No. 19-339
Judge David A. Tapp

In the United States Court of Federal Claims

CULLY CORPORATION,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

RESPONSE TO GOVERNMENT'S OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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RESPONSE TO GOVERNMENT'S OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Comes now Cully Corporation ("Cully") through Counsel and responds to the United States' opposition to Cully's Motion for Partial Summary Judgment.

INTRODUCTION

This case concerns whether the United States deprived Cully of its property interests without just compensation in three Cold War era buildings that the United States had conveyed to Cully in 2006. The government asserts that the buildings were never Cully's in the first place. The government premises its argument on three flawed theories. First, the government contends that a lease agreement entered into between the United States and the North Slope Borough ("NSB") gave the NSB exclusive possession for 25 years. Second, the United States contends that Cully is collaterally estopped based on a state court judgment that Cully lacked present possession to exclude a trespasser. Third the government contends that federal regulations prohibited the transfer of the buildings to Cully in 2006.

Cully responds.

I. ARGUMENT

A. Summary of Argument

There are no genuine issues of material fact as to the circumstances giving rise to the transfer of the buildings to Cully. The government does not disagree that it intended to demolish three buildings absent Cully's performance, but in return for which the government would transfer the buildings to Cully, nor does it disagree that Cully performed. The government does not disagree that the General Administration Service ("GSA") concurred in the Air Force's request to transfer the buildings to Cully. The government does not dispute that knowledge that the buildings were scheduled for demolition was well known in 2005. The government does not dispute that both NSB and the government, in entering into the 25-year Lease in 2005, knew demolition of the buildings was planned, and in statements from 2005 to 2012, manifested their belief that the buildings belonged to Cully.

B. Cully's Cognizable Property Interest:

Cully has previously demonstrated that the Air Force's Letter of Transfer was authorized by the Air Force's Pacific Air Command ("AFPAC') headquarters in Hawaii, and that the GSA had concurred with the Air Force's intended transfer. The Bureau of Land Management ("BLM") concurred in Cully's request to the Air Force not to demolish the buildings because Cully was to be the future landowner. ECF 80 at pp. 4-16; ECF 87 at pp. 2-7. Cully also demonstrated that in the lead up to the transfer, the government and the NSB agreed that the 2005 Lease was for the airstrip and did not include the buildings. ECF at 80;

ECF 87-2, Appx. 2, Ex. 18 at 3, Ex. 14; Ex. 10. Air Force records for the period from April 2006 through March 2013 demonstrate that the parties, the Air Force, the NSB and Cully, all relied upon the Letter of Transfer as providing Cully with the buildings. ECF 80, at pp. 15-19. The Letter of Transfer vested Cully with cognizable property interests. We demonstrate that Cully is entitled to partial summary judgment on the basis of the Letter of Transfer, and the intent of the Air Force to transfer the buildings to Cully in lieu of demolishing them in 2005.

C. The Government's Assertion of Estoppel Is Mistaken:

The government, while not a party to the case, *Cully Corporation v. AECOM*, 2 BA-13-00214 CI (Alaska Super. 2015), asserts that Cully is estopped from attacking the *AECOM* court's holding that Cully lacked a possessory interest in the Hanger. Gov't Brief, ECF 88 at pp. 5-10. But, as Cully has demonstrated, collateral estoppel is limited to bind parties to a previous case involving the same issue. Cully Opposition To Government's Motion for Summary Judgment, pp. 14-27. *See also Restatement (Second) Judgments* § 27 (determination conclusive between the parties); *Mother's Restaurant, Inc. v. Mama's Pizza, Inc.,* 723 F.2d 1566, 1569 (Fed. Cir 1983) (application to same parties in the prior litigation); *Montana v. United States,* 440 U.S. 147, 153-54 (1979) (application to same parties or their privities in subsequent litigation, quoting *Southern Pacific R. Co. v. United States*, 168 US 1, 48-49 (1897)).

The *AECOM* case involved a lawsuit for trespass during the winter of 2012-2013. The contractor claimed that an Air Force employee gave it permission to use the Hanger. ECF

80 at p. 28. The employee, Vickie Gilmore, testified that she gave permission on her mistaken belief in October, 2012, that the Air Force owned the Hanger. *Id.* The *AECOM* case thus did not involve the same parties and the issue was decidedly different.

Nor is Cully seeking a review of the Alaska court ruling, contrary to the government's assertion at ECF 88 at p.6. Rather, the government asserts this court should not only review, but also uphold the state court's dicta. *See* ECF 88 at p. 11 (arguing that, although the Alaska court confined its holding to the Hanger, that it really should be read as the three buildings).

This Court, in contrast, is asked to determine Cully's cognizable property interests and the efficacy of the Letter of Transfer as a matter of law. Nonetheless, in view of the government's injection of the *AECOM* litigation into these proceedings, we turn next to the government's mistaken theory of contract construction.

D. The Government's Formulation of Contract Construction is Mistaken:

The government argues that this Court should limit its inquiry into the 2005 Lease to the "plain and unambiguous language of the Lease…." citing a single Lease exhibit, Exhibit A. ECF 88 at p. 11. But, the 2005 Lease is much more than Exhibit A. The Lease also incorporates two Exhibit C's. The most current of the two Exhibits C's states expressly that the buildings are in cold storage and are slated for demolition under Operation Clean Sweep. ECF 87-1, Appx. 1, at pp. 12-13 and *Id.*, Appx, 2, Ex. 17, pp. 29 and 30 of 65.

More importantly, the government ignores ¶ 10.7 of the Lease. This provision gives NSB notice that the buildings will be demolished under the government's Operation Clean Sweep. *See* ECF 87-2, Appx. 2, at Ex. 17 pp. 8-9. ¶ 10.7:

> The Lessee expressly acknowledges that it fully understands that some or all of the response actions to be undertaken with respect to the Federal Facility Agreement (FFA) or the Installation Restoration Program ("IRP") may impact Lessee's quiet use and enjoyment of the Premises. The Lessee agrees that notwithstanding any provision of the Lease, the Lessor assumes no liability to the Lessee should implementation of the FFA, the IRP or other hazardous waste cleanup requirements, whether imposed by law, regulatory agencies, the Lessor, or the Department of Defense, interfere with the Lessee's use of the Premises. The Lessee shall have no claim against the United States or any officer, agent, employee, or contractor thereof on account of any such interference, whether due to entry, performance of remedial or removal investigations, or exercise of any right with respect to the FFA or IRP or under this Lease or otherwise.

(emphasis added).

The "FFA" imposes responsibilities on the Air Force under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") 42 U.S.C. 9301 *et. seq.* with respect to the hazardous waste at Point Lay. Similarly, the IRP addressed the Air Force's intent, under Operation Clean Sweep, to demolish the buildings, including the garage, hanger and warehouse in 2005. ECF 80, at pp. 11-13; ECF 87-2, Appx. 2, Ex. 11, 13 p.13:11-15.

The issue presented is thus whether the parties to the Lease not only knew, but also intended that the buildings were removed from the Lease because they were slated for demolition. The answer to that question is one of law, because the undisputed facts demonstrate that both parties to the Lease intended that the buildings would be demolished during the summer of 2005.

1. Extrinsic Evidence Does not Vary the Lease

Cully agrees that when contract provisions "are phrased in clear and unequivocal language, they must be given their plain and ordinary meaning and the court may not resort to extrinsic evidence to interpret them. " ECF 88 at 12, citing *Coast Fed. Bank, Fsb v. United States*, 323 F. 3d 1035,1038 (Fed. Cir. 2003) (*en banc*). But the Lease is not plain nor is its language unequivocal. The government invites the Court to review Exhibit A to the Lease as the talisman against Cully's takings claim. Cully invites the Court's review of the Lease, and will demonstrate that the extrinsic evidence Cully offers does not vary, modify or alter the written expression of the intent of the parties when the Lease was executed in March and May, 2005.

2. Contract Interpretation Requires Resort to Extrinsic Evidence

Extrinsic evidence is admissible to explain the context, the understandings of the parties and the meaning of the words used.[1] In a contract interpretation case, the Court's objective "is to determine the intent of the parties at the time they contracted." *Veit & Co., Inc. v. United States*, 56 Fed. Cl. 30, 34 (2003) (quoting *Greco v. Dept. of Army,* 852 F.2d 558, 560 (Fed. Cir. 1988)). "It has been a fundamental precept of common law that the intention of the parties to a contract control[s] its interpretation." *Beta Systems, Inc. v. United States,* 838 F.2d 1179, 1185 (Fed. Cir. 1988) (quoting *Firestone Tire & Rubber Co. v. United States*, 444 F.2d 547, 551, 195 Ct. Cl. 21 (Ct. Cl. 1971)). The intent of the parties is determined

[1] The government falsely asserts that Cully conceded in *AECOM* that the Lease included the hanger, garage and warehouse, ECF 88 at p, 11. In fact, Cully at no time has conceded the buildings were part of the Lease. Rather, the government intended to demolish them.

by a review of the contract, and if necessary, other objective evidence. *Flexfab, LLC v. United States,* 424 F.3d 1254, 1262 (Fed. Cir. 2005). If the terms of the contract are clear and unambiguous, there is no need to resort to extrinsic evidence for its interpretation. *Barron Bancshares, Inc. v. United States,* 366 F.3d 1360, 1375 (Fed. Cir. 2004); *Interwest Constr. v. Brown*, 29 F.3d 611, 615 (Fed. Cir. 1994); *Alaska Lumber & Pulp Co. v. Madigan*, 2 F.3d 389, 392 (Fed. Cir. 1993); *Sea-Land Serv., Inc. v. United States,* 553 F.2d 651, 658, 213 Ct. Cl. 555 (Ct. Cl. 1977), cert. denied 434 U.S. 1012, 98 S. Ct. 724, 54 L. Ed. 2d 755 (1978). If ambiguity exists, however, the Court's role is to give legal effect to the intent of the parties at the time the agreement is made. *King v. Dept. of Navy,* 130 F.3d 1031, 1033 (Fed. Cir. 1997).

As here, an ambiguity exists. The Court must then interpret extrinsic evidence in a manner that gives meaning to all of the contract's provisions. *McAbee Constr., Inc. v. United States,* 97 F.3d 1431, 1434 (Fed. Cir. 1996) (citing *Hughes Communication Galaxy, Inc. v. United States,* 998 F.2d 953, 958 (Fed. Cir. 1993). Extrinsic evidence should not be used "to justify reading a term into an agreement that is not found there." *Fox v. Office of Personnel Mgmt.*, 100 F.3d 141, 145 (Fed. Cir. 1996). On the other hand, the Court may use extrinsic evidence if the contract is ambiguous "to the extent the final expression is not contradicted." *W&F Bldg. Maint. Co., Inc. v. United States,* 56 Fed. Cl. 62, 69 (2003) (citing *McAbee,* 97 F.3d at 1434-35).

The context in which the parties made the contract also may be significant. *Metric Constructors, Inc. v. NASA,* 169 F.3d 747, 752 (Fed. Cir. 1999) ("Excluding evidence of trade practice and custom because the contract terms are 'unambiguous' on their face ignores the

reality of the context in which the parties contracted, [which] . . . may well reveal that the terms of the contract are not, and never were, clear on their face."). *Am. Ordnance LLC v. United States*, 83 Fed. Cl. 559, 569-70 (2008).

The Federal Circuit accepts the use of dictionary definitions. *Teg-Paradigm Envtl, Inc. v. United States*, 465 F.3d 1329, 1340 (Fed. Cir. 2006). Here, the word "demolished" as used in the 2005 Lease at Exhibit C means to "destroy totally or to commence the work of total destruction with the purpose of completing the same." *Blacks Law Dictionary*, Fifth Ed. at 389.

In addition, context is important because the Court's role in contract interpretation is to determine the objective intentions of the parties. The Court should reject the government's over-simplication of the Lease as consisting of Exhibit A only. Rather, "a court must consider the contract as a whole and interpret it to effectuate its spirit and purpose, giving reasonable meaning to all parts in context and without contradiction." *L.W. Matteson, Inc. v. United States*, 61 Fed. Cl. 296, 307 (2004). The Lease should be interpreted in a manner that gives meaning to all of its provisions and makes sense. *Giove v. DOT*, 230 F.3d 1333, 1340-41 (Fed. Cir. 2000). The language of the "contract must be given that meaning that would be derived from the contract by a reasonable intelligent person acquainted with the contemporaneous circumstances." *Hol-Gar Mfg. Corp. v. United States*, 169 Ct. Cl. 384, 388, 351 F.2d 972, 975 (1965).

Ultimately, "context defines a contract and the issues deriving thereof." *Enron Fed. Solutions, Inc. v. United States*, 80 Fed. Cl. 382, 393 (2008). "Words and other conduct are

interpreted in the light of all the circumstances, and if the principle purpose of the parties is ascertainable it is given great weight." Restatement (Second) of Contracts § 202(1) quoted in *Alvin, Ltd. v. United States Postal Serv.*, 816 F.2d 1562, 1565 (Fed. Cir. 1987).

The Restatement recognizes that no contract, including this Lease, can be interpreted without understanding the intent of the parties:

> (1) The interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings in the light of the circumstances, in accordance with the rules stated in this Chapter.
>
> (2) A question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence. Otherwise, a question of interpretation of an integrated agreement is to be determined as a question of law.
>
> b. *Plain meaning and extrinsic evidence*. It is sometimes said that extrinsic evidence cannot change the plain meaning of a writing, but meaning can almost never be plain except in a context. Accordingly, the rule stated in Subsection (1) is not limited to cases where it is determined that the language used is ambiguous. Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties. *See* §§ 202, 219-23. But after the transaction has been shown in all its length and breadth, the words of an integrated agreement remain the most important evidence of intention.

Restatement (Second) Contracts, § 212 and Comment b.

Cully demonstrated in its opening brief that the government announced its Operation Clean Sweep previous to 2004, and by January 2005, had issued its Scope of Work. ECF 80, pp. 10-11. The Scope of Work included demolition of the buildings pursuant to the IRP and

FFA, the same buildings as are identified in Exhibit C (ECF 87-2, Appx. 2, Ex. 17) and as contemplated in the Lease at ¶ 10.7. *id.* Below, Cully will demonstrate that the government's assertion that the NSB had a present possessory interest at the time of the Takings Letter is simply not true: the parties to the Lease agreed in the Lease that the buildings would be demolished in 2005 pursuant to Operation Clean Sweep.

3. The Context Demonstrates that the Buildings were to Be Demolished

The Lease must be interpreted in a manner that gives meaning to all of its provisions and makes sense. *Shell Oil Co. v. United States,* 751 F.3d 1282, 1287 (Fed. Cir. 2014) citing *McAbee Const. Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996). The government asserts that the three (3) buildings slated for demolition are leased to NSB. Without question the Lease is silent concerning the event that in fact occurred: Cully saved the buildings from demolition. The government would have the Court find a default provision in the Lease: because the buildings were not demolished, they must be leased to the NSB, notwithstanding that the Lease is silent on this question. But such interpretation would require the Court to read a term contrary to the parties' understanding into the contract.

In *Am. Ordnance LLC v. United States*, 83 Fed. Cl. 559 (2008), the parties initially agreed in a letter agreement that the contractor would produce ammunition on equipment to be procured by the government. However, because of certain exigencies, the contractor agreed to purchase the necessary equipment and the government agreed that the equipment would then belong to the contractor. After the contract ended, a new contracting officer

determined that the equipment belonged to the government. The Court found that the final agreement lacked a "clear contract term specifying ownership." *Id*. at 569.

There, the court turned to the extrinsic evidence, which "reveals the parties' intent precisely." *Id.* The extrinsic evidence demonstrated that the "the government's new position on ownership occurred through the deletion of terms from the letter contract. "This methodology of deleting unnecessary terms explains why the definitive contract alone does not specify which party owns the … equipment." *Id.* at 570. The court also examined the post-execution action of the parties, finding that those actions "uniformly support the conclusion that [the Contractor] owned the … equipment." *Id.* at 571.

Cully's uncontroverted extrinsic evidence demonstrates that the parties to the Lease did not intend the lease to include the three buildings, because they were slated for demolition. In fact, the actions of the government and the NSB demonstrate the intent of the parties that the buildings would be demolished during the summer of 2005. After signing the Lease, in May, the NSB vacated the buildings. Both the Air Force and the NSB conceded in public meetings that the purpose of the 2005 Lease was to permit the NSB to continue to operate the airstrip. *See* ECF 87-2, Appx.2, Ex. 18 at 3 ("25 year lease only covers the airstrip, the apron and the land under the hanger"); *Id.,* Ex. 14 (NSB vacated the buildings; Air force restoration contractors conducting work in the buildings; Air Force hanger used to store debris and hazardous waste); *Id.* Ex. 13, p. 93, lines 1-5, p. 94, lines 13-19; Ex. 19, pp 51-53 (Air Force would demolish the buildings unless Cully signed a license and remediated). Similar to the omission of a term in *Am Ordnance, LLC,* here the 2005 Lease, based on the 1996 Lease but

with a starkly different context, was silent on ownership and possession of the buildings slated to be demolished, in view of the fact that neither the Air Force nor the NSB intended anything other than demolition.

The 2005 Lease's provisions specifying demolition of certain of the defined premises (*see* ECF 87-2, Appx. 2, Ex. 17, ¶ 10(7) and Exhibit C) lend ambiguity to the Lease, unless the parties' intentions are understood. A court looks to contemporaneous evidence "to confirm that the parties intended the term to have its plain and ordinary meaning." *Teg Paradigm Envtl, Inc.* 465 F.3d 1329, 1340.

Here, Exhibit E to the 2005 Lease, taken from the 1996 Lease, requires the NSB to maintain the buildings (compare 1996 Lease, ECF 82-2, Appx. 2, Ex. 2, Memorandum of Agreement ("MOA") with Lease ECF 87-2, Appx. 2, Ex. 17, designated therein as Exhibit E). But, the buildings were to be demolished, and thus, read out of context, Exhibit E makes no sense.

However, placed in context, Exhibit E was a part of the 1996 Lease. All the exhibits to the 2005 Lease, including Exhibit C, regarding building demolition, and Exhibit E, were "included and made a part of th[e] Lease." *See* ECF 87-2, Appx. 2, Ex. 17, p. 22.

In context, the original MOA in the 1996 Lease was created and signed two years before the Air Force ceased operation of the Point Lay Distant Early Warning (DEW) site and the 2005 Lease was made effective six (6) years after the site was closed. That is, the 2005 Lease was made effective November 1, 2004. ECF 87-2, Appx. 2, Ex. 17, p. 1. In context then, the buildings were to be demolished in 2005. The intent of the parties to the

Lease was singular: the NSB was to operate the airstrip and keep the roads clear of snow. *id.* *See* ECF 87-2, Appx. 2, Ex. 17 at Exhibit E, Part V.[2]

In *Shell Oil v. United States,* 751 F.3d. 1282, oil companies entered into a World War II agreement with the United States to produce aviation grade gasoline. The production resulted in toxic chemical waste that the oil companies disposed of in a municipal landfill. Forty years later, with the advent of CERCLA, the question became whether the United States was required to indemnify the oil companies. The *Shell Oil* court, while applying the plain meaning rule of construction, nonetheless resorted to extrinsic evidence to determine the meaning of the word "costs." Finding that, although CERCLA was far in the future, the contract anticipated that the government would bear the risk of future costs. In doing so, the court reviewed the communications between the parties at the time of contract formation and the context in which the contract was formed to deduce the meaning of the language used. *Id* at 1296-97.

Here, the Lease makes no sense without considering the extrinsic evidence, and such evidence does not modify, amend or contradict the terms of the contract. The site was closed, the Air Force was under a legal duty to remediate, and the IRP and FFA as well as federal law required the demolition of the buildings.[3] However, Point Lay Village, 800 miles from

[2] Part V, *id.* provides, *inter alia,* that the NSB will maintain roads, remove snow, maintain the runway, taxiway, lights, manage the airport in accordance with State Department of Transportation regulations, maintain and repair the airfield, its lighting and navigational aids, and provide fire and police protections as well as pay utilities. The MOA does require "minor repair" of facilities not listed.

[3] We discussed in ECF 80 the Title 40 regulations requiring the holding agency to demolish buildings prior to excessing the federal land to the BLM. *See* ECF 80 at pp. 38-40.

Anchorage, with no roads linking it to any community, required an air strip. Similarly, the Air Force required the air strip for its continuing duties of remediation. The context as well as the risk shifting can only be understood in light of extrinsic evidence. The evidence changes nothing in the Lease: the buildings were going to be demolished and that is what Exhibit C, made a part of the Lease, states and what ¶ 10.7 explains. In the absence of such evidence, the plain meaning of the contract becomes anything but plain.

In *Valley Realty Co. v. United Sta*tes, 96 Fed. Cl. 16 (2010), a dispute arose between a lessor and the United States Postal Service over which party was to repair a broken sewerage line. There, the court, interpreting "the contract in a manner that gives meaning to all of its provisions and makes sense" *id* at 22, held that the Postal Service was responsible where it generated a rider to a many years-old lease. Similarly, here, the court's interpretation, giving meaning to all of the provisions in a manner that makes sense, must consider the extrinsic evidence, the context and the contemporaneous circumstances. The Lease, in short, was not made in a void, but under the unique circumstances the parties were addressing.

In *Metric Constructors, Inc. v. NASA,* 169 F.3d 747 (Fed. Cir. 1999), the issue was whether a contract term required the contractor to change all the fluorescent lamps in a renovation project, or only those lamps not newly installed. The contract wording provided for "relamping," *Id* at 748. The *NASA* court held for the contractor that 'relamping" could not include replacing all the hundreds of fluorescent lamps, stating:

> This court adheres to the principle that " the language of a contract must be given that meaning that would be derived from the contract by a reasonably intelligent person acquainted with the contemporaneous circumstances." *Hol-Gar Mfg. Corp. v. United States*, 169 Ct. Cl. 384, 351 F.2d 972,

> 975 (Ct. Cl. 1965). Thus, to interpret disputed contract terms, "the context and intention [of the contracting parties] are more meaningful than the dictionary definition." *Rice v. United States*, 192 Ct. Cl. 903, 428 F.2d 1311, 1314 (Ct. Cl. 1970); *see also Western States Constr. Co. v. United States*, 26 Cl. Ct. at 818 (1992); *Corman v. United States*, 26 Cl. Ct. 1011, 1015 (1992). Trade practice and custom illuminate the context for the parties' contract negotiations and agreements. Before an interpreting court can conclusively declare a contract ambiguous or unambiguous, it must consult the context in which the parties exchanged promises. Excluding evidence of trade practice and custom because the contract terms are "unambiguous" on their face ignores the reality of the context in which the parties contracted. That context may well reveal that the terms of the contract are not, and never were, clear on their face. On the other hand, that context may well reveal that contract terms are, and have consistently been, unambiguous.
>
> Thus, evidence of trade practice and custom plays an important role in contract interpretation. Before arriving at a legal reading of a contract provision, a court must consider the context and intentions of the parties. That context may or may not disclose ambiguities. In any event, evidence of trade practice and custom is part of the initial assessment of contract meaning. It illuminates the contemporaneous circumstances at the time of contracting, giving life to the intentions of the parties. It helps pinpoint the bargain the parties struck and the reasonableness of their subsequent interpretations of that bargain.

Id. 169 F.3d 752.

As in *NASA,* here there is no disagreement as to the context. Nor does Cully, who is not a party to the contract, seek to introduce new, different, or modified terms to the Lease. The court, though, must give the language of this Lease the meaning that would be derived from the contract by reasonable intelligent persons acquainted with the contemporaneous circumstances. *See also Am Ordnances LLC* 83 Fed. Cl. 569 (objective is to determine the intent of the parties at the time they contracted, citing *Veit & Co. Inc. v. United States*, 56 Fed. Ct. 30, 34 (2003)); *Beta Sys.,* 838 F.2d, 1185 (fundamental concept of the common law that the intent of the parties to a contract controls its interpretation).

4. The Government Misreads the Parol Evidence Rule

The government asserts that extrinsic evidence of the conduct of the parties after the Lease was signed is inadmissible "parole [sic] evidence." ECF 88 at 12. The government is demonstrably in error. First, the evidence that the government finds inadmissible is not parol, but evidence of the parties' conduct *after* the Lease was made effective.[4] In contrast, parol evidence is extrinsic evidence antecedent or contemporaneous to the contract at issue. *KMart Corp. v. United States*, 31 Fed. Cl. 677, 681 (1994) quoting *Nicholson v. United States,* 29 Fed. Cl. 180, 193-95 (1993) (citing *Corbin on Contracts* § 573, at 357; *Williston on Contract*s§ 631, at 948.).

Extrinsic evidence to show the parties' conduct before a controversy arises out of a written contract is more revealing than the dry language of the contract. See *Alvin Ltd v. United States Postal Service*, 816 F.2d 1562, 1566 (Fed. Cir. 1987); *see also Macke Co. v. United States*, 199 Ct. Cl. 552, 467 F.2d 1323, 1325 (1972) ("excellent specimen of the truism that how the parties act under the arrangement, before the advent of controversy, is often more revealing than the dry language of the written agreement by itself."). Here, as demonstrated, through 2012, both the Air Force and NSB acted as if the Lease covered the air strip, the navigational aids and the roads, but not the buildings.

[4] The government takes issue with its own employees' admissions from 2006-2012 that Cully owns the buildings and the NSB leases the air strip and navigational aids. *See* ECF 88, at p. 12, taking issue with a quote from Air Force Realty Officer John Smith that the Lease to the NSB was only for the airstrip, a statement made by Mr. Smith in 2008.

The government's citation, *Oxnard v. United States*, 851 F.2d 344, 347 (Fed. Cir. 1988) is helpful. There, the Navy's written communications were consistent with its litigation position. Here, the Air Force's written and recorded statements were consistent that the Lease was only for the air strip and its operations, and the buildings were to be demolished, but instead were given to Cully.

The plain meaning of the Lease in context is that the buildings were to be demolished as a matter of federal law[5] The buildings were not included in the Lease to the NSB. They were to be demolished. That the buildings were conveyed to Cully demonstrates how the parties to the Lease acted after its execution.

5. The Government Creates a Strawman

The government argues that the Lease was never amended. Cully asserts that the NSB was relieved of risk and liability because the buildings were conveyed to Cully rather than to be demolished. The undisputed facts demonstrate that the NSB issued permits to the Air Force to demolish the buildings and to haul the materials off site to the Barrier Island after the Lease became effective. *See* ECF 87-2, Appx. 3, Ex. 5 and 6. The NSB abandoned the

[5] *See* also: 41 C.F.R. § 102-75.900 provides: [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.

buildings after the Lease became effective. *See* ECF 87-2, Appx. 2, Ex. 14. The government then transferred the buildings to Cully. ECF 87-2, Appx. 2, Ex. 31, 33.

The parties to the Lease ultimately determined that an amendment was not needed. See ECF 87-2, Appx. 2, Deposition of Laura Keiser, Ex. 40 and Ex. 53, p. 69:1-23. The Air Force and NSB continued to perform in accordance with the Lease absent the buildings. Although the Lease required NSB to insure the buildings ECF 87-2, Appx. 2, Ex. 17, ¶ 15, the NSB did not insure the buildings and the Air Force did not enforce that provision. Cully owned the buildings and the NSB lacked an insurable interest. Throughout the period following the transfer letter through April 2013, the parties to the Lease respected Cully's ownership. Indeed, in July 2012, Real Estate Officer Laura Kaiser reminded the Air Force that "Cully owned the buildings". ECF 87-2, Appx. 2, Ex. 39 at p. 3.

The government's litigation position cannot be squared with the assurances that predated Cully's demand to AECOM to pay rent for the utilization of Cully's Hanger. Col. Skaja's "win/win" decision was turned on its head. As in *Am. Ordnance*, here, the Air Force "pull[ed] a fast one." *See e.g. Am. Ordnance* 83 Fed. Cl 571. *See also Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970) ("The joke is on you. You shouldn't have trusted us, is hardly worthy of our great government"); *Rahman v. Napolitano*, 814 F. Supp. 2d 1098, 1106 (W.D. Wash. 2011) (Retroactively placing plaintiffs in unlawful status essentially sanctions plaintiffs for behavior that was not deemed unlawful when it occurred, citing *Brandt*.

6. The Alaska Court's Order Is Not Binding In This Proceeding

Cully has previously responded to the government's collateral estoppel argument. ECF 87 at pp. 11-27. That response is incorporated. Briefly, *AECOM* involved different claims and the government was not a party. In addition, the Alaska Superior Court expressly rejected reviewing the Letter of Transfer. This case concerns the Letter of Transfer.

The facts in *AECOM* are also inapposite. *AECOM* claimed a privilege to use the Cully Hanger on the strength of permission allegedly extended by a government agent who admitted both her mistaken assumption that the Air Force owned the buildings and that she lacked authority to bind the government. And the *AECOM* court expressly limited its holding to the issue of whether the NSB held the Hanger under the Lease for 25 years.

Issue preclusion requires an issue of fact or law to be actually litigated between the parties to a prior lawsuit. *See Restatement (Second) of Judgments*, § 27:

> 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.

Here, none of the elements are present. The lawsuit Cully filed against AECOM was in trespass. Neither the government nor the NSB were parties to the litigation.

Moreover, the government's "cited cases" do not support its position. In *Mother's Restaurant, Inc.*, 723 F.2d, 1569, the parties were the same parties as in the precedent matter and the issues were the same issues. The *Mother's Restaurant* Court held, citing the Restatement (Second) Judgments, § 27:

> 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).

The government cites *Montana v. United States*, 440 U.S. 147, 153 (1979). There, the Court stated:

> 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).

Jaye v. United States, 781 F. App'x 994 (Fed. Cir. 2019) is non precedential. *Id.* It was dismissed for lack of subject matter jurisdiction. In passing, the Court stated that it had no jurisdiction to review state court takings claims. That is not the issue here. This Court most assuredly has jurisdiction to review federal takings claims.

The defense also cites *Petro-Hunt, L.L.C. v. United States,* 862 F.3d 1370 (Fed. Cir. 2017). There, the Federal Circuit declined to review a Fifth Circuit ruling. Here, Cully is not seeking judicial review of any ruling. Rather, Cully is simply seeking compensation for a taking. In this case, it is the government seeking review and the 2005 Lease is presented by a party to that Lease, the United States. In addition, the issue now presented was never tried before any court: the validity and scope of the Government's Letter of Transfer.

Cully is not estopped and is not seeking judicial review of a state court judgment. *See SecurityPoint Holdings, Inc. v. United States*, 138 Fed. Cl. 101,108 (2018) (finding that where ownership not actually litigated, collateral estoppel does not apply).

7. Cully Is Not Seeking a Ruling on the Ownership of the Site

Cully is not seeking a Court ruling that it owns the land encompassed by U.S.S. 5251, the site of the Point Lay Long Range Radar Station. To the contrary, Cully included the facts to demonstrate only Col. Skaja's ingenious methodology to preserve the buildings for Cully and his meticulous inquiries to obtain confirmation that Cully would receive the land. Col. Skaja's due diligence obviated the need to demolish the buildings and created a win/win for the government and Cully. ECF 87-2, Appx. 2, Deposition of Col. Skaja, Ex. 19, pp. 34:1-25. Indeed, Cully made it clear in its briefing that the basis for the Letter of Transfer was the BLM's confirmation that Cully would one day receive the site. And, based upon Cully's primacy under ANCSA as the future landowner, BLM would accept the land when remediated. This in turn permitted the Air Force to transfer the buildings to Cully rather than to demolish them.

E. The Letter of Transfer Was Effective

Demonstrating the weakness of its position, the government quibbles with a recent Supreme Court decision that determined that Alaska Native Corporations are Tribes.[6] The government argues that this Court should ignore Supreme Court precedent concerning Cully's unique status as an Alaska Native Corporation, because of Cully's state incorporation as a "for profit corporation". But Cully is an Alaska Native Corporation. Under federal law, Cully was required to incorporate in Alaska as a for-profit corporation. But, in Alaska, where there

[6] *See* ECF 88 at pp14-18, discussing *Yellen v. Confederated Tribes of the Chehalis Reservation,* 141 S. Ct. 2434 (2021)

is but one Indian reservation confined to a small island in Southeast Alaska. Native corporations own 40,000,000 acres of the state in fee simple with federal law protecting that ownership.[7]

The Letter of Transfer was a valid exercise of authority. The Air Force, with the blessings of the Department of Defense, Secretary of the Air Force, the GSA, and the Department of the Interior all concurred in the Transfer Letter and did not dispute the transaction in 2005. For years, the Air Force 611th in Alaska recognized the validity of the transfer and Cully's ownership and possession of the buildings. The buildings were removed from the Air Force inventories of Point Lay LRRS facilities. And then, with no warning, the Air Force on April 11, 2013, took the buildings back under the guise that Cully was a "for profit" corporation and not entitled to a "donation" under 41 C.F.R. § 102.75.990.

1. The 2006 Transfer Letter Was a Valid Exercise of Executive Authority

(a) The Government Ignores the Undisputed Facts Establishing the Validity of the Letter of Transfer

The government does not dispute:

- That the Air Force closed the Cold War-era Point Lay Long Range Radar Station, located a half-mile from the Native Village of Point Lay, in 1998.
- From 1971 to 2004, Cully Corporation, as the ANCSA Village Corporation for the Native Village of Point Lay, had been foreclosed from selecting the operating Site under ANCSA, § 3(e), 43 U.S.C. § 1602(e).[8]

[7] *See* 43 U.S.C. § 1636(d) (the Automatic Land Bank) a provision that protects ANCSA lands from all forms of adverse possession and taxation so long as the lands are not developed.

[8] ANCSA § 3(e) prohibited Native Corporations from selecting "the smallest practical tract …enclosing land actually used in connection with the administration of any Federal installation…." Because the LRRS was operational in the 1970's, when village corporations

- The Air Force entered into a 5-year lease of the Site to the North Slope Borough in 1996 for the purpose of maintaining the air strip and facilities.

- Cully, in cooperation with the Air Force, the Federal Aviation Administration and the North Slope Borough, developed an intergovernmental work group to develop a plan to permit the NSB to expand the air strip to provide a safer travel with federal grant money.

- in late 2004, the Air Force announced its plans, under Operation Clean Sweep, to demolish buildings and other facilities still standing at the abandoned Site, remediate the lands and return management to the Bureau of Land Management.

- The Alaska Land Transfer Acceleration Act of 2004, Pub. L. 108-452, § 201(a)(1)(Dec. 10, 2004), 118 Stat. 3575 ("ALTAA") allowed Cully to select the LRRS.

- In January, 2005, the 611th Engineering Squadron Commander, Col. Kenneth Smith, met with the Point Lay Remediation Advisory Board and explained that under Operation Clean Sweep, the facilities would be demolished, the land remediated and turned over to the Bureau of Land Management.

- Commencing in March, 2005,

    - Cully began working with the Air Force, the Bureau of Land Management and the State of Alaska to finalize Cully's selection of the LRRS as the remaining piece of Cully's ANCSA entitlement and requested that three buildings, a hanger, a garage and a warehouse, not be demolished.
    - The Air Force requested permits from the NSB to proceed with demolition of the facilities.

    - The Air Force and NSB entered into a 25 year lease for the operation of the air strip and related roads and aviation aids.

    - The NSB issued demolition permits to the Air Force.

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were permitted to select lands (see 43 U.S.C.§ 1611(a)("for three years from December 18, 1971…"), Cully's selection of the LRRS, a surveyed subdivision of federal lands identified as U.S.S. 5251,was not permitted.

- The NSB abandoned the buildings in anticipation of the Air Force demolishing of those buildings.

- The Air Force secured approval from the GSA to donate the buildings to Cully, agreement from the Bureau of Land Management not to destroy the buildings and from the Air Force Pacific Air Command to grant Cully a license to remediate the land under the garage in return for which the Air Force would not demolish the buildings but transfer them to Cully.

- The State of Alaska determined that Cully's remediation removed the garage from a hazardous site designation.

- The Air Force removed the Buildings from its inventory and via a Letter of Transfer, conveyed the buildings to Cully.

(b) The Government Grounds Its Renunciation of the Efficacy of the Letter of Transfer on a False Premise

The government, attempting to demonstrate that the 2006 Letter of Transfer was not effective, asserts that there is no way that Cully could be a lawful recipient of the buildings. But federal law also prevents such wasteful disposition of property. The government ignores the body of law the Air Force followed in 2005-2006 to convey the buildings to Cully. The authors of the 2013 Takings Letter testified that they were not aware that the GSA and the AFPAC had approved the conveyance of the buildings in 2005. ECF 87-2, Appx. 2, Ex. 48, Gen. Hoog deposition, p. 37, lines 24:25; Ex. 45, Deposition of James Fife, p. 80, lines 18-25. Thus, the government continues to ignore regulations specifically permitting the conveyance to Cully as detailed in Cully's opening brief at pp. 34-37.[9]

[9] Mary Adams, relying on 41 C.F.R. § 102-2.80, sought and received GSA approval for the transfer. *Id.* The GSA stated "GSA concurs with your decision to donate the three buildings … to the local native corporation, Cully Corp. The buildings have no commercial value and

What is more, the government ignores 41 C.F.R. § 102-75.1025:

> A federal agency may not abandon or destroy improvements on land or related personal property unless a duly authorized official of that agency finds, in writing, that donating the property is not feasible. This written finding is in addition to the determination prescribed in § 102-75.1000, § 102-75.1005 and § 102-75.1010. **If donating the property becomes feasible at any time prior to actually abandoning or destroying the property, the Federal agency must donate it.**

(emphasis added).

Here, donation of the property did become feasible and a deviation was specifically approved by GSA. In return, the Air Force was no longer responsible for the buildings, and obtained a No Further Action letter on cleanup from the Alaska's Department of Environmental Conservation. Thus, "donating" the property via GSA's common sense deviation approval resulted in the Air Force avoiding demolition and remediation expenses in 2005. This was clearly a feasible outcome for the government.

The government also ignored the authority of Base Commander Skaja to dispose of property pursuant to 41 C.F.R. § 102-75.1055. Under that regulation the GSA delegates to the Secretary of Defense the authority to determine that Federal agencies do not need Department of Defense controlled excess real property and related personal property having a total estimated fair market value, including all the component units of the property, of less than $50,000; and to dispose of the property by means deemed most advantageous to the United States.

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we understand the land will also go to the native corporation after the site cleanup …." ECF 87-2, Appx. 2, Ex. 31 at p. 11 and Ex. 22. Plaintiff's brief at pp. 34-35.

Col. Skaja testified that he had the authority to make the conveyance of the buildings to Cully. Such authority was based on a thorough review by his staff, including the Base Engineer, the Base Facility Board, the Realty Officer, and the JAG in the Staff Summary Sheet. ECF 87-2, Appx. 2, Ex. 31. By contrast, there is no documented authority in the record of such review prior to the 2013 Takings Letter. Rather, the only support for the renunciation of the 2006 Transfer Letter is the Bullet Point Background Paper, containing numerous material misstatements of fact and law.

2. Cully's Status as a "Public Body"

Cully is an Alaska Native Corporation. Its claim to fame as a "for profit" corporation is its required incorporation as such pursuant to federal law. *See* 43 U.S.C. §§ 1602(j) and1607(a). Cully cannot sell its stock and its shareholders cannot sell their stock. 43 U.S.C. § 1606(h). Cully's stock and that in the hands of its shareholders are inalienable. *Id.* Cully's undeveloped land is protected under federal law. 43 U.S.C. § 1636(d). Cully received its Alaska Native Claims Settlement Act ("ANCSA") entitlements, both land and money, to "hold, invest, manage and or distribute … for and on behalf of a Native village in accordance with ANCSA." Cully's authority to provide benefits to its Native shareholders and their families to promote their health, education and welfare is expressly recognized by statute and such benefits "may be provided on a basis other than pro rata based on share ownership." 43 U.S.C. § 1606(r).[10] ANCSA, in short, is an exercise of the

[10] 43 U.S.C. § 1606(r) is directly contrary to the concept of corporate share ownership and as well to for profit enterprises.

federal government's plenary powers to regulate Indian affairs. Pub. L. 100-241, § 2(9), 101 Stat. 1788 (1988).

The United States has a "unique historical relationship with Alaska Natives." *Yellen* v. *Confederated Tribes of the Chehalis Reservation,* 141 S. Ct. 2438. In 2005, multiple federal agencies, recognized that unique relationship and Cully's unique status. As a result the GSA concurred in the donation. Today, the government seeks to justify its renunciation by disavowing the unique, historical relationship that permitted the government to obtain free remediation and avoid expensive demolition and shipping expenses. The government's efforts failed. The Letter of Transfer was valid. The 2013 Takings letter is ineffective as a renunciation, but effective as a Taking. Cully is entitled to compensation for the taking of its property.

The government did not respond to Cully's demonstration that the regulations do define "Tribes" to include Alaska Native Corporations. *See* Cully brief, ECF 80 at 32 (41 C.F.R. § 102-37.560 refers to the Indian Financing definition of "Tribe". In turn, the Indian Financing Act defines "Tribe" to include Alaska Native corporations).[11] The sole basis for the renunciation, then, is that Cully is "for profit". But that basis fails because Cully is in reality a unique entity created by Congressional statute as a public entity for the Native People of Point Lay, as GSA and the Air Force recognized in 2005.

[11] (c) "Tribe" means any Indian tribe, band, group, pueblo, or community, including Native villages and Native groups (including corporations organized by Kenai, Juneau, Sitka, and Kodiak) as defined in the ANCSA, which is recognized by the federal government as eligible for services from the Bureau of Indian Affairs. 25 U.S.C. § 1452.

F. In the Alternative, the Anti-Deficiency Act Protects Cully

Cully's second cause of action is in quantum meruit. See Second Amended Complain, ECF 87-2, Appx. 2, Ex. 1, pp. 10-11. Cully alleged that the government breached an express contract to convey the buildings to Cully, when the government declared the Letter of Transfer void and of no effect 8 years after the services were performed and 7 years after the Letter of Transfer conveyed the buildings to Cully.

The services Cully provided were provided in good faith. Recovery under a *quantum meruit* measure of damages is available, when a contractor provides goods or services in good faith under an express contract that is later rescinded for invalidity. *Seh Ahn Lee v. United States*, 895 F.3d 1363, 1366 (Fed. Cir. 2018) (citing *Int'l Data Prods. Corp. v. United States*, 492 F.3d 1317, 1325 (Fed. Cir. 2007), and *United States v. Amdahl Corp.*, 786 F.2d 387, 393 (Fed. Cir. 1986)).

The government's position, that the Anti-Deficiency Act does not provide a ground for jurisdiction, is inapposite to Cully's claim. Cully is not asserting a separate basis for jurisdiction. The ADA, however, does provide a basis for finding the government liable under *quantum meruit* for the acceptance of services performed by Cully in good faith and without expense to the government in violation of the ADA when the government renounced the agreement and took back the buildings. The government makes no response to the cases Cully cited in its brief, both of which found that the Anti-Deficiency Act did not shield the government from paying funds for which it was liable. *See* ECF 80 at p. 39 citing *Wetzel-Oviut Lumber Company v. United States*, 38 Fed. Cl. 563 (1997) (failure of government to

pay portions of a timber contract); and *Springfield Parcel C. LLC. v. United States,* 124 Fed. Cl. 163,196 (2015) (GSA violated ADA in contracting a lease term longer than 1 year).

In the case at bar, the Air Force received the benefit of the bargain and Cully lost its investment. The Air Force admitted that it had funds for demolition but accepted the benefit of Cully's labor and services. As explained in its opening brief, Cully was deprived of scarce resources.

CONCLUSION

Cully relied in good faith on the Government's Letter of Transfer. The government's response? "The joke is on you. You shouldn't have trusted us." *See Am. Ordnance LLC* 83 Fed. Cl. 571. Cully is entitled to partial summary judgment that the Government's Takings Letter is effective as a Taking and that the government owes Cully for the property taken without just compensation.

RESPECTFULLY SUBMITTED this 24th day of February, 2022.

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CERTIFICATE OF FILING

I hereby certify that on the 24th day of February, 2022, a copy of the foregoing "Response to Government's Opposition to Plaintiff's Motion for Partial Summary Judgment 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