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United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
WESTERN REGIONAL OFFICE
2600 North Central Avenue
Phoenix, Arizona 85004

TAKE PRIDE IN AMERICA

IN REPLY REFER TO:
Real Estate Services
MS-420

JUL 19 2010

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. William C. Tuttle
3400 H. C. Route 20
Blythe, California 92225-9713

Dear Mr. Tuttle:

This refers to your Notice of Appeal dated April 1, 2010, responding to a March 2, 2010, decision by the Superintendent of our Colorado River Agency (Agency), to cancel Lease No. B-509-CR (the "Lease"), between the Colorado River Indian Tribes (Tribe), as Lessor, and William D. Tuttle (Tuttle), as Lessee. For the reasons discussed below, the Superintendent's decision to cancel the lease is hereby affirmed.

Background

On March 31, 1977, the Lease was approved by the Superintendent, pursuant to 25 U.S.C. § 415, as amended, and governing regulations found at 25 CFR Part 162. The leased premises are located on the Colorado River Indian Reservation, comprising 98.24 acres of tribal land.

The term of the Lease was set at 50 years, beginning on March 31, 1977, and ending on February 28, 2027. The Lease authorized the use of the land for "agricultural, residential, recreational, education, commercial or community development and all uses necessary to community development." Advance rentals were to be made payable as follows: Years 1-5: $491.20 annually; Years 6-20: $982.40 annually; and Years 21-50: $1,473.60 annually.

On June 10, 1986, Modification No. 1 of the Lease was approved by the Superintendent, requiring the payment of percentage rents equal to 3% of the gross receipts derived from business conducted on the leased premises, including lot sales and lot rentals. The modification also required that you provide an annual accounting to the Tribe within 60 days of the end of each calendar year. The validity and enforceability of this modification was upheld by decision of the Interior Board of Indian Appeals (Board) in the case of Tuttle and Rio Valley Estates v. Western Regional Director, 46 IBIA 216 (2008). We subsequently made an administrative determination based on that portion of the Board's decision which remanded the case for a determination of the amount of any refund, credit, or offset due to you, with respect to interest

paid by you under protest during the pendency of that earlier appeal. Specifically, by letter dated September 23, 2009, we advised that as a result of these "overpayments," you were entitled to a refund, credit or offset in the amount of $10,504.79.

Soon thereafter, by letter dated September 30, 2009, the Superintendent notified you that you were in default under certain provisions in the Lease. First, she stated that you owed back rent in the aggregate amount of $4,420.80 for years 2005, 2006, and 2009, but that such amount would be offset against the amount to be refunded or credited under the terms of our September 23, 2009, letter; based on the offset, the Superintendent further advised that any defaults relating to the non-payment of basic rent for the years 2005, 2006, and 2009 were being waived. The Superintendent did not find any further amount to be refundable at that time. Any additional amounts owed to the Tribe could not be determined due to your ongoing failure to provide the annual accounting statements (and pay the associated percentage rents) required under the 1986 modification described above. In that regard, in her September 30, 2009, letter, the Superintendent advised that you were in default based on your failure to satisfy those annual accounting requirements (and pay any associated percentage rents), dating back to 1992. Finally, the Superintendent advised that you were in default based on your failure to submit evidence of current liability and "fire and damage" insurance.

In her September 30, 2009, letter, the Superintendent advised that you had ten days in which to: (1) cure the violations; (2) dispute the determination that violations had occurred and/or explain why the Agency should not cancel the lease; or (3) request additional time in which to cure the violations. By undated letter (received by the Tribe on October 13, 2009), you responded to the default letter, stating that you were having health problems and that your response would follow shortly. By letter dated October 14, 2009, you indicated that you intended to challenge the Board's 2008 decision in federal court, and that any percentage rents would be paid under protest. In the meantime, you advised (without providing the required accounting or any other supporting documentation) as follows with regard to the payment of percentage rents:

> The average annual income from sublease payments is approximately $11,000.00. If we apply the 3% rate to this amount, the annual percentage [rent] due would be $330.00. For 17 years the total would therefore be: (17)(330.00) = 5600.00.

In your October 14, 2009, letter, you also requested a waiver of the strict accounting requirements set forth in the Lease, which (as modified) expressly call for "certified statements of gross receipts . . . prepared by an independent certified public accountant, duly licensed in either the State of Arizona or the State of California, in conformity with standard accounting procedures, accompanied by an opinion rendered by the certified public accountant." Your October 14, 2009, letter also transmitted an October 8, 2009, invoice purporting to satisfy the insurance requirements referenced in the September 30, 2009, notice of default.

By letter dated March 2, 2010, the Superintendent issued a decision to cancel the Lease, based on your failure to cure the violations cited in the September 30, 2009, notice of default. Specifically, the cancellation decision advised you that your October 14, 2009, letter: (1) did not satisfy the accounting requirements set forth in the Lease, as quoted above, in that it was not

prepared by a certified public accountant, did not conform to applicable accounting procedures, and was not otherwise properly documented in the manner required by the Lease; and (2) did not satisfy the insurance requirements set forth in the Lease, in that no evidence was provided to show the requisite policy limits, the Tribe as a co-insured, or any "fire and damage" coverage. The cancellation decision cited the default provisions in Article 17 of the Lease (which allowed 30 days for cure of monetary defaults and 60 days for cure of non-monetary defaults), and concluded that you had not cured these violations (or otherwise explained why the Lease should not be cancelled) within the applicable time period. In closing, the Superintendent advised that you could appeal her cancellation decision to our office.

By letter dated March 11, 2010, you asked for 45 additional days in which to "cure all violations." By certified letter postmarked April 1, 2010, you filed a Notice of Appeal from the Agency's March 2, 2010, cancellation decision. We acknowledged receipt of your appeal by letter dated April 29, 2010, advising that you had 30 days from the date on which the Notice of Appeal was filed in which to file a Statement of Reasons explaining why you believed the Superintendent's cancellation decision to have been in error. We subsequently received a May 6, 2010, telefax purporting to be a Statement of Reasons, but it did not explain why you believed the cancellation decision to be in error; rather, the telefax indicated that your accountant was still preparing the certified statements of gross receipts, and advised that you would be submitting a $4000.00 check to "show [y]our good faith." We subsequently received a check in the amount of $4800.00, dated May 3, 2010, made payable to the order of BIA by Rio Valley Estates.

By letter dated May 17, 2010, we advised you as follows, with respect to our handling of the above-referenced check and the status of your appeal:

> Neither your Notice of Appeal, nor the May 6, 2010, telefax, explained why you believe the Superintendent's cancellation decision is in error. Therefore, in accordance with 25 C.F.R. § 2.17, we are giving you additional time to amend those appeal documents to clearly state the reasons for your appeal (i.e., why the lease should not be cancelled based on the violations cited in the decision). You will have ten (10) days from your receipt of this letter to amend your appeal documents to provide those reasons.
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> As you know, the cancellation decision has been stayed by your filing of the Notice of Appeal. However, you must comply with the applicable regulations which require that "[w]hile the cancellation decision is ineffective, the tenant must continue to pay rent and comply with the other terms of the lease." We have, therefore, deposited the above-referenced check in a Special Deposit Account, and the associated funds will remain in that account pending the outcome of your appeal. Please note that until that time the funds will not be distributed to the Tribe, and the deposit should not under any circumstances be viewed as a waiver of any remedies available to either BIA or the Tribe based on non-payment or untimely payment.

> Please also note that neither this letter, nor our earlier reminder letter dated April 29, 2010, should be viewed as providing you with an extension of time in which to cure the violations described in the Agency's decision letter. Moreover, the deposit of the above-referenced funds should not be viewed as a cure of (or as an extension of time in which to cure) the violations relating to non-payment described in the Agency's decision.

You subsequently submitted a formal Statement of Reasons dated May 25, 2010, transmitting an Independent Accountants' Compilation Report signed by Certified Public Accountant Douglas R. Bigler of Blythe, California, dated May 20, 2010. Mr. Bigler's cover letter provided as follows:

> We have compiled the accompanying statement of Gross Revenues and Lease Payment as required by Lease No. B-509-CR, in accordance with Statement on Standards for Accounting and Review Services issued by the American Institute of Certified Public Accountants. The information included has been prepared on the accounting basis used by the individuals for U.S. Federal Income Tax purposes, which is a basis of accounting other than U.S. generally accepted accounting principles.
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> A Compilation is limited to presenting in the form of financial statements information that is the representation of the individuals whose financial statements are presented. We have not audited or reviewed the accompanying statement of financial condition and, accordingly, do not express an opinion or any other form of assurance on it.

With your Statement of Reasons, you provided a second check, in the amount of $5408.10 (based on your own calculations, included with the Statement of Reasons but separate from the above-referenced Compilation), and that check was processed by us in the same manner as that described in our May 17, 2010, letter. The Statement of Reasons concludes with your assertion that "any remaining deficiencies either have been resolved at this time, are so close to full and final resolution or so *de minimis non curat lex* that there is no legitimate basis for citing them as reasons for Lease termination." By letter dated June 25, 2010, the Tribe's Attorney General, Mr. Eric Shepard, responded to the Statement of Reasons, arguing that the Agency's cancellation decision should be affirmed, based on the materiality of the defaults and your continuing failure to cure those defaults.

Analysis and Decision

During the cure period which followed your receipt of the Agency's September 30, 2009, notice of default, you indicated that you intended to challenge the Board's 2008 decision on which the notice was based, while at the same time requesting a waiver of the strict accounting requirements set forth in the Lease. No further response (or any attempt to cure) was made until long after the cure period provided for in the Lease had expired, and then only upon your receipt of the Agency's March 2, 2010, cancellation decision. At 25 CFR § 162.619(a), our regulations

provide that where a lessee fails to cure within the requisite time period, we should consult with the Indian landowner and determine whether the lease should be cancelled. In this case, the Tribe's June 25, 2010, response to your Statement of Reasons confirms its desire to see the Agency's cancellation decision affirmed, based on a "continuing, material breach" of the Lease. In that regard, the materiality of the accounting obligation is undisputed, and (by Mr. Bigler's own admission) the Compilation provided with your May 25, 2010, Statement of Reasons does not satisfy the strict accounting requirements set forth in the Lease (meaning, as the Tribe suggests, that the default remains uncured as of this date).

Even if your accounting (and related payment) obligations had been satisfied through your May 2010 submissions, you would no longer have had the right to cure the default without the express waiver and consent of the Tribe (your right to cure having expired at the end of the cure period provided for in the Lease). As we expressly noted in our May 17, 2010, letter, no action taken in the processing of your May 2010 checks was to be "viewed as a waiver of any remedies available to either BIA or the Tribe based on non-payment or untimely payment [or] as providing you with an extension of time in which to cure the violations described in the Agency's decision letter." Assuming that the figures set forth in Mr. Bigler's Compilation (showing $16,970.36 in percentage rents accruing to the Tribe, through 2009) are correct, our own calculations indicate that this amount would exceed the combined amount of: (1) the $6083.99 remaining refundable to you from the interest "overpayments" described above; and (2) the two payments made by you in May 2010, resulting in the deposit of $10,208.10 in an interest-bearing Special Deposit Account, pending the outcome of this appeal. Accordingly, the funds now being held in the Special Deposit Account will be distributed to the Tribe, if/when all appeal rights are exhausted and the Agency cancellation decision becomes final, and the entire amount remaining refundable to you from the earlier "overpayments" will be applied to the balance owed to the Tribe.

Conclusion and Right to Appeal

In view of the foregoing, we hereby affirm the Superintendent's decision to cancel the Lease. This decision may be appealed to the Interior Board of Indian Appeals, Office of Hearings & Appeals, 801 N. Quincy Street, Suite 300, Arlington, VA 22203, in accordance with the regulations found at 43 C.F.R. §§ 4.310 – 4.340 (copy enclosed). Your Notice of Appeal to the Board must be signed and mailed within 30 days of the date on which you receive this decision. The Notice of Appeal should clearly identify the decision being appealed (a copy of this decision may be attached).

You must send copies of the Notice of Appeal to: (1) the Assistant Secretary – Indian Affairs, U.S. Department of the Interior, 1849 C Street, N.W., MS-4140-MIB, Washington, D.C. 20240; (2) the Colorado River Indian Tribe, and any other interested party known to you; and (3) this office. Your Notice of Appeal must certify that you have sent copies to each of these parties. If you file a Notice of Appeal, the Board will notify you of further appeal procedures. If no appeal is timely filed, this decision will become final for the Department of the Interior upon the expiration of the appeal period. No extension of time may be granted for filing a Notice of Appeal.

If you have any questions, please contact Ms. Gloria Koehne, Realty Specialist, or Mr. Stan Webb, Regional Realty Officer, at 602-379-6781.

Sincerely,

ACTING Regional Director

Enclosure: 43 C.F.R. §§ 4.310 – 4.340

cc: See Distribution List