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: July 22, 2021)

THE UNITED STATES' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

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INTRODUCTION

This case centers on flooding on private land owned by the plaintiff, Holly Berry, and allegedly caused by a casino built on an adjacent parcel by the Cherokee Nation ("Nation"), a federally recognized Indian Tribe and sovereign nation. In her amended complaint, Ms. Berry seeks to yoke the United States to the Nation's commercial development because the United States holds the casino site, known as the Cherokee Springs Site ("Site"), in trust at the request of and for the benefit of the Nation. By this novel means, Ms. Berry claims she is owed compensation from the United States for the alleged taking of an interest in her property under the Fifth Amendment's Takings Clause.

Settled principles of takings law instruct that Ms. Berry's takings claim is untenable. First, and foremost, Ms. Berry impermissibly roots her Fifth Amendment claim in the United States' *inaction*. To that end, she theorizes that the United States took a compensable interest in her property because it did not take steps to ensure that the Nation's casino construction would not lead to flooding on her property. But "[o]n a takings theory, the government cannot be liable for failure to act." *St. Bernard Parish Gov't v. United States*, 887 F.3d 1354, 1360 (Fed. Cir. 2018).

Rather, all the acts that Ms. Berry alleges caused flooding were taken by the Nation on its land, not the United States. Where the complained-of acts are those of a third party, takings liability cannot attach unless the third party acted as the United States' agent or under its coercive influence. *See A & D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1154–55 (Fed. Cir. 2014). For this reason, third party actions generally cannot support a takings claim, for "[w]hat a plaintiff 'may challenge under the Fifth Amendment is what the government has done, not what [third parties] have done.'" *Navajo Nation v. United States*,

631 F.3d 1268, 1274 (Fed. Cir. 2011) (quoting *Fallini v. United States*, 56 F.3d 1378, 1380 (Fed. Cir. 1995) (second alteration in original)). And the alleged flooding at the Berry property is purportedly due to the Nation's independent actions as a third party, which were taken not at the United States' direction, but in furtherance of the Nation's economic development and self-determination as a sovereign nation.

Perhaps seeking a way around this hurdle, Ms. Berry asserts that the law governing gaming on Indian lands, the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701–21, creates an "expanded" duty to act. But even if this were the case (and it is not), Ms. Berry still could not root a takings claim in the United States' inaction, for such duties would be duties owed to the Cherokee Nation, not Ms. Berry. Accordingly, Ms. Berry's complaint fails to state a claim, and must be dismissed.

BACKGROUND

I. The United States' Acquisition of Land Into Trust for Indian Tribes.

Under section 5 of the Indian Reorganization Act ("IRA"), 25 U.S.C. § 5108, the Secretary of the Interior ("Secretary") may acquire land into trust on behalf of federally recognized Indian Tribes. The Department of the Interior's ("Interior") regulations implement the IRA and set out the process for trust land acquisition. *See* 25 C.F.R. Part 151. In particular, land may be acquired into trust for a Tribe under any of three conditions:

> (1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or
>
> (2) When the tribe already owns an interest in the land; or
>
> (3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

Id. § 151.3.

Trust acquisition under the IRA "safeguard[s] Indian lands against alienation from Indian ownership and against physical deterioration." *South Dakota v. U.S. Dep't of Interior*, 314 F. Supp. 2d 935, 943 (D.S.D. 2004) (quoting H.R. 7902, 73rd Cong., tit. III, § 1 (1934)). And because land "provid[es] the foundation for tourism, manufacturing, mining, logging, and gaming," trust acquisitions play a key role in achieving the IRA's goal of "rehabilitat[ing] the Indian's economic life." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 226 (2012) (quotations and alteration omitted).

When Interior takes land into trust for a Tribe, a general fiduciary relationship is established between the United States and the Tribe as to the relevant parcel. *See, e.g.*, *White Mountain Apache Tribe v. United States*, 537 U.S. 465, 473 (2003); *Navajo Nation v. United States*, 537 U.S. 488, 503–04 (2003); *United States v. Mitchell* (*Mitchell I*), 445 U.S. 535, 542–43 (1980). This relationship has a "limited scope." *Hydaburg Co-op Ass'n v. United States*, 667 F.2d 64, 67 (Ct. Cl. 1981) (holding that "the 'trust' established by section 5 of the Act imposes only a duty on the United States to hold the acquired Indian lands so as to prevent continued alienation") (citing *Mitchell I*, 445 U.S. at 543–44). The Tribe exercises its own inherent governmental authority over trust land, including (but not limited to) the land's management, protection, and conservation.[1] *See United States v. Wheeler*, 435

[1] As discussed in more detail below, a treaty, statute, or regulation may create specific and enforceable fiduciary responsibilities for the United States with respect to tribal land. *See White Mountain Apache Tribe*, 537 U.S. at 475 (statutory right to daily occupation of a portion of trust land meant that the United States "may not allow [that portion of the property] to fall into ruin"); *United States v. Mitchell* (*Mitchell II*), 463 U.S. 206, 219 (1983) (heightened fiduciary duties as to forested allotments due to Interior's "pervasive role in the sales of timber from Indian lands"). But those duties would be enforceable by the trustee—i.e., the tribe or individual Indian holding a beneficiary interest in the land.

U.S. 313, 323 (1978) (observing that Indian Tribes are “unique aggregations possessing attributes of sovereignty over both their members and their territory”); *Nanomantube v. Kickapoo Tribe in Kansas*, 631 F.3d 1150, 1151–52 (10th Cir. 2011) (Tribes “are sovereign political entities possessed of sovereign authority not derived from the United States, which they predate” (citation omitted)).

In addition, when determining whether to acquire land into trust for a Tribe, the Secretary is required to consider the availability of information necessary for compliance with the National Environmental Policy Act, 42 U.S.C. §§ 4321–4370m-12 *See* 25 C.F.R. § 151.10(h).

II. Indian Gaming on Trust Land.

Enacted in 1988, the Indian Gaming Regulatory Act (“IGRA”) “creat[es] a federal regulatory scheme for the operation of gaming on Indian lands.” *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisc. v. United States*, 367 F.3d 650, 654 (7th Cir. 2004) (citing 25 U.S.C. § 2702). IGRA recognizes that gaming on Indian lands can “promot[e] tribal economic development, self-sufficiency, and strong tribal governments,” while also allowing certain state regulation of gaming on Indian lands. *Id.*; *see also* 25 U.S.C. §§ 2701(5), 2702.

Under IGRA, “Indian lands” include not only lands to which title is held in trust by the United States for the benefit of any Indian tribe or individual, but also all lands within the limits of any Indian reservation, as well as lands held by any Indian tribe or individual that are subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power. *Id.* § 2703(4). In other words, IGRA contemplates that gaming may occur on trust lands *or* on non-trust lands.

That being said, IGRA generally forbids gaming on lands taken into trust after October 17, 1988. *Id.* §§ 2719(a). There are, however, several exceptions. *Id.* § 2719(a)–(b). Relevant here, IGRA provides an exception for specified lands in Oklahoma if acquired in trust for the benefit of a tribe that had no reservation in October 1988, such as the Cherokee Nation. *Id.* § 2719(a)(1)–(2) (excepting Oklahoma lands within the boundaries of the tribe's former reservation or contiguous to other land in Oklahoma held in trust or restricted status by the United States for the tribe). This exception is known (and referred to below) as the "Oklahoma Exception."[2] *See, e.g.*, *Comanche Nation of Oklahoma v. Zinke*, No. CIV-17-887-HE, 2017 WL 6551298 (W.D. Okla. Nov. 13, 2017).

IGRA further provides that a Tribe can "engage in, or license and regulate" certain types of gaming, known as Class II and Class III gaming,[3] on Indian lands within the Tribe's jurisdiction if, in relevant part and among other things, the Tribe adopts an ordinance or resolution approved by the Chair of the National Indian Gaming Commission ("NIGC").[4]

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[2] Mirroring the statute, Interior's implementing regulations provide that for specified lands in Oklahoma, gaming is allowed on land taken into trust after October 17, 1988, if the tribe had no reservation on October 17, 1988, and the land is located within the boundaries of the tribe's former reservation or contiguous to other land held in trust or restricted status for the tribe in Oklahoma. 25 C.F.R. § 292.4(b).

[3] IGRA defines three classes of gaming. In relevant part, Class II gaming includes bingo and certain card games. *See* 25 U.S.C. § 2703(7); 25 C.F.R. § 502.3 (defining Class II gaming). Class III gaming includes all forms of gaming not otherwise classified as Class I or Class II, such as slot machines. *See* 25 U.S.C. § 2703(8); 25 C.F.R. § 502.4 (defining Class III gaming).

[4] Under IGRA, Congress established the NIGC as an independent authority to support and regulate tribal gaming. In relevant part, the NIGC regulates and monitors certain aspects of Indian gaming; reviews and approves tribal gaming ordinances and management agreements; and enforces violations of IGRA, its regulations, and approved tribal gaming ordinances. *See* 25 U.S.C. §§ 2704, 2713. "Although the Commission is nominally part of the Department of the Interior . . . [it] functions as an independent entity." *Sac and Fox Nation v. Norton*, 240 F.3d 1250, 1265 n.12 (10th Cir. 2001); *see also United Keetoowah*

25 U.S.C. § 2710(b)(1)(B), (d)(1)(A). And IGRA provides that the NIGC Chair "shall" approve a Tribe's gaming ordinance if, among other things, the ordinance provides that "the construction and maintenance of the gaming facility and the operation of that gaming [will be] conducted in a manner which adequately protects the environment and the public health and safety." *Id.* § 2710(b)(2)(E). Should a Tribe violate its gaming ordinance, IGRA's regulations empower the NIGC Chair to issue a notice of violation or, in his discretion, to order the casino's temporary closure. 25 C.F.R. §§ 573.3, 573.4.

III. Interior's Acquisition of the Cherokee Springs Site.

In July 2014, the Nation submitted an application to the Department of the Interior's Bureau of Indian Affairs ("BIA") requesting that Interior take into trust the 45.92-acre Cherokee Springs Site. *See* Ex. A, U.S. Dep't of the Interior, Notice of Decision Letter on the Cherokee Springs Site (Jan. 19, 2017), at 1 ("NOD").[5] The site is located in Cherokee County, Oklahoma, near the city of Tahlequah. *Id.* The Nation proposed to develop a casino/hotel facility on the parcel, which sits within a larger 150-acre site owned by the Nation in fee. *Id.* When the Cherokee Springs Casino opened, the Nation planned to close an existing casino on a different site and convert that building into a school. *Id.*

Band v. Oklahoma, 927 F.2d 1170, 1177 (10th Cir. 1991). Congress has delegated to the NIGC the authority to "promulgate such regulations and guidelines as it deems appropriate to implement the provisions" of IGRA. 25 U.S.C. § 2706(b)(10).

[5] In considering a motion to dismiss, the Court may properly consider documents incorporated into the complaint by reference, and may take judicial notice of the contents of public documents and matters of public record. *See 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)). Ms. Berry's amended complaint cites to and references the effects of the NOD and the environmental assessment ("EA") discussed in the NOD. *See* Am. Compl. ¶¶ 8 & n.5, 11 & nn. 9–10, ECF No. 7.

Over the next two-and-a-half years, the Nation periodically submitted additional information to Interior. *Id.* On January 19, 2017, Interior determined that the site would be acquired in trust for the Nation's benefit. *Id.* at 1–2; *see also* Land Acquisitions; The Cherokee Nation, 82 Fed. Reg. 37,609, 37,609–10 (Aug. 11, 2017); Am. Compl. ¶ 8 n.4. Interior concluded that acquiring the site would facilitate tribal self-determination and economic development, and that the site met IGRA's "Oklahoma Exception" to the general prohibition on conducting gaming activities on lands acquired into trust by the United States after October 1988. NOD at 2–3. Interior published notice of the acquisition in the Federal Register on August 11, 2017. 82 Fed. Reg. at 37,609–10.

As part of Interior's review of the acquisition's environmental impact pursuant to the National Environmental Policy Act ("NEPA"), an Environmental Assessment ("EA") was prepared. Based on the EA, Interior determined that a Finding of No Significant Impact ("FONSI") was appropriate. *See* NOD at 12–13. Interior acknowledged that the acquisition and project development would lead to "changes to existing topography" and create "a greater area of impervious surfaces" on the Site that could "potentially increas[e] surface flow rates." *Id.* at 13. Importantly, though, Interior also determined that "[m]itigation measures and industry standard B[est] M[anagement] P[ractices]," including a Storm Water Pollution Prevention Plan and appropriately sized detention basins, would be put in place to minimize these impacts. *Id.*

IV. The Complaint's Allegations.

A. <u>Allegations Concerning the Casino's Construction and Subsequent Flooding at the Berry Property.</u>

Ms. Berry alleges that in 2016, before Interior acquired the Cherokee Springs Site into trust, the Nation began building its casino facility at the Site, which is adjacent to her

property. Am. Compl. ¶ 20; *see also* Ex. B (aerial photo depicting the properties). According to the complaint, at some point the Nation's agents "unlawfully entered" the Berry property, removed vegetation and soil, and dug a drainage ditch across the property without permission. Am. Compl. ¶¶ 14, 21. The casino's construction also allegedly "altered both the elevation and existing drainage patterns of the property" and "substantially increased the impervious surfaces" at the Cherokee Springs site. *Id.* ¶ 12.

According to the complaint, since the casino's development, water purportedly has been "diverted" from the Site onto the Berry property, allegedly causing "severe flooding, erosion, and impoundment of water." *Id.* ¶ 20; *see also id.* ¶ 13. Ms. Berry asserts that these impacts are "[d]ue to the altered drainage patterns, the increase in impervious surfaces, and the failure to properly design and construct water runoff measures." *Id.* ¶ 13. This water allegedly "flood[s] several acres continuously" and has purportedly "diminish[ed] the usability and value of [the] property." *Id.* ¶ 20 (claiming that the "diverted water has substantially interfered with [Ms. Berry's] use of her real property").

B. Allegations Concerning the Nature of the Trust Relationship Between the United States and the Nation.[6]

Citing section 5 of the IRA, Ms. Berry alleges that when Interior took the Site into trust, the United States "created a trust relationship between itself and [the Nation] as it pertains to the [Site]." *Id.* ¶ 18. According to Ms. Berry, this relationship "impose[s] . . . certain duties on [the United States] as trustee." *Id.* In her view, these duties are "expanded" beyond what she terms the "traditional duties" of such a relationship by certain provisions of IGRA. *Id.* ¶ 19. She alleges that these so-called "expanded" duties

[6] For the reasons discussed below, because these allegations all amount to legal conclusions, the Court is not constrained to accept them as true.

include a duty to monitor and investigate Indian gaming operations; to inspect, examine, and audit casino records; and to ensure that the Nation "does not violate any tenets laid out in approved gaming ordinances."[7] *Id.* Ms. Berry alleges that this last duty supposedly binds the United States to ensure that "a 'gaming operation's facility'" is not "'constructed, maintained, or operated in a manner that threatens the environment or the public health and safety.'"[8] *See id.* (quoting 25 C.F.R. § 573.4(a)(12)).

C. <u>Ms. Berry's Claims for Relief.</u>

As noted above, Ms. Berry asserts that the flooding and erosion on her property is "due to" the United States' "failure . . . to ensure properly designed water runoff from" the Site. *Id.* ¶ 20. The "increased flooding, caused by [the United States'] actions and inactions," she insists, "constitutes a taking of a flowage easement and detention pond upon" her property. *Id.* ¶ 22. She also claims that the Nation's purported removal of vegetation from and construction of a drainage ditch on her property have "further create[d] a drainage easement" in some unspecified manner. *Id.* ¶¶ 21. Based on these allegations, she demands compensation under the Fifth Amendment to the United States Constitution. *Id.* ¶¶ 22–23.

ARGUMENT

I. Standard for Motions to Dismiss Under Rule 12(b)(6).

Under RCFC 12(b)(6), a complaint must be dismissed "when the facts asserted by the claimant do not entitle him to a legal remedy." *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002). To avoid dismissal, the complaint's factual allegations must allow

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[7] The provisions Ms. Berry cites describe the powers of the NIGC, which, as described above, operates as an independent agency housed within the Department of the Interior.

[8] For the most part, the allegations in ¶¶ 18 and 19 of the amended complaint are not factual in nature, but rather assert conclusions of law.

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 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). In other words, the plaintiff's entitlement to relief must be plausible on the complaint's face. *Twombly*, 550 U.S. at 570.

Though detailed factual allegations are not required, the allegations must establish every element of the plaintiff's claim. *Taylor v. United States*, 959 F.3d 1081, 1087 (Fed. Cir. 2020) (dismissing complaint that did not establish elements of a regulatory taking); *Dimare Fresh Inc. v. United States*, 808 F.3d 1301, 1309–12 (Fed. Cir. 2015) (same). Conclusory allegations or recitations of the elements of a cause of action should not be credited. *See Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 570.

II. The Court Must Dismiss the Complaint Because it is Premised on the United States' Inaction and the Uncoerced Actions of a Private Party.

An axiom of takings law is that the United States "cannot be liable on a takings theory for inaction." *St. Bernard Parish Gov't v. United States*, 887 F.3d 1354, 1357 (Fed. Cir. 2018); s*ee also United States v. Sponenbarger*, 308 U.S. 256, (1939) (no taking where floodway that would have included the plaintiff's property was never built); *Georgia Power Co. v. United States*, 633 F.2d 554, 557 (Ct. Cl. 1980) ("[A] taking may not result from [the government's] discretionary inaction."). And the Federal Circuit has made plain that "[t]here clearly can be no taking when whatever acts complained of are those of private parties, not the government." *Alves v. United States*, 133 F.3d 1454, 1458 (Fed. Cir. 1998) (citing *767 Third Ave Assocs. v. United States*, 48 F.3d 1575, 1582–83 (Fed. Cir. 1995)); *see also Georgia Power*, 633 F.2d at 557.

Yet, as explained below, Ms. Berry's complaint centers not on Interior's action (i.e., taking the Site into trust), but on a third party's actions and on Interior's inaction. Because the United States did not coerce the Nation into taking any actions, it cannot be liable to Ms. Berry on a takings theory for the alleged consequences of the Nation's actions. Nor does IGRA create an enhanced duty to act that supports Ms. Berry's takings claim. The amended complaint thus fails to state a claim for relief.

A. In Substance, the Amended Complaint Faults the United States Only for the Failure to Act.

On inspection, every physical action Ms. Berry alleges to have cause flooding at her property was taken by the Nation. *See* Am. Compl. ¶¶ 14, 20–21. Only inaction truly is laid at Interior's feet: namely, the alleged "failure . . . to ensure properly designed water runoff from the trust property." *Id.* ¶ 20; *see also id.* ¶ 22 (alleging that flooding "caused by [the United States'] actions and inactions[] constitutes a taking").

In *Alves*, the Federal Circuit rejected a claim similarly premised on the United States' failure to take action that may have mitigated the alleged harm to property. There, a rancher's cattle were permitted to graze on land owned by the Bureau of Land Management ("BLM"), but they trespassed onto part of a neighboring ranch, causing damage. 133 F.3d at 1455. The neighboring rancher claimed that BLM's failure to keep the trespassing cattle off his land resulted in a taking of the forage and water the cattle destroyed. *Id.* at 1456. The court of appeals disagreed, holding that BLM's "regulatory control over the [trespassing] livestock d[id] not change the fact that the livestock [we]re properly controlled in the first instance" by the permittee rancher, not BLM. *Id.* at 1358.

Similarly, in *Georgia Power*, a power company obtained an easement to run a power line twenty-five feet above a U.S. Army Corps of Engineers' ("Corps") reservoir. 633 F.2d at 555. Some years later, sailors began to ply the reservoir with tall-masted sailboats, leading the power company to raise the power line by thirty feet. *Id.* The court held that the Corps' failure to regulate mast heights did not result in a taking because "the interference complained of constituted acts of independent third parties," and the Corps had, at most, failed to prevent those acts. *Id.* at 556.

In this case, Interior exercises even less regulatory control over the physical features of the Cherokee Springs Site than BLM exercised over the rancher's cattle in *Alves*, for IGRA chiefly concerns gaming, not buildings. *See Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1193 (9th Cir. 2008) ("IGRA's core objective is to regulate how Indian casinos function so as to 'assure the gaming is conducted fairly and honestly by both the operator and players.'" (quoting 25 U.S.C. § 2702(2))). And, like the neighboring rancher in *Alves* and the power company in *Georgia Power*, Ms. Berry in substance faults the United States only for not acting to head off alleged interference with property caused by someone else's acts. *See* Am. Compl. ¶¶ 18–22. Thus, as in *Alves* and *Georgia Power*, Ms. Berry's inaction-based takings claim must fail.

B. The Nation's Actions Cannot Be Imputed to the United States Because the United States Did Not Control or Coerce the Nation Into Acting.

To be sure, the complaint insinuates that the Nation's actions here should be treated as the United States' actions. *See id.* ¶¶ 20–22. Ms. Berry appears to glean this notion from the duties that attend the United States' trust relationship with the Nation, which she asserts are "expanded" by IGRA.

Even if Ms. Berry were correct about the scope of these duties (and, as discussed below, she is not), her takings claim would fail because the United States did not control or coerce the Nation into taking the steps that allegedly resulted in increased flooding at her property. It is well established that takings liability based on a third party's actions may attach only if the third party acted as the government's agent or under the government's coercive influence. *See A & D Auto Sales*, 748 F.3d at 1154 (collecting cases). But where the United States' influence on a third party's actions is "merely persuasive," no taking can result. *Id.*

Ms. Berry does not (and cannot) establish that in building its casino, the Nation acted as Interior's agent or under its coercive influence. It is well settled that "[a]n agency relationship results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act." *Navajo Nation*, 631 F.3d at 1275 (quoting *Brubaker Amusement Co. v. United States*, 304 F.3d 1349, 1360 (Fed. Cir. 2002)); *see also A & D Auto Sales*, 748 F.3d at 1154 (observing that "[a]n agency relationship may exist where the third party is hired or granted legal authority to carry out the government's business"). Nothing about the United States' trust responsibilities to the Nation under the IRA authorizes the Nation to carry out the United States' business or subjects the Nation to the United States' control in connection with the Site. Quite the contrary: the core objectives of the IRA are to facilitate tribal *self-determination*. *See, e.g.*, 25 U.S.C. § 5123; 25 C.F.R. § 151.3(a)(3).

Further, to establish coercion, a plaintiff must show that the United States put "irresistible pressure" on the third party with a mind to "compel specific actions." *A & D Auto Sales*, 748 F.3d at 1154–55 (quoting *Turney v. United States*, 115 F. Supp. 457, 464

(Ct. Cl. 1953)). A third party's use of its land in connection with voluntary participation in a government program falls far short of meeting this standard. *See Welty v. United States*, 135 Fed. Cl. 538, 550–51 (2017). In *Welty*, riverine landowners complained that after a neighbor built a levee on a property enrolled in the U.S. Department of Agriculture's ("USDA") Conservation Reserve Program ("CRP"), their property began to experience increasingly severe flooding. *Id.* at 541. Acknowledging that USDA did not build the levee, the landowners nonetheless claimed that their neighbor built the levee "with the approval, input, and oversight of the United States." *Id.* The court dismissed the complaint for failure to state a claim, reasoning that "[t]o the extent any of the alleged damage . . . related to modifications made or maintenance performed for purposes of complying with the terms of the CRP, that damage is a result of [the neighbor's] voluntary decision to participate in [the CRP], not the result of any actions required by or coerced by" the United States. *Id.* at 550–51.

Here, Ms. Berry's claim is even weaker than the claim in *Welty*, for the Nation retains its inherent governmental authority over the Site, and Interior did not (and does not) control or direct the Nation's decision to commercially develop its trust land for gaming purposes. In fact, as noted above, Ms. Berry alleges the Nation started construction *before* Interior took the Site into trust; and, of course, land need not even be taken into trust for a Tribe to operate a gaming facility under IGRA. *See* 25 U.S.C. § 2703(4). Rather, in furtherance of its own self-determination and economic development, the Nation built the Cherokee Springs Casino, and, of its own initiative, also engaged with Interior to have the site taken into trust as contemplated by the IRA and IGRA. Accordingly, because Interior did not control, direct, or coerce the Nation into building the casino or using the Site for

gaming purposes, much less adopting the specific design that purportedly led to the flooding, the Nation's actions cannot form the basis for a takings claim against the United States.

C. IGRA Does Not Create Any Enhanced Trust Duties Applicable to the Site.

As a rule, Interior's taking of land into trust under § 5 of the IRA creates only a general (and limited) trust relationship between the Tribe and the United States. *See, e.g.*, *Hydaburg*, 667 F.2d at 67–68. The only fiduciary duty established is a duty "to hold the acquired . . . lands so as to prevent continued alienation." *Id.* (analogizing the IRA to the General Allotment Act of 1887).

On occasion, courts have held that *other* statutory or regulatory provisions create specific fiduciary obligations for the United States that are enforceable by the trustee tribe. *See White Mountain Apache Tribe*, 537 U.S. at 474–76 (statute granting Interior the right "to make direct use of portions of the trust corpus"); *Mitchell II*, 463 U.S. at 219–22 (timber sale regulations under which Interior "exercises literally daily supervision over the harvesting and management of tribal timber"); *Oglala Sioux Tribe of Pine Ridge Indian Reservation v. United States*, 21 Cl. Ct. 176, 188–89 (1990) (grazing permit regulations vesting Interior with "pervasive authority and elaborate control over" tribal grazing permits).

In the first place, even if IGRA resembled these statutory and regulatory provisions, that fact would not help Ms. Berry's cause: for the duties imposed by such provisions are enforceable solely by the trustee tribe against the United States, and not by unrelated third parties. In other words, even if IGRA established some duty to act, and the United States did not so act, only the affected Tribe (here, the Nation) could bring a claim for damages

against the United States (assuming all other requirements for justiciability had been met). A third-party takings claim premised on that same inaction could not be bootstrapped to such a hypothetical claim.

But even setting that problem aside, Ms. Berry's assertions of an "expanded" duty have no foundation because "no fiduciary duty [is] created by [IGRA's] elaborate regulatory scheme." *Vizenor v. Babbitt*, 927 F. Supp. 1193, 1201 (D. Minn. 1996); *accord Rancheria v. Salazar*, 881 F. Supp. 2d 1104, 1122 (N.D. Cal. 2012) (rejecting the argument that IGRA imposes "a continuing trust obligation to assist . . . Tribe[s] in engaging and conducting gaming"), *rev'd on other grounds sub nom Rancheria v. Jewell*, 776 F.3d 706 (9th Cir. 2015); *Lac Courte Orielles Band of Lake Superior Chippewa Indians of Wisconsin v. United States*, 259 F. Supp. 2d 783, 791 (W.D. Wisc. 2003) ("Nothing in [IGRA] indicates any intention by Congress to recognize or create a fiduciary duty."), *aff'd*, 367 F.3d 650. In this regard, IGRA does not direct Interior or the NIGC to oversee daily casino operations, nor dictate that Interior or the NIGC should ensure that tribes choose only games that will produce a certain rate of return.

Rather, IGRA's provisions serve in relevant part "to shield [tribes] from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players." 25 U.S.C. § 2702(2). And the tools that IGRA and its regulations provide to the NIGC for carrying out these purposes—including the ability to monitor operations, the right to inspect books and records, and the authority to approve tribal gaming ordinances and order temporary closures—generally are committed to the agency's discretion. *Cf. Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (agency's refusal

to take enforcement steps is not reviewable). This differentiates Interior's role under IGRA from its hands-on management in the realm of tribal timber sales and grazing permits. *See* 25 U.S.C. § 5109 (directing Interior to apply certain principles to Tribal timber management and livestock grazing); *see also Navajo Nation*, 537 U.S. at 507–08 (coal leasing provisions of the Indian Mineral Leasing Act ("IMLA") did not establish an enforceable fiduciary duty because they "neither assigned [Interior] a comprehensive managerial role nor . . . expressly invested [it] with responsibility to secure the needs and best interests of [Tribe]." (quotation omitted). Accordingly, like the coal leasing provisions of IMLA in *Navajo Nation*, IGRA does not establish additional trust duties enforceable against Interior by a Tribe.

* * * * *

In summary, all the actions identified in the complaint that allegedly led to flooding at the Berry property were taken by the Nation, and were well within its purview as a sovereign entity. And because the United States cannot be liable on a takings theory for inaction or the uncoerced acts of third parties, the complaint fails to state a claim, and must be dismissed. Finally, IGRA does not create any enhanced trust duties on Interior's part; and even if it did, a third party like Ms. Berry could not latch a takings claim on to an alleged failure to undertake such duties, which are enforceable only by the Tribe itself.

CONCLUSION

For the reasons discussed above, the Court should dismiss Ms. Berry's claim under the Fifth Amendment's Takings Clause for failure to state a claim for which relief may be granted.

Respectfully submitted,

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