had "failed to provide to the Bureau or the Tribes either a sufficient certified statement of gross receipts, or any accompanying opinion rendered by a certified public accountant for the fiscal years 1992 through 2008, as required by the terms of the Lease[,]" and that Mr. Tuttle's statement in response to the Notice of Default estimating the annual income as '"approximately $11,000 . . .[f]or 17 years . . .' falls short of the accounting standards to which you are obligated under the Lease." AR0000021-22.

43. The Superintendent next explained that Mr. Tuttle also remained in default under Article IV of the Lease ("Rentals" and "Percentage Rents"). The Superintendent first reiterated that the Tribes would apply the amount of interest that Mr. Tuttle had overpaid "to offset unpaid rental amounts, and waive this aspect of the default" as to base rentals. *Id*. She then explained, however, that the Tribes could not and would not apply this overpayment to additional Percentage Rent that Mr. Tuttle might owe because "[n]either the Bureau nor the Tribe has any way to know or to calculate what those gross receipts may be, nor is there any reasonable means to determine the corresponding Percentage Rent due" because Mr. Tuttle had not provided a certified accounting of the gross receipts of business conducted on the leased premises." *Id*.

44. The Superintendent further explained that Mr. Tuttle remained in Default under

Article VI of the Lease, Public Liability Insurance: Addendum, Article 3, Fire and Damage Insurance. AR0000023. The Superintendent acknowledged that Mr. Tuttle's response to the Notice of Default "include[d] a photocopy of a receipt from The Coulson Insurance Agency. . . indicating that Rio Valley Estates LLC is the insured under Policy #: CPS1070473, effective for the period 9/18/09 – 9/18/10, and issued by its company: Vulcan/Scottsdale," *id.*, but she explained that this document failed to meet Mr. Tuttle's obligations under the Lease because it did not identify CRIT, as Lessor, as a named co-insured under the policy, or state that the policy protects Lessee and Lessor jointly; did not state the amount of coverage provided under the policy; and did not demonstrate that Mr. Tuttle carried fire and damage insurance for the property as required by the Lease Modification. *Id.*

45. The Notice of Cancellation then stated that, "[f]or all of the foregoing reasons, and pursuant to the Default provisions of the Lease Addendum, at Section 17(B)(2), the Bureau and the Tribe are hereby exercising their right to cancel Lease No. B-509-CR. . . ." *Id.*

46. In conclusion, the Superintendent notified Mr. Tuttle of his right to administratively appeal the cancellation decision within 30 days of the date he received the Notice of Cancellation. AR0000024.

47. On March 11, 2010 Mr. Tuttle responded to the Notice of Cancellation and asked for a 45-day extension of time to cure all violations based on his accountant's unavailability due to illness. AR0000213.

F. Mr. Tuttle's Appeals

48. On April 1, 2010, Mr. Tuttle submitted a Notice of Appeal to the Acting Regional Director and petitioned for review of the Superintendent's March 2, 2010 determination. AR0000004.

49. On April 29, 2010, the Acting Regional Director notified Mr. Tuttle that her office had received the Notice of Appeal, that the cancellation decision was stayed by his filing of the appeal, and that he had thirty days from the date on which the Notice of Appeal was filed to submit a Statement of Reasons. AR0000201.

50. Mr. Tuttle submitted a handwritten Statement of Reasons on May 6, 2010. AR0000192-194. In that Statement, Mr. Tuttle stated that he had "always had a certificate of liability insurance for every year[,] [and that] 2009-2010 certificate of liability insurance was sent to the B.I.A. in Parker with the additional named insured." AR0000193.

51. Mr. Tuttle further stated that his accountant was preparing the certified statements, and that he would send a check what he owed when the statements were completed, but that he would send a check for four thousand dollars the following day "to show our good faith." *Id.*

52. Mr. Tuttle subsequently sent a check to the BIA. AR0000198. In consultation with CRIT, the BIA placed the check in a special deposit account for the pendency of the appeal process. *See* AR0000197.

53. By letter dated May 17, 2010, the Acting Regional Director informed Mr. Tuttle that neither his Notice of Appeal nor the handwritten Statement of reasons offered a sufficient explanation as to why Mr. Tuttle believed the Superintendent's cancellation decision was in error, but that, pursuant to 25 C.F.R. § 2.17, the BIA would afford Mr. Tuttle additional time to amend the appeal documents to state clearly his reasons for appeal.

54. On May 25, 2010, Mr. Tuttle submitted a typewritten Statement of Reasons. AR0000167-170. In the May 25 Statement, Mr. Tuttle first identified the reasons the Lease had been cancelled and then claimed that the identified disputes had by then "largely been addressed

and deficiencies resolved." AR0000167. He also stated that "[t]he delays resulted from both health issues which affected the Petitioner's ability to deal with the business matters underlying the decision being appealed and the unavailability of Petitioner's Certified Public Accountant. . . ." *Id.*

55. With the May 25, 2010 Statement of Reasons, Mr. Tuttle submitted a compilation report prepared by certified public accountant, which summarized the gross revenues that Mr. Tuttle had received from the leased premises and the business rentals due and owing under the lease. AR0000174-179. The accountant clarified, however, that the information in the compilation report had been "prepared on an accounting basis used by the individuals for U.S. Federal Income Tax purposes, which is a basis of accounting other than U.S. generally accepted accounting principles." AR0000175. The accountant also stated that "[w]e have not audited or reviewed the accompanying statement of financial condition and, accordingly do not express an opinion or any other form of assurance on it. *Id.*

56. With the May 25, 2010 Statement of Reasons, Mr. Tuttle also submitted a second check in the amount of $5408.10 based on his own estimated calculations of the amount of business rent owed. AR0000183.

57. On July 19, 2010, the Acting Regional Director informed Mr. Tuttle in a letter sent by certified mail that he had decided to affirm the Superintendent's decision to cancel the Lease. AR0000121-127.

58. In the July 19, 2010 letter, the Acting Regional Director found, inter alia, that after he received the September 30, 2009 Notice of Default, Mr. Tuttle had made no attempt to cure until "long after the cure period provided in the Lease had expired. . . ." The Acting Regional Director further informed Mr. Tuttle that "even if your accounting (and related payment

obligations) had been satisfied through your May 2010 submissions, you would no longer have had the right to cure the default without the express waiver and consent of the Tribe (your right to cure having expired at the end of the cure period provided by the Lease)". AR000125.

59. On August 18, 2010, Mr. Tuttle filed a Notice of Appeal from the Acting Regional Director's decision with the IBIA. AR0000116-120.

60. Mr. Tuttle cited the following as reasons for appeal: "1. The Termination Was Erroneous as a Matter of Fact; 2. Contrary to the Regional Director's Conclusions, All Deficiencies Were Cured Prior to the Termination; [and] 3. The Land is Under the Jurisdiction of the Bureau of Reclamation and/or the Bureau of Land Management and Not the Bureau of Indian Affairs; Thus, the Regional Director Had No Authority to Terminate the Federal Lease." AR0000116-117.

61. After full briefing by Mr. Tuttle, the BIA, and the Tribes, on December 18, 2012, the IBIA issued an Order affirming the Acting Regional Director's determination. AR0000274-283.

62. In its December 2012 Order, the IBIA found that "the record supports BIA's finding that [Mr. Tuttle] violated the terms of the lease and that he did not cure those violations within the time period prescribed by the lease" and that Mr. Tuttle had not "made any convincing argument why BIA's decision to cancel the lease, in the face of the uncured violations was an abuse of discretion." AR0000282.

III. STANDARD OF REVIEW

Review of Plaintiff's claims is governed by the standards set forth in the APA, 5 U.S.C. §§ 701-706. Claims brought pursuant to the APA are reviewed and decided on summary judgment based upon the existing administrative record. *See Davis v. Pension Benefit. Guar. Corp.*, 864 F. Supp. 2d 148, 156 (D.D.C. 2012) (quoting *United Steel, Paper & Forestry,*

Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Intl Union, AFL-CIO-CLC v. Pension Benefit Guar. Corp., 839 F. Supp. 2d 232, 246 (D.D.C. Mar. 20, 2012)) ("In actions under the APA, summary judgment is the appropriate mechanism for 'deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review.'"); *Assn of Admin. Law Judges v. U.S. Office Pers. Mgmt.*, 640 F. Supp. 2d 66, 74 n.6 (D.D.C. 2009) (confining review of claims that agency acted arbitrarily and capriciously in violation of the APA to the administrative record). The record for purposes of judicial review "is limited to the information before the agency at the time the challenged action was taken." *Id.* at 75 (citing *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985)).

The APA provides that final agency action may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Nevada v. Dep't of Energy*, 457 F.3d 78, 85 (D.C. Cir. 2006) (quoting 5 U.S.C. § 706(2)(A)). This standard requires that the agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citation omitted). In turn, "[t]he Court's task is to determine whether the agency's decisionmaking was reasoned, . . . i.e., whether it considered relevant factors and explained the facts and policy concerns on which it relied, and whether those facts have some basis in the record." *Davis v. Latschar*, 202 F.3d 359, 365 (D.C. Cir. 2000) (internal quotation marks and citation omitted). "The court is not empowered to substitute its judgment for that of the agency," *Citizens to Pres. Overton Park, Inc. v. Volp*e, 401 U.S. 402, 416 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977), and it may not overturn

the agency's action provided that "the decision was based on a consideration of relevant factors" and there has been no clear error of judgment. *Id. See also Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983). The standard of review for APA claims is thus a very narrow one under which the agency's action is presumed valid and is "accorded great deference." *Oceana, Inc. v. Evans*, No Civ. A. 04-0811, 2005 WL 555416, at *7 (D.D.C. Mar. 9, 2005).

IV. ARGUMENT

A. The Court Lacks Subject Matter Jurisdiction to Review Plaintiff's Claims Because He Lacks Prudential Standing.

"Lack of standing is a defect in subject matter jurisdiction, and a plaintiff's standing . . . must be first determined 'in order to establish the jurisdiction of the Court to hear the case and reach the merits."' *Pai v. U.S. Citizenship & Immigration Servs.*, 810 F. Supp. 2d 102, 106 (D.D.C. 2011) (quoting *George v. Napolitano*, 693 F. Supp. 2d 125, 128–29 (D.D.C. 2010)). The basic constitutional standing requirements are rooted in Article III of the Constitution and require "the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" *Nat'l Recycling Coal. v. Browner*, 984 F.2d 1243, 1248 (D.C. Cir. 1993) (quoting *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (internal quotation marks omitted).

In addition to constitutional standing requirements, a claimant must also show prudential standing. *Nat'l Recycling Coal. v. Browner*, 984 F.2d 1243, 1248 (D.C. Cir. 1993) ("As a threshold matter, petitioners must satisfy the requirements of both constitutional and "prudential"

standing.") "Under the D.C. Circuit's jurisprudence, "prudential standing is a limitation on standing, particularly in cases challenging agency action under the Administrative Procedure Act." *Pai*, 810 F. Supp. 2d at 108. "[T]he D.C. Circuit has made it clear that prudential standing is a jurisdictional requirement." *Safari Club Int'l v. Jewell*, 960 F. Supp. 2d 17, 53 (D.D.C. 2013) (citing *Ass'n of Battery Recyclers v. EPA*, 716 F.3d 667, 674 (D.C. Cir. 2013); *Deutsche Bank Nat'l Trust Co. v. FDIC*, 717 F.3d 189, 194 n. 4 (D.C. Cir. 2013)). In a case brought under the APA, if the plaintiff fails to satisfy either the constitutional or prudential requirements, the court should dismiss for lack of subject matter jurisdiction. *U.S. Women's Chamber of Commerce v. U.S. Small Bus, Admin.*, No. 1:04-CV-01889, 2005 WL 3244182, at *3 (D.D.C. Nov. 30, 2005) (citing *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998)).

"Prudential standing requires that the 'plaintiff's complaint fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Pai*, 810 F. Supp. 2d at 108. In *Pai*, the D.C. Circuit explained that

> [s]ection 702 [of the APA] and the prudential zone of interest test are intimately related—the former provides a statutory grant from Congress to an aggrieved party to contest agency action and the latter provides a judicial limitation necessary to ensure that the proper party is asserting the claim against the agency.

Id. (quoting *Nat'l Fed'n of Fed. Emps. v. Cheney*, 883 F.2d 1038, 1042 (D.C. Cir. 1989)). To determine standing for claims brought under the APA, the court must thus inquire "whether the plaintiff[] 'fall[s] within the class of persons whom Congress has authorized to sue under the [APA]'; [and] '[t]o do so . . . , whether [his] 'grievance ... arguably fall[s] within the zone of interests protected or regulated by the statutory provision or constitutional guarantee

invoked in the suit."' *Mendoza v. Perez*, No. 1:11-cv-01790, 2014 WL 2619844, at *9 (D.C. Cir. June 13, 2014) (quoting *Bennett v. Spear*, 520 U.S. 154, 162 (1997)).

1. Plaintiff's Complaint Does Not Allege That the BIA Violated Any Statute Other Than the APA.

In his complaint filed in March 2013, Mr. Tuttle challenged the BIA's decisions to cancel the Lease as arbitrary, capricious, and an abuse of discretion in violation of the APA. Compl. ¶¶ 57, 58, 59. Mr. Tuttle did not invoke any other substantive statute, however, nor did he allege that the BIA's actions violated any statutory provision apart from the APA. Rather than grounding his arguments about "arbitrary" or "capricious" action on a provision of a substantive statute, Mr. Tuttle instead based his allegations on the Lease itself, *see id.* ¶ 53 ("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 ARTICLE 17(B) . . . ."), but he then requests judicial review of the agency's actions based on the arbitrary and capricious standard of review for APA claims.

The claims that Mr. Tuttle alleges in his complaint are not justiciable under the APA. Rather than imposing substantive requirements, the APA provides the framework for review of allegations that an agency has violated some other underlying substantive statutory requirement. *See, e.g., Or. Natural Res. Council v. Thomas*, 92 F.3d 792, 798 & n. 11 (9th Cir. 1996) (court must have "law to apply" under the APA). A court cannot evaluate whether an action is arbitrary, capricious or contrary to law, without a "meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). "[I]f no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action." *Id. See also Legal*

Assistance for Vietnamese Asylum Seekers v. Bureau of Consular Affairs, 104 F.3d 1349, 1353 (D.C. Cir. 1997).

The APA recognizes the need for an underlying statutory obligation when reviewing an agency's actions. Section 702 of the APA creates a cause of action for "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action *within the meaning of a relevant statute*." 5 U.S.C. § 702 (emphasis added). "The relevant statute, of course, is the statute whose violation is the gravamen of the complaint. . . ." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 886 (1990). *See also* Wright & Miller, 14A Fed. Prac. & Proc. Juris.3d § 3659 ("There is no right to seek judicial review under the Administrative Procedure Act in the absence of a relevant statute whose violation forms the legal basis of the complaint against the governmental action.").

Here, Mr. Tuttle's complaint does not allege that the United States has violated any statute other than the APA itself, and the complaint thus provides "no law to apply" under the APA. Accordingly, the Court should not entertain - and indeed, is without jurisdiction to consider - Mr. Tuttle's claims regarding the validity of the BIA's lease cancellation decisions.

2. Plaintiff Lacks Prudential Standing Under the Statute He Invokes On Summary Judgment.

In his memorandum in support of his motion for summary judgment, Mr. Tuttle cites the Indian Long-Term Leasing Act, 25 U.S.C. § 415 (the "Leasing Act"), and alleges for the first time that the BIA's lease cancellation decisions violated that statute and its accompanying regulations at 25 C.F.R. Part 162. Pl.'s Mem. in Supp. of Mot. for Summ. J., ECF No. 24-1 at 21-22, 25 ("Pl's Mem."). Mr. Tuttle's complaint does not cite or even reference either the Leasing Act or the regulations, however, and to the extent that Mr. Tuttle is now attempting to

amend his complaint through his summary judgment motion, he should not be permitted to do so. As this Court has several times held, "'[i]t is well established that a party may not amend its complaint or broaden its claims through summary judgment briefing.'" *Haynes v. Navy Fed. Credit Union*, No. 11–0614 (CKK), 2014 WL 2591371, at *6 (D.D.C. June 10, 2014) (quoting *District of Columbia v. Barrie*, 741 F. Supp. 2d 250, 263 (D.D.C. 2010); *Sloan ex rel Juergens v. Urban Title Servs., Inc.*, 652 F. Supp. 2d 51, 62 (D.D.C. 2009) ("Plaintiff cannot amend [a] complaint . . . by filing a motion for summary judgment . . . [but] must amend the complaint in accordance with Fed. R. Civ. P. 15(a)"); *Sharp v. Rosa Mexicano, D. C., LLC.*, 496 F.Supp.2d 93, 97 n. 3 (D.D.C. 2007) (plaintiff may not, "through summary judgment briefs, raise [ ] new claims" not raised in the complaint without having filed an amended complaint.") (citing *Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004). However, and in any event, even if the Court were to consider Mr. Tuttle's belatedly raised claims based on the Leasing Act, Mr. Tuttle nevertheless cannot demonstrate the prudential standing necessary to pursue these claims under the APA.

As federal appeals courts in other circuits have recognized, the Leasing Act is concerned with protecting Indian tribes and Indian landowners, not non-tribal lessees of Indian lands, and therefore, non-Indian parties to leases approved pursuant to the Leasing Act "do not arguably fall within the zone of interests protected by [the statute] and its accompanying regulations." *Hollywood Mobile Estates, Ltd. v. Seminole Tribe of Fla.*, 641 F.3d 1259, 1270 (11th Cir. 2011); *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031, 1036, 1037 (8th Cir. 2002) (statutes upon which plaintiff organization relied, including 25 U.S.C. § 415 were "intended to protect only Native American interests" and "it would be inconsistent to interpret them as giving legally

enforceable rights to non-tribal or non-governmental parties whose interests conflict with the tribes' interests.").[5]

In *Hollywood Mobile Estates*, the plaintiff, a non-Indian lessee, sought to amend its complaint to seek an injunction compelling the Secretary of the Interior to enforce a lease and place the plaintiff back in possession of the subject premises. 641 F.3d at 1268. The Eleventh Circuit held that the proposed amended complaint was "best construed as a request for a mandatory injunction against the Secretary under the Administrative Procedure Act," but it then found that the plaintiff's interests were "not arguably within the zone of interests protected by [the Leasing Act] and its accompanying regulations." *Id.*

In explaining its findings, the Eleventh Circuit first stated that, in applying the zone of interest test, it was required "to examine [the Leasing Act] and its accompanying regulations to determine the interests they arguably protect and then determine whether the interests of [the plaintiff] are among those arguably protected interests." *Id.* at 1269. Applying the test, the court then explained that the Secretary of the Interior's approval of leases of Indian land pursuant to the Leasing Act

> 'is consistent with the long-standing relationship between Indians and the government in which the government acts as a fiduciary with respect to Indian property.' That fiduciary relationship requires the federal government to act for the benefit of Indian landowners *because Congress intended section 415 'to protect Indian tribes and their members.'* The same is true of the corresponding regulations.

[5] *See also San Xavier Dev. Auth. v. Charles*, 237 F.3d 1149, 1153 (9th Cir. 2001) (lessee of Indian land lacked prudential standing under 25 U.S.C. § 416, a related statute governing leases within San Xavier Indian Reservation, because neither statute nor accompanying regulations provided remedy for non-Indian lessees).

Id. (quoting *Saguaro Chevrolet, Inc. v. United States*, 77 Fed. Cl. 572, 577-78 (2007) (emphasis added) and *San Xavier Dev. Auth.*, 237 F.3d at 1153).

Mr. Tuttle is a non-Indian lessee of Indian land. Thus, like the plaintiffs in *Rosebud Sioux Tribe* and *Hollywood Mobile Estates*, his interests are "not arguably within the zone of interests protected by [the Leasing Act]," and its corresponding regulations. 641 F.3d at 1269. Therefore, Mr. Tuttle lacks prudential standing to bring his claims for violations of the Leasing Act and the Court should dismiss his claims for lack of subject matter jurisdiction. Nevertheless, if the Court finds that Mr. Tuttle's claims are justiciable, it should reject his arguments on the merits.

B. The BIA's Actions In Deciding to Cancel Plaintiff's Lease Were Fully In Accordance With Its Regulations and With the Terms of the Lease.

The gravamen of Mr. Tuttle's claims is that the BIA's lease cancellation decisions were *ultra vires* and arbitrary and capricious because the BIA did not follow the termination procedures set forth in Article 17B of the Lease Addendum, and instead followed the procedures set forth in 25 C.F.R. Part 162. On summary judgment, Mr. Tuttle argues that the regulations are in conflict with the Lease terms and that the Lease terms must control. Pl.'s Mem. 23. These arguments, however, are simply wrong.

First, the regulations Mr. Tuttle cites in support of this argument, 25 C.F.R. §§ 162.008, 162.366. 162.367, Pl.'s Mem. 23, 24, did not become effective until January 2013 and thus, they were not in effect at the time of the challenged decisions. Moreover, as Mr. Tuttle himself notes, the latter two regulations, (sections162.366. and 162.367), apply to residential leases, *id.* at 24, whereas Mr. Tuttle's Lease is a "Business Lease" and would now be governed by regulations set forth in 25 C.F.R. Part 162, Subpart D (sections 162.401-474).

Most importantly, the terms of the Lease are not in conflict with the applicable regulations as Mr. Tuttle alleges. On its first page, the Lease recites that the Leasing Act as supplemented by the corresponding regulations (then in 25 C.F.R. Part 131) "and any amendments thereto relative to business leases on restricted Indian lands" are incorporated into the Lease by reference. AR0000239. Thus, the leasing regulations in 25 C.F.R. Part 162 and the Lease terms are to be read together, and when so read, the regulations and the Lease provisions concerning cancellation establish a sequential process for providing a tenant notice of a lease violation, affording the tenant the opportunity to respond and cure, and then, if the violation is not cured, providing notice of cancellation and proceeding with termination pursuant to the terms of the Lease.

In September 2009, when the Superintendent issued the Notice of Cancellation, and when the Acting Regional Director and the IBIA subsequently affirmed the Superintendent's decision in 2010 and 2012, the relevant regulations were set forth in 25 C.F.R. §§ 162.618 and 162.619.[6] Section 162.618 provided that if the BIA determined that a lease had been violated,

> . . . we will send the tenant and its sureties a notice of violation within five business days of that determination. . . . by certified mail
> .

and then

> (b) Within ten business days of the receipt of such a notice of violation, "the tenant must:
>
> (1) Cure the violation and notify us in writing that the violation has been cured;
> (2) Dispute our determination that a violation has occurred and/or explain why we should not cancel the lease; or
> (3) Request additional time to cure the violation.

[6] A true and correct copy of 25 C.F.R. §§ 162.618 and 162.619 is attached hereto as Exhibit 1.

25 C.F.R. §162.618 (a),(b). If the tenant failed to take any of the actions required by section 162.618 within the ten-day time period, the BIA then would "consult with the Indian landowners, as appropriate, and determine whether . . .

(1) The lease should be canceled . . . ;
(2) We should invoke any other remedies available to us under the lease . . . ;
(3) The Indian landowners wish to invoke any remedies available to them under the lease; or
(4) The tenant should be granted additional time in which to cure the violation."

25 C.F.R. §162.619(a). If the BIA decided to cancel the lease, section 162.619 then required it to send the tenant and its sureties a cancellation letter by certified mail. 25 C.F.R. §162.619(c).

In issuing the Notice of Default and the Notice of Cancellation to Mr. Tuttle, the BIA followed the procedures set forth in the regulations. The Agency Superintendent together with the Tribes first sent a Notice of Default to Mr. Tuttle on September 30, 2009 pursuant to section 618. The Notice of Default set forth in detail the nature of Mr. Tuttle's violations of the Lease, and it advised Mr. Tuttle that he had ten days from his receipt of the notice to cure the identified violation, dispute the Superintendent's determination, or request additional time to cure the violation. AR0000026-0000030.

In his initial reply to the Notice of Default, in October 2009, Mr. Tuttle requested additional time beyond the cure period provided by the regulations. AR0000401. In his subsequent reply received a few days later, Mr. Tuttle purported to cure the identified violations. Contrary to the Lease's requirements, however, Mr. Tuttle provided only an uncertified estimate of his gross receipts and declined to incur the expense of having a certified public accountant prepare and verify this information. AR0000227-228; AR0000156-157. Mr. Tuttle also did not provide evidence of insurance as required by the Lease. Rather, he merely enclosed an invoice showing that he had paid for a policy of public liability insurance, but which did not show the

Tribes as a co-insured or the amounts of coverages, or that he was carrying fire insurance covering the leased premises. AR0000158. Five months later in March 2010, long after the cure period provided in the Lease had expired, when Mr. Tuttle still had not cured the violations identified in the Notice of Default, the Superintendent decided to cancel the Lease and sent the Notice of Cancellation to Mr. Tuttle by certified mail as required by section 162.619 of the regulations.

Having followed its regulations governing notice of cancellation, the BIA could then have proceeded to terminate the Lease pursuant to its terms, which allowed it to either "proceed by suit or otherwise to enforce collection or to enforce any other provision" of the Lease pursuant to Article 17A of the Lease Addendum; or "[r]e-enter the premises and remove all persons and property therefrom . . . and either (1) [r]e-let the premises without terminating th[e] [L]ease [or] (2) [t]erminate the [L]ease at any time" as provided by Article 17B. The BIA has not yet taken the eviction and re-leasing steps set forth in Article 17, however, because the cancellation and thus, the actual "termination," of the Lease have been stayed by Mr. Tuttle's appeals, first to the Acting Regional Director, then to the IBIA, and now, in this Court. As a result, the BIA has not been able to re-enter and re-let the premises or otherwise fully effectuate the termination process as Mr. Tuttle claims it was required to do by Article 17 of the Lease Modification, and the Lease has not been, nor can it yet be, "terminated" within the meaning of Article 17 of the Lease Addendum. Meanwhile, for now nearly five years throughout the pendency of the appeals and to this day, Mr. Tuttle has continued to reside and presumably do business on the leased premises in flagrant disregard for his obligations under the Lease.

C. The BIA's Decisions Concerning Lease Cancellation Did Not Violate the Leasing Act or the Corresponding Regulations.

On summary judgment, Mr. Tuttle argues that in issuing the Notice of Cancellation, the BIA delegated its responsibilities for lease cancellation to the Tribes. Mr. Tuttle claims that this supposed delegation exceeded Congress's statutory grant of authority to the Secretary of the Interior and that the alleged delegation violated the Due Process Clause of the Fifth Amendment. Pl's Mem. 25-26. Mr. Tuttle's arguments in this regard are, however, based on his misunderstanding of the facts concerning the Tribes' involvement in the cancellation decisions.

First, contrary to Mr. Tuttle's understanding, and as Defendants explained in their Opposition to Plaintiff's Motion for Order to Supplement the Administrative Record, ECF No. 17 at 9, the BIA and CRIT did enter into a contract under the Indian Self Determination Act, Public Law No. 93-638, 88 Stat. 2203 (1975),[7] for real estate management services, including the administration of leases of tribal lands. As Defendants also explained previously, under such contracts, it is common practice for the BIA to communicate with a tribe as its contractor concerning lease instruments and lease transactions, including notices of default and cancellation of leases. Decl. of Stan Webb in Supp. of Opp'n to Pl.'s Mot. for Order to Supp. Admin. Record, ECF 17-1, ¶ 8. In accordance with this common practice, in September 2009, following the IBIA's remand of the Regional Director's 2005 decision, the BIA consulted with the Tribes to recalculate the interest owed on past due rent and determine the amount of the offset owed to Mr. Tuttle and what amount, if any, Mr. Tuttle still owed under the Lease as reflected in the Tribes' records. AR Supp. 25. The Tribes' involvement in drafting the Notice of Default and issuing that Notice on September 30, 2009 was appropriate because much of the information was

[7] Contracts under the Indian Self Determination Act are commonly known as 638 contracts.

then with the Tribes as the Tribes were in possession of the information Mr. Tuttle's payment history under the Lease. That information was required in order to apply the IBIA's determination to the facts calculate the offset owed to Mr. Tuttle and then, prepare the Notice of Default. For this reason, the Notice of Default was drafted by the Tribes and issued jointly by the Tribes and the BIA.

Mr. Tuttle focuses on two e-mail messages among the additional documents that Defendants produced as responsive to the Court's Order on Plaintiff's motion to supplement and reads these e-mails out of context as showing that BIA abdicated its responsibility for making the decision to cancel the Lease and gave that responsibility over to the Tribes. *See* Pl.'s Mem. at 13-14, ¶¶ 58-61. To the contrary, however, these e-mails reflect, at most, that there was a delay and some miscommunication between the BIA and the Tribes about calculating the offset owed to Mr. Tuttle and preparing the Notice of Default and that the Tribes became sufficiently frustrated by the delay that they took on the drafting responsibilities in order to move the process forward. ARSUPP000025. The e-mail messages show that the Tribes also assisted in drafting the Notice of Cancellation. *Id.* Contrary to Mr. Tuttle's contentions , however, the e-mails show that the Superintendent and agency staff reviewed and commented on the Notice of Cancellation, *see e.g.*, AR0000228; AR0000233; AR0000234-236, and further confirm that the Superintendent made the decision to cancel the Lease and signed the Notice as the independent decision of the agency. *See* AR000023 (stating that BIA had made "its own administrative decision" concerning issuance of Notice of Cancellation, and therefore agency should prepare the administrative record of that decision).

In sum, the record in this case shows that the Tribes, as contractor, and applying BIA standards were "involved in preparing" the Notice of Default and the Notice of Cancellation.

AR Supp. 25. The record does not support Mr. Tuttle's contention that CRIT was the decisionmaker, and the record in no way demonstrates that the BIA abdicated its responsibility to reach a decision to provide notice to Mr. Tuttle of its decision to cancel the Lease. Instead, the BIA reasonably considered the facts and independently determined that cancellation of the Lease was appropriate.

With respect to Mr. Tuttle's newly raised due process claim, first, this claim is not within Plaintiff's Complaint, and the Court need not address this argument on that basis alone. Moreover, as discussed below, because Plaintiff cannot claim a property interest in a business lease, there can be no due process violation in the cancellation of a lease.

Procedural due process imposes certain requirements on government decisions depriving an individual of an interest in life, liberty, or property. *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). "The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999). If a government action does not deprive an individual of such an interest, the due process guarantee does not require any hearing or process whatsoever – even if the challenged action adversely affects that individual in other ways. *See e.g., O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773 (1980). Thus, "only after finding the deprivation of a protected interest" may the Court proceed to considering Plaintiff's allegations regarding procedural defects in the application of the leasing regulations to the BIA's lease cancellation decisions. *See Am. Mfrs. Mut. Ins. Co.*, 526 U.S. at 59; *Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594, 598 (D.C. Cir. 1993) ("If the party has a protected interest, we then decide how much process is due.") (internal quotation omitted).

Mr. Tuttle does not hold a property interest in a business lease. *See S & D Maintenance Co., Inc. v. Goldin*, 844 F.2d 962, 966 (2nd Cir. 1988) ("An interest in enforcement of an ordinary commercial contract with a state is qualitatively different from the interests the Supreme Court has thus far viewed as 'property' entitled to procedural due process protection."). The BIA's decisions to cancel the Lease thus do not deprive him of any property interest and he cannot prevail on his due process claim.

D. Plaintiff Cannot Relitigate the Ownership Status of the Land or the Validity of the Lease Modification.

Finally, Mr. Tuttle's repeated attempt to relitigate the substantive grounds for the BIA's decision to cancel his lease, re-hash the validity of the 1986 Lease Modification, and re-visit the ownership status of the leased premises should be summarily rejected. In March 2010, five months after it had issued a notice of violation pursuant to the leasing regulations, the BIA reasonably found that Mr. Tuttle: 1) had "failed to provide to the Bureau or the Tribes either a sufficient certified statement of gross receipts, or any accompanying opinion rendered by a certified public accountant . . . as required by the terms of the Lease[,]"AR 0000022-23; 2) remained in default for nonpayment of percentage rents under the Lease because he had provided no information to calculate the amount of percentage rents owed, *id.*; 3) had never submitted the proof of insurance that the Tribes as Lessee reasonably required; AR000023; and therefore, contrary to Mr. Tuttle's alleged facts in his summary judgment motion, 4) that Mr. Tuttle had failed to cure these violations "within the period provided by law." *Id.* The Regional Director and the IBIA subsequently affirmed the Superintendent's finding that he had not cured the violations within the time periods prescribed by the lease or in the leasing regulations. AR0000125; AR0000282.

With respect to Mr. Tuttle's contentions that the Lease itself was the sole consideration for giving up land that he owned in fee, and that he was later coerced into signing the Lease Modification, these stale arguments serve only to bolster Mr. Tuttle's efforts to re-cast what is, at bottom, a straightforward landlord-tenant dispute about a tenant's continuing failure to pay rent and otherwise abide by the terms and conditions of his lease. And in any case, both arguments have long since been rejected in judicial and administrative decisions. (*United States v. Brigham Young Univ., et al.*, No. CV 72-3058-DWW (C.D. Cal. 1977), AR 0000390, ("The United States is the owner in trust for the Colorado River Indian Tribes" of land including the leased premises , and "is now, and has at all times been, the owner, and entitled to possession . . . of the real property . . . ."); *Tuttle v. Acting W. Regional Director*, No: IBIA 05-79-A (Feb. 7, 2008), AR0000052-53, (noting Mr. Tuttle's more than fifteen year delay in alleging coercion and affirming Regional Director' decision to recognize Lease modification as valid and enforceable.)

V. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiff's claims for lack of subject matter jurisdiction based on Plaintiff's lack of prudential standing to pursue them under the Administrative Procedure Act; or alternatively, if the Court finds that Plaintiff's claims are justiciable, that the Court deny Plaintiff's Motion for Summary Judgment and grant summary judgment in favor of Defendants.

Dated: July 29, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2014, I electronically filed the foregoing Defendants' Cross-Motion for Summary Judgment and Memorandum in Support and in Opposition to Plaintiff's Motion for Summary Judgment with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all listed counsel of record.

/s/ Barbara M.R. Marvin
Barbara Marvin