ORAL ARGUMENT HAS NOT BEEN SCHEDULED

No. 16-5095

THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAROL TUTTLE, TRUSTEE FOR THE WILLIAM C. TUTTLE AND CAROL M. TUTTLE FAMILY TRUST,

Plaintiff-Appellant,

v.

SALLY JEWELL, UNITED STATES DEPARTMENT OF THE INTERIOR, *et. al.*,

Defendants-Appellees.

On Appeal From the United States District Court for the District Of Columbia in Case No. 13-365, Rosemary M. Collyer, United States District Judge

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APPELLANT'S OPENING BRIEF

Submitted By

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CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

(1) Parties and Amici

The parties in this case are (a) Appellant Carol Tuttle, Trustee for the William C. Tuttle and Carol M. Tuttle Family Trust ("Tuttle") and (b) Appellees United States Department of the Interior ("DOI"), including its constituent agency the Bureau of Indian Affairs ("BIA"), DOI Secretary Sally Jewell, and DOI Acting Assistant Secretary for Indian Affairs Lawrence Roberts (collectively, "the Secretary").

(2) Ruling Under Review

The ruling under review in this case is the March 11, 2016, Order and Opinion entered by the Honorable Rosemary M. Collyer in the United States District Court for the District of Columbia denying Tuttle's Motion for Summary Judgment, granting the Secretary's Cross Motion for Summary Judgment and entering final judgment in favor of Appellees. *William C. Tuttle. v. S.M.R. Jewell, et al.*, No. CV 13-00365 (RMC) (D.D.C. Mar. 11, 2016) (Doc. Nos. 45 and 46). Plaintiff-Appellant filed a Notice of Appeal on April 11, 2016 (Doc. No. 47).

(3) Related Cases

Appellant is not aware of any other pending cases related to this matter.

/s/ Dennis J. Whittlesey
Dennis J. Whittlesey

CORPORATE DISCLOSURE STATEMENT

Appellant Tuttle is not a corporation and no third party holds any ownership interest in Appellant. Various non-corporate Sublessees under the Tuttle Lease have a financial interest in the outcome of the litigation but are not parties.

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GLOSSARY OF ABBREVIATIONS

CRIT	Colorado River Indian Tribes
Tuttle Lease	Lease No. B-509-CR, executed March 31, 1977, as modified on June 4, 1986.
Tuttle	Plaintiff-Appellant Carol Tuttle, Trustee for the William C. Tuttle and Carol M. Tuttle Family Trust
Secretary	Collectively, the United States Secretary of the Interior and the Assistant Secretary-Indian Affairs of the United States Secretary of the Interior

INTRODUCTION

This litigation concerns the termination of a federal lease for land in California on the West Bank of the Colorado River. The termination was ostensibly conducted by various officials of the United States Department of the Interior ("Interior") acting on behalf of the Secretary of the Interior ("Secretary").

At the time of the termination, the lessee was William Tuttle who had owned the land at issue in fee simple status since 1949, but was forced through legal and financial pressure from Interior officials to surrender his fee title in exchange for a 50 year lease in 1977. The Lessor was identified in the Lease as the Colorado River Indian Tribes ("CRIT"), although the Lease vested all supervision and enforcement responsibility exclusively in the Secretary. Only nine years later, Tuttle was forced, again through legal and financial pressure from Interior officials, to accept Lease modifications imposing additional financial concessions and reporting requirements without any consideration.

Finally, the Tribes began working with the relevant Interior officials to terminate the Lease outright despite the fact that the Lease's default provisions included protections in Tuttle's favor that only allowed outright termination under special circumstances never completely adhered to by the Interior officials. Instead, they pursued the termination through invocation of federal leasing

regulations that could not apply to this Lease by the applicable regulations' specific terms and allowed CRIT to direct the Lease termination.

The district court's Decision in favor of the Secretary (and her subordinate officials involved in this matter) was the product of three significant errors. First, the Lease designated the Secretary as having exclusive authority and rights to conduct any action against Tuttle associated with a default of its provisions; yet, the Secretary effectively delegated all of the enforcement decision-making to CRIT tribal officials. This activity alone constituted an outright abrogation of carefully-constructed Lease provisions and effectively and illegally delegated all Lease enforcement decisions to tribal operatives, yet the district court ruled in favor of the process followed. Second, the district court ruled in favor of the termination process followed by sustaining the Secretary's reliance on federal regulations that − by their own terms − are superseded by conflicting provisions of the Tuttle Lease. Third, the district court further justified its decision by invoking provisions of a 1964 Act that expressly excluded the Tuttle Leasehold property from the very federal leasing authority upon which the district court relied in denying Tuttle's claims.

This case is not complicated. Tuttle agreed to a Lease and Modification under pressure, but nevertheless made reasonable and good-faith efforts to fulfill his responsibilities in accordance with their specific terms despite the severe health

problems which eventually led to his death. CRIT worked with federal officials to ignore the Lease's protections of Tuttle's rights. The Secretary's termination of the Lease ignored those rights, was arbitrary and capricious, and did not observe the procedure required by law.

The law, regulations and facts are contrary to the district court's decision, and the resulting judicial error should be reversed.

JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2201 because the action presented questions arising under federal law. The United States consented to the action under the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

This Court of Appeals has jurisdiction pursuant to 28 U.S.C. § 1291, in which Congress legislated appellate jurisdiction from all final decisions of district courts of the United States. The Order and Opinion on appeal constitute a final decision of the United States District Court for the District of Columbia, disposing of all the parties' claims.

The Order and Opinion were entered on March 11, 2016. The Notice of Appeal was timely filed on April 11, 2016, and docketed in this court on April 27, 2016.

STATUTES AND REGULATIONS

The relevant statutes and regulations are set forth in an addendum to this Opening Brief.

STATEMENT OF ISSUES FOR REVIEW

The issues raised in this Appeal are whether the district court erred in determining that:

(a) the Secretary's cancellation of Tuttle's lease ("Tuttle Lease") did not violate the applicable Interior regulations or the Tuttle Lease terms;

(b) the Secretary did not improperly delegate her decision-making to the Colorado River Indian Tribes ("CRIT"); and

(c) the Secretary's cancellation of the Tuttle Lease and refusal to accept Tuttle's attempts to cure any violations in consideration of the facts known to her was not arbitrary and capricious and without observance of the procedure required by law.

STATEMENT OF THE CASE

1. On January 27, 1949, Plaintiff-Appellant William Tuttle purchased the 98.24 acre property at issue in this litigation ("Tuttle Leasehold Property") and received a deed conveying fee simple title to Tuttle and his brother Robert E. Tuttle. Doc. No 24-2 at p. 22. Robert Tuttle subsequently died and Tuttle inherited his ownership interest in the Tuttle Leasehold Property.

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

3. On April 8, 1977, the United States District Court for the Central District of California entered a Stipulated (but not adjudicated) Judgment that the United States was the owner of certain lands – including Tuttle's fee land – and that the land was held "in trust" for CRIT by the United States. The Stipulated Judgment was rendered in a quiet title action styled *United States v. Brigham Young University, William C. Tuttle, and Robert E. Tuttle, No. CV 72-3058-DWW.* AR 0000363.

4. Notwithstanding the fact that he held fee simple title to the Property in 1977, Tuttle was forced to agree to the Stipulated Judgment and surrender his fee title under both legal and financial pressure from the United States government.

5. As the sole consideration for his executing the Stipulated Judgment, Tuttle entered into and executed the Tuttle Lease, No. B-509-CR, a fixed-term 50-year lease with CRIT pursuant to which Tuttle agreed to make the first rental payment to the Secretary and subsequent payments to CRIT on the following fixed-rate basis: (a) years 1-5: $491.20 annually; (b) years 6-20: $982.40 annually; and (c) years 21-50: $1,473.60 annually. AR 0000077.

6. The 50-year Tuttle Lease contained only one provision for termination – with or without cause – prior to the expiration of the 50 year leasehold term, which was described at ARTICLE 17 of the Tuttle Lease Addendum. AR 0000100.

7. The Tuttle Lease and Lease Addendum were approved by the Secretary on March 31, 1977. AR 0000077.

8. In 1986, Tuttle was forced to enter into a lease modification ("Tuttle Lease Modification"), which specifically provided that it "does not change any of the terms, conditions or stipulations of Lease No. B-509-CR except as specifically set forth herein." AR 0000074. The Lease Modification contained no new provision for any termination – with or without cause – prior to the expiration of the 50 year leasehold term.

9. The Lease Modification imposed increased rent payments of three percent (3%) of the gross receipts of all business conducted on the Tuttle Leasehold Property, and a requirement for an annual accounting and proof of insurance. AR 0000075.

10. The Lease Modification was approved by the Secretary on June 10, 1986. AR 0000074.

11. Through a timely appeal to the IBIA, Tuttle subsequently challenged the validity of the 1986 Lease Modification, which resulted in an IBIA decision in

2008 that (a) the Lease Modification was valid, but (b) Tuttle had been overcharged for, and had overpaid, certain interest charges. AR 0000035.

12. As part of, and pursuant to the requirements of, the 2008 IBIA ruling described at ¶ 11, the Secretary calculated the overcharges to be $10,504.79. AR 0000033.

13. On September 30, 2009, the Secretary and CRIT jointly issued a Default Notice ("Secretary's Default Notice") to Tuttle declaring a failure to pay rent of $4,420.80. Following negotiations, the Secretary and CRIT agreed to credit the overpayment of interest against the rent and waive the alleged default based on unpaid rent. However, the Secretary and CRIT refused to waive three other alleged technical violations of the Lease. AR 0000025.

14. The Secretary's Default Notice described at ¶ 13 asserted that (1) Tuttle had failed to pay the annual percentage rent based on gross receipts since 1991 in violation of the Lease Modification, (2) Tuttle had failed to submit statements of receipts to the Secretary and CRIT so that they could calculate the percentage rent, and (3) Tuttle had failed to provide acceptable evidence of insurance for the property. AR 0000027-28.

15. The Secretary's Default Notice allowed Tuttle only 10 days to cure or dispute the alleged violations or to request additional time to cure (AR 0000029),

in direct contravention of the 30-day period for cure guaranteed by Lease Addendum ARTICLE 17. AR 0000100.

16. On October 14, 2009 − 15 days after promulgation of the Secretary's Default Notice − and 15 days before expiration of the Lease's 30-day period for cure, Tuttle transmitted a letter to CRIT responding to the Secretary's Default Notice by (1) reporting estimated annual receipts of $11,000 and an estimated percentage rent amount of $5,600 and requesting that the base rent and percentage rent be deducted from the overcharges, (2) furnishing new proof of insurance, and (3) requesting that the Lease modification's requirement of a formal statement from a CPA be waived due to the personal expense that such a statement would require. AR 0000155-58.

17. On March 2, 2010, the Secretary issued a Notice of Cancellation, stating that the Superintendent had determined that Tuttle's efforts were insufficient to cure the alleged violations for the following uncorroborated reasons: (a) his estimate of receipts did not meet the reporting requirements of the Lease Modification, (b) the amount of unpaid percentage rent could not be calculated and, thus, could not be deducted from the remaining interest overpayment on account with the Secretary, and (c) the insurance policy submitted was insufficient. AR 000020.

18. The Notice of Cancellation neither cited Lease Addendum ARTICLE 17, nor explained how it satisfied the specific requirements of Lease Addendum ARTICLE 17(A) or 17(B). *Ibid*.

19. By letter dated March 11, 2010, Tuttle timely notified the Secretary of his intent to cure the non-rent violations and requested 45 days to do so, as provided for at Lease Addendum ARTICLE 17. AR 0000213.

20. Tuttle made a good-faith effort to cure the deficiencies alleged in the Notice of Violation by timely submitting a check in the amount of $4,800 and a Statement of Reasons explaining that his ability to respond to the Default Notice had been substantially impaired by serious medical emergencies he was experiencing. AR0000159.

21. Shortly thereafter, Tuttle submitted another Statement of Reasons and enclosed (1) a Compilation Report from his Certified Public Accountant for the years 1992-2009 estimating the percentage rent owed at $16,970.36 and (2) a check for $5,408.10. AR 0000167.

22. When coupled with the remaining credit for overpayment on account with the Secretary, Tuttle's unpaid rent was paid in full with delivery of the check described at ¶ 21.

23. On July 19, 2010, the Secretary's Acting Regional Director affirmed the Secretary's Superintendent's decision to terminate the Lease. AR 0000121.

24. On August 19, 2010, Tuttle filed a Notice of Appeal in this matter with the IBIA seeking review of the Lease termination. *William C. Tuttle v. Acting Western Regional Director, Bureau of Indian Affairs*, 56 IBIA 53 (Dec. 18, 2012). It should be noted that the IBIA is within the Department of the Interior, and thus, an integral part of the "Secretary."

25. On December 18, 2012, the IBIA rendered its Order affirming the Acting Western Regional Director's termination of the Lease. AR 0000274.

26. The IBIA Decision cited no provision of the Lease or Lease Modification providing for termination, did not reconcile its decision with Lease Addendum ARTICLE 17, and did not explain how the Decision satisfied the specific actions required by the Secretary in Lease Addendum ARTICLE 17(A) or 17(B).

27. On March 21, 2013, Tuttle timely filed his action in the District Court for the District of Columbia, resulting in the Order and Opinion on appeal herein.

SUMMARY OF THE ARGUMENT

Plaintiff-Appellant Tuttle appeals the district court's Order and Opinion of March 11, 2016, which denied his Motion for Summary Judgment (Doc. No. 24) and granted the Defendant-Appellee's Cross-Motion for Summary Judgment (Doc. No. 27).

Tuttle had challenged the termination of the Tuttle Lease on the basis that the Defendant-Appellees (i) improperly denied him an opportunity to cure as was his contractual right under the Tuttle Lease terms, (ii) conducted the Tuttle Lease termination in accordance with inapplicable BIA regulations instead of the applicable specific Tuttle Lease termination requirements, and (iii) improperly delegated the Tuttle Lease termination to CRIT despite the fact that the Tuttle Lease provided no role for CRIT in the lease termination process.

Moreover, the Secretary's regulations utilized by the Secretary and CRIT were inapplicable because they (a) were enacted after the Tuttle Lease execution, (b) conflicted with the Tuttle Lease provisions, and (c) by their own terms, could not be applied to supersede conflicting Tuttle Lease provisions.

The district court erred in finding that the Secretary's Tuttle Lease cancellation was not arbitrary and capricious due to (1) the wholesale delegation of the termination process to CRIT, (2) the Secretary's refusal to allow Tuttle a reasonable time to cure in light of his age and poor health, and (3) her conduct of

the Lease termination pursuant to inapplicable and conflicting BIA regulations instead of the Lease's own provisions.

STANDING

Tuttle has standing pursuant to the Administrative Procedure Act, 5 U.S.C. § 702 ("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.")

STANDARD OF REVIEW

When conducting a review of the legal sufficiency of an agency's action in light of the record, this Court's task is "precisely the same as the district court's." *Dr. Pepper/Seven-Up Companies, Inc. v. FTC*, 991 F.2d 859, 862 (D.C. Cir. 1993). As such, the district court's decision is "not entitled to any particular deference" and this Court should proceed as though the County had appealed the Secretary's decision directly to this Court. *Id*.

"[T]he agency must articulate a 'rational connection between the facts found and the choice made [by the Agency].'" *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc*., 419 U.S. 281, 285 (1974) (citation omitted). Therefore, as the D.C. Circuit has made clear, "where the agency has failed to provide a reasoned explanation, or where the record belies the agency's conclusion, [this Court] must undo its action." *Petroleum Communications, Inc. v. F.C.C.*, 22 F.3d 1164, 1172

(D.C. Cir. 1994) (emphasis supplied). However, this Court has noted that, in considering APA challenges to agency action, "the Court does not have to give deference to interpretations not made by an agency." *Lake Pilots Ass'n v. United States Coast Guard*, 257 F. Supp. 2d 148, 170 (D.D.C. 2003) (emphasis supplied) (internal quotations omitted).

The reviewing court "shall… hold unlawful and set aside agency action, findings, and conclusions" that are, *inter alia*, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "without observance of procedure required by law." 5 U.S.C. §706. Thus, if this Court determines that Defendants' Lease cancellation was arbitrary and capricious or that they applied the wrong procedure to the Lease termination, it must remand to the district court to set aside the decision.

ARGUMENT

I. The District Court Erred in Concluding That the Secretary Did Not Delegate Her Authority to the Colorado River Indian Tribes.

The district court improperly endorsed the Secretary's surrender to CRIT of the ultimate decision of whether to terminate Tuttle's Lease, while denying that it was a "delegation" as alleged by Tuttle. The district court wrote,

> BIA's statement that Mr. Tuttle could not cure his breaches without a waiver from the Tribes was correct under the law. The regulations required BIA to consult with the Indian landowners to decide whether to cancel the lease, invoke other remedies, or grant the tenant additional time to cure. 25 C.F.R. § 162.619(a)(1)-(4). The BIA properly consulted with the Tribes, but it had no power or authority to require the Tribes to accept Mr. Tuttle's attempted late cure.

Opinion, Doc. No. 45 at p. 19 (emphasis added).

However, the court admitted that "Mr. Tuttle is correct that Article 17 of the Lease requires the Secretary to decide whether to terminate the lease." *Id*. at 20 (emphasis added). In doing so, the court conceded that the Secretary's regulations and the Tuttle Lease termination provisions differ in a fundamental way: under the Tuttle Lease, the termination decision rested with the Secretary; but under Part 162, the final decision rested with CRIT because – as stated by the lower court, the Secretary could not make any decision unless CRIT accepted it. But, instead of recognizing that the application of the Secretary's regulations changed Tuttle's legal landscape in derogation of his negotiated rights under the Lease, the district

court dismissed his concerns, referencing only the fact that the Lease identified the Tribe as lessor and that the Tribe has a "substantive interest" in receipt of their rent. Opinion at p. 20. Tuttle never denied that the Lease designated the Tribe as Lessor or the Tribe's interest in collecting rent, but those statements are irrelevant to Tuttle's challenge. Rather, Tuttle challenged the Secretary's application of the wrong legal process to the Lease cancellation and surrender to CRIT's demands for immediate cancellation. That surrender was particularly inequitable in light of the facts surrounding the original execution and subsequent modification of the Lease, including legal and financial pressure from federal officials that Tuttle (1) surrender fee simple title to the land (in return for a 50-year leasehold interest) and (2) subsequently accept increased financial and reporting requirements without receiving any consideration in return (in the Lease Modification).

Tuttle's Motion for Summary Judgment referenced many indications in the Administrative Record showing that the Tribe made all relevant decisions related to the Lease that were accepted *in toto* by the Secretary. *See* Mem. Spt. Mot. Summ. J. at pp. 11-14.

In improperly delegating the Lease termination, the Secretary failed to articulate a rational basis for her decision. "[T]he agency must articulate a 'rational connection between the facts found and the choice made [by the Agency].'" *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285

(1974) (internal citation omitted). Because the Secretary did not execute the termination, the reasons behind the termination were made by CRIT officials and its legal team. There is nothing in the record to even hint that the Secretary considered all of the reasons – legal and factual – that would have led her to reach a different conclusion and reject CRIT's demands for immediate termination.

The district court also failed to reconcile its decision with authority cited by Tuttle that agency decisions must be made at arm's length and be insulated from the biases of regulated entities such as CRIT. Third-party decisions like CRIT's Lease termination decision must be independently and extensively reviewed before an agency may lend the decision its *imprimatur*. *See* Mem. Spt. of Mot. Summ. J at 27, Doc. No. 24-1, citing *Assocs. Working for Aurora's Res. Env't v. Colo. Dept. of Transp*., 153 F.3d 1122 (10th Cir.1998). The Secretary violated that principle because (a) BIA officials never "exercised substantial supervision" over CRIT's cancellation process, (b) CRIT made "all major decisions" regarding the cancellation acting simultaneously as lessor and regulator, and (c) the Secretary failed to conduct an independent review or investigation into the factual circumstances of the Tuttle Lease, including the legal and financial pressure put on him to surrender fee title in return for the Lease and subsequently to accept the unfavorable and unfair Lease Modification at a time when he was elderly and in extremely poor health.

II. The District Court Erred in Concluding that the Secretary's *Ex Post Facto* and Conflicting Regulations Control the Lease Termination.

The district court erroneously found that the Secretary's Part 162 regulations controlled the termination of the Tuttle Lease and that the Tuttle Lease incorporated BIA regulations controlling lease termination, despite the fact that those regulations were promulgated long after the Tuttle Lease was executed and specifically provide that provisions of any lease then in effect would control over any conflicting provisions of the regulations. 25 C.F.R. § 162.008. This misapplication of the controlling law demands a remand to the agency for a reconsideration of the Lease termination under the appropriate legal and regulatory requirements.

A. 25 C.F.R. § 162.008 states that conflicting provisions of leases approved before January 4, 2013, control over the Secretary's regulations.

Both the Notice of Default and the Notice of Cancellation cited − and purported to be issued in accordance with − various regulations within 25 C.F.R Part 162. However, they failed to reconcile the actions being taken with the Secretary's lease termination procedures which specifically provide that the lease terms shall control as to actions concerning leases approved prior to January 4, 2013.

Part 162 states, in pertinent part:

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

25 C.F.R. § 162.008 (emphasis added). In the agency's preamble to the rule at its publication in the Federal Register, the agency explained that the purpose of the language is to:

> Clarify what version of the regulations will apply to leases approved before the effective date of the rule. We reworded 162.008 to clarify that new regulations will apply to leases approved before the effective date of the rule, except that where the provisions of the lease conflict with the provisions of the regulation, the provisions of the lease will govern.

Residential, Business, and Wind and Solar Resource Leases on Indian Land, 77 FR 72440-01 (Dec. 5, 2012).

The Tuttle Lease was executed on March 31, 1977. The Tuttle Lease Modification was executed on June 4, 1986, and approved by the Secretary six days later – both of which occurred long before the Secretary promulgated Part 162, and well before the operative date of January 4, 2013, specified in Section 162.008. Accordingly, any conflicting Lease terms control.

B. The Lease termination provisions conflict with the Regulations applied by the Secretary in this case.

The Lease provides that the Secretary, not CRIT, shall independently conduct any termination and neither contemplates nor authorizes any interference in a Lease termination by the Tribe. Lease Addendum ARTICLE 17(A) establishes the Secretary's sole discretion to pursue legal and equitable remedies for resolving alleged Lease violations as follows: "the Secretary may … Proceed by suit or otherwise to enforce collection or to enforce any other provision of this lease." AR 0000100 (emphasis added). That provision also provides for a non-eviction alternative to lease termination which the Secretary and CRIT ignored, and which may have prevented the forfeiture of Tuttle's land and harm to Tuttle and his sublessees resulting from the arbitrary Lease cancellation.

Lease Addendum ARTICLE 17 precludes termination if the default or breach can be cured by payment or expenditure of money and cure is received within 45 days of written notice. AR 0000101. Tuttle cured the deficiencies related to rent payments and therefore termination under the Lease provisions was inappropriate.

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

In purporting to terminate the Lease, the Secretary and her subordinates (including the Acting Regional Director and the Agency Superintendent) failed to comply with the requirements of either Addendum ARTICLE 17(A) or 17(B), a fatal flaw in the process she followed in a rush to terminate the Lease to satisfy CRIT's demands, rather than respect the fact that the Lease is the only consideration Tuttle ever received in return for forfeiture of his fee simple land title.

The district court erred in ignoring these substantial protections in the Lease by allowing the Secretary to proceed under her newly-adopted regulations and delegate the process to CRIT, in the process ignoring Tuttle's only guaranteed protection that the Secretary – and only the Secretary – would have oversight of his compliance with the Lease provisions as written. Indeed, the district court ignored the protections of objective Secretarial decision-making when it endorsed the Secretary's rote acceptance of every Lease action proposed by CRIT. Indeed, this included allowing CRIT to write the entire Lease termination plan despite the Tribe's inherent conflict of interest in serving both as lessor and regulator.

C. Part 162 was enacted subsequent to the Lease execution and cannot be retroactively applied.

The termination provisions of the Lease conflict with the Secretary's regulations, and the Secretary's conduct of the termination pursuant to those regulations denied Tuttle the very rights that were agreed to and which constituted

a critical provision of the Tuttle Lease. *Ex post facto* regulations promulgated after the execution of the Tuttle Lease cannot be applied in this case. Part 162 was promulgated on January 22, 2001, and amended effective January 4, 2013, long after the Lease was executed in 1977 and modified in 1986. Accordingly, Part 162 did not exist in its present form when the Tuttle Lease was executed and was not part of the bargain struck between the parties.

In general, "a statutory grant of rulemaking authority will not... be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). The APA itself defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy…." 5 U.S.C. § 551(4) (emphasis supplied).

This Court has previously articulated the test for when a rule is impermissibly retroactive:

> A rule operates retroactively if it takes away or impairs vested rights. The critical question is whether the interpretation established by the new rule "changes the legal landscape." If a new rule is "substantively inconsistent" with a prior agency practice and attaches new legal consequences to events completed before its enactment, it operates retroactively. Even where a rule merely narrows "a range of possible interpretations" to a single "precise interpretation," it may change the legal landscape in a way that is impermissibly retroactive.

Arkema Inc. v. E.P.A., 618 F.3d 1, 7 (D.C. Cir. 2010) (internal citations removed).

In this case, the Secretary's application of Part 162 to the Lease termination "changed the legal landscape" and attached new legal consequences to the Tuttle Lease by depriving him of an independent conduct of any termination decision and process by the BIA as guaranteed by Lease Addendum Section 17. Accordingly, the district court erred in affirming the Secretary's application of those regulations to the Tuttle Lease, injuring Tuttle by depriving him of the independent review contemplated therein.

III. The District Court Erred in Concluding that the Act of April 30, 1964, Applies to the Tuttle Lease Because Section 5 of That Act Expressly Exempts Lands West of the Colorado River from the Secretary's Leasing Authority.

The Tuttle Lease's references to the Act of April 30, 1964, 78 Stat. 188 (Public Law 88-302) do not accomplish what the district court asserts: an express statement that "the Lease was governed by federal regulations and subsequent amendments to the regulations." Opinion at 2. Although the 1964 Act was entitled "An Act to fix the beneficial ownership of the Colorado River Indian Reservation located in the States of Arizona and California," it expressly exempted the West Bank land on which the Tuttle Leasehold is located from the application of federal leasing laws.

To this point, the Act declared the entire Reservation to be "tribal property held in trust by the United States for the use and benefit of the Colorado River

Indian Tribes of the Colorado River Reservation." However, due to an ongoing dispute regarding the legal status of the land lying west of the Colorado River, whose course had shifted since the establishment of the reservation, Section 5 of the 1964 Act included a critical contingency:

> 'The Secretary of the Interior is authorized to approve leases of lands on the Colorado River Indian Reservation, Arizona and California….
>
> *Provided, however*, That the authorization herein granted to the Secretary of the Interior shall not extend to any lands lying west of the present course of the Colorado River and south of section 25 of township 2 south, range 23 east, San Bernardino base and meridian in California, and shall not be construed to affect the resolution of any controversy over the location of the boundary of the Colorado River Reservation: *Provided further*, That any of the described lands in California shall be subject to the provisions of this Act when and if determined to be within the reservation.

Public Law 88-304 (Apr. 30, 1964)(emphasis supplied).

The 1964 Act expressly prohibited the Secretary from leasing any land on the Colorado River's West Bank on behalf of CRIT pursuant to the Indian Long Term Leasing Act of 1955, 25 U.S.C. § 415, until and unless the western boundary of the Reservation has been formally determined. In other words, pursuant to the specific terms of Section 5, the Secretary has no authority to lease the West Bank Land on behalf of CRIT until and unless that land is formally and lawfully

determined to be eligible under the statutory precondition of a "determination" to that effect.

The Secretary informally purported to make the required Section 5 determination in a January 1969 letter, but that purported "determination" action was rejected by the U.S. Supreme Court in 1983.

The Secretary issued a Memorandum Order dated January 17, 1969,[1] declaring that the CRIT Reservation extends into California to include the West Bank Land without reference to – and perhaps in deliberate derogation of − the 1964 Act. The Supreme Court rejected CRIT's argument in water rights litigation that the 1969 Secretarial Order satisfied the Section 5 requirement for a formal boundary determination. See *Arizona v. California*, 460 U.S. 605, 636, n. 26 (1983) (stating that "the Colorado River Tribes will have to await the results of further litigation before they can receive an increase in their water allotment based on the land determined to be part of the reservation") (emphasis supplied).

At all times since the 1964 Act became law, the required boundary determination has been a precondition to the Secretary's authority to lease federal lands on the West Bank of the Colorado River. The fact that no such determination has been made contradicts and precludes the district court's finding that the BIA regulations (which directly conflict with the Lease terms) were

[1] On this date, the Lyndon Johnson Administration was only a few days away from leaving office.

appropriately applied to the Lease termination. For the same reasons, the district court erred in determining that the participation of CRIT officials in deciding and implementing the Lease termination was appropriate under the Act of April 30, 1964.

CONCLUSION

Because the district court erred in its conclusions that the Secretary's decision to apply inapplicable regulations to the Lease Termination and delegate the termination to CRIT was not arbitrary, capricious, and without observance of the law, that decision should be reversed and the Lease termination should be remanded to the Secretary for reconsideration to be conducted pursuant to the default procedures in the Lease itself.

DATED this 20th day of September 2016.

CAROL TUTTLE

By Counsel

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FRAP 32(a)(7) CERTIFICATE OF COMPLIANCE

In compliance with Federal Rule of Appellate Procedure 32(a)(7), I certify that the foregoing contains 5,271 words, excluding parts of the document that are exempted by the Rule.

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2016, I electronically filed the foregoing 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/ *Dennis J. Whittlesey*
Dennis J. Whittlesey

ADDENDUM: STATUTES AND REGULATIONS

25 C.F.R. § 162.008 2

25 C.F.R. § 162.619 3

Act of April 30, 1964, 78 Stat. 188 (Public Law 88-302) 5

25 C.F.R. § 162.008

Does this part apply to lease documents I submitted for approval before January 4, 2013?

This part applies to all lease documents, except as provided in § 162.006. If you submitted your lease document to us for approval before January 4, 2013, the qualifications in paragraphs (a) and (b) of this section also apply.

(a) If we approved your lease document before January 4, 2013, this part applies to that lease document; however, if the provisions of the lease document conflict with this part, the provisions of the lease govern.

(b) If you submitted a lease document but we did not approve it before January 4, 2013, then:

(1) We will review the lease document under the regulations in effect at the time of your submission; and

(2) Once we approve the lease document, this part applies to that lease document; however, if the provisions of the lease document conflict with this part, the provisions of the lease document govern.

25 C.F.R. § 162.619

What will BIA do if a violation of a lease is not cured within the requisite time period?

(a) If the tenant does not cure a violation of a lease within the requisite time period, we will consult with the Indian landowners, as appropriate, and determine whether:

(1) The lease should be canceled by us under paragraph (c) of this section and §§162.620 through 162.621 of this subpart;

(2) We should invoke any other remedies available to us under the lease, including collecting on any available bond;

(3) The Indian landowners wish to invoke any remedies available to them under the lease; or

(4) The tenant should be granted additional time in which to cure the violation.

(b) If we decide to grant a tenant additional time in which to cure a violation, the tenant must proceed diligently to complete the necessary corrective actions within a reasonable or specified time period from the date on which the extension is granted.

(c) If we decide to cancel the lease, we will send the tenant and its sureties a cancellation letter within five business days of that decision. The cancellation letter must be sent to the tenant by certified mail, return receipt requested. We will also provide actual or constructive notice of a cancellation decision to the Indian landowners, as appropriate. The cancellation letter will:

(1) Explain the grounds for cancellation;

(2) Notify the tenant of the amount of any unpaid rent, interest charges, or late payment penalties due under the lease;

(3) Notify the tenant of its right to appeal under part 2 of this chapter, as modified by §162.620 of this subpart, including the amount of any appeal bond that must be posted with an appeal of the cancellation decision; and

(4) Order the tenant to vacate the property within 30 days of the date of receipt of the cancellation letter, if an appeal is not filed by that time.

Act of April 30, 1964, 78 Stat. 188 (Public Law 88-302)

AN ACT To fix the beneficial ownership of the Colorado River Indian Reservation located in the States of Arizona and California.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, for the purpose of fixing the beneficial ownership of real property interests in the Colorado River Reservation now occupied by the Colorado River Indian Tribes, its members, and certain Indian colonists, all right, title, and interest of the United States in the unallotted lands of the Colorado River Reservation, including water rights and mineral rights therein, together with all improvements located thereon and appurtenant thereto, except improvements placed on the land by assignees or by Indian colonists, and except improvements furnished by the United States for administrative purposes (including irrigation facilities) or for the housing of Federal employees, are hereby declared to be tribal property held in trust by the United States for the use and benefit of the Colorado River Indian Tribes of the Colorado River Reservation.

SEC. 2.

For the purpose of this Act:

(a) "Tribes" means the Colorado River Indian Tribes of the Colorado River Reservation, with a constitution adopted pursuant to the Indian Reorganization Act of June 18, 1934 (48 Stat. 984; 25 U. S. C. 461 et seq.), as said constitution now exists or may hereafter be amended, consisting of a band of the Mohave Indians, the band of Chemehuevi Indians affiliated therewith, and various Indians heretofore or hereafter adopted by the Colorado River Indian Tribes.

(b) "Colorado River Reservation" means the reservation for Indian use established by the Act of March 3, 1865 (13 Stat. 559), as modified and further defined by Executive orders of November 22, 1873, November 16, 1874, May 15, 1876, and November 22, 1915, all of which area shall be deemed to constitute said reservation.

SEC. 3.

Any person of Indian blood, his spouse of Indian blood (excluding persons whose Indian blood is traceable solely to Indian tribes, bands, or groups not resident in or subject to the jurisdiction of the United States), and any dependent child of either or both of them, who is not a member of the tribes on the date of this Act, and who has settled on irrigated lands of the Colorado River Reservation through application for a settler's land permit and who is still holding such lands by virtue of the authority of a temporary land use permit issued by or under the authority of the tribes or the Federal Government, shall be deemed to be adopted by the tribes if within two years from the date of this Act he files with the tribal council a statement accepting membership in the tribes and renouncing membership in any other tribe, band, or group. Such statement may be filed on behalf of a dependent child by either parent or by a person standing in loco parentis.

SEC. 4.

This Act shall become effective upon the agreement of the tribes to abandon the claims now pending in docket numbered 185 and in docket numbered 283A before the Indian Claims Commission under the Act of August 13, 1946 (60 Stat. 1049), and the dismissal of said claims by the Indian Claims Commission. Nothing in this Act shall affect or be taken into consideration in the adjudication of, or with respect to, any other claims now pending by the tribes against the United States.

SEC. 5.

The Act of June 11, 1960 (74 Stat. 199), as amended by the Act of September 5, 1962 (76 Stat. 428), is amended to read as follows:

"The Secretary of the Interior is authorized to approve leases of lands on the Colorado River Indian Reservation, Arizona and California, for such uses and terms as are authorized by the Act of May 11, 1938 (52 Stat. 347; 25 U. S. C. 396a et seq.), and the Act of August 9, 1955 (69 Stat. 539), as amended

(25 U. S. C. 415 et seq.) including the same uses and terms as are permitted thereby on the Agua Caliente (Palm Springs), Dania, Navajo, and Southern Ute Reservations: Provided, however, That the authorization herein granted to the Secretary of the Interior shall not extend to any lands lying west of the present course of the Colorado River and south of section 25 of township 2 south, range 23 east, San Bernardino base and meridian in California, and shall not be construed to affect the resolution of any controversy over the location of the boundary of the Colorado River Reservation: Provided further, That any of the described lands in California shall be subject to the provisions of this Act when and if determined to be within the reservation."

Approved, April 30, 1964.