United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ARLINGTON, VA 22203

CORTINA INTEGRATED WASTE MANAGEMENT, INC., Appellant,	)	Order Affirming Decision in Part and Vacating in Part
v.	)	Docket No. IBIA 19-058
PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	June 27, 2024

Cortina Integrated Waste Management, Inc. (Appellant or CIWMI) appealed to the Board of Indian Appeals (Board) from a March 1, 2019, decision (Decision) of the Pacific Regional Director (Regional Director), Bureau of Indian Affairs (BIA), cancelling a lease between Appellant and the Kletsel Dehe Wintun Nation of the Cortina Rancheria (Nation).[1] The Regional Director cancelled the lease because she found that Appellant had failed to perform within a reasonable time and had failed to provide certain notices required by the lease. We affirm her decision in part: the lease required Appellant to perform within a reasonable time, and Appellant failed to do so. For that reason, we uphold the Regional Director's cancellation of the lease. We vacate her decision in remaining part because the Regional Director failed to provide notice of Appellant's other alleged violations before termination, as required by the law.

Background

I. The Lease

On April 29, 2003, the Nation and Appellant executed a business lease for the purposes of developing and operating an integrated solid waste management facility on land within the Nation's Rancheria. Second Amended and Restated Business Lease at 1-2

[1] The Nation was formerly known as the Kletsel Dehe Band of Wintun Indians, the Cortina Indian Rancheria, and the Cortina Indian Rancheria of Wintun Indians of California. The lease identifies the lessor informally as the Cortina Band of Wintun Indians.

(Lease) (Administrative Record (AR) B).[2] For ease of reference, we refer to this project simply as the "landfill," although we recognize that, as proposed, it would have also included "a materials recovery facility, a composting facility, and a petroleum-contaminated soils bioremediation project." Lease ¶ 1(K). The initial term of the Lease was 25 years (starting from BIA's approval). *Id.* ¶ 1(N). BIA approved the Lease on January 25, 2007. *See* Approval of Business Lease No. 500101-07-32, Lease at PDF 1.

This is the third challenge to this project that the Board has heard. The Board affirmed the Regional Director's decision to approve an earlier version of the lease against various challenges brought by the County of Colusa, California (County), in *County of Colusa, California v. Pacific Regional Director*, 38 IBIA 274, 287 (2003). The Board reversed a 2013 decision by the Regional Director to terminate this Lease on grounds unrelated to the present challenge in *Cortina Integrated Waste Management, Inc. v. Pacific Regional Director*, 61 IBIA 339, 347 (2015) (*Cortina I*).

II. BIA's Reasons for Cancelling the Lease

On November 8, 2018, the Regional Director notified Appellant that it was in default of paragraph 22 of the Lease, the Lease's "time is of the essence" clause. Notice of Violation, Nov. 8, 2018, at 1-2 (Notice of Violation) (AR C). The Regional Director explained that Appellant had committed a "material breach" of "material terms" of the Lease by failing to build and begin operating the landfill in a timely way. *Id.* at 2-3. The Notice of Violation stated that the "failure to timely undertake construction is a breach that frustrates the Lease purposes and denies the [Nation] the Lease benefits that were fundamental to the bargain to which the parties agreed in entering into the Lease." *Id.* at 2. The Regional Director also asked Appellant to "demonstrate that access to the construction site is not impossible . . . ." *Id.* at 3. Citing the Lease and BIA's business leasing regulations, 25 C.F.R. § 162.466, the Regional Director instructed Appellant that it had

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[2] BIA submitted the administrative record electronically. The record is divided into five folders described as "tabs" and assigned a letter (e.g., "Tab A – IBIA Docketing and Previous IBIA Decisions"). The administrative records for two previous challenges to this project are included in the electronic record in separate folders under Tab A ("Admin Record IBIA 01-32-A and 01-36-A" and "Admin Record IBIA 14-002"). Within these folders, the documents for the current record are identified by date and title, while the documents for the previous two records are identified either by document number or by date and title. We cite record documents submitted electronically by folder, title, and date (or, where appropriate, document number). We cite to the original page number of the document (at #), unless we note that the citation is to the PDF page number (at PDF #).

10 days to cure the default, dispute BIA's determination that a default had occurred, or ask for additional time to cure the default.[3] *Id.* at 2-3.

Appellant responded to BIA on December 10, 2018, denying that any material breach had occurred and arguing that Appellant had worked diligently to complete the landfill. Letter from CIWMI to Regional Director, Dec. 10, 2018 (CIWMI Resp. to NOV) (AR C). The Nation replied to Appellant's response on December 17, 2018. Letter from Nation to BIA, Dec. 17, 2018 (AR C).

On March 1, 2019, the Regional Director issued the Decision to terminate the Lease. Notice of Decision and Termination, Mar. 1, 2019 (Decision) (AR A). She concluded that Appellant had breached paragraph 22 of the Lease, the Lease's "time is of the essence" clause, because it failed to build and begin operating the landfill "in a timely manner" and had not even completed the first steps of the project by obtaining the necessary permits and securing a safe access route for trucks. *Id.* at 2-5. The Regional Director stated that, "[b]ased on the current pace of approval, the facility would not open until the end of the current Lease term, leaving little opportunity for benefits to accrue to the [Nation] from the Lease." *Id.* at 5. The Regional Director also concluded that Appellant had breached paragraph 17(A)(5) of the Lease by failing to notify the Nation that it was not able to obtain safe access to the landfill site. *Id.* at 5-6. She then decided to terminate the Lease on both of those grounds. *Id.* at 6.

III. Appeal to the Board

Appellant appealed to the Board and included arguments in its notice of appeal. Appellant also filed an opening brief. BIA, the Nation, and the County filed answer briefs in opposition to Appellant.[4] Appellant separately replied to each of the answer briefs.

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[3] The Lease incorporates by reference BIA's leasing regulations, 25 C.F.R. Part 162, including "any amendments thereto relative to business leases . . . ." Lease at 1. The Lease itself also includes provisions requiring notice and an opportunity to cure, in the event of a default. *Id.* ¶ 23(B)(1)-(4).

[4] The County moved to intervene pursuant to 43 C.F.R. § 4.313, which allows the Board to grant intervention, as parties or amicus curiae, to any "interested person or Indian tribe." The Board, noting that by its terms § 4.313 is to be "liberally construed," permitted the County to file a brief in response to the issues raised in Appellant's notice of appeal and opening brief. Order Concerning County's Motion to Intervene, June 24, 2019, at 2.

The County and the Nation also moved to supplement the administrative record. Many of the documents are already included in BIA's administrative record (as part of the record for Docket No. IBIA 14-002). *See supra* note 2. Some of the additional documents post-

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Standard of Review

Two distinct standards of review apply in this appeal. We review the Regional Director's interpretation of the terms of the Lease *de novo* because interpreting the terms of a lease is a question of law. *See, e.g., Seminole Tribe of Florida v. Eastern Regional Director*, 53 IBIA 195, 210 (2011). In contrast, the Regional Director's ultimate decision to cancel the Lease is a mixed question of law and fact that has been entrusted to the Regional Director's discretion, so we review that decision only to ensure that it complies with the law (including our *de novo* interpretation of the terms of the Lease), is supported by evidence in the administrative record, and gives a reasoned explanation that is not arbitrary or capricious. *Garnenez v. Acting Navajo Regional Director*, 60 IBIA 162, 166 (2015); *Hawkey v. Acting Northwest Regional Director*, 57 IBIA 262, 264 (2013). In reviewing that discretionary decision, we will not substitute our own judgment for the Regional Director's judgment. *High Desert Recreation, Inc. v. Western Regional Director*, 57 IBIA 32, 38 (2013). The appellant bears the burden of proving that the Regional Director's decision is in error. *Hawkey*, 57 IBIA at 264; *see also Seminole Tribe of Florida*, 53 IBIA at 210.

The Board cannot hear and does not review the Nation's and Appellant's claims that they are owed money damages for breaches of this Lease because the Board is not a court of general jurisdiction. *U.S. Fish Corp. v. Eastern Area Director*, 20 IBIA 93, 97 (1991). We have only that authority that has been delegated to us by the Secretary of the Interior. 43 C.F.R. § 4.1(b)(1)(i). Here, that delegated authority allows us to review the Regional Director's decision. *Id.* But it does not allow us to hear any claims for an alleged breach of contract. *See High Desert Recreation*, 57 IBIA at 45. Nor does it allow us to award money damages against BIA or the Nation. *U.S. Fish Corp.*, 20 IBIA at 97. Such claims cannot be heard by the Board. *See Anderson v. Acting Southwest Regional Director*, 44 IBIA 218, 226-27 (2007).

Applicable Law and Rules of Construction

Interpreting leases of Indian lands is a question of Federal law. *High Desert Recreation*, 57 IBIA at 38. In the absence of applicable Federal law, however, the Board may look to state law for guidance, so long as "it does not conflict with the Federal interest

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date the Decision and do not belong in BIA's administrative record. Nevertheless, the Board has allowed parties to supplement the Board's appeal record as long as opposing parties have an opportunity to respond, *see State of California v. Acting Pacific Regional Director*, 40 IBIA 70, 71 n.3 (2004), and the Board allowed supplementation of its appeal record in this case.

in developing and protecting the use of Indian resources." *Id.*; *cf.* 25 C.F.R. § 162.109(c) ("State law may apply to agricultural lease disputes . . . if the agricultural lease so provides and the Indian landowners have expressly agreed to the application of state law."). The Board is guided by California State law in its interpretation of this Lease because the parties agreed that California State law should be applied. Lease ¶ 39 ("Notwithstanding any provision of this Lease to the contrary, and except as augmented or pre-empted by federal or tribal law, the parties intend that, in any dispute or controversy arising out of or involving this Lease, this Lease shall be construed according to the principles of the contract laws of the State of California.").

The general principles that the Board uses to interpret Indian lease terms are well-recognized:

> An Indian lease is a contract and the principles of contract construction apply to ascertain its meaning. The Board's task when construing or interpreting a contract is to determine and give effect to the intent of the parties. The starting point for discerning the intent of the parties is the language of the document itself. When the parties include language in a contract that is clear, complete, and unambiguous, that language will be given effect as expressing the complete intent of the parties, without resorting to extrinsic evidence.

Midthun v. Acting Rocky Mountain Regional Director, 48 IBIA 282, 289 (2009) (citations omitted), and cases cited therein. The Board will only consider extrinsic evidence if the lease terms are reasonably susceptible to more than one interpretation after giving them their natural and ordinary meaning. *Midthun*, 48 IBIA at 289.

Discussion

I. The Regional Director Did Not Err When She Cancelled This Lease Because Appellant Has Failed to Build This Landfill Within a "Reasonable Time."

Seventeen years ago, the Nation and Appellant struck a deal: the Nation would let Appellant build and operate a landfill on the Nation's land, and Appellant would pay the Nation rent and a share of the landfill's revenue. Seventeen years later, that landfill has not been built, Appellant has not obtained any of the permits needed to build or operate the landfill, the Nation has not received any rent or revenues, and the landfill is still years away from completion. About two thirds of the Nation's lands have been locked up in this profitless deal for nearly two decades.

Not surprisingly, the Nation wants out of the Lease. The Regional Director has the authority, both under BIA's regulations and the terms of the Lease itself, to cancel (or

"terminate") this Lease if Appellant violates its terms. The Nation asked the Regional Director to cancel the Lease, and the Regional Director concluded that Appellant violated the terms of the Lease by failing to build and begin operating this landfill within a reasonable time. (The Regional Director also concluded that Appellant violated the Lease by failing to provide certain notices required by its terms, which we address below in section II.)

We affirm the Regional Director's decision that Appellant violated the Lease by failing to timely perform. For the reasons explained below, the Regional Director did not err when she concluded that (1) this Lease required Appellant to build and begin operating this landfill within a reasonable time, (2) Appellant has not and cannot fulfill that obligation, and none of Appellant's excuses justify its failure to provide timely performance, and (3) this breach constituted both a "material breach" and a "breach of a material term" that justified cancellation of the Lease under BIA's regulations and the terms of the Lease.

A. The Lease Required Appellant to Build and Begin Operating This Landfill Within a "Reasonable Time."

The Regional Director concluded that this Lease required Appellant to provide "timely performance" and to build and begin operating this landfill within a "reasonable" time. Decision at 5. We have reviewed the Regional Director's interpretation of the Lease *de novo* and conclude that it is correct for three reasons:

First, California State law clearly provides that Appellant must perform its obligations under this Lease within a "reasonable time." The Lease itself does not set any specific deadlines for the construction of the landfill or the beginning of operations.[5] But under California State law, if no time for performance is specified, then the contract must be performed within a "reasonable time." Cal. Civ. Code § 1657 (Deering 2024) ("If no time is specified for the performance of an act required to be performed, a reasonable time is allowed."); *see also* 14A Tracy Bateman Farrell et al., California Jurisprudence 3d, *Contracts* § 258 (3d ed. 2024) ("If a contract does not specify the time when a party is to be called on to perform, a reasonable time is implied by law."); 1 Timothy Murray, Corbin

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[5] The disputes presented in this appeal might have been avoided if CIWMI, the Nation, and BIA had included specific deadlines in the Lease. Notably, BIA's regulations now require business leases for the construction of permanent improvements to include terms that "require the lessee to complete construction . . . within the schedule specified in the lease or general schedule of construction, and a process for changing the schedule by mutual consent of the parties." 25 C.F.R. § 162.417. That regulation, however, was only adopted after this Lease had already been approved by BIA.

on California Contracts § 37.01 (rev. ed. 2024) (same). This is also true under contract law generally. *See* Restatement (Second) of Contracts § 204 cmt. d (Am. L. Inst. 1981).

Second, the Lease explicitly provides that "time is of the essence," which, when no specific deadline is set, also means that it must be performed within a "reasonable time." Paragraph 22 of the Lease states:

> **Time of the essence**. Because of the potential health and economic impacts upon the [Nation] and the surrounding community should either of the parties default in the performance of their duties in a timely and efficient manner, time is agreed to be of the essence in the performance of each of the terms and conditions of this Lease. This provision is a bargained-for consideration, not a mere recital, and both parties specifically agree to be bound by it.

Where a contract provides that "time is of the essence," the traditional rule (under both California State law and contract law generally) is that any delay in performance—even by a single day—is a material breach. *See* 1 Timothy Murray, Corbin on California Contracts § 37.02 (rev. ed. 2024). The consequences of that rule can be severe, and such provisions are not commonly included in construction contracts, which are often subject to delays. 1 Timothy Murray, Corbin on California Contracts § 37.05 (rev. ed. 2024). The courts have sometimes "tempered" the traditional rule by refusing to enforce a "time is of the essence" provision if it would "work a forfeiture" on a party that performed substantially (or if it would allow another party to reap a "windfall"). *Magic Carpet Ride LLC v. Rugger Inv. Grp., LLC*, 41 Cal. App. 5th 357, 367-69 (2019).

Here, the Lease states that "time is of the essence" but then sets no specific deadline for Appellant to build and begin operating this landfill. That does not mean that the provision is meaningless: when "time is of the essence," but "no time is spelled out, a reasonable time is allowed."[6] 1 Timothy Murray, Corbin on California Contracts § 37.05 (rev. ed. 2024). Moreover, this term "manifests the parties' intentions for timely performance," *id.* § 37.02, and "when time is expressly made of the essence, equity will not ignore the provision," 14A Tracy Bateman Farrell et al., California Jurisprudence 3d,

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[6] The Regional Director lists other terms of the Lease that require prompt compliance to demonstrate the "critical nature of the Time of the essence clause." *See, e.g.,* Decision at 3 (citing ¶ 2(C) of the Lease, which requires Appellant to "comply promptly with any and all Environmental Requirements"). Because we conclude that both California State law and the "time is of the essence" clause require Appellant to build and begin operating this landfill within a "reasonable time," we need not address those other terms.

Contracts § 264 (3d ed. 2024). Thus, even though the Lease does not set a deadline for performance, the fact that the parties agreed that "time is of the essence" must be considered in determining the effect of the delays here. Restatement (Second) of Contracts § 242 cmt. d (Am. L. Inst. 1981).

Third, the California courts have held that similar contracts required performance within a "reasonable time." In *City of Stockton v. Stockton Plaza Corporation*, the City of Stockton, California, leased land to the Stockton Plaza Corporation (Stockton Plaza) on the condition that it redevelop that land by building a convention center and a motel. 261 Cal. App. 2d 639, 641 (1968). A little more than 3 years passed and Stockton Plaza, unable to obtain financing for the project, built nothing. *Id.* at 650 (noting that 40 months had passed since execution of the lease and 2 years since approval of contractor's plans). As here, the lease set no specific deadline for performance, so Stockton Plaza argued that it had the right to keep the lease alive indefinitely, as long as it was working in good faith to obtain the necessary financing. *Id.* at 642. The California Court of Appeals rejected that argument and held that, despite the lack of any specific deadline in the lease, Stockton Plaza was required to perform its obligations within a "reasonable time." *Id.* at 650 (concluding that trial court had not erred in finding that Stockton Plaza failed to perform within a reasonable time).

For these reasons, we conclude that the Regional Director correctly interpreted this Lease to require Appellant to build and begin operating this landfill within a "reasonable time." None of Appellant's arguments persuade us otherwise. Appellant argues that, because the Lease includes no "performance deadline of any kind," it was only required to "diligently attempt to keep the Leased Premises and all portions thereof actively and properly used," Opening Brief (Br.), June 24, 2019, at 2 (citing Lease ¶ 2(B)) (emphasis omitted), and that "[t]he fact that it has taken a long time is not, in and of itself, a breach of the Lease because CIWMI has been diligent," Reply to BIA's Answer, Aug. 20, 2019, at 10 (Reply Br.). But these arguments are untenable because, under both California State law and general contract law, a contract that sets no specific deadline must nonetheless be performed within a "reasonable time"—as even Appellant itself admitted before the Regional Director. Letter from Appellant to Regional Director, Dec. 10, 2018, at 2 (AR C) (Appellant citing California Civil Code § 1657 and acknowledging that "[i]t has long been held that, even when there is a time of the essence clause, in the absence of a specific time stated for performance, a reasonable time to perform will be presumed") (emphasis omitted).

Next, Appellant claims that paragraph 13 of the Lease "does not permit either party to assert claims of delay." Opening Br. at 7-8 (arguing that paragraph 13 creates "an affirmative defense to the present claimed breach of the time of the essence clause"). But paragraph 13 does nothing of the kind: it does not restrict the parties from asserting any

claims of non-performance or default, based on delay or for any other reason. Instead, it merely states that any delay by either of the parties in exercising their rights under the Lease cannot be construed to waive or impair those rights or to "alter[] in any way the parties' agreements." Lease ¶ 13. The Regional Director did not conclude, however, that Appellant's delay waived or impaired its rights or altered the Lease—she concluded that Appellant's delay is a breach of its covenants.[7] As such, paragraph 13 is not relevant here.

Finally, Appellant argues that the Regional Director cannot terminate this Lease for untimely performance because she previously stated (in the 2013 notice of termination reversed in *Cortina I*) that it would be "inappropriate" to cancel this Lease "for lack of timely development" since the Lease does not provide "a specific date for commencement of operations." Opening Br. at 5 (citing Letter from Regional Director to CIWMI, Aug. 19, 2013, at 5 (AR A – Admin Record IBIA 14-002 – Doc. No. 31)). But that statement does not persuade us to change our interpretation of the Lease, nor do we find that it binds the Regional Director. At that time, the Regional Director sought to cancel the Lease on the grounds that Appellant had violated certain warranties set out in the Lease or admitted in writing its inability to pay its debts, not on the timeliness of its performance. *Cortina I*, 61 IBIA at 341-42 (citation omitted). We are not persuaded that the Regional Director meant to decide, at that time, much less for all time, whether the Lease could be terminated for Appellant's delay in performance. And even if she did, her 2013 decision was reversed by the Board.

Moreover, under these circumstances, the Regional Director is entitled to change her mind on this issue as long as she explains the basis for her decision. *See, e.g., Hopi Indian Tribe v. Director, Office of Trust and Economic Development*, 22 IBIA 10, 16 (1992) (holding that it is long-settled law that an agency can change its interpretation of the law, so long as "any change in the agency's position" is "fully and clearly explained in order to show that the change is not arbitrary or capricious"). She has done that here, and, for the reasons explained above, we agree with her that this Lease required Appellant to build and begin operating this landfill within a "reasonable time."

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[7] BIA is not a party to the Lease and is not bound by paragraph 13's agreement by "[b]oth parties . . . not to construe the . . . delay . . . of the other party as altering in any way the parties' agreements . . . ." Lease ¶ 13.

B. The Regional Director Rationally Concluded That Appellant Has Not Built and Begun Operating This Landfill Within a Reasonable Time.

1. The Regional Director Rationally Concluded That a "Reasonable Time" to Build and Begin Operating this Landfill Was Between 10 and 17 Years.

Because we agree with the Regional Director that this Lease required Appellant to build and begin operating this landfill within a "reasonable time," we must now review the Regional Director's assessment of what a "reasonable time" was. And because that is a mixed question of law and fact entrusted to the Regional Director's discretion, we review that aspect of her decision only to ensure that it complies with the law, is supported by evidence in the administrative record, and is based on a reasoned explanation that is not arbitrary or capricious. We do not substitute our own judgment for the Regional Director's judgment. Based on our review, we conclude that the Regional Director did not err when she decided that 10 to 17 years was a "reasonable time" to build and begin operating this landfill.

Exactly what constitutes a "reasonable time" for performance depends on the totality of the facts, but the term is flexible and empowers the courts "to do justice according to the circumstances of each individual case." *City of Stockton*, 261 Cal. App. 2d at 645-46; *see also* 14A Tracy Bateman Farrell et al., California Jurisprudence 3d, *Contracts* § 258 (3d ed. 2024) ("What constitutes a reasonable time for performance is generally a question of fact which depends on the situation of the parties, the nature of the transaction, and the facts of the particular case."); *cf.* Restatement (Second) of Contracts § 242 cmt. b (Am. L. Inst. 1981) ("The importance of delay to the injured party will depend on the extent to which it will deprive him of the benefit which he reasonably expected."). Here, the Regional Director relied on three main factors: (1) the terms of the Lease, (2) a report prepared by the Nation's contractor, Tetra Tech BAS, Inc. (Tetra Tech), and (3) her own experience with major projects on Indian lands. We address each of these factors in turn.

First, the Regional Director found that the Lease itself gives some guidance on how much time is "reasonable." The initial term of the Lease is 25 years. Lease ¶ 4. (That term began to run on January 25, 2007, when the Lease was approved by BIA.) As Appellant notes, the Lease anticipates that there will be "a phase getting the project up and running," CIWMI Notice of Appeal, Apr. 4, 2019, at 4 (Notice of Appeal); for example, the Lease distinguishes between the "commencement date"—the date that the Lease is approved by the Secretary—and the "operations commencement date"—the date when the landfill will actually begin accepting waste. Lease ¶ 1(F), (R). Nonetheless, the Regional Director concluded that, by providing an initial term of 25 years, the Lease shows that the parties meant this landfill to be built and begin operating in less than 25 years, otherwise "the

facility would not open until the end of the current Lease term, leaving little opportunity for benefits to accrue to the Tribe . . . ." Decision at 5. And while the Lease provides that Appellant may renew the Lease for an additional term of 25 years at its discretion, Lease ¶ 5, nothing in the Lease suggests that the parties expected the landfill to begin generating revenues only in its second term and only if Appellant renewed the Lease. Thus, the Regional Director rationally concluded that the "reasonable time" for Appellant's performance must be less than 25 years.

Second, the Regional Director relied on a report prepared by the Nation's contractor, Tetra Tech.[8] Decision at 5. Drawing on its "more than 30 years of experience in the permitting, design, and construction of solid waste landfill facilities in California," Tetra Tech reviewed this project and concluded that it would typically take between 10 and 17 years to plan, permit, and build such a landfill on tribal lands. Tetra Tech, Cortina Integrated Waste Management, Inc. Facility Final Summary Report, June 27, 2018, at 1, 6 (Report) (attached as Exhibit A to Letter from Nation to Regional Director, July 10, 2018 (AR C)) ("Accordingly, the total timeline to permit, construct, and open the facility ordinarily ranges from 7 to 12 years. Because this facility is located on Sovereign Tribal lands, however, it is regulated by the BIA, [the United States Environmental Protection Agency (EPA)], and other federal agencies that add another layer of permitting and approvals. As a result, it is reasonable to add 3 to 5 years to the timeline, for a total range of 10 to 17 years."). Appellant cautions that Tetra Tech's estimate is based on how long it should take "generally" to build "a solid waste facility in California" and is "not Project-specific," Reply Br. at 11, but Appellant does not otherwise appear to dispute the estimate of the total time to open such a landfill (although it disputes Tetra Tech's other conclusions, as we discuss below). Tetra Tech's estimate is less than 25 years and is thus consistent with the term of the Lease. We conclude that, by relying on the Tetra Tech report, the Regional Director relied on substantial evidence in the administrative record and rationally concluded that this project should have taken between 10 and 17 years to construct.

Third, and finally, the Regional Director independently reviewed Tetra Tech's estimate and found that it was "reasonable" based on BIA's "experience with approvals for

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[8] Appellant complains that it only received a copy of the Tetra Tech report as part of the administrative record on appeal and not before the Regional Director reached her final decision and issued the notice of termination. Reply Br. at 10. Appellant does not cite any regulation, and we are aware of none, that required the Regional Director to provide CIWMI with all of the documents before she reached a decision. *See State of South Dakota v. Great Plains Regional Director*, 69 IBIA 173, 186-89 (2023) (rejecting State's argument that it was entitled to all documents considered by agency before agency made its decision); *French v. Aberdeen Area Director*, 22 IBIA 211, 214 (1992) (same).

complex and controversial projects on Indian Lands in California." Decision at 5. Taking all of this together, we conclude that the Regional Director rationally decided, based on substantial evidence in the administrative record, that it should have taken between 10 and 17 years to build and begin operating this landfill.

2. The Regional Director Rationally Concluded That Appellant Has Not and Cannot Complete This Project Within That "Reasonable Time."

Next, the Regional Director concluded that Appellant has not and likely cannot build and begin operating this landfill within the "reasonable time" of 10 to 17 years from the approval of the Lease (that is, Appellant cannot complete and begin operating the landfill between 2017 and 2024).[9] *See* Decision at 5. The Regional Director based that conclusion on three main factors.

First, the Regional Director found that Appellant had made little progress on this project so far: in the 12 years between the approval of the Lease and the Regional Director's decision, no construction was completed (except groundwater monitoring wells) and none of the permits necessary to build or operate the landfill were obtained.[10] *Id.* Based on Appellant's pace, the Regional Director concluded that the landfill could not be opened before the end of the initial Lease term, "leaving little opportunity for benefits to accrue to the Tribe from the Lease," and thus Appellant had breached its obligation to build and begin operating this landfill within a "reasonable time." *Id.*

Second, the Regional Director again relied on the Tetra Tech report. *Id.* In that report, Tetra Tech estimated that Appellant was still at least 9 to 13 years away from obtaining the necessary permits, completing construction, and beginning operations at the landfill. Report at 13. Since the Tetra Tech report was completed in June 2018, that would put the opening of the landfill somewhere between June 2027 and June 2031, at least 3 years after Tetra Tech's estimate of a "reasonable time."

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[9] The Regional Director concluded that Appellant's delay could be measured from the execution of the first Lease, in 2000, and not just from BIA's approval of the second Lease in 2007. Decision at 5 (determining that Appellant's compliance with the Lease "must be considered in light of the entire record, including attempts to obtain permits and approvals since the commencement of the First Amended (original) Lease"). Because we find that the record supports the conclusion that Appellant's delay has been unreasonable whether it is measured from 2000 or 2007, we need not resolve this issue.

[10] While it post-dates the Regional Director's decision, and we do not rely on it in affirming that Decision, we note for the sake of completeness that CIWMI does not appear to have made any further progress over the last 5 years during the pendency of this appeal.

Tetra Tech reached that estimate by analyzing all of the tasks that must be completed before Appellant can build and begin operating this landfill. Report at 5-11. Most notably, Tetra Tech found that significant additional environmental review is still needed from EPA, the County, and the U.S. Army Corps of Engineers. *Id.* at 7-9. The Regional Director agreed and adopted Tetra Tech's estimate "in reliance on the expert opinion of Tetra Tech" and based on her own knowledge of "the remaining environmental requirements under the National Environmental Policy Act, the Clean Water Act, the Clean Air Act, etc. . . . ." Decision at 5.

The record supports the Regional Director's (and Tetra Tech's) conclusion that there are years of environmental review and permitting left before this landfill can be built and begin operating. The main obstacle here seems to be the permits required by the Resource Conservation and Recovery Act (RCRA). RCRA establishes a comprehensive Federal program to regulate the handling of solid wastes. *See generally* 42 U.S.C. §§ 6901-6979b; *see also Backcountry Against Dumps v. EPA*, 100 F.3d 147, 148 (D.C. Cir. 1996). Consistent with the authority granted to it by RCRA, EPA has established national standards for municipal solid waste landfills to ensure that they are designed and operated in a way that protects human health and the environment. *Backcountry Against Dumps*, 100 F.3d at 148.

Those uniform national standards, however, do not account for all of the varied environments and local conditions where landfills may be built across the country. As a result, there are situations where alternative standards would be just as effective but more appropriate. EPA's national standards, for example, require a closed landfill to be covered with "a minimum of 18 inches of compacted clay." *See* Final Determination To Approve Site Specific Flexibility for the Cocopah Landfill, 85 Fed. Reg. 53176, 53177 (Aug. 28, 2020) (Cocopah Landfill Determination). In a hot and dry state such as Arizona, however, that clay cover might dry out and crack, allowing "increased infiltration along the cracks." *Id.* In that situation, EPA has recognized the limitations of its national standards and approved an alternative cover better able to withstand the Arizona weather. *Id.*

EPA has generally delegated the authority to approve these more flexible alternative standards to the states. *Backcountry Against Dumps*, 100 F.3d at 149. The states, however, do not have regulatory authority over Indian Country, and thus the State of California cannot approve any alternative standards for the landfill at issue here. EPA tried to delegate the authority to approve alternatives to the tribes, but at least one court found that delegation to be inconsistent with RCRA (which, according to the court, limits delegation of permitting authority to the states and defines Indian tribes as "municipalities," not states). *Backcountry Against Dumps*, 100 F.3d at 151-52.

EPA can still approve alternative standards for landfills in Indian Country, but the process is much more cumbersome because the agency must promulgate a specific

regulation for each landfill. *Id.* at 152; *see, e.g.,* Cocopah Landfill Determination, 85 Fed. Reg. at 53176 (adopting alternative standards for the final cover system for a landfill in Indian Country). A landfill operator in Indian Country that wants to use such an alternative standard must submit a "site-specific flexibility request" (SSFR) to EPA, which, if EPA approves it, becomes a "site-specific flexibility determination." Cocopah Landfill Determination at 53177; *see generally* EPA, Draft Guidance for Site-Specific Flexibility Requests for Municipal Solid Waste Landfills in Indian Country, EPA 530–R–97–016 (August 1997) (Draft Guidance).[11] It can take years to develop an SSFR and have it approved by EPA. *See, e.g.,* Cocopah Landfill Determination at 53177 (approving alternative cover system for landfill about 10 years after project operator began to work with EPA on SSFRs).

Here, Appellant submitted draft SSFRs to EPA in September 2009, including requests for an alternative liner and for permission to build the landfill in an area with seismic activity. Notice of Appeal at 2. As EPA has explained, there are eight major steps left before it can complete its review and approve (or disapprove) those SSFRs. Letter from EPA to Nation, Aug. 4, 2017, at 2-3 (AR C). Those steps include, in addition to the review required by RCRA itself, the preparation of a supplemental environmental assessment or environmental impact statement under the National Environmental Policy Act (NEPA), consultation with the U.S. Fish and Wildlife Service under the Endangered Species Act (ESA), and consultation with State and Tribal historic preservation officers under the National Historic Preservation Act (NHPA). *Id.* EPA will also be required to provide public notice, conduct a public hearing, and take and respond to public comment. *Id.* at 2.

Appellant may need other permits too: a Tribal minor new source review permit under the Clean Air Act, *id.* at 2; a National Point Discharge Elimination System (NPDES) permit under the Clean Water Act, *id.* at 3; a revised Section 401 certification under the Clean Water Act, *id.*; and fill permits under Section 404 of the Clean Water Act from the U.S. Army Corps of Engineers, *id.* At the time that the Regional Director made her Decision, Appellant had obtained none of these permits (and, as far as the record shows, Appellant still has not obtained any of them). Drawing on Tetra Tech's report, and BIA's own experience with these environmental laws, the Regional Director concluded that it would likely take between 9 and 13 years to finish this permitting process and build and begin operating the landfill. Decision at 5. The record supports the Regional Director's conclusion.

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[11] This guidance is available at https://www.epa.gov/system/files/documents/2022-05/siteflex.pdf. A copy has been added to the record on appeal.

Appellant does not dispute that it still needs to complete these regulatory steps, but it rejects Tetra Tech's estimate of 9 to 13 years as "nothing more than speculation" and "wrong, or at the very least misguided." Notice of Appeal at 4. According to Appellant, Tetra Tech has overestimated how long the process will take because it has failed "to take into account that the remaining tasks . . . can occur simultaneously, once the SSFRs are processed." Reply Br. at 11. Appellant "estimates that the first landfill cell could be operational as soon as 24 months from [the Nation's environmental agency's] approval of the SSFRs and re-submittal to EPA." Notice of Appeal at 4; *see also* Opening Br. at 7 (claiming that "construction could commence within 18 months after final approval of the SSFRs").

But Appellant does little to substantiate its claim that—with no permits and nothing built 12 years after the Lease was approved—the whole project could now be completed in just 2 years. It submits a one-page project timeline prepared by its consultants, SCS Engineers, that purports to show that the landfill could be built and operating within about 23 months. Notice of Appeal, Attachment (Attach.) U. But there are problems with that timeline, several of them fatal. Most importantly, this timeline was not submitted to the Regional Director before she made the Decision being appealed here: the document is dated March 29, 2019, and the Regional Director issued her notice of termination on March 1, 2019. The Board has a well-established general rule that it will not consider arguments or issues raised for the first time on appeal to the Board. *See, e.g., Benewah County, Idaho v. Northwest Regional Director,* 55 IBIA 281, 295 (2012) (refusing to consider issues that were not put before the Regional Director and that were based on "post-decisional data"); *Wind River Alliance v. Rocky Mountain Regional Director*, 52 IBIA 224, 227-29 (2010); *see also* 43 C.F.R. § 4.318. Appellant cannot show that the Regional Director erred by failing to consider a timeline that was never presented to her in the first place.

Moreover, even if this timeline had properly been before the Regional Director, it expressly states that it omits significant aspects of the permitting process: "Schedule excludes federal Clean Water Act Section 404 and NPDES permits" and "State/County roadway improvement permitting and construction," and it "assumes the project will be considered a 'minor source' for federal air permitting purposes . . . ." Notice of Appeal, Attach. U. Nothing in the timeline attempts to justify these assumptions. Thus, by its own admission, the timeline underestimates how long it will take to build and begin operating the landfill.

Appellant's timeline also does not respond to Tetra Tech's report in any substantive way: it merely advances, without explanation, its own counter-estimates of how long each stage in this process might take. But many of its estimates do not appear to be credible: for example, the timeline estimates that it will take EPA only 6 months to review and approve

the SSFRs. As EPA itself has explained, however, the remaining steps in the process to approve these SSFRs are significant: they require EPA to promulgate a new regulation through public notice and comment rulemaking and, in doing so, to comply with the agency's consultation obligations under the ESA and the NHPA, and to prepare a supplemental environmental analysis under NEPA. Letter from EPA to Nation, Aug. 4, 2017, at 1-2 (AR C). Nothing in the record or in Appellant's submissions here plausibly explains how that is likely to be accomplished in just 6 months. And Appellant's timeline is also not credible because it has been making these same claims for years now, despite the lack of progress and even in the face of the significant permitting work that still needs to be done: when BIA decided to terminate this Lease in 2013 (the termination we reversed in *Cortina I*), Appellant argued that the landfill could be permitted, built, and begin operations within 18 months. Letter from Appellant to Regional Director, Apr. 29, 2013, at PDF 37 (AR A – Admin Record 14-002 – Doc. No. 23). Of course, that did not happen, and, as the Regional Director noted, "the time elapsed speaks for itself," Decision at 5: EPA has had Appellant's SSFRs since 2009 and had not completed any of the steps described above even though a decade passed before the Regional Director issued her notice of termination. Neither Appellant nor its timeline explain why it is now credible to believe that EPA could complete this work in just 6 months.

Third, and finally, the Regional Director found that "timely performance may not be possible due to the need for [Appellant] to obtain . . . access to the construction site, which the record reflects is likely to be impossible to obtain."[12] Notice of Violation at 2. As Appellant notes, there are already roads that provide access to the Nation's lands and the proposed site of the landfill. Letter from CIWMI to Regional Director, Dec. 10, 2018, at 5 (AR C) (noting that, "[c]urrently, there is access to the Leased Premises over the existing road for construction and operation . . ."). But BIA has found that those rural roads, in their current state, cannot safely support the kinds of large trucks that will carry waste to the landfill once it is operational. Cortina Integrated Waste Management Project Final Environmental Impact Statement, September 2000, at 3.7-1 to 3.7-4, 4.7-12 to 4.7-14 (FEIS) (AR A – Admin Record IBIA 01-32-A and 01-36-A – E – Doc. No. 8); Record of Decision Cortina Integrated Waste Management Project, Attach. A, ¶ 10 (at PDF 13-15) (ROD) (AR A – Admin Record IBIA 01-32-A and 01-36-A – E – Letter from Greg Amaral to Margo Landers, BIA, Nov. 29, 2000, Attachment). As such, BIA identified mitigation measures that Appellant must undertake (in cooperation with the County and

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[12] The Regional Director also concluded that CIWMI breached paragraph 17(A)(5) of the Lease by failing to notify the Nation about the difficulties surrounding access to the site. Decision at 3. We address that conclusion below in section II; here, we address only the distinct finding that CIWMI's failure to obtain access is further evidence that it has not and cannot fulfill its obligations under the Lease within a reasonable time.

the California Department of Transportation) to ensure that these roads can safely support the project. ROD, Attach. A at ¶ 10; *see also* CIWMI Resp. to NOV at 5 (conceding that "road 'improvements' will be made as per the BIA mitigation letter and the Lease").

As an example, BIA found that there is a barn located immediately next to the road surface of Spring Valley Road (the "Marsh barn") that creates a potential safety issue, FEIS at 4.7-11, and so it required Appellant to either realign the road to provide "thirty feet of clearance between the edge of the traveled way" and the barn (as suggested by Federal traffic safety standards) or, in the alternative, to reach an agreement with the landowner to relocate or demolish the barn. ROD ¶ 10(e)(vii) (at PDF 15); FEIS at 4.7-14. Thus, Appellant must either obtain the consent of the landowner (who owns not only the barn, but also the land over which Appellant would need a right-of-way to realign the road), or it must persuade the County to condemn the land using its power of eminent domain. BIA revised some of these mitigation measures in 2008 when Appellant identified an alternative route to the landfill, but it did not lift the requirement to avoid the Marsh barn. Letter from Regional Director to Nation & CIWMI, Apr. 28, 2008, at 1-2 (AR A – Admin Record IBIA 14-002 – Doc. No. 8).

When she made her Decision to terminate this Lease, the Regional Director found that Appellant had still not secured the lands necessary to avoid the Marsh barn even though 19 years had passed since BIA first identified these mitigation measures. Decision at 6. The Regional Director found that it is "likely to be impossible to obtain" those lands now because the landowner has refused to sell to Appellant and the County may or may not ultimately be willing to condemn that land in the face of the conflict between Appellant and the landowner. Notice of Violation at 2; Decision at 5-6; *see also* Report at 9-11. The record also shows that Appellant has apparently abandoned its efforts to convince the County to condemn these lands (at least for now). Report at 7, 9-10 (stating that Appellant applied for condemnation and various County permits in 2014, but the County considers those applications withdrawn because Appellant failed to pay the relevant fees); County's Answer Br., July 24, 2019, at 5 (confirming that County regards applications as withdrawn). For all these reasons, the Regional Director concluded that, "[a]s it stands today, 23 years after commencement of the original Lease, CIWMI is still unclear whether adequate access can ever be obtained for the facility," and this failure to develop an access route breached Appellant's obligation to act "in a timely manner." Decision at 6.

In response, Appellant argues that its failure to secure these lands is no evidence of delay but only shows that it has prioritized other aspects of this project over access: more specifically, it claims that it has focused on getting EPA to approve its SSFRs first because that permitting process might also require changes in road design. Reply Br. at 16 (contending that it "makes no business sense for CIWMI to invest in roadways and access permits when there is a possibility of design changes that could impact those very things");

see also Notice of Appeal at 5 ("Federal requirements are the critical items that must be obtained prior to these actions. It is not a material breach of the Lease for [Appellant] to prioritize actions differently than those suggested in the Termination Letter."). There may be some truth to that argument, although it is not clear how the RCRA permitting process would change the need to avoid the Marsh barn. But even so, Appellant has not made much progress in obtaining its RCRA permits either. Given all these facts, we conclude that it was not error for the Regional Director to take Appellant's failure to obtain access as further evidence that it has not and cannot fulfill its obligations under the Lease within a "reasonable time."

* * *

In short, the Regional Director concluded that Appellant has not and likely cannot fulfill its obligations under this lease within a "reasonable time" because, 12 years after the approval of the Lease: (1) it still had not obtained any of the necessary permits or begun construction; (2) it was still at least 9 to 13 years away from beginning operations; and (3) it still had not secured the land needed to allow safe access to the landfill site. While reasonable people might disagree about exactly how long it could take to complete this project, the Regional Director did not err by relying on the estimates prepared by Tetra Tech and her own extensive experience with the permitting of projects in Indian County, nor do Appellant's estimates show that she erred, especially in light of Appellant's failure to make progress on any aspect of this project. For all the reasons discussed above, we find that her conclusions are rational and supported by substantial evidence in the record.

3. None of Appellant's Excuses Justify Its Failure to Perform Within a Reasonable Time.

Next, Appellant argues that it has not breached the Lease, even if the landfill has been delayed, because it has been working diligently on this project and the delays are not its fault. *See, e.g.,* CIWMI Resp. to NOV at 2-4. The Regional Director dismissed Appellant's excuses, finding that, while some delays have been "beyond CIWMI's control," Appellant was nonetheless required by the Lease to "undertak[e] a comprehensive plan for approval that anticipates possible delays from regulatory bodies, reduces those delays, and keeps all processes moving simultaneously to the extent possible to achieve the requirement of completing construction in a timely and efficient matter." Decision at 5. The Regional Director found that Appellant had not done that—"[i]n this case the time elapsed speaks for itself"—and thus concluded that Appellant breached the Lease by failing to perform within a reasonable time. *Id.*

We review the Regional Director's conclusion to ensure that it complies with the law and is based on substantial evidence in the record. Reviewing the terms of the Lease itself,

we find that Appellant's delays are not "excusable delays" as the Lease defines that term. Then, reviewing each of Appellant's excuses, we conclude that the Regional Director did not err by rejecting them.

a. These Delays Are Not "Excusable Delays" as Defined by the Lease.

The Lease recognizes that some delays may be excusable. Lease ¶ 1(J) (defining "Excusable Delay"); Lease ¶ 23(F) ("The failure of CIWMI to comply with any obligation herein shall not be deemed an Event of Default if the failure results from Excusable Delay . . . ."). It includes a clause that defines "excusable delay" to include force majeure conditions "beyond a party's control" such as (1) "acts of the elements" like a "major fire, flood, [or] earthquake"; (2) "prohibitory judicial, legislative, or administrative action by any civil or military authority"; (3) "strike, lockout, or other incapacitating labor dispute"; (4) "riot, insurrection, sabotage, or war"; or (5) "massive breakdown of or damage to any facilities or equipment . . . ." Lease ¶ 1(J).

No party argues that Appellant's delay here is the result of these kinds of "acts of God," and we conclude that it is not. None of the delays identified by Appellant (such as the Nation's attempts to cancel the Lease) are explicitly listed as "excusable delay." *Cf. City of Stockton*, 261 Cal. App. 2d at 650-51 (concluding that delays in obtaining financing were not excused under the lease because they were not included on list of excusable delays). Most of the conditions listed in the definition are obviously inapplicable: Appellant does not claim, for example, that it has been delayed by flood, strike, or war. And while Appellant argues that it has been delayed by EPA's failure to approve its RCRA permits, that is (at most) a failure to act and not a "prohibitory action" by EPA. Thus, we conclude that there has been no "excusable delay" as defined by the Lease.

b. The Nation's Attempts to Cancel the Lease Did Not Excuse Appellant from Timely Performance.

Appellant argues that the Nation has been "the main obstacle and cause of the delay" because the Nation "has moved to cancel the Lease" "[e]ach time that the SSFRs have been on the cusp of completion." CIWMI Resp. to NOV at 4-5 (emphasis omitted). Appellant contends that the Nation's previous attempt to terminate the Lease was "32 months of needless delay all caused by the Tribe." *Id.* at 3 (emphasis omitted). Appellant seems to believe that it was excused from its obligations under the Lease during "the time between the [Nation's] Notice of Default in 2013 and the final Decision by the IBIA . . . in 2015," *id.* at 3, and that its failure to make any progress on the landfill during those 32 months cannot be held against it.

The Regional Director rejected Appellant's argument, concluding that "the attempts by the Tribe to terminate the lease in 2012 . . . do not excuse CIWMI of its obligations to comply with the Lease's Time of the essence provision and related provisions." Decision at 4 (citing Lease ¶ 13). The Regional Director is correct as matter of law. The Regional Director issued a notice of termination for this Lease in 2013, but that termination never became final and effective and thus the Lease was never terminated. By operation of law, a regional director's decision that is timely appealed automatically remains without effect, unless made effective by the Board. *See* 25 C.F.R. § 162.470 ("The cancellation decision will not be effective if an appeal is filed unless the cancellation is made immediately effective under part 2 of this chapter."); 43 C.F.R. § 4.314(a); *Hamaatsa, Inc. v. Southwest Regional Director*, 55 IBIA 132, 134 n.4 (2012). The Board, of course, reversed the 2013 notice of termination and so it never went into effect. (Similarly, Appellant timely appealed the Regional Director's 2019 notice of termination and it remained ineffective until the issuance of this decision.)

Because the Lease was never terminated, it did not need to be "reinstated" and was always in effect and binding on the parties. Thus, Appellant continued to be bound by its terms during the 32 months of the previous appeal (and continued to be bound by its terms during the present appeal until the issuance of this decision). That is explicitly stated in BIA's regulations: "[w]hile a cancellation decision is ineffective, the lessee must continue to pay compensation and comply with the other terms of the lease." 25 C.F.R. § 162.470. The Regional Director's 2013 notice of termination acknowledged that the termination would only become effective if no appeal was filed, and the 2019 notice of termination says so explicitly. Letter from Regional Director to CIWMI, Aug. 19, 2013, at 6 (AR A – Admin Record IBIA 14-002 – Doc. No. 21) ("If no appeal is timely filed, this decision will become final for the Department of the Interior at the expiration of the 30-day appeal period."); Decision at 6 ("If you file a notice of appeal, this decision will not be effective . . . ."). Thus, Appellant remained obligated to perform under this Lease even after it received the notice of termination in 2013, and, if it chose to delay its efforts, that delay is its responsibility and not the Nation's (just as the Nation's failure to perform any of its obligations during that period would be the Nation's responsibility). BIA correctly rejected Appellant's claim that its delays should be excused as a result of the Nation's failed effort to terminate this Lease in 2013.

c. The Nation's Delay in Reviewing the SSFRs Did Not Preclude Appellant's Timely Performance.

Next, Appellant argues that the Nation is responsible for this delay because it has been "intentionally dilatory" in fulfilling its obligations under the Lease. Opening Br. at 4; *see also* Reply Br. at 3 (claiming that the Nation "intentionally delayed necessary Tribal approvals"). Appellant claims that the Nation refused to cooperate with Appellant for a

period of about 31 months, from October 2015, when the Board reversed the previous termination decision, to April 2018, when Appellant concedes that the Nation was acting in conformance with the Lease, *see, e.g.,* Notice of Appeal at 3 (acknowledging that the Nation "has been acting in conformance with the Lease" since its April 2018 response to Appellant's demand for assurances).

Appellant, however, does little to explain what obligations the Nation failed to fulfill under the Lease or how it was "intentionally dilatory." Appellant provides a detailed chronology of events beginning on February 9, 2017. Reply Br. at 6-10. But most of the events listed do not show that the Nation was dilatory. For example, Appellant reports that, on February 16, 2017, the Nation demanded proof that Appellant was carrying the insurance required by paragraph 25 of the Lease, and Appellant provided that proof a little more than 3 months later, on May 5, 2017. Reply Br. at 6-7. Nothing about that shows that the Nation was dilatory or explains why Appellant could not continue to pursue other aspects of the project during that period.

In its most concrete example, Appellant claims that the Nation's environmental agency (the Wintun Environmental Protection Agency, WEPA) delayed its review of Appellant's revised draft SSFRs. Reply Br. at 9. But Appellant's own brief shows that Appellant submitted those SSFRs to WEPA on March 2, 2018, and that the Nation had, by April 16, 2018, committed itself to reviewing them and providing technical comments. *Id.* Over the next year, as Appellant explains, the Nation retained a consultant, reviewed the SSFRs, and provided its comments to Appellant. Notice of Appeal at 3. Appellant does not allege that the Nation delayed its review after April 2018—to the contrary, it explicitly concedes that the Nation "has been acting in conformance with the Lease" since then. *Id.* Thus, even if true, Appellant has documented only a little more than a month of delay by the Nation. Given that the Regional Director rationally concluded that Appellant could not complete this project within its first 25-year term, that month of delay is not significant and does not show that the Regional Director erred.

Appellant also argues that the Nation was dilatory from October 2015 through the submission of the draft SSFRs in February 2017, but it fails to identify any specific actions that the Nation was required to take by the Lease that it allegedly delayed. Instead, Appellant makes only the broad argument that the Nation "refused to acknowledge that the Lease was in good standing" during that period. Reply Br. at 5. Appellant claims that an October 31, 2016, letter from its counsel "describes with detail . . . its frustration with the Nation's passivity since the Lease was reinstated." *Id.* at 5-6 (emphasis omitted). But that letter only reports that the Nation failed to respond to Appellant's letters (the Nation's alleged "passivity"); it does not allege that the Nation failed to take actions required by the Lease. Letter from CIWMI to EPA & BIA, Oct. 31, 2016, at 2-3 (AR C). Moreover, the letter mostly documents EPA's failures to act on Appellant's various submissions (which we

discuss below in section I.B.3.d), not any failures by the Nation. *Id.* Another letter in the record from Appellant's counsel suggests that the Nation's failure to recommit itself publicly to the landfill may have discouraged potential investors and made it more difficult for Appellant to raise funds. Letter from CIWMI to Nation, May 6, 2016 (AR C – Letter from CIWMI to EPA & BIA, Oct. 31, 2016, Attach. at PDF 14-15) (claiming that the Nation's "continued silence regarding the restoration of the lease . . . would make it virtually impossible for CIWMI to raise the necessary funds to pursue the project . . ."). But it is not clear that the Nation's silence violated the terms of the Lease or that it somehow delayed Appellant from continuing to pursue the necessary permits or taking the other steps needed to build and begin operating this landfill within a reasonable time.

The Regional Director terminated this Lease because, 12 years after it was first approved, Appellant had not obtained any of the necessary permits and was still 9 to 13 years away from beginning operations. Appellant has shown that the Nation may be responsible for some delay itself. But that is not enough to show that the Regional Director erred because the Nation's delay makes up such a small part of the overall delay (months out of years) and the Regional Director acknowledged that some of the delay was beyond Appellant's control. *See* Decision at 5. Moreover, even if Appellant had shown that it should be credited for 31 months of delay by the Nation, it still would not be on track to fulfill its obligations under the Lease within a reasonable time (because, at most, that "reasonable time" runs out in January 2024 and, even with 31 months credit, Appellant would probably not be able to open this landfill until late in 2024).

d. EPA's Delay in Approving the SSFRs Did Not Excuse Appellant from Timely Performance.

The Regional Director decided to terminate this Lease, in part, because Appellant has not obtained the permits needed to build and operate this landfill and it appears that it will take "at least twice and possibly as much as three times as long as reasonable" to do so. Decision at 5. Appellant counters that it cannot be blamed for delays that have been "largely due to the federal permitting process" and that "it is the United States government, as a whole, that is responsible for much of the delay." Reply Br. at 2, 5 (citations and internal quotation marks omitted).

We find that the Regional Director did not err. It is certainly true that EPA's review of the SSFRs has taken a long time. But Appellant knew or should have known before this Lease was signed that obtaining RCRA permits for landfills in Indian Country would be a complex and time-consuming process. And while Appellant blames EPA for these delays, BIA concluded instead that Appellant was also partly responsible because it failed to anticipate and reduce those delays. Decision at 5; *see also* Report at 6 (concluding that Appellant is responsible for the delay in obtaining the RCRA permits because it did not

form "a comprehensive coalition of agencies and the Tribe and agree on an effective regulatory framework for obtaining necessary approvals").

In any event, we need not decide who is to blame because Appellant accepted the risk of regulatory delay when it signed this Lease. As the Regional Director noted, Appellant expressly agreed in this Lease to obtain all of the permits needed to build and operate this landfill, Lease ¶ 3(B), and, under California law, necessarily agreed to do so within a reasonable time. When it failed to accomplish that, Appellant breached this contract, even if it was not at fault. *See* Restatement (Second) of Contracts § 235 (Am. L. Inst. 1981) ("When performance is due, however, anything short of full performance is a breach, even if the party who does not fully perform was not at fault . . . ."); *see also, e.g.*, 2 Steven G.M. Stein, Construction Law ¶ 6.09[1] (2024) ("Unless the circumstances preventing timely performance rise to the level of legal impossibility or commercial impracticability, the contractor shoulders responsibility even for those unforeseen delays which occur without fault of the contractor."); *City of Stockton*, 261 Cal. App. 2d at 650 (holding that lessee breached contract by failing to build hotel and convention center within reasonable time, even though that failure was not lessee's fault). Thus, regardless of who is to blame, we find that EPA's delays did not excuse Appellant from timely performance, and the Regional Director did not err when she found that Appellant breached this Lease by failing to perform within a reasonable time even in light of these regulatory delays.

e. Appellant's Alleged Diligence Did Not Excuse It from Timely Performance.

Finally, Appellant argues that that it cannot be blamed for delays in this project because it has always acted diligently. CIWMI Resp. to NOV at 2-4; Opening Br. at 3-5; Reply Br. at 6-13. To prove its diligence, it provides chronologies of its efforts to obtain permits and the other steps that it has taken to complete the project. CIWMI Resp. to NOV at 2-4; Reply Br. at 6-13.

The Regional Director disagreed, finding that Appellant had not exercised "reasonable diligence or effort," Decision at 5, and Appellant has not shown that the Regional Director erred. There are significant gaps in Appellant's own chronologies. For example, Appellant's chronology shows that it did nothing to advance this project for 3 years, from 2013 through 2015. *See* CIWMI Resp. to NOV at 2-3 (documenting Appellant's efforts from 2007 through 2012 and from 2016 through 2018, but identifying no steps that Appellant took between 2013 and 2015). And while Appellant apparently maintains that it was not bound by the Lease during that period, we have already rejected that argument above in section I.B.3.b.

In other years, Appellant's accomplishments do not suggest diligence: in 2011, for example, the only step that Appellant reports that it took toward the completion of this project was preparing a "response to public comments." *Id.* at 2. In 2012, its only accomplishment is listed as "Air Permit EPA – SCS Engineers," *id.*, presumably referring to the preparation of an application for a Clean Air Act permit by its consultants. In 2016, Appellant states that it retained a contractor and prepared a "scope of work and budget to provide support services." *Id.* at 3. Taking a full year to complete such activities does not suggest diligence, and Appellant does not explain why it would. Moreover, as the Regional Director reasonably found, diligence required Appellant to keep "all processes moving simultaneously to the extent possible," Decision at 5, and Appellant has not shown that it did so.

In any event, we need not decide whether Appellant was diligent because that question is not relevant here. While the Lease includes terms that require Appellant's diligence, the Regional Director did not find that Appellant had breached those terms. *See* Lease ¶ 2(B) (requiring Appellant to "diligently attempt to keep the Leased Premises and all portions thereof actively and properly used"). Instead, the Regional Director concluded that Appellant breached this Lease because it had not performed within a reasonable time. And while Appellant maintains that the Lease sets no deadlines and "calls only for diligent efforts by Appellant," Opening Br. at 5 (emphasis omitted), we have rejected that argument above in section I.A. Thus, we conclude that, even if Appellant was diligent, the Regional Director did not err by finding that it breached this Lease by failing to perform within a reasonable time.

* * *

None of Appellant's excuses justify its failure to perform within a reasonable time: (1) no party argues that force majeure prevented Appellant from fulfilling its commitments; (2) the Nation's previous attempt to cancel the Lease was unsuccessful and did not excuse Appellant from its obligations; (3) the Nation's delays were not significant; (4) EPA's review of the RCRA permits has taken a long time, but Appellant accepted the risks of regulatory delay; and (5) Appellant's diligence (or lack thereof) does not change the fact that it has failed to perform within a reasonable time. The Regional Director did not err when she rejected Appellant's excuses and concluded that Appellant breached the Lease.

C. The Regional Director Did Not Err by Terminating the Lease Based on This Breach.

For the reasons discussed above, we have found that the Regional Director did not err when she concluded that (1) this Lease required Appellant to build and begin operating this landfill within a reasonable time, (2) Appellant has not and cannot fulfill that obligation, and (3) none of Appellant's excuses justify its failure to provide timely performance. The Regional Director then found that, by failing to perform within a reasonable time, Appellant had committed a "material breach" of the Lease, Notice of Violation at 3, and "breached a material term," Decision at 1, and terminated the Lease based on that breach.

We conclude that she did not err by doing so. The Lease empowers the Nation to ask BIA to terminate the Lease if Appellant defaults "in the performance of any material covenant, warranty, or condition . . . ." Lease ¶¶ 23(A)(3) (defining "Event of Default"), 23(B)(1) (authorizing the Nation to ask BIA to terminate the Lease "[s]hould an Event of Default occur, and the Secretary being satisfied that there has been a violation of this Lease by CIWMI . . ."). BIA's regulations, in turn, allow the agency to cancel a lease for any breach of contract. 25 C.F.R. §§ 162.467(c) (authorizing BIA to terminate leases for uncured violations), 162.003 (defining "violation" to include any "failure to take an action . . . when required by the lease, or to otherwise not comply with a term of the lease")[13]; *see generally id.* § 162.466 ("What will BIA do about a violation of a business lease?").

The Regional Director concluded that Appellant "breached a material term" of the Lease by failing to build and begin operating this landfill within a reasonable time. Decision at 1. More specifically, the Regional Director found that Appellant had breached the Lease's "time is of the essence clause," which provides:

> Time of the essence. Because of the potential health and economic impacts upon the [Nation] and the surrounding community should either of the parties default in the performance of their duties in a timely and efficient manner, time is agreed to be of the essence in the performance of each of the terms and conditions of this Lease. This provision is a bargained-for consideration, not a mere recital, and both parties specifically agree to be bound by it.

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[13] BIA's regulations require the regulatory definition of "violation" to be applied for the purposes of BIA's enforcement of a lease "no matter how 'violation' or 'default' is defined in the lease." 25 C.F.R. § 162.003 (definition of "violation").

Lease ¶ 22. The Regional Director concluded that the "time is of the essence" clause is a "material term" of the Lease that "speaks to the core purpose of the agreement," Decision at 2, and its breach "resulted in frustration of the Lease purpose, which was both to construct and operate the facility, and to benefit the Tribe," Notice of Violation at 1. The "material nature" of this clause, the Regional Director found, is "demonstrated by the numerous requirements within the Lease for timely action by Appellant," Decision at 3, and by the "structure of the Lease" itself, which provides for "planning, construction, and operation with revenues and royalties accruing to the Tribe and CIWMI," *id.* at 4.

We review the Regional Director's interpretation of the Lease *de novo* and conclude that it is correct. As the Regional Director found, the "core purpose" of this Lease was to use the Nation's land to build and operate a landfill for the mutual economic benefit of the Nation and Appellant. *See City of Stockton*, 261 Cal. App. 2d at 650 (upholding termination of contract for failure to perform within a reasonable time because failure "thwarted" the "principal object of the lease, the prompt construction of a first rate, downtown hotel and convention center . . ."). When Appellant executed this Lease, it agreed that "time is of the essence" and that its timely performance was essential because delay would have "economic impacts" on the Nation. *See* Lease ¶ 22. Appellant expressly denied that this "time is of the essence" clause was a "mere recital" and thus we cannot now conclude that the term is immaterial. *See* 1 Timothy Murray, Corbin on California Contracts § 37.02 (rev. ed. 2024) ("The traditional view in California is that when time is made of the essence of a contract, a failure to perform within the time specified is a material breach of the contract.") (internal quotation marks omitted).

The Regional Director also found that Appellant committed a "material breach." Notice of Violation at 3. This is a mixed question of fact and law, and we conclude that the Regional Director's determination is rational, complies with the law, and is supported by substantial evidence in the record. It is black-letter contract law that anything short of full performance—including both defective performance and absence of performance—is a breach of contract. Restatement (Second) of Contracts § 235 (Am. L. Inst. 1981). But not every breach of contract is a "material breach."[14] Nonetheless, the traditional rule,

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[14] By its own terms, this Lease does not limit termination to "material breaches," but rather allows termination for any breach of a "material covenant, warranty, or condition." Lease ¶ 23(A)(3). Similarly, BIA's regulations do not limit termination to a "material breach," but rather allow termination for any "violation." 25 C.F.R. § 162.467(c) (authorizing BIA to terminate leases for uncured violations); *see id.* § 162.003 (defining "violation" to include any "failure to take an action . . . when required by the lease, or to otherwise not comply with a term of the lease"). Because the Regional Director concluded that this breach was both material and a breach of a "material term," we need not decide whether this Lease

(continued...)

under both California State law and contract law generally, is that any delay in performance is a material breach if the contract includes a "time is of the essence" clause. 1 Timothy Murray, Corbin on California Contracts § 37.02 (rev. ed. 2024). Because the Lease includes such a clause, Appellant's failure to perform within a reasonable time is necessarily a material breach.

Some courts have tempered the traditional rule by refusing to enforce a "time is of the essence" clause if it would either "work a forfeiture" on a party that has performed substantially or would allow the non-breaching party to reap a "windfall." *See, e.g., Magic Carpet Ride*, 41 Cal. App. 5th at 367, 369; *see also* 1 Timothy Murray, Corbin on California Contracts § 37.02 (rev. ed. 2024). But those are "exceptions to the rule" and, "[g]enerally, a time is of the essence clause manifests the parties' intentions for timely performance." 1 Timothy Murray, Corbin on California Contracts § 37.02 (rev. ed. 2024). In any event, the Nation will not reap a windfall here—to date, it has been deprived of the economic benefit that it reasonably expected. *See* Restatement (Second) of Contracts § 241 (Am. L. Inst. 1981) (listing as a factor to consider in determining whether a breach is material: "the extent to which the injured party will be deprived of the benefit which he reasonably expected"). And while Appellant claims that it will suffer forfeiture (because it will not be able to recover the money that it has so far invested in this project, *see, e.g.,* CIWMI Resp. to NOV at 5), none of that alleged forfeiture will accrue to the benefit of the Nation because almost nothing has been built and no permits have been obtained.

Alternatively, we can decide the scope of this breach by looking at the "flip side" of "material breach": "substantial performance." 2 Timothy Murray, Corbin on California Contracts § 53.04 (rev. ed. 2024). If a party fails to perform substantially, that failure is "necessarily . . . material." *Id.* (internal quotation marks omitted). Conversely, if a party's performance is "defective" but "substantial," then its breach is necessarily "immaterial." *Id.* Thus, the criteria for determining material breach and substantial performance can be used "interchangeably." *Id.*

Here, Appellant cannot show "substantial performance" and therefore cannot show that its breach is immaterial. This is not a case where Appellant obtained the permits and built the landfill, but missed the deadline because the project took longer than a "reasonable time." *See, e.g., Magic Carpet Ride*, 41 Cal. App. 5th at 364 (observing that a breach may be immaterial "when a party performs but misses a deadline"). Instead, Appellant has not built any significant part of the landfill and has not obtained any of the necessary permits.

(...continued)
could be cancelled for an immaterial breach of a material term (or a material breach of an immaterial term).

Because Appellant's performance is not substantial, it necessarily follows that its breach is material. We hold that the Regional Director did not err when she terminated this Lease based on Appellant's "material breach" of a "material term."

* * *

Taking all of this together, we hold that the Regional Director did not err by terminating this Lease based on Appellant's failure to build and begin operating this landfill within a reasonable time.

II. The Regional Director Erred by Terminating the Lease for a Violation of Paragraph 17(A)(5) Without First Providing Notice of That Violation to Appellant.

The Regional Director also terminated the Lease on the basis that Appellant had committed a material breach of paragraph 17(A)(5). Decision at 3. Paragraph 17(A)(5) of the Lease provides that "CIWMI shall promptly advise the [Nation] in writing of . . . CIWMI's discovery of any occurrence of condition on any real property adjoining or in the vicinity of the Leased Premises that could cause the Leased Premises . . . to be subject to any restrictions on the ownership, occupancy, . . . or use of it under any Environmental Requirements." Appellant must still obtain approvals from the County and the California Department of Transportation, as well as the agreement of local landowners (or agreement by the County to exercise its power of eminent domain), to make the road improvements needed to allow trucks to travel safely to the landfill site. The Regional Director found that it "appears that even if the facility were constructed, access to the facility will not be granted by the County due to reasons that may include County environmental concerns . . . ." Decision at 6. The Regional Director then concluded that Appellant had breached the Lease by failing to notify the Nation under paragraph 17(A)(5) that it would not be able to obtain safe access to the landfill site. *Id.* ("As it stands today, 23 years after commencement of the original Lease, CIWMI is still unclear whether adequate access can ever be obtained for the facility. We find this to be in default of CIWMI's obligations . . . to notify the [Nation] of any condition that could cause the Leased Premises to be subject to use restrictions.").

Appellant argues that it was denied due process because the Regional Director never notified it that it had allegedly violated paragraph 17(A)(5) of the Lease and it was never given any opportunity to cure (or dispute) that violation. Opening Br. at 8-9; Notice of Appeal at 1. As Appellant notes, BIA's regulations require BIA to give both notice and an opportunity to cure (or dispute) a violation of a business lease before that lease can be terminated. 25 C.F.R. § 162.466(b). "Failure to give the requisite notice invalidates a cancellation decision." *A C Building & Supply Company v. Western Regional Director*, 51 IBIA 59, 73 (2010).

Here, the Regional Director's notice of violation did not inform Appellant that it had violated paragraph 17(A)(5) of the Lease. Indeed, that notice does not refer to paragraph 17(A)(5) of the Lease at all; it states only that Appellant violated paragraph 22 of the Lease by failing to build and begin operating the landfill within a reasonable time. Notice of Violation at 2. The notice does raise questions about access to the site, specifically asking Appellant to "demonstrate that access to the construction site is not impossible," *id.* at 3, but it never suggests that Appellant violated paragraph 17(A)(5) of the Lease by failing to notify the Nation about access problems.

The Regional Director's failure to notify Appellant about its alleged violation of paragraph 17(A)(5) invalidates her decision to terminate the Lease on that ground. *See A C Building & Supply Co.*, 51 IBIA at 73. While the Regional Director was free to conclude that Appellant had also violated paragraph 17(A)(5) of the Lease based on Appellant's response to her inquiries about access, when she "relied on a new breach not clearly identified or explained earlier, [she] was required to give Appellant notice and an opportunity to cure or dispute that new breach . . . ." *Id.* at 74. Her "failure to provide that notice vitiates the cancellation decision based on the previously unraised breach." *Id.*

The Nation argues that the Regional Director should be excused from providing notice of this violation because "it is too late for CIWMI to cure its failure for the past 11 years to give the Tribe notice of a fatal flaw in the Project." Nation's Answer Br., July 24, 2019, at 36. But it is not obvious that it is "too late" to provide the notice required by the Lease: Appellant could provide that notice now. In any event, the Nation does not identify any authority that would allow us to excuse the Regional Director's failure to provide the notice required by the law, and we are aware of none. As such, we hold that the Regional Director erred when she terminated this Lease because Appellant had allegedly breached paragraph 17(A)(5). We conclude that this was harmless error, however, because we have already affirmed the Regional Director's decision to terminate the Lease on the independent basis that Appellant failed to build and begin operating this landfill within a reasonable time. Because we vacate this aspect of the Regional Director's decision for her failure to provide notice, we do not reach the merits of this issue (and thus do not decide whether Appellant's failure to provide notice of these access problems constituted a breach of paragraph 17(A)(5) and, if so, whether providing the requisite notice now would cure such a breach).

III. The Regional Director Did Not Make the Findings Necessary to Show That the Lease Was Frustrated.

In her Answer Brief, the Regional Director also suggests that this Lease could have been terminated for "frustration of purpose." BIA's Answer Br., July 24, 2019, at 9 (stating that the Nation's "purpose for entering into the Lease, which is economic

development, was frustrated by Appellant's failure to timely perform"). But the Regional Director did not cite "frustration of purpose" as a basis for terminating the Lease in the Decision. *See* Decision at 2 (finding that Appellant breached the Lease's "time is of the essence" clause and that "this breach has also resulted in breach of the Lease purpose to benefit the Tribe"); *but see* Notice of Violation at 1 (finding that Appellant's failure to perform "has also resulted in frustration of the Lease purpose"). Nor did she make the findings necessary to support termination of the Lease for "frustration of purpose."

As Appellant correctly notes, Reply Br. at 14-16, the doctrine of "frustration of purpose" applies where "[p]erformance remains possible, but the fundamental reason of both parties for entering into the contract has been frustrated by an unanticipated supervening circumstance, thus destroying substantially the value of performance . . . ." 2 Timothy Murray, Corbin on California Contracts § 77.01[3] (rev. ed. 2024) (cleaned up); *see also* Restatement (Second) of Contracts § 265 (Am. L. Inst. 1981) ("Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary."). The doctrine has important limitations. It does not apply where the "frustrating event" was foreseeable. 1 Timothy Murray, Corbin on California Contracts § 77.01[3] (rev. ed. 2024). It does not apply where a party to a contract fails to perform (that is breach, not frustration). Restatement (Second) of Contracts § 237 (Am. L. Inst. 1981). And it only applies where, "due to a supervening event, the transaction no longer makes sense because one party's performance is virtually worthless to the other." 2 Timothy Murray, Corbin on California Contracts § 77.01[1] (rev. ed. 2024).

The Regional Director did not make the foundational findings necessary to support the application of the doctrine here. She did not identify any "unanticipated supervening circumstance" that would render performance by Appellant worthless to the Nation. While there is evidence in the record that suggests that this landfill may now be "financially infeasible" due to changes in the market for its services, *see* Report at 11-13, such "mere market shifts" are not ordinarily sufficient to show "frustration," Restatement (Second) of Contracts § 261 cmt. b (Am. L. Inst. 1981), and neither is the fact that this landfill may be "less profitable" or even that it may "sustain a loss," *id.* § 265 cmt. a. In any event, we need not decide whether this record could possibly support a finding of "frustration of purpose" or "frustration by impracticability" because the Regional Director did not make those findings. Instead, she terminated this Lease for a material breach, not frustration. For these reasons, we reject the Regional Director's argument that "frustration of purpose" provides an alternative legal ground for sustaining the termination of this Lease.

Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director's March 1, 2019, decision in part and vacates it in part.[15]

I concur:

JAMES MAYSONETT Digitally signed by JAMES MAYSONETT Date: 2024.06.27 11:32:55 -04'00'

James A. Maysonett
Administrative Judge

Thomas A. Blaser
Chief Administrative Judge

[15] The Nation and Appellant both argue that they are owed money damages for breaches of this Lease. As discussed above in our summary of the standard of review, the Board has no authority to adjudicate claims for money damages, and we express no opinion on those claims.

Cortina Integrated Waste Management, Inc.
v. Pacific Regional Director,
Bureau of Indian Affairs
Docket No. IBIA 19-058
Order Affirming Decision in Part and
Vacating in Part
Issued June 27, 2024
70 IBIA 43

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