IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Holly Berry, Plaintiff, v. The United States, Defendant.	No. 21-1017L Judge Kathryn C. Davis (e-filed: September 10, 2021)

THE UNITED STATES' REPLY IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

I. Introduction

Ms. Berry's opposition (ECF No. 11) does not present the Court with any valid reason not to grant the United States' motion to dismiss her complaint (ECF No. 9). As explained in the motion, Ms. Berry impermissibly seeks to pin takings liability to the United States for *inaction*: namely, the United States' alleged failure to ensure that a casino built on a parcel adjacent to Ms. Berry's property (the "Site") by the Cherokee Nation ("Nation") would not cause increased flooding at her property. Our motion also explained why, under controlling caselaw, the Nation's actions cannot be imputed to the United States under the circumstances presented by Ms. Berry's complaint.

In her opposition, Ms. Berry does not meaningfully respond to either of these points, which together command dismissal. Instead, she devotes her brief to the notion that the United States has "heightened" trust duties with respect to the Site, and that takings liability to a third-party like herself may be premised on an alleged failure to discharge these supposed duties. As discussed below, her arguments ignore contrary precedent and otherwise lack a firm basis in law; and the Court cannot find liability based simply on Ms. Berry's general appeal to sympathy and equity. Accordingly, the Court should dismiss her complaint.

II. Ms. Berry's Complaint Must Be Dismissed Because It Is Premised on the United States' Inaction.

As explained in our motion, Ms. Berry's takings claim has a fatal defect: she alleges that the United States took an interest in her property by *failing* to act. *See* United States' Mot. to Dismiss Pl.'s 1st Am. Compl. at 10–12, ECF No. 9 ("Def.'s Mot."). Under controlling caselaw (which Ms. Berry does not address) such a claim cannot stand. *See id.* (discussing, among other cases, *St. Bernard Parish Gov't v. United States*, 887 F.3d 1354,

1357 (Fed. Cir. 2018); *Alves v. United States*, 133 F.3d 1454, 1458 (Fed. Cir. 1998); and *Ga. Power Co. v. United States*, 633 F.2d 554, 557 (Ct. Cl. 1980)).

Ms. Berry's opposition repeatedly confirms that her takings complaint centers on the United States' inaction. *See* Pl.'s Obj. to Def.'s Mot to Dismiss at 3, ECF No. 11 ("Pl.'s Opp'n") (asserting that the United States "failed in its duty to ensure that [the Nation's] gaming facility was" properly constructed, and that "[a]s a result of Defendant's failure, Plaintiff's property has suffered severe flooding, erosion, and impoundment of water"); *id.* (claiming that "damage result[ed] from Defendant's failure" to act); *id.* at 4 (positing that "failing to prevent damage to the environment and/or public health/safety" is "the violation at issue"); *id.* at 5 (arguing that the United States "failed in its duty as a 'guardian' to protect Plaintiff from actions taken by [the Nation]"). But because "[o]n a takings theory, the government cannot be liable for failure to act," the Court must dismiss Ms. Berry's complaint. *See St. Bernard Parish*, 887 F.3d at 1360.

III. Ms. Berry Makes No Attempt to Satisfy the Standard for Imputing the Nation's Actions to the United States.

As discussed in our motion, for takings liability to attach to the United States based on a third party's actions, the third party must act as the government's agent or under the government's coercive influence. *See* Def.'s Mot. at 12–15 (discussing, among other cases, *A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1154–55 (Fed. Cir. 2014)). Ms. Berry does not mention this doctrine or point to any allegations that might somehow establish agency or coercion.

Rather, her opposition rests on an outdated depiction of the trust relationship between the United States and the Nation, which she claims mirrors the relationship between

guardian and ward. *See* Pl.'s Opp'n at 4–5. The defects in this conception are discussed in more detail below. Yet even if the comparison were valid, that would not subject the United States to takings liability for the Nation's actions because a ward is not considered the guardian's agent. *See* Restatement (Third) Agency Intro. (Am. L. Inst. 2006) ("[T]he defining characteristics of 'true agency' are not present in the relationship between . . . a guardian and the guardian's ward . . . ."). Thus, even if a guardian/ward relationship was the proper description for the present-day relationship between federally recognized tribes and the United States, that would not provide a reason to impute the Nation's actions to the United States such that takings liability might attach. Ms. Berry's complaint must be dismissed for this reason as well.

IV. Contrary to Ms. Berry's Position, IGRA Does Not Create Enforceable Trust Duties as to the Site.

Ms. Berry concedes that in the ordinary case, the act of taking land into trust creates only a bare trust between the United States and the relevant Tribe. *See* Pl.'s Opp'n at 2. And as pointed out in our motion, federal courts have repeatedly held that when land taken into trust will be used for gaming purposes, IGRA's provisions do not create enforceable trust responsibilities for the United States. *See* Def.'s Mot. at 16 (citing *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 Redding Rancheria v. Jewell*, 776 F.3d 706 (9th Cir. 2015); *Lac Courte Orielles Band of Lake Superior Chippewa Indians of Wis. v. United States*, 259 F. Supp. 2d 783, 791 (W.D. Wisc. 2003), *aff'd*, 367 F.3d 650 (7th Cir. 2004); and *Vizenor v. Babbitt*, 927 F. Supp. 1193, 1201 (D. Minn. 1996)).

Ms. Berry neither mentions nor tries to distinguish these cases. Instead, without any meaningful analysis, she baldly asserts that under IGRA, the United States "very clearly 'has control or supervision over tribal monies or properties.'" Pl.'s Opp'n at 2 (quoting *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980). *Navajo Tribe*, though, emerged from a very different legal context—resolving claims under the Indian Claims Commission Act of 1946. *See Navajo Tribe*, 624 F.2d at 983. That law created "extraordinary remedies," empowering the Indian Claims Commission to hear and account for myriad past harms inflicted on Tribes by the United States for which no adequate remedy existed at law. *See, e.g.*, *United States v. Seminole Nation*, 173 F. Supp. 784, 788–89 & nn.6–8 (Ct. Cl. 1959). And the specific question in *Navajo Tribe* involved "accounting claims" that "deal[t] with the management and disposition of Navajo funds and property." *Navajo Tribe*, 624 F.2d at 988. Neither IGRA itself nor its implementing regulations give Interior equivalent authority over gaming facilities or proceeds. Rather, at most, the regulations contemplate a role for federal oversight—not direct management—of gaming on Indian lands. *Navajo Tribe* and the other Indian Claims Commission cases are thus wholly inapposite.

Ms. Berry's effort to analogize this case to *White Mountain Apache Tribe v. United State*s, 537 U.S. 465 (2003), likewise does not pass muster. *See* Pl.'s Opp'n at 3. In *White Mountain*, when a larger tract was statutorily placed into trust, Congress specifically reserved portions of the tract for Interior's use "for administrative or school purposes." *Id.* at 468–69. It was the actual use and occupation of a trust asset by the federal government that created the enforceable duties to the Apache Tribe. *See id.* at 475. Interior and the

National Indian Gaming Commission's role at the Site under IGRA is nothing like the daily occupation and use of part of the trust land in *White Mountain*.

In short, contrary to Ms. Berry's claims, IGRA does not create any enforceable trust duties for the United States with respect to the Site.

V. In Any Event, Only the Nation May Enforce Trust Duties Against the United States.

Even if Ms. Berry's contentions about the nature of the United States' trust duties were not incorrect, that would not aid her takings case. Most importantly, as discussed above, a takings claim cannot be based upon inaction. And even if that were not so (and as we pointed out in our motion), trust duties may be enforced against the United States only by the beneficiary of that trust relationship (here, the Nation), not third parties like Ms. Berry. *See* Def.'s Mot. at 15–16.

Insisting otherwise, Ms. Berry tries to craft a third-party remedy from out-of-context language plucked from an almost 200-year-old Supreme Court case. *See* Pl.'s Opp'n at 4–5. To wit, quoting *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (Marshall, C.J.), she asserts that "Native Americans are in a 'state of pupilage,' situated in such a way as to be considered 'wards' of the 'guardian' United States." Pl.'s Opp'n at 4. She then posits that by failing to prevent the (alleged) negative consequences of the casino's construction, the United States "failed in its duty as a 'guardian' to protect [her] from actions taken by its ward." *Id.* at 4–5.[1]

[1] *See also* Pl.'s Opp'n at 5 (claiming, without citation, that "the ward is assumed to be unlearned in what is 'right' or 'wrong,' and it is up to the guardian to teach the ward, while at the same time protecting outsiders from the ward's actions while it is being taught").

To be sure, *Cherokee Nation* is certainly a relevant case on the question of the federal courts' jurisdiction to hear claims by Native American Tribes. *See* 30 U.S. at 15–16, 19–20. But to read a substantive obligation to third parties into *Cherokee Nation*'s antiquated description of the relationship between Tribes and the United States is to go too far. Indeed, for at least the last century, Congress and the courts have often emphasized the many ways in which Tribes retained their interests in self-determination, including within IGRA itself. *See* 25 U.S.C. § 2702(1) (one purpose of IGRA is to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments"); *see also McGirt v. Oklahoma*, --- U.S. ---, 140 S. Ct. 2452, 2467 (2020) (noting that "[b]eginning in the 1920s, the federal outlook toward Native Americans shifted 'away from assimilation policies and toward more tolerance and respect for traditional aspects of Indian culture.'" (quoting 1 F. Cohen, Handbook of Federal Indian Law § 1.05 (2012)).[2]

Perhaps more to the point, Ms. Berry also provides no support for her claim that "[g]enerally speaking, the harmful actions of a ward are attributed to the guardian." *See* Opp'n at 5. She thus has failed to identify any legal basis upon which the Court could rule

[2] *See also, e.g.*, *McGirt*, 140 S. Ct. at 2464 (Congress may "allow[] [Tribes] to continue to exercise governmental functions over land even if they no longer own it communally"); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991) (observing that laws such as the Indian Financing Act of 1974, 88 Stat. 77, and the Indian Self–Determination and Education Assistance Act, 88 Stat. 2203 "reflect Congress' desire to promote the 'goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development'" (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987))); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) ("[A]s sovereign," Tribes have "general authority . . . to control economic activity within [their] jurisdiction . . . .").

that the results of the Nation's actions on its own trust land amount to a taking of Ms. Berry's property by the United States.

VI. Ms. Berry's Appeals to Sympathy and Equity Do Not Constitute a Viable Cause of Action; Rather, the Court Must Assess Whether Ms. Berry's Allegations Amount to a Cognizable Claim Against the United States.

Ms. Berry's final appeal is to sympathy and the Court's sense of equity, arguing that because the Nation enjoys sovereign immunity, she can turn nowhere for redress but to the United States. *See id.* But the Nation's immunity does not imply the existence of a judicial remedy against the United States, whose own waiver of sovereign immunity must also be strictly construed. *See Chancellor Manor v. United States*, 331 F.3d 891, 898 (Fed. Cir. 2003); *Caciapelle v. United States*, 148 Fed. Cl. 745, 761 (2020), *appeal docketed,* No. 20-2037 (Fed. Cir. July 24, 2020); *see also Principality of Monaco v. Mississippi*, 292 U.S. 313, 324 (1934) (observing that immunity "inhere[s] in the nature of sovereignty" and "is the general sense and the general practice of mankind" (quoting The Federalist No. 81(Alexander Hamilton)).[3] For a certainty, the Tucker Act waives the United States' immunity for takings claims under the Fifth Amendment. *See* 28 U.S.C. § 1491(a)(1). But that waiver's contours are found in the cases describing the bounds of cognizable takings claims; and, for all the reasons given above and in our motion, a claim not based on affirmative actions of the United States fails to state a claim upon which relief can be granted.

[3] The "nature and . . . extent" to which federally recognized Tribes enjoy sovereign immunity "rests in the hands of Congress." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 800 (2014) (observing that "it is fundamentally Congress's job . . . to determine whether or how to limit tribal immunity"); *see also Okla. Tax Comm'n*, 498 U.S. at 510 (Congress "has always been at liberty to dispense with . . . tribal immunity or to limit it").

Nor is Ms. Berry utterly without recourse: she could seek redress for the alleged damages to her property directly with the Nation itself. There is, however, no indication that she has attempted to do so. The Court therefore ought not conflate the lack of a judicial remedy against the United States with the absence of any possibility for relief.

VII. Conclusion

For the reasons set forth above and in our motion to dismiss, the Court should grant our motion and dismiss Ms. Berry's complaint.

Respectfully submitted,

TODD KIM
Assistant Attorney General

/s/

BRAD LENEIS

Trial Attorney
United States Department of Justice
Environment & Natural Resources Division
Natural Resources Section
150 M St. NE
Washington, DC 20002
(202) 616-5082
brad.leneis@usdoj.gov
Attorneys for the United States

CHRISTINA KRACHER

Attorney-Adviser
Branch of Environment and Lands
Division of Indian Affairs
Office of the Solicitor
Department of the Interior
1849 C Street NW
Washington, D.C. 20240

Of Counsel

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