IN THE UNITED STATES COURT OF FEDERAL CLAIMS

THE WHITE MOUNTAIN APACHE TRIBE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No.: 17-359 L
	)	
THE UNITED STATES OF AMERICA,	)	Judge Edward J. Damich
	)	
Defendant.	)	Electronically filed
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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE UNITED STATES' MOTION FOR PARTIAL DISMISSAL

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I. INTRODUCTION

Plaintiff White Mountain Apache Tribe is barred by the statute of limitations from pursuing claims for breach of trust relating to the alleged mismanagement of its trust funds and non-monetary trust assets for the past 70 years—i.e. from 1946 to the present. It is indisputable that the manner in which those funds and assets were managed were both knowable and well-known to Plaintiff prior to March 15, 2011 – six years before this lawsuit was filed. Plaintiff's claims predating March 15, 2011 are therefore barred by the statute of limitations.

For instance, in a prior case that went to trial in 1986 trial, Plaintiff made direct claims and presented evidence relating to the management of its trust assets. Plaintiffs, in fact, directly argued that "that harvests [from its tribal forests] exceeded sustained-yield growth for all years since 1946." *White Mountain Apache Tribe v. United States*, 11 Cl. Ct. 614, 679 (1987). Plaintiff's prior case also challenged the "stocking levels" and "level of cutting" of its forests, disagreeing with the United States "about whether the sustained-yield grown figures used by the Government in planning timber cuts actually are being achieved by the forest." *Id.* This insurmountable record dispels any doubt that Plaintiffs have been on notice of any claims they allege to have with respect to forest management by the United States. And Plaintiff's own allegations, such as its claim that documents published in 1993, 2003, and 2005 disclose breaches of alleged trust duties, make clear that Plaintiff was aware of the material facts regarding the pre-2011 portion of its forest asset claims prior to 2011. Indeed, Plaintiff, not the United States, has been responsible for managing certain of the trust assets that are the subject of its claims since well before 2011. In short, the statute of limitations bars the pre-2011 portion of

Plaintiff's natural resource mismanagement claims because the material facts underlying the Complaint were not unknowable, but known, to Plaintiff prior to March 15, 2011.

The six-year statute of limitations also bars Plaintiff from pursuing "breach of trust" claims relating to the alleged mismanagement of Plaintiff's trust funds for most of the past 70 years—*i.e.*, from 1946 to March 15, 2011. Plaintiff indisputably knew or should have known about the manner in which the United States was managing Plaintiff's trust funds and non-monetary trust resources before March 15, 2011, *i.e.*, six years before Plaintiff filed this case.

Additionally, Plaintiff's claim for damages stemming from the United States' alleged failure to properly maintain dams on its reservation should be dismissed because Plaintiff fails to identify a money-mandating duty that would support an award of damages to Plaintiff. Plaintiff points to no statute that would vest this court with jurisdiction to award Plaintiff damages even if Plaintiff was correct that the United States (1) has not made necessary repairs to dams located on Plaintiff's reservation that are owned by the United States or (2) made unnecessary or improper repairs to Davis Dam. Plaintiffs' claims seeking damages for an alleged failure to conduct unspecified repairs at unspecified dams are also barred because Plaintiff fails to state a claim upon which relief can be granted. Plaintiff's dam safety claims must be dismissed because Plaintiff simply does not allege sufficient facts to support a plausible claim for relief. Finally, Plaintiff lacks standing to bring its dam safety claims because (1) any injury from a hypothetical future dam failure is, at best, speculative and (2) any actionable maintenance deficiency would not be remedied by an award of damage to Plaintiff.

For these reasons, the United States respectfully moves under the Rules of the Court of Federal Claims ("RCFC") 12(b)(1), 12(b)(6), and 12(h)(3) for dismissal of: (1) all of Plaintiff's 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 alleged no money mandating duty to maintain dams located on Plaintiff's reservation.

II. BACKGROUND

The White Mountain Apache Tribe ("Plaintiff") is a federally recognized tribe with a reservation located in eastern Arizona. The reservation consists of approximately 2,600 square miles, and is the eleventh largest Indian reservation in the country. Compl. ¶ 9. Plaintiff has approximately 15,000 tribal members. Compl. ¶ 5.

Plaintiff's trust land contains merchantable timber. Compl. ¶¶13-14. Plaintiff receives revenue from timber sales and "owns and operates a saw mill through a wholly-owned subsidiary." Compl. ¶13.

Plaintiff alleges that the Department of the Interior ("Interior") mismanaged trust funds and non-monetary trust assets for the Plaintiff's benefit, and that Plaintiff has never received an accounting of its trust funds. Plaintiff alleges breaches of fiduciary duties by the Unites States as trustee of "funds, land, timber and other assets held by the United States for the benefit of the Tribe from 1946 to the present." Compl. ¶ 1. Plaintiff alleges that the fiduciary duties require the United States to ensure that "tribal trust property and trust funds are protected, preserved and managed so as to maximize the trust income to the beneficiary by prudent investment," Compl. ¶ 26, and these duties have been breached resulting in "substantial losses to the Tribe." Compl. ¶ 27.

With regard to its non-monetary trust assets, Plaintiff contends that the United States "exercises control over natural resources on and under the Tribe's land, and has a trust obligation to appropriately manage the natural resources located within the boundaries of Indian reservations and trust lands." Compl. ¶ 20. Plaintiff further alleges that the United States "has managed the Tribe's land, timber, and other non-monetary assets, approved leases, rights-of-way and grants of other interests in the Tribe's trust lands." Compl. ¶ 23. Plaintiff also alleges that the United States breached alleged trust duties relating to the management of forest assets located on Plaintiff's reservation. Compl. ¶¶ 42-60. And Plaintiff further alleges that the United States has breached a trust duty relating to the safety of dams located on Plaintiff's reservation. Compl. ¶¶ 61-65. Plaintiff claims that the United States breached alleged trust duties in managing those assets, causing economic loss. Compl. ¶¶ 57-59. Plaintiff seeks monetary damages for these alleged breaches from August 14, 1946 to the present. Compl. at 21-23.

III. STANDARD OF REVIEW

"It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Navajo Nation* (*Navajo I*), 537 U.S. 488, 502 (2003) (quoting *United States v. Mitchell* (*Mitchell II*) 463 U.S. 206, 212 (1983)). "Neither the Tucker Act nor the Indian Tucker Act creates substantive rights; they are simply jurisdictional provisions that operate to waive sovereign immunity for claims premised on other sources of law (e.g., statutes or contracts)." *United States v. Navajo Nation* (*Navajo II*), 556 U.S. 287, 290-91 (2009) (citing *United States v. Testan*, 424 U.S. 392, 400 (1976)). Jurisdiction has to be established before the Court may proceed to the merits of a case. *Steel Co. v. Citizens for*

a Better Env't, 523 U.S. 83, 88-89 (1998). Courts are presumed to lack subject-matter jurisdiction unless it is affirmatively indicated by the record; therefore, it is plaintiff's' responsibility to allege facts sufficient to establish the Court's subject-matter jurisdiction. *Renne v. Geary*, 501 U.S. 312, 316 (1991); *DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1318 (Fed. Cir. 2006) ("[I]t is settled that a party invoking federal court jurisdiction must, in the initial pleading, allege sufficient facts to establish the court's jurisdiction." (citations omitted)).

Once the Court's subject-matter jurisdiction is questioned under Rule 12(b)(1), the Court accepts as true the factual allegations in the complaint and draws all reasonable inferences in a plaintiff's favor. *Henke v. United States* 60 F.3d 795, 797 (Fed. Cir. 1995). However, a plaintiff bears the burden of proving by a preponderance of the evidence the facts sufficient to establish that the court possesses subject matter jurisdiction. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988); *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010).

When deciding a motion to dismiss, the Court may review the content of the competing pleadings, exhibits thereto, matters incorporated by reference in the pleadings, whatever is central or integral to the claim for relief or defense, and any facts of which the Court will take judicial notice. *Crusan v. United States*, 86 Fed. Cl. 415, 417-18 (2009). When a motion to dismiss challenges the Court's subject-matter jurisdiction, the Court may look beyond the pleadings and inquire into jurisdictional facts to determine whether jurisdiction exists. *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991). The determination of whether this Court has subject matter jurisdiction to hear

Plaintiff's claims is a question of law. *Toxgon Corp. v. BNFL, Inc.*, 312 F.3d 1379, 1381 (Fed. Cir. 2002).

Where the court lacks subject matter jurisdiction, "opening discovery in response to defendant's motion to dismiss would result in a waste of resources for both parties." *Crow Creek Sioux Tribe v. United States*, 2017 U.S. Claims LEXIS 604 at *2 (Fed. Cl. June 1, 2017).

IV. ARGUMENT

A. Plaintiff's non-monetary trust asset mismanagement claims pre-dating March 15, 2011 are barred by the statute of limitations.

Plaintiff alleges that the United States has mismanaged Plaintiff's non-monetary trust assets for more than seventy years. Compl. ¶¶ 42-60, p. 21. These claims are barred by the six-year statute of limitations imposed by Congress. 28 U.S.C. § 2501. In particular, Plaintiff's claim that the United States mismanaged its Forest Assets is barred by the statute of limitations because Plaintiff had actual knowledge of the manner in which its forests were managed prior to March 15, 2011.

It is beyond dispute that the limitations period set forth in 28 U.S.C. § 2501 is a jurisdictional requirement for a suit in this Court. *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1354 (Fed. Cir. 2006). In determining the date at which a claim accrues, "a landowner will be deemed to be on inquiry of activities that are openly conducted on his property." *Ingrum v. United States*, 560 F.3d 1311, 1316 (Fed. Cir. 2009). *Cotton Petroleum Corp. v. United States*, 228 Ct. Cl. 864, 867 (1981) (where activities are open and notorious, the claimant is "on inquiry as to its possible injury"). The Federal Circuit has held that breach of trust claims brought by tribes are subject to

the same six-year statute of limitations under 28 U.S.C. § 2501 that applies to other litigation against the United States under the Tucker Act and that "statutes of limitations are to be applied against the claims of Indian tribes in the same manner as against any other litigant seeking legal redress or relief from the government." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576-78 (Fed. Cir. 1988).

The statute of limitations begins to run when a "claim first accrues." 28 U.S.C. § 2501. Accrual occurs when the operative facts exist and are not inherently unknowable. *Menominee Tribe v. United States*, 726 F.2d 718, 720-22 (Fed. Cir. 1984). Statutes of limitations therefore accrue where "Indians were capable enough to seek advice, launch an inquiry, and discover through their agents the facts underlying their current claim." *Id.* at 721. So the statute of limitations accrues against Indian tribes where the tribes were not prevented "from being aware of the material facts that gave rise to their claim," even if the tribes were not "aware of the full extent of their injury." *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 672 F.3d 1021, 1030-33 (Fed. Cir. 2012) *("Shoshone IV"). See also*, *San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1350 (Fed. Cir. 2011); *Spirit Lake Tribe v. North Dakota*, 262 F.3d 732, 744 (8th Cir. 2001) ("[W]hen ownership of a disputed property would be resolved based on a single legal theory, notice of the government's claim to one tract constituted notice as to the other tracts."). Simply put, "[r]egardless of . . . trust relationship with the government, plaintiffs are charged with knowledge of their affairs and their rights at law." *Littlewolf v. Hodel*, 681 F.Supp. 929, 942 (D.D.C. 1988). The Federal Circuit has made clear that to determine when the statute of limitations begins to run, "the 'proper focus' must be 'upon the time of the [defendant's] acts, not upon the time at which the *consequences* of the acts

[become] most painful.'"). *Navajo Nation v. United States*, 631 F.3d 1268, 1277 (Fed. Cir. 2011) (quoting *Del. State Coll. v. Ricks*, 449 U.S. 250).

There is no reasonable dispute that Plaintiff was on notice of Interior's management of Plaintiff's forest assets. Indeed, Plaintiff previously brought claims against Interior that are similar and overlapping to the claims advanced in this suit. That previous case went to trial in 1986 and, as described below, irrefutably establishes that: (1) facts giving rise to the pre-2011 portions of Plaintiff's claim were not unknowable; and (2) Plaintiff possessed actual knowledge of the facts that gave rise to the pre-1986 portions of Plaintiff's claim. In fact, Plaintiff's own allegations establish that the material facts underlying Plaintiff's claims were not only knowable, but actually known to Plaintiff prior to March 15, 2011. *e.g.* Compl. ¶¶ 13 (forest assets located on "accessible commercial timberland" and "accessible commercial woodlands" and "Tribe owns and operates a saw mill"); 44 (reports issued in 1993 and 2003 "described breaches of fiduciary duty"); 49 (thinning targets in 2005 Forest Management Plan "insufficient to meet . . . fiduciary responsibilities"); 51 (2005 Forest Management Plan "estimates an annual loss of approximately $800,000 due to mistletoe infection"). Because Plaintiff filed its Complaint on March 15, 2017, any claims regarding asset mismanagement brought more than six years before this date are untimely. *See Quapaw Tribe of Okla. v. United States*, 111 Fed. Cl. 725, 733 (2013) (quoting *Shoshone IV*, 672 F.3d at 1035 n.9) (claim for breach of fiduciary duty related to non-monetary trust assets are barred where claim accrued before limitations period). This Court therefore lacks subject-matter jurisdiction over Plaintiff's natural resource mismanagement claims predating March 15, 2011, and those claims should be dismissed.

1. Plaintiff's prior breach of trust trial regarding forest asset mismanagement claims makes clear that Plaintiff possessed actual knowledge regarding the management of its forest assets between 1946 and 2011.

This is not Plaintiff's first lawsuit against the United States relating to the management of forests on Plaintiff's reservation. Plaintiff attempts to distinguish its previous litigation against the United States by arguing that the prior litigation was limited to an "accounting" claim that addressed only the period before August 14, 1946. Compl. ¶¶ 66-69. These efforts are unavailing. The Court of Claims' 1987 opinion makes clear that Plaintiff (1) was capable of vigorously litigating claims relating to alleged forest asset mismanagement, and (2) possessed actual knowledge of the post-1946 management and condition of its timber lands. *White Mountain Apache Tribe*, 11 Cl. Ct. at 618. Plaintiff's previous litigation regarding the alleged mismanagement of its forest assets or resources establishes the common-sense proposition that Plaintiff is, at a minimum, able to observe both the state of forests located out in the open on its reservation and how those forests are managed. Because the facts underlying Plaintiff's complaint are not inherently unknowable, Plaintiff's pre-2011 forest asset mismanagement claims are barred by the statute of limitations.

Plaintiff's prior forest mismanagement case was brought under the Indian Claim Commission Act and sought compensation "for mismanagement of the water, rangeland, and timber on the Fort Apache Indian Reservation." *Id*. Plaintiff presented fact and expert witness testimony at trial in September and October of 1986. *Id*. Notably, the Court of Claims conducted a site inspection as part of the trial that "assessed the present-day condition of the rangeland and timber resources, and gave vivid context to the

Government's past timber harvesting and current forest management practices." *Id.* at 621. Plaintiff's claims and presentation of evidence regarding its forest assets and the Court of Claims' 1987 opinion, as detailed below, remove any doubt as to whether, prior to 2011, Plaintiff was "capable enough to seek advice, launch an inquiry, and discover through [its] agents the facts underlying [its] current claim." *Menominee Tribe*, 726 F.2d at 721

In this case, Plaintiff alleges that the United States "failed to conduct thinning operations necessary to accelerate commercial growth" and that "thinning is necessary on hundreds of thousands of acres of the Tribe's commercial forests." Compl. ¶ 48. But in 1987, the Court of Claims' three-day site inspection "by helicopter or overland vehicle" was able to identify "dense stands of young trees all about the same age, which may require substantial thinning to be done soon." *White Mountain Apache Tribe*, 11 Cl. Ct. at 618, 621, 671. *See also id*. at 677-78 (discussing claim relating to thinning by prescribed burn). The Court's observations make clear that the distance between trees – the material fact necessary to evaluate the need for thinning – is observable, and therefore knowable, at all times between 1946 and the present. Indeed, Plaintiff argued in 1986 "that harvests exceeded sustained-yield growth for all years since 1946." *Id*. at 679. Plaintiff challenged the "stocking levels" and "level of cutting" of its forests, disagreeing with the United States "about whether the sustained-yield grown figures used by the Government in planning timber cuts actually are being achieved by the forest." *Id*. Plaintiff's previous litigation therefore makes clear that Plaintiff was capable of determining at any time relevant to this litigation that its forest is "overstocked with small-diameter trees" by simply observing its own forest. Compl. ¶ 49. This factual

record dispels any doubt about whether Plaintiff had adequate notice about any forest mismanagement claims that it had or might have against the United States.

Remarkably, in 1986 Plaintiff "objected to the BIA's use of a forest management technique known as 'prescribed burning'" to thin the forest and reduce forest fires. *White Mountain Apache Tribe*, 11 Cl. Ct. at 677-78.[1] Ironically, after criticizing BIA's use of prescribed burns as "fraudulent mismanagement" in its previous forest resource mismanagement case, *id.* at 678, Plaintiff now contends that BIA does not conduct sufficient prescribed burns to comply with its alleged fiduciary duties. Compl. ¶¶ 48-50. It is unnecessary and inappropriate for this Court to evaluate the validity of Plaintiff's shifting claims regarding the appropriateness of prescribed burns at any point prior to 2011. Any such claims are barred by the statute of limitations because the only material fact – whether prescribed burns were conducted – was known to Plaintiff before 2011. Plaintiff's claims related to any alleged failure before March 15, 2011 to thin or otherwise manage timber is barred by the statute of limitations.

The Court of Claims' description of Plaintiff's sawmill business also supports the common-sense proposition that at all times relevant to this case Plaintiff knew, or was capable of obtaining, sufficient information relating to the management of its forest assets or resources for its claims relating to the management of those assets or resources to accrue. In 1987, the Court described Plaintiff's claim as follows: "that by overcutting the forest, the Government both forced the Indian-owned Fort Apache Timber Company

[1] Plaintiff tried additional claims relating to an alleged "failure of the BIA to charge adequate stumpage rates" and "for disposal of tribal timber without compensation to the tribe" in 1991 and 1992. *White Mountain Apache Tribe of Arizona v. United States*, 25 Cl. Ct. 333 (1992).

["FATCO"] . . . to expand its sawmill facilities and created the preconditions for future reductions in employment income to tribal members when future harvests are reduced to compensate for earlier overcutting." *White Mountain Apache Tribe*, 11 Cl. Ct. at 667, 673. Plaintiff presented fact and expert witnesses and voluminous documentary evidence at trial. *Id*. at 620-21. Hal Butler, the general and sales manager of Plaintiff's sawmill, testified in support of these claims. *Id*. at 673. The Court described Mr. Butler as "an avid, interested witness committed to FATCO as an enterprise." *Id*. Based upon Mr. Butler's testimony, the Court found that the sawmill overexpansion Plaintiff complained of in 1987 "was encouraged, instead, by the increased [Annual Allowable Cut] of 92,000 [thousand board feet] contained in the 1968 Management Plan." *Id*.

In short, Plaintiff possessed knowledge regarding the status of both its forests and its sawmill business that allowed it to pursue claims relating to: (1) cutting an appropriate quantity of Plaintiff's timber; (2) BIA's thinning practices; (3) the intersection of its forest resources and its tribally-owned sawmill, and (4) management plans for its forest assets.

Plaintiff now claims that the United States breached fiduciary duties relating to: (1) cutting an appropriate quantity of Plaintiff's timber, Compl. ¶¶ 45-50; (2) BIA's thinning practices, Compl. ¶¶ 48-50; (3) the intersection of its forest resources and its tribally-owned sawmill, Compl. ¶¶ 53-56; and (4) management plans for its forest resources, Compl. ¶¶ 45-56. Plaintiff knew the pre-1986 material facts relating to these claims because it tried breach of trust claims regarding forest asset management in 1986. The material facts relating to these claims were no less knowable to Plaintiff at any point between 1986 and today. It is beyond reasonable dispute that management of Plaintiff's

forest is open and obvious as is the United States' role as trustee. Simply put, Plaintiff's trial of forest resource-related claims in 1986 establishes that its pre-2011 forest resource-related claims accrued prior to March 15, 2011 and are therefore barred by the statute of limitations. The Court should dismiss the relevant portions of Plaintiff's claims.

2. Plaintiff's allegations regarding documents published in 1993, 2003, and 2005, standing alone, are sufficient to defeat its pre-2011 forest resource mismanagement claims.

Plaintiff bases its forest resource mismanagement claims on Indian Forest Management Assessments Team ("IFMAT") reports published in 1993 and 2003 and a 2005 forest management plan. Compl. ¶¶ 42-51. Plaintiff alleges that (1) these documents were created well before March 15, 2011 and (2) these documents establish that Plaintiff's forest assets were damaged in breach of the United States' trust duties. Rather than assist Plaintiff in establishing that the United States breached any fiduciary duty, these documents instead establish that the material facts underlying Plaintiff's forest resource mismanagement claim were both knowable to, and known by, Plaintiff prior to March 15, 2011. Plaintiff's claims relating to the alleged mismanagement of its forest assets accrued well before 2011 and are therefore barred by the statute of limitations and should be dismissed.

Plaintiff admits that it possessed historical information about the state of its forest assets or resources because in 1990, "Congress required . . . periodic independent assessments 'of Indian forest lands and Indian forest land management practices." Compl. ¶ 42. Plaintiff contends that the IFMAT published reports in response to this

Congressional requirement in 1993 and 2003.[2] *Id*. Plaintiff also contends that these reports described "breaches of fiduciary duty . . . [that] occurred on the Fort Apache Indian Reservation." Compl. ¶ 44. In short, Plaintiff's own allegations establish that the alleged breaches of fiduciary duty that are the subject of its Complaint were not only knowable, but were the subjects of published reports in 1993 and 2003. This Court's analysis of Plaintiff's pre-2011 forest resource-related claims need proceed no further.

Plaintiff's description of the 2005 Forest Management Plan ("2005 Plan") is similarly fatal to its pre-2011 forest resource claims. Plaintiff cannot, and does not, contest that it possessed the 2005 Plan in late 2004.[3] Significantly, Plaintiff alleges that the 2005 Plan establishes that the United States breached an alleged fiduciary duty to "control disease and insect infestation." Compl. ¶ 51. Plaintiff alleges that the 2005 Plan "suggests that diseases and insect infestation are causing great damage to trust resources." *Id*. Plaintiff further alleges that the 2005 Plan "estimates that the Tribe has lost over 100 million board feet of timber to spruce beetle" and "estimates an annual loss

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[2] While Plaintiff states that these reports "were prepared" in response to Congressional requirements, Defendant notes that Plaintiff clearly had notice of the reports. 25 U.S.C. § 3111(b). The reports were published and relied upon by tribes. *See* Prepared Statement of Jaime Pinkham, President, Intertribal Timber Council, S. Hrg. 105-374 at 874 (Mar. 13, 1997); Prepared Statement of Nolan Colegrove, Sr., President, Intertribal Timber Council, S. Hrg. 108-795 at 874 at 320 – (Mar. 13, 1997) ("After enactment of Public Law 101–630, the first Indian Forest Management Assessment Team report was issued in November 1993 (IFMAT–I). The second independent assessment has now been conducted and its report, IFMAT–II, was issued in December 2003; Intertribal Timber Council, Forestry Assessment, available at http://www.itcnet.org/issues_projects/issues_2/forest_management/assessment.html (last visited June 29, 2017) (collecting IFMAT reports).

[3] Letter from B. Nuvamsa, BIA, to Hon. D. Massey, Sr., White Mountain Apache Tribe (Nov. 29, 2004) (Ex. 2); Letter from B. Nuvamsa, BIA, to Hon. D. Massey, Sr., White Mountain Apache Tribe (Dec. 9, 2004) (Ex. 3).

of approximately $800,000 due to mistletoe infection." *Id*. Plaintiff's own allegations therefore establish that whether portions of its forest were damaged by disease and insect infestation was not only knowable to, but actually known by, Plaintiff prior to 2011. Plaintiff further alleges that it is possible to determine which portions of its forest are infested with bark beetles through aerial surveys. *Id*. As with Plaintiff's allegations that mistletoe and spruce beetle infestations were the subject of a 2005 report, any such open and notorious bark beetle infestations are inherently knowable. Plaintiff's claims relating to any disease and infestation that existed prior to March 15, 2011 must therefore be dismissed.[4] *Shoshone IV*, 672 F.3d at 1030-33 (statute of limitations accrues even if the tribes were not "aware of the full extent of their injury").

Similarly, Plaintiff alleges that the 2005 Plan attempts to address fire risk by "recommending 10,000 acres per year of mechanical treatment in commercial forests, 30,000 acres per year of prescribed burns in commercial forests, and 30,000 to 40,000 acres per year of prescribed burns in woodlands." Compl. ¶ 49. Plaintiff's claim that the 2005 Plan's recommendations were "insufficient to meet [the United States'] fiduciary responsibilities," *id*., was both knowable and known when the recommendations were adopted in 2005.

And while the Court should dismiss the pre-2011 portions of Plaintiff's forest resource claim based solely upon Plaintiff's own characterization of the 2005 Plan, the

[4] The United States does not concede that it possesses a money-mandating trust duty to prevent disease or infestation from harming timber located on Plaintiff's reservation. It expects to address the merits of any issues or claims relating to forest disease or infestation post-dating 2011, as the case moves forward or the Court deems appropriate.

plan itself provides even more support for dismissing those claims. *See* Forest Management Plan 2005-2014 (Attached as Exhibit ("Ex.") 1). The 2005 Plan assesses issues related to "forest pests & damaging agents" beyond the beetle and mistletoe damages identified in Plaintiff's Complaint. Compare 2005 Plan at 293-306 to Compl. ¶ 51. The 2005 Plan contains information regarding the funds received from timber sales. Compare 2005 Plan at 309-317 to Compl. ¶¶ 52-54, 56, 59-60.[5] The 2005 Plan contains a harvest schedule that identifies the timber cuts planned from 2005 through 2014 by area and quantify. Compare 2005 Plan at 325-29 with Compl. ¶¶ 52-56. The 2005 Plan contains information regarding the standards that Interior used for forest inventory, planning, monitoring, and development. Compare 2005 Plan at 169-210 with Compl. ¶ 46. The 2005 Plan contains extensive discussions of efforts to maintain or improve forest health. Compare 2005 Plan at 196-210 with Compl. ¶ 47. Plaintiff cannot plausibly maintain that it lacked the facts necessary to bring its current action prior to 2011 when the 2005 Plan that Plaintiff relies upon comprehensively describes both past and planned management of Plaintiff's forest assets.

It is irrelevant whether Plaintiff is correct that the IMFAT reports and the 2005 Plan both constituted and disclosed breaches of trust. Plaintiff's allegations makes clear that the facts underlying Plaintiff's forest asset mismanagement claim were not only knowable, but actually known by Plaintiff, prior to 2011. The pre-2011 forest asset management claims are therefore barred by the statute of limitations. Accordingly,

[5] The 2005 Plan also put Plaintiff on notice regarding all information contained in the 1990 history book, "Fort Apache Forestry: A History of Timber Management and Forest Protection on the Fort Apache Indian Reservation, 1870-1985." 2005 Plan at 180.

Plaintiffs pre-March 15, 2011 claims for forest mismanagement must be dismissed for lack of jurisdiction. *Hopland Band of Pomo Indians*, 855 F.2d at 1576-78.

3. Plaintiff's other admissions regarding its pre-2011 knowledge of the facts underlying its current forest asset claim bar the pre-2011 portion of that claim.

Plaintiff also makes a series of allegations establishing that Plaintiff knew material facts relating to the management of its forest assets prior to 2011 because Plaintiff was managing those resources. As discussed below, Plaintiff admits that it was thinning its own forests and operating its own sawmill. Plaintiff cannot seriously contest that it was unaware of the amount of money it received from the Bureau of Indian Affairs ("BIA") or the amount of money it expended on thinning prior to 2011. Nor can Plaintiff seriously contest that it was unaware of economic issues relating to the design of its own sawmill or the trees that sawmill processed prior to 2011. The pre-2011 portion of those claims are barred by the statute of limitations.

a. Plaintiff's claims relating to work it conducted with funds from the Bureau of Indian Affairs

Plaintiff claims that the "United States eliminated the staff and funding necessary to fulfill its trust responsibilities, forcing the Tribe to take on management costs such as thinning and road maintenance that must be borne by the United States." Compl. ¶ 44. Plaintiff similarly alleges that inadequate road maintenance "led to tens of thousands of dollars of unnecessary trucking and road maintenance expenses" in a recent timber sale. Similarly, Plaintiff's forest management claims based upon "the United States impos[ing] costs on the Tribe and WMATCO," by "requir[ing]the Tribe to perform extensive thinning and road construction in timber sales without adequate compensation or

support," Compl. ¶ 58, are barred by the statute of limitations. Plaintiff was manifestly aware of whether it assumed management costs or incurred "unnecessary" expenses at the time the costs were incurred.

Plaintiff's reference to its assumption of certain management duties from the United States is significant for two reasons. Plaintiff assumed forest management duties from the United States under a program designed to further Indian self-determination. "Congress authorized the Secretary of the Interior and tribes to enter into contracts, commonly referred to as self-determination or P.L. 638 contracts, 'in which tribes promise to supply federally funded services, for example tribal health services, that a Government agency would otherwise provide.' " *Flathead Irrigation Dist. v. Jewell*, 121 F. Supp. 3d 1008, 1012 (D. Mont. 2015) (quoting *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 634 (2005)). It is indisputable that Plaintiff knew the amount of money it received under its P.L. 638 contracts for forestry thinning at the time it received the money. For example, Plaintiff knew that it received $282,163.00 under its assumption of the "Forestry Thinning Program" for Fiscal Year 1997. Amendment of Solicitation, Modification of Contract No. 10 (Sept. 30, 1997) (Ex. 4). And Plaintiff knew whether those funds were sufficient for thinning because it was conducting that thinning. Claims relating to entering into a P.L. 638 contract or providing annual funding pursuant to a P.L. 638 contract therefore accrue at the time the contract was entered into or funded. *Flathead Irrigation Dist.*, 121 F. Supp. 3d at 1021-1022; *Boye v. United States*, 90 Fed. Cl. 392, 405 (Fed. Cl. 2009). Plaintiff's challenges to the pre-2011 funding of thinning operations and the adequacy of compensation or support provided by the United States to conduct those operations, Compl. ¶¶ 44, 48-50, 57-58, are barred by

the statute of limitations because Plaintiff was aware of the amount of money it received to conduct thinning operations.

Plaintiff's assumption of certain forest management functions – particularly its management of thinning operations – is significant for a second reason. Plaintiff suggests the United States failed to conduct sufficient thinning operations. Compl. ¶¶ 48-50. But Plaintiff's acknowledgement that it has assumed responsibility for its thinning and road construction – and related claim that the United States breached a trust duty by failing to provide adequate compensation in support of Plaintiff – defeats the pre-2011 component of these claims. Plaintiff knew that the forest needed to be thinned for a number of reasons, including that Plaintiff was conducting thinning operations. Plaintiff knew the nature of thinning operations that were planned, in part, because Plaintiff was conducting those operations. Plaintiff's claims relating to work it performed under its P.L. 638 contracts prior to 2011, including the funding for that work, are therefore barred by the statute of limitations.

b. Plaintiff's claims relating to Plaintiff's tribally-owned and operated sawmill

Similarly, several of Plaintiff's claims are barred by the statute of limitations because they relate to Plaintiff's management of its own sawmill. Plaintiff alleges that the United States breached unidentified fiduciary duties by managing timber located on Plaintiff's reservation in a manner that failed "to put forward sufficient timber sales to maintain a viable sawmill on the Fort Apache Indian Reservation." Compl. ¶¶ 50, 52-56. Plaintiff further alleges that the "United States failed to achieve the average annual allowable cut prescribed in the [2005 Plan]." Compl. ¶ 55. There can be no serious

dispute that the facts relating to Plaintiff's processing of timber at Plaintiff's own sawmill were known to Plaintiff at the time processing occurred. The pre-2011 component of these claims are therefore barred by the statute of limitations.

Nor can Plaintiff pursue today any claim relating to an alleged failure to help tribal businesses prior to 2011. Plaintiff alleges that the United States breached an unidentified fiduciary duty by not responding to the alleged change in the composition of Plaintiff's timber due to inadequate tree thinning, "assist[ing] the Tribe in updating its sawmill to accommodate . . . small diameter trees," or "developing markets for small diameter trees." Compl. ¶¶ 53-56. Plaintiff acknowledges that it "owns and operates" the sawmill and that it processes its timber at its sawmill. Compl. ¶¶ 13, 56. Plaintiff cannot maintain that it was unaware of whether the United States was updating Plaintiff's sawmill or developing markets for Plaintiff's trees when Plaintiff owned the sawmill that was processing its trees. Compl. ¶¶ 13, 53, 54. Therefore, to the extent any such duties existed prior to March 15, 2011, the statute of limitations bars Plaintiff's claims relating to the alleged breach of those duties.

4. To the extent that Plaintiff's bare references to minerals, grazing contamination, rights-of-way, and leases can be construed as trust resource mismanagement claims, the pre-2011 portions of those claims are barred.

Plaintiff's remaining non-monetary asset mismanagement claims were similarly knowable prior to March 15, 2011. As discussed below, those claims are therefore barred by the statute of limitations.

As an initial matter, Plaintiff's remaining non-monetary asset claims are less specific than its forest asset claims. Plaintiff makes passing reference to alleged

minerals, grazing land, contamination from hazardous waste or pollution, rights-of-way, and leases. Compl. ¶¶ 15, 20-21, 50, 52. As discussed in Section IV(B)(1), below, the five paragraphs Plaintiff devotes to its dam safety claim fail to allege sufficient facts to establish this Court's jurisdiction. *See DaimlerChrysler Corp.*, 442 F.3d at 1318. Plaintiff does not even attempt to include a separate claim relating to minerals, grazing land, contamination from hazardous waste or pollution, rights-of-way, or leases in its Complaint, much less describe the legal or factual basis for such claims. Any claims relating to these resources should therefore be dismissed.[6]

To the extent that Plaintiff's bare references to these issues might indicate Plaintiff's desire to seek compensation relating to those resources, these claims should be dismissed due to Plaintiff's failure to plead sufficient facts to establish this Court's jurisdiction. *See Dimare Fresh, Inc. v. United States*, 808 F.3d 1301, 1306 (Fed. Cir. 2015). While Plaintiff has not plead sufficient facts to allow the United States to comprehend the nature of any claims regarding the minerals, grazing land, contamination from hazardous waste or pollution, rights-of-way, and leases, the pre-2011 components of any such non-monetary asset claims are barred because the material facts were either known or knowable prior to 2011. This is illustrated by Plaintiff's extensive litigation of grazing claims against the United States prior to 2011.

The Complaint makes passing reference to grazing issues. Compl. ¶¶ 21 (citing grazing regulations), 50 (suggesting that thinning operations have some impact on

[6] To the extent that Plaintiff's claims survive this motion to dismiss, it may be necessary for Plaintiff to provide a more definite statement of its claims pursuant to RCFC 12(e).

"grazing, recreation, and cultural and aesthetic values"), 52 (mentioning "promot[ing] grazing" as an important function of woodlands). Plaintiff tried a series of grazing claims in the same 1986 trial that resolved its forest asset claims. *White Mountain Apache Tribe*, 11 Cl. Ct. at 618, 647-667. As with Plaintiff's forest asset mismanagement claims, Plaintiff's litigation of its pre-1946 grazing claims makes clear that the condition of Plaintiff's rangeland was not only knowable, but Plaintiff actually knew and presented evidence regarding the condition of its rangeland in 1986. The 1986 trial focused on alleged overgrazing, which Plaintiff contended caused "widespread erosion and deterioration of the land and encroachment of juniper and pinyon pine trees." *Id*. at 648. And Plaintiff sought compensation for the period after 1946 under the theory that pre-1946 wrongs continued past the Indian Claims Commission's August 13, 1946 jurisdictional cutoff. *Id*. at 662-63. Indeed, Plaintiff presented evidence and sought damages relating to juniper eradication programs that did not even begin until 1947. *Id.* To the extent Plaintiff sets forth any grazing claims, Plaintiff's trial of grazing claims in 1986 makes clear that the condition and management of Plaintiff's rangeland was clearly knowable to Plaintiff prior to 2011. The pre-2011 components of those claims are therefore barred by the statute of limitations.

5. Plaintiff's claims that predate March 15, 2011 are not saved by a series of Appropriations Acts passed by Congress prior to 2016.

Plaintiff cannot rely upon a series of Appropriations Acts to argue that the statute of limitations with respect to its non-monetary asset mismanagement claims has been tolled until it receives an accounting. The Appropriations Acts are inapplicable to, and

therefore do not save, Plaintiff's pre-2011 natural resource mismanagement claims for three distinct and insurmountable reasons.

First, Plaintiff only references the Appropriations Acts in its Trust Funds claim. Compl. ¶¶ 39-40. This limited reference is ostensibly because the Appropriations Acts do not address, much less toll, natural resource mismanagement claims. The Acts tolled the statute of limitations for tribal claims related to the mismanagement of tribal trust funds until a tribe is provided with an accounting from which it could determine whether it had suffered a loss. *Shoshone Indian Tribe v. United States ("Shoshone II")*, 364 F.3d 1339, 1347 (Fed. Cir 2004). Rather, as the Federal Circuit directly stated, the Appropriations Acts "appl[y] to losses or mismanagement of trust funds only." *Shoshone IV*, 672 F.3d at 1034. They did not apply to "claims involving [non-fund] trust assets." *Shoshone II*, 364 F.3d at 1350. As such, "[a] claim premised upon the terms of a lease being suboptimal is a claim related to trust assets, and, therefore, outside of the scope" of the Appropriations Act. *Shoshone IV*, 672 F.3d at 1035. Similarly, "a claim premised upon the Government's failure to collect royalties in accordance with a hypothetical lease is a claim for mismanagement of trust assets." *Id.* In this case, Plaintiff alleges claims based upon mismanagement of forest assets – a non-monetary trust asset or resource. Compl. ¶¶ 42-60. Plaintiff's allegations have nothing to do with "losses to or mismanagement of trust funds." The Appropriations Acts would not have applied to those claims even if such acts were still in effect. Therefore, the statute of limitations as set forth in 28 U.S.C. § 2501 is not tolled for these claims.

Second, the 2014 Appropriations Acts that Plaintiff relies upon, Compl. ¶ 40, expired by the time Plaintiff filed its Complaint. The Interior Department's

Appropriations Acts with the tolling provision were first adopted in Fiscal Year 1990 and were adopted each year thereafter through Fiscal Year 2015, with minor changes in Fiscal Years 1991 and 1993. For fiscal year 2016, however, no such tolling provision was included as part of Interior's Appropriations Act. *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, Div. G. Title I. Plaintiff did not lodge its complaint until March 15, 2017. Plaintiff therefore cannot rely on expired Appropriations Acts from prior years. Plaintiff's pre-2011 claims are barred by the normally applicable, six-year statute of limitations. Without a tolling provision, the statute of limitations for Plaintiff's claims ran from the date they accrued. As discussed above, Plaintiff's prior litigation and Complaint make clear that its pre-2011 natural resource mismanagement claims accrued and were knowable prior to 2011. *See e.g.*, Compl. ¶¶ 42-60. Here, that would mean that any claims regarding mismanagement that occurred more than six years prior to filing of the Complaint are untimely. This Court, therefore, lacks subject matter jurisdiction over any claims by Plaintiff that occurred before March 15, 2011, and should therefore dismiss those claims.

Third, Plaintiff's claims relating to the management of its timber are "not . . . the sort of claim for which a final accounting would be necessary to put a plaintiff on notice of a claim, because claimants knew or should have known" about the material facts giving rise to its claim. *Wolfchild v. United States*, 731 F.3d 1280, 1291 (Fed. Cir. 2013). The Appropriations Acts provided only "that the statute of limitations does not commence to run for claims 'concerning losses to or mismanagement of trust funds' until the beneficiary receives 'an accounting . . . from which [it] can determine whether there has been a loss.'" *Id*. Significantly, "the two quoted phrases are properly read together:

the claims about 'losses' or 'mismanagement' that are protected by this provision are those for which an accounting matters in allowing a claimant to identify and prove the harm-causing act at issue; otherwise, the ITAS would give claimants the right to wait for an accounting that they do not need." *Id.* Here, Plaintiff's Complaint makes clear that it needs no accounting to bring its claims relating to the alleged mismanagement of its "forest assets."

Tribal plaintiffs have no right to sleep on their claims for decades.[7] Congress imposed a statute of limitations that requires plaintiffs to bring their claims within 6 years. *John R. Sand & Gravel Co.*, 457 F.3d at 1354. Here, Plaintiff seeks compensation for alleged mismanagement of its forest assets since 1946. During this period, Plaintiff (1) presented extensive evidence to the Court of Claims regarding the state of its forest assets; (2) bases its claims on reports from 1993 and 2003 that it claims disclose breaches of trust, Compl. ¶¶ 42-44; (3) bases its claims on a 2005 Plan that it alleges was "insufficient to meet [the United States'] fiduciary responsibilities" and disclosed extensive damage to Plaintiff's forest, Compl. ¶¶ 49, 51. Finally, Plaintiff's multiple specific allegations regarding the ways in which its forest assets have been harmed undermine its suggestion that it needs any additional accounting for its forest asset claims to accrue.[8] As in *Wolfchild*, Plaintiff needs no accounting in order to determine whether

[7] The alternative – that Tribes can rely on the outdated Appropriations Acts to allow damages to accrue for decades rather than bringing problems to the United States' attention as required by the statute of limitations – is unsustainable as a matter of both policy and law.

[8] As noted above, Plaintiff is incorrect to the extent it asserts, Compl. ¶ 44, that it must know the full extent of its injury for its claims to accrue. *Shoshone IV*, 672 F.3d at 1030-33.

it suffered financial injury as a result of the United States' alleged mismanagement of Plaintiff's forest assets or resources. The Appropriations Acts, even if in effect, "do[] not save this claim from untimeliness." *Wolfchild*, 731 F.3d at 1291.

6. Plaintiff's trust fund accounting and mismanagement claims pre-dating March 15, 2011 are barred by the statute of limitations.

Pursuant to the American Indian Trust Management Reform Act of 1994, the United States has provided Plaintiff with sufficient information regarding its trust funds to cause any claims relating to the accounting for, or mismanagement of, those funds prior to March 15, 2011 to accrue by March 15, 2011. Those claims are therefore barred by the statute of limitations.

Plaintiff's trust fund claims are predicated on its assertion that the United States has failed to provide an accounting of Plaintiff's trust funds from 1946 to the present. Compl. ¶ 37. But Plaintiffs cannot state an actionable accounting duty based on theories of control untethered to any statute or regulation. *Navajo II*, 556 U.S. at 290-91.

"The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011). For a duty to be judicially enforceable, a tribe first "must identify a substantive source of law that establishes specific fiduciary or other duties." *Navajo I*, 537 U.S. at 506. That "substantive source of law" must be a "statutory or regulatory prescription," not arising merely out of a "general trust relationship." *Id.; Jicarilla*, 564 U.S. at 177. Second, a tribe must show that such source of law "can be fairly interpreted as mandating compensation for damages sustained as a result of a breach of [such] duties." *Navajo II*, 556 U.S. at 291. Although "principles of trust law

might be relevant" to that subsequent and separate question of whether a specific statute or regulation creates a *money-mandating* duty, *id*., they have no place in the threshold inquiry into whether there is any duty in the first place. That threshold issue is the relevant inquiry here. As set forth in the *Navajo* and *Jicarilla* decisions the United States is not a "general trustee" against which common-law trust duties, divorced from any statute or regulation, are judicially enforceable. Plaintiffs' arguments to the contrary are without support. Plaintiff sites only two statutes that address any accounting duty owed to Plaintiff. Compl. ¶ 32. Neither imposes any duty upon the United States to provide Plaintiff with an accounting back to 1946. More importantly, no statute tolls Plaintiff's pre-2011 trust fund claims.

Section 4044 of the Trust Fund Management Reform Act required the Interior Department to conduct a retrospective reconciliation of tribal trust funds. Congress expressly limited Interior's duty to conduct any retrospective reconciliation for tribes by giving Interior approximately 17 months to complete three tasks: (1) complete its reconciliation of tribal "trust fund accounts;" (2) obtain an attestation from each tribe that the reconciliation was "as full and complete accounting as possible" or a statement that the tribe disputed its balances; and (3) submit "by May 31, 1996, a report identifying for each tribal trust fund account for which the Secretary is responsible a balance reconciled as of September 30, 1995." 25 U.S.C. § 4044. By May 31, 1996, Interior completed these three steps, fulfilling its statutory duty under Section 4044. Between 2002 and 2005, Congress tolled the statute of limitations for potential claims arising from the tribal receipt of trust reconciliation project results. *See* An Act to Encourage the Negotiated Settlement of Tribal Claims, Pub. L. No. 107-153, 116 Stat. 79 (2002) (codified at 25

U.S.C. § 4044 note). The legislation deferred the deadline for tribes to "dispute[] the balance of the account holder's account as reconciled [and/or] . . . dispute[] the Secretary's reconciled balance," 25 U.S.C. § 4044(2)(B). The result of the law is that the statute of limitations for such claims ran on December 31, 2006.[9] *See* 25 U.S.C. § 4044 note. Therefore, any claims challenging the trust reconciliation project results are time-barred and should be dismissed. Put another way, Plaintiff's pre-1994 claims are barred by the statute of limitations.

Under Section 4011 of the 1994 American Indian Trust Fund Management Reform Act, the Interior Department must account for the Indian trust funds on a prospective basis, which includes the obligation to account "for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to section 162a of this title," to be provided in the form of a "statement of performance [also known as "a periodic statement of performance"] to each Indian tribe and individual with respect to whom funds are deposited or invested pursuant to section 162a of this title." 25 U.S.C. § 4011(a)-(b). The periodic statement of performance for each period is required to contain "(1) the source, type, and status of the funds; (2) the beginning balance; (3) the gains and losses; (4) receipts and disbursements; and (5) the ending balance." *Id*. Additionally, the Secretary has to conduct an annual audit "of all funds held in trust by the United States

[9] Pub. L. No. 107-153 stated that the "deemed received" date was December 31, 1999, thus extending the six-year statute of limitations to December 31, 2005. On December 31, 2005, Pub. L. No. 109-158, 119 Stat. 1954 (2005), changed the "deemed received" date to December 31, 2000, thereby extending one last time the deadline for challenging the trust reconciliation project results to December 31, 2006.

for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to section 162a of this title." 25 U.S.C. § 4011(c).

Since 1995, Interior therefore provided the Plaintiff with periodic statements of performance ("PSPs") for Plaintiff's trust accounts in compliance with Section 4011. *See, e.g.* PSPs for period ending December 31, 2010 (Ex. 5); PSPs for period ending January 31, 2011 (Ex. 6); PSPs for period ending February 28, 2011 (Ex. 7). Plaintiff's pre-2011 trust fund mismanagement claims are barred because, after 15 years, Congress allowed the tolling provision upon which Plaintiff relies to expire after Interior provided all tribes with periodic statements of performance detailing the management of tribal trust funds for fifteen years. During that 15-year period, over 115 tribes relied upon the Appropriations Acts to bring trust fund accounting and mismanagement claims against the United States. Plaintiff did not. The portion of its trust fund accounting and mismanagement claims that pre-date March 15, 2011 are therefore untimely.

As discussed above, the 2014 Appropriations Acts Plaintiff relies upon, Compl. ¶ 40, expired by the time Plaintiff filed its Complaint. Plaintiff simply cannot rely on expired Appropriations Acts to toll its trust funds claim. Since Plaintiff's Complaint was filed on March 15, 2017, there is no tolling available to Plaintiff, and its claims are barred by the six-year statute of limitation set forth in 28 U.S.C. § 2501. Without a tolling provision, the statute of limitations for Plaintiff's claims ran from the date that they accrued. Here, those of Plaintiff's trust fund accounting and mismanagement claims that occurred more than six years prior to filing of the complaint are untimely. Thus this Court lacks subject matter jurisdiction over any trust fund-related claims that occurred before March 15, 2011, and the Court should dismiss those claims.

B. This Court should dismiss Count III of Plaintiff's claim in its entirety.

In Count III of the Complaint, Compl. ¶¶ 61-65, Plaintiff alleges essentially two categories of claims relating to 14 dams on its reservation: (1) claims based on the United States' alleged failure to maintain Indian dams located on Plaintiff's reservation, and (2) claims for economic damages allegedly incurred as a result of dam maintenance actually undertaken by the United States. Both categories of claims should be dismissed for lack of subject matter jurisdiction because Plaintiff does not identify a money mandating fiduciary duty to maintain dams in any particular manner. The portion of Plaintiff's complaint seeking damages for an alleged failure to conduct unspecified repairs at unspecified dams – repairs that may yet be conducted – is also barred because Plaintiff fails to state a claim upon which relief can be granted and lacks standing to bring claims for such speculative future injuries. Thus this Court should grant the United States' motion as to Count III in its entirety.

1. Plaintiff fails to state a claim regarding the United States' alleged failure to provide requisite dam safety and perform necessary dam maintenance.

To avoid dismissal for failure to state a claim, a complaint must allege facts "plausibly suggesting (not merely consistent with)" a showing of entitlement to relief. *Dimare Fresh, Inc.*, 808 F.3d at 1306 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although "detailed factual allegations" are not required to satisfy this requirement, a successful complaint must contain "more than labels and conclusions" and plaintiff must plead sufficient factual allegations "to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In assessing whether Plaintiff has met this burden, the Court "'must accept well-pleaded

factual allegations as true and must draw all reasonable inferences in favor of the claimant.'" *Bell/Heery v. United States*, 739 F.3d 1324, 1330 (Fed. Cir. 2017). But "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). And plaintiffs cannot rely on "bare assertions" or conclusory allegations. *Id.* at 680-81.

Plaintiff's dam safety claim, Compl. ¶¶ 61-65, falls far short of describing any breach of trust, much less plausibly suggesting that Plaintiff is entitled to any relief. The factual allegations for Plaintiff's dam safety claim consist of two paragraphs alleging that the "United States constructed many dams and embankments" on Plaintiff's reservation and has "failed to perform the necessary maintenance" on some unidentified subset of 12 "high hazard" and 2 "substantial hazard" dams. Compl. ¶¶ 62-63.[10] Plaintiff provides no information about the names, locates, conditions, or maintenance deficiencies of these dams. In particular, Plaintiff does not identify any dams on its reservation that are in need of immediate repair. Nor does Plaintiff allege how it was, or could have been, injured by any unspecified maintenance deficiency. Plaintiff's conclusory allegations are insufficient to "raise a right to relief above the speculative level." *See Bell Atlantic Corp.*, 550 U.S. at 555.

[10] Plaintiff's recitation of the findings contained in the Indian Dams Safety Act, Compl. ¶ 61, regarding the need to correct safety deficiencies to "avoid future threats to human life and property" is insufficient to show that any such safety deficiencies exist on Plaintiff's reservation, much less that Plaintiff has suffered an injury from any such safety deficiencies.

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

Plaintiff's dam safety claims should also be dismissed because Plaintiff identifies no statute imposing a money mandating duty upon the United States to maintain or repair the dams on Plaintiff's reservation in any manner.[11] Plaintiff's dam-related claims should therefore be dismissed.

The Indian Tucker Act is "a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages . . . . [T]he Act merely confers jurisdiction upon [the United States Court of Federal Claims] whenever the substantive right exists." *Testan*, 424 U.S. at 398. The Federal Circuit therefore uses a two-part test to determine whether this court has jurisdiction over claims brought pursuant to the Indian Tucker Act. *Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015). To satisfy the first prong of the test, Plaintiff "'must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed to faithfully perform those duties.'" *Id*. (quoting *Navajo II*, 556 U.S. at 290). Such "trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law." *Jicarilla*, 564 U.S. at 165. *See also Menominee Indian Tribe of Wisc. v. United States*, 136 S.Ct. 750, 757. Indeed, "[w]hen the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated . . . , neither the Government's 'control' over

[11] While Plaintiff has not alleged sufficient facts to establish that any dam poses an imminent threat to life or property, this court has no jurisdiction over claims for injunctive relief. *See Kanemoto v. Reno*, 41 F.3d 641, 644-645 (Fed. Cir. 1994).

[assets claimed by Indians] nor common-law trust principles matter." *Jicarilla*, 564 U.S. at 177 (quoting *Navajo Nation II*, 556 U.S. 287, 302 (2009).

The test's second prong is satisfied only if "the substantive source of law can be fairly interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the governing law] impose[s]." *Hopi Tribe*, 782 F.3d at 667 (quoting *Navajo II*, at 290-91). As discussed below, neither the Indian Dams Safety Act nor 25 U.S.C. § 162a(d)(8) satisfies either prong of this test. Accordingly, Plaintiff's dam safety breach of trust claim should be dismissed for lack of subject matter jurisdiction.

a. The Indian Dams Safety Act

Plaintiff's claims that the Indian Dams Safety Act of 1994, 25 U.S.C. § 3801 *et seq.*, imposes on the United States an affirmative, actionable duty "to manage, maintain, and repair the dams on the Fort Apache Indian Reservation" and "to avoid and mitigate losses to the Tribe when the United States' maintenance of dams causes economic or other injury," Compl. at 22. Plaintiff's claim is without merit and should be dismissed.

The Indian Dams Safety Act was enacted to establish a "dam maintenance and repair program" within the BIA. 25 U.S.C. § 3801(5). Through this program, the Secretary was directed to develop a list of dams located on Indian lands and to identify each dam's (1) dam safety condition classification and (2) risk hazard classification.[12] 25

[12] A dam's hazard classification is a distinct concept from its safety condition classification. *Compare* 25 U.S.C. § 3803(e)(3) (defining dam hazard classification) and 25 U.S.C. § 3803(e)(2) (defining dam safety condition classifications). A dam's "safety condition classification" is determined based on known existing or potential dam safety deficiencies and the dam's likely performance under various conditions. The five safety condition classifications are: satisfactory, fair, conditionally poor, poor, and unsatisfactory. The BIA rates each dam's safety and maintenance needs according to the Dam Safety Prioritization Rating ("DSPR") system developed by the Bureau of

U.S.C. § 3803(e). Congress further directed the Secretary to "develop a maintenance action plan . . . for those dams with a risk hazard rating of high or significant." 25 U.S.C. § 3803(d). Although the goal of the program is to maintain Indian dams in a "satisfactory condition on a long-term basis," the Act does not include any deadlines for correcting maintenance deficiencies or otherwise require any specific action with respect to individual dams. 25 U.S.C. § 3803(a). Rather, the Secretary must make annual reports to Congress detailing the status of each dam with a maintenance action plan and the projected total and annual costs and schedule for rehabilitation or repair for each dam. 25 U.S.C. 3803(i).

The Indian Dams Safety Act establishes a process by which the Secretary, acting through the BIA, is to assess and prioritize Indian dam maintenance and repair needs with the long-term goal of maintaining all Indian dams in a satisfactory condition. The Act does not impose on the Secretary any specific duty to take any specific repair or rehabilitation action on any specific dam. Instead, the Act requires the Secretary to report to Congress regarding "the projected total cost and a schedule of the projected annual cost of rehabilitation or repair for each dam under this section." 25 USC § 3803(i). The Act envisions that: (1) Interior will conduct maintenance in the future; (2) with the limited funds appropriated by Congress after receiving Interior's reports. *Cf. Cobell v. Salazar*,

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Reclamation. The DSPR system enables the BIA to prioritize dam maintenance and repairs based on the safety condition of each dam. Plaintiff does not allege that any dam on Plaintiff's reservation has any particular safety condition classification or DPSR. Compl. ¶ 63. In contrast, a dam's "risk hazard classification" signifies the likelihood that significant property damage or loss of life would occur in the event of a catastrophic dam failure. There are three risk hazard classifications: high, significant, and low. 25 U.S.C. § 3803(e). "Substantial hazard" is not a recognized risk hazard classification.

573 F.3d 808, 812-813 (D.C. Cir. 2009) (where applicable trust duty exists, courts "cannot ignore the responsibility of the agency for careful stewardship of limited government resources); *Hopi Tribe*, 782 F.3d at 671 (no fiduciary obligation to ensure adequate water quality). This statutory scheme of reporting to Congress regarding the limited future maintenance work Interior plans to do with its limited budget cannot fairly be read to impose on Interior a mandatory fiduciary duty to repair dams on Plaintiff's reservation.

The Indian Dams Safety Act does not impose a money mandating fiduciary duty with respect to the one repair project specifically addressed in Plaintiff's complaint. Plaintiff alleges that the United States mismanaged repairs to Davis Dam in 2014, thereby resulting in alleged lost tourism revenue and mitigation costs. Compl. ¶¶ 64-65. Because the Indian Dams Safety Act is focused on future dam maintenance for safety purposes, it cannot fairly be read to impose a money mandating fiduciary duty to manage repairs in any particular manner. Nor can it be read to require the United States to compensate tribes for losses of tourism revenue caused by maintenance projects. To the extent Plaintiff relies on the Indian Dams Safety Act to establish this Court's jurisdiction, Plaintiff's dam safety breach of trust claim should therefore be dismissed.

Even if this Court were to find that the Indian Dams Safety Act satisfies the first prong of the money-mandating analysis, Plaintiff's claims should still be dismissed because the Act does not mandate compensation for damages in the event of an alleged breach. First, the Act does not mention or even allude to claims for damages by tribes against the United States. The Act's title and substance are instead focused on dam safety. 25 USC § 3801 *et seq*. *Cf*. Compl. ¶ 61 (alleging that purpose of Act is " 'to avoid future threats to human life and property.' " (quoting 25 U.S.C. § 3801(3)). Second, 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 Indian Dams Safety Act, which is to bring about necessary dam repairs. Accordingly, Plaintiff's claims should be dismissed for lack of subject matter jurisdiction.

b. 25 USC 162a(d)(8)

Plaintiff also relies on 25 U.S.C. § 162a(d)(8) to establish a purported money mandating fiduciary duty upon the United States to dams on Indian reservations. *See* Compl. ¶¶ 62-63, p. 22. The statute states:

> (d) Trust responsibilities of Secretary of the Interior
> The Secretary's proper discharge of the trust responsibilities of the United States shall include (but are not limited to) the following:
> . . .
> (8) Appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands.

Section 162a(d)(8) does not create specific "rights creating or duty-imposing" prescriptions for managing any dams. Rather, the statute concerns the Secretary's responsibility with respect to the appropriate management and investment of Indian trust funds, rather than non-monetary assets. *Jicarilla*, 564 U.S. at 178 ("These provisions [including 25 U.S.C. § 162a] define the trust responsibilities of the United States with respect to tribal funds." (internal quotation marks and citation omitted); *Hopi*, 782 F.3d at 670 n.1 (stating that 25 U.S.C. § 162a(d)(8) "detail[s] the United States' trust responsibilities in managing tribal funds and investments."); *Osage Tribe of Indians of Okla. v. United States* cites section 162a as one of the statutes "governing the investment of Indian trust funds." 93 Fed. Cl. 1, 26 (2010); *Crow Creek Sioux Tribe v. United States*, No. 16-760C, 2017 U.S. Claims LEXIS 604 at *10 (Fed. Cl. June 1, 2017) (stating "25

U.S.C. § 162a(d)(8) does direct the government to manage the natural resources of Indian tribes, but does not direct any specific actions to be taken by the government in that management" and holding that "absent statutory authority to direct the government to more affirmatively manage Indian natural resources, and absent an actual compensable injury" the court lacked jurisdiction to hear the tribe's claims). Furthermore, man-made dams are not "natural resources." Therefore, section 162a(d)(8) does not provide the substantive source of law necessary to supply this Court with subject matter jurisdiction to award damages over Plaintiff's claims for the United States' alleged failure to the rehabilitation and maintenance of dams on Indian reservations.

3. Plaintiff fails to satisfy the injury and redressability requirements in order to establish that it has standing to assert dam-related claims.

Plaintiff bears the burden of proof to establish federal jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). To meet the Article III standing requirements, Plaintiff must establish three elements. *Id.* at 560. First, Plaintiff must show that it has suffered an "injury in fact" that is "concrete and particularized" and actual or imminent, not "conjectural" or "hypothetical." *Id.* (citations omitted). Allegations of possible future injuries are not sufficient. *Clapper v. Amnesty Int'l*, 133 S. Ct. 1138, 1147 (2013); *La. Envtl. Action Network v. Browner*, 87 F.3d 1379, 1384 (D.C. Cir.1996) (claim that "dire consequences . . . would befall it if" certain events were to transpire insufficient to "state an injury sufficiently imminent and concrete for constitutional standing"). And Indian tribes suffer no injury from, and therefore lack standing to challenge, the distribution of funds to which they have no entitlement. *Hoopa Valley Tribe v. United States*, 597 F.3d 1278, 1283 (Fed. Cir. 2010). Second, Plaintiff

must establish a causal connection between the injuries complained of and the United States' action. *Lujan*, 504 U.S. at 560-61 (citations omitted). Third, Plaintiff must show it is likely, as opposed to merely speculative, that the injury will be addressed by a favorable decision of the Court. *Id.* at 561.

Plaintiff has not made the requisite showing of actual injury from any failure by the United States to maintain the dams on Plaintiff's reservation. Plaintiff claims that the United States has breached a trust duty by failing to perform necessary maintenance. Compl. ¶ 62. But Plaintiff has not established that it has been injured by any failure by the United States to complete maintenance work that may be conducted in the future. Plaintiff's implication that unspecified dams on its reservation "pose an imminent threat to people and property," *id.* ¶ 62, highlights the conjectural and hypothetical nature of Plaintiff's claims.[13] Plaintiff essentially admits that it has not been harmed from any failure to conduct maintenance. And even if Plaintiff is correct that maintenance deficiencies exist, they may be addressed by future maintenance work. In short, any claim based upon the possibility that Plaintiff will suffer unspecified future harm if unspecified maintenance deficiencies are not corrected is predicated on a conjectural and hypothetical

[13] Plaintiff notably makes no allegations regarding the existing dam safety condition classification or safety priority rating of any of the dams on its reservation. The Indian Dams Safety Act defines risk hazard classifications based on the property damage and loss of life that could occur in the event of dam failure rather than on the likelihood of failure. 25 U.S.C. 3803(e)(3). So if a dam is classified as "high hazard," that classification says nothing about the dam's maintenance needs. In contrast, a dam's "safety condition classification," or a dam's safety priority rating, is based on the known existing or potential dam safety deficiencies and the dam's expected performance under certain conditions.

injury. In other words, Plaintiff has not satisfied the injury prong of its standing requirement.

Furthermore, Plaintiff has failed to demonstrate that its dam safety breach of trust claim would be redressed by a favorable outcome. Specifically, Plaintiff has not shown that an award of damages to Plaintiff would improve the safety condition classification of dams on its reservation. Accordingly, Plaintiff's dam safety breach of trust claim should be dismissed for lack of standing.

V. CONCLUSION

For the foregoing reasons, 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 on its reservation.

Respectfully submitted this 14th day of July, 2017,

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