Appellant Yankton Sioux Tribe (Tribe) sought cancellation of the City of Wagner (City), South Dakota’s longstanding lease of allotted lands on the Yankton Sioux Reservation for expansion of a wastewater treatment facility that serves the City and tribal housing developments. The Yankton Agency Superintendent (Superintendent), Bureau of Indian Affairs (BIA), declared the lease void ab initio because, he alleged, BIA had failed to conduct the required review under the National Environmental Policy Act (NEPA), and in the alternative cancelled the lease, finding that it had been approved without satisfying certain regulatory requirements. The City appealed the Superintendent’s decision and on September 23, 2015, BIA’s Great Plains Regional Director (Regional Director) reversed the Superintendent’s decision in a decision letter to the City. The Tribe asked the Board of Indian Appeals (Board) to review the Regional Director’s decision.

We affirm the Regional Director’s decision. In doing so, we first find that the Regional Director did not err in determining that the City’s appeal of the Superintendent’s decision was timely. Although we find that the administrative record does not support the Regional Director’s position that BIA complied fully with the requirements of NEPA when approving the lease in 1987, the record does include evidence that the environmental effects of the proposed project had been assessed by the U.S. Environmental Protection Agency (EPA) and that EPA, the lead agency providing the bulk of the funding for the expansion of the waste treatment facility, had determined by completing an Environmental Impact Assessment (EA) that the project would have no significant environmental impacts, and issued a Finding of No Significant Impact (FONSI) accordingly. The EA and FONSI were part of the lease record maintained by BIA, and the Regional Director found that the EA and FONSI provided a reasonably thorough discussion of the potential adverse and beneficial impacts of the proposed water treatment facility expansion and that BIA properly relied on these documents when approving the lease in 1987.

65 IBIA 112
More important for our consideration, the Tribe does not argue that it has been in any respect injured by BIA’s alleged failure to comply with NEPA or by BIA’s apparent failure to document its adoption of EPA’s environmental assessment and issue its own FONSI based on the agency’s independent review of EPA’s analysis. Rather, the Tribe apparently seeks to terminate the lease so that it may now, as majority interest owner of the leased land, negotiate more favorable terms for the continued operation of the facility at the existing location. Because the purpose of NEPA is to address the environmental impact of a proposed Federal action, we conclude that the Tribe has failed to assert a concrete and particularized injury that falls within the zone-of-interest that NEPA protects. The Tribe therefore lacks standing to challenge the sufficiency of BIA’s NEPA review. In regard to the Tribe’s remaining lease challenges, we find that the lease complied with the applicable BIA regulations in effect at the time the lease was approved. Finally, the Tribe has not established that a sewer pipe located on the leased property is in trespass, nor has it shown any other trespass by the City.

Background

I. Plans to Expand the City’s Wastewater Treatment Facility

In 1979, EPA conducted an environmental review under NEPA, 42 U.S.C. § 4321 et seq., of a proposal from the City to expand its existing wastewater treatment facility. Letter from Regional Director to City, Sept. 23, 2015, at 4 (Decision) (Administrative Record (AR) V-1). Specifically, the EA examined the construction of “two additional cells on the highland east of the present site” and other improvements to the existing system. EA, undated, at 2-3 (AR I-13). The goal of the expansion was to prevent the discharge of raw sewage into a streambed, which the EA characterized as a public health hazard, and ensure adequate sanitation facilities for the City and for a tribal housing development and industrial park located on tribal land adjacent to the City’s southern limit. Id. The EA projected that the population to be served by the proposed project would include 1,830 City residents and 680 residents of the tribal housing community. Id. at 4-5. A public hearing was held to discuss the project, although there is no indication whether the Tribe attended. Id. at 2. EPA consulted with several state and Federal agencies regarding the proposed construction. Id. at 1. Because the “review process did not indicate significant

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1 The administrative record is organized in five parts, each with enumerated tabs containing one or more documents. For our decision, we refer to documents by the appropriate part (I through V) and tab number. Page numbers, when cited, are to the relevant page(s) of the individual document identified in the citation.
environmental impacts would result from the proposed action,” EPA issued a FONSI on September 6, 1979. FONSI, Sept. 6, 1979, at 1 (AR I-13). In the FONSI, EPA stated:

The project study area does not include wetlands, prime agricultural land, threatened or endangered species habitat, historical sites, or other unique or environmentally sensitive characteristics. The major primary impacts of the project will be short-term air, noise and traffic disruption. Secondary impacts are expected to be minimal.

Id. at 1; see also EA at 3-4 (describing the project area as “marginal crop land,” and stating that the “primary adverse impacts . . . will be noise, dust, and some traffic disruption” during construction, but that such impacts “will be short term in nature”). Construction of the proposed project would not begin before 1987, when funding for the expansion was secured and the City entered into a lease for land adjoining the existing facility in the eastern highlands.

In 1981, the Tribe entered into an agreement with the City and the Yankton Sioux Housing Authority (Authority) to include an additional cluster of 40 homes, to be built by the Authority for tribal members north of the City, in the proposed expansion of the wastewater treatment system. Agreement among the [City,] [Authority,] and [Tribe], June 1, 1981 (1981 Agreement) (AR I-10); Decision at 5. In the 1981 Agreement, the Tribe agreed to contribute to the City 4.5% of the estimated cost of the proposed expansion of the wastewater treatment facility, should bids be let for the project. 1981 Agreement at 2 (unnumbered). In June 1987, the Tribe submitted a request to the Indian Health Service (IHS) to provide financial assistance to expand the City’s wastewater treatment facilities, which would “serve 104 existing Indian homes located in and adjacent to the city of Wagner,” apparently including the cluster of 40 homes referenced in the 1981 Agreement. Project Summary for the Construction of Sanitation Facilities to serve Existing Indian Homes located in the Community of Wagner, South Dakota on the Yankton Sioux Indian Reservation South Dakota, Special Project AB-87-827, July 1987, at 1 (unnumbered) (IHS Project Summary) (AR I-10). IHS estimated the total cost of the project to be $744,500, with 75% of the total coming from an EPA Construction Grant, $82,000 from the City Sewer Fund, $47,500 from a City Bond Issue, and $75,000 from IHS for the Yankton Sioux Tribe. Id. at 3 (unnumbered). On August 27, 1987, IHS approved Project Number AB-87-827 and agreed to contribute $75,000 as the Tribe’s share of the project. Project Approval, Aug. 27, 1987 (AR I-10).

The Tribe, the City, and IHS subsequently entered into a memorandum of agreement in which the Tribe agreed to appoint a representative to coordinate the Tribe’s participation in the wastewater treatment facility expansion project, promote attendance at meetings, and act as liaison to the various government agencies participating in the project.
Memorandum of Agreement among IHS, the City, and the Tribe, AB-87-827, Sept.-Oct. 1987, at 1, 3 (unnumbered), ¶ 1 (MOA) (AR I-10). In the MOA, the parties also mutually agreed that the City would “provide sewer services to the North Wagner and South Wagner Yankton Sioux Indian Housing Authority homes and the rates for these units shall be no less favorable than the rates charged to all other users for the same class of service.” *Id.* ¶ 5. The parties to the MOA, including the Tribe, also agreed that Indian housing units “will be considered an integral part of the City sewer system, and all rules governing the operation and maintenance of the facilities will apply.” *Id.*

II. The Lease

On February 10, 1987, BIA, on behalf of an Indian landowner, and the Tribe entered into a 25-year lease (Lease) with the City for 42.5 acres of land located on Indian trust Allotment No. 11088-B.² Lease No. 346-10387, Feb. 10, 1987 (AR I-12). The purpose of the Lease was described as “wastewater treatment system.” *Id.* at 1 (unnumbered). The Indian landowner, on whose behalf BIA executed the Lease, held an approximately 63.5% ownership interest in the allotment on which the lease was located, and was adjudged to be incompetent or *non compos mentis*. Decision at 5 & n.10; Lease at 1-2 (unnumbered); see also 25 C.F.R. § 162.2(a)(1) (1986) (authorizing the Secretary to grant leases on individually owned land on behalf of persons who are *non compos mentis*).

The Tribe held an approximately 36.3% ownership interest in the allotment at that time. Decision at 5 n.10. The Lease was approved by BIA on May 20, 1987. Lease at 2 (unnumbered).

The Lease stated that the City, as lessee, had “the option to renew for an additional 25 years after the termination of lease.” *Id.* at 1 (unnumbered). The annual rental rate was $2,847.50, and was due when the lessee took possession of the land. *Id.* The rental rate was subject to review and adjustment by the Secretary at not less than 5-year intervals. *Id.* ¶ 7. A separate Lease Agreement for the property was apparently prepared in 1985 by the same parties, approved by BIA in May 1987,³ and incorporated in the Lease. Lease ¶ 13 (stating that a Lease Agreement of 4 pages was added to the Lease prior to its execution “and by reference is (are) made a part hereof”). The Lease Agreement establishes the base

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² The leased property was described as: “The South 900 feet of the Southwest Quarter of the Northeast Quarter and the North 500 feet of the North Half of the Northwest Quarter of Southeast Quarter of Section 34; T. 96 N., R. 63 W., Fifth Principal Meridian, Charles Mix Co. South Dakota containing 42.5 acres more or less.” Lease at 1 (unnumbered).

³ The Lease Agreement preamble states that it was “made and entered into this _____ day of November, 1985,” while the signature block for the parties indicates that it was approved by BIA on May 20, 1987. Lease Agreement, May 20, 1987 (AR I-12)
rental charge as $67 per acre for a total annual rental charge of $2,847.50, and specifies that “[r]ental shall be . . . 1½ times the average [BIA] cash and crop rental charge for cropland in Charles Mix County, on a per acre basis.” Lease Agreement, art. I & IV (AR I-12).

Article VI of the Lease Agreement sets the term of the lease at 25 years, and provides that “Lessee shall have an exclusive option to renew this lease for an additional twenty-five years under the same terms and conditions as herein set forth.” Id. art. VI. Article XI of the Lease Agreement states:

At the date of execution of this agreement, all residents of the [City], 50 housing units on the south side of Wagner under the control of the [Authority], the Indian Senior Citizens Apartments, and a maximum of 40 housing units under the control of the [Authority], located in the cluster site north of Wagner, will be served under this lease agreement.

Id. art. XI. The notation “NO BOND REQUIRED PER TELEPHONE CALL WITH AAO [Aberdeen Area Office]” is typed in bold font on the bottom of the Lease. Lease at 1 (unnumbered). BIA recorded the Lease and the Lease Agreement as lease number 346-10387, and both documents bear this number at the top of each page. See Lease; Lease Agreement.

III. Dispute Concerning Renewal of the Lease

During the spring and summer of 2012, the Tribe sought to renegotiate the terms of the Lease with the City “so that they are more favorable to the Tribe.” Letter from Superintendent to Regional Director, Mar. 5, 2011, at 1 (unnumbered) (AR III-1). In his letter to the Regional Director, the Superintendent stated that the Tribe sought to terminate the Lease before expiration of the Lease’s primary term, but that he had counselled the Tribe to wait until the lease term expired, after which time, the Superintendent opined, “there is no agreement or stipulations” and the Tribe could either accept the option for renewal, terminate the Lease and provide a 30-day notice to the City to remove improvements, or “continue negotiations for more favorable terms.” Id. at 2 (unnumbered). The Superintendent also stated that he “believe[s] that this is a Self-Determination issue” and that “[t]he Tribe, as [the current] majority land owner, has the right to implement and enforce decisions regarding the ‘use’ of their trust resources.” Id. Finally, the Superintendent informed the Regional Director that he had “ensured that the allottees are taken care of during the potential[ly] lengthy negotiation period” by increasing the rental rate to $148.00 per acre for the upcoming year. Id.

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4 The year in the date recorded on the letter is erroneous and should have been 2012. The letter was received by the Regional Office on March 6, 2012.
The Tribe’s efforts were not successful, however, and on May 16, 2012, shortly before the 25-year primary term expired, the City notified BIA and the Tribe that it was exercising its right to renew the Lease for the extended term, and enclosed with its notice a check for the annual rental payment at an adjusted rate of $148.33 per acre for the 42.5 acres. Letter from Kenneth W. Cotton, Esq. to Superintendent and Tribe, May 16, 2012, at 1 (stating that the City’s payment was based on a “new rental rate . . . which we understand is 1½ times the most recent Tribal farm land rent”) (AR II-14). In the City’s view, it possessed an exclusive option to renew the Lease under the same terms and conditions specified in the original lease, and only the specific amount of the rent due was negotiable, “as it is every five years under the lease.” Id. at 1-2. The City subsequently determined that the adjusted rental rate for land covered by the Lease should be $189.81 per acre, but again declined to renegotiate sewer and wastewater treatment rates with the Tribe as part of renewal of the Lease. Letter from Kenneth W. Cotton, Esq. to Superintendent and Tribe, Aug. 1, 2012, at 1-2 (AR I-10). The City maintained that “sewer and wastewater treatment system rates are in no way governed by the lease for the 42.5 acres,” and should be addressed separately. Id. at 3.

After receiving the City’s notice to extend the Lease, the Tribe adopted a resolution alleging, inter alia, that the City might be occupying tribal trust or allotted lands not subject to a lease or easement, the City had acted in bad faith by not requesting an adjustment to rental rates, and there was no bond or insurance to protect the Tribe’s and allottee’s interests, and asked that BIA investigate its allegations. Resolution No. 2012-073, Yankton Sioux Tribe, Aug. 13, 2012, at 1-2 (unnumbered) (AR I-10). The Tribe also requested that, if its allegations were verified, BIA provide notice of any Lease violations to the City. Id. at 2 (unnumbered). BIA then notified the City of “a potential trespass on Allotment #11088-B,” and requested that the City provide documentation, including a tribal resolution or other written consent from the Tribe authorizing the Tribe’s Chairman to enter into the Lease; approved easements for the wastewater treatment facility’s underground sewer inlet pipes; and NEPA documents associated with the construction of the sewage treatment cells on the Allotment. Letter from Superintendent to City, Aug. 15, 2012, at 1-2 (AR I-8). In response, the City stated that the property was leased for the purpose of operating the wastewater treatment facility, which would “include the necessary pipes and connections” to make the facility viable, and that it did not possess the other requested documents. Letter from Kenneth W. Cotton, Esq. to Superintendent, Sept. 4, 2012 (AR I-7). Subsequently, the Tribe requested that BIA cancel the Lease because it had been unable to renegotiate favorable lease terms. Letter from Tribe to Superintendent, Jan. 3, 2013 (AR I-5).

On January 3, 2013, the Superintendent cancelled the Lease. Letter from Superintendent to City, Jan. 3, 2013 (Superintendent’s Decision) (AR I-4). Finding that the Lease had been approved without complying with NEPA, the Superintendent held that
the Lease was void ab initio. Id. at 4, 6-7. Although referring to his action as a “cancellation decision,” the Superintendent stated that the Lease was invalid when executed and, therefore, the wastewater treatment “facility has been and continues to be trespassing” on Allotment 11088-B since May 20, 1987. Id. at 4. The Superintendent also concluded that the City failed to keep “promises” contained in the Lease by, inter alia, not adjusting the rental rate over the course of the 25-year lease period, obtaining an approved easement for an underground sewer inlet pipe, and paying damages to the allotment owners for the construction of the facility. Id. at 4-5. Based on these findings, the Superintendent calculated the amount of trespass damages owed by the City. Id. at 7-8.

The City appealed the Superintendent’s decision to the Regional Director. City’s Notice of Appeal, Jan. 29, 2013 (City’s NOA) (AR II-2); City’s Statement of Reasons, Mar. 1, 2013 (City’s SOR) (AR II-14). The City stated that the terms of the Lease and Lease Agreement granted to the City the “exclusive right to renew the contract, under the same terms and conditions as the first lease,” and that the City exercised its right by notifying BIA and the Tribe of its intent to renew in its letter of May 16, 2012. City’s SOR at 1-2 (unnumbered). The City stated that in discussions with BIA and the Tribe, the Tribe “dictated unilaterally” terms to be included in any subsequent lease that “had nothing to do with the subject matter at hand.” Id. at 2 (unnumbered). The City also stated that, following discussions with the Tribe and the Superintendent, the City again notified them that it was renewing the Lease. Id.

The Regional Director issued his Decision on September 23, 2015. Regarding the allegation that BIA did not comply with NEPA when approving the Lease, the Regional Director found that BIA relied on the EA and FONSI prepared by EPA and that such reliance was reasonable because the NEPA analysis “related entirely to the upgrade and expansion of the wastewater treatment system.” Decision at 15. He stated that “EPA carefully reviewed the engineering report, environmental impact assessment, and other supporting data” in making its determination and conducted a public hearing prior to issuing the FONSI. Id. at 13. He found that “[t]he parties involved in this project, including state and federal agencies (EPA, IHS, BIA, and [Fish and Wildlife Service]) all relied on the one EA/FONSI before proceeding with the project . . . .” Id. at 15. He also stated that “it is apparent that EPA (as well as BIA and IHS) was consulting the Tribe” because the EA referred to services to be provided to Indian housing units, including housing projected to be constructed by the Authority, and such information would be obtained from the Tribe. Id. at 13. Further, the Regional Director stated that “[t]he [administrative record] demonstrates that nearly continuous communication, collaboration, and cooperation was occurring among the parties, including BIA, IHS, EPA and the Tribe, between the time the . . . EA was completed in 1979 and until February 10, 1987, when the Lease and several agreements . . . were executed by the parties.” Id. at 14. The Regional Director concluded that BIA had complied with NEPA and therefore the Lease
was valid. Decision at 1, 13-15. The Regional Director also disagreed with the Superintendent’s conclusion that the Lease terminated at the end of the primary lease term. *Id.* at 1-2. He found the Superintendent did not adequately explain “why the City was not entitled to the exclusive option to renew the Lease according to the agreement.” *Id.* at 2. He stated that the lease renewal clause in article VI of the Lease Agreement “is neither confusing nor ambiguous” and that “[t]he right of renewal is a unilateral one granted to the City.” *Id.* at 17. The Regional Director determined that the City had timely expressed its intent to renew the Lease and that “the lease extension was automatic and made under the same terms and conditions, its approval retroactive from the date that BIA approved the Lease.” *Id.*

The Regional Director also addressed allegations concerning the validity of the Lease raised by the Tribe in its Resolution No. 2012-073. First, the Regional Director found that the Tribe had not shown that the City had acted in bad faith and breached the Lease by not requesting rental adjustments. *Id.* He stated that although periodic rental reviews provided for in the Lease had not been conducted, “neither the BIA nor any party to the Lease has ever requested a rental review.” *Id.* at 2.

Next, regarding the alleged lack of an easement for the sewer inlet pipe, the Regional Director stated that the pipe was located within the leased area and, since the purpose of the Lease was expressly for the installation of sewage treatment cells and related infrastructure to treat the community’s effluent, “such piping must be considered normal and reasonably necessary” for the intended purpose, and an easement for a pipeline located within the leased property was not necessary. *Id.* at 18. The Tribe had negotiated an easement for an outfall line that extended beyond the leased area into trust property, the Regional Director stated, and could have negotiated a separate easement for the inlet line within the leased area, had it wished to do so. The fact that the Tribe did not do so, he reasoned, should be viewed as “both intentional and deemed unnecessary” by the Tribe. *Id.* The Regional Director held that because the Lease was valid and no easement was necessary for the sewer inlet pipe, the City was not in trespass. *Id.* at 2, 20.

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5 Although the Tribe alleged in its Statement of Reasons filed with the Board that “[t]he Regional Director erred by rejecting the Tribe’s position that the [City] breached the contract by not requesting periodic rental adjustments,” Statement of Reasons, Nov. 13, 2015, at 2, ¶ 4, it did not address this allegation in its opening brief and, in its reply to the Regional Director’s answer, stated that the issue of periodic rental adjustments “is not one of the bases for the Tribe’s appeal” to be considered by the Board, Reply Brief (Br.), Apr. 12, 2016, at 7. Therefore, the Board will not address the matter further.
Finally, the Regional Director addressed the Tribe’s claims that the Lease was invalid because the rental rate was based on agricultural rather than industrial use, and because the Lease did not require a surety bond or insurance. In regard to the rental rate, the Regional Director found that the Tribe failed to support its argument that the rate, based on the average per acre crop and cash charges for agricultural land in the county, was improper or that a rate based on industrial valuation would be different from that negotiated by the parties. \textit{Id.} at 19. If the Tribe was dissatisfied with the proposed rate, the Regional Director reasoned, it should have raised its objections in 1987 when the Lease, which the Tribe executed, was being negotiated. \textit{Id.} The Regional Director found that a surety bond was not required from the City when the Lease was executed in 1987, and stated that the Lease expressly acknowledged this on its face. \textit{Id.} Moreover, under the regulations, the Regional Director stated, BIA had the authority, at its discretion, to waive the bond and insurance provisions. \textit{Id.} at 19-20 & n.30. The Regional Director viewed the Tribe’s execution of the Lease, with the typed notation regarding a bond, as evidence of its agreement at that time with the waiver of the bond and insurance requirements. \textit{Id.} at 20. Hence, the Regional Director vacated the Superintendent’s finding that the Lease was void \textit{ab initio}, reversed the cancellation of the Lease, vacated the trespass penalties, and remanded the matter to the Superintendent to determine whether any rental income was owed. \textit{Id.}

This appeal followed. Appellant Yankton Sioux Tribe filed an opening brief, the Regional Director filed an answer, and the Tribe filed a reply. No other briefs were received.

\textbf{Standard of Review}

An appellant bears the burden of showing error in a regional director’s decision. \textit{Los Alamos Self Storage v. Acting Southwest Regional Director}, 60 IBIA 1, 9 (2015); \textit{Preservation of Los Olivos v. Pacific Regional Director}, 58 IBIA 278, 306-07 (2014). The Board reviews questions of law, including interpretation of lease provisions, \textit{de novo}. \textit{Seminole Tribe of Florida v. Eastern Regional Director}, 53 IBIA 195, 210 (2011). We review arguments concerning the sufficiency of evidence under the same standard. \textit{Id.} The Board reviews BIA’s discretionary decisions to determine whether they are in accordance with applicable law, supported by the administrative record, and are not arbitrary and capricious. \textit{Los Alamos Self Storage}, 60 IBIA at 9. “In reviewing BIA discretionary decisions, the Board does not substitute its judgment for that of BIA, instead determining whether BIA’s decision was unreasonable.” \textit{Id.} (internal citations omitted).
Discussion

I. Timeliness

The Tribe first argues that the City failed to file with the Superintendent a timely appeal from his decision cancelling the Lease. Opening Br., Feb. 18, 2016, at 5-6. But the Regional Director considered the timeliness issue, see Decision at 2-3, and the Tribe has not shown that he erred in concluding that the appeal was timely. Although 25 C.F.R. § 2.9(a) provides that an appellant must file its appeal “in the office of the official whose decision is being appealed,” the Superintendent’s Decision mistakenly instructed the City to file its appeal with the Regional Director within 30 days of its receipt, with copies of the appeal to the Superintendent and all interested parties. Superintendent’s Decision at 9. The Superintendent’s Decision was delivered to the City on January 4, 2013. U.S. Postal Service Track-and-Confirm, visited on Nov. 12, 2014 (AR I-4). The City, following the Superintendent’s appeal instructions, filed its appeal with the Regional Director on January 29, 2013. See City’s NOA. The address block in the City’s notice of appeal includes the names and addresses of the Regional Director, Superintendent, Tribe’s Chairman, and City’s Mayor, and states that it is “made and served pursuant to 25 C.F.R. § 2.12, and in accordance with [the Superintendent’s] final two paragraphs on page 9 of the [Superintendent’s Decision].” Id. at 1. In a separate letter submitted with its notice of appeal, the City states “all parties to this appeal have been served by United States certified mail on the day and date set forth in the Certificate of Service and at the addresses included therein.” Letter from Kenneth W. Cotton, Esq. to Regional Director, Jan. 29, 2013 (AR II-2).

The Tribe has failed to provide any evidence that the Superintendent was not timely served consistent with the appeal instructions provided in the Superintendent’s Decision. But even if this were not the case, 25 C.F.R. § 2.13(c) permits the late filing of a notice of appeal when BIA is at fault for the misdirection of the filing, as was the case here, see, e.g., Marques v. Superintendent, Eastern Nevada Field Office, 38 IBIA 224 (2002), and as the Regional Director found in determining that the City’s appeal was timely, Decision at 3; Answer Br., Mar. 24, 2016, at 9. The Tribe makes no attempt to rebut this argument and we find no support for the Tribe’s challenge.

II. NEPA Compliance and Standing

The Tribe next argues that BIA failed to comply with NEPA, including allegations that the EA relied upon by BIA did not study the specific location of the leased property, was outdated at the time of the Lease’s approval, and that the level of tribal consultation concerning the Federal action was inadequate. The Tribe concludes that because of these alleged deficiencies, BIA’s approval of the Lease in 1987 was invalid and the Lease was void
ab initio. See, e.g., Opening Br. at 6-8; Reply Br. at 4-6. Although we address each of the allegations infra, and find that the Tribe has failed to establish the factual basis of each of its claims, we dismiss the Tribe’s NEPA-based claim for lack of prudential standing. Specifically, the Tribe has failed to assert any claim that falls within the zone of interests to be protected or regulated by NEPA.

To maintain an appeal before the Board, the Board has a well-established practice of requiring an interested party to demonstrate that it satisfies the constitutional requirements of standing as described in Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992), that is, (1) that it has suffered a concrete and particularized injury, that is either actual or imminent, to a legal interest of its own; (2) that the injury is traceable to the challenged agency action; and (3) that it is likely that the injury will be redressed by a favorable decision. County of Sauk, Wisconsin v. Midwest Regional Director, 45 IBIA 201, 218-19 (2007), aff’d sub nom. Sauk County v. U.S. Dep’t of the Interior, 2008 U.S. Dist. LEXIS 42552 (May 29, 2008). In addition to these constitutional requirements of standing, an interested party who seeks to challenge an agency action under a specific statute must have prudential standing to bring that claim, that is, it must show that the interest it claims has been harmed by the agency action falls within the zone of interest that the statute seeks to protect. Id. at 219.

The purpose of NEPA is to address the environmental impact of proposed Federal action, in this case, the proposed lease of trust land for the purpose of expanding an existing wastewater treatment facility. See id. at 218 (citing County of Colusa v. Pacific Regional Director, 38 IBIA 274, 282 (2003)). Prudential standing to challenge the Regional Director’s compliance with NEPA is established under 42 U.S.C. § 4321 et seq. Id. at 218 n.19. Although the zone-of-interest requirement is not intended to be an onerous test, the Tribe has failed to assert any concrete and particularized injury that falls within the zone of interest that NEPA protects. At no point has the Tribe alleged that it has sustained some cognizable environmental injury related to BIA’s alleged failure to comply with NEPA. To the extent that the Tribe alleges injury of any kind, it does so in relation to its interest in negotiating better lease terms going forward, i.e. terms that are more financially beneficial to the Tribe. See, e.g., Letter from Tribe’s Chairman to Superintendent, Jan. 3, 2013 (AR I-5) (“I have participated in the lease renegotiations, and no beneficial results could be achieved for the [Tribe] and allotted owners. Therefore, I am requesting that you cancel this lease . . . .”); see also Resolution No. 2012-073, Yankton Sioux Tribe, Aug. 13, 2012, at 2 (unnumbered) (AR I-10) (stating that the parties did not reach agreement in negotiations to renew the Lease, and requesting BIA to “verify” allegations raised by the Tribe, including alleged discrepancies in land descriptions, failure to adjust rental charges, improper basis for calculating rental rate, and trespass).
In its reply brief, the Tribe in effect concedes that its position is not based on any harm caused by the alleged violations of NEPA, but arises from a “change in circumstances” now that it is the majority interest owner of the leased property and thus able to “insist on terms for the lease.” Reply Br. at 4. At best, such “injury” is to the Tribe’s economic interests and is therefore outside the zone of interest to be protected by NEPA. See County of Sauk, 45 IBIA at 219-20 (dismissing NEPA challenge for lack of standing because appellant’s loss of revenue and jurisdiction claims were not within the zone of interest of NEPA); see also Rosebud Sioux Tribe v. McDivitt, 286 F.3d 1031, 1038-39 (8th Cir. 2002) (discussing NEPA claim for lack of prudential standing because statutory provisions governing EA and FONSI do not support a claim motivated by purely economic interests); Central South Dakota Cooperative Grazing District v. U.S. Dep’t of Agriculture, 266 F.3d 889, 896 (8th Cir. 2001) (dismissing for lack of standing appellant’s challenge to EA because “an economic injury is an insufficient basis for prudential standing within the meaning of NEPA”). We therefore conclude that the Tribe lacks standing to pursue its NEPA-related claims.

Appellant’s reliance on the Board’s decisions in Lambert v. Rocky Mountain Regional Director, 43 IBIA 121 (2006), and Scott v. Acting Albuquerque Area Director, 29 IBIA 61 (1996), is misplaced. Reply Br. at 3-4. In both of those cases, the lease at issue was found to be invalid because the approving BIA official, the Superintendent, lacked the authority to approve a lease for the agreed upon term. Lambert, 43 IBIA at 124-26 (25-year lease was invalid where Superintendent lacked authority to approve business lease exceeding 10 years); Scott, 29 IBIA at 67-70 (25-year lease with option to renew for another term of same duration invalid where Superintendent lacked authority to approve lease exceeding 25 years, inclusive of any provision for renewals or extensions).

In Scott, the Board also affirmed the determination of the Area Director (now Regional Director) that the lease was invalid due to the Superintendent’s failure to comply with NEPA by conducting an environmental assessment prior to approving the lease. Id. at 70-71. The appellants had argued that an EA done for an earlier lease to a different lessee could serve as the basis for a categorical exclusion from further NEPA review because the lease at issue was for the same purpose considered in the earlier EA. Id. at 70. Rejecting that argument, the Board explained that, even if BIA were to consider the EA for an earlier lease as the basis for a subsequent categorical exclusion, the latter would not apply because at the relevant time a categorical exclusion from NEPA requirements could only be issued for lease renewals, and not for new leases. Id. (citing 516 DM (Departmental Manual) 6, Appendix 4, sec. 4.4D (effective Mar. 24, 1988)). The Board also found that the appellants’ lease “covers more land and has a considerably broader purpose than did the 1972 lease.” Id. In particular, the Board noted that the purpose of the earlier lease, which covered 4.64 acres, was “to build a cabin or small home,” while the appellants’ lease covered 12.69 acres and authorized the construction of a home, erosion control measures, tree and
fruit planting, livestock raising, construction of a water system, and construction of additional water well facilities and/or other residential buildings. Id. at 70-71. The Board held that, “[u]nder these circumstances, it is clear that the NEPA requirements for appellants’ lease cannot be deemed satisfied by the EA done for the earlier lease.” Id. at 71.

The circumstances in the matter now before the Board are readily distinguished from those in Scott, where the size of the leased area and purpose of the earlier lease considered by the EA were significantly different from the leased area and purpose of the later lease.6 In Scott, the bulk of the uses authorized by the new lease had not been considered at all in the EA. In the matter now before the Board, as discussed further infra, the potential impacts on the environment from the expansion of the wastewater treatment facility were thoroughly studied in the EA, and the “major primary impacts of the project,” which were identified as “short-term air, noise and traffic disruption” during construction, FONSI at 1, occurred many years ago when the expansion of the facility was completed. The expansion of the wastewater treatment facility, which was undertaken to remedy an ongoing violation by the old facility of the National Pollutant Discharge Elimination System (NPDES) permit, see Decision at 5, apparently remedied the environmental violations, since the expanded facility was covered by an NPDES permit issued at the time this appeal was filed, see Statement of Reasons, Nov. 13, 2015, Exhibit (Ex.) C, NPDES Permit No. SD-0020184. The facts of this case, where BIA asserts reliance on a project EA and FONSI completed before the Lease was approved, and where the Tribe seeks to challenge BIA’s NEPA compliance only after the completion of the project and upon renewal of the lease, distinguish this case from those in which a lease was held to be void.

The Tribe does not challenge the core finding memorialized in the FONSI that expansion of the wastewater treatment plant would have no significant environmental impacts, or that the short-term primary impacts were limited to dust, noise, and traffic disruption during construction. See FONSI; EA at 4. Nor does it challenge the EA’s conclusion that, by eliminating the discharge of raw sewage into a streambed, “[t]he beneficial aspect of this project will be the reduction of a public health hazard.” EA at 4. Rather, the Tribe argues that the Regional Director erred in finding that BIA’s reliance7 on

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6 We also note that this case is distinguishable from High Sierra Fellowship v. Western Regional Director, 45 IBIA 197 (2007), in which it was undisputed that no NEPA review had taken place. Id. at 199 & n.3.

7 The record indicates that the EA and FONSI were made part of the decision record prior to approval of the Lease. See Letter from Superintendent to City, Jan. 3, 2013, at 4 (AR I-4). Although the Regional Director argues that BIA used and relied on the EA and FONSI issued by EPA when approving the Lease, see Decision at 15; Answer Br. at 12-13, the record does not include documents indicating that BIA, as the agency responsible for (continued...)
the EA and FONSI was justified because certain “mandatory NEPA requirements” were not met. Opening Br. at 6. Specifically, the Tribe contends that (1) the EA and FONSI pertained to a different area of land from the individual Indian and tribally owned allotted land covered by the Lease; (2) the EA was outdated; and (3) BIA failed to consult with the Tribe, which the Tribe argues is required by Federal law, specifically Executive Order 13175. Id. at 6-8.

A. The Tribe Fails to Show That the Leased Property Was Not Within the Scope of the EA

The Tribe alleges that the specific land area considered by the EA is unclear, and that at least a portion of Allotment 11088-B was not studied. Opening Br. at 7; Reply Br. at 5-7. The Tribe contends that the EA pertains primarily to nearby fee land, and not to Indian trust land. Reply Br. at 5. The Tribe cites only to the Superintendent’s January 3, 2013, decision letter as the basis for its contention. Opening Br. at 6; see Letter from Superintendent to City, Jan. 3, 2013, at 3-4 (asserting that the EA and FONSI “have no connection” to the Lease and that “[n]o trust land was included in either the FONSI or [EA]”) (AR I-4). The basis for the Superintendent’s assertion is not clear, especially since neither document discusses the fee or trust status of the area studied, and is inconsistent with the Tribe’s position that some portion of Allotment 11088-B was not included. Nor does the Tribe offer any explanation for why the EA purportedly studied land altogether different from that included in the Lease for the project.

The description of the project area in the EA refers generally to the City of Wagner, the area’s “gently rolling plains” and agricultural lands, and the Tribe’s expanding Indian

(...continued)

the Federal action at issue, formally adopted the EA and issued its own FONSI, as required by Departmental procedures then in effect. See 516 DM 3, sec. 3.6 (C), release no. 3508, effective Sept. 26, 1984 (“If such an EA [prepared by another agency] . . . is adopted, the responsible official must prepare his/her own NOI or FONSI which also acknowledges the origin of the EA and takes full responsibility for its scope and content.”). The policy and procedures for adoption of an EA prepared by another agency were revised in 2004 to include a subsection D which provided that adoption or augmentation of another agency’s EA must receive the same public participation that it would have received if it originated with the adopting or augmenting agency. 516 DM 3, sec. 3.6(D), release no. 3613, effective May 27, 2004; see also Notice of final revised procedures, 69 Fed. Reg. 10866, 10878 (March 8, 2004). In 2008, the Department codified its procedures for implementing NEPA found in chapters 1-6 of Part 516 of the DM in new regulations issued as 43 C.F.R. Part 46. 73 Fed. Reg. 61292 (Oct. 15, 2008).
Housing Project to the south of the City. EA at 3, sec. 2, Description of the Project Area. It includes an overview of the type of land, land uses, and soil problems in the area. And it provides a reasonably thorough discussion of the major aspects of the proposed facility expansion and its effects on the land near the existing facility. Nothing in the EA or FONSI suggests that the scope of the EA’s analysis was limited to a specific parcel of land proposed for the physical expansion of the wastewater treatment facility, which was to serve 1,830 City residents and 680 residents of the Tribe’s housing community, nor would such a limited focus be consistent with NEPA’s purpose of assessing the impacts of a proposed Federal action on the environment. And while the EA states that “the proposed project . . . is to retain the present 20.9 acre photo-synthesis pond and construct two additional cells on the highland east of the present site,” id. at 2, the specific acreage and location of any proposed site is not provided. In any case, since the existing facility was to be expanded, it is reasonable to assume that the expansion area would be close to the existing site of the wastewater treatment facility. A map provided by the Tribe shows that the two cells constructed in the Lease area are located directly northeast and adjacent to the existing facility. Statement of Reasons, Ex. B, Site Schematic, at 2. The Tribe fails to show error in the Regional Director’s determination, which is supported in the record, that the EA was sufficiently broad to include the leased property.

B. The Tribe Fails to Establish That the EA Was Outdated

The Tribe also takes issue with the amount of time that elapsed between the completion of the NEPA analysis and the issuance of the Lease. Opening Br. at 7; Reply Br. at 6-7. As noted above, the EA was completed in 1979, and the Lease was approved in 1987. The Tribe, however, provides no specific evidence that the EA was flawed or that conditions had changed in the interim. It simply states that “[s]ignificant changes are likely to have occurred in that time,” without providing any indication or evidence of the nature of any change, or how it would have warranted updating the EA. Opening Br. at 7. The Tribe bears the burden of proof of showing a NEPA violation, and its bare assertion that the analysis was outdated is insufficient to meet that burden. Preservation of Los Olivos, 58 IBIA at 317 (cursory, undeveloped arguments do not show agency violated NEPA). Further, the FONSI and the EA anticipated that the wastewater treatment facility would be designed to meet population needs, including tribal housing, into the 1990s. FONSI at 1; EA at 4-5. So the secondary impacts of such a facility, extending past the date of the Lease’s approval, were not ignored.

C. The Tribe’s Consultation Argument Lacks Merit
In arguing that BIA did not comply with NEPA, the Tribe also contends that “the record is void of any evidence of consultation with the Tribe as required by federal law.” Opening Br. at 7. But, as the Regional Director observes, the Tribe’s argument is based only on Executive Order 13175, which was not in effect in 1979 when EPA completed the EA, or in 1987 when BIA approved the Lease negotiated by the Tribe. Answer Br. at 14; Exec. Order No. 13175, 65 Fed. Reg. 67,249 (Nov. 6, 2000). Nor has the Tribe identified any NEPA-specific consultation statute that it alleges was violated.

Under the NEPA regulations, an agency must only “[m]ake diligent efforts to involve the public.” 40 C.F.R. § 1506.6(a). While the regulations require that the public be involved in preparing an EA “to the extent practicable,” 40 C.F.R. § 1501.4(b), they do not require public meetings or hearings. Voices for Rural Living v. Acting Pacific Regional Director, 49 IBIA 222, 240 (2009). The Tribe does not allege that it was not notified of the EA conducted for the expansion of the wastewater treatment system. Contrary to the Tribe’s allegation, see Opening Br. at 7, the administrative record does contain evidence that the Tribe was consulted in the preparation of the EA, as noted supra at 113 & 118 in regard to housing information obtained from the Tribe, and as both a proponent and beneficiary of the wastewater treatment facility expansion project. See MOA at ¶ 1 (providing that the Tribe will appoint a representative to coordinate tribal participation in the project, promote meeting attendance, and act as liaison among government agencies); IHS Project Summary, at 1-2 (unnumbered) (stating that the Tribe requested IHS assistance with improvements to the sewage treatment system and had reached agreement with the City on a lease for the land needed for system expansion) (AR I-10). Hence, the Tribe has not met its burden to show that a NEPA violation occurred regarding tribal consultation.

III. Compliance with Leasing Regulations

The Tribe also argues that the Lease is invalid because it failed to comply with 25 C.F.R. § 162.5. Specifically, the Tribe contends that BIA approved the Lease at less than the fair annual rental, and without requiring the City to provide a security bond or obtain insurance. Opening Br. at 8-9; Reply Br. at 7-9.

The Tribe does not show that the Regional Director erred in concluding that the Lease met the requirements of 25 C.F.R. § 162.5 (1986). See Decision at 19-20; Hicks v. Northwest Regional Director, 59 IBIA 285, 286 n.4 (2015) (the regulation in effect at the time the Lease became effective applies). Nor has the Tribe presented any evidence that it is not receiving a fair annual rental, as provided by § 162.5(b). The Tribe argues that BIA incorrectly based the rental charge on cropland valuation, instead of valuing the land based on its potential use for industrial development. Opening Br. at 8. But there is no indication that the land subject to the Lease was or would likely be developed for industrial use at the time of the Lease’s approval, in the absence of the Lease. Thus, the Tribe has not
shown that valuing the land based on its agricultural value was inappropriate. In point of fact, the rental rate agreed to in the Lease exceeded the fair annual rental value for similar land, inasmuch as the rental rate was calculated at “1⅓ times the average [BIA] cash and crop rental charge for cropland in Charles Mix County, on a per acre basis.” Lease Agreement, art. IV. Hence, we are not convinced that approval of a rental rate in excess of the fair market value for agricultural land violated BIA’s regulations, as alleged by the Tribe.

Similarly, the Tribe has failed to show that the Regional Director erred in finding that the Lease is valid despite the absence of a security bond or insurance paid by the lessee. As the Regional Director explained, the security bond requirement could be waived under the applicable regulation, see § 162.5(c), which a typed notation on the face of the Lease indicates occurred in this case. Lease at 1 (unnumbered) (“NO BOND REQUIRED PER TELEPHONE CALL TO AAO”). The Tribe contends that the record does not support the Regional Director’s finding that the Secretary waived the bond requirement. Opening Br. at 9. However, the Regional Director upheld the Superintendent’s decision to approve the Lease without requiring a bond based on the express language of the Lease itself, and further concluded that the Tribe approved of waiving the bond as evidenced by its execution of the Lease. Decision at 19-20. The Regional Director explained that EPA, the City, and IHS had all worked together to the benefit of the Tribe, the Authority, and the Indian community, by funding the expansion of the wastewater treatment facility, and that it was not unreasonable for the Superintendent to approve the Lease without first requiring a surety bond or proof of insurance. Id. The absence of other evidence in the record demonstrating that the bond and insurance provisions were waived, and the Tribe’s current disagreement with waiver of these provisions, does not show that the Regional Director erred in concluding that the Lease was valid under the circumstances. See, e.g., Linabery v. Acting Great Plains Regional Director, 53 IBIA 42, 48 (2011) (“bare assertions, standing alone, are not sufficient to meet [appellant’s] burden” of showing regional director’s decision was not reasonable).

The purpose of a security bond is to insure the lessee’s performance of contractual obligations under a lease, including rent payment unless the lease requires advance payment, construction costs, and any other contractual obligations. 25 C.F.R. § 162.5(c). Here, the financing for the expansion project was provided by EPA, IHS, and the City. IHS Project Summary, at 3 (unnumbered), Table 1 (sources of funding for project). And the full annual rent payment was due on the date the City took possession of the lease property. Lease at 1 (unnumbered). No other contractual obligations were identified in the Lease or Lease Agreement, or advanced by the Tribe, and it is not apparent what additional security

8 It is unclear what other evidence of waiver the Tribe would expect to be produced. The Tribe does not allege, much less demonstrate, that a particular form of waiver was required.
a bond would offer under the circumstances. Likewise, insurance could be required to protect improvements on the leased property or to protect the lessors' interests, but was not mandatory. 25 C.F.R. § 162.5(d). Given the public nature of the wastewater treatment facility, the Tribe does not show that the Superintendent lacked authority to approve the Lease without requiring a security bond or proof of insurance, or that the Regional Director erred in finding that the lease was valid, under the circumstances, for the reasons provided.

IV. Trespass

A. The Regional Director Reasonably Concluded That No Easement Was Needed

The Tribe contends that a sewer inlet pipe for the wastewater treatment facility is in trespass because the Lease does not include sub-surface rights for the pipe's installation. The Tribe argues that the Regional Director erred in finding that an easement was not needed for the pipe. Opening Br. at 9-10; Reply Br. at 9-10.

We disagree. The Lease does not address whether an easement is needed for the sewer inlet pipe. Neither party presents any extrinsic evidence on this point, nor does the administrative record contain any evidence regarding the issue. But it is clear that the leased property was to be used for a “wastewater treatment system.” Lease at 1 (unnumbered). And the Tribe does not show that the Regional Director’s conclusion that all parties would have been aware that the water treatment facility would utilize underground pipes was unreasonable. Decision at 18; but cf. Hawkey v. Acting Northwest Regional Director, 57 IBIA 262, 264-65 (2013) (BIA’s interpretation of lease in error when that interpretation was contradicted by the plain language of the lease). Indeed, the Tribe’s approval of the Lease for its stated purpose would include approval for infrastructure necessary for the facility, such as pipelines, that were located within the leased property. In support of its argument, the Tribe points to an easement that it granted for an outfall pipe. Opening Br. at 10. This, however, ignores a key distinction between the outfall pipe, which extended beyond the borders of the leased property onto trust land, and the sewer inlet pipe, which is located within the leased property. It also indicates that the Tribe was aware that pipes would be part of the wastewater treatment system when it entered into the lease, and distinguished between those that extended beyond the leased property and those that were contained within the area of the lease. Hence, the Tribe has not established that a trespass occurred as a result of the sewer inlet pipe.

B. The Tribe Does Not Show That Any Other Trespass Occurred

65 IBIA 129
Finally, the Tribe argues that “the record does not support a finding [by the Regional Director] that the City is occupying the trust land identified in the [L]ease.” Opening Br. at 10; see also Reply Br. at 10-11. The Tribe alleges that “discrepancies in land descriptions contained in various documents” exist that were not addressed by the Regional Director. Opening Br. at 10; see also Reply Brief at 10 (alleging that there are discrepancies between the land descriptions in state and EPA permit documents and the Lease). The Tribe does not provide evidence that the land occupied by the City’s expanded wastewater treatment plant, or any part thereof, is not within the area described in the Lease, for which the Tribe has received payment for the past 25 years. Nor does the Tribe explain the relevancy, or attest to the accuracy, of the land descriptions included in other non-BIA permits. Lastly, the Tribe does not present any authority establishing that BIA was required, based on the Tribe’s unsupported allegations, to have a survey conducted to determine whether the wastewater treatment facility was located on the leased property.

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 September 23, 2015, decision.

I concur:

// original signed //original signed
Robert E. Hall Mary P. Thorstenson
Administrative Judge Administrative Judge