IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

**REPLY MEMORANDUM IN SUPPORT OF**
**THE UNITED STATES' MOTION FOR PARTIAL DISMISSAL**

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## I. INTRODUCTION

Plaintiff was well aware of the pre-2011 component of its trust asset and fund mismanagement claims because it: (1) presented expert evidence relating to the status of its forest in a 1987 trial in which Plaintiff claimed its forest had been irreparably damaged by Defendant; (2) received and evaluated reports on the state of its forests, including reports that disclosed the very damages Plaintiff now alleges; (3) assumed management responsibilities for its forest; (4) was deeply engaged in asset management for decades; and (5) received many reports detailing the manner in which its trust funds were managed. Plaintiff is wrong as a matter of fact and law that the statute of limitations did not accrue for over 65 years. Claims accrue when a tribe knew or should have known of the underlying facts. And it is indisputable that Plaintiff not only should have known, but actually knew, the facts underlying its pre-2011 claims before 2011.

Separately, Plaintiff's claims for an alleged failure to repair dams on its reservation should be dismissed because Plaintiff has identified no trust duty, much less a money-mandating trust duty, requiring Defendant to repair the dams. Plaintiff's brief instead highlights Congress's recognition that some maintenance of Indian dams must be deferred. The applicable statutes therefore do not create a money-mandating duty.

## II. ARGUMENT

### A. Plaintiff's pre-2011 forest asset mismanagement claims predating are barred by the statute of limitations.

Statutes of limitations begin to run in cases of alleged mismanagement when "Indians were capable enough to seek advice, launch an inquiry, and discover through their agents the facts underlying their current claim." Mem. of Points and Authorities in

Sup. of United States' Mot. for Partial Dismissal at 10 (ECF No. 9-1) ("Mem.") (quoting *Menominee Tribe v. United States*, 726 F.2d 718, 721 (Fed. Cir. 1984). Plaintiff's opposition suggests the statute of limitations can never bar forest mismanagement claims because Plaintiff lacks basic knowledge of its forest and has no obligation to evaluate complex forest conditions. Pl.'s Resp. to United States Mot. for Partial Dismissal at 6-8 (ECF No. 16) ("Opp'n"). Plaintiff's position is incorrect as a matter of law and fact.

As an initial matter, Plaintiff fundamentally misinterprets pleading standards in asserting that Defendant'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 that would entitle it to relief." Opp'n at 2 (citations omitted). But this "'no set of facts' language has been questioned, criticized, and explained away long enough . . . and . . . has earned its retirement." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562-563 (2007).[1] Plaintiff cannot simultaneously (1) have sufficient information to plead specific allegations under RCFC 8 and (2) lack sufficient information for the statute of limitations to accrue. *See Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997) ("statute of limitations begins to run when 'the plaintiff can file suit and obtain relief.'"). Plaintiff has the same information today that it possessed in 2011. Plaintiff, therefore, manifestly knew or should have known of the facts underlying its current claims.

**1. Plaintiff is incorrect as a matter of law that forest mismanagement claims are too complex for statutes of limitations to accrue.**

Plaintiff's argument that it is exempted from statutes of limitations in forest management cases due to the complexity of forest management is conclusively refuted by the line of cases Plaintiff cites. Opp'n at 5-6 (citing *United States v. Mitchell*, 463 U.S.

206 (1983)). On remand, the Court of Claims rejected Mitchell's arguments that: (1) the trust duty excused an individual tribal member from diligence; (2) the government had a duty to disclose mismanagement; and (3) claims relating to stumpage values and timber regeneration were so complex as to be inherently unknowable. *Mitchell v. United States*, 10 Cl. Ct. 63, 67 (1986) ("*Mitchell VI*"). *Mitchell VI* held that:

> the law does not insist that one be certain of the existence of a course of action before the statute of limitations may commence running. Rather, reasonable diligence in the protection of one's interests dictates that where there is reason to suspect there is reason to inquire and, therefore "whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is [also] notice of everything to which such inquiry might have led."

*Id*. at 67-68. *Mitchell VI* therefore held that where Indians "knew or had reason to know of the Government's alleged mismanagement," they "knew enough to have commenced investigation" of the Bureau of Indian Affair's ("BIA") timber practices and policies, and the statute of limitations therefore applied to their claims. *Id*. at 71-72. Plaintiff therefore may only "sue for those wrongs which have occurred during the limitations period." *Id*. at 75-77.[1] Indeed, in contrast to the individual Indian plaintiffs in *Mitchell*, Plaintiff here is a sophisticated tribe that has held a significant role in managing its forests.

The United States need not explicitly repudiate a trust duty for a statute of limitations to commence running. A "trustee may repudiate the trust by taking actions inconsistent with his responsibilities as a trustee or by express words." *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 672 F.3d 1021, 1030 (Fed. Cir. 2012) ("*Shoshone IV*"). Plaintiff is incorrect, Opp'n at 7-8, 11, that Defendant has a duty

[1] On reconsideration the court affirmed that forest management can be distilled into discrete actions that are subject to the statute of limitations. *Mitchell v. United States*, 10 Cl. Ct. 787, 788 (1986) (rejecting theory that would perpetually toll "the statute of limitations, and allow damages dating back to the first breach").

to self-report potential breaches of its fiduciary duties. But even if Defendant was under a duty to identify breaches of fiduciary duty, Plaintiff's allegations that a 2005 Forest Management Plan ("2005 Plan") breached BIA's fiduciary duty establish that Defendant met such a duty. *See* Mem. at 8. Plaintiff's complaint belies any argument that it lacked contemporaneous knowledge of actions that it now contends constituted breaches of trust.

Defendant established that Plaintiff's pre-2011 forest mismanagement claims are barred because: (1) the underlying facts were not unknowable; and (2) Plaintiff actually knew of those facts. Mem. at 8-12 (identifying "actual knowledge"). Plaintiff is incorrect that Defendant applied the wrong legal standard by addressing whether the facts underlying Plaintiff's claims were unknowable. Opp'n at 4-7 (citing *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573 (Fed. Cir. 1988). First, *Hopland* holds that: (1) claims accrue when events have occurred that "entitle the plaintiff to institute an action"; and (2) statutes of limitations apply to tribes "in the same manner as against any other litigant." *Id*. at 1576-78. *Hopland* suggests that statutes of limitations run when, as in this case, the underlying facts are knowable. *Id*. Second, Plaintiff's pre-2011 claims are barred because Plaintiff knew or should have known of them. Mem. at 8-12.

Plaintiff relatedly bases its brief on an incorrect legal standard. It contends that Defendant must evaluate, identify, or disclose breaches of fiduciary duty. Opp'n at 8, 11, 12, 15. Plaintiff appears to base this duty to affirmatively identify breaches of trust on its reading of *Shoshone IV*. Opp'n at 6. But *Shoshone IV* found determinative that a tribe was not prevented "from being aware of the material facts that gave rise to its claim" and held "that § 2501 'is not tolled by the Indians' ignorance of their legal rights.'" *Shoshone IV*, 672 F.3d at 1031. Indeed, "[R]equiring a trustee to inform a beneficiary of a 'fact'

that requires legal judgment is requiring the trustee to act as a lawyer, a requirement beyond the scope of our case law and beyond the scope of obligations of a trustee." *Dumarce v. Scarlett*, 446 F.3d 1294, 1302 (Fed. Cir. 2006). It is Plaintiff's responsibility – not Defendant's – to determine whether a breach of trust has occurred.

**2. Plaintiff's prior forest mismanagement claims make clear that it possessed actual knowledge of the facts underlying its current claims.**

Plaintiff's prior lawsuit makes clear Plaintiff both was capable of knowing and actually knew the facts underlying its current claim because it retained experts and presented evidence on post-1946 "timber harvesting and forest management practices." Mem. at 9-13. Plaintiff's efforts to minimize the 1987 trial are unavailing.

First, Plaintiff is flatly incorrect, Opp'n at 12-13, that its 1987 trial addressed only pre-1946 issues or a single timber sale. In truth, the Court directly stated that "plaintiff devoted a considerable portion of its presentation to post-1946 timber harvests and management plans in an attempt to link all forest management events from before 1946 through the present." *White Mtn. Apache Tribe v. United States*, 11 Cl. Ct. 614, 679 (1987) (contending "harvests exceeded sustained-yield growth for all years since 1946").

Plaintiff's contention that its previous litigation has no bearing on accrual because forest claims are "highly technical and necessitates extensive work by qualified experts," Opp'n at 13, is even more devoid of merit. Even highly technical claims accrue where plaintiffs are "capable enough to seek advice, launch an inquiry, and discover through their agents the facts underlying their current claim." *Menominee Tribe*, 726 F.2d at 721. The 1987 trial proves, at a minimum, that Plaintiff was capable of retaining experts to evaluate its forests in 1987. This, standing alone, is fatal to Plaintiff's pre-1987 claims.

While the Court need proceed no further, Plaintiff's public statements disprove its assertion, Opp'n at 14, that it "hired experts in 1986 to review pre-1946 timber harvests" and did not analyze "later forest management." Defendant offered to settle Indian Claims Commission Docket 22-H. In response, Plaintiff stated that "for many years" Defendant permitted cutting "in excess of the sustained yield policy with the result that the Tribe is threatened with irreparable damage and the destruction of its forest." Tribal Res. No. 81-41 (Feb. 10, 1981) (Ex. 1).[2] Defendant's offer required a waiver of claims for "mismanagement of forest lands" through 1979. Tribal Res. 81-73 (Apr. 1, 1981) (Ex. 2). Plaintiff "employed . . . attorneys, investigators and scientists to evaluate the tribe's potential claims . . . in comparison to the" offer. Tribal Res. 83-236 (July 26, 1983) (Ex. 3). Those experts drafted reports that studied "damages . . . manifested on the reservation in . . . stunted tree growth . . . and insect and fire destruction of the forest." *Id*. When settlement failed, Plaintiff filed proposed findings of fact that addressed forest claims through at least 1986. *See* Findings of Fact No. 101 (Aug. 29, 1986) (sustained yield harvest and allowable cuts "exceeded consistently . . . through 1986") (Ex. 4); No. 102 (overcutting in sale from 1946-1966); No. 111 (seeking damage for "loss of future growth"); Aff. of T. Watson at ¶2-4 (Ex. 5). Plaintiff's pre-1987 claims accrued because it studied and presented evidence in court on the issues it seeks to relitigate. *See* Mem. at 12 (citing Compl.). It is beyond reasonable dispute that Plaintiff observed and evaluated tree growth, timber sales, thinning, prescribed burns, and insect and fire damage in 1987. As discussed below, Plaintiff could evaluate similar claims at any time prior to 2011.

[2] The Court may take notice of tribal resolutions. *Klamath Claims Comm. v. United States*, 541 Fed. Appx. 974, 980 n.8 (Fed. Cir. 2013); Opp'n at 42 n. 19; White Mountain Apache Tribal Res., available at http://www.wmat.us/Legal_Scans/Resolutions/.

**3. Plaintiff's assertions regarding forestry reports highlight that Plaintiff knew the material facts at issue before 2011.**

Plaintiff's position that the 2005 Plan both constituted and disclosed breaches of fiduciary duties is fatal to its pre-2011 claims. Mem. at 14-17 (detailing information in 2005 Plan). Plaintiff's unsupported assertions that it lacked information regarding the management of its forest to cause its claims to accrue fail to address the specific information in the 2005 Plan that Defendant highlighted. Regardless, Plaintiff effectively admits, at a minimum, that its pre-2005 claims are barred by the statute of limitations.

Plaintiff's admission that claims relating to a forest management plan accrue at the plan's conclusion is fatal to its pre-2005 claims. *See* Opp'n at 16 (2005 Plan "relevant to claim accrual in 2014") (citing *Apache Tribe of the Mescalero Reservation v. United States*, 43 Fed. Cl. 155, 162 (1999). This recognition that a tribe is aware of failures to take action under a plan at the time of "the termination of the FMP" applies, at a minimum, to Plaintiff's pre-2005 claims. Here, a prior plan disclosed the type of information Plaintiff admits causes claim accrual. Forest Management Plan 1991-2000 ("1991 Plan") (Ex. 6).[3] It is beyond dispute that Plaintiff knew of the 1991 Plan and raised concerns regarding its actualization by 2001:

> **WHEREAS,** the Tribal Council has also raised certain concerns in respect to whether the Forest Management Plan goals for forest growth, forest condition, Tribal economy, and environmental values on a sustained yield basis for the previously ten years have been actualized, and whether the proposed Forest Management Plan provides for

Tribal Res. 2001-274 (Oct. 5, 2001) (Ex. 8) (affirming "participation . . . as beneficial

[3] The 1991 Plan initially covered the period through 2000 and was extended to 2005. *See* Tribal Res. 2003-06 at 3 (Jan. 8, 2003) (Ex. 7). The 1991 Plan disclosed a wealth of information regarding Plaintiff's forests. A 22-page section on fire management calls for meeting each Councilman annually, showing and explaining "the impacts of burning" and developing burn plans "based on standards acceptable to the Tribal Council" 1991 Plan at 26. And the 1991 Plan reports on Forest Pests and Damaging Agents. *Id*. at 273-86.

owner[]" and "participation and decision making" in the 2005 Plan and Environmental Assessment ("2005 EA")). Plaintiff's articulation of concerns regarding the 1991 Plan proves that it "knew enough to have commenced investigation" *Mitchell VI*, 10 Cl. Ct. at 71-72. Moreover, Plaintiff's admission that claims accrue at a forest management plan's end is fatal to its pre-2005 forest claims because the 1991 Plan concluded in 2005.

Even if Plaintiff was correct that Defendant must make an affirmative disclosure for the statute of limitations to commence running, the 2005 EA constitutes such a disclosure. The 2005 EA considered four alternatives for managing Plaintiff's forest. One of those alternatives – Alternative A - was "a continuation of the management direction outlined in the 1990-2000 [FMP] as updated through various Tribal Council resolutions." 2005 EA at 22 (Ex. 9). BIA selected Alternative B because it followed statutory mandates. 2005 EA at 26-35. BIA stated that Alternative B was preferable to Alternative A's continuation of the 1990 Plan's direction. *E.g.*, *id*. at 26 ("Alternatives A and D would not have allowed silvicultural treatment of all size classes."). Even under Plaintiff's interpretation of *Shoshone* to require disclosure of suboptimal past practices, the 2005 EA is fatal to Plaintiff's pre-2005 claims.

The 2005 Plan similarly disclosed facts – such as irreparable damage to Plaintiff's forest – that caused the statute of limitations to run. Mem. at 14-15. Plaintiff wrongly asserts that the statute of limitations regarding bark beetle and mistletoe damage could not begin to run because "facts regarding when and to what extent the Government breached its fiduciary duty are still unclear" and the 2005 Plan's goals might have been achieved prior to its expiration. Opp'n at 16-17 (citing *Mescalero Apache*, 43 Fed. Cl. at 162). *Mescalero Apache*, at most, applied a tribe-specific analysis to a claim that BIA

failed to meet a forest management plan's budget of cutting 17.9 million board feet of timber per year – challenging the application of a plan's cutting budget from 1979 to 1989 when claims were filed in 1992. *Id.* at 162, 165.[4] But as Plaintiff alleges, the material facts here were fixed in 2005:

> For example, the 2005-2014 Forest Management Plan estimates an annual loss of approximately $800,000 due to mistletoe infection. The Forest Management Plan also estimates that the Tribe has lost over 100 million board feet of timber to spruce beetle. A 2014 report from the U.S.

Compl. ¶ 51. To be clear, the 2005 Plan disclosed that trees were irreparably destroyed and quantified those damages.[5] Plaintiff's suggestion that it is pursuing damages related to pre-2011 forest fires, Opp'n at 17, should be dismissed because Plaintiff was aware of the fires when they occurred. The 2005 Plan's disclosure of damage to Plaintiff's forest caused related claims to accrue regardless of whether Plaintiff knew the full extent of any such damage. *Wolfchild v. United States*, 731 F.3d 1280, 1291 (Fed. Cir. 2013).

Plaintiff's discussion of the 1993 and 2003 Indian Forest Management Assessments Team reports fares no better. Plaintiff admits that the reports: (1) "provide generalized evidence that Defendant regularly mismanages forests on Indian trust lands;" (2) recommend how to improve management; and (3) discuss "conditions on the Tribe's Reservation." Opp'n at 15-16. If Plaintiff claims that "publicly available information cited in its complaint supports its claims, then these public materials would also have contributed to the totality of the circumstances putting [it] on notice of possible claims."

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[4] *Mescalero Apache* preserved at most, claims for damages "incurred after August 28, 1984." *Id* at 171. And Mescalero Apache, unlike Plaintiff, assumed no responsibilities under 638 contracts. *Id*. at 162.

[5] Plaintiff's Complaint does not reference forest fires. Regardless, Plaintiff cannot credibly claim that the facts necessary to fix any liability the United States might have for a forest fire occur years after the fire. *See* Tribal Res. 2002-173 (June 23, 2002) ("seeking recovery from the devastation of" fire and recognizing "time limit of three years" to complete rehabilitation plan) (Ex. 10)

*Woori Bank v. Merrill Lynch*, 923 F. Supp. 2d 491, 497-498 (S.D.N.Y. Feb. 5, 2013). Plaintiff's discussion of the reports demonstrates that it was aware of sufficient facts related to the government's alleged mismanagement of its forest to trigger a duty to investigate. *Mitchell VI*, 10 Cl. Ct. at 71-72; *Shoshone IV*, 672 F.3d at 1030-33. Its pre-2011 forest management claims therefore accrued before 2011.

**4. Plaintiff's resolutions make clear that it knew the facts underlying its pre-2011 claims.**

Plaintiff's foundational assertion, *e.g.*, Opp'n at 11, 14, that it was ignorant of all matters relating to its forests because BIA (1) operated without input from Plaintiff and (2) without sharing information, is manifestly incorrect. The only document Plaintiff offers in support of this contention actually disproves it. It is irrelevant that Plaintiff's chairman never signed the 2005 Plan because Plaintiff cannot contest that BIA provided the plan to Plaintiff. Mem. at 14. Even if Plaintiff was correct that forest management plans have no bearing on accrual absent its chairman's signature, Plaintiff's chairman signed the 1991 Plan. 1991 Plan at 2 (Ex. 6). As discussed above, Plaintiff's own arguments therefore condemn its pre-2005 claims.

The second "fact" Plaintiff offers in support of its assertion that it lacks knowledge of how its forest is managed is, at best, badly outdated. Contrary to Plaintiff's assertion, it has regularly received and analyzed information about its forests since 1985. In 1985, Plaintiff declared that BIA's disclosures and Plaintiff's investigation revealed the need to curtail harvests of Plaintiff's forests in a manner that would cause "severe financial losses" to Plaintiff and that Interior's "destruction of [Plaintiff's] forests . . . be declared grossly illegal." Tribal Res. 85-305 at 7-9, 12-13 (Dec. 19, 1985) (Ex. 11).

Indeed, Plaintiff both identified material facts and reached a legal conclusion based on those facts. Plaintiff's pre-1985 forest management claims are therefore barred.

Plaintiff assumed a significant role in managing its forests by no later than 1995. Plaintiff established a committee to evaluate the "feasibility of transferring forestry management responsibilities" from BIA to Plaintiff. Tribal Res. 92-230 (Aug. 6, 1992) (Ex. 12). The committee "assess[ed] the BIA's performance of its Forest Management activities." *Id.* Plaintiff affirmed that it "exercises full and exclusive control of all natural resources" and in exercising its "sovereign powers, has utilized, managed, regulated, controlled, and administered the Tribe's natural resources, including . . . forest lands." Tribal Res. at 17-18 (Mar. 3, 1995) (Ex. 13). Notably, Plaintiff found that:

> WHEREAS, the White Mountain Apache Tribe, confronted with devastation of Tribe's Reservation through mismanagement by the Trustee, has undertaken broadly as a sovereign to develop a long range plan to restore, rehabilitate, and resuscitate Tribe's range and forest lands, which have been irreparably damaged by a century of mismanagement by the United States Trustee, concerning which, as reviewed

*Id.* Plaintiff "initiated a reduction in the annual allowable cut of its forests in order to restore and preserve ecological harmony on its lands and . . . prohibited destructive broadcast burning" by BIA. Tribal Res. 94-060 at 3 (Feb. 24, 1994) (establishing natural resources department). As Plaintiff put it:

> **WHEREAS,** tribal members, tribal biologists, botanists, foresters, soil scientists, and hydrologists employed or under contract by the White Mountain Apache Tribe possess knowledge of the Tribe's Reservation far superior to that of federal and state agencies or environmental organizations and are best able to manage the lands, fauna, flora and waters of the Tribe's Reservation to ensure ecological maintenance and stability for all such species; and

*Id.* at 4 (Ex. 14). To be clear, Plaintiff represented that it (1) was aware of irreparable damage due to Defendant's alleged mismanagement, (2) possessed better knowledge of

its reservation than Defendant, and (3) developed a plan to restore its forests. Put another way, Plaintiff absolutely knew about the material facts underlying its forest claims. Its own tribal resolutions on the matter are beyond dispute.

Plaintiff also assumed significant forest management responsibilities, including responsibility for forestry thinning, pursuant to 638 contracts.[6] ECF 9-1 at 18-19. Plaintiff admits that Defendant paid Plaintiff to thin its forests in 1997. Opp'n at 17-18.[7] Plaintiff offers no credible response to Defendant's argument that Plaintiff acquired knowledge of thinning it conducted. Plaintiff instead misapplies an overruled case to argue that Defendant waived its arguments relating to 638 contracts. Opp'n at 18 (citing *Hymas v. United States*, 117 Fed. Cl. 446, 496 n.34 (2014) (waiver of "one-sentence . . . . unaccompanied by any analysis" in summary section of brief), *vacated by Hymas v. United States*, 810 F.3d 1312 (Fed. Cir. 2016). In contrast to the bare reference held to waive an argument in *Hymas*, Defendant here supported its argument regarding Plaintiff's 638 contracts with two pages of analysis. ECF 9-1 at 18-19.

Regardless, Plaintiff's resolutions easily dispatch Plaintiff's suggestion, Opp'n at 17, that it assumed no thinning responsibilities before 2011. By 1995, Plaintiff contracted "to operate . . . forestry . . . and other programs." Tribal Res. 95-286 (Aug. 31, 1995) (Ex. 15). BIA pays Plaintiff hundreds of thousands of dollars per year to manage forestry programs such as "growth management." Tribal Res. 2001-205 (July 18, 2001)

[6] The term "638 contract" refers to an agreement between Interior and a tribe pursuant to the Indian Self-Determination and Education Assistance Act (ISDEAA) P.L. 93-638 (codified at 25 U.S.C. § 5301 et seq. (formerly codified at 25 U.S.C. § 450 et seq.)). Under a 638 contract a Tribe provides services such as natural resource management (including forestry) that otherwise would have been provided by Interior.

[7] The Court need not attempt to harmonize Plaintiff's allegations that Defendant imposed costs on Plaintiff by requiring it to perform thinning without adequate compensation, Compl. ¶ 58, with its disclaimer that it "does not allege that any ISDEAA contract was unlawful or insufficient" or injurious. Opp'n at 17 n.5. All that matters for purposes of the statute of limitations is that Plaintiff was paid to thin its own forests.

(Ex. 16). Plaintiff's 1995 budget detailed the functions it assumed. Tribal Res. 95-312a (Oct. 11, 1995) (Ex. 17), *id* at 4 (Timber Sale Administration budget for "twelve tribal forestry technicians"); 5 (Growth & Management budget for "forestation projects," one full-time technician, and seasonal employees). Plaintiff's proposals touted its "superior knowledge and capability in restoring damaged lands." Res. 2004-12 at 1 (Jan. 14, 2004) (Ex. 18). Plaintiff cannot credibly claim that the statute of limitations is tolled because Defendant failed to provide Plaintiff with information regarding a thinning Plaintiff itself conducted. Tribal Res. 2004-254 (Oct. 14, 2004) (Ex. 19) (Plaintiff to perform Forestry Thinning Program duties); Tribal Res. 2010-67 (Mar. 23, 2010) (Ex. 20) (thinning 800 acres); Tribal Res. 2010-239 (Sept. 1, 2010) (Ex. 21) (Tribe "has managed," among other programs, "Forest Management & Protection" and "Forestry Thinning").

Plaintiff's awareness of and involvement in forest management does not stop there. It received information from BIA and provided input to BIA regarding many other decisions. BIA presented information on timber "sale, sale history, thinning, burning, sale acreage, sale & leave volume, roads and bonds." Briefs, Tribal Council Meeting (Dec. 2, 1998) (Ex. 22). Plaintiff evaluated this information and used it to, among other things, either approve or decline timber sales. *Id.*; Tribal Res. 98-268 (Dec. 2, 1998) (Ex. 23) (approving timber sale); Tribal Res. 94-337 (Nov. 3, 1994) (Ex. 24) (declining timber cut "to protect and preserve [Plaintiff's] wildlife, plant life, forest, natural resources and water rights"). Plaintiff protested BIA refusals to approve certain timber sale contracts. Tribal Res. 91-23 at 3 (Jan. 24, 1991) (Ex. 25).

Plaintiff also retained a tribal forestry manager and was intimately involved in fuels reduction efforts. Briefs, Tribal Council Meeting at ¶¶ 4-6 (Sept. 1, 1999) (Ex. 26).

Plaintiff passed resolutions making prescribed burns "subject to the supervision and monitoring of the Tribal Forestry Department." Tribal Res. 98-162 (July 9, 1998) (Ex. 27). Plaintiff directed the timing of prescribed burns "so as not to impact on tribal hunting seasons." Tribal Res. 96-215 (Sept. 12, 1996) (Ex. 28). And Plaintiff made plans to reforest areas and "reduce the allowable annual cut" where appropriate. Tribal Res. 90-266 (Nov. 29, 1990) (Ex. 29).

Nor can there be any doubt that Plaintiff could evaluate information BIA provided. Plaintiff's Council had "experience in the field of Forestry." Agenda, Regular Council Meeting ¶ 16 (Jan. 10, 1996) (Ex. 30). Plaintiff's Tribal Council and Forestry Staff participated in field trips to discuss, among other things, timber sale areas. Briefs, Lame Deer Field Trip (June 15, 1998) (Ex. 31). Plaintiff participated in developing forest management plans. ECF 9-4. And BIA actively conferred with Plaintiff regarding forest management plans. ECF No. 9-5.

Defendant solicited input from and regularly shared information with Plaintiff. Plaintiff took responsibility for forest management through 638 contracts and tribal resolutions. Plaintiff's unsupported assertions of ignorance regarding the management of its forests do not withstand scrutiny and provide no basis for denying this motion.

**5. Dismissing Plaintiff's pre-2011 claims would simplify proceedings and spare the parties unnecessary expense.**

Plaintiff is incorrect, Opp'n at 20, that dismissing Plaintiff's "pre-2011 claims would not meaningfully simplify these proceedings." Plaintiff undercuts this assertion by arguing that evaluating a single timber sale "required days of testimony by five experts, a site visit, and extensive analysis of planning documents." *Id*. at 13. Discovery and trial

for 6 years of claims is a significantly smaller undertaking than discovery for 71 years of claims. Plaintiff does not suggest otherwise.

Plaintiff's remarkable proposal that the parties engage in discovery before it "describes the nature of each claim and the time period of alleged Government liability" flips Court of Federal Claims Rule ("RCFC") 8 on its head. To be clear, Plaintiff admits that it has not yet described the nature of its claims. This is no small matter, as it is difficult to see how the parties or court could evaluate, among other things, discovery's proportionality without understanding the nature of Plaintiff's claims. *See Mujica v. AirScan Inc.*, 771 F.3d 580, 593 (9th Cir. 2014) ("[P]laintiffs must satisfy the pleading requirements of Rule 8 before the discovery stage, not after it.").

Plaintiff's argument that dismissal is inappropriate because statute of limitations issues are "inextricably bound to the merits," Opp'n at 20-21, of its claims fares no better. Plaintiff's claims accrued before 2011 because Plaintiff knew of the forest management plans, timber cuts, pest damage, prescribed burns and other facts that it now appears to contend constituted breaches of trust. Plaintiff knew enough to investigate these facts. *See Mitchell,* 10 Cl. Ct. at 67-68. The statute of limitations therefore accrued regardless of how Plaintiff's experts analyzed or might have analyzed the material facts. Discovery in such circumstances would only waster both parties' resources. *See Crow Creek Sioux Tribe v. United States*, 2017 U.S. Claims LEXIS 604 at *2 (Fed. Cl. June 1, 2017).

**B. Plaintiff's pre-2011 claims regarding potential mismanagement of broad categories of natural resources should be dismissed.**

Defendant's opening brief established that the pre-2011 component of Plaintiff's unspecified claims regarding broad categories of natural resources should be dismissed

because Plaintiff either knew or should have known about the management of those natural resources. Mem. at 20-22. At a minimum, Plaintiff should be ordered to specify its claims. *Id*. "[T]he imposition of litigation costs must be justified at the threshold by the presence of factual allegations making relief under the governing law plausible, not merely speculative." *ABB Turbo Sys. AG v. TurboUSA, Inc.*, 774 F.3d 979, 984 (Fed. Cir. 2014). Instead of identifying such factual allegations, Plaintiff underscores the need for specificity before engaging in discovery covering Plaintiff's entire reservation.

Plaintiff contends that several paragraphs of its Complaint provide the factual bases for its natural resource claims. Opp'n at 22. Plaintiff at most alleges that:

> 15. Some Reservation trust lands have been contaminated by non-Tribal entities with hazardous waste, pollution, and other harmful substances. Some non-Tribal entities make use of expired right of ways and leases on the Reservation.
>
> 27. The United States breached the above duties owed to the White Mountain Apache Tribe, resulting in substantial losses to the Tribe.

Compl. ¶¶ 15, 27. Plaintiff fails to identify a single right-of-way or contaminated area where Defendant breached a trust duty. *Id*. Plaintiff remarkably admits it does not know if any such trust duty has been breached. Opp'n at 22-23. Plaintiff has provided no facts to raise a reasonable expectation that discovery will reveal evidence of violations. *See ABB Turbo*, 774 F.3d at 984-85. Plaintiff's proposal – that it need not specify claims until after discovery – would render FRCP 8 meaningless.[8]

[8] As with Plaintiff's forest claim, resolutions prove that Plaintiff: (1) was not nearly as ignorant of its resources as it asserts; and (2) actually knew of issues relating to, among other things, rights-of-way and contamination prior to 2011. Tribal Res. 2009-246 (July 10, 2009) (Ex. 32) (resolving pipeline trespass); Tribal Res. 2002-290 (Nov. 15, 2002) (Ex. 33) (brownfields demonstration project).

**C. Plaintiff's pre-2011 trust fund mismanagement claims are barred because Plaintiff admits that it needs no additional accounting to bring them.**

As Defendant established in its Memorandum, Defendant has no duty to provide Plaintiff with an accounting back to 1946. Mem. at 26-27. Plaintiff does not dispute this point, claiming that it does not seek an accounting. Opp'n at 23.[9] Plaintiff instead argues that its claims could not have accrued because Plaintiff cannot know of its trust fund mismanagement claims absent an accounting. Plaintiff's argument is defeated by simple logic. Plaintiff must know enough to bring its claims because it actually brought those claims. Plaintiff disproves its statute of limitations argument – that it lacks enough information about its trust funds to challenge their management – by bringing this case.

As set forth in Defendant's Memorandum, Plaintiff's pre-1994 claims are barred because Congress deemed Plaintiff to have received its Trust Reconciliation Project report in 2000.[10] Plaintiff is correct that Congress deemed the TRP reports received on December 31, 2000 "to encourage settlement." Opp'n at 31. But Plaintiff's theory, Opp'n at 29-33, that Congress imposed a "deemed received" deadline with no legal significance is incorrect. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (Courts "give effect, if possible, to every clause and word of a statute"). The "deemed received" deadline only has significance because it provided the parties with two additional years to negotiate settlements by tolling the statute of limitations deadline. Congress explicitly

[9] The Court need not attempt to resolve another central tension of Plaintiff's reply – Plaintiff's assertions that (1) no claims can ever accrue without an accounting, Opp'n at 26, and (2) an accounting is impossible. *Id.* at 33. Plaintiff's brief rests on the interpretation that Congress indefinitely tolled the statute of limitations until completion of an impossible accounting that Congress never directed.

[10] Plaintiff is incorrect, Opp'n at 31, that Defendant needed to present evidence that Plaintiff received its Tribal Trust Funds Reconciliation Project Agreed-upon Procedures and Findings Rep. for White Mountain Apache Tribe ("TRP report") (Ex. 34). Plaintiff's complaint is based upon those reports and Congress deemed them received by tribes. Compl. ¶ 33; Mem. at 28. Nonetheless, Defendant attaches the report.

deemed the TRP report to have been received "for purposes of applying a statute of limitations." An Act to Encourage the Negotiated Settlement of Tribal Claims, Pub. L. No. 107-153, 116 Stat. 79 (2002). These unambiguous words control the act's meaning.[11] Dozens of tribes took advantage of Congress's extension of the "deemed received" deadline and filed claims following unsuccessful settlement efforts. *See* Order, *Nez Perce Tribe v. Kempthorne*, No. 06-cv-2239 (D.D.C. Oct. 15, 2008) (Ex. 35). Plaintiff did not, and its pre-1994 trust fund mismanagement claims are therefore barred.

Plaintiff's Complaint defeats its argument, Opp'n at 24-35, that its trust fund mismanagement claims were tolled by a series of Appropriations Acts. The Acts provide that the statute of limitations "shall not commence to run" on trust fund mismanagement claims until a tribe "has been furnished with an accounting of such funds from which [it] can determine whether there has been a loss." *Id*. at 24 (emphasis added). The Acts do not allow tribes to wait indefinitely to bring trust fund mismanagement claims. Rather, "the claims about 'losses' or 'mismanagement' that are protected . . . are those for which an accounting matters in allowing a claimant to identify and prove the harm-causing act at issue; otherwise, the [Acts] would give claimants the right to wait for an accounting that they do not need." *Wolfchild*, 731 F.3d at 1291. Or as Plaintiff puts it, Plaintiff's claims accrue when it can determine whether it has suffered a loss. Opp'n at 24.

Plaintiff's Complaint makes clear that it requires no additional accounting. It knew enough without such an accounting to allege that it was damaged by Defendant:

[11] That two congressmen noted uncertainty regarding whether the TRP reports would bar claims, *see* Opp'n at 32, is irrelevant. Regardless, the legislative history recognizes that "statute of limitations for any significant discrepancies uncovered" during the TRP process "may have expired by the time" of completion. *Id.* at 27 (quoting S. Rep. No. 101-534 (1990)); 31 (citing S. Rep. 107-138 at 5 (Feb. 15, 2002) ("acute concern that Indian tribes will be forced to immediately file claims")).

> failing to ensure that monies due to the Tribe were paid and collected [and] that funds received were accurately recorded and identified; losing the Tribe's funds due to inappropriate record-keeping and other mismanagement; failing to invest tribal income in a timely manner; failing to obtain an appropriate return on invested funds; failing to deposit monies into trust funds or disburse monies from trust funds in a proper and timely manner; disbursing monies without proper authorization; . . . and mismanaging forest suspense accounts.

Compl. at 20-21. The Appropriations Acts therefore do not preserve Plaintiff's claims regardless of whether Plaintiff knows the full extent of any injury. *Wolfchild*, 731 F.3d at 1291; *Shoshone IV*, 672 F.3d at 1030-33.

Plaintiff's opposition highlights that its 1994 TRP report provided it with sufficient knowledge for pre-1992 trust fund mismanagement claims to accrue. As Plaintiff alleges, Opp'n at 34, (1) a 1996 Government Accountability Office ("GAO") report found that certain transactions could not be reconciled and (2) BIA "tested" investment yields and "identified deposit lag time."[12] Lest there be any doubt, Plaintiff's TRP report disclosed that approximately 1.6% of Plaintiff's disbursements could not be reconciled with available documents. The report disclosed that Plaintiff's investment returns for one account and that those returns fell short of a benchmark return of .51%. *Id*. at 17-18; 23 (recalculating interest). The TRP report also disclosed that Plaintiff's trust accounts received no timber receipts in 1990, 1991, and 1992. The TRP and GAO reports therefore caused Plaintiff's pre-1992 claims to accrue by providing sufficient facts Plaintiff needed to determine whether it was injured.[13]

[12] The 1996 GAO report also noted that approximately one percent of lease receipts tested were not verified with the information available at that time. ECF 16-2 at 5.

[13] While the reason why Interior reported that Plaintiff's trust fund accounts received no timber revenues is immaterial for purposes of this motion, timber purchasers have paid Plaintiff directly since 1990. Tribal Resolution 90-199 (Sept. 5, 1990)(Ex. 36). Defendant has no duty to account for such direct payments. *Cobell v. Salazar*, 573 F.3d 808, 815 (D.C. Cir. 2009) ("*Cobell XXII*").

Plaintiff's Periodic Statements of Performance ("PSPs") similarly caused Plaintiff's pre-2011 claims to accrue. The PSPs provide a list of Plaintiff's real property assets and identify encumbrances on those assets by lease number, type, holder, effective date, and expiration date. *See* Fort Apache Tribe Statement of Account No. XXXXXX7-10 (Ex. 6 to Mem.). Plaintiff therefore knew enough to inquire about the funds collected under these encumbrances.[14] And a cursory review of the PSPs refutes Plaintiff's assertion, Opp'n at 38, that they fail to disclose how Plaintiff's trust funds were invested. *E.g.* White Mtn. Forestry Slash Burning Suspense Statement (Jan. 31, 2011) (stating investments and estimating income) (Ex. 6 to Mem.). Plaintiff's critique of Interior's pre-1994 statements, Opp'n at 39, misses the mark because Interior upgraded its statements in response to the 1994 Trust Management Reform Act and subsequent feedback. *See* Statement of L. Calbom at 8 (June 11, 1996) (Ex. 37); ECF No. 16-3; 25 U.S.C. § 4011(b) (listing Congress's requirements for PSPs). And Plaintiff's assertion that the PSPs cause no claims to accrue because their opening and closing balances are inaccurate, Opp'n at 37, proves Defendant's point – Plaintiff should have known about facts it claims are established by a 1998 letter.

**D. Count III of Plaintiff's Claim Should be Dismissed in Its Entirety.**

**1. Plaintiff has not demonstrated subject matter jurisdiction by establishing a specific duty to repair dams on a certain timeline.**

Plaintiff fails to identify a substantive source of law that establishes a specific fiduciary duty. Mem. at 32-37; *United States v. Navajo Nation*, 556 U.S. 287, 290 (2009) (Plaintiff must clear first hurdle of identifying "a substantive source of law establish[ing]

[14] The PSPs state a right-of-way's expiration date or identify it as perpetual, *see id.* at 4, thereby refuting Plaintiff's assertion, Opp'n at 22, that it lacked information about pipeline rights-of-ways expiring.

specific fiduciary" or other duty Defendant allegedly "failed to faithfully perform"). Plaintiff argues the Indian Dams Safety Act of 1994 ("IDSA"), 25 U.S.C. § 3801 *et seq.*, "impose[s] comprehensive, mandatory duties over the safety of Indian dams upon the Secretary [of the Interior]" and that "Congress accepted a fiduciary duty to manage the maintenance and safety of Indian dams 'according to those specific prescriptions,'" Opp'n at 45. Plaintiff's arguments misinterpret the intent and structure of the IDSA and fail to identify any specific rights-creating duty in the Act.

The IDSA cannot be read to impose a specific duty to repair every Indian dam because it requires the Secretary to prioritize repairs. Mem. at 33-34 (citing 25 USC § 3803.) Plaintiff is correct that BIA's annual funding is insufficient to immediately repair all deferred maintenance. Opp'n at 41-42. "[W]here Congress has entrusted to the agency the duty of applying, and therefore interpreting, a statutory duty owed to the Indians, [courts] cannot ignore the responsibility of the agency for careful stewardship of limited government resources." *Cobell XXII*, 573 F.3d at 812. The statutory scheme here accepts that BIA will have to allocate resources in a manner that leaves some dams in need of repairs. It cannot be a breach of trust if BIA does what Congress directed it to do: allocate its limited funds to complete the most urgently-needed repairs while deferring lower-priority repairs. *See Navajo*, 556 U.S. at 290.

Plaintiff therefore buttresses Defendant's argument by citing to a 2017 BIA presentation on the recently-enacted Water Infrastructure Improvements for the Nation Act of 2016 (the "WIIN Act"). Opp'n at 41-42. The WIIN Act makes clear that Congress did not impose a duty to immediately repair all BIA dams. To help address BIA's maintenance backlog and funding shortfalls, the WIIN Act allocates $22,750,000

to be annually deposited into a "high-hazard fund" from 2017 through 2023. 25 U.S.C. § 3805(b)(1)(C). Although the WIIN Act established a fund to address some deferred maintenance, Congress did not appropriate money. § 3805(b)(1)(B). Congress instead prohibited BIA from expending WIIN Act funds until Congress makes specific appropriations. ECF No. 16-5 at 11.[15]

Should BIA receive appropriated WIIN Act money, Congress provided "prioritization criteria" to direct repairs of eligible dams. § 3805 (c)(3-5). The WIIN Act explicitly deprioritized Plaintiff's reservation. § 3805 (c)(5)(B)(i) (prioritizing dams that "serve more than 1 Indian tribe within an Indian reservation"). It further directed Interior to spread funding to all dams with critical maintenance needs to the extent practicable and capped funding at "$10,000,000 to any individual dam . . . during any consecutive 3-year period." § 3805 (c)(5). By explicitly prioritizing certain repairs and simultaneously restricting funding, Congress recognized that the WIIN Act will not immediately address all outstanding dam maintenance needs.

Plaintiff's reliance on *Vargas v. United States*, Opp'n at 44, is misplaced. *Vargas* was a Federal Tort Claims Act case alleging negligence based upon an actual dam breach. 2002 U.S. Dist. LEXIS 27718 at *11 (E.D. Wash. May 17, 2002). It (1) did not address the IDSA's requirement that BIA prioritize maintenance and (2) predates both *Cobell XXII* and the WIIN Act's explicit recognition that dam repairs must be prioritized.

[15] Plaintiff's exhibit omits the pages of the report that explain these funding issues. *See* Safety of Dams Tribal Consultation Presentation at 20 (Feb. 2017), available at https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/ots/pdf/idc2-060297.pdf.

Plaintiff identifies no language that would transform the IDSA into a mandate to repair every Indian dam by a date certain. In other words, Plaintiff has failed to identify a specific right-creating duty. This Court should therefore dismiss Count III.

**2. Plaintiff fails to identify any money-mandating duty regarding Defendant's maintenance of the dams on Plaintiff's reservation.**

Plaintiff identifies no basis for holding the IDSA to impose a money-mandating duty upon Defendant to maintain or repair the dams on Plaintiff's reservation in any manner. Plaintiff's dam-related claims should be dismissed for this reason as well.

As the Federal Circuit recently held, "A statute is money mandating if either: (1) 'it can fairly be interpreted as mandating compensation by the Federal Government for . . . damages sustained'; or (2) 'it grants the claimant a right to recover damages either expressly or by implication.' *Lummi Tribe of the Lummi Reservation v. United States*, 870 F.3d 1313, 1317 (Fed. Cir. 2017). *Lummi* is instructive because it held that the statute at issue there is not money mandating because it does not entitle tribes "to an actual payment of money damages, in the strictest terms; their only alleged harm is having been allocated too little in grant funding." *Id. at* 1318. *Lummi* found significant that the statute at issue "does not authorize a free and clear transfer of money." *Id*. at 1319. The IDSA similarly does not directly fund specific dam repairs, much less transfer payments to tribes who might benefit from prioritizing repairs on their reservations.

Plaintiff's citation to *Agwiak v. United States* misses the mark because that case addressed a statute providing that "an employee at a remote duty site 'is entitled' to the remote duty allowance" and that such allowances "shall be paid." 347 F.3d 1375, 1380

(Fed. Cir. 2003). The statute in *Agwiak* was money-mandating because it required money payments to the plaintiff. *Id*. The IDSA requires no analogous payments to Plaintiff.

Finally, Plaintiff is incorrect, Opp'n at 46, that this case is controlled by *United States v. White Mtn. Apache Tribe*, 537 U.S. 465 (2003). Unlike the statute at issue in the 2003 White Mountain Apache decision, the statutory scheme governing Indian dam safety provides "strong indications that Congress did not intend to mandate money damages." *Id*. at 478. Specifically, the IDSA's requirement that Defendant prioritize repairs, the WIIN Act's funding restrictions, and the shortfall in appropriations for dam repairs all strongly indicate that Congress did not intend to mandate money damages. This Court should therefore dismiss Plaintiff's Count III because Plaintiff has not identified a money-mandating duty of Defendant to maintain and repair dams on Plaintiff's reservation in a certain manner.

**3. Plaintiff's dam safety claim is inadequately plead.**

Even if the IDSA imposed a specific applicable money-mandating fiduciary duty, Plaintiff's claims should still be dismissed for failure to statue a claim. A complaint must allege facts "'plausibly suggesting (not merely consistent with)'" a showing of entitlement to relief. *Dimare Fresh, Inc. v. United States*, 808 F.3d 1301, 1306 (Fed. Cir. 2015) (citing *Twombly*, 550 U.S. at 570). A complaint must "state the necessary elements of the plaintiff's claim." *Keehn v. United States*, 110 Fed. Cl. 306, 319 (2013) (citation omitted). Plaintiff's assertions, Opp'n at 40-42, that it satisfied FRCP 8(a)(2) through broad claims regarding the maintenance of unspecified dams are insufficient to raise its right to relief above the speculative level.

Plaintiff's citations to *Dobyns v. United States*, 91 Fed. Cl. 412, 425 (Fed. Cl. 2010), Opp'n at 40, 42, illustrate its failure to satisfy RCFC 8(a)(2). *Dobyns* recognized that "'[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements' were [in]sufficient to state a claim." *Id.* at 427-28 (citations omitted)). *Dobyns* allowed claims to proceed where the complaint "cites three specific orders . . . that were allegedly violated" based on specific findings in an Office of the Inspector General report. *Id*. at 429. Plaintiff's, in contrast, provides five short paragraphs generally alleging unspecified issues at fourteen unspecified dams. Compl ¶¶ 61-65. These bare allegations do not provide notice of Plaintiff's claims. As discussed above, "plaintiffs must satisfy the pleading requirements of Rule 8 before the discovery stage, not after it." *Mujica*, 771 F.3d at 593.

## III. CONCLUSION

Defendant respectfully submits that this Court should dismiss (1) all claims in this case that predate March 15, 2011 because those claims fall outside the applicable limitations period, and (2) Claim III of Plaintiff's Complaint in its entirety because Plaintiff has not alleged a money-mandating duty to maintain dams located on Plaintiff's reservation, stated any claim with sufficient specificity, or established its standing to bring claims relating to an alleged failure to maintain dams.

Respectfully submitted this 20th day of October, 2017,

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**CERTIFICATE OF SERVICE**

I hereby certify that, on October 20, 2017, I electronically transmitted the foregoing the Reply Memorandum in Support of the United States Motion for Partial Dismissal, using the ECF system for filing and transmission of a Notice of Electronic Filing to the ECF registrants in this case.

*s/ Matthew Marinelli*
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