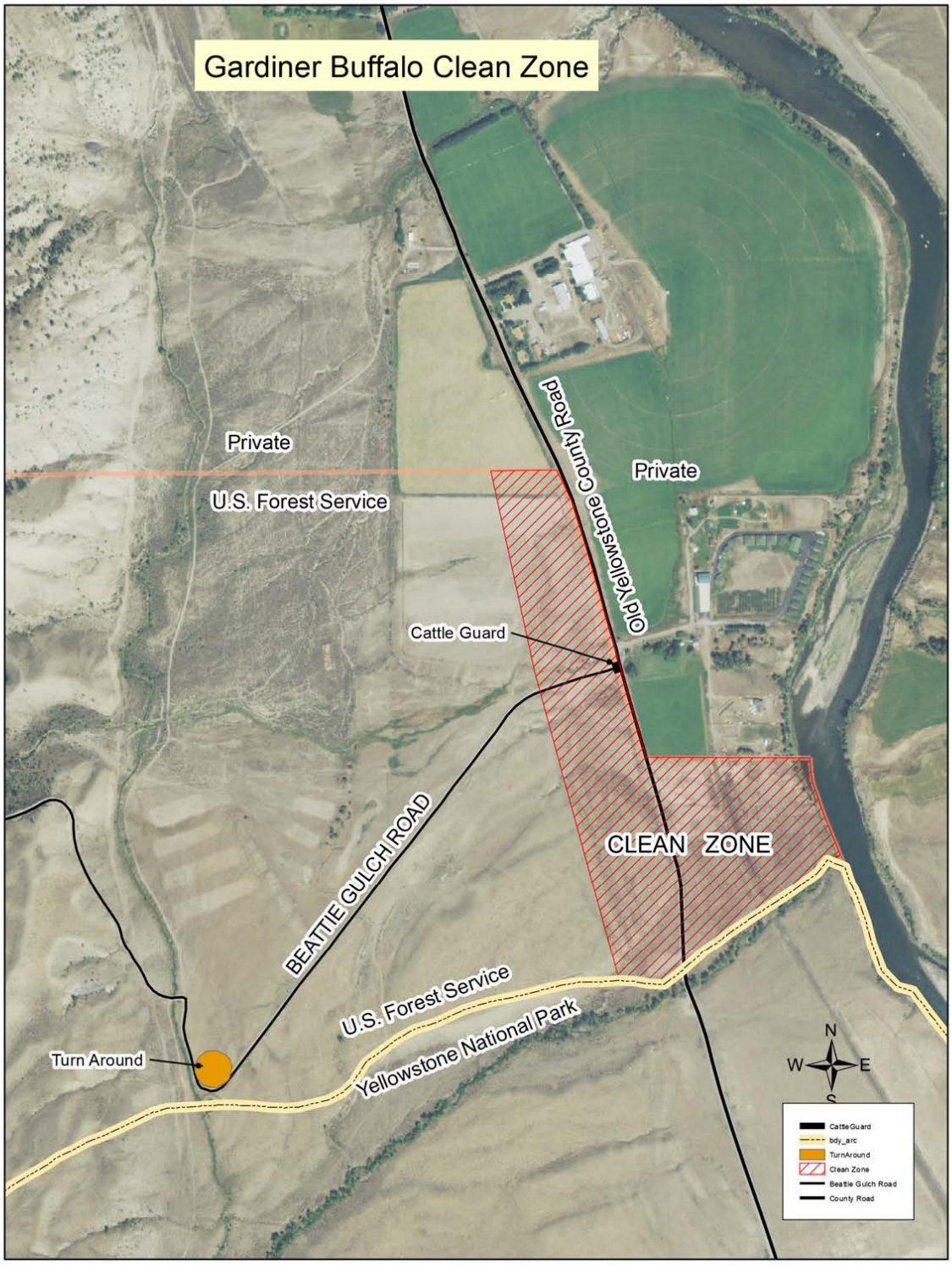
JARED S. PETTINATO
The Pettinato Firm
3416 13th St. NW, #1
Washington, DC 20010
(406) 314-3247
Jared@JaredPettinato.com
Attorney of Record for Plaintiffs

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

L & W CONSTRUCTION LLC, and BONNIE LYNN, Plaintiffs, v. UNITED STATES, Defendant.	No. 19-1628L Senior Judge Eric G. Bruggink PLAINTIFFS L & W CONSTRUCTION LLC AND BONNIE LYNN'S OPPOSITION TO THE UNITED STATES' MOTION TO DISMISS ORAL ARGUMENT REQUESTED

MAP

FOR DEMONSTRATIVE PURPOSES ONLY



Confederated Salish and Kootenai Tribes, Gardiner Buffalo Clean Zone, https://csktbisonhunt.org/RegsMapsUpdates/#beattie

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

The United States is destroying Bonnie Lynn's small, vacation-rental business, without paying her just compensation. Every winter, when the deep snow drives some bison north out of Yellowstone National Park, the Park Service and the Forest Service (the Agencies) create a concentrated, dangerous bison slaughter killing field in Beattie Gulch. That slaughter inversely condemns[1] L & W Construction's and Ms. Lynn's (collectively, Ms. Lynn) business and properties by creating a danger zone where bullets pass and where ravens and raptors drop possibly disease-carrying bison guts. The Fifth Amendment compels just compensation.[2]

Some tribes exercise a sliver of their treaty rights to hunt bison on public land in Beattie Gulch, but the Agencies lack political will to provide any meaningful breadth to those rights.[3] Even as the State of Montana has opened additional areas for bison to roam, Compl. 9 n.5, ECF No. 1, the Agencies have cramped six tribes' hunters into two small areas for exercising those treaty rights. 2019 Operation Plan 6-7. The Beattie Gulch hunt covers less than a quarter-mile-square.[4] Montana Fish, Wildlife and Parks concluded that "the density of hunters [there] has increased beyond what FWP considers safe." *Id.* It has recognized that "the safety issues continue to escalate and the fear for injury or death to hunters is real."[5]

---

[1] Inverse condemnations differ from eminent domain proceedings by the order of operations. In direct condemnation proceedings, the government starts eminent domain proceedings, acquires the property rights, and pays the landowner just compensation. *United States v. Clarke*, 445 U.S. 253, 256-258 (1980). In inverse condemnation proceedings, however, the government takes the land, and that leaves the landowner to pursue just compensation in court. *Id.*

[2] The Fifth Amendment prohibits the United States from taking "private property" for "public use, without just compensation." U.S. Const. amend. V.

[3] *See* Operating Procedures for the Interagency Bison Management Plan (IBMP) (Dec. 31, 2019) (2020 Operation Plan) (recognizing the tribes' treaty rights), ECF No. 8-4.

[4] Letter from Mont. Fish, Wildlife and Parks to Interested Person (Sept. 2, 2018), ECF No. 8-5.

[5] Letter from Dave Loewen, Montana Fish, Wildlife, and Parks, Chief of Law Enforcement, *et al.* to Sam Sheppard, R3 Supervisor *et al.* (Jan. 27, 2017), Ex. 1.

Ms. Lynn has no desire to stop tribes from exercising their treaty rights to hunt wild bison. She wants to see more wild bison leave Yellowstone to tribal reservations, tribal ownership, and tribal management. In addition to the clear benefits to the tribes, expanding the bison population also would relieve pressure on this bottleneck at Beattie Gulch. Until the Agencies find a new solution, the bison slaughter will continue to endanger the lives of tribal hunters, state-licensed hunters, property owners, neighbors, and visitors. Its impacts spill over to neighboring properties where the dangerous situation prevents Ms. Lynn from enjoying her own properties and stops her from operating and expanding her small business of vacation-rental cabins. Compl. ¶ 6.

The *en banc* Federal Circuit has encouraged claims precisely like Ms. Lynn's claims because they "accomplish[] public ends, for example, by checking the power of the Government through suits brought under the [Administrative Procedure Act] or under the takings clause of the Fifth Amendment." *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1555 (Fed. Cir. 1994). Indeed, another federal court has already stated that it expects this Court to give Ms. Lynn just compensation for the bison slaughter's impacts on her business and properties.

In December 2019, the United States District Court for the District of Montana (the District Court) denied Neighbors Against Bison Slaughter and Ms. Lynn's (collectively, Neighbors) motion for a preliminary injunction to stop the bison slaughter. Order, *Neighbors v. Nat'l Park Serv.*, No. 1:19-cv-128-SPW, at 9 (Dec. 2, 2019), ECF No. 57, Ex. 2. It denied that motion in part because "[t]he Plaintiffs have already filed an inverse condemnation lawsuit for just compensation from the loss of rental income." *Id.* at 9. The District Court effectively concluded that the government prioritized the bison management plan over Ms. Lynn's property interests. *See id.* at 12-13. That rationale triggers the classic purpose of the Takings Clause: "to prevent the government from forcing some people alone to bear public burdens which, in all fairness and

justice, should be borne by the public as a whole." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617-18 (2001) (quotations omitted).

With its motion to dismiss, the government seeks to foreclose this avenue of relief for Ms. Lynn. Although the government's arguments may have some superficial plausibility, they fall apart upon closer review. The government has made these arguments in other cases, and even in the rare instances when the trial courts have agreed, appellate courts have subsequently overturned them.

The government argues that any inverse condemnation started outside the statute-of-limitations period. But the Agencies have repeatedly issued several decisions modifying the bison management plan, and the Supreme Court recognizes that claims do not accrue until the taking has stabilized. *United States v. Dickinson*, 331 U.S. 745, 749 (1947). Separately, 28 U.S.C. § 1500 does not divest this Court of jurisdiction. Ms. Lynn filed this case first, and courts test jurisdiction under that statute at the time of filing, when no other case was pending. Finally, the government accuses wild animals of causing Ms. Lynn's economic harms, but the bison management plans directly, naturally, probably, and predictability made Ms. Lynn's vacation-rental cabins unrentable during the winter and undermined her business and expansion plans. The Fifth Amendment compels the government to pay her just compensation.

STANDARDS OF REVIEW

The government makes three jurisdictional arguments under 12(b)(1) and one argument under 12(b)(6), but the government contests the evidence in the Complaint only in its first, statute-of-limitations argument. Thus, for the other three arguments (Section 1500, tort-claim, and the inverse condemnation cause-of-action), the Rules of the Court of Federal Claims (RCFC) restrict this Court's review to the facts in the Complaint and the documents it incorporates.

Of course, plaintiffs are the "masters of the complaint," so Ms. Lynn's articulations of her own claims control whatever characterizations the governments claims may make. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 395 (1987).

I. Rule 12(b)(6) Standard

Rule 12(b)(6) compels courts to dismiss cases when the plaintiff "fail[s] to state a claim upon which relief can be granted." To rule on a motion to dismiss for failure to state a claim, courts look to the pleading standards in Rule 8(a)(2). *See Bell Atl. Corp. v Twombly*, 550 U.S. 544, 554-55 (2007).[6] Rule 8(a)(2) only requires plaintiffs to present "a short and plain statement of the claim showing that the pleader is entitled to relief." Courts deny motions to dismiss when a complaint "give[s] the defendant fair notice of what the claim is and the grounds upon which it rests." *Id.* at 555 (quotations and alterations omitted).

The Supreme Court recognizes that the drafters designed the "relaxed pleading standards of the Federal Rules . . . not to keep litigants out of court *but rather to keep them in*." *Id.* at 575 (emphasis added). The drafters intended the parties to sort out the merits during "a flexible pretrial process and, as appropriate, through the crucible of trial." *Id.*

Rule 8(a)(2) merely requires a plaintiff to "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. In deciding whether to dismiss an action failing to state a claim under Rule 12(b)(6), courts assume the factual allegations in complaints as true—even if the court doubts them. *Id.* at 555-56. Courts may also "look to matters incorporated by reference or integral to the claim, items subject to judicial notice, and matters of public record." *Dimare Fresh, Inc. v. United States*, 808 F.3d 1301, 1306 (Fed. Cir. 2015). Rule 8 only requires plaintiffs

[6] As this Court is aware, the Rules of the Court of Federal Claims (RCFC) "generally follow the Federal Rules of Civil Procedure." *C. Sanchez and Son, Inc. v. United States*, 6 F.3d 1539, 1541 n. 2 (Fed. Cir. 1993). For the purposes here, RCFCs 8, 12, and 15 track the coordinate Federal Rules of Civil Procedure.

to "nudge their claims across the line from conceivable to plausible." *Id.* Therefore, courts deny motions to dismiss when a complaint "raise[s] a reasonable expectation that discovery will reveal evidence of [the alleged legal violation]." *Twombly*, 550 U.S. at 556.

Even if a complaint demonstrates some flaw, RCFC 15(a)(2) directs this Court to "freely give leave" to amend a complaint "when justice so requires." When a court identifies a flaw that an amendment could cure, courts give plaintiffs an opportunity to cure that flaw. *See Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004) ("Dismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment.") (quoted approvingly by *Metricolor LLC v. L'Oreal S.A.*, No. 2018-2397, at *10 (Fed. Cir. Oct. 30, 2019)).

II. Rule 12(b)(1) Standard

Motions to dismiss under Federal Rules of Civil Procedure 12(b)(1) require this Court to consider whether a plaintiff has met its burden of establishing the Court's jurisdiction over the claim. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). The Supreme Court presumes "that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (quotations omitted).

For the record on a jurisdictional motion, courts rely on the facts in the complaint unless and until the defendant actually contests them. *Banks v. United States*, 741 F.3d 1268, 1277 (Fed. Cir. 2014). Only when a defendant contests particular jurisdictional facts does the burden shift to the plaintiff to establish the necessary facts by a preponderance of the evidence. *Id.*

Of the government's three jurisdictional arguments, it does not dispute any facts in its Section 1500 argument or in its tort argument. Consequently, the Rules require this Court to rely on the facts in the Complaint in ruling on those arguments. *See id.* Rule 12(b)(1) only allows this

Court to rely on evidence outside the Complaint, or not incorporated by reference, for the government's first, statute-of-limitations argument.

FACTUAL AND PROCEDURAL BACKGROUND

Yellowstone bison management has caused controversies since at least the 1960s. *See Intertribal Bison Co-op. v. Babbitt*, 25 F. Supp. 2d 1135, 1136 (D. Mont. 1998) ("The NPS reduced herd size to 397 animals in 1967."). After trying various approaches over the decades, in recent years, the Agencies have started managing the Yellowstone bison population, in part, by using a dangerous, concentrated bison slaughter on a quarter-mile-square area called Beattie Gulch. Compl. ¶ 1, 3. Every winter, the bullets and the noise turn Beattie Gulch into a killing field. *Id.*¶ 1. The Agencies could manage the Yellowstone bison to avert risks and to protect property owners, neighbors, and visitors, but they have designed a Yellowstone bison management system whose adverse effects fall disproportionately on those neighbors. *Id.* ¶ 6.

I. The Government's Bison Slaughter Has Taken Bonnie Lynn's Business Plans for Winter, Nightly, Vacation-Rental Cabins and Expansion That She Started Planning in 2005.

Bonnie Lynn bought three properties on the banks of the Yellowstone River in 2005. *Id.* ¶ 1. She owns L & W Construction LLC, which owns the two vacation-rental cabins yards from Beattie Gulch. *Id.* ¶ 8. Ms. Lynn directly owns another, 2.4-acre plot of still-undeveloped land just across the road from the Beattie Gulch trailhead. Bonnie Lynn Decl. ¶ 15, Ex. 3.

The cabins on the river in the winter have an amazing serenity and unique access to Yellowstone. *Id.* ¶ 43. Ms. Lynn used to take her family and friends to the cabins to enjoy Christmas, Thanksgiving, and other holidays there. *Id.* ¶ 24. Except for one year since December 2013, however, the bison slaughter has stopped that. *Id.*

Ms. Lynn has sought to rent the cabins as nightly, vacation-rental cabins, but she has not succeeded since the end of 2013. *Id.* ¶ 38. Ms. Lynn concluded that "guests do not want to rent

and experience the travesty taking place in front of the cabins." *Id.* ¶ 25. She has resorted to renting the cabins month-to-month, but even that far less-lucrative, backup plan has not succeeded. *Id.* ¶ 42. People respond to her advertisements, but her duty of quiet enjoyment to her renters compels her to inform potential guests of the bison slaughter. *Id.* ¶ 44. Some people ask, "Could I be killed there?" *Id.* Because of the bison slaughter, Ms. Lynn cannot deny it. *Id.* Even when some people have braved the bison slaughter, they have cried over the horrifying bison slaughter, and Ms. Lynn has cried with them. *Id.* ¶ 46.

Separately, the still-undeveloped parcel borders Forest Service land to the South, Yellowstone River to the East, and one neighbor parcel to the West before Old Yellowstone Trail South. *Id.* ¶ 14. Ms. Lynn parks an RV there now, but since 2005, she has planned to build an additional vacation rental guesthouse to enhance her business and income. Compl. ¶8; Lynn Decl. ¶ 15. She "plotted the placement and dug the foundation for another vacation rental guest house." Lynn Decl. ¶ 15. She installed a septic tank large enough for both the vacation rental guest house and for another, main house. *Id.* Ms. Lynn had planned to rent out the guest house, so it could "help pay for itself," while she lived in the house part-time, managed her business, and brought her family there. *Id.*

The Beattie Gulch trailhead starts just across Old Yellowstone Trail South from the undeveloped parcel. Compl. ¶ 14. In 2005, when Ms. Lynn bought the properties, very little hunting was happening in Beattie Gulch. *Id.* ¶¶ 29 (chart), 47. Since then, "the hunting has intensified in an unpredictable way . . . ." *Id.* ¶ 48.

II. The Agencies Continue to Modify Their Yellowstone Bison Management Plan, which includes hunting in Beattie Gulch.

After intense discussions with the State of Montana in 2000, the Agencies completed an environmental impact statement (EIS) and issued a record of decision (ROD) in 2000. *Id.* ¶ 18.

Based on that 2000 IBMP ROD, the Park Service, the Forest Service, the U.S.D.A. Animal and Plant Health Inspection Service, and the State of Montana created the IBMP. *Id.* ¶ 18. Now, the IBMP group includes nine agencies, tribes, and organizations. *Id.* The IBMP has continued to modify that bison management program ever since. *Id.* ¶¶ 19-44.[7]

Initially, the Agencies allowed no bison hunting in or outside Yellowstone. IBMP ROD 21-37. The Park Service culled the bison population within Yellowstone to ensure the population did not exceed 3,000. *Id.* at 52. Under the ROD, the Agencies adopted a three-step, adaptive management approach for "bison on winter range outside Yellowstone . . . ." *Id.* at 10. As they learned more about bison management, they intended to adapt and to take incremental steps forward. *Id.*

Under step 1, north of Yellowstone, the IBMP agencies intended to "haze" the bison to keep them within Yellowstone. *Id.* at 11-12. If that failed, they intended to capture, test, and vaccinate the bison that escaped. *Id.* They intended to start step 2 in the 2002 winter. *Id.* at 12. Under step 2, they intended to allow incrementally more bison, tested and clean of brucellosis, north of

[7] The government's statement of facts contradict the Complaint's statements on management responsibility for Yellowstone bison and the bison slaughter in Beattie Gulch. Responsibility for the hunt forms a central dispute among the Parties, and Rule 12 prohibits the government from blithely presenting its side as fact. Instead, Rule 12 requires the Court to assume the Complaint's facts are true. *See Twombly*, 550 U.S. at 555-56. The government alleges that "[t]he Forest Service has limited authority to regulate hunting and shooting on National Forest System lands," and that "[a]s bison exit Yellowstone, wildlife management authority shifts from the Park Service to the State of Montana." US Br. 5-6. The government also asserts that Montana "has direct authority and responsibility to enforce hunting regulations outside Yellowstone National Park, including the direct authority to close hunting areas to state licensees . . . ." *Id.* at 6. These statements contradict the Complaint, which assigns responsibility for all bison management decisions to the Agencies because they signed the operation plans. Compl. ¶¶ 4, 6, 19. Rule 12 prohibits the government from contesting the Complaint's facts in the context of this motion. *See Twombly*, 550 U.S. at 555-56.

Yellowstone until April 15. *Id.* Then, Montana intended to haze any remaining bison back into Yellowstone. *See id.* Step 3 would extend Step 2 to untested bison. *Id.* at 13.

Since 2005, the Agencies have abandoned the three-step plan and now use adaptive management to continuously alter their management plans. *See* Compl. ¶ 28. Through "adaptive management," they have approved an escalating bison hunt north of Yellowstone. *Id.* ¶¶ 28-29.

Each annual operation plan authorizes the Park Service to decide how many bison to slaughter as the bison migrate north out of Yellowstone to meet the Park Service's "population management and conflict resolution objectives." *See*, *e.g.*, 2019 Operation Plan 4 ([2019] Operating Procedures for the [IBMP] (Dec. 31, 2018)), ECF No. 8-4. The Park Service lets some of the bison continue north for hunters, quarantines some for research, and transfers some to the Assiniboine and Sioux Tribes' Fort Peck Reservation. *Id.* at 10-13.

As part of the IBMP plan, the Agencies have decided to allow bison hunting. Compl. ¶ 28. Although some hunting started in 2005, since 2012, it "has dramatically intensified . . . ." *Id.* ¶¶ 28-30. By releasing more bison out of Yellowstone for hunters to gun down over the border, the Park Service could meet its population objectives without the time and expense of killing so many bison itself. *See id.* ¶ 23.

The Agencies have continued modifying the bison slaughter conditions in Beattie Gulch. For example, by 2015, the hunting had intensified so much that "the Forest Service closed eighteen acres to hunting for safety." *Id.* ¶ 31. Two years later, that agency pushed hunting farther west of Old Yellowstone Trail and deeper west into Beattie Gulch. *Id.*

III. The Beattie Gulch Hunting Presents a Clear and Present Danger Every Winter that Scares Away Potential Tenants.

The Agencies' Yellowstone bison management plan, with its Beattie Gulch bison slaughter, has cost Ms. Lynn tens of thousands of dollars every year in lost rental income and lost potential

opportunities to invest in building additional vacation-rental properties. *Id.* ¶ 6; Lynn Decl. ¶ 15. Beattie Gulch hunters shoot bison only a few hundred yards from over a dozen private residences and businesses. Compl. ¶ 42. "[R]esidents and visitors near Beattie Gulch can die in their beds from any single hunter's mistake or failure of judgment." *Id.* ¶ 33. The government's bison slaughter "scares away visitors who would rent [Ms. Lynn's] cabins . . . ." *Id.* ¶¶ 9, 34, 48. It has lowered her property values and prevented her from using her properties for winter family visits. *Id.* ¶ 9.

Moreover, the Agencies require hunters to leave the bison guts in Beattie Gulch for scavengers. *Id.* ¶ 56. Each pile of bison guts can weigh hundreds of pounds. *Id.* ¶ 35. Ravens and raptors predictably scavenge on the bison guts—which pose a serious health threat—and physically occupy her land by dropping bits of potentially disease-carrying bison guts on her properties. *Id.* ¶ 57.

IV. Ms. Lynn Seeks Just Compensation in This Court.

L & W Construction and Ms. Lynn filed this Complaint on October 18, 2019. First, they claimed that the Agencies' bison management plan approved a dangerous, concentrated bison slaughter every winter in Beattie Gulch that temporarily took their properties. *Id.* ¶¶ 51-54. Second, they claimed that the raptors and ravens dropped possibly disease-carrying bison guts on their land every winter, and temporarily, physically took their properties. *Id.* ¶¶ 55-58.

This case directly analogizes to a recent Supreme Court flooding case. In *Ark. Game & Fish Comm'n v. United States*, the Army Corps of Engineers had operated its dam in a way that repeatedly flooded an Arkansas wildlife management area and killed the trees there. 568 U.S. 23, 37-30 (2012). The Supreme Court easily recognized a taking. *Id.* at 27. A brief comparison shows the striking parallels.

In *Arkansas Game & Fish*, the "forests in the Management Area were healthy and flourishing before the flooding . . . ." *Id.* at 29. Here, Ms. Lynn's business was healthy and flourishing before the bison slaughter intensified and concentrated in Beattie Gulch. "In 2005, very little bison hunting was happening at Beattie Gulch, so Ms. Lynn easily rented her cabins." Compl. ¶ 47.

There, "the [Army Corps of Engineers] approved a planned deviation [from a dam] in response to requests from farmers." 568 U.S. at 27. Here, the Agencies approved releasing more bison from Yellowstone in response to requests from hunters and the State of Montana. *See* Compl. ¶¶ 3, 4, 6, 22, 23, 28, 43.

In *Arkansas Game & Fish*, "[w]hile the deviation benefited farmers, it interfered with the Management Area's tree-growing season." 568 U.S. at 28. Here, too. While the bison slaughter benefitted the hunters and the Agencies, it undermined Ms. Lynn's business. Compl. ¶ 48.

The *Arkansas Game & Fish* landowner "repeatedly objected to the deviations from the Manual and alerted the Corps to the detrimental effect the longer period of flooding would have on the hardwood timber in the Management Area." 568 U.S. at 29. Here, "[f]or years, neighbors and residents, who live only a few hundred yards away from the bison-hunting horror show, have objected to the unsafe hunting at regular IBMP public meetings." Compl. ¶ 42.

The floodwater in *Arkansas Game & Fish* inundated the management area. 568 U.S. at 28. Here, "[e]very year, raptors and ravens eat the bison guts, or carry them away and drop them on neighboring lands." Compl. ¶ 57; *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982) ("a minor but permanent physical occupation of an owner's property authorized by government constitutes a 'taking' of property . . ."). Moreover, "[t]he bison hunt drastically increases the risk of property owners, neighbors, and visitors dying, and that danger not only evicts the residents from their homes, but also scares away visitors who would otherwise rent

cabins there. It effectively creates an easement on Ms. Lynn's cabin properties and [still-undeveloped parcel] every winter and decreases the fair market value of those properties." Compl. ¶ 53.

In *Arkansas Game & Fish*, "[t]he repeated annual flooding for six years altered the character of the property to a much greater extent than would have been shown if the harm caused by one year of flooding were simply multiplied by six." 568 U.S. at 30. Although the takings happened recurrently, but temporarily over multiple years, the Supreme Court recognized a taking. *Id.* at 26-27. Here too, Ms. Lynn could have weathered one year of bison slaughter disrupting her business, but now "[t]he cabins have decreased in fair market value compared to their value if the owner could use them year-round." Compl. ¶¶ 49-50.

There, the Corps operated dams; here, the Agencies operate bison. There, the Corps could have predicted water flooding the management area; here, the Corps could have predicted bullets flying over Ms. Lynn's properties and ravens dropping bison guts onto them. For the same reasons as in *Arkansas Game & Fish*, the Agencies temporarily took Ms. Lynn's properties and the government owes her just compensation.

As a further analogy to the easement created over her properties by the dangerous managed bison slaughter, the Supreme Court addressed a fire-control servitude in *Portsmouth Co. v. United States*, 260 U.S. 327 (1922) (Holmes, J.). There, the United States had set up a military fort whose guns ranged over the claimant's summer resort properties. *Id.* at 328. No one doubted that "serious loss has been inflicted upon the claimant, as the public ha[d] been frightened off the premises by the imminence of the guns . . . ." *Id.* at 329. The Court recognized a taking could happen when the government had repeatedly "discharged all of the guns over and across the same land" because that could establish a fire-control "servitude" on the land. *Id.* at 329-330.

Here, the repeated, poorly regulated, concentrated, dangerous bison slaughter has, each year, created a similar, fire-control servitude over Ms. Lynn's properties that has scared away the public from the winter resort properties. Compl. ¶¶ 4, 6, 31-33, 42-44, 48, 53. Again, the Fifth Amendment requires the government to pay just compensation for each past year's fire-control servitude.

V. Neighbors Against Bison Slaughter and Ms. Lynn seek different relief in District Court.

Three days after Ms. Lynn filed her complaint here, Plaintiffs Neighbors and Bonnie Lynn filed a claim in the United States District Court for the District of Columbia. Compl. (APA Compl.), ECF No. 8-1. Neighbors makes four claims under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. In the first three, Neighbors contend that, when the Agencies issued the 2019 Operation Plan, they arbitrarily and capriciously implemented three statutes:

1. The Forest Service Organic Act of 1897, 16 U.S.C. §§ 472-482, 551;
2. The Act of January 24, Pub. L. No. 67-395, 43 Stat. 1174, 1214 (Yellowstone Management Act Amendments) (codified at 16 U.S.C. § 36); and
3. The National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 to 4370m-12.

APA Compl. ¶¶ 4-8, 54-71. Based on these arguments, Neighbors asked the District Court to set aside the 2019 Operation Plan and to enjoin the bison slaughter until it completes a new environmental analysis.

In the fourth claim, Neighbors seeks a supplemental environmental impact statement under NEPA. *Id*. ¶¶ 69-71 (count 4). They allege that the concentrated, dangerous hunting in Beattie Gulch has exceeded the environmental impacts analyzed in the IBMP EIS, and that NEPA requires the Agencies to issue a supplemental EIS. *Id.*

Neighbors quickly moved for a temporary restraining order and for a preliminary injunction. *Neighbors*, No. 1:19-cv-3144-BAH (Oct. 21, 2019), ECF No. 4. The United States District Court

for the District of Columbia denied the motion for a temporary restraining order and transferred the case to the District Court in Montana. Mem. Op., *Neighbors* (Nov. 14, 2019), ECF No. 47. Once in Montana, the District Court denied the motion for a preliminary injunction. Order, *Neighbors*, at 9 (Dec. 2, 2019). That Court has entered a scheduling order, and the Agencies are currently compiling their administrative records. Order, *Neighbors*, (Jan. 3, 2020), ECF No. 62.

ARGUMENT

I. Because the Harm Has Continued and Has Not Stabilized, the Statute of Limitations Does Not Bar Ms. Lynn's Claims.

The government argues that the statute of limitations in 28 U.S.C. § 2501[8] prohibits this Court from hearing this case because, it claims, Ms. Lynn's taking claim accrued on or before October 19, 2013.[9] US Br. 12-13. The government misunderstands how takings claims accrue. It also misapprehends how to reconcile a jurisdictional statute of limitations that inextricably intertwines with merits questions. Then, it misconceives the nature of Ms. Lynn's continuing-harm claims. For each of these reasons, the statute of limitations does not bar Ms. Lynn's claims.

A. Section 2501 Does Not Bar these Non-Frivolous Claims Because the Accrual Date Intertwines with the Merits Determination.

The government argues in favor of a process that would force Ms. Lynn to prove her case in response to a motion to dismiss. The Federal Circuit has already overturned this Court for mixing jurisdictional questions with merits questions. *Moden v. United States*, 404 F.3d 1335, 1340 (Fed. Cir. 2005). When merits questions and jurisdictional questions depend upon the same facts, courts assume jurisdiction over nonfrivolous claims and address the merits. *Id.*

[8] "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501.

[9] The United States consistently refers to October 18, 2013, but by limiting claims to "six years after such claim first accrues," the statute of limitations reaches back only to October 19, 2013.

Motions to dismiss merely "test the sufficiency of the complaint," instead of asking a court to decide the merits. *Nalco Co. v. Chem-Mod, LLC*, 883 F.3d 1337, 1350 (Fed. Cir. 2018) (quotations and emphasis omitted). By pointing out that Section 2501 creates a jurisdictional limitation, the government seeks to shift to Ms. Lynn the burden of "prov[ing] by a preponderance of the evidence that the events that allegedly established the United States' liability did not occur prior to October . . . 2013." US Br. 13. Rule 12 requires courts to deny motions like this.

On the merits, courts find takings when the "regulation goes too far." *Palazzolo*, 533 U.S. at 622 (quoting *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (Holmes, J.)). No one can pinpoint that moment here without addressing Ms. Lynn's claims on the merits. Most claims for just compensation "turn on situation-specific factual inquiries." *Ark. Game & Fish*, 568 U.S. at 32 (citing *Penn Central Transp. Co. v. N.Y. City*, 438 U.S. 104, 123-125 (1978)). Courts "have no set formula to determine where regulation ends and taking begins." *MacDonald Sommer Frates v. Yolo Cnty.*, 477 U.S. 340, 348 (1986) (quotations omitted). In situations of temporary, physical and regulatory incursions, courts examine "the 'taking' question by engaging in essentially ad hoc, factual inquiries" and by using factors such as "economic impact," "interference with reasonable investment backed expectations," and "the character of the governmental action." *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *accord Lingle v. Chevron USA Inc.*, 544 U.S. 528, 538-39 (2005) (citing *Penn Central*, 438 U.S. at 124); *Ark. Game & Fish*, 568 U.S. at 39.

The government's theory would require Ms. Lynn to immediately address the "difficult problem" of establishing the Agencies' bison management went "too far" and took her properties—and when that happened. *See Williamson Planning Comm'n v. Hamilton Bank*, 473

U.S. 172, 199 (1985), overruled on other grounds by *Knick v. Twp. of Scott*, No. 17-647, Slip Op. at 24-27 (June 21, 2019). In this still-developing situation, establishing that date would, remarkably, require the very discovery Ms. Lynn will pursue to establish the merits of her claim.

Luckily, this Court need not resolve this jurisdictional issue by identifying the date on which the regulations went too far. The Federal Circuit has criticized this Court for "address[ing] the merits of the [plaintiffs'] nonfrivolous inverse condemnation claim" in the context of a motion to dismiss for lack of jurisdiction. *Moden*, 404 F.3d at 1340; *see Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 92 (1998) (criticizing an interpretation of jurisdiction requirements that "would turn every statutory question [on the merits] into a question of jurisdiction."). It rejected the government's argument and held that "when a defendant disputes the merits of a claim in a motion to dismiss for lack of subject matter jurisdiction, jurisdiction should be assumed and the merits of the claim should be addressed" unless the plaintiff makes a claim "'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" *Moden*, 404 F.3d at 1340 (quoting *Steel Co.*, 523 U.S. at 89); *see also Dickinson*, 331 U.S. at 749 (cautioning against "procedural rigidities").

As another test, when a plaintiff "wins under one construction of [the applicable law] and loses under another," that legal question does not present a jurisdictional question, but a merits question. *Steel Co.*, 523 U.S. at 89-90. Here, the government's statute of limitations argument arises on the merits: on what date did the facts coalesce to meet the legal standard of a regulation going "too far"? Here, depending on when the bison slaughter operation plans went "too far," Ms. Lynn's claims could have arisen before or after October 2013. Therefore, Ms. Lynn would win under one legal construction of "too far" and would potentially lose under another. Under *Steel Co.*, that presents a cause-of-action issue and *not* a jurisdictional issue. *See id.* at 89-90.

This claim does not qualify as frivolous, so the statute of limitations does not defeat this Court's jurisdiction.

B. The Bison Slaughter Situation Has Never Stabilized.

The government argues that the Agencies' documents mentioned "bison hunting" several times before October 2013, and Ms. Lynn's claim accrued because she "should have expected potential impacts by wildlife and public land uses, such as hunting." US Br. 13-14. Even if the government could make a valid jurisdictional argument, which it cannot, no taking claim accrues until the situation stabilizes. *See Dickinson*, 331 U.S. at 749. This situation certainly never stabilized before October 2013. Since then, the Forest Service has closed two areas to hunting directly adjacent to Ms. Lynn's guest-house development lot. The government is asking for an accrual date that the evidence contradicts. *See Banks*, 741 F.3d at 1281 (overturning this Court for failing to set an accrual date that accounted for the plaintiffs' difficulties in identifying a permanent condition).

The Supreme Court has already rejected the government's argument that "suit must be brought, lest he jeopardize his rights, as soon as his land is invaded . . . ." *Dickinson*, 331 U.S. at 749. "[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson*, 473 U.S. at 186. Here, the government argues that several documents gave Ms. Lynn notice of the taking: the 2000 IBMP EIS, a 2004 Montana analysis of bison hunting, and some events described in the Complaint that escalated the slaughter. US Br. 13-14. Instead of demonstrating that the taking claim had accrued in the past, the government's shotgun-like list of different dates and documents only underscores the reality that the dangerous, concentrated bison slaughter on a quarter-mile-square in Beattie Gulch never stabilized. As the Supreme Court held,

"there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized." *Dickinson*, 331 U.S. at 749.

In *Dickinson*, for example, the United States had built a dam on the plaintiff's property, and no one could initially predict how much additional land the river would erode. *Id.* at 746-747. The Court rejected the argument that the claim accrued when "the property of the respondents was partially submerged for the first time" because that would not account for the erosion ultimately attributable to the dam. *Id.* 747. Instead, it recognized that plaintiffs could "postpone[e] suit until the situation becomes stabilized." *Id.* at 749. By the same token in the regulatory context, a "court cannot determine whether a regulation goes 'too far' unless it knows how far the regulation goes." *MacDonald*, 477 U.S. at 348; *Palazzolo*, 533 U.S. at 622.

No one—not even the Agencies—could predict how far this bison management regulation would go. The Agencies' documents confirm that the Agencies have continued to "modif[y]" the bison management plan "by adaptive management adjustments since 2005," and those modifications have continued. *See*, *e.g.*, 2019 Operation Plan 2. Ms. Lynn's counsel can find no earlier references to a concentrated bison slaughter in Beattie Gulch before a December 2010 IBMP meeting report. Summ. Report from [IBMP] Meeting 3 (Dec. 7/8, 2010), Ex. 4. In that document, the Forest Service reported that it had set up a call to discuss the possibility, "in the short term," to "allow[] tribal hunts in the Beattie Gulch area." *Id.*

That first expanded, concentrated bison slaughter did not happen until the 2012-2013 winter. Afterward, the Agencies admitted they could not predict the plan's future changes: "[a]ll recognize that everyone must learn 'as we go' given, for example, that this was the first time for an extended hunt, especially [in] Beattie Gulch . . . ." Summ. Report from the [IBMP] Meeting 3 (May 9, 2013), Ex. 5. This sentence establishes two important facts: (1) the Agencies first

allowed a concentrated Beattie Gulch slaughter during the 2012-2013 winter, and (2) in May 2013, the Agencies planned to change the slaughter conditions over the 2013-2014 winter from what they had allowed the prior winter. There, the Agencies recognized "issues and challenges" that arose from "congestion and competition for hunting space" over the 2012-2013 winter. *Id.* This document demonstrates that no one—not even the Agencies—could have anticipated the concentrated slaughter in Beattie Gulch before the 2012-2013 winter, and the situation had not stabilized even by the 2013-2014 winter.

The later IBMP minutes demonstrate the changing conditions for the concentrated bison slaughter in Beattie Gulch and the additional measures the Agencies took. In 2014, for example, the Agencies held a field trip and collected ideas for managing Beattie Gulch differently. Summ. Report from the [IBMP] Meeting 3-4 (Nov. 20, 2014), Ex. 6. Those proposals included closing Beattie Gulch, opening a new road, allowing hunting in Yellowstone, moving the bison for the hunters to shoot, giving more bison to the Tribes, and increasing the landscape available for bison to roam. *Id.*

Discussions over bison slaughter regulations in Beattie Gulch continued, and the Forest Service has responded by issuing new closure orders in Beattie Gulch. In 2015, the IBMP was considering five alternatives, and among them, "Total Beattie Gulch closure." Summ. Report from the [IBMP] Meeting 2 (Nov. 19, 2015), Ex. 7. There, the Park Service "noted that among the many concerns voiced among Partners, staff, public, and hunters about the problems of hunting in Beattie Gulch, two are preeminent:

- "Public safety/relations—issues of public and nearby resident safety due to gunfire, traffic snarls, visceral impact of bison being killed and remains being left behind, grizzlies feeding on carcasses

- "Firing line effect—occurs as bison move out of YNP and into Beattie Gulch, driving bison back into the park where they can't be hunted and preventing dispersal to a larger area available to bison throughout northern portion of the Gardiner Basin."

Id. at 3. These IBMP meeting minutes demonstrate that the situation never stabilized before October 2013.

Even more conclusive, alongside these discussions, the Forest Service was issuing regulation orders that closed parts of Beattie Gulch to hunting. In December 2013, it closed to hunting the Forest Service land directly adjoining Ms. Lynn's 2.4 acres.[10] In 2017 and 2018, the Forest Service closed to hunting an area directly west across Old Yellowstone Trail South from Ms. Lynn's 2.4 acres.[11] The Forest Service apparently renews these orders every year because they expire, but it has not bound itself to continue issuing those closures. The statute of limitations does not bar Ms. Lynn's claims because the situation has never stabilized and certainly never stabilized before October 2013.[12]

C. Seven Operation Plans Harmed Ms. Lynn Within the Statute of Limitations Period.

In the alternative to her claim that the Agencies' bison management program has caused a temporary taking since October 2013, the statute of limitations does not bar Ms. Lynn's temporary, continual-harm claims. *See* RCFC 8(a)(3). Because Ms. Lynn, in the alternative, makes a continuing-harm claim and seeks just compensation only for the takings that arose within the six years before she filed her Complaint, the date the regulation first went "too far"

[10] [Forest Service] Order No. 01-11-03-13-05 (Dec. 5, 2013), Ex. 8.
[11] [Forest Service] Order No. 01-11-03-17-01 (Dec. 7, 2016), Ex. 9; [Forest Service] Order No. 01-11-03-18-01 (Nov. 28, 2017), Ex. 10.
[12] To be clear, however, the Supreme Court has recognized that Ms. Lynn need not wait for her claims to stabilize while the Agencies explore even more adaptive management measures. *See Palazzolo*, 533 U.S. at 621 ("Government authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision."); *see also Balagna v. United States*, 138 Fed. Cl. 398, 400 (Fed. Cl. 2018) (Kaplan, J.) (denying a request to delay temporary-taking compensation despite no final action on the taking).

does not matter. Indeed, Ms. Lynn is seeking compensation only for the past, temporary takings because she expects that the takings will stop when the agencies complete a new EIS.

Even today, as the Agencies admit, they continue modifying the conditions of the bison slaughter. *See* Summ. Report from the [IBMP] Meeting 2 (Dec. 3, 2019) (identifying a current issue as "[i]mproving safety, quality of the [Beattie Gulch] hunt/improving boundary issues"); US Br. 5. Each subsequent operation plan qualifies as a new action that temporarily takes Ms. Lynn's properties.[13] Section 2501 bars none of the claims that have arisen since October 2013. *See Shoshone Indian Tribe v. United States*, 672 F.3d 1021, 1035 (Fed. Cir. 2012) (recognizing that, "upon a continuing trespass, [tribal plaintiffs] can still bring suit for injuries occurring within six years of their filing suit and all injuries that occurred thereafter."); *cf. Gwaltney v. Chesapeake Bay Found.*, 484 U.S. 49, 64 (1987) (foreclosing jurisdiction of past Clean Water Act violations, while recognizing jurisdiction over "good-faith allegation[s] of continuous or intermittent violation . . . ."); *Portsmouth*, 260 U.S. at 329-30 ("while a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove it.").

For temporary, regulatory takings, the statute of limitations does not start to run "until the process that began the taking has ceased." *Petro-Hunt, LLC v. United States*, 862 F.3d 1370, 1380 (Fed. Cir. 2017). Each year, the Agencies issued new operation plans, and in each plan, they regulated the bison slaughter in a way that took Ms. Lynn's properties. Therefore, seven separate regulatory taking claims and seven separate physical taking claims have accrued within the six-year period under Section 2501: in 2013, 2014, 2015, 2016, 2017, 2018, and 2019.

[13] *See also* Operating Procedures for the [IBMP] (Dec. 18, 2012), Ex. 11; Operating Procedures for the [IBMP] (Nov. 26, 2013), Ex. 12; Operating Procedures for the [IBMP] (Dec. 19, 2014), Ex. 13; Operating Procedures for the [IBMP] (May 9, 2016), Ex. 14; Operating Procedures for the [IBMP] (Dec. 16, 2016), Ex. 15; Operating Procedures for the [IBMP] (Dec. 26, 2017), Ex. 16; Operating Procedures for the [IBMP] (Dec. 31, 2019), Ex. 17.

None of the cases that the government cites address continuing harm claims. In *Casitas Municipal Water District v. United States*, no taking claim had accrued because the United States had not taken water that the water district would otherwise have sent to its customers. 708 F.3d 1340, 1343 (Fed. Cir. 2013). In *Fallini v. United States*, the Federal Circuit dismissed the case under the statute of limitations because the property owners could identify only one government action: the statute Congress had passed twenty-one years before the plaintiff filed its lawsuit. 56 F.3d 1378, 1379-80, 1383 (Fed. Cir. 1995). In contrast, this case presents seven new governmental decisions, and each qualifies as a separate, temporary taking.

II. Section 1500 Does Not Apply When the Plaintiff Files in This Court First.

Without precedential support, the government argues that 28 U.S.C. Section 1500 divests this Court of jurisdiction.[14] US Br. 17-20. To the contrary, this case does not satisfy either of that section's two separate elements. Section 1500 applies if (1) an "earlier-filed 'suit or process' is pending in another court," and if (2) "the claims asserted in the earlier-filed case are 'for or in respect to' the same claim(s) asserted in the later-filed Court of Federal Claims action." *Brandt v. United States*, 710 F.3d 1369, 1374 (Fed. Cir. 2013).

This situation does not satisfy the first element because, when L&W Construction and Ms. Lynn filed this case three days before filing in district court, no other suit or process was pending. *See Keene Corp. v. United States*, 508 U.S. 200, 207 (1993)) ("[T]he Court of Federal Claims followed the longstanding principle that 'the jurisdiction of the Court depends upon the

[14] "The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States." 28 U.S.C. § 1500.

state of things at the time of the action brought.'" (quoting *Mollan v. Torrance*, 22 U.S. 537, 539 (1824) (Marshall, C.J.) and collecting other cases).

The second requirement does not apply because the facts do not substantially overlap. The District Court case will rely on retrospective evidence in the already-existing administrative records that lead to the 2019 Operations Plan. This case will rely on prospective documentary, testimonial, and expert witness evidence of events, developed in this Court, that resulted from each of the seven operation plans. Section 1500 does not divest this Court of jurisdiction. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014); *Cohens v. Virginia*, 19 U.S. 264, 404 (1821) (Marshall, C.J.) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

A. Binding Precedent Compels the Conclusion That Section 1500 Does Not Apply.

In contending that Section 1500 applies after the time of filing, the government argues against fifty-five years of binding precedent. The government bases its argument entirely on (1) dicta, (2) holdings abrogated by later courts, and (3) quotations to dissenting opinions.[15] All binding precedent points in one direction: Section 1500 applies based on the circumstances at the time of filing. Section 1500 does not divest this Court of jurisdiction because, when Ms. Lynn filed this complaint days before filing in district court, no other cases were pending.

In 1868, Congress passed Section 1500 to sort out the more than one hundred people who were seeking money in district court and in the Court of Claims over claims that the United States took their cotton. *Tecon Eng'rs, Inc. v. United States*, 343 F.2d 943, 946 (Ct. Cl. 1965).[16]

[15] This Court meticulously rebutted these arguments in *Kaw Nation v. United States*, 103 Fed. Cl. 613 (2012) (Allegra, J.).

[16] That Court of Claims decision binds this Court as completely any Federal Circuit decision. *See Bankers Trust N.Y. Corp. v. United States*, 225 F.3d 1368, 1373 (Fed. Cir. 2000) ("Court of Claims cases, until overturned by this court *en banc*, are binding precedent . . . .").

Congress took a specific approach to cut back on those duplicative claims. It stopped precisely the plaintiffs who were already proceeding in district court from filing new cases in the Court of Claims. *Id.*

As a result, with one brief moment of exception soon overturned, for the past fifty-five years, this Court, the Court of Claims, every Federal Circuit panel, and the *en banc* Federal Circuit have assessed jurisdiction under Section 1500 at the time of filing. *Petro-Hunt*, 862 F.3d at 1381 (Fed. Cir. 2017); *Brandt*, 710 F.3d at 1379 n. 7 (Fed. Cir. 2013); *Cent. Pines Land Co. v. United States*, 697 F.3d 1360, 1367 (Fed. Cir. 2012); *Hardwick Bros. Co. II v. United States*, 72 F.3d 883, 886 (Fed. Cir. 1995); *Loveladies*, 27 F.3d at 1548 (Fed. Cir. 1994); *Tecon*, 343 F.2d at 946.

The government relies heavily on *UNR*, an *en banc* Federal Circuit decision whose dicta the Supreme Court rejected. US Br. 18, 19 (citing *UNR Indus., Inc. v. United States*, 962 F.2d 1013, 1019 (Fed. Cir. 1992), *aff'd sub nom. Keene*). The *UNR* court overruled *Tecon* and held that Section 1500 requires this Court to test its jurisdiction at all points in time. 962 F.2d at 1023. That holding, however, lasted only a matter of months before the Supreme Court overturned it as dicta because the plaintiff in that case had filed in district court first. *See Keene*, 508 U.S. at 210 n.4. The next year, the *en banc* Federal Circuit confirmed that *UNR*'s holding did not bind any court. *Loveladies*, 27 F.3d at 1548-49.

The applicable precedent holds that Section 1500 tests jurisdiction only at the time of filing, and *stare decisis* compels that statutory interpretation to stand. *See Flood v. Kuhn*, 407 U.S. 258, 284 (1972) ("If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court."). Courts use an "enhanced" form of *stare decisis* for statutory constructions. *See Knick*, Slip Op. at 26; *Kisor v. Wilkie*, No. 18-15, Slip Op. at 31-32 (June 26, 2019) (holding that "*stare decisis* has special

force" in favor of prior statutory interpretations (quotations omitted)). Courts *re*consider statutory interpretations only if the party presents a "particularly special justification." *Kisor*, Slip Op. at 32-33 (quotations omitted). Here, the government has not even attempted to carry its burden. Without a special justification, only Congress or the Supreme Court can overrule the binding interpretation. *See Flood*, 407 U.S. at 283-84 ("We continue to be loath, 50 years after [one decision] and almost two decades after [another decision], to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.").

The government also relies on *dicta* from *United States v. Tohono O'Odham Nation*, 563 U.S. 307 (2011), to rebut the heavy weight of precedent. U.S. Br. 15, 18-20. But that case did not present this order of filing issue, so its decision has no weight. *See Tohono*, 563 U.S. at 315; *Kaw Nation*, 103 Fed. Cl. at 617 (collecting cases). Ms. Lynn established this Court's jurisdiction at the time of filing, and Section 1500 does not divest that jurisdiction regardless of later filings. Overwhelming case law compels this result.

B. The Operative Facts Do Not Substantially Overlap.

In addition to the timing issue, Section 1500 does not divest this Court of jurisdiction because the operative facts between this case and the District Court case do not overlap substantially. Separate from the time-of-filing issue, Section 1500 also does not apply when two cases are not "based on substantially the same operative facts," or, in other words, if the two cases do not "substantial[ly] overlap in operative facts." *Tohono*, 563 U.S. at 317-18. Here, the operative facts do not substantially overlap; only one document, the 2019 Operation Plan, overlaps, and it overlaps as cause relates to effect.

In the District Court case, the Administrative Procedure Act claim arises from the retrospective facts for the agency regulation based solely in the agencies' administrative records on the 2019 Operation Plan and for the failure to issue a supplemental EIS. The APA confines the evidence and operative facts to the "administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam). The Supreme Court has recognized that the "factfinding capacity of the district court is thus typically unnecessary to judicial review of agency decisionmaking." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

This takings case, in contrast, will focus precisely on "some new record made initially" in this Court. *See Camp*, 411 U.S. at 142. The Parties will develop documentary, testimonial, and expert evidence to demonstrate whether the seven operation plans took Ms. Lynn's properties, and whether the Fifth Amendment requires the government to pay just compensation.

Just as the evidence developed in this case does not bear on whether the administrative records support the Agencies' decisions in the District Court case, the evidence there does not establish a taking here. No administrative record documents will reveal the economic impact on Ms. Lynn's properties. No administrative record documents will show the degree to which the operation plans interfered with her reasonable, investment-backed expectations. Moreover, Ms. Lynn claims seven operation plans took her property, but she challenges only one in District Court. *See supra*, n.10. Again, this Court retains jurisdiction regardless of Section 1500.

The government argues that the complaints filed in this Court and in the District Court have overlapping paragraphs and similar factual background, and from that comparison, it argues that the complaints describe substantial overlapping operative facts. US Br. 17. That argument, however, reads the term "operative" out of *Tohono O'odham*. When "mere background facts"

overlap, Section 1500 does not bar jurisdiction. *See Cent. Pines*, 697 F.3d at 1365. Common contextual details do not establish any overlapping *operative* facts that prove any claim elements—much less *substantially* overlapping operative facts. *Tohono*, 563 U.S. at 317-18. The government has fallen far short of demonstrating that Section 1500 applies when only one decision point marks the only overlap of operative facts. *See Beberman v. United States*, No. 2018-1519, at *11 (Fed. Cir. Oct. 12, 2018) (per curiam) ("two facts do not provide enough overlap to conclude that the claims arise from substantially the same operative facts."). This Court retains jurisdiction regardless of Section 1500.

III. The Agencies Caused Predictable Impacts on Ms. Lynn's properties.

The government again mischaracterizes Ms. Lynn's claims as nuisance claims that arise from government inaction; it argues that they sound in tort and preclude this Court's jurisdiction under the Tucker Act. US Br. 1, 21-22; *see* 28 U.S.C. § 1491(a)(1).[17] The government asserts that Ms. Lynn is making a nuisance tort claim, essentially, because its lawyers "know a nuisance claim when they see it." This argument fails to apply the legal standard under the Tucker Act for separating inverse condemnation claims from tort claims. The government's slipshod argument falls far short of justifying dismissal for lack of jurisdiction.

To start, interpreting a tort claim according to the government's argument risks completely unraveling this Court's jurisdiction over inverse condemnation claims. The Supreme Court has recognized inverse condemnation claims as a variety of a tort claim. "[W]hen the government has taken property without providing an adequate means for obtaining redress, suits to recover just compensation have been framed as common-law tort actions." *City of Monterey v. Del*

[17]"The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon the Constitution . . . in cases not sounding in tort." 28 U.S.C. § 1491(a)(1).

Monte Dunes at Monterey, Ltd., 526 U.S. 687, 715 (1999). But if every inverse condemnation claim qualifies as a tort claim, *id.*, and if the Tucker Act precludes this Court's jurisdiction over tort claims, 28 U.S.C. § 1491(a)(1), then this Court would lose jurisdiction over all inverse condemnation claims. That is not the law. Instead, "Congress enabled property owners to obtain compensation for takings in federal court when it passed the Tucker Act in 1887 . . . ." *Knick*, Slip Op. at 22. The "enhanced" *stare decisis* principles prohibit contrary conclusions now. Merely labeling a claim as a "tort" has no force.

The Federal Circuit has identified the two elements for establishing an inverse condemnation claim. These elements differentiate those claims from garden-variety tort claims.

1. A plaintiff establishes the first element of an inverse condemnation claim by showing either

    a. "the government intended to invade a protected property interest" or

    b. "the asserted invasion is the direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the activity."

    Moden, 404 F.3d at 1342-43. This element requires the plaintiff to prove not only causation, but also that "the government should have predicted or foreseen the resulting injury." *Id.*

2. A plaintiff establishes the second element of an inverse condemnation claim by demonstrating that "the invasion appropriated a benefit to the government at the expense of the property owner, at least by preempting the property owner's right to enjoy its property for an extended period of time, rather than merely by inflicting an injury that reduces the property's value." *Id.* at 1342 (quotations omitted).

Id. (quotations omitted). The Complaint establishes each of these elements and demonstrates that the Tucker Act grants this Court jurisdiction.

A. <u>The Agency-Authorized Bison Slaughter Predictably Created an Easement Over Ms. Lynn's Properties and Led to Raptors Dropping Bison Guts on Her Properties.</u>

The first element asks whether the government intended the results or whether the government authorized an action and the "asserted invasion is the direct, natural, or probable

result" of it. *Moden*, 404 F.3d at 1342-43. (Ms. Lynn does not claim that the Agencies intended to take her properties directly, so the first part of the first element does not apply.) The Complaint establishes the first element by asserting that the Agencies authorized the bison management in Beattie Gulch, and the bison management plan caused the inverse condemnation. Compl. ¶ 19. The Complaint further alleges causation and predictability:

- the United States could have foreseen the impacts on Ms. Lynn's properties because, "[f]or years, neighbors and residents, who live only a few hundred yards away from the bison-hunting horror show, have objected to the unsafe hunting at regular IBMP public meetings." *Id.* ¶ 42.

- "The United States reasonably foresaw raptors and ravens dropping bison guts onto neighboring land as a result of its policies of allowing concentrated bison gut piles in Beattie Gulch." ¶ 41.

- The Agencies "caus[ed] a dangerous situation that prevents Ms. Lynn from operating her small business . . . ." *Id.* ¶ 6.

- "The government's bison hunt has stopped Ms. Lynn from renting her vacation rental cabins during the winter, has lowered her property values, has prevented her from using her properties for family visits, and has caused her emotional trauma." *Id.* ¶ 9.

- The bison slaughter "effectively creates an easement on Ms. Lynn's cabin properties and [still-undeveloped parcel] every winter and decreases the fair market value of those properties." *Id.* ¶ 53.

- "The United States has authorized hunters to shoot bison in Beattie Gulch mere yards from nearby private land and vacation cabins." *Id.* ¶ 56.

Those statements demonstrate every aspect of the first element in an inverse condemnation claim. *See United States v. Causby*, 328 U.S. 256, 261 (1946) ("the United States conceded on oral argument that if the flights over respondents' property rendered it uninhabitable, there would be a taking compensable under the Fifth Amendment."); *Portsmouth Co. v. United States*, 260 U.S. at 329 ("There is no doubt that a serious loss has been inflicted upon the claimant, as the public has been frightened off the premises by the imminence of the guns . . . .").

The government argues that the Complaint only alleges agency inaction, and inaction does not qualify as a taking. U.S. Mem. in Supp. of Mot. to Dismiss (US Br.) 21-22, ECF No. 8. The government just cherry-picks quotations out of the Complaint to make its argument. The Complaint asserts the Agencies acted under their Yellowstone bison management plan or IBMP. That regulation qualifies as one action, and the repeated, "various changes to the bison management plan" in annual operation plans qualify as more actions. Compl. ¶ 4, 28, 29, 48. The plain language in the Complaint undermines the government's argument that the Complaint alleges only agency inaction. The Complaint plausibly alleges that the Agencies' actions have predictably affected Ms. Lynn's properties as a direct, natural cause of the bison management and the various operation plans.

B. The Agencies Benefitted by Decreasing Expenses and Efforts for Culling Bison.

The second element of an inverse condemnation claim asks whether "the invasion appropriated a benefit to the government at the expense of the property owner . . . ." *Moden*, 404 F.3d at 1342-43. The Complaint alleges that the Agencies "prioritize a dangerous hunt that prevents Ms. Lynn from using her properties and scares away visitors who would rent her cabins." Compl. ¶ 34. Moreover, "[t]he Federal Agencies have decided that the public bison hunt, with its spillover effects on the neighborhood, has more public interest value than the neighbors renting their cabins and using their own land." *Id.* ¶ 52; *see also* Order (Dist. Ct.). The Complaint asserts that the Agencies' actions have acted repeatedly, and they knew and understood the effects of their actions on Ms. Lynn's properties. Compl. ¶ 6.

The government uses the slaughter to decrease taxpayer costs of slaughtering the bison itself. No plainer government benefit could accrue. This Complaint establishes an inverse condemnation claim over which the Tucker Act compels jurisdiction.

IV. Ms. Lynn Has Stated a Clear Claim for an Inverse Condemnation Taking.

In a last-ditch effort to avoid paying just compensation for creating a dangerous, concentrated bison slaughter that takes the property of neighbors near Beattie Gulch, the government blames everyone else: the tribal hunters, the state-licensed hunters, the State of Montana, and even wild raptors and ravens. US Br. 23-24. The government seeks to introduce new elements into the *Moden* structure for stating an inverse condemnation claim. That argument has no merit.[18]

A. The Complaint Identified the IBMP ROD and Operation Plans as the Regulations Affecting Her Properties.

The government argues that Ms. Lynn has stated no valid regulatory taking claim because no regulation actually regulates her land. US Br. 22-23. The Federal Circuit, however, already overturned this Court for requiring a regulation to apply directly to a plaintiff's property before recognizing a taking. *Dimare Fresh*, 808 F.3d at 1306-09.

The government then argues that Ms. Lynn failed to identify the regulation, anyway. US Br. 22-23. That is wrong. The Complaint identified the Agencies' actions that caused the taking. The Complaint's short, plain statement references the bison management program pervasively. Indeed, the IBMP ROD, which initially implemented that program, regulated Ms. Lynn's properties directly, Beattie Gulch, and all the neighboring properties. The Complaint alleges that,

[18] In a throwaway footnote, the government argues that, because Ms. Lynn "did not allege that the United States has taken all economically beneficial use of the[] properties," Ms. Lynn made an invalid taking claim. US Br. 23 n.8. The government makes the logical fallacy of denying the antecedent. No one reasonably disputes that, *if* the government takes all economically beneficial use of a property, *then* the claim qualifies as a taking. *Lucas v. S.C Coastal Council*, 505 U.S. 1003, 1019 (1992). This Court would commit a logical fallacy by giving force to the opposite implication: *if* the government does *not* take all economically beneficial use of a property, *then* the claim does *not* qualify as a taking. *See Crouse-Hinds Co. v. InterNorth, Inc.*, 634 F.2d 690, 702-03 n.20 (2d Cir. 1980) ("The proposition that 'A implies B' is not the equivalent of 'non-A implies non-B,' and neither proposition follows logically from the other. The process of inferring one from the other is known as 'the fallacy of denying the antecedent.'" (citing J. COOLEY, A PRIMER OF FORMAL LOGIC 7 (1942)) (cited by RUGGERO J. ALDISERT, LOGIC FOR LAWYERS 162 (3d ed. 1997)).

"[d]espite the apparent risks to human life and safety, the Federal Agencies have repeatedly authorized the slaughter." Compl. ¶ 4. The Complaint presented no mystery.

In any event, the labels of "regulatory" or "physical" do not matter because the Court will apply the same *Penn Central* test either way.[19] As long as "agencies possess congressional authority to regulate," agency actions may qualify as regulatory takings although "the action does *not* have any legal effect or impose a direct legal obligation on any party." *Dimare Fresh*, 808 F.3d at 1306-09. The Supreme Court has recognized that "there will be instances when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs." *Palazzolo*, 533 U.S. at 617. In other words, "[a] temporary takings claim could be maintained as well when government action occurring outside the property gave rise to a direct and immediate interference with the enjoyment and use of the land." *Ark. Game & Fish*, 568 U.S. at 33 (quotations omitted) (collecting cases). These claims easily meet that low bar because they allege the Agencies directly and immediately interfered with Ms. Lynn's personal enjoyment and use of her land as vacation rental property.

Even if the law required Ms. Lynn to designate the particular regulations, she has done so. The government fails to see any regulation that applies to Ms. Lynn's properties, but the Complaint points to the IBMP Record of Decision. *E.g.*, Compl. ¶¶ 18, 22. The government could not miss this; it, too, identifies the IBMP ROD as a decision document under which the Agencies implemented the IBMP bison management scheme. US Br. 5-6.

[19] *See Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992) ("arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate *claims*. They are, rather, separate *arguments* in support of a single claim—that the ordinance effects an unconstitutional taking.").

That ROD created different management zones, and Zone 2 covers Ms. Lynn's properties. *See* IBMP ROD 29 (map). There the Agencies decided to regulate Zone 2 by "us[ing] hazing, capture facilities, or shooting, if necessary, to prevent bison from leaving management Zone 2 . . . ." *Id.* at 11. To this day, the Agencies use "[h]azing . . . to manage the distribution of bison by preventing dispersal beyond Zone 2 area boundaries." 2019 Operation Plan 9. Nothing limits these regulations to lands owned by the Forest Service or the State of Montana. Thus, the Agencies have regulated Ms. Lynn's land directly as part of the comprehensive bison management scheme they implemented in the IBMP ROD and later modified in successive operation plans.

To be clear, the regulations of Ms. Lynn's and other private property inextricably intertwines with the rest of the bison management scheme. If the Agencies had excluded private property from its Zone 2 regulations, the bison management plan would never have worked. As one clear example, helicopter "hazing," or herding, to move the bison back to Yellowstone, would never have been a viable management strategy on a patchwork of private and public land. Without regulating private properties, the Agencies would have had to have struck a different balance in the plan. This entire, integrated bison management regulation that regulates Ms. Lynn's land has led to this bison slaughter that caused the takings of her properties.

B. The Complaint Alleges the Elements of a Taking.

The government blames the wild animals for the taking. US Br. 23-26. It misunderstands the causation element of inverse condemnation claims.

The government seeks to leverage an imprecise legal standard to create a new, blanket exemption from inverse condemnation claims. The government contends that no taking could arise unless "the raptors and ravens are instrumentalities of the United States." US Br. 24. In *Arkansas Game & Fish*, the government likely blamed the water and argued it did not qualify an

"instrumentality of the United States." For the same reason that argument would not have held water there, it does not here. *See Ark. Game & Fish*, 568 U.S. at 32 (rejecting as a "crabbed reading of the Takings Clause" the government's argument that "the [property] damage was merely 'a consequential result' of the dam's construction near the plaintiff's property.").

The government seeks to create another carve-out category free from inverse condemnation liability, although the Supreme Court recently rejected a similar attempt for flooding. *See Ark. Game & Fish*, 568 U.S. at 36-37. The Supreme Court directs this Court to assess "takings cases . . . with reference to the particular circumstances of each case, and not by resorting to blanket exclusionary rules." *Id.* The government has no basis for creating a new, wild-animal carve-out.

The label "instrumentalities of government" just masks the underlying standard for determining government responsibility, which depends on agency, vicarious liability, and intent. *Cf.* RESTATEMENT (THIRD) OF AGENCY § 7.03 ("A principal is subject to direct liability to a third party harmed by an agent's conduct when . . . the agent acts with actual authority . . . and . . . the agent's conduct, if that of the principal, would subject the principal to tort liability"). The Supreme Court has recognized in other contexts that "courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not." *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 775 n.7 (1983). The Federal Circuit has already completed that analysis in *Moden*. 404 F.3d at 1342. As shown above, in that case, the Federal Circuit listed the two requirements for an inverse condemnation lawsuit. *Id.* Those requirements do not change just by introducing wild animals.

The government relies on *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423, 1424 (10th Cir. 1986) (*en banc*), and *Fallini* for the principle that wild animals do not qualify as

"instrumentalities of the government." US Br. 2, 24-26. Those courts predated *Moden*, but the *Moden* analysis would have led to the same result. In *Mountain States*, the court dismissed the taking claim after declining to hold the government responsible for the wild animals' actions. 799 F.2d at 1431. The plaintiff ranchers identified the government actions as Congress protecting wild horses in the Wild Free-Roaming Horses and Burros Act (the Wild Horse Act), 16 U.S.C. §§ 1331-1340, and the Bureau of Land Management subsequently failing to manage those horses. *Id.* at 1424-26. The ranchers complained that the horses were "erod[ing] the topsoil and consum[ing] vast quantities of forage and water" on their land, and they complained that the Wild Horse Act stopped them from discouraging the horses without facing criminal penalties. *Id.*

The court rejected the claim because the wild horses did not qualify as not "instrumentalities of the federal government whose presence constitutes a permanent governmental occupation of the Association's property." 799 F.2d at 1428. In other words, those wild horses did not qualify as government agents. That concept of "instrumentality" thus merely reflects the "settled principles of foreseeability and causation." *See Ark. Game & Fish*, 568 U.S. at 34.

The *Fallini* court similarly declined to hold that the Wild Horse Act caused a taking when the protected horses trespassed on the plaintiff's land and drank their water. 56 F.3d at 1383. That court turned its decision on agency theory to reject the taking claim. It concluded that "the horses are not *agents* of the Department of the Interior any more than beachcombers wandering across a property owner's land are agents of the legislature that mandated the creation of an easement along the shore." *Id.* (emphasis added).[20] This case, too, denied that the United States caused the actions of wild animals. *Cf. Ark. Game & Fish*, 568 U.S. at 34.

[20] The government also cites *Colvin Cattle Co. v. United States*, 67 Fed. Cl. 568, 575 (Fed. Cl. 2005) (Wiese, J.). US Br. 25-26. There, in considering similar factual circumstances, the Federal

As these cases show, government actions that merely protect wild animals do not turn wild animals into government agents and thereby make the government liable for their actions. But suppose the Agencies had hazed a herd of bison toward someone's Volkswagen and obliterated it. Then, no one could reasonably doubt that government action would have taken the Volkswagen. Like the Volkswagen hypothetical, this Complaint presents a government action that predictably causes wild animals to accomplish government objectives.

At bottom, the United States disputes the causation fact, but seeks to camouflage its factual dispute as a legal issue. The Complaint states directly: "[t]he United States reasonably foresaw raptors and ravens dropping bison guts onto neighboring land as a result of its policies of allowing concentrated bison gut piles in Beattie Gulch." Compl. ¶ 42. In the context of a motion to dismiss, courts assume the facts in the Complaint are true. *Twombly*, 550 U.S. at 555. Therefore, if the government plausibly could have caused the wild animals' actions here, Rule 12 requires the Court to assume that fact as true and to reject this argument. *See id.*

Here, contrary to the facts in *Mountain States* and *Fallini*, the government is not protecting raptors and ravens; it is using them to accomplish government objectives of cleaning up the bison gut piles. The government requires the hunters to leave the possibly diseased bison guts in Beattie Gulch. *Id.* ¶ 56. It cannot intend the gut piles to stay there forever (or the quarter-mile-square area would pile up with bison guts over the course of years), and the raptors and ravens do their part in a manner any wildlife biologist could predict—and actually do predict. *Id.* ¶ 42. These allegations demonstrate that, in fact, the government policy predictably causes the ravens and raptors to drop possibly diseased bison guts on neighboring properties, and therefore, the

---

Circuit reached the same result as *Mountain States* and *Fallini* for the same reason. It elicits the same rebuttal.

government is taking Ms. Lynn's properties. Even backing into the government's parlance, the Agencies here are using these wild animals as "instrumentalities of the government."

Ms. Lynn has "nudged [her] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. In the context of repeated government actions and feedback from neighbors, the Agencies plausibly could have foreseen raptors dropping bison guts on Ms. Lynn's lands. Therefore, Rule 8(a) and Rule 12 require this Court to deny the government's motion to dismiss.

CONCLUSION

The government has nitpicked Ms. Lynn's complaint without giving it the generous construction that Rule 8(a) requires, and contrary to that Rule's direction to keep litigants in court. *See Twombly*, 550 U.S. at 575. In the end, Ms. Lynn presented no frivolous claims, but gave the government fair notice of her claims and the grounds upon which she based them. *See id.* at 555. Ms. Lynn has stated a claim and established this jurisdiction, so the Rules require the Court to deny the government's motion.

If the Court intends to grant any part of the United States' motion to dismiss based on pleading deficiencies, Ms. Lynn requests the Court to grant leave to amend to cure them.

Ms. Lynn respectfully requests the opportunity for her counsel to present oral argument.

Dated February 13, 2020,

/s/ Jared S. Pettinato

JARED S. PETTINATO, MT Bar No. 7434
The Pettinato Firm
3416 13th St. NW, # 1
Washington, DC 20010
(406) 314-3247
Jared@JaredPettinato.com

Attorney of Record for Plaintiffs

OF COUNSEL:

MATTHEW D. THURLOW
Baker & Hostetler LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 861-1681
mthurlow@bakerlaw.com