



## INTERIOR BOARD OF INDIAN APPEALS

Seymour Anderson, Maureen Johnson, and Alex Smith v.  
Acting Southwest Regional Director, Bureau of Indian Affairs

44 IBIA 218 (04/09/2007)

Related Board cases:

40 IBIA 101

Reconsideration denied, 40 IBIA 137



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
801 NORTH QUINCY STREET  
SUITE 300  
ARLINGTON, VA 22203

SEYMOUR ANDERSON, MAUREEN	:	Order Affirming Decision
JOHNSON, and ALEX SMITH,	:	
Appellants,	:	
	:	
v.	:	Docket No. IBIA 05-52-A
	:	
ACTING SOUTHWEST REGIONAL	:	
DIRECTOR, BUREAU OF INDIAN	:	
AFFAIRS,	:	
Appellee.	:	April 9, 2007

Seymour Anderson, Maureen Johnson and Alex Smith (Appellants) appealed to the Board of Indian Appeals (Board) seeking reversal of a January 27, 2005 decision of the Acting Southwest Regional Director, Bureau of Indian Affairs (Regional Director, BIA). <sup>1/</sup> The Regional Director upheld a decision by the Southern Pueblos Agency Superintendent (Superintendent), BIA, which approved a request and action by the Pueblo of Cochiti (Pueblo) to relieve the Cochiti Community Development Corporation (CCDC) from any obligation under the Cochiti Lake Master Lease (Master Lease) to rebuild or replace a recreation center in the Town of Cochiti Lake (Town). CCDC is a Pueblo corporation and also the Pueblo's lessee under the Master Lease. Appellants are residents of the Town, who pay recreation fees as sublessees with CCDC.

Appellants contend that BIA was required to consider or to accommodate Appellants' various complaints against the Pueblo and CCDC in deciding whether to approve the Pueblo's request to grant relief to CCDC, and that BIA should not have decided whether to grant relief to CCDC until a dispute between Appellants and CCDC over the use of their recreation fees had been resolved to their satisfaction. We affirm the Regional Director's decision because BIA has a limited role under the Master Lease. That limited role did not require BIA to serve as a forum for Appellants' complaints against the

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<sup>1/</sup> On July 27, 2005, the Board was advised, by letter dated July 25, 2005 from Appellant Johnson, that Anderson had died. The Board has received no notice of withdrawal from Anderson's estate, and therefore we continue to treat Anderson as an appellant, recognizing that his interest may now be represented by his estate.

Pueblo and CCDC, and Appellants have not met their burden to show that the Regional Director erred or abused his discretion in approving the Pueblo's request to grant relief to CCDC.

### Background

#### A. Master Lease

In 1969, the Pueblo entered into a 99-year lease, the Master Lease, with the California City Development Company (California City) to "establish a recreation-oriented new town on the reservation of [the Pueblo]." Master Lease ¶ 2A; Attachment A. BIA approved the lease pursuant to 25 U.S.C. § 415, a statute authorizing Indian landowners to lease their trust or restricted property with the approval of the Secretary of the Interior (Secretary). 2/

As part of the development project, the Master Lease required the lessee to construct, within 10 years, "all or a portion of" named on-site improvements having a reasonable value of \$2 million, including (1) a commercial area, (2) a motel-restaurant complex, (3) a swim park, including swimming pool, bath house, volleyball court, shuffleboard and miscellaneous small sport facilities, (4) riding stables, facilities, and trails, (5) an indoor sports arena with facilities for community meetings and social events, (6) picnic and camping facilities, (7) a marina, and (8) homes, apartments, mobile homes and/or trailer parks. Master Lease ¶ 7.B. A general plan of development for the Town, which was attached to the lease, stated that the lessee "proposes to construct and operate a substantial complex of recreational facilities for the benefit of all subleaseholders and for the general public." Master Lease Attachment A at 2.

Paragraph 19 of the Master Lease required the lessee to maintain insurance for buildings and improvements in order to protect against loss, and also provided, in relevant part:

In the event of partial or total destruction of or damage to any building or improvement on the leased premises, \* \* \* the Lessee \* \* \* at Lessee's \* \* \* sole cost, shall reconstruct the building or improvement or upon approval by

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2/ Section 415 of 25 U.S.C., as amended by the Act of October 12, 1968, Pub. L. No. 90-570, 82 Stat. 1003, expressly authorized the Secretary to approve leases for up to 99 years for the Pueblo's lands.

[the Pueblo], of [sic] a building or improvement capable of rendering equivalent service, in compliance with laws and building regulations of the [Pueblo], excepting those changes, alterations, or omissions permitted by the written consent of the [Pueblo] and the Secretary. Such reconstruction shall commence within ninety days after the damage or destruction occurs and shall be pursued diligently.

(Emphasis added.)

Shortly after BIA approved the Master Lease, California City assigned its interest as lessee to Great Western Cities, Inc. (GWC), which built the Town and executed separate subleases with individuals for residences within the Town. The subleases are subject to the terms and provisions of the Master Lease, and also require each sublessee to pay a recreation fee. See May 24, 1972 Notice of General Provisions by GWC at 2-3. 3/

In 1973, GWC assigned its interest in the Master Lease to Great Western Cities, Inc. of New Mexico (GWCNM). In 1985, GWCNM declared bankruptcy, and in the subsequent bankruptcy proceedings, CCDC purchased its interest in the Master Lease and assumed its obligations as lessee. CCDC is a corporation that is wholly-owned by the Pueblo, and members of the Pueblo Tribal Council (Tribal Council) serve on CCDC's Board of Directors. 4/

## B. Recreation Center

Sometime prior to 1985, either GWC or GWCNM built a recreation center in the Town. In January 1997, the recreation center was damaged in a snowstorm, and the roof collapsed. CCDC decided to tear down the remainder of the recreational center, and

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3/ As of November 27, 2002, each sublessee paid a quarterly recreation fee of \$67.93 under the terms of their subleases. Findings and Conclusions of the Pueblo Tribal Council Made and Entered Based on Submissions to the Tribal Council on November 27, 2002, ¶ 9.

4/ Pueblo Resolution No. 02-035 describes CCDC as a corporation chartered by the Secretary of the Interior under section 17 of the Indian Reorganization Act (IRA), 25 U.S.C. § 477. See also Pueblo Answer Brief at 2 (same). The administrative record includes a charter issued by the Pueblo pursuant to tribal ordinance, but no Secretarial charter.

received insurance proceeds. Considerable discussion ensued between CCDC and the Town over whether and what type of replacement recreation center should be built, and how the replacement recreation center should be funded. CCDC contended that the recreation fees collected through subleases had never been sufficient to cover the costs of maintaining the recreation center, and that rebuilding or replacing the recreation center was not economically feasible unless the Town assumed some financial responsibility for the center. An attempt to resolve the issue by a Joint Commission of Pueblo-Town Relations, consisting of representatives of the Pueblo, the Town, and CCDC, failed.

### C. Tribal Court Proceedings

In April and December of 2002, two groups of sublessees, including Appellants, filed complaints in the Leasehold Disputes Division of the Pueblo Tribal Court. Both complaints asked the court to order CCDC to return all recreation fees collected since January 1997 and to grant an injunction to restrain CCDC from further collecting recreation fees until the recreational facility is restored. CCDC filed a motion to dismiss the sublessees' refund claims on the ground that they are barred by CCDC's sovereign immunity. On May 4, 2005, the court granted CCDC's motion. According to the Pueblo, litigation over whether CCDC should be prohibited from collecting the recreation center fee has still not been resolved. See Pueblo's Answer Brief at 16.

### D. Tribal Council Proceedings

On November 27, 2002, CCDC and the Town submitted separate proposals to the Tribal Council at a Tribal Council meeting convened to consider what to do about the recreation center. CCDC asked the Tribal Council to release CCDC from its obligation under Paragraph 19 of the Master Lease to rebuild or replace the recreation center, invoking the exception in Paragraph 19 allowing "those changes, alterations, or omissions permitted by" the Pueblo and the Secretary. CCDC argued there were insufficient funds available to fund a new center and the Town's population was too small to justify a replacement center. CCDC also contended that it had applied the recreation fees paid since 1997 to reimburse itself for recreation center deficits between 1987 and 1997, and that the recreation fees through the third quarter of 2002 would either leave a small deficit or small surplus. CCDC proposed to permanently waive payment of the fees after all recreation center deficits were reimbursed. CCDC recommended that any insurance proceeds not used for removing remaining portions of the recreation center and restoring the land should go to the Pueblo or to CCDC. The Town proposed the construction of a new recreation center, using the insurance proceeds and funds from the Cochiti Lake Improvement Trust Fund

(Trust Fund). 5/ The Town also proposed that CCDC should transfer to the Town CCDC's authority to assess and collect the recreation fee from the sublessees.

Following the hearing, the Tribal Council issued "Findings and Conclusions" based on the submissions of CCDC and the Town. Among the Tribal Council's findings were the following: (1) CCDC had never collected recreation fees sufficient to pay for the maintenance and operation of the old recreational center and had subsidized the old recreation center with CCDC revenues or funds loaned to CCDC from the Pueblo, (2) CCDC had used the insurance proceeds to remove the remaining portions of the recreation center and to secure architectural assessments to determine the feasibility of constructing a new recreation center, (3) CCDC was presently unable to meet its existing financial obligations and Master Lease payments to the Pueblo and was in debt to the Pueblo, (4) the population of the Town was vastly smaller than originally contemplated, and (5) it was not economically feasible to construct a replacement facility. The Tribal Council also found that it would not be in the best interest of the Pueblo to loan CCDC funds to construct a replacement recreation center.

On the same day of the hearing and its Findings and Recommendations, the Tribal Council enacted Resolution No. 02-035, which formally acted on the proposals submitted by CCDC and the Town. The Tribal Council first concluded that it had not found any of the alternatives presented for constructing a replacement facility to be economically feasible. Based on its review of the proposals and supporting legal memoranda submitted by CCDC and the Town, the Tribal Council approved CCDC's request to be relieved of any further legal obligation to construct a replacement recreational center under Paragraph 19 of the Master Lease. 6/ The Tribal Council rejected the Town's proposal to have CCDC transfer

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5/ The Cochiti Lake Improvement Trust Fund is a trust fund that was created in 1970 by agreement between GWC and the First National Bank of Albuquerque (as trustee) for the construction and maintenance of certain off-site improvements in the Town, such as streets, drainage, a water system, sewers, street lighting, power and gas. See Cochiti Lake Improvement Trust Agreement at 2; Master Lease ¶ 7A.

6/ The Tribal Council's approval was expressly made "subject to" various clarifications and modifications, which included (1) the Tribal Council's approval of CCDC's request to stop collecting recreation fees following its receipt of final Secretarial approval of the Pueblo's decision to relieve CCDC of any duty to rebuild a recreational facility, (2) the Tribal Council's directive to CCDC to earmark or set aside certain funds for future use in constructing a replacement recreational facility in the Town, (3) the Tribal Council's

(continued...)

its authority to assess and collect recreation fees to the Town and to use money from the Trust Fund to pay for the construction of a recreation center, but stated that it was open to exploring whether a smaller amount could be taken from the Fund if there were funds left over from the amount needed for road and utility projects.

#### E. Superintendent's Decision

On December 23, 2002, pursuant to Paragraph 19 of the Master Lease, the Pueblo requested the Superintendent's approval of the Tribal Council's action to release CCDC from its obligation under that paragraph to rebuild or replace the recreation center. As grounds for its request, the Pueblo submitted a number of documents, including Resolution No. 02-035, the proposals submitted by the Town and CCDC, legal memoranda submitted by the Town and CCDC, and a spreadsheet showing the revenues and expenses of the recreation center.

In January and February of 2003, the Town and several sublessees submitted comments to the Superintendent on Resolution No. 02-035 and on the Pueblo's request for BIA approval to relieve CCDC of its obligation to rebuild or replace the recreation center. The Town and most of the commenters, including Appellants, opposed BIA approval of the Pueblo's request. Some commenters, however, supported the Pueblo's request.

On August 27, 2003, the Superintendent consented to the Pueblo's request. The Superintendent's decision stated that she had reviewed the materials submitted by the Pueblo, the Town, and the Town residents and had determined to grant consent to the Pueblo's action to release CCDC from any obligation under Paragraph 19 of the Master Lease to rebuild the recreation center. The Superintendent also concurred in the Tribal Council's finding that it would be inequitable for CCDC to continue to collect

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6/(...continued)

requirement that CCDC establish a separate interest-bearing account, deposit the earmarked funds in the account, and disburse funds from the account only with the Tribal Council's approval, and (4) the Tribal Council's directive to CCDC to cooperate with the Town to explore whether a way to fund the recreation center could be found using a combination of the earmarked funds and funds contributed by or obtained from other sources by the Town. In the proceedings before the Board, counsel for the Pueblo represents that recreation fees collected since November 2002 have been held in escrow, along with insurance proceeds from the recreation center. See Pueblo's Answer Brief at 16 n.1.

recreation fees in the future without a recreation center, and stated that her consent included the Pueblo's approval of CCDC's request to stop imposing and collecting those fees, effective on the date of her decision.

#### F. Regional Director's Decisions

Appellants appealed to the Regional Director. Appellants argued that (1) BIA should refrain from taking action on the Pueblo's request until their tribal court action over recreation fees is resolved; (2) BIA should not have approved the Pueblo's request because the sublessees were not notified of Resolution No. 02-035 before or after it was submitted to BIA for approval; and (3) CCDC and the Pueblo have a conflict of interest because Directors of CCDC are also members of the Tribal Council, and having the "same people" on both sides of the Master Lease violates the Contract of Sale between GWCNM and the CCDC. Oct 28, 2003 Statement of Reasons from Appellants to Regional Director at 2.

On March 9, 2004, the Regional Director affirmed the Superintendent's decision. Appellants appealed the Regional Director's decision to the Board, but on review of the administrative record submitted by the Regional Director, the Board determined that it was incomplete. The Pueblo also objected to the record as incomplete. At the request of the Regional Director, the Board vacated the March 9, 2004 decision and remanded the matter for further consideration. Anderson v. Acting Southwest Regional Director, 40 IBIA 101, recon. denied, 40 IBIA 137 (2004).

The Regional Director then issued the January 27, 2005 decision that is the subject of this appeal. The Regional Director again affirmed the Superintendent's decision and rejected Appellants' arguments. First, he found that BIA's approval need not be delayed by the tribal court proceedings because those proceedings involved claims regarding recreation fees, and not CCDC's obligation to rebuild or replace the recreation center. The Regional Director then concluded that "[w]hatever rights sublesse[e]s retained regarding the continued existence of a recreation center \* \* \* were always subject to the limitations set out in Paragraph 19 of the Master Lease which included the right of CCDC as lessee to seek approval of the Pueblo and the BIA to not rebuild the recreation center in the event of its destruction." Id. at 4-5. The Regional Director also noted that, "[w]hile the Secretary has no role in monitoring or administering the collection of recreational fees under the Master Lease, when this decision becomes final we see no legitimate reason for the Pueblo to withhold repayment of those fees to the residents subject to the Master Lease." Id. at 5 n.1. However, he noted that it was not within the Secretary's authority to direct the Pueblo to take any particular action on the issue of recreation fees.

Appellants appealed to the Board. Appellants and the Pueblo submitted briefs.

### Standard of Review

The Regional Director's decision whether to consent to releasing CCDC from its obligation to rebuild the recreation center under Paragraph 19 of the Master Lease involves an exercise of discretion. Cf. Kearny Street Real Estate Co. v. Sacramento Area Director, 28 IBIA 4, 17 (1995) (BIA exercises discretion in deciding whether or not to approve a lease of Indian land). An appellant bears the burden of proving that BIA did not properly exercise its discretion. Arizona State Land Dep't v. Western Regional Director, 43 IBIA 158, 160 (2006), and cases cited therein. Simple disagreement with or bare assertions concerning BIA's decision are insufficient to carry this burden of proof. Cass County v. Midwest Regional Director, 42 IBIA 243, 246-47 (2006).

In reviewing appeals from discretionary decisions, the Board's role is limited to determining whether an appellant has demonstrated that BIA's decision is not in accordance with the law, is not supported by the record, or is not adequately explained. See Quaempts v. Acting Northwest Regional Director, 42 IBIA 272, 280 (2006); Navajo Nation v. Navajo Regional Director, 40 IBIA 108, 115 (2004). With respect to the exercise of discretion itself, the Board does not substitute its judgment for that of BIA. Quaempts, 42 IBIA at 280.

### Discussion

On appeal to the Board, Appellants argue that the Regional Director's decision was in error because (1) it would "unjustly harm" Appellants, "thereby subjecting the [Pueblo] to further liability for its tortious and unjust actions," Opening Brief at 1, (2) Appellants have been required to pay recreation fees but have not been provided with an accounting of how those fees are spent and have not been provided a viable forum for raising their claims, (3) none of the information submitted to the Regional Director was confirmed and verified, (4) the Regional Director failed to investigate why the Tribal Council could not identify any economically feasible options for rebuilding or replacing the recreation center, (5) CCDC should not be relieved of its obligation to rebuild the recreation center without refunding recreation fees to Appellants, and (6) the Pueblo and CCDC have a conflict of interest, which is contrary to the intent of the Contract of Sale and which prevents Appellants' interests from being adequately protected and represented. Appellants raise a litany of complaints against the Pueblo and CCDC, some related to the recreation center and others that reflect much broader dissatisfaction with the administration of the Master Lease by the

Pueblo and CCDC. 7/ In addition to requesting reversal of the Regional Director's decision, Appellants also ask the Board to order CCDC to provide Appellants with an accounting of the recreation funds, and to advise the Pueblo and CCDC "to act in a responsible and ethical manner in their future management of the Master Lease obligations and to respect to the rights of sublease holders." Id. at 5.

The first four of Appellants' arguments were not raised in their earlier appeal to the Regional Director. The Board has a well-established rule of declining to consider arguments that are raised for the first time on appeal to the Board. Van Gorden v. Acting Midwest Regional Director, 41 IBIA 195, 203 (2005); see also 43 C.F.R. § 4.318 (appeal to the Board generally limited to issues that were before the BIA deciding official). We see no reason to depart from that rule in this case, and therefore we decline to consider these arguments. 8/

The crux of Appellant's remaining arguments is that BIA was required to consider or to accommodate their various complaints against the Pueblo and CCDC in deciding whether to approve the Pueblo's request to grant relief to CCDC. Appellants seek to use the Regional Director's decision under Paragraph 19 of the Master Lease, and this appeal, as a forum for raising a host of complaints against the Pueblo and CCDC, and to have BIA withhold relief from CCDC until their complaints have been resolved to their satisfaction. Appellants' arguments reflect a misunderstanding of BIA's role in this matter, and suggest that Appellants believe that BIA and the Board should act as a regulatory agency, or as a forum for disputes between sublessees and CCDC. According to Appellants, relief should be granted to CCDC only if and when Appellant's concerns about recreation fees, and apparently numerous other issues, have been satisfactorily addressed.

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7/ Appellants describe Resolution 02-035 as one in a string of attempts by the Pueblo and CCDC to "diminish the rights and legitimate expectations of a peaceful existence in the [Town] and the value of the real property of the sublessees." Opening Brief at 1.

8/ Although we find that Appellants' first argument was not presented to the Regional Director, we recognize that their claim of "unjust harm" is also subsumed in several other arguments that were raised below and which are properly before the Board. Thus, by declining to consider Appellants' first argument, we do not mean to suggest that we are not considering their claim of unjust harm as it relates to those other arguments.

Even if Appellants had raised their third and fourth arguments before the Regional Director, we would still decline to consider them because they were first raised on appeal to the Board in Appellants' reply brief. See Aloha Lumber Corp. v. Alaska Regional Director, 41 IBIA 147, 161 (2005).

The Secretary's action in this matter, however, was taken solely pursuant to specific authority contained in Paragraph 19 of the Master Lease, and the Secretary's role is that of trustee for the Pueblo and not as a regulator or general forum for resolving disputes over the Master Lease. Paragraph 19 of the Master Lease allows the lessee to be relieved of its obligation to rebuild or replace an improvement if both the Pueblo and the Secretary consent to such relief. In determining whether or not to approve such relief, BIA owes a trust duty to the Pueblo, as the landowner. See Bell v. Acting Billings Area Director, 29 IBIA 105, 106 (1996) (in managing leases of Indian land, BIA's trust duty is towards the landowner).

Nothing in the Master Lease imposes an obligation on BIA to consider or accommodate the interests of either CCDC or the sublessees in deciding whether to approve the Pueblo's request to grant relief to CCDC. To the contrary, in exercising its trust obligation, BIA is entitled to give considerable deference to the Pueblo's judgment of what is in its own best interest. Cf. 25 C.F.R. § 162.107(a) (in reviewing leases, BIA will defer to the Indian landowner's determination of the landowner's best interest, to the maximum extent possible). The Regional Director did not err in concluding that he need not wait until Appellants' tribal court claims were resolved before deciding whether to approve the Pueblo's request to grant CCDC relief. Nor did the Regional Director err by failing to counter-balance the alleged conflict of interest caused by the Pueblo's control of CCDC by ensuring that Appellants' separate interests — whether in their recreation fee claim or other matters — were protected before approving the Pueblo's request.

Even assuming, as Appellants apparently contend, that they are entitled as third-party beneficiaries to enforce certain obligations in the lease, the Regional Director correctly concluded that whatever rights sublessees may have regarding the continued existence of a recreation center “were always subject to the limitations set out in Paragraph 19 of the Master Lease which included the right of CCDC as lessee to seek approval of the Pueblo and the BIA to not rebuild the recreation center in the event of its destruction.” Decision at 4-5. Whether or not Appellants are entitled to an accounting or refunds are issues that are outside the narrow scope of the matter presented to BIA. <sup>9/</sup> Nothing in Paragraph 19, or under Federal law or regulation, created a duty on the part of BIA to withhold approval

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<sup>9/</sup> We do note that the Tribal Council's resolution to grant relief to CCDC was expressly conditioned on certain clarifications and modifications, supra at 222-23 n.6. Thus, BIA's approval of the Pueblo's request necessarily incorporates the same terms and conditions as were included in the Tribal Council's action, and cannot be construed as granting broader relief to CCDC than was requested by the Pueblo.

of the Pueblo's request to relieve the lessee of an obligation until disputes between the lessee and sublessees have been resolved, or to act as a forum for the resolution of such disputes. <sup>10/</sup> As Appellants point out, the Regional Director clearly expressed his view that he saw no legitimate reason for the Pueblo to withhold repayment of recreation fees once BIA's decision became final, but considering the Department's role under Paragraph 19, we conclude that Appellants have not shown that the Regional Director abused his discretion or acted contrary to law by declining to withhold approval of the Pueblo's request until or unless repayment occurred.

We therefore conclude that Appellants have failed to show that the Regional Director's decision was in error, or an abuse of discretion, or not supported by the record.

Appellants also ask the Board to order CCDC to provide Appellants with an accounting of the recreation funds, and to advise the Pueblo and CCDC "to act in a responsible and ethical manner in their future management of the Master Lease obligations and to respect the rights of sublease holders." Opening Brief at 5. These requests are clearly outside the scope the Regional Director's decision and outside the scope of an appeal to the Board. In addition, the Board is not a court of general jurisdiction and does not have authority over disputes between private individuals and a tribal corporation, or between individuals and tribes. Cf. Schmitges v. Skull Valley Band of Goshute Indians, 41 IBIA 138 (2005).

Appellants have not met their burden of showing that the Regional Director erred or abused his discretion in consenting to the Pueblo's action to release CCDC from its obligation to rebuild or replace the recreation center.

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<sup>10/</sup> We understand Appellants' concern that after CCDC purchased GWCNM's interest in the Master Lease, the practical distinction between the interests of the lessee (with whom Appellants have subleases and on whom Appellants believe they should be entitled to rely to protect their interests) and the interests of the lessor (the Pueblo) may be less than clear, or even nonexistent, and that Appellants' ability to assert claims against the lessee may now be limited by CCDC's sovereign immunity. The fact remains, however, that CCDC has succeeded GWCNM as the lessee under the Master Lease, and the practical or legal consequences of that arrangement for Appellants does not mean that BIA's role under Paragraph 19 has been expanded to counter-act those consequences, or that BIA owed a duty toward the sublessees in determining whether to approve the Pueblo's request to grant relief to CCDC.

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 decision of January 27, 2005.

I concur:

          // original signed            
Steven K. Linscheid  
Chief Administrative Judge

          // original signed            
Debora G. Luther  
Administrative Judge