No. 22-2031

In the United States Court of Appeals for the Federal Circuit

HOLLY BERRY,
Plaintiff – Appellant,

v.

UNITED STATES OF AMERICA,
Defendant – Appellee

On Appeal from the United States District Court of Federal Claims
Case No. 21-01017, Judge Kathryn C. Davis

OPENING BRIEF OF PLAINTIFF-APPELLANT

Donald A. Lepp
DRUMMOND LAW, PLLC
1500 South Utica Avenue, Suite 400
Tulsa, Oklahoma 74104-6522
Telephone: (918) 749-7378
Facsimile: (918) 749-7869
Attorney for Plaintiff-Appellant

September 16, 2022

CERTIFICATE OF INTEREST

As required by Federal Circuit Rule 47.4, I certify the following:

1. The full names of all parties represented by me are Holly Berry

2. The names of the real parties in interest, if different from the parties named above, are:

3. There are no parent corporations or publicly held companies that own 10% or more of the stock of any party represented by me.

4. The names of all law firms and the partners and associates that appeared for the plaintiffs-appellants in the trial court or are expected to appear in this court are:

Donald A. Lepp
DRUMMOND LAW, PLLC
1500 South Utica Avenue, Suite 400
Tulsa, Oklahoma 74104-6522
Telephone: (918) 749-7378
Facsimile: (918) 749-7869
Attorney for Plaintiff-Appellant

Dated: September 16, 2022

s/ Donald Lepp
Donald A. Lepp, OBA #16260
DRUMMOND LAW, PLLC
1500 South Utica Avenue, Suite 400
Tulsa, Oklahoma 74104-6522
Telephone: (918) 749-7378
Facsimile: (918) 749-7869
Attorney for Plaintiff-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

U.S. Constitution

Statutes

Rules

Legislative materials

None.

Other authorities

None.

STATEMENT OF RELATED CASES

There are no prior or related appeals.

INTRODUCTION

Appellant Holly Berry (hereinafter "Berry") owns real property located in Tahlequah, Oklahoma, which is within the boundaries of the Cherokee Nation (hereinafter "Cherokee Nation" or "Nation"). Appx18. This matter arises out of the approval by the United States of America (hereinafter "United States" or "government") of a request by the Cherokee Nation for the United States to take into trust certain real property located adjacent to Berry's property. Appx19. The Cherokee Nation's request was for the purpose of allowing the Nation to construct a gaming facility on the land. Appx19.

After construction of the gaming facility by the Cherokee Nation, Berry's land suffered flooding problems that rendered portions of her property unusable. Appx20. As a result, Berry filed suit in the Federal Court of Federal Claims against the United States seeking compensation for a taking under the Fifth Amendment of the United States Constitution. Appx5.

The United States moved to dismiss the lawsuit pursuant to Fed. R. Civ. P. 12(b)(6). Appx2. After briefing and oral argument, the Court of Federal Claims granted the Motion to Dismiss. Appx79-90. In its Opinion and Order, the Court of Federal Claims found that Berry's takings claim was not viable because it was the action of the Cherokee Nation, not the United States, that caused the flooding. Appx83-86. The court further ruled that the United States did not have "an

enhanced trust duty" toward the Cherokee Nation which would render the United States responsible for the taking caused by the flooding. Appx86-87. Berry timely filed her appeal with this Court. Appx92.

This case raises important questions regarding the United States' obligations to private citizens harmed by a tribe's activities where those activities were authorized by the United States in furtherance of its goal to facilitate the tribe's independence. As a backdrop, because of the sovereign status of Indian tribes, a private citizen rarely has a forum to seek redress against an Indian tribe for harms caused by the tribe. Thus, the specific issue to be resolved in this case is whether the Takings Clause of the Fifth Amendment provides for compensation in an inverse condemnation case where an Indian tribe made improvements to land owned by United States pursuant to an approval to do so by the United States, whereupon those improvements created a flowage easement upon the claimant's property.

Based upon the unique set of facts in this case, this Court should reverse the dismissal of Berry's claim by the Court of Federal Claims and remand for further proceedings.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

STATEMENT OF THE ISSUES

1. Whether the Court of Federal Claims erred in granting the United States' motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted.

2. Whether the Court erred in determining that Berry's claim was based upon the inaction of the United States.

3. Whether the Unites States' approval of the request by the Cherokee Nation to take the land into trust to allow development of a casino on property adjacent to the Berry's land is sufficient direct action to allow a takings claim.

4. Whether the Court of Federal Claims erred by holding that Berry's only recourse was to challenge agency action under the Administrative Procedures Act.

STATEMENT OF THE CASE AND FACTS

A. FACTUAL BACKGROUND

Berry owns real property in Tahlequah, Cherokee County, Oklahoma, which is within the boundaries of the Cherokee Nation. Appx18. The United States, utilizing its statutory authority under 25 U.S.C. § 5108 (the "Indian Reorganization Act" or "IRA"), took real property adjacent to Berry's property into trust for the Cherokee Nation. Appx19. The Nation proposed to build a gaming facility, on the property taken into trust, in which to conduct class II and class III gaming.

Appx19. Prior to conducting class II gaming, federally recognized Native American tribes must submit any and all proposed tribal gaming ordinances or resolutions to the Chairman of the National Indian Gaming Commission. Appx19.

On January 19, 2017, the United States issued a letter to the Cherokee Nation approving the taking of the land into trust, and subsequently approved the development of the land. Appx20. In the Environmental Assessment prepared in connection with the approval, it was determined that, "[a]cquisition of the [site] would result in changes to the existing topography . . . [and] would create a greater area of impervious surfaces than currently exists on the project site, potentially increasing surface flow rates." Appx20.

The subsequent development of the property significantly altered both the elevation and existing drainage patterns of the property. Appx20. The development also substantially increased the impervious surfaces of the Nation's property, which is adjacent to Berry's and other properties. Appx20. Due to the altered drainage patterns, the increase in impervious surfaces, and the failure to properly design and construct water runoff measures, Appx20. Berry's real property has suffered severe flooding, erosion, and impoundment of water. Appx22. Specifically, the construction of the casino has substantially interfered with Berry's use of her property by flooding several acres continuously and diminishing the usability and value of the property, as well as adversely impacting

her remaining real property. Appx22.

B. PROCEDURAL BACKGROUND

On March 2, 2021, Berry filed her Complaint in the Court of Federal Claims against the United States. Appx5. On June 2, 2021, the United States filed its Motion To Dismiss pursuant to Rules 12 (b)(1) and (6). Appx.2. In response, Berry's Amended Complaint against United States was filed on June 21, 2021. Appx.2. The United States filed its Motion to Dismiss the Amended Complaint on July 22, 2021. Appx2. On March 4, 2022, oral argument was heard before Judge Kathryn C. Davis. Appx47.

On May 18, 2022, the Court of Federal Claims entered its Opinion and Order granting the United States' Motion to Dismiss pursuant to Rule 12 (b)(6). Appx79. At the same time, the Court's Judgment was entered, pursuant to Fed. R. Civ. P. Rule 58, providing that the Amended Complaint was dismissed with prejudice for failure to state a claim. Appx91.

Berry filed her Notice of Appeal with this Court on July 18, 2022. Appx92.

SUMMARY OF ARGUMENT

As will be shown below, the Court of Federal Claims' dismissal of Berry's lawsuit was in error. It was the government's affirmative act in approving the taking of land into trust for the purpose of construction of a gaming facility which set into motion the events which led to the flooding of Berry's land. Under these

particular circumstances, a taking by the United States has occurred. Further, the Court of Federal Claims' description of the United States' duty to the Nation and to Berry is mischaracterized. While the general duty the government owes to the Cherokee Nation has been described as limited, the specific duty under these circumstances is much broader. Specifically, here, the United States actually owns the land upon which the improvements were made which caused the harm to Berry. Moreover, as noted above, the improvements were made with the approval of the United States in furtherance of its duties to the Cherokee Nation.

As will be shown below, the cases cited by the Court of Federal Claims in support of its ruling that Berry's claim is based upon the inaction of the United States are easily distinguishable. Those cases involve actions by private citizens or wild animals over which the United States has no control. Here, the United States owns the land and controls what happens on its land. This gaming facility and the ultimate flooding on Berry's land is a direct result of the United States' approvals. As such, Berry has pleaded a viable takings claim that should not be dismissed at the pleading stage.

STANDARD OF REVIEW

A decision on a motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted is an issue of law reviewed *de novo*. *Boaz Hous. Auth. v. United States*, 994 F.3d 1359, 1364 (Fed. Cir. 2021);

Bristol-Myers Squibb Co. v. Royce Labs., Inc., 69 F.3d 1130, 1134, (Fed. Cir. 1995).

ARGUMENT AND AUTHORITIES IN SUPPORT OF THIS APPEAL

I. BERRY HAS ALLEGED A VIABLE TAKINGS CLAIMS.

The Takings Clause of the Fifth Amendment states that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. "[M]ost takings claims turn on situation-specific factual inquiries." *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 31, 133 S. Ct. 511, 184 L.Ed.2d 417 (2012). Flooding cases, like this one, "should be assessed with reference to the 'particular circumstances of each case' and not by resorting to blanket exclusionary rules." *Id.* at 37 (quoting *United States v. Central Eureka Mining Co*., 357 U.S. 155, 168 (1959)).

To establish a viable takings claim in this matter, Berry must show: (1), she has a property interest for purposes of the Fifth Amendment, *In Re: Upstream Addicks and Barker (Texas) Flood-Control Reservoirs*, 138 Fed. Cl. 658, 664 (2018) (citing *Members of the Peanut Quota Holders Ass'n v. United States*, 421 F.3d 1323, 1330 (Fed. Cir. 2005)), and (2) the government's actions amount to a compensable taking of that property interest. *Id.* at 665 (citing *American Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1372 (Fed. Cir. 2004)).

Here, Berry has met the first element by alleging ownership in the affected property. Appx18. However, with respect to the second element, the inquiry is more involved as the United States Supreme Court has identified at least five relevant factors a court should consider. *Arkansas Game*, 568 U.S. at 38-39. Those relevant factors include (1) time; (2) causation; (3) intent or foreseeability; (4) the owner's "reasonable investment backed expectations" regarding the land's use, and (5) the "[s]everity of the interference." *Id.* at 38–39. Here, the Court of Federal Claims did not address any of these factors. Instead, the Court of Federal Claims focused on whether the taking in this case was due to government action or inaction.

A. The Approvals by the United States Constitute Direct Action Sufficient for a Takings Claim.

In its Opinion and Order, the Court of Federal Claims stated that a viable takings claim usually "must be predicated on actions undertaken by the United States," not third parties such as a tribe, a foreign sovereign, or a local government. Appx83. The Court of Federal Claims noted that "Plaintiff's characterization of [the United States'] acts as the 'proximate cause' of her injuries, in the absence of any direct governmental action or an agency-coercion theory, further shows that [the United States'] involvement is simply too attenuated to support a takings claim." Appx86.

So, effectively, the Court of Federal Claims determined that because it was not the government's shovel moving the dirt on the site to build the casino then it was not responsible for the taking. However, this view is too restrictive and ignores the totality of circumstances surrounding this particular situation. Specifically, the United States is the holder of legal title to the property at issue, and it was the United States that granted the approval of the construction that caused the harm.

In order to recognize the flaw in the lower court's reasoning, it is instructive to review the cases cited by the Court of Federal Claims to support its position. For the proposition that a takings claim usually "must be predicated on actions undertaken by the United States," not third parties, the Court of Federal Claims cites to three cases: *Navajo Nation v. United States*, 631 F.3d 1268, 1274 (Fed. Cir. 2011); *All. of Descendants of Tex. Land Grants v. United States*, 37 F.3d 1478, 1482 (Fed. Cir. 1994); and *Griggs v. Allegheny Cnty.*, 369 U.S. 84, 89–90 (1962). Appx83-84. However, none of those cases are similar to this case.

In *Navajo Nation v. United States*, 631 F.3d 1268 (Fed. Cir. 2011), the Navajo Nation alleged a taking based upon the government's imposition of a development moratorium on land the Navajo jointly owned with the Hopi Tribe. *Id*. at 1272. In 1980, the government imposed a requirement that any development by one tribe would require the consent of the other. *Id*. at 1271. The Navajo

contended that it was subject to a taking when the Hopi Tribe refused permission to the Navajo to engage in any development. *Id*. at 1273. The *Navajo Nation* court noted that a takings claim must be predicated on action undertaken by the United States, not the Hopi Tribe. *Id.* at 1274. However, this statement was dicta. The actual holding was that the running of the statute of limitation barred the Navajo Nation's claim. The court found that the statute of limitations began to run in 1980 when the government enacted the law that precluded development without the other tribe's consent. *Id*. at 1277. Accordingly, it was not the Hopi's decision to withhold consent that the court found to be the source of the harm, but the *enactment* of the statute. In the case at bar, it was the United States' approval that ultimately led to the flooding, much like the enactment of the statute in *Navajo Nation*.

All. of Descendants of Tex. Land Grants v. United States, 37 F.3d 1478 (Fed. Cir. 1994) is also a statute of limitations case. In that case, heirs and descendants of Mexican nationals who received land grants in what would later become Texas alleged a taking when Texas joined the United States. *Id*. at 1480. The court found that the statute of limitations began to run in 1941 when a treaty released the United States from all liability for the Texas land grant from Mexican citizens. *Id*. at 1482. Thus, similar to the statute in *Navajo Nation*, it was the

enactment of a treaty that gave rise to the claim, much like the approvals in this case.

In *Griggs v. Allegheny Cnty*., 369 U.S. 84, 82 S.Ct. 531, 7 L.Ed.2d 585 (1962), the issue was whether an air easement granted by Alleghany County, Pennsylvania, to an airport constituted a taking. The county argued that it was not the actual taker of the air easement because it was the United States who had defined navigable airspace through its regulations. The Supreme Court rejected this argument because the county was the promotor, owner and lessor of the airport and that the airport could not function without airspace. *Id*. at 89-90. This case is clearly dissimilar to the case at bar where the court specifically found that the county was wholly responsible.

In summary, these cases cited by the Court of Federal Claims do not support its decision. Indeed, *Navajo Nation* and *All. of Descendants of Tex. Land Grants* actually support Berry's position by finding that the taking was the enactment of the laws that set matters in motion. Here, it was the approval of the building of the casino that put matters in motion which ultimately led to the flooding on Berry's property.

B. Coercive Action is Not Necessary in This Matter.

Next, the Court of Federal Claims reasoned that courts have only recognized third-party takings where the United States induces a third-party to act by coercive

action, citing *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142 (Fed. Cir. 2014). Appx83-84. However, that case is inapposite. *A & D Auto Sales* involved two takings lawsuits by former dealers of General Motors and Chrysler relating to their 2009 bankruptcies. The former dealers alleged that the termination of their franchises through the bankruptcies was induced by the government because it required bankruptcy as a condition of financial assistance. The court noted that it was a fact-based determination whether government would be liable under these circumstances. *Id*. at 1153. First, it noted that the government action would not be a taking if the effects of the action directed toward a third party was merely unintended or collateral. *Id*. Second, where the acts were direct and intended the government would only be liable where the third party is acting as an agent or the government's influence over the third party was coercive. *Id*. at 1155. However, notably, this case was limited to adverse financial effects of governmental action, such as those involving financial assistance. Thus, this case has no relevance to the case at bar.

C. The Relevant Acts in this Case are the Approvals Not Failure to Take Action.

At oral argument in this case, the United States argued, and the Court of Federal Claims agreed, that the relevant act in this matter was the government's inaction or "failure to prevent actions by the nation (an independent third party) that caused [Berry's] injuries." Appx84. To support this view, the Court of

Federal Claims stated that the approvals to take the land into trust and allow construction of the casino are not "direct governmental action effecting a taking, but rather agency decision-making that *permitted* the Nation's actions." Appx85. (emphasis in original). The Court of Federal Claims' analysis is wrong. The direct action in this case was not a "failure to prevent" but, instead, it was the affirmative act of approving the development of the Cherokee Nation's land.

The Court of Federal Claims cites to four cases to support its analysis, but each of the cases is distinguishable. In *Alves v. United States*, 133 F.3d 1454 (Fed. Cir. 1998), the plaintiff owned a ranch in Nevada and possessed grazing permits for nearby public lands. *Id*. at 1455. Since 1973, livestock from a neighboring ranch trespassed on plaintiff's ranch and public lands within the ranch. *Id*. The Bureau of Land Management ("BLM") obtained an injunction against the neighboring landowner to prevent the trespass, but the government was only partially successful in enforcing the injunction, which resulted in damage to the plaintiff's ranch by the trespassing livestock. *Id*. The plaintiff alleged a taking based upon the BLM's failure to prevent the trespassing. *Id*. at 1455-56. The Court of Federal Claims rejected the claim because it was based upon inaction, i.e., the failure to prevent the trespass. *Id*. at 1457-58. According to the court, the fact that the BLM may have had regulatory control over the livestock does not change the fact that the livestock are properly controlled in the first instance by the

neighboring landowner, and that Alves' complaint is with the neighboring landowner, not the government. *Id*. at 1458.

In *L & W Constr. LLC v. United States*, 148 Fed. Cl. 417 (2020), property owners alleged a takings claim based upon the government's decision to grant permits to hunt bison in Yellowstone National Park. *Id*. at 421. The plaintiffs alleged that the hunting program had caused a temporary regulatory taking of plaintiffs' property by creating an atmosphere of danger and decreasing the rental value of their property. *Id*. Plaintiffs also alleged that the hunting program had effected a temporary physical taking when carrion birds transport bison offal onto plaintiffs' property. *Id*. The court rejected the claim because the birds, as wild animals, act on their own impulse and not as instrumentalities of the United States. *Id*. at 424. Moreover, the court found that the claim was more akin to the tort of nuisance because they are alleging a reduction in value, not a direct physical impact. *Id*.

In *Bench Creek Ranch, LLC v. United States*, 149 Fed. Cl. 222 (2020) the plaintiffs were the owner of a ranch located in Nevada who filed an inverse condemnation lawsuit as a result of wild horses who were impacting their ranch by grazing and drinking water from the ranch. *Id*. at 224. The plaintiff alleged that the BLM's refusal to remove the wild horses or provide a water source for the horses amounted to a taking by the federal government. *Id*. at 224-25. The Court

of Federal Claims dismissed the plaintiff's takings claim because it was based upon a failure to act, which sounds in tort. *Id*. *at* 227.

In each of the above three cases, the harm was caused by animals, which is a fundamentally different scenario than here. In the case of trespassing livestock or birds carrying unwanted materials onto a ranch, the government did not want those things to happen. Here, the government did want (and it did approve) the development of the land that caused the flooding on Berry's property.

Finally, in *St. Bernard Par. Gov't v. United States*, 887 F.3d 1354 (Fed. Cir. 2018), the owners of real property in New Orleans alleged a taking based upon flood damage from Hurricane Katrina because the government had failed to properly maintain or modify the Mississippi River-Gulf Outlet channel. *Id*. at 1356. The court dismissed the claim because the plaintiffs complained of a failure to act, which sounds in tort, and not affirmative action. *Id*. at 1361. As such, the *St. Bernard Par. Gov't* case specifically involves a failure to act whereas in the case at bar, Berry complains of the affirmative act of the United States approving the development of land that caused the harm of which she complains.

D. This Is Not an APA Claim.

The Court of Federal Claims noted in its Opinion and Order that "[w]hat Plaintiff points to is not direct governmental action effecting a taking, but rather agency decision-making that permitted the Nation's actions." Appx85. According

to the lower court, the approvals by the United States in favor of the Cherokee Nation give rise to a challenge under the Administrative Procedures Act, not a takings claim. *Id*.[1]

However, this Court in *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358 (Fed. Cir. 1998), held that if the government appropriates property without paying just compensation, a plaintiff may sue in the Court of Federal Claims on a takings claim regardless of whether the government's conduct leading to the taking was wrongful, and regardless of whether the plaintiff could have challenged the government's conduct as wrongful in another forum. *Id*. at 1363. The *Del-Rio* court noted:

> It is true that in some circumstances it might be more efficient to cure legal defects in the contested governmental action rather than forcing the government to pay for appropriated property, but if the government has taken property and has done so in a legally improper manner, it has committed two violations of the property-owner's rights. The two separate wrongs give rise to two separate causes of action, and the property-owner may elect to sue for just compensation or to seek relief for the legal improprieties committed in the course of the taking.

Id. at 1363-64 (citations omitted).

Thus, even if Berry had been provided notice of the approvals to enable her to challenge the agency action, she has the right to seek compensation in the Court of Federal Claims for the taking.

[1] Notably, there is nothing in the record to suggest that Berry was ever provided notice of the approvals to enable her to challenge them.

E. The Unique Relationship Between United States and Cherokee Nation Should Not Be Ignored in this Case.

While the Court of Federal Claims' analysis did address the nature of the relationship between the United States and Indian tribes, it held that the "limited trust relationship between the United States and Indian Tribes" does not impose duties comparable to this applicable to private trustees unless existing substantive law imposes such duties over Indian affairs. Appx88. The substantive law that the Court of Federal Claims looked at was the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq*. The court indicated that IGRA does not impose such a duty because the government does not manage the day-to-day affairs over the Nation's gaming facility and that the stated policy of the IGRA is to promote self-sufficiency for Indian tribes. Appx89. However, again, the lower court's view is too restrictive by focusing on the casino operations and not focusing on the United States' role as the holder of title to the land and the fact that the injury was caused by the construction of the casino and not the day-to-day operations.

The relationship of the United States to Indians is "perhaps unlike that of any other two people in existence." *Cherokee Nation v. Georgia*, 30 U.S. 1, 10 (1831). In the treaty with the Cherokees of November 28, 1785, the United States agreed to "give peace to all the Cherokees, and receive them into the favour and protection of the United States." *Id*. at 22-23. Notably, in the Treaty (Article

XIII), the parties were referred to as "contracting parties." *Id*. at 46-47. Therefore, the relationship between the Cherokee Nation and the United States is more akin to a private trust relationship than the lower court held.

In light of this truly unique relationship between the Cherokee Nation and the United States, coupled with the fact that the United States holds title to the land that caused the harm in question, the necessary approval by the United States to allow development on this land takes on a more important role than considered by the Court of Federal Claims. While it would indeed be too attenuated to impose liability upon the United States for injuries suffered by private citizens during a visit to the Nation's gaming facility, the injury suffered here is far more direct. Here, the United States holds title to the land that is adjacent to Berry's land. The United States, as holder of the land in trust, approved the development of a gaming facility upon the land to which it owns title. Accordingly, the case at bar should not be viewed as a "third-party" case. In this case, the United States, in holding title to the land and approving the development, is inextricably intertwined within the process that led to the taking. As such, it should be responsible for the taking that resulted from its decisions.

F. NEPA Analysis Upon Which the Approvals was Based Constitutes "Major Federal Action" Upon Which a Taking Should be Based.

As part of the approval process, the United States must conduct environment analysis pursuant to the National Environmental Protection Act ("NEPA"), 42

U.S.C. §§ 4321–70, to ensure that the building of the gaming facility does not have a significant impact on the environment. Part of that analysis requires the United States to look at the potential impacts on flooding.

In the Environmental Assessment prepared in connection with the approval, it was determined that, "[a]cquisition of the [site] would result in changes to the existing topography . . . [and] would create a greater area of impervious surfaces than currently exists on the project site, potentially increasing surface flow rates." Appx20. The subsequent development of the property significantly altered both the elevation and existing drainage patterns of the property. Appx20. The development also substantially increased the impervious surfaces of the Nation's property, which is adjacent to Berry's and other properties. Appx20.

The Court of Federal Claims, in dismissing the approvals as sufficient government action, ignored the impact of the United States' finding of no significant impact on the environment after it conducted the environmental assessment. NEPA requires federal agencies to "take a hard look at environmental consequences" of a proposed project or action. *Kiewit Infrastructure W. Co. v. United States*, 972 F.3d 1322, 1330 (Fed. Cir. 2020) *(*quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)) "[A] non-federal project is considered a 'federal action' if it cannot begin or continue without prior approval by a federal agency and the agency possesses authority to exercise discretion over

the outcome." *Sugarloaf Citizens Ass'n v. Federal Energy Regulatory Comm'n,* 959 F.2d 508, 513–14 (4th Cir. 1992).

Here, the Court of Federal Claims did not take into consideration that under NEPA the approvals of taking the land into trust and approving the development was a "major federal action." As such, it is illogical that such a "major federal action" would not be deemed sufficient direct action to create a viable taking claim if the approved development resulted in harm to an adjacent landowner, such as Berry.

CONCLUSION AND RELIEF SOUGHT

Flooding cases, like this one, should be assessed with reference to the 'particular circumstances of each case' and not by resorting to blanket exclusionary rules." *Arkansas Game*, 568 U.S. at 37, 133 S. Ct. 511 (quoting *United States v. Central Eureka Mining Co*., 357 U.S. 155, 168, (1959)). By looking at the unique circumstances here, this Court should find Berry can make out a viable claim for a taking based upon the approval by the United States of the construction of a casino on property owned by the United States, as trustee on behalf of the Cherokee Nation, that caused the creation of a flowage easement on Berry's adjacent property.

For the foregoing reasons, Appellant Holly Berry respectfully requests that this Court reverse the decision by the Court of Federal Claims to dismiss her

Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6), and remand to the Court of Federal Claims for further proceedings.

Respectfully Submitted,

/s/ Donald Lepp

Donald A. Lepp, OBA #16260
DRUMMOND LAW, PLLC
1500 South Utica Avenue, Suite 400
Tulsa, Oklahoma 74104-6522
Telephone: (918) 749-7378
Facsimile: (918) 749-7869
Attorney for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 5702 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 365 in 14-pointTimes New Roman font.

/s/ Donald Lepp
Donald A. Lepp
Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Federal Circuit by using the CM/ECF system. All participants have consented to service by electronic mail:

William B. Lazarus

Thekla Hansen-Young

/s/ Donald Lepp
Donald A. Lepp

ADDENDUM

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

HOLLY BERRY, Plaintiff, v. THE UNITED STATES, Defendant.	)	No. 21-1017L Filed: May 18, 2022

OPINION AND ORDER

Plaintiff Holly Berry, a landowner in Oklahoma, brings this Fifth Amendment takings claim related to a gaming facility built by the Cherokee Nation ("Nation") on land held in trust by Defendant. This trust land is located next to Plaintiff's property, and, according to Plaintiff, its development caused repeated flooding, erosion, and impoundment of water on her land. Defendant moved to dismiss the Amended Complaint for failure to state a claim under Rule 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"). As explained below, because Plaintiff has failed to state a viable takings claim, Defendant's motion to dismiss is **GRANTED** and its previous motion to dismiss is **DENIED AS MOOT**.

I. BACKGROUND

Plaintiff owns land in Tahlequah, Oklahoma. Pl.'s Am. Compl. ¶¶ 7, 15, ECF No. 7; Ex. A to Pl.'s Am. Compl., ECF No. 7-1; Ex. B to Def.'s Mot. to Dismiss Pl.'s Am. Compl., ECF No. 9-2. Plaintiff alleges that Defendant, utilizing its statutory authority under 25 U.S.C. § 5108 (the Indian Reorganization Act or "IRA"), took land adjacent to Plaintiff's property ("the Site") into trust for the Nation, which had proposed to develop and operate a gaming facility. ECF No. 7 ¶ 8.

On January 19, 2017, Defendant issued a letter approving the Nation's application for Defendant to acquire the Site in trust. *Id.* ¶ 11; Ex. A to Def.'s Mot. to Dismiss Pl.'s Am. Compl., ECF No. 9-1. The letter explained that "[t]hrough the exercise of tribal governmental authority, the Site will be subject to the Nation's management, protection, and conservation after it is acquired in trust." ECF No. 9-1 at 4. The letter also referenced an Environmental Assessment ("EA") conducted as part of Defendant's evaluation of the Nation's application. The EA concluded that development would "result in changes to the existing topography" and "create a greater area of impervious surfaces than currently exists on the project site, potentially increasing surface flow rates," but that a grading plan and a stormwater prevention plan would minimize impacts to the topography and stormwater flow. *Id.* at 14. The letter further explained that a Finding of No Significant Impact ("FONSI") was appropriate, requiring no Environmental Impact Statement. *Id.* Defendant published notice of the land acquisition in the Federal Register on August 11, 2017. Ex. B to Pl.'s Am. Compl., ECF No. 7-2.

Plaintiff alleges that the Nation's subsequent development of the gaming facility "significantly altered both the elevation and existing drainage patterns" of the Site and "substantially increased [its] impervious surfaces." ECF No. 7 ¶ 12. According to Plaintiff, due to these changes and "the failure to properly design and construct water runoff measures, Plaintiff's real property has suffered repeated severe flooding, erosion, and impoundment of water." *Id.* ¶ 13. Plaintiff also alleges that the Nation, to divert its own water runoff, entered Plaintiff's land, removed vegetation and soil, and dug a drainage ditch—all without her permission. *Id.* ¶¶ 14, 21.

Plaintiff contends that Defendant's trust relationship with the Nation as to the Site imposes duties and obligations on Defendant as trustee. *Id.* ¶ 18. Because the Site is used by the Nation for gaming, she alleges that Defendant's duties are expanded consistent with its regulatory role

under the Indian Gaming Regulatory Act ("IGRA"), which (among other things) gives Defendant the authority to order the temporary closure of a gaming facility that "is constructed, maintained, or operated in a manner that threatens the environment or the public health and safety, in violation of a tribal ordinance or resolution approved by the [National Indian Gaming Commission ("NIGC")] Chair." *Id.* ¶ 19 (internal quotation marks omitted) (quoting 25 C.F.R. § 573.4(a)(12)). Plaintiff asserts that "increased flooding, caused by Defendant's action and inactions, constitutes a taking of a flowage easement and detention pond upon the Plaintiff's property pursuant to the [Fifth] Amendment of the U.S. Constitution." *Id.* ¶ 22. Plaintiff seeks "just compensation in an amount equal to the value of the real property taken." *Id.* ¶ 23.

Plaintiff filed her Complaint on March 2, 2021. Pl.'s Compl., ECF No. 1. After Defendant moved to dismiss under RCFC 12(b)(1) and 12(b)(6) on June 2, 2021, Plaintiff filed an Amended Complaint on June 21, 2021.[1] ECF No. 7. On July 22, 2021, Defendant moved to dismiss the Amended Complaint under RCFC 12(b)(6), arguing that Plaintiff failed to state a takings claim upon which relief may be granted. Def.'s Mot. to Dismiss Pl.'s Am. Compl., ECF No. 9. Defendant contends that all of the acts alleged to have caused flooding on Plaintiff's property were taken by the Nation—not the United States, which cannot be liable under a takings theory for an alleged failure to act. *Id.* at 6–7. The parties completed briefing on September 10, 2021, and the Court heard oral argument on March 4, 2022.

[1] When Plaintiff filed the Amended Complaint, it superseded the original complaint and became the controlling pleading. *See Smith v. United States*, 120 Fed. Cl. 455, 460 (2015). As a result, Defendant's Motion to Dismiss Plaintiff's Complaint, ECF No. 6, is moot. *Id.*

II. LEGAL STANDARDS

A. Jurisdiction of the Court of Federal Claims

The Court has jurisdiction under the Tucker Act to consider "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). This jurisdiction encompasses takings claims under the Fifth Amendment. *Hammitt v. United States*, 69 Fed. Cl. 165, 168 (2005) (citing *Murray v. United States*, 817 F.2d 1580, 1583 (Fed. Cir. 1987)), *aff'd*, 209 F. App'x 986 (Fed. Cir. 2006).

B. Standard of Review for Rule 12(b)(6) Motion

To avoid dismissal under Rule 12(b)(6), a complaint must "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see Steffen v. United States*, 995 F.3d 1377, 1379 (Fed. Cir. 2021). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). When reviewing a motion under RCFC 12(b)(6), the Court "assume[s] all well-pled factual allegations are true" and makes "all reasonable inferences in favor of the nonmovant." *United Pac. Ins. Co. v. United States*, 464 F.3d 1325, 1327–28 (Fed. Cir. 2006). However, the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Acceptance Ins. Co. v. United States*, 583 F.3d 849, 853 (Fed. Cir. 2009) (internal quotation marks omitted) (quoting *Twombly*, 550 U.S. at 555).

In deciding a motion under RCFC 12(b)(6), the Court may consider the complaint itself, "the written instruments attached to it as exhibits, 'documents incorporated into the complaint by

reference, and matters of which a court may take judicial notice.'" *Todd Constr., L.P. v. United States*, 94 Fed. Cl. 100, 114 (2010) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)), *aff'd*, 656 F.3d 1306 (Fed. Cir. 2011). This includes the contents of public documents and matters of public record. *Bristol Bay Area Health Corp. v. United States*, 110 Fed. Cl. 251, 262 (2013) (citing *Sebastian v. United States*, 185 F.3d 1368, 1374 (Fed. Cir. 1999)).

III. DISCUSSION

Plaintiff's Amended Complaint must be dismissed because it fails to plausibly allege a takings claim. As Defendant correctly argues, Plaintiff's allegations against the United States are founded on its alleged failure to prevent a third party (the Nation) from causing harm to Plaintiff's property, which is insufficient to constitute a taking. Nor does Plaintiff plead an actionable claim (either under a takings theory or otherwise) for Defendant's alleged breach of fiduciary duty.

A. Plaintiff Fails to Allege a Cognizable Taking.

"A taking occurs when governmental action deprives [an] owner of all or most of its property interest." *Nw. La. Fish & Game Pres. Comm'n v. United States*, 446 F.3d 1285, 1289 (Fed. Cir. 2006) (citing *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945)). This may include government projects that result in the flooding of an individual's land. *See id.* at 1289–90 (citing *Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. 166, 172 (1871)). Such a claim usually "must be predicated on actions undertaken by the United States," not third parties such as a tribe, a foreign sovereign, or a local government. *Navajo Nation v. United States*, 631 F.3d 1268, 1274 (Fed. Cir. 2011); *see All. of Descendants of Tex. Land Grants v. United States*, 37 F.3d 1478, 1482 (Fed. Cir. 1994); *see also Griggs v. Allegheny Cnty.*, 369 U.S. 84, 89–90 (1962). Courts have occasionally recognized third-party takings claims, but only where the United States induces a third party to "act[] as the government's agent or the government's influence over the third party

was coercive rather than merely persuasive." *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1154 (Fed. Cir. 2014) (collecting cases). "[T]akings liability does not arise from government inaction or failure to act." *St. Bernard Par. Gov't v. United States*, 887 F.3d 1354, 1361 (Fed. Cir. 2018).

Defendant argues that Plaintiff's Amended Complaint fails to state a takings claim because Plaintiff's allegations against Defendant are based on Defendant's *inaction*—specifically, the Government's alleged failure to prevent actions by the Nation (an independent third party) that caused her injuries. ECF No. 9 at 16–17. Defendant further claims that Plaintiff cannot impute the Nation's harmful actions to Defendant because she fails to allege that the Nation acted as Defendant's agent or under Defendant's coercive influence on a third-party takings theory.[2] *Id.* at 17–20.

The Court agrees with Defendant. As explained above, a taking necessarily involves *governmental* action. But Plaintiff fails to allege any governmental action that caused the injuries raised in her takings claim. Beyond conclusory assertions of liability, the Amended Complaint alleges only that Defendant acquired and held the Site in trust, not that that Defendant itself developed the Site and therefore caused the flooding on her land. *See* ECF No. 7 ¶¶ 18, 20–21. Instead, the Nation developed and operated the gaming facility on the Site, as permitted under the IRA and IGRA. *Id.* ¶ 8; *see* ECF No. 9-1. Indeed, the Amended Complaint alleges that the Nation, *not Defendant*, "commenced construction in 2016," ECF No. 7 ¶ 20, and "unlawfully entered upon

[2] At oral argument, Plaintiff conceded that the Nation did not act to develop the Site in the capacity of Defendant's agent or through a coercive relationship with Defendant. As such, the Court will not address this aspect of the motion other than to note its agreement with Defendant. *See Goodrich v. United States*, 434 F.3d 1329, 1334 (Fed. Cir. 2006) ("Whereas an agent is acting on behalf of, and usually at the direction of, his principal, a permittee is granted the option, but not the obligation, to engage in certain activities.").

[her] real property, removed vegetation, and dug a drainage ditch" without her permission, *id.* ¶ 21. These allegations do not state a plausible claim for relief, however, because "[t]he actor in a Fifth Amendment takings claim against the United States *must be the United States*." *L & W Constr. LLC v. United States*, 148 Fed. Cl. 417, 424 (2020) (emphasis added); *see, e.g.*, *Alves v. United States*, 133 F.3d 1454, 1458 (Fed. Cir. 1998). "In the flooding context, in particular, both Supreme Court precedent and [Federal Circuit] precedent have uniformly based potential takings claims on affirmative government acts." *St. Bernard Par.*, 887 F.3d at 1361 (rejecting takings claim based on flooding allegedly caused by the Government's failure to properly construct and maintain a navigation channel).

At oral argument, Plaintiff asserted that the "action" taken by Defendant here was its approval of the Nation's application, evaluation of which involved Defendant issuing the EA and FONSI, and Defendant's subsequent acquisition of the land in trust. *See* ECF No. 9-1 at 13–14. Plaintiff emphasized that these acts were the "proximate cause" of the damage to Plaintiff's land, as the Nation would not have developed the gaming facility had Defendant not approved the Nation's application and taken the Site into trust. Even with this framing, Plaintiff's takings claim fails. What Plaintiff points to is not direct governmental action effecting a taking, but rather agency decision-making that *permitted* the Nation's actions. While such agency decision-making may give rise to a claim in federal district court under the Administrative Procedure Act, *see Springfield Parcel C, LLC v. United States*, 124 Fed. Cl. 163, 176 n.11 (2015), such a challenge is not actionable in this Court as a taking under the Fifth Amendment.

The Federal Circuit and other judges of this court have recognized as much, rejecting takings claims based on the Government's alleged failure to exercise (or properly exercise) its regulatory authority. *See, e.g.*, *Alves*, 133 F.3d at 1458; *L & W Constr.*, 148 Fed. Cl. at 422. For

example, in *Alves*, a landowner asserted a takings claim against the Bureau of Land Management ("BLM"), alleging that the BLM's failure to prevent the cattle of a neighboring landowner (the Danns) from grazing on Alves' land constituted a Fifth Amendment taking. *Alves*, 133 F.3d at 1455–56. The Alves property included public lands for which Alves held BLM grazing permits, and the BLM had previously secured an injunction against the trespass by the Danns' cattle. *Id.* at 1455. The Federal Circuit explained that the Government's ability to regulate the Danns' livestock did not "change the fact that the livestock are properly controlled in the first instance by the Danns, and that Alves' complaint is with the Danns, not the government." *Id.* at 1458 ("The government is not an insurer that private citizens will act lawfully with respect to property subject to governmental regulation merely because the government has chosen to regulate.").

Likewise, Plaintiff's characterization of Defendant's acts as the "proximate cause" of her injuries, in the absence of any direct governmental action or an agency-coercion theory, further shows that Defendant's involvement is simply too attenuated to support a takings claim. *See L & W Constr.*, 148 Fed. Cl. at 424 ("A mere causal link through the agency of a third force, perhaps appropriate in a tort context, is not sufficient to allege a taking."). Indeed, to the extent the Amended Complaint raises a tort claim against the Government for its alleged failure or refusal to stop the Nation from causing damage to Plaintiff's land, the Court would lack jurisdiction. *Bench Creek Ranch, LLC v. United States*, 149 Fed. Cl. 222, 226 (2020) (citing *St. Bernard Par.*, 887 F.3d at 1360–61), *aff'd*, 855 F. App'x 726 (Fed. Cir. 2021).

B. Plaintiff Fails to Allege Defendant Owes Her an Actionable Fiduciary Duty.

In an attempt to sidestep the requirement of affirmative governmental action to support her takings claim, Plaintiff alleges that Defendant—as trustee of the Site—is subject to liability for its failure to perform fiduciary duties. The Court, however, agrees with Defendant that IGRA does

not create an enhanced trust duty with respect to the Site, nor could Plaintiff—who is not a beneficiary of the trust land—enforce any such duty. ECF No. 9 at 20–22. Such a claim, to the extent Plaintiff raises one, also fails.

In her response brief, Plaintiff asserts that Defendant and the Nation have more than a "bare trust" relationship with respect to the Site and that Defendant "very clearly 'has control or supervision over tribal monies and properties.'" Pl.'s Opp'n to Def.'s Mot. to Dismiss at 5, ECF No. 11 (quoting *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 183 (1980)). She refers to multiple regulations implementing IGRA in support of this point, *id.* (citing 25 C.F.R. §§ 522.4(b)(3), 571.1, 571.5), including the class II gaming ordinance approval requirements and the NIGC's temporary closure authority, *id.* (citing 25 C.F.R. §§ 522.4(b)(7),[3] 573.4(a)(12)), as well as Supreme Court breach of trust cases, *id.* at 6 (citing *United States v. Mitchell*, 463 U.S. 206 (1983), and *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003)). Plaintiff asserts that this constellation of authorities necessarily implies a generalized duty of Defendant to protect the public from the actions of the Nation, which includes protecting Plaintiff from the alleged flooding, erosion, and impoundment of water on her property. *See id.* at 7–8 (citing *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831)). This argument, however, has no legal grounding.

While there exists a limited trust relationship between the United States and Indian tribes, this relationship alone does not "impose duties upon the United States such as those applicable to private trustees." *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1297 (D.N.M. 1996) (citing *Mont. Bank of Circle, N.A. v. United States*, 7 Cl. Ct. 601, 613–14 (1985)), *aff'd*, 104 F.3d 1546

[3] Plaintiff's brief erroneously cites 25 C.F.R. § 522.4(b)(3). ECF No. 11 at 6–7. The quoted approval criteria requiring tribes to "construct, maintain and operate a gaming facility in a manner that adequately protects the environment and the public health and safety" is found at § 522.4(b)(7).

(10th Cir. 1997). "To impose such obligations, the substantive law at issue must unambiguously impose upon the United States detailed, comprehensive duties over Indian affairs." *Id.* (citing *Mont. Bank*, 7 Cl. Ct. at 614).

In *United States v. Mitchell*, for example, the Supreme Court found that federal statutes and regulations imposed fiduciary duties upon the United States as to certain tribal land upon which forest resources had "long been managed by the Department of the Interior, which exercise[d] 'comprehensive' control over the harvesting of Indian timber." 463 U.S. at 209 (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980)). Specifically, these authorities tasked the Government with "daily supervision over the harvesting and management of tribal timber," *id.* at 222 (internal quotation marks omitted) (quoting *Bracker*, 448 U.S. at 147), and authorized the Secretary of the Interior "to invest tribal and individual Indian funds held in trust . . . if deemed advisable and for the best interest of the Indians," *id.* at 222, n.24 (citing 25 U.S.C. § 162a). In sum, "[v]irtually every stage of the process [was] under federal control." *Id.* at 222.[4]

As Plaintiff conceded at oral argument, none of the cases she relies on involved a takings claim, but rather claims that the Government breached a fiduciary duty owed to a tribe or individual tribal member. Plaintiff fails to allege that she is a similarly situated beneficiary. And even if she were such a beneficiary, Plaintiff also fails to allege anywhere near the same level of pervasive governmental control over the development of the Site or funds derived from the Nation's gaming

[4] The other breach of trust cases Plaintiff cites are likewise inapposite. In *White Mountain Apache Tribe*, the Supreme Court held that the United States possessed a duty to manage land and improvements on land held in trust for a tribe because the Government was statutorily authorized to and did in fact occupy a portion of the trust corpus. 537 U.S. at 475. *Navajo Tribe of Indians* involved trust fund accounting claims against the Government brought by a tribe, not an unrelated third party like Plaintiff. 224 Ct. Cl. at 190.

operation on the Site as in *Mitchell*, *White Mountain Apache Tribe*, or *Navajo Tribe of Indians*. This is because, as numerous other courts have found, IGRA does not allow the Government to exercise such elaborate, comprehensive control over tribal gaming operations necessary to create a fiduciary duty. *See, e.g.*, *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. United States*, 259 F. Supp. 2d 783, 791 (W.D. Wis. 2003) ("Nothing in [IGRA] indicates any intention by Congress to recognize or create a fiduciary duty."), *aff'd*, 367 F.3d 650 (7th Cir. 2004); *Vizenor v. Babbitt*, 927 F. Supp. 1193, 1201–02 (D. Minn. 1996); *Pueblo of Santa Ana*, 932 F. Supp. at 1297–98; *Redding Rancheria v. Salazar*, 881 F. Supp. 2d 1104, 1122 (N.D. Cal. 2012), *aff'd in part, rev'd in part on other grounds sub nom. Rancheria v. Jewell*, 776 F.3d 706 (9th Cir. 2015). Indeed, the regulatory provisions that Plaintiff cites, *see* ECF No. 11 at 5–6, merely reflect Defendant's oversight and enforcement authority—not direct governmental control and hands-on management of tribal gaming. *See* 25 U.S.C. § 2702(2)–(3) (declaring the policy of IGRA, including to "ensure that the Indian tribe is the primary beneficiary of the gaming operation" and to establish federal regulatory authority and federal standards for Indian gaming).

Finally, the Court finds no authority for Plaintiff's novel argument that Defendant has a generalized duty to protect the public from the Nation's actions. Plaintiff describes a "guardian"-"ward" relationship between Defendant and the Nation, respectively, and complains of a lack of alternative judicial remedies against the Nation. *See* ECF No. 11 at 6–8. But such a description of the Government's relationship with Indian tribes is inconsistent with IGRA's stated policy that tribal gaming be authorized "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments," 25 U.S.C. § 2702(1), and it does not reflect the development of federal Indian law over the last century, *see McGirt v. Oklahoma*, --- U.S. ---, 140 S. Ct. 2452, 2467 (2020). To the extent that Plaintiff alleges that this guardian-ward formulation

creates an agency relationship within the takings context or otherwise makes the Nation's conduct actionable, any such theory is unsupported by existing authority. Likewise, as Defendant correctly notes, a lack of available judicial remedies against the Nation, either in a tribal court or in federal court, does not imply the existence of a remedy against Defendant, expand Defendant's waiver of sovereign immunity, or otherwise bolster the validity of Plaintiff's claim.

IV. CONCLUSION

For these reasons, Defendant's Motion to Dismiss (ECF No. 9) is **GRANTED** and Plaintiff's Amended Complaint is **DISMISSED** with prejudice for failure to state a claim pursuant to RCFC 12(b)(6). The Court further **ORDERS** that Defendant's prior Motion to Dismiss (ECF No. 6) is **DENIED AS MOOT**. The Clerk is directed to enter judgment accordingly.

SO ORDERED.

Dated: May 18, 2022

/s/ Kathryn C. Davis
KATHRYN C. DAVIS
Judge

In the United States Court of Federal Claims

No. 21-1017L
(Filed: May 18, 2022)

HOLLY BERRY

Plaintiff

v **JUDGMENT**

THE UNITED STATES

Defendant

Pursuant to the court's Opinion And Order, filed May 18, 2022, granting defendant's motion to dismiss,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that plaintiff's amended complaint is dismissed with prejudice for failure to state a claim.

Lisa L. Reyes
Clerk of Court

By: s/Anthony Curry

Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.