IN THE UNITED STATES COURT OF FEDERAL CLAIMS

THE WHITE MOUNTAIN APACHE TRIBE, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	No. 17-359 L Judge Edward J. Damich Electronically filed

PLAINTIFF'S RESPONSE TO UNITED STATES' MOTION FOR PARTIAL DISMISSAL

ORAL ARGUMENT REQUESTED

Brian W. Chestnut
ZIONTZ CHESTNUT
2101 4th Avenue, Suite 1230
Seattle, WA 98121
Tel. (206) 448-1230
Fax (206) 448-0962
bchestnut@ziontzchestnut.com
Attorney of Record for Plaintiff

Of Counsel:
Beth Baldwin
Wyatt Golding
ZIONTZ CHESTNUT
2101 4th Avenue, Suite 1230
Seattle, WA 98121
Tel. (206) 448-1230
Fax (206) 448-0962
bbaldwin@ziontzchestnut.com
wgolding@ziontzchestnut.com

Of Counsel:
Jim Palmer
Attorney General
White Mountain Apache Tribe
201 E Walnut St
Whiteriver, AZ 85941
Tel. (928) 338-2537
jimpalmer@wmat.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

I. INTRODUCTION

The White Mountain Apache Tribe alleges that the United States has breached its solemn fiduciary duty to the Tribe by mismanaging the Tribe's monetary and non-monetary assets from 1946 to present. The Government's management of the Tribe's trust funds, forests, dams, and other assets has violated numerous applicable laws and regulations. In its complaint, the Tribe set forth the assets at issue, the laws and regulations that the Government violated, and the applicable time frame. That is all that is required at this stage of proceedings. Because the Government exerts near-total control over the Tribe's assets, and has either not kept adequate records or not provided the Tribe with necessary information, and the Tribe's claims are based on application of legal standards to inherently highly complex facts, the Tribe does not and cannot yet know the precise scope of each claim asserted. The Government's extreme request that the Court dismiss all of the Tribe's claims for violations prior to 2011 is not supported by case law and is contrary to the usual approach of this Court in similarly complex cases, which has been to allow discovery to proceed and then to address the statute of limitations or other jurisdictional issues based on a more complete factual record. Following discovery, the Tribe will winnow its claims and provide the Court with a specific set of claims coupled with the scope of time applicable to each claim. The Tribe respectfully requests that this Court dismiss the Government's motion in its entirety.

II. STANDARD OF REVIEW

The plaintiff bears the burden to allege sufficient facts to establish the Court's subject matter jurisdiction. *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011). However, that is not a heavy burden. When asked to dismiss a complaint for lack of subject matter jurisdiction based on the face of the complaint, the Court has the "limited" task of

determining whether the Tribe has stated a claim that could prevail if the Tribe supported it with evidence:

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.

Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), *overruled on other grounds by Davis v. Scherer*, 468 U.S. 183 (1984). Thus, the Court must accept as true all of the Tribe's allegations and draw all reasonable inferences in the Tribe's favor. *Pixton v. B & B Plastics, Inc.*, 291 F.3d 1324, 1326 (Fed. Cir. 2002); *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995); *Rosebud Sioux Tribe v. United States*, 75 Fed. Cl. 15, 22 (2007). Even if it appears on the face of the pleadings that a recovery is "very remote and unlikely," the Government's Motion should not be granted "unless it appears beyond doubt" that the Tribe can prove no set of facts in support of its claim which would entitle it to relief. *See Hamlet v. United States*, 873 F.2d 1414, 1416 (1989); *Rosebud Sioux*, 75 Fed. Cl. at 22-23.

In reviewing a motion to dismiss pursuant to Rule 12(b)(1), the court may review matters beyond the pleadings to the extent the moving party seeks to challenge the truth of jurisdictional facts. *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988) (citing *Land v. Dollar*, 330 U.S. 731, 735 (1947)). A court need not consider matters outside pleadings at all, but if the court decides to consult such matters it must inform the parties and set a schedule for submitting additional affidavits and documents if parties wish. *Gordon v. Nat'l Youth Work All.*, 675 F.2d 356, 361 (D.C. Cir. 1982); *Reynolds*, 846 F.2d at 748.

III. ARGUMENT

The argument is divided into four parts to correspond with the Government's Motion: forest claims, other non-monetary asset claims, trust fund claims and dam claims. For the reasons discussed in each section, the Government's Motion should be dismissed in its entirety.

A. The Statute of Limitations Does Not Bar the Tribe's Claims Regarding the Government's Forest Mismanagement at this Early Stage of Proceedings.

The United States has exercised comprehensive control over the White Mountain Apache Tribe's non-monetary resources at all times at issue in this case (1946 to present). The Tribe has little input on BIA's management of the forests on the Reservation. The forestry-related mismanagement allegations concern the technical adequacy of the Government's silvicultural management of over 1.3 million acres of forests and woodlands over decades. As a result of a lack of control, lack of information, and the inherent complexity in managing a vastly varied landscape, the Tribe has insufficient information to determine when the Government breached its fiduciary duties and when specific claims accrued. Compl. ¶28. Due to chronic mismanagement and inadequate record keeping and inventory, the Government likely also lacks the requisite information to determine claim accrual. Compl. ¶28, 44, 45. The complaint therefore appropriately casts a broad net to capture all known and yet to be discovered instances during that time frame in which the Government has breached its solemn fiduciary duty to the Tribe. Establishing when each of the alleged breaches of fiduciary duty occurred, and when the related claim accrued, requires discovery and fact analysis. Following the close of discovery, the Tribe will be prepared to more specifically state the nature of each claim and the time frame of liability. But at this early stage of proceedings it is premature to eliminate any of the Tribe's claims.

In similar cases involving complex and detailed claims relating to the Government's breach of fiduciary duty in managing forests on Indian reservations in the Southwest, this Court

denied the Government's motions to dismiss. *See Apache Tribe of the Mescalero Reservation v. United States*, 43 Fed. Cl. 155, 156 (1999) ("*Mescalero Apache*"); *see also San Carlos Apache Tribe v. United States*, No. 14-1045 (Fed. Cl. July 31, 2015) (order denying motion to dismiss) (attached in Appendix); *see also United States v. Mitchell*, 463 U.S. 206, 211 (1983) ("*Mitchell II*"). *Mescalero Apache* provides a helpful roadmap. There, like here, the tribe brought a variety of claims relating to forest mismanagement across a large reservation. The tribe filed the complaint in 1992 and alleged trust violations from 1979 onward. Like here, the Government attempted to dismiss the claims prior to discovery based on the statute of limitations. The Court denied the Government's motion to dismiss, correctly concluding that the tribe stated viable claims within the past six years, which prevented the Government from escaping all liability, and therefore the best course of action was to proceed to the merits of the case. *Apache Tribe of the Mescalero Reservation v. United States*, Civ. No. 92-403L (Fed. Claims, July 23, 1993) (order denying motion to dismiss) (attached in Appendix). After discovery and trial, the Government refiled a motion to dismiss, and the parties and the court had the benefit of a fully developed factual record and a winnowed set of claims to address the statute of limitations. *Mescalero Tribe*, 43 Fed. Cl. at 156. Similarly, in *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 672 F.3d 1021, 1027-28 (Fed. Cir. 2012) ("*Shoshone IV*"), the court considered a motion to dismiss only after the parties established the requisite jurisdictional facts through discovery. Particularly given that the Government concedes this Court has jurisdiction over claims accruing since 2011, the same approach is necessary and appropriate here.

The Government takes the extreme position that all claims relating to forest management occurring prior to March 15, 2011 should be dismissed at the earliest stage of litigation. The Government argues that some of the Tribe's forestry claims accrued prior to 2011 and therefore

are barred by the statute of limitations. The Government's argument is based on the alternative theories that the Tribe either had actual knowledge of the Government's mismanagement prior to 2011, or that the breaches were not "inherently unknowable." *See* Mot. at 7-8. The Government's motion is critically flawed throughout because it relies on the wrong legal standard. The "inherently unknowable" standard only applies where a Tribe seeks equitable tolling of the statute of limitations, which the Tribe does not seek here based on the facts currently available. *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988).

The Government's motion provides wholly insufficient factual and legal support for the assertion that the Tribe knew of all breaches of fiduciary duties. The Government never identifies when or how it repudiated its trust obligations. The contention that the Tribe knew of breaches of fiduciary duty "by simply observing its own forest," Mot. at 10, is wrong. As evidenced by the roughly 80 subsections of federal regulations governing forestry on Indian lands, *see* 25 C.F.R. §§ 163.1 to 163.83, eight separate BIA handbooks on the subject spanning thousands of pages, and three in-depth reports prepared by the Indian Forest Management Assessment Team (IFMAT), forestry is a highly technical and complex endeavor not reduceable to casual observation.[1]

The cases relied upon by the Government likewise do not apply because they all feature clearly discernible and discrete events repudiating the trust relationship and identifying claim accrual, such as legislation terminating federal management of Indian forests. *See Menominee Tribe of Indians v. United States*, 726 F.2d 718, 722 (Fed. Cir. 1984). By adopting the incorrect

[1] The BIA Handbooks on Forest Management Planning, Contract Sales of Forest Products, Permit Sales of Forest Products, Forest Development, Forest Trespass, Silviculture, Woodland Management, and Forest Management Deductions are available here: https://www.bia.gov/policy-forms/handbooks. The IFMAT was formed under NIFRMA and the reports, also referenced in the Government's motion at 14 n. 2, are available here: http://www.itcnet.org/issues_projects/issues_2/forest_management/assessment.html.

"inherently unknowable" standard and alleging that the Tribe had a duty to investigate and evaluate breaches of trust, the Government attempts to impose an affirmative obligation on the Tribe to monitor and evaluate complex conditions of a very large forest. The Supreme Court has already considered and rejected that approach to assessing the statute of limitations on forest management claims, concluding that "[a] trusteeship would mean little if the beneficiaries were required to supervise the day-to-day management of their estate by their trustee or else be precluded from recovery for mismanagement." *Mitchell II*, 463 U.S. at 227.

1. A Claim Accrues When the Tribe "Knew or Should Have Known" that Instances of Mismanagement were Sufficient to Constitute a Likely Breach of Fiduciary Duty.

The Government misstates the basic accrual rules and overlooks the special common law rules that apply to this Indian breach of trust case. The statute of limitations governing the Tribe's claims for breach of trust under the Indian Tucker Act is six years, and that six-year period begins to run when the "claim first accrues." 28 U.S.C. § 2501. A cause of action for breach of trust only "accrues when the trustee 'repudiates' the trust *and* the beneficiary has knowledge of that repudiation." *Shoshone IV*, 672 F.3d at 1030 (Fed Cir. 2012) (emphasis in original); *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1348 (Fed. Cir. 2004) ("*Shoshone II*") (citing cases and Restatement (Second) of Trusts). A trustee may repudiate the trust by taking actions inconsistent with his responsibilities as a trustee or by express words. *Id.*

Actions are sufficient to convey a breach of trust when "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." *Hopland Band of Pomo Indians*, 855 F.2d at 1577 (emphasis in original) (citation omitted). This standard is often paraphrased as meaning that a claim accrues when a Tribe "knew or should have known" of the alleged breach. *See San Carlos Apache Tribe*, 639

F.3d 1346, 1350 (Fed. Cir. 2011). The Tribe, as a trust beneficiary, is "permitted to rely on the good faith and expertise of [its] trustees," and therefore is "under a lesser duty to discover malfeasance relating to [its] trust assets." *Shoshone II*, 364 F.3d at 1347 (citation omitted). This is particularly true in the forestry context, where monitoring requires a high degree of technical information, sophistication, and resources that are often unavailable to Indian tribes, including the White Mountain Apache Tribe. Federal acknowledgment of the complexity and expense of forestry "led to federal management in the first place." *Mitchell II*, 463 U.S. at 227.

The "inherently unknowable" standard incorrectly referenced by the Government (Mot. at 7, 9, 15) only applies to the narrow subset of cases in which a plaintiff seeks equitable tolling of the statute of limitations for claims that it concedes accrued more than six years before filing the complaint, based on either the Government's intentional concealment of information or the impossibility of discovering the claim. *Young v. United States*, 529 F.3d 1380, 1384 (Fed. Cir. 2008). As explained in *Hopland Band of Pomo Indians*, "the distinction that must be drawn is that between tolling the commencement of the running of the statute (a tolling of the accrual) and tolling the running of the statute once commenced (a tolling of the statute). In suits against the government brought under section 2501, the distinction can be critical because the former routinely is allowed while the latter rarely is." 855 F.2d at 1578. Here, because the Government did not repudiate the trust prior to 2011, the Tribe's forestry related claims prior to 2011 fall into the first category set forth in *Hopland Band of Pomo Indians*: tolling of claim accrual. The "inherently unknowable" standard does not apply based on facts currently available. *Id.*

2. The Tribes' Claims Did Not Accrue Before 2011.

The Government's motion does not identify how the trust was repudiated and when the repudiation was known or should have been known by the Tribe, both of which must occur for accrual of any claim. *See, e.g.*, *Shoshone II*, 364 F.3d at 1348. The Government similarly fails

to identify the "express words or . . . actions inconsistent with [its] responsibilities as trustee" that put the Tribe on notice of any of its claims. *Id.* With these basic deficiencies, the Government cannot identify when the Tribe's claims accrued and cannot sustain a motion to dismiss.

The Government's motion assumes that the Tribe knew or should have known of the repudiation prior to 2011 based on the ability to see trees in the forest. *See, e.g.*, Mot. at 9, 10, 19. That argument is incorrect and simplistic, and has already been rejected by this Court in two very similar cases involving mismanagement of large and diverse forest resources. *See Mescalero Apache*, 43 Fed. Cl. at 156; *San Carlos Apache Tribe* (attached); *Mescalero Apache Tribe*, Civ. No. 92-403L. The actual date of claim accrual is "when the trust beneficiary knew or should have known of the *breach*," not simply when some imperfect forest conditions were present. *See Jones v. United States*, 801 F.2d 1334, 1335 (Fed. Cir. 1986) (emphasis added).

The cases principally relied on by the Government are inapposite because they deal with clearly discernible, discrete breaches of fiduciary duty. For example, *Quapaw Tribe of Okla. v. United States*, 111 Fed. Cl. 725 (2013), concerned a one-time transfer of land and degradation of land that had been formally designated a Superfund site more than six years prior. In *Menominee Tribe*, 726 F.2d at 722-23, the Tribe assumed sole responsibility for forest management by special federal statute over six years before suit was filed. In *Navajo Nation v. United States*, 631 F.3d 1268 (Fed. Cir. 2011), the tribe alleged that federal legislation taking Navajo land breached the Government's fiduciary duty. *Shoshone IV* dealt with the alleged illegality of conversion of leases 20 years prior to the filing of the complaint, when the tribes were notified and took formal action to approve the conversion. The court ruled that notification and approval constituted repudiation of the trust for purposes of claim accrual. *Shoshone IV*, 672 F.3d at 1034.

In contrast to the cases cited by the Government, the claims alleged here involve ongoing mismanagement of a 1.3 million acre forest over decades, with no single, discrete decision that breached a fiduciary duty, but rather a cumulative failure to sustainably manage the Tribe's resources according to the standards imposed by federal law. The Government has breached but never repudiated its trust obligations.

The Tribe does not know precisely when breaches of fiduciary duty occurred. *See Henke v. United States*, 60 F.3d 795, 800 (Fed. Cir. 1995) (rejecting Government's motion to dismiss on statute of limitations grounds because allegations of complaint asserted that cause of action accrued at some date "not yet ascertained" but within the limitations period). Determining when the claim accrues is highly fact specific and depends on the nature of the claim. *See John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1357 (Fed. Cir. 2006), *aff'd*, 552 U.S. 130 (2008). Knowledge of mismanagement sufficient to constitute claim accrual in the forestry context requires access to detailed technical information. Modern forestry entails use of satellite imagery, geographic information systems (GIS), computer forest-growth models, and analysis of growth plot data collected over decades. *See* Mot., Exh. 1 at iii (2005-2014 Forest Management Plan, hereinafter cited as "FMP"). The 2013 IFMAT Report concisely explains the challenges in identifying a likely breach of trust in any specific instance: "no explicit, uniform performance standards for Indian forest management have been established to provide a basis for evaluating the degree to which the federal government is fulfilling its trust responsibility." IFMAT III at 9. Determining whether instances of potential mismanagement rise to a likely breach of fiduciary duty is a complex endeavor requiring significant expertise and resources, which the Tribe (and in many instances, the Government) lacked.

It is also not the case that the Tribe "should have known" of the Government's breaches of fiduciary duty. The difficulty ascertaining a breach of fiduciary duty is complicated in any large forest, because management varies by location and occurs across decades. A breach of fiduciary duty may only be detectable using long-term monitoring over decades following mismanagement, based on the lag time between forest management and measurable forest response. FMP at 24. Meaningful monitoring and long-term study is particularly challenging on the Fort Apache Indian Reservation, which contains over 1.3 million acres of ecologically diverse forests and woodlands in various states of recovery from known mismanagement prior to 1946. The Reservation has thousands of stands of forest across widely varied terrain; a given stand may only require management every 20 to 40 years (with wide variation based on forest response to conditions), *see* FMP at 31, and harvest of high value ponderosa pine may only occur once every 130 to 150 years. *White Mt. Apache Tribe*, 11 Cl. Ct. at 667.[2] The Tribe has no duty to independently conduct forest planning and monitoring, and the great complexity of assessing forest management means that it is not the case that the Tribe "should have known" of the breaches.

The difficulty identifying breaches is compounded by the undisputed fact that the Government controls all forest management decisions and information. Under the National Indian Forest Resources Management Act (NIFRMA), the BIA has control over and responsibility for undertaking forest management activities on Indian lands, even where management activities are ultimately carried out by a tribe under grants or cooperative agreements. 25 U.S.C. § 3104(a); 25 C.F.R. §§ 163.10, 163.3. The BIA controls "every stage of timber management by virtue of its power to: (a) manage the timber resources in accordance with the principles of sustained yield

[2] In forestry terminology, a "stand" is "[a]n aggregation of trees occupying a specific area and sufficiently uniform in composition, age, arrangement, and condition that it is distinguishable from the forest in adjoining areas." *See* IFMAT III at 61.

management; (b) sell, on the open market, excess timber when the volume available and for harvest is in excess of that which is being developed and/or utilized by the local Indian forest enterprise; (c) prevent loss of values resulting from insects, diseases, or other catastrophes; (d) prepare and revise forest management and operating plans as needed; (e) maximize benefit to the Indian owner; and (f) generally manage and protect tribal forest lands 'to the extent that such action is in the best interest' of the Indians." *Mescalero*, 43 Fed. Cl. at 163. While BIA is supposed to coordinate with the Tribe in forest management, BIA often operated without input from the Tribe and without sharing information. *See* FMP at i (lacking Chairman's signature); *White Mountain Apache Tribe*, 11 Cl. Ct. at 677. Where BIA did cooperate with the Tribe via completion of contracts under the Indian Self-Determination and Education Assistance Act ("ISDEAA"), such cooperation did not constitute claim accrual or alter the Government's trust duties to the Tribe. 25 U.S.C. § 5332(2).

Not only did the Tribe lack the information necessary to identify claim accrual, the Government itself often lacked adequate information to determine when breaches of fiduciary duty occurred. It is undisputed that the Government has lost or destroyed important records (Compl. ¶28), and cannot provide an informative and reliable accounting of the Tribe's forest resources (*id.* ¶¶36, 39), such as the universe of leases or transactions (*id.* ¶33).[3] The BIA is woefully understaffed and has outdated monitoring and forest technology, which means that in many cases even the agency does not possess sufficient information to identify breaches of fiduciary duty. IFMAT III at 52. The regional BIA for the Tribe lacks a forest planner or inventory specialist. Compl. ¶45. The 2005-2014 FMP is expired and three years later BIA has made no apparent

[3] As with the trust funds claims, the failure to account to the Tribe is pointed out to show the Tribe could not know of its claims. It is not a claim for damages based on breach of the fiduciary duty to render an accounting.

progress in developing a new one. Compl. ¶45. The Tribe could not have known of claim accrual where even the Government failed to evaluate likely breaches of fiduciary duty.

Because the Tribe must rely on the Government for every aspect of management of its forest resources, it has no obligation to evaluate or investigate forest management, and there is no basis for the Government's argument that the Tribe should have known of the Government's breaches of fiduciary duty. It would be a perverse outcome if Congress deprived the Tribe of management of its own forests (which are the Tribe's primary source of revenue), and then punished the Tribe for the failure to constantly monitor its own forests through application of the statute of limitations. "A trusteeship would mean little if the beneficiaries were required to supervise the day-to-day management of their estate by their trustee or else be precluded from recovery for mismanagement." *Mitchell II*, 463 U.S. at 227.

a. The 1987 Court of Claims Case Addressed Pre-1946 Breaches of Fiduciary Duty, and Does Not Bar the Tribe's Claims.

The Government argues that the Court of Claims opinion in *White Mountain Apache Tribe v. United States*, 11 Cl. Ct. 614 (1987) indicates that the Tribe "possessed actual knowledge of the post-1946 management and condition of its timber lands." Mot. at 9. The Government repeatedly mischaracterizes the scope of the claims asserted in that case, and improperly assumes that knowledge developed for trial regarding claims arising before 1946 constitutes knowledge sufficient to identify breaches post-1946 and post-trial.

The Court of Claims case began as a petition filed in the Indian Claims Commission in 1950, which the Tribe amended in 1959. The Tribe's claims were tried 27 years later, but focused on pre-1946 conduct. *White Mt. Apache*, 11 Cl. Ct. at 618. The bulk of the case concerned mismanagement of water resources and rangeland. *Id.* at 622-666. In regards to forestry, the case included allegations of significant overcutting in the "Unit One" timber sale and "several other

areas that were cut or contracted for cutting before August 13, 1946," *id.* at 672, overcutting between 1918 and 1986 as it related to unwarranted expansion of the Tribe's sawmill, *id.* at 673, uncompensated wood use by the Army prior to 1917, *id.*, failure to respond to forest fires, *id.* at 674, and fraudulent mismanagement of forest resources to increase downstream water supply, *id.* at 675. The case did not overlap with any claims asserted in the present case.[4] Notably, the court considered many claims for violations occurring decades prior to the filing of the complaint.

The Government contends (Mot. at 10) that a site visit by the court and the parties in 1986 allowed the Tribe to observe "the distance between trees," and as a result the Tribe should have known at all times 1986 to present that the U.S. was in breach of its fiduciary duty. The Government makes too much of scant evidence, and its arguments are directly undermined by the court's opinion in *White Mt. Apache*. What *White Mt. Apache* confirms is that evaluation of forest management is highly technical and necessitates extensive work by qualified experts. The evaluation of whether one timber sale constituted a breach of fiduciary duty required days of testimony by five experts, a site visit, and extensive analysis of planning documents. *See id.* at 670-673. The court held that proving alleged breaches of fiduciary duty arising from overcutting required an expert to measure the residual volume of a given stand of trees or the percentage of pre-harvested volume that was cut (which may have to be estimated based on later data and expected growth curves) and then to establish that the management sufficiently deviated from accepted contemporaneous professional norms to constitute a breach of trust. *Id.* Breaches of fiduciary duty arising from mismanagement of hundreds of thousands of acres of forest over

[4] The closest relationship is with claims of overcutting (also known as exceeding "sustained-yield growth") between 1918 and 1986 leading to expansion of the sawmill. However, careful inspection reveals that this claim was entirely focused on sawmill expansion, and did not introduce specific evidence of overcutting occurring after 1946. *Id.* at 673 and 678.

decades are not ascertainable from the Tribe "simply observing its own forest," particularly where the Government controls the relevant management and information. Mot. at 10.

The Government also argues that the bare fact of whether the Tribe knew prescribed burns were conducted after 1946 is enough to bar the Tribe's claim the Government failed to adequately engage in prevention of forest fire risk through thinning and prescribed burns. The issues are wholly unrelated. In *White Mtn. Apache Tribe* the Tribe argued that the Government intentionally excessively burned certain forests in order to increase water supply downstream. 11 Cl. Ct. at 678. That allegation focused on water supply and related to suspicions of illegal conduct, and provides no indication that the Tribe knew or should have known that fire prevention measures decades later would be insufficient to protect trust resources.

Finally, the Government argues that *White Mt. Apache Tribe* demonstrates the Tribe's capacity to evaluate forest management, and that the claims should be dismissed because the Tribe was capable of seeking advice and launching inquiry. Mot. at 10 (citing *Menominee Tribe*, 726 F.2d at 721). This argument is similarly misplaced. The cited portion of *Menominee Tribe* concerns the "inherently unknowable" standard that does not apply here. *See Hopland Band of Pomo Indians*, 855 F.2d at 1578. Furthermore, the Tribe's experts evaluated specific timber sales that occurred prior to 1946. There is no indication that experts conducted similar analyses for later forest management. Just because the Tribe hired experts in 1986 to review pre-1946 timber harvests does not mean that the Tribe "should have known" of all mismanagement after 1946.

b. Publication of the IFMAT Reports and FMP Do Not Constitute Claim Accrual.

The Government argues that two classes of documents provided the Tribe with notice of the Government's breaches of fiduciary duty, and thus triggered the statute of limitations at various

times pre-2011. These documents do not initiate claim accrual because they do not repudiate the trust relationship or identify specific breaches of fiduciary duty.

i. The IFMAT I and IFMAT II Reports Concern General Trends in Forestry Across the United States, and Do Not Identify Breaches of Fiduciary Duty.

In its complaint, the Tribe alleged that the breaches of fiduciary duty collectively described in the IFMAT reports I, II, and III also occurred on the Fort Apache Indian Reservation. Compl. ¶44. In the motion to dismiss, the Government misconstrues the complaint as conceding the Tribe's awareness of breaches of fiduciary duty in 1993 and 2003. Tellingly, the Government does not provide any citation to the reports in its briefing, and does not mention the IFMAT III Report of 2013. The IFMAT reports of 1993 ("IFMAT I") and 2003 ("IFMAT II"), generated in response to requests from Congress, provide generalized evidence that the United States regularly mismanages forests on Indian trust lands, and present recommendations on how to improve management. In contrast, the IFMAT III report of 2013 (within the six-year window of the statute of limitations) states that the Government is generally in violation of its fiduciary obligations to Indian tribes, in part due to its failure to address the systemic deficiencies highlighted in the prior two reports. The Tribe's complaint merely referenced the allegation that general concerns highlighted in the IFMAT Reports I-III also occurred in the specific context of the Reservation, an allegation that requires discovery and analysis to prove.

The IFMAT I and IFMAT II reports do not state that the Government repudiated or breached its fiduciary duty, and do not set forth sufficient facts to establish such a breach on a specific reservation. IFMAT I was a high-level analysis of BIA's forest management as it related to tribal needs, with some discussion of conditions on the Tribe's Reservation as an example. Rather than identifying breaches of fiduciary duty, the report's "major recommendation" was to define the nature and scope of the Government's trust obligation. *See* IFMAT I at ES 15. IFMAT

II expressly noted that "[t]here is still no independent assessment of the federal government's effectiveness in fulfilling its trust obligation…" IFMAT II at 4. As such, the reports are a valuable resource that the Tribe will rely upon for background context in these proceedings. It is not the case that the Tribe "knew or should have known" of breaches of fiduciary duty based on the availability of the 1993 and 2003 reports.

ii. The 2005 FMP Does Not Identify Breaches of Fiduciary Duty, and the Tribe Reasonably Relied Upon the FMP's Promises to Fix Identified Forest Management Problems.

The Government also argues that the 2005 FMP informed the Tribe of breaches of fiduciary duty and therefore initiated claim accrual. Mot. at 15. The Government's argument mischaracterizes the Tribe's complaint and the role of the FMP. The FMP sets forth goals to be achieved over a ten-year period. While the failure to achieve those goals may be considered a breach of fiduciary duty, the Tribe could not know that such a breach would not occur until completion of the ten-year period. *Mescalero Apache*, 43 Fed. Cl. at 162. To the extent the Tribe referenced the FMP in its complaint, those references are only relevant to claim accrual in 2014.

The Government also argues that the Tribe's knowledge of some degree of bark beetle and mistletoe infestation constituted claim accrual for any later breach of fiduciary duty for failure to control and respond to infections. The Government's reliance on *Shoshone IV* is misplaced because in that case the alleged breach of fiduciary duty was a discrete action—the conversion of leases without competitive bidding. 672 F.3d at 1032-33. The Tribe was fully aware of that action at the time it occurred, but not fully aware of the legal implications. Here, in contrast, the breach arises from inaction over time and across a large and dynamic forest, and the facts regarding when and to what extent the Government breached its fiduciary duty are still unclear to the Tribe. There was no repudiation of the trust or discrete action in violation of the trust that the Tribe should have known triggered the need to file a lawsuit.

For example, the mistletoe infection documented in the FMP only establishes the fact that mistletoe existed in the forest prior to 2005. The presence of a common disease does not alone identify a breach of fiduciary duty. The BIA identified an issue and set forth plans to resolve it, and the Tribe reasonably relied on the BIA to carry out those plans. The breach occurred at some point later, when the BIA did not further evaluate the prevalence of disease and did not carry out the promised measures to control the disease. The Tribe did not, and could not, have known that BIA would fail to remedy insect and disease problems until the termination of the FMP. The same is true of other claims made in reference to the FMP, including failure to attain sustainable yield, failure to thin, and failure to adequately prevent forest fires.[5]

c. The Tribe Does Not Allege that Imposing Costs on the Tribe is a Breach of Fiduciary Duty, but Rather that it is a Component of Damages.

The Government argues that because the Tribe knew how much money it received for thinning and the degree of unnecessary costs the Tribe was forced to bear, its claims regarding breaches of trust arising from those issues are limited to 2011 and later. Mot. At 17. Again, the Government misconstrues the Tribe's complaint, which states that "[b]ecause of its breaches of fiduciary duty, the United States imposed costs on the Tribe and WMATCO." Compl. ¶58. The Tribe does not pursue these cost impositions as independent claims, but rather as one aspect of damages arising from other breaches of trust.

The Government further misconstrues the Tribe's claims in its discussion of the Indian Self-Determination and Education Assistance Act ("ISDEAA") contracts for forestry operations (also known as "638 contracts" because of their basis in PL-638). *See* Mot. at 18. The Tribe does not allege that any ISDEAA contract was unlawful or insufficient, caused an injury to the Tribe,

[5] Monetary claims relating to forestry, such as failure to attain full contracted prices for timber sales and mismanagement of forestry related accounts, are addressed in Part III.C of this brief, which is dedicated to trust fund claims.

or not paid when the Government was required to do so. The cases cited by the Government are therefore wholly inapplicable. *Id.* (citing *Flathead Irrigation Dist. v. Jewell*, 121 F. Supp. 3d 1008 (D. Mont. 2015) and *Boye v. United States*, 90 Fed. Cl. 392 (2009)).

Next, the Government argues that all claims relating to thinning or road construction are barred pre-2011 because the Tribal forestry program, through implementation of ISDEAA contracts, gained sufficient knowledge to understand when a breach of trust may have occurred prior to 2011. *See* Mot. at 19. The Government's "Exhibit 4" is a one-page document from 1997 that simply notes the existence of an ISDEAA contract relating to forestry, but does not describe the role of the Tribe, the relationship with BIA, or the nature of the supposed knowledge the Tribe gained through implementation of the contract. *See* Mot., Exh. 4. The Government does not support its arguments with any factual evidence demonstrating that the Tribe knew or should have known of the breaches of fiduciary duty, and does not cite any applicable legal authority. The argument should be deemed waived. *Hymas v. United States*, 117 Fed. Cl. 466, 496 n. 34 (2014).

The Government's argument is further flawed in that it ignores how thinning and other treatments are planned and carried out on Indian trust lands, irrespective of the existence of an ISDEAA contract. Under NIFRMA, "[t]he Secretary shall undertake forest land management activities on Indian forest land, either directly or through contracts, cooperative agreements, or grants under the Indian Self-Determination Act." 25 U.S.C. § 3104(a). An ISDEAA contract does not alter or reduce the Government's fiduciary duties to the Tribe. 25 U.S.C. § 5332(2). The BIA maintains a supervisory role in which the Tribe merely carries out specific projects under BIA direction. *See* 25 C.F.R. §§ 163.10, 163.3; *Mescalero Apache*, 43 Fed. Cl. at 163. For example, thinning is an aspect of forest development, and forest development projects must comply with the Forest Management Plan and are funded and approved by the BIA. 25 C.F.R. § 163.32. While

some tribes play a greater role in the development of forestry operations, here, the BIA has controlled and developed the Forest Management Plan that governs timber sale management on the Reservation. Compl. ¶44. The Tribe's completion of specific tasks planned and approved by BIA under ISDEAA contracts does not diminish the BIA's trust responsibility and does not mean that the Tribe knew or should have known of breaches of fiduciary duty.

d. The Tribe's Other Forest Claims Are Not Limited to 2011 to the Present.

The Government's final subsection devoted to forestry-related claims presents a mishmash of arguments, which the Tribe addresses in turn. Mot. at 19. The Tribe's claims regarding the attainment of the annual allowable cut, failure to put forward sufficient quantity and diversity of timber sales, and failure to assist with developing markets for small-diameter trees all extend to at least 2005, the date of the last FMP. Here, the 2005-2014 FMP sets forth the annual allowable cut, *see* FMP 325-329, states that BIA will "[a]ssist the White Mountain Apache Tribe in developing markets for previously underutilized forest products or species," FMP at 14, and promises that BIA will "[d]evelop a local market for the pole timber scheduled for harvest." *See* FMP at 226. The Government's argument that these claims are barred prior to 2011 is incorrect, because the "Tribe could not attain knowledge of whether a claim existed until after the ten year cutting budget expired," *Mescalero Apache*, 43 Fed. Cl. at 162, which occurred in 2014. With regards to the claim that the Government provided insufficient assistance with the sawmill, it is true that the Tribe had control over sawmill operations. If discovery reveals that the Tribe knew or should have known of breaches of fiduciary duty relating to the sawmill prior to 2011, the Tribe will appropriately limit such claims to the six years prior to filing of the complaint.

e. Because the Statute of Limitations for the Tribe's Forestry Claims is Inextricably Bound up with the Merits, the Appropriate Course is to Deny the Government's Motion and Reconsider Whether Claims are Barred after Completion of Discovery.

Where the resolution of jurisdictional issues is intertwined with the merits of a case, the decision on jurisdiction should await a determination of the merits either by the Court on a summary judgment motion or by the fact finder at trial. *Forest Glen Props., LLC v. United States*, 79 Fed. Cl. 669, 678 (2007); *Inter-Tribal Council of Ariz., Inc. v. United States*, 125 Fed. Cl. 493, 503 (2016). Determining when alleged breaches occurred and when the Tribe either knew or should have known of such breaches is highly fact-dependent and closely tied to the merits of the case. For instance, determining when a claim arises for a failure to thin a given stand of forest requires assessment of when the forest ideally should be thinned based on existing conditions and sound professional judgment, when the failure to thin rises to the level of a breach of fiduciary duty, and when the failure was sufficiently apparent that the Tribe should have known of its occurrence. These are essentially the same issues that will be addressed on the merits of the case. *See, e.g.*, *White Mountain Apache*, 11 Cl. Ct. at 672. Because the jurisdiction and merits issues are inextricably intertwined, the appropriate path is for the Court to await determination of facts at trial before ruling on the temporal scope of claims properly asserted. *Inter-Tribal Council of Ariz., Inc. v. United States*, 125 Fed. Cl. at 503.

Dismissal of pre-2011 claims would not meaningfully simplify these proceedings. The Government has conceded that the Tribe has valid claims dating from at least 2011, meaning that this court has uncontested jurisdiction, trial will proceed in some form, and the Government cannot fully escape liability at this stage. Regardless of the scope of the statute of limitations, the Tribe's claims extend to the entire forest, and therefore the state of the entire forest will be at issue in discovery and trial. A determination of claim accrual will be a crucial juncture in this case, and determination now, without a factual record, would be premature and extremely prejudicial to the Tribe. The Tribe's commercial forest is its primary economic asset, and when operational the

sawmill is the Tribe's single largest employer. A full and detailed evaluation of the scope of each claim is critical to the Tribe's ability to recover for past mismanagement and to develop its most important economic resource for the benefit of Tribal members.

In sum, the Government has not established that it repudiated its fiduciary obligations with respect to management of the Tribe's forests prior to 2011, or that the Tribe knew or should have known of such a repudiation. The Tribe, through the facts alleged in its complaint, has met the low burden of establishing this Court's subject matter jurisdiction. Discovery is required to determine precisely when claim accrual occurred for each of the Tribe's forest claims. It is likely that many, if not all, of the Tribe's claims relating to pre-2011 conduct first accrued after 2011. Tolling of claim accrual is "routinely allowed" in cases seeking money damages for breach of trust under the Indian Tucker Act. *Hopland Band of Pomo Indians*, 855 F.2d at 1578. As in *Mescalero Apache*, 43 Fed. Cl. at 156, the correct and efficient path is to deny the Government's motion to dismiss and proceed to discovery. Following the close of discovery, the Tribe will describe the nature of each claim and the time period of alleged Government liability, and the parties can revisit the statute of limitations issues if necessary.

B. The Other Non-Monetary Asset Claims are Sufficiently Pleaded and Timely.

The Government asserts (Mot. at 20-22) that the Tribe's remaining non-monetary asset claims should be dismissed for alleged failure to detail the legal or factual basis of those claims, and because the Tribe allegedly should have known of the claims pre-2011. All non-monetary assets claims (except the Indian Dam Safety Act claim), are covered by Claim II – Non-Monetary Assets. Compl. at ¶21.[6] The Tribe asserts there are third parties who have occupied Reservation

[6] The Government incorrectly asserts (Mot. at 21) that the claims for mismanagement of assets other than forest assets are not a separate claim. The Tribe's trust fund claims (Claim I) concern the failure to collect money owed under leases and similar legal instruments.

lands and that the Government has failed to enforce applicable law, including statutes and regulations, and leases and other instruments entered under such law. The factual bases for these claims are provided throughout the Complaint at ¶¶11-15, 23, 27, 28 and Claim II. For example, the Tribe asserts that rights of way have expired, and that third parties have contaminated the Reservation. Compl. ¶15. The legal bases underlying Claim II are the statutes and regulations cited in the Complaint that govern leases, rights of way and other rights to natural resources at ¶¶ 20-22 and Claim II.

At this early stage of the case, more details are not required to be pleaded. *See* discussion at Part III.D. below. Furthermore, the Government-trustee does not know basic information about the Reservation assets and associated legal instruments, Complaint ¶¶28, 33, 35, 36, 39, and has failed to disclose to the Tribe much of the information it does know and control, Complaint ¶¶24, 28, 34, 36, 39. Consequently, the Tribe is not positioned to further elucidate its claims at this stage of the case.

Due to the lack of information available to the Tribe, the Tribe's claims are timely under the accrual standards described in Part III.A.1. above. For example, the Tribe needs more information to further specify its expired rights of way claim. Pipeline rights of way expire after 20 years, but the Secretary may extend the right for another 20 years "upon such terms and conditions as he may deem proper." 25 U.S.C. § 321. Without any information from the Secretary, the Tribe cannot know whether a pipeline is renewed and in effect or terminated and, therefore, would not know whether the other important obligations of the right of way holder are required and have been met, including resource conservation and protection measures, or restoration of the

lands after right of way. 25 C.F.R. § 169.5 (2011)[7] (listing required stipulations that that right of way applicants must "expressly agree to"). Similarly, contamination by third parties has not been disclosed by the Government. Through discovery, the Tribe intends to determine the status and nature of the Reservation rights of way and contamination so it can specify claims in detail based on the legal duties of the Government to enforce applicable law.

C. The Trust Fund Claims are Not Barred by the Statute of Limitations Because No Accounting has been Provided by the Tribe's Trustee.

The Tribe alleges various forms of trust fund mismanagement by the United States, including: failure to ensure that monies due to the Tribe were paid and collected, Compl. at 20 ¶4; failure to obtain full value to be paid under contracts, leases and other legal instruments, *id.* ¶59; failure to ensure that funds received were adequately recorded and identified, *id.* at 20 ¶4; lost funds due to inappropriate record-keeping and other mismanagement, *id.*; failure to deposit and invest tribal income in a proper and timely manner and obtain an appropriate return on those funds, *id.*; disbursement of money without proper authorization, *id.*; and mismanaged, lost, misallocated and misspent accounts, *id.* at ¶¶21, 60. The Tribe does not bring an accounting claim[8].

The Government's arguments that the Tribe's pre-2011 trust fund claims are untimely are incorrect. Part C.1 below describes the special statutes of limitations law applicable to the Tribe's trust fund claims and show that the Appropriations Act, which sets forth a special accrual rule for the Tribe's claims, has not expired. Part C.2 explains that the statute has not begun to run on any

[7] Attached in the Appendix is the regulation cited, which was in place during most of the time period covering this case, and therefore applies to the Tribe's claims, but was recently replaced by a new regulation.

[8] The United States misreads the Tribe's complaint to include an accounting claim. Mot. at 26-27. The Tribe brings claims to recover money damages only, *id.* ¶¶7 and 20, and does not seek an accounting or other injunctive relief. To establish that the Tribe's claims have not accrued, the Complaint details the Government's poor record-keeping and complete failure to provide the Tribe with a meaningful accounting of its trust funds. *Id.* ¶¶28-40.

of the Tribe's trust fund claims because the Tribe has received no accounting or other information from which it could be on notice of its claims.

1. The Special Trust Fund Accrual Rules.

As explained in Part III.A.1 above, to establish that the Tribe's claims have accrued, the Government must show that the Tribe either knew or should have known of its claims. As beneficiary of the Government-administered trust, the Tribe is under a lesser duty to discover its claims. *Shoshone II*, 364 F.3d at 1347. Because "the trustee can breach his fiduciary responsibilities of managing trust property without placing the beneficiary on notice that a breach has occurred, [i]t is therefore common for the statute of limitations to not commence to run against the beneficiaries until a final accounting has occurred that establishes the deficit of the trust." *Id.* at 1348. "This is simple logic — how can a beneficiary be aware of any claims unless and until an accounting has been rendered?" *Id.* at 1347.

A special claims accrual rule applies to tribal trust funds claims. Congress passed a series of Appropriations Acts that toll the statute of limitations for losses to or mismanagement of trust funds until an accounting is provided from which the tribe can determine whether there has been a loss. *See e.g.*, Department of the Interior Appropriations Act of 2014, Pub. L. No. 113-76, Div. G, Title I, 128 Stat. 305-06 (Jan. 17, 2014). The Act states:

> notwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of the enactment of this Act, concerning losses to or mismanagement of trust funds, until the affected Indian tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss.

Accordingly, the Tribe's trust fund claims do not accrue until it has received an accounting from which it can determine whether there has been a loss. In other words, to commence the running of the statute of limitations the accounting must be "meaningful." *Shoshone II*, 364 F.3d at 1347.

The Government argues that the 2014 Act "expired" by the time the Tribe filed suit in 2017 and, therefore, it cannot serve to delay accrual of the Tribe's trust fund claims. Mot. at 29. This argument lacks merit. The starting point for interpreting the Act is the statutory language itself. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). If the text of the Act is clear and unambiguous, the Court need go no further. *Weddel v. Sec'y of Dept. of Health and Human Servs*, 23 F.3d 388, 391 (Fed. Cir. 1994).

The plain language of the Act shows that it is not limited to the year in which it was enacted. By using the words, "the statute of limitations shall not commence to run . . . until the affected tribe . . . has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss," Congress unequivocally defined the time in which the Act applies: until the Tribe receives the requisite accounting. *Shoshone II*, 364 F.3d at 1347 ("[t]he…phrase…'shall not commence to run' unambiguously delays the commencement of the limitations period"). These words of futurity mean the Act was supposed to apply beyond the fiscal year of the Act. *United States v. IBM Corp.*, 892 F.2d 1006, 1009 (Fed. Cir. 1989). In *IBM Corp.*, the Federal Circuit stated that, had words like "hereafter, notwithstanding any other provision of law" been used, the clause in question would have applied beyond the fiscal year of the appropriation. *Id.* The very broad term "notwithstanding any other provision of law" further evinces Congressional intent to conclusively define when the statute of limitations commences despite any other law, including the applicable statute of limitations at 28 U.S.C. § 2501. *Shoshone II*, 364 F.3d at 1346; *see also Mapoy v. Carroll*, 185 F.3d 224, 229 (4th Cir. 1999) (phrase "notwithstanding any of the provision of law" means all other statutes of contravening effect). Finally, by choosing the words "any claim," Congress referred to all trust fund claims, not just those that accrued in the year of the Appropriations Act.

Indeed, Congress knows how to use words to sunset a statute's applicability and did so in other parts of the very Appropriations Act in question: at 212 ("all funds for direct construction projects shall expire on September 30, 2015"); at 213 ("all funds for repairs and alterations prospectus projects shall expire on September 30, 2015"); at 300 ("unobligated balances not so transferred shall expire on September 30, 2016"); at 345 ("The authority provided by subsections (a) and (b) expires September 30, 2019"); and at 549 ("The authority to hire individuals contained in subsection (a) shall expire on September 30, 2015"). Department of the Interior Appropriations Act of 2014, Pub. L. No. 113-76, 128 Stat. 5 (Jan. 17, 2014). In contrast, the language of the special claim accrual statute governing this case does not includes an expiration date. *See Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 416 (2009) (concluding that provisions elsewhere in statute limiting availability of relief indicate that "Congress knows how to" do so "when it wants to.") (citation omitted).

This reading of the Act makes sense when considered in context. Congress, the Inspector General for the Department of the Interior, and the General Accounting Office each found and reported that tribal trust fund records were either non-existent or in shambles, and no trust fund accountings had been produced. Compl. ¶¶28-33. In this context, Congress decided to defer the accrual of trust fund claims until the requisite accounting (from which a loss can be determined) is furnished.

Because the plain language of the Act conclusively shows that that the Act applies to claims after the Act was passed, the Court need look no further to conclude the Act has not expired. *Consumer Prod. Safety Comm'n*, 447 U.S. at 108. Nevertheless, the plain meaning is further supported by canons of construction and legislative history.

Any ambiguities in the Act should be construed in the Tribe's favor. Congress undeniably passed the Act to preserve claims for the benefit of Indian plaintiffs. As a remedial statute, it should be construed liberally in the Tribe's favor. *In re Doyle*, 293 F.3d 1355, 1358 (Fed. Cir. 2002); *Patton v. Secy. of Health and Human Serv.*, 25 F.3d 1021, 1030 (Fed. Cir. 1994). It is "'illogical, if not inequitable'" to construe to the detriment of the Tribe a provision designed to benefit tribes. *Pascale v. United States*, 998 F.2d 186, 190 (3rd Cir. 1993) (quoting *Hannon v. United States Postal Serv.*, 701 F. Supp. 386, 389 (E.D.N.Y. 1988)). A similar, well-established canon requires liberal construction of statutes passed for the benefit of Indian tribes, with doubtful expressions resolved in the favor of Indians. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976). Thus, even if the Act is subject to more than one interpretation – which it is not – the Court should adopt the interpretation most favorable to the Tribe.

Legislative history is consistent with the plain meaning of the Act, demonstrating that the Act continues to apply to Plaintiff's claims filed in 2017. The original 1990 trust fund claim accrual provision was intended to:

> extend the statute of limitations with relation to Indian trust fund management. Since the audit and reconciliation of such funds, as directed by the Committee, will require at least 5 years to complete, it is possible that the statute of limitations for any significant discrepancies uncovered during this process may have expired by the time such audits are completed. Therefore, the Committee has agreed to provide this extension in order to protect the rights of the tribes and individuals involved should such protection prove necessary.

S. Rep. No. 101-534 (1990) (emphasis added). Several years later, the House Appropriations Committee wrote that the provision is designed to "protect the rights of tribes and individuals until the reconciliation and audit of their accounts has been completed." H.R. Rep. 103-158 (1993).

Because Congress knew of the poor status of Indian trust fund account records,[9] it intended to protect tribal rights until tribes received an accounting to put them on notice of their claims.

Under these special trust fund accrual rules, the relevant question is whether the Tribe has received an accounting covering any of the time periods of this case (1946 – present) that would put the Tribe on notice of its claims and therefore trigger the running of the statute of limitations. As shown in Part III.C.2 below, because the Tribe has not received an accounting for any time period, its trust claims have not accrued.[10]

2. The Tribe's Trust Fund Claims Have Not Accrued Because it has Not Received an Accounting of its Trust Funds From Which it Can Determine a Loss.

The Government contends that the Tribe's trust fund claims have accrued. However, the Government provides no evidence that the Tribe received an accounting or other notice of its claims for the fifty-year period from 1946 through 1995. It is therefore indisputable that the statute of limitations has not commenced to run from trust violations occurring during that time. For claims during the period of 1996 through 2011, the Government contends that Statements of Performance for 2009 through 2011 put the Tribe on notice of its trust fund claims. For reasons discussed below, those statements are not an accounting and do not provide notice of the claims. Thus, the Tribe's claims have not accrued.

Rendering an accounting to the White Mountain Apache Tribe would not be a simple endeavor. Its reservation, the eleventh largest in the United States, covers 2,600 square miles or

[9] For example, in Part III.C.2.b, General Accounting Office reports detailing the United States' very poor trust fund recordkeeping are summarized.

[10] The parties appear to agree about the scope of the claims covered by the Act, as set forth in *Shoshone II*. As noted by the Government (Mot. at 22-23), *Shoshone II* holds that the Act does not delay accrual of asset mismanagement claims. While the Tribe agrees, claims that the Government failed to properly manage and collect revenues, interest and penalties due under asset-based contracts, leases and similar legal instruments, and claims for mismanagement of asset-based accounts, like forestry-related trust accounts, are trust fund claims within the scope of the Act. *Shoshone II*, 364 F.3d 1350-51. Therefore, those claims do not accrue until an accounting has been provided. *See discussion* at Part III.C.2. below.

1.67 million acres. Compl. ¶9. The Reservation contains not only a massive forest and associated resources, but also other lands used for grazing, commercial leases, rights of way, and similar legal arrangements, all of which are controlled and managed by the Government as trustee. *Id.* ¶¶12-14, 24-26. From 1946 to the present, those resources have generated substantial revenue, including rent, royalties, and other payments. *Id.* ¶¶14, 23; *see also Jicarilla v. United States*, 112 Fed. Cl. 274, 279 n. 2 (2013). That revenue was collected, deposited, managed, and invested by the United States as the Tribe's trust funds. Compl. ¶23.

The United States controls all the books and records of account related to the Tribe's trust funds and assets, which are inaccurate and in very poor shape. *Id.* ¶¶28, 34, 36. According to the Office of Inspector General of the Department of the Interior, the General Accounting Office ("GAO"), and Congress, the Government's maladministration of tribal trust funds has been a massive, longstanding problem. *Id.* ¶29. The Government tried to do an accounting, but that proved impossible, as alleged in the Complaint. *Id.* ¶¶28-31 and 33. Many of the underlying trust account records were lost and destroyed. *Id.* ¶28. Thus, the United States has not informed the Tribe of the trust property it owns; the income the trust property has produced; or the disposition of the income such as how the income was invested and whether those investments maximize trust income to the Tribe. *Id.* ¶35. For the periods 1946 to the present, the Tribe has never received a reliable, accurate or complete accounting of: its trust funds (¶37); amounts due, received or deposited under contracts or leases or other instruments by which third parties owed funds to the Tribe for the occupation, use, or taking of the Tribe's assets (¶38); or an accounting from which it can determine whether there has been a loss (¶40).

a. Congress's Declaration that the Reconciliation Report is "Deemed Received" Does Not Mean the Tribe Received an Accounting.

The Government argues that the statute of limitations ran on December 31, 2006, because Congress declared that the tribes received a "retrospective reconciliation" on December 31, 2000, of trust fund account balances as of September 30, 1995. Mot. at 27-28. There are at least two problems with this argument. First, Congress's action could only cause the statute of limitations to run at the end of 2006 if the Tribe received a reconciliation report and that report was declared an accounting sufficient to put the Tribe on notice of its claims. However, Congress expressly opted to not legislate the legal significance of the reconciliation reports provided to tribes. Rather, Congress intended the "deemed received" language to facilitate settlement of claims. Second, the "reconciliation" was not an accounting from which the Tribe could determine a loss. The GAO has found that, due to missing records and lack of funding, the reconciliation was too limited to constitute an accounting. Thus, the Appropriations Act still applies: because the Tribe has not received an accounting, the Tribe's trust fund claims are timely.

In 1994, Congress required the Secretary of the Interior to prepare a reconciliation report "identifying for each tribal trust fund account for which the Secretary is responsible a balance reconciled as of September 30, 1995."[11] In 2002, Congress amended the statute to provide that any reconciliation report received by a tribe in response to 25 U.S.C. § 4044 "shall be deemed to have been received by the Indian tribe on December 31, 2000." 25 U.S.C. § 4044 note.[12] The amendment was "intended to provide recipients of reconciliation reports with the opportunity to postpone the filing of claims, or to facilitate the voluntary dismissal of claims, to encourage settlement negotiations with the United States," Pub. L. No. 107-153, §

[11] The American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, § 304, 108 Stat. 4248 (codified at 25 U.S.C. § 4044).
[12] Codifying Pub. L. 107–153, § 1, 116 Stat. 79 (Mar. 19, 2002) and Pub. L. 109–158, § 1, 119 Stat. 2954 (Dec. 30, 2005).

1(b), and provided December 31, 1999 as the "received by" date, *id.* § 1(a). In 2005, Congress again amended the statute only to change the "received by" date from December 31, 1999 to December 31, 2000.[13]

The Government has not presented evidence that the Tribe received a reconciliation report, or describing what the alleged reconciliation report contained. Nevertheless, even if the Tribe did receive such a report, the reconciliation report is not an accounting that will commence the running of the statute of limitations. The plain language of the "deemed received" statute is clear: in setting a definite receipt date for reconciliation reports, Congress only intended to encourage settlement negotiations with the United States.

The legislative history of the 2002 Act confirms Congress was fully aware that there was a dispute over whether the reconciliation reports constituted the requisite "meaningful" accounting which could have triggered the running of statute of limitations, and chose not to resolve it. The Senate Committee on Indian Affairs, in its report on S. 1857 (the bill which became Pub. L. No. 107-153 in 2002), specifically addressed the legislation's narrow purpose:

> Because of the Committee's acute concern that Indian tribes will be forced to immediately file claims to prevent the United States from asserting that the statute of limitations has or will run on their claims for losses to or mismanagement of their trust funds, the Committee has approved a bill which addresses only this discrete issue. By including a "statement of purpose," the Committee memorializes this limited purpose within the language of the provision itself. Because the purpose of S. 1857 is so limited, neither the bill nor Congress' action in approving this bill should be construed to favor any one of the competing interpretations of the provisions of appropriations acts which preclude the statute of limitations from commencing to run until an Indian tribe has received an "accounting" and/or "an accounting of such funds from which the beneficiary can determine where there has been a loss." The Committee takes no position on whether the receipt of reconciliation reports does in fact commence the running of a statute of limitations on tribal claims against the United States related to the United States' management of tribal trust funds.

[13] Pub. L. 109–158, § 1, 119 Stat. 2954 (Dec. 30, 2005).

S. Rep. 107-138 at 5 (Feb. 15, 2002) (emphasis added). Likewise, when the House of Representatives debated S. 1857, several Congressmen noted the unclear status of the reconciliation reports. Congressman Hansen acknowledged it in his remarks supporting the bill:

> [T]his bill is a bill to encourage settlement of tribal claims. . . . Although the United States began to provide Indian tribes with reconciliation reports in early 1996, no one knows for sure whether these reports commenced the running of the statute of limitations. The Government Accounting Office has given Congress real reason to doubt that these reports constitute a sufficient accounting to satisfy the Federal Government trust obligation.

See Cong. Rec.—House H704 (daily ed. Mar. 6, 2002) (emphasis added). Congressman Kildee added that while many tribes "believe that the reconciliation reports do not constitute an accounting" and "have already filed claims in Federal courts" to preserve their claims against the United States, "[t]his bill does not address the legal issues involved in those lawsuits." *Id.* at H705. Congressmen Hansen and Kildee were co-sponsors of the House companion bill, H.R. 3851. *See id.*

Despite the "deemed received" legislation of 2002 and 2005, for many years thereafter Congress continued to pass Appropriations Acts that expressly delayed accrual of tribal trust claims. If, as the Government contends, Congress precluded claims not filed by December 31, 2006 by passing "deemed received" statutes in 2002 and 2005, there would have been no reason for Congress to continue to include the language delaying the accrual of claims until an accounting was received in subsequent Appropriations Acts, as Congress did in 2002, 2003, 2004, 2005, 2006, 2008, 2009, 2010, 2012 and 2014.[14] In fact, Congress adopted the special accrual rule during the

[14] Pub. L. No. 107-63, Title I, 115 Stat. 435 (Nov. 5, 2001); Pub. L. No. 108-7, Div. F, Title I, 117 Stat. 236 (Feb. 20, 2003); Pub. L. No. 108-108, Title I, 117 Stat. 1263 (Nov. 10, 2003); Pub. L. No. 108-447, Div. E, Title I, 118 Stat. 3060-61 (Dec. 8, 2004); Pub. L. No. 109-54, Title I, 119 Stat. 519 (Aug. 2, 2005); Pub. L. No. 110-161, Div. F, Title I, 121 Stat. 2115 (Dec. 26, 2007); Pub. L. No. 111-8, Div. E, Title I, 123 Stat. 718-19 (Mar. 11, 2009); Pub. L. No. 111-88, Div. A, Title I, 123 Stat. 2922 (Oct. 30, 2009); Pub. L. No. 112-74, Div. E, Title I, 125 Stat. 1002 (Dec. 23, 2011); Pub. L. No. 113-76, Div. G, Title I, 128 Stat. 305-06 (Jan. 17, 2014).

same years (2002 and 2005) that it adopted the "deemed received" language. The only logical conclusion is Congress intended to continue to delay the accrual of claims until the requisite accounting was provided.[15]

b. The Reconciliation Report Did Not Put the Tribe on Notice of its Claims.

Even if the Tribe received a reconciliation report, that report is not an accounting as defined by the Appropriations Act, nor did it put the Tribe on notice of its claims under the special accrual rules that apply to claims made by tribal trust beneficiaries. The tortured process to reconcile tribal trust fund accounts is explained by the GAO's May 1996 report entitled, "Financial Management: BIA's Tribal Trust Fund Account Reconciliation Results," which is cited in the Complaint at ¶33. The report begins by noting that no reconciliation of tribal trust accounts had ever been completed, even though some accounts are 50 to 100 years old. Tribe's Ex. 1 at 3. Attempts were made in the past, but reconciliations (and, therefore, an accounting) proved impossible due to "inadequate records." *Id.* at 3 n. 1.

The GAO concluded that a "full reconciliation was impossible." *Id.* at 12. It explained that, despite "a massive effort to locate supporting documentation and reconcile trust fund accounts, tribal accounts could not be fully reconciled or audited due to missing records and the lack of audit trail in BIA's systems." *Id.* at 3. Also, Congress did not provide adequate funding for the task. *Id.* at 7. The GAO made more specific findings further undermining the Government's argument that the reconciliation report put the Tribe on notice of its claims.

[15] Since 2014, Congress has not included the language delaying accrual of trust fund claims probably because, as noted by the Government (Mot. at 29), almost all tribes with claims had brought trust fund mismanagement claims by then.

The attempted reconciliation did not provide a complete picture of tribal accounts for the entire period those accounts were in existence. The reconciliation covered only 1973 to 1995. *Id.* at 3-4, 7. About 300,000 individual Indian money ("IIM") accounts[16] were not included in the project at all. *Id.* at 7 and 17.

For the accounts for which a reconciliation was attempted, the reconciliation did not provide an accurate statement of account balances. For example, tens of thousands of transactions in the accounts, totaling $2.4 billion, could not be verified "due to missing records." *Id.* at 6, 14-15. BIA "had no reconciliation procedure to address the completeness of the accounting records." *Id.* at 6-7. As a result, "BIA does not know the universe of transactions or leases" involved, *id.* at 12, which rendered BIA unable to determine the total amount of receipts and disbursements that should have been recorded, *id.* at 6, 12, 15. BIA only tested what it thought was 10% of tribal leases, but could not reliably verify this because it did not know the universe of leases and could not estimate the expected lease revenue. *Id.* at 7. Only 16% of investment activity was tested under "alternative procedures" and those tests were hampered by "missing records." *Id.* at 7. The reports analyzed transactions for deposit lag time, but failed to propose adjustments for resulting interest lost. *Id.* at 16. Many of the accounts "are not reconcilable." *Id.* at 11.

The reconciliation reports themselves failed to disclose to the tribes material facts about the reports' limitations, such as: the universe of transactions and leases was not known; certain reconciliation procedures which were not performed or completed; certain accounts were not reconciled; certain time periods were not covered; and what alternative source documents were used. *Id.* at 8, 13. Instead of certifying the validity of the results of the reconciliation, as originally contemplated, the contractor preparing the reconciliation delivered a "status letter" that identified

[16] "Individual Indian Money" accounts or "IIM" accounts are maintained for tribes and individuals. *Id.* at 4 n. 2

additional errors, inconsistencies and methodological concerns with the reconciliation, and the GAO found the "usefulness of the status letter is limited." *Id.* at 10. The GAO wrote that, given that the BIA may never resolve the tribes' many concerns about the reconciliations, a legislative settlement may be the best avenue to resolve tribal concerns. *Id.* at 4, 11-12.

According to the GAO, tribes were provided a report on the results of the reconciliation process, including a statement of unreconciled account statements, along with a supplemental report covering 1992 – 1995. *Id.* at 5 and 7 n. 5. Perhaps because of the many problems with these reports, Defendant's motion does not include reference to or a copy of any such report for the White Mountain Apache Tribe. As the GAO informed Congress in 1996, BIA did not have an adequate policy for preventing and detecting trust fund losses until at least 1995. Tribe's Ex. 2 at 3. Indeed, as of the mid-1990's, BIA had not developed a comprehensive set of trust fund management policies and procedures, and "lacked an accounts receivable system . . . because BIA does not have a master lease file as a basis for determining accounts receivable." *Id.*at 4. If BIA itself was unable to detect trust fund losses, or even develop an accounts receivable system, it follows that any reconciliation report of account balances would fail to inform the Tribe as to whether its accounts suffered a loss.

Because the Tribe has not received an accounting for the pre-1995 period, its claims have not accrued under the Appropriations Act and well-established trust accrual rules. It is undisputed that no accounting or reconciliation of tribal trust accounts was completed for the period 1946 to 1972. Additionally, for all the reasons stated in the GAO report, the "reconciliation" that may have been provided to the Tribe covering 1973 to 1995 was so incomplete and unreliable, it falls well short of an accounting that would provide the Tribe notice of its claims.

c. The Periodic Statements of Performance Are Not Accountings from which the Tribe Can Determine a Loss.

Defendant argues that the Tribe's claims from 1996 to 2011 are untimely because the Tribe has allegedly received periodic statements of performance ("PSPs") for that period. It argues that, because PSPs were provided to tribes, Congress allowed the Appropriations Act provision delaying the accrual of the statute of limitations to expire. Mot. at 29. For the reasons discussed above (at Part C.1), that argument has no merit. Congress clearly did not intend to set an expiration date for the Appropriations Acts proviso given what it knew about the Government's inability to reconcile trust accounts. As demonstrated by the plain language of the Appropriations Act, Congress wanted to delay accrual of the statute of limitations until tribes could determine whether they had a loss and therefore a claim. It is for that reason the Congress continued to pass the special accrual rule in the Appropriations Acts well after the PSPs were provided to tribes.

For many reasons, the PSPs do not put the Tribe on notice that the United States failed to properly manage the Tribe's trust funds. Compl. at ¶¶2, 41. Simply put, the PSPs do not reveal whether the Tribe has suffered a loss for any of its trust fund claims because the PSPs are not reliable and, therefore, not informative.

As demonstrated by the GAO report, the Government's trust fund records immediately pre-dating the PSPs have many problems. No IIM account data was included. For those accounts that were identified, the reconciliation was not reliable for the reasons stated above and briefly listed here: no accounting of any tribal accounts for the time period before 1972; incomplete reconciliation process; no audit trail; missing documents; lack of knowledge of the universe of leases or transactions; lack of knowledge of receipts or disbursements that should have been recorded; limited testing of reconciliation procedures; and errors, inconsistencies and methodological concerns. *See discussion* at Part III.C.2.b. above. Those problems carried over into the PSPs, which began in 1996. According to Interior's Inspector General, an examination of

fiscal year 1996 records showed that "limited progress" had been made to improve trust fund operations including accounting. Letter from Williams to Office of Special Trustee, January 23, 1998. Ex. 3 at 2. Cash balances and investments could not be independently verified. *Id.* at 2-3. For example, cash balances were materially different than the balances reported by the Department of the Treasury. *Id* at 2. Also, accounting systems, controls, records and trust fund balances were deemed unreliable. *Id*. Consequently, it was not possible to audit the cash, trust fund balances, receipts and disbursements. *Id* at 2-3. Additionally, other problems were identified, including that the IIM account balances were not reliable, improper disbursements were made, and investments were understated. *Id* at 3. Given the inadequate baseline of information available, it is impossible to know the completeness and accuracy of the Tribe's accounts as reflected in the PSPs.

Importantly, the PSPs' opening and closing balances could not be accurate given the likelihood that BIA is missing records and other important information (e.g., unknown leases, transactions, disbursement, receipts), that there is no audit trail, and that the pre-PSP reconciliation process was not completed. For the Tribe to be put on notice, it must be able to determine a loss. Put another way, the records would have to "establish[] the deficit of the trust." *Shoshone II*, 364 F.3d at 1348. Any such loss or deficit would be based on the opening and closing balances of the Tribal accounts, which in turn would be the result of the incomplete, problematic reconciliation. Without reliable opening and closing balances, and, in the case of IIM accounts, any balances, it is simply impossible to know whether any of the Tribal accounts suffered a loss.

Another fundamental problem which precludes the PSPs from providing notice to the Tribe of any of its claims is that the PSPs do not reveal whether the amounts due under contracts and other legal instruments were properly collected or managed. These amounts should represent a substantial part of the Tribe's trust funds. As explained in *Shoshone II*, trust fund claims covered

by the Appropriations Act include claims that the Government failed to properly manage and collect revenues, interest and penalties due under contracts, leases and similar legal instruments. 364 F.3d at 1350-51; *see also Pueblo of San Ildefonso v. United States*, 35 Fed. Cl. 777, 788 (1996) (accounting must clearly and accurately delineate what gains have accrued, what losses have occurred, receipts and expenditures). To put the Tribe on notice, the accounting contemplated under the Act must include those amounts, *Shoshone II*, 346 F.3d at 1351.

The PSPs' lump sum amounts wholly fail to inform the Tribe whether these amounts were properly collected and managed. Based on 50 pages of the year ending December 31, 2010 PSP, there appears to be approximately 1500 legal instruments to track, including commercial leases, business leases, rights of way, pipelines, and utility and telecommunications lines. Ex. 5 to Mot. at 43-93. For many of those instruments, there should be transactional information to explain whether the amounts due were properly collected and managed. This major information gap further undermines the argument that the Tribe was put on notice of any of its claims.

A comparison of the information in the PSPs to the information needed for the Tribe's specific trust fund claims shows the Tribe could not know of its claims. The PSPs do not reveal whether the proper amounts were collected, which is central to several of the Tribe's claims (failure to ensure that monies due to the Tribe were paid and collected and that funds received were adequately recorded and identified, Compl. at 20 ¶4, and failure to obtain full contract value for all timber sales sold, *id.* ¶59). Likewise, the Tribe cannot know the adequacy of the chosen investment vehicle without accurate information showing how much money was placed in the accounts or reliable closing balances. Similarly, the Tribe cannot know of its investment claims without knowing the identify of each of its accounts, and the extent to which such accounts were pooled with other tribal accounts, so it can understand the totality of its trust fund portfolio and be

in a position to assess the overall investment scheme employed (or whether this is one). *Id.* at 20 ¶4; *see, e.g. Jicarilla v. United States*, 100 Fed. Cl, 726, 739 (2011) (prudent management may require pooling of accounts). And, the PSPs do not reveal whether the Government lost funds due to inappropriate record-keeping and other mismanagement, or failed to deposit and invest funds in a timely manner, each of which is a trust fund claim alleged by the Tribe. Compl. at 20 ¶4.

In *Chippewa Cree Tribe of the Rocky Boy's Reservation v. United States*, 69 Fed. Cl. 639 (2006), this Court found that disclosures like the PSPs were not accountings sufficient to put a tribe on notice of its claims and, therefore, did not start the running of the statute of limitations. The Government offered account statements generated "from the early 1980's forward." *Id.* at 663, 664. The Court examined a 34-page report for fiscal year 1983 which purported to contain beginning and ending balances, earnings, interest and losses over the period. *Id.* at 664. However, the Court determined the report was not the "meaningful accounting" required for claims to accrue in part because the accounts were established in 1964 and there was no evidence accountings before the 1980's were prepared or provided to claimants. *Id.* at 664. The Court also found that the actual distribution of the funds did not put the claimants on notice. *Id.* at 664-65; *see also Osage Tribe of Indians of Okla. v. United States*, 68 Fed. Cl. 322, 334 (2005) (rejecting argument that tribe's claims were time-barred because records showed that tribe "suspected the trustee had failed for some time to carry out its trust responsibilities."). As in *Chippewa Cree*, the White Mountain Apache Tribe's PSPs do not reveal a loss, in part because no accounting predated them.

For all these reasons, the Tribe has not been put on notice of its claims under traditional claim accrual principles and has not received an accounting from which it can determine a loss, as defined by the Appropriations Act. Therefore, its claims have not accrued and are not barred by the statute of limitations.

D. The Government Mischaracterizes the Tribe's Dams Claims, Which Are Sufficiently Pleaded to State a Claim.

To avoid dismissal under RCFC 12(b)(6) for failure to state a claim, "a complaint must allege facts 'plausibly suggesting (not merely consistent with)' a showing of entitlement to relief." *Matthews v. United States*, 750 F.3d 1320, 1322 (Fed. Cir. 2014). "The facts as alleged 'must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).'" *Kam-Almaz v. United States*, 682 F.3d 1364, 1367-68 (Fed. Cir. 2012) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

However, this standard does not require heightened pleading beyond RCFC's Rule 8(a)(2), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." *See Dobyns v. United States*, 91 Fed. Cl. 412, 425-26 (2010) (post *Twombly*, complaint not required to recite specific facts, establish prima facie case, or set forth all facts on which plaintiff relied to support claims). "[W]here one of the litigants is a government agency that has privileged access to information[,] a claimant must not be required, *ab initio*, to aver all or nearly all the facts subservient to its claims." *Id.* at 426-27. Instead, Rule 8 "'simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence' of the alleged violation." *ABB Turbo Sys. AG v. TurboUSA, Inc.*, 774 F.3d 979, 984-85 (Fed. Cir. 2014) (quoting *Twombly*, 550 U.S. at 556).

The Tribe's dams claims are relatively simple to state. A breach of fiduciary duty claim requires proof "that a fiduciary duty . . . existed and that the United States failed faithfully to perform those duties," which can be done "by showing that Interior failed to comply either with mandatory trust obligations specified in a statute or in its own regulations, or with the fiduciary duties that spring from those obligations." *Jicarilla Apache Nation v. United States*, 112 Fed. Cl. 274, 288 (2013) (internal quotation marks and citations omitted). The Tribe pleaded that the United

States has fiduciary duties to manage, maintain and repair the dams on the Reservation, Compl. Claim III, ¶3, because of the fiduciary relationship created by the Indian Dams Safety Act ("IDSA"), *id.* ¶2, and that the United States breached those fiduciary duties because it failed to maintain dam safety while preventing waste while undertaking dam repairs, *id.* ¶4 and Compl. ¶¶64, 65, failed to perform necessary maintenance on dams located on its Reservation, Compl. ¶62, and only a few of the high-hazard dams located on its Reservation have been repaired, *id.* ¶63.[17]

The Government asserts that the Tribe has not pleaded sufficient facts to support its claim for breach of fiduciary duty under the IDSA because the Tribe fails to identify the fourteen high- or significant-hazard dams on the Reservation through "names, locates [sic], conditions, or maintenance deficiencies of these dams." Mot. at 30-31. Furthermore, the Government asserts that the Complaint "is insufficient to show that any such safety deficiencies exist on Plaintiff's reservation, must less that Plaintiff has suffered any injury . . . ." *Id.* at 31.

The Government well knows which dams within the Reservation are high- and significant-hazard, because the Government classifies the dams and maintains all relevant records. *See* 25 U.S.C. § 3803(e) (duty to develop and maintain list of dam safety classifications); Dep't of Interior, Dep't Manual, Part 753, Ch. 2 at 2.9 D (describing dam safety records management and storage).[18] In October 2016, the Bureau of Indian Affairs ("BIA") created a map identifying the

[17] The term "substantial hazard" at Complaint ¶63 is meant to refer to dams classified by BIA as "significant hazard." A dam's risk hazard classification is important because high- and significant-hazard dams (as opposed to low-hazard dams) have been determined to put lives at risk if the dams fail. 25 U.S.C. § 3801(e)(3). They are also supposed to receive priority in BIA's maintenance and repair program. There are many dams located within the Reservation, but the Tribe has chosen to focus only on the 14 dams that pose the greatest hazard to people and property downstream and thus, present the greatest need for adequate maintenance and repair.

[18] The Departmental Manual can be viewed at https://elips.doi.gov/elips/browse.aspx. It is also unwise for Plaintiff to disclose, in a publicly-available pleading, any information about dam safety

fourteen high- and significant-hazard potential dams within Plaintiff's Reservation managed under BIA's Safety of Dams Program.[19] BIA acknowledges that its annual funding is "insufficient to address all deferred maintenance." 2017 BIA Dams Presentation. Ex. 4 at 7. Specific factual allegations regarding dam safety classifications and safety priority ratings are not necessary to plead breach of fiduciary duty to regularly and properly maintain the dams.[20] The Tribe's allegations, combined with the Government's record and knowledge of the dam safety classifications and priority ratings, raise a plausible right to relief and have "enough factual detail to put defendant on notice as to the basic nature of the claims raised, so as to allow this case to proceed to discovery." *Dobyns*, 91 Fed. Cl. at 430 (citations omitted).

1. The Indian Dams Safety Act is a Money-Mandating Statute That Imposes Fiduciary Duties Upon the United States.

To invoke jurisdiction under the Indian Tucker Act, 28 U.S.C § 1505, a tribe "must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) ("*Navajo I*") (citing *United States v. Mitchell*, 463 U.S. 206, 216-17, 219 (1983) ("*Mitchell II*")). "If that threshold is passed, the court must then determine whether the

---

that is "sensitive in nature" because Defendant requires that such information be protected from deliberate disclosure. *See id*. at 2.6.

[19] The map was released on BIA's website, https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/ots/pdf/idc2-060297.pdf, as part of a PowerPoint presentation entitled "Bureau of Indian Affairs Office of Trust Services Division of Water and Power, WATER INFRASTRUCTURE IMPROVEMENTS FOR THE NATION (WIIN) ACT OF 2016 Title III, Subtitle A, Safety of Dams: Tribal Consultation February 2017", and attached as Ex. 4 (hereinafter, "2017 BIA Dams Presentation"). The map is at page 14 of that presentation (Ex. 4 at 10). The Court may take judicial notice of this and other documents posted on executive agency websites, as matters of public record that are widely available, in deciding a motion under RCFC 12(b)(6). *See Horvath v. United States*, 130 Fed. Cl. 273, 285-86 (2017) (citing *Dimare Fresh, Inc. v. United States*, 808 F.3d 1301, 1306 (Fed. Cir. 2015)).

[20] IDSA recognizes that "many Bureau dams have maintenance deficiencies regardless of their current safety condition classification and the deficiencies must be corrected to avoid future threats to human life and property." 25 U.S.C. § 3801(3) (emphasis added). Consequently, BIA has a fiduciary duty to ensure that dams on Indian lands are regularly maintained, and that duty is not tied to a dam's safety classification.

relevant source of substantive law 'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the governing law] imposes.'" *Id.* (quoting *Mitchell II*, 463 U.S. at 219) (alteration in original). The substantive law need not explicitly provide that the right or duty it creates is enforceable in money damages. *Jicarilla Apache Nation v. United States*, 100 Fed. Cl. 726, 737-38 (2011). Principles of trust law might be relevant "in drawing the inference that Congress intended damages to remedy a breach of obligation." *United States v. White Mountain Apache Tribe,* 537 U.S. 465, 477 (2003).

"To establish that the United States has accepted a particular fiduciary duty, an Indian tribe must identify statutes or regulations that both impose a specific obligation on the United States and 'bear[] the hallmarks of a conventional fiduciary relationship.'" *Hopi Tribe v. United States,* 782 F.3d 662, 667 (Fed. Cir. 2015) (quoting *United States v. Navajo Nation*, 556 U.S. 287, 301 (2009) ("*Navajo II*")). A mandatory duty to manage a tribal resource for the benefit of the tribe creates fiduciary duties enforceable by money damages. *See Shoshone Indian Tribe of the Wind River Reservation v. United States*, 56 Fed. Cl. 639, 646-648 (2003).

The IDSA creates a comprehensive dam maintenance and safety management scheme that places mandatory fiduciary duties upon the United States to protect tribal resources. The statute obligates the Secretary of the Interior ("Secretary") to "establish a dam safety maintenance and repair program within the Bureau to ensure maintenance and monitoring of the condition of each dam identified [under the Act] necessary to maintain the dam in a satisfactory condition." 25 U.S.C. § 3803(a). The IDSA requires the Secretary to develop a maintenance action plan, which shall include a prioritization of actions to be taken, for those dams with a risk hazard rating of high or significant. 25 U.S.C. § 3803(d). The Secretary "shall perform such rehabilitation work as is

necessary to bring the dams identified [under the Act] to a satisfactory condition [and] [e]ach dam located on Indian lands shall be regularly maintained . . . ." 25 U.S.C. § 3803(c).

The IDSA recognizes that "many Bureau dams have maintenance deficiencies [that] must be corrected to avoid future threats to human life and property." 25 U.S.C. § 3801(3). BIA's mission under IDSA "is to reduce the potential loss of human life and property damage caused by dam failure by making BIA dams as safe as practically possible," and BIA recognizes that dams on Indian lands "form a significant part of the water resources infrastructure and trust assets for the various Indian reservations." BIA, *Safety of Dams Program Handbook*, 55 IAM – H at 2 (2014, release #14-28).[21] At least one Federal district court held that the IDSA "establishes a fiduciary duty of the BIA" to regularly maintain dams on Indian lands. *Vargas v. United States*, CS-01-0064-WFN, 2002 U.S. Dist. LEXIS 27718 at *11 (E.D. Wash. May 17, 2002).

The Government characterizes the IDSA as a procedural statute that requires the Secretary to "assess and prioritize dam maintenance and repair needs," but does not include any deadlines for correcting maintenance deficiencies, or impose upon the Secretary any duty to take any specific repair or rehabilitation action on any specific dam. Mot. at 33-34. According to the Government, the Act "envisions" that BIA will conduct maintenance in the future with the limited funds appropriated by Congress, which cannot be read to impose mandatory fiduciary duties to repair dams on the Reservation. *Id.* at 35.

The Government's reading of the IDSA is fundamentally flawed. Throughout the statute, Congress repeatedly commands that the Secretary "shall" perform dam safety duties, which means those duties are mandatory. *See Agwiak v. United States*, 347 F.3d 1375, 1380 (Fed. Cir. 2003). The IDSA expressly instructs the Secretary to perform necessary rehabilitation work and regularly

[21] The Handbook is available at https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/raca/pdf/idc1-027631.pdf.

maintain the dams. 25 U.S.C. §§ 3803(a), (c). Those mandatory duties with respect to dam maintenance and repair are comprehensive; under IDSA, the Secretary is responsible for every step required to regularly maintain and bring a dam into satisfactory condition. By imposing comprehensive, mandatory duties over the safety of Indian dams upon the Secretary, Congress accepted a fiduciary duty to manage the maintenance and safety of Indian dams "according to those specific prescriptions." *See Hopi Tribe*, 782 F.3d at 667. Unlike the laws reviewed by the Federal Circuit in *Hopi Tribe*, which failed to create a fiduciary duty because none of the laws "instruct[ed] the United States to manage drinking water quality" on the Hopi Reservation, 782 F.3d at 669, the ISDA contains numerous express, mandatory prescriptions to maintain and repair Indian dams, *e.g.*, 25 U.S.C. §§ 3803(a), (c). Thus, *Hopi Tribe*, cited in the Government's motion at 35, is inapposite.

Defendant argues that even if the IDSA imposes fiduciary duties on the United States, the statute is not money-mandating because "the Act does not mention or even allude to claims for damages by tribes against the United States." Mot. at 35. However, a statute is money-mandating if it "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *Mitchell II*, 463 U.S. at 218; *accord Navajo II*, 556 U.S. at 290 ("The other source of law need not explicitly provide that the right or duty it creates is enforceable through a suit for damages. . ."); *White Mtn. Apache Tribe*, 537 U.S. at 473 (statute must "be reasonably amenable to the reading that it mandates a right of recovery in damages."). If a tribe identifies a "specific rights-creating or duty-imposing statutory or regulatory prescription[]," and "*if* that prescription bears the hallmarks of a 'conventional fiduciary relationship,' *then* trust principles (including any such principles premised on 'control') could play a role in 'inferring that the trust obligation [is] enforceable by damages.'" *Navajo II*, 556 U.S. at 301 (internal citations omitted).

The IDSA establishes fiduciary obligations of the United States for overseeing and managing Indian dam safety that can fairly be interpreted as mandating compensation by the United States for damages sustained by the Tribe. The Secretary's duties under the IDSA include duties to regularly maintain Indian dams and to reduce potential loss of human life and property, and damage to Indian resources, from dam failure. *See* 25 U.S.C. §§ 3803(a), (c). Those statutory duties bear the hallmarks of a conventional trustee's duty of prudence:

> The trustee has a duty to administer the trust as a prudent person would, in light of the purposes, terms, and other circumstances of the trust. The duty of prudence requires the exercise of reasonable care, skill and caution. If the trustee possesses . . . special facilities or greater skill than that of a person of ordinary prudence, the trustee has a duty to use such facilities or skill.

Restatement (Third) of Trusts, § 77 (2012). Whether a breach of trust has occurred depends on the prudence or imprudence of the trustee's conduct, not on the eventual results. *Id.*, cmt. a. In *White Mountain Apache Tribe*, the Court held that a similar duty to prudently manage trust assets supported the "fair inference" that the United States should be liable in damages for the breach of its fiduciary duties. 537 U.S. at 475-76. Thus, the IDSA is reasonably amenable to the reading that it mandates a right of recovery in damages for the Government's breach of its fiduciary duties.

The Government continues to argue that the statute is not money-mandating because "an award of damages to a Tribe for any failure to maintain dams owned and operated by the United States would not further the purpose of the [IDSA], which is to bring about necessary dam repairs." Mot. at 35-36. The Government cites no authority for this proposition, likely because the Supreme Court disposed of this argument in *White Mountain Apache*:

> If the Government is suggesting that the recompense for run-down buildings should be an affirmative order to repair them, it is merely proposing the economic (but perhaps cumbersome) equivalent of damages. But if it is suggesting that relief must be limited to an injunction to toe the fiduciary mark in the future, it would bar the courts from making the Tribe whole for deterioration already suffered, and shield the Government against the remedy whose very availability would deter it from wasting trust property in the period before a Tribe has gone to court for injunctive relief.

537 U.S. at 478-79.

After conceding that IDSA's comprehensive dam maintenance and safety scheme gives the Secretary significant control, *see* Mot. at 33-34 n. 12, the Government argues the Secretary could neglect to perform any repairs on any dam without running afoul of the IDSA because the Secretary could, at some theoretical time in the future, conduct such maintenance and repairs, *id.* at 38. Such comprehensive control over a resource is a hallmark of a trustee's power, and supports the conclusion that the IDSA establishes money-mandating fiduciary duties. Restatement (Third) of Trusts, § 70 (2012) (trustee's powers are "comprehensive," except as limited by statute or terms of the trust).[22]

Finally, the Government asserts that there is no money-mandating duty to maintain dams "in any particular matter." Mot. at 30. The Government's duties include, at the very least, regular maintenance of Plaintiff's dams, s*ee* 25 U.S.C. § 3803(c); Compl. ¶¶62, 63, Claim III ¶3—a claim that the Government does not seriously dispute. Once BIA undertakes such maintenance or repairs, it cannot do so imprudently, or in a way that harms the object of the trust. As alleged by the Tribe, BIA's maintenance and repair work on Davis Dam involved the loss of large amounts of water from Hawley Lake—a trust asset, and an object of the trust relationship. *See* 25 U.S.C. § 3801(4); BIA Safety of Dams Handbook, 55 IAM-H at 2 (dams and water infrastructure are significant trust assets); *id.* at 14 n.6 ("Large releases through spillways can also lead to very undesirable consequences that are similar in nature to dam failure consequences," and should not be "inappropriately increased as a result of dam safety risk-reduction measures."). The loss of water due to BIA's imprudence was so great it rendered Hawley Lake unusable for recreational purposes,

[22] The Government's position underscores why tribes must be able to bring claims for breach of fiduciary duties set forth in IDSA if Defendant's plans for future maintenance and repair are unnecessarily dilatory.

disabling one of the Tribe's most successful commercial ventures. [23] An award of money damages is available to remedy the resulting economic loss to the Tribe.[24]

2. The Tribe Has Standing to Assert Its Claims.

The Government's argument that the Tribe fails to satisfy "constitutional standing" requirements is misplaced because such requirements are part of Article III's case-or-controversy requirement for the Article III judiciary; this Court is an Article I tribunal and can eschew "traditional justiciability standards" if "jurisdiction conferred by Congress demands otherwise." *See Shinnecock Indian Nation v. United States*, 782 F.3d 1345, 1351 n. 7 (Fed. Cir. 2015). The IDSA was enacted by Congress for the benefit of Indian tribes that have dams on their reservations and imposed mandatory fiduciary duties upon the Secretary with respect to those dams. Thus, as a tribe with dams on its reservation alleging that the Secretary breached his fiduciary duties, the Tribe has standing conferred by Congress to bring this claim.

For similar reasons, the Tribe also satisfies Article III's standing requirements. Incorrectly viewing the Tribe's claims as tort claims, the Government argues that the Tribe "has not made the requisite showing of actual injury from any failure of the United States to maintain the dams on Plaintiff's reservation" because the Tribe's claims are "based upon the possibility that Plaintiff will suffer unspecified future harm if unspecified maintenance deficiencies are not corrected,"

[23] *See* Restatement (Third) of Trusts § 100 (2012) ("A trustee who commits a breach of trust is chargeable with the amount required to restore the values of the trust estate . . . to what they would have been if the portion of the trust affected by the breach had been properly administered."); *id.* cmt. b(1) ("If a breach of trust causes a loss, including any failure to realize income . . . that would have resulted from proper administration of the trust, the trustee is liable for the amount necessary to compensate fully for the breach.") (emphasis added).

[24] Plaintiff will not attempt to defend 25 U.S.C. § 162a(d)(8) as a money-mandating statute imposing fiduciary duties to maintain Plaintiff's dams, because the IDSA is sufficient to support the Plaintiff's dam claim. However, § 162a(d)(8) does not limit itself to trust funds; instead, the statute says "natural resources," water is a natural resource, and dams are a trust asset. We must presume that Congress "says what it means, and means what it says." *Henson v. Santander Consumer USA, Inc*., No. 16–349, slip op. at 10 (U.S., June 12, 2017). Defendant's argument that Congress really meant "funds" when it said "natural resources" makes little sense.

which is "predicated on a conjectural and hypothetical injury." Mot. at 38. However, these are not tort claims; they are claims for breach of fiduciary duty. The Tribe's interest as beneficiary of the trust created by the IDSA is sufficient to confer constitutional standing upon the Tribe to enforce the trust. *See Osage Nation v. United States*, 57 Fed. Cl. 392, 394-95 (2003) (Plaintiff tribe has standing to bring breach of trust claims when tribe was the trust beneficiary and alleged injury from U.S. mismanagement of funds in tribe's trust account); *accord Scanlan v. Eisenberg*, 669 F.3d 838, 843 (7th Cir. 2012) (applying "canonical principles of trust law . . . for purposes of an Article III standing analysis."); Restatement (Third) of Trusts, § 94 (2012) (beneficiary may sue trustee to redress breach of trust or to enforce the trust). The existence of insufficiently-maintained dams on Indian lands is an injury by itself—indeed, it is the specific injury the IDSA was enacted to redress.[25]

In *Hoopa Valley Tribe v. United States*, 597 F.3d 1278 (Fed. Cir. 2010), the tribe lacked standing because it was no longer a beneficiary of a settlement fund, and thus lacked a legally protected interest in the settlement fund, once it received all of the money it was entitled to under the statute creating the fund. *Id.* at 1283-84. Here, the Tribe is clearly a beneficiary of the trust created by the IDSA because dams subject to the IDSA's requirements are located on the Tribe's Reservation and the Tribe is alleging that it has not received all the benefits under IDSA.

[25] In its legislative history of the IDSA, Congress recognized that BIA had previously failed to achieve the goals of federal dam safety guidelines and Interior's dam safety program; BIA's failure to adequately maintain dams on Indian lands was a problem in and of itself, and compounded existing safety problems. H.R. Rep. No. 103-600 (1994); *see also* 25 U.S.C. § 3801(3) ("many Bureau dams have maintenance deficiencies regardless of their current safety condition classification and the deficiencies must be corrected to avoid future threats to human life and property") (emphasis added). For standing purposes, a failure to regularly maintain Plaintiff's dams as required by IDSA is a sufficient injury. *See Lyshe v. Levy*, 854 F.3d 855, 859 (6th Cir. 2017) (holding that "the failure to comply with a statutory procedure that was designed to protect against the harm the statute was enacted to prevent" created concrete harm).

The Government also argues that the Tribe has not been injured by a botched dam repair that caused significant economic damage because the Government has no money-mandating duty to maintain dams in a particular manner, Mot. at 30, 35, or to "compensate tribes for losses of tourism revenue caused by maintenance projects," *id.* at 35. But those are merits arguments as to the scope of the Government's fiduciary duties. *See Fredericks v. United States*, 125 Fed. Cl. 404, 414 (2016). Merits determinations are not part of the standing analysis, which assumes the merits of a litigant's claim. *Rocky Mt. Helium, LLC v. United States*, 841 F.3d 1320, 1325 (Fed. Cir. 2016). Assuming the merits of the Tribe's allegation that such fiduciary duties exist and extend at least as far as the Tribe claims, "palpable economic injuries have long been recognized as sufficient to lay the basis for standing." *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972).

IV. CONCLUSION

For all of the reasons stated herein, the Tribe respectfully requests that this Court deny the Government's motion to dismiss.

Respectfully submitted this 15th day of September, 2017.

s/ Brian W. Chestnut
Brian W. Chestnut
ZIONTZ CHESTNUT
2101 4th Avenue, Suite 1230
Seattle, WA 98121
Tel. (206) 448-1230
Fax (206) 448-0962
bchestnut@ziontzchestnut.com
Attorney of Record for Plaintiff

Of Counsel:
Beth Baldwin
Wyatt Golding
ZIONTZ CHESTNUT
2101 4th Avenue, Suite 1230
Seattle, WA 98121
Tel. (206) 448-1230
Fax (206) 448-0962

bbaldwin@ziontzchestnut.com
wgolding@ziontzchestnut.com

Of Counsel:
Jim Palmer
Attorney General
White Mountain Apache Tribe
201 E Walnut St
Whiteriver, AZ 85941
Tel. (928) 338-2537
jimpalmer@wmat.us

CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2017, I caused a copy of the foregoing to be served through the Court's CM/ECF System to all parties.

s/ Brian W. Chestnut
Brian W. Chestnut
ZIONTZ CHESTNUT
2101 4th Avenue, Suite 1230
Seattle, WA 98121
Tel. (206) 448-1230
Fax (206) 448-0962
bchestnut@ziontzchestnut.com
Attorney of Record for Plaintiff