NOS. 09-17349 & 09-17357 (CONSOLIDATED)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WATER WHEEL CAMP RECREATIONAL AREA, INC.,

Plaintiff / Cross-Appellant, and

and ROBERT JOHNSON,

Plaintiff / Appellee,

v.

GARY LaRANCE, in his official capacity as Chief and Presiding Judge of the Colorado River Indian Tribal Court, and JOLENE MARSHALL, in her capacity as Clerk of the Colorado River Indian Tribal Court,

Appellants / Cross-Appellees.

On Appeal from the United States District Court for the District of Arizona United States District Judge David G. Campbell (No. 2:08-cv-00474)

REPLY BRIEF OF CROSS-APPELLANT WATER WHEEL CAMP RECREATIONAL AREA, INC.

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GLOSSARY OF ABBREVIATIONS

25 C.F.R.	25 C.F.R. Part 131 (renumbered, as amended, Part 162)
CRIT	Colorado River Indian Tribes
District Court	United States District Court for the District of Arizona
ER	Excerpts of Record
Eviction Ordinance	Article I. Evictions, Property Code, Colorado River Indian Tribes, Ordinance 04-06 (October 12, 2006), attached as an addendum to WW Resp. Br.
Johnson	Robert Johnson, CEO of Water Wheel Camp Recreational Area, Inc.
Law and Order Code	Law and Order Code, Colorado River Indian Tribes, Ordinance No. 26 (June 22, 1974), attached as an addendum hereto.
Lease	July 7, 1975, Lease between Colorado River Indian Tribes and Water Wheel Camp Recreational Area, Inc.
Lessee	Water Wheel
Lessor	CRIT
Property Code	Property Code, Colorado River Indian Tribes, Ordinance 04-06 (October 12, 2006), attached as an addendum to WW Resp. Br.
SER	Supplemental Excerpts of Record

TCP Resp. Br.	Appellants' Response to Cross-Appellant's Principal Brief and Reply to Appellee's Response Brief, Docket No. 37, submitted July 28, 2010.
Tribal Court	Colorado River Indian Tribes' Tribal Court
Tribal Court Parties	Chief Judge Gary LaRance and Chief Clerk Jolene Marshall
WW Resp. Br.	Response Brief of Appellee [Robert Johnson] and Cross Appellant's [Water Wheel's] Principal Brief, Docket No. 33 submitted June 28, 2010.
Water Wheel	Water Wheel Camp Recreational Area, Inc.

CERTIFICATE OF COMPLIANCE

The undersigned counsel of record certifies as follows:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6930 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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I. INTRODUCTION

The issue before this Court is whether the non-Indian corporation Water Wheel Camp Recreational Area, Inc. ("Water Wheel") consented to the jurisdiction of the Colorado River Indian Tribes ("CRIT") Tribal Court when Water Wheel entered into the Lease at issue. Appellee Water Wheel respectfully submits that because it did not consent to the Tribal Court jurisdiction in the manner prescribed by the Lease, this Court must reverse the District Court's ruling that Water Wheel was subject to CRIT's invocation of such jurisdiction.

Of course, this case must be resolved in the context of the seminal case of *Montana v. United States,* 450 U.S. 544 (1981), in which the Supreme Court articulated the exceptions to the general rule that there is no tribal jurisdiction over non-Indian individuals and entities unless one of two exceptions is satisfied. Of those two, only the "consensual relationship" exception possibly could apply and, indeed, it was the sole focus of briefing and argument below, the basis for the District Court's ruling, and is the issue now before this Court.

In finding consent, the District Court looked to the only possible basis for doing so – a federal Lease executed between Water Wheel (as "Lessee") and the United States Department of the Interior ("Interior"). While CRIT also signed the Lease and was identified therein as the "Lessor," the document itself was drafted

and is administered under the federal leasing regulations found at Title 25 *Code of Federal Regulations*, as was specifically dictated in the Lease Preamble.

Under well-established law, the Lease is a complete and integrated document, meaning that each of its provisions must be read *in pari materia*. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63-64 (1995) ("cardinal principle of contract construction [is] that a document should be read to give effect to all [of] its provisions and to render them consistent with each other"); *Sluimer v. Verity, Inc.,* 606 F. 3d 584, 592 (9th Cir. 2010) ("The first choice when construing a contract is, of course, to give effect to all of its provisions"); *see also* Restatement (Second) of Contracts § 202.2 and cmt. d (1981) ("[a] writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together"). While Water Wheel did consent to enforcement of the Lease by the Secretary of the Interior ("Secretary") in the event of a Default (or "breach"), the totality of the Lease makes clear that Water Wheel never agreed to such enforcement **by CRIT** and most-assuredly never consented to Tribal Court jurisdiction. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656 (2001) ("nonmember's consensual relationship in one area [] does not trigger tribal [jurisdiction] in another – it is not in for a penny, in for a pound").

As discussed, *infra*, the District Court elected to ignore the controlling principle of contract construction in order to find Tribal Court jurisdiction. To do

so, the District Court read Lease Sections 21 and 23 as wholly independent of each other, although they – along with every other Lease provision – cannot be separated from the document and construed in a vacuum as a matter of law. Only by reading each of those sections as independent of the other, was the District Court able to justify its conclusion that CRIT had the right to litigate an eviction in Tribal Court. And that was simply legal error.

The controlling enforcement Lease provision is found at Section 21, and all else flows from it. It defines the Secretary as the enforcer in the event of Default, while relegating CRIT to a lesser role with power to act **only** if certain events occurred. None of those events occurred, yet CRIT struck out on its own in derogation of the Lease prohibitions to its doing so.

This appeal is neither an "assault" on CRIT nor an attack imperiling the Tribe's political integrity (which is required for invocation of the second *Montana* exception). Rather, this appeal centers on a Lease to which Water Wheel was a party, and **the Lease alone** must establish the basis for any jurisdictional determination. The Lease makes it clear that the Tribe could not bring this Tribal Court eviction action until, and unless, Water Wheel specifically consented in writing to the Property Code. Water Wheel did not.

While the Secretary might have standing to prosecute alleged actions of Water Wheel which may constitute Lease Defaults, the facts present in this case do

not constitute the circumstances triggering standing for CRIT to do so. The issues are strictly matters of contract and written consent. Water Wheel is entitled to the bargain it made and must not be subjected to judicially-contrived jurisdiction to which it never agreed.

II. ARGUMENT

A. The Tribal Court eviction action against Water Wheel is contrary to the terms of the Lease.

The Eviction Ordinance – to which it is beyond dispute that Water Wheel never consented in writing – is contrary to the terms of the Lease and, thus, cannot apply to Water Wheel. The critical Lease provision is at Lease Addendum Section 34, which clearly mandates that after-enacted CRIT laws, regulations or ordinances which have the "effect of changing or altering the express [Lease] provisions and conditions" shall be inapplicable to Water Wheel unless and until Water Wheel consents in writing to be subject to them. ER-249.

Also not in dispute are that (1) the Tribe enacted its Eviction Ordinance some 37 years **after** the parties executed the Lease, and (2) Water Wheel never consented in writing to be subject to the Ordinance. Yet, the Tribal Court Parties now claim, remarkably, that Water Wheel is subject to CRIT's Property Code because no Lease term or condition was changed or altered by that after-enacted tribal law. TCP Resp. Br., 10. The Tribal Court Parties' argument defies credibility, as even a cursory review of the Lease and the relevant federal

regulations (incorporated therein) reveals that they are irreconcilably at odds with the Property Code.

1. The Tribal Law and Order Code does not provide a basis for Tribal Court jurisdiction.

At the outset, the Tribal Court Parties avoid even addressing the conflict between the Lease and the Property Code by citing the Tribal Law and Order Code, which was enacted in 1974, a year prior to execution of the Water Wheel Lease. TCP Resp. Br., 10. The Tribal Court Parties claim that the Tribal Court has jurisdiction over Water Wheel because Section 101(c) of the Law and Order Code purportedly "gave the Tribal Court jurisdiction over any person who owns, uses or possesses any property within the Reservation, for **any civil action**." *Id.* at 10-11 (emphasis added). Citing this language as a launch pad, the Tribal Court Parties then argue that Water Wheel agreed to be subject to Tribal Court jurisdiction notwithstanding the limitations established at Section 34, because the Law and Order Code was in effect when Water Wheel executed the Lease. *Id.* at 11. This argument is both flawed and dissembling.

First, the Tribal Court Parties selectively and deceptively quote Section 101(c), so as to conceal limiting language in Section 101 which defeats their argument. Specifically, the Tribal Court Parties do not provide this Court with a

copy of the 1974 CRIT Law and Order Code itself,[1] but rather quote the **Tribal Court's ruling** on the applicability of Section 101(c) **where Judge LaRance edited out the Section's qualification that its provisions were subservient to federal law and regulation.** TCP Resp. Br., 10-11. Although this Section does grant the Tribal Court jurisdiction over certain claims, Judge LaRance ruled – and the Tribal Court Parties quoted it for this Court's attention – that the Section stands on its own and establishes blanket Tribal Court Jurisdiction over the Water Wheel eviction without regard to any Lease provision or federal law. ER-295.

What Judge LaRance (and the Tribal Court Parties) failed to disclose is that Section 101 limits any purported Tribal Court jurisdiction by providing that it is subject to "any limitation, restriction[] or exception[] imposed by or under the authority of the Constitution or **laws of the United States** . . . ." *See* CRIT Law and Order Code, Article I, § 101 (establishing personal jurisdiction of the Tribal Court); *see also id.* at § 102(B) (subjecting, in relevant part, the CRIT Tribal Court's subject matter jurisdiction to the same limitations as personal jurisdiction). Through their *verbatim* quoting of Judge LaRance's selective citation to Section 101, the Tribal Court Parties are intentionally and disingenuously suggesting that the section goes far beyond the scope of its express provisions.

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[1] The relevant provisions of the CRIT Law and Order Code are filed as a Supplemental Addendum to this Reply.

Neither Judge LaRance nor his attorneys told this Court that the Tribal Court's jurisdiction is limited by the laws of the United States because the Lease incorporates the federal regulations at 25 C.F.R. Part 162 and its predecessor in effect at the time of Lease execution, 25 C.F.R. Part 131, which provide the comprehensive scheme for administration and enforcement of the Lease. *Cf. Nat'l Farmers Union Ins. Co.'s v. Crow Tribe of Indians*, 471 U.S. 845, 851, 852 n. 14 (1985) (the Supreme Court has recognized Congress' plenary power over Indian tribes, and that Congress can enact, and has enacted, "federal law . . . diminish[ing] the inherent powers of Indian tribes in significant ways"). Moreover, federal judicial opinions govern the scope of tribal court jurisdiction over non-members by precluding tribal court jurisdiction under a variety of circumstances,[2] including those present in this case. As such, even if the Law and Order Code could provide a basis for jurisdiction over some non-member defendants, the Lease and federal law/regulations specifically incorporated therein preclude Tribal Court jurisdiction over the Tribe's eviction action against Water Wheel **in this case**.

In addition, the Tribal Court Parties fail to address the fact that accepting their theory that the Law and Order Code establishes Tribal Court jurisdiction over

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[2] *See generally Plains Comm. Bank v. Long Fam. Cattle Co., Inc.*, 544 U.S. ___, 128 S. Ct. 2709, 2726 (2008) ("[t]ribal jurisdiction . . . generally does not extend to nonmembers . . . [because] sovereign authority of Indian tribes is limited . . . [and] that bedrock principle does not vary depending on the desirability of a particular [tribal] regulation").

Water Wheel without regard to the Lease restrictions would render Lease Addendum Section 34 superfluous. It is true that Section 34 provides that Water Wheel agreed to abide by all tribal laws in existence on the date the Lease was executed as well as after-enacted laws that conflict with the Lease, **but only if Water Wheel has consented to them in writing.** Section 101(c) cannot and does not extend Tribal Court jurisdiction over Water Wheel for matters arising under after-enacted tribal ordinances. For this Court to hold otherwise would render meaningless the Lease's mandate that Water Wheel consent in writing to those after-enacted laws. *See* ER-249 (Section 34, governing the applicability of after-enacted reservation laws and ordinances). The Tribal Court Parties argue that, pursuant to Section 101(c), Water Wheel consented to abide by **all** tribal laws – no matter when enacted and without regard to whether the laws conflict with the Lease or were consented to by Water Wheel. TCP Resp. Br., 10 – 11. This overreaching interpretation of Section 101(c) is without factual or legal basis, and for this reason alone, the Tribal Court Parties' argument must fail.

2. The Property Code conflicts with the Lease and, thus, cannot apply to Water Wheel.

The Tribal Court Parties next blithely declare that the Property Code applies to Water Wheel, even without its consent, because the Code does not change or alter any Lease provision. They repeatedly assert that Water Wheel failed to identify any "provision or condition of the Lease [that] is changed or altered by the

. . . Ordinance, or how . . . [it] altered its bargain with the Tribe." TCP Resp. Br., 10, 11. The obvious implication of the Tribal Court Parties' statement is that no provision of the Lease is altered or changed by the Property Code. They are wrong.

As an initial matter, Water Wheel's principal brief demonstrates that application of the Property Code would change and alter the terms of the Lease. Among other things, Water Wheel explained that the Property Code's eviction procedure and the remedies prescribed therein would supplant entirely the comprehensive federal regulatory scheme for lease administration and enforcement to which the parties agreed. *See, e.g.*, WW Resp. Br., 54-55 (discussing conflict with Lease Section 23 – Holding Over); *id.* at 58-62 (discussing conflict with Lease Section 21 – Default).

The most striking conflict between the Lease terms and the Property Code arises from Lease Section 21, which governs "Default" and mandates that the Secretary – and, pointedly, not the Tribe – is responsible for Lease enforcement pursuant to 25 C.F.R. Part 162. It does not mention the CRIT Property Code and Eviction Ordinance, which, of course, did not exist on the date of Lease execution. ER-243-46. Specifically, Section 21 provides that the **Secretary** must give Water Wheel written notice of any alleged Lease default, upon receipt of which Water Wheel has 15 days to cure any rental payment default or 60 days to cure any other

Lease default. ER-243-44. If the default is not cured during the applicable time period, the Lease then authorizes **the Secretary, and only the Secretary**, to take one of two actions: (1) bring suit to enforce the Lease provisions, including collecting rental payments; or (2) evict and either re-let the premises or terminate the Lease. *Id.* To emphasize this point, there is no provision authorizing any other party with respect to enforcement of a Lease default in the absence of insolvency or bankruptcy, as discussed *infra.*

It is significant that the Lease charges **only** the Secretary with authority to enforce the Lease and evict Water Wheel under these circumstances, a directive which flows from 25 C.F.R. Part 162 (as well as the predecessor, Part 131). As already noted, the provisions of 25 C.F.R. Part 131 (now Part 162) are pointedly and specifically incorporated as part of the Lease, and they provide for federal administrative review and, if necessary, federal court review of Secretarial actions.[3] Indeed, the Lease reflects the parties' agreement that (1) the **Secretary, and not CRIT**, would enforce the terms of the Lease, and (2) the forum for appeals from Secretarial Lease enforcement actions arising from breaches – or

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[3] *See* 25 C.F.R. § 131.14 (providing that the "notice of cancellation shall inform the lessee of his right to appeal pursuant to Part 2 of this chapter"); 25 C.F.R. § 162.113 ("appeals from decisions by the BIA under this part may be taken pursuant to 25 C.F.R. Part 2").

"Defaults" – would be administrative review pursuant to 25 C.F.R. Part 2.[4] *See* 25 C.F.R. § 131.14; 25 C.F.R. § 162.113.

In contrast, the Property Code states: "[i]f, after the date set forth in the notice to quit, the tenant has not quit possession, the landlord [(which presumably means "CRIT," although such is not clear)] may commence an action in the Tribal Court for eviction and such other relief as the Court may deem just and proper...." CRIT Property Code, § 1-304. Thus, for this Court to legitimize CRIT's prosecution of an eviction action outside the scope of Section 21 supplants the Secretary's assigned role of Lease enforcement and effectively vitiates the federal administrative and judicial review protections for which Water Wheel bargained in the Lease.

Put differently, if CRIT is permitted to evict Water Wheel and assess $4 million in alleged damages in Tribal Court, Water Wheel will be utterly denied any due process – any administrative appeal would be rendered moot (as Water Wheel would already have been evicted); administrative and federal forums would be unavailable (given the Tribe's sovereign immunity); and the federal leasing regulations and the Lease itself would be meaningless. This Court must not allow CRIT to circumvent federal law and its own agreement to the Lease terms in order

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[4] The current 25 C.F.R. Part 2 regulations are filed as a Supplemental Addendum to this Reply.

to deny Water Wheel any semblance of due process under the federal regulations and the Lease. *Cf. Plains Commerce*, 128 S.Ct. at 2724 ("tribal sovereignty . . . [exists] outside the basic structure of the Constitution" and "[t]he Bill of Rights does not apply to Indian tribes").

Plainly stated, CRIT's Property Code establishes a process and procedure for tribal prosecution of evictions which is wildly at odds with the Lease. Property Code § 1-301(a)-(h) authorizes the Tribe to evict Water Wheel for any one of a litany of reasons, whereas the Lease only allows for eviction if Water Wheel **defaults** under the terms of the Lease itself. ER-243-246. Depending on the circumstances, the Property Code may not allow an opportunity to cure a default or even require the Tribe to give Water Wheel a notice to quit or, in other cases, it may need to provide only three, seven or 14 days to vacate. *See* Property Code § 1-302 (a)-(d). In contrast, the Lease requires that the Secretary give Water Wheel notice regarding any default under the Lease and extends a cure period of either 15 or 60 days before taking action to cancel or terminate the Lease in accordance with 25 C.F.R. Part 162. ER-243-44.

Unlike the process mandated by the CRIT Property Ordinance, the Lease provides that subsequent to Secretarial action, Water Wheel can appeal pursuant to 25 C.F.R. Part 2 within 30 days of receiving the decision. *See* 25 C.F.R. § 2.9 (1989). In contrast, if an action is brought by a landlord in Tribal Court, the

Property Code provides that a lessee has only 10 days to answer any Tribal Court Complaint, but the **lessee may only assert one or more of nine limited defenses** which are specifically enumerated in the Property Code. *See* Property Code, § 1-311. The Lease, on the other hand, places no limitations on the defenses Water Wheel may present in response to a Secretarial enforcement action.

Another glaring difference between the Lease and the Property Code is that the Code mandates that the Tribal Court "**shall**" grant eviction and remedies, but "**may**" find that one or more of the enumerated defenses "constitute[s] a sufficient defense to the extent necessary to ensure justice." *See* Property Code, § 1-311. Neither the Lease nor the federal leasing regulations dictate the scope of defenses the Lessee can raise in order to overcome a presumption in favor of the Lessor CRIT. Further, they do not emulate the mandate of the Property Code that the Court must order eviction and other remedies sought by CRIT unless the Lessee can convince the Tribal Court that at least one of the limited universe of defenses applies. Indeed, the Property Code not only restricts Water Wheel's right to due process pursuant to the Lease, but it does so when Water Wheel, a non-member, has "no say" in tribal government and despite the clear terms of the Lease. *Cf. Plains Commerce,* 128 S. Ct. at 2724 ("nonmembers have no part in tribal government — they have no say in the laws and regulations that govern tribal

territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented . . .").

3. The Lease itself provides the exclusive remedies available thereunder.

It is clear that the CRIT Property Code conflicts with the Lease and, as such, cannot apply to Water Wheel because there is no written consent to its application. Moreover, the Lease designates the Secretary as the party responsible for enforcement (ER-243-44), and the federal regulations incorporated therein provide for administrative resolution of disputes. *See* 25 C.F.R. § 162.113. Still, the Tribal Court Parties doggedly maintain that "there is nothing in Article 21, or anywhere else in the Lease, that prohibits CRIT from suing for breach of the Lease." TCP Resp. Br., 10.

In support of this argument, the Tribal Court Parties have turned to Lease Addendum Sections 22 ("Attorney's Fees") and 23 ("Holding Over") (ER-247), claiming that it is significant that these provisions provide CRIT with a role in Lease enforcement. TCP Resp. Br., 13. They argue that Section 22 constitutes an "explicit recognition of the Tribe's authority to evict" Water Wheel under these circumstances. *Id.* at 14. While Water Wheel agrees that Sections 22 and 23 may provide the Tribe with the ability to bring suit in some unidentified forum and under certain limited circumstances, none of those circumstances are present in this case.

Assuming, *arguendo*, that Water Wheel's presence on the leasehold constitutes a breach of Section 29, which governs "Delivery of Premises," that breach would constitute a default under the terms of the Lease. ER-248. Section 29 provides that at "the termination or expiration of this lease, Lessee will peaceably and without legal process deliver up the possession of the leased premises, in good condition . . . ." *Id.* Lease defaults are governed by Addendum Section 21 which provides, in relevant part, that **the Secretary** must take one of two actions: (1) proceed by suit or otherwise to enforce the Holdover provision (*i.e.*, evict Water Wheel); or (2) re-enter the premises and remove all persons and property therefrom. ER-244. Accordingly, if Water Wheel failed to deliver the leasehold to the Tribe as required by Section 29, then the failure would be a **Default of Section 29's requirements**, which in turn would trigger the Secretary's duty to take one of the two aforementioned courses of action. Water Wheel's construction of the Lease provisions is wholly consistent with the federal regulation at 25 C.F.R. § 162.623, which describes "what [the BIA will] do if a tenant holds over after the expiration . . . of a lease":

> [i]f a tenant remains in possession after the expiration or cancellation of a lease, [the BIA] will treat the unauthorized use as a trespass . . . [and] will take action to recover possession **on behalf of the Indian landowners**, and **pursue any additional remedies** available under applicable law.

25 C.F.R. § 162.623 (emphasis added).

Here, CRIT had no power to prosecute the eviction action because the parties agreed that the Secretary would do so.[5] ER-243-44. To be sure, the parties knew how to create a right in the Lessor to take particular actions pursuant to the Lease, as the Lease itself prescribes various actions that may be taken by the "Lessor **and** the Secretary" or "the Lessor **or** Secretary." *See* WW Resp. Br., 62, n. 13 (citing to instances of same). In fact, even Section 21 itself provides that the "Lessor **and** the Secretary" may take either of the enforcement actions (earlier reserved exclusively for the Secretary), **but only** when the Lessee is a debtor in insolvency or bankruptcy. *Compare* ER-244, at lines 20-24 ("[i]n such event **the Lessor and the Secretary** shall have the options set forth in sub-Articles A and B above") (emphasis added), *with* ER-243-44 (if Lessee fails to cure default in allotted time, "the **Secretary** may" take one of two actions set forth in Sub-Articles A and B) (emphasis added).

The Tribal Court Parties attempt to overcome the Lease's constraints on the actions CRIT may take or bring under the Lease by stating that nothing in Section

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[5] The Supreme Court repeatedly has held that "[a]s to nonmembers . . . a tribe's adjudicative jurisdiction does not exceed its [regulatory] jurisdiction . . . ." *Nevada v. Hicks*, 533 U.S. 353, 357-58 (2001). For all the reasons stated herein, the Secretary had the duty to regulate the Water Wheel conduct at issue (*i.e.*, holding over or default under the Lease). Thus, CRIT was divested (by federal leasing regulations and/or its agreement to the Lease) of the power to regulate certain aspects of Water Wheel's conduct and, without the power to regulate the conduct here at issue, CRIT lacks the ability to adjudicate an action arising from that conduct.

22 "qualifies tribal authority to prosecute such actions." TCP Resp. Br., 14. The critical consideration here is not qualification of tribal authority, but rather that nothing in Section 22 **grants** CRIT the authority to bring such an action. In fact, Section 22 – which is aptly entitled "Attorney's Fees" – recognizes that if the Tribe brings an action that it is **otherwise entitled to bring** under the Lease and federal regulations, **then** it is entitled to attorney's fees.[6] For example, pursuant to the Lease, the Tribe could bring an action for unlawful detainer when the Lessee is insolvent or bankrupt. ER-244, 247. As this Court well knows, bankruptcy proceedings are designed and managed by the court to effect a financial reorganization and allow the bankrupt estate to move forward. While the Chapter XI process might lead to removal of a party from the leasehold, it also might lead to a successful reorganization. Under the Lease, CRIT could have a role in that process, but would have to abide by the federal laws protecting the party in bankruptcy.

Section 22 cannot be read to grant CRIT the ability to bring any action to enforce any provision of the Lease without respect to whom or what entity the Lease grants enforcement power, or whether such an action is contrary to federal law. Yet, the Tribal Court Parties argue just that. Their expansive reading is thwarted by the language of Section 22 itself which, in addition to applying to

[6] To this point, it is worth noting that if the Secretary brings an action on behalf of the Tribe there obviously would be no such fees for the Tribe to recoup.

"unlawful detainer," apparently also would apply to an action by Lessor "to enforce performance of any of the covenants and conditions of this lease . . . ." ER-247. If, as the Tribal Court Parties' argue, Section 22 independently grants the Tribe the right to bring any action under the Lease, then the Lease's designation in Section 21 of "the Secretary," "the Secretary and Lessor," or "the Secretary or Lessor" as the party required to take action under various circumstances, would be meaningless. As discussed, *supra,* contracts must be read as a whole and no provision should be construed so as to render another provision meaningless or nugatory. *Mastrobuono,* 514 U.S. at 63-64; *Sluimer*, 606 F. 3d at 592. The interpretation urged by the Tribal Court Parties violates this well-established rule.

Moreover, as discussed in Section II.B, *infra,* the Tribal Court Parties' interpretation also would be contrary to the comprehensive federal regulations which govern the Lease and provide the appropriate forum for resolution of Lease disputes. *But see* TCP Resp. Br., 15 (stating that no Lease provision "speaks to the issue of the appropriate forum").

B. BIA leasing regulations preclude Tribal Court jurisdiction over the Tribe's eviction action against Water Wheel.

The Tribal Court Parties claim that nothing in the leasing regulations "expressly limit what the tribe can do" and charge that the regulations "don't say what Water Wheel says they mean." TCP Resp. Br., 16. To be clear, Water Wheel says that the leasing regulations represent a comprehensive federal regulatory

system that "describe[s] the authorities, policies and procedures the BIA uses to grant, approve and administer service lease and permits on certain Indian lands" – these regulations (not the Tribe's) govern the relationship between the parties. *See* 66 Fed. Reg. 7079 (Jan. 22, 2001).

Next, the Tribal Court Parties cite 25 C.F.R. § 162.619(a)(3), and claim that it permits CRIT to bring an action for "unlawful detainer" pursuant to the "Attorney's Fees" provision of the Lease. TCP Resp. Br., 16-17. Section 162.619 governs what **the BIA** will do in the event a lessee does not cure a breach within the applicable time frame, and Subsection 162.619(a)(3) states that, among other things, BIA will "**consult** with the Indian landowners . . . to determine if [they] wish to invoke any remedies available to them under the lease." (Emphasis added.) Here, the Lease only grants CRIT the ability to enforce the Lease under certain circumstances and, as demonstrated herein, those circumstances are not present in this case. As such, there are no negotiated remedies for CRIT – itself – to exercise with respect to Water Wheel.

In addition, this Court must consider 25 C.F.R. § 162.612, which authorizes and governs the inclusion of tribal-negotiated remedies for lease violations, and specifically mentions that a tribe may be given the power to terminate a lease (a power that the Lease grants to CRIT but only in limited circumstances). 25 C.F.R. § 162.612(a). Subsection 162.612(b) confirms that any negotiated remedies must

be **provided for in a lease** and are in addition to Secretarial enforcement under Part 162. 25 C.F.R. § 162.612(b). Water Wheel's Lease does not provide for any tribal enforcement of the Lease provisions in CRIT Tribal Court.

Subsection 162.612(c) states that "**a lease may provide for** lease disputes to be resolved in **tribal court** or any other court of competent jurisdiction" but adds that the BIA is not bound by the parties' selected forum. (Emphasis added.) Significantly, the regulations authorizing negotiated tribal remedies to be provided under a lease did not even exist when the Lease was executed, and 25 C.F.R. Part 131 contains no such provision.[7] In fact, selection of a Tribal Court forum was not an option when the Lease was executed, and the Lease does not provide for resolution of Lease disputes in Tribal Court. Consequently, the CRIT courts never could have jurisdiction over this eviction action.

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[7] The Tribal Court Parties assert that the "District Court noted that none of the parties below contended that the current BIA leasing regulations, promulgated in 2001, were not applicable to the 1975 Water Wheel Lease." TCP Resp. Br., 17 n. 1 (citing ER-15, n. 13). While Water Wheel agrees that Part 162 is applicable to the Lease, Water Wheel has consistently maintained that Part 162 is **only** applicable to the extent that it does not conflict with the Lease terms. *See* Pls.' Reply Br. Concerning the Lack of Tribal Court Jurisdiction Pursuant to the Rule of *Montana v. United States* at 22, Doc. 67 (May 8, 2009). 25 C.F.R § 162.100(c) makes clear that it applies to all leases in effect when the regulations were promulgated in 2001, but "**unless otherwise agreed by the parties, [Part 162] will not affect the validity or terms of any existing lease.**" (Emphasis added.) As such, the Lease controls if there is any conflict between the Lease terms and the amended Part 162 regulations.

The Tribal Court Parties offer little-to-no explanation regarding why or how the Lease permits CRIT to evict Water Wheel despite the comprehensive federal regulatory scheme governing federally-approved leases of Indian land. However, they do attempt to distinguish *Kuykendall v. Phoenix Area Director*, 8 IBIA 76 (1980) and *Yavapai-Prescott Indian Tribe v. Watt*, 707 F.2d 1072 (9th Cir. 1983). In *Kuykendall*, which subsequently was reinstated by this Court in *Yavapai*, the Interior Board of Indian Appeals ("IBIA") considered whether a tribe, through its tribal court, unilaterally could cancel a lease executed by a private land owner and the Secretary (on behalf of a tribe) when the lease incorporated by reference 25 C.F.R. Part 131. *Kuykendall*, 8 IBIA at 82. The IBIA declared that the tribe was not only without authority to do so, but that the Secretary was required to "administer the contract according to the [lease] terms." *Id.* at 86. The IBIA explained:

> [t]he agency is bound by its own regulations: Especially where the[] regulations [25 C.F.R. Part 131] insure that private citizens directly affected by Government action shall not be deprived of their interest without due process protections furnished by the agency regulations.

Id. at 87.

Consequently, the IBIA found that the lease there at issue only could be canceled in conformity with 25 C.F.R. § 131.14 "which, in addition to due process safeguards concerning notice, includes a right of appeal to the Commissioner of

Indian Affairs and to this Board." *Id.* *Accord* 25 C.F.R. § 162.113 ("appeals from decisions by the BIA under this part may be taken pursuant to 25 C.F.R. Part 2").

The Water Wheel Lease also incorporates 25 C.F.R. Part 131, which includes dispute resolution provisions – including the same regulations cited in *Kuykendall* – for disagreements arising under the Lease. *See* 25 C.F.R. § 131.14; *see also Kuykendall*, 8 IBIA at 87. Also, similar to the lease in *Kuykendall*, the Water Wheel Lease makes no mention of resolution of disputes arising from the Lease under tribal law or in tribal court. Despite *Kuykendall's* and *Yavapai-Prescott's* striking similarity to this case, the Tribal Court Parties nevertheless attempt to distinguish those cases from the one *sub judice* by stating summarily that those cases involved a tribal court action to cancel a lease and not a tribal court action for eviction. However, the Tribal Court Parties fail to explain – presumably because they cannot – how or why that distinction is significant or relevant. TCP Resp. Br., 18 (simply stating that "[l]ease cancellation is not an issue here").

Instead, the Tribal Court Parties state that, at some point after this Court's decision in *Yavapai-Prescott*, the Secretary amended the 25 C.F.R. Part 162 leasing regulations to allow for "Indian landowners . . . to invoke any remedies available to them under the lease." TCP Resp. Br., 18. This argument is flawed for several reasons. The Secretary has, indeed, amended the regulations since *Yavapai-Prescott,* and the new regulations do contain the language cited by the

Tribal Court Parties. However, the Water Wheel Lease was executed in 1975, well before the promulgation of the initial Part 162 regulations cited in *Yavapai-Prescott* and, as such, long before those regulations were amended. Accordingly, when Water Wheel executed the Lease, the Part 162 regulations providing for tribal-negotiated remedies (including tribal court jurisdiction over lease disputes) did not exist and, thus, given the Tribe's express (and only) remedies under the Lease, those remedies are more limited than the Tribe seeks.

Notwithstanding what the Tribe may wish with respect to remedies, the fact that it may now negotiate remedies to be included in other future leases cannot retroactively grant the Tribe rights it does not have under **this Lease**. Put differently, this Lease represents the agreement between Water Wheel and CRIT, it speaks for itself, and its negotiated remedies are what they are. The remedies available under **this Lease** are Secretarial enforcement (as well as administrative review of Secretarial decisions) and/or Tribal enforcement under the limited circumstances (not present here) identified in the Lease.

To the extent the Tribal Court Parties argue that the new Part 162 regulations permit the Tribe to conduct enforcement and seek remedies that the Lease assigns to the Secretary, that argument too must fail. Even if the Part 162 regulations could be said to generally expand tribal lease enforcement powers, they cannot do so in this case because the Lease controls. *Cf.* TCP Resp. Br., 18 (implying that

the Secretary amended the regulations to expand the scope of tribal powers with respect to lease enforcement). As mentioned above, the Part 162 regulations only apply to this Lease to the extent that they "**will not affect the validity or terms of any existing lease.**" *See* 25 C.F.R § 162.100(c) (emphasis added). Allowing the Tribe (rather than the Secretary) to now seek enforcement in tribal court (rather than through the agreed-upon administrative process) would remove entirely the enforcement and dispute resolution mechanisms enunciated in the Lease and the applicable federal regulations. *See generally*, discussion at Parts II.A-B. In fact, if this Court finds that the Tribe, rather than the Secretary, can take action to enforce this Lease, it would "eliminate[] the [Lease's] administrative remedy while the sovereign immunity of [Indian] tribes bars relief against the Tribe." *Yavapai-Prescott*, 707 F.2d at 1075 (citing *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978)). This alone would demonstrably alter and change the agreement of the parties and, thus, the terms of the Lease.

C. Water Wheel's pending administrative appeal is consistent with the Lease's mandate for Secretarial enforcement of Lease provisions, as well as administrative review of Secretarial action or inaction.

The Tribal Court Parties misstate Water Wheel's argument with respect to the 25 C.F.R. Part 2 process by contending that Water Wheel is arguing that its request for administrative action pending before Interior bars the exercise of Tribal Court Jurisdiction. TCP Resp. Br., 19. They then go on to declare that there **is no**

Water Wheel appeal, thus (they argue) rendering moot any impact on the Tribal Court process from what they say is a "fictitious administrative appeal." *Id.* at 19-20.

Contrary to the Tribal Court Parties' assertions, Water Wheel **did** appeal to Interior based on Interior's failure to protect Water Wheel's leasehold interests from "arbitrary actions and inaction of CRIT against Water Wheel . . . with the knowledge and acquiescence of BIA officials." WW Resp. Br., 57; SER-26. What the Tribal Court Parties will not tell this Court, and perhaps do not even know, is that Water Wheel's administrative filing alleged that the BIA failed to take action and that its outright failure to act was the **equivalent** of agency action, thereby allowing Water Wheel to invoke the appeal process of 25 C.F.R. Part 2. *See Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987) ("agency inaction may represent effectively final agency action that the agency has not frankly acknowledged: when administrative inaction has precisely the same impact on the rights of the parties as denial of relief, an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an order denying relief").

To this day, Water Wheel never has received any decision from Interior with respect to Water Wheel's request, and never has been advised by Interior that no action has been taken on it. WW Resp. Br., 57. The matter is pending, yet the

Tribal Court Parties have weakly declared that BIA officials "never took any action, because it is not their responsibility to protect lessees of tribal land from alleged wrongdoing by a tribal official." TCP Resp. Br., 20. This claim again reveals the Tribal Court Parties' willingness to dispose of the due process guaranteed by the Lease.[8] Quite obviously, CRIT sought adjudication against Water Wheel in its "home court," thus depriving Water Wheel of its procedural and due process protections afforded by federal laws and federal courts, including appeals to impartial tribunals.

There is no dispute that the Lease incorporates 25 C.F.R. Part 131 (now Part 162), which provides that decisions or actions (or the lack thereof) made pursuant to the leasing regulations **may be appealed** pursuant to 25 C.F.R. Part 2. *See* 25 C.F.R. § 131.14; 25 C.F.R. § 162.113. Water Wheel invoked its right to do so under Part 2. *See* 25 C.F.R. § 2.8(a) (1989) ("person or persons whose interests are adversely affected, or whose ability to protect such interests is impeded **by the failure of an official to act on a request to the official, can make the official's inaction the subject of appeal**") (emphasis added). Once Water Wheel filed its request for action, Interior was required to provide some form of decision, even if

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[8] *See* WW Resp. Br., 59 – 60 (recalling that, when the District Court asked why CRIT did not follow Section 21 of Lease and pursue 25 C.F.R. remedies by requesting that the Secretary take action against Water Wheel, counsel for the Tribal Court Parties responded that enforcement pursuant to the Lease terms "is very ponderous").

that decision was to deny Water Wheel's request. *See* 25 C.F.R. § 2.7(a) (1989) ("official making a decision shall give all interested parties . . . written notice of the decision"). Here, Water Wheel took advantage of the proper process for review pursuant to the Lease – seeking Department of Interior review – and that request remains before the agency.

The Tribal Court Parties simply prefer to dispose of the administrative review process altogether. In advocating that result, they claim that Water Wheel's appeal probably would be unsuccessful anyway (TCP Resp. Br. 21), and suggest that an appeal they allege is without merit should not be recognized by Interior or the courts. It is telling, if not deeply ironic, that the Tribal Court Parties support this argument (and attendant assumptions) by citing IBIA opinions, which are themselves appeals of lease enforcement action(s) pursued by Interior itself. *See, e.g.,* TCP Resp. Br., 21-22; *Tafoya v. Acting Southwest Regional Director*, 46 IBIA 197, 201 (2008) ("BIA has an obligation to recover possession of the trust land for the landowner" pursuant to 25 C.F.R. § 162.623).

Nevertheless, the Tribal Court Parties once again assume the responsibility for determining the merits of Water Wheel's case, rather than focusing on the proper process and authority to resolve such claims. Indeed, whether Water Wheel has (or had) a valid claim for breach of the Lease is something that must be determined by Interior pursuant to the 25 C.F.R. Part 2 regulations, not the Tribal

Court Parties. In any event, even assuming *arguendo* that Water Wheel's request for action would have been denied by Interior, it does not negate the fact that this administrative process is the **sole** means for the Tribe to evict Water Wheel under **this Lease**.

III. CONCLUSION

For the reasons stated in Cross-Appellant's Principal Brief and those stated herein, Cross-Appellant Water Wheel respectfully requests that this Honorable Court reverse and vacate that portion of the District Court Order of September 23, 2009, which denied Water Wheel the relief it sought against the Tribal Court Parties.

Dated this 11th day of August 2010.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th of August, 2010, I electronically filed the foregoing REPLY BRIEF OF CROSS-APPELLANT WATER WHEEL CAMP RECREATIONAL AREA, INC. with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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SUPPLEMENTAL ADDENDUM

[e]xcept for the following, all applicable statutes, etc., are contained in the brief or addendum of June 28, 2010 submitted as Response Brief of Appellee ad Cross-Appellant's Principal Brief, Docket No. 33 Cir. R. 28-2.7*(Rev. 12/1/09)*

SUPPLEMENTAL ADDENDUM

LAW AND ORDER CODE

ARTICLE I

GENERAL PROVISIONS

[NOTE: Except as otherwise noted, the provisions of Article I of the Law and Order Code were enacted on June 22, 1974 by Ordinance No. 26.]

CHAPTER A. JURISDICTION

Section 101. Personal Jurisdiction.

Subject to any limitations, restrictions or exceptions imposed by or under the authority of the Constitution or laws of the United States, or by the Constitution or By-Laws of the Tribes, or by ordinances of the Tribes, or by express provisions elsewhere in this Code, the courts of the Tribes shall have civil and criminal jurisdiction over the following persons:

a. Any person residing, located or present within the Reservation for:

(1) any civil cause of action; or

(2) any charge of criminal offense prohibited by this Code or ordinances of the Tribes when the offense alleged to have occurred within the 0.Reservation.

b. Any person who transacts, conducts or performs any business or activity within the Reservation, either in person or by an agent or representative, for any civil cause of action or charge of criminal offense prohibited by this Code or ordinances of the Tribes arising from such business or activity.

c. Any person who owns, uses or possesses any property within the Reservation, for any civil cause of action or charge of criminal offense prohibited by this Code or ordinances of the Tribes arising from such ownership, use or possession.

d. Any person who commits a tortious act or engages in tortious conduct within the reservation, either in person or by an agent or representative, for any civil cause or action arising from such act or conduct.

e. Any person who commits a criminal offense prohibited by this Code or ordinances of the Tribes, by his own conduct or the conduct of another for which he is legally accountable, if:

(1) The conduct occurs either wholly or partly within the Reservation; or

(2) The conduct which occurs outside the Reservation constitutes an attempt, solicitation, or conspiracy to commit an offense within the Reservation, and an act in furtherance of the attempt or conspiracy occurs within the Reservation; or

(3) The conduct which occurs outside the Reservation constitutes an attempt, solicitation, or conspiracy to commit in another jurisdiction an offense prohibited by this Code or ordinances of the Tribes and such other jurisdiction.

None of the foregoing bases of jurisdiction is exclusive, and jurisdiction over a person may be established upon anyone or more of them as applicable.

Subject to the provisions of Section 102, nothing contained within this Code shall be deemed to constitute a waiver or renunciation of the sovereign immunity of the Tribes to suit, which immunity is hereby reaffirmed.

Section 102. Subject Matter Jurisdiction.

A. Notwithstanding any other provision of law, for purpose of this section, the term "Person" shall mean any individual, firm, co-partnership, joint venture, association, social club, fraternal organization, corporation, estate, trust, business trust, receiver, trustee, syndicate, a state of the United States, any county, city, municipality, district, or other political subdivision of a state, or any other group or combination acting as a unit but does not include the Colorado River Indian Tribes, any of its enterprises or subdivisions or any of its officers, agents or employees while acting in their official capacity.

B. Subject to any limitations, restrictions or exceptions imposed by or under the authority of the Constitution or laws of the United States, or by the Constitution or Bylaws of the Tribes, or by the ordinances or codes of the Tribes, or by express provision elsewhere in this Code, the courts of the Tribes shall have jurisdiction over all civil causes of action and over all controversies between any persons. Subject to the same limitations, restrictions or exceptions, the courts of the Tribes shall have criminal jurisdiction over all offenses prohibited by ordinances or codes of the Tribes.

C. The courts of the Tribes shall have jurisdiction to determine any claim of violation of Section 202 of Title II, P.L. 90-284 (82 Stat. 77) enacted by the Congress of the United States on April 11, 1968, the Constitution or Bylaws of the Tribes, or of any ordinances or codes of the Tribes and to grant appropriate relief for injustice or deprivation resulting directly and exclusively from such violation only upon an express and effective waiver of the Tribe's sovereign immunity from unconsented suit.

D. No action brought against the Tribes under this section shall be brought in the name of an enterprise, subdivision, agent or elected official of the Tribe but shall be brought in the name of the Colorado River Indian Tribes.

E. Service of process in any action brought against the Tribes shall be individually made both on the Chairman of the Colorado River Indian Tribes and the Tribal Attorney of the Colorado River Indian Tribes. Notwithstanding any other provision of law, service made in any other manner on the Tribe will be invalid and ineffective.

F. Nothing contained in subsection (C) shall be deemed to constitute a aiver or renunciation of the sovereign immunity of the Tribes for any purpose.
[As Amended December 13, 1985, Ord. No. 85-6.]

Section 103. Concurrent Jurisdiction.

The jurisdiction invoked by this Code over any person, cause or subject shall be concurrent with any valid jurisdiction over the same of the courts of the United States, any state, or any political subdivision thereof; provided, however, this Code does not recognize, grant, or cede jurisdiction to any other political or governmental entity which jurisdiction does not otherwise exist in law.

CHAPTER B. ADMINISTRATIVE PROVISIONS

Section 104. Definitions and Construction.

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PART 2—APPEALS FROM ADMINISTRATIVE ACTIONS

Section Contents

Authority: R.S. 463, 465; 5 U.S.C. 301, 25 U.S.C. 2, 9.

Source: 54 FR 6480, Feb. 10, 1989, unless otherwise noted.

§ 2.1 Information collection.

top

In accordance with Office of Management and Budget regulations in 5 CFR 1320.3(c), approval of information collections contained in this regulation is not required.

§ 2.2 Definitions.

top

Appeal means a written request for review of an action or the inaction of an official of the Bureau of Indian Affairs that is claimed to adversely affect the interested party making the request.

Appellant means any interested party who files an appeal under this part.

Interested party means any person whose interests could be adversely affected by a decision in an appeal.

Legal holiday means a Federal holiday as designated by the President or the Congress of the United States.

Notice of appeal means the written document sent to the official designated in this part, indicating that a decision is being appealed (see §2.9).

Person includes any Indian or non-Indian individual, corporation, tribe or other organization.

Statement of reasons means a written document submitted by the appellant explaining why the decision being appealed is in error (see §2.10).

[54 FR 6480, Feb. 10, 1989; 54 FR 7666, Feb. 22, 1989]

§ 2.3 Applicability.

top

(a) Except as provided in paragraph (b) of this section, this part applies to all appeals from decisions made by officials of the Bureau of Indian Affairs by persons who may be adversely affected by such decisions.

(b) This part does not apply if any other regulation or Federal statute provides a different administrative appeal procedure applicable to a specific type of decision.

§ 2.4 Officials who may decide appeals.

top

The following officials may decide appeals:

(a) An Area Director, if the subject of appeal is a decision by a person under the authority of that Area Director.

(b) An Area Education Programs Administrator, Agency Superintendent for Education, President of a Post-Secondary School, or the Deputy to the Assistant Secretary—Indian Affairs/Director (Indian Education Programs), if the appeal is from a decision by an Office of Indian Education Programs (OIEP) official under his/her jurisdiction.

(c) The Assistant Secretary—Indian Affairs pursuant to the provisions of §2.20 of this part.

(d) A Deputy to the Assistant Secretary—Indian Affairs pursuant to the provisions of §2.20(c) of this part.

(e) The Interior Board of Indian Appeals, pursuant to the provisions of 43 CFR part 4, subpart D, if the appeal is from a decision made by an Area Director or a Deputy to the Assistant Secretary—Indian Affairs other than the Deputy to the Assistant Secretary—Indian Affairs/Director (Indian Education Programs).

§ 2.5 Appeal bond.

top

(a) If a person believes that he/she may suffer a measurable and substantial financial loss as a direct result of the delay caused by an appeal, that person may request that the official before whom the appeal is pending require the posting of a reasonable bond by the appellant adequate to protect against that financial loss.

(b) A person requesting that a bond be posted bears the burden of proving the likelihood that he/she may suffer a measurable and substantial financial loss as a direct result of the delay caused by the appeal.

(c) In those cases in which the official before whom an appeal is pending determines that a bond is necessary to protect the financial interests of an Indian or Indian tribe, that official may require the posting of a bond on his/her own initiative.

(d) Where the official before whom an appeal is pending requires a bond to be posted or denies a request that a bond be posted, he/she shall give notice of his/her decision pursuant to §2.7.

§ 2.6 Finality of decisions.

top

(a) No decision, which at the time of its rendition is subject to appeal to a superior authority in the Department, shall be considered final so as to constitute Departmental action subject to judicial review under 5 U.S.C. 704, unless when an appeal is filed, the official to whom the appeal is made determines that public safety, protection of trust resources, or other public exigency requires that the decision be made effective immediately.

(b) Decisions made by officials of the Bureau of Indian Affairs shall be effective when the time for filing a notice of appeal has expired and no notice of appeal has been filed.

(c) Decisions made by the Assistant Secretary—Indian Affairs shall be final for the Department and effective immediately unless the Assistant Secretary—Indian Affairs provides otherwise in the decision.

[54 FR 6480, Feb. 10, 1989; 54 FR 7666, Feb. 22, 1989]

§ 2.7 Notice of administrative decision or action.

top

(a) The official making a decision shall give all interested parties known to the decisionmaker written notice of the decision by personal delivery or mail.

(b) Failure to give such notice shall not affect the validity of the decision or action but the time to file a notice of appeal regarding such a decision shall not begin to run until notice has been given in accordance with paragraph (c) of this section.

(c) All written decisions, except decisions which are final for the Department pursuant to §2.6(c), shall include a statement that the decision may be appealed pursuant to this part, identify the official to whom it may be appealed and indicate the appeal procedures, including the 30-day time limit for filing a notice of appeal.

[54 FR 6480, Feb. 10, 1989; 54 FR 7666, Feb. 22, 1989]

§ 2.8 Appeal from inaction of official.

top

(a) A person or persons whose interests are adversely affected, or whose ability to protect such interests is impeded by the failure of an official to act on a request to the official, can make the official's inaction the subject of appeal, as follows:

(1) Request in writing that the official take the action originally asked of him/her;

(2) Describe the interest adversely affected by the official's inaction, including a description of the loss, impairment or impediment of such interest caused by the official's inaction;

(3) State that, unless the official involved either takes action on the merits of the written request within 10 days of receipt of such request by the official, or establishes a date by which action will be taken, an appeal shall be filed in accordance with this part.

(b) The official receiving a request as specified in paragraph (a) of this section must either make a decision on the merits of the initial request within 10 days from receipt of the request for a decision or establish a reasonable later date by which the decision shall be made, not to exceed 60 days from the date of request. If an official establishes a date by which a requested decision shall be made, this date shall be the date by which failure to make a decision shall be appealable under this part. If the official, within the 10-day period specified in paragraph (a) of this section, neither makes a decision on the merits of the initial request nor establishes a later date by which a decision shall be made, the official's inaction shall be appealable to the next official in the process established in this part.

[54 FR 6480, Feb. 10, 1989; 54 FR 7666, Feb. 22, 1989]

§ 2.9 Notice of an appeal.

top

(a) An appellant must file a written notice of appeal in the office of the official whose decision is being appealed. The appellant must also send a copy of the notice of appeal to the official who will decide the appeal and to all known interested parties. The notice of appeal must be filed in the office of the official whose decision is being appealed within 30 days of receipt by the appellant of the notice of administrative action described in §2.7. A notice of appeal that is filed by mail is considered filed on the date that it is postmarked. The burden of proof of timely filing is on the appellant. No extension of time shall be granted for filing a notice of appeal. Notices of appeal not filed in the specified time shall not be considered, and the decision involved shall be considered final for the Department and effective in accordance with §2.6(b).

(b) When the appellant is an Indian or Indian tribe not represented by counsel, the official who issued the decision appealed shall, upon request of the appellant, render such assistance as is appropriate in the preparation of the appeal.

(c) The notice of appeal shall:

(1) Include name, address, and phone number of appellant.

(2) Be clearly labeled or titled with the words "NOTICE OF APPEAL."

(3) Have on the face of any envelope in which the notice is mailed or delivered, in addition to the address, the clearly visible words "NOTICE OF APPEAL."

(4) Contain a statement of the decision being appealed that is sufficient to permit identification of the decision.

(5) If possible, attach either a copy of the notice of the administrative decision received under §2.7, or when an official has failed to make a decision or take any action, attach a copy of the appellant's request for a decision or action under §2.8 with a written statement that the official failed to make a decision or take any action or to establish a date by which a decision would be made upon the request.

(6) Certify that copies of the notice of appeal have been served on interested parties, as prescribed in §2.12(a).

§ 2.10 Statement of reasons.

top

(a) A statement of reasons shall be filed by the appellant in every appeal, and shall be accompanied by or otherwise incorporate all supporting documents.

(b) The statement of reasons may be included in or filed with the notice of appeal.

(c) If the statement of reasons is not filed with the notice of appeal, the appellant shall file a separate statement of reasons in the office of the official whose decision is being appealed within 30 days after the notice of appeal was filed in that office.

(d) The statement of reasons whether filed with the notice of appeal or filed separately should:

(1) Be clearly labeled "STATEMENT OF REASONS".

(2) Have on the face of any envelope in which the statement of reasons is mailed or delivered, in addition to the address, the clearly visible words "STATEMENT OF REASONS".

[54 FR 6480, Feb. 10, 1989; 54 FR 7666, Feb. 22, 1989]

§ 2.11 Answer of interested party.

top

(a) Any interested party wishing to participate in an appeal proceeding should file a written answer responding to the appellant's notice of appeal and statement of reasons. An answer should describe the party's interest.

(b) An answer shall state the party's position or response to the appeal in any manner the party deems appropriate and may be accompanied by or otherwise incorporate supporting documents.

(c) An answer must be filed within 30 days after receipt of the statement of reasons by the person filing an answer.

(d) An answer and any supporting documents shall be filed in the office of the official before whom the appeal is pending as specified in §2.13.

(e) An answer should:

(1) Be clearly labelled or titled with the words "ANSWER OF INTERESTED PARTY."

(2) Have on the face of any envelope in which the answer is mailed or delivered, in addition to the address, the clearly visible words "ANSWER OF INTERESTED PARTY," and

(3) Contain a statement of the decision being appealed that is sufficient to permit identification of the decision.

§ 2.12 Service of appeal documents.

top

(a) Persons filing documents in an appeal must serve copies of those documents on all other interested parties known to the person making the filing. A person serving a document either by mail or personal delivery must, at the time of filing the document, also file a written statement certifying service on each interested party, showing the document involved, the name and address of the party served, and the date of service.

(b) If an appeal is filed with the Interior Board of Indian Appeals, a copy of the notice of appeal shall also be sent to the Assistant Secretary—Indian Affairs. The notice of appeal sent to the Interior Board of Indian Appeals shall certify that a copy has been sent to the Assistant Secretary—Indian Affairs.

(c) If the appellant is an Indian or Indian tribe not represented by counsel, the official with whom the appeal is filed (i.e., official making the decision being appealed) shall, in the manner prescribed in this section, personally or by mail serve a copy of all appeal documents on the official who will decide the appeal and on each interested party known to the official making such service.

(d) Service of any document under this part shall be by personal delivery or by mail to the record address as specified in §2.14. Service on a tribe shall be to the principal or designated tribal official or to the governing body.

(e) In all cases where a party is represented by an attorney in an appeal, service of any document on the attorney is service on the party represented. Where a party is represented by more than one attorney, service on any one attorney is sufficient. The certificate of service on an attorney shall include the name of the party whom the attorney represents and indicate that service was made on the attorney representing that party.

(f) When an official deciding an appeal determines that there has not been service of a document affecting a person's interest, the official shall either serve the document on the person or direct the appropriate legal counsel to serve the document on the person and allow the person an opportunity to respond.

[54 FR 6480, Feb. 10, 1989; 54 FR 7666, Feb. 22, 1989]

§ 2.13 Filing documents.

top

(a) An appeal document is properly filed with an official of the Bureau of Indian Affairs:

(1) By personal delivery during regular business hours to the person designated to receive mail in the immediate office of the official, or

(2) By mail to the facility officially designated for receipt of mail addressed to the official; the document is considered filed by mail on the date that it is postmarked.

(b) Bureau of Indian Affairs offices receiving a misdirected appeal document shall forward the document to the proper office promptly. If a person delivers an appeal document to the wrong office or mails an appeal document to an incorrect address, no extension of time should be allowed because of the time necessary for a Bureau office to redirect the document to the correct address.

(c) Notwithstanding any other provision of this section, an official deciding an appeal shall allow late filing of a misdirected document, including a notice of appeal, where the official finds that the misdirection is the fault of the government.

§ 2.14 Record address.

top

(a) Every interested party who files a document in connection with an appeal shall, when he/she files the document, also indicate his/her address. Thereafter, any change of address shall be promptly reported to the official with whom the previous address was filed. The most current address on file under this subsection shall be deemed the proper address for all purposes under this part.

(b) The successors in interest of a party shall also promptly inform the official specified in paragraph (a) of this section of their interest in the appeal and their address.

(c) An appellant or interested party failing to file an address or change of address as specified in this section may not object to lack of notice or service attributable to his/her failure to indicate a new address.

§ 2.15 Computation of time.

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In computing any period of time prescribed or allowed in this part, calendar days shall be used. Computation shall not include the day on which a decision being appealed was made, service or notice was received, a document was filed, or other event occurred causing time to begin to run. Computation

shall include the last day of the period, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday.

§ 2.16 Extensions of time.

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An official to whom an appeal is made may, upon a showing of good cause by a party and with notice to all other parties, extend the period for filing or serving any document; *provided,* however, that no extension will be granted for filing a notice of appeal under §2.9 of this part or serve by itself to extend any period specified by law or regulation other than in this part.

§ 2.17 Summary dismissal.

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(a) An appeal under this part will be dismissed if the notice of appeal is not filed within the time specified in §2.9(a).

(b) An appeal under this part may be subject to summary dismissal for the following causes:

(1) If after the appellant is given an opportunity to amend them, the appeal documents do not state the reasons why the appellant believes the decision being appealed is in error, or the reasons for the appeal are not otherwise evident in the documents, or

(2) If the appellant has been required to post a bond and fails to do so.

§ 2.18 Consolidation of appeals.

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Separate proceedings pending before one official under this part and involving common questions of law or fact may be consolidated by the official conducting such proceedings, pursuant to a motion by any party or on the initiative of the official.

§ 2.19 Action by Area Directors and Education Programs officials on appeal.

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(a) Area Directors, Area Education Programs Administrators, Agency Superintendents for Education, Presidents of Post-Secondary Schools and the Deputy to the Assistant Secretary—Indian Affairs/Director (Indian Education Programs) shall render written decisions in all cases appealed to them within 60 days after all time for pleadings (including all extensions granted) has expired. The decision shall include a statement that the decision may be appealed pursuant to this part, identify the official to whom it may be appealed and indicate the appeal procedures, including the 30-day time limit for filing a notice of appeal.

(b) A copy of the decision shall be sent to the appellant and each known interested party by certified or registered mail, return receipt requested. Such receipts shall become a permanent part of the record.

§ 2.20 Action by the Assistant Secretary—Indian Affairs on appeal.

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(a) When a decision is appealed to the Interior Board of Indian Appeals, a copy of the notice of appeal shall be sent to the Assistant Secretary—Indian Affairs.

(b) The notice of appeal sent to the Interior Board of Indian Appeals shall certify that a copy has been sent to the Assistant Secretary—Indian Affairs.

(c) In accordance with the provisions of §4.332(b) of title 43 of the Code of Federal Regulations, a notice of appeal to the Board of Indian Appeals shall not be effective until 20 days after receipt by the Board, during which time the Assistant Secretary—Indian Affairs shall have authority to decide to:

(1) Issue a decision in the appeal, or

(2) Assign responsibility to issue a decision in the appeal to a Deputy to the Assistant Secretary—Indian Affairs.

The Assistant Secretary—Indian Affairs will not consider petitions to exercise this authority. If the Assistant Secretary—Indian Affairs decides to issue a decision in the appeal or to assign responsibility to issue a decision in the appeal to a Deputy to the Assistant Secretary—Indian Affairs, he/she shall notify the Board of Indian Appeals, the deciding official, the appellant, and interested parties within 15 days of his/her receipt of a copy of the notice of appeal. Upon receipt of such notification, the Board of Indian Appeals shall transfer the appeal to the Assistant Secretary—Indian Affairs. The decision shall be signed by the Assistant Secretary—Indian Affairs or a Deputy to the Assistant Secretary—Indian Affairs within 60 days after all time for pleadings (including all extensions granted) has expired. If the decision is signed by the Assistant Secretary—Indian Affairs, it shall be final for the Department and effective immediately unless the Assistant Secretary—Indian Affairs provides otherwise in the decision. Except as otherwise provided in §2.20(g), if the decision is signed by a Deputy to the Assistant Secretary—Indian Affairs, it may be appealed to the Board of Indian Appeals pursuant to the provisions of 43 CFR part 4, subpart D.

(d) A copy of the decision shall be sent to the appellant and each known interested party by certified or registered mail, return receipt requested. Such receipts shall become a permanent part of the record.

(e) If the Assistant Secretary—Indian Affairs or the Deputy to the Assistant Secretary—Indian Affairs to whom the authority to issue a decision has been assigned pursuant to §2.20(c) does not make a decision within 60 days after all time for pleadings (including all extensions granted) has expired, any party may move the Board of Indian Appeals to assume jurisdiction subject to 43 CFR 4.337(b). A motion for Board decision under this section shall invest the Board with jurisdiction as of the date the motion is received by the Board.

(f) When the Board of Indian Appeals, in accordance with 43 CFR 4.337(b), refers an appeal containing one or more discretionary issues to the Assistant Secretary—Indian Affairs for further consideration, the Assistant Secretary—Indian Affairs shall take action on the appeal consistent with the procedures in this section.

(g) The Assistant Secretary—Indian Affairs shall render a written decision in an appeal from a decision of the Deputy to the Assistant Secretary—Indian Affairs/Director (Indian Education Programs) within 60 days after all time for pleadings (including all extensions granted) has expired. A copy of the decision shall be sent to the appellant and each known interested party by certified or registered mail, return receipt requested. Such receipts shall become a permanent part of the record. The decision shall be final for the Department and effective immediately unless the Assistant Secretary—Indian Affairs provides otherwise in the decision.

§ 2.21 Scope of review.

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(a) When a decision has been appealed, any information available to the reviewing official may be used in reaching a decision whether part of the record or not.

(b) When the official deciding an appeal believes it appropriate to consider documents or information not contained in the record on appeal, the official shall notify all interested parties of the information and they shall be given not less than 10 days to comment on the information before the appeal is decided. The deciding official shall include in the record copies of documents or a description of the information used in arriving at the decision. Except where disclosure of the actual documents used may be prohibited by law, copies of the information shall be made available to the parties upon request and at their expense.

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