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 MOTION TO STRIKE DECLARATION OF WILLIAM C. TUTTLE AND SUPPORTING DOCUMENTS

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 reply in further support of their motion to strike the Declaration of Plaintiff, William C. Tuttle ("Plaintiff") and all documents appended thereto as Exhibit 1 (ECF No. 24-2).

This case involves a dispute concerning the terms of Lease No. B-509-CR ("the Lease"), which is a Business Lease 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") in 1977. The Bureau of Indian Affairs ("BIA") holds title to the land in trust for the Tribes, and it approved the Lease pursuant to the Indian Long-Term Leasing Act, 25 U.S.C. § 415, ("the Leasing Act"), and the corresponding regulations. In September 2009, the Superintendent of the BIA's Colorado River Agency and the Tribes jointly issued a

Notice of Default to Plaintiff based on his continuing default under three covenants of the Lease. Five months later, when Plaintiff had not cured the defaults, the Agency Superintendent issued a Notice of Cancellation.

Plaintiff challenges the Superintendent's decision to cancel the Lease, as well as the subsequent affirmances of that decision by the Acting Regional Director and the Interior Board of Indian Appeals, as violating the terms of the Lease and the Leasing Act and its accompanying regulations, and therefore, as arbitrary and capricious in violation of the Administrative Procedure Act ("APA"). *See* Pl.'s Mem. in Supp. of Mot. For Summ. J., ECF No. 24 -1. The declaration and supporting documents that Plaintiff submitted in support of his motion for summary judgment, ECF No. 24-2**,** are not part of the administrative record in this case and Plaintiff has not shown any gaps in the record that would justify consideration of such extra-record material in a case challenging agency action brought under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. Moreover, the extra-record documents Plaintiff proffers are neither relevant to, nor probative of, the issues to be decided by this Court, and the title opinion letter that is part of Exhibit 1 to Plaintiff's declaration is unauthenticated and otherwise bears no indicia of reliability.

1. Plaintiff has not shown any gaps in the administrative record lodged and supplemented by Defendants in this case that justify consideration of extra-record evidence.

Defendants lodged the Administrative Record in this case in September 2013. Thereafter, Plaintiff filed a motion asking that this Court order supplementation of the Administrative Record with three categories of documents based on his presumption that, to the extent such documents exist, they are properly part of the record. On March 25, 2014 the Court

granted Plaintiff's motion in part and ordered Defendants to supplement the Administrative Record with:

> (1) All records concerning oral or written communications between Defendants, including Bureau of Indian Affairs officials at the Parker Agency and Western Regional Office, and Mr. Tuttle and/or his wife Carol Tuttle, acting on Mr. Tuttle's behalf;
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> (2) All records concerning oral or written communications between Defendants and the Colorado River Indian Tribes that relate to this matter . . .;
>
> and
>
> (3) All intra-agency communications relating to this matter that occurred after the termination decision was reached.

ECF No. 19 at 5-6.

The D.C. Circuit has held that judicial review of agency decisions '"is to be based on the full administrative record that was before the [agency decisionmakers] at the time [they] made [their] decision."" *Pac. Shores Subdiv v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 4 (D.D.C. 2006) (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, (1977)). This means that documents are part of an agency's administrative record only if they were before the agency's decisionmakers at the time of the challenged decision, and if the decisionmakers considered them either directly or indirectly. *Id.* (quoting *Maritel, Inc. v. Collins*, 422 F .Supp.2d 188, 196 (D.D.C. 2006)) ("This Court has interpreted the 'whole record' to include 'all documents and materials that the agency 'directly or indirectly considered' .... [and nothing] more nor less.'"). Thus, although the documents from the BIA's files that the Court ordered be added to the Administrative Record reflect communications between the BIA and Plaintiff or his wife, between the BIA and the Colorado River Indian Tribes concerning Plaintiff's lease, and intra-agency communications, this does not mean that any of the documents

were considered by the agency's decisionmakers – in this case, the Acting Western Regional Director and the IBIA. Nevertheless, Defendants complied with the Court's Order and produced documents responsive to the Order, but maintained their objection that the documents are not properly part of the administrative record. ECF No. 21.

On summary judgment, Plaintiff now relies on documents in the supplement to the administrative record ("ARSUPP"), and he cites to these documents as telling his side of the story, *see* Pl.'s Opp'n to Mot. to Strike at 6, (ECF No. 34), which is that Defendants illegally delegated the decisionmaking concerning cancellation of the Lease and the administration of the Lease cancellation to the Tribes in violation of the Leasing Act and its regulations. Plaintiff thus has not shown that his declaration and the supporting documents or any information outside the supplemented record is necessary to provide a complete picture as to the underlying events, or that there are any gaps in the administrative record as supplemented that justify his submission of this extra-record evidence. Rather, Plaintiff characterizes even the supplemented record as "leav[ing] this Court with little more contextual information than it had before it ordered the AR to be supplemented," Pl.'s Opp'n to Mot. to Strike at 5, and then proffers the baseless speculation that Defendants "had every incentive not to disclose adverse information" and therefore must have "omitted communications" relevant to show that the decision process concerning cancellation of the Lease violated the Leasing Act and the accompanying regulations. *Id*. If Plaintiff believed, as he claims, that, in producing the supplement to the administrative record, Defendants had still omitted documents or redacted content within those documents that is both responsive to the Court's Order and relevant to the issues in this case,[1] he could have

[1] *See also* Pl.'s Opp'n to Defs.' Cross- Mot. for Summ. J. at 13, n.6, (ECF No. 33) (implying that redactions in AR SUPP documents are intended to conceal the extent of the Tribes'

filed a motion to compel and sought further supplementation of the administrative record either prior to or in conjunction with his motion for summary judgment. He did not do so, however, the Court should not allow him to present, and should not consider, extra-record evidence that he has unilaterally created and that he claims to submit to fill "gaps" in the record, which he only speculates exist.

2. Plaintiff's declaration and the supporting documents are not relevant to the issues in this case.

This case presents two threshold issues for the Court's review and resolution: 1) whether Plaintiff's contractually-based claims alleging violations of the Lease terms are cognizable under the APA; and 2) whether the Leasing Act affords Plaintiff prudential or statutory standing to bring his claims alleging violations of that statute under the APA. If the Court finds that Plaintiff's contractually-based claims are cognizable and/or that his claims based on the Leasing Act are justiciable, the Court must then consider a third, substantive issue, i.e, whether Defendants' issuance of the Notice of Cancellation and or its cancellation of the Lease violated either the terms of the Lease or the Leasing Act and its accompanying regulations.

In resolving these issues, the Court should refer to the Lease and the subsequent Lease Modification, and to the Leasing Act and its regulations, and it may also refer to other documents in the Administrative Record. The Court has no need or occasion, however, to rely on any extra-record evidence, and it certainly has no reason to consider Plaintiff's declaration or the

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involvement in the cancellation process. 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 a single exception, the redactions were made to e-mails within the documents in the AR SUPP that concerned another lessee and therefore were not relevant to this case**.** Plaintiff's allegations that the documents were redacted for the purpose of concealing information adverse to defendants thus are spurious and unfounded.

accompanying, unauthenticated out-of-court statement of an unidentified, supposed "real estate title specialist" that Plaintiff submits as purportedly giving necessary context for this case. First, although the report concludes that the land is not held in trust by the United States, Plaintiff now concedes that "the ownership status of the land is not at issue" in this case. Pl.'s Opp'n to Mot. to Strike at 8. Thus, any evidence arguably provided by the declaration and the report is introduced to address an issue that is "not of consequence" in determining the validity of the agency actions that Plaintiff challenges here, and it is therefore neither "relevant" to this action as defined in Federal Rule of Evidence 401, nor "relevant and probative" under the Rules of Practice for Administrative Law Judge Proceedings, which Plaintiff claims should apply in this Court. Pl.'s Opp'n to Mot. to Strike at 6.

Plaintiff argues that he is offering his declaration and the supporting documents, not for the truth of the matter asserted, i.e., not to prove the status of title to the property, but as context and "to demonstrate his understanding that he held title to the property in fee simple status . . . in exchange for the Lease as the sole consideration for his surrendering his title, Pl.'s Opp'n to Mot. to Strike at 7, and "as evidence of [his] ties to, and investment in, the property . . . which would be severed and forfeited for *de minimus* alleged violations . . . that did not meet the Tribe's and Defendants' arbitrary standard," *id.* at 8, but regardless, his declaration and supporting documents are still not relevant or probative of the issues in this case. Neither Plaintiff's understanding about the ownership status of the property nor his "ties to the property," apart from the leasehold interest, are relevant or probative of substantive issue in this case, which is the propriety of Defendants' cancellation of the Lease. The status of the Plaintiff's interest in the property was conclusively resolved by another federal court thirty-seven years ago in *United States v. Brigham Young Univ.*, No. CV 72-3058-DW (C.D. Cal 1977), *see* AR 0000388-

0000391, and the only evidence relevant in this case concerning Plaintiff's current interest in the subject premises cancellation is contained in the Lease and the Lease Modification, both of which are included in the Administrative Record. Likewise, Plaintiff's characterizations about the nature or materiality of his defaults under the Lease, the basis for Defendants' decision to cancel the Lease, and the propriety of that decision are not relevant to the questions at issue; rather the evidence concerning these questions is set forth in cancellation documents and other documents that are part of the administrative record.

3. The opinion letter that Plaintiff proffers in support of summary judgment is unauthenticated and therefore inadmissible.

Finally, the opinion letter authored by Steven Andrews, the purported "real estate title specialist," that is part of Exhibit 1 to Plaintiff's Declaration should be stricken on the independent ground that it is unauthenticated and bears no indicia of reliability. Even if the letter is offered purely as evidence to provide context and not for the truth of the matter asserted, as Plaintiff claims, it nevertheless must be authenticated in order to be admissible. *McBryde v. Comm. to Review Circuit Council Conduct and Disability Orders*, 264 F.3d 52, 78 (D.C. Cir. 2001) (citing Fed. R. Evid. 901); *see also Wiesner v. F.B.I.*, 668 F. Supp. 2d 157, 160 (D.D.C. 2009) (citing *Cuddy v. Wal–Mart Super Center, Inc.*, 993 F. Supp. 962, 967 (W.D. Va. 1998) ("It is true that unsworn, unauthenticated documents cannot be considered on a motion for summary judgment.") (other citations omitted)). Authentication requires the proponent to "produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). This Court, and also administrative appellate bodies, can reject proffered evidence that is unauthenticated and that the tribunal "finds to be untrustworthy or irrelevant[,]" or which

lacks sufficient indicia of reliability. *See Fei Yan Zhu v. United States*, 744 F.3d 268, 273 (3rd Cir. 2014).

Here, as Defendants previously noted, the opinion letter, which Plaintiff proffers as evidence of his understanding about title to the leased premises and his "ties" to the property, is an unsworn and unsigned out-of-court statement by an individual whom Plaintiff characterizes as a "real estate title specialist," but Plaintiff has offered no evidence of that individual's qualifications, nor does he even provide an address or any contact information. Moreover, the opinion letter is not addressed to Plaintiff but rather to the Assessor's Office for the County of Riverside California although Plaintiff claims that he retained the author of the letter to examine title to the property, and Plaintiff offers no other information about the circumstances under which the letter was produced. Plaintiff thus has not provided any information either initially or on reply that supports the document's authenticity as a title opinion supporting the "context" Plaintiff claims it proves. For this reason also, the letter should be stricken and not considered by the Court.

Dated: September 3, 2014

Respectfully submitted,

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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' Motion to Strike Declaration of William C. Tuttle and All Supporting Documents 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