IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

J.G. SABLAN ROCK QUARRY, INC.,
Plaintiff-Appellant,

v.

DEPARTMENT OF PUBLIC LANDS,
Defendant-Appellee.

SUPREME COURT NO. 2009-SCC-0008-CIV
SUPERIOR COURT NO. 06-0424

Cite as: 2012 MP 2

Decided March 30, 2012

Michael W. Dotts and Vincent DLG Torres, Saipan, MP, for Plaintiff-Appellant.
Gilbert Birnbrich, Office of the Attorney General, Saipan, MP, for Defendant-Appellee.
BEFORE: ALEXANDRO C. CASTRO, Acting Chief Justice; JOHN A. MANGLONA, Associate Justice; HERBERT D. SOLL, Justice Pro Tem.

CASTRO, J.:

¶ 1 Plaintiff-Appellant J.G. Sablan Rock Quarry, Inc. ("Sablan"), appeals the trial court's decision affirming four of the seven grounds for Defendant-Appellee Department of Public Lands' ("DPL") termination of Sablan's permit to mine pozzolan and basalt on the island of Pagan. On appeal, Sablan argues that the trial court erred in finding that: (1) DPL provided Sablan with adequate due process prior to terminating Sablan's permit; (2) the statute of limitations did not bar DPL from revoking Sablan's permit; (3) DPL was not estopped from terminating Sablan's permit; and (4) DPL's revocation of Sablan's permit was not arbitrary or capricious agency action.

¶ 2 For the reasons stated herein, we reverse the trial court's determination that DPL provided Sablan with adequate due process regarding Sablan's alleged failure to generate revenue. In all other

respects, the trial court's decision is affirmed and this matter is remanded for entry of judgment consistent with this opinion.

I

¶ 3 In 1992, Sablan and Pacific Venture, Ltd. ("Pacific Venture"), received non-exclusive one-year permits to mine pozzolan and basalt on Pagan from the Marianas Public Land Corporation ("MPLC").[1] Each mining permit allowed the permittee to "use that certain real property, situated at Pagan island . . . as shown and delineated on the attached Appendix 'A'."[2] *J.G. Sablan Rock Quarry, Inc. v. Dep't of Pub. Lands*, No. 06-0424 (NMI Super. Ct. June 12, 2007) (Statement of Material Facts Not in Dispute at Ex. 3) (hereafter, "Statement of Material Facts"). We note that neither Sablan nor DPL has been able to locate or produce the appendix (or appendices) referenced in the permits.

¶ 4 In August 1993, MPLC issued a non-exclusive five-year mining permit to Sablan. This permit allowed Sablan to "use that certain real properties [sic], situated at Pagan island . . . as shown and delineated on the attached Appendix 'A'." Appendix to the Opening Br. ("Appendix") at 77. Like the 1992 permits, the parties have not located or produced a copy of the Appendix "A" that is referenced in the 1993 permit.

¶ 5 In 1995, the Division of Public Lands issued Sablan a permit granting it the non-exclusive right to use certain lands on the island of Pagan "for the operation of pozzolan extraction and related activities and basalt quarrying operation" for a term of twenty years. Appendix at 91. This permit expressly

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[1] A brief history of the evolution of public land management agencies in the Commonwealth is useful to avoid confusion. The Marianas Public Land Corporation was a semi-autonomous agency created pursuant to Article XI, Section 4 of the Commonwealth Constitution and charged with the administration of public lands within the Commonwealth. Pursuant to Article XI, Section 4(f) of the Commonwealth Constitution, in 1994 Executive Order 94-3 dissolved MPLC and transferred its functions to the Division of Public Lands within the Department of Land and Natural Resources.

In 1997, the Commonwealth Legislature passed Public Law ("PL") 10-57, which established a Board of Public Lands as part of the Division of Public Lands within the Department of Land and Natural Resources.

In 2000, PL 12-33 separated public land management from the control of the Department of Land and Natural Resources by establishing an independent Board of Public Lands with control over an Office of Public Lands.

In 2001, PL 12-71 abolished the Board of Public Lands and Division of Public Lands and established the Marianas Public Lands Authority ("MPLA") as an independent public corporation within the executive branch.

In 2006, PL 15-2 abolished MPLA and established DPL as an independent department within the executive branch.

[2] These 1992 permits (as well as numerous important background documents) are not contained in Sablan's "Appendix to the Opening Brief" or in DPL's "Appendix to the Opposition Brief." As part of the trial court record, Pacific Venture's permit is included as part of the record on appeal and we may rely on it. NMI Sup. Ct. R 10(a)(1) (record on appeal includes "original papers and exhibits filed in the Superior Court"); NMI Sup. Ct. R. 30(a)(2) ("Parts of the record may be relied on by the court or the parties even though not included in the [Appendix to the Briefs]."). However, we admonish counsel for both parties for failing to include all relevant parts of the record in the Appendix to the Briefs and caution them when filing future briefs in this Court to take greater care. We also note that, pursuant to Commonwealth Supreme Court Rule 30, the Appendix to the Briefs should be a *single* appendix prepared and filed by the appellant after conferring with the appellee. NMI Sup. Ct. R. 30(b)(1).

revoked Sablan's 1993 permit.[3] *Id.* In 1996, the parties amended two sections of the 1995 permit ("Amended Permit"). The Amended Permit changed Article 3 of the 1995 permit to remove language that originally allowed the government to terminate the permit "if it [found] the permit not to be in the best interest of the people of the Commonwealth." Appendix at 91. However, the Amended Permit retained other termination language, which stated that the "permit shall terminate automatically should [Sablan] fail to generate and/or report any revenue to the Government from its activities on the premises for two consecutive years." *Id.* at 105. In addition to changing Article 3, the Amended Permit also amended Article 9. Article 9 of the Amended Permit states that DPL may terminate the permit in response to Sablan's "violation of any of the terms or conditions" of the permit after complying with the following procedure:

> A. The Government shall first give sixty (60) days notice to Permittee that it is declaring the permit void because of violations of terms or conditions, which notice shall specify the terms or conditions violated.
>
> B. Permittee may request a hearing on the alleged violations within 60 days of receipt of the notice.

Appendix at 105.

¶ 6 In November 2000, a Land Enforcement Officer prepared a memorandum for the Director of the Division of Public Lands regarding an inspection of Sablan's mining operations on Pagan. The memorandum stated that there was no evidence of the active use of the public land by Sablan and that Sablan "has constructed structures on public land that is outside the permitted premises" that were "in dire need of repairs." Statement of Material Facts at Ex. 15. Additionally, the memorandum listed other alleged violations of the Amended Permit, including "the nonpayment of an outstanding balance of $330,837.35 . . . ." *Id.*

¶ 7 In October 2001, the Public Lands Administrator ("Administrator") provided an oral report to the Board. As reflected in the minutes of that meeting, the Administrator reported that his audit of Sablan discovered that Sablan owed the Board of Public Lands $3.726 million under the Amended Permit and other permits. The Administrator also recommended termination of the Amended Permit. The Board of Public Lands ultimately deferred action on the matter.

¶ 8 In December 2002, the Comptroller of the newly-created MPLA submitted a memorandum to the Commissioner of MPLA regarding Sablan and the Amended Permit. The Comptroller drafted the memorandum in response to Sablan's requests for a waiver of royalties due under previous permits (along with corresponding interest amounts) as well as a retroactive waiver of the $20,000.00 annual fee

[3] This permit once again allowed Sablan to "use those certain real properties, situated at Pagan Island . . . as shown and delineated on the attached Appendix 'A'." *Id.* at 90-91. However, this appendix has never been produced.

for the Amended Permit.[4] The Comptroller recommended denial of Sablan's waiver requests and "further recommend[ed] terminating the permit due to non-payment . . . ." Statement of Material Facts at Ex. 21.

¶ 9 Thereafter, in February 2004 the Commissioner of MPLA sent a letter ("Notice of Violation") to Sablan detailing numerous alleged violations of the Amended Permit. In addition to other alleged violations not relevant to this appeal, the Notice of Violation stated that Sablan was in violation of the Amended Permit by: (1) failing to pay required rental fees and interest between September 1995 and January 2004, totaling $125,433.27; (2) failing to pay other rental and royalty obligations totaling $358,204.29; (3) erecting a barracks structure outside of the permitted premises; and (4) failing to submit a development plan to MPLA for Sablan's proposed mining activities. Statement of Material Facts at Ex. 22. The Notice of Violation conspicuously stated that "[Sablan] is hereby put on notice . . . that [Sablan] has violated its Permit." *Id.* The Notice of Violation provided Sablan "sixty (60) days from receipt of this notice to cure the above-noted violations and defaults" and informed Sablan that it could request in writing a hearing within the sixty-day period. *Id.*

¶ 10 For the next several months, Sablan attempted to negotiate a settlement of the violations with MPLA through letters and in-person meetings. During this period, Sablan provided MPLA with a check for $125,433.27 in order to bring its rental payments up to date. Despite this payment, the Acting Commissioner of MPLA, in a memorandum to the MPLA Board dated August 10, 2004, recommended termination of the Amended Permit based on "years of inactivity and non-payment of fees." Statement of Material Facts at Ex. 24. Although Sablan submitted a number of proposed settlement agreements during this period in an attempt to convince MPLA to withdraw the Notice of Violation, MPLA ultimately did not accept any of the agreements.

¶ 11 In a letter dated April 25, 2005, Sablan requested that MPLA provide him with a "short letter stating that [Sablan's] Mining Permit in Pagan is still valid, and that the lease rental payment ($20,000 a year) is up to date." Appendix at 114. Sablan's understanding "that there are several other issues [MPLA] still needs to decide on" and that "Sablan is not pressing on any time soon" was made clear. *Id.* The letter stated the reason for the request was to provide the Commonwealth Development Authority information on a "pending personal matter" of John G. Sablan in response to a request from that agency. *Id.* In response to Sablan's request in the April 2005 letter, the Commissioner of MPLA made the following three statements in writing in April 2005 regarding the status of the Amended Permit:

1. Your Pagan Mining Permit has not been terminated;
2. You have made payments for the Permit fee up to December 31, 2005; and
3. You have been making regular, good faith payments.

[4] Article 4 of the Amended Permit requires Sablan to pay an annual fee of $20,000.00 as well as royalties for each cubic yard of pozzolan and basalt extracted. Appendix at 92.

Id. at 115. The MPLA Board of Directors did not terminate the Amended Permit prior to the abolition of the agency in February 2006.

¶ 12 In May 2006, John S. DelRosario, Secretary of the newly-created DPL, issued a letter ("Notice of Termination") to Sablan that the Amended Permit was "terminated and void." Appendix at 170. In addition to other alleged violations not relevant here, the Notice of Termination included the following grounds for termination: (1) failure to generate revenue; (2) failure to provide DPL with a development plan for Sablan's proposed mining activities; (3) "conducting, or seeking to conduct, mining and related activities in areas of Pagan not covered by the [Amended Permit]"; and (4) failure to pay royalties owed under Sablan's 1993 mining permit totaling $345,914.17. *Id.* at 170-71. The Notice of Termination informed Sablan that a hearing could be requested on these alleged violations within sixty days of the notice. *Id.* at 172.

¶ 13 Sablan timely requested a hearing and DPL scheduled a post-deprivation reconsideration hearing before Secretary DelRosario for July 14, 2006. Upon discovering that Secretary DelRosario would preside at the hearing, Sablan filed a motion requesting that the Secretary recuse himself due to his prior involvement with the matter. At the hearing, the Secretary denied Sablan's request for recusal. After denying Sablan's recusal request, the Secretary allowed Sablan to present witness testimony. John G. Sablan and two of the company's attorneys provided testimony regarding the history of the permits and arguments which were intended to show Sablan's compliance with the Amended Permit. DPL did not present witnesses or evidence at the hearing and Sablan, thus, was not able to examine or cross-examine any agency witnesses. At the conclusion of the hearing, the Secretary took the matter under advisement. In August 2006, the Secretary issued his decision, which upheld all grounds for DPL's termination of the Amended Permit.

¶ 14 Sablan then filed a complaint in the Superior Court challenging DPL's termination of the Amended Permit. Sablan alleged that DPL failed to provide Sablan with adequate due process prior to termination of the Amended Permit. Sablan also challenged the substantive merits of DPL's termination decision. DPL filed a motion for partial summary judgment regarding the due process portion of Sablan's complaint. The trial court granted this motion, holding that the terms of Article 9 of the Amended Permit dictated the process owed to Sablan and that DPL's Notice of Termination and subsequent reconsideration hearing complied with DPL's requirements under Article 9. The trial court also held that section 9111(b) of the Commonwealth Administrative Procedure Act, 1 CMC §§ 9101-9115, controlled DPL's termination decision and that DPL's actions complied with that section.

¶ 15 After disposing of Sablan's due process claims, the trial court set a briefing schedule and limited briefing to: (1) whether Sablan breached the Amended Permit; and (2) whether estoppel barred DPL from terminating Sablan's permit due to the actions of its predecessor agencies. The parties briefed

these issues and waived oral argument. The trial court held that estoppel did not bar DPL from terminating the Amended Permit. The trial court also upheld DPL's termination on four of the seven grounds identified in the Notice of Termination: (1) failure to generate revenue; (2) failure to provide DPL with a development plan for Sablan's proposed mining activities; (3) conducting activities outside the permitted mining area; and (4) failure to pay royalties owed under Sablan's 1993 mining permit totaling $345,914.17.[5] Sablan timely appealed to this Court.

II

¶ 16 This Court has jurisdiction over this appeal pursuant to 1 CMC § 9113, which grants "aggrieved parties" standing to appeal Superior Court decisions reviewing administrative matters. *N. Marianas Coll. v. Civil Serv. Comm'n*, 2006 MP 4 ¶ 5.

III

A. Procedural Due Process

¶ 17 Sablan argues that DPL did not provide him with adequate due process prior to termination of the Amended Permit. Specifically, Sablan argues that he was entitled to: (1) notice of violation of the Amended Permit; and (2) a full adjudicatory hearing *before* termination of the Amended Permit (i.e. a pre-deprivation hearing). To determine whether Sablan received adequate due process, we must consider Sablan's rights under three distinct sources of due process: (1) constitutional procedural due process pursuant to Article I, Section 5 of the Commonwealth Constitution and Section 1 of the Fourteenth Amendment to the United States Constitution (applicable in the Commonwealth pursuant to section 501 of the Covenant)[6]; (2) process pursuant to the Commonwealth Administrative Procedure Act, 1 CMC §§ 9101-9115 ("Commonwealth APA"); and (3) process pursuant to the procedures set forth in the Amended Permit. The trial court held that the notice and hearing DPL afforded Sablan did not violate any of Sablan's due process rights. Our review of legal issues in a summary judgment order is de novo. *Estate of Muna v. Commonwealth*, 2007 MP 16 ¶ 6. Likewise, our review of a trial court's determination that procedures satisfied constitutional and statutory due process is de novo. *In re Hafadai Beach Hotel Extension*, 4 NMI 37, 41 (1993).

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[5] DPL did not appeal the trial court's decision as to the other three grounds for termination.

[6] Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America. 48 U.S.C. § 1801 note ("the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States: . . . Amendment 14"). Article I, Section 5 of the Commonwealth Constitution "is taken directly from section 1 of the Fourteenth Amendment to the United States Constitution . . . ." *Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands* 20 (1976); *see also id.* ("No substantive change from section 1 of the Fourteenth Amendment or the interpretation of that section by the United States Supreme Court is intended.").

1. Constitutional Due Process

¶ 18 Sablan first argues that DPL's termination decision violated his constitutional right to due process. "[A] fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *In re Hafadai Beach Hotel Extension*, 4 NMI at 45 (internal quotation marks and citation omitted). To determine if Sablan's constitutional right to due process has been violated, we must "first determine if a due process interest is implicated and, second, determine what procedures protect that interest sufficiently to satisfy due process." *Id.* at 44-45. DPL concedes that the Amended Permit provided Sablan with a protected interest to which due process attaches. The first element of constitutional due process is therefore satisfied, and we now consider whether procedures necessary to protect Sablan's due process interest in the Amended Permit were provided.

¶ 19 To determine what procedures satisfy due process, a court must consider the following factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976); *In re Hafadai Beach Hotel Extension*, 4 NMI at 45 n.29 (listing the *Mathews* factors). Analysis of these factors is a necessarily fact-specific process and it is useful to seek guidance from other United States jurisdictions. 7 CMC § 3401; *see Santos v. Santos*, 2000 MP 9 ¶ 18 (seeking guidance from other jurisdictions where no Commonwealth case on point). The Ninth Circuit Court of Appeals recently decided a case with similar facts in *Buckingham v. Secretary of the United States Department of Agriculture*, 603 F.3d 1073 (9th Cir. 2010).

¶ 20 In *Buckingham*, a rancher received a permit from the United States Forest Service ("Forest Service") to graze livestock within a national forest in 1983, which he renewed in 1989 and again in 1999. *Id.* at 1077-78. Between 1998 and 2004, the rancher received "at least seven notices" detailing non-compliance with various terms of his grazing permit. *Id.* at 1078. Due to these violations, in 2004 the Forest Service partially canceled the rancher's permit and issued a revised permit allowing the rancher to use a smaller amount of land. *Id.* Thereafter, the Forest Service issued additional notices of non-compliance between July and September of 2005 and engaged in discussions with the rancher before eventually canceling the permit in its entirety in November 2005. *Id.* at 1078-79. The rancher did not receive a pre-deprivation hearing but, per Forest Service regulations, he did receive two levels of administrative review of the cancellation decision. *Id.* at 1083. The rancher was allowed to present oral argument at one level of review (at a post-deprivation hearing) and written argument at both levels. *Id.* Ultimately, the Forest Service affirmed its cancellation decision. The rancher then challenged the

cancellation in the United States District Court, claiming violations of his due process rights under the Fifth Amendment of the United States Constitution. *Id.* at 1079.

¶ 21 On appeal, the rancher argued that he was entitled to a full evidentiary hearing prior to cancellation of his grazing permit. *Id.* at 1082. The Ninth Circuit Court of Appeals rejected this argument and affirmed the district court's decision. *Id.* at 1084. The court found that pre-deprivation notice and an opportunity to be heard is not always required and that a combination of pre- and post-deprivation procedures can satisfy the Fifth Amendment depending on the circumstances of the relevant government action. *Id.* at 1082; *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 547-48 (1985) ("We conclude that all the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures . . . ."); *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 984 (9th Cir. 1998) (stating that there is no "hard and fast" rule requiring a pre-deprivation hearing). Additionally, the court found that due process does not mandate the use of formal, adversarial, evidentiary hearings in every case. *Buckingham*, 603 F.3d at 1082; *Memphis Light, Gas, & Water Div. v. Craft*, 436 U.S. 1, 16 n.17 (1978); *United States v. Clifford Matley Family Trust*, 354 F.3d 1154, 1162 (9th Cir. 2004); *Hickey v. Morris*, 722 F.2d 543, 549 (9th Cir. 1984). Furthermore, the court recognized that the opportunity to cross-examine witnesses is not required in all cases. *See Buckingham*, 603 F.3d at 1083 (rejecting petitioner's argument that additional procedures such as an evidentiary hearing and cross-examination were necessary).

¶ 22 After discussing the general requirements of procedural due process, the *Buckingham* court applied the three factor test from *Mathews* to the facts of the grazing permit cancellation. *Buckingham*, 603 F.3d at 1082-84. The court noted that there was a strong private interest involved since the rancher's livelihood was at least partially dependent on his right to graze his livestock in the National Forest. *Id.* at 1082. Balanced against this private interest was the Forest Service's strong interest in protecting national forests from environmental degradation caused by over-grazing. *Id.* Finally, the court held that the risk of erroneous deprivation was low and that existing procedures were fair to the rancher since the Forest Service: (1) provided notice and an opportunity to cure to the rancher on several occasions; (2) allowed the rancher to contact Forest Service staff and discuss the violations; and (3) afforded the rancher two levels of administrative review with oral argument at one level and written argument at both levels. *Id.* at 1083-84. Based on this analysis, the court held that "we cannot conclude that the Forest Service deprived [the rancher] of the opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* at 1084.

¶ 23 Applying the three factor *Mathews* test to the case at bar, Sablan's private interest in retaining the Amended Permit is similar to that of the rancher in *Buckingham*; the inability to mine on Pagan adversely affects Sablan's ability to generate revenue. However, DPL's interest in compliance with the

terms of the Amended Permit is also strong. DPL has a strong interest in generating revenue through the collection of fees and royalties for the extraction of materials from lands that it owns as well as an interest in not incurring the costs associated with providing greater procedures prior to the termination of mining permits. The third factor – the risk of erroneous deprivation – involves an analysis of the fairness of the procedures provided to Sablan and warrants greater discussion. *Buckingham*, 603 F.3d at 1083-84. This analysis looks to both the adequacy of the notice provided to Sablan as well as the adequacy of the hearing DPL provided.

¶ 24 As to the adequacy of the notice provided, Sablan alleges that DPL violated his due process rights by failing to provide notice prior to termination of the Amended Permit. DPL counters that its 2006 Notice of Termination provided sufficient notice to satisfy due process. Generally, the government must provide notice to an individual *prior* to deprivation of a right protected by constitutional due process. *Brewster*, 149 F.3d at 984.[7] Given the length of the term of the Amended Permit as well as the importance to Sablan of retaining the permit, we follow this general rule and hold that pre-deprivation notice was required in this case prior to termination of the Amended Permit. Therefore, DPL's reliance on this Notice of Termination is misplaced since it did not provide pre-deprivation notice.

¶ 25 While the 2006 Notice of Termination did not provide the necessary pre-deprivation notice to Sablan, MPLA issued the 2004 Notice of Violation more than two years before DPL terminated the Amended Permit.[8] The Notice of Violation provided notice of, among other things, three of the four violations that form the basis of DPL's termination decision: (1) failing to pay rental and royalty obligations totaling $358,204.29; (2) erecting a barracks structure outside of the permitted premises; and (3) failing to submit a development plan. Like the rancher in *Buckingham*, Sablan received notice of these grounds for termination long before DPL issued its Notice of Termination. We view such an amount of notice as clearly adequate for purposes of procedural due process.

¶ 26 Unlike the other three grounds for termination currently on appeal, the Notice of Violation did not mention failure to generate revenue as one of the itemized violations.[9] Since it was not included in

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[7] In rare cases "when countervailing interests require it," post-deprivation notice may be sufficient. *Brewster*, 149 F.3d at 984. DPL does not argue, and we cannot discern, any such countervailing interests in this case to excuse DPL from providing notice to Sablan prior to termination of the Amended Permit.

[8] The court notes that the parties failed to include the Notice of Violation in the Appendix to the Briefs, which forced the Court to review the Clerk's Record on Appeal to locate the document. As courts in other jurisdictions have recognized, it is not our duty to scour the record for relevant evidence and counsel would be wise to make sure all relevant evidence is included in the Appendix to the Briefs in future cases before this Court. *See Del Real v. City of Riverside*, 95 Cal. App. 4th 761, 768 (Cal. Ct. App. 2002) ("The appellate court is not required to search the record on its own seeking error.").

[9] The only reference to the revenue-generating requirement of the permit is a statement that "MPLA also reserves its right to terminate the [Amended] Permit, pursuant to Article 3 . . . ." This vague statement was not sufficient to put Sablan on notice that its failure to generate revenue was a ground for revocation.

the Notice of Violation, Sablan received no notice of the alleged violations based on failure to generate revenue. Therefore, while Sablan received adequate notice of the other three grounds for termination, we hold that DPL violated Sablan's due process rights by failing to provide notice related to the revenue issue prior to termination.[10]

¶ 27 In addition to the adequacy of the notice provided, in order to determine the risk of erroneous deprivation we must assess the extent and fairness of the procedures provided to Sablan. After receiving the Notice of Violation in 2004, Sablan and his counsel had numerous interactions with DPL's predecessor agencies both in person and through correspondence. During this time, Sablan had ample opportunities to dispute the allegation or to cure its violations of the Amended Permit. *See e.g.*, Appendix at 110 (June 2004 letter from counsel for Sablan to MPLA discussing meeting between the parties and offering proposed settlement agreement); *id.* at 114 (June 2005 letter discussing letter received by counsel for MPLA and requesting information from MPLA); *id.* at 129 (December 2005 letter from counsel for Sablan requesting meeting with the MPLA board). Despite these opportunities, DPL decided that Sablan was still in non-compliance with various terms of the Amended Permit and issued its Notice of Termination. The Notice of Termination informed Sablan of his right to request a hearing regarding the termination decision and Sablan availed itself of that right. In addition to allowing for submission of written arguments and evidence, DPL provided Sablan with the opportunity to present witnesses at the hearing before Secretary DelRosario. Moreover, contrary to Sablan's assertion, Secretary DelRosario was a neutral hearing officer since the original Notice of Violation was issued by Henry Hofschneider, who was the Commissioner of MPLA when the Notice of Violation issued.[11] After the hearing, Secretary DelRosario issued a detailed decision explaining the reasons for the termination of the Amended Permit. While Sablan contends that additional process (i.e., a formal adjudicatory hearing)

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[10] We note that Article 3 of the Amended Permit purports to allow for the automatic termination of the permit in the event that Sablan fails to "generate and/or report any revenue to the Government from its activities on the premises for two consecutive years." Appendix at 105. However, as DPL failed to argue that Article 3 obviated the necessity to provide notice of violation based on this ground to Sablan prior to termination, such argument is waived. *I.G.I. Gen. Contractor & Dev., Inc. v. Pub. Sch. Sys.*, 1999 MP 12 ¶ 16 ("[W]here a party does not discuss issues in its brief, they are treated as waived.") (citation omitted). Additionally, we note, without deciding the matter, that the practice of conditioning a government entitlement on the sacrifice of due process protections – colloquially known as the "bitter with the sweet" approach – has been found unconstitutional by the United States Supreme Court. *See Loudermill*, 470 U.S. at 540-41 (noting that "the Court has clearly rejected" the bitter with the sweet approach).

[11] Because Commissioner Hofschneider issued the Notice of Violation that formed the basis for the termination of the Amended Permit, Secretary DelRosario was a neutral hearing officer despite issuing the Notice of Termination. However, absent the Notice of Violation, serious questions would arise as to the impartiality of a hearing officer who reviews a determination that he or she made in the first instance. *See Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) ("[P]rior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker. He should not, however, have participated in making the determination under review.").

would have yielded a better outcome because it would have allowed him to demonstrate compliance with the Amended Permit by refuting factual issues raised by DPL, Sablan "has failed to persuasively explain why [he] was unable to resolve those factual issues through the ample process [he] was given." *Buckingham*, 603 F.3d at 1083. In sum, although the hearing did not occur prior to termination of the Amended Permit, the procedures followed by DPL in terminating the Amended Permit carry with them a low risk of erroneous deprivation because of the opportunities Sablan had to show compliance with the Amended Permit (with the exception of the revenue issue).

¶ 28 In light of the foregoing, we conclude that DPL's actions in terminating the Amended Permit comport with constitutional procedural due process requirements with regard to all grounds for termination except for the ground related to revenue generation. We turn next to whether DPL's termination procedures satisfy the requirements of the Commonwealth APA.

2. Due Process Under the Commonwealth APA

¶ 29 The Commonwealth APA describes the procedures that agencies must follow in the absence of agency-specific administrative regulations. Since DPL does not have agency-specific administrative regulations governing the termination of this permit, the Commonwealth APA governs. Sablan claims that the termination of the Amended Permit constituted an "adjudication in which a sanction may be imposed" within the meaning of 1 CMC § 9108(a)[12] and that, as such, DPL was required to provide Sablan a full adjudicatory hearing following the procedural requirements of 1 CMC §§ 9109 and 9110. Sections 9109 and 9110 contain the procedures that must be followed during formal adjudicatory hearings. These procedures include, among other things, the right to: (1) use of the relevant agency's subpoena power to compel attendance of individuals at hearings; (2) an impartial agency official or hearing officer; (3) presentation and cross-examination of witnesses; and (4) presentation of documentary evidence. 1 CMC § 9109(d), (e), (i).

¶ 30 Although the foregoing procedures are generally required in adjudications where a sanction may be imposed, a different set of procedures must be followed when licenses are at issue. 1 CMC § 9108(a) (section does not apply "in an agency proceeding respecting the grant or renewal of a license"). This different standard is located in 1 CMC § 9111 ("section 9111"), the section of the Commonwealth APA containing special provisions applicable to licensing. Section 9111(b) states that:

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[12] 1 CMC § 9108(a) states that:

> This section applies in every adjudication in which a sanction may be imposed, except in an agency proceeding respecting the grant or renewal of a license, unless an agency proceeding therefor is required by law to be preceded by notice and opportunity to be heard. In an adjudication under this section, all parties shall be afforded an opportunity for a hearing after reasonable notice.

> [N]o revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings[13], the agency gave written notice to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for retention of the license.

Thus, prior to the revocation or termination of a license, an agency must provide: (1) notice; and (2) an opportunity to show compliance. Section 9111(b) does not explicitly state that a hearing of *any* kind is required, much less the full adjudicatory hearing desired by Sablan. Indeed, federal courts interpreting a similar section of the federal Administrative Procedure Act, 5 U.S.C. § 558(c)[14], have addressed this issue and concluded that section 558(c) "does not by itself create a right to a full adjudicatory hearing . . . ." *Gallagher & Ascher Co. v. Simon*, 687 F.2d 1067, 1074 (7th Cir. 1982). Thus, the Commonwealth APA did not require DPL to provide Sablan with a hearing prior to revocation of the Amended Permit. Although we hold that section 9111(b) does not compel agencies to provide a hearing prior to revocation of licenses, we note that, as a general matter, the constitutional due process right to "some kind of hearing is paramount." *Bd. of Regents v. Roth*, 408 U.S. 564, 570 (1972); *see also id.* at 570 n.7 (noting that a hearing is required except in " 'extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' " (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1972))).

¶ 31 Another argument raised by Sablan is that the license revocation procedures laid out in section 9111(b) do not apply to the Amended Permit because the provision of a full adjudicatory hearing is "more appropriate . . . ." Appellant's Reply Br. at 6. However, the plain language of the Commonwealth APA compels the application of section 9111(b) procedures to the revocation of the

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[13] The Commonwealth APA defines an "[a]gency proceeding" as "an agency process as defined by subsections (a), (g), and (n) of this section." 1 CMC § 9101(d). Subsection (g) of section 9101 contains the agency process relevant to DPL's termination of the Amended Permit. This subsection states that " '[l]icensing' includes the agency process respecting the . . . revocation . . . of a license." 1 CMC § 9101(g).

[14] Section 558(c) provides, in relevant part:

> Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given –
>
> (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements.

Section 9111(b), as well as many provisions of the Commonwealth APA, was modeled after the Revised Model State Administrative Procedure Act, which was approved by the National Conference of Commissioners on Uniform State Laws in 1961. 1 CMC § 9101 Law Revision Comm'n cmt. Section 9111(b) is similar to section 558(c). The main difference between the two sections is that section 558(c) actually provides a greater amount of procedure by requiring agencies to allow licensees to "demonstrate *or achieve* compliance" with license terms. *Id.* (emphasis added). This opportunity to cure is not present in section 9111(b), which only requires agencies to allow licensees "an opportunity to show compliance" with license terms. This is a crucial distinction between the federal and Commonwealth APA's that Sablan repeatedly fails to grasp in its briefing.

Amended Permit. The Commonwealth APA defines "license" to include "the whole or part of any agency, [sic] permit, certificate, approval, registration, charter, or similar form of permission required by law . . . ." 1 CMC § 9101(f). Sablan could not argue in good faith that the Amended Permit is not a permit. Instead, Sablan argues – with no citation to any authority – that "it would seem that §9111 [sic] was intended for periodic licenses . . . ." Appellant's Reply Br. at 6. However, there is no language in the Commonwealth APA indicating any intention on the part of the legislature to limit the applicability of the definition of "license" to only short-term permits. Therefore, we hold that section 9111(b) applies to DPL's revocation of the Amended Permit and spells out the procedure that DPL was required to follow.

¶ 32 Our holding that section 9111(b) contains the relevant procedures for termination of the Amended Permit is supported by the Ninth Circuit's treatment of the Forest Service's cancellation of the grazing permit at issue in *Buckingham*. 603 F.3d at 1084-85. In *Buckingham*, in addition to challenging the permit cancellation on constitutional due process grounds, the rancher also argued that the United States Forest Service violated the federal APA. *Id.* In assessing the government's compliance with the federal APA, the Ninth Circuit applied the procedures set forth in 5 U.S.C. § 558(c), the federal APA's analog to § 9111(b). *Id.* at 1085. The court noted that the notice letters presented to the rancher prior to cancellation of the grazing permit provided adequate notice to the rancher because the letters "pinpointed the section of the disputed grazing permit that he violated and notified him of the factual basis for the charged violations." *Id.* The court distinguished another permit cancellation case, *Anchustegui v. Department of Agriculture*, 257 F.3d 1124 (9th Cir. 2001), where the "Forest Service issued a single letter to serve as both a notice of non-compliance and a decision letter regarding the same non-compliance." *Id.* (emphasis omitted). Unlike the agency's conduct in *Anchustegui*, the Forest Service in *Buckingham* had provided ample notice *before* their ultimate cancellation of the grazing permit. *Id.* at 1085-86. Because of the advanced notice and ample opportunity to show compliance that the Forest Service had afforded the rancher, the Ninth Circuit concluded that there was no violation of the federal APA. *Id.* at 1086-87.

¶ 33 Turning to the termination of the Amended Permit, MPLA issued the Notice of Violation to Sablan in 2004, more than two years before DPL issued the Notice of Termination. Like the Forest Service's notices in *Buckingham*, the Notice of Violation detailed violations of the Amended Permit and pinpointed relevant sections of that permit. As mentioned above, this Notice of Violation informed Sablan of his violations related to three of the four grounds for termination that are currently before this Court.[15] The Notice of Violation also provided Sablan with sixty days to cure the alleged violations as

[15] As to the revenue-generation violation alleged in the 2006 Notice of Termination, the Notice of Violation failed to provide adequate notice to Sablan.

well as providing Sablan with an opportunity to request a hearing. By providing both notice and an opportunity to cure, the Notice of Violation complied with the two requirements of section 9111(b). Indeed, the Notice of Violation's cure provision actually provided Sablan with a greater amount of due process than section 9111(b), which only requires notice and an opportunity to show compliance. Therefore, with the exception of the revenue-generation ground for termination, DPL satisfied its requirements under the Commonwealth APA.

3. Due Process Under the Amended Permit

¶ 34 Sablan claims that Article 9 of the Amended Permit required DPL to provide a full adjudicatory hearing prior to termination. Article 9 contains the procedures DPL must follow before terminating the Amended Permit. It states that:

> When, in the opinion of [DPL], there has been a violation of *any* of the terms or conditions of this permit, [DPL] may declare this permit void, as follows:
>
> A. [DPL] shall first give sixty (60) days notice to [Sablan] that it is declaring the permit void because of violation of terms or conditions, which notice shall specify the terms or conditions violated.
>
> B. [Sablan] may request a hearing on the alleged violations within 60 days of receipt of the notice.

Appendix at 105 (emphasis added). The procedures required by Article 9 are similar to those required by both constitutional due process and the Commonwealth APA. Essentially, Article 9 requires that DPL provide Sablan with notice of alleged violations and an opportunity to be heard. It is silent as to the extent of the hearing that DPL must afford Sablan and also does not compel DPL to conduct the hearing prior to termination. Although Sablan argues that he was entitled to a pre-deprivation formal adjudicatory hearing, he makes no persuasive argument supported by legal authority to support that assertion. *Del Rosario v. Camacho*, 2001 MP 3 ¶ 60 ("We need not address an issue in the absence of cited authority regarding an argument raised on appeal.").

¶ 35 As stated above, the 2004 Notice of Violation gave Sablan over two years of notice regarding three of the four grounds for termination before this Court. This Notice of Violation, as well as the 2006 Notice of Termination, provided Sablan with an opportunity to request a hearing. Sablan requested, and DPL provided, a hearing where Sablan was allowed to present written arguments and evidence as well as oral argument. By providing notice and a hearing, we hold that DPL complied with the procedures required by Article 9 with regard to all grounds for termination that are before this Court with the exception of the revenue-generation violation.

B. Affirmative Defenses Raised by Sablan

¶ 36 Sablan claims that three affirmative defenses foreclose DPL's ability to terminate the Amended Permit: (1) estoppel; (2) statute of limitations; and (3) laches. We will address each in turn.

1. Estoppel

¶ 37 Sablan argues that DPL should be estopped from terminating the Amended Permit due to the actions of its predecessor agencies. In support of this claim, Sablan relies on the MPLA Commissioner's April 2005 letter to Sablan. This letter states that the Amended Permit "has not been terminated" and that Sablan "ha[s] been making regular, good faith payments." Appendix at 115. Sablan argues that he detrimentally relied on the government's acceptance of the rental payments and the government's issuance of the April 2005 letter and that, given this reliance, DPL should be estopped from terminating the Amended Permit. The trial court held that DPL was not estopped from terminating the Amended Permit. Whether estoppel applies to bar DPL's termination action is a mixed question of law and fact we review de novo. *Aquino v. Tinian Cockfighting Bd.*, 3 NMI 284, 291 (1992); *In re Estate of Deleon Guerrero*, 3 NMI 253, 264 n.11 (1992). We review the trial court's factual findings on this issue under the clearly erroneous standard. *Commonwealth Ports Auth. v. Tinian Shipping Co.*, 2007 MP 22 ¶ 14 ("While mixed questions of law and fact are reviewed de novo . . . the trial court's findings of fact are reviewed under the clearly erroneous standard . . . .").

¶ 38 Estoppel is "rarely applied against the government . . . ." *Benavente v. Marianas Pub. Land Corp.*, 2000 MP 13 ¶ 19 (quoting *Rasa v. Dep't. of Lands & Res.*, 1998 MP 7 ¶ 11). In order to estop DPL from terminating the Amended Permit, Sablan must show that: (1) DPL (and its predecessors) had knowledge of the relevant facts; (2) Sablan was ignorant of the true state of facts; (3) DPL acted in such a way that Sablan had a right to believe that DPL intended its conduct to be relied on; and (4) Sablan relied on DPL's conduct to his detriment. *O'Connor v. Div. of Pub. Lands*, 1999 MP 5 ¶ 9. In addition to these four general elements, in order to apply estoppel against the government, Sablan must show that DPL: (5) engaged in "affirmative misconduct going beyond mere negligence;" and (6) that "the government's wrongful act will cause a serious injustice, and the public's interest will not suffer undue damage by imposition of the liability." *Benavente*, 2000 MP 13 ¶ 20 (quoting *Watkins v. United States Army*, 875 F.2d 699, 707 (9th Cir. 1989)).

¶ 39 DPL concedes that "the MPLA actions during 2004, 2005, and 2006, which [Sablan] contends bar [DPL] from terminating the permit, actually occurred." Appellee's Opp'n Br. at 15. This concession satisfies the first element of estoppel. Moving to the second element, Sablan claims that it was ignorant of the true state of facts and that it "had absolutely no idea or information that the [Amended] Permit would be terminated by DPL on May 3, 2006." Appellant's Opening Br. at 19. However, Sablan knew or should have known that a termination decision could occur at any time after receiving the 2004 Notice of Violation, which explicitly stated that failure to cure all of the violations listed in the notice "will result in the Permit being terminated." Statement of Material Facts at Ex. 22. Moreover, Sablan admitted that not all violations from the Notice of Violation had been addressed as late as April 25,

2005, when counsel for Sablan sent a request for information to MPLA and conceded that "[Sablan] understands that there are several other issues your client still needs to decide on . . . ." Appendix at 114. Given this knowledge, Sablan's claim of ignorance of the true state of facts fails. As for the third element required to prove estoppel, MPLA's April 2005 letter was simply a response to Sablan's request for information. Nothing in the letter suggests any intent on the part of MPLA apart from an intent to respond to Sablan's request for information. Given Sablan's knowledge that there were still outstanding issues related to the Notice of Violation when he requested the April 2005 letter from MPLA, any reliance on MPLA's letter by Sablan was unreasonable. Thus, even if DPL was not a public agency, Sablan could not satisfy the four general elements required to assert estoppel. Because Sablan has failed to satisfy the four general requirements necessary to show estoppel, we decline to address the two remaining requirements necessary to estop a government agency.

2. Statute of Limitations

¶ 40 Sablan claims that the six-year catch-all statute of limitations found in 7 CMC § 2505 barred DPL from terminating the Amended Permit because all of the grounds for termination arose more than six years before DPL issued the Notice of Termination. The trial court denied that the statute of limitations applied to any of the grounds for termination, holding that "[s]tatutes of limitations do not prevent a party to a contract from exercising their right to terminate the contract." *J.G. Sablan Rock Quarry, Inc. v. Dep't of Public Lands*, No. 06-0424 (NMI Super. Ct. Dec. 31, 2008) (Decision and Order Affirming Revocation of Mining Permit at 15) ("Decision"). The applicability of the statute of limitations is a question of law we review de novo. *Oden v. N. Marianas Coll.*, 2003 MP 13 ¶ 6.

¶ 41 The catch-all statute of limitations contained in section 2505 states that "[a]ll actions other than those covered in 7 CMC §§ 2502, 2503, and 2504 shall be commenced within six years after the cause of action accrues . . . ."[16] Sablan's argument is based on the trial court's comparison of the Amended Permit to a contract. Expanding on this idea, Sablan argues that DPL's termination of the Amended Permit should be construed as a breach of contract action. However, Sablan provides no relevant authority treating a party's decision to exercise its right to terminate a contract as a breach of contract action. This dearth of authority is unsurprising since a party's exercise of a right to terminate is not an "action" as contemplated by that term's use in the Commonwealth Code of Civil Procedure. Although the Commonwealth Code of Civil Procedure does not define the term, other jurisdictions define the term "action" for purposes of their codes of civil procedure. For instance, the California Code of Civil Procedure defines "action" as "an ordinary proceeding *in a court of justice* by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of

[16] Sections 2502, 2503, and 2504 of Title 7 contain varying time limits for filing suits based on specific actions. However, none of these actions are similar to the termination decision at issue.

a wrong, or the punishment of a public offense." Cal. Civ. Proc. Code § 22 (Deering 2012) (emphasis added); *see also Frost v. Witter*, 64 P.2d 705, 707 (Cal. 1901) ("An action is nothing else than the right or power of prosecuting in a judicial proceeding what is owed to one . . . ." (emphasis and citation omitted)).

¶ 42 Here, instead of suing Sablan for breach of contract, which would constitute an "action" for purposes of the statute of limitations, DPL chose to exercise its right to terminate the Amended Permit. Had it not been for Sablan's challenge to that decision, DPL's termination decision would have never come before any court. Therefore, we hold that the exercise of a termination provision of a contract without bringing suit does not amount to an "action" as that term is used in the Commonwealth Code of Civil Procedure and that the statute of limitations in section 2505 does not apply to DPL's decision to terminate the Amended Permit.

3. Laches

¶ 43 Sablan raised the equitable doctrine of laches below but the trial court refused to consider the defense because Sablan raised it for the first time in its reply brief. Decision at 16 n.4. On appeal, Sablan reasserts laches but once again has failed to raise the defense until his reply brief. Appellant's Reply Br. at 17 n.12. Sablan misrepresents the trial court's decision on this point, claiming that the trial court refused to address laches because Sablan had not raised the defense at the administrative level. However, the trial court's decision clearly states that "the argument cannot be raised for the *first* time in a reply brief . . . ." Decision at 16 n.4. We likewise decline to address an issue raised for the first time in a reply brief because such action generally constitutes waiver of the issue and Sablan has made no showing that "justice and fairness require" consideration of the issue. *Bank of Saipan v. Superior Court*, 2002 MP 17 ¶¶ 20, 21.

C. Merits of the Grounds for DPL's Termination Decision

¶ 44 In addition to his arguments about what Sablan perceives as procedural infirmities in DPL's termination of the Amended Permit, Sablan argues that the termination should be reversed because DPL's grounds for termination were meritless. We review the trial court's findings regarding each ground for termination[17] de novo but "are bound by the constraints of the [Commonwealth APA] in our de novo review." *Pac. Sec. Alarm, Inc. v. Commonwealth Ports Auth.*, 2006 MP 17 ¶ 12.

¶ 45 The trial court applied the "substantial evidence" standard of review when reviewing DPL's action. Decision at 14. However, the substantial evidence standard of review is applicable only in cases "subject to 1 CMC §§ 9108 and 9109 or otherwise reviewed on the record of an agency hearing provided by statute." 1 CMC § 9112(f)(2)(v). Since, as discussed in section III.A.2 above, DPL's termination

[17] Because we hold that Sablan did not receive adequate notice regarding its failure to generate revenue, we will not analyze whether DPL's decision on this ground was arbitrary and capricious.

decision was not subject to section 9108 or 9109 and DPL did not hold a formal hearing, the substantial evidence standard of review is inapplicable. The correct standard of review for the agency action at issue is what is commonly known as the "arbitrary and capricious" standard. 1 CMC § 9112(f)(2)(i). Under this standard, courts should hold unlawful agency actions that are "[a]rbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . . " *Id.* An agency action is arbitrary and capricious "if the agency has . . . entirely failed to consider an important aspect of the problem." *In re Hafadai Beach Hotel Extension*, 4 NMI at 45 n.33 (quoting *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992)); *see also id.* at 43 n.21 ("Generally . . . the review of a formal hearing is for substantial evidence and the review of an informal hearing is for arbitrariness.") (citation omitted). An arbitrary and capricious action has also been defined as "willful and unreasonable action without consideration or in disregard of facts or without determining principle." *In re Blankenship*, 3 NMI 209, 217 (1992) (quoting Black's Law Dict. (5th ed. 1979)).

¶ 46 Before turning to a review of the grounds for termination, one additional issue must be addressed regarding the scope of the administrative record for this case. Sablan repeatedly claims that DPL's termination decision could only rely on evidence presented at the July 2006 reconsideration hearing. Sablan's claim reflects a fundamental misunderstanding of the scope of the record in administrative appeals. The Commonwealth APA requires reviewing courts to review "the whole record . . . ." 1 CMC § 9112(f). Although this phrase has not been defined by Commonwealth courts, federal courts interpreting virtually identical language from the federal APA, 5 U.S.C. § 706, have defined the record for administrative appeals as including everything that was before the agency pertaining to the merits of its decision, and "all documents and materials directly or indirectly considered by agency decision-makers . . . ." *Thompson v. United States Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (internal quotation marks, citations, and emphasis omitted). We find *Thompson* instructive and hold that the record of DPL's termination decision is far more extensive than Sablan's claim suggests. On review, this Court will consider any evidence that was before DPL when it made its termination decision in order to determine whether that decision was arbitrary and capricious. We will now address the specific grounds of termination appealed by Sablan.

1. Failure to Submit a Development Plan

¶ 47 Article 10 of the Amended Permit states that Sablan "shall submit to the Government a detailed proposal for approval by the Government indicating how it intends to develop the pozzolan & basalt recovery operation on the premises" within 180 days of the date of execution of the permit. Appendix at 95. The 2004 Notice of Violation informed Sablan that it had not submitted this necessary development plan. Because DPL had no evidence that any plan had ever been submitted, it included this failure as one of the grounds for termination in the 2006 Notice of Termination. At the reconsideration hearing,

Sablan produced what it claimed to be the table of contents to a development plan. However, DPL had no record of ever having received the table of contents and neither party could produce a copy of the complete development plan that Sablan had purportedly submitted to the government. Additionally, prior to the reconsideration hearing, Sablan had never mentioned the development plan in any of his correspondence with DPL or its predecessor agencies. After reviewing this evidence, Secretary DelRosario evidently made a credibility determination against Sablan and concluded that the existence of a table of contents is not adequate proof that a development plan was ever submitted. On the record before us, we cannot conclude that this was "willful and unreasonable" or arbitrary and capricious agency action. *In re Blankenship*, 3 NMI at 217. Therefore, we affirm DPL's decision on this ground. Since Article 9 of the Amended Permit states that DPL may terminate the permit in response to Sablan's "violation of *any* of the terms or conditions" of the permit, DPL was entitled to terminate the Amended Permit on this ground alone after providing notice and an opportunity to show compliance. Appendix at 105 (emphasis added).

2. Failure to Pay Past-Due Royalties and Rentals

¶ 48 The 2004 Notice of Violation states that, in addition to the $125,433.27 Sablan owed for rental payments, it also owed $358,204.29 for "rental and royalty obligations from previous permits . . . ." Statement of Material Facts at Ex. 22. The 2006 Notice of Termination states that Sablan owed $345,914.17 for "royalties and other payments under your earlier permit in 1993 to conduct mining activities on Pagan."[18] Appendix at 171. Sablan claims that he obtained a verbal deferral agreement with MPLA regarding these past-due rental and royalty obligations. However, the only evidence provided by Sablan is self-serving testimony from the principal of the corporation at the reconsideration hearing. DPL responds that there is no unbiased evidence in the record regarding any deferral or waiver of Sablan's obligations. To the contrary, DPL points to the December 2002 memorandum prepared by the Comptroller of the MPLA, which recommends denial of Sablan's request for waiver of past-due amounts. In light of the evidence before him at the time of the decision, it was not arbitrary and capricious for the Secretary to terminate the Amended Permit on this ground.[19]

IV

¶ 49 For the foregoing reasons, we REVERSE the trial court's conclusion that Sablan received adequate notice regarding the ground for termination related to his alleged failure to generate revenue. We AFFIRM the trial court's conclusions that: (1) DPL provided Sablan with adequate due process prior

[18] Neither party provides an explanation for the difference between these two amounts.

[19] Because we uphold the Secretary's decision to terminate the Amended Permit on the grounds that Sablan failed to submit a development plan and failed to pay royalty and rental payments, and each of these violations constitutes an independently adequate ground for termination, we decline to address whether the Secretary erred in concluding that Sablan conducted mining activities outside of its permitted area.

to terminating the Amended Permit on all grounds except Sablan's alleged failure to generate revenue; and (2) neither estoppel nor the statute of limitations prevented DPL from terminating the Amended Permit. We also AFFIRM DPL's decision to terminate the Amended Permit on the grounds that Sablan: (1) failed to submit a detailed development plan to DPL; and (2) failed to pay past-due royalty and rental obligations. We REMAND this matter to the trial court for entry of judgment consistent with this opinion.

SO ORDERED this 30th day of March, 2012.

/s/
ALEXANDRO C. CASTRO
Acting Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

/s/
HERBERT D. SOLL
Justice Pro Tem