IN THE UNITED STATES COURT OF FEDERAL CLAIMS

(Electronically Filed on January 16, 2020)

L & W CONSTRUCTION LLC, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 19-1628L
	)	
THE UNITED STATES OF AMERICA,	)	Judge Eric G. Bruggink
	)	
Defendant.	)	

UNITED STATES' MOTION TO DISMISS

Pursuant to Rule 12(b)(1) and 12(b)(6) of the Rules of the Court of Federal Claims ("RCFC"), Defendant, the United States of America, moves to dismiss Plaintiffs' Complaint ("Compl."), ECF No. 1, for lack of jurisdiction and for failure to state a claim.

This Court lacks jurisdiction because Plaintiffs' claims are barred by the six-year statute of limitations. Also, pursuant to RCFC 12(b)(1) and 12(h)(3), the United States respectfully moves to dismiss the complaint for lack of subject matter jurisdiction under 28 U.S.C. § 1500 as a result of Plaintiff Bonnie Lynn's pending district court action based on the same operative facts as the case before this Court. In addition to a lack of jurisdiction, pursuant to RCFC 12(b)(6), Plaintiffs' Complaint should be dismissed for failing to state a claim upon which relief can be granted.

A supporting memorandum setting forth the grounds for this motion follows.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

MEMORANDUM IN SUPPORT OF UNITED STATES' MOTION TO DISMISS

I. INTRODUCTION AND SUMMARY

Plaintiffs assert that the National Park Service and the U.S. Forest Service have taken Plaintiffs' properties by "allowing a dangerous, concentrated hunt of Yellowstone bison in Beattie Gulch, Montana." Compl. ¶ 1. Plaintiffs assert two claims in their Complaint brought under the Fifth Amendment to the Constitution of the United States and the Tucker Act, 28 U.S.C. § 1491(a)(1): a temporary regulatory takings claim and a temporary physical takings claim. *See* Compl. ¶¶ 51-58.

The statute of limitations bars Plaintiffs' claims. Plaintiffs allege that the United States allowed unsafe conditions during bison hunting on federal and state-owned land near their properties. When Plaintiffs purchased their properties in 2005, bison were already being hunted, and Plaintiffs allege that the hunting intensified in 2005, 2011, and 2012. Based on these claims, Plaintiffs' claims accrued before October 18, 2013. As such, the six-year statute of limitations bars Plaintiffs' claims.

The Court should also dismiss Plaintiffs' Complaint for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 1500 because Plaintiffs filed a second lawsuit in the United States District Court for the District of Columbia that presents the same issues as this case.[1] Section 1500 deprives this Court of jurisdiction whenever a lawsuit is pending in another court based on substantially the same facts as the case filed in the Court of Federal Claims. After filing this case on October 18, 2019, Plaintiffs then filed a complaint in the United States District Court for the District of Columbia on October 21, 2019, which is attached as Exhibit A. *See also* Pls.' Notice

[1] This case has since been transferred to the District of Montana, where it is currently pending.

of Directly Related Case, ECF No. 5. In order to fulfill the purpose and plain text of the statute, § 1500 requires that this action is dismissed to avoid the burden and costs of redundant litigation.

In their Complaint, Plaintiffs assert repeatedly that the United States has the authority to make bison hunting in Beattie Gulch safe but fails to exercise that authority. *See id.* ¶ 34. This Court lacks jurisdiction over any claim premised on the federal agencies' alleged failure to act, which sounds in tort. Thus, this Court is not the correct forum for such claims, and Plaintiffs' Fifth Amendment claims are not the proper vehicle to address any grievances over the agencies' alleged failure to act.

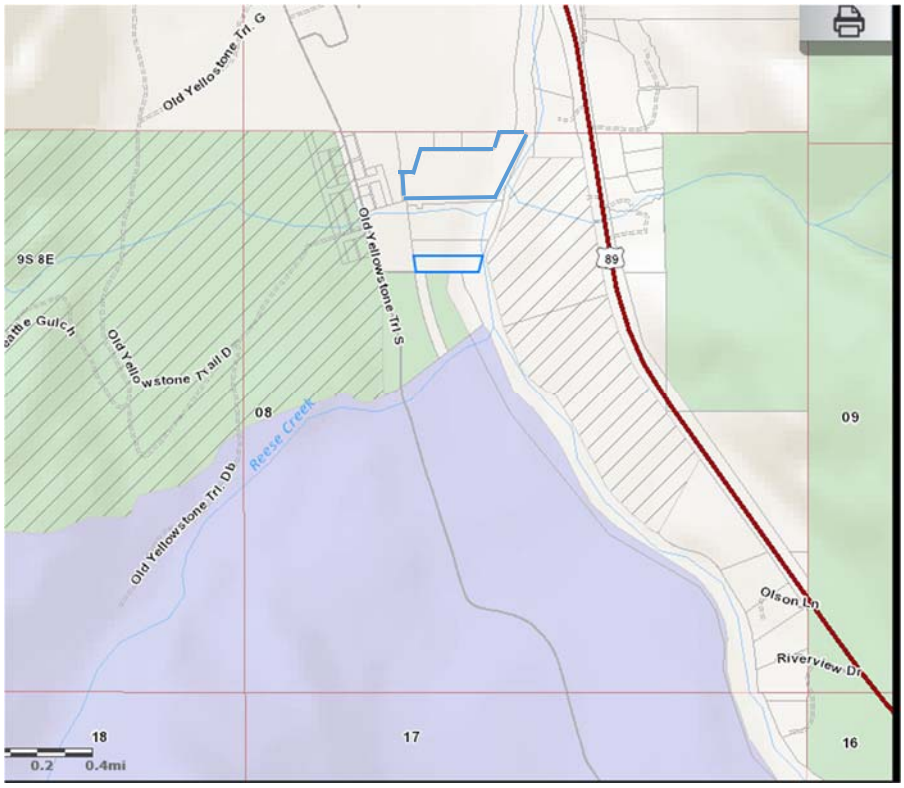
In addition to these jurisdictional deficiencies, Plaintiffs' Complaint fails to allege facts sufficient for their takings claims. Plaintiffs allege a temporary regulatory taking in their first count of their Complaint, but they are unable to identify any regulation applied to their properties as the source of the alleged taking. Plaintiffs also allege a temporary physical taking that is the result of the actions of wild animals—raptors and ravens—dropping pieces of bison guts on their property. This claim is far too attenuated from any alleged government action to state a takings claim, and it is well established that wild animals are not an instrumentality of the United States on which a takings claim can be premised. Thus, Plaintiffs fail to state a viable takings claim under RCFC 12(b)(6).

For these reasons, the Court should grant the United States' motion to dismiss.

II. FACTUAL BACKGROUND[2]

A. History of Bison Hunting

Wild and free-roaming bison form an integral part of the Greater Yellowstone Ecosystem. Compl. ¶ 20. Yellowstone National Park provides a sanctuary for a wild and free-ranging population of bison up to a certain limit. Interagency Bison Management Plan Record of Decision ("IBMP ROD") at 6, attached as Ex. B. The park, however, is not a self-contained ecosystem, and, similar to other wildlife, bison often migrate out of Yellowstone in winter to lower elevations where there is less snow and forage is more available. Compl. ¶ 2; IBMP ROD at 4-5, Ex. B. One path that the bison take is through Beattie Gulch, an area north of Yellowstone National Park on the Custer Gallatin National Forest. *Id*.



To orient the Court, this map shows the relevant area of Beattie Gulch.[3]

The National Park Service has the goal of managing the Yellowstone wild plains bison population. *Id*. ¶ 2. The National Park Service captures some bison, which are either transferred to tribes for slaughter and distribution of meat to their members or enrolled in a multi-year quarantine program for eventual transfer to tribes to start or augment herds on tribal reservations. *Id*. ¶ 23; IBMP ROD at 10-11, Ex. B. Hunting outside Yellowstone is also one method that is used to reduce the bison population, but the hunting is not authorized or regulated by the United States. *Id*. ¶ 3.

Tribal as well as state-regulated bison hunting has been taking place on state and National Forest System land outside Yellowstone National Park for nearly 15 years. In 2004, the Montana state legislature authorized bison hunting. MONT. CODE ANN. §§ 87-1-216(2)(c), 87-2-730. Since 2005, state and tribal hunters have been participating in winter bison hunts on Custer Gallatin National Forest land with private permits issued by Montana Fish, Wildlife and Parks and tribal permits. Chris Geremia, *et al*., *Status Report on the Yellowstone Bison Population* (Sept. 2018), attached as Ex. C. The number of bison that exit Yellowstone and which can be hunted outside the park varies from year to year. 2019 IBMP Winter Operating Plan at 4, 5, 10, attached as Ex. D. Additionally, there have been changes over the years in the number of tribes exercising their treaty rights to hunt bison in this area. Compl. ¶ 28.

[2] Solely for purposes of its motion to dismiss, the United States accepts the factual allegations in the Complaint. However, many of the allegations contained in the Complaint are contentions of law, rather than allegations of fact.

[3] The maps shows Yellowstone National Park in purple, the Forest Service in green, and private land in tan with the Plaintiffs' properties identified with a blue border.

B. IBMP

After years of planning and negotiations over how best to coordinate bison management in the Yellowstone area, the Interagency Bison Management Plan ("IBMP") was adopted in 2000. Compl. ¶ 18. Its original members were the National Park Service, U.S. Department of Agriculture's Animal and Plant Health Inspection Service and Forest Service, Montana Department of Livestock, and Montana Department of Fish Wildlife, and Parks. The federal agencies published separate, but similar, Final Environmental Impact Statements analyzing the environmental impacts of the IBMP and a Record of Decision adopting the IBMP. IBMP ROD at 6, Ex. B. Since then, the IBMP Partners have issued annual updates and operations plans to respond to changing management conditions.

The Forest Service has limited authority to regulate hunting and shooting on National Forest System lands. Although the Secretary possesses authority to "designate areas" in the National Forest System "where, and establish periods when, no hunting or fishing will be permitted," this authority is to be exercised "for reasons of public safety, administration, or compliance with provisions of applicable law." 43 U.S.C. § 1732(b). The Forest Service has issued annual closures in the area near Plaintiffs' properties. In 2015, for example, the Forest Service closed 18 acres in the interest of public safety. Compl. ¶ 31. Again, in 2017, a small area of the Forest was closed to shooting, which pushed the bison hunting further from the private property. *Id.*

The IBMP acknowledges that the National Park Service has exclusive jurisdiction over bison management actions within the boundaries of Yellowstone National Park. IBMP ROD at 6, Ex. B. Bison hunting outside of Yellowstone by state-regulated hunters and tribes with recognized treaty rights is a population control tool, one which the IBMP recognizes as a

desirable option for managing the population and distribution of Yellowstone bison under appropriate conditions. IBMP ROD at 15, Ex. B. As bison exit Yellowstone, wildlife management authority shifts from the Park Service to the State of Montana. *See* 2019 Winter Plan at 11, Ex. D. Montana Fish, Wildlife and Parks administers state-regulated public hunting outside the Park, including on Forest System lands. IBMP ROD at 15, Ex. B; *see also* 36 C.F.R. §§ 241.2, 251.50(c). Montana Fish, Wildlife, and Parks, in connection with Montana Department of Livestock, has direct authority and responsibility to enforce hunting regulations outside Yellowstone National Park, including the direct authority to close hunting areas to state licensees, but it does not regulate tribal hunting. 2019 IBMP Winter Operations Plan at 3, Ex. D; Letter from Montana Fish, Wildlife & Parks, Sept. 21, 2018, attached as Ex. E. Indeed, in recent years, the State has proposed hunting closures "to address hunter safety issues." *Id.*

C. Plaintiffs' Properties

Plaintiffs in this action are L&W Construction LLC and its sole owner, Bonnie Lynn. Compl. ¶ 8. Plaintiffs own two cabins and an RV lot in the Beattie Gulch area.[4] *Id*. ¶ 53. Plaintiffs allege that Plaintiff Lynn decided to purchase two cabins near Yellowstone with the long-term plan of renting them to fund her retirement. *Id*. ¶ 45. The prior owners were selling the cabins because they could not keep up their business according to Plaintiff Lynn. Lynn Decl. ¶ 8. Plaintiff Lynn then advised them that they could sell the properties individually and turn the cabins and land into a condominium complex to increase their pool of potential buyers. *Id*. Plaintiff Lynn estimated that if she purchased two cabins and paid them off, she could use the income they generated to support her retirement. *Id*. ¶ 11. In 2005, Plaintiff Lynn purchased

[4] Plaintiffs allege that Plaintiff L & W Construction LLC owns the two condo cabins and that Plaintiff Lynn is the sole owner of L & W Construction LLC. Compl. ¶ 8.

those two cabins, located at 550 Old Yellowstone Trail South, Units 1 and 8, Gardiner, Montana. *Id*. Plaintiff Lynn has rented the two condo cabins as vacation rentals every year since 2006. *Id*. ¶ 12.

Plaintiff Lynn also purchased an undeveloped lot of 2.4 acres a few hundred yards south of the cabins and about 300 yards north of the northern Yellowstone boundary, located at 538 Old Yellowstone Trail South, Gardiner, Montana. *Id*. ¶ 13. Plaintiff Lynn purchased an RV and planned to build two houses on the property, a part-time home for herself and a vacation rental guest house. *Id*. ¶ 15.

D. CFC Complaint

Plaintiffs filed their complaint in this Court on October 18, 2019. Compl., ECF No. 1. Plaintiffs allege a takings claim under the Fifth Amendment and the Tucker Act, 28 U.S.C. § 1491. *Id*. Plaintiffs allege that "Congress gave the federal agencies broad authority to stop the unsafe hunt on Forest Service land, but they have failed to do so." *Id*. ¶ 5. Plaintiffs assert that the United States has created a concentrated, unsafe, and unethical hunt every winter, which prevents Plaintiff Lynn from operating her small business and costs her money. *Id*. ¶ 6. Plaintiffs further allege that the bison guts physically occupy her land, taking her land for a public use. *Id*.

Plaintiffs assert that bison hunting has changed the character of Beattie Gulch and escalated dramatically since 2000. *Id*. ¶ 28. Plaintiffs also assert that hunting has intensified since 2012, specifically the winter of 2012-2013, because of rules adopted by the Park Service and Forest Service. *Id*. ¶ 30; Lynn Decl. ¶ 23. As a result, Plaintiffs assert that the cabins are only rented from May until October and that the cabins have decreased in market value compared to if they could be used year-round. Compl. ¶¶ 49-50.

In Count 1, Plaintiffs assert a temporary regulatory taking due to the failure of the National Park Service and the Forest Service to regulate the bison hunt in a way that keeps Plaintiffs safe. *Id*. ¶ 52. According to Plaintiffs' allegations, the danger of the bison hunt evicts residents from their homes and scares away visitors who would rent cabins, effectively creating an easement on Plaintiffs' properties. *Id*. ¶ 53.

Plaintiffs allege that the bison hunters leave behind hundreds of "gut piles" after killing the bison, and the gut piles attract wildlife and pose a significant health threat to people, pets, livestock, and wildlife because of the potential transmission of the bacterium *Brucella abortus*. *Id*. ¶ 35-37. In Count 2, Plaintiffs assert a temporary physical taking is caused by raptors and ravens who carry pieces of the bison guts away and drop them on Plaintiffs' properties. *Id*. ¶ 57.

E. District Court Complaint

Three days after filing the Complaint in the CFC, on October 21, 2019, Plaintiff Lynn and a community organization she created filed a complaint in the United States District Court for the District of Columbia, *Neighbors Against Bison Slaughter, et al, v. United States*, No. 1:19-cv-3144 (D.D.C.) ("DCT Compl."). Ex. A. On November 15, 2019, that case was then transferred to the District of Montana, *Neighbors Against Bison Slaughter, et al., v. United States*, No. 1:19-cv-128 (D.MT.). In that case, the named plaintiffs are Bonnie Lynn and Neighbors Against Bison Slaughter, a community organization created by Plaintiff Lynn. DCT Compl. ¶ 17.

Plaintiffs assert four claims in their District Court Complaint: (1) an Administrative Procedure Act ("APA") violation in implementing the Yellowstone Bison Management Act Amendments; (2) an APA violation in implementing the Forest Service land management statutes; (3) a National Environmental Policy Act ("NEPA") violation of the requirement to

analyze connected actions; and (4) a NEPA violation of the requirement to issue a supplemental environmental impact statement. Plaintiffs seek declarations of these statutory violations, injunctive relief permanently enjoining all hunting on federal land in Beattie Gulch within one mile of the private residences. DCT Compl. ¶ 72.

Specifically, Plaintiffs allege that the National Park Service and Forest Service have abandoned their duties to manage the Yellowstone bison and endangered hunters and local property owners by not analyzing the impacts of the bison hunting in Beattie Gulch. *Id*. ¶ 1. Plaintiff Lynn alleges that she owns three properties across the road from an area of the Gallatin National Forest where hunters kill bison and that the hunting has "stopped Ms. Lynn from renting her vacation rental cabins during the winter, lowered her property values, prevented her from using her properties for family visits, and caused her emotional trauma." *Id*. ¶¶ 15-16.

III. STANDARD OF REVIEW

A. RCFC 12(b)(1)

Jurisdiction is a threshold issue and a court must confirm its jurisdiction to hear and decide a case before proceeding to the merits. *Ultra-Precision Mfg. Ltd. v. Ford Motor Co.*, 338 F.3d 1353, 1356 (Fed. Cir. 2003). Absent congressional consent to entertain a claim against the United States, the Court lacks authority to grant relief. *United States v. Testan*, 424 U.S. 392, 399 (1976); *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

To withstand a RCFC 12(b)(1) motion to dismiss for lack of jurisdiction, the plaintiff bears the burden of proving the allegations supporting jurisdiction. *Mars Inc. v. Kabushiki-Kaisha Nippon Conlux*, 24 F.3d 1368, 1372 (Fed. Cir. 1994); *Am. Pac. Roofing Co. v. United States*, 21 Cl. Ct. 265, 267 (1990) ("where the court's jurisdiction is put in question, plaintiff 'bears the burden of establishing subject matter jurisdiction by a preponderance of the

evidence'") (quoting *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988)). If a motion to dismiss for lack of subject matter jurisdiction challenges the truth of the jurisdictional facts alleged in the complaint, this Court may consider relevant evidence to resolve disputed facts and does not need to presume the truthfulness of the plaintiff's allegations. *Reynolds*, 846 F.2d at 747. Thus, in deciding a motion to dismiss for lack of subject matter jurisdiction, the Court may consider evidentiary matters outside the pleadings, without converting the motion into one for summary judgment. *See Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1355 (Fed. Cir. 2011) (citing *Cedars-Sinai v. Watkins*, 11 F.3d 1573, 1583-84 (Fed. Cir. 1993); *Arbaugh v. Y&H Corp*., 546 U.S. 500, 514 (2006)). *See also Indium Corp. of Am. v. Semi–Alloys, Inc*., 781 F.2d 879, 884 (Fed. Cir. 1985) ("In deciding such a Rule 12(b)(1) motion, the court can consider . . . evidentiary matters outside the pleadings."); *Newtech Research Sys., LLC v. United States*, 99 Fed. Cl. 193, 200 (2011) ("[When] defendant challenges the jurisdictional facts alleged in the complaint[,] . . . the parties are able to introduce—and the court is permitted to examine—evidence beyond the four corners of the complaint in order for the court to resolve disputed jurisdictional facts." (footnote omitted)), *aff'd*, 468 F. App'x 985 (Fed. Cir. 2012) (per curiam).

If the Court, at any time, determines that the plaintiff has not met its burden with respect to establishing jurisdiction and that it lacks subject-matter jurisdiction, the action must be dismissed. RCFC 12(h)(3); *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009). Subject-matter jurisdiction cannot be forfeited or waived and should be considered when fairly in doubt. *Id.*; *cf John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 134 (2008) (affirming the Federal Circuit's decision to *sua sponte* raise statute of limitations considerations and ultimately decide there was no jurisdiction).

B. RCFC 12(b)(6)

A complaint should be dismissed under RCFC 12(b)(6) when the facts alleged in the complaint do not establish that the claimant is entitled to a legal remedy. *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002); *Akins v. United States*, 82 Fed. Cl. 619, 622 (2008). Rule 12(b)(6) serves "to allow the court to eliminate actions that are fatally flawed in their legal premises and destined to fail, and thus to spare litigants the burdens of unnecessary pretrial and trial activity." *Maxwell v. United States*, 104 Fed. Cl. 112, 116 (2012) (quoting *Advanced Cardiovascular Sys., Inc. v. Scimed Life Sys., Inc.*, 988 F.2d 1157, 1160 (Fed. Cir. 1993)). Although the Court should assume that all well-pleaded factual allegation are true, a "plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks & brackets omitted). Furthermore, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Schrader v. United States*, 103 Fed. Cl. 92, 96 (2012) (quoting *Ashcroft*, 556 U.S. at 678) (internal quotation marks omitted). *See also Westinghouse Elec. Corp. v. United States*, 41 Fed. Cl. 229, 233-34 (1998) (in considering a motion to dismiss, "legal conclusions, deductions, or opinions couched as factual allegations are not given a presumption of truthfulness." (citations omitted)).

Although the court's inquiry under Rule 12(b) is limited to examining the facts pleaded in the complaint, the court may look to "matters incorporated by reference or integral to the claim, items subject to judicial notice and matters of public record."[5] *Dimare Fresh, Inc. v. United*

[5] All documents cited and attached herein were incorporated by reference in Plaintiffs' Complaint. *See generally* ECF No. 1.

States, 808 F.3d 1301, 1306 (Fed. Cir. 2015) (alterations and citations omitted). The Court may also consider supplemental documents that are "undisputed factual matters of public record" and "exhibits to plaintiff's complaint." *Lippmann v. United States*, 127 Fed. Cl. 238, 247 (2016).

IV. ARGUMENT

A. The Statute Of Limitations Bars Plaintiffs' Claims.

The statute of limitations bars Plaintiffs' claims because they accrued more than six years before Plaintiffs filed suit on October 18, 2019. As a matter of statute, 28 U.S.C. § 2501, this Court only has jurisdiction over claims "filed within six years after such claim first accrues." *Mildenberger v. United States*, 643 F.3d 938, 945 (Fed. Cir. 2011). Because the statute of limitations relates to a waiver of the United States' sovereign immunity, it is a jurisdictional requirement that cannot be waived and is not subject to tolling. *John R. Sand & Gravel Co.*, 552 U.S. at 134 (referring to the six-year statute as "jurisdictional" and a "more absolute, kind of limitations period"); *see also Banks v. United States*, 741 F.3d 1268, 1276 (Fed. Cir. 2014) ("[T]he statute's six-year time frame is a limited jurisdictional window in which plaintiffs have the ability to bring a claim against the Government." (citation omitted)).

A Fifth Amendment takings claim accrues "when all the events which fix the government's alleged liability have occurred and the plaintiff was or should have been aware of their existence." *Casitas Mun. Water Dist. v. United States*, 708 F.3d 1340, 1359 (Fed. Cir. 2013) (quoting *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988)). "Whether a plaintiff should have been aware of the existence of a claim is an objective test in which 'a plaintiff does not have to possess actual knowledge of all relevant facts in order for the cause of action to accrue.'" *Grass Valley Terrace v. United States*, 46 Fed. Cl. 629, 633 (2000) (quoting *Fallini v. United States*, 56 F.3d 1378, 1380 (Fed. Cir. 1995)), *aff'd per curiam*,

7 F. App'x 928 (Fed. Cir. 2001), *rev'd sub nom. Franconia Assocs. v. United States*, 536 U.S. 123 (2002). The governmental act that causes accrual of a takings claim is the act that constitutes the taking. *Casitas*, 708 F.3d at 1359.

For Plaintiffs' takings claims to be timely, they must prove by a preponderance of the evidence that the events that allegedly established the United States' liability did not occur prior to October 18, 2013. *See M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010). Plaintiffs do not identify a specific government action that gave rise to an alleged taking, but rather, they allege broadly that the regulations in the IBMP allowed hunting on public lands that have effected a taking of their properties. *See, e.g.*, Compl. ¶ 54. The IBMP was adopted in 2000, so these allegations are time-barred or otherwise insufficient to establish subject matter jurisdiction by a preponderance of the evidence because Plaintiffs knew or "should have been aware" that "all the events which fix the government's alleged liability [had] occurred" more than six years before the complaint. *Casitas*, 708 F.3d at 1359 (quoting *Hopland Band of Pomo Indians*, 855 F.2d at 1577).

1. Plaintiffs knew or should have known that bison hunting occurred on nearby federal lands before October 18, 2013.

Plaintiffs knew or should have been aware of the government actions that allegedly gave rise to a taking well before October 18, 2013. Several state and federal agencies developed the IBMP during the 1990s, and as stated above, the IBMP was issued in 2000. Compl. ¶ 18. The IBMP included hunting as one method of managing the bison population. *Id*. ¶ 21. Then in 2004, the State of Montana issued its Final Bison Hunting Environmental Assessment and Decision Notice, which is available at http://fwp.mt.gov/fishAndWildlife/management/bison/. Additionally, Plaintiffs' Complaint included a chart showing the number of bison killed by hunters

each year from 2005 to 2012. *Id*. ¶ 29. So, there is evidence that hunting has occurred since 2005. Moreover, it is undisputed that Plaintiffs knew that the bison hunting was occurring prior to 2013.

2. Plaintiffs knew or should have known about the potential concerns surrounding bison hunting before October 18, 2013.

The related decisions managing the Yellowstone bison were and have been publicly available. The existence of and issues surrounding the bison hunt also were not concealed, but were discussed as part of the public comment periods on the draft plans that were required by both NEPA and the Montana Environmental Policy Act. It is undisputed that hunting occurred annually for many years throughout the entire time that Plaintiffs have owned their properties. Plaintiffs assert that the hunting has changed or intensified since 2005, in 2011, and since 2012. Compl. ¶¶ 28, 30, 48. Plaintiffs allege that bison hunting has escalated dramatically since 2000 and since 2005. Compl. ¶ 28. Further, Plaintiffs assert that in 2011, the Forest Service and the Park Service approved increasing tribal hunting opportunities. *Id*. As a result, Plaintiffs allege that the bison hunting also intensified since 2012. *Id*. ¶ 29. Plaintiffs assert that neighbors and residents have objected to the unsafe hunting conditions for years. *Id*. ¶ 42. Thus, even without considering other evidence, Plaintiffs' claims are time-barred because Plaintiffs directly attribute the alleged government action affecting their properties to events in place more than six years before they filed their takings claims on October 18, 2019.

Based on Plaintiffs' pleading, the evidence shows that Plaintiffs were aware or should have been aware of the bison hunting and any unintended consequences in the area more than six years before their October 18, 2019 Complaint. *See Grass Valley Terrace*, 46 Fed. Cl. at 633 (quoting *Fallini*, 56 F.3d at 1380). Given the proximity to public lands and Plaintiffs' desire to take advantage of this location, Plaintiffs also should have expected potential impacts by wildlife and public land uses, such as hunting. Plaintiffs have failed to plead allegations

establishing that their claims accrued after October 18, 2013. Accordingly, this Court should dismiss Plaintiffs' claims as time-barred because all the "pertinent events [had] occurred" that allegedly fixed the United States' liability before October 18, 2013. *Higgins v. United States*, 589 F. App'x 977, 980 (Fed. Cir. 2014) (quoting *Fallini*, 56 F.3d at 1380); *see also Casitas*, 708 F.3d at 1359.

B. Section 1500 Operates To Divest This Court Of Jurisdiction Because Plaintiffs Filed Another Lawsuit In District Court Alleging The Same Facts.

Section 1500 divests this Court of jurisdiction over "any claim for or in respect to which" the plaintiff has "any suit or process" against the United States or an agent thereof "pending in any other court." *Keene Corp. v. United States*, 508 U.S. 200, 207-08 (1993). As explained by the Supreme Court, this means that Section 1500 divests the Court of jurisdiction if (1) the claims in the two courts are sufficiently overlapping and (2) the claims in the other court are "pending." *Id*.

The statute's "clear" purpose is to "save the Government from burdens of redundant litigation," *United States v. Tohono O'Odham Nation*, 563 U.S. 307, 315 (2011), and it does so by "forc[ing] plaintiffs to choose between pursuing their claims in the [CFC] or in another court." *UNR Indus., Inc. v. United States*, 962 F.2d 1013, 1018, 1021 (Fed. Cir. 1992), *cert. granted*, 506 U.S. 939 (1992), *aff'd*, 508 U.S. 200 (1993). By forcing plaintiffs to choose the court in which they will pursue their claims, Section 1500 "prevent[s] the United States from having to litigate and defend against the same claims in both courts." *Harbuck v. United States*, 378 F.3d 1324, 1328 (Fed. Cir. 2004).

1. The claims in both cases complaints are based on substantially the same operative facts.

The first of the two requirements that must be met for Section 1500 to apply is that the CFC action and the District Court action must be "for or in respect to" the same claim within the

meaning of the statute. Under Section 1500, "[t]wo suits are for, or in respect to the same claim, precluding jurisdiction in the CFC, if they are based on substantially the same operative facts, regardless of the relief sought in each suit." *Tohono*, 563 U.S. at 317. In other words, the relief sought in both cases need not be identical for Section 1500 to divest this Court of jurisdiction, but the Court should consider if the suits are "based on substantially the same operative facts." In examining the cases that prompted this statute, the Supreme Court stated that "[t]he so-called 'cotton claimants' . . . sued the United States in the Court of Claims under the Abandoned Property Collection Act, 12 Stat. 820, while at the same time suing federal officials in other courts, seeking relief under tort law for the same alleged actions." *Id*. at 311-12. So, it seems "substantially the same operative facts" means that both cases are based on the same alleged actions.

First, the parties in interest in the two actions are the same. Plaintiff Bonnie Lynn is named in both actions. In the CFC action, Plaintiff L & W Construction LLC is an entity formed and solely owned by Plaintiff Lynn, that holds title to her rental properties. Compl. ¶ 8. In the District Court action, Plaintiff Neighbors Against Bison Slaughter is a "community organization"[6] also formed by Plaintiff Lynn, "to present a united front to the IBMP." DCT Compl. ¶ 17. Plaintiff Lynn is clearly the individual behind both cases.

Second, in both cases, the plaintiffs allege that the National Park Service and the U.S. Forest Service have failed to manage the Yellowstone bison without causing harm to private property and individuals. *Compare* Compl. ¶ 1 *with* DCT Compl. ¶ 1. Both cases focus on the bison hunts that occur outside of Yellowstone in the area of Beattie Gulch and alleged impacts to

[6] Based on the pleadings, there is no indication that there are any other members in this organization.

private property, specifically the property owned by Plaintiff Lynn. Compl. ¶¶ 2-3, 6; DCT Compl. ¶¶ 2-3, 15. Both cases allege that the bison hunt has affected Plaintiff's Lynn ability to rent her properties during the winter, lowered her property values, and impacted her use of her properties. Compl. ¶ 9; DCT ¶ 16. And while both cases seek different legal remedies, they rely on the same statutory authority to support the alleged obligation of the Park Service and the Forest Service. Compl. ¶¶ 12-14; DCT ¶¶ 26-28. In addition to many identical paragraphs, the factual background in both cases is substantially the same. *Compare* Compl. ¶¶ 17-50 *with* DCT Comp. ¶¶ 31-53.

In order to establish a taking of their property in this action and to prevail in the District Court action, Plaintiffs will have to rely on the same operative facts: the same plaintiff, the same real property, the same allegations regarding alleged harm to that real property from bison hunting on public lands and IBMP history, and the same time periods. Accordingly, this Court should conclude that the CFC Complaint and the District Court Complaint present the same issues premised on substantially the same operative facts.

2. Section 1500 divests this Court of jurisdiction, regardless of the order of filing.

The second requirement for Section 1500 to apply is the pendency of a suit or process against the United States in any other court. In this case, Plaintiffs' District Court action was filed three days after the CFC action. Accordingly, this case presents the question of whether the order of filing two suits against the United States in different courts affects the application of Section 1500. In *Brandt v. United States,* the Federal Circuit stated that § 1500 applied when "there is an earlier-filed 'suit or process' pending in another court" with a "later-filed Court of Federal Claims action." 710 F.3d 1369, 1374 (Fed. Cir. 2013) (citation omitted); *see also Tecon Eng'rs, Inc. v. United States,* 343 F.2d 943 (Ct. Cl. 1965).

The United States acknowledges that, in other cases before the Court of Federal Claims, this Court has held that the order-of-filing is relevant. In numerous opinions, the Court of Federal Claims has applied *Tecon* as binding precedent. *See, e.g.*, *Ute Indian Tribe of Uintah and Ouray Indian Reservation v. United States*, 145 Fed. Cl. 609, 619-20 (2019) (reservedly finding *Tecon* is binding circuit precedent); *Int'l Fed'n of Prof'l & Tech. Eng'rs v. United States*, 111 Fed. Cl. 175, 180-81 (2013) (finding that the district court action was not pending at the time this case was filed because plaintiffs filed their complaint in the Court of Federal Claims before they filed their complaint in the Eastern District of Virginia); *Otoe-Missouria Tribe of Indians v. United States*, 105 Fed. Cl. 136, 138-39 (2012) (rejecting Defendant's argument that *Tecon* is no longer good law and noting that such argument has not been followed by the Court of Federal Claims); *Warren Tr. v. United States.*, 107 Fed. Cl. 533, 554 (2012) (holding that *Tecon* was good law because the plaintiff did not have a pending suit at the time of filing in the CFC); *Kenney Orthopedic, LLC v. United States.*, 107 Fed. Cl. 85, 90 (2012) (noting that the court is required to apply the controlling law and rejecting the opportunity to apply Section 1500); *Kaw Nation of Okla. v. United States*, 103 Fed. Cl. 613, 617 (2012) (upholding *Tecon* as good law); *Nez Perce Tribe v. United States*, 101 Fed. Cl. 139, 145 (2011) (reasoning that the Supreme Court left undisturbed the *Tecon* timing exception).

Despite these cases, the United States urges that the order of filing should not be determinative. Both the Federal Circuit and the United States Supreme Court have held that Congress' clear purpose in enacting § 1500 was "to force an election between a suit in the Court of Claims and a suit in another court on essentially the same claim," and "to save the Government from burdens of redundant litigation." *UNR Indus.*, 962 F.2d at 1022; *Tohono*, 563 U.S. at 315. As the Supreme Court explained in *Tohono*: "The rule in § 1500 effects a significant jurisdictional

limitation, and Congress reenacted it even as changes in the structure of the courts made suits on the same facts more likely to arise. Doing so reaffirmed the force of the bar and thus the commitment to curtailing redundant litigation." *Id*. at 314. Indeed, the Supreme Court has rejected a narrow interpretation of § 1500, warning courts not to be "bound by Circuit precedent that [leaves § 1500] without meaningful force." *Id*. The Court expressly declared that "the Court of Appeals was wrong to allow its precedent to suppress [§ 1500's] aims" because we "should not render statutes nugatory through construction." *Id*. at 315. Additionally, the Federal Circuit has observed that, "[t]o permit a plaintiff to maintain cases in both courts until the government moves to dismiss the Claims Court suit or until a judge addresses the motion would compel the government to defend two suits simultaneously, contrary to this recognized purpose of [S]ection 1500." *UNR Indus.*, 962 F.2d at 1022.

The Federal Circuit has not had opportunity to squarely address the viability of *Tecon* in the aftermath of the Supreme Court's *Tohono* decision. In *Brandt*, the Federal Circuit concluded that the "order of filing" rule remains binding precedent. In a lengthy concurrence, however, Judge Proust explained why she would have overruled the order-of-filing rule in *Tecon* as contrary to the clear language and purpose of Section 1500:

> The Supreme Court has held that Congress's 'clear' purpose for § 1500 was 'to save the Government from burdens of redundant litigation.'" Because of the order-of-filing rule, complainants can easily subvert that purpose and avoid the jurisdictional restrictions in § 1500 by simply filing first in the Court of Federal Claims and then in another court. By merely delaying filing of a second related suit by only a day—as the plaintiffs did here—complainants can force the government to defend itself in the Court of Federal Claims and another court in redundant co-pending suits. That is clearly not how Congress envisioned § 1500 would restrict access to the Court of Federal Claims.

Brandt, 710 F.3d at 1381 (citation omitted).

Judge Proust also pointed out that the Federal Circuit, sitting *en banc*, had previously overruled the order of filing rule. Although the Supreme Court concluded in *Tohono* that the rule was not presented in that case because the CFC action was filed after the District Court suit, Judge Proust argued that "the logical force of our reasoning to dispense with the order-of-filing rule remains." *Id.* In enacting § 1500:

> Congress wanted not to dictate the order in which a claimant files suits in the [Court of Federal Claims] and another court on the same claim, but to discourage him from doing so altogether. Otherwise the purpose of saving the government from defending the same claim in two courts at the same time would be defeated.

Id. (quoting *UNR Indus.*, 962 F.2d at 1022-23).

In light of Supreme Court guidance on Section 1500, Judge Proust urged the Federal Circuit to "revisit *Tecon* once again and dispose of the order-of-filing rule." *Id*. Continuing to follow *Tecon* "transform[s] § 1500 into a hollow jurisdictional restriction 'without meaningful force.'" *Id*. at 1382. Moreover, continued reliance on the order-of-filing rule imposes an oppressive burden on the United States – forcing it to defend itself against duplicative claims based on the same operative facts simultaneously. Such a result conflicts with the language and purpose of §1500, and should not be countenanced.

Although Plaintiff Lynn and her LLC filed suit in this Court three days before it commenced an action based on the same operative facts in the U.S. District Court, under § 1500, as construed by the Supreme Court in its *Tohono dicta*, this Court should be divested of jurisdiction irrespective of the order of filing. *See Ins. Co. of the West v. United States*, 243 F.3d 1367, 1372 (Fed. Cir. 2001) (when Supreme Court dicta is explicit and carefully considered, this Court must follow it.).

C. The Court Lacks Jurisdiction Over Claims Sounding in Tort, Including Any Claim Premised on a Failure to Act.

The CFC lacks jurisdiction over tort claims.[7] Here, Plaintiffs allege that Congress gave the federal agencies broad authority to stop an unsafe hunt on Forest Service land, but they have failed to do so. Compl. ¶ 5. They allege that bison hunting on public land is unsafe because of bison remains that are left behind by hunters and may be transported onto adjacent private lands by other wildlife. Compl. ¶¶ 35. Any alleged failure of the National Park Service or the Forest Service to act *vis-á-vis* bison hunting is, if anything, a tort and does not give rise to a takings claim or takings liability. *E.g.*, *Alves v. United States*, 133 F.3d 1454, 1457-59 (Fed. Cir. 1998) (affirming the CFC's holding that it lacked jurisdiction over a grazing permittee's claim that BLM failed to regulate trespassing livestock because that claim sounds in tort); *St. Bernard Par. Gov't v. United States*, 887 F.3d 1354, 1361-62 (Fed. Cir. 2018) (concluding that the alleged failure of the government to maintain or modify a channel "cannot be the basis of takings liability" and that the sole remedy for inaction "lies in tort"), *cert. denied*, 139 S. Ct. 796 (2019). To the extent Plaintiffs are alleging that bison hunting on public lands has created a nuisance that is affecting the use of their adjacent private lands, such a claim would be a tort, over which the CFC lacks jurisdiction. *See CanPro Invs. Ltd. v. United States*, 120 Fed. Cl. 17, 25 (2015) (dismissing claim based on a nuisance theory as sounding in tort); *Alford v. United States*, 125 Fed. Cl. 4, 7 (2016) (dismissing claims based on alleged trespass and nuisance as sounding in tort); *Nw. La. Fish & Game Pres. Comm'n v. United States*, 79 Fed. Cl. 400, 406 (2007) (finding that claims alleging a continuing trespass or continuing nuisance sound in tort and must be dismissed for lack of jurisdiction), *aff'd*, 574 F.3d 1386 (Fed. Cir. 2009).

[7] The relevant provision of the Tucker Act states that "[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States

Accordingly, this Court lacks jurisdiction over any claims by Plaintiffs that are premised on the United States' alleged failure to act, and such claims should be dismissed under RCFC 12(b)(1).

D. Plaintiffs' Complaint Fails To State A Viable Takings Claim Under RCFC 12(b)(6).

1. Plaintiffs have failed to allege facts supporting a plausible claim that the United States effected a regulatory taking of their properties..

Plaintiffs essentially argue that the existence of the bison hunt on federal land creates an unsafe condition on the neighboring land that has economically impacted their properties and assert in Count 1 of their Complaint, a temporary regulatory taking. This claim fails.

A regulatory taking occurs when a government regulation "goes too far" in burdening the use of private property. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). "To determine whether a governmental regulation of property has gone so far as to effect a taking, courts have engaged in an essentially ad hoc factual inquiry. . . ." *M&J Coal Co. v. United States*, 47 F.3d 1148, 1153 (Fed. Cir. 1995) (citation omitted). In this case, that inquiry goes no further than the inability to identify a regulation that has been applied to Plaintiffs' properties. No such regulation is at issue in their claim. *See Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1216 (Fed. Cir. 2005) ("Air Pegasus, which did not itself own or operate any helicopters, does not allege that the FAA's restrictions regulated its operations under the lease . . . . Air Pegasus, while no doubt injured by reason of the government's actions, has not alleged a taking of private property under the Fifth Amendment."). When an economic injury is not the result of the Government's direct regulation of a plaintiff's property, but rather is derivative of

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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) (emphasis added).

Government regulation of some other party or property, there is no viable claim for a regulatory taking. *See Huntleigh USA Corp. v. United States*, 525 F.3d 1370, 1380 (Fed. Cir. 2008) ("[The act] did not, however, regulate Huntleigh directly. Rather, it modified governmental regulation of the airlines, which resulted in adverse economic consequences for Huntleigh."); *see Palmyra Pac. Seafoods, LLC v. United States*, 561 F.3d 1361, 1366 (Fed. Cir. 2009) ("The fact that the government's regulation of activities in the waters surrounding Palmyra may have adversely affected the value of their contract rights to engage in activities on shore is not sufficient to constitute a compensable taking."); *see also Love Terminal Partners LP v. United States*, 889 F.3d 1331, 1342 (Fed. Cir. 2018) (noting there cannot be a regulatory taking in the absence of significant economic injury). Plaintiffs' Complaint does not identify any government regulation that applies to their properties. This failure is fatal to their regulatory takings claims and compels a dismissal of that claim for failure to state a claim under RCFC 12(b)(6).[8]

2. Plaintiffs have failed to allege facts supporting a plausible claim that the United States effected a physical taking of their properties..

Plaintiffs' Complaint does not "pinpoint the precise action" that "constituted conduct the government could not engage in without paying compensation." *Acceptance Ins. Cos. v. United States*, 583 F.3d 849, 855 (Fed. Cir. 2009); *see also Kitt v. United States*, 277 F.3d 1330, 1336 (Fed. Cir. 2002) (plaintiff must identify the precise governmental action that is the subject of the claim); *Creppel v. United States*, 41 F.3d 627, 634 (Fed. Cir. 1994).

Plaintiffs' claim of a temporary physical taking by the United States rests on an attenuated chain of events involving (1) the state of Montana, which permits and regulates the

[8] Furthermore, Plaintiffs do not allege that the United States has taken all economically beneficial use of their properties. Plaintiffs allege only that the cabins are difficult to rent during the winter. Compl. ¶ 53. This alleged economic impact does not rise to the level of a taking.

public bison hunt, and Indian tribes, who regulate their tribal rights to hunt; (2) private hunters and tribal hunters; and (3) wild raptors and ravens. None of these actions can be attributed to the United States. First, Plaintiffs allege that the hunters shoot bison mere yards from nearby private land. Compl. ¶ 56. Notwithstanding regulations that prohibit discharging a firearm within 150 yards of a residence or occupied area, 36 C.F.R. § 261.10, the shooting of bison on nearby property that Plaintiffs do not own is not a taking of Plaintiffs' property by the United States. Nor are the actions of hunters leaving bison guts on land that does not belong to Plaintiffs. *Id*. The crucial action in Plaintiffs' allegation of a temporary physical occupation does not occur until "raptors and ravens eat the bison guts, or carry them away and drop them on neighboring lands." *Id*. ¶ 57.

The question that must be answered in analyzing Plaintiffs' claims is whether the raptors and ravens are instrumentalities of the United States. The short answer is no. So, it follows that no takings claim or liability can arise from the actions of these wild animals. This situation is similar to cases where ranchers have asserted that wild horses have created a taking by foraging on their grazing allotments and/or properties. Judicial consideration of this legal question in both this Court and the Federal Circuit refers back to *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (10th Cir. 1986) (en banc). There, the plaintiffs challenged BLM's management of wild horses in southwestern Wyoming and also alleged a taking of private property based on the occupation and use of such property by those wild horses. Based on a survey of state and federal laws and court decisions, the Tenth Circuit concluded that "[o]f the courts that have considered whether damage to private property by protected wildlife constitutes a 'taking,' a clear majority have held that it does not and that the government thus does not owe compensation." *Id*. at 1428-29. The Tenth Circuit found that majority view to be consistent with controlling Supreme

Court precedent and, on that basis, rejected the plaintiff's contention that wild horses are instrumentalities of the federal government. *Id*. at 1428.

Subsequent decisions of this Court and the Federal Circuit have consistently held that wild horses are not agents or instrumentalities of the government. In *Fallini v. United States*, the plaintiffs owned private lands and held a term grazing permit issued by BLM for the use of approximately 657,520 acres of public lands that make up the Reveille Allotment in Nye County, Nevada. 56 F.3d 1378, 1379 (Fed. Cir. 1995). The plaintiffs alleged that the consumption of water by wild horses on the grazing allotment constituted an uncompensated taking of their water rights and, in 1983, sent a bill to BLM seeking compensation for the water consumed by the wild horses. *Id*. at 1381. The CFC granted summary judgment in favor of the United States on this claim. The CFC concluded that the plaintiffs "did not have a compensable expectancy in exclusion of wild horses and other wild animals from the allotment or exclusive use of the forage and water." *Fallini v. United States*, 31 Fed. Cl. 53, 58 (1994), *judgment vacated on other grounds*, 56 F.3d 1378 (Fed. Cir. 1995). On appeal, the Federal Circuit held that the *Fallini* plaintiffs' claims were time-barred and therefore did not reach the merits of the takings claim. However, in so doing, it was necessary for the court to identify the government actions that might give rise to an alleged taking. On that issue, the Federal Circuit rejected the premise that the wild horses could be considered agents or instrumentalities of the United States government. *Fallini*, 56 F.3d at 1383 ("What the Fallinis may challenge under the Fifth Amendment is what the government has done, not what the horses have done."). *See also Bradshaw v. United States*, 47 Fed. Cl. 549, 554 (2000) (rejecting plaintiffs' claim because the feral horses are not instrumentalities of the government), *aff'd*, 468 F.3d 803, 809 (Fed. Cir. 2006); *Colvin Cattle Co. v. United States*, 67 Fed. Cl. 568, 575 (2005) (finding "intrusions by wildlife as outside the

control of the government and thus not instrumentalities of a taking") (citing *Kleppe v. New Mexico*, 426 U.S. 529, 535-36 (1976).

The Court should reach the same result here. Wildlife, including raptors and ravens, that may transport and leave behind remains of bison or other wild animals on private property are not agents of the United States. The actions of such wild animals do not, as a matter of law, constitute a government action that gives rise to a Fifth Amendment takings claims. Because Plaintiffs have identified no other federal government action as the cause of the alleged taking, their claim of a temporary physical taking should be dismissed under RCFC 12(b)(6).

V. CONCLUSION

For these reasons, the United States respectfully requests that the Court dismiss Plaintiffs' claims pursuant to RCFC 12(b)(1) and 12(b)(6).

Respectfully submitted, this 16th day of January, 2020.

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