



INTERIOR BOARD OF INDIAN APPEALS

High Desert Recreation, Inc. v. Western Regional Director, Bureau of Indian Affairs

57 IBIA 32 (05/10/2013)

Related Board case:
52 IBIA 30



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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HIGH DESERT RECREATION, INC.,)	Order Affirming Decision
Appellant,)	
)	
v.)	Docket No. IBIA 11-063
)	
WESTERN REGIONAL DIRECTOR,)	
BUREAU OF INDIAN AFFAIRS,)	
Appellee.)	May 10, 2013

High Desert Recreation, Inc. (Appellant) appealed to the Board of Indian Appeals (Board) from a December 28, 2010, decision (Decision) of the Acting Western Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Decision upheld an August 6, 2010, decision by the Superintendent of BIA's Western Nevada Agency (Superintendent) to cancel a commercial lease between Appellant, as lessee, and the Pyramid Lake Paiute Tribe (Tribe), as lessor, for nonpayment of rent.¹ Beginning in November 2009 and continuing until BIA's Decision to cancel the lease, Appellant "offset" rent owed to the Tribe, based on the Tribe's delay and/or failure to make roof and road repairs on the Premises. We affirm the Decision because the record supports the Regional Director's conclusion that Appellant was not in compliance with its rent obligation under the lease and failed to timely cure or excuse its noncompliance. Appellant's offsets were not authorized by the lease and its obligation to pay rent was independent of any breach of the lease by the Tribe. We also reject Appellant's arguments that the Regional Director's Decision was procedurally flawed or violated Appellant's due process rights.

¹ The lease is identified as Lease No. PLTB00237; Commercial Lease No. 651-005-04. Notice of Appeal at 1 n.1.

The lease commenced in March 2004 and authorized Appellant's use and occupancy of certain premises, including a marina, recreational vehicle park, convenience store, gas station, and boat storage facility at Pyramid Lake, Sutcliffe, Nevada (Premises). Lease at 1, 8 (Administrative Record (AR) Tab 61).

Background

I. Appellant's Rent Obligation

The lease was executed by the Tribe and Appellant, and approved by BIA, in 2004. Lease at 8.² As of November 2009, basic monthly rent was \$2750 and the lease required Appellant to make payments directly to the Tribe. Order Granting Motions for Appeal Bond, July 29, 2011, at 1; Lease Art. 1. In the event of default, the procedures in BIA's leasing regulations, 25 C.F.R. Part 162, applied. Lease Arts. 14, 27(D). Pursuant to the regulations, a lessee's failure to pay rent is a violation of the lease and BIA will issue a notice of violation in accordance with § 162.618. 25 C.F.R. § 162.615(a). If the lessee does not cure the violation within the applicable time period, or otherwise convince BIA that the lease should not be cancelled, BIA may cancel the lease. *Id.* §§ 162.615(b), 162.618, 162.619(c).

II. Appellant's Nonpayment of Rent

Beginning in 2005, Appellant sent the Tribe (and BIA) notices that the marina roof was leaking and that sink holes were emerging in an access road to the recreational vehicle park, and asserted that the Tribe was required to make repairs to these areas of the Premises. Letter from Appellant to Superintendent, Feb. 9, 2010, at 1 (AR Tab 52); Supplement to Statement of Reasons, May 19, 2010, at 2 & Exs. 1-49 (AR Tab 38) (photos of the roof and road problems). According to Appellant, the Tribe failed to perform required repairs in breach of its obligations under the lease. In 2006 Appellant sued the Tribe in Federal court for breach of the lease, however, the District Court dismissed the case in 2007 for lack of jurisdiction. *High Desert Recreation, Inc. v. Pyramid Lake Paiute Tribe*, No. 03:06-CV-0588-LRH (RAM) (D. Nev. June 1, 2007) (order granting motion to dismiss) (Tribe's Answer Brief (Br.), Ex. 1). Appellant appealed the District Court's decision. Eventually, in October 2008, the Tribe resealed the marina roof. Answer of Interested Party, May 10, 2010, at 7 (AR Tab 40). In January and March 2009 the Tribe again made repairs to the roof. *Id.* In May 2009 the Tribe made certain repairs to the road. *Id.* at 8 & Ex. 18. Appellant contends that these repairs did not cure the roof and road problems. In August 2009 the U.S. Court of Appeals for the Ninth Circuit affirmed the District Court's dismissal of Appellant's breach of lease lawsuit for lack of jurisdiction. *High Desert Recreation, Inc. v. Pyramid Lake Paiute Tribe*, No. 07-16254 (9th Cir. Aug. 4, 2009) (unpublished order dismissing appeal) (Tribe's Answer Br., Ex. 2). Appellant never sued the Tribe in Tribal Court to obtain injunctive relief to enforce the

² The lease was for a term of 10 years and Appellant had the option of a 10-year extension, which Appellant exercised in 2005, extending the lease until 2024. Decision at 1.

Tribe's obligations under the lease, or for damages resulting from the Tribe's alleged breaches of the lease.

In November 2009, approximately 3 months after the Court of Appeals dismissed Appellant's breach of lease lawsuit, Appellant stopped remitting rent to the Tribe. Appellant contends that the Tribe's delay and/or failure to make satisfactory repairs resulted in partial destruction of the Premises by rendering a portion of the building unusable and otherwise impairing Appellant's business on the Premises. Notice of Appeal at 2. Appellant asserts that it was exercising a right under the lease to "offset" rent for "damages" that it incurred as a result of the Tribe's "breach" of its obligations to repair the roof and road. *Id.*

At the time that Appellant stopped remitting rent, Appellant presented invoices to the Tribe for past "costs" and "[l]oss of premise[s] footage" due to the roof leaks, and for past "costs" due to alleged lack of road repair, all pertaining to the time period of 2005 to November 2009. Letters from Appellant to Tribe, Nov. 4, 2009, attaching Invoice Nos. 38101, 38102, and 38105 (AR Tab 55). These invoices totaled \$75,255.46. *Id.* Appellant told the Tribe that Appellant was, from that point forward, intending to remain in possession without remitting any of its \$2750 monthly rent until the invoices were completely offset. *Id.* Appellant invoked Article 13 of the lease, *id.*, which provides in pertinent part:

In the event of a partial destruction of the premises during the term hereof, from any cause, the Tribe shall forthwith repair the same, provided that such repairs can be made within sixty (60) days, but such partial destruction shall not terminate this lease, except that Lessee shall be entitled to a proportionate reduction of rent while such repairs are being made, based upon the extent to which the making of such repairs shall interfere with the business of Lessee on the premises. If such repairs cannot be made within sixty (60) days, the Tribe, at its option, may make the same within a reasonable time, this lease continuing in effect with the rent proportionately abated as aforesaid, and in the event that the Tribe shall not elect to make such repairs which cannot be made within sixty (60) days, this lease may be terminated at the option of either party.

Lease Art. 13 ("Destruction of Premises").

III. BIA's Decision to Cancel the Lease

Approximately 3 months after Appellant stopped remitting rent pursuant to its claimed right of abatement, the Superintendent issued a notice, pursuant to 25 C.F.R.

§ 162.618, that Appellant was in default and must either cure the violation or explain why the lease should not be cancelled. First Notice of Violation, Jan. 28, 2010 (AR Tab 53). Appellant disputed that it was in arrears primarily on the basis that it had a right to offset rent under Article 13 of the lease, and alleged that the Tribe had repair obligations under Article 3 of the lease as well. See Letter from Appellant to Superintendent, Feb. 9, 2010, at 1-2.³ Appellant asserted that its claimed offset was “principally due to . . . procrastination” by the Tribe in making repairs. *Id.* at 3.

The day after receiving Appellant’s February 9 letter, the Superintendent issued a decision to cancel the lease. Superintendent’s First Decision, Feb. 12, 2012 (AR Tab 51). Appellant appealed to the Regional Director, re-asserting its prior arguments and also contending that the lease contains an implied covenant of “good faith and fair dealing” on the part of the Tribe. Statement of Reasons, Apr. 8, 2010, at 3 (AR Tab 46). The Regional Director vacated the Superintendent’s cancellation decision and remanded the matter because the Superintendent had not considered Appellant’s February 9 letter. Decision to Remand, May 27, 2010, at 3 (AR Tab 34). Appellant appealed the Regional Director’s decision—which was favorable to Appellant—to the Board. Notice of Appeal of Remand Decision, July 1, 2010 (AR Tab 20).

Meanwhile, the Superintendent had begun to implement the remand from the Regional Director, and issued a second notice of violation. Second Notice of Violation, June 18, 2010 (AR Tab 25). Appellant responded to the second notice of violation by arguing, among other things, that the issuance of this second notice during the regulatory period for appealing the Regional Director’s remand decision violated Appellant’s due process rights. Letter from Appellant to Superintendent, July 2, 2010, at 1-2 (AR Tab 19). The Superintendent then stayed action on the remand proceedings pending the Board’s decision on Appellant’s appeal from the Regional Director’s decision to vacate and remand the Superintendent’s first decision. Letter from Superintendent to Appellant, July 7, 2010 (AR Tab 17). On July 26, 2010, the Board dismissed for lack of standing Appellant’s appeal of the Regional Director’s remand decision. *High Desert Recreation, Inc. v. Acting Western Regional Director*, 52 IBIA 30 (2010).

Upon the conclusion of that appeal, the Superintendent issued a new decision to cancel the lease. Superintendent’s Second Decision, Aug. 6, 2010 (AR Tab 13). The grounds for this decision were that (1) the record did not reflect that a “partial destruction” of the Premises occurred, and therefore Article 13 was inapplicable as a basis for

³ Article 3 provides in pertinent part: “Lessee shall be responsible for all repairs required, excepting the roof, exterior walls, [and] structural foundations, which shall be maintained by the Tribe.” Lease Art. 3 (“Care and Maintenance of Premises”).

nonpayment of rent, and (2) the Tribe's maintenance and repair obligations are only set out in Article 3 of the lease and any remedy that Appellant might have for the Tribe's breach of those obligations must be obtained through means other than abatement of rent under Article 13. *Id.* at 1. Appellant appealed to the Regional Director, alleging various procedural and substantive defects in the Superintendent's decision and bias on her part. Notice of Appeal, Sept. 4, 2010 (AR Tab 12). On December 28, 2010, the Regional Director issued the Decision from which Appellant appeals to the Board.

In relevant part, the Regional Director left in place the Superintendent's conclusion that a partial destruction did not occur. Decision at 5-6. The Regional Director reasoned that a partial destruction must be caused by "the type of sudden, unexpected, and insured-against events that would typically fall within the scope of a 'Destruction of Premises' provision." *Id.* She also thought it was "instructive" that neither party terminated the lease under Article 13. *Id.* Next, she concluded that Appellant's obligation to pay rent was an independent covenant, and that therefore the Tribe's alleged breaches of its own lease obligations did not legally excuse Appellant from remitting rent. *Id.* Accordingly, she declined to consider the merits of Appellant's claims against the Tribe. *Id.*

IV. Appellant's Appeal to the Board

A. Appeal Bond

At the outset of this appeal, the Regional Director, joined by the Tribe, moved for summary dismissal on the grounds that 25 C.F.R. § 162.621 requires a lessee to continue to pay rent during the pendency of an administrative appeal from a BIA lease cancellation decision and that Appellant failed to do so. The Board denied the motion because the issue of Appellant's compliance with § 162.621 implicated the underlying merits of the appeal insofar as Appellant's merits argument is that it was entitled to offset rent under Article 13 of the lease. In lieu of making the continuation of this appeal contingent on Appellant remitting rent to the Tribe, the Board allowed motions for an appeal bond under § 162.620 and 43 C.F.R. § 4.332(d). After considering motions by the Regional Director and the Tribe for the Board to impose an appeal bond, the Board ordered Appellant to deposit with BIA a bond for the amount of the rent (\$67,020, which includes late payment penalties⁴ and interest) that Appellant might be adjudged to be in arrears since November 2009. Order Granting Motions for Appeal Bond, July 29, 2011. The Board also ordered Appellant to deposit additional monthly bonds in the amount of \$2750 until the conclusion

⁴ Pursuant to the lease, a \$20 per day late payment penalty is also collectable as "rent." Lease Art. 1.

of this appeal. *Id.* The principal bond was due by September 30, 2011, and Appellant timely deposited that bond and subsequent monthly bonds.

After Appellant complied with the bond order, however, the Tribe pursued supplemental proceedings in Tribal Court to evict Appellant from the Premises and to collect unpaid rent. The Tribe obtained a temporary writ of restitution from the Tribal Court and on October 5, 2011, the Tribe ousted Appellant. *See* Notice of Issuance of Temporary Writ of Restitution, Oct. 7, 2011. In light of Appellant's ouster, on November 30, 2011, the Board suspended the requirement for Appellant to deposit monthly appeal bonds. *See* Order Suspending Appeal Bond, Nov. 30, 2011. Ultimately, the Tribal Court issued a default judgment against Appellant, awarding the Tribe a judgment for \$82,370.98 plus attorney's fees and costs. *See* Notice of Disposition, Aug. 2, 2012, & Attach. It does not appear that the Tribe has collected on that judgment.

B. Appellant's Arguments on Appeal

With respect to the merits of this appeal, Appellant included arguments in its notice of appeal and it filed an opening brief. The Regional Director and the Tribe each filed an answer brief. Appellant filed a reply brief as well as a motion for expedited consideration or for immediate return of the appeal bond. In its filings, Appellant contends that the Tribe's delay and/or failure to make repairs to the roof and road was a breach of the Tribe's lease obligations and constituted a partial destruction of the Premises, thus providing Appellant the right to abate rent under Article 13 of the lease. Appellant further argues that Article 3 of the lease separately required the Tribe to make certain repairs, and that the Tribe breached Article 3 as well as implied covenants of "good faith and fair dealing" and "quiet enjoyment" by, among a litany of alleged actions or inactions, failing to make timely and satisfactory repairs. Appellant argues that its obligation to pay rent is dependent upon the Tribe's meeting its lease obligations under Article 13, Article 3, and the implied lease covenants, and that the Tribe's breaches of the lease excuse Appellant from remitting rent until the Tribe pays Appellant's invoices and comes into compliance with the lease.

Appellant challenges the Regional Director's Decision on various grounds, including (1) the Regional Director's interpretation of "partial destruction"; (2) her conclusion that Appellant's obligation to pay rent is an independent covenant; (3) BIA's failure to enforce the lease against the Tribe; and (4) the Regional Director's affirmance of the decision of the Superintendent—who Appellant claims was biased, committed procedural errors, and violated its due process rights.

Discussion

I. Standard of Review

Interpretations of lease provisions are questions of law, which the Board reviews *de novo*. *Seminole Tribe of Florida v. Eastern Regional Director*, 53 IBIA 195, 210 (2011), and cases cited therein. When a BIA decision involves the exercise of discretion, the Board will not substitute its own judgment for BIA's, but will review *de novo* the sufficiency of the evidence to support BIA's decision, and will also review the sufficiency of BIA's explanation. *Id.* It is Appellant's burden to prove that BIA's decision was erroneous, was not supported by substantial evidence, or was an abuse of discretion. *See id.*

II. Applicable Law and Rules of Construction

Although the interpretation of leases of Indian lands is a question of Federal law, in the absence of Federal law on point, the Board may look to state statutory and decisional law as a convenient source of the general law of contracts to the extent that it does not conflict with the Federal interest in developing and protecting the use of Indian resources. *Canyon Development v. Acting Sacramento Area Director*, 32 IBIA 66, 75-76 (1998); *Kearny Street Real Estate Co., L.P. v. Sacramento Area Director*, 28 IBIA 4, 14-15 (1995). Additionally, state law may "apply to lease disputes or define the remedies available to Indian landowners in the event of a lease violation by the tenant, if the lease so provides and the Indian landowners have expressly agreed to the application of state law." 25 C.F.R. § 162.109(c). In the present case, the Tribe does not have a landlord and tenant code,⁵ and it suggests that we may look to Nevada law for state law to apply. *See* Tribe's Answer Br. at 20 & n.3. But because the lease does not expressly provide for the application of the law of any state, in this case the Board will look to Nevada law merely as an indication of general contract law. *Kearny Street Real Estate*, 28 IBIA at 15; *see Franks v. Acting Deputy Assistant Secretary – Indian Affairs (Operations)*, 13 IBIA 231, 235 (1985) (the Board will refer to the law of the state with the greatest interest in the lease).⁶

The general principles that the Board applies to construction of Indian lease terms are well-recognized:

⁵ Where in existence, "[t]ribal laws generally apply to land under the jurisdiction of the tribe enacting such laws, except to the extent that those tribal laws are inconsistent with these regulations or other applicable federal law." 25 C.F.R. § 162.109(b).

⁶ Appellant is a Nevada chartered corporation, the Tribe and the Premises are located in Nevada, and the lease was executed in Nevada.

An Indian lease is a contract and the principles of contract construction apply to ascertain its meaning. The Board's task when construing or interpreting a contract is to determine and give effect to the intent of the parties. See 17A C.J.S. Contracts § 295a (1963). The starting point for discerning the intent of the parties is the language of the document itself. When the parties include language in a contract that is clear, complete, and unambiguous, that language will be given effect as expressing the complete intent of the parties, without resorting to extrinsic evidence. [*Id.*] § 294b(1).

Midthun v. Acting Rocky Mountain Regional Director, 48 IBIA 282, 289 (2009) (citations omitted), and cases cited therein.⁷

III. Analysis

A. Whether Appellant Properly Abated Its Rent under Article 13 of the Lease

In 2009 Appellant began to “offset” rent, in its entirety, based on alleged delay and/or failure of the Tribe, dating back to 2005, to make repairs to the marina roof and a road on the Premises, which allegedly resulted in a partial destruction of the Premises, caused interference with Appellant's business, and entitled Appellant to abate rent pursuant to Article 13 of the lease. In relevant part, Article 13 authorizes abatement of rent as follows:

In the event of a *partial destruction* of the premises during the term hereof, *from any cause*, the Tribe shall forthwith repair the same, provided that such repairs can be made within sixty (60) days, but such partial destruction shall not terminate this lease, except that Lessee shall be entitled to a *proportionate reduction of rent while such repairs are being made, based upon the extent to which the making of such repairs shall interfere with the business of Lessee* on the premises. If such repairs cannot be made within sixty (60) days, the Tribe, at its option, may make the same within a reasonable time, this lease continuing in effect with the rent *proportionately abated as aforesaid*, and *in the event that the Tribe shall not elect to make such repairs which cannot be made within sixty (60) days, this lease may be terminated at the option of either party.*

⁷ If, after giving the lease terms their natural and ordinary meaning they are reasonably susceptible to more than one interpretation, the Board will consider extrinsic evidence to discern the intent of the parties. *Midthun*, 48 IBIA at 289.

Lease Art. 13 (emphases added).

1. Partial Destruction

The Regional Director determined that, as a threshold matter, a partial destruction did not occur and therefore Article 13 was inapplicable. Decision at 5-6. Neither the Decision, nor the Regional Director’s brief on appeal, provides any support for the limited interpretation that she adopted for the term “partial destruction.”⁸ In addition, we find no basis to infer, from the fact that neither party terminated the lease under Article 13, that the parties intended the narrow meaning adopted by the Regional Director. The duration of time needed for the Tribe to make repairs—not whether a partial destruction has occurred—is what triggers the parties’ right of termination. See Lease Art. 13. Whether the repairs could or could not have been completed in 60 days is not the test for “partial destruction,” and the parties’ failure to terminate the lease under Article 13 thus does not convey the significance attributed to it by the Regional Director.

Ultimately, we need not determine whether a partial destruction occurred (and so we will assume without deciding that the Premises were partially destroyed) because we conclude that the Regional Director’s determination that Appellant was in default can be affirmed on other grounds, as a matter of law.

2. Appellant’s Abatement of Rent

In the event of partial destruction, the right to abatement exists “*while . . . repairs are being made*” by the Tribe and the amount of the abatement must be proportionate to “the extent to which *the making* of such repairs . . . *interfere[s] with [Appellant’s] business.*” Lease Art. 13 (emphases added).⁹ These lease terms are unambiguous and we therefore accord them their usual meaning. See *Midthun*, 48 IBIA at 289. The right of abatement does not arise from the Tribe’s delay and/or failure to make repairs, or even from the partial destruction itself, but instead arises from the making of repairs that interfere with Appellant’s business. See Lease Art. 13. Article 13 is narrowly—but clearly—drafted to

⁸ In support of the Regional Director’s interpretation that a partial destruction must be caused by “the type of sudden, unexpected, and insured-against events that would typically fall within the scope of a ‘Destruction of Premises’ provision,” her answer brief cites two Nevada Supreme Court decisions, neither of which interprets “partial destruction.” Decision at 6; Regional Director’s Answer Br. at 4 (citing *Mahban v. MGM Grand Hotels*, 691 P.2d 421 (Nev. 1984); *Lisser v. Kelly*, 502 P.2d 108 (Nev. 1972)).

⁹ Appellant does not argue that it had a right to make repairs to the roof or road, or that it made any repairs that were the Tribe’s responsibility to make under the lease.

give the lessee a right to abate rent while repairs are being performed and to the extent that the making of those repairs interferes with Appellant's business. As discussed below, Appellant's claimed offset was not based on the right of abatement, but was instead based on damages for the Tribe's alleged breach of the lease, which is distinct from the right of abatement.

Appellant contends that it was entitled to offset its monthly rent based on damages it sustained "*as a result of the Tribe's breach.*" Notice of Appeal at 2 (emphasis added); *see id.* at 6 ¶ 10. Thus, Appellant's asserted right of offset is expressly premised on a damages claim against the Tribe for breach of repair obligations under the lease. Additionally, Appellant contends that Article 13 authorized Appellant "to abate the monthly rental payment *until such time as the Tribe made repairs.*" *Id.* at 2 (emphasis added); *see id.* at 6 ¶ 9. But Article 13 does not—in contrast to some other leases—give the lessee a general right to abate rent as encouragement for the lessor to make repairs or as an alternative to filing a claim for damages resulting from the lessor's failure to repair. *See, e.g., Kosena v. Eck*, 635 P.2d 1287, 1290 (Mont. 1981) ("until said premises have been put in proper repair"); *Taylor v. White Stores, Inc.*, 707 S.W.2d 514, 515 (C.A. Tenn. 1985) ("until the repairs are made"); *Constellation Holding Corp. v. Beckerman*, 180 Misc. 498, 500 (N.Y. Sup. 1943) ("for such period as is necessary for the actual making of repairs"); *cf.* Nevada Revised Statutes (NRS) § 118A.355(1)(d) (landlord's failure to maintain a "dwelling unit" in habitable condition affords the tenant the right to withhold rent "until the landlord has remedied, or has attempted in good faith to remedy, the failure"). Under our plain reading of Article 13, the right of rent abatement exists only for interference with business during and caused by the Tribe's making of repairs.

Once the Tribe initiated repairs, it is true that abatement could continue until the repairs were completed, if the making of repairs interfered with Appellant's business. But Appellant has not shown—or even argued—that it abated rent during, or in proportion to any business interference caused by, the Tribe's making of repairs. Instead, as Appellant's invoices to the Tribe submitted in 2009 further illustrate, Appellant stopped remitting rent to recoup past "costs" that allegedly resulted from the Tribe's "delay" in making repairs to the roof and road.¹⁰ These invoices reflect Appellant's man-hours spent attending to the roof and road problems predominantly during the time period of 2005 through 2008, not

¹⁰ For example, the invoices seek to recover "costs" based on man-hours spent on such tasks as "[a]ttend[ing] to" and "correspondence regarding" the roof and road problems. Letters from Appellant to Tribe, Nov. 4, 2009, attaching Invoice Nos. 38101, 38102, and 38105; *see also* Supplement to Statement of Reasons, May 19, 2010, at 2 (AR Tab 38) (Appellant described its activities as including "putting up caution cones because of sink holes in the road or mopping store floors because of a leaky roof.").

interference with business during the time that the Tribe made certain repairs beginning in late 2008. And, even if Appellant had submitted invoices for the proper time period, the invoices are not a measure of interference with business itself. Appellant seems to acknowledge in its appeal filings that interference with business is the proper measure of abatement under Article 13. *See* Notice of Appeal at 2 (Appellant contends that “the roof leaks . . . have significantly limited [Appellant’s] ability to use the building to generate *business income*.” Emphasis added.); Reply Br. at 3 (Appellant contends that “the Tribe has taken every step it could think of to reduce *sales*.” Emphasis added.). But Appellant’s invoices do not reflect that measure. Appellant has not argued or submitted evidence, for example, that it had to close its business for one or more days while the roof was being repaired, and that it lost income, sales, or profits as a result.¹¹ Rather, Appellant seeks through its invoices and offsets under Article 13 to do what it was unable to do in Federal court: obtain relief for the Tribe’s alleged breaches of its lease obligations.

In sum, Appellant has not argued, much less established, that its “abatement” was proportionate to any interference with Appellant’s business caused by the Tribe’s making of repairs, and on those grounds we affirm the Regional Director’s conclusion that Article 13 did not excuse Appellant’s failure to remit rent.

B. Whether Appellant was Legally Excused from the Payment of Rent Based on the Tribe’s Alleged Breaches of the Lease

Appellant maintains that it was justified in remaining in the Premises while not remitting rent based on a litany of alleged “bad faith” acts by the Tribe, including alleged failures to repair, which Appellant contends has deprived Appellant of the “quiet enjoyment” of its leasehold interest. Reply Br. at 3-5. Each of the alleged breaches by the Tribe—breach of the Tribe’s express repair obligations under the lease, breach of the

¹¹ In addition to the invoices for past costs, Appellant submitted an invoice to the Tribe for “[l]oss of premise[s] footage” relating to the roof leaks, based on a loss of use of 1400 square feet, or 29.70%, of the total 4720 square footage of the Premises, from May 2005 to January 2009. Letter from Appellant to Tribe, Nov. 4, 2009, attaching Invoice Nos. 38101 and 38102. The Restatement (Second) of Property describes “abatement in proportion to the fraction of the land of which the tenant was deprived” as the “proportional area rule”—one of several different measures of abatement that courts have applied to determine the diminished value of the premises on mainly agricultural land. Restatement (Second) of Property, Landlord & Tenant, § 11.1, reporter’s note 4 (1977) (explaining that this rule “has been applied mainly in leases of agricultural land . . . but it is clearly unrealistic when applied to improved or urban land”). Thus, this invoice too is not an appropriate measure of any interference with Appellant’s business.

implied covenant of good faith and fair dealing,¹² and breach of the implied covenant of quiet enjoyment¹³—even if true did not supply Appellant a basis to withhold rent. Appellant’s obligation to pay rent under Article 1 of the lease was independent of the Tribe’s lease obligations and, although an exception to the rule of independent covenants may be asserted where the lessor “constructively evicts” the lessee, Appellant was not constructively evicted during the time that it withheld rent.

The Regional Director determined that “the lessor’s obligation to make repairs is generally held to be independent of the lessee’s obligation to pay rent (unless a constructive eviction has occurred), and a failure to meet that obligation would generally give rise to an action, in contract, for damages.” Decision at 6. Therefore, she concluded that Appellant’s obligation to pay rent in this particular case was independent of any available remedies and that Appellant had no proper basis to withhold rent. *See id.*

The Regional Director correctly stated the current status of the law regarding the independent nature of the covenant to pay rent in commercial leases of real property. In the context of *commercial* leases, the common law rule, which is still applicable in most states including Nevada, is that the lessee’s covenant to pay rent is independent of the lessor’s express or implied covenants, unless the lease expressly provides otherwise or the lessee is actually or constructively evicted. *See* Restatement (First) of Contracts § 290 (1932) (“Non-performance of a covenant by one party to a lease . . . *unless performance of the covenant is an express condition*, does not excuse the other party from performing his covenants *further than the law of property governing the effect of eviction of the grantee* or of waste by him provides.” Emphases added.).¹⁴ Because the lease did not provide otherwise

¹² *See First National Bank of Ely v. Progressive Casualty Insurance*, 2012 WL 5944847 at *4 (D. Nev. Nov. 27, 2012) (quoting *A.C. Shaw Constr. v. Washoe Cnty.*, 784 P.2d 9, 9 (Nev. 1989)) (“Nevada law holds that “[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and in its enforcement.”).

¹³ *See Zeitchick v. Lucey*, 2010 WL 2399331 at *3 (D. Nev. June 10, 2010) (quoting *Winchell v. Schiff*, 193 P.3d 946, 952 (Nev. 2008)) (“The purpose of the covenant of quiet enjoyment is to secure tenants against the acts or hindrances of landlords.”).

¹⁴ *See also* Restatement (Second) of Contracts § 231, comment e and reporter’s note thereto (1981) (explaining that the independence of lease covenants is now addressed in the Restatement (Second) of Property); Restatement (Second) of Property, Landlord and Tenant, § 5.4, comment c (“the rights of the tenant . . . where the landlord is at fault in not keeping the leased property in repair after the tenant enters are in most instances restricted to residential property”); M.S. Dennison, *Commercial Tenant’s Remedies Where Landlord Fails to Keep Premises in Condition Fit or Suitable for Commercial Use*, 57 Am. Jur. Proof of (continued...)

except in the case of a partial destruction and the making of repairs that interfered with Appellant's business as discussed *supra*, Appellant had two options: If the Tribe, through actions or inactions, rendered the Premises unfit for the purpose for which it was leased, Appellant could have stopped paying rent and abandoned the Premises within a reasonable time based on constructive eviction. *E.g.*, *Zeitchick*, 2010 WL 2399331 at *3 (citing *Winchell*, 193 P.3d at 952); *Yee v. Weiss*, 877 P.2d 510, 512 (Nev. 1994). Appellant did not abandon the Premises nor has it even asserted that it was constructively evicted.

Alternatively, Appellant could have remained in possession of the Premises, continued to pay rent to the Tribe, and sued the Tribe for breach of the lease. *See Hosmer v. Avayu*, 636 P.2d 875, 876 (Nev. 1981) (citing *Guntert v. City of Stockton*, 55 Cal. App. 3d 131, 151 (1976) (tenant "elected to remain in possession, continue to pay rent and sue for" breach of contract)) (tenants could not assert constructive eviction because they did not abandon the premises, but while remaining in the premises they could sue the landlord for breach of the lease obligation to make repairs). As discussed *supra*, Appellant attempted to sue the Tribe in Federal court for damages based on alleged violations of the lease agreement, but Appellant's claims were dismissed because the lease does not contain an express waiver of the Tribe's sovereign immunity from suit in Federal court. *See High Desert Recreation, Inc.*, No. 03:06-CV-0588-LRH (RAM), *aff'd*, No. 07-16254. Approximately 3 months after the Court of Appeals decision, Appellant then chose a third option, i.e., to withhold rent as a means to collect damages and force the Tribe to make repairs, which Appellant did not have the right to do under the lease.¹⁵ As noted earlier, Appellant did not attempt to sue the Tribe in Tribal Court, nor did it assert a counterclaim in the Tribe's action in Tribal Court against Appellant.

C. Whether BIA Has a Duty to Enforce the Tribe's Lease Obligations

On appeal, Appellant contends that BIA's failure to decide the merits of Appellant's breach of lease claims and to enforce the lease against the Tribe constitutes "an unlawful abdication of BIA's legal obligations under [Part] 162." Notice of Appeal at 6 ¶ 11. As

(...continued)

Facts 3d 127 §§ 6-7 (only a minority of courts recognize in commercial leases an implied warranty of fitness or suitability of the premises for use, which makes the covenant to pay rent dependent on the usability of the premises); NRS Chapter 118C (Nevada commercial leasing chapter contains no warranty regarding fitness or suitability of the premises for use).

¹⁵ Because Appellant did not make the argument, we express no opinion whether Appellant could have made repairs and offset rent based on the repair costs. *See generally* NRS § 118A.360 (upon failure of the landlord to make repairs to a "dwelling unit," the tenant may make repairs and deduct that cost from rent).

discussed below, Appellant misunderstands BIA's role in policing Indian leases and its responsibility with respect to lease disputes. Moreover, because Appellant's obligation to pay rent was independent of the Tribe's obligations under the lease, and therefore Appellant's failure to pay rent is sufficient grounds to cancel the lease, the Regional Director was within her discretion not to consider the merits of Appellant's claims against the Tribe.

The leasing regulations provide in relevant part that BIA "will . . . assist landowners in the enforcement of payment obligations that run directly to them. . . . [BIA] will [also] ensure that tenants comply with the operating requirements in their leases." 25 C.F.R. § 162.108. These regulations do not speak to any BIA duty to a lessee of Indian land. Thus, the Regional Director correctly observed that "the extent of BIA's policing of Indian leases is to ensure that the lessees, whether Indian or non-Indian, fulfill their contract obligations" to the landowner. Decision at 5 (quoting *Hawley Lake Homeowners' Ass'n v. Deputy Assistant Secretary – Indian Affairs (Operations)*, 13 IBIA 276, 289 (1985)).

In exercising her authority to assist the Tribe in enforcing the rental payment provisions of the lease, the Regional Director correctly concluded that Appellant's obligation to pay rent was independent of any breach of the lease by the Tribe. She therefore did not "find it necessary to make any factual inquiries" with respect to Appellant's claims against the Tribe. Decision at 6. Contrary to Appellant's arguments, in this case there is no need for a decision—either by BIA or the Board—on Appellant's claims against the Tribe in order to decide whether the lease should be cancelled for nonpayment of rent. See *Tuttle v. Acting Western Regional Director*, 46 IBIA 216, 232, 240 n.29 (2008) (citing *Anderson v. Acting Southwest Regional Director*, 44 IBIA 218, 227 (2007) (Secretary's role is that of trustee for the Indian tribe and not as a regulator or general forum for resolving disputes over the lease)) (holding that the Department owed no duty to the lessee, whether under the lease or based on a fiduciary relationship, to adjudicate his contract claim against the tribe).¹⁶ Indeed, the Board has stated that BIA has a "duty to refrain from imposing itself in a contract dispute . . . that should be submitted to tribal court for resolution." *Tuttle*, 46 IBIA at 231 (quoting *Hawley Lake Homeowners Ass'n*, 13 IBIA at 288). Moreover, even assuming that Appellant's allegations regarding the Tribe's breach of the lease are true, the Board has held that "[a]lthough BIA may attempt to advise individual

¹⁶ Also contrary to Appellant's arguments, due process does not require an evidentiary hearing prior to cancellation of a lease of Indian land. See *All Materials of Montana, Inc. v. Billings Area Director*, 21 IBIA 202, 210-11 (1992), and cases cited therein. Because BIA had no need to reach the merits of Appellant's claims against the Tribe, there was no need for a hearing to resolve any factual disputes. See 43 C.F.R. § 4.337(a) ("the Board may require a hearing" if "the record indicates a need for further inquiry to resolve a genuine issue of material fact").

Indians and tribes concerning proper conduct as lessors, it has no statutory or regulatory authority to take action against an Indian lessor.” *Id.* (quoting *Hawley Lake Homeowners’ Ass’n*, 13 IBIA at 289).¹⁷ Thus, without opining what forum would be the appropriate forum to hear Appellant’s claims against the Tribe, we conclude that the Regional Director did not abuse her discretion in abstaining from deciding Appellant’s breach of lease claims while she also sought to ensure that Appellant, as lessee, fulfilled its independent obligation to pay rent.

D. Alleged Bias by BIA

The last of Appellant’s contentions is that, even if we reject its other arguments, BIA’s Decision reflects an abuse of discretion because BIA acted with bias, did not follow proper procedures for issuing a notice of violation, and attempted to conceal information from the Board by failing to provide the complete administrative record to the Board. *See* Notice of Appeal at 6; Opening Br. at 6-11; Reply Br. at 6, 8-9.

We agree that BIA initially committed procedural errors during its consideration of whether to cancel the lease for nonpayment of rent. For example, the Superintendent initially failed to consider Appellant’s arguments for withholding rent under Article 13 of the lease. But the Regional Director vacated the Superintendent’s first decision to cancel the lease and remanded the matter to the Superintendent for a new decision. *See* Decision to Remand. And Appellant’s claim that the Superintendent violated its due process rights because there were allegedly “two BIA administrative actions pending against [Appellant] simultaneously,” Notice of Appeal at 3, is simply incorrect. During Appellant’s appeal of the Regional Director’s decision to remand the Superintendent’s first notice of violation, the Board noted that the Superintendent had issued a second notice of violation but that the notice itself did not purport to cancel the lease, and that “the Superintendent would lack authority to issue a *decision* until th[e] appeal [regarding the remand decision] is resolved.” *High Desert Recreation*, 52 IBIA at 32 n.5 (emphasis added). In accordance with the Board’s instruction, the Superintendent did not issue her second decision to cancel the lease

¹⁷ The Board previously explained during this appeal that it lacks jurisdiction to order Tribal officials to restore Appellant to the Premises while the lease remained in effect. *See* Order Denying Appellant’s Motion to Order BIA to Restore Appellant to Leasehold Premises, Nov. 30, 2011, at 5; *cf. Hollywood Mobile Estates Limited v. Cypress*, 415 Fed. Appx. 207 (11th Cir. 2011) (holding that tribal officials did not have sovereign immunity from a request for a Federal court injunction compelling them to restore the lessee’s possession of the premises). Because we affirm the Regional Director’s Decision to cancel the lease, Appellant’s request that the Board order BIA to restore Appellant to the Premises is now also moot.

until August 6, 2010, after the Board's decision dismissing Appellant's appeal. Appellant has not shown that it suffered any prejudice by any confusion that occurred in the earlier proceedings. Appellant responded to the Superintendent's notice of violation, the Superintendent waited to issue her decision until after the Board dismissed Appellant's appeal, and Appellant then exercised its right of appeal to the Regional Director, and now to the Board. Thus, Appellant's claim that its appeals were not processed in accordance with the regulations is not a basis to vacate the Regional Director's Decision.

With respect to Appellant's allegations of bias by BIA, there is neither a specific allegation, nor evidence in the record, of bias or prejudice on the part of the Regional Director who issued the Decision that is being appealed. Nor is there any basis to suggest that the Superintendent's alleged "bias" influenced the Regional Director's Decision. Appellant has not alleged any due process violations by the Regional Director. Moreover, Appellant has been afforded a full opportunity to present its views and have them considered by the Board prior to a final Departmental determination. In our *de novo* review of the lease and based on the arguments submitted to the Board, we have concluded that the Regional Director was correct that Appellant was not legally excused from the payment of rent.¹⁸

Finally, with respect to Appellant's claim that the Regional Director concealed documents by not furnishing the entire administrative record, Appellant did not object to the record within the time period provided in the Board's appeal regulations. *See* 43 C.F.R. § 4.336 ("Any objection to the record as constituted shall be filed with the Board within 15 days of receipt of the notice of docketing."). Regardless, Appellant also states that it supplied the allegedly missing portions of the record to the Board. Opening Br. at 3 & Ex. 3 ("The entire historical record with respect to the road and roof is contained within Binder number 1 of 2 that was submitted by [Appellant] to the [Western Regional Office]. . . . [Appellant] respectfully submits the binders at this time in an effort to put forth the truth and record to the Board."). Assuming that the record was missing the documents supplied by Appellant, there is no evidence of concealment and Appellant has not demonstrated how it has been prevented from presenting its views and having them considered by the Board.¹⁹

¹⁸ We also note that the Regional Director's Decision reflects involvement of regional office staff, including Stan Webb, whom the *Tribe* argued in earlier proceedings was biased against the *Tribe*. *See* Letter from Tribe to Regional Director, June 30, 2010 (AR Tab 21) ("[Mr. Webb] is irretrievably tainted by the advocacy role he has adopted in this case as well as from the multiple ex parte communications that have occurred with [Appellant].").

¹⁹ Appellant also sought, during this appeal, to supplement the administrative record with a chronological record of Tribal Court proceedings ancillary to this appeal, as evidence of the Tribe's alleged efforts to undermine Appellant's lease. *See* Appellant's Information as

(continued...)

Therefore, for all of the foregoing reasons, we affirm on other grounds the Regional Director's Decision to cancel Appellant's lease for nonpayment of rent.

E. Back Rent Owed, Appellant's Eviction, and the Appeal Bond

The remaining issue to be decided, then, is the amount of back rent that Appellant owes the Tribe. The amount of rent for which Appellant is in arrears may be readily determined by the Board because (1) as a matter of law Appellant's obligation to pay rent while remaining in possession of the Premises was independent of the Tribe's satisfaction of its lease obligations; (2) there is no disagreement over the amount of basic rent owed under the lease; and (3) Appellant ceased paying rent beginning in November 2009 and all parties agree that Appellant was under no obligation to pay rent after the Tribe evicted Appellant through Tribal Court proceedings ancillary to this appeal, in October 2011.

As a requirement for maintaining this appeal, while not making the Regional Director's Decision to cancel the lease immediately effective, the Board ordered Appellant to post an appeal bond representing the amount of rent for which Appellant might be adjudged to be in arrears for the time period of November 2009 through September 2011, and to also post additional bonds according to the monthly rental schedule, until the resolution of this appeal. *See* 25 C.F.R. § 162.621 ("While a cancellation decision is ineffective, the tenant must continue to pay rent and comply with the other terms of the lease."); Order Granting Motions for Appeal Bond, July 29, 2011. The sole reason that the Board structured Appellant's payment of rent as a "bond," rather than simply requiring Appellant to pay rent directly to the Tribe pursuant to Article 1 of the lease and as required by § 162.621, was because Appellant's merits argument was that it was exercising its right to offset rent and that continuing to remit "rent" under the circumstances would amount to double payment.

Given our disposition of the merits of Appellant's appeal, and in the absence of any evidence that the Tribe has separately collected the accrued rent from Appellant, the funds posted for the bond must be characterized as the rent required to be paid under § 162.621 as a condition of the appeal, and as rent, these funds must be paid to the Tribe. The only exception to our ruling concerns those funds posted as a bond in lieu of rent for the months

(...continued)

Supplement to the Administrative Record, Oct. 13, 2011. While we take judicial notice of those other proceedings, we have no jurisdiction over the Tribal Court and express no opinion on those proceedings.

of October and November 2011, during which time Appellant was ousted from Premises: All parties agree that Appellant owed no rent for these 2 months.

In our determination that the funds posted for the bond must be paid to the Tribe, we have considered the conduct of the Tribe and its counsel, Charles R. Zeh, as they pursued supplemental proceedings in Tribal Court to evict Appellant after Appellant posted the appeal bond as protection for the Tribe's interests while BIA's cancellation decision remained ineffective and Appellant remained entitled to occupy the Premises as a matter of Federal law. *See Laborers National Pension Fund v. ANB Investment Management and Trust Co.*, 26 F. Supp. 2d 1048, 1051 (N.D. Ill. 1998) (following the posting of an appeal bond, "pursuing supplementary proceedings in this situation may merely constitute harassment and result in unnecessary time and money expended by both parties"). We note that the Tribe and its counsel did not express to the Board, at any time during this appeal, any concern that the bond they requested was somehow inadequate to protect the Tribe's interests while this appeal was pending. The conduct of the Tribe and Mr. Zeh in pursuing Appellant's eviction, after the posting of an adequate appeal bond and while the lease remained in effect as a matter of Federal law is, to say the least, troubling. But assuming, without deciding, that the Board would have discretion in this case to return the bond to Appellant after upholding the Regional Director's Decision, we conclude that the mandate under § 162.621 outweighs the equitable considerations that might otherwise favor returning the bond to Appellant.

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, the Board affirms the Regional Director's December 28, 2010, Decision.

I concur:

// original signed
Thomas A. Blaser
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge