No. 19-339
Judge David A. Tapp

In the United States Court of Federal Claims

CULLY CORPORATION,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

OPPOSITION TO DEFENDANT'S CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Statutes

Public Laws

Federal Court Rules

State Cases:

State Court Rules:

Restatements of the Law

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CULLY CORPORATION,	)	No. 19-339
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Defendant.	)	

OPPOSITION TO DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

COMES NOW Cully Corporation ("Cully"), through counsel, and hereby opposes the Government's motion for summary judgment on Cully's claims for a taking and a quantum meruit and its motion to dismiss for lack of subject matter jurisdiction.

INTRODUCTION

The government's motion for summary judgment relies on two completely erroneous legal theories. Neither legal theory is supported by black letter law nor by the law of this Circuit.

The government ignores the fact that three buildings purportedly included in a 2004 Lease (the Lease) were to be demolished in 2005. Indeed, the Lease itself so states.[1] The

[1] The government misstate the date the Air Force took back the property as "March 27, 2013" and mischaracterizes the case as "reneg[ing] on a promise". *See* Government Brief (Gov't Br.), ECF 83 at p.10. The Takings Letter is dated March 6 and delivered on April 11, 2013. *See infra*.

Government ignores the fact that the buildings, slated for demolition because that is what the law required, and although old, and of no value, were not demolished. And the government ignores that the understanding of the parties to the 2004 Lease was that the buildings were to be demolished in 2005.

Indeed, one might wonder why, the Air Force did not demolish the three buildings. The reason: there was a bargain approved at the highest levels that if Cully performed remediation, it would receive the buildings, just as it would receive the land.

Nor is the Government's recitation of the law based on reality. This is so because it seeks summary judgment based on issue preclusion arising out of a case that did not involve the Government and took place in an Alaska court when Cully sought restitution for trespass. Similarly, the Government, with no new facts, seeks to challenge this court's earlier ruling that is now the law of the case.

FACTS[2]

This case concerns three buildings still standing at a former Long Range Radar Site (LRRS, or Site) located near the Alaska Native Village of Point Lay. In 1996, the government leased buildings and an airstrip at the Site to the North Slope Borough (NSB).[3] Although the lease expired in 2001, the parties, with the help of Cully, formed an interagency committee to work out Cully's under-selections, Cully's request for the Site, the Air Force's duties of

[2] Cully relies in part on its Statement of Facts contained in its Motion for Partial Summary Judgment and supporting exhibits. *See* Appendix. 1, ECF 80, pp. 3-26, (FACTS), and Appendix. 2 (supporting documents).

[3] *See* Appx. 2 at Ex. 2.

remediation, and NSB's intentions to expand the airstrip to meet Federal Aviation Administration (FAA) requirements. *See* Appdx. 3 at Ex. 1. The Bureau of Land Management (BLM) advised Cully of the many barriers to obtaining the land. As of 2001, no law permitted village corporations to obtain excess Air Force real property. (Alaska Native Claims Settlement Act (ANCSA), § 3(e), 43 U.S.C. 1602(e) prohibiting selections of federal installations). Moreover, BLM was not permitted to accept valuable improvements. *See* Appx. 3, Ex. 2 (noting that if land contains valuable improvements, it is not suitable for BLM management but must be managed by the General Services Administration (GSA)).

The Air Force, recognizing that it would not be able to excess the Site to the BLM with the buildings, implemented "Operation Clean Sweep". That program required the Air Force to demolish the Site's buildings, including the garage, hanger, and warehouse. *See* January 2005 Clean Sweep Work Plan, Appx. 2, Ex. 11 at pp. 70-71. [4]

In late 2004, with the passage of the Alaska Land Transfer Acceleration Act (ALTAA) of 2004, Pub. L. 108-452, Dec. 10, 2004 118 Stat. 3582, the land became available for Cully to select. ATLAA, § 201 provides:

> **(a) In General.--** To make certain Federal land available for conveyance to a Native Corporation that has sufficient remaining entitlement, the Secretary may waive the filing deadlines under sections 12 and 16 of the Alaska Native Claims Settlement Act (ANCSA) (43 U.S.C. 1611, 1615) if:
>
> **(1)** the Federal land is
>
> **(A)** located in a township in which all or any part of a Native Village is located; or

[4] As discussed in Cully's Motion for Partial Summary Judgment, *See* ECF 80 at pp. 31-35, federal regulations prohibit excessing improvements on government lands absent specific authority from GSA and the receiving agency, in this case, BLM.

> **(B)** surrounded by--
>
> **(i)** land that is owned by the Native Corporation; or
>
> **(ii)** selected land that will be conveyed to the Native Corporation;
>
> **(2)** the Federal land--
>
> **(A)** became available after the end of the original selection period;
>
> (i) was not selected by the Native Corporation because the Federal land was subject to a competing claim or entry; and
>
> (ii) the competing claim or entry has lapsed; or
>
> **(B)** was previously an unavailable Federal enclave within a Native selection withdrawal area;
>
> **(3)**
>
> **(A)** the Secretary provides the Native Corporation with a specific time period in which to decline the Federal land; and
>
> **(B)** the Native Corporation does not submit to the Secretary written notice declining the land within the period established under subparagraph (A); and
>
> **(4)** the State has voluntarily relinquished any valid State selection or top-filing for the Federal land.

Here, the Site is surrounded by Cully lands, and is an integral part to Cully's core township. ALTAA's passage meant Cully could now legally select and receive the Site.

Thus, by early 2005,the steps remaining for Cully to obtain conveyance of the land encompassed by the Site were:

- The Air Force to remediate and relinquish, *i.e.*, declare the Site, U.S.S. 5251, excess; and
- For BLM to accept the Site, once remediated to convey to Cully; and
- For the State to relinquish its top-filing in favor of Cully.

In January, 2005, Col. Kenneth Smith and Mr. Longtin presented the Operation Clean Sweep Work Plan, (Appx. 2, Ex. 11), to the Restoration Advisory Board ("RAB"). Representatives of the NSB were present for the meeting. *See* RAB Meetings, January 13,

2005, Appx. 2, Ex. 30. The Work Plan required demolition of the buildings, including the hanger, the garage, and the warehouse. *See* Appx. 2, Ex. 11 and 12.

> As described in Appendix 1 and 2 hereto, the following occurred early in 2005:
>
> 1. The BLM requested, and the State of Alaska confirmed it would relinquish its top filing to Cully, per § 20, ALTAA. *See* Appx. 2, Ex. 5 and 6 (March and April, 2005, respectively)
>
> 2. Cully requested that the buildings, specifically, the hanger, the warehouse and the garage, be included in the land conveyance from the Air Force. *See* Appx. 2, Ex. 7.
>
> 3. Col Armstrong requested, and the BLM confirmed that Cully was entitled to receive the Air Force land and had requested the buildings pursuant to ALTAA and that BLM intended to convey the same to Cully. *See* Appx. 2, Ex. 8.

In May, 2005, the Air Force and the NSB signed a new Lease, with a commencement date of November, 2004. *See* Defendant's Cross Motion for Summary Judgment ("DXM") at 5.[5] The 2004 Lease is similar to the lease that expired in 2001, with several notable exceptions. First, the 1996 lease referenced Exhibit D "Physical Condition Report" with respect to the facilities leased to the Air Force. *See* 1996 Lease, p. 2 and p. 5, Appx. 2, Ex. 2. In contrast, the 2004 Lease contains *two* Exhibit C's, each entitled "Physical Condition

[5] *Cf* DXM A-1 to A-31 (ECF 83-1). The 2004 Lease includes a 2002 Final Baseline Environmental Study (Exhibit D) that states that the NSB contaminated the Hanger facility ("this facility is considered a Category 7 property with regard to the hazardous waste management practices of the leaseholder. At the time this facility originally was leased to the North Slope Borough, it was a Category 3 property. (Sources: U.S. Air Force, 1996a; Earth Tech, 2000)." *See* Appx. 2, Ex. 17 at pp 36-37. *See* Request for Environmental Impact Analysis" signed by Mary Adams, the 611th Realty Officer, requesting the lease be renewed for five (5) years, and this was approved by the environmental engineer. *See id.*, p. 57.

Report." *See* 2004 Lease, Appx. 2, Ex. 17, p. 29 of 65 and p.30 of 65. The first Exhibit C was simply lifted from the 1996 Lease. It states that the facilities are all in "fair" condition. In contrast, the *second* Exhibit C, i*d*. at p. 30, prepared for the Lease, discloses that *each* of the facilities is "scheduled for Operation Clean Sweep demolition" and discloses that the condition of each facility "cannot be verified". *id.*

By January 2005, the parties to the Lease were aware that the buildings under the 2004 Lease were scheduled for demolition. *See* Appx. 2 at Ex. 11 (Clean Sweep Work Plan); Appx. 2, Ex. 30 (Jan. 17 2005 RAB Minutes). The 2004 Lease was not signed until May, 2005. Appx. 2, Ex. 17, p. 20. And by that time, GSA had approved the excessing of the buildings to Cully. *See* GSA Email, Appx. 2, Ex. 22. The NSB vacated the buildings to be demolished in April 2005. Appx. 2, Ex. 14. The BLM confirmed to Col. Armstrong that Cully was the future owner of the lands and wanted the buildings. *See* Appx. 2, Ex. 8.

Cully and the Air Force entered into an agreement whereby Cully would remediate the garage under a license authorized and approved by the Pacific Air Command of the Air Force (PACAF) in anticipation that the remediation would result in saving the buildings from demolition so that ownership could be transferred to Cully. *See* Appx. 2, Ex. 24. Throughout 2005, the Air Force confirmed that the 2004 Lease was only for the airstrip, the apron, and the land the hangar sits on. RAB Minutes, Appx. 2, Ex. 18 at p. 3.

Cully successfully remediated the hanger, and the Air Force transferred the facilities to Cully. Appx. 2, Ex. 34. Between 2006 and 2012, Air Force Real Estate officers omitted on numerous occasions that the Air Force had transferred the buildings to Cully and removed

the buildings from the Air Force inventory. *See* Appx. 1 at pp. 17-19, and referenced exhibits at Appx. 2, Ex. 32 at p. 44.

In early January 2013, Cully President Martha Awalin met with AECOM and requested that AECOM pay rent for using the Cully Hangar. AECOM refused. *See* Declaration of Martha Awalin, Ex. 3 to Appx. 3. Three months after Cully demanded rent for using the Cully Hangar, the Air Force renounced the efficacy of the buildings' transfer to Cully. Takings Letter, Appx. 2, Ex. 46. Then, the reason given for the renunciation was that Cully was a for profit corporation and thus could not be a recipient of the buildings. *id.* Today, in a complete reversal, the government has abandoned the inefficacy of the Takings Letter. Instead, the government now asserts that Cully did not possess the buildings because an unrelated Alaska Superior Court order held that the 2004 Lease gave the NSB exclusive possession of the buildings for 25 years. The government thus impliedly concedes that Cully did have a reversionary interest before the Takings letter.[6]

II. ARGUMENT

A. Issues Presented

1. Whether Cully had a protectable property interest in the buildings, regardless of whether it has a present possessory interest?
2. Whether the Superior Court action judgment in the *Cully v. AECOM* case collaterally estops Cully from bringing this action?
3. Whether this Court's prior ruling denying the Government's motion to dismiss bars the Government's renewed motion under the law of the case doctrine?
4. Whether when Cully learned in January 2013 that AECOM was occupying Cully's hangar in violation of Cully's property interests

[6] The government is also demonstrably in error in its assertion that Cully did not record its ownership of the buildings. *See* Declaration of Marty Appx. 3, Ex.3 at p.7 hereto.

> such was sufficient notice of the government's taking where a government employee, with no authority to bind the government, told the government contractor, AECOM, it could use that hangar, under the mistaken impression that the government still owned the hangar?

B. Summary of Argument

The government misunderstands issue preclusion. Issue preclusion requires an identity of parties and issues. The government's argument that the six-year statute of limitations began running when Cully discovered a trespasser in Cully's Hanger is barred by this Court's prior rulings.

C. Standard of Review

1. Summary Judgment/5th Amendment Takings

Summary judgment is appropriate when, making all reasonable inferences in favor of the non-moving party, there exists no genuine issue of material fact for trial. *See* R. 56(c)(1) RCFC; *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1370-71 (Fed. Cir. 2004). The Fifth Amendment prevents the Government from taking private property for public use without just compensation. U.S. Constitution Amendment V.

The Federal Circuit has developed a two-part test to determine whether a taking has in fact occurred. First, as a threshold matter, the court must determine whether the claimant has established a property interest for purposes of the Fifth Amendment *Am. Pelagic*, 379 F.3d at 1372. "[T]he Constitution does not itself create or define the scope of 'property' interests protected by the Fifth Amendment. Instead, 'existing rules and understandings' and 'background principles' derived from an independent source, such as state, federal, or

common law, define the dimensions of the requisite property rights for purposes of establishing a cognizable taking." *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1213 (Fed. Cir. 2005).

Where, as in this case, the claimant identifies a cognizable property interest, the court must proceed to the second part of the analysis: "whether the governmental action at issue amounted to a compensable taking of that property interest." . *Schooner Harbor Ventures, Inc. v. United States*, 569 F.3d 1359, 1362 (Fed. Cir. 2009); *Am. Pelagic*, 379 F.3d at 1372.

A trial court properly grants summary judgment only when no genuine issue of material fact exists and the law entitles the movant to judgment as a matter of law. Fed. R. R. 56(c) R CFC. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). *Creppel v. United States*, 41 F.3d 627, 630-31 (Fed. Cir. 1994). Here, as demonstrated, Cully has properly supported its opposition with admissible evidence as required pursuant to R. 56(c)(1)(A). R.CFC.

2. Statute of Limitations: Standard of Review

28 U.S.C. § 2501 provides that .every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless filed within six years after such claim first accrues. The time of accrual for the takings claim commences when the taking is final:

> A physical takings claim accrues when the scope of what is taken is fixed, *see Samish Indian Nation v. United States*, 419 F.3d 1355, 1369 (Fed. Cir. 2005)(quoting *Martinez v, United States*, 333 F.3d 1295, 1303 (Fed. Cir. 2003) (en banc)) (stating that a claim under § 2501 accrues "when all events

> have occurred to fix the Government's alleged liability, entitling the claimant to demand payment and sue for his money"), and the plaintiff knew or should have known of the acts that fixed the government's alleged liability, *Hopland Band of Porno Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988). Because the Tucker Act's statute of limitations is jurisdictional, the plaintiffs bear the burden of proving that their claims are not time-barred. *Mildenberger v. United States*, 643 F.3d 938, 944-45 (Fed. Cir. 2011); *Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998).

Katzin v. United States, 908 F.3d 1350, 1358 (Fed. Cir. 2018).

The question here is when "all events" occurred to fix the alleged liability of the Government six years before the Cully's 2019 takings claims. This court has already denied the Government's motion to dismiss under the same facts it now alleges. *See* Order, ECF 59 at 5-6.

D. Cully Possessed a Compensable Property Interest

The Government's assertion that Cully lacked a compensable property interest taken by the March 6, 2013 Takings letter is nonsense. Citing inapposite authority, the government's assertion appears to be based on the Alaska State court's finding in *Cully v. AECOM, Inc.* Case No. 2BA-13-00214. The issue in *AECOM* turned on the 2004 Lease and the intentions of the parties to the Lease, neither of whom was before the Superior Court. But even assuming, *arguendo,* that the Superior Court was correct that the 2004 Lease somehow precluded Cully from obtaining restitution from AECOM for its use of the hangar, such could not deprive Cully of its vested interest in the buildings, buildings that would not have existed but for Cully's remarkable partnership with the Air Force, the BLM

and the GSA. Put another way, even if the buildings were subject to the 2004 Lease, Cully was the owner of the buildings and the future owner of the land.[7]

1. Whether the Letter of Transfer was Subject to the 2004 Lease is Immaterial to the Court's Consideration of Cully's Takings Claim in this Proceeding Because Cully Had Protectable Property Interests pursuant to the Letter of Transfer.

Under the Government's incorrect construct of the law, only the person in possession, whether such possession is lawful or not, is entitled to compensation for a physical invasion and taking of property interests. The Government bases this argument not on the Constitution, Amendment V, but rather on the Government's theory that because only the person in possession has a right to exclude, only she has a protectable property interest. *See* Gov't. Brief, ECF 83 at pp13-14.

The Government is demonstrably in error. In *Bd. of Cty. Supervisors v. United States*, 48 F.3d 520 (Fed. Cir. 1995) the government argued that a County had no compensable interests in future rights of way. The Federal Circuit held that "the argument of the United States regarding the difficulties inherent in determining the value of property interests for which there is no market is beside the point." *Id.* at 528.

Nor is the taking in this case unworthy of compensation even if, arguendo, Cully did not possess all of the sticks in the bundle. "Precedent shows that the ability to exercise

[7] In the event that the government would have excessed the land to Cully through the BLM in 2006, as was promised, Cully would be the landowner and the owner of the buildings, and as well the lessor. *See* § 13(g), ANCSA, 43 USC § 1614(g) (providing that conveyances to a Native Corporation "shall contain provisions making [the conveyance] subject to the lease….") Here, the 2004 Lease specifically provides that it may be terminated for no reason at any time. *See* Appx. 2, Ex. 17, ¶ 7.3.

every one of the sticks (rights) in the bundle of fee simple rights at the time of a taking is not a prerequisite to establishing a valid property interest under the Fifth Amendment." *Cienega Gardens v. United States,* 331 F.3d 1319, 1329 (Fed. Cir. 2003). Present possessory rights are not required for valid 5th Amendment takings claim. *Id.* Thus the Fifth Amendment protects "every sort of [real property] interest the citizen may possess*." United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945).

The government argues that the Alaska court's holding that Cully had no present possessory right means that Cully has no compensable interest. But that is false. If Cully's ownership is subject to the 2004 Lease, which it is not, Cully nonetheless holds the reversionary interest. The Supreme Court has made clear that an owner is entitled to compensation for its reversionary interest in a present leasehold, stating:

> It would therefore seem to follow that when a lease of trust land is made, the trust must receive from the lessee the then fair rental value of the possessory interest transferred by the lease, and that upon a subsequent condemnation by the United States, the trust must receive the then full value of the reversionary interest that is subject to the outstanding lease, plus, of course, the value of the rental rights under the lease. The trust should not be entitled, in addition to all this, to receive the compensable value, if any, of the leasehold interest. That, if it exists and if the lease is valid, is the lessee's.

Alamo Land & Cattle Co. v. Arizona, 424 U.S. 295, 303-04, 96 S. Ct. 910, 915 (1976). Or, put another way, Cully is entitled to compensation for the taking of its property interests. What sticks from the bundle were taken will necessarily need to be determined at a trial.

In *Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326 (Fed. Cir. 2012), cited by the government, the claimant purchased 4,000 acres on the speculation that the Army Corps might give him a mitigation bank permit. *Id.* at 1327. When the Army Corps declined to permit the land as a mitigation bank, the claimant sued. There, unlike in Cully, the claimant failed to assert, much less establish, any interest in property that was taken. *Id.* 1331. Here, the Takings Letter demonstrates that the property conveyed to Cully in the 2006 Letter of Transfer was taken.

Am. Pelagic Fishing Co., 379 F. 3d 1363-7 is of no help to the government. There, the National Marine Fisheries Service (NMFS) took a use permit, not a vessel. The Government as a matter of law may grant use as it wishes. *Id.* at 1336-7. Since Cully has established its property interests in the three buildings (as well as its future interest in the whole of USS 5251, the Site) it has established it owned cognizable property interests in the buildings prior to the Takings letter.

2. There is no Law that Holds that Only the Right to Exclude is a Cognizable Property Interest.

Cully agrees that the right to exclude others is a valuable property right. Indeed, up through 2012, Cully and the Air Force both excluded trespassers from Cully's buildings. *See* Deposition of John Smith, Appx. 2, Ex. 32 at pp. 43-45, and Appx. 2, Ex. 37 at p. 6. (611th Real Estate Officer Mr. Smith explaining at the 2009 Point Lay RAB meeting):

> 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.

In 2012, Real Estate Officer Laura Keiser reminded her co-workers that Cully owned the three buildings and thus, the buildings were not available to AECOM. *See* Deposition of Laura Keiser, Appx. 2, Ex. 53.

However, the right to exclude stick was among those taken by the Takings letter. But the right to exclude is not the only stick in the bundle. Here, without question, upon Cully's assertion of the right to exclude AECOM in January 2013, the government proceeded to take the entire bundle. The Fifth Amendment requires the United States to compensate Cully in such an amount as will be established at trial.

3. The Government Is Simply Wrong in Asserting that Issue Preclusion is Applicable.

The Government asserts that the summary judgment order dismissing Cully's claims against AECOM for trespass precludes Cully from proceeding before this Court. Gov't Brief, ECF 83, pp. 14-19. Because issue preclusion is inapplicable and because this Court should consider the 2004 Lease as well as the circumstances known to the parties to that Lease, the Alaska court's order is at best, evidentiary, but not preclusive.

a). The Government Misstates the Elements of Issue Preclusion.

The Restatement (Second) Judgments, § 27 provides:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

Comment a explains:

> *Subsequent action between the same parties.* The rule of issue preclusion is operative **where the second action is between the same persons who**

> **were parties to the prior action, and who were adversaries (see § 38)** with respect to the particular issue, whether the second action is brought by the plaintiff or by the defendant in the original action. It is operative whether the judgment in the first action is in favor of the plaintiff or of the defendant. The effect of a judgment for the defendant in the first action may be to require a judgment for the defendant in the second action. *See* Illustration 1. A judgment for the plaintiff in the first action may have the effect of enabling him to recover in the second action without proving his claim, provided that the controlling issues were litigated and determined in the prior action, but the defendant is not precluded from defending the second action on the basis of an issue not litigated and determined in the first action. *See* Illustration 2.

(emphasis added). Comment (a), Restatement (Second) Judgments.

Here, the order that the government seeks to use against Cully involved a case that Cully brought against AECOM for restitution for the unpermitted use of the Cully Hangar during the winter of 2012-2013. *See Cully Corp. v. AECOM, Inc*., supra, *Order on Summary Judgment*. The United States was not a party, nor was the NSB. The issue was limited to trespass. The court declined to consider the efficacy of the Letter of Transfer. Gov't Appx. A 41-47. Thus, the issue was not tried between the same parties, nor is the issue before this court the same issue as before the Alaska court. Moreover, the case was settled after Cully appealed to the Alaska Supreme Court, but the parties settled while the appeal was pending. *See* Order Dismissing Appeal, Appendix 3, Ex. 4.

Indeed, a close reading of the cases cited by the government establishes that the government does not fully comprehend the elements required to obtain issue preclusion. The government cites *Mother's Restaurant, Inc. v. Mama's Pizza, Inc*, 723 F. 2d 1566, 1569 (Fed. Cir. 1983) for the proposition that issue preclusion may be used to foreclose Cully's suit against the government. In doing so, the government omits crucial language:

> Under the doctrine of issue preclusion, traditionally called "collateral estoppel", issues which are actually and necessarily determined by a court of competent jurisdiction are conclusive in a subsequent suit **involving the parties to the prior litigation**. Restatement (Second) of Judgments § 27 (1980). (emphasis added).

Mother's Rest., Inc, 723 F.2d 1569. This lawsuit does not involve both parties to the prior litigation.

The government has also cited *Montana v. United States*, 440 U.S. 147, 153 (1975), and in doing so, has also ignored the "same parties" language:

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies . . . ." *Southern Pacific R. Co*. v. *United States*, 168 U.S. 1, 48-49 (1897).

(emphasis supplied). *Montana v. United States*, 440 U.S. 153-54.

b). Cully is not Foreclosed from Asserting that the Buildings were Properly Transferred in 2006 and Taken in 2013

Even if the government's construct of collateral estoppel is correct, which Cully contends it is not, the government is nonetheless not entitled to summary judgment on the efficacy of the Letter of Transfer that the government subsequently renounced. This is so because the Alaska court specifically held that it would not rule on the Letter of Transfer. Gov't Appendix ECF 83-1 at A 43. The Alaska court held that, although it could determine that Cully did not have exclusive possession of the hangar, such holding would be premised on the 2004 Lease. *Id.* at A-43. In doing so the court stated, "Because it appears the Air Force may be an indispensable party under Alaska Civil Rule 19, and it is possible for the

court to decide this motion under AECOM's second theory, the court declines to address whether the Letter of Transfer is invalid." *Id.*

Thus, this case not only involves different parties, but also a distinctly different issue, to wit: the Taking, based on the validity of the Letter of Transfer. Indeed, the Alaska Court in *AECOM* held that it assumed "the Letter of Transfer was valid in conveying the Air Force's interest to Cully." *Id*. A-43, n. 17.

c). This Court is Not Bound by the Alaska Court's Holding that the Lease Included the Buildings.

In reaching its opinion, the Alaska court confined its opinion to only one of the three buildings—the Hanger. The Alaska court acknowledged federal law was involved in construing a federal lease. Thus, the contract must "be given the plain meaning which would be derived by a reasonably intelligent person acquainted with contemporaneous circumstances". *Id*. at A 44. Simply put, the 2004 Lease in fact does not give exclusive possession to the NSB. And this lack of exclusive possession is manifested in the 2004 Lease.

The 2004 Lease anticipates the hanger, the warehouse and the garage were to be demolished in 2005. *See* the second Exhibit C, Appx. 2, Ex. 17 at p. 30. The 2004 Lease allows the government to terminate at any time and without a reason. *Id* at – 7.3. Because the buildings were to be demolished, there could be no expectation of exclusivity.

The NSB and the Air Force, the two parties to the 2004 Lease (and the 1996 Lease), were not before the Alaska court. Those parties were aware, beginning at least by January 2005, that the three buildings were going to be demolished by the Air Force. The NSB knew when it signed the 2004 Lease on May 3, 2005, that the buildings were no longer available.

In further proof of this fact, the Borough announced that it had moved totally out of the garage and the warehouse and was using the Hanger only for "cold storage." Appx. 2, Ex. 14. The NSB and the Air Force agreed, throughout 2005, that the 2004 Lease covered only the airstrip. Second Exhibit C to 2004 Lease, Appx. 2, Ex. 17 at p. 30. The Air Force requested permits from the NSB to proceed with demolishing the Buildings in March 3, 2005, Appx. 3, Ex. 5. The NSB issued permits to demolish the three buildings in the summer of May 2, 2005. Appx. 3, Ex. 6. The parties to the 2004 Lease were intelligent persons acquainted with the contemporaneous circumstances. But no party to the 2004 Lease was before the Alaska court. Thus, the Alaska court had only the 2004 Lease, with all the ambiguities it contained.

That both the NSB and the Air Force were acquainted with the contemporary circumstances is also compelled by the Staff Summary Sheet and attachments in 2005, *See* Appx. 2, Ex. 31. Per the facility disposal form, "the facilities are no longer utilized and are excess to AF requirements, very poor condition and uneconomical to maintain." *Id.* at p. 8. In short, that report establishes that the buildings could not, as a matter of law, be included in the 2004 Lease. This is so because the 2004 Lease refers only to the first Exhibit C, the physical condition report that "dates back to 1988 and sets forth the condition of the Premises at the time it was decommissioned." Read as a whole, and without surplusage, the parties to the 2004 Lease were aware and agreed that the buildings would not be a part of the 2004 Lease because they would be demolished.

d). <u>The second Exhibit C Thus Removes the Reasons for Inclusion of the buildings in the 2004 Lease</u>

The 2004 Lease lists the same facilities as those listed in the 1996 Lease. *See* "Preamble" 1996 Lease, Appx. 2, Ex. 2, p.1, and p. 15, and the 2004 Lease, Appx. 2, Ex. 17, Exhibit B. Those facilities are also listed on the two Exhibit C's in the 2004 Lease, but the 2004 Lease refers only to the one Exhibit C Physical Condition Report that "dates back to 1988 and sets forth the condition of the Premises at the time it was decommissioned." *See* Appx. 2, Ex. 17 at p 30. The Exhibit C referenced in the 2004 Lease Preface lists each of the buildings and states that each is in "fair condition." *Id.* at p. 29.

By contrast, the *second* Exhibit C in the 2004 Lease (Appx. 2, Ex. 17) makes no such representation, disclaims knowledge of the condition of the buildings, and states that each building is "scheduled for Clean Sweep demolition." *Id.* at p. 30.

Read as a whole, and without surplusage, both parties to the 2004 Lease, neither of whom was before the *AECOM* court, were aware that the buildings would not be a part of the 2004 Lease because they would be demolished. Perhaps for that reason, there is no record that the NSB purchased any insurance on those buildings in the Air Force records, although insuring the structures were a requirement under the 1996 lease. *See also* 2004 Lease, at *id* at pp 12-14 requiring insurance.[8]

e) The *AECOM* Litigants Litigated only Trespass Issues

According to Comment e to the Restatement (Second) of Judgments:

> *e. Issues not actually litigated.* A judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action. There are many reasons why

[8] In fact, the only insurance record that the government brought forward is insurance that Cully procured on the buildings. Gov't Appendix A 63-64.

> a party may choose not to raise an issue, or to contest an assertion, in a particular action. The action may involve so small an amount that litigation of the issue may cost more than the value of the lawsuit. Or the forum may be an inconvenient one in which to produce the necessary evidence or in which to litigate at all. The interests of conserving judicial resources, of maintaining consistency, and of avoiding oppression or harassment of the adverse party are less compelling when the issue on which preclusion is sought has not actually been litigated before. And if preclusive effect were given to issues not litigated, the result might serve to discourage compromise, to decrease the likelihood that the issues in an action would be narrowed by stipulation, and thus to intensify litigation.

Here, the Air Force and the NSB were both well acquainted with the contemporaneous circumstances events that occurred in 2005. The Air Force and the NSB knew the buildings would be demolished. *See* Appx. 2 at Ex. 11, Ex. 12, and Ex. 30. Both expressly disavowed that the 2004 Lease encompassed other than the airstrip. The NSB approved the Air Force permits necessary to remove the demolished buildings The NSB confirmed it had vacated the buildings. But those facts, underlying the reasons that the buildings were still standing after Clean Sweep, were not only not litigated, but frankly, were not germane to Cully's ownership of the buildings. *See also Tutt v. Doby*, 148 U.S. App. D.C. 171, 459 F.2d 1195, 1199 (1972) (collateral estoppel essentially applies only to matters actually litigated and determined in the first action); *Miller v. Poretsky*, 595 F.2d 780, 787 (1978) [collateral estoppel applies generally only to "issues actually litigated and determined in the prior suit", citing *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326 (1955)].

Consistent with Restatement (Second) Judgments, § 27, Comment e, *supra*, Cully brought a simple trespass case to collect restitution for the use of its hanger for the roughly eight months preceding Cully's receipt of the Takings letter. Before the Alaska trial court

were only two issues, AECOM's occupation of Cully's Hanger and Cully's Letter of Transfer. The court expressly did not rule on the Letter of Transfer because "the Air Force may be an indispensable party….." ECF 83-1 at A 43.

Now, after suing the Air Force, the issue of both Cully's ownership and its possession prior to the Takings letter can be tried. In 2013, Cully only wanted compensation for the prior use of the facility. Today, on the other hand, genuine issues of material fact are present in the case at bar on ownership, prior possession, and the economic loss Cully incurred on account of the Taking. *See* Appx. 3, Ex. 3, Declaration of Martha Awalin, Cully President and Ex. 7, Declaration of Ken Johnson's. Those issues, as demonstrated, could not be tried before the Alaska court, based on the Alaska court's finding that the Air Force was indispensable to those precise issues.

f) Cully owned the Buildings before the Takings Letter

The Government misconstrues the Alaska court's *AECOM* holding, misrepresenting that the *AECOM* court held that "Cully does not have a right to the buildings." ECF 82, Gov't Brief at 15. The *AECOM* court actually declined to rule on Cully's right to the buildings. The Alaska court confined its ruling to whether Cully had a right *to present possession* of the Hanger sufficient to assert a trespass claim against AECOM. *See AECOM*, Order on Summary Judgment, A 41, n. 1 and text ("At issue in this case is one building,…(Hanger").

The government asserts that the *AECOM* order "cannot be questioned or collaterally attacked in this Court." Brief at 17. The government supports that argument with an unpublished case, *Jaye v. United States*, 781 Fed. Appx 994, 995 (Fed. Cir. 2019). Cully is

not seeking a review of the *AECOM* decision, nor does this Court have such jurisdiction. *Id; accord, Petro- Hunt LLC v. United States*, 862 F. 3d 1370, 1385 (Fed. Cir. 2017). Cully is entitled to try the taking of its property interests, and for the Court to determine whether, as Cully believes is the case, Cully had a present right of possession in addition to the other sticks in its bundle of property rights.

4. Cully Has Demonstrated a Cognizable Property Interest

Cully has identified cognizable property interests, as embodied in the Letter of Transfer. Authorized government agents confirmed Cully's ownership from 2005 to the time of the Taking in 2013. *See* Appx. 1, ECF 20-25 and referenced Exhibits at Appx. 2.

The definition of a property interest is amorphous:

> '[T]he Constitution does not itself create or define the scope of 'property' interests protected by the Fifth Amendment. Instead, 'existing rules and understandings' and 'background principles' derived from an independent source, such as state, federal, or common law, define the dimensions of the requisite property rights for purposes of establishing a cognizable taking." *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1213 (Fed. Cir. 2005) (internal quotation marks omitted).

Schooner Harbor Ventures, Inc. v. United States, 569 F.3d 1359, 1362 (Fed. Cir. 2009).

In *Schooner Harbor*, the property interest the Plaintiff asserted was the right of an owner of fee simple: its right to develop its land. *Id*. at 1365. Here, whether the 25 year lease included the to-be-demolished buildings, Cully had ownership of the largest three buildings anywhere on the Chukchi Sea coast within a 100 mile radius. There is no question that the Letter of Transfer was duly authorized. There is no question that Cully will be the owner of the entire Site once BLM is able to transfer it. The government, in spite of itself, has conceded

that point, admitting that Cully holds the reversionary interests to the buildings. ECF 83, Gov't Brief at 18.

The government next argues that taking a reversionary interest is akin to taking a future, unvested interest. Govt Br. at 18. In *Santa Fe Alliance for Public Health and Safety v. City of Santa Fe*, 993 F.3d 802, 814 (10th Cir, 2021), the taking of public health by placing microwave towers on rights of way had not occurred. *Id*. The issue here is that Cully had vested property interests in 2006 through April 11, 2013 that were taken. The genuine issue of material fact is whether the takings were only of Cully's reversionary interests, subject to the 2004 Lease or all of the sticks in the bundle. In *West Linn Corporate Park, LLC v. City Of W. Linn*, 534 F. 3d 1091 (9th Cir. 2008), the issue was whether administrative remedies had been exhausted. Here, the issues are what sticks did Cully possess and whether those sticks included present rights as well as reversionary interests.

5. Cully's Damages Claims are Questions of Fact

Cully now addresses the government's suggestion that Cully suffered no damages on account of the taking. The government first insists that the *AECOM* decision limits Cully to damages for its reversionary interests that remain after the 25 year lease of the airstrip. That argument ignores the narrow reach of the *AECOM* decision. As demonstrated above, the *AECOM* decision turns on the plain meaning of the 2004 Lease, ignores the leasing parties' acquaintance with the circumstances, and addresses only the Hanger. Even if the court finds that Cully is estopped to demonstrate that the 2004 Lease did include the buildings to be demolished, that is not the end of the inquiry. The Air Force intended to amend the 2004 Lease after Cully successfully remediated the garage. *See* e.g., Appx. 2, Ex. 31, at p. 1;

Deposition of Laura Keiser, Appx. 3, Ex. 8, pp. 55-57, 154. And, through 2005, NSB and the Air Force disavowed utilization of the buildings, because the three buildings were to be demolished.

Cully's efforts to obtain the three buildings and prevent their demolition under Operation Clean Sweep is described in detail in Cully's Motion for Partial Summary Judgment. Briefly, three buildings at Point Lay, a garage, a warehouse, and a hanger, were scheduled to be demolished under Operation Clean Sweep in 2005 in order to conform with Federal regulations. *See* Appx. 2, Ex. 17 at p 30. The Site, U.S.S. 5251, was to be returned to the BLM. BLM confirmed in a letter to the 611th Commander that Cully would receive the land and that Cully requested that the buildings not be demolished under Operation Clean Sweep. Appx. 2, Ex. 8. The 611th Civil Engineering Squadron (611th CES) also sought the concurrence of the GSA that the Air Force donate the three buildings to Cully. Appx. 1 at pp. 11-12, Appx. 2, Ex. 21, p.7, and Appx. 2, Ex. 22. The GSA concurred, authorizing the 611th CES to donate the three buildings because they "had no commercial value and the costs associated with their demolition will far exceed any value." *id*.

But, the Air Force Operation Clean Sweep plans required that the buildings be demolished. In order to vary the approved plan, the 611th CES, based in Alaska contacted the Pacific Air Command Headquarters, Hickam Air Force Base (PACAF), Hawaii, to request permission for the variance. Cully was told that if it remediated the garage at its sole cost, the buildings would not be demolished, but would be transferred to Cully's ownership. *See* Appx. 2, Ex. 25. A license to enter and remediate the garage was attached to the letter. *Id*. Cully

signed the license. *See* Appx. 2, Ex. 24, pp 1-66. Cully remediated the garage at its cost. *See* Appx. 2, Ex. 26. A Staff Summary Sheet was prepared recommending transfer of the three buildings to Cully. *See* Appx. 2, Ex. 31, pp 1-15. It was noted that a lease would need to be prepared for the land underlying the buildings for Cully. *See id*. at p. 1. The Staff Summary Sheet was approved up the chain of command. *Id*. Approval was recommended for the Letter of Transfer, as recommended by PACAF. *See* Appx. 2, Ex. 21 at p 52:11-25 and pp 53:1-25-54:1:18. In addition, the Air Force also authorized a DD_1354, for facilities disposal. *See* Appx. 2, Ex. 33, p. 6. This form stated that the three buildings had no disposal value, are no longer utilized and are excess to AF requirements, very poor condition and uneconomical to maintain. *Id.*

Upon Cully signing the Letter of Transfer in March 2006, Cully received the buildings. *Id.* From 2006 through 2012, neither the Air Force nor the NSB questioned the efficacy of the conveyance of the buildings to Cully. The lease amendment remained unrecorded. There is no record of any present possession of the buildings in any entity but Cully during that period of time.

The NSB, knew at least by January 2005, that the buildings would be demolished. *Supra*. By May 2, 2005, the NSB had approved permits for the demolition of the three buildings. The 2004 Lease was signed by the Air Force on March 11, 2005 and by the NSB on May 3, 2005. Appx. 2, at Ex. 17, at p. 23, with the two Exhibit C's. As described above throughout 2005, the NSB and Air Force announced on numerous occasions to the Point Lay

RAB that the 2004 Lease covered only the airstrip. The buildings were to be demolished in 2005 and thus, were not included as leased properties.

Thus, genuine issues of material fact include:

- Whether, between 2006, with the Letter of Transfer, and 2013, with the Taking Letter, did Cully have a possessory interest in the buildings?
- Did the Air Force fail to record the lease amendments?
- Did the Air Force correct the lease with the NSB and fail to record it?
    - Regardless of whether the Air Force fail to modify or amend the NSB lease would such have been necessary?
    - Did the Air Force and NSB intend the buildings to remain in the lease, although the NSB issued permits to allow the building debris to be removed across NSB lands, and the Air Force notified the NSB that the buildings would be demolished in 2005?
- Whether, even if Cully did not have a present right to the buildings that Cully alone prevented from demolition, did Cully have a reversionary interest?
- If Cully did in fact have a present possessory interest in the Hanger at the time it was evicted, is the government liable to Cully for the rent Cully sought from AECOM?
- If the NSB was the tenant and had exclusive rights to the Hanger, then what interest did the Air Force possess that permitted Ms. Gilmore to authorize AECOM to use the Hanger?
- Did the Air Force intend to require Cully to perform remediation of the garage so that the buildings would not be demolished but transferred to Cully?
- If the buildings were not donated to Cully, why were they removed from the Air Force inventory of Point Lay LRRS facilities?
- If the buildings were not conveyed to Cully, is the government liable to Cully in quantum meruit for the benefit Cully conferred: expending its own funds to

remediate the garage and thus obviate the demolition of the buildings based on the unfulfilled promise that it would receive the Buildings in 2005?

- Did the government obtain additional benefits from Cully's efforts in 2005, including but not limited to saving the government the expense of demolishing three large buildings, mobilizing the debris to the Barrier Island, obtaining a No Further Action letter, *See* Appx. 2 at Ex. 52, and maintaining the Hanger for the Air Force contractors in 2012-2014?

- Did the government violate the Anti-Deficiency Act in accepting Cully's remediation services, maintenance, and repair services between 2006 and April, 2013 of the buildings?

Finally, the government suggests that Cully sued the wrong party and NSB is liable. But NSB vacated the buildings. The government fails to explain why the NSB is liable for a lease that the contracting parties agreed was limited to the airstrip or why the government, in creating a lease with latent and patent ambiguities and conveying the buildings to Cully, is not liable for the taking. Or, alternatively, for acting in bad faith.

E. The Government's Latest Motion to Dismiss is Frivolous

The government's 4th motion seeking dismissal for lack of jurisdiction is as flawed as its previous efforts. *See e.g.*, ECF 45. The government relies on the same facts as in ECF 45, but now, with dicta from a different case. The Court should summarily deny the government's motion to dismiss for lack of subject matter jurisdiction.

1. The Law of the Case Prevents Relitigation of the Motion

This Court previously held (*See* ECF 59 at p. 6)

> The law of the case doctrine provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." [citation omitted] The United States Supreme Court has stated that "the doctrine [of law of the case}posits that when a court decides upon a rule of law, that decision should continue to govern the

> same issues in subsequent stages in the same case.[citations omitted] The law of the case is a judicially created doctrine under which "a court will generally refuse to reopen or reconsider what has already been decided at an earlier stage of the litigation."[citations omitted]. Nonetheless, "the law of the case doctrine is limited to issues that were actually decided, either explicitly or by necessary implication, in the earlier litigation"{citations omitted].

Because the government seeks to relitigate the exact issue under the same facts, the law of the case doctrine is applicable and the government's motion to dismiss should be denied.

2. Alternatively, the Government's Argument is Contrary to Established Law

a. Cully was not Ousted until After March 9, 2013.

The statute of limitations for claims under the Tucker Act, 28 U.S.C. § 1491(a), is six years from the time of accrual. 28 U.S.C. § 2501. A claim accrues "when all events have occurred that fix the alleged liability of the government and entitle the Plaintiff to institute an action." *Creppel v. United States*, 41 F.3d 627, 631 (Fed.Cir.1994). In a Fifth Amendment taking, the claim accrues when the government itself acts to take the property. *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"). That is, when the government takes "some specific action" that results in appropriation of property for a public use. *See All. of Descendants of Tex. Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994).

If a property owner is ousted, the rule is that the taking occurred when the owner was ejected. *See United States v. Clarke*, 445 U.S. 253, 258 (1980) ("the time of the invasion constitutes the act of taking … [i]t is that event which gives rise to the claim for compensation

and fixes the date as of which the land is to be valued") (internal quotation and citation omitted); *see also Turney v. United States*, 126 Ct. Cl. 202, 214 (1953) (taking occurred when Army "officially took possession of the property" from the attempted purchaser and not when decision was communicated); *Washoe County. v. United States*, 319 F.3d 1320, 1326 (Fed. Cir. 2003) (taking did not occur when government communicated with a third party because taking occurs when the government "directly appropriates" property or effects a "practical ouster").

The government now suggests, citing *A&D Auto Sales , Inc. v. United States*, 748 F.3d. 1142, 1154 (Fed. Cir. 2014) that "the government may be liable when a third party hired by the government acting as its agent injures the plaintiff." (emphasis supplied). But *A&D* turns on coercive conduct, whether the government's action was direct and intended. The A&D Court stated:

> A second principle applies where the government's action was direct and intended. In such circumstances, the government may be liable if the third party is acting as the government's agent or the government's influence over the third party was coercive rather than merely persuasive. *See Tex. State Bank v. United States*, 423 F.3d 1370, 1376-77 (Fed. Cir. 2005); *Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1362-63 (Fed. Cir. 2005); *Casa de Cambio Comdiv S.A., de C.V. v. United States*, 291 F.3d 1356, 1361-62 (Fed. Cir. 2002); *B & G Enters. v. United States*, 220 F.3d 1318, 1323-25 (Fed. Cir. 2000); *Langenegger v. United States*, 756 F.2d 1565, 1572 (Fed. Cir. 1985). An agency relationship may exist where the third party is hired or granted legal authority to carry out the government's business. *See, e.g., Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 21-23, 60 S. Ct. 413, 84 L. Ed. 554 (1940) (construction company hired to build river dikes); *Lion Raisins*, 416 F.3d at 1363-64 (quasi-public crop marketing committee authorized to set price floors for crops); *Hendler v. United States*, 952 F.2d 1364, 1378-79 (Fed. Cir. 1991) (state officials authorized to perform environmental tests on the plaintiffs' land). Here, GM and Chrysler were not

acting as agents of the government in terminating the franchise agreements. *Id.*

Here, Vikki Gilmore, the government employee, admitted in sworn testimony that she had no authority to bind the government. *See* Appx. 1 at p. 26; and *See* Appx. 2, Ex. 41 at p. 49 (gave permission under mistaken belief that the Air Force owned the hanger). Vikki Gilmore provided no authorization in writing. This is not a case where the government action was direct and intended or where a government agent ejected Cully. It is a case that demonstrates human error. Ms. Gilmore simply failed to check the record. It was not until two months later, on April 11, 2013, that the government took the property, and the statute of limitations began to run.

In, *Katzin v. United States*, 908 F.3d 1350 (Fed. Cir. 2018) [*Katzin II]* the government sent a fax to prospective purchasers of land in Puerto Rico, telling the purchasers that the United States owned the land. *Katzin II*, 908 F.3d at 1360. The seller sued under the Fifth Amendment, claiming that the government's fax was a taking because that third-party communication affected the seller's ability to sell the property. *Id.* The Federal Circuit held to the contrary: "the government's mere sharing of information about its claim of ownership to real property with a third party *does not constitute a physical taking* (or a *per se* regulatory taking) of that property." *Katzin II*, 908 F.3d at 1361 (emphasis added).

Similarly, in *Peterson Indus. Depot v. United States*, the cause of action for a taking accrued not when an agreement between the government and an owner of a rail line was reached, but when the Army first actually communicated with the owner to charge for access

to the property. *Peterson Industrial Depot, Inc. v. United States*, 140 Fed. Cl. 1, 9 (2018). *See also 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").

So too, here, the government's argument, that the taking occurred through a third-party communication, is not the law. The government argues that the taking occurred when Cully learned that the Air Force may have informed AECOM that it could use the Hanger based on Ms. Gilmore's mistaken assumption that the Air Force owned the Hanger. That purported Air Force communication to a third party is on point with the faxed communication in *Katzin*. If Cully had attempted to bring suit in January of 2013 based on that communication, such claim would be doomed because, according to precedent such as *Katzin* and *Peterson*, no cause of action had accrued.

Rather, the correct analysis is that the taking occurred when the Air Force actually took action to oust Cully from the property. Cully was ousted upon its receipt of the Takings Letter. The government does not contest that the Takings Letter was the first time that the Air Force notified Cully that the government had reassumed ownership of the Buildings. The letter contained instructions that Cully must vacate the property. *See* Appx. 2, Ex. 46. Indeed, the Air Force itself, before the Takings Letter, had admitted that Cully owned the property. Since the claim was filed within six years of Cully's receipt of the Takings Letter, the claim is timely, and this Court has jurisdiction.

3. <u>The Facts Recently Discovered Establish that The Government Did not Consider It Owned the Hanger until AFTER March 24, 2013</u>

The government's alleged "new facts" are:

- In 2012, Cully's subsidiary provided polar bear guard duties for AECOM, a company contracted to remediate an old Air Force dump at the water's edge of U.S.S. 5251.
- In October, 2012 Air Force employee Vikki Gilmore mistakenly informed AECOM that the Government had permission to store heavy equipment and hazardous waste in the hanger."
- Cully learned that AECOM was storing the equipment in the hanger in late December, 2012. Cully disputes this date. *See* Awalin Declaration. Appx. 3, Ex. 3.
- Cully sent a demand letter for rent to AECOM in January and copied Ms. Gilmore on Jan. 24, 2013.

But, the mere fact that Cully was aware of a contractor in 2012 does not change the analysis. There is no nexus between Cully's awareness of a remediation contractor and the government taking the buildings. The only new facts obtained in the litigation establish that the Air Force did not take action to re-take the property until "about a week before" Col. Burk signed her letter dated March 6, 2013. *See* Deposition of Col. Burk, Appx. 2, Ex. 47 at pp 23-23. That letter was spurred by a false and misleading "Bullet Point Background Paper." *Id* and *See* Appx. 2, Ex. 44 (the "Bullet Point Background Paper" created out of whole cloth to argue that the 2006 Transfer Letter was "illegal.").

Nor was the Taking letter not sent to Cully on March 6, 2013. On the contrary, Col. Burk brought her letter, unsent, dated March 6, 2013 together with the Bullet Point Background Paper to the Commanding General, Gen. Hoog. Gen. Hoog, on the basis of the Bullet Point Background Paper, determined it was best to contact the Congressional delegation and give the Senators and Representative a heads up that the government would

be taking the buildings back. *See* Deposition of Gen. Hoog, Appx. 2, Ex. 48 at pp. 34-35. His staff wrote a letter dated March 25, 2013. Appx. 2, Ex. 49 (Gen. Hoog's letter). Gen. Hoog's letter to the Alaska Congressional Delegation states in part, "The Air Force will shortly send the attached letter to Cully Corporation…." *Id.* The letter Gen. Hoog referenced was Col. Burk's March 6, 2013 letter. *See* Appx. 2, Ex. 48 at p. 17.

On or about April 11, 2013, Gen. Hoog's staff received calls from the Alaska Senators and Rep. Don Young inquiring about the letter that was to be attached to Gen. Hoog's March 25, 2013 letter. *See* Appx. 2, Ex. 50. It was then that the staff learned that they had failed to include Col. Burk's March 6, 2013 letter with Gen. Hoog's March 25, 2013 letter. Realizing that Cully would soon hear from the Congressional delegation about what was in store for the little corporation, 1st Lieutenant McCormack dashed the March 6, 2013 Burk letter to be delivered to Cully on April 11, 2013. *Id.* Thus, the true fact is that Cully did not receive, and the Air Force did not send, the Taking Letter until on or after April 11,2013.

For its part, the government brings no new facts. The law of the case doctrine applies. This Court's Order, Doc. 59, should not be disturbed.

CONCLUSION

Cully possessed protectable property interests in the buildings until the Government took those interests on or about April 11, 2013. The Government's motion for summary judgment should be denied. Further, the Government's renewed motion for dismissal for lack of subject matter jurisdiction is frivolous. Cully respectfully requests this Court to deny the government's motion in its entirety.

RESPECTFULLY SUBMITTED this 8th day of February, 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 8th day of February, 2022, a copy of the foregoing "OPPOSITION TO DEFENDANT'S CROSS MOTION FOR 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