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.	)	
	)	

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN (1) OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND (2) SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

This action challenges the Defendants' premature termination of Plaintiff's 50-year lease (the "Lease") on federal land. The Lease was executed on March 31, 1977, and is not due to expire until 2027. *See* Business Lease No. B-509-CR (AR0000077-107).

The Lease was amended only one time after execution on June 2, 1986. *See* Lease Modification No. 1 (AR000074-076).

The Plaintiff owned the land in fee simple title prior to executing the Lease and surrendered his title in return for the Lease "under both legal and financial pressure from the United States government." Compl. ¶ 13; (Docket #1); Declaration of William C. Tuttle ("Tuttle Decl.") ¶ 6 (Docket #24-2). The sole consideration Plaintiff received in exchange for surrendering fee title was a leasehold interest in the same land. Compl. ¶ 15; Tuttle Decl. ¶ 8.

Lease Modification No. 1 required Plaintiff to agree to two additional concessions without receiving any consideration in return. These new concessions consisted of (1) remitting rental payments increased by an amount equal to three percent of the gross receipts of all business conducted on the land and (2) obtaining annual audits of all revenues generated on the land to be prepared by a Certified Public Accountant to be retained by him personally. Plaintiff alleges that he accepted Lease Modification "as the result of legal and financial pressure" from the Defendants and Colorado River Indian Tribes ("CRIT" or "Tribe"). Compl. ¶ 26; Tuttle Decl. ¶ 10. Significantly, the Lease Modification states the following: "This modification does not change any of the terms, conditions or stipulations of Lease No. B-509-CR except as specifically set forth herein." (AR0000076)

In the Complaint, Plaintiff alleges the Lease termination decision was conducted in a manner that ignored the Lease's termination requirements – specifically, Defendants failed to

follow the very precise process required for an early termination as enumerated in the Lease itself at Lease Addendum ARTICLE 17, which provides in pertinent part:

> **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 in the Lease providing for an early lease termination, and they clearly limit default decisions and termination actions to the Secretary of the Interior. By the specific provisions of Lease Modification No. 1, the above-quoted default/termination provisions were not modified in 1986.

In a combined memorandum (hereinafter "Defs.' Mem."), Defendants advance various arguments in opposition to Plaintiff's Motion for Summary Judgment and in support of their Cross-Motion for Summary Judgment. It is unclear which of Defendants' arguments are related to each motion, but Plaintiff in this Memorandum responds first to the arguments apparently advanced in support of Defendants' Cross-Motion for Summary Judgment and then replies to the arguments apparently related to Defendants' Opposition to Plaintiff's Motion for Summary Judgment.

The following argument reinforces Plaintiff's claims that the cancellation was illegally delegated to CRIT for decision and document drafting. That the Acting Regional Director's

accepted CRIT's decision without any independent determination only reinforces the illegality of this Lease termination. As explained in Section III, *infra*, the Acting Regional Director stated his belief that the Department of the Interior could not render any decision other than a decision formulated or approved in advance by CRIT.

II. PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT.

Defendants assert that Tuttle's claim under the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.* ("APA"), is defective as it "does not allege that Defendants violated any statute other than the APA itself," Defs' Mem. at 20, and that Tuttle lacks prudential standing to bring his case. Defs.' Mem. at 21. Defendants' APA argument fails because (a) the APA imposes no such requirement, and (b) Tuttle has alleged contractual and statutory violations by Defendants sufficient to trigger APA review. Further, Defendants' argument that Plaintiff lacks prudential standing contradicts recent Supreme Court authority.

A. Tuttle's Complaint Alleging Defendants' Violation of the Lease Termination Triggers APA Review.

Government participation in an illegal Lease termination is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" by its own terms. This is true even where there is no statutory violation–that is, a legal wrong can arise in the context of contractual provisions as well. Notwithstanding the various statutory violations alleged by Plaintiff and summarized *infra*, judicial review is not limited to statutory violations under the APA, which states:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. § 702 (emphasis added). Congress's definition of the APA scope of review in 5 U.S.C. § 702 is intended to create a remedy for two distinct categories of injuries: (1) injuries related to

agency action outside of a statutory framework and (2) injuries resulting from an agency's statutory violation. The inclusion of the conjunction "or" unambiguously divides the statutory requirement from the first category.[1] The Supreme Court recognized this distinction in *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (U.S. 1990), stating:

> the party seeking review under § 702 must show that he has "suffered legal wrong" because of the challenged agency action, or is "adversely affected or aggrieved" by that action "within the meaning of a relevant statute." Respondent does not assert that it has suffered "legal wrong," so we need only discuss the meaning of "adversely affected or aggrieved . . . within the meaning of a relevant statute."

Id. at 883.[2]

The injury caused by Defendants' conduct in fact falls into both categories. In his Complaint, Tuttle alleged that Defendants' failure to allow him an adequate opportunity to cure and otherwise observe the Lease termination provisions violated his contractual rights under the Lease. *See* Compl. ¶¶ 39, 48, 53, 55-63. This allegation alone is sufficient to trigger judicial review of the Lease termination under the first category of injury described in Section 702. In his Motion for Summary Judgment (Docket # 24), Tuttle identified further injuries caused "by agency action within the meaning of a relevant statute," described below.

Defendants' authority, consisting of cases requiring specific allegations of violation of a second "substantive" statute for APA review, is confined to the second category of injury. No such statute is necessary for judicial review of Tuttle's claim that the Lease termination violated the Lease itself.

B. Plaintiff Alleged Numerous Substantive Violations of the Lease Termination Requirements, Relevant Statute and Interior Regulations.

[1] Congress' intent to create two separate categories of agency action reviewable by federal courts, one related to statutes and one not, is buttressed by its inclusion of separate standards for each category: for non-statutory complaints, judicial review is available for any person "suffering legal wrong," but for statutory complaints, judicial review is available for any person "adversely affected or aggrieved by agency action."

[2] *See also Alabama Coushatta Tribe of Texas v. United States*, No. 13-40644 (5th Cir. July 9, 2014) ("Section 702 also waives immunity for two distinct types of claims. It waives immunity for claims where a 'person suffer[s] legal wrong because of agency action.' 5 U.S.C. § 702 ... Section 702 also waives immunity for claims where a person is 'adversely affected or aggrieved by agency action within the meaning of a relevant statute.' 5 U.S.C. § 702.")

1. Defendants' Approval of Unlawful Lease Termination Violated the Indian Long-Term Leasing Act.

Tuttle alleged that "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, 25 U.S.C. § 415, as delegated to Defendants and must be set aside." Pl.'s Mot. Summ. Judgment at 25. The Indian Long-Term Leasing Act defines the Government's role in administration of leases of Indian land and does not provide (and the Defendants' own regulations also do not provide) for a delegation to the Tribe of the approval role. Plaintiff's Motion for Summary Judgment described how Defendants' delegation of its approval role was arbitrary, capricious, and otherwise not in accordance with law. Pl.'s Mot. Summ. Judgment at 16-23. This allegation triggers judicial review as Tuttle was "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702.

2. Defendants' Illegal Delegation of the Termination Process to CRIT Violated Plaintiff's Constitutional Due Process Rights.

Tuttle alleges that Defendants violated his rights to constitutional due process: "procedural due process imposes constraints on governmental decisions which deprive individuals of property interests guaranteed by the Due Process Clause of the Fifth Amendment … Due to the fact that the [Interior Board of Indian Appeals ("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." *Id*. at 26-27. This allegation triggers APA review under Section 702.

Defendants, astonishingly, argue that the Lease termination did "not deprive him of any property interest and he cannot prevail on his due process claim." Defs.' Mem. at 31. Defendants cite a single Second Circuit case, *S & D Maint. Co., Inc., v. Goldin*, 844 F.2d 962 (2nd Cir. 1988), to support this novel proposition. However, that case, in which an unpaid

contractor sued New York City for violating his due process rights, has no useful authority to offer this Court in this matter.

First, the *Goldin* Court held that the "constitutionally dispositive consideration" causing it to dismiss the contractor's claim was that the contract at issue allowed unilateral termination and therefore "did not create a property interest in non-termination in the first place" *Id.* at 968. The Court held that "[t]he unconditional termination power conferred by Article 44 is fatal to S & D's asserted property interest in non-termination." *Id.* Tuttle's Lease contains no such unilateral termination provision.

Second, the subject of Plaintiff's interest is not in "the enforcement of an ordinary commercial contract." Defs.' Mem at 31 (quoting *Goldin,* 844 F.2d at 966). The Fifth Amendment states that "No person shall … be deprived of life, liberty, or property, without due process of law." Tuttle does not allege the loss of a government entitlement as the plaintiff in *Goldin* did. Tuttle he seeks to avoid the loss of an interest in land−real property. A leasehold interest is a constitutionally protected property interest despite Defendants' bizarre claim to the contrary.

3. Defendants' Delegation of Lease Termination Violated the Indian Self-Determination and Education Assistance Act.

Tuttle alleges that the regulations implementing the one federal statute which does allow the BIA to transfer lease administration responsibilities to Indian tribes, the INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT, 25 U.S.C. 450f, *et seq.*, expressly prohibit Tribes from performing Lease cancellations. Pl.'s Mot. Summ. Judgment at 21. Defendants' apparent delegation to the Tribe of the Lease cancellation decision is therefore *ultra vires* and triggers judicial review of that agency action.

C. The Supreme Court Has Curtailed the Prudential Standing Test and Tuttle's Complaint Satisfies the Lowered Requirements of the Test.

To demonstrate prudential standing, the interest asserted by a plaintiff must be "arguably within the zone of interests to be protected or regulated by the statute" that he says was violated. *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970). Plaintiff's reliance on outdated interpretations of this test from non-controlling federal circuits is questionable considering the Supreme Court's restatement of the doctrine in two recent cases: *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (U.S. 2012) and *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. ___ (2014).

1. Plaintiff's Complaint Satisfies the Prudential Standing Test Articulated by the Supreme Court in Its *Patchak* and *Lexmark* Decisions.

In the Supreme Court's recent articulation of the prudential standing test, the Court reiterated that the test "is not meant to be especially demanding." *Patchak*, 132 S. Ct. at 2210 (quoting *Clarke v. Securities Industry Assn.*, 479 U.S. 388, 399, 107 S. Ct. 750, 93 L. Ed. 2d 757 (1987) (emphasis added). A plaintiff complaining of a statutory violation need not show "any indication of congressional purpose to benefit the would-be plaintiff" in the statute. *Id.* The Court emphasized that the prudential standing test must service Congress' purpose in enacting the Administrative Procedure Act "to make agency action presumptively reviewable." *Id.* (emphasis added). Furthermore, "the benefit of any doubt goes to the plaintiff." *Id.* The Court stated that defendants face a difficult burden in challenging a plaintiff's prudential standing to bring a claim:

> The test forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.

Id. (emphasis added).

Patchak is particularly on-point as it presented the Supreme Court with the question of whether a non-Indian plaintiff could invoke Section 5 of the INDIAN REORGANIZATION ACT OF 1934, 25 U.S.C. § 465 ("IRA"). That Section authorizes the Secretary of the Interior to acquire property "for the purpose of providing land to Indians." The plaintiff in Patchak sought adjudication of his complaint that the use of the property as a casino would injure him by "destroy[ing] the lifestyle he enjoyed" prior to the United States' acquisition. *Id*. at 2203. The Court held that the plaintiff had prudential standing under the IRA. *Id.* at 2211.

The Court determined that the IRA's "regulatory ambit"–its zone of interests–is land use, because the IRA's implementing regulations require the Secretary to consider whether the "land is necessary to facilitate tribal self-determination, economic development, or Indian housing",[3] "[t]he purposes for which the land will be used" and the "potential conflicts of land use which may arise."[4] *Id*. at 2211. These regulations demonstrated to the Court that the "statute's implementation centrally depends on the projected use of a given property." *Id*. Because *Patchak*'s interests in the enjoyment of his property fell within the expansive zone of interests of the IRA−land use−he had prudential standing to maintain his suit. *Id*. at 2212.

The Supreme Court issued its latest statement on the prudential standing test earlier this year in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. ___ (2014), finding that the judge-created doctrine is in tension with the Court's recent statement that "a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Id.* at 9 (citing *Sprint Commc'n, Inc. v. Jacobs*, 571 U. S. ___ (2013) (slip op., at 6) (internal quotations omitted).

[3] 25 CFR § 151.3(a)(3).
[4] *Id*. at §§ 151.10(c), 151.10(f).

Importantly, the *Lexmark* Court backed away from the prudential standing doctrine as contrary to the intent of Congress, stating "[j]ust as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because "prudence" dictates." *Id*. at 9 (internal citation omitted).

While *Lexmark* was brought under the Lanham Act and not the APA, the *Lexmark* Court quoted its decision in *Patchak* to reiterate that, in the APA context, the prudential standing "zone-of-interests" test is a very low bar for plaintiffs to overcome, provided that the injury asserted bears at least some marginal relation to the governing statute. *Id* at 11 (quoting *Patchak*, slip op., at 15-6). The *Lexmark* Court held that the zone-of-interests test and a simple "proximate-cause" requirement together form the appropriate "prudential standing" test governing which plaintiffs may assert a given cause of action. *Lexmark*, slip. op. at 6. The Court summarized the proximate-cause requirement as simply "whether the harm alleged is proximately tied to the defendant's conduct." *Id* at 18.

Tellingly, neither the *Patchak* nor *Lexmark* opinions mention *Hollywood Mobile Estates Limited et al. v. Seminole Tribe of Florida et al.*, 641 F.3d 1259 (11th Cir. 2011), upon which Defendants heavily rely. This suggests that the current Supreme Court would likely reverse the Eleventh Circuit's holding in that case (regarding the Indian Long-Term Leasing Act) under the *Patchak* and *Lexmark* analysis.

Defendants contend that the purpose of the Indian Long Term Leasing Act is protection of Indian tribal lessors, not non-Indian lessees like Plaintiff. Defs.' Mem. at 22. But the Supreme Court made clear in *Patchak* that prudential standing does not require "any indication of congressional purpose to benefit the would-be plaintiff." *Id*. (internal citation omitted). Accordingly, Defendants' recitation of the purposes of the Indian Long-Term Leasing Act is

irrelevant to this Court's inquiry. The appropriate inquiry under *Patchak* is to determine the Indian Long-Term Leasing Act's broad regulatory ambit−"the zone protected or regulated by the statute"−by examining the statute and its implementing regulations, and compare them to the injury asserted. *Patchak*, 132 S. Ct. at 2211.

Contrary to Defendants' assertions that the Indian Long Term Leasing Act only protects the interests of Indian tribes, the statute itself expressly contains, *inter alia*, provisions protecting non-tribal parties − most importantly, a judicial forum in the case of a dispute arising between parties to a lease: "Prior to approval of any lease or extension of an existing lease pursuant to this section, the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to… the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject." 25 USC § 415. It is more than passing irony that Defendants, arguing that the Act protects only Indian tribes, ask this Court to deny Plaintiff the forum expressly guaranteed by Congress in the text of the INDIAN LONG-TERM LEASING ACT.

More specific protections for lessees can be found in the Interior Department's regulations implementing the Act. These are the specific provisions Defendants violated in terminating the Lease. Title 25 CFR § 162.618 provides that, in the event that the Secretary determines that a lease of Indian land has been violated, the lessee must (1) be provided notice and (2) an opportunity to cure the alleged violation within ten days. Section 162.619 sets out the process for cancellation and mandates the government provide various notices to lessee including the right to appeal its decision.

Together, the statute and regulations demonstrate that the "regulatory ambit" of the Indian Long-Term Leasing Act is, broadly, "leasing of Indian land." The statutory and regulatory

framework provides protections for both Indian lessors and non-Indian lessees of tribal land. As described, *supra,* and in Plaintiff's Motion for Summary Judgment, Defendants failed to follow their own regulations, and the resulting injury clearly falls within the "regulatory ambit" or "zone of interests" of 25 U.S.C. § 415.

Finally, under *Lexmark's* "proximate-cause" test, there is no serious argument that Plaintiff has not alleged that Defendants' actions are proximately tied to his injury. Tuttle's suit clearly satisfies the low bar for prudential standing articulated in *Patchak* and *Lexmark*.

2. Defendants' Authority Regarding Prudential Standing Is Inapposite.

Defendants cite *Hollywood Mobile Estates, supra,* for the proposition that the INDIAN LONG-TERM LEASING ACT cannot provide a cause of action for anyone but Indian lessors of land. Defs.' Mem at 22. Notwithstanding the fact that *Hollywood Mobile Estates* is not binding on this Court, and would likely have been a different result under the Supreme Court's restatement of the prudential standing test in *Patchak*, see *infra*, *Hollywood Mobile Estates* is distinguishable from this case.

Hollywood, a non-Indian business lessee, filed a complaint in federal court seeking a "temporary restraining order or a preliminary injunction" to prevent an Indian tribe from initiating cancellation proceedings based on alleged lease violations. *Id*. at 1262. Unlike Tuttle, Hollywood did not allege that the government defendants had executed or approved the cancellation. In fact, after Hollywood filed its complaint, the Tribe did request the BIA to cancel the Lease–which BIA declined to do, determining that Hollywood had not breached the lease. *Id*. The Eleventh Circuit held that Hollywood lacked standing because "[a]lthough Hollywood alleged an imminent injury, Hollywood failed to allege that its injury was fairly traceable to the Secretary." *Id*. at 1265 (emphasis added). Hollywood named the Secretary as a defendant, "but failed to allege an action of the Secretary that had caused Hollywood any injury." *Id*. at 1265-66.

The Eleventh Circuit emphasized that "the Secretary played no role in that action. The Tribe acted unilaterally against Hollywood."[5] *Id*. at 1266.

Hollywood Mobile Estates is clearly and materially distinguishable from this case. While in that case all the allegations were directed to the tribe, Tuttle has clearly and repeatedly alleged Defendant's active role in both issuing the Notice of Default and Notice of Cancellation and affirmatively approving the Lease Cancellation. Tuttle's Complaint clearly alleged Defendants' role in the unlawful Lease Termination. *See* Compl. ¶¶ 39, 48, 53, 55-63.

To the extent that the result in the NEPA case of *Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1031 (8th Cir. 2002), applies to this matter, the Eighth Circuit's passing statement that the plaintiff lacked standing under 25 U.S.C. § 415 is overruled by the Supreme Court's restatement of the test in *Patchak*, which substantially lowered the burden required to establish prudential standing.

III. PLAINTIFF'S REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

A. Response to Defendant's "Factual Background" − Neither the AR, the AR SUPP or Defendants' Statement of Facts Demonstrate the Independent Review by Defendants Required for Termination of Plaintiff's Lease.

When the original Administrative Record ("AR") was filed herein, Plaintiff recognized that a considerable body of communications between him and the Defendants was not included, and so he timely moved to have the Defendants supplement the AR accordingly. Over vigorous objection from the Defendants, this Court granted Plaintiff's motion. The resulting document yield disclosed that virtually the entire default and termination process was determined by CRIT – including writing the initial drafts for the relevant documents that in turn were adopted by the Defendants as their own. These facts were discussed in detail in Plaintiff's Motion for Summary Judgment and need not be repeated here. However, the Defendants' Opposition and Cross

[5] In contrast, Tuttle's Lease limits any determination of Default and Lease Termination to the Secretary and precludes any tribal role in that process.

Motion for Summary Judgment aggressively denied that CRIT made any decisions and repeatedly declared without documentation that all decisions were duly considered by the federal decision-makers and rendered in accordance with the Lease and federal law.

These denials appear to be directly contradicted by many documents within the AR SUPP. However, the extent of contradiction is difficult to determine due to a number of redactions on various AR SUPP documents that partially conceal the extent of the close coordination between the Defendants and CRIT during the entire administrative process resulting in this litigation. Still, it is beyond dispute that CRIT was directly involved in developing the decision documents declaring Default and Termination. Notwithstanding those extensive redactions – some of which obliterated the entire content of some emails exchanged between them – it remains possible to determine that close coordination.[6]

The Defendants argue that every decision was made by federal officials independently of CRIT's (a) recommendations and (b) draft written materials that are virtually identical to those propounded and served on Plaintiff. The Defendants then essentially reiterate that every document they served on the Plaintiff was the product of a exclusively-federal decision and entirely consistent with (i) the Lease documents and (ii) regulations they deemed relevant without regard to, or reconciliation with, the requirements of Lease Addendum ARTICLE 17. In advancing this argument, the Defendants stated the following at pages 15-16 of their Opposition (Docket #28):

[6] Documents within AR SUPP were substantively redacted prior to being served on Plaintiff; nonetheless, it is still possible to glean from them evidence that CRIT's legal team was directly involved in drafting proposed decision materials that were in turn forwarded to Defendants for review, edits and return to CRIT for finalization. (*See, e.g.,* AR SUPP 000022-25, 000085, 000088-100, 000219-225, 000261-263.) In addition, a great number of them disclose that CRIT was directly involved in compiling the original Administrative Record. (*See, e.g.,* AR SUPP 000030-35, 000037, 000041, 000045, 000047, 000088-100.) And others disclose a close coordination between CRIT and the Defendants in developing legal strategy for defense of Tuttle's claims, strategy which is repeated throughout their court filings even though at least some of it was based on false assumptions of fact. (*See, e.g.,* AR SUPP 000148, 000151-152, 000154, 000156, 000159-160, 000198.) They also reveal that CRIT's outside legal counsel was consulted by CRIT for review and comment on various matters that should have been reserved for government counsel and decision-makers. (AR SUPP 0000219-225.)

> 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 submission, you would no longer have had the right to cure the default without the express waiver and consent of [CRIT] (your right to cure having expired at the end of the cure period provided by the Lease.)" AR000125 (Emphasis supplied.)

The Defendants failed to disclose, however, the context for the Acting Regional Director's statement, which was that the cancellation decision was delegated to CRIT through a regulation that could not be applied to this Lease—*i.e.*, the Lease's own terms dictate that only the Secretary could make such a decision. The context was stated in the paragraph of the July 19, 2010, letter that preceded Defendants' declaration that Tuttle would have had no right to cure the default without CRIT's express waiver and consent:

> At 25 *CFR* § 162.619(a), our regulations provide that where a lessee fails to cure within the requisite time period, we should consult with the Indian landowner and determine whether the lease should be cancelled. AR 0000125-26 (emphasis added).

In relying on this totally irrelevant regulation, the Acting Regional Director invoked 25 *CFR* Part 162 for the principle that CRIT was the actual decision-maker since no decision could be made without CRIT's consent, regardless of the facts or whether the decision was positive or negative. In essence, he disclosed his belief that the Department could not render any decision other than a decision formulated or approved in advance by CRIT.

Moreover, the federal fealty to CRIT in virtually every decision affecting the Termination of Plaintiff's Lease has been extended to allowing CRIT to participate in the defense of this litigation, as shown at Footnote 6, *supra*, which identifies various documents from the AR SUPP that were redacted in part but still make clear that the federal officials conducting this litigation

continue to make decisions based on CRIT's desires. The documents cited in Footnote 6 provide a snapshot of the CRIT involvement: (1) CRIT was involved in drafting decision materials that were forwarded to Defendants for review, edits and return to CRIT for finalization; (2) CRIT was directly involved in compiling the original AR; (3) the Defendants closely coordinated the legal strategy for this litigation with CRIT; and (4) CRIT's outside counsel was even directly involved in the tribal review and comment on various matters that should have been reserved for government counsel and decision-makers. The litany could go on beyond these issues, but the ongoing federal reliance on CRIT's input demonstrates that CRIT continues to have a veto over federal decisions affecting the Lease and this litigation.

For example, the CRIT control over even the AR is demonstrated by an email memorandum from Doug Bonamici, a CRIT Law Clerk in the Office of the Tribal Attorney General in which he advises federal officials of tribal approval of the very Administrative Record that this Court found inadequate and ordered to be supplemented. He went on to assert that CRIT wanted to be involved in briefing the issues for this litigation. Law Clerk Doug Bonamici stated the following in an email dated November 9, 2010:

> We do not have any objection to the record - it looks like it represents our interests and concerns very well, but we would like to have the opportunity to brief any issues that may arise once the case moves forward. In your experience, will the Docketing come later - I note no number is entered in our copy of the Admin, Record either.
>
> Thanks- your insights will be appreciated. Db
>
> AR SUPP 191 (Emphasis supplied.)

The decision-making role of CRIT throughout the entire process has been in contravention of the Lease requirements and restrictions, and apparently continues to this day.

In light of the federal deference to CRIT in all matters relating to the Tuttle Lease Termination, it should be no surprise that CRIT and the Acting Regional Director invoked the

regulation at 25 *CFR* § 162.619(a) rather than the Lease termination provisions in ordering cancellation of the Lease (AR0000126). Indeed, in order terminate the Lease as demanded by CRIT, they had to rely on the regulations since ARTICLE 17 specifically directs that the entire process be handled by the Secretary and nobody else. And, it is reiterated that the Lease Modification did not impact any portion of the Lease default provisions.

As noted *supra*, Lease Addendum ARTICLE 17 provides that the Secretary must control and perform the default procedure. The Secretary's discretion is limited to two courses of action: either (1) to "Proceed by suit or otherwise" to enforce the Lease without termination, or (2) to re-enter the premises and terminate the Lease. AR 0000100 (emphasis added). Defendants' mistaken belief that their only role was to enforce the Tribe's decision deprived Tuttle of his right to an independent deliberative process by the Secretary that may have had a different outcome than the decision that the AR and AR SUPP shows was demanded by the Tribe. As noted in Plaintiff's Memorandum of Points and Authorities in Support of Summary Judgment, Tuttle was entitled at the very least to an independent and extensive analysis that was insulated from CRIT's bias. (Docket # 24-1).

By relying on Part 162, the Acting Regional Director ignored critical elements required for Lease cancellation: (1) he embraced a process allowing CRIT to dictate the decision which he then promulgated, and (2) he abandoned the strict Lease provisions for early termination by invoking Part 162−a course of action necessitating that he ignore the fact that those regulations were not published until March 30, 1982, or some five years after the Lease was executed.[7] He further ignored the 1986 Lease Modification's unequivocal assertion that it did not alter any Lease provision other than the new financial requirements being forced upon the Plaintiff under "legal and financial pressure."

[7] Part 162 of 25 *CFR* was published at Vol. 47 *Fed. Reg.* 13326 (Mar. 30, 1982).

In summary, Defendants delegated the Lease termination to the Tribe in express violation of its terms. Their purported observance of the Part 162 Regulations is irrelevant as the Lease expressly contemplates that any termination must be executed exclusively by the Secretary pursuant to ARTICLE 17 devoid of CRIT's influence.

B. Plaintiff Seeks to Litigate the Legality of his Lease Termination and Has Never Suggested "Relitigating" Title to the Land.

Defendants complain that Tuttle attempts to "relitigate the substantive grounds for the BIA's decision to cancel his lease." Defs.' Mem. at 31. Plaintiff's action is not a "relitigation" of the Lease cancellation – it is his exercise of a right granted by Congress to seek judicial review of an injury caused by Defendants' action. This is the first judicial review of Tuttle's Lease cancellation. Moreover, this is the only review by any forum of Defendants' wrongful lease termination in which the facts revealed by the AR SUPP are before the decision-maker. It is hardly a "relitigation."

IV. CONCLUSION

Plaintiff Tuttle filed a Supplemental Reply Brief with the IBIA on March 7, 2011, in which he stated the following: "[I]f the Lease is cancelled, Appellant, at age 88, in ill-health, and his spouse, could be left without a home." AR0000337, 0339. As of this date, he is at least 91 years old and remains in ill health. CRIT's fervor to get him off of the leasehold at the earliest possible date is documented, but cannot be reconciled with any humane consideration of evicting an elderly man and his wife after they satisfied all of the requirements of the Lease and Lease Modification No. 1. The Lease provided strict guidelines for a declaration of Default and Termination by the Secretary. However, it also provided for Secretarial discretion at ARTICLE 17(a) to proceed with collection of overdue payments rather than eviction. AR0000100. Nothing in the AR or AR SUPP even hints that this option was considered. Plaintiff surrendered fee title to land under legal and financial pressure, for which he was given a 50-year leasehold

estate. The facts of his personal story, starting at the time he was forced to surrender fee title and continuing to the present date, should not have been ignored by the Defendants, but they were forgotten in CRIT's drive to "get the Tuttles out." This is a decision reserved to federal decision-makers and it is one they should be required to render independently of CRIT's pressure for immediate eviction.

For the foregoing reasons, Plaintiff respectfully requests that the Court (1) grant his Motion for Summary Judgment and (2) deny Defendants' Cross-Motion for Summary Judgment.

Dated: August 19, 2014

Respectfully Submitted,

s/Dennis J. Whittlesey

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