



## INTERIOR BOARD OF INDIAN APPEALS

William C. Tuttle and Rio Valley Estates v. Acting Western Regional Director,  
Bureau of Indian Affairs

46 IBIA 216 (02/07/2008)

Related Board cases:

36 IBIA 254

Reconsideration denied, 36 IBIA 291

41 IBIA 74



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
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WILLIAM C. TUTTLE and RIO	)	Order Affirming Decision in Part,
VALLEY ESTATES,	)	Reversing and Remanding Decision
Appellants,	)	in Part, and Dismissing Appeal in Part
	)	
v.	)	
	)	Docket No. IBIA 05-79-A
ACTING WESTERN REGIONAL	)	
DIRECTOR, BUREAU OF	)	
INDIAN AFFAIRS,	)	
Appellee.	)	February 7, 2008

Since 1977, William C. Tuttle has leased a 98.24-acre tract of tribal land from the Colorado River Indian Tribes (Tribe), under a 50-year lease, Business Lease No. B-509-CR (Lease). Tuttle previously claimed title to the property, and entered into the Lease with the Tribe in connection with the settlement of litigation in which the United States challenged his title.<sup>1</sup> The lessee-lessor relationship between Tuttle and the Tribe apparently has been fraught with conflict from the mid-1980's, if not sooner. Since at least the year 2000, Tuttle has sought intervention from the Bureau of Indian Affairs (BIA) against the Tribe to resolve a litany of complaints related to Tuttle's use and development of the property, and more recently related to an attempted assignment of the leasehold interest to Rio Valley Estates, a limited liability company.

In this appeal, Tuttle and Rio Valley Estates (Appellants), have appealed to the Board of Indian Appeals (Board) from a May 18, 2005, decision (Decision) of the Acting Western Regional Director (Regional Director), BIA, in which the Regional Director

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<sup>1</sup> Tuttle and his brother Robert originally jointly claimed title, and both executed the Lease as the lessees. Tuttle states that after Robert died, he became the successor to Robert's interest.

sought to address Tuttle's various complaints.<sup>2</sup> With one or two limited exceptions — e.g., BIA's recognition of the Lease as still valid and effective and its recognition of Tuttle's right to develop the property — the Regional Director denied the declaratory relief or BIA action sought by Tuttle, either by rejecting his arguments outright or by issuing a qualified response that failed to provide him with the specific relief he requested. As summarized below, and as discussed more fully in this decision, we affirm the Regional Director's decision in part, reverse and remand it in part, and dismiss certain remaining claims.

### Summary of Appellants' Claims and Our Disposition of Those Claims

In seeking relief from the Regional Director, and on appeal to the Board, Appellants<sup>3</sup> raised and raise, with accompanying requests for declaratory or other relief, the following claims and arguments:

- (1) a **1986 Lease modification** executed by Tuttle and the Tribe, which provided for additional rent and which was approved by BIA, must be declared invalid for lack of consideration and because Tuttle was coerced into signing it;
- (2) Tuttle's payment of rental arrears in 2004, following a payment dispute, precluded or cured any possible nonpayment default and therefore **the Lease remains in full force and effect**; and he is not liable for **interest on lease payments** that he tendered to but which were refused by the Tribe for several years during the dispute;

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<sup>2</sup> In 2001, Tuttle filed an appeal with the Board from alleged BIA inaction, pursuant to 25 C.F.R. § 2.8 (appeal from inaction of official). The Board dismissed that appeal without prejudice to allow BIA to attempt to resolve the conflicts between Tuttle and the Tribe. *Tuttle v. Western Regional Director*, 36 IBIA 254, *recon. denied*, 36 IBIA 291 (2001). In 2004, Appellants submitted to the Regional Director another formal demand for action pursuant to section 2.8, which they followed with another appeal to the Board. The Regional Director then issued the Decision, and the Board dismissed the section 2.8 appeal as moot. *Tuttle v. Western Regional Director*, 41 IBIA 74 (2005). Appellants then appealed to the Board seeking review of the Decision on the merits.

<sup>3</sup> The appeal to the Board was filed jointly by Tuttle and Rio Valley Estates, and Appellants filed joint briefs. Rio Valley Estates's only claimed interest, however (and its standing) is dependent upon the premise that it holds a valid assignment of the Lease.

- (3) an **assignment** of the leasehold interest to Rio Valley Estates submitted for approval on April 16, 2003, is valid and must be recognized as such by BIA;
- (4) BIA and the Tribe may not condition their **approval of subleases and assignments** by Tuttle on his willingness to renegotiate (to increase) his rent;
- (5) BIA has a **duty to provide electrical service** (generated and administered by BIA's Colorado River Indian Irrigation Project) to the leased property, and may not condition such service on permits or inspections from the Tribe;
- (6) BIA has a **duty to assert regulatory jurisdiction over a road** that apparently passes over fee and adjoining leasehold property on the Tribe's reservation, which Tuttle and his sublessees use, in order to protect public safety and a right of access to Tuttle's leasehold property;
- (7) BIA's actions or inactions have denied Tuttle **due process** and constitute a **taking** of his property, in violation of the Fifth Amendment to the U.S. Constitution.

Appellants raise these arguments in the context of one unifying allegation: According to Appellants, for the past 20 years the Tribe has repeatedly interfered with Tuttle's rights under the Lease for the purpose of extracting an agreement from Tuttle for additional rent. Appellants contend generally, in the context of one or more of the above specific arguments, that BIA has a duty to enforce the Lease on their behalf, and that BIA has breached that duty through its complicity with the Tribe's noncooperation or obstructionism. As further explained in this decision, we disagree with Appellants' argument that BIA owes them a duty under the Lease to enforce its terms against the Tribe, and Appellants have not demonstrated that any such duty is owed pursuant to law or the terms of a settlement agreement. With respect to the specific claims described above, we

- (1) *affirm*, on other grounds, the portion of the Decision concluding that BIA considers the Lease modification to be valid and demanding an accounting from Tuttle pursuant to the terms of the modification;
- (2) *dismiss*, for lack of standing, Appellants' request that the Board declare the Lease to be in full force and effect, *reverse*, based on a concession by the Regional Director on appeal, the portion of the Decision finding that Tuttle is liable for interest on rent that he timely tendered to but which was refused by the Tribe, and *remand* the interest issue to the Regional Director for consideration of an appropriate remedy;
- (3) *affirm*, on other grounds, the portion of the Decision declining to recognize the assignment to Rio Valley Estates as valid;
- (4) *dismiss*, for lack of standing and ripeness, Appellants' request for a declaration that neither the Tribe nor BIA may condition approval of subleases and assignments on the lessee's agreement to increase the rent;

- (5) *dismiss*, for lack of standing and ripeness, Appellants' claim that BIA is required to provide electrical service to the leased property;
- (6) *affirm* the portion of the Decision in which the Regional Director declined to assert regulatory jurisdiction over the access road; and
- (7) *reject* Appellants' due process and related takings claim as either unfounded or as beyond our jurisdiction.

## Background

Although not shown to be directly relevant to our disposition of the issues raised in this appeal, some historical background for this long-running dispute between Tuttle and the Tribe may be helpful. In 1972, the United States, on behalf of the Tribe, filed a quiet title action against Tuttle and others, claiming title to certain lands that are located on the west side of the Colorado River in California. The United States and Tuttle eventually settled the litigation, pursuant to which title for the 98.24-acre tract was quieted in the United States. In 1977, in connection with the settlement,<sup>4</sup> the Tribe (as beneficial owner and lessor), and Tuttle (as lessee), entered into a 50-year lease for the property. The Lease was approved by the Superintendent of the Colorado River Agency, BIA (Superintendent), pursuant to the Act of April 30, 1964, 78 Stat. 1888, which in turn authorized the Secretary of the Interior (Secretary) to approve leases of land on the Tribe's reservation pursuant to the general Federal statute governing leases of Indian trust lands, 25 U.S.C. § 415. Under the terms of the Lease, Tuttle's rent started at \$491.20 annually (\$5.00/acre) and over time rose to a maximum of \$1473.60 annually (\$15.00/acre), starting in the 21st year of the Lease. With the exception of the initial payment, rent was paid directly to the Tribe. Lease ¶ IV.

At some point after Tuttle entered into the Lease, he undertook efforts to develop the property, as authorized by the Lease. According to Tuttle, the Tribe has persistently thwarted those efforts, leading to the various disputes that are collectively raised in this appeal.

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<sup>4</sup> In the Decision, the Regional Director stated in general terms that the Lease was negotiated as part of the agreement to settle the quiet title litigation. *See* Decision at 1 (“[t]he Lease was entered into between the [Tribe] . . . and [Tuttle] . . . to settle a quiet title action”). Neither the Regional Director nor Appellants (who invoke the settlement agreement in making several arguments) have submitted a copy of the settlement agreement to the Board, or a copy of the final judgment entered in the case after settlement. Neither party contends that the Lease terms were incorporated by reference in the quiet title action settlement agreement or that the Federal court approved the Lease itself.

## 1. 1986 Lease Modification

Relevant to the first issue in this appeal, in 1986 the Tribe and Tuttle executed a modification to the Lease. The modification provided that in addition to the basic rent, Tuttle would pay the Tribe an amount equal to three percent of the gross receipts of all business conducted on the leased land, including lot sales, and lot rentals, regardless of whether the business was conducted by Tuttle, a sublessee, or an assignee. The modification also required that Tuttle provide an annual accounting to the Tribe and to the Secretary in order to determine the amount of additional rent due under the gross receipts provision. The modification does not recite any consideration from the Tribe in exchange for Tuttle's agreement to pay the additional rent. On June 10, 1986, the Superintendent approved the modification, declaring that "[t]he . . . modification is hereby approved and declared to be made in accordance with the law and the rules and regulations prescribed by the Secretary of the Interior thereunder, and now in force." At or about the same time, the Tribe apparently approved several individual subleases for Tuttle's Rio Loco Ranch (Rio Loco) development. In 2001, Tuttle sought to have BIA declare the modification invalid for lack of consideration. He later contended that the Tribe had coerced him into agreeing to the Lease modification, and still later argued — as he does on appeal to the Board — that BIA had coerced him.

In the Decision, the Regional Director concluded that the Lease modification was valid because, he stated, the Tribe had approved "form subleases" at the time the modification was negotiated, and because such approval was discretionary, it constituted valuable consideration from the Tribe in exchange for Tuttle's agreement to pay additional rent. The Regional Director announced BIA's intent to enforce the modification and demanded an accounting from Tuttle, along with such payment and interest as may be shown to be due by the accounting.

## 2. Nonpayment of Rent, Cure, and Interest Due on Payments Tendered but Refused

Relevant to the second issue in this appeal, in 1994, Tuttle apparently stopped making the basic rent payments to the Tribe.<sup>5</sup> At some point, however, Tuttle reversed course and in 1999 he tendered basic rent payments to the Tribe. By then, however, the Tribe had taken the position that Tuttle's nonpayment of rent constituted a repudiation of

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<sup>5</sup> According to Tuttle, the payment dispute arose when the Tribe refused to issue building permits for further development of the property. The Regional Director suggests that Tuttle may have stopped payment because he was hoping to resurrect his claim of fee title to the property. *See* Response of Appellee to Appellants' Opening Brief at 13.

the Lease and therefore the Lease was no longer valid. The Tribe refused to accept Tuttle's resumption of payment. *See* Letter from Herman Laffoon to Rio Loco Resort, Oct. 16, 2000 (Tribal Council has decided not to accept Tuttle's payment); *see also* Letter from Tribe's Acting Attorney General to Tim Moore, Feb. 11, 2000 ("Tuttle does not have a valid lease agreement with the [Tribe]"); Letter from Tribe's Acting Attorney General to BIA Regional Realty Officer, Oct. [illegible], 2000, at 1 ("Unfortunately, Mr. Tuttle has for the past six years, taken the position that the lands covered by his Master lease are not tribal lands. Hence, he has refused to honor any of the lease terms. The Tribe[] has lost tens of thousands of dollars in revenue because of Mr. Tuttle's repudiation of the lease.").<sup>6</sup>

In November of 2000, Tuttle, through counsel, wrote to the Regional Director to request BIA's assistance in Tuttle's "ongoing lease dispute" with the Tribe. Letter from Moore to Regional Director, Nov. 10, 2000, at 1. In the letter, Tuttle characterized his request for BIA involvement as "premature," but suggested that it would be of assistance. *Id.* In January of 2001, Tuttle wrote to the Superintendent, formally seeking BIA's intervention in the dispute with the Tribe and formally requesting BIA action pursuant to 25 C.F.R. § 2.8.<sup>7</sup> Tuttle asked BIA to require the Tribe to provide a written statement that the Lease was in good standing, contended that the Tribe's actions and inactions had interfered with his development rights under the Lease, and sought an order from BIA requiring the Tribe to comply with the Lease. Tuttle did not make any claims of complicity or wrongdoing by BIA. However, when BIA failed to intervene or issue a decision, Tuttle filed an earlier appeal to the Board to compel BIA action. The Board dismissed that appeal without prejudice, to allow BIA to attempt to resolve the conflicts between Tuttle and the Tribe. *See supra* note 2.

Eventually, in 2004, BIA apparently brokered a partial resolution of the payment dispute by agreeing to accept Tuttle's payments on behalf of the Tribe. In September of 2004, Tuttle paid the rent due, including amounts he had earlier withheld as well as those subsequently tendered to but refused by the Tribe, plus interest.<sup>8</sup> The interest was paid under protest.

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<sup>6</sup> Tuttle denied making any statements that the lands were not tribal lands.

<sup>7</sup> Section 2.8 of 25 C.F.R. is an action-prompting mechanism, pursuant to which a party may seek to obtain a decision or action by BIA, and may appeal BIA's inaction if no decision or action is forthcoming.

<sup>8</sup> The Lease provides that "[p]ast due rental shall bear interest at ten percent (10%) per annum from the due date until paid." Lease ¶ V.

In the Decision, the Regional Director concluded that because Tuttle had paid his outstanding obligations for the basic rent, and because no notices of default had ever been delivered, his nonpayment had been cured and the Lease remained “in full force and effect.” Decision at 3. The Regional Director also concluded, however, that Tuttle should be required to pay interest on all previously “unpaid” lease amounts, including those that had been timely tendered to but refused by the Tribe.

### 3. Assignment of Leasehold Interest to Rio Valley Estates

Another issue arose in 2003 when Tuttle attempted to obtain approval from the Tribe and BIA of an assignment of the leasehold interest to Rio Valley Estates. The Lease contains a provision giving the lessee the right to assign the Lease upon the prior written approval of the Tribe and BIA, and states that such approval shall not unreasonably be withheld. Lease Addendum, Article 7(B). The Lease further provides that the Tribe and BIA have an affirmative obligation to either approve or disapprove in writing and in detail any assignment within 45 days of submission. The Lease then states that “[f]ailure to submit to Lessee such reasons for disapproval within forty-five (45) days shall be deemed an approval of the assignment or transfer.” *Id.*

In a letter to the Tribe, dated March 13, 2003, after addressing other matters, Tuttle’s counsel stated that “[t]his letter shall also serve as Mr. Tuttle’s request for consent to transfer his Lease . . . . The transfer shall be to a newly formed Limited Liability Company to enable further development of the property.” Letter from Moore to Laffoon, Mar. 13, 2003. Attached to the letter was an unexecuted Lease Assignment Document, which identified the assignors as William C. Tuttle and Carol M. Tuttle, and Richard Timothy Moore and Firouzeh Emilie Moore,<sup>9</sup> and identified the assignee as Rio Valley Estates, a California Limited Liability Company. The Lease Assignment Document recited that in a document executed by the Tuttle family on April 2, 2001, a 50% interest in the leasehold property had been transferred to the Moores, and that the Tuttle family and the Moores now wished to assign all of their rights to Rio Valley Estates. Stan Webb, the BIA Regional Realty Officer, was copied on Moore’s letter to the Tribe.

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<sup>9</sup> Specifically, the document identified the assignors as William C. Tuttle and Carol M. Tuttle, as Trustees of the William C. Tuttle and Carol M. Tuttle Family Trust, dated June 12, 1999, and William C. Tuttle and Carol M. Tuttle as individuals and Richard Timothy Moore and Firouzeh Emilie Moore, as trustees of the Nicole Trust, dated January 7, 1993, and Richard Timothy Moore and Firouzeh Emilie Moore, as individuals.

Tim Moore also serves as counsel to Appellants.

Moore also wrote a letter addressed to Webb on March 13, 2003, regarding a variety of issues and complaints concerning the Lease, as well as what Moore characterized as the potential assignment of the Master Lease. *See* Letter from Moore to Webb, Mar. 13, 2003, at 1. In the letter, Moore argued that the Lease “clearly envisioned the ability to sublease and the potential to assign the Master Lease,” and did not condition such subleases or assignments on renegotiation of the financial terms of the Lease. *Id.* at 5-6; *see also id.* at 8 (“Tuttle was given the absolute and unconditional right to build, sublease and to assign the Master Lease”). Moore’s letter to Webb did not propose any specific assignment of the Lease, nor did it request BIA’s approval of an assignment.

On March 27, 2003, the Tribe, in writing, denied Tuttle’s request for approval of the assignment. The Tribe solicited additional information in the event Tuttle wished to renew his request.

On April 16, 2003, Moore replied to the Tribe’s request for additional information, responding in part as follows:

The persons involved, as assignees (sic) are William and Carol Tuttle, as to an undivided 50% ownership and Tim and Fifi Moore as to an undivided 50% ownership. Personal resumes and financial statements will be promptly submitted when tentative approval is given. A Limited Liability Company will be formed after the assignment is approved and all related documentation will be forwarded to your office.

Letter from Moore to Laffoon, Apr. 16, 2003. BIA is not copied on Moore’s letter to the Tribe.<sup>10</sup> Separately, on April 16, 2003, Moore also again wrote to Webb to address various complaints about the Tribe, but the letter did not discuss the proposed assignment described in Moore’s letter of the same day to the Tribe.

Follow-up correspondence between Tuttle and the Tribe took place, which included a letter from Tuttle advising the Tribe that he had given his consent to the assignment of a partial interest in the Lease to Tim and Fifi Moore, a letter from the Tribe stating that it had yet to receive a complete assignment or transfer proposal to Rio Valley Estates, and a reply from Moore asserting that “it could be argued” that the assignment had been approved by operation of the 45-day provision in the Lease. *See* Letter from Tuttle to Laffoon, June 30,

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<sup>10</sup> The record does not establish when BIA may have first received a copy of this letter. Tuttle did include a copy as an exhibit to a December 13, 2004, letter and section 2.8 notice of appeal to the Regional Director.

2003; Letter from Laffoon to Tuttle, July 16, 2003; Letter from Moore to Laffoon, July 30, 2003, at 2.

On February 5, 2004, Moore sent a letter to the Superintendent, enclosing a copy of the now-executed Lease Assignment Document, dated January 3, 2004.<sup>11</sup> In the letter, Moore stated that the document was being sent to the Superintendent for his approval.

The Superintendent responded in a letter dated March 11, 2004, returning the Lease Assignment Document. The Superintendent stated that BIA's realty records indicated that BIA had not received a request for reassignment of the Lease to the William C. Tuttle and Carol M. Tuttle Family Trust or for reassignment of the Lease to Timothy and Firouzeh Moore. The Superintendent further stated that "[w]ithout an approved assignment, as identified in your submittal, it is inappropriate for the Bureau to either approve or deny the request." Letter from Superintendent to Moore, Mar. 11, 2004. The Superintendent took the position that because the proposal was being returned because of "material deficiencies," the 45-day time period under the Lease for approval or disapproval did not apply.

Moore replied to the Superintendent, stating that "[t]he Limited Liability Company (LLC) was formed and the Lease transferred . . . after the Assignment was approved by [the Tribe] due to the lack of a timely response to our letters of March 13, 2003 and July 30, 2003."<sup>12</sup> Letter from Moore to Superintendent, Mar. 31, 2004, at 1. The letter also stated that "[t]he April 16, 2003 letter to [the Tribe] was not responded to until well after the 45 day response period required by the Lease," and that the Tribe had never responded to Moore's July 30, 2003, letter. *Id.* Moore asserted that neither the Tribe nor BIA had timely made a commercially reasonable objection to the assignment, and therefore the Tuttle and the Moores considered the assignment to Rio Valley Estates to have been approved. *Id.*

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<sup>11</sup> The document is executed by the Tuttle and the Moores as assignors, and again by the Tuttle and the Moores on behalf of and as members of Rio Valley Estates, as assignee.

<sup>12</sup> It is unclear whether the reference to the March 13, 2003, letter is a typographical error: It is undisputed that the Tribe did in fact respond on March 27, 2003, to Moore's March 13, 2003, letter to the Tribe, and expressly denied Moore's request for approval of the assignment. *See* Opening Brief at 17 (The Tribe "denied approval of the assignment by letter dated March 27, 2003"). In their opening brief on appeal to the Board, Appellants rely solely on the April 16, 2003, letter as constituting the date of submission of the assignment. *See* Opening Brief at 48 ("the assignment submitted on April 16, 2003, was deemed approved and is in effect").

In his Decision, the Regional Director did not consider whether, under the facts recounted above, the assignment would be deemed to be approved pursuant to the 45-day deadline and the deemed-approved provisions in the Lease. Instead, the Regional Director concluded that the Lease had not been effectively assigned to Rio Valley Estates because, notwithstanding the language in the Lease, BIA's "actual" approval of assignments was required. Decision at 2-3. The Regional Director found that the Superintendent had not been delegated the authority to approve the deemed-approved provision in the Lease in the first place, as applied to the Secretary's approval of an assignment. Because BIA had not given its "actual" (presumably meaning "specific written") approval of an assignment, the Regional Director decided that Tuttle remained the sole lessee.

#### 4. Conditioning Approval of Subleases and Assignments on Renegotiation of Rental Terms

According to Appellants, throughout the time period leading up to their current appeal to the Board, the Tribe and BIA have taken the position that they will only approve new assignments or subleases if Tuttle agrees to renegotiate and substantially increase the rent under the Lease. The record before the Board does not contain any documents by BIA or the Tribe clearly taking that position, or denying a requested sublease or assignment on that ground, but the record does contain several letters from Moore to BIA in which Moore asserts that the Tribe and various BIA officials have made statements that an increase in rent will be a condition to such approval.

In the Decision, however, the Regional Director acknowledged what he characterized as BIA's "suggestion" in previous meetings that the Basic Rent payable under the Lease should be increased if or when the Lease is assigned. Decision at 2. It is unclear from the context whether BIA's past "suggestions" were based on an attempt by BIA to broker a compromise between Tuttle and the Tribe, or reflected BIA's own independent views. In the Decision, however, the Regional Director stated that while he agreed that tribal and BIA consent or approval may not "generally be withheld solely to improve [the Tribe's] economic position," he "reserv[ed] the right to further research this issue if/when an executed assignment is formally submitted to [BIA] for approval (with a request that [BIA] approve notwithstanding the absence of tribal consent)." Decision at 3. The Regional Director indicated that among the issues that BIA would need to review would be the basis for the original economic terms that were negotiated and whether any exceptions

to the “general rule” existed “where there is such a great disparity between the negotiated rent and the present value.” *Id.*<sup>13</sup>

## 5. Electrical Power from BIA

Apparently some time in 2003, Tuttle raised with the BIA Regional Realty Officer the issue of BIA providing electrical power for new development at Rio Loco through BIA’s Colorado River Indian Irrigation Project (CRIIP). The Lease states that the Lessee “shall have the right to enter into agreements with public utility companies and the State of California or any of its political subdivisions to provide utility services, including . . . electricity . . . , necessary to the full enjoyment of the leased premises and the development thereof.” Lease Addendum, Article 10.

The record does not indicate what, if any, efforts Tuttle made to obtain electrical service from either a public utility company<sup>14</sup> or the State or its subdivisions. At some point, however, he began contending that BIA had a duty to provide electricity to the leased property through CRIIP, which sells electricity to customers pursuant to 25 C.F.R. Part 175, and which apparently is capable of providing service to the leased property. Tuttle contended that the Tribe had improperly refused to inspect or issue permits related to electrical service, that the Lease exempted him from the unreasonable application of tribal laws to which he did not consent, and that BIA had an obligation to provide him with electricity without requiring tribal inspections, permits, or approval.

Relevant to the application of tribal law, the Lease provides that “[a]ll improvements placed on the leased premises shall be constructed in a good and workmanlike manner and in compliance with applicable laws and building codes,” and that the lessee shall “maintain the premises and all improvements thereon in good order and repair and in a neat, sanitary and attractive condition and in compliance with applicable laws, ordinances or regulations.” Lease Addendum, Article 5. The Lease also provides generally that the lessee agrees to

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<sup>13</sup> Appellants apparently dispute that such a “disparity” exists, suggesting that the primary consideration that Tuttle gave in agreeing to the Lease was not the monetary rent included in the Lease itself, but his willingness to settle the litigation and “give up” the property by relinquishing his claim of title. Appellants also contend that during extensive negotiations to settle the quiet title litigation and to negotiate the Lease, BIA and the Tribe disliked the rent provisions in the Lease but “eventually had to agree” to them. Opening Brief at 14.

<sup>14</sup> Tuttle does not characterize CRIIP as a public utility, but does characterize it as a “quasi-public utility.” Notice of Appeal to Regional Director at 3.

abide by all laws, regulations, and ordinances of the Tribe, “provided that as part of the consideration for this lease no such laws, regulations or ordinances shall have the effect of changing, altering or overriding the express provisions and conditions of this lease, or impinging upon, restricting, or in any manner whatsoever affecting the Lessee’s use and occupation of the leased premises under this lease, or imposing any taxes, levies, business license fees, licenses or similar impositions upon the Lessee unless consented to in writing by the Lessee.” *Id.*, Article 27.

Tuttle argued to the Regional Director that although he was willing to comply with the substance of tribal laws pertaining to building codes and safety, the proviso language in Article 27 means that he is not required to obtain tribal inspections and permits if the Tribe refuses to cooperate, i.e., unreasonably interferes with his use of the property, which he contended has been the case.

In the Decision, the Regional Director agreed that Tuttle has the right to fully develop the property, and stated that BIA agreed that the Tribe may not administer its laws and ordinances in such a way as to unreasonably restrict such development. Decision at 2. The Regional Director also stated in general terms, however, that BIA would continue to recognize the Tribe’s regulatory authority over Tuttle’s development. The Regional Director further stated that BIA may consider a request from Tuttle for electrical service in the absence of tribal action or approval, if Tuttle could clearly show that the Tribe had exercised its authorities in a manner that is inconsistent with the terms of the lease. The Regional Director noted that in such a case, BIA would simply be providing electrical service pursuant to its regulations, and would not be “enforcing the lease against [the Tribe].” *Id.* at 2. The Regional Director disclaimed any authority or responsibility to enforce the Lease on behalf of Tuttle, and stated that BIA would not impose itself as overseer or mediator of the dispute between Tuttle and the Tribe. *Id.*

The Regional Director’s administrative record for the Decision, and extensive supplemental documentation submitted to the Board by Appellants,<sup>15</sup> is replete with

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<sup>15</sup> Appellants objected to the Regional Director’s administrative record as incomplete and requested that the Board order the Regional Director to provide “copies of correspondence, memoranda, telephone conversations, summaries of meetings, notes, copies of e-mails and all other documents that relate to the Decision.” Objection to the Record as Constituted at 2-3. The Regional Director responded that the materials submitted to the Board are in fact the materials he relied upon, arguing that he has “sole discretion” in deciding which documents were used by him to arrive at his decision. Response to Appellants’ Objection (continued...)

correspondence discussing in general terms whether or under what conditions BIA might provide electrical service to Tuttle's leasehold property. None of those documents, however, indicates that prior to the Decision, Appellants submitted a specific application to BIA for electrical service, pursuant to 25 C.F.R. Part 175 and the Operations Manual for CRIIP. After Appellants filed this appeal with the Board, however, they submitted several letters to BIA that arguably constitute an application for electrical service, which they contend BIA has still refused to provide.

## 6. Access Road on Adjoining Properties

From at least 1990, Tuttle and his Rio Loco sublessees apparently have at various times fought with neighboring landowners and lessees about a road used to access Tuttle's leased property, as evidenced by several letters provided by Appellants to the Board. *See* Letter from Harvey S. Glade to Tim DeTurk, May 25, 1990 (complaining that the Tuttles never obtained permission to use the access road); Letter from David Wahlquist to Moore, Jan. 19, 2000 (complaining about Tuttle and Rio Loco homeowners). The road apparently runs across certain fee property as well as trust property on the Tribe's reservation leased by Deseret Trust Company's Hidden Valley development. Tuttle eventually demanded BIA intervention, on the grounds that such intervention was needed to address safety and access issues.

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<sup>15</sup>(...continued)

to the Record as Constituted at 4. We agree that it is for the Regional Director to decide which documents he considered or relied upon in reaching his decision, although the regulations also identify certain categories of documents that *must* be included, without regard for whether or not they were actually considered or relied upon. *See* 43 C.F.R. § 4.335(a). Thus, there are limits to the Regional Director's discretion in assembling the record. As a practical matter, however, a party challenging the record as incomplete has the burden to produce, or at least identify with sufficient particularity, documents allegedly missing from the record. In addition, regardless of whether or not a document should have been included in BIA's record, the Board may allow parties to supplement the record on appeal as appropriate. *See, e.g., California v. Acting Pacific Regional Director*, 40 IBIA 70, 71 n.3 (2004).

In the present case, the Regional Director did not object to Appellants' own supplementation of the appeal record, and Appellants have submitted numerous documents, which the Board has considered. Thus, Appellants' objection and request for relief with respect to the record may be moot. To the extent that it is not, however, Appellants have not identified any additional documents that they contend should have been included in the record to the Board, and we deny their request to order the Regional Director to submit additional documents for the record.

In the Decision, the Regional Director found that the access road is not a BIA road or a tribal road, but instead is a private road. He stated that “[i]ssues concerning safety and interference with access with respect to that road must continue to be taken up with the adjoining owner/lessee, Hidden Valley.” Decision at 4. He further stated that “[w]hile [the Tribe] has agreed to provide the Lessee with reasonable rights of access to [Lessee’s] Rio Loco [development] property, at the Lessee’s cost, the BIA cannot ensure (or compel [the Tribe] to provide) the improved conditions or unrestricted use of this ‘common’ road that you have requested.” *Id.*

## 7. Due Process Violation and Taking Claim

In their demand to the Regional Director for a decision, Appellants contended that sovereign immunity prevents judicial resolution of their dispute with the Tribe, that BIA’s “refusal to allow” new electrical power has rendered the property without value, and that they have been deprived of the benefits of the Lease without a remedy that affords them essential due process rights to which they are entitled. Notice of Appeal to Regional Director at 2. Appellants also contended generally that “[i]f the past and present conduct of the BIA and [the Tribe] is allowed to continue, the Lease is without value,” *id.* at 3, “there is a continuing material failure of the consideration,” *id.* at 2, and the Lease should be terminated and the property “returned” to fee simple ownership by the lessee and the Lease extinguished, *id.*

In his decision, the Regional Director did not specifically address Appellants’ due process and takings arguments, although he did state that BIA has no authority to award damages.

### Discussion<sup>16</sup>

Before addressing each discrete issue raised on appeal, we first address a general claim raised by Appellants in the context of several specific issues — that BIA has a duty to enforce the Lease on behalf of the lessee, and that BIA’s failure to force the Tribe to comply

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<sup>16</sup> Appellants and the Regional Director filed briefs. After briefing was concluded, the Chairman of the Tribe submitted a letter briefly responding to Appellants’ briefs, and Appellants filed a reply. The Tribal Chairman’s letter constitutes the Tribe’s only participation in the proceedings before the Board. The Tribe disputed Appellants’ allegations of collusion and asserted that the Tribe and BIA act independently of one another. The Tribe did not otherwise respond to Appellants’ factual allegations or legal arguments.

with the Lease constitutes a violation of that duty. Appellants describe this as either a fiduciary duty owed to them, or as an obligation owed by BIA under the Lease and under the quiet title litigation settlement. We disagree with Appellants that BIA has a responsibility to enforce the Lease against the Tribe or owes them any such obligation under the Lease.<sup>17</sup>

Appellants argue that BIA has a responsibility to enforce the Lease and to refrain from interfering with development of the leasehold. Appellants rely on the involvement of BIA in negotiating the lease, the requirement for BIA approval of the Lease and of assignments, modifications, encumbrances, etc., and the fact that, under the Lease, the lessee's obligations are to the United States as well as to the Tribe, as giving rise to a "general fiduciary duty on the part of the Federal Government 'to manage Indian resources and land for the benefit of the Indians.'" Opening Brief at 24 (quoting *United States v. Mitchell*, 463 U.S. 206, 224 (1983)). This duty, according to Appellants, translates into BIA authority and a responsibility to "administer the Lease," *id.* at 25, which apparently further translates into a duty to enforce the Lease against the Tribe on Appellants' behalf. We disagree. Whatever duty the United States may owe to the Tribe, nothing in *Mitchell* supports Appellants' argument that BIA has some general obligation to "administer" the Lease for the parties or owes a legal duty to Appellants to administer the Lease on their behalf or enforce it against the Tribe at their request.

In their notice of appeal, Appellants also argue that the Regional Director's statement that BIA does not have authority or a responsibility to enforce the lease is contrary to the Board's decision in *Hawley Lake Homeowners' Ass'n v. Deputy Assistant Secretary - Indian Affairs (Operations)*, 13 IBIA 276 (1985), and contrary to 25 U.S.C. § 229 (injuries to property by Indians),<sup>18</sup> which the Board discussed in *Hawley Lake*.

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<sup>17</sup> Although Appellants argue that BIA has the authority and an obligation to ensure that the settlement of the quiet title litigation is "honored," Opening Brief at 3, presumably by taking action against the Tribe to remedy Appellants' complaints, Appellants have failed to cite specific terms of the settlement agreement or specific action by the court, or to provide the Board with a copy of the settlement agreement. Thus, the Board has no basis to consider what, if any, obligations BIA or the Department of the Interior (Department) may have under the settlement agreement that are relevant to the disputed issues in this appeal.

<sup>18</sup> Section 229 provides, in relevant part, that "[i]f any Indian, belonging to any tribe in amity with the United States, shall, within the Indian country, take or destroy the property of any person lawfully within such country," such person may make application to BIA, which in turn shall make application to the Tribe, "for satisfaction."

In fact, our decision in *Hawley Lake* is contrary to Appellants' position. In that decision, the Board rejected an argument that section 229 imposed a duty on BIA to intervene in a dispute between lessees and a tribe regarding the lessees' rights under the leases. Instead, the Board stated that "BIA had a duty to refrain from imposing itself in a contract dispute between the tribe and appellant's members that should be submitted to tribal court for resolution." *Id.* at 288. The Board specifically rejected the argument made by the appellant in that case that BIA had a duty to ensure that Indians deal fairly with non-Indians in commercial transactions. *Id.* As the Board noted, "[a]lthough BIA may attempt to advise individual Indians and tribes concerning proper conduct as lessors, it has no statutory or regulatory authority to take action against an Indian lessor. Such actions must be brought in the appropriate tribal or Federal court." *Id.* at 289.

Contrary to Appellants' contention, Opening Brief at 2, BIA does not act "on behalf of" the Tribe in the sense that BIA may force the Tribe to take particular actions or take action "on behalf of" the Tribe pursuant to the Lease without its consent. Appellants cite no authority for such a proposition. Neither BIA nor the Board has jurisdiction over the Tribe, and Appellants' frustration with the Tribe and with the fact that the Lease does not waive the Tribe's sovereign immunity does not give rise to a duty owed to them by BIA. Nor does it provide a basis for Appellants to project all of their complaints against the Tribe onto BIA. Because BIA does not owe a duty to Appellants to administer or enforce the Lease, BIA's alleged inaction and failure to intervene on their behalf violates no duty.<sup>19</sup>

We now address each specific issue raised in this appeal.

#### 1. 1986 Lease Modification

In the Decision, the Regional Director found that the Tribe's approval of form subleases constituted the Tribe's consideration for Tuttle's agreement to pay additional rent

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<sup>19</sup> BIA is not precluded, of course, from attempting to mediate or otherwise provide assistance to the parties to resolve a dispute, but such involvement does not arise from a duty or legal obligation.

Of course, if BIA takes some affirmative action on its own that adversely affects a lessee of Indian land, the Board may review BIA's action, including any factual findings or legal conclusions upon which that decision is based, which may include BIA's evaluation of the respective rights of the parties to a lease. But the fact that BIA, in deciding whether to take Federal action, may need to evaluate and reach conclusions regarding the rights of parties to a lease, does not mean that BIA has an independent duty or authority to adjudicate a dispute between a tribe and its lessee when no Federal action is otherwise required.

in the 1986 modification to the Lease. Tuttle denies that the Tribe ever approved any form subleases.<sup>20</sup> In his answer brief to the Board, the Regional Director abandons his reliance on the Tribe's purported approval of form leases, and now disclaims any knowledge of what the consideration was for the modification.<sup>21</sup> Instead, the Regional Director now argues as a matter of law that consideration is presumed and Appellant has failed to rebut that presumption by proving lack of consideration. Appellants contend that the Decision is in error because it failed to invalidate the modification, which Appellants argue lacked consideration and was coerced.

We affirm the Regional Director's decision to recognize the validity of the Lease modification, but on different grounds than those on which he relied. We conclude that BIA may continue to treat the Lease modification as valid and enforce it as appropriate for two reasons: (1) with respect to the alleged lack of consideration, Appellants are not entitled to have BIA or the Board adjudicate their contract claim against the Tribe; and (2) to the extent Appellants seek to challenge BIA action taken at the time the modification was executed and approved, their challenge comes too late to warrant consideration.

First, Tuttle's claim that BIA or the Board should declare the modification invalid for lack of consideration is in substance a contract claim against the Tribe. Tuttle seeks to invoke the Department as a forum for adjudicating and invalidating a term in the Lease (the gross receipts additional rent provision) to which the parties — Tuttle and the Tribe — agreed, on the basis of contract law: enforceable agreements require consideration. Such a claim properly belongs in another forum, e.g., tribal court, and Appellants are not entitled to have BIA or the Board adjudicate this claim. *Cf. Anderson v. Acting Southwest Regional Director*, 44 IBIA 218, 227 (2007) (Secretary's role is that of trustee and not as a regulator or general forum for resolving disputes over the lease). As discussed above, the Department owes no duty to Tuttle, whether under the Lease or based on a fiduciary relationship, to provide a forum for adjudicating his contract claim against the Tribe.

Second, to the extent that Tuttle contends that his agreement to the modification was coerced by BIA, his challenge to BIA action is raised too late to warrant consideration. Parties who are on notice of BIA action that they consider to affect their rights adversely may reasonably be expected to be diligent in protecting such rights. *Cf. Weinberger v. Rocky*

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<sup>20</sup> Tuttle agrees that several individual subleases were approved about the same time as the 1986 modification to the Lease, but contends that such approval could not constitute consideration because the Lease already provided that approval of individual subleases could not be unreasonably withheld, thus creating a pre-existing duty.

<sup>21</sup> The record does not include any form leases purportedly approved by the Tribe.

*Mountain Regional Director*, 46 IBIA 167, 171 (2008). There is no evidence in the record that Tuttle sought to challenge BIA's allegedly "coercive" actions or its approval of the Lease modification when that approval was given, or within a reasonable time thereafter. In 2000 — fourteen years after the modification was approved — Tuttle (through counsel) sought BIA's assistance in his lease dispute with the Tribe, but made no complaints about alleged BIA misconduct. Indeed, in 2001, when Tuttle demanded action by BIA to intervene in the dispute, his only allegation about the lease modification was that it was invalid for lack of consideration: no mention was made of any coercion. Notice of Request for Action, Jan. 19, 2001. The same was true in a letter sent to BIA in 2003. Letter from Moore to Webb, Mar. 13, 2003. Only later did Tuttle contend that he had been coerced, at first arguing only that the *Tribe* had coerced him, *see* Letter from Moore to Jeffrey Hinkins, BIA, June 30, 2004, and then implying *BIA's* involvement, *see* Notice of Appeal from Moore to Wayne Nordwall, Dec. 13, 2004, at 17. Tuttle provides no explanation for the belated nature of this allegation against BIA, and we conclude that he may not, at this late date, seek to challenge the Lease modification based on BIA's actions or alleged actions at the time it was agreed to by the parties and approved by BIA.<sup>22</sup>

Therefore, we affirm the Regional Director's decision to recognize the Lease modification as valid and enforceable, but on the grounds that Tuttle is not entitled to invoke the authority of the Department to adjudicate his contract claim against the Tribe and because any portion of his claim that pertains to BIA action in 1986 is barred as being raised too late.

2. Nonpayment of Rent, Cure, and Interest Due on Payments Tendered but Refused

Appellants sought confirmation from the Regional Director, in the form of a declaration, that the Lease is still in full force and effect. Appellants argued that Tuttle had cured any alleged violation based on nonpayment of rent, and therefore there was no basis for either BIA or the Tribe to declare him to be in default or to consider the Lease as no longer in effect. The Regional Director agreed that during the payment dispute, when Tuttle was withholding payments, no notice of default had ever been sent to him, and

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<sup>22</sup> Of course, even if we considered these claims against BIA to be timely, a question would still exist whether Tuttle would have prudential standing to assert a claim that BIA's approval of the Lease modification was improper because the modification lacked consideration from the Tribe, *see County of Sauk v. Midwest Regional Director*, 45 IBIA 201, 219 (2007) (discussing prudential standing), and whether the Board would otherwise have jurisdiction to consider his claim of coercion as a ground for allowing him to subsequently revoke his consent and to set aside the modification.

therefore — because he paid the rental arrears before any cancellation action was taken — the Lease remained in “full force and effect.” Decision at 3. In their opening brief, Appellants nevertheless seek a declaration from the Board that the Lease is in full force and effect, Opening Brief at 48, notwithstanding the statement in their notice of appeal that they “appreciate the [Regional] Director’s statement that the Lease is still in full force and effect.” Notice of Appeal at 4.

We dismiss this portion of their appeal because no case or controversy exists with respect to this issue: Appellants were not injured by this portion of the Decision. As a matter of administrative prudence, the Board applies the constitutional principles of standing that apply to Federal courts, which require that an actual case or controversy exist and that a complainant show actual and particularized injury. *See, e.g., Arizona State Land Dep’t v. Western Regional Director*, 43 IBIA 158, 163 (2006). No such case or controversy is shown here because the Regional Director agreed with Appellants that the Lease is in full force and effect, and therefore we dismiss this portion of their appeal.

With respect to Tuttle’s liability for interest on payments tendered to but refused by the Tribe at the time, the Decision concluded that Tuttle should be held liable. On appeal, however, the Regional Director has abandoned that position and now agrees that Tuttle should not be liable for interest on payments that were timely tendered to but refused by the Tribe.

Based on the Regional Director’s position on appeal, we reverse his decision that Tuttle is liable for interest for the years during which Tuttle tendered timely payment to the Tribe. We remand this matter to the Regional Director to determine what remedy may be available to Tuttle in the form of a refund, offset, or other appropriate remedy, for the interest that he paid under protest but for which he was not liable.

### 3. Assignment to Rio Valley Estates

Appellants contend that Moore’s April 16, 2003, letter triggered an obligation, apparently on the part of BIA, to either approve or to disapprove in writing and with specific reasons the proposed assignment within a 45-day period, and because no disapproval was received within that time period, the assignment must be deemed to be valid. The Regional Director concluded that the assignment was not valid or effective because BIA’s actual written approval is required for assignments and therefore the deemed-approved clause in the Lease is not valid against the Secretary of the Interior.

We agree that the Regional Director correctly declined to recognize as valid the purported assignment of the Lease to Rio Valley Estates, but we again rely on grounds

different from those relied on by the Regional Director. In so doing, we decline to reach the issue of whether the deemed-approved clause is valid against the Secretary.

First, although Appellants argue that the assignment to Rio Valley Estates should be deemed to be valid, they have failed to provide any foundation for us to find that the purported assignors hold the respective interests that are recited in the assignment. The record is devoid of documentation for an approved assignment of a 50% interest from Tuttle to himself and Carol Tuttle, jointly (whether as part of a trust or otherwise), or of an assignment from Tuttle of a 50% interest to Tim and Firouzeh Moore. To the contrary, the Superintendent found that BIA had no record of having received a request for such a previous assignment, *see supra* at 224, and Appellants do not dispute this finding on appeal. Yet the assignment to Rio Valley Estates recites, and is clearly predicated upon, a purported “April 2, 2001” partial assignment to the Moores. An assignment to Rio Valley Estates necessarily depends on the assignors having rights to assign. This apparently is the “material deficiency” that BIA identified when it responded to Moore’s February 5, 2004, request to BIA for approval of the assignment.<sup>23</sup>

In addition, we find no basis for concluding that *BIA*’s approval of the assignment could be deemed to have been given based on the April 16, 2003, letter to the Tribe, upon which Appellants rely in this appeal. As an initial matter, we note the vagueness that infuses Appellants’ claim that “the assignment submitted on April 16, 2003, was deemed approved and is in effect.” Opening Brief at 48. Deemed approved by whom? The Tribe? BIA? Both? Appellants describe the April 16 letter as having been “submitted to the BIA and [the Tribe],” *id.* at 18, but that description is not supported by the record. The April 16 letter to the Tribe was not copied to BIA, nor have Appellants previously taken the position that the April 16 letter triggered a duty by *BIA* to either approve or disapprove the

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<sup>23</sup> Tuttle’s February 5, 2004, letter to BIA, did specifically ask for BIA’s approval of the assignment to Rio Valley Estates. The Superintendent responded that the proposal was materially deficient and therefore BIA had no obligation to either approve or disapprove it. Appellant does not argue on appeal to the Board that this exchange of correspondence with BIA provides a basis for finding BIA approval of the assignment to Rio Valley Estates. That said, and particularly in light of the disagreement about the enforceability of the 45-day provision, it would seem prudent for BIA to respond to any request for approval from Tuttle within 45 days by clearly either approving (conditioned on the Tribe’s approval, if appropriate) or disapproving (on clearly articulated, substantive and/or procedural grounds) the request, even if the disapproval is based on identified “material deficiencies.” Such an action need not concede that the 45-day deadline or the deemed-approved provisions in the Lease apply.

assignment within 45 days. On appeal to the Board, Appellants rely solely on the April 16 letter to the Tribe as triggering the 45-day period, without specifying as against whom.<sup>24</sup>

Because Moore's April 16 letter to the Tribe was not copied to BIA, we fail to see how it could have triggered any obligation for BIA to respond — even assuming that a legal foundation for the assignment had existed and even assuming that the 45-day provision in the Lease is enforceable against the Secretary. And even if BIA could somehow have been charged with an obligation to respond to that letter, by its express terms the letter acknowledges that Tuttle is only partially complying with the Tribe's March 27, 2003, request for additional information, and promises to provide further information after "tentative" approval of the assignment is given. The letter did not ask for final approval of anything, and thus no such final approval could be deemed to have been given by BIA, even under the terms of the Lease.

We thus affirm, on these alternative grounds, the Regional Director's decision declining to recognize the assignment to Rio Valley Estates as valid, and we do not address whether the deemed-approved clause in the Lease is enforceable against the Secretary.<sup>25</sup>

4. Conditioning BIA Approval of Subleases and Assignments on Renegotiation of Rent.

Tuttle contends that the Tribe and BIA have improperly interfered with his right to develop the leased property by refusing to approve subleases or assignments unless Tuttle agrees to renegotiate and increase the rent due to the Tribe under the Lease. We dismiss this claim because Appellants have not articulated any actual injury that resulted to them as a result of the Regional Director's decision, nor have they shown that the issue is ripe for our review.

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<sup>24</sup> Appellants previously apparently contended that the March 13 letter to the Tribe, which was copied to BIA, *see supra* at 222, combined with the March 13 letter to BIA, *see id.* at 223, which did not specifically propose any assignment, triggered BIA's duty to respond. On appeal to the Board, however, Appellants abandon that argument. As Appellants acknowledge, the Tribe did respond to their March 13 request within 45 days and specifically denied the request for approval of the assignment. *See* Opening Brief at 17.

<sup>25</sup> Nor do we need to address the effect of the Tribe's apparent position that it has not approved the assignment. BIA's approval of an assignment is required by the Lease, but its approval is also secondary to that of the Tribe, as lessor.

First, the Regional Director clearly left open the possibility of BIA approval of a sublease or assignment without requiring any renegotiation of rental terms. Appellants contend that the Regional Director “states, unequivocally, that they will attempt to renegotiate the Lease consideration if an assignment is submitted in the future,” Notice of Appeal at 3, but that contention is simply not supported by the record, leaving aside whether Appellants’ reference to “they” refers to BIA, the Tribe, or both. The Regional Director’s decision does not take the position that BIA will refuse to approve a sublease proposed by Tuttle and consented to by the Tribe<sup>26</sup> unless it is accompanied by a negotiated increase in Tuttle’s rent under the Lease. Nor have Appellants produced any document from BIA taking that position; instead, they have produced numerous letters drafted by Moore or Tuttle which make such allegations about BIA or the Tribe.

Thus, BIA has not conditioned its approval on an increase in rent, and at most has suggested that it would closely review the issue if and when a specific assignment or sublease is presented for approval. In our view, the Regional Director’s decision at best constitutes an equivocal advisory opinion without foundation in or action on any specific proposed sublease or assignment.<sup>27</sup> As such, Appellants have not shown that they have suffered any concrete and particularized injury as a result of the Regional Director’s decision.

Second, even assuming that by “suggesting” the possibility that renegotiation of rent might be appropriate and “reserving the right” to further research the issue, the Regional Director’s decision caused injury to Tuttle, Appellants’ claim that BIA cannot condition its approval of a sublease or assignment on Appellants’ agreement to renegotiate the rental terms of the lease is not ripe for review. The issues of standing and ripeness are closely related, *see Wind River Resources Corp. v. Western Regional Director*, 43 IBIA 1, 3 n.2 (2006), and even where standing may exist, ripeness may not. Three considerations are relevant to determining whether a claim is ripe: will a delay cause hardship, will Board intervention interfere with further administrative action, and is further factual development of the issues required? *Id.* at 3.

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<sup>26</sup> Without the Tribe’s consent, BIA’s “approval” of a sublease does not give it validity.

<sup>27</sup> The issue of whether the *Tribe* refuses to approve a sublease or assignment unless or until Tuttle agrees to pay additional rent is a distinct issue. The Tribe’s unreasonable refusal to approve a sublease or assignment may provide grounds for Tuttle to claim that the Tribe is violating the Lease, but the Tribe’s action is independent of BIA. Neither BIA nor the Board have the authority to force the Tribe to agree to subleases and assignments.

In the present case, the absence of a specific proposed sublease or assignment, from which BIA approval has been withheld, is relevant to all three considerations. First, under these circumstances, whether delay in resolving this issue will cause hardship to Tuttle is speculative because we do not know whether BIA will ever use this ground to disapprove a sublease or assignment. Because there is no specific proposed sublease or assignment pending before BIA, the Board's intervention would not necessarily interfere with further administrative action. It would, however, constitute an advisory opinion if BIA never relies on this ground to disapprove a proposed sublease or assignment. *See Washoe Tribe of Nevada v. Western Regional Director*, 45 IBIA 180 (2007) (Board does not issue advisory opinions). Equally, if not more important, however, is our view that Appellants' claim would benefit from the further factual development. Appellants apparently rely on the quiet title litigation settlement in arguing that conditioning approval of subleases and assignments on renegotiation of rent is necessarily improper. *See supra* note 13. That may or may not be the case, but as we have noted, Appellants did not submit the settlement agreement to the Board, nor does it appear that they presented it to BIA in support of their arguments. And, of course, in the absence of BIA review and disapproval of a specific sublease or assignment on the ground that Appellant must agree to renegotiate the rent, we have no factual record on which to review specific action. On balance, we conclude that, taken as a whole, these considerations weigh against finding this claim to be ripe.

#### 5. BIA's Duty to Provide Electrical Service

Appellants' next argument — that BIA has a duty to provide electrical service and may not condition such service on consent by the Tribe — also is not ripe for review, because the Regional Director's decision did not act on any application by Appellants and did not constitute a denial of an application. The correspondence with BIA that Appellants rely upon as their "application" postdates their filing of this appeal and therefore is outside the scope of the proceedings before the Board.

Appellants contend that "BIA has refused to provide electrical service" for development of the Lease unless the Tribe approves and that the Tribe refuses to approve service. Opening Brief at 15. However, the contention that BIA has "refused" to provide electrical service is not supported by the record. The Regional Director's decision left open the possibility that BIA would provide electrical service to Appellants, even over the Tribe's objections.

Appellants also criticize the Decision as overly vague, contending that the Regional Director's statement that BIA "may consider" a request is "too uncertain to resolve the power request issue," and that unless BIA provides a "definitive method" for Lessee to

obtain power, “more precious time will be wasted and this dispute will not be resolved.” Notice of Appeal at 2. The fact that Appellants refer to this issue as the “power request issue” is illustrative and undermines their criticism of BIA for being vague: Until this appeal was filed, it appears — based on the record before the Board — that Appellants never submitted a specific, documented, application to BIA for electrical service. Instead, they chose to argue about the “power request issue,” without providing any specific application upon which BIA could act, either by approving it or by providing specific reasons for disapproving it or finding it deficient.

The documents that Appellants rely on in this appeal as their request to BIA for electrical service is their correspondence to the Superintendent *after* this appeal was filed. *See, e.g.*, Letter from Moore to Superintendent, Sept. 8, 2005 (“This letter shall serve as our request for electrical service”). The scope of this appeal is limited to reviewing the specific issues and evidence before the Regional Director when he issued his decision. *See* 43 C.F.R. § 4.318. Appellants cannot rely on their post-appeal request for electrical service as grounds for contending that the Regional Director’s decision either denied them electrical service or did so improperly.

In summary, Appellants’ argument that the Regional Director denied them electricity is based on a misreading of the Decision and is not otherwise supported by the record, and the Regional Director’s response to Appellants regarding electrical service is not otherwise ripe for our review.

#### 6. BIA’s Duty to Assert Jurisdiction Over Access Road.

Appellants contend that “BIA can and should take steps to ensure safe use of the road and Lessee’s right of access to the Lease,” Opening Brief at 3, and that BIA should be required to “post and enforce speed limits,” *id.* at 47, and to ensure the safety of users, *see* Reply Brief at 15, on this road. *See also* Opening Brief at 48 (“BIA has an obligation to ensure access to the Lease and road safety for residents of the Reservation.”).

We affirm the Regional Director’s decision because Appellants provide no factual basis or legal authority justifying a ruling by the Board that BIA is required to take the actions requested. First, Appellants do not dispute the Regional Director’s finding that the road is not within BIA’s road system, and is therefore not subject to regulation pursuant to BIA’s reservation road system regulations. *See* 25 C.F.R. Part 170. Second, with respect to access, Appellants do not contend that they have been denied use of the road or denied

access to the leasehold property. Third, with respect to safety, Appellants provide no evidence of any actual safety problems; instead their arguments that BIA must intervene are based on general allegations without any supporting evidence, e.g., in the form of affidavit or otherwise. Thus, Appellants have failed to provide any legal authority or factual justification for BIA to intervene to protect Appellants' safety or their use of the road on the adjoining leasehold, and we affirm this portion of the Decision.

#### 7. Due Process and Fifth Amendment Takings Claims

Appellants' due process and takings claims appear to be premised solely upon their arguments that the Regional Director's decision was in error or contrary to law. Thus, to the extent we have rejected those arguments, either by affirming the Decision or by dismissing certain claims, we reject Appellants' due process and takings claims as without foundation.<sup>28</sup> In addition, of course, the Board's jurisdiction does not extend to considering constitutional challenges to actions that otherwise fall within the scope of BIA's authority under Federal law or regulation.<sup>29</sup>

### Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, and as provided above, the Board affirms in part and reverses in part the Regional Director's May 18, 2005, decision. We remand to the

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<sup>28</sup> To the extent that Appellants' allegations might be construed as suggesting that BIA's administrative process in considering Appellants' various complaints somehow deprived them of due process, we reject the allegation. The Board has previously held that an appellant's due process rights are protected by the right to appeal a BIA decision to the Board. See *Quantum Entertainment, Ltd. v. Acting Southwest Regional Director*, 44 IBIA 178, 208 (2007), and cases cited therein.

<sup>29</sup> Appellants suggest that the Tribe's sovereign immunity prevents judicial resolution of their complaints against the Tribe, which likely explains the redirection of their allegations against the Tribe to claims directed against BIA. The record contains no evidence that Appellants have ever attempted to avail themselves of remedies in tribal court, but in any event, the absence of a judicial remedy against a tribe does not provide a basis to seek relief against the Tribe in a Departmental forum.

Regional Director the issue of a remedy for the interest that Tuttle paid under protest and for which he was not liable. We dismiss the remainder of the appeal.

I concur:

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

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// original signed  
Debora G. Luther  
Administrative Judge