IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CULLY CORPORATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 19-339C
	)	(Judge Tapp)
THE UNITED STATES,	)	
	)	
Defendant.	)	

DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION
TO DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

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Pursuant to Rule 56 of the Rules of the United States Court of Federal Claims (RCFC), defendant, the United States, respectfully submits this reply to plaintiff Cully Corporation's (Cully) Opposition to Defendant's Cross Motion for Partial Summary Judgment (Pl. Resp.).

I. Cully Is Collaterally Estopped From Challenging The *AECOM* Decision

As demonstrated in our opening and response briefs, Cully's takings claim fails the first prong of the two-part test, because Cully has no property interest in the three buildings at issue. *See* Def. Br. at 13, Def. Resp. at 4-5 (citations omitted). The right of possession, the threshold *right to exclude others*, belongs to the Borough, pursuant to the Lease, as the Alaska Superior Court held. *See* Def. Br. at 5-20 (citing, among other authority, *Cully Corp. v. AECOM, Inc.*, 2BA-13-00214 CL (Alaska Super. Ct., Sept. 18, 2015), A41 (*AECOM* Decision)).

A. Cully Confuses Collateral Estoppel (Issue Preclusion) With *Res Judicata* (Claim Preclusion)

First, Cully argues in its response that the Government misstates the elements of issue preclusion because the United States was not a party to the *AECOM* lawsuit, nor was the NSB, and Cully. *See* Pl. Resp. at 14-15 (citations omitted). Cully argues that issue preclusion does not apply because "[t]his lawsuit does not involve *both parties* to the prior litigation." *See* Pl.

Resp. at 15 (emphasis added). In making this argument, Cully appears to confuse the doctrine of issue preclusion, or collateral estoppel (the defense we actually asserted), with the closely related doctrine of claim preclusion, *res judicata* – the latter requires mutuality of parties in both cases, the former does not.

Claim preclusion, or *res judicata*, prohibits relitigation of a claim previously decided on the merits, or "any other admissible matter which might have been offered for that purpose." *See Nevada v. United States*, 463 U.S. 110, 129-130 (1983). The party moving for dismissal under *res judicata* must establish "that (1) the parties are identical or in privity; (2) the first suit proceeded to a final judgment on the merits; and (3) the second claim is based on the same set of transactional facts as the first." *Ammex, Inc. v. United States*, 334 F.3d 1052, 1055 (Fed. Cir. 2003).

Issue preclusion, or collateral estoppel, a related concept, "bars litigation of an issue if an identical issue was actually litigated and necessarily decided in a prior case where the interests of the party to be precluded were fully represented." *See Simmons v. Small Bus. Admin.*, 475 F.3d 1372, 1374 (Fed. Cir. 2004). The test for issue preclusion is different from that of claim preclusion. As we stated correctly, issue preclusion is applicable if:

> (1) The issues to be concluded are identical to those involved in the prior action; (2) in that action the issues were raised and 'actually litigated'; (3) the determination of those issues in the prior action was necessary and essential to the resulting judgment; and (4) the party precluded [] was fully represented in the prior action.

See Mother's Rest., Inc. v. Mama's Pizza, Inc., 723 F.2d 1566, 1569 and n.4 (Fed. Cir. 1983) (citations omitted); *accord*, *Shell Petroleum v. United States*, 319 F.3d 1334, 1338 (Fed. Cir. 2003).

B. Defensive Issue Preclusion Does Not Require Mutuality Of Parties

Issue preclusion may be raised "offensively" by a plaintiff against a defendant who was a party to a prior lawsuit, or "defensively" by a defendant against a plaintiff who was a party to a prior lawsuit. *See*, *e.g.*, *Marcel Fashions Grp, Inc. v. Lucky Brand Dungarees, Inc.*, 898 F.3d 232, 238-239 (2nd Cir. 2018) (citations omitted). Specifically, "defensive issue preclusion" arises when a defendant in a second lawsuit pleads issue preclusion, *see id*., to bar a plaintiff from relitigating an issue the plaintiff lost in the first lawsuit against the same, or a *different* defendant. *See Jackson Jordan, Inc., v. Plasser Am. Corp.*, 747 F.2d 1567, 1575 (Fed. Cir. 1984) ("an estoppel may be invoked to defend a claim brought by the same plaintiff against either a party or non-party to the first action") (citing *Blonder-Tongue Lab'ys, Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 328-330 (1971)).

Although the doctrine of claim preclusion, *res judicata*, retains the requirement that the parties be *identical*, or in privity, in the two actions, *see Ammex,*, 334 F.3d at 1055, defensive issue preclusion, or collateral estoppel, does not. In 1971, the Supreme Court "abandoned [that] limitation, known as the 'mutuality' principle" in *Blonder-Tongue*. *See Marcel Fashions Grp*, 898 F.3d at 238 (citing *Blonder-Tongue*, 402 U.S. at 328-330). The rule of *Blonder-Tongue* is clear, as the Federal Circuit has long recognized, "the doctrine of collateral estoppel may be applied even though the party asserting the doctrine was not a party in the prior action." *See Jackson Jordan*, 747 F. 2d at 1574 (citing *Blonder-Tongue*, 402 U.S. 313).

C. The Superior Court's Decision In *AECOM* Is Binding

Next, Cully posits that it is "not seeking a review of the *AECOM* decision," and acknowledges that this Court does not "have such jurisdiction" to do so, *see* Pl. Resp. at 21-22 (citations omitted), but proceeds to do precisely that. *See* Pl. Resp. at 17 (header ¶ (c) "This

Court Is Not Bound by the Alaska Court's Holding that the Lease Included the Buildings"). Cully invites the Court to ignore the Alaska Superior Court's holding and to re-adjudicate issues that the State Court has already decided, but with which Cully disagrees. *See* Pl. Resp. at 17 ("Simply put, the 2004 Lease in fact does not give exclusive possession to the NSB"); *compare* A47 (*AECOM* Decision at 7 (holding that "the Lease conveyed possession of the [facility] to the Borough for a term of 25 years").

Re-litigating these issues is something that this Court cannot do. Cully's suggestion that the Court can disregard the judgment and holding of the Alaska Superior Court is incorrect. *See*. The statute implementing the full faith and credit clause of the Constitution, 28 U.S.C. § 1738, requires Federal courts "to give preclusive effect to the state court's decision." *See Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2169 (2019); *see also*, *Deguelle v. Camilli*, 724 F.3d 933, 937 (7th Cir. 2013) (28 U.S.C. § 1738 "requires federal as well as state courts to give state court judgments the same preclusive effect that the state courts that issued the judgment would give them") (citations omitted).

In its response, Cully argues that the issues addressed by the Alaska Superior Court in the *AECOM* decision "was limited to trespass," and asserts that the court "declined to consider the efficacy of the Letter of Transfer," but fails to demonstrate why that is so. *See* Pl. Resp. at 15, 19-20. Cully's assertions lack merit and ignores the actual decision, where the word "trespass" appears only three times, and is only briefly discussed. *See* A43, A47 (*AECOM* Decision at 3, 7).

Rather, the *AECOM* Decision focuses almost entirely upon the Alaska Superior Court's interpretation of the Lease under Federal law, the effect of the Lease upon the rights of the parties, *and* Cully's argument's concerning the "efficacy" of the Letter of Transfer, all of the

Alaska Court specifically addressed. This is readily apparent from a quick review of the Decision's headers and ensuing narrative: "**Under the Lease, the Air Force conferred possession of the Hangar to the Borough**," "**The Letter of Transfer did not modify or amend the Lease**." *See* A44-46 (*AECOM* Decision at 4-6) (emphasis in original).

Specifically, the Alaska Superior Court held that the Letter of Transfer, which the Court assumed to be valid for the purposes of the summary judgment motions, made no difference to the rights of the parties. Put simply, because the Air Force had already conveyed its possessory interest to the Borough under the Lease, *there was no remaining interest* to convey to Cully in the Letter of Transfer. *See id.* at 4 ("Once a lessor has conveyed its present possessory interest to a lessee, the same interest cannot be conveyed to a third party"). This is a key holding that Cully omits. *See* Pl. Resp. at 16-17 (discussing that the Alaska "court declines to address whether the Letter of Transfer is invalid").

Nor is it dispositive, as Cully suggests, that "the Alaska court confined its opinion to only one of the three buildings – the Hanger." *See* Pl. Resp. at 17. Although the Alaska Superior Court focused upon the hanger (the building where AECOM stored its heavy equipment), the Court's holding and reasoning apply equally to all three buildings that are covered by the very same Lease. *See* A42 (*AECOM* Decision at 2) ("The leased property and premises include the Hangar as well as 12 additional facilities") (citing the Lease).

In short, the central issue the Alaska Superior Court decided was not trespass, which is only briefly mentioned, but "whether Cully's interest is subject to the Lease, thereby precluding Cully from having possession," and decided that it was - - and for that reason, the Alaska Court held that Cully could not "maintain its trespass claim." A43, 47 (*AECOM* Decision at 3, 7).

Elsewhere in its response, Cully invites this Court to take a second bite of the apple, by

re-litigating other identical arguments that Cully raised, and lost, in the Alaska Court. Cully argues, for example, that because the three buildings were to be "demolished" in 2005 pursuant to an Air Force program called "Operation Clean Sweep," (*see* Pl. Resp. at 1-3, 6, 17), this means that the three buildings were excluded from the Lease. *See* Pl. Resp. at 18 ("the parties to the 2004 Lease were aware and agreed that the buildings would not be a part of the Lease because they would be demolished").

Cully raised this identical argument to the Alaska Superior Court, which did not find it persuasive. Although the Alaska Superior Court did not specifically address Cully's "Operation Clean Sweep" and "demolition" arguments in its September 18, 2015 Order On Summary Judgment, the Court addressed Cully's precise contentions in its October 21, 2015 memorandum order denying Cully's motion for reconsideration that found Cully's arguments to be without merit. *See* Def. Ex. A ("Order Denying Motion For Reconsideration") (Reconsideration Decision); *see also*, *e.g.*, *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007) (courts make take judicial notice of matters of public record, including court decisions).

Specifically, in its motion for reconsideration, Cully argued that, because the buildings were "scheduled for Clean Sweep demolition," the Air Force and the Borough did not intend to include the hanger in the Lease, and the Lease did not confer exclusive possession of the hangar to the Borough because the hanger was excess property. *See* Def. Ex. A at 1 (Reconsideration Decision ¶¶ 1, 4, 6) (citing Cully's motion for reconsideration). The Alaska Superior Court rejected Cully's arguments as meritless, and denied Cully's motion for reconsideration. *See Id.* ¶¶ 3, 5, 7-8, 18).

First, in addressing each of Cully's arguments, and as it did in the earlier opinion, the Alaska Superior Court interpreted the Lease pursuant to Federal law and to the plain language of

that agreement. *See* Def. Ex. A at 1 (Reconsideration Decision ¶ 2). The court held that Cully's "Clean Sweep demolition" and "excess property" interpretations would "conflict with," and "render meaningless," other language in the Lease that "13 facilities, including the Hangar, are leased to the Borough for 25 years." *See id*. ¶¶ 3, 5, 7-8, 10, 12-13, 17.

In short, as the Alaska Superior Court's decisions demonstrate, Cully had "*a full and fair opportunity*" in State Court to litigate the terms of the Lease, to argue its interpretation of the Lease, and to address the purported effect of the Letter of Transfer upon the Lease and the rights of the parties. *See Blonder-Tongue*, 402 U.S. at 329. The Alaska Superior Court, in turn, *fully addressed and adjudicated* each of Cully's arguments, found them unpersuasive, and issued a judgment against Cully - - a decision and judgment that Cully simply disagrees with, but which disagreement Cully did not perfect with an appeal. *See* A41 (*AECOM* Decision); Def. Ex. A (Reconsideration Decision).[1] Cully may not re-litigate these issues now in this Court. *See Knick*, 139 S. Ct. at 2169; *see also Blonder-Tongue*, 402 U.S. at 328-1330; *Mother's Rest*. at 1569; *Shell Petroleum*, 319 F.3d at 1338.

II. Cully Cannot Demonstrate A Fifth Amendment Taking

As we demonstrated in our opening and response briefs, Cully's takings claim fails the first prong of the two-part test, because Cully has failed to identify and demonstrate "a cognizable Fifth Amendment property interest that is asserted to be the subject of the taking." *See* Def. Br. at 13-14 (citing, among other authority, *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004)), Def. Resp. at 4-5 (same).

In Fifth Amendment takings jurisprudence, the word "property" is not used to refer to a physical thing, but to the "group of rights inhering in the citizen's relation to the physical thing,

[1] In its response, Cully clarifies that it filed an appeal of the *AECOM* Decision in the Alaska Supreme Court, but then withdrew it. *See* ECF No. 87-3 at 30 (Pl. Ex. 4).

[such] as the right to possess, use and dispose of it." *See United States v. Gen. Motors*, 323 U.S. 373, 377-378 (1945). This concept of rights is referred to as the "bundle of sticks." *See Am. Pelagic*, 379 F.3d at 1376. As we explained in our opening brief, in assessing whether a cognizable Fifth Amendment property interests exists, courts look to "'crucial indicia of a property right,' such as the ability to sell, assign, transfer, or exclude." *See* Def. Br. at 14 (citing *Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1330 (Fed. Cir. 2021)). The most important rights in the bundle of sticks is the right of exclusive possession, i.e., the right to exclude others. *See* Def. Br. at 14 (citing, among other cases, *Cal. Hous. Sec., Inc. v. United States*, 959 F.2d 955, 958 (Fed. Cir. 1992)).

A. Cully Fails To Identify A Cognizable Property Interest

In its response, Cully argues, in effect, that notwithstanding the *AECOM* Decision and the Lease, it had compensable "property interests" in the buildings, but does not identify or explain what those are. *See* Pl. Resp. at 11-14. Indeed, Cully argues that what property interests it has can only be determined at trial. *See* Pl. Resp. at 12 ("What sticks from the bundle were taken will necessarily need to be determined at trial"). Cully is mistaken.

In fact, as the plaintiff asserting a takings claim, it is Cully that must identify a specific property interest that has been taken. "To establish a Fifth Amendment taking, *a claimant* must identify a cognizable property interest. [] If the claimant fails to do so, we need not reach the issue of whether any property interest was taken." *See Est. of Hage v. United States*, 687 F.3d 1281, 1291 (Fed. Cir. 2012) (emphasis added) (citations omitted). With its vague assertions to "owning" the property and equally vague references to the "bundle of sticks," (*see* Pl. Resp. at 11-14), Cully fails to meet its burden of identifying a specific property interest that was taken. *See Est. of Hage*, 687 F.3d at 1291.

First, Cully asserts that the "*AECOM* court actually declined to rule on Cully's right to the buildings. The Alaska [c]ourt confined its ruling to whether Cully had a right to *present possession* of the Hanger sufficient to assert a trespass claim against AECOM." *See* Pl. Resp. at 21 (emphasis in Cully's brief). Cully is mistaken and ignores what the Alaska Superior Court actually held:

> A general rule of property law is that a lease confers the *right of possession*. A lessee has *exclusive passion* and *legal control* of leased property and premises.

A44 (*AECOM* Decision at 4) (emphasis added) (citing, among other cases, *Prudential Ins. Co. of Am. v. United States*, 801 F.2d 1295, 1299 (Fed. Cir. 1986)).

Implicit in the Alaska Superior Court's holding is that the Borough, under the Lease, had the *right* of *exclusive possession* and *legal control* of the buildings via the Lease. A44-45 (*AECOM* Decision at 4-5). The Borough's right under the Lease is not just a "present possessory interest," as Cully suggests, (*see* Pl. Resp. at 12, 21), it is the right of exclusive possession and control of the buildings that extends for "a term of *25 years*." A44, A47 (*AECOM* Decision at 4, 7) (emphasis added).

To put the Alaska Superior Court's holding in *AECOM* into perspective, it is worth re-visiting the requirements of a physical taking. The Supreme Court has held that "[p]roperty rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'" *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 417, 435 (1982) (citation omitted). A physical taking occurs when the Government deprives the owner of such rights, and "a *stranger* directly invades and occupies the owner's property." *See Loretto*, 458 U.S. at 435, 441 (emphasis in original). *See also Caldwell v. United States*, 391 F.3d 1226, 1235 (Fed. Cir. 2004) ("a taking occurs when the owner is deprived of *use of the property* [by another's]

physical possession" of said property) (citing *United States v. Dow*, 357 U.S. 17, 23 (1958) (emphasis added); *Petro-Hunt LLC v. United States*, 862 F.3d 1370, 1378 (Fed. Cir. 2017) (same) (citation omitted).

Because of the Lease, which was executed *before* the Letter of Transfer, Cully has *never* held the right to possess and use the buildings. *See Loretto*, 458 U.S. at 435; *see also Caldwell*, 391 at 1235. Those rights, instead, lawfully rest with the Borough, and do so for 25 years, pursuant to the Lease. A44, A47 (*AECOM* Decision at 4, 7). Indeed, as to the buildings, lawfully, it is Cully that is the "*stranger*." *See Loretto*, 458 U.S. at 435.

In its response, Cully argues that "the right to exclude is not the only stick in the bundle" and Cully alludes vaguely to the "entire bundle," *see* Pl. Resp. at 14, but Cully never answers the critical question: with the right of exclusive possession and legal control of the buildings conveyed to the Borough for 25 years until October 31, 2029 under the Lease, *see* A4 (Lease ¶ 1), A47 (*AECOM* Decision at 7), just which "stick" in the "bundle" of property rights is left for Cully to assert a takings claim? Cully does not answer (nor can it), and fails to meet its burden of identifying a specific property interest that was taken. *See Est. of Hage*, 687 F.3d 1291.

As a matter of law, pursuant to the Lease, the North Slope Borough, not Cully, holds the cognizable property interests in the buildings, which defeats Cully's ability to bring a takings action. *See Am. Pelagic Fishing*, 379 F.3d at 1372-1373.

B. <u>Any Claim For A Future Taking Is Not Ripe</u>

In our opening brief, we demonstrated that, "the Alaska Superior Court's statement that "the Letter of Transfer, at most, conveyed a reversionary interest to Cully that is subject to the Lease," *see* A45 (*AECOM* Decision at 5), simply means that a *future taking* that might occur *after* the Lease expires -- over seven years from now in 2029, is not a matter that is ripe for

judicial review. *See* Def. Br. at 18 (citing *Santa Fe All. for Pub. Health & Safety v. City of Santa Fe, New Mexico*, 993 F.3d 802, 814 (10th Cir. 2021) and *West Linn Corp. Park LLC v. City of West Linn*, 534 F.3d 1091, 1100 (9th Cir. 2008)).

In response to our demonstration, Cully first argues that it "hold[s] the reversionary interest," and suggests that it is "entitled to compensation for its reversionary interest in a present leasehold," *see* Pl. Resp. at 12, citing *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 303-304 (1976) for that purpose. Cully's argument lacks merit and its reliance upon *Alamo Land & Cattle* is misplaced.

Alamo Land & Cattle establishes that a leasehold interest is a property right that can be subject to a takings claim. *Alamo Land & Cattle*, 424 U.S. at 303 ("It has long been established that the holder of an unexpired leasehold interest in land is entitled, under the Fifth Amendment, to just compensation for the value of that interest when it is taken upon condemnation by the United States"). In the case, a private ranching operation held grazing land in leasehold, the State of Arizona held the land in trust as lessor, the property was subject to a Federal condemnation action. *See Alamo Land & Cattle*, 424 U.S. at 296-300.

In a fairly complex decision, the Supreme Court addressed the rights of compensation by the rancher (the lessee) and Arizona (the lessor), as between them, under the New Mexico-Arizona Enabling Act, 36 Stat. 572 (1910) (Enabling Act). *See Alamo Land & Cattle*, 424 U.S. at 303-304. Unlike that case, Cully does not hold a "leashold interest," it is not a lessee nor a lessor, nor is there a statute, such as the Enabling Act, defining the compensation rights of the parties. *Alamo Land & Cattle* is simply not relevant to the instant case.

Next, Cully addresses our citation to *Santa Fe Alliance* and *West Linn Corp. Park*, *see* Pl. Resp. at 23 (citing Def. Br. at 18) (citing *Santa Fe Alliance*, 993 F.3d at 814, *West Linn Corp.*

Park, 534 F.3d at 1091)), and contends that the Government admits that "Cully holds the reversionary interests to the buildings." *See* Pl. Resp. 23 (citation omitted). The Government admits no such thing. As we pointed out in our opening brief, it is the Alaska Superior Court that stated, "the Letter of Transfer, *at most*, conveyed a reversionary interest to Cully that is subject to the Lease." *See* Def. Br. at 18 (citing A45 (*AECOM* Decision at 5) (emphasis added). We argued that this "simply means that a *future taking* that might occur *after* the Lease expires -- over seven years from now in 2029, is not a matter that is ripe for judicial review." Def. Br. at 18.

Our point in referencing the Alaska Superior Court's statement is to demonstrate that the possible "reversionary interest" mentioned by the *AECOM* Court is not a cognizable property interest that would give rise to a takings claim in March of 2013, as alleged by Cully. Rather, it is, at most, a statement of a possible *future interest* – and one that certainly has not been taken in any way. Indeed, the Alaska Superior Court's Reconsideration Decision reiterates this understanding. *See* Def. Ex. A (Reconsideration Decision at 5) ("The most the Air Force could convey to Cully through the Letter of Transfer was all of the Air Force's *future interests* in the Hangar") (emphasis added).

A "future interest," *i.e.*, a right to possess, control, and use the buildings in the *future* after the Lease expires, does not give rise to a takings claim in the present. That is so because, as we have demonstrated, "'[w]here there has been a physical invasion, the taking occurs at once.'" *See West Linn Corp. Park*, 534 F.3d at 1100 (quoting *Daniel v. Cnty. of Santa Barbara*, 288 F.3d 375, 382 (9th Cir. 2002)); *see also Pascoag Reservoir & Dam, LLC v. Rhode Island*, 337 F.3d 87, 91 (1st Cir. 2003) (same); *Casitas Mun. Water Dist. v. United States,* 543 F.3d 1276, 1292 (Fed. Cir. 2008) ("in the physical taking jurisprudence any impairment is sufficient").

In the context of a physical taking, courts are loathe to recognize a "future taking" as an actionable claim. The United States Court of Appeals for the 10th Circuit's decision in *Santa Fe All.* supports this understanding. In that case, an organization of home and business owners in Santa Fe, New Mexico, challenged the placement of cell towers and antennas in public rights-of-way upon grounds that the placement effected "a taking of the members' homes and businesses." *See Santa Fe All.*, 993 F.3d at 814 (the plaintiffs alleged that they "are already refugees from cell towers and antennas and have already lost previous homes and businesses due their proximity"). The plaintiffs, however, also challenged "the installation of *new* telecommunications facilities." *See id*. at 807 (emphasis added). The 10th Circuit rejected such a claim:

> [t]o the extent the Alliance seeks redress for alleged *future* losses of homes and business, the taking had not occurred at the time the Alliance filed its amended complaint. . . even if the placement of telecommunications facilities on public rights-of-way could constitute a taking of adjoining private property, no just compensation was due to any particular individual for a yet-to occur- taking.

See id. at 814 (emphasis in original). Likewise, Cully cannot bring an action for a "yet-to-occur taking."

This is not to say that Cully can actually bring a takings claim in the future. In its well-reasoned decisions, the Alaska Superior Court stated that the Letter of Transfer, "at most," conveyed a "reversionary interest" or a "future interest" to Cully, *see*, respectively, A45 (*AECOM* Decision at 5), Def. Ex. A (Reconsideration Decision ¶ 17), but the State Court did not expand upon or explain these statements.

First, it is not clear how a "reversionary interest," A45 (*AECOM* Decision at 5), would actually "revert" to Cully. It would certainly not do so via the Lease, because Cully is not a party to the Lease. Under the Lease, upon its expiration on October 31, 2029, the Borough is

obligated to vacate and "surrender the premises to the Lessor," *i.e.*, to the Air Force. A4, A9 (Lease ¶¶ 1, 9). Upon this eventuality, the rights that the Borough enjoyed under the Lease as Lessee, "revert to the lessor," (*see Prudential*, 801 F.2d at 1299), that is to the Air Force (Lessor), when the Lease expires. Under the Lease, therefore, pursuant to longstanding principles of landlord-tenant law, it is the Air Force that holds the reversionary interest. *See id*.

Moreover, the Lease *may* expire, but it may not. The Borough, the local Government body in Point Lay (that operates the airport there on behalf of the Air Force, pursuant to the Lease) and the Air Force, may decide in the next seven years to *renew the Lease* or *extend the Lease term*, perhaps for another 25 years. It is a commonplace that leasing parties extend and renew such agreements all the time, as anyone who has ever leased an apartment well knows. The Air Force and the Borough are entirely free to do so under the Lease. *See* A20 (Lease ¶ 26) ("This Lease may be amended at any time by mutual agreement of the Parties in writing and signed by a duly authorized representative of each party").

The Federal Circuit has held that the "ripeness doctrine is designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *See Martin v. United States*, 894 F.3d 1356, 1362 (Fed. Cir. 2018) (citations omitted). Under that doctrine, "[a] claim for relief is not ripe for judicial review when it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Id*. (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-581 (1985)).

Under these circumstances, a "yet-to-occur" takings claim based upon a possible "reversionary interest" to Cully, years in the future, that may not even occur, is not a matter that is ripe for judicial review. *See Martin*, 894 F.3d at 1362.

III. The Court Lacks Jurisdiction Over Cully's Implied-In-Law Contract Claims

In our response brief, we demonstrated that the Court lacks jurisdiction to entertain Cully's claims to the land, at present or in the future, at the Point Lay Long Range Radar site (LRRS) upon which the buildings sit, and beyond, as Cully has asserted in its opening brief. *See* Def. Resp. at 10-12 (citations to Cully's brief omitted). These statements and claims appear to be an implied-in-law contract claim to the land. But this Court lacks jurisdiction to entertain implied-in-law contract claims. *See Hercules, Inc. v. United States*, 516 U.S. 417, 423 (1996) (the Court's jurisdiction under the Tucker Act, 28 U.S.C. § 1491 (a), "extends only to contracts either express or implied in fact, and not to claims or contract implied in law").

In its response, Cully simply repeats assertions that it "owns" the land but, even if true (which it is not), that does not change the fact that this Court lacks jurisdiction over implied-in-law contract claims.

IV. Cully's Takings Claim Is Time-Barred

In our opening brief, we demonstrated that Cully's takings claim is time-barred by the applicable statute of limitations, 28 U.S.C. § 2501, because it accrued no later than January 24, 2013, over six years before Cully filed its lawsuit on March 5, 2019. *See* Def. Br. at 20-23.

By late 2012, Cully knew the Air Force had a contract with AECOM to perform remediation work at that time because AECOM hired Beluga Construction, a wholly owned subsidiary of Cully, to serve as a subcontractor on the Air Force-AECOM contract. A51-52 (Awalin Depo), A67 (Awalin Depo II). In October 2012, Air Force employee Vikki Gilmore notified AECOM that it had permission from the NSB to store heavy equipment and hazardous waste in the hanger. A73-74, A75-78 (Gilmore Depo, excerpt), A42 (*AECOM* Decision at 2), A65 (Jan. 22, 2013 email). Cully learned that AECOM was storing its heavy equipment in the

hanger in late 2012, when Martha Awalin, Cully's President, saw the equipment being stored there. A53 (Awalin Depo), A67 (Awalin Depo II).

Cully knew at that time, and certainly by January 2013, that the NSB and the Air Force had given AECOM permission to store its equipment in the hanger and was actually doing so. A48 (Jan. 24, 2013 Letter), A42 (*AECOM* Decision at 2). On January 24, 2013, Cully, through counsel, sent a demand letter to AECOM, noting these facts, asserting ownership of the facilities, and demanding that AECOM pay rent to Cully, which AECOM refused. A48 (Jan. 24, 2013 Letter), A42 (*AECOM* Decision at 2).

Consequently, Cully's taking's claim accrued no later than January 24, 2013, when Cully learned that AECOM, the Air Force's contractor and agent, by permission, was storing its heavy equipment in the hanger that Cully claimed to own. A48 (Jan. 24, 2013 Letter), A42 (*AECOM* Decision at 2), A67 (Awalin Depo II at 7). *See A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1154 (Fed. Cir. 2014). Cully filed its lawsuit against the Air Force on March 5, 2019. Cully missed the statutory deadline by six weeks.

First, Cully's assertion that the Government's motion is frivolous (*see* Pl. Resp. at 27) lacks merit. Whether a lawsuit is time-barred is a fundamental question that goes to the Court's jurisdiction, and subject matter jurisdiction may be raised at any time. *See Rick's Mushroom Serv., Inc. v. United States*, 521 F.3d 1338, 1246 (Fed. Cir. 2008).

Next, Cully argues that our motion is barred by the "law of the case" doctrine, *see* Pl. Resp. at 27. Cully is mistaken. The law of the case doctrine "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." *Arizona v. California*, 460 U.S. 605, 618 (1983), supplemented by 466 U.S. 144 (1984). It is axiomatic, however, that "[a]n initial denial of a motion to dismiss does not

foreclose, as the law of the case, the court's later consideration of those claims on summary judgment." *Athey v. United States*, 123 Fed. Cl. 42, 50 (2015) (citing *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996), and *Gould, Inc. v. United States*, 66 Fed. Cl. 253, 266 (2005) ("The 'law of the case,' therefore, is that these allegations survive a motion to dismiss for failure to state a claim upon which relief can be granted. Whether the merits of those very same claims survive summary judgment is an entirely different and undecided matter.")). Thus, "[t]he law of the case does not apply because a motion to dismiss and a motion for summary judgment require consideration of different 'legally relevant factors.'" *Id.* (citing *Behrens*, 516 U.S. at 309).

Furthermore, there are important distinctions between our motion to dismiss and the motion for summary judgment. In our earlier motion, we cited Cully's allegations in its second amended complaint as the factual basis of our motion, and which the Court must accept as true. *See* ECF No. 45 at 5 ("the Court must accept a plaintiff's 'well-pleaded factual allegations as true and draw all reasonable inferences' in its favor" (quoting *Boyle v. United States*, 200 F.3d 1369, 1372 (Fed. Cir. 2000)), *see* ECF No. 45 (citing 2nd Am. Compl. ¶¶ 33, 34). Based upon Cully's allegations, the Court held that "the mere averment that Cully was aware that an Air Force employee, whose position is not clear from the record, told AECOM they could access the facilities is not enough to prove the earlier accrual of that claim as posited by the United States." *See* ECF No. 59 at 5.

If, however, a motion denies or controverts the plaintiff's allegations of jurisdiction, however, the movant is deemed to be challenging the factual basis for the court's subject matter jurisdiction. In such a case, the allegations in the complaint are not controlling, and the Court may consider evidence outside the pleadings to establish predicate jurisdictional facts. *See Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583-1584 (Fed. Cir. 1993) (citations

omitted); *see also Indium Corp. v. Semi-Alloys, Inc.*, 781 F.2d 879, 884 (Fed. Cir. 1985) (same).

Our motion now asserts a different factual basis, one not grounded upon the allegations in the complaint, but upon admissions made by Cully, particularly its President, Ms. Awalin, in her deposition, statements by Air Force employee Vikki Gilmore in her deposition, and Cully's actual, January 24, 2013 demand letter to AECOM. A48 (Jan. 24, 2013 Letter), A42 (*AECOM* Decision at 2), A67 (Awalin Depo II at 7), A73-74, A75-78 (Gilmore Depo, excerpt).

Our challenge is factually straightforward, and is not based upon any "communication," but rather, is based upon the fact that AECOM, the Air Force's contractor, by permission, stored its heavy equipment in the hanger that Cully claimed to own. Ms. Awalin admitted she was fully aware of this as early as 2012 when she saw AECOM's equipment in the hanger. A67 (Awalin Depo II at 7). On January 24, 2013, Cully sent a demand letter to AECOM, with a copy furnished to Air Force employee, Ms. Gilmore, fully demonstrating that Cully was aware of the Air Force's involvement. A48.

Contrary to Cully's assertion, the holding of *A & D Auto Sales*, that a taking may be effectuated by a third party is not mere "dicta." *See* Pl. Resp. at 27. The Federal Circuit has oft repeated that "actions of a third party that harm a plaintiff's private property rights can be attributed to the United States, 'if the third party [was] acting as the government's agent.'" *See Welty*, 926 F.3d at 1324 (quoting *A & D Auto Sales*, 748 F.3d at 1154). AECOM was the Government's "agent," in this instance, because it was "hired" by the Air Force. *See Welty v. United States*, 926 F.3d 1319, 1324 (Fed. Cir. 2019) ("'[a]n agency relationship may exist where [a] third party is hired or granted legal authority to carry out the government's business'") (quoting *A & D Auto Sales*, 748 F.3d at 1154)). Indeed, Cully was well aware that AECOM was acting as the Air Force's agent.

A claim "accrues as soon as all events have occurred that are necessary to enable the plaintiff to bring suit, *i.e.,* when 'all events have occurred to fix the Government's alleged liability.'" *Martinez v. United States*, 333 F.3d 1295, 1303 (Fed. Cir. 2003) (*en banc*) (quoting *Nager Elec. Co. v. United States*, 368 F.2d 847, 851 (Ct. Cl. 1966).

Contrary to Cully's assertion, a physical takings claim does not occur when the taking is "final." *See* Pl. Resp. at 9 (citations omitted). That is the standard for a regulatory taking. *See Petro-Hunt*, 862 F.3d at 1380 ("a party who has suffered a regulatory taking is allowed to wait to file suit until the process that began the taking has ceased"). It is not the standard for a physical taking, which, as we have demonstrated, accrues upon the invasion or occupation of the property. *See West Linn Corp. Park*, 534 F.3d at 1100 ("'[w]here there has been a physical invasion, the taking occurs at once'") (citation omitted). That physical invasion of Cully's purported property by AECOM, the Air Force's agent, occurred in 2012. Indeed, Cully did not hesitate to timely file a lawsuit against AECOM for that alleged trespass. A41 (*AECOM* Decision). It could have done so against the Air Force, AECOM's employer, but did not. Cully's takings lawsuit is time-barred.

CONCLUSION

For the reasons set forth above and in our opening and response briefs, we respectfully request that the Court grant the Government's motion for summary judgment and deny plaintiff's motion for partial summary judgment.

Respectfully submitted,

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February 24, 2022

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CERTIFICATE OF FILING

I hereby certify that on the 24th day of February, 2022, a copy of the foregoing "DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S CROSS MOTION FOR 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/Joseph A. Pixley