IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION

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I. INTRODUCTION

The White Mountain Apache Tribe respectfully asks the Court, pursuant to Court of Federal Claims Rule 54(b), to reconsider its January 5, 2018 Opinion and Order (ECF No. 22), which granted in part the United States' motion to dismiss. The Tribe requests the Court to reconsider its dismissal of two narrow subsets of the Tribe's forest management breach of trust claims: claims arising from the Government's non-performance of management obligations set forth in the Tribe's 2005-2014 Forest Management Plan, and claims arising from the Government's mismanagement of the Tribe's woodlands.

The Court dismissed of all the Tribe's diverse forestry claims prior to 2011. In doing so, it appears that the Court considered all the forestry claims together as if they were based on the same set of facts and law, even though they are distinct. *See* Complaint ¶¶ 45-57. More specifically, it appears the claims were collectively dismissed based on the broad idea that, because the Tribe was on sufficient notice of some forest facts to investigate further, the Tribe knew or should have investigated and known of all its claims. Accepting that rationale for this Court's judgment, it does not apply to all the Tribe's forestry claims, and a more specific analysis is necessary for claims where the Tribe's awareness of some problems with its forest is not dispositive.

As discussed in detail below (in Part III.A.3), some of the Tribe's claims allege that the Bureau of Indian Affairs ("BIA") breached its fiduciary duty in failing to carry out FMP objectives from 2005 to 2014. In the 2005-2014 Forest Management Plan ("FMP"), the BIA acknowledged problems with its management of the Tribe's forests, and set forth how BIA would implement its trust obligations to remedy those problems. The Tribe's FMP-related claims include failure to attain the ten-year cutting budget (undercutting), failure to thin, failure to remedy insects and

disease, failure to derive value from the woodlands, and failure to monitor and evaluate the forest. These claims accrue at the end of the FMP term, regardless of when the Tribe knew or should have known of a potential breach. *Apache Tribe of the Mescalero Reservation v. United States*, 43 Fed. Cl. 155 (1999) ("*Mescalero Apache*"). The claims do not accrue upon the Tribe's awareness of some forestry management problems at the beginning of the FMP period because the Tribe's trustee promised to fulfill its trust duties by remedying the problems over a set period of time. Only at the end of the FMP period, when it became evident that the promised remedy did not occur, had all the events fixing the Government's liability taken place and the claims accrued. *See Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988). *Mescalero Apache* is supported by a well-established accrual rule that applies to the trustee-beneficiary relationship, that claims accrue when the trustee's planned corrective action becomes due (Third Restatement of Trusts, at § 98 (2012); *accord Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct 417 (1991)), and also the closely analogous contract law principle that a claim for non-performance accrues at the end of the performance term (*Franconia Assocs. v. United States,* 536 U.S. 129, 144 (2002); *PG&E v. United States*, 92 Fed. Cl. 175, 195 (2010)).

The Government's motion sought to dismiss all the Tribe's pre-2011 forestry claims in this complex case. It appears that the Court may have misapprehended the Tribe's arguments related to a few of its claims which were based on non-performance of the FMP. To rectify any such misapprehension that may exist, the Tribe requests that this Court reconsider and expressly declare that the specific claims set forth herein relating to the non-performance of the 2005-2014 Forest Management Plan first accrued in 2014, and thus are not barred by the statute of limitations.

The Tribe further seeks reconsideration of the Court's decision with respect to claims of breach of trust for the United States' failure to manage the extensive woodlands on the Tribe's

reservation. The issue was not directly addressed in the Government's briefing or this Court's Order.

II. STANDARD OF REVIEW

The Opinion and Order on the Government's motion to dismiss is an interlocutory order. The Tribe seeks reconsideration and/or clarification under Rule 54(b) of the Rules of the United States Court of Federal Claims ("RCFC"). *See Wolfchild v. United States*, 68 Fed. Cl. 779, 784 (2005) ("This case remains in an interlocutory posture, and consequently the government's motion for reconsideration falls under RCFC 54(b) and RCFC 59(a), rather than under the more rigorous standards of RCFC 59(e)."). RCFC 54(b) provides, in relevant part:

> [A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

"The decision whether to grant reconsideration lies largely within the discretion of the [trial] court," and "is available 'as justice requires.'" *L-3 Comm. Integrated Sys., L.P. v. United States*, 98 Fed. Cl. 45, 48 (2011) (citation omitted); *Cobell v. Norton*, 224 F.R.D. 266, 272 (D.D.C. 2004)). The "as justice requires" standard requires concrete considerations of whether the court "has patently misunderstood a party, has made a decision outside the adversarial issues presented to the [c]ourt by the parties, has made an error not of reasoning, but of apprehension, or where a controlling or significant change in the law or facts [has occurred] since the submission of the issue to the court." *L-3 Comm. Integrated Sys.*, 98 Fed. Cl. at 49 (citations omitted). While "[a] motion for reconsideration is not intended… to give an 'unhappy litigant an additional chance to sway' the court," a motion for reconsideration may advance a just result "under the relevant circumstances." *Id.*

III. ARGUMENT

Reconsideration of the Tribe's claims relating to the Government's non-performance of the Tribe's FMP is appropriate because, although this Court found that the Tribe was aware of forest management problems in 2005 in part based on disclosure in the 2005-2014 FMP, that awareness does not resolve the question of claim accrual relating to non-performance of the ten-year cutting budget and silvicultural prescriptions set forth in the FMP. The 2005-2014 FMP sets forth the specific management mechanisms by which the Government implements its fiduciary obligations to the Tribe over a ten-year period. It was published in 2005, and never revised or amended. The Court of Claims previously determined that claims for breach of fiduciary duty based on non-performance of a forest management plan's annual allowable cut and silvicultural prescriptions accrue at the end of the period covered by the FMP. *Mescalero Apache*, 43 Fed. Cl. at 163.

Justice requires reconsideration of the Court's Order, because it appears that the Court focused exclusively on the question when the Tribe "knew or should have known" of a breach of trust, and based its opinion in large part on the Tribe's duty to investigate likely breaches. *See* Order at 6, 7, 8. This misapprehends one of the Tribe's arguments that, even if the Tribe knew of potential breaches of fiduciary duty in 2005, the Tribe rightfully awaited performance on the 2005-2014 FMP by the Government trustee, and its claims accrue only upon determination of non-performance. *See* Plaintiff's Response to Motion to Dismiss at 16 and 19. Reconsideration is necessary to fully address the Tribe's arguments on an important issue of law, which is premised on this Court's precedent. An FMP is required by the National Indian Forest Resource Management Act in order for logging to occur on the Tribe's Reservation, and commercial forestry is the Tribe's biggest economic resource. It would be unjust to disadvantage the Tribe for relying on the governing statutory scheme and its trustee's promises to fix acknowledged problems in

forest management between 2005 and 2014. The just result is to allow the Tribe to pursue claims arising from failure to implement the FMP at the end of the FMP, when performance is complete and measurable.

Reconsideration of the Court's decision is also appropriate because of important differences between timberlands and woodlands. The Court's decision does not directly address the Tribe's claims relating to mismanagement of woodlands, and the Government did not provide argument or evidence supporting its motion to dismiss those claims. The Tribe possesses 467,000 acres of woodlands that the Government has almost entirely failed to manage for commercial or other benefit. Many of the documents that this Court relied on in granting the motion to dismiss, such as the "IFMAT I" and "IFMAT II" reports, do not directly address woodlands, and they remain a largely ignored resource. The 2005 FMP concedes that, as of 2005, the BIA had not yet developed any management system for woodlands.

A. The Tribe's claims relating to non-performance of the FMP's annual allowable cut and silvicultural prescriptions accrue at the end of the FMP.

The Tribe's complaint sets forth claims relating directly to the Government's failure to implement the FMP. The complaint alleges that the Government "failed to achieve the average annual allowable cut prescribed in the 2005-2014 Forest Management Plan," ¶ 55, failed to meet the thinning prescriptions set forth in the FMP, ¶ 48 and ¶ 49, and "failed to monitor or evaluate the 2005-2014 management period," ¶ 45. Claims that the Government "failed to control disease and insect infestation," ¶ 51, and "failed to derive commercial and other value from the Tribe's approximately 467,000 acres of woodlands," ¶ 52, also directly relate to the Government's failure to implement the silvicultural prescriptions and programs promised in the FMP. Below, the Tribe explains: (1) the role of the FMP, (2) the special trustee-beneficiary claim accrual law, and (3) how the law applies to each claim.

1. Only at the end of the FMP ten-year plan can forest management be evaluated.

A forest management plan is "the principle document" which "provides for the regulation of the detailed, multiple-use operation of Indian forest land by methods assuring that such lands remain in a continuously productive state while meeting the objectives of the tribe." 25 U.S.C. § 3103(5). In other words, the FMP states how the United States will implement and meet its fiduciary obligation to manage the Tribe's forests over a set time period (generally ten years). 25 U.S.C. § 3104(b)(2). Recognizing that programs may vary from year to year based on weather, funding, and forest conditions, the FMP sets the benchmark of how the Government must perform over the forest management plan period. 25 C.F.R. § 163.11(a).

Unless the Government terminates its fiduciary role, commercial forestry must occur as set forth in the FMP and may not occur without a valid FMP in place. 25 U.S.C. § 3104(b)(1). The BIA must manage the Tribe's forests "in a perpetually productive state in accordance with the principles of sustained yield and with the standards and objectives set forth in forest management plans by providing effective management and protection through the application of sound silvicultural and economic principles." *Id.* (emphasis added). A tribe must rely on implementation of the FMP if the tribe seeks to conduct commercial forestry and maintain healthy forests on its lands.

The FMP is the primary means by which BIA is required to take a Tribe's priorities and concerns into account when planning how to manage the Tribe's forests. The BIA must conduct "full and active consultation" with the affected tribe in the development of the FMP. 25 C.F.R. § 163.3(b)(1) and (2). The document must set forth "the manner in which the policies of the tribe and the Secretary will be applied, with a definite plan of silvicultural management, analysis of the short term and long term effects of the plan, and a program of action, including a harvest schedule,

for a specified period in the future." 25 C.F.R. § 163.11(a). The FMP must further provide "standards providing quantitative criteria to evaluate performance against the objectives set forth in the plan." 25 U.S.C. § 3103(5)(b).

In this case, the Tribe's FMP is a ten-year plan that "provides the management direction by which program activities will be regulated during the planning period in order to meet long-term resource objectives." ECF 009-2, Ex. 1 Part 1 to the "Memorandum of Points and Authorities in Support of the United States' Motion for Partial Dismissal" at 1 (hereinafter, "FMP").[1] The FMP sets ten-year harvest plans and goals for timber volume extraction, and sets ten-year objectives for various forest health indices BIA will seek to attain, such as target stocking levels. FMP at 26. Some aspects of the FMP, such as specific timber sales, have year-by-year targets. Most FMP targets are set out for the ten-year period to accommodate fluctuations in conditions and budgets. *See* FMP at 152.

The FMP is based in part on a periodic evaluation of the forest status termed "Continuous Forest Inventory," or "CFI." The CFI data are fundamental to forest management and measurement of forest response—until inventory is collected and studied, adequacy of past management is difficult to meaningfully discern. The Government collects and analyzes the data every ten years:

> For the forest-level inventory, data are gathered at 10-year intervals utilizing over 2,000 Continuous Forest Inventory (CFI) plots across the forested areas of the Fort Apache Indian Reservation. The CFI plots provide baseline data, which include timber volume, growth, mortality, and harvest by species and diameter size class. This data describes the current condition and, through computer modeling projects the future condition of the Tribal forest.

FMP at 149.

[1] Ex. 1, Part 1 includes up to page 153 of the FMP. The citations for page numbers greater than 153 may be found at ECF 009-3, Ex. 1, Part 2.

The inventory analysis from the previous ten years informs the silvicultural prescriptions necessary to optimize growth, increase forest health, set the annual allowable cut, and to determine the associated "ten-year cutting budget." FMP at 152. The FMP breaks the ten-year cutting budget into separate units and projects volumes over ten years for each forest unit. FMP at 285-87. Within each unit, individual timber sales span from one to six years in anticipated duration. *Id.* During the ten-year FMP period, the FMP is the starting point for any silvicultural practice or timber harvest plan. FMP at 252. In short, the FMP is the roadmap and touchstone for all forest practices in an Indian tribe's forest, and ten years is the standard unit of time over which forest management occurs and, importantly, may be evaluated. Thus, it is only at the end of the FMP – in 2014 – that the critical CFI data is supposed to be available and the Tribe would be in a position to evaluate the outcome of the ten-year FMP.

2. Where a trustee promises to remedy a problem with trust management, the trust beneficiary is entitled to rely on that promise, and the claim does not accrue until the remedy is due and not delivered.

As noted in this Court's Order, 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 (Fed. Cir. 1988). The general standard for claim accrual is : "[A] cause of action against the government has 'first accrued' only when all the events which fix the government's alleged liability have occurred *and* the plaintiff was or should have been aware of their existence." *Hopland*, 855 F.2d at 1577 (emphasis in original).

Two more specific claim accrual rules apply to the Tribe's claims arising from non-performance of the FMP. First, "[b]eneficiaries of a trust are permitted to rely on the good faith and expertise of their trustees; because of this reliance, beneficiaries are under a lesser duty to

discover malfeasance relating to their trust assets." *Shoshone Indian Tribe v. United States*, 364 F.3d 1339, 1347 (Fed. Cir. 2004); *Wolfchild*, 62 Fed. Cl. 521, 547 (2004). Second, when the trustee identifies a problem in trust management and promises to remedy that problem through implementation of its ongoing trust duties, the trust beneficiary is entitled to rely on that promise, and a claim for breach of trust does not accrue until the remedy is due and not delivered. *Mescalero Apache*, 43 Fed. Cl. at 162; *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417 (1991), aff'd, No. 95-5014, 1995 U.S. App. LEXIS 23960 (Fed. Cir. 1995); Restatement 3d of Trusts, § 98 (2012).

The most pertinent example applying these rules in a forestry context is *Mescalero Apache*, where the Court of Claims considered when the tribe's claim accrued for breach of trust against the Government for failure to attain the annual allowable cut set forth in the tribe's FMP. The Court determined that the claim accrued at the end of the FMP period and allowed claims to extend to Government conduct extending to the beginning of the FMP period, reasoning that the tribe "could not attain knowledge of whether a claim existed until after the ten year cutting budget expired." *Mescalero Apache*, 43 Fed. Cl. at 162. Thus, the Tribe was entitled to rely on the FMP and could not sue until the FMP period was complete.

Fort Mojave illustrates the same principle in a different context. The court considered a breach of trust claim related to the Government's inadequate representation of a tribe in water rights proceedings. The Supreme Court made an initial adjudication in 1963, but retained jurisdiction and left the resulting decree open to future amendments. In 1978, the Government moved the Court to amend the decree based on the Government's admitted errors in representing the Tribe's interests. The motion was unsuccessful, and in 1983 the Supreme Court entered a final decree. The Tribe sued for breach of trust, and the Government moved to dismiss based on

the statute of limitations.

The Court of Claims denied the Government's motion, because "here, the government affirmatively acknowledged that it had erred, took the position that plaintiffs were entitled to the water rights in dispute, and commenced to take actions in furtherance of its trust responsibilities aimed at resecuring those rights for plaintiffs." *Ft. Mojave*, 23 Cl. Ct. at 429. As a result, "all of the events which fix the government's alleged liability" had not occurred until the second Supreme Court decision, when it became apparent that the proposed solution failed. *Id.* at 431 (quoting *Hopland Band of Pomo Indians*, 855 F.2d at 1577).[2]

Mescalero and *Fort Mojave* accord with the Restatement of Trusts, upon which the Court of Claims regularly relies. *See, e.g.*, *Cheyenne-Arapaho Tribes of Indians v. United States*, 206 Ct. Cl. 340, 348 (1975); *see also United States v. Mitchell*, 463 U.S. 206, 226 (1983). "[I]f a beneficiary complained of a breach of trust and was assured by the trustee of corrective action, the beneficiary is excused from a delay that reasonably resulted from reliance on that assurance." Restatement 3d of Trusts, § 98 (2012). The ability of the trust beneficiary to rely upon the trustee is fundamental to the trust relationship, which is why beneficiaries have a lesser duty to discovery malfeasance. *Shoshone Indian Tribe*, 364 F.3d at 1347.[3]

[2] On appeal on different grounds, the Federal Circuit confirmed that "[t]he Tribes timely filed this action in March 1989, seeking damages from the government for its alleged breach of trust in representing the Tribes' interests in the litigation that led to the Supreme Court's 1963 decision." *Fort Mojave Indian Tribe v. United States*, No. 95-5014, 1995 U.S. App. LEXIS 23960, at *1-2 (Fed. Cir. Aug. 18, 1995).

[3] In *San Carlos Apache Tribe v. United States*, 639 F.3d 1346 (Fed. Cir. 2011), like in *Fort Mojave*, the tribe attempted suit relating to water rights litigation that occurred decades prior. The court barred the claims based on the statute of limitations because, unlike in *Fort Mojave*, the earlier decree expressly stated that it was a final resolution of all rights, and that the parties were "forever enjoined and restrained from asserting or claiming" any rights different from those in the decree. *Id. at* 1351. The claim therefore accrued upon entry of the decree, when there was a final determination and it was "objectively evident that all of the events that fixed the government's alleged liability and entitled the Tribe to institute an action against the government occurred upon entry of the Decree." *See also Catawba Indian Tribe v. United States*, 982 F.2d 1564, 1570 (Fed. Cir. 1993) (holding that a tribe's claim accrued upon passage of a disputed law because the "objective meaning and effect were fixed when the Act was adopted."). Similarly, when the FMP is complete it is "objectively evident that all the events that fixed the governments alleged liability" have occurred, and at that time a tribe can assess whether the government fulfilled the ten-year plan.

Finally, the reasoning in *Mescalero Apache* and *Fort Mojave* is reinforced by black-letter contract law relating to breach by non-performance. For example, in *PG&E v. United States*, 92 Fed. Cl. 175, 195 (2010), the Court considered a suit seeking damages caused by the Government's breach of a contract. The contract required performance by 1998, and the plaintiff sued in 2004. The Court found that the plaintiffs "likely developed a reasonable belief at least as early as 1988 . . . that [the Government] would not timely perform in 1998." *Id.* at 195. Nonetheless, the Court held that the plaintiff's "claim accrued and the statute of limitations commenced to run on January 31, 1998, the date fixed for the government's performance," and allowed claims relating to conduct dating back to the beginning of the contract period. *Id.*; *see also Wis. Elec. Power Co. v. United States*, 90 Fed. Cl. 714, 770 (2009)(holding that costs dating back to 1988 were recoverable where complaint was filed in November 2000, because claim accrued when performance was due in 1998).

In *Franconia Assocs. v. United States*, 536 U.S. 129 (2002), the Court considered the application of six-year limit in 28 U.S.C. § 2501 to claims filed under the Tucker Act. The plaintiffs were property owners who obtained low interest loans from the Government and sought to prepay those loans. Congress then passed a law in 1987 which limited the ability for borrowers to prepay. Plaintiffs filed suit in 1997, approximately nine years later, alleging that the new law constituted a breach of contract and an unconstitutional taking without compensation. *Id.* at 133. The Federal Circuit held that breach occurred at the time of passage of the new law and that claims filed more than six years later were time barred. The Supreme Court reversed. The Court held that, where a party indicates that it will not perform a contract prior to the time fixed for performance, that indication constitutes a repudiation, not a breach. At that point the injured party may decide whether to sue for anticipated breach, or to await performance. If the injured party "opts to await performance, 'the cause of action accrues, and the statute of limitations commences

to run, from the time fixed for performance rather than the earlier date of repudiation.'" *Id.* at 144 (citing C. Corman, Limitation of Actions § 7.2.1, p. 488-89 (1991)).

In reaching its decision, the Court relied in part on principles of fairness and practicality, reasoning that "the plaintiff should not be penalized for leaving to the defendant an opportunity to retract his wrongful repudiation; and he would be so penalized if the statutory period of limitation is held to begin to run against him immediately." 536 U.S. at 146 (quoting A. Corbin, Contracts § 989, p. 967 (1951)). The Court further reasoned that it would be disadvantageous to the Government over the long-term to encourage premature, anticipatory breach suits. 536 U.S. at 146. These considerations are applicable to the FMP context, where the Government may potentially remedy lack of performance early in the FMP period with improvements later, and where suits prior to full implementation of the FMP would potentially be premature.

3. The Tribe's claims for breach of trust based on non-performance of the 2005-2014 FMP accrued in 2014.

This Court found that the Tribe "knew or should have known" of a claim's existence at the time when there were sufficient facts to trigger a duty to investigate. *See* Opinion and Order at 6, 7, 8. However, the duty to investigate is not determinative for claims specifically focused on non-performance of the FMP. Even if the Tribe had actual knowledge of potential forest management problems, the claim would not accrue until the trustee failed to carry out the promised steps to remedy those problems by the end of the FMP period.

As explained claim-by-claim below, this Court did not specifically address the Tribe's claims which are focused on non-performance of goals and objectives in the FMP. For those specific claims, "all the events which fix the government's alleged liability" had not occurred until the breach happened—which was in 2014 at the end of the performance period.

a. The Tribe's claim for undercutting

Mescalero Apache is directly on point for the Tribe's claim for breach of trust based on undercutting, arising from the Government's failure to attain the ten-year cutting budget and "annual allowable cut" over the course of the 2005-2014 FMP. In *Mescalero Apache*, the Tribe claimed that the Government did not meet the "obligations that extend through the entire ten year AAC of the 1979 FMP." *Mescalero Apache*, 43 Fed. Cl. at 165. Here, the Complaint states: "[t]he United States failed to achieve the average annual allowable cut prescribed in the 2005-2014 Forest Management Plan, and failed to achieve the average annual allowable cut in 2015 and 2016." ¶ 55. The claims asserted in the two cases are functionally identical and, as in *Mescalero Apache*, the Tribe's claims accrue at the end of the FMP.

The *Mescalero Apache* court denied the Government's motions to dismiss based on the statute of limitations before and after trial. As a matter of law, the court concluded that the statute of limitations did not bar claims extending to the beginning of the FMP because the "Tribe could not attain knowledge of whether a claim existed until after the ten-year cutting budget expired." *Mescalero Apache*, 43 Fed. Cl. at 162. During trial, the court concluded that the correct method to assess BIA's performance of its trust obligations was to use the FMP ten-year cutting budget as a key indicator of what a prudent trustee would achieve, and then to measure the "shortfall" of timber volume as measured over the ten-year FMP period to assess whether breach of fiduciary duty occurred. *Id.* at 168. This methodology confirmed that it was not possible to assess undercutting claims until the end of the ten-year period, when the total shortage became known.

The reasoning in *Mescalero Apache* aligns with the practical reality of timber management, as recognized in the White Mountain Apache Tribe's FMP. *See generally* pp. 6-8, *supra*. The Government is not strictly required to meet the AAC each year. Year-to-year fluctuations in

weather, markets, and other forces do not allow for an assessment of performance on an annual basis. While BIA seeks to attain an "even flow" of timber, volumes may fluctuate based on unpredictable events such as large fires and resulting salvage harvests. FMP at 193. If markets are weak, the prudent trustee may well reserve timber volume to capitalize later, when markets are strong. The FMP's calculations and harvest schedules are based on anticipated average performances, such as average annual stumpage and revenue. *See* FMP at 278-79 ("Forest Economic Analysis"). Assessment of timber harvest relies on the forest inventory, which is only conducted every ten years. *See* FMP at 149. It could be premature to bring suit halfway through an FMP, *see Mescalero Apache*, 43 Fed. Cl. at 162, because it would be unknown at that point whether later years of stronger harvests would still deliver on FMP promises. When performance is finally due, and not delivered, "all the events which fix the government's alleged liability" occur. *Hopland Band of Pomo Indians*, 855 F.2d at 1577.

While this Court did not directly address *Mescalero Apache*, it appears this Court associated the Tribe's arguments relating to non-performance of the FMP with case law relating to accrual of damages. *See* Order at 8 (citing *Wolfchild v. United States*, 731 F.3d 1280, 1291 (Fed. Cir. 2013)). Respectfully, the Tribe believes that perspective misconstrues the Tribe's argument. The Tribe does not argue that the claim does not accrue until the full extent of damages is known, but rather that it cannot be determined whether a breach of fiduciary duty occurred until the end of the FMP period, because the FMP promises to attain certain cutting levels and carry out certain silvicultural prescriptions necessary to implement trust obligations by the end of the ten-year FMP period. In *Wolfchild*, there was "an open repudiation of an alleged trust duty," the Government did not promise to remedy the breach, and the nature of the loss was readily apparent. 731 F.3d 1280, 1291. In contrast, in *Mescalero Apache*, *Fort Mojave*, and the current case, the

claim did not accrue until the Government's promised performance was not delivered. The end of the FMP is when performance is due and can be measured, and therefore that is when a claim arising from the failure to attain the ten-year cutting budget and associated annual allowable cut accrues. *Mescalero Apache*, 43 Fed. Cl. at 162; *see also Franconia Assocs. v. U.S.*, 536 U.S. at 146; Restatement 3d of Trusts, § 98 (2012).[4]

b. The Tribe's claims relating to silvicultural prescriptions and management.

The remaining claims at issue arise from the Government's failure to take the measures promised in the FMP to ensure a healthy and productive forest resource on the Reservation. For each of those claims, we show they did not accrue until 2014 by identifying: (1) the Tribe's allegations as stated in the Complaint, and (2) the specific measures that the Government expressly proposes to take over the ten-year period in the FMP:

Thinning. The Complaint alleges that the Government failed to conduct sufficient thinning, including the failure to thin acreages set forth in the FMP. ¶¶ 4, 48, 49, 50, 58. The FMP acknowledges that many areas are overstocked, FMP at 26, and that timber stands need to be thinned periodically to maintain desired stocking levels, FMP at 120. The FMP promises that, among other management measures, "thinning and burning will be scheduled and carried out to optimize the long-term health, production, and value of the forests and woodlands while maximizing economic returns to the Tribe to the extent possible." FMP at 97. The FMP sets specific and detailed forest stand treatment strategies and goals that BIA will seek to attain over

[4] The Court cited four cases for the principle that a trust beneficiary has a duty to investigate likely breaches of fiduciary duty: *Menominee Tribe v. United States*, 726 F.2d 718, 720-22 (Fed. Cir. 1984); *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 672 F.3d 1021, 1031 (Fed. Cir. 2012); *Ingrum v. United States*, 560 F.3d 1311, 1316 (Fed. Cir. 2009); *Mitchell v. United States*, 10 Cl. Ct. 63, 68-71 (1986). None of those cases dealt with the narrow question of whether claims arising from a failure to implement an FMP (or other promised implementation of trust duty) accrue when performance is due. The "duty to investigate" is consistent with the conclusion that a claim does not accrue until it is apparent and can be measured, because only then can the Tribe actually investigate the potential breach.

the ten years. FMP at 242 ("Silvicultural Treatment Targets for Forest Products Management Emphasis Areas"). The FMP further promises tens of thousands of acres of thinning per year over the ten-year period to reduce fire risk. FMP at 130.

Insects and Disease. The Complaint alleges that the Government "failed to control disease and insect infestation." ¶ 4, 51. As noted in this Court's Opinion and Order, the FMP discloses that roughly 30 percent of 600,000 forested acres on the Reservation are infected with mistletoe, and estimates a loss to the Tribe of $800,000 annually. FMP at 274. The FMP promises that "Management will take a proactive approach to avoid the detrimental effects of catastrophic fire and epidemic insect and disease outbreaks." FMP at 97. The FMP specifically describes different insects, diseases, and pests, and treatment strategies to be employed by each. FMP at 252-64. The FMP then sets forth detailed "Regeneration Strategies for Diseased Stands" with targets, standards, and objectives to be achieved over the ten years. FMP at 238-39.

Woodlands. The Complaint alleges that the Government "failed to derive commercial and other value from the Tribe's approximately 467,000 acres of woodlands." ¶¶ 4, 13, 52. The FMP acknowledges that BIA studies "found deficiencies associated with woodland management in Indian country and sought to upgrade woodland management practices." FMP at 215. In response, the FMP sets an objective to "[p]rovide a management system which will identify woodland products, values, locations, quantities, and ecologically sound utilization practices." FMP at 216.

Forest Inventory and Monitoring. The Complaint alleges that the Government "failed to monitor or evaluate the 2005-2014 management period." ¶¶ 4, 45. The FMP promises that "Activities supported by the FMP will be monitored and may undergo reviews to determine if goals are being reached or if the demands and opportunities of the Tribe have shifted and new direction is sought." FMP Preface. The FMP specifically states that BIA will continue to conduct

inventory and that "CFI will provide current and comparative long-range trend data on the growth and mortality of the forest to ensure method and order in harvesting the tree capital and provide for continuous production and a sustained yield of benefits." FMP at 119.

Thus, with respect to each of the above claims specified in the Complaint, BIA proposed in 2005 to take detailed forest management actions to implement its fiduciary obligations by the end of the ten-year FMP. Each of those claims arise from BIA's failure to carry out silvicultural prescriptions and programs promised in the FMP. In each case, through the development of the FMP, BIA identified a problem with forest management, promised to remedy the problem, and set out a plan for how to do so. For these claims, *Mescalero Apache* is again on point, as the court stated that "[a]ny claim for mismanagement of defendant's silvicultural obligations during the period of the 1989 FMP could not be made prior to its expiration on December 31, 1998…The Tribe could not attain knowledge of whether a claim existed until after the ten year cutting budget expired." *Mescalero Apache*, 43 Fed. Cl. at 162.

Mescalero Apache aligns with the reasoning in *Fort Mojave*:

> the government affirmatively acknowledged that it had erred…and commenced to take actions in furtherance of its trust responsibilities aimed at resecuring those rights for plaintiffs…
>
> In seeking such a modification and asserting these grounds, defendant was acting pursuant to its continuing trust responsibilities with respect to plaintiffs' water rights. Since the ultimate outcome of the United States' continuing trust actions (both pre- and post-1963) remained very much in doubt until the Supreme Court's 1983 decision, "all the events" which fixed liability for a breach of trust had not occurred until the issuance of that decision.

Ft. Mojave, 23 Cl. Ct. at 429.

Just as in *Fort Mojave*, here the White Mountain Apache FMP "affirmatively acknowledged" errors in forest management. For example, in the section of the FMP relied upon by the Government in its motion to dismiss, the FMP acknowledges tens of millions of dollars of

economic loss due to largely uncontrolled mistletoe and spruce beetle outbreak. *See* FMP at 274. BIA then promised to fix the problem, repeatedly stating that it would employ "integrated pest management" and that "[i]nsect, disease, and animal pest prevention and suppression, along with reducing losses from other forest damaging agents, will be an integral part of forest resource management." FMP at 135. Critically, BIA's 2005 acknowledgement of management problems – and the Tribe's actual or constructive knowledge thereof – does not trigger claim accrual, but rather delayed claim accrual pending determination whether the remedy actually transpired, because "acknowledgement of error and commencement of authorized actions aimed at resecuring the trust res distinguishes the instant case from all of the Indian trust cases cited by defendant." *Ft. Mojave*, 23 Cl. Ct. at 429. Only when BIA failed to carry out the promised remedy did the Tribe's 2005-to-2014 claims accrue. Restat 3d of Trusts, § 98 (2012).

Indeed, if the Tribe cannot rely on its trustee's commitments without sacrificing legal rights, and must sue upon disclosure of any potential breach of trust, it would undermine trust management and overburden the judicial system. Whenever any of the inevitable challenges with trust resource management arose, the trust beneficiary would face an imperative to file suit instead of working with the trust beneficiary toward a solution. This would incur potentially needless litigation and discourage transparency and communication between the trustee and trust beneficiary.

B. The Government's motion to dismiss the woodlands claims was unsupported and should be denied.

When deciding a case based on a lack of subject matter jurisdiction, the court must first assume that all undisputed facts alleged in the complaint are true and must draw all reasonable inferences in the non-movant's favor. *Etchegoinberry v. United States*, 114 Fed. Cl. 437, 474 (2013). Here, the Tribe alleged that the Government failed to derive commercial and other value

from the Tribe's woodlands, and distinguished this claim from its claims related to commercial timberlands. Complaint ¶ 52, *see also* ¶¶ 13, 14. The Government's motion to dismiss and, consequently, this Court's Order focused all analysis of forest claims on the Tribe's claims relating to commercial timberlands. The Government's motion to dismiss and its reply do not include argument specific to woodlands at all, and only mention woodlands in a few citations to the Tribe's complaint. *See, e.g.*, Motion to Dismiss at 8, 15.

This Court's Order mentions woodlands once, when it notes in background that the Reservation includes 467,000 acres of accessible commercial woodlands. Order at 2. Despite the lack of attention, the Tribe's claims relating to woodlands are important to the Tribe and require separate analysis. The documents principally relied upon by the Government and this Court to determine that the Tribe "knew or should have known" of claim accrual—the IFMAT I and IFMAT II reports, and the FMP—provide scant information regarding woodland management, and do not adequately support a motion to dismiss.[5] In fact, those documents reveal that proper management of woodlands is poorly understood by the Tribe, let alone the trustee. For instance, IFMAT II recommends that BIA should "bring woodlands into the mainstream of forest planning," and recommends that, "[b]ecause of their extent and ecological function as wildlife habitat and watershed protection forests, and their production of range, fuelwood, and non-timber forest product values, woodlands should receive more professional management attention." IFMAT II at 19. Similarly, as discussed *supra* (at Section III.A.3.b.), the FMP includes only five terse pages on woodlands (two of which are citations), discusses one limited set of inventory data, and acknowledges that BIA has yet to "[p]rovide a management system which will identify woodland

[5] Indian Forest Management Assessment Team reports, available here: http://www.itcnet.org/issues_projects/issues_2/forest_management/assessment.html

products, values, locations, quantities, and ecologically sound utilization practices." FMP at 215-219.

The Tribe alleged that this Court has jurisdiction, Complaint ¶ 7, that the Government exerted "comprehensive control" over forest management, Claim II, that the Government breached its fiduciary duties from 1946 to the present with respect to forest management, Claim II, and that the Government specifically breached its trust duties based on the mismanagement of woodlands, ¶ 52, *see also* ¶¶ 13, 14. The Government did not rebut the Tribe's allegations with respect to woodlands, and therefore this Court must take the Tribe's allegations as true and draw all inferences in favor of the Tribe, and the motion to dismiss the woodlands claims should be denied. *Etchegoinberry v. United States*, 114 Fed. Cl. at 474. Alternatively, if this Court determines that, due to an obligation to investigate trust violations, the Tribe should have independently discovered breach of trust with respect to woodlands management, the Tribe's claims should date to the beginning of the FMP. *See* pp. 15-16 *supra.*

IV. CONCLUSION

For all of the reasons stated herein, the Tribe respectfully requests that this Court revise the Opinion and Order to hold that claims arising from BIA's non-performance of the 2005-2014 Forest Management Plan first accrued in 2014, thereby allowing those claims from 2005 through 2011. The Tribe also respectfully requests that the Court revise the Opinion and Order to deny the Government's motion to dismiss with respect to claims relating to mismanagement of the Tribe's woodlands.

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/s/ Brian W. Chestnut
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CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2018, I caused a copy of the foregoing to be served through the Court's CM/ECF System to all parties.

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