IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2012-5073

JERRY MCGUIRE

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in
Case No. 09-CV-380, Judge Bohdan A. Futey

BRIEF OF THE UNITED STATES

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STATEMENT OF RELATED CASES

The Plaintiff-Appellant, Jerry McGuire ("McGuire"), filed for Chapter 11 bankruptcy relief on June 5, 2001 in the United States District Court for the District of Arizona. That filing included a Fifth Amendment takings claim against the United States. On appeal, the Ninth Circuit held that the district court lacked jurisdiction to hear McGuire's takings claim and transferred the case to the Court of Federal Claims. *See McGuire v. United States*, 550 F.3d 903, 909 (9th Cir. 2008). Counsel is unaware of cases pending in other courts that will be directly affected by this Court's decision.

JURISDICTIONAL STATEMENT

Appellant Jerry McGuire alleged subject matter jurisdiction under 28 U.S.C. § 1334(b) in a Chapter 11 bankruptcy proceeding filed in the United States District Court for the District of Arizona. That proceeding included a Fifth Amendment takings claim asserted by McGuire against the United States. The United States Court of Appeals for the Ninth Circuit held that the district court lacked jurisdiction over McGuire's takings claim because the United States has consented to be sued for takings claims in excess of $10,000 only in the United States Court of Federal Claims ("CFC"). The Ninth Circuit accordingly transferred the case to the CFC, where McGuire alleged jurisdiction under 28 U.S.C. § 1491(a). On February 22, 2012, the CFC entered judgment in favor of the United States. A1-23.

McGuire timely appealed the CFC's judgment on March 13, 2012. A259. As we explain below, however, the CFC lacked jurisdiction to hear the case because it is unripe. This Court's jurisdiction rests on 28 U.S.C. § 1295(a)(3).

STATEMENT OF THE ISSUES

McGuire contends that the United States took his agricultural leasehold when the Bureau of Indian Affairs ("BIA"), an agency of the Department of the Interior ("Interior"), removed the Eighth Avenue Bridge ("Bridge"), which was located across an irrigation canal owned and operated by BIA and was constructed without BIA's approval long before McGuire leased the property. McGuire does not seek compensation for the taking of the Bridge itself, but instead asserts that removal of the Bridge eliminated the only reasonable access to the northern portion of his leased property. The issues on appeal are:

1. Whether McGuire's claim that the United States' removal of the unauthorized bridge took his agricultural leasehold fails for lack of jurisdiction where McGuire never ripened his claim by applying for a permit to construct a bridge that would provide him continued access across the canal.

2. Assuming McGuire's claim is ripe, whether McGuire's takings claim fails on the merits because neither the lease, nor relevant regulations, nor necessity granted McGuire a cognizable property interest either in the Bridge itself, in

continuing to access the northern portion of his Leased Property by using the Bridge, or in the ability to repair or rebuild the Bridge.

STATEMENT OF THE CASE

A. Nature of the Case

McGuire leased farmland ("Leased Property") from the Colorado River Indian Tribes ("CRIT") that was roughly bisected by an irrigation canal owned and operated by BIA and accessible via several routes, including a wooden bridge known as the Eighth Avenue Bridge, which was located on the canal. BIA informed McGuire in 1998 and 1999 that the Bridge was unsafe and unauthorized and would be removed. BIA repeatedly encouraged McGuire to apply for a permit to install a replacement bridge pursuant to federal regulations by submitting plans and/or documentation. McGuire never applied to BIA for a permit to install a bridge. Instead, McGuire filed suit against BIA in tribal court and sought to prevent the Bridge's removal. After BIA removed the Bridge in January 2000, McGuire immediately stopped making lease payments, and BIA canceled his lease for nonpayment. CRIT leased the property to another tenant, who made a written application to BIA and received a permit to build a bridge over the canal.

McGuire brought a takings claim as part of a Chapter 11 bankruptcy proceeding, and the Ninth Circuit transferred the case to the CFC. McGuire asserts that the United States, through the BIA, took his property interests when it

removed the Bridge and did not authorize him to repair or replace the Bridge. McGuire does not seek compensation for the taking of the Bridge itself, A42 (Am. Compl. ¶ 16), but instead alleges a regulatory taking of the Leased Property based on the alleged denial of his preferred means of access to the northern portion of the Leased Property via the Bridge. A41 (Am. Comp. ¶13). After a three-day trial, the CFC entered judgment against McGuire because McGuire did not demonstrate that he held a cognizable right to access property via the Bridge or to repair or rebuild the Bridge. McGuire now appeals.

B. Statement of Facts

1. January 1995 Lease between McGuire and Colorado River Indian Tribes

On January 1, 1995, McGuire signed a ten-year lease with the Colorado River Indian Tribes for the use of 1,355.76 acres of farmland on CRIT's reservation in Parker, Arizona, SA260-80 (DX1), which he used to farm alfalfa, A109 (Tr. 62:20-24). Because the land was held in trust for CRIT by the United States, BIA was required to approve the lease. SA389 (DX47 (Tr. 78:16-17)). Superintendent Allen Anspach of the BIA's Colorado River Agency approved the lease for BIA on June 13, 1996. SA276 (DX1, 15).

2. The Leased Property and the BIA Irrigation Project

The Leased Property and access routes are depicted in the following photograph:

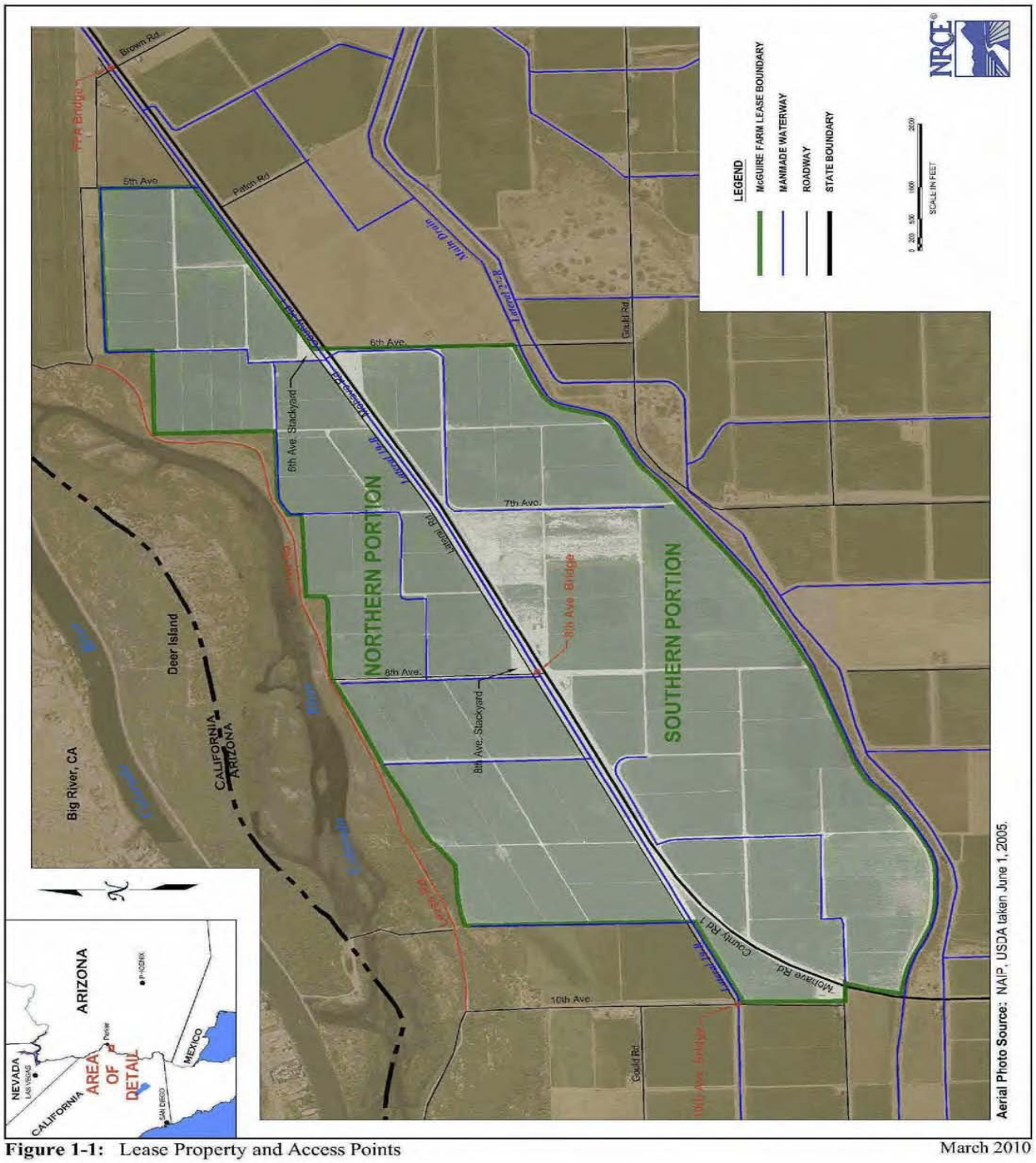

Figure 1-1: Lease Property and Access Points March 2010

SA362 (DX38, 206); *see also* SA449 (PX49) (photograph).

The Leased Property is bisected by an irrigation canal ("Lateral 19-R") that is owned and operated by BIA. SA411-12 (DX47 (Tr. 100:9-101:15) (Anspach's testimony)); A104 (Tr. 42:22-43:1) (McGuire's testimony); A162-63 (Tr. 358:16-359:4) (Ted Henry's testimony). Lateral 19-R is part of the Colorado River Indian Tribe Irrigation Project, a system of canals of varying sizes that spans 85,000 acres and is maintained by the BIA. A202 (Tr. 515:22-516:1) (Rodney McVey's testimony); A168 (Tr. 380:19-382:20) (Henry's testimony). Relevant regulations at the time provided BIA with a right-of-way "of sufficient width to permit passage and use of equipment necessary for construction and proper operation and maintenance of the project's canals, laterals, and other irrigation works." 25 C.F.R. § 171.12 (1999). It is undisputed that this right-of-way covered both Lateral 19-R itself as well as the banks on either side of the canal. A163 (Tr. 360:12-20) (Henry's testimony); A56 (*McGuire v. United States*, 97 Fed. Cl. 425, 429 (2011).

The Mojave Road, a major public thoroughfare, runs parallel to Lateral 19-R on the canal's south side. A101 (Tr. 32:20-24) (McGuire's testimony); SA449 (PX49) (map showing location of Mojave Road relative to Lateral 19-R). The southern portion of the Leased Property directly abuts the Mohave Road, but it is necessary to cross Lateral 19-R to reach the northern portion of the property. A102 (Tr. 34:17-21) (McGuire's testimony). At the start of McGuire's lease, three

bridges crossed Lateral 19-R near the Leased Property and provided McGuire with access to the northern portion of the Leased Property. A163 (Tr. 360:2-8; 362:13-17) (Henry's testimony). The Eighth Avenue Bridge crossed the canal at Eighth Avenue, which runs between Mojave Road and Levee Road. SA449 (PX49); A104 (Tr. 43:6-9). Levee Road is located on a narrow stretch of CRIT property that lies between the northern border of the Leased Property and the Colorado River. A164 (Tr. 364:24-365:22). The second bridge, the Tenth Avenue Bridge, was located just southwest of the Leased Property. SA449 (PX49); A163 (Tr. 362:13-17) (Henry's testimony). The Tenth Avenue Bridge was owned and maintained by BIA and was open to the public. A165 (Tr. 367:6-368:7). The third bridge, known as the FFA Bridge, crossed the canal just northeast of the Leased Property. SA449 (PX49); A163 (Tr. 362:13-17). BIA also owned the FFA Bridge, which was also open to the public. A166 (Tr. 371:12-25-372:1-6). The CFC found that McGuire could reach the northern portion of the Leased Property by using either the FFA Bridge or the Tenth Avenue Bridge and then driving on the canal bank roads or on Levee Road. A3-A4.

The Eighth Avenue Bridge is the subject of this lawsuit. The Bridge was a wooden structure supported by concrete bulkheads. A104 (Tr. 43:10-21) (McGuire's testimony). It was probably built by an earlier tenant in the 1960's or 1970's, although its precise origins are unknown. A104 (Tr. 43:22-44:1)

(McGuire's testimony); A195 (Tr. 488:18-24) (McVey's testimony). It was located within BIA's right-of-way inside Lateral 19-R. A163 (Tr. 360:16-20) (Henry's testimony about the bridge's location); SA422 (DX47 (Tr. 111:11-12) (BIA did not consider the bridge to be part of the leased premises). Various parties, including BIA and McGuire, used the Bridge. A104 (Tr. 44:4-19), A 114 (Tr. 82:12-83:17) (McGuire's testimony concerning use of the Bridge); SA312-15 (DX8 at 9-12). At the time McGuire took possession of the Leased Property, the Bridge provided the most direct route between the northern and southern portions of the Leased Property. A102 (Tr. 35:2-5); A110 (Tr. 67:18-68:6) (McGuire's testimony). McGuire also chose to stack baled alfalfa hay harvested from the northern portion of the Leased Property on the northern side of the Bridge and haul the hay over the Bridge using large trucks. SA380 (DX38 at US000229 (Dr. L. Niel Allen's Report) ("[T]he 8th Avenue stackpile seems to have been used exclusively by Mr. McGuire for the northern portion.").

As a structure across a BIA irrigation project, the Bridge was governed by BIA regulations formerly at 25 C.F.R. § 171.9 (1999) (now at 25 C.F.R. §§ 171.400, 171.405 (2011)). These regulations went into effect in 1977, long before McGuire entered into the lease. *See* Operations and Maintenance, 42 Fed. Reg. 30,361 (June 14, 1977). The regulations authorized BIA to build bridges or other crossings when necessary for BIA's use in maintaining the project or, at its

discretion, for private use. 25 C.F.R. § 171.9(a)-(b). Alternatively, such crossings could be constructed by private parties, but only "in accordance with plans approved by" BIA. 25 C.F.R. § 171.9(c). Such structures were required to be "constructed and maintained under revocable permits on proper forms issued by the Officer-in-Charge of the irrigation project to the party or parties desiring such structures." *Id.* It is undisputed that the Bridge was not constructed by BIA, CRIT, or McGuire and that it was not authorized by permit before it was constructed. SA283 (PX20/DX4); SA284 (PX21/DX5); A104 (Tr. 43:6-25-44:1); A195 (Tr. 488:4-24). It is also undisputed that, for McGuire to build a replacement bridge, he was required to obtain a permit in accordance with 25 C.F.R. § 171.9(c).

3. Removal of the Eighth Avenue Bridge

In the summer of 1998, BIA Superintendent Alan Anspach notified McGuire in person that BIA planned to remove the Bridge because it was unsafe. A38 (McGuire's Am. Compl. ¶ 10.4). McGuire met with CRIT's tribal council chairman about Superintendent Anspach's letter, and CRIT subsequently wrote letters to BIA requesting that BIA explore alternatives to removing the Bridge. A124 (Tr. 125:7-25) (McGuire's testimony); SA281-82 (DX2-3) (letters from CRIT to BIA). In December 1998, BIA wrote to CRIT that the Bridge would be removed in January 2000 because it was not constructed in accordance with Interior Department regulations, was not built or approved by BIA, and was

unsafe. SA283 (DX4). The letter stated that farmers would either have to use alternate routes or obtain approval from BIA to construct a new bridge. BIA enclosed a copy of the applicable regulations at 25 C.F.R. § 171.9 with the letter.

BIA sent McGuire three letters in 1999 reminding McGuire of BIA's intent to remove the Bridge in January 2000 and encouraging him to apply for a permit to build a new bridge over Lateral 19-R. SA284-316 (DX5-9). The first, sent in February 1999, informed McGuire of BIA's "intent to remove the unsafe and unauthorized wooden bridge" across the canal on the Leased Property. SA284 (DX5). The letter advised:

> If you should decide that you need to bridge the canal in order to operate your farm you may submit to the Agency Superintendent plans, with specifications, for a new bridge and apply for a crossing permit. See attached; Reference to 25 CFR, Ch. 171.9 Structures.

A copy of the regulations was including with the letter.

McGuire did not apply for a permit. In August 1999, BIA sent a second letter to McGuire, reminding McGuire of BIA's plans to remove the Bridge and of the need to apply for a permit. SA303 (DX7). The letter specifically stated:

> This letter is being sent as a reminder of the impending action and to also remind you that should you feel a new bridge is needed at this location it will be necessary for you to submit the required documentation to the Agency Superintendent in accordance with the enclosed requirements from 25 CFR, Chapter 171.9.

A copy of the regulations was again enclosed with the letter. However, McGuire still did not apply for a permit. Instead, on October 12, 1999, McGuire's attorney filed a complaint in tribal court alleging that removal of the Bridge would be illegal, would breach the lease, and would take his leasehold. SA304 (DX8).

On November 12, 1999, BIA sent its third and final letter before the Bridge's removal. SA316 (DX9). The letter explained that the Bridge was scheduled for removal in early January 2000 but would be closed immediately because it was unsafe for use. The letter "again encourage[d] [McGuire] to apply for a permit to replace the current structure with one that meets [BIA's] design and safety requirements. SA316 (DX9). It further explained that McGuire would "need to access [the] affected lease acres by going around the canal" "[u]ntil an approved alternative to the existing bridge is found." *Id.*

The Bridge was closed in November 1999 and removed in January 2000. A123 (Tr. 118:2-13); A123 (Tr. 121:7-8). McGuire still did not apply for a permit to construct a bridge, and instead continued to harvest his alfalfa by traveling over the FFA Bridge and using smaller vehicles than he previously. A124 (Tr. 123:10-14). He also stopped paying annual rent on the Leased Property. A144 (Tr. 204:2-5) (McGuire's testimony).

By letter dated July 10, 2000, CRIT notified McGuire that he was in violation of the lease and provided him 10 days to correct the violation or show

why the lease should not be canceled. SA317 (DX10) (July 10, 2000 letter from CRIT to McGuire). McGuire's lawyer formally requested, by letter dated July 18, 2000, that CRIT consider reducing the lease payments. SA319 (DX11) (letter from Mr. Krueger to CRIT). McGuire did not, however, respond to CRIT's July 10 letter, resume rent payments, or show why the lease should not be canceled. *Id.*

In August 2000, BIA canceled the lease. SA320 (DX12) (letter from McVey to McGuire dated Aug. 11, 2000). McGuire filed an administrative appeal challenging the lease cancellation. SA322-26 (DX13) (Notice of Appeal filed Aug. 18, 2000). BIA denied the appeal on February 2, 2001. SA328 (DX24). At no time during this period did McGuire apply for a BIA permit to build a bridge.

CRIT subsequently leased the property to another tenant in January 2001. A196 (Tr. 491:8-18) (McVey's testimony); *see also* DX43 (lease, subject to protective order Dkt. 93). The new tenant farmed the northern portion of the Leased Property during 2001 using the FFA Bridge, the Tenth Avenue Bridge, and the Levee Road. A196 (Tr. 493:20-494:6) (McVey's testimony). In January 2002, the tenant applied for a BIA permit, pursuant to 25 C.F.R. § 171.9, to construct a bridge over the canal where the Eighth Avenue Bridge was previously located. A183-84 (Tr. 442:23-444:11) (Jeffrey Hinkins' testimony). BIA granted the permit and the tenant built a new bridge with a concrete culvert crossing. SA382-87 (DX46) (Jan. 14, 2002 permit).

C. Procedural History

1. Ninth Circuit Proceedings

McGuire filed for Chapter 11 bankruptcy relief on June 5, 2001. *McGuire v. United States*, 550 F.3d 903, 908 (9th Cir. 2008); SA332 (DX27 at US000120) (McGuire's Chapter 11 Plan). On November 13, 2001, he filed an inverse condemnation claim against the government as part of his bankruptcy case, seeking $2,000,000 in compensation. *McGuire*, 550 F.3d at 908. The government moved to dismiss the claim for lack of subject matter jurisdiction on the ground that the United States had not waived its sovereign immunity to be sued in district court for takings claims in excess of $10,000. *Id.* The bankruptcy court concluded that it had jurisdiction under the Tucker Act, 28 U.S.C. § 1491, and the district court adopted its recommendation and denied the government's motion to dismiss. *Id.*

After a trial in April 2005, the bankruptcy court found that the United States had taken McGuire's leasehold interest and recommended that McGuire be awarded $1,132,059.60 in compensation based on the fair market value of the lease over five years. *Id.* The district court did not adopt this recommendation; instead holding that the case had never ripened because the government never denied an application for a permit to construct a new bridge. *Id.*

On December 24, 2008, the Ninth Circuit held on appeal that the district court did not have subject matter jurisdiction over the takings claim, and ordered it

to be transferred to the CFC. Before transferring the case, however, the Ninth Circuit concluded that McGuire's claim was ripe. *Id.* at 909. The court held that McGuire had contacted BIA concerning "removal and plans for a new bridge," and had "tr[ied] a variety of additional strategies to maintain access to the Leased Property" by "enlisting the help of the Tribe," "retain[ing] local counsel and fil[ing] suit against [] BIA in tribal court," and filing an administrative appeal. *Id.* The Ninth Circuit found that although McGuire did not "submit a formal application for a bridge permit," he was not required to do so to satisfy ripeness requirements because "[n]o further purpose would have been served by filing a formal application for a bridge permit." *Id.* at 910. The Ninth Circuit explained that even though the district court lacked subject matter jurisdiction, the court of appeals could address ripeness to serve the interests of "judicial economy and courtesy to the transferee court." *Id.* at 910 n.3.

2. Court of Federal Claims Proceedings

The CFC received the case from the U.S. District Court for the District of Arizona on June 10, 2009. In September 2010, the government moved to dismiss under CFC Rules 12(b)(1) and 12(b)(6), arguing that the CFC lacked jurisdiction because McGuire's claim was not ripe. *See* A54 (*McGuire*, 97 Fed. Cl. at 428). The CFC denied the motion, holding that the Ninth Circuit's decision on ripeness

is the law of the case, and that no extraordinary circumstances existed that would require the Ninth Circuit's decision to be questioned. A62-67.

The government also moved, in the alternative, for summary judgment, contending that even if the case is ripe, McGuire could not show either that he had a legally cognizable property interest or that a compensable taking had occurred. A54-55. The CFC granted summary judgment for the government on McGuire's categorical takings claim, but otherwise denied summary judgment, A68-75, and held a trial in September 2011. McGuire presented his own testimony (A101-50) and that of Tim Terkelson, a certified private accountant, who discussed McGuire's lost earnings (A150-58). The government presented the testimony of Ted Henry, the Irrigation Project Manager at BIA's Colorado River Agency, who testified about alternative means of access to the northern portion of the Leased Property (A162-80); Jeffrey Hinkins, a Supervisory General Engineer for the Agency, who testified about the permitting process for structures over BIA canals and his interactions with McGuire and the subsequent lessee (A180-89); Rodney McVey, the former Acting Superintendent of the Agency, who testified, *inter alia*, about the terms of the lease between CRIT and the subsequent lessee (A189-204); L. Niel Allen, an engineer who testified as an expert about alternative means of access and the economic impact of using these alternatives (A205-46); and Albert Trimels, the Roads Maintenance Engineer for BIA's Western Regional Office,

who testified about the circumstances that led BIA to remove the Bridge (A246-53). The CFC admitted the prior trial testimony of Alan Anspach, the retired former Superintendent of the Agency, regarding the Bridge's removal and the permitting process. A161-62 (Tr. 354:20-356:14); SA388-426 (DX47). The CFC also entered the deposition testimony of and a letter written on McGuire's behalf by Gregory Sprawls, the tribal farm manager, over the government's hearsay objection. A158 (Tr. 258:22-260:23); SA429-48 (PX47, PX48).

Following trial, the CFC issued an Opinion and Order on February 22, 2012, in which it held that McGuire had not identified a legally cognizable property interest that would require compensation, A22-23, and that therefore, a regulatory taking analysis under *Pennsylvania Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), was unnecessary. A21-22. In its opinion, the court analyzed McGuire's alleged property interests: the right to access the northern portion of his property via pre-existing routes, and the right to repair or replace the Eighth Avenue Bridge. A12. To determine if these claimed interests amounted to a compensable property right, the court looked for "crucial indicia of a property right, such as the ability to sell, assign, transfer, or exclude." A10.

The court first examined McGuire's claimed interest in "ingress, egress, and access as it existed at the outset of the lease," which McGuire asserted included a right to use the Bridge. A12. The court concluded that this was not a legally

cognizable property interest for several reasons. First, it noted that Federal Circuit case law foreclosed the possibility that McGuire's expectation to use the Bridge created a property interest in the Bridge. A12-13. Second, it found that McGuire's lease with CRIT did not create a legal right to use the Bridge, because the Bridge was not owned or controlled by CRIT, and was located on a BIA right of way, and therefore was not part of the Leased Property. A14-15. The court also noted that, even if the lease's provision allowing "ingress and egress" included the right to use the Bridge, this right did not amount to a property right because it did not include any of the "crucial indicia" of a property right, such as the ability to sell, assign, transfer, or exclude others. A14-15. Third, the court held that McGuire could not assert a takings claim here because, at most, he held a revocable permit to use the Bridge, and the revocation of such a permit is not a compensable taking. A15-18 (citing *Colvin Cattle Co. v. United States*, 468 F.3d 803, 805-06 (Fed. Cir. 2006)).

Next, the court examined whether McGuire had a property interest in repairing or replacing the Bridge that was created by either McGuire's lease or BIA regulations. The court found that Paragraphs 9 and 10 of the lease, which addressed "improvements" to the Leased Property, did not apply to the Eighth Avenue Bridge, because the Bridge fell inside the BIA right-of-way and was therefore not covered by the lease. A20-21. And, regardless, McGuire did not establish that the right to repair or rebuild a bridge amounted to a compensable

property right. A20. The court also found that BIA's regulations, specifically 25 C.F.R. § 171.9(c), did not create a right to repair or rebuild, because it only covered crossings that were "constructed for and by" the BIA, and McGuire presented no evidence that the BIA had constructed the Bridge. A20.

SUMMARY OF THE ARGUMENT

1. The suit should be dismissed for lack of ripeness. The Ninth Circuit's discussion of ripeness is not binding law of the case because that discussion is dicta and is incorrect. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988). This Court should consider this jurisdictional question and dismiss McGuire's claim for lack of jurisdiction because it is not ripe.

McGuire does not dispute that BIA regulations provided him the opportunity to install a new bridge. Nevertheless, despite repeated letters from BIA encouraging McGuire to submit documentation in order to obtain permission to construct a replacement bridge, he never applied for a permit. Instead, McGuire sued BIA in tribal court and appealed BIA's decision in an effort to prevent BIA from removing the Bridge. Because there was a "further administrative process" that could have "reasonably result[ed]" in a definite agency decision, *Morris*, 392 F.3d at 1376, McGuire's takings claim is not ripe for judicial review.

2. Assuming it is ripe, McGuire's suit fails on the merits for multiple reasons. First, to the extent McGuire's claim rests on BIA's removal of the Bridge,

his claim fails because McGuire did not have a property interest in continued use of the unauthorized Bridge. He did not, as he alleged, "own" the Bridge by virtue of his lease, BIA regulations, or statements allegedly made by CRIT and BIA. Nor did his lease or BIA regulations grant a right-of-way to use the Bridge. Second, McGuire had no property interest in repairing the Bridge, and no right to replace the removed Bridge without first obtaining a BIA permit to do so, which he did not attempt to do. Third, McGuire could access his property by other means, and therefore did not have a property interest in the Bridge as the sole and necessary means of access to his property. Fourth, McGuire's expectation to use the Bridge did not create a property interest in the use of or ability to repair the Bridge, because expectations are not themselves compensable property interests. *See Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1332 (Fed. Cir. 2012) (citing *Acceptance Ins. Cos. v. United States*, 583 F.3d 849, 858-59 (Fed. Cir. 2009)). Finally, McGuire at most had a revocable permit to use the Bridge, and this Court has found that such permits are not cognizable property interests.

STANDARD OF REVIEW

This Court reviews the CFC's findings of fact under the "clearly erroneous" standard, while its legal holdings are reviewed *de novo*. *Pac. Gas & Elec. Co. v. United States*, 668 F.3d 1346, 1350 (Fed. Cir. 2012); *Bell BCI Co. v. United States*, 570 F.3d 1337, 1340 (Fed. Cir. 2009). A factual finding is clearly erroneous

"when, on the entire record, the appellate court is left with a 'definite and firm conviction that a mistake has been committed.'" *In re Mark Indus.*, 751 F.2d 1219, 1222-23 (Fed. Cir. 1984) (citations omitted). The Supreme Court has held that mixed questions of law and fact should be subject to deferential review "when it appears that the [trial] court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate scrutiny will not contribute to the clarity of legal doctrine." *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233 (1991) (citations omitted); *see also Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 659 F.3d 1369, 1374 (Fed. Cir. 2011).

ARGUMENT

I. This Court should dismiss McGuire's claim for lack of jurisdiction.

This Court should dismiss this case for lack of jurisdiction because McGuire never ripened his takings claim. The CFC found that McGuire's claim was ripe because it would "follow the law of the case as established by the Ninth Circuit" in *McGuire*, 550 F.3d at 910, even though it acknowledged it might have reached a different result if it were presented with the ripeness issue in the first instance. A8-9 (*citing McGuire*, 97 Fed. Cl. at 433-37). However, the Ninth Circuit's discussion of ripeness is incorrect, and therefore need not be adopted as law of the case. This Court should consider this jurisdictional question and dismiss the claim for lack of jurisdiction because McGuire's claim is not ripe.

A. The Ninth Circuit's decision on ripeness is not binding.

This Court is not required to adopt the discussion of the Ninth Circuit on ripeness as law of the case. That discussion was not necessary to the decision, and, in any event, ripeness is a jurisdictional issue, which this Court therefore should entertain. *Morris*, 392 F.3d at 1375-76; *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001). "A court has a duty to inquire into its jurisdiction to hear and decide a case," *Special Devices, Inc. v. OEA, Inc.*, 269 F.3d 1340, 1342 (Fed. Cir. 2001) (citation omitted), "notwithstanding what other courts, in dicta or otherwise, may have suggested." *Hydaburg Co-op Ass'n v. United States*, 667 F.2d 64, 66 (Ct. Cl. 1981); *Folden v. United States*, 379 F.3d 1344, 1354 (Fed. Cir. 2004) (same).

The Ninth Circuit held that the United States has not waived its sovereign immunity to takings claims in suits brought under the Bankruptcy Act, and therefore neither the district court nor the bankruptcy court had jurisdiction over it. But before the Ninth Circuit transferred the case to the CFC, it opined that McGuire's claim was ripe. 550 F.3d at 910. Without ruling on whether ripeness is a "jurisdictional" issue, the Ninth Circuit justified its discussion of ripeness in the interests of "judicial economy and courtesy to the transferee court[]," and as a "predicate" to transferring the case on the theory that it would be "inappropriate to transfer a case that [it] did not consider ripe for adjudication." *Id.* at 910 n.3.

The Ninth Circuit's opinion as to ripeness, which it issued despite its conclusion that it lacked jurisdiction to hear the case, is dicta and therefore cannot be law of the case. The question of ripeness was not necessary to the Court's determination that the district court did not have subject matter jurisdiction over McGuire's claim. Nor was it necessary to determining whether the Ninth Circuit could transfer the case to the CFC under 28 U.S.C. § 1631. The Ninth Circuit needed only to decide whether the case "could have been brought" in the CFC, *Doe v. United States*, 372 F.3d 1308, 1317 (Fed. Cir. 2004), which it concluded was possible under the Tucker Act, 28 U.S.C. § 1491. The question of whether a case could have been filed in another court should be construed narrowly to address only whether the receiving court may hear the type of claim at issue pursuant to statutory or other authority; otherwise, to determine whether a claim could have been brought in another court, the transferring court could reach the merits of the claim and the accepting court would be bound by the law of the case. *C.f. Bernard v. United States*, 674 F.3d 904, 909 (8th Cir. 2012) (declining to transfer a case to the CFC where plaintiffs had abandoned their claims for money damages years earlier); *Joslyn v. United States*, 420 F. Appx 974, 979 (Fed. Cir. 2011) (citing *Phillips v. Seiter*, 173 F.3d 609, 610-11 (7th Cir. 1999)) (explaining that once a court determines that it lacks subject-matter jurisdiction, it may conduct

only "limited review" of the merits to determine if the case is a "sure loser" that should be dismissed rather than transferred.).

The Ninth Circuit acknowledged that it opined on ripeness as a "courtesy" to the CFC. As such, its discussion is dicta. *See In re McGrew*, 120 F.3d 1236, 1238 (Fed. Cir. 1997) (dicta consists of "statements in judicial opinions upon a point or points not necessary to the decision of the case."); *c.f. Christopher Vill. L.P. v. United States*, 360 F.3d 1319, 1333 (Fed. Cir. 2004) (declining to follow prior Fifth Circuit decision as law of the case where court had issued a ruling on the merits in spite of its finding that it lacked jurisdiction); *Hydaburg Co-op Ass'n*, 667 F.2d at 66 ("[W]hen a suit is dismissed for lack of jurisdiction, rulings on the merits rendered prior to the dismissal are nullities, *void ab initio*" and "[s]uch rulings are entitled to no weight . . . as law of the case"). In the absence of a waiver of sovereign immunity making the United States subject to suit in the Ninth Circuit, that court had no basis for reaching the question of whether the takings claim was ripe—especially given that the Ninth Circuit determined that it *was* ripe. That question should have been left to this Court and the Court of Federal Claims, which have exclusive jurisdiction over takings claims against the United States in a case such as this, and which have developed a substantial body of law on ripeness in the context of federal permitting actions. In light of the foregoing, the Ninth Circuit's opinion is not law of the case and it is not owed any deference.

Even if the Ninth Circuit's ripeness determination is law of the case, the law of the case doctrine, which applies to decisions of transferring courts, does not "limit" the receiving court's "power" to determine whether it has jurisdiction to hear a case. *Christianson*, 486 U.S. at 817 (citing *Messinger v. Anderson*, 225 U.S. 436, 444 (1912)). Rather, the doctrine "expresses the practice of courts generally to refuse to reopen what has been decided." *Id.* A court may therefore "revisit prior decisions [] of a coordinate court in any circumstance," and, where it concludes that a prior "jurisdictional" decision is "clearly wrong," it is "obliged to decline jurisdiction." *Christianson*, 486 U.S. at 817.[1] As explained below, the Ninth Circuit's discussion of ripeness is clearly wrong. This Court should therefore dismiss McGuire's claim for lack of jurisdiction because it is not ripe.

B. McGuire's claim is not ripe.

McGuire does not seek compensation for the taking of the Bridge itself. *See* A42 (Am. Compl. ¶ 16). Instead, he alleges a regulatory taking of the Leased

[1] Though the Supreme Court advised in *Christiansen* that a court should accept a court's "transfer decision" if it is "plausible," this standard of adopt-if-plausible does not apply to *all* of a transferring court's decisions, only to decisions to accept transferred cases. The CFC's acceptance of the transfer is not at issue. Here, the Ninth Circuit's discussion of ripeness was separate from its ruling that the district court did not have jurisdiction over McGuire's claim. Once the Ninth Circuit determined that that it did not have jurisdiction to hear McGuire's claim, it should have dismissed or transferred the case, without addressing whether the claim would ultimately be successful in the CFC. *Cf. Christopher Vill.*, 360 F.3d at 1329 ("[B]ecause the Fifth Circuit lacked jurisdiction to award relief, the appeal should have been dismissed."). This Court is not required to accept the Ninth Circuit's discussion of ripeness as "law of the case."

Property based on the alleged denial of his preferred means of access to the northern portion of the Leased Property: the Eighth Avenue Bridge. *See* A41 (Am. Comp. ¶13). The Bridge crossed over a BIA canal and was thus governed by BIA's regulation at 25 C.F.R. § 171.9, which stated in relevant part:

> (a) All structures, including bridges or other crossings, which are necessary as part of the project's irrigation and drainage system will be installed and maintained by the project.
>
> . . .
>
> (c) After a project is completed, additional structures crossing or encroaching on project canal, lateral or drain rights-of-way which are needed for private use may be constructed privately in accordance with plans approved by the Officer-in-Charge or by the project. In either case the cost of installing such structures will not be at the project's expense. Such structures will be constructed and maintained under revocable permits on proper forms issued by the Officer-in-Charge of the irrigation project to the party or parties desiring such structures.

25 C.F.R. § 171.9 (1999). This regulation provided BIA with the authority and discretion to issue a permit to a private party to construct or maintain a bridge across a project canal for private use. In order to repair or maintain the Bridge, or construct a new bridge at the same location, McGuire was therefore required to submit a permit application to BIA.

"[W]here a government entity provides procedures for obtaining a final decision, a takings claim will not be ripe until the property [o]wner complies with those procedures." *Greenbrier v. United States*, 193 F.3d 1348, 1359 (Fed. Cir. 1999). As the Supreme Court has explained:

> [T]he very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. . . . Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred.

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127 (1985); *see also Palazzolo*, 533 U.S. at 618 ("[A] takings claim challenging the application of land-use regulations is not ripe unless the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.") (citation and internal quotation marks omitted). Before a final agency decision is made, it is impossible for a court to ascertain whether the regulation deprives a property owner of "all economically beneficial or productive use" of the property, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992), or eviscerates the owner's reasonable investment-backed expectations to the extent that a taking occurred, *Penn. Central*, 438 U.S. at 124.

Therefore, "[t]he general rule is that a claim for a regulatory taking 'is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.'" *Morris*, 392 F.3d at 1376 (quoting *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985)). The property owner must take all "reasonable and necessary steps to allow" the agency "an opportunity to exercise its discretion"; it is only when "it becomes clear that the agency lacks the

discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty" that a takings claim is ripe. *Palazzolo*, 533 U.S. at 620-21.

McGuire never ripened his takings claim because he failed to submit plans for BIA's approval, thereby depriving BIA of the ability to exercise its discretion. Indeed, BIA sent McGuire three letters over a period of ten months before the Bridge was removed in January 2000, informing him of the need to apply for a permit. The February 5, 1999 BIA letter to McGuire expressly stated that to apply for a permit McGuire should "submit to the Agency Superintendent plans, with specifications, for a new bridge." SA284 (DX5). The August 25, 1999 BIA letter reiterated that, before McGuire could construct a new bridge, "it will be necessary [] to submit the required documentation to the Agency Superintendent in accordance with [25 C.F.R.] 171.9." SA303 (DX7). The November 12, 1999 BIA letter "again encourage[d] [McGuire] to apply for a permit to replace the current structure with one that meets [BIA's] design and safety requirements." SA316 (DX9).

Despite these notices over a ten-month period, McGuire never applied for a permit or submitted plans to build a new bridge over the canal. *See* CFC Dkt. 91, Ex. A at 102:23-103:8 (Anspach Testimony); A182-83 (Tr. 436:24-437:7, 440:18-21) (Hinkins' testimony); A193 (Tr. 480:15-17) (McVey's testimony);

A164-67 (Tr. 366:24-367:5; Tr. 370:19-23; Tr. 376:3-6) (Henry's Testimony). Nor did McGuire write to ask BIA for assistance in preparing an application or for a meeting with the Superintendent, or for a decision on whether he could repair or construct a new bridge.

McGuire testified that, rather than applying for a permit, he requested BIA to make repairs to the Bridge, A114 (Tr. 84:9-85:9), and discussed with a BIA official, Jeffrey Hinkins, plans to replace the unsafe and damaged wooden bridge with a pipe culvert crossing. A112 (Tr. 76:8-25 to 77:1-11). However, Hinkins, testified that he spoke with McGuire about the bridge "and other things" at Irrigation Committee meetings, which both he and McGuire attended, A182-83 (Tr. 436:17-23, 438:19-439:18), but that McGuire never submitted written plans "at any time before or after [the meetings]." A182 (Tr. 436:24-437:6); A183 (Tr. 439:12-18). Hinkins testified that "[t]here might have been some handwrit[ten] drawings on a piece of paper that we did together in my office or something, but nothing that I would deem as sufficient to go forth and issue a permit on." A182 (Tr. 437:1-6, 438:13-18); *see also* A183 (Tr. at 442:1-22). In addition to these conversations, McGuire attempted to *prevent the removal* of the Bridge through a claim brought in tribal court in October 1999. SA305-11 (DX8) (McGuire's complaint in tribal court). His complaint did not allege that he had filed an

application with BIA for a permit to construct a new bridge or that BIA denied such an application.

After the Bridge was removed in January 2000, instead of applying for a permit to construct a new bridge, McGuire refused to pay the annual rent due on his lease. SA320-21 (DX12) (Lease cancellation letter); *see also* SA328 (DX24) (Feb 2, 2001 letter concerning appeal). McGuire's lease was no cancelled for nonpayment until August 2000, seven months after the Bridge was removed. However, he did not attempt to work with BIA to secure a permit for a replacement bridge during that time. SA320 (DX12); SA328-30 (DX24). Even after BIA canceled his lease, and McGuire filed an administrative appeal contesting that action, he did not attempt to apply for a permit to build a new bridge. *See* SA322-26 (DX13) (McGuire's administrative appeal); SA305-11 (DX8) (McGuire's complaint in tribal court); *see also* SA328-30 (DX24) (Feb 2, 2001 letter concerning appeal). McGuire retained possession of the Leased Property until he exhausted his administrative appeals in February 2001. SA328-30 (DX24). McGuire does not purport to have made any effort to obtain permission to construct a new bridge after the Bridge was removed, and his August 2000 administrative appeal does not allege that he ever applied for a permit or that BIA denied him permission to build a bridge. *See* SA322-30 (DX13) (McGuire's administrative appeal); SA328-30 (DX24) (Feb 2, 2001 letter concerning appeal);

A125 (Tr. 127:16 – 128:5) (McGuire's testimony that BIA never granted or denied a permit application).

Citing to McGuire's (1) testimony concerning informal conversations with BIA officials; (2) testimony regarding a single sketch of a design for a new bridge; (3) suit against BIA in tribal court to prevent the removal of the Bridge; and (4) appeal of BIA's decision to remove the Bridge, the Ninth Circuit stated that "McGuire followed the prevailing practice by contacting the BIA," and that "no further purpose would have been served by filing a formal application for a bridge permit." *McGuire*, 550 F.3d at 909-10. This ruling is clearly wrong under relevant precedent concerning ripeness.

None of the actions pointed to by the Ninth Circuit constituted a permit application that satisfied ripeness requirements. A lawsuit seeking to *prevent* the removal of the Bridge and an administrative appeal of BIA's cancellation of his lease plainly do not constitute applications for permits to construct a new bridge. The focus of those efforts was to prevent BIA's removal of the Bridge and cancellation of the lease, and, during those proceedings, McGuire never asked for permission to repair the Bridge or construct a new bridge. *See* SA322-27 (DX13) (McGuire's administrative appeal); SA304-15 (DX8) (McGuire's complaint in tribal court).

Although McGuire had casual conversations with a BIA official and may have sketched out a potential bridge design with that official during such one such conversation, A141 (Tr. 190:2-5), these actions do not constitute a permit application of any sort and certainly do not amount to a "meaningful application" required to satisfy ripeness requirements. *See, e.g.*, *Heck v. United States*, 134 F.3d 1468, 1472 (Fed. Cir. 1998) (finding takings claim unripe when agency cancelled claimants incomplete permit application and allowed him the opportunity to refile). Though BIA acknowledged that its practice was informal, A182 (Tr. 435:16-436:16), even under its practice at the time, McGuire failed to submit "something [BIA] would deem as sufficient to go forth and issue a permit on." A182 (Tr. 435:16-437:6); SA413-14 (DX47) (Tr. 102:23-103:8) (Anspach Testimony); A183-84 (Tr. 441:25-444:11) (discussion of what was required to obtain permit); A188 (Tr. 460:9-25) (same). Indeed, McGuire acknowledged in his testimony that he did not "believe[] [he] had a permit application pending with BIA" after he received BIA's August 1999 letter, A141 (Tr. 190:6-9), and that he did not "submit any other plans to the BIA in writing after receipt of th[e] November 1999 letter." A141 (Tr. 192:5-19).

McGuire could have made a written request to BIA and submitted documentation proposing repairs to the Bridge or construction of a new Bridge. *See, e.g.*, A182-83 (Tr. 436:4-439:18) (testimony that BIA "needed something in

writing so that we could begin the process to issue a permit of some kind"). BIA "needed a pretty good idea of what [McGuire] was going to put in, and the type of pipe, the size of the pipe, some basic specifications on it to ensure that it was strong enough, and a big enough diameter to be able to handle the capacities and the anticipated loads that would go across it." A184 (Tr. 444:1-6); A182 (Tr. 438:14-18). McGuire was put on notice of the need for additional documentation through BIA letters informing him that he needed to apply for a permit. *See* SA284, 303, 316 (DX5, 7, 9) (letters from BIA to McGuire). He did not provide the required information. "Where further administrative process could reasonably result in a more definite statement of the impact of the regulation, the property owner is generally required to pursue that avenue of relief before bringing a takings claim." *Morris*, 392 F.3d at 1376. Because additional administrative process was available to McGuire, and he did not take advantage of that process, McGuire failed to ripen his claim. *C.f. Gilbert v. City of Cambridge*, 932 F.2d 51, 61 (9th Cir. 1991) (holding that the futility exception requires "the filing of one meaningful application," and "any reasonable doubt ought to be resolved against [the complaining] party").

McGuire implies in his appeal brief that BIA would not have issued him and/or actually denied him a permit to repair or rebuild the Bridge. *See* Br. at 4

("BIA refused to allow McGuire to put in a new Bridge."); Br. at 37-38, 44.[2] There is nothing in the record showing that BIA denied or would have denied McGuire's permit application, A125 (Tr. 127:16 – 128:5), or supporting the Ninth Circuit's assertion that filing a formal application would serve no purpose. And, for that matter, the subsequent tenant applied for and received a permit to construct a new bridge. SA386-87 (DX46) (permit); A183-84 (Tr. 442:23-444:11); SA413-14 (DX47) (Anspach Testimony, Tr. 102:23-103:8.).

McGuire failed to take all "reasonable and necessary steps to allow" BIA "an opportunity to exercise its discretion." *Palazzolo*, 533 U.S. at 620-21.[3] To hold otherwise would allow plaintiffs to circumvent permitting requirements, no matter how informal, and deny agencies the opportunity to exercise their discretion. *See id*. The Court should therefore dismiss McGuire's suit for lack of jurisdiction

[2] McGuire alleges that "Anspach did not like him." Br. at 6. Aside from McGuire's assertions, there is no support for this in the record. Regardless, the CFC correctly held that "BIA's actions and the motivations for it are [] beyond the scope of [the CFC] and not in issue" because, in a takings claim, the "plaintiff must make the 'concession that the government action was valid.'" A5 (Op. at 4 n.31 (citing *Hearts Bluff*, 669 F.3d at 1332).

[3] Because McGuire never filed a permit application, he cannot succeed on the grounds that such an application would have been futile. *See Stearns v. United States*, 396 F.3d 1354, 1358 (Fed. Cir. 2005) (application process not futile where plaintiff had not applied); *Wyatt v. United States*, 271 F.3d 1090, 1097 (Fed. Cir. 2001) (futility exception may excuse owner from submitting *multiple* applications when the manner in which the *first* application was *rejected* makes it clear that no project will be approved); *Heck*, 134 F.3d at 1472. Similarly, McGuire cannot claim that BIA unreasonably delayed in responding to a permit application. *See Wyatt*, 271 F.3d at 1098.

because it is not ripe. *See MacDonald, Sommer & Frates v. Yolo Cnty.*, 477 U.S. 340, 348 (1986) ("It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property.").

II. Assuming McGuire's takings claim is ripe for review, the claim fails on the merits.

McGuire claims that his "right[s] to access and replace the removed Bridge" were "taken from him without just compensation." CFC Dkt. 112 at 7; Br. at 34, 44. McGuire bases his assertion of a property interest in the Bridge on four grounds: (1) that Paragraphs 9, 10, and 17 of the Lease provided him with rights in the Bridge; (2) that the regulations at 25 C.F.R. §§ 162.9, 169.5, 169.13, 169.18, and 171.9 provided him with a right to use the Bridge and the right to repair or replace it if it became damaged; (3) that he, by necessity, had a right to use and replace the Bridge because it provided the only meaningful access to his property; and (4) that his expectations to use the Bridge gave rise to a property interest in the Bridge. Assuming that McGuire's claim is ripe, the CFC correctly held that McGuire's claim fails[4] because none of these sources provided McGuire with

[4] Because the CFC held that McGuire did not hold a compensable property interest in using and repairing or replacing the Eighth Avenue Bridge, it did not analyze whether a regulatory taking occurred under *Penn. Central*. Such a determination is fact-intensive, and therefore should this Court hold that the claim is ripe for review and that McGuire has a cognizable property interest, it should remand to the CFC to analyze the claims under *Penn. Central*. *See Harari v. Lee*, 656 F.3d 1331, 1340

ownership of, the right to use, or the right to repair or replace the Eighth Avenue Bridge. And McGuire's claim is foreclosed because the Bridge could only be "constructed" or "maintained" under a revocable permit, 25 C.F.R. § 171.9 (1999), and any interests granted by such permits are not compensable.

A. McGuire has not established the existence of a legally cognizable property interest, as is required to bring a takings claim.

This Court evaluates whether a claimant has stated a takings claim under a two-part test. The threshold determination in a takings case is "whether the claimant has identified a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking." *Hearts Bluff*, 669 F.3d at 1329 (citations omitted); *see also Colvin Cattle*, 468 F.3d at 806; *Conti v. United States*, 291 F.3d 1334, 1339 (Fed. Cir. 2002). If a plaintiff identifies a property interest, the court moves to the second step of the analysis and determines whether the governmental action at issue amounts to a compensable taking of that property. *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1213 (Fed. Cir. 2005); *Penn. Central*, 438 U.S. at 124.

A plaintiff has the burden of establishing a cognizable property interest. *See Skip Kirchdorfer, Inc. v. United States*, 6 F.3d 1573, 1580 (Fed. Cir. 1993). The court's inquiry into whether McGuire possessed a protected property interest at the

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(Fed. Cir. 2011) (remanding to the fact-finding tribunal to resolve a "technical, fact-intensive question in the first instance").

time of the alleged taking begins with identifying the allegedly taken property right, and examining the source of that alleged right. *See Air Pegasus*, 424 F.3d at 1217 (limiting review to the alleged right, not "a right to access . . . , but a right to access the *navigable* airspace from its heliport") (emphasis in original). In assessing whether a plaintiff owns a compensable property interest, this Court has looked for "'crucial indicia of a property right,' such as the ability to sell, assign, transfer, or exclude." *Hearts Bluff*, 669 F.3d at 1330 (quoting *Conti*, 291 F.3d at 1342). "'[E]xisting rules and understandings' and 'background principles' derived from an independent source such as state, federal, or common law define the dimensions of the requisite property rights for purposes of establishing a cognizable taking." *Conti*, 291 F.3d at 1340 (quoting *Lucas*, 505 U.S. at 1030).

McGuire has not passed the first threshold because he has not met his burden of demonstrating a property right in the interest allegedly taken. McGuire rests his takings claim not on his property interest in the Leased Property, but on BIA's alleged denial of his asserted rights to use the Bridge to access the Leased Property and repair or replace the Bridge. *See* Br. at 34, 36, 44-45. McGuire's takings claim fails because, as explained below, he had no guaranteed right to use the unsafe Eighth Avenue Bridge to access the northern portion of the Leased Property and other reasonable means of access were available. The CFC correctly found that McGuire held no property right in the use, repair, or replacement of the Bridge.

B. McGuire's Lease does not create a property right in the Eighth Avenue Bridge.

McGuire held the Leased Property subject to a lease with the Colorado River Indian Tribes. A14; SA262 (DX1). That lease did not provide McGuire with a property interest in the Bridge itself, a right to use it to access the northern portion of the Leased Property, or a right to repair or replace the Bridge.

1. McGuire's lease did not provide him with an ownership interest in the Bridge itself.

McGuire asserts on appeal that he "owned" the Bridge as a result of his lease with CRIT. Br. at 36 ("McGuire either owned the bridge because [] BIA disclaimed it and CRIT did not claim it . . . or [because] McGuire leased the bridge"). This Court should disregard this argument for several reasons. McGuire has previously disclaimed ownership of the Bridge, asserting in his tribal court complaint that "the subject bridge is, in fact, not the property of [McGuire]." SA307 (DX8, 2-3). He has also waived this claim by failing to raise it in his arguments before the CFC.[5] *See Golden Bridge Tech., Inc. v. Nokia, Inc.*, 527 F.3d 1318, 1322-23 (Fed. Cir. 2008) (noting that the Federal Circuit generally does not entertain arguments that were not presented to the trial court absent special circumstances that are not present here).

[5] *See* Post-Trial Brief, Dkt. 108 at 21 (contending that BIA took his access and right to rebuild); Answer to Defendant's Post-Trial Brief, Dkt. 112 at 7 (claiming that the right to access and to replace the removed bridge were the taken property rights); Reply to Defendant's Answering Brief, Dkt. 114 at 4 (same).

Even if this argument is not foreclosed, McGuire has not pointed to any lease provision that would create such an ownership interest. If, as McGuire asserts and the CFC found, CRIT did not own the Bridge, Br. at 28, 36, A14, CRIT could not convey property that it did not own, possess, or control to McGuire, and the Bridge cannot be considered part of McGuire's leased premises, A22.[6]

2. McGuire's lease did not provide him with a property right to use the Bridge to access the northern portion of his lease.

Nor did the lease create a property right to use the Bridge to access the Leased Property. The lease makes no mention of a right to access the northern portion of the Leased Property via the Eighth Avenue Bridge. *See* SA260-77 (DX1) (McGuire's Lease). Paragraph 17 of the lease conferred to McGuire only "ingress and egress to the leased premises over existing roadways under the

[6] In addition, McGuire asserts in his Statement of Facts that Rodney McVey, the Acting Superintendent of the Colorado River Agency at the time, told McGuire that the bridge was McGuire's property. Br. at 28. McVey testified that he did not recall saying this to McGuire, although he did remember telling McGuire to maintain the bridge. A195 (Tr. 487:8-488:8). Even if McVey did make this statement, that statement did not give McGuire a property interest in the bridge; McGuire presented no evidence that McVey had the authority to assign ownership of the Bridge to McGuire. *See Urban Data Sys., Inc. v. United States*, 699 F.2d 1147, 1153-54 (Fed. Cir. 1983) ("[T]he United States is not bound by its agents acting beyond their authority and contrary to regulation."). To the extent that any such representation led McGuire to expect to continue to use the Bridge, the CFC correctly held that such expectations of future use do not create a legally cognizable property interest. A12-14; *see* Section II.E.

possession and control of LESSOR [CRIT]."[7] *See* SA266 (DX1, ¶ 17) (emphasis added).

McGuire presented no evidence at trial showing that CRIT possessed or controlled the Bridge. Indeed, all evidence was to the contrary. Before the Bridge was removed by BIA, CRIT members wrote to BIA requesting that "the removal of the bridge be delayed," A124 (Tr. 125:7-25), SA281-82 (DX2-3), indicating that CRIT understood that it did not possess or control the Bridge. McGuire also testified that Rodney McVey, who was at the time the Acting Assistant Superintendent of the Colorado River Agency of the BIA, told him that the Bridge "wasn't the Tribe's." A111 (Tr. 71:11-14).). In addition, Anspach testified that CRIT, the Lessor, was not in possession and control of the BIA right-of-way for Canal 19R. SA412, 426 (DX47, 101:4-15, 115:18-19) (also available at Dkt. 91, Ex. A, Bankruptcy Trial Tr. 101:4-15); A116 (Tr. 93:5-8); A146 (Tr. 210:14-15). Indeed, Paragraph 2 of the lease specified that the use of the Leased Property was "subject to any prior, valid, existing claim or rights-of-way including the present existing roads." *See* SA262 (DX1 ¶ 2). Thus, the right to use the Bridge, which was located "inside the 19-R Canal, and inside the BIA right of way," *see* A163 (Tr.

[7] McGuire asserts in his Statement of Facts that the Lease entitled him to "reasonable ingress and egress for commercial use of the lease for irrigation farming . . . *[including] access for large farming implements and semi-trailer trucks*." Br. at 6 (emphasis added). However, he provides no support for this assertion, and there is none to be found in the terms of his Lease.

360:16-20); SA426 (DX47) (Tr. 115:20-24), was not part of the lease. *See* A114 (Tr. 83:7-22) (McGuire's testimony that Bridge was in area under BIA's control).

Considering this information, the CFC correctly held that, because the Eighth Avenue Bridge was located within BIA's right-of-way and was not within the possession and control of CRIT, the lease did not convey the Bridge to McGuire as a means of ingress and egress, *see* SA262 (DX1 ¶ 1), and, as such, McGuire did not acquire a right of access via the Eighth Avenue Bridge.[8] This finding is owed deference by this Court. *See Salve Regina Coll.*, 499 U.S. at 233.

3. Paragraphs 9 and 10 of McGuire's lease did not provide him with a property right to repair or replace the Bridge.

McGuire also contends that Paragraphs 9 and 10 of his lease, which concern improvements to the leased premises, gave him a property right to either repair or replace the Bridge. Br. at 45. Paragraph 9 provided that the

> LESSOR shall have the right to require LESSEE to remove any damaged or unsightly buildings and/or improvements *on the leased premises* or otherwise restore the leased premises . . . .

SA264 (DX1 ¶ 9) (emphasis added). Paragraph 10 provided that

> LESSEE shall, at all times during the term of this lease and at LESSEE's sole cost and expense, maintain the *premises and all improvements thereon* and any alterations, additions, or appurtenances thereto, in good order and

[8] The CFC also correctly held that, even if Paragraph 17 provided McGuire with "ingress and egress" over the Eighth Avenue Bridge, McGuire failed to demonstrate how such a "right" presented the "'crucial indicia' of a property right." A15 (citing *Conti*, 291 F.3d at 1342 and *Nw. La. Fish. & Game Pres. Comm'n v. United States*, 574 F.3d 1386, 1390 (Fed. Cir. 2009)).

> repair and in a safe, sanitary, neat and attractive condition, and shall comply with all public laws, ordinances and regulations applicable to said premises.

SA264-65 (DX1 ¶ 10) (emphasis added). Neither provision applies here, because the Bridge was not part of the leased premises. SA264-65 (DX1 ¶¶ 9-10).[9]

C. Relevant regulations foreclose the possibility of McGuire holding a cognizable private property interest in the Eighth Avenue Bridge.

McGuire incorrectly asserts that BIA regulations at 25 C.F.R. §§ 162.9, 169.5, 169.13, 169.18, and 171.9 gave him an ownership interest in and right-of-way over the Bridge, as well as a right to repair or replace the Bridge. *See* Br. at 34, 36. McGuire misreads the relevant regulations, which convey no such rights.

1. McGuire did not obtain an ownership interest in the Bridge under 25 C.F.R. § 162.9.

McGuire asserts that he was the owner of the Bridge by default, based on the fact that neither BIA nor CRIT claimed to own the Bridge. For this proposition, he points to a regulation in effect at the time of his lease which provided that

[9] Even if a right to rebuild existed, it is not a compensable property interest. None of the sources cited by McGuire to assert that a right to rebuild is compensable, Br. at 45-46, are applicable to this case, as each involves a right to access property and not the right to rebuild a structure on property. *See, e.g.*, *Wellswood Columbia, LLC v. Town of Hebron*, 992 A.2d 1120 (Conn. 2010); *C and R Stacy, LLC v. Cnty. of Chisago*, 742 N.W.2d 447 (Minn. App. 2007); *Klumpp v. Borough of Avalon*, 997 A.2d 967 (2010); James A. Kushner, 1 Subdivision Law and Growth Mgmt. § 3:6 (2d ed.) (2012) (discussing physical takings and not the right to rebuild a structure). Further, even if such a property right existed, McGuire has not demonstrated that such a right has any of the "crucial indicia" of a property right—*e.g.*, the ability to sell, assign, transfer, or exclude—that would make this "right" compensable. *See Hearts Bluff*, 669 F.3d at 1330 (citing *Conti*, 291 F.3d at 1342).

"[i]mprovements placed on the leased land shall become the property of the lessor unless specifically excepted therefrom under the terms of the lease." 25 C.F.R. § 162.9 (April 1, 1999 Edition); Br. at 36. Under McGuire's theory, the regulation provides that CRIT, as lessor, became owner of the Bridge, but since CRIT and BIA disclaim ownership of the Bridge, its ownership defaulted to McGuire. As an initial matter, this argument has been waived on appeal because he did not argue or brief it before the CFC. *Golden Bridge Tech.*, 527 F.3d at 1322-23.

Even if McGuire did not waive this argument, it lacks merit. The Bridge was built long before McGuire started his lease and without BIA approval, SA284 (DX5), and as discussed in Section II.B, was not part of the leased premises, so it did not become CRIT's property. SA422 (DX47 (Tr. 111:11-12) (BIA did not consider the bridge to be part of the leased premises). Even if the bridge was part of the leased premises, the fact that "CRIT did not claim [the bridge] under § 162.9," Br. at 36, does not cause ownership to default to McGuire. Section 162.9 provided that all improvements become the property of the lessor, CRIT, unless "specifically excepted therefrom under the terms of the lease." McGuire has not pointed to any provision of his or any prior tenant's lease that created such an exception for the Eighth Avenue Bridge. The fact that CRIT did not claim to own the Bridge in its letters to BIA, *see* SA281-82 (DX2, 3), has no bearing on the

terms of McGuire's or any other tenant's lease and does not have the effect of transferring an ownership interest in the Bridge to McGuire.

2. McGuire did not acquire a right-of-way over the Bridge through 25 C.F.R §§ 169.5, 169.13, or 169.18.

McGuire's reliance on 25 C.F.R. part 169 (1999), Br. at 37, is without merit. Section 169.18 provides, in relevant part: "All rights-of-way granted under the regulations in this part 169 shall be in the nature of easements for the periods stated in the conveyance instrument." McGuire claims that Paragraph 17 of his lease (which provided for "ingress and egress" over CRIT property at "all reasonable times") granted him a right of way under this regulation.

McGuire's lease did not give him a right-of-way under 25 C.F.R. § 169.18 (1999). The regulations at 25 C.F.R. § 169.5 made clear that the rights-of-way referred to in Section 169.18 could only be "granted" to individuals who made "*[w]ritten application[s]* identifying the *specific use* requested," and "filed [them] in duplicate with the Secretary."[10] *Id.* § 169.5 (emphasis added). The regulations

[10] McGuire also cites to 25 C.F.R. § 169.13. Br. at 37. This provision stated:

> In addition to the consideration for a grant of right-of-way provided for by the provisions of § 169.12, the applicant for a right-of-way will be required to pay all damages incident to the survey of the right-of-way or incident to the construction or maintenance of the facility for which the right-of-way is granted.

25 C.F.R. § 169.13 (1999). McGuire does not explain how this provision, which governs a right-of-way applicant's responsibility to pay damages resulting from constructing a right-of-way, is relevant to his argument that the regulations "leave

also require an application to "cite the statute [] under which it is filed and the width and length of the desired right of way" and "be accompanied by satisfactory evidence of the good faith and financial responsibility of the applicant." *Id.*

McGuire has not produced any evidence that he submitted a "[w]ritten application identifying the specific use requested" that cited the statute(s) under which it was filed, as Section 169.5 required. Nor can the lease itself be considered a written application requesting a right-of way over the Eighth Avenue Bridge because, likewise, it does not meet the requirements of Section 169.5. And even if his lease could be considered an application, McGuire has not offered any proof of CRIT's authority under this regulation to grant him a right-of-way over a bridge located within BIA's right-of-way. Thus, 25 C.F.R. §169.18 did not give him a property interest in the Bridge.

3. 25 C.F.R. § 171.9 did not create a right to repair or replace the Eighth Avenue Bridge.

McGuire alleges, without explaining why or how, that 25 C.F.R. § 171.9 (1999) provided him with a right to rebuild or repair the Bridge. Br. at 37. This argument fails. Section 171.9(c) governed *construction* of bridges across BIA irrigation canals by private parties. That section governed construction of new structures by private parties, made no mention of existing structures, and therefore

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no doubt that a right-of-way is a property right." Br. at 37. Regardless, this provision does not apply to McGuire's lease, because McGuire never submitted a written application for a right-of-way over the Bridge as required by § 169.5.

does not apply. Another provision, Section 171.9(d), discussed repairs to crossings, but it only covered crossings that were "constructed *for and by* the project" and later transferred to a private party. 25 C.F.R. § 171.9(d) (emphasis added). This provision did not cover the Eighth Avenue Bridge because it "was not built or authorized by [BIA]." SA283 (DX4).

D. McGuire did not have a cognizable right to access his property via the Eighth Avenue Bridge because he could access the northern portion of his Leased Property through other means.

McGuire erroneously alleges he was unable to access and farm the northern portion of the Leased Property by any means other than the Bridge and thus necessarily had a cognizable property interest in it. Br. at 32-35, 44. McGuire cannot establish a property interest in the Bridge based on alleged "necessity," *see Palmyra Pac. Seafoods, L.L.C. v. United States*, 561 F.3d 1361, 1370-71 (Fed. Cir. 2009), because McGuire could access the northern portion of the Leased property using other routes. *See Laney v. United States*, 661 F.2d 145, 149 (Ct. Cl. 1981) ("It has always been held that where the owner has access to his property on one, two, or three sides, [that when his access] on one side is cut off [it] is not a taking, *even if the economic fruitfulness of the block is substantially impaired*.") (emphasis added); *see also Johnson v. United States*, 479 F.2d 1383, 1391 (Ct. Cl. 1973) ("'[R]ight of access' is not an unlimited right to access at any and all points in the boundary between an abutter's land and the highway, but instead is a right to a

reasonably convenient and suitable means of access."); *United States v. Certain Land in City of Newark*, 439 F.2d 670, 673 (3rd Cir. 1971) ("[A]n abutting owner is not entitled to damages under the Fifth Amendment to the Constitution for the taking or closing off of access to a highway where reasonably suitable alternative means of access remain."). McGuire has failed to show that the government cut off "all feasible routes" of access to his property by removing the Bridge. *See Laney*, 661 F.2d at 149; *see also Johnson*, 479 F.2d at 1391 (noting that "[i]f a landowner enjoy[s] reasonably convenient and suitable access," then he "did not have a 'property right' in [the access] that has been denied").

1. It was physically and economically feasible to access the property using alternative routes.

McGuire claims that it was "physically impossible" to access the northern portion of the Leased Property without using the Eighth Avenue Bridge. *See* Br. at 9, 20-21, 24, 27, 33. However, the CFC correctly found that McGuire was not totally deprived of access to his property when the Eighth Avenue Bridge was removed, because he could still access his property via the Levee Road to the north or by crossing either the Tenth Avenue or FFA Bridge and driving along the canal banks. A18. This finding of fact is reviewed under a clearly erroneous standard. *Pac. Gas & Elec. Co.*, 668 F.3d at 1350. There was no error, as this finding is clearly supported by trial testimony.

Government witnesses testified that it was feasible for McGuire to continue to farm his property using three alternative access routes. *See, e.g.*, SA396 (DX47 at Tr. 85:3-86:9); A183 (Tr. 439:19-440:7) ("there are several roads all around the area" that McGuire could use to "access the northern portion of his lease"). One alternative means of access to farm the northern part of the lease was to use the Tenth Avenue Bridge to the west of the lease. *See* A163 (Tr. 362:10-17); A208 (Tr. 539:10-540:5); SA363-64, 368 (DX38, at US000212-13, US000217) (describing the alternative route); SA369-71, 366-67 (DX38, Fig. 2-3, 2-4, & 2-5, at US000218-20; Fig. 2-8 at US000215; Fig. 2-9, at US000216); SA385 (DX39, 20, Table 15 at US000384 (June 10, 2010 Supplement to the March 10, 2010 Expert Technical Analysis Concerning *McGuire v. United States* prepared by L. Niel Allen). A second alternative route to the northern portion of the lease involved crossing the canal at Brown Road, near the FFA building on the east side of the lease. A163 (Tr. 362:10-17); A210-11 (Tr. 550:23-551:15); SA372-76, (DX38, 2-14 at US000221, 2-6 at US000222, 2-16 at US000223, 2-17 at US000224, 2-7 at US000225); SA385 (DX39, 20 at US000384). The third route involved accessing the northern portion from the Levee Road that borders the Leased Property on the north. A163 (Tr. at 362:18-20); A212 (Tr. at 555:2-6); SA379 (DX38, 2-8 at US000228, 2-19 at US000226, 2-20 at US000227); SA378 (DX39, 2-20). To make these routes more convenient and more profitable, as well as minimize travel on

canal banks, McGuire could have located alfalfa stackpiles closer to the Tenth Avenue Bridge or FFA Bridge. A212 (Tr. 558:16-23); SA380-81 (DX38, 2-22 at US000229, 2-9 at US000230 (location of proposed stackpiles)); SA382 (DX38, 2-24 at US000231) (estimated costs); SA385 (DX39, 20 at US000384) (same).

The United States' expert estimated that the additional costs of using these alternative means of access ranged from $25,704 to $71,998 for the remaining five years of the lease, resulting in a reduction in McGuire's income by a low of 23% and an average of 43% for the remainder of his lease. *See* SA385 (DX39, 20 at US000384); A217 (Tr. 576:6-8); A244 (Tr. 805:16-806:17). Under *Laney*, these additional costs could not give rise to a taking. 661 F.2d at 149 ("It has always been held that where the owner has access to his property on one, two, or three sides, [that when his access] on one side is cut off [it] is not a taking, *even if the economic fruitfulness of the block is substantially impaired*.") (emphasis added); *Johnson*, 479 F.2d at 1391; *Certain Land in City of Newark*, 439 F.2d at 673.

McGuire testified at trial that he used these routes to access the northern portion of the Leased Property after the Bridge was removed. He continued to harvest and sell alfalfa from the northern portion after the Bridge was removed. A142-43 (Tr. 197:6-198:14); *see also* SA336 (DX28, 3) (transcript of bankruptcy meeting where McGuire states that the northern portion was "accessible by pick-up [] to remove the crop"). McGuire also planted and harvested wheat on the northern

portion after the Bridge was closed. A143 (Tr. 198:15-199:19). McGuire testified that he used a swather, bale wagon, combine, and dump trucks, among other implements, to harvest and remove his crops, all without use of the Eighth Avenue Bridge. A142-43 (Tr. 197:22-198:14, 199:5-19).

The tenant who took over McGuire's lease was also able to farm the property without the Bridge using the alternative routes. The subsequent tenant farmed the northern portion by using hay tracks and traveling across the FFA Bridge, the Tenth Avenue Bridge, and the Levee Road. A196 (Tr. 493:9-494:1-6). It was not "physically impossible," Br. at 46, to farm using alternative routes.

2. It was legally feasible to access the northern portion of the property via alternate routes.

McGuire asserts that he was not legally permitted to use the alternative routes, because those routes would have required him to drive on either the canal bank or the Levee Road, both of which had "No Trespassing" signs. Br. at 7, 9-10, 15, 18-20, 21-22, 24, 33, 46-47. He claims that using these routes would have put him in violation of a lease provision and/or BIA regulations that prohibit the use of the leased premises for "any unlawful conduct or purpose." Br. at 35-36, 47 (citing SA263 (DX1 ¶ 6); 25 C.F.R § 162.5(g)(3)).[11] However, McGuire has not shown that he was not permitted to use either the canal banks or the Levee Road.

[11] McGuire also claims that Paragraph 24 of his lease prohibited illegal conduct like trespassing. However, Paragraph 24 only required McGuire to "comply with

By custom and practice, BIA allowed farmers to drive heavy farm equipment over the canal bank roads before, during, and after McGuire farmed the Leased Property, and farmers used those roads on a daily basis. A192 (Tr. 476:25-477:24); A167 (Tr. 376:13-14); A167 (Tr. 376:12-23) (Henry testimony that "if [traffic on canal bank roads] is farmer traffic, then we don't do anything [to keep them off], because that is the main access to their property"); A192 (Tr. 476:2-477:24) (farmers and McGuire used canal roads to haul hay). McGuire was also permitted to use the Levee Road under Paragraph 17 of his lease as a means of "ingress and egress" to the Leased Property, because the Levee Road is owned by CRIT. *See* Br. at 23 (CRIT owns Levee Road); SA266 (DX1 ¶17) ("LESSEE shall … be allowed ingress and egress over existing roadways under the *possession and control of LESSOR*.") (emphasis added); A179-80 (Tr. 426:1-427:19) (Henry's testimony that the Levee Road is open to the public and that it is the custom and practice for people to use that road and other farm roads without asking permission).

BIA informed McGuire of these alternate routes, and McGuire admitted that he understood that Anspach expected him to use the canal bank roads to access the Leased Property. *See* A123 (Tr. 119:17-23) (McGuire's testimony that BIA made

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applicable Federal, State, and Tribal law governing control of pink bollworm, bollweevil, or other infestation." SA267 (DX1 ¶ 24).

improvements to the canal banks to provide McGuire with an alternative means of access); *see also* SA316 (DX9) (BIA letter to McGuire stating that "you will need to access your affected lease acres by going around the canal"); SA329 (DX24, 2) (BIA letter to McGuire stating: "With respect to your argument concerning access, we would note that . . . the type of alternative, 'illegal' access which you have described has routinely been allowed [by both CRIT and BIA] and utilized by agricultural lessees in the past."). Indeed, McGuire provided no evidence that he was not allowed to use the canal banks or Levee Road to access the Leased Property, and actually used those routes after the Bridge was removed. Br. at 24; A106 (Tr. 51:7-12); A139 (Tr. 184:9-12).

Finally, mistakenly relying on *United States v. Welch*, 217 U.S. 333 (1910), McGuire alleges that he should be compensated because using the canal bank or Levee Road would have required him to cross others' property to reach his farm. *See* Br. at 43 ("The Supreme Court recognized that denial of access which cuts off private property except by crossing lands of others as a compensable Fifth Amendment taking."). McGuire misstates the Supreme Court's holding in *Welch*. In *Welch*, the plaintiffs had a private easement across a neighbor's property that was the "only practical outlet" from their property to the county road. *Id.* at 338. The property on which the easement was located was permanently flooded by a government dam, *id.*, and the court held that the plaintiffs' easement was taken, *id.*

at 339. *Welch* therefore stands for the proposition that an easement across private property is a cognizable property interest, not for McGuire's assertion that he should be compensated because he had to cross others' property to reach his own.

E. McGuire's assumption that he would be able to continue to use the unauthorized Bridge for the duration of his lease did not give him a compensable property interest.

McGuire alleges that he had an expectation to use the Eighth Avenue Bridge, and that this expectation, coupled with his interest in the Leased Property, gave him an interest in using the Bridge for the duration of his lease. Br. at 15, 17, 35, 41. For the reasons previously explained, McGuire had no basis for such an expectation—not under the lease or BIA regulations, or for any other reason.

In any event, this Court has held that "hopes and expectations of future property use are not in and of themselves a cognizable property interest." *Hearts Bluff*, 669 F.3d at 1332 (citing *Acceptance Ins. Cos.*, 583 F.3d at 858-59). In *Hearts Bluff*, the plaintiff purchased a large tract of land for use as a mitigation bank, relying in part on the Army Corps of Engineers' representation that it would likely grant a mitigation bank permit. *Id.* at 1327. When the Corps denied the permit application, the plaintiff sued, arguing that the Corps' representations gave rise to a "reasonable investment-backed expectation property interest." *Id.* at 1332. This Court rejected that argument, finding that the plaintiffs' expectations did not create a cognizable property interest. *Id.* Likewise, McGuire's expectation that he

would be able to use the Eighth Avenue Bridge to access his property did not give him a compensable property interest in its continued use. Br. at 15, 17, 35.

F. The Bridge could only be "constructed" and "maintained" subject to a revocable permit, foreclosing any compensable property interest in the Bridge.

Even if McGuire could establish that the Bridge was lawfully constructed and that he had applied for a permit or somehow acquired a property interest in the Bridge, his claim would still fail because he could only have "construct[ed] or maintain[ed]" the Bridge "under [a] revocable permit[]," 25 C.F.R. § 171.9(c) (1999), SA386-87 (DX46), which does not create a compensable property right.

A revocable permit does not create a compensable property right because any interest created by a revocable permit is "a matter of governmental permission, rather than a property right." *Am. Pelagic Fishing Co., v. United States*, 379 F.3d 1363, 1374, 1380 (Fed. Cir. 2004) (no compensable property interest in fishing in the EEZ); *Hearts Bluff*, 669 F.3d at 1330-31 (no cognizable compensable interest in obtaining a permit to use land as a "mitigation bank" to offset other polluting activities); *Colvin Cattle*, 468 F.3d at 808 (no property interest in a grazing permit that was a revocable license); *Conti*, 291 F.3d at 1341-42 (no compensable interest in swordfishing permit); *Mitchell Arms, Inc. v. United States*, 7 F.3d 212, 217 (Fed. Cir. 1993) (no compensable interest in revocable permit to import firearms); *see also Mohlen v. United States*, 74 Fed. Cl. 656, 662-63 (2006) (revocation of a

maintenance permit allowing owners to repair a dock located on government property was not a regulatory taking because it was a revocable license).

McGuire attempts to distinguish these cases on the grounds that he was deprived of his right to access the Leased Property when the Bridge was removed, Br. at 38-41, 43, but, as explained above in Section II.D., McGuire could access the northern portion of the Leased Property by other means. This Court's case law therefore forecloses the possibility that his alleged right to use a Bridge that existed subject to a revocable permit creased any compensable right in that Bridge. *See, e.g.*, *Hearts Bluff*, 669 F.3d at 1330; *Conti*, 291 F.3d at 1341-42.

CONCLUSION

For the forgoing reasons, the judgment of the Court of Federal Claims should be affirmed.

Respectfully submitted,

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[12] Johanna Dennehy, Michigan Law Class of 2013 and an intern in the Environment and Natural Resources Division, did substantial work on this brief.

CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATION

This brief complies with the type volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. Excepting the portions described in Circuit Rule 32(a)(1), the brief contains 13,587 words.

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CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2012, an electronic copy of the foregoing was served via the Federal Circuit's electronic case filing system upon the Plaintiff's counsel of record:

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