No. 19-339
Judge A. Tapp

In the United States Court of Federal Claims

CULLY CORPORATION,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT WITH EXHIBITS

FORTIER & MIKKO, P.C.
Samuel J. Fortier
Fortier & Mikko, P.C.
1600 A Street, Suite 101
Anchorage, Alaska 99501
(907) 277-4222 (phone)
(907) 277-4221 (fax)
Email: sfortier@fortiermikko.com
Attorneys for Plaintiff Cully Corporation

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CULLY CORPORATION'S MOTION FOR PARTIAL SUMMARY JUDGMENT

COMES NOW Cully Corporation, through counsel, and hereby moves for partial summary judgment against the United States on Cully Corporation's Takings claim, its first claim for relief pursuant to its Second Amended Complaint.

INTRODUCTION

Cold War edifices still stand on the frozen shores of the Chukchi Sea because of the foresight of the leaders of the small village corporation, Cully Corporation ("Cully"), the Plaintiff in this case. The buildings were not demolished, although slated for demolition in 2005, because of the remarkable cooperation between the United States Bureau of Land Management ("BLM"), the then leaders of the United States Air Force's ("Air Force") 611th Squadron ("611th") and Cully's undertaking of remediation in return for the buildings. Years later, due to the power of the North Slope Borough ("NSB") and the carelessness of new

commanders at the 611th , the buildings were taken from Cully, in order to prevent Cully from receiving rent from an Air Force contractor. In this motion, Cully establishes that the United States is liable to Cully under the Takings Clause Fifth Amendment to the United States Constitution for the taking.

I. FACTS

A. The Land.

1. Cully Corporation Claims Its Aboriginal Lands But the Site Is Unavailable.

Beginning in 1943, a series of Public Land Orders set aside the Kalimiut's traditional lands around Kali Village (now Point Lay), located on the shores of the Chukchi Sea, for United States military purposes. In the 1950's, government erected the Point Lay Defense and Early Warning ("DEW") station at the Site. *See* Second Amended ("Am.") Complaint ¶ 5, Ex. 1. The government also constructed an airstrip and several buildings at the Site. Exhibit 2 at 18. With the discovery of oil on the North Slope, the settlement of the aboriginal claims of the Native people became of sudden interest and a pragmatic goal. *See United States v. Atlantic Richfield Co.,* 435 F. Supp. 1009, 1018 (D. Alaska 1977), *aff'd,* 612 F.2d 1132. As a result, the Alaska Native Claims Settlement Act (Pub. L. 92-203, Dec. 18, 1971, 85 Stat. 688, codified at 43 U.S.C. § 1601, *et seq.*) (hereafter, ANCSA), was signed into law. Pursuant to ANCSA Cully was incorporated under Alaska state law as the ANCSA Village Corporation for and on behalf of the Native

Village of Point Lay on May 7, 1973. *See* ANCSA §11(b)(1), 43 U.S.C. § 1610(b)(1); Exhibit 3.[1]

Cully was entitled to receive 90,000 acres of federal unreserved lands, including the core township of the Kalimiut. ANCSA § 3(e), 43 U.S.C. § 1602(e). That core township included the Site, but since that land had been reserved under Public Land Orders for active DEW military operations, it was not available for Cully to select. *Id.* Cully selected all of the lands available in its core township and remained under selected – that is, Cully selected less land than it was entitled to under ANCSA, in hopes that the Site would someday become available. *See* Ex. 1 at 6; Ex. 3.

2. Cully Acquires the Right to Select the Site and Requests the Buildings.

Cully continued to seek options for transfer of the Site until the Alaska Land Transfer Acceleration Act of 2004 ("ALTAA") presented a way for Cully to select it as Cully's remaining ANCSA land. *See* § 201(a)(1) P.L. 108–452, Dec. 10, 2004, 118 Stat. 3575, codified at 43 U.S.C. § 1602(e); Ex. 1 at 7.

Cully notified BLM (the agency responsible for conveyance of public lands) of Cully's intent to select the Site and BLM communicated with the Air Force and the State. Ex. 4; Ex 5. The State indicated it would relinquish its rights to the Site in favor of Cully. Ex. 6. Cully specifically reiterated its request that garage, a hanger and a warehouse (the

[1] ANSCA defines a village corporation, such as Cully, as "An Alaska Native village corporation organized under the laws of the State of Alaska, as a business for profit or nonprofit corporation to hold, invest, manage and/or distribute lands, property, funds and other rights and assets for and on behalf of a Native village …." 43 U.S.C. § 1602(j).

"Buildings") be included in the transfer. Ex. 7. The BLM confirmed to the Air Force that, upon the Air Force's completion of clean-up and planned excessing of the Site to the BLM, the BLM would convey the Site to Cully under ANCSA. The BLM also confirmed that Cully requested that the Buildings be included as a part of the relinquished property and not demolished. Ex. 8.

3. Land Transfer is Delayed by Contamination

Cully formed an interagency planning group with NSB, the Air Force, the BLM, the Federal Aviation Administration ("FAA"), and the Arctic Slope Regional [Native] Corporation to discuss the issues surrounding the land transfer and airstrip improvements. *See* Ex. 9 at 1.[2] Cully passed a resolution to support a lease from the Air Force to NSB in order to secure FAA funding to upgrade the gravel airstrip. *Id*. Cully required that the lease was only intended to cover the airstrip. *Id.*

Federal law did not allow the Air Force to excess environmentally contaminated lands. Ex. 8 at 2; Ex. 10 at 1. The Air Force began planning to demolish the buildings as part of the cleanup. Ex 10.

4. The Buildings Are Scheduled for Demolition.

The Air Force drafted a "Clean Sweep" Work Plan in January 2005 that called for the Buildings and all other improvements within the Site to be demolished, and the grounds

[2] At the same time, Cully also made the Air Force aware of the village corporation's prime interest in securing the former Long Range Radar Site. See Exhibit 10, letter from Col Chamberlain to Senator Ted Stevens dated August 12, 2002 acknowledging Cully's interest and explaining status of land situation.

remediated to acceptable levels. Ex. 11. The Air Force submitted an application for a demolition permit to NSB on March 3, 2005 that requested permission to demolish the buildings and haul them off-site. Ex. 12. The NSB approved the application on May 2, 2005. *Id.*

Mr. David Longtin was the Remedial Project Manager for the Air Force for Point Lay on Project Clean Sweep. Ex. 13, p.13:1-15. The Air Force created a Remediation Advisory Board ("RAB") for stakeholders to discuss their positions on remediation. Ex. 13, p.13:1-15. Mr. Longtin presented a powerpoint explaining Project Clean Sweep at the

RAB meeting in January 2005. Ex. 12 and Ex 13, pp 28-29, 33, 40-42. He recently testified that:

> A Well, in general we would -- for the radar sites which are no longer active, which an earlier slide said it was deactivated in 1998. So sites that were no longer active, that's what the Air Force would do is demolish all the buildings, clean up the contamination, and then -- and then excess the property or attempt to excess the property.
>
> Q Okay. Another point here is "The Air Force is aware that there is some local interest in the Hangar, Garage and Warehouse." Do you see that?
>
> A Yep.
>
> Q Okay. When did you become aware of the local interest in the hangar, garage, and warehouse, if at all?
>
> A I don't remember specifically, but probably at a RAB meeting, you know, it -- it came up. As I was updating the public, here's what we plan on doing. Members of the public likely said, hey, we'd be interested in -- in these buildings, you know, what -- what can you do to make that happen.

Ex. 13 p.41:2-21.

The BLM wrote to Mr. Longtin in February 2005, requesting a meeting. Ex. 15. The BLM's email explained that, while no final decision had been made as to the future owner

of the Sites when the Air Force excessed the Site to BLM, Cully was requesting that the Buildings be left and not demolished. *Id.* By March, 2005, the Air Force was inquiring of Cully whether it would be willing to accept the Buildings and the land. *Id.*, p. 60:6-11 and Ex. 16, p.8.

In May, the NSB had vacated the garage and warehouse in anticipation of demolition and was using the hangar only for cold storage. Ex. 14.

5. The Point Lay Airstrip Is Leased to NSB.

The Air Force and the NSB entered into a new, 25-year lease of the airstrip (the"2005 Lease") in May, 2005. Ex. 17. The 2005 Lease provided the Air Force a right to outgrant: "The Lessor shall have the right to grant additional outgrants with respect to the premises. However, any such outgrant shall not be inconsistent with the Lessee's use of the premises under this Lease." *Id.* §2.1. The lease further provided in the same section:

> The holders of such ou grants, present or future, shall have reasonable rights of ingress and egress over the Premises in order to carry out the purposes of the out grant, provided, however, any such right shall not be exercised inconsistent with Lessee's rights and use of the Premises under this Lease. These rights may also be exercised by workers engaged in the construction, installation, maintenance, operation, repair, or replacement of the facilities located on the out grant….

Id.

Section 10.7 provided that the Buildings (and all other improvements[3]) were subject to the planned remediation and cleanup activities. The 2005 Lease specified that the Buildings were slated for demolition.[4] The 2005 Lease also disclosed that the hangar and garage were contaminated, and that the hangar's contamination was due to the "hazardous waste management practices of the leaseholder [NSB]." Ex. 13 at 37.

The purpose of the 2005 lease was to permit the NSB to operate the airstrip. The NSB was not expected to have possession of the Buildings and it did not have possession of the Buildings. Ex. 18 at 3 (Air Force reports to the Point Lay RAB that the "25-year lease only covers the airstrip, the apron and the land that the hangar is on.") (emphasis added); Ex. 14 (Air Force restoration contractors conducting work in the buildings; hangar used for storage of debris, hazardous waste);[5] Ex. 10 (Cully advocating for the Air Force to sign the lease for the airstrip with NSB so the NSB could get airstrip improvement funds).

[3] Paradoxically, Exhibit A is a duplicate of Exhibit A to the 1996 Lease, describing the "Premises" leased as including the Buildings, as well as numerous other buildings no longer in existence.

[4] Exhibit C to the 2005 Lease (p. 30) specifies that each of the Buildings was "in cold storage status and is scheduled for demolition." Page 22 of the Lease specifies that Exhibits are "attached to and made a part of this Lease."

[5] In addition to the imminent demolition of the Buildings in 2005, the NSB in fact expressly repudiated any suggestion that the 2005 lease covered the buildings and insisted that the lease covered only the airstrip property. *Id.*

6. The Cleanup Contract to Prevent Demolition.

a. The Air Force Expresses Its Intent to Transfer the Buildings to Cully Instead of Demolishing Them If Cully Remediates the Garage.

Col. Skaja was the Commander of the 611th, and in overall charge of all the remote DEW Line sites in Alaska, his formal title was Air Support Group Commander. Ex. 19, pp. 7 and 9. Col. Skaja testified that his approach, approved by the Pacific Air Command, Hickam AFB, Hawaii ("PACAF") was to avoid demolition if the community wanted the Buildings:

> Q To the village corporation. Is that correct?
> A I don't recall exactly who we transferred it to, but we -- we wanted, again, to help out the village and also help us by not having to demolish the buildings that were of some value to the local community. That was common practice throughout the state of Alaska, where we could help out, we would.

Ex. 19, p.29, lines 2-8. Col. Skaja also explained:

Q Sure. I'm curious whether -- let me restate it. During your tenure in Alaska between 2005 and 2007 did you become aware of the transfer of any military property that was determined to be surplus and of no further value to the military to any civilian control?

A Yes, I do. In a general sense, inside our infrastructure at the 17 long range radars and the three short range radar sites we had extra facility capacity. As we had drawn down from a larger military footprint to a smaller contractor footprint, we had extra facilities. Our -- one of our responsibilities was to make sure we did proper demolition and cleanup of those sites, if appropriate, but in cases around Alaska there were times that it was more appropriate to transfer the buildings to corporations or -- or villages that could make use of them. So instead of tearing them down, we would transfer them over and it was a win win, a win for the Air Force because we didn't have to do the demolition and a win for the local populous who would get use of those facilities. So that was a common practice at many of the radar sites.

Ex. 19, p.17.

The Air Force wanted to be complete with the Clean Sweep demolition. It had a barge coming to the village. As a result, the Air Force told Cully that Cully needed to take

some action in order to prevent demolition of the Buildings. Ex. 13, p.93, lines 5-10. Indeed, for the Air Force, the simplest solution would have been demolition in line with the Clean Sweep program. *Id.* The contaminant required to be remediated to prevent demolition was petroleum oil, and lubricant (POL) contamination under the garage. *Id.* Cully suggested to the Air Force that, rather than to move the building, Cully could simply excavate the "dirty dirt" and replace it, leaving the building in place. Ex. 13, p 94, lines 13-19. The Air Force specified that such labor and expense would be solely Cully's responsibility. Ex. 19, pp 51-53.

Cully wrote to Mr. Longtin on June 1, 2005 and explained that Cully would authorize funds to remediate the garage, so that Cully would then be the owner of the Buildings. Ex. 20. The garage Building could be remediated in place, and the amended plan would both save Cully and the Air Force money because the Air Force did not have to move the Buildings, or remove and replace the soil. Ex. 13, pp. 92-94; Ex. 20.

In the meantime, back at Headquarters for the 611th, Realty Officer Mary Adams was working to obtain the necessary legal prerequisites to authorize the conveyance of the Buildings to Cully, should the remediation of the garage come to fruition. Ms. Adams began her career at the 611th as a Realty Officer in 2001. Her job was to maintain and account for the assets of the Air Force LRRS assets throughout Alaska. Ex. 21 at p.7, lines 21-25 and p. 9, lines 13-18. Ms. Adams was aware of the Air Force's intent to complete the remediation by late 2005 so that the property could be excessed to the BLM and that

the BLM intended to convey the same to Cully to fulfill Cully's ANCSA entitlement. *Id.* at 11:22-25 and 12:1-4.

The issue, however, was complicated. The 611th team's effort to help Cully and at the same time to keep within the confines of federal law required working with numerous regulations. Ms. Adams began researching the issues in April, 2005. She contacted the General Services Administration ("GSA") to obtain that agency's consent to surplus the Buildings to Cully. *See* Ex. 22; Ex. 21 at 13:10-22. Ms. Adams also consulted with PACAF. Ex. 21, 52:9-25. And, after receiving authority, she prepared a license to authorize Cully to undertake the remediation of the garage in the event Cully wanted to proceed and prevent demolition of the buildings. Ex. 21, pp 44-45. The license was sent to PACAF for approval. Ex. 23.

Cully's proposal to remediate under the garage and to leave the garage in place was accepted at the 611th. On June 21, 2005, Mr. Longtin emailed Cully with a draft of the license. Ex. 24. Mr. Longtin warned Cully that if Cully was not willing to abide by the terms of the license, "we'll tell the folks in Hawaii to ignore the license and we'll demolish the garage." *Id.* The email also informed Cully that the Air Force was "very motivated to give you the Building[s]." *Id.*

On June 27, 2005, Ms. Adams submitted a request for an environmental impact analysis to the PACAF. Ex. 25 at p. 66. The proposed action was a "license for Cully Corporation for excavation and removal of contaminated soil and replace with clean fill under and around building No. 2." *Id.* The purpose and need for the action was "the AF is

unable to transfer contaminated property." *Id.* The form stated: "if contaminated soil is not removed, the facility will need to be … demolished." The request was signed by James Hostman, the Environmental Engineer for the 611th. *Id.* The license was intended to protect the Air Force from liability and to put the entire risk on Cully. Ex. 13, p.94:13-19.

On July 7, 2005, Col Skaja submitted the final license, as authorized by PACAF and approved by Col. Skaja, to Cully. Ex. 25. The cover letter stated succinctly that demolition of the garage would continue as planned under the Clean Sweep program unless Cully signed the attached license and completed the remediation by Aug. 1. *Id.*

b. Cully Remediates the Garage.

Cully received the license to conduct the work on July 21, 2005. Ex. 25. The license obligated Cully to perform remediation at its own cost. *Id.* ¶ 2. Cully was successful in timely completing the cleanup. However, remediation resulted in costs of approximately $45,000 to Cully. Ex. 26.

Because Cully requested that the buildings remain in place, the Air Force was able to deviate from its Work Plan and did not need to excavate the 100 cubic yards of contaminated soil, nor did it need to expend the funds to demolish and remove the hangar. Ex. 27 at 15, 21; Ex. 19, p.40:13-18; Ex. 13, p 60:12-18; Deposition of Col Smith, Ex. 29. P.34:10-25.[6] On September 30, 2005, the Alaska Department of Environmental

[6] The June 2006 611 CES Progress Report notes "The work plan indicated that 50 cubic yards of POL [petroleum, oil and lubricants)-contaminated soils would be excavated if the garage were demolished and 5 cubic yards …if the garage were to remain. Approximately 100 cubic yards were excavated by a third-party." Ex. 35.

Conservation ("ADEC") approved Cully's remediation. ADEC lauded the cleanup. Deposition of Lori Roy, Ex. 27, p.46:21-25-p.47 and Ex. 29.

7. The Air Force Transfers Ownership of the Buildings to Cully.

a. The Air Force Executes Documents to Transfer the Buildings to Cully.

The Air Force had determined in early 2005 that excessing buildings upon the request of a village corporation could be a win/win situation. Ex. 30 at p. 4. Col. Smith, the squadron commander for the 611th Engineering Squadron in Alaska from 2003-2006, speaking at a RAB meeting in Point Lay in January 2005, stated that if the community wanted the buildings, and the excessing authority, the BLM, agreed, leaving the buildings could be a win/win situation. Ex. 29, p.34:16-23.

The BLM concurred that Cully was to receive the land when the Air Force excessed it to that agency. Cully and BLM agreed that the Buildings should not be demolished because Cully had requested the buildings. As of August 1, 2005, Cully had met the Air Force requirements and remediated the garage, and by September, 2005, the State had accepted the property as remediated in accordance with state law. Thus, the win/win situation envisioned by Col Smith on a frigid January day in Point Lay earlier that year was coming to fruition.

The Air Force proceeded with the promised transfer. After being instructed by Col. Skaja to proceed, Ms. Adams contacted PACAF to obtain instructions on how to proceed with the transfer. and spoke with the PACAF Chief of Real Estate, Ted Vector. Ex. 21,

pp.53-54. Learning the process, she went to work. *Id* at 54-56. The necessary forms included a Letter of Transfer as advised by PACAF, a DD 1354 form to remove the property from the facility inventory and a DD-300, a facilities disposal form, all of which Ms. Adams attached to a Staff Summary Sheet. Ex. 31.

Each form required review and approval by a chain of command. The Staff Summary Sheet served as a record that the proposed action was duly and legally vetted. Realty Specialist John Smith, who worked with Ms. Adams, testified to the process. *See* Ex. 32, Deposition of John Smith at pp 32-33:

Q How -- how -- who would she have had to seek approval of prior to sending this letter?

A A typical request of this nature or an action of this nature would have been reviewed by our environmental department, it would have been reviewed by the squadron commander, it would have been reviewed by our legal office, our JAG, and it would have gone to headquarters, Pacific air command.

Q And is there a way that each one of those departments signs off or commits their approval

to such a requested?

A There probably should have been a staff summary sheet.

Q What is a staff summary sheet?

A It's a cover sheet that gives a brief description of the item that's being reviewed and is routed, you know, through a specific set of offices for the review and approval.

Q So you -- you believe that a request like this would have needed at least four approvals, the environmental department, the squad commander for the 611.....

A Squadron, yes.

Q .....the legal office which would be JAG.....

A Uh-huh. (Affirmative)

Q .....and Pacific headquarters?

A Yes.

Ms. Adams prepared her recommendations and the Staff Summary Sheet in November 2005. The required authorities, including the Installation Facilities Board, unanimously concurred. Col. Skaja approved the conveyance in March, 2006. *See* Ex. 31 (Staff Summary Sheet, completed DD 1354, completed, and executed Letter of Transfer and completed and executed DD 300). The Air Force completed, and Cully accepted, a Facilities Disposal Form and a DD-1354 form which, when signed, effected a physical transfer of the property named within the DD-1354.[7] Col. Smith, the 611th Engineering

[7] The DD Form 1354 "is provided for execution to transfer physical custody and accountability … to the Cully Corporation." According to Mary Adams, Realty Specialist for the 611th at Elmendorf USAF Base, Alaska, "once the DD-1354 is signed, the facilities are taken out of inventory." *See* Ex. 21 at 23-25. Ms. Adams, in creating the DD-1354, followed the instructions of the Chief of Realty at the Pacific Air Command for USAF, at Hickham AFB, Hawaii. *Id.* at 61. The Transfer Letter was prepared as backup documentation because the transfer was to a non-governmental entity. *Id.* at 58.

Squadron Commander, signed the form on Nov. 5, 2006. Ex. 29, p.49. He testified that the form, as completed, was consistent with his first discussion at the Point Lay RAB meeting in January 2005: to obtain a win/win situation, leaving the Buildings in place for the use of Cully Corporation, as requested by Cully and confirmed by the BLM. Ex. 29 at 50.

Col. Skaja, in his capacity as Base Commander, executed the DD 300, approving the recommendations of the Installation Facilities Board, the Base Environmental Chief, and the PACAF approved Letter of Transfer in March, 2006. *See* Ex. 33. Col. Skaja testified that the Letter of Transfer he signed was necessary as the final document to transfer the Buildings to Cully. Ex. 19, p.73:22-25. Col. Skaja testified that he would not have signed the Letter of Transfer had he not been authorized to do so. *Id.* p.75:1-6. Col. Skaja also testified that he concurred with the findings that the Buildings "[were no longer used], [were] excess to AF requirements, very poor condition, and uneconomical…." *Id.* p.77. Upon Cully's acceptance of the Letter of Transfer, the Buildings were no longer in the Air Force inventory. *See* Ex. 34.

b. The Air Force Regarded the Transfer as Complete and Effective.

In 2007, the 611th Realty Officer sent an email to Cully along with a Summary of Realty Actions at the request of BLM. Ex. 36. That email and summary confirmed the Buildings had been transferred out of the Air Force ownership and belonged to Cully Corporation. *Id.*

Between 2009-2011, Realty Specialist John Smith, still responsible for conducting inspections of former DEW sites and other USAF property visited Point Lay. Ex. 32 at 10-12. He did not inspect the Buildings there because the Buildings were no longer part of the Air Force inventory. *Id.* at 43-45. Mr. Smith testified that Cully's requests for the Buildings and the land were in the Point Lay LRRS realty files. *Id.* 58-59. He testified that the lease to the NSB was only for the airstrip and that after Mary Adams left the 611th, he was the only Realty Specialist. *Id* at 79. All the property forms necessary to transfer the three buildings to Cully had been properly completed and remained in the Point Lay LRRS files at all times that he was with the 611th. *Id.*at 89-90.

Lori Roy began employment with the 611th as a Remedial Project Manager in 2006, working alongside Mr. Longtin for a few months until Mr. Longtin left in 2006. Ex. 27 at p.13. Ms. Roy denied any knowledge of the transfer of the Buildings to Cully, although she attended the June 2006 RAB meeting with Mr. Longtin. *Id.* at 25.[8] She also attended the 2009 RAB meeting with 611th Realty Officer John Smith. *Id.* 66-67. There, Mr. Smith stated [Ex. 32, p.3]:

[8] Ms. Roy also denied any knowledge of the BLM confirmation that upon the Air Force excessing the property, Cully would receive it, and that the BLM also agreed to accept the Buildings in the excessing transaction. Ex. 28 at 30.

NEW BUSINESS

MR. TRACEY: We are going to move onto Section II, New Business, Item A, United States Air Force Update.

MR. SMITH: Going back through some of the documents that we had in the office looking to provide information on these two items, the building ownership, the hangar, the warehouse and the garage, those were transferred to Cully Corp in March of 2006 for ownership. That was done by my predecessor. I do have a copy of the document electronically.

By 2011, there were new players at the 611th Civil Engineering Squadron travelling to the Point Lay site. Additional environmental work was necessary for two small sites at the Site, a dump site and a former fueling station. Ex. 27, p.49. An Air Force contractor, AECOM, hired to do remediation, was present at the 2011 RAB meeting as discussions concerned additional remediation work. Ex. 38 at 1. It remained undisputed that Cully owned the Buildings.

Into 2012, 611th Realty Officers admitted to Cully's ownership of the Buildings. Realty Officer Laura Keiser confirmed on several occasions to Remedial Project Manager Ms. Roy, Keiser's supervisor, Mr. Fife, and her coworker, Vikki Gilmore, that Cully owned the buildings on the former LRRS. On July 31, 2012, Ms. Keiser reminded her coworkers that "buildings 2, 3 and 4 [hanger, warehouse and garage] belong to Cully." Ex. 39. She also advised her supervisor, Mr. Fife, that she was amending the NSB lease "to remove the three [B]uildings." Ex. 40.[9]

[9] Cathy Moody, also a GS-9 Realty officer, created an email dated March 1, 2012 that misleadingly stated only that "Cully had a 3 month license for excavation and removal of contaminated soil and replacement with clean fill. [….] However, there is an interim conveyance to take possession of the land ONCE WE RELINQUISH IT."(emphasis in original). Ex. 43. The email discloses the 2005 NSB lease, but makes no mention of the

8. The Strange Origin of the Takings Letter

Vikki Gilmore was employed as a Realty Specialist at the 611th Civil Engineering Squadron in 2011. Deposition of Vikki Gilmore, Ex. 41, p.13. She had a civil service grade of GS-9.[10] *Id.* Ms. Gilmore had access to the files for the Point Lay Site and she had received the earlier 2012 emails from Ms. Keiser confirming that Cully owned the Buildings at the Site. Ms. Gilmore testified that she had no authority to bind the government. *Id.* Ms. Gilmore testified that in October, 2012, she informed Ms. Jacqui Venuta of AECOM that AECOM could over-winter its heavy equipment in the Cully Hanger under the mistaken belief that the Air Force owned it. *Id* at 49. AECOM then placed its equipment in the Cully Hanger. Ms. Gilmore testified that:

18 A -- I did not provide written approval because I was under
19 the impression that those were still Air Force facilities
20 and -- and because they were doing a contract on behalf of
21 the Air Force, they didn't need special approval to store
22 their equipment in those facilities.

Ex. 41, p.50.

Cully conveyance documents nor any explanation as to the basis for the 2005 license to remediate. *Id.*

[10] A GS-9 rating is analogous to a lieutenant junior grade (0-2). See Military rank equivalency (mccsokinawa.com), last accessed 01/23/2022. Ms. Keiser was also a GS-9. Ex. 52 at 13.

In January, 2013, after AECOM had staged its heavy equipment in the Cully Hanger, Ms. Venuta of AECOM was approached by Martha Awalin, the president of Cully Corporation. Ms. Awalin requested that AECOM pay rent for the use of the Cully Hanger. Ms. Venuta contacted Lori Roy with an email dated Jan. 22, 2013, upset about Cully's request for rent and pinning the blame on Ms. Gilmore in Realty. Ex. 42. The AECOM email set off a fire storm. Lori Roy demanded to know what the record revealed. *Id.*

Ms. Gilmore, Ms. Keiser, Ms. Roy and Mr. Fife, also being heavily lobbied by the NSB, developed a significantly misleading "Bullet Point Background Paper." Ex. 44. The document is undated, but appears to have been drafted in February, 2013. *id*. The Realty Officers for the most part denied principle authorship. Ex. 41, pp.69-70; Keiser Deposition, Ex. 52 pp.94-95 (claiming authorship and Mr. Fife cleaning up the grammar); Fife Deposition, Ex. 45, p.55 (just cleaned up Gilmore and Keiser grammar). The Bullet Point Background paper begins with the assumption that the 2006 Letter of Transfer was "illegal" on the sole basis that Cully is a for-profit Alaska Corporation. *See* Ex.44.

Mr. Fife was the Portfolio Asset Chief for the 611th and property management was part of his portfolio at the relevant time. Ex. 45, p.12. He had no knowledge of what was in the facility files where the 2006 conveyance documents are stored. Ex.45, pp.15-16. Mr. Fife had no knowledge as to why the Cully buildings were not demolished or even that Cully had a license to remediate. *Id.* He knew nothing about the NSB lease. *Id*., pp.34-35. Mr. Fife made clear that the Bullet Point Background paper was most assuredly not a staff summary sheet, and it is not clear who approved or reviewed the paper. *Id.* at 56. When

Mr. Fife was questioned regarding the NSB Lease, Ex. 17, he understood the lease was for the airstrip. *Id.* at 63-64. The Bullet Point Background paper's other unsupported allegations were also a mystery to Mr. Fife.

Among the Bullet Point Background Paper's clearly false statements were:

1. NSB would lose its FAA grant if the Buildings were in fact Cully's. This "fact" is contradicted by the express exclusion of the buildings as subject to demolition in 2005 and Cully's advocacy for the Buildings and the land in 2005. (per Ex. 17, at Att. C, the buildings were in cold storage, to be demolished in 2005). *Id* at 60.[11]

2. That the NSB was occupying all three buildings. *Id.* at 66. But NSB had vacated the buildings in anticipation of demolition in 2005. Ex. 14.

3. The NSB lease had never been modified. *Id* at 69. But the lease was only for the airstrip. *See supra* p. 8.

Mr. Fife stated that the Bullet Point Background Paper's assertion that the conveyance to Cully was illegal was Ms. Keiser's analysis, not his *Id*. at 70. He has no legal training and there is no legal memo backing up the assertion. *Id*. The lease clearly permits subleasing, despite the paper's assertion to the contrary. *Id* at 88. Mr. Fife had no knowledge of a $3 million bill to NSB. *Id*.

Ms. Gilmore testified that she, Laura Keiser, and Lori Roy coauthored the Bullet Point Background Paper and gave it to Col. Burk, Col. Skaja's successor. Like Fife, Ms.

[11] In addition, *see* discussion at p.8, *Supra*, and Ex. 18, p.3.

Gilmore had no knowledge of the earlier Staff Summary Sheet attachments and the PACAF authorizations, the planned demolition of the Buildings, or Cully's agreement with the Air Force to remediate. Had she known of these facts, they should have been included in the Bullet Point Background Paper. *Id* at 76. Ms. Gilmore testified that real estate instruments can be approved by the Installation Facilities Board and the Wing Commander. But, she was not aware of the signed DD 300 that should have been in the files. *Id* at 45.

Ms. Keiser claimed authorship of the Bullet Point Background Paper. Keiser Deposition, Ex. 52, p.97. Her position was that her predecessor, Mary Adams, had no authority to sign the letter dated March 28, 2006 and this apparently resulted in the entire transaction being "illegal." *Id.* p.97. As with Ms. Gilmore and Mr. Fife, Ms. Keiser was not aware of the reasons why the buildings were not demolished. Nor had she seen the Staff Summary Sheet. *Id*., p.98. She denied knowledge of her 2012 written statements that Cully owned the buildings. Her position was that she did her own research and that the unsupported facts and conclusions were her own, and based on her alleged research. *Id.*, p.127.

B. The Takings Letter

Col. Burk was the 611th Commander in 2013. The "legal issue", as contained in the false, misleading Bullet Point Background Paper, was brought to Col. Burk's attention in late February 2013 about a month after the Venuta complaint that Cully wanted rent for hanger use. Ex. 47, p.21. Shortly after the "legal issue" was brought to her attention, Col. Burk signed a letter to Cully (the "Takeback Letter") dated March 6, 2013. (Ex. 46) Ex.

47. p.21. The letter was to inform Cully that the Transfer Letter executed seven years earlier was not effective and that the Air Force was the owner of the Buildings. The Takings Letter demanded that Cully remove all of its belongings from the premises. *Id.* Col. Burk testified that the 611th Engineering Squadron commander, Lt. Col. Elwood Henry, brought her the letter to sign. Ex. 49 at 21. She testified that Col. Henry had reviewed the issue with the "team", and she signed it. *Id*. at 22. Col Burk testified that her understanding was that Col. Henry and Laura Keiser had looked at the issue, discussed with legal and were providing their recommendations. She could not recall whether there was anything in writing, but does recall the verbal information. *Id.*

Col. Burk also testified that she was not aware that Cully had a valid top filing on the land under the ALTAA of 2004. *Id* at 33. She had not been informed that, in 2005, the BLM had confirmed that Cully would receive the land and that BLM confirmed that Cully wanted the Buildings. *Id.* at 38. She was not informed that the Buildings were scheduled for demolition under Operation Clean Sweep, but that PACAF had authorized remediation in lieu of demolition. *Id*. at 38-40. She was not informed that Col. Armstrong requested confirmation from BLM that it would accept the land with the buildings as requested by Cully. *Id.* at p.64. She was not aware that Col. Skaja had signed a Letter of Transfer. *id.* No facts were brought to Col. Burk's attention to indicate that Col. Skaja did not follow the regular order of due diligence in signing the Letter of Transfer in March, 2006. *Id.* at 69.

General Hoog (ret) was the 11th Air Force Commander, and the Alaska Air Defense Commander between 2011 and 2013. Deposition of Gen. Hoog, Ex. 48 at p.13-14. Gen. Hoog learned of the Cully issue when Col. Burk approached him to brief him on the issue March, 2013. *Id.* at 18-19. Gen. Hoog testified that Col. Burk brought him the Bullet Point Background Paper, but there was no staff summary sheet accompanying it. *Id.* at 34, 37-38. He did not review anything else, and what she told him—that because Cully was a for profit company, that was good enough for him. *Id*. at 21. In other words, because Cully was a for profit native corporation, it was ineligible to receive the land. *Id* at 28.

Gen Hoog, however, was not aware that Cully was going to receive the land and had requested that the Buildings not be destroyed, and that the BLM had confirmed Cully's entitlement. *Id.* at 41. There was no discussion regarding the BLM or the plan to excess the site to the BLM, with the Buildings still standing and to Cully. *Id.* The General was not aware that Cully was an ANCSA corporation. *Id.* at 50. He was not aware that in 2012, the 611th knew the buildings belonged to Cully. *Id.* at 51. He was not aware that the NSB lease specifically identified that the Buildings were to be demolished. *Id.* at 52. He was not aware that the 611th had told AECOM that it could use the buildings. *Id.* at 53. He did not know what documents had been used, or that the entire transaction was premised on a fully vetted staff summary sheet. *Id.* He agreed that if the buildings were in fact Cully's, then the Air Force would be required to pay rent. *Id.* He did not ask whether there were other options. *Id.*

Gen. Hoog also clarified the sequence of events. His staff wrote a letter for his signature March 25, 2013 to the Alaska delegation. *Id.* at p.46; Ex. 49. Col. Burk's letter dated March 6, 2013 was to accompany the General's letter to the Alaska delegation before it went to Cully. *Id.* The purpose was to give Senators Begich and Murkowski and Rep. Young a heads up before Col. Burk's letter (Ex. 46), went to Cully Corp. Thus, the Takings letter, Ex. 46 although dated March 6, 2013, was not sent to Cully until April 11, 2013. *See also* Ex. 50 (Takings letter to Cully sent April 11, 2013).

Finally, in September 2019, the Air Force informed Cully that the Buildings would be demolished. Ex. 51.

II. ARGUMENT

A. Issues Presented

1. **Did the 2006 Letter of Transfer vest Title to the Buildings in Cully?**
2. **Did the 2013 Takings letter deprive Cully of its Property Interests in the Buildings?**
3. **Is the Government Liable to Cully under the Fifth Amendment's Taking Clause?**

B. Summary of Argument

The United States is liable to Cully for taking Cully's property without just compensation. The government's contention, that the 2006 Transfer letter was illegal, is demonstrably in error. Indeed, the government was able to take the Buildings because they still stood in 2013 because of Cully's agreement with BLM and the Air Force in 2005. The government taking, based upon a false premise that Cully was not the owner, resulted in the government depriving Cully of a source of income, simply because tiny Cully

Corporation requested rent from the contractor. Rather than pay, the government simply took. The Fifth Amendment to the United States Constitution requires just compensation to be paid to Cully for the taking. Cully is entitled to partial summary judgement in its favor and against the United States, determining the government is liable to pay Cully just compensation, the amount to be determined at trial.

C. Standard of Review

Summary judgment is appropriate where the evidence demonstrates there is "no genuine dispute as to any material fact and that the movant is entitled to judgement as a matter of law." Rules of the Court of Federal Claims ("RCFC") 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A genuine issue is one that "may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250. A fact is material if it might significantly affect the outcome of the suit. *Id.* at 248. In determining if summary judgment is appropriate, a court will draw all inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). A party seeking summary judgment bears the burden of establishing the "absence of any genuine issues of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (quoting *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181, 184, 244 U.S. App. D.C. 160 (D.C. Cir. 1986)).

When the moving party has met this burden, the burden shifts and the nonmovant must point to sufficient evidence to show a dispute exists over a material fact allowing a

reasonable fact finder to rule in its favor. *Anderson*, 477 U.S. at 256. The evidence need not be admissible, but mere denials, conclusory statements, or evidence that is merely colorable or not significantly probative will not defeat summary judgment. *Celotex*, 477 U.S at 324.

D. The Air Force Took Cully's Property Interests.

The USAF appropriated Buildings that it had conveyed to Cully. This is a quintessential takings claim. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) ("The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property."). There was an agreement to transfer the buildings. Cully performed and the agreement was consummated in a completed transfer. The buildings were removed from Air Force inventory in 2005 per the November 2005 DD 1354. Due to a series of inept actions leading up to and following an Air Force contractor occupying Cully's hanger, the Air Force renounced the donation, in mid-April 2013 in a letter dated March 6, 2013. The United States committed a taking of Cully's property rights. It is the actions of the United States that are at issue here. *See Glob. Freight Sys. Co. W.l.l. v. United States*, 130 Fed. Cl. 780, 788 (2017) ("When considering a possible taking, the focus is not on the acts of others, but on whether sufficient direct and substantial United States involvement exists.").

Nonetheless:

> The Takings Clause of the Fifth Amendment… provides: "[N]or shall private property be taken for public use, without just compensation." The Founders recognized that the protection of private property is indispensable to the promotion

> of individual freedom. As John Adams tersely put it, "[p]roperty must be secured, or liberty cannot exist." Discourses on Davila, in 6 Works of John Adams 280 (C. Adams ed. 1851). This Court agrees, having noted that protection of property rights is "necessary to preserve freedom" and "empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them." *Murr v. Wisconsin,* 582 U. S. ___, ___, 137 S. Ct. 1933, 198 L. Ed. 2d 497, 509 (2017).

Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2071 (2021)

1. The 2005 Donation, Consummated with the 2006 Letter of Transfer, was Effective and Valid

a. <u>Cully's Status as an "Indian Tribe"</u>

The Air Force under Col. Skaja was faced with unique circumstances and a set of laws that the United States Supreme Court has consistently found are unique to Alaska. Indeed, the Court most recently stated:

> This is not the first time the Court has addressed the unique circumstances of Alaska and its indigenous population. *See*, e.g., *Sturgeon v. Frost*, 587 U.S. ___, 139 S. Ct. 1066, 203 L. Ed. 2d 453 (2019); *Sturgeon v. Frost*, 577 U. S. 424, 136 S. Ct. 1061, 194 L. Ed. 2d 108 (2016); *Alaska v. Native Village of Venetie Tribal Government*, 522 U. S. 520, 118 S. Ct. 948, 140 L. Ed. 2d 30 (1998); *Metlakatla Indian Community v. Egan*, 369 U. S. 45, 82 S. Ct. 552, 7 L. Ed. 2d 562 (1962). The "simple truth" reflected in those prior cases is that "Alaska is often the exception, not the rule." *Sturgeon*, 577 U. S., at 440, 136 S. Ct. 1061, 194 L. Ed. 2d 108. To see why, one must first understand the United States' unique historical relationship with Alaska Natives.

Yellen v. Confederated Tribes of the Chehalis Reservation, 141 S. Ct. 2434, 2438 (2021).

Col. Skaja and his command at the Pacific Air Command, United States Air Force,

recognized this crucial fact. Ms. Keiser, a low ranking civil servant with an ax to grind against her predecessor, Mary Adams, did not.[12]

In *Yellen,* the issue was whether Alaska Native Corporations were Tribes for the purposes of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). *Yellen* 141 S. Ct. 2435. Holding that the CARES Act incorporated the definition of Tribes found in the Indian Self Determination and Education Assistance Act (ISDEAA) , the Court held that ANCSA Corporations were indeed Tribes under the CARES Act. In so holding, Court recognized the unique features of ANCSA Corporations holding:

> The Court today affirms what the Federal Government has maintained for almost half a century: ANCs are Indian tribes under ISDEAA. For that reason, they are Indian tribes under the CARES Act and eligible for Title V funding. The judgment of the Court of Appeals for the District of Columbia Circuit is reversed, and the cases are remanded for further proceedings consistent with this opinion.

Id., 141 S. Ct. 2452.

The depositions of the 2013 611th Realty Officers and Alaska Command Officers demonstrate that not one of the actors considered Cully's unique status as an Alaska Native Village Corporation.[13] Instead, the sole basis for the government action was that Cully was formed as a for profit corporation under Alaska law, and thus ineligible for the 2005

[12] Ms. Keiser testified that she did not like Mary Adams and the reason why was because Ms. Adams did not want to learn. Ms. Keiser worked as a coworker with Ms. Adams at the 611th for a short period of time. Ex. 54 at 54:3-25-55:4-7.

[13] *See*, *eg.*, Ex. 45, p.25 (Keiser believes Village Corporations can only handle matters within the village not land); Ex. 48, p. 50:6-10; Ex. 45, p. 25:17-21; Ex. 41, p. 81:20-23; Ex. 42, p. 81:20-23; Ex. 47, p. 33:18-20.

donation. But Cully was eligible to receive the Buildings in 2005. For that reason, the buildings were not demolished. The government is liable to Cully for the 2013 taking under the Fifth Amendment to the United States Constitution.

b. The Donation Recognized Cully's Unique Status and that It would Soon-be the Landowner

The Air Force mission, throughout Operation Clean Sweep, was to remediate the Site so that the land could be excessed to the BLM and the BLM could then convey to Cully, in order that Cully could achieve its entitlement under ANCSA. Cully wanted the Buildings to remain on the land. The Air Force wanted to demolish the Buildings. The Air Force did not want to return to Point Lay. For its part, the BLM was constrained to accept only remediated property. The Buildings did not fit that paradigm.

However, Cully, as the future landowner, did want the Buildings, recognizing their potential value in a land barren of such structures. When the Air Force was assured that the BLM would accept the excessed lands with the buildings, that freed the Air Force of a demolition task and assured Cully that the buildings would remain IF Cully remediated the site.

As Col.'s Skaja and Smith both noted, the opportunity, unique in Alaska, presented a win/win although it required deviation from the Clean Sweep program approved by PACAF. PACAF, however, also agreed to the change. *See e.g.* License, Ex. 24, approved by PACAF. The sole catch, then was whether Cully was eligible to receive the donation?

2. Cully Was Eligible to Receive the Donation under the Federal Disposal Regulations

a. <u>The Donation Regulations Clearly Allowed the Donation.</u>

Because the government took Cully's Buildings under the guise that Cully was a "for profit" corporation, it is necessary to examine the law of government surplus property. The Letter of Transfer specifies the Air Force's authority as 41 C.F.R. § 102-75.990. *See* Ex. 31 at p.4. There are 2 related C.F.R. subchapters pertaining to an agency's disposal of property. Subchapter B is related to disposal of personal property. *See* 41 C.F.R. § 102-31 to 102-42. The regulation defines a public body as "any department, agency, special purpose district, or other instrumentality of a State or local government; any **Indian tribe**; or any agency of the Federal Government." 41 C.F.R. § 102-37.560 (emphasis added). Under this definition, there is no question that Cully is an eligible recipient of the Buildings. It is a Tribe. This is further clarified by the fact that the only definition for "Tribe" in the regulations is a referral to the definition in the Indian Financing Act. The IFA in turn refers to the Indian Self-Determination and Education Assistance Act, as did the CARES Act, and as did the U.S. Supreme Court in *Yellen* in finding the ANCSA corporations are Tribes. *Yellen* at 2435.

In turn, the real property disposal regulations, found at 41 C.F.R. § 102-71 to 102-84, define a public body as "any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, or any political subdivision, agency, or instrumentality of the foregoing." 41 C.F.R. § 102-71.20. Although Tribes are not

included within the definition of "Public Body" there is also no exclusion of Tribes from the definition of "Public Body." Nor, for that matter, is there a reasonable explanation for the omission. Federal agencies regularly donate property to Tribes. The lands selected by Cully will be a donation from the Bureau of Land Management. And BLM specifically requested the buildings to remain and not be demolished.

Further, the federal regulations expressly permit donations:

> [S]ubject to the restrictions in this subpart, any Federal agency having control of real property that has no commercial value or for which the estimated cost of continued care and handling exceeds the estimated proceeds from its sale, may —
> (a) Abandon or destroy Government-owned improvements and related personal property located on privately-owned land;
> (b) Destroy Government-owned improvements and related personal property located on Government-owned land (abandonment of such property is not authorized); or
> (c) Donate to public bodies any Government-owned real property (land and/or improvements and related personal property), or interests therein.
> 41 C.F.R. § 102-75.990

The Air Force, in line with the regulation, properly donated the improvements to Cully. Put another way, there is no legitimate government purpose or policy advanced by not considering Tribes as public bodies for the purposes of the real property regulations, particularly in this case. Cully was the acknowledged, confirmed future owner. The interim property manager, BLM, requested the Buildings not be demolished. The Air Force simply complied. Indeed, 41 C.F.R. § 102-75.990 does permit the donation of the improvements because the improvements and related personal property included can without question be donated to Cully in its capacity as an Indian Tribe.

b. Alternatively, the Air Force's Consultation with GSA and Authority from BLM Authorized the Base Commander to Approve the Donation

The carefully orchestrated 2005 effort that led to a thoroughly vetted staff summary sheet (Ex.31) stands in stark contrast to the haphazard, false, misleading and rushed Bullet Point Background Paper (Ex. 44). The 2005 process was run up to PACAF Headquarters, vetted with GSA (Ex. 22), the appropriate disposal agency, and with BLM, the excessing agency (Ex. 8). Cully's work obtained a closeout letter for the Air Force from the State, thereby guaranteeing that the lands, with the Buildings, could be excessed to the BLM. Indeed, in 2013, the Air Force could have mollified any concerns, real or imagined, by Ms. Keiser, by consulting its Judge Advocate and if it felt necessary, request a formal consultation with GSA. *See* 41 C.F.R. § 102-2-080. The fact that the Air Force did not seek GSA guidance demonstrates such guidance was unnecessary because the 611th's obtaining informal concurrence from the GSA in 2005.

Ms. Adams, in 2005, had the foresight to consult with both GSA and PACAF. The GSA consult was well within the regulations. The donation regulations anticipate both informal and formal requests for deviations. Ms. Adams and Mr. Fred Zderic engaged in precisely that informal consultation:

> (a) Consult informally with appropriate GSA program personnel to learn more about how your agency can work within the FMR's requirements instead of deviating from them. The consultation process may also highlight reasons why an agency would not be permitted to deviate from the FMR; e.g., statutory constraints.
>
> (b) Formally request a deviation, if consultations indicate that your agency needs one. The head of your agency or a designated official should write to GSA's

> Regulatory Secretariat to the attention of a GSA official in the program office that is likely to consider the deviation. (See the FMR bulletin that lists contacts in GSA's program offices and § 102-2.90.) The written request must fully explain the reasons for the deviation, including the benefits that the agency expects to achieve.

41 C.F.R. § 102-2.80. Ms. Adams' email reached out to GSA. GSA understood from Ms. Adams' request that the Air Force was seeking authority to transfer three buildings to Cully Corporation. Mr Zderic recognized and expressly noted that Cully was the "local native corporation." He stated

Mary:

GSA concurs with your decision to donate the three buildings (#2 Vehicle maintenance, #3 Air freight, & #4 Warehouse) at Pt Lay, Alaska to the local native corporation, Cully Corp. The buildings have no commercial value and the costs associated with their demolition would far exceed any value. We understand that the land will also go to the native corporation after the site cleanup thru BIA.
Please give me a call if I can be of further assistance.

Fred Zderic
Realty Specialist
GSA, Auburn, WA
Real Property Disposal
(253) 931-7541

Ex. 31 at p.11; Ex. 22. Without question, Mr. Zderic, a realty specialist in the field of agency donations, felt the donation proposal was well within the regulations and no further consultation to determine a deviation was necessary.

The Air Force, however, did not rest on that laurel, alone, in 2005. Rather, Ms. Adams, the Realty Officer, continued up the chain of PACAF command. Under 41 C.F.R. § 102-75.1055, the Secretary of Defense has authority, as well, to dispose of military property no longer needed by means deemed most advantageous to the United States, so

long as the property has a value of less than $50,000. 41 C.F.R. § 102.1055. Here, the Secretary did delegate, as demonstrated by the 2005 license to Cully. *See* Ex. 24. In addition, an Installation Facilities Board was convened and recommended the donation. Col. Skaja signed the Letter of Transfer in his official capacity as Commander of the base. He testified that he would not have signed if he lacked authority. It is undisputed that Col. Skaja had such authority just as it is undisputed that Col. Burk had authority to take the buildings back.

When Cully Corporation accepted the Letter of Transfer, it accepted the responsibility to ascertain and clean up any contamination in the Buildings before the Air Force excessed the land to the BLM. *See* 41 C.F.R. § 102-75.1020. Once again, per federal law, the Air Force will be responsible for review and remediation:

> The landholding agency is responsible for all expenses to the Government and for the supervision of the decontamination of excess and surplus real property that has been contaminated with hazardous materials of any sort. Extreme care must be exercised in the decontamination, management, and disposal of contaminated property in order to prevent such properties from becoming a hazard to the general public. The landholding agency must inform the disposal agency of any and all hazards involved relative to such property to protect the general public from hazards and to limit the Government's liability resulting from disposal or mishandling of hazardous materials.

41 C.F.R. § 102-75.955.

c. <u>The Letter of Transfer was an Appropriate Instrument to Transfer Title.</u>

Mary Adams testified that PACAF recommended to her to use a Letter of Transfer. Ex. 21, p.54. The donation regulations state that no special form to convey is required. 41

C.F.R. § 102.37.575. However, the forms used must be sufficient to create an audit trail. *Id*. Here, the audit trail clearly exists, and had the file been reviewed, Gen. Hoog and Col. Burk would have been far more enlighted.

The Government's argument, that the Letter of Transfer is null and void, is based solely on Ms. Keiser's representation in 2013 that Cully is a "for profit" corporation. But, Cully is a unique, Alaska Native entity, a Tribe that owns land, very much wants the Point Lay Site, the highest, best and safest lands from the rising seas of a warming Arctic. Because Cully is a Tribe, *sui generis,* the Letter of Transfer was not null and void, and the government, having taken the buildings, is liable to Cully for the taking, and Cully is entitled to the protections of the Takings clause to the Fifth Amendment to the United States Constitution

E. In the Alternative, The Anti-Deficiency Act Prohibits The Air Force's Acceptance of Cully's Remediation of the Garage.

Col. Skaja testified that the Clean Sweep program allocated funds for the remediation of the Point Lay Site. Ex. 19:19-21; pp. 43-44. Col Smith testified that funding for the Clean Sweep program was for demolition of facilities. Ex. 29:16-25. Thus, Cully's undertaking to clean the garage was a programmatic undertaking for which the government had funds, but Cully was not compensated. Rather, the undertaking was successful in saving the Buildings *from* demolition. That was the win/win for the government. The Buildings were transferred to Cully. And that was its win/win for Cully until April 11, 2013.

The issue is thus whether, in the event that Cully is not compensated for the taking and the government has the buildings, does the law protect Cully? Clearly, the services performed,

sufficient to close the garage as a contaminated site were not compensated. Ex 19, pp.50-52. There is no question that the Clean Sweep program was funded. Col. Skaja explained:

> A It would not surprise me that Cully would not have been paid. That's a double negative, I know. The reason being is the Air Force had funds to do remediation and we had people to do remediation and we would not have paid an outside corporation to do that.

Ex. 19, p.51.

The Air Force's renunciation of the Letter of Transfer and its taking of Cully's property constitutes a violation of the Anti-Deficiency Act. 31 U.S.C. § 1342. The Act prohibits the government from accepting free services with certain exceptions not applicable in this case:

> An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. This section does not apply to a corporation getting amounts to make loans (except paid in capital amounts) without legal liability of the United States Government. As used in this section, the term "emergencies involving the safety of human life or the protection of property" does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.

31 U.S.C. § 1342.

Here, the Air Force accepted Cully's services. It had funds to pay federal workers for those services. As a result of the free services, Cully received the Buildings, burdened with liability, including the likely future need to perform additional remediation. But after the Buildings were conveyed to Cully, the Government apparently obtained further free services while subjecting Cully to further risk by suggesting that the Buildings, although to be demolished, were a part of the NSB lease and ultimately, insisting that the Letter of Transfer was "null and void." Ex. 46. The Government violated the Anti-Deficiency Act when it renounced the Letter of Transfer *after* it solicited, accepted and benefited from Cully's remediation.

The work that Cully performed, in short, augmented the Air Force budget. Not only was the Air Force saved from the expense of demolition, but also from the expense of shipping the building debris from Point Lay, a village with no port. In return, the government received what it coveted, a No Further Action letter and free use of the Cully buildings. In *Wetzel-Oviut Lumber Company v. United States,* 38 Fed. Cl. 563 (1997), the United States failed to pay portions of a timber contract because, it claimed, it did not have the funds to do so. *Id.* at 567. The Court held that the Anti-Deficiency Act do not shield the government from paying funds for which it is liable. *Id.* at 572. *See also Springfield Parcel C, LLC v. United States,* 124 Fed. Cl. 163, 196 (2015) (GSA violated Anti-deficiency Act in contracting lease terms longer than 1 year).

CONCLUSION

The Letter of Transfer was proper, the buildings vested in Cully and the United States in liable to justly compensate Cully for the taking. Alternatively the remediation Cully performed benefited the Government, to no benefit of Cully.

RESPECTFULLY SUBMITTED this 25th day of January, 2022.

FORTIER & MIKKO, P.C.

Attorneys for Plaintiff Cully Corporation

s/Samuel J. Fortier

Samuel J. Fortier, ABA No. 8211115
1600 A Street, Suite 101
Anchorage, Alaska 99501
(907) 277-4222 (phone)
(907) 277-4221 (fax)
Email: sfortier@fortiermikko.com

CERTIFICATE OF FILING

I hereby certify that on the 25th day of January, 2022, a copy of the foregoing "MOTION FOR PARTIAL SUMMARY JUDGMENT WITH APPENDICES was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/Samuel J. Fortier