2012-5073

United States Court of Appeals for the Federal Circuit

Jerry McGuire,

Plaintiff-Appellant,

v.

United States,

Defendant-Appellee.

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

Appellant Jerry McGuire's Reply Brief

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Issues Presented for Review

Issue 1: Did the trial court err when it held McGuire failed to prove he owned a cognizable property interest in access to his CRIT farm lease, and refused to award compensation for BIA's regulatory taking of a bridge it did not replace, an essential bridge over a canal separating his lease from the public road?

Issue 2: Did the trial court err when it held McGuire failed to prove he owned a cognizable property interest in his right to replace the bridge removed by BIA because the bridge was essential for access to his CRIT farm lease?

Appellee's Additional Issue: Appellee challenges this Court's jurisdiction, arguing that the Ninth Circuit Court of Appeals erred when it concluded this case is ripe for adjudication. The Appellee urges this Court to disregard the Ninth Circuit. *McGuire v. United States*, 550 F3d 903 (9th 2008). [McGuire notes the ripeness argument has been considered by six (6) judges (Bankruptcy- AZ; District Court – AZ; Ninth Circuit; CFC), and the Government has yet to get a vote for its ripeness position.]

Statement of the Case

I. Nature of Case

1. Jerry McGuire's case, which is ripe for adjudication, presents proof of a federal taking of McGuire's property interests. The taking is compensable. The

CFC erred when it concluded that, though ripe, McGuire did not establish a property right. Ripeness was decided, correctly, by the Ninth Circuit. It found, as McGuire's record at retrial also proves, that McGuire repeatedly sought permission to build a bridge. (A185-187, Hinkins 450:16-458:7) He gave sufficient information to the authorities in control, including a sketch. The BIA had no permit form and had never received an application for, nor issued, a permit out of the Parker, Arizona office where McGuire was located. BIA absolutely knew, and was repeatedly told, that McGuire wanted to put in a bridge. He repeatedly met with engineers and explained that his bridge design was precisely identical to the next bridge downstream—which was owned by BIA.

2. The CFC's essential mistake was its impression that McGuire's case turned on a permit, and not a property right. This view is incorrect. The BIA took McGuire's bridge, refused to allow him to repair or replace it, which he was entitled to do, and deprived him of access sufficient to permit operation of his government lease as a farm, as intended. The access taken, over McGuire's bridge, had existed and served the farm for at least thirty (30) years—dating back to at least McGuire's childhood. The government had a right to require the bridge be replaced. It had no right to deny McGuire's quest to replace it.

3. McGuire's inexorable search for a remedy winds toward its thirteenth year since BIA removed his bridge in 2000. McGuire's farm lease, requiring

payments of $250,000 annually, was half over at the time. Without access to the best producing half of the lease, McGuire was unable to farm any of the land economically. He has been consistent about this. (PX 23, p 9, McGuire affidavit.) He was in a commodity production farming business and was defeated by unit costs at unsustainable levels when half his farm was rendered useless. The CRIT refused to sever the lease, though Mr. McGuire asked in an attempt to mitigate his damages.

4. No access meant doom and bankruptcy. One followed the other for McGuire, the "marketer of the year" (PX 47, Sprawls Depo 14:12-15:9), despite his best efforts. He brought this claim in bankruptcy court. His case has been tried twice, now. Both times McGuire proved (a) he complied with all procedural requirements, including the application for permission to rebuild the bridge since there was no permit, (b) he performed his lease until performance was made impossible by the BIA, (c) denial of access broke McGuire financially, (d) McGuire established his damages, and (e) the government's conduct amounts to a taking requiring compensation in the amount of McGuire's damages.

5. McGuire reiterates the Statement of Facts in his Opening Brief. The United States identifies no error in his citations or description of the facts. But, the government makes significant leaps in its factual description. Appellee claims "McGuire did not apply for a permit." (Br 10 & 12). It tries to bootstrap its

argument by stating McGuire's successor received a permit to build the bridge, and ignores that this occurred after McGuire raised the issue in court twice—tribal court and this case (then in bankruptcy). Before then, there was no permit application process used or known to the Parker BIA Agency. The fact that a successor got the first permit issued does not prove lack of effort by McGuire any more than the fact that Lindbergh landed in Paris proves his predecessors were poor pilots.

6. McGuire owned the bridge.[1] CRIT did not assert that it owned the bridge (PX18, 19). BIA disclaimed it. (PX20). The applicable regulation, 25 *CFR* § 162.9, provides that improvements, including bridge, become the property of CRIT unless disclaimed. If disclaimed improvements are the tenant's property. McGuire was told by BIA the bridge was his. (A201, 513:20-514:13: A252, 837:6-11; A, PX17) The bridge was apparently built by a prior tenant and became McGuire's by virtue of § 162.9 or McGuire's under his lease. (PX1, lease ¶¶1, 9, 10). McGuire had a right to repair, or replace, the bridge. (PX21, 24 & 44) BIA

[1] Appellee claims McGuire should not be permitted to make this claim based on the evidence because his lawyer wrote differently in a trial brief. What lawyers say is not evidence. And what they expect evidence to be does not prevent surprises at trial. E.g., "[W]hat the lawyers say to you is not evidence, but merely their opportunity to explain what they think has been proven in this case." *United States v. Kendrick*, 682 F3d 974, 987 (11th Cir 2012).

and the appeals tribunal told him so. (PX44) No witness testified otherwise. Replacement or repair was a right, not a privilege. Also, BIA told McGuire he could replace it. (PX20, 21,22) McGuire claimed the bridge and no one denied it was his. (PX26, 28 p3, 30, 32, 34) Despite owning the bridge, BIA could order it taken out for safety reasons, but this gave rise to a right to replace the structure. BIA thwarted McGuire's replacement efforts.

7. McGuire, McVey, and others knew the removed bridge was the critical route to the farm's north side. It had been since McGuire was born and raised two miles to the west. (A101-108) McVey agreed it was *the* historical route to the farm. (A195; 487:8-488:24)

8. BIA Engineer Hinkins was aware of the types of bridges permitted across the canal. He knew the 8th Ave Bridge was removed, and oversaw its forced closure and removal. (A181, 432:7-23); could not recall discussing concrete pipe as a bridging method (A183, 442:4-10), but he did talk with McGuire about the bridge often. *Id.* Hinkins knew the design required minimal drawings and would work. He knew McGuire wanted his help and that his purpose, as Project Engineer, was to be helpful. (A184, 446:4-447:8; A187-188, 455:2-459:21) Hinkins admitted the Parker BIA Agency did not have a permit form or process and he knew McGuire gave him enough information for the bridge proposal to be processed: McGuire requested permission to build a bridge consisting of two 8 foot

long tubes, a concrete headwall, earthen overlay and filler, and rails, all built to match the BIA bridge downstream at 10th Ave. McGuire submitted this much orally as Hinkins admitted (A184-188, 446:1-459:21), and in writing, which McGuire recalls. (A111-113, 72:2-78:24) The Ninth Circuit found this submission by McGuire was made.

9. McGuire had a right under his lease (PX1), and the BIA's regulations, (PX24, 31; PX 44, 25 *CFR* § 171.9 [in effect then, not now]), to repair or replace the bridge. He was given no notice of specific deficits, no opportunity to repair, and not permitted to replace the bridge. (A111-113, 72:2-78:24, A113-115, 79:13-86:4) This right was commercially logical to make the lease workable because (a) the 10-year term was needed for the lease to be economically viable, (b) BIA and CRIT disclaimed bridge maintenance duties which befell the tenant under the lease, and (c) the conceptual inducement to lease one farm, not two, separated by a road but necessarily farmed as a unit for at least ten (10) years was so basic the land would not be split even after the bridge was removed because CRIT knew the land would not be leasable except as a unit.

10. There was not a viable alternative route over a typical canal bridge like those at the FFA Farm or at 10th Ave. The 8th Ave. wooden bridge was not typical. (A232, 757:23-758:10) The typical bridges did not lead to legal access;

they just gave a passage to different land than McGuire's lease, which could be reached only by trespassing. (A232, 758:11-21; A233, 759:7-15; A108, 427:4-6)

11. This situation may persist because McGuire's lease presents a unique circumstance in the CRIT irrigation project. The lease is one of the ten (10) largest farms owned by CRIT (A147, 216:7-217:6) It is the only large farm not served by a bridge which passes directly from Mohave Road, to the farm itself (A176, 411:8-18) Bridges are placed at intervals. The north side of McGuire's leases not served by a BIA crossing over the canal. *Id*.

12. With only half the productive land, and substantially all the expenses, McGuire's operation could only lose money. It became economically unfeasible. (A157-158, 257:9-258:9). Before access was denied, McGuire's operation prospered. (A115, 86:9-87:22). Afterwards, he was bankrupt. (PX 42, DX 27).

13. The occurrence of a taking from Mr. McGuire is overt. McGuire invested more than $1.2 million, paid land improvement costs, made substantial modifications to upgrade the farm, laser-leveled it for flood irrigation, and established a crop. (A135-136, 166:11-173:22).

14. The government's argument comes down to a contention that McGuire did not submit a *written* application for a new bridge on a form the government had not created or printed. McGuire did see the engineer and submit a sketch. He so testified (A111-113, 72:2-78:24). Hinkins, the BIA engineer, knew

what McGuire proposed because McGuire said his goal was to replicate the 8th Ave. Bridge, a BIA approved structure. Hinkins testified McGuire told him he would put in two (2) tubes, face the current with cement, and match the facing in an appropriate and approved way with a canal lining. This was all Hinkins needed to know to understand the proposed bridge. (A184-185, 446:4-447:8; A187-188, 455:2-459:21).

15. Eventually Anspach told McGuire his decision was final and McGuire would have to sue in federal court. (PX 24). He did.

16. BIA had the regulatory responsibility and physical ability to act on McGuire's request for permission to replace the bridge with a standard BIA bridge design. It did not. Action was withheld. This is not McGuire's fault. It is the government's doing under its regulatory power. As the government's Brief argues, these events occurred because the government acted out of public safety concern when it removed the bridge, but it failed to act out of the same concern when it refused to allow McGuire, the farmer, to replace his access.

17. BIA contends McGuire could have accessed his lease from either the 10th Ave. Bridge to the west or the FFA Bridge to the east. It is wrong for two (2) fundamental reasons. First, only canal bank access existed from either bridge to the McGuire parcel. Driving on the canal bank is an illegal trespass. (A172-173, 397:4-400:2; A174-175, 406:11-409:4; A180, 427:4-6; A105, 48:5-25; A129,

476:25-477:9). Second, the canal banks are not built to support repeated hay traffic. (A187-188, 458:4-459:20). They are fragile and driving on them compromises or risks compromise to the canal lining. (A171-172, 391:5-397:2). In addition, the canal banks were attempted without success. The failed effort was photographed by McGuire (PX2) and described in his testimony. (A119-123, 103:13-120:24).

18. The 10th Ave. Bridge, like the FFA Bridge, did not lead to McGuire's property. This leaves only the levee roads as an option, and McGuire had no right to use those either. (A139, 185:4-14). Even the government's expert, Allen, admitted the roads were difficult to pass and would require truck traffic at a nominal rate of movement lower than ten (10) mph. (DX38, p 210).

Argument

I. McGuire's Case Is Ripe for Judicial Determination.

19. The Court need not expend energy deciding ripeness -- an issue decided before. The law of the case doctrine discourages review again. The doctrine "ensures judicial efficiency and prevents endless litigation. Its elementary logic is matched by elementary fairness – a litigant given one good bite at the apple should not have a second." *Suel v. Sec'y of Health & Human Services*, 192 F3d 981, 984-85 (Fed Cir 1999). The government had its bite.

20. Defendant's first attempt to dismiss the case for lack of ripeness occurred when the case was still in the 9th Circuit. The 9th Circuit decided ripeness favorably to McGuire; its ripeness decision was a necessary part of its decision to transfer the case to the CFC under 28 *USC* § 1631. The Supreme Court has held that an appellate court decision in one circuit *binds* a court in another circuit after remand and transfer to the new court.

> [T]he doctrine applies as much to the decisions of a coordinate court in the same case as to a court's own decisions. … Federal courts routinely apply law-of-the-case principles to transfer decisions of coordinate courts. [*Citations omitted*.] Indeed, the policies supporting the doctrine apply with even greater force to transfer decisions than to decisions of substantive law; transferee courts that feel entirely free to revisit transfer decisions of a coordinate court threaten to send litigants into a vicious circle of litigation.

Christianson v. Colt Indus Operating Corp, 486 US 800, 816 (1988).

21. Under the law of the case principle, the same issue need not be determined more than once per case. The doctrine posits that when a court decides a matter, that decision governs the same issues in subsequent stages in the same case. *National Medical Enterprises, Inc, v. US*, 28 Fed Cl 540, 547 (1993). The law of the case doctrine disfavors reconsidering what has already been decided. *CW Over & Sons, Inc v. US*, 48 F Cl 342, 347 (2000). The doctrine was created to ensure judicial efficiency and to prevent the possibility of endless litigation. *Toro Co v. White Consolidated Industries, Inc*, 383 F3d 1326, 1336 (Fed 2004).

22. When a case is transferred from one federal court to another pursuant to 28 *USC* 1631 to remedy a jurisdictional defect, the law of the case doctrine governs the lower court in the transferee location. *Christianson v. Colt Indus Operating Corp*, 486 US 800, 815-16 (1988).

23. The government argues the law of the case doctrine does not apply because the 9th Circuit was not required to decide the issue of ripeness and that it was dicta. Yet, the doctrine is limited to issues *actually* decided, -- not necessarily decided -- either explicitly or by necessary implication, in the earlier litigation. *Toro Co v. White Consolidated Industries, Inc*, 383 F3d 1326, 1336 (CA Fed 2004). Regardless of how ripeness is characterized, the 9th Circuit decided this issue in order to transfer the case under 28 *USC* § 1631. Section 1631 requires the transferor court determine that the case could have been brought in the transferee court. It provides:

> [T]he court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

24. Ripeness is part of this necessary determination. The case could not have been brought originally in the Bankruptcy Court if it were not ripe. This Court held the CFC does not have jurisdiction over claims made under the *Tucker*

Act that are not ripe. *Morris v. US*, 392 F3d 1372, 1375 (2004) the Court explained the jurisdictional nature of ripeness:

> Absent an express statutory grant of jurisdiction to the contrary, the Tucker Act provides the Court of Federal Claims exclusive jurisdiction over takings claims for amounts greater than $10,000. See *Palm Beach Isles Assocs. v. United States*, 208 F3d 1374, 1383 n. 10 (FedCir2000). However, that court does not have jurisdiction over claims that are not ripe. See *Howard W. Heck & Assocs., Inc. v. United States*, 134 F3d 1468 *(*Fed Cir 1998*)*.

Id. at 1375. The Ninth Circuit's decision regarding transfer is consistent with this Circuit's *Morris* holding. The 9th Circuit rightfully determined McGuire's claims were ripe and that the CFC had jurisdiction.

25. If this Court revisits ripeness, the facts support McGuire. He took every available step to gain a permit that would allow him access to the northern portion of the land. McGuire followed all the procedures that were in existence at the time. A letter from BIA Supt. Anspach told McGuire to apply for a permit to build a new bridge. (PX 24 ¶2, DX 9 ¶2). Yet, the BIA neither had a permitting process nor an application form for McGuire to fill out or follow. (A182-183, 438:7-439:11). Anspach did not once deal with a bridge proposal while at the Colorado River Indian Agency as agency superintendent. (DX 47, 87:1-4).

26. McGuire met with the BIA Engineer, Hinkins. While together they sketched out a proposed bridge. (A141, 190:3-5). McGuire gave the sketch to Mr. Hinkins. No response ever came. (A125, 127:13-128:5). McGuire was stuck.

27. A taking may occur if there is extraordinary delay in governmental decision making. *Wyatt v. US*, 271 F3d 1090, 1098 (Fed Cir 2001). Extraordinary delay must be "substantial." *Id*. at 1098. While some lengthy delays have been found to be not "substantial," the length of the delay is not necessarily the primary factor to be considered when determining whether there is extraordinary government delay. *Wyatt,* 271 F3d at 1098. The nature of the permitting process and reasons for delay must be examined. *ld.*

28. Here, the delay throughout 1999 and into 2000 when McGuire lost his lease because he could not access half of his leased property was unreasonable and substantial. To the extent McGuire was obligated to apply for a permit to replace the bridge, he did so, and his claim is ripe for review. In this case the delay was so substantial it put McGuire out of business. He had a ten (10) year, half used lease; the delay took 20% of the lease's duration, and 40% of its remaining term.

29. Repeated requests are not required when it is clear the government has denied the applicant's claim. In the context of land development, "typically, before a decision is final the landowner must have submitted one formal development plan and sought a variance from any regulations barring development in the proposed plan that have been denied." *Kawaoka v. City of Arroyo Grande*, 17 F3d 1227, 1232 (emphasis added) (citing *Herrington v. County of Sonoma*, 857 F2d 567, 569 (9th Cir 1988), *cert denied,* 489 US 1090 (1989). Here, McGuire's

unrequited requests, his letters, suit in Tribal Court, and his administrative appeals, leave no doubt about McGuire's resolve. His efforts matured his case to ripeness.

30. This Court recognizes a "futility exception" to the final decision requirement, under circumstances "where the agency's decision makes clear that pursuing remaining administrative remedies will not result in a different outcome, the remaining remedies are futile and the impact of the regulation on the use of the property is reasonably certain." *Morris v. US,* 392 F3d 1372, 1376 (Fed Cir 2004). McGuire submitted his proposal for a permit by doing exactly what Anspach told him to do: meet with Henry and Hinkins about a design. He did what Hinkins and Henry told him to do: wait for Anspach to make his decision. Anspach blockaded the bridge, removed it, and subsequently terminated McGuire's lease. McGuire was rebuffed, and his access was taken.

II. McGuire Had a Property Interest. It was "Taken."

31. Access makes property have value. Without it, property is valueless. "Without land man cannot exist. To whom the ownership of land is given, to him is given the virtual ownership of the men who must live upon it**." Henry George,** *The Land Question*, (1881), in George, *Complete Works*, III: 75.

32. McGuire had at least two (2) property rights, both of which were taken. First, he had a property interest in ingress, egress, and access as it existed at the outset of the lease. (PX 1, ¶¶ 17). Second, McGuire had a right under his lease

(1PX, ¶¶ 9, 10) and the BIA's regulations (PX24, 31; PX 44, 25 CFR § 171.9) to repair or replace the 8th Ave. Bridge to maintain his access. This access was augmented by McGuire's ownership of the removed structure. He was given no notice of specific deficits, no opportunity to repair, and McGuire was not permitted to replace the bridge. (A111-113, 72:2-78:24; A113-115, 79:13-86:4). McGuire fought to save his lease and build a new bridge. (PX 23, A125-128, 128:9-139:14). McGuire made repeated requests to replace the bridge. (A111-113, 72:2-78:24). Denial of these rights cost McGuire his livelihood, pushed him into bankruptcy, and led him to this litigation.

33. The Government's action, or more pointedly inaction, was such that it "deprive[d] the owner of all or most of his interest in his property." *Aris Gloves, Inc. v. U S*, 420 F2d 1386, 1391, 190 Ct Cl 367, 374 (1970). Attested by the fact of McGuire's bankruptcy caused by the denial of access. (PX 43, p2.)

34. The quality of McGuire's case can be made due to an unexpected occurrence during trial. McGuire's intra-trial sketch, prepared at counsel table during the Allen testimony, was received in evidence. (PX 50). At trial, McGuire spontaneously sketched the implausibility of Neil Allen's alternate stacking yard location by demonstrating that Allen's proposed stack yard would have been ringed on all sides by irrigation canals. McGuire's drawing demonstrates how

easily he could depict a matter with a diagram. There is no reason to believe he lacked this same skill during his numerous conversations with engineer Hinkins.

35. McGuire claims a right to access and replace the removed bridge with a safe one. These are the property rights taken from him without just compensation, forcing McGuire to sacrifice his investments, suffer absolute physical inability to realize his investment-backed expectations, and to pass into bankruptcy.

36. The government argues McGuire could have driven his farming implements where driving is illegal, dangerous, and implausible to keep his farm going. It claims he did farm—ignoring that he moved bales of hay off in miniscule quantities at exaggerated and impossible costs—as the government tries to justify its refusal to allow bridge replacement with one like those up and down the canal from him. Bridge replacement cost would have been nominal compared to McGuire's lost expectations.

37. Though the government's Brief devotes considerable attention to its argument that alternative means of access were available to McGuire, there is no support in the record for this position. Indeed, the government argues that trespass in violation of the law provides the alternative to the missing 8th Ave. Bridge. It urges that McGuire could have used the 10th Ave. Bridge, the FFA Bridge, or the levee roads to access his property. But, the government is thwarted by its own

witnesses, Henry, Hinkins, and McVey, who established the canal banks and levee road cannot be trespassed upon. Doing so is a crime. Furthermore, the canal banks are not passable or safe for the kind of transportation need that accompanies a farming operation like McGuire's. Neither are the levee roads. The government's alternative access routes are (a) legally impermissible, and (b) physically implausible.

38. Denial of access can give rise to a regulatory taking. *Stephenson v. United States*, 768- 86L, 1994 WL 765356 (Ct Cl 1994). State courts have recognized claims for access takings. *Florida Dep't of Transp v. Gefen*, 636 So 2d 1345, 1346 (Fla 1994)(an inverse condemnation action can lie when government activity causes substantial loss of access to property even without physical appropriation). *Gefen* cites a 1989 decision which holds:

> There is a right to be compensated through inverse condemnation when governmental action causes a substantial loss of access to one's property even though there is no physical appropriation of the property itself. It is not necessary that there be a complete loss of access to the property. However, the fact that a portion or even all of one's access to an abutting road is destroyed does not constitute a taking unless, when considered in light of the remaining access to the property, it can be said that the property owner's right of access was substantially diminished. The loss of the most convenient access is not compensable where other suitable access continues to exist. A taking has not occurred when governmental action causes the flow of traffic on an abutting road to be diminished. The extent of the access which remains after a taking is properly considered in determining the amount of the compensation.

Palm Beach County v. Tessler, 538 So 2d 846, 849-50 (Fla 1989).[2]

39. It is worthwhile to define narrowly the government's position. It claims McGuire had no cognizable interest in the 8th Ave. Bridge removed by the BIA. Yet, no serious controversy exists about McGuire's right to reasonable access or that access was central to his investment-backed expectations as a tenant. Limiting access does not always rise to the level of a taking. But, where it defeats one's intended use of property, as demonstrated by investments made in the property, a taking occurs because the *Penn Central* standards are satisfied.

40. The government exercised its regulatory power by preventing McGuire from replacing the removed bridge after exercising its regulatory power to remove the bridge itself. This action caused McGuire's losses. It deprived him of the beneficial use of his lease. And, it caused financial losses. *Penn Central's* first requirement—assessment of the economic impact of the government action—falls to McGuire. Second, McGuire's investment-backed expectations cannot be seen as in serious contention. He expected, and counted on, access or McGuire would not have leased the land north of the canal. This second *Penn Central* factor is proven by McGuire. Finally, the character of the government action—a safety

[2] California has recognized that action for inverse condemnation can be based on a claim of substantial impairment of the right of ingress and egress. *See Border Business Park, Inc v. City of San Diego*, 142 Cal App 4th 1538, 1551, 49 Cal Rptr 3d 259 (2006), *cert denied*, 127 S Ct 2280 (2007). So has Texas. *State v. Heal*, 917 SW2d 6, 9-10 (Tex 1996); *Lethu Inc v. City of Houston*, 23 SW3d 482, 485-86 (Tex App 2000).

measure and a canal protection measure—were for public purposes. They may have been questionable policy implementation decisions and may have been made for weak reasons, but they occurred for, and in the name of, public purpose. The third Penn *Central* factor—assessment of the character of the government action—also falls to McGuire.

41. The government also took the bridge; McGuire concedes its power to do so for safety reasons, so long as it permitted replacement.

42. The government's reliance on *Laney v. U S*, 661 F2d 145 (Fed Cir 1981) (Br 45) is misplaced. The denial of access on "all feasible routes," as noted in *Laney*, does not mean all theoretically feasible ways to reach the land. Instead, "feasible routes of access" are those that make feasible the fulfillment of the owner's investment-backed expectations when property is taken through government action or inaction for a public purpose through the government's exercise of its regulatory powers. *Laney* was explained, along with other cases by this Court in a 1986 opinion that supports McGuire:

> The holding or plain implication of *United States v. Riverside Bayview-Homes, Inc.*, [474 US 121(1985)] is that a regulation under the *Clean Water Act* can be a taking if its effect on a landowner's ability to put his property to productive use is sufficiently severe. *See* statement of Justice White, [474 US 127] n. 4. …. Defendant, however, invoked the navigation servitude to excuse a regulation under the Clean Water Act that completely denied to the owner of a small island, any economic use of it, but the Court of Claims in *Laney v. United States*, 661 F2d 145, 228 Ct Cl 519 (1981) held that this could be a taking, and a summary judgment holding it could not be

> was denied. This court has held that a taking can occur by a valid regulation with no physical invasion. *Skaw v. United States,* 740 F2d 932 (Fed Cir 1984). Under these authorities, the question has got to be faced whether the impact of the regulation here involved was sufficiently severe under the facts, as undisputed or as found, and the unchallengeable legality in this proceeding of the regulatory act here involved, does not answer the question or even lead towards the answer. In *Laney,* too, the legality of the regulation under the *Clean Water Act* was conceded.

Florida Rock Indus., Inc. v. United States, 791 F2d 893, 900 (Fed Cir 1986). *Laney* appears to be mis-cited by the government in this case, just as the government "d[id] not analyze the legal issues correctly and misconstrues the authority on which it relie[d]" in *Laney* 661 F2d at 523.

III. McGuire's Interests Include Indicia Of Property Rights.

43. Forcing a property owner to give the public access is a compensable taking. This firmly established point, illustrated by *Ridge Line, Inc. v. United States*, 346 F3d 1346, 1354 (Fed Cir 2003), invites the logical reciprocal that *denying* an owner's access for public safety is also a compensable inverse condemnation. McGuire's access was cut off. And, refusal to allow McGuire to replace the Bridge was a regulatory act "practically so burdensome and pervasive that [McGuire was] denied all use of his land." *Pennsylvania Coal Co v. Mahon,* 260 U S 393 (1922). The law supports McGuire. He was stripped of his lease when his property rights to access and replace the bridge were taken from him.

44. McGuire's evidence establishes crucial indicia of property rights. McGuire was a lessee on federal land. He had no ability to sell, assign, transfer, or exclude persons from the lease except in accord with the terms of the lease. But, he had absolute rights under the lease to do so. McGuire had more than an expectation to use the bridge. The bridge was *the* ingress and egress. His lease gives him a right to all ingress and egress or access existing when the lease was signed, including the bridge. The lease created a legal right to use the bridge, and the opinion below (A 14-15) to the contrary is not correct. The lease expressly states includes with the described leased property:

> … **containing an aggregate of 1,355.76 acres more or less and** subject to any prior, valid, existing claim or rights-of- way, including the **present existing roads.**

The lease also provides, in ¶ 17 (PX1, ¶17, p 5):

> LES**SEE shall, at all reasonable times, be allowed ingress and egress to the leased premises over existing roadways under the possession and control of LESSOR.**

BIA did not possess or control roads except as the agent for CRIT, the lessor. So, CRIT controlled the roadways, including access; it leased the access to McGuire.

45. McGuire did not require the right to sell or assign the bridge separately from the lease in order to have a property right in the bridge, which was conjoined with the lease. McGuire had a right to assign the lease, if he did so in compliance with its terms. (PX 1, ¶ 29, p 8).

46. Finally, McGuire did not have a revocable permit to use the bridge. Though the government (Br 17) argues this was the case, it argues elsewhere, repeatedly (Br 10, 12, 30, 31, etc.), that he had no permit and applied for none. The government asserts McGuire's extensive actions to replace the bridge did not constitute a permit or an application for one, but it claims that a nonexistent instrument constitutes a permit from which all McGuire's rights spring. There is no evidence in the record of any permit, or other instrument, being issued to Mr. McGuire to augment, supplement, or to supplant his BIA lease.

47. The critical indicia of ownership of a lessee's leasehold interests are present here. McGuire's ownership interests, and the taking of them, were proven.

Conclusion

49. Reversal and remand with directions to enter judgment for McGuire on liability and to determine his damages and rights of recovery are respectfully requested. McGuire also seeks all costs to date.

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Proof of Service

I certify that on August 9, 2012, an electronic copy of the foregoing was served via the Federal Circuit's electronic case filing system upon the Defendant's counsel of record:

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Certificate of Compliance

I certify that this Brief, submitted under Rule 32(a)(7)(B) complies with the type-volume limitation, and includes, exclusive of the Cover Page, Table of Contents and Appendices, consists of 5,365 words and 454 lines. The font used is Times New Roman, 14 pt.

/s/ Davis A. Domina
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