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' REPLY IN SUPPORT OF CROSS-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 the following reply in support of Defendants' Cross-Motion for Summary Judgment (ECF No. 26).

I. INTRODUCTION

In this case, the Plaintiff, William C. Tuttle, ("Plaintiff' or "Mr. Tuttle") entered into Lease No. B-509-CR, a "Business Lease," ("the Lease") with the Colorado River Indian Tribes ("the Tribes" or "CRIT") in 1977 pursuant to the provisions of the Indian Long-Term Leasing Act, 25 U.S.C § 415, ("the Leasing Act"), and its accompanying regulations. Pursuant to those regulations, on September 30, 2009, the Tribes and the Bureau of Indian Affairs ("BIA") jointly issued a Notice of Default to Mr. Tuttle, advising him that he was in default under several provisions of the Lease. On March 2, 2010, when Mr. Tuttle failed to cure the defaults, the Superintendent of the BIA's Colorado River Agency decided to cancel the Lease and issued a Notice of Cancellation to Mr. Tuttle. Mr. Tuttle appealed the BIA's Acting Western Regional Director, and then to the Interior Board of Indian Appeals ("IBIA"), both of which affirmed the Agency Superintendent's decision. In March 2013, Mr. Tuttle then filed suit in this Court.

In his complaint, Mr. Tuttle alleges that, in deciding to cancel the Lease, the BIA violated the terms of the Lease and thus acted arbitrarily and capriciously and in violation of the Administrative Procedure Act ("APA"). In seeking summary judgment, he has attempted to broaden his claims to allege violations of the Leasing Act and its accompanying regulations, the Due Process Clause of the Constitution, and also for the first time in his opposition to Defendants' cross motion for summary judgment, the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450f.

First, the contractually-based claims Mr. Tuttle alleged in his complaint are not cognizable under the APA. Moreover, Mr. Tuttle lacks standing to bring his belatedly alleged statutorily-based claims because his interests are inconsistent with – indeed, entirely antithetical to – the Leasing Act's zone of interests. Finally, even if the Court should find that Mr. Tuttle's claims are both cognizable and justiciable and that the Court has subject matter jurisdiction, Mr. Tuttle's contractual, statutory, and due process claims all fail on their merits.

II. ARGUMENT

A. The APA Does Not Provide a Basis for the Court's Jurisdiction for Review of Plaintiffs' Contractual Claims.

In his memorandum in opposition to Defendants' motion for summary judgment, Mr. Tuttle admits that in his complaint he alleged only that Defendants violated his contractual rights under the Lease. Pl.'s Mem. of P & A in Opp'n to Defendants' Cross Mot. For Summ. J., at 4, (ECF No. 33) ("Pl.'s Opp'n"). Mr. Tuttle nevertheless contends that he is "[a] person suffering legal wrong because of agency action" within the meaning of the APA, 5 U.S.C. § 702, and that the Court therefore has jurisdiction to review his contractually-based claims pursuant to the APA. To the contrary, however, the D.C. Circuit's holding in *Transohio Savings Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 609 (D.C. Cir. 1992), instructs that the United States has not waived its sovereign immunity to allow this Court to review and decide claims founded upon contracts.

The D.C. Circuit has interpreted the Tucker Act, 28 U.S.C. § 1491, and the Little Tucker Act, 28 U.S.C. § 1346(a)(2) "as providing the *exclusive* remedy for contract claims against the government, at least *vis a vis* the APA." *Transohio Sav. Bank*, 967 F.2d at 609 (citing *Sharp v. Weinberger*, 798 F.2d 1521, 1523 (D.C. Cir. 1986)), and it has declared that, "[a]s a result . . . §702 of the APA does not waive sovereign immunity for contract actions against the

government." *Id.* Although section 702 entitles "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute . . . to judicial review thereof," 5 U.S.C. §702, the waiver of sovereign immunity afforded under that section applies only to the extent that no other statute "expressly or impliedly forbids the relief which is sought." *Fisher-Cal Indus., Inc. v. United States*, 839 F. Supp. 2d 218, 224 (D.D.C.2012) (quoting 5 U.S.C. § 702). As the D.C. Circuit further held in *Transohio Savings Bank*, and as this Court has frequently reiterated, "[t]he Tucker Act and the Little Tucker Act impliedly forbid relief, other than money damages, for contract claims." *Transohio Sav. Bank*, 967 F.2d at 609 (citing *Sharp*, 798 F.2d at 1523); *Anderson v. Gates*, No. 12-1243 (JDB), 2013 WL 6355385, at *9-10 (D.D.C., Dec. 6, 2013); *Douglas Timber Operators* v. *Salazar*, 774 F. Supp. 2d 245, 261 (D.D.C. 2011); *Wright v. Foreign Serv. Grievance Bd.*, 503 F. Supp. 2d 163, 180-81 (D.D.C. 2007). A number of other circuits have agreed with the D.C. Circuit's interpretation. *See, e.g., Robbins v. Bureau of Land Mgmt.*, 438 F.3d 1074, 1082 (10th Cir.2006) ("[T]he APA does not waive sovereign immunity for claims that arise out of a contract and that seek specific performance of the contract as relief.")); *Up State Fed. Credit Union v. Walker*, 198 F.3d 372, 375 (2d Cir. 1999) (quoting *Presidential Gardens Assocs. v. United States ex rel. Sec'y of Hous. & Urban Dev.*, 175 F.3d 132, 143 (2d Cir. 1999) ("The Tucker Act 'impliedly forbids' relief other than remedies provided by the Court of Federal Claims for actions that 'arise[ ] out of a contract' with the United States."); *Tucson Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 646 (9th Cir. 1998) (claims brought under the APA that are "contractually-based, not statutorily-based . . . are barred by the Tucker Act").

This case is, as Defendants previously observed, "at bottom, a straightforward landlord-tenant dispute" about the cancellation of a lease based on Mr. Tuttle's continuing failure to pay

business rents and otherwise abide by the Lease's terms and conditions. Defs.' Mem. of P. & A. in Supp. of Cross-Mot. for Summ. J. at 32 (ECF No. 27) ("Defs.' Summ. J. Mem."). Thus, Plaintiff's complaints that the cancellation of the Lease violated the Lease's terms and conditions are barred by the Tucker Act, and are not cognizable or justiciable under the APA.

B. The Leasing Act Does Not Afford Mr. Tuttle Standing for His Belatedly Alleged Statutorily-Based Claims.

In his response in opposition to Defendants' motion for summary judgment, Mr. Tuttle claims to have alleged violations of the Leasing Act and its accompanying regulations. Pl.'s Opp'n, 4-5. Tellingly, however, he cites not to his complaint, but rather to arguments he first raised in support of summary judgment. *Id.* at 5. This Court has frequently held that "[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 *Dist. of Columbia v. Barrie*, 741 F. Supp. 2d 250, 263 (D.D.C. 2010) (citing *Sloan v. Urban Title Servs., Inc.*, 652 F. Supp. 2d 51, 62 (D.D.C. 2009) ("Plaintiff cannot amend her complaint by . . . filing a motion for summary judgment; she must amend her complaint in accordance with Fed. R. Civ. P. 15(a)."); *DSMC Inc. v. Convera Corp.*, 479 F. Supp. 2d 68, 84 (D.D.C. 2007) (rejecting the plaintiff's attempt to broaden claims and thereby amend its complaint in opposition to defendant's motion for summary judgment). For this reason alone, Mr. Tuttle's belatedly raised statutorily-based claims should not be considered by the Court,[1] but in any event, Mr. Tuttle cannot prevail on these claims because he

[1] With respect to his attempt to raise claims under Indian Self Determination and Education Assistance Act, Mr. Tuttle did not allege any such claims in his complaint, and in his initial summary judgment memorandum, he asserted that there had been no suggestion that such a contract even exists in this case. Mem. of P. & A. in Supp. of Pl's Mot. for Summ. J. at 21 (ECF 24-1) ("Pl.'s Summ. J. Mem."). In their memorandum in support of summary judgment, Defendants reiterated that such a contract does exist, however, Defs.' Summ. J. Mem. at 28

has not shown and cannot demonstrate that his interests are within the zone of interests of the Leasing Act such that he has standing to bring his claims under the APA.

1. The test for standing to bring claims for violations of the Leasing Act has not been changed by recent Supreme Court jurisprudence.

Mr. Tuttle contends that he has standing to bring his Leasing Act claims based on, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak,* 132 S. Ct. 2199 (2012) and *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014), two cases recently decided by the Supreme Court. He argues that, in those cases, the Supreme Court has "curtailed the prudential standing test" and that his claims satisfy the now diminished standard. Pl.'s Opp'n at 7-11. This argument is, however, premised on fundamental misunderstandings of the Court's treatment of prudential standing and the zone of interests test in *Patchak* and *Lexmark*.

In *Patchak,* the plaintiff challenged the Secretary of the Department of the Interior's decision pursuant to a provision of the Indian Reorganization Act, 25 U.S.C. § 465 ("IRA"), to acquire certain property for the benefit of an Indian tribe seeking to open a casino. 132 S. Ct. at 2202-03. The plaintiff, a neighboring landowner, alleged that, in taking the property into trust, the Secretary had exceeded her authority under the statutory provision, which authorized the Secretary to acquire land '"for the purpose of providing land for Indians."' *Id*. at 2210. The Government argued that the statute concerned land acquisition rather than land use, and that the

(citing Decl. of Stan Webb in Supp. of Opp'n to Pl.'s Mot. for Order to Supp. Admin. Record, ECF No. 17-1)**,** and having been thus reminded, Mr. Tuttle now attempts to allege a claim based on this statute in his opposition and reply. *See* Pl.'s Opp'n at 6. This is clearly improper and his claims based on this statute should not be considered by the Court. *See Jones v. Mukasey*, 565 F. Supp. 2d 68, 81 (D.D.C. 2008) (citing *Am. Wildlands v. Kempthorne*, No. 07–5179, 2008 WL 2651091, at *8 (D.C. Cir. July 8, 2008); *McBride v. Merrell Dow & Pharm.*, 800 F.2d 1208, 1211 (D.C. Cir.1986)).

plaintiff's interests in the proposed use of the land thus were not within the zone of interests protected by the statute and he lacked prudential standing to bring his claims. *Id.*

In considering prudential standing, the Court initially reiterated the zone of interest test it had articulated twenty-five years earlier in *Clarke v. Securities Industry Association* , 479 U.S. 388 (1987). The Court stated that the zone of interest test: 1) '"is not meant to be especially demanding"'; 2) is to be applied "in keeping with Congress's 'evident intent' when enacting the APA 'to make agency action presumptively reviewable"'; 3) does not require any "'indication of congressional purpose to benefit the would-be plaintiff"'; and 4) can foreclose suit, but only where "a plaintiff '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." *Patchak*, 132 S. Ct. at 2210 (quoting *Clarke*, 479 U.S. at 399-400). Applying this well-established standard, the Court determined that the plaintiff's grievance was encompassed within the zone of interests of the provision of the IRA at issue. Specifically, the Court held that, although that statutory provision "specifically addresses only land acquisition[,] . . . decisions under the statute are closely enough and often entwined with considerations of land use" as per the implementing regulations to bring the plaintiff's claims concerning the proposed use of the land within the statute's "regulatory ambit." *Id.* at 2211-12.

In *Lexmark*, the Supreme Court likewise did not alter the zone of interests test. Rather, it left the test intact but clarified that it is properly applied under a different rubric or nomenclature other than "prudential standing." 134 S. Ct. at 1386-87. The Court initially stated that it had "granted certiorari to decide '*the appropriate analytical framework for determining a party's standing* to maintain an action for false advertising under the Lanham Act,"' *id.* at 1385

(emphasis added), and it then explained that its prior decisions had been based "on statutory, not 'prudential 'considerations, *id.* at 1386, and that

> [w]hether a plaintiff comes within the zone of interests' is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim. As Judge Silberman of the D.C. Circuit recently observed, 'prudential standing' is a misnomer' as applied to the zone-of interests analysis, which asks whether 'this particular class of persons ha[s] a right to sue under this substantive statute."

Id. at 1387 (citations omitted) (quoting *Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 675-76 (D.C. Cir. 2013) (concurring opinion)).

The Court then proceeded to determine whether the defendant had a statutory cause of action under the Lanham Act to bring its counterclaim against the plaintiff alleging false advertising. In reaching its determination, the Court first "presume[d] that a statutory cause of action extends only to plaintiffs whose interests 'fall within the zone of interests protected by the law invoked.'" *id.* at 1388, and it proceeded to analyze whether the defendant's false advertising claims came within the zone of interests protected by the Lanham Act. In reaching its determination, the Court employed the same long-established zone of interests tests that it had reiterated in *Patchak*. Although the plaintiff's claims were not brought under the APA, the Court noted in dicta, that "in the APA context . . . the test is not "'especially demanding[,]"' *id*. at 1389, and it reiterated that 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 authorized that plaintiff to sue." *Id.* The Court then also presumed that a proximate cause provides another limitation on a statutory cause of action, and it therefore analyzed whether the harm the defendant alleged had a "sufficiently close connection to the conduct" prohibited by the Lanham Act. *Id.* at 1390. The Court concluded that the defendant's alleged injuries were "injuries to precisely the sort of interests that the [Lanham] Act

protects[,] and that the defendant had "sufficiently alleged that its injuries were proximately caused by [the plaintiff's] misrepresentations." *Id.* at 1393.

Contrary to Mr. Tuttle's characterizations, the Supreme Court in *Patchak* simply reiterated the test for prudential standing under the APA that has been an accepted part of federal court jurisprudence since at least 1987, and did nothing to curtail that standard, but rather, merely broadened the regulatory ambit of a particular provision of the IRA. Also contrary to Mr. Tuttle's interpretation, in *Lexmark*, the Court clarified the analytical framework in which the zone of interests test for standing is properly applied but likewise did nothing to "curtail" or alter the test itself. Under the long-established test as applied pursuant to *Patchak* and *Lexmark*, no "indication of congressional purpose to benefit the would-be plaintiff" is required, but a plaintiff may still "fall[] outside the group to whom Congress granted a cause of action . . . [if] its interests 'are so . . . inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit."' *Mendoza v. Perez*, 754 F.3d 1002, 1016-17 (D.C. Cir. 2014) (quoting *Patchak* 132 S. Ct. at 2210).

2. Mr. Tuttle's suit is foreclosed because his grievance is entirely inconsistent with the interests of the Leasing Act and its accompanying regulations.

In accordance with the Supreme Court's decisions in both *Patchak* and *Lexmark*, the question in this case is whether, in enacting the Leasing Act, Congress conferred a cause of action that encompasses claims against the BIA brought by a non-Indian lessee such as Mr. Tuttle, *see Lexmark*, 134 S. Ct. at 187, and whether the grievance he asserts is "'arguably within the zone of interests to be protected or regulated by the statute,' that he says was violated." *Patchak*, 132 S. Ct. at 2210. The Leasing Act was not implicated in the *Patchak* or *Lexmark* cases and thus, the question is not answered by reference to either of those rulings. Instead, it requires the Court to examine the Leasing Act and the

accompanying regulations and determine whether Mr. Tuttle's grievance can be interpreted as encompassed by the "regulatory ambit" of that particular statute or whether it is "'so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit"' Mr. Tuttle's suit. *Id.* (citing *Clarke* at 399). Although not controlling authority in this Circuit, the Eleventh Circuit's decision in *Hollywood Mobile Estates, Ltd. v. Seminole Tribe of Fla.*, 641 F.3d 1259 (11th Cir. 2011), is instructive in this analysis because it directly addresses this question.

In *Hollywood Mobile Estates*, the plaintiff lessee managed a mobile home park on premises leased pursuant to the Leasing Act and its accompanying regulations. After the plaintiff received notice from the defendant Tribe that it was in default under multiple provisions of the lease, the plaintiff filed suit against the Tribe and the Secretary of the Interior and sought a temporary restraining order or permanent injunction to prevent the Tribe from re-entering or taking the leased premises. *Hollywood Mobile Estates*, 641. F.3d at 1263. The plaintiff subsequently moved to dismiss the Tribe after it asserted sovereign immunity. *Id.* The district court then dismissed the claims against the Secretary for failure to state a claim on which relief could be granted and denied the plaintiff's motion for leave to amend the complaint. *Id.* at 1264. The plaintiff appealed both rulings.

The Eleventh Circuit affirmed the district court's dismissal of the complaint, but it held that the district court "should have dismissed . . . for lack of subject matter jurisdiction." *Id.* at 1266. In this regard, the Court determined that the plaintiff had "failed to allege that its injury was fairly traceable to the Secretary" or "to allege an action of the Secretary that had caused [plaintiff] any injury," *id.* at 1265-66, and that the plaintiff lacked constitutional standing to bring

its claims against the Secretary. The Court then proceeded to consider the district court's denial of the plaintiff's motion for leave to amend, and whether the plaintiff had prudential standing to bring its claims. [2]

In the proposed amended complaint, the plaintiff sought an injunction pursuant to the APA and the Mandamus and Venue Act, 28 U.S.C §1361, "to compel the Secretary to enforce the lease by placing Hollywood . . . back into possession of the leasehold premises." *Id.* at 1264, 1267. The court held that the proposed amended complaint was "best construed as a request for a mandatory injunction against the Secretary under the [APA]," *id.* at 1268, and it then applied the same long-established zone of interest tests that the Supreme Court later applied in *Patchak* and *Lexmark*,[3] and 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 reaching its holding, the Eleventh Circuit explained that:

> The interests of Hollywood are not arguably within the zone of interests protected by the Indian Long–Term Leasing Act, which allows '[a]ny restricted Indian lands, whether tribally, or individually owned, [to] be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes.' . . . The Secretary's approval of leases of Indian land '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

[2] Mr. Tuttle attempts to distinguish *Hollywood Mobile Estates* because, unlike the allegations against the Secretary, here, he has alleged that Defendants took an active role in the lease cancellation, and thus, the third element of constitutional standing (causation) is met. Defendants do not claim that Mr. Tuttle lacks constitutional standing to bring his claims, however; rather, their contention is rather that Mr. Tuttle lacks prudential or statutory standing based on the zone of interests test, which the court in *Hollywood Mobile Estates* applied in denying the plaintiff leave to amend.

[3] *Id.* at 1269 ("In applying the 'zone of interests' test, we do not ask whether, in enacting the statutory provision at issue, Congress specifically intended to benefit the plaintiff. Instead, we first discern the interests "'arguably . . . to be protected' by the statutory provision at issue; we then inquire whether the plaintiff's interests affected by the agency action in question are among them.").

> government to act for the benefit of Indian landowners because Congress intended section 415 'to protect Indian tribes and their members.'" . . .

Id. at 1269 (citations omitted). The court then stated that "[t]he same is true of the corresponding regulations, which charge the Bureau of Indian Affairs with regulating leases under section 415[,]" *id.*, because, as it further explained,

> [t]he Bureau promulgated these regulations for several purposes: to assist Indian landowners, to protect the interests of Indian landowners, and to enable the Bureau to take action to recover possession on behalf of the Indian landowners, to protect the interests of Indian landowners, to enable the Bureau to take action to recover possession on behalf of Indian landowners, and to preserve the value of Indian lands."

Id. (citations omitted). The court specifically noted that 25 C.F.R section 162.108, "[t]he regulation that addresses the 'responsibilities' of the Bureau 'in administering and enforcing leases' provides that the Bureau acts to protect the interests of Indian tribes." *Id.* Finally, the court cited with approval the Eighth Circuit's holding in *Rosebud Sioux Tribe v. McDivitt,* 286 F.3d 1031 (8th Cir. 2002), wherein that court found that "it would be inconsistent to interpret [the statute and the regulations" as giving legally enforceable rights to non-tribal or non-governmental parties whose interests conflict with the tribe's interests." *Rosebud Sioux Tribe*, 286 F.3d at 1037.

The Leasing Act and the accompanying regulations upon which Mr. Tuttle attempts to base his grievance were intended for the benefit of Indian landowners. Although prudential or statutory standing does not require that there be any "'indication of congressional purpose to benefit the would-be plaintiff,"' *Patchak*, 132 S. Ct. at 2210, Mr. Tuttle's grievance nevertheless does not come within the Leasing Act's zone of interests, not because he is not the intended beneficiary of the statute, but because his claims are '"so . . . inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the

suit."' *Patchak* 132 S. Ct. at 2210 (quoting *Clarke*, 479 U.S. at 399). Here, as the Eighth Circuit held in *Rosebud Sioux Tribe*, "it would be inconsistent to interpret [the Leasing Act and the accompanying regulations] as giving legally enforceable rights" to Mr. Tuttle, because he is "a non-tribal and non-governmental party whose interests" are in direct conflict with the interests of the Tribes, which are the intended beneficiary of the statute. *See Rosebud Sioux Tribe*, 286 F.3d at 1037. Thus, Mr. Tuttle does not fall within the zone of interests of the Indian Long-Term Leasing Act and the Court should enter summary judgment in favor of Defendants.

C. The BIA's Actions in Deciding to Cancel Plaintiff's Lease were Fully in Accord with the Lease Terms.

Mr. Tuttle cannot prevail on his contractually-based because he has not shown that the BIA violated the terms of the Lease. As Mr. Tuttle admits, the gravamen of his complaint is that the BIA's lease cancellation decisions violated his contractual rights because the BIA "fail[ed] to allow him an adequate opportunity to cure and otherwise observe the Lease termination provisions" set forth in Article 17B of the Lease Addendum, Pl.'s Opp'n at 4, and instead, first provided him with notice and opportunity to cure the violations pursuant to 25 C.F.R. Part 162. Mr. Tuttle argues on summary judgment that the regulations are in conflict with the Lease terms and that the Lease terms must control. Pl.'s Mem. at 23. As Defendants explained in their opening memorandum, these arguments do not take into account the orderly process set forth in the regulations and the Lease provisions for, first, giving a tenant notice of violations and an opportunity to cure; then, if the violations are not cured, providing notice of cancellation; and then re-entering and/or re-leasing the subject premises pursuant to the Lease terms. Of note, in his Opposition, Mr. Tuttle admits that these same regulations were intended for his benefit and protection and to ensure that a tenant is afforded due process prior to termination of a lease. *See* Pl.'s Opp'n at 10.

The terms of the Lease are not in conflict with the applicable regulations as Mr. Tuttle alleges. The Lease provides 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 (emphasis added). Thus, notwithstanding Mr. Tuttle's argument that the leasing regulations in 25 C.F.R. Part 162 did not become effective until five years after the Lease was signed, Pl.'s Opp'n at 16, the regulations, including subsequent amendments, are incorporated into, and are to be read together, with the Lease terms. When they are so read, the regulations and the Lease provisions establish a sequential process for ensuring that due process is afforded to a defaulting tenant by providing notice and an opportunity to respond and cure prior to cancellation of the Lease; then providing notice of cancellation if the violation is not cured; and then, and only then, proceeding with re-entry and/or re-leasing pursuant to the Lease provisions.

In providing Mr. Tuttle with notice of default and then of its decision to cancel the Lease, the BIA strictly observed the procedures set forth in the regulations and the Lease. The Agency Superintendent together with the Tribes first sent a Notice of Default to Mr. Tuttle on September 30, 2009 pursuant to 25 C.F.R. section 618. The Notice of Default set forth in detail the nature of Mr. Tuttle's violations of the Lease and 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. 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. Shortly thereafter, Mr. Tuttle purported to cure the identified violations, but he provided only an uncertified estimate of his gross receipts, declined to incur the expense of having a certified public accountant prepare and verify this information,

AR0000227-228; AR0000156-157, and did not provide evidence of insurance showing the Tribes as a co-insured or the amounts of coverages, or that he was carrying fire insurance covering the leased premises as required by the Lease. *See* AR0000158. Mr. Tuttle made no further effort to cure the identified violations, and therefore in March 2010, five months after it issued the Notice of Default and long after the 30-day cure period provided in the Lease had expired, the Superintendent decided to cancel the Lease and sent the Notice of Cancellation to Mr. Tuttle in accordance with 25 C.F.R. section 162.619.

The steps that the BIA took pursuant to the Leasing Act's regulations are a prerequisite to, and not inconsistent with, the termination process set forth in Article 17 of the Lease, which Mr. Tuttle insists the BIA should have exclusively followed. Having provided Mr. Tuttle with notice in accordance with its regulations and given him ample opportunity to cure the identified violations, once it issued the notice of cancellation, the BIA could then have proceeded to terminate the Lease pursuant to its terms, either by "proceed[ing] 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 by re-entering and re-letting the leased premises or terminating of the Lease pursuant to Article 17B. The BIA has not taken these final termination steps pursuant to Article 17 because cancellation of the Lease was stayed throughout the pendency of Mr. Tuttle's appeals to the Acting Regional Director and to the IBIA, and as a result, the BIA has not been able to effectuate termination as Mr. Tuttle claims Article 17 requires. Nevertheless, the BIA has, to date, acted completely in accordance with the Lease terms, which incorporate the requirements in its regulations.

D. The BIA Did Not Violate the Leasing Act or Its Accompanying Regulations.

On summary judgment, Mr. Tuttle claims that in deciding to cancel the Lease, the

BIA illegally entirely delegated its responsibilities for lease cancellation to the Tribes. He contends that this alleged delegation exceeded Congress's statutory grant of authority to the Secretary of the Interior violated the Due Process Clause of the Fifth Amendment. Pl.'s Summ. J. Mem. at 25-26. The record does not support these arguments. The record shows that the Tribes participated in the BIA's decision to cancel the Lease, but it falls far short of showing CRIT was "the actual decision-maker" concerning the lease cancellation, Pl.'s Opp'n at 13-14, or that "the entire default and termination process was determined by CRIT," *id.* at 12, as Mr. Tuttle alleges.

As Defendants previously explained and as Mr. Tuttle now recognizes, the BIA and CRIT entered into a contract under the Indian Self-Determination Act and Education Assistance Act, Public Law No. 93-638, 88 Stat. 2203 (1975) for real estate management services, including the administration of leases on tribal lands. The Leasing Act's accompanying regulations generally allow a tribe or tribal organization to contract or compact under the Act to administer leasing on Indian lands, but they prohibit contracting tribes from administering certain parts of the regulations, including cancellation of a lease. *See* 25 C.F.R. 162.018 (allowing contracting tribes to administer any part of the regulations except "an approval or disapproval of a lease document, waiver of a requirement for lease approval . . ., cancellation of a lease, or an appeal.). The regulations, however, do not prohibit tribes from participating in the process or from performing ministerial acts associated with the process. *See id.* Also contrary to Mr. Tuttle's arguments, neither the Leasing Act nor the regulations require that contracting tribes be excluded from the decision-making process leading to cancellation of a lease. Indeed, as Defendants previously explained, under such contracts, "it is common practice for the BIA to communicate with the Tribe concerning lease instruments and lease transactions, including notices of default

and cancellation of leases. *See* Decl. of Stan Webb in Supp. of Opp'n to Pl.'s Mot. for Order to Supp. Admin. Record, ECF 17-1, ¶ 8. This makes sense because the Tribe is the other party to the Lease.

Here, there is no question, and Defendants do not deny, that the Tribe as contractor participated in the process leading up to cancellation of Mr. Tuttle's Lease. The Tribes necessarily participated in preparing the initial Notice of Default, because, pursuant to their Indian Self Determination Act contract, they maintained the leasing and payment records concerning the Lease, and thus, the information required to calculate the interest owed on past due rent and determine the amount of the offset to be paid to Mr. Tuttle pursuant to the Regional Director's 2008 decision, and what amount, if any, Mr. Tuttle still owed under the Lease was in their possession. Additionally, as Defendants explained and as e-mails in the supplement to the administrative record reflect, there were miscommunications between the BIA and the Tribes concerning calculating the offset, and as a result, there was some delay in preparing the Notice of Default. As the e-mails indicate, the Tribes became frustrated by the delay and they took on the drafting responsibilities in order to move the process forward. *See* ARSUPP000025. The Tribes then signed and issued the Notice of Default jointly with the Agency Superintendent on September 30, 2009. AR0000026-0000030. Again, the Leasing Act's regulations do not prohibit a contracting tribe from participating in identifying violations of a lease, or from drafting and participating in providing notice to a defaulting tenant. *See* 25 C.F.R. 162.018.

The e-mail messages in the supplement to the administrative record show that the Tribe also participated in the decision-making process that preceded the Notice of Cancellation and that they assisted in drafting that Notice. Contrary to Mr. Tuttle's allegations, however, the e-mails also reflect that the Superintendent and agency staff reviewed and commented on the

Notice of Cancellation throughout the decision-making and drafting process. *See e.g.*, ARSUPP000228; ARSUPP000233; ARSUPP000234-236. The Leasing Act's regulations do not require that a contracting tribe be excluded from the decision-making process leading to the cancellation of a lease nor do they prohibit a tribe from performing ministerial duties, including drafting a notice of cancellation. *See* 25 C.F.R. 162.018. Rather, the regulations provide only that the tribe may not administer the lease cancellations, and contrary to Mr. Tuttle's claims, the BIA did not delegate its responsibility for administering the Lease cancellation to the Tribes.[4] Rather, the record shows that the Superintendent made the final decision to cancel the Lease as the independent decision of the agency, *see* ARSUPP000023; that the Notice of Cancellation was signed by the Superintendent, AR0000024; and that the Agency then sent the notice to Mr. Tuttle by certified mail in accordance with the regulations. Thus the BIA, not the Tribes, administered the cancellation of the Lease on March 2, 2010.

Mr. Tuttle further alleges that the Acting Regional Director's affirmance of the Superintendent's decision to cancel the lease in July 2010 shows that the Tribes had been "the actual decision-maker" concerning the lease cancellation. *See* Pl.'s Opp'n at 14. In his affirmance by letter dated July 19, 2010, the Acting Regional Director cited to 25 C.F.R. §162.619, a then-effective provision of the Leasing Act's regulations, which required that "[if]

[4] Plaintiff also implies that the redactions in the documents in the supplement to the administrative record are intended to conceal the extent of CRIT's involvement. *See* Pl.'s Opp'n, at 14-15 (citing *id.*, n.6). In fact, however, the certified index of the AR SUPP documents that Defendants submitted to the Court when they produced the supplement to the administrative record, ECF No. 21-1, reflects that, with few exceptions, the redactions were made to e-mails within the AR SUPP documents that concerned another lessee and thus were not relevant to this case**.** Plaintiff's allegations are unfounded and, in any event, he has never filed a motion to compel to attempt to obtain the redacted information and he raises this complaint only on reply. Therefore, the Court can and should disregard these allegations.

[a] tenant does not cure a violation of a lease within the requisite time period, [the BIA] will consult with the Indian landowner, as appropriate, and determine whether . . . [t]he lease should be cancelled." Mr. Tuttle argues that, in citing to this regulation, the Acting Regional Director somehow "disclosed his belief" that, in deciding to cancel the Lease, the BIA was necessarily subservient to the Tribes and that any decisions concerning the Lease had to be "formulated or approved in advance by [the Tribes]." Pl's Opp'n at 14.[5] This argument, however, ignores the full context of the Acting Regional Director's letter and obfuscates the chronology of what led to the Superintendent's decision to cancel the lease with events that did not take place until after the Notice of Cancellation had been issued.

In attempting to show that the Tribes, not the BIA, were the "actual decisionmaker" that decided to cancel the lease, Mr. Tuttle points to one sentence in the Acting Regional Director's letter concerning the BIA's obligation to consult with the Tribes as the Indian landowner, which he reads out of context. The portion of the Acting Regional Director's letter of which this sentence is a part states in full as follows:

> During the cure period which followed your receipt of the Agency's September 30, 2009, notice of default, you indicated that you intended to challenge the Board's 2009 decision on which the notice was based, while at the same time requesting a waiver of the strict accounting requirements set forth in the Lease. *No further response (or any attempt to cure) was made until long after the cure period provided for in the Lease had expired, and then only upon your receipt of the Agency's March 2, 2010, cancellation decision.* At 25 C.F.R. §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. *In this case, the Tribe's June 25, 2010, response to your Statement of Reasons confirms its desire to see the Agency's cancellation decision affirmed, based on a "continuing material breach" of the Lease.* In that

[5] Curiously, in proffering this argument, Mr. Tuttle characterizes this regulation as "totally irrelevant," Pl.'s Opp'n at 14, notwithstanding his admission a mere four pages earlier that this is one of the provisions pursuant to which he brings his claims and, in support of his assertions in attempting to show standing, that this same regulation was intended for his benefit and protection. *See id.* at 10.

> regard, the materiality of the accounting obligation is undisputed and . . . the Compilation provided with your May 25, 2010, statement of Reasons does not satisfy the strict accounting requirements set forth in the Lease (meaning, as the Tribe suggests, that the default remains uncured as of this date.
>
> 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 for in the Lease). . . .

AR0000125-000026.

The first paragraph quoted above shows only that during the course of Mr. Tuttle's first appeal, after the Notice of Cancellation was issued, and even though both the ten-day cure period provided by the Notice of Default and the applicable cure periods provided by the Lease had long since expired, in June 2010, the BIA consulted with the Tribes as the Indian landowner of the leased premises concerning whether they would accept Mr. Tuttle's attempts to cure the violations of the Lease. The statement in the second paragraph quoted above indicates that, if Mr. Tuttle had attempted to cure the violations after the time to cure had passed, but before the Notice of Cancellation was issued, the BIA would likewise have consulted with the Tribe at that time to ascertain whether it wished to cancel the Lease or to invoke other remedies or allow Mr. Tuttle still more time to cure the violations. In fact, however, Mr. Tuttle did not attempt to cure the violations until after the Notice of Cancellation was issued, and thus the referenced consultation with the Tribe as provided for in section 162.619 of the regulations did not occur as part of the decision-making process leading to the Notice of Cancellation. Contrary to Mr. Tuttle's arguments, although the Tribes participated in the cancellation process as a contractor, the decision was not dictated or preordained by the Tribes but made and administered as an independent decision of the Agency.

Mr. Tuttle also argues that, following the issuance of the Notice of Cancellation, the Tribes have continued to participate in the administrative litigation process concerning his appeals and have improperly continued to influence the BIA's decisions and the course of "this litigation." Pl.'s Opp'n at 14-15.[6] These arguments ignore the Tribes' role as the lessor and the Indian landowner of the leased premises and its right to participate in the decision-making process in that capacity. In that capacity, the Tribe responded to Mr. Tuttle's appeal to the Acting Regional Director as an interested party, and it was permitted to, and did, participate in the briefing in defense of Mr. Tuttle's subsequent appeal to the IBIA. Participation as an interested party to a lease is the Tribes' right – it does not show complicity or collusion between the BIA and the Tribe in the decision-making process or in the administrative litigation, and certainly not in this case.

Finally, Mr. Tuttle claims that he was deprived of the opportunity for a meaningful hearing on his claims in violation of the Due Process Clause of the Constitution based on the BIA's allegedly having delegated the lease cancellation decision and administration of the cancellation to the Tribes. First, as with Mr. Tuttle's statutorily-based claims, this claim is not within Mr. Tuttle's complaint and is only belatedly raised on summary judgment, and the Court need not address this argument on that basis alone. Second, Mr. Tuttle bases this claim on his arguments that the record in the administrative appeals was "tainted by [the Tribes'] unsupervised analysis" and was improperly based on "decisions made and documents authored by CRIT," Pl.'s Summ. J. Mem. at 26, but, as explained above, the BIA did not delegate the

[6] Plaintiffs' allegations that improper complicity or collusion between the BIA and the Tribes extends even in "this litigation" are patently false. Plaintiff cites to a November 2010 e-mail that was written during the administrative litigation process in which the Tribe participated as an interested party, and long before this case was filed in March 2013. The Tribes have not been involved in this litigation.

analysis or decision-making process associated with the lease cancellation to the Tribes. The record shows that the BIA oversaw the drafting of the lease cancellation documents; that the Tribes did not make the lease cancellation decision for the BIA; and that the BIA, not the Tribes administered the cancellation of the Lease. The e-mails in the supplement to the administrative record do not reflect, as Mr. Tuttle claims, that the cancellation decision was made by the Tribes, and the administrative record of the Superintendent's decision that was the basis for the Acting Regional Director's and the IBIA's affirmances included documents that reflect the BIA's independent decision to cancel the lease.

Moreover, even if Mr. Tuttle is correct that his commercial leasehold interest triggers procedural due process protections, his procedural due process claim fails because he has received ample process and all the process to which he is entitled by law in advance of suffering any actual deprivation as the result of the cancellation of the Lease. Mr. Tuttle received a Notice of Default nearly five years ago in September 30, 2009, which identified the provisions of the Lease under which he was in default, and provided him an opportunity to cure the identified violations. AR0000026-0000030. After five months during which he did not attempt to cure the violations, he then received a Notice of Cancellation, which informed him of his right to appeal. AR0000020-0000024. Mr. Tuttle then appealed to the Acting Regional Director and petitioned for review of the Superintendent's March 2, 2010 determination. AR0000004. The Acting Regional Director considered Mr. Tuttle's appeal, and on July 19, 2010, in a letter sent by certified mail, he informed Mr. Tuttle that he had decided to affirm the Superintendent's decision to cancel the Lease. AR0000122-0000127. Following the Acting Regional Director's affirmance, on August 18, 2010, Mr. Tuttle appealed the Acting Regional Director's decision to the IBIA. AR0000116-0000120. Thereafter, Mr. Tuttle received consideration of his claims

before the IBIA, including claims alleging collusion between the BIA and the Tribe similar to those he raises here.[7] Following full briefing by Mr. Tuttle, the BIA, and the Tribes as an Interested Party, on December 18, 2012, the IBIA affirmed the Acting Regional Director's determination. AR0000274-0000283.

In sum, Mr. Tuttle has had ample opportunity to present his version of events, and there has been no violation of any due process rights.

III. CONCLUSION

For the reasons stated herein and in Defendants' Cross-Motion for Summary Judgment and memorandum in support, the Court should enter summary judgment in favor of Defendants.

Dated: September 3, 2014

Respectfully submitted,

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[7] *See* Tribe's Answering Br., AR0000380 (citing Br. of Appellant, William C. Tuttle, at 1-3 (AR0000430-0000432)) ("Appellant's wearisome assertions of collusion between the United States and the Tribe that "[t]he Lease termination was issued pursuant to direction from CRIT's Attorney General" and that the trust status of the land "has never been directly decided by any court[]" serve only to muddy a relatively clear landlord-tenant dispute over failure on the part of the tenant to comply with the terms of his lease.").

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CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2014, I electronically filed the foregoing Reply in Support of Defendants' Cross-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
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