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
_____	)	

UNITED STATES' OPPOSITION TO
PLAINTIFF'S MOTION FOR RECONSIDERATION

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I. INTRODUCTION

This Court applied well-established law to bar Plaintiff's pre-2011 forest mismanagement claims because Plaintiff's own allegations made clear that it knew the material facts underlying those claims. Plaintiff's motion for partial reconsideration appears to seek reconsideration of the Court's order dismissing its pre-2011 woodland mismanagement claims and "specific claims set forth herein relating to the non-performance of the 2005-2014 Forest Management Plan." ECF No. 26-1 at 2. Plaintiff provides no supportable basis to disturb this Court's dismissal of their claims. First, Plaintiff's motion should be denied because Plaintiff largely relies on arguments that the Court already considered and rejected. Second, the new arguments that Plaintiff uses to buttress its previously-rejected claims are based entirely on legal authority that (1) is inapplicable to this case and (2) was available to Plaintiff during the initial briefing period. Third, Plaintiff's arguments that the statute of limitations on its pre-2011 claims did not run fail on the merits because Plaintiff's allegations and tribal resolutions established that it possessed actual knowledge of the material facts underlying its claims. Fourth, Plaintiff's core argument that its claims do not accrue until its 2005 Forest Management Plan would, if correct, render all of its claims unripe because the 2005 Plan was extended through December 31, 2019. Finally, Plaintiff provides no basis for reversing this Court's dismissal of Plaintiff's pre-2011 woodland mismanagement claims.

Plaintiff fails to meet this Court's standard for granting a motion for reconsideration. And even if this Court were to entertain Plaintiff's effort to reargue issues already fully briefed and considered by this Court, Plaintiff's claims still fail on the merits. In short, the statute of limitations requires Plaintiff to bring its claims in a timely

fashion. There is no injustice, much less a manifest injustice, in requiring Plaintiff to promptly bring claims predicated on the assertion that the United States' actions are causing its forests to be damaged by insects or forest fire risks to increase. Rather, Plaintiff should be compelled to come forward with such allegations within the statute of limitations period imposed by Congress.

II. LEGAL STANDARD

A motion for reconsideration under United States Court of Federal Claims Rule 59(a) "is not intended to give an unhappy litigant an additional chance to sway the court" or give "a party dissatisfied with the result an opportunity to argue its case." *Dairyland Power Coop. v. United States*, 2010 U.S. Claims LEXIS 14, *2-3 (Fed. Cl. Feb. 22, 2010) (quoting *Circle K Corp. v. United States*, 23 Cl. Ct. 659, 664-65 (1991)) (Damich, J.). "The moving party must support its motion for reconsideration by a showing of exceptional circumstances justifying relief, based on a manifest error of law or mistake of fact." *Id*. at *4; *Entergy Nuclear Fitzpatrick v. United States*, 101 Fed. Cl. 464, 468 (Fed. Cl. 2011) (quoting *A.A.B. Joint Venture v. United States*, 77 Fed. Cl. 702, 704 (2007)). A motion for reconsideration is permitted only for one of three reasons: "(1) that an intervening change in controlling law has occurred; (2) that previously unavailable evidence is now available; or (3) reconsideration is necessary to prevent manifest injustice." *Dairyland Power*, 2010 U.S. Claims LEXIS 14, at *4 (quoting *Parsons ex rel. Linmar Prop. Mgmt. Trust v. United States*, 174 Fed. Appx. 561, 563 (Fed. Cir. 2006)). Even under the manifest injustice test, however, this Court requires a dissatisfied litigant to present new information. *Id*. at *5, *9; *Whispell Foreign Cars, Inc. v. United States*, 106 Fed. Cl. 777, 782 (2012) (party moving for reconsideration may not merely reassert

arguments that "were previously made and were carefully considered by the court." (citation omitted). And reconsideration will not be granted where a litigant "simply disagrees with the Court as to what conclusions are proper based on the evidence in the record, and wishes to reargue its case on this matter." *Dairyland Power*, 2010 U.S. Claims LEXIS 14, at *5.

Additionally, a motion for reconsideration "'may not be used to . . . raise arguments or present evidence that could have been raised prior to the entry of judgment.'" *Behrens v. United States*, 135 Fed. Cl. 66, 70 (2017) (quoting *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008)). "[W]here litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." *L-3 Commc'ns Integrated Sys., L.P. v. United States*, 98 Fed. Cl. 45, 49 (Fed. Cl. 2011) (quoting omitted). "Courts are particularly unreceptive to factual assertions, such as plaintiff's, that were available during initial briefing, but which surface on reconsideration." *White Mountain Apache Tribe v. United States*, 9 Cl. Ct. 32, 34 (1985).[1]

III. ARGUMENT

A. Plaintiff's motion is based upon arguments this Court already rejected.

Plaintiff concedes that its motion reargues already rejected points by contending that this Court "misunderstood" or "misapprehend[ed]" Plaintiff's arguments the first

[1] Plaintiff's efforts to obtain reconsideration of orders denying its motions for reconsideration in previous litigation before this Court were also rejected because repetitive motions for reconsideration frustrate the ultimate resolution of a case. *White Mountain Apache Tribe v. United States*, 20 Cl. Ct. 371, 372-73 (1990).

time. ECF No. 26-1 at 3-4. The Court's analysis need proceed no further than Plaintiff's admission that it is rearguing issues that were already addressed and resolved. *See Dairyland Power Coop.*, 2010 U.S. Claims LEXIS 14 at *2-3; *Whispell Foreign Cars, Inc.* 106 Fed. Cl. at 782. Indeed, the Court of Federal Claims typically denies motions for reconsideration based upon a party's assertion that the Court "misunderstood" arguments that it "already considered and rejected. *Pierce v. United States*, 2014 U.S. Claims LEXIS 943, at *3-4 (Fed. Cl. Sept. 8, 2014). The Court carefully considered the Parties' arguments in partially granting the United States' dismissal motion. Plaintiff's reassertion of previously-rejected arguments should be denied.

Plaintiff's memorandum makes clear that Plaintiff largely recycles arguments the Court previously rejected. For example, Plaintiff's lead argument is that forest management can be "evaluated . . . only at the end of the FMP."[2] ECF No. 26-1 at 8. This simply rehashes Plaintiff's initial argument that "the Tribe could not know" of a breach of the FMP "until completion of the ten-year period." ECF No. 16 at 16 (citing *Apache Tribe of the Mescalero Reservation v. United States*, 43 Fed. Cl. 155, 162 (1999) ("*Mescalero Apache*")); Opinion and Order, ECF No. 22 at 7 (tribe contends that "it was only after the ten year period ended in 2014, that the Tribe could assess the success or failure of the forest management plan."). The Court explicitly considered and rejected Plaintiff's argument. It recognized, among other things, that Plaintiff's own allegations

[2] As discussed below, Plaintiff is incorrect that the 2005 Plan ended in 2014. Rather, the 2005 FMP was extended through December 31, 2019 at Plaintiff's request - meaning that Plaintiff's argument that claims cannot be evaluated until the end of an FMP, if correct, would render all of its claims relating to the 2005 FMP unripe. Letter from Superintendent, Ft. Apache Agency, to Chairman R. Lupe, White Mountain Apache Tribe (Mar. 3, 2015) (ECF No. 9-2 at page 4 of 151).

regarding the 2005 FMP make clear that Plaintiff was "aware of facts relating to its forest mismanagement claims" well before 2011. ECF No. 22 at 8.

Likewise, Plaintiff previously argued that complexity of forest management claims somehow absolves Plaintiff of its duty to pursue those claims in a timely manner. ECF No. 16 at 3-6, 9-10. Plaintiff attempts to revive this argument by focusing on the complex nature of forest management, suggesting that it can only develop an understanding of the condition of its forests with the help of a Continuous Forest Inventory. ECF No. 26-1 at 7-8. The Court also explicitly considered and rejected this argument, holding that "even highly technical claims accrue where plaintiffs are 'capable enough to seek advice, launch an inquiry, and discover through their agents the facts underlying their current claim.'" ECF No. 22 at 7-8. Plaintiff's unsupported assertion that a Continuous Forest Inventory is the sole and exclusive tool that could provide Plaintiff with necessary material facts to bring its current claims is not credible.

Plaintiff also rehashes its argument that the Tribe could not know that the United States committed breaches of fiduciary duties at any point prior to 2014 because the United States could remedy any such breaches over the course of the FMP. *See* ECF No. 16 at 17 ("Tribe did not, and could not, have known that BIA would fail to remedy insect and disease problems . . . fail[] to attain sustainable yield, fail[] to thin, and fail[] to adequately prevent forest fires" until "the termination of the FMP").

Plaintiff's opposition to the motion to dismiss and its motion for reconsideration cite the same cases for the same propositions. For example, Plaintiff relies on *Shoshone Indian Tribe v. United States*, 364 F.3d 1339 (Fed. Cir. 2004) and *Shoshone Indian Tribe v. United States*, 672 F.3d 1021 (Fed. Cir. 2012) in both briefs. *Compare* ECF 26-1 at 8-

10, 15n.4 *with* ECF 16 at 6-7, 24-25.[3] The Court fully considered both cases, finding that they supported the United States' position regarding Plaintiff's forest mismanagement claims. ECF No. 22 at 5-7. Plaintiff similarly relied heavily on *Mescalero Apache* in both briefs to argue that discovery is necessary. The Court considered this case as well, ECF No. 22 at 5 n.1, holding that discovery is inappropriate with respect to Plaintiff's pre-2011 forest mismanagement claims because the Tribe's own assertions make clear that it "knew the Material Facts before 2011." ECF No. 22 at 7-8. Plaintiff's motion presents a classic case of rearguing law and facts that the Court has already considered.

B. Plaintiff's motion ignores the correct legal standard for claim accrual.

Plaintiff's motion for reconsideration remarkably seeks to recast the proper legal standard for assessing when a claim accrues. The Court held that Plaintiff's pre-2011 forest mismanagement claims are barred because they accrue when Plaintiff "was aware of sufficient facts . . . to trigger a duty to investigate." ECF No. 22 at 6-8. Plaintiff now contends that it is impossible for Plaintiff to develop a sufficient understanding of its forests to trigger the statute of limitations until the United States conducts a Continuous Forest Inventory. ECF No. 26-1 at 7-8. To be clear, Plaintiff seeks to *flip* the standard for accrual on its head – making the United States, rather than Plaintiff, responsible for investigating Plaintiff's claims. But as the Court previously held, Plaintiff was capable

[3] Plaintiff ironically cites water rights litigation that it contends illustrates that statutes of limitations do not accrue where the United States commenced actions to remedy errors. And Plaintiff's unsuccessful motion for reconsideration seeking to enjoin the United States "from filing a [water rights] claim on the Tribe's behalf" highlights the extent to which Plaintiff had actual knowledge of the manner in which its resources were managed. *White Mountain Apache Tribe v. Hodel*, 784 F.2d 921, 922-23 (9th Cir. 1986).

enough to launch an inquiry and discover the facts underlying its current claims. ECF No. 22 at 7-8.

Plaintiff's description of why it needs a Continuous Forest Inventory also does not withstand scrutiny. Plaintiff suggests that a 2014 inventory was needed to determine the quantity of trees that were cut over the previous 10 years and the damage from pests. But Plaintiff provides no support for its assertion that it required the United States to conduct an inventory in 2014 to determine whether trees were cut or damaged by insects in 2006. And the 2005 Plan Plaintiff cites is used to "develop sound timber management plans" going forward rather than analyze performance under past claims. 2005 Plan at 170 (ECF No. 9-3). For example, the 2005 Plan identifies the inventory as a tool "to calculate a sustained yield AAC to be used for developing a ten-year cutting budget." *Id*. at 172; 325-28 (detailing projected harvests). Put another way, the Continuous Forest Inventory is used to plan what should be cut in the future rather than assess how much was cut in each year governed by the past management plan. And Plaintiff's contention that the inventory is necessary for it to obtain sufficient information to file its current claims is flatly contradicted by the Complaint, which alleges that the inventory is "inadequate, out of date, inaccurate and wholly insufficient for planning sawmill operations." Compl. ¶ 45 (ECF No. 1).[4] Regardless, Plaintiff's suggestion, ECF No. 26-1 at 8, that forest management can only be evaluated at the end of an approximately ten-year period is manifestly incorrect. *See* ECF No. 22 at 7-8.

[4] It is also difficult to reconcile Plaintiff's allegation that the United States failed to "monitor or evaluate the 2005-2014 management period," *id.*, with its assertion that it could only bring its current claims at the end of the 2014 period.

To the extent that this Court entertains Plaintiff's reargument, *Mescalero Apache* remains inapplicable to this case. As the United States argued, "*Mescalero Apache*, at most, applied a tribe-specific analysis to a claim that BIA failed to meet a forest management plan's budget of cutting 17.9 million board feet of timber per year – challenging the application of a plan's cutting budget from August 28, 1984 to 1989 when claims were filed in 1992." ECF No. 21 at 8-9 (citing *Mescalero Apache*, 43 Fed. Cl. at 162, 165). First, *Mescalero Apache* is inapplicable because the Mescalero Apache tribe "did not elect, pursuant to the Indian Self-Determination and Education Assistance Act, to manage its own resources." 43 Fed. Cl. at 162. Plaintiff, in contrast, alleges that it entered contracts under the ISDEAA "to perform extensive thinning and road construction in timber sales." Compl. ¶ 58.[5] Second, *Mescalero Apache* is inapplicable because the Mescalero Apache tribe lacked a timber mill until 1987, which was within the six-year statute of limitations applicable to its 1992 Complaint. 43 Fed. Cl. at 156, 161. Unlike the situation in *Mescalero Apache*, Plaintiff alleges that it owned and operated a timber mill and that its mill was harmed by the United States' failure "to achieve the annual allowable cut prescribed in the 2005-2014" Plan. Compl. ¶¶ 13, 43, 53-56. It is beyond dispute that Plaintiff's processing of its own timber provided it with all necessary information regarding the quantity of timber cut from its reservation. The Complaint therefore undermines its assertion that it lacked sufficient information to bring its pre-2011 claims in 2011. And even if it was applicable, which it is not, *Mescalero*

[5] As the United States explained, Plaintiff acquired information regarding its forest by assuming significant forest management responsibilities through such "638 contracts." ECF No. 21 at 12-13.

Apache would bar certain of Plaintiff's claims. *Compare* Compl. ¶ 59 (claim for failure to obtain full contract value for timber sold), *with Mescalero Apache*, 43 Fed. Cl. at 165 (plaintiffs could not pursue their stumpage claims with respect to timber harvested before the six-year limitations period). Plaintiff is simply incorrect, ECF No. 26 at 8-12, that *Mescalero Apache* interprets Forest Management Plans as a promise to remedy problems, such as quantifiable damage from beetles, that toll the statute of limitations.

This Court correctly rejected Plaintiff's argument that it lacked sufficient information to bring its current claims prior to the 2005 Plan's conclusion. ECF No. 22 at 8 (citing *Wolfchild v. United States*, 731 F.3d 1280, 1291 (Fed. Cir. 2013)). The Court should similarly reject Plaintiff's recycled arguments based upon *Mescalero Apache*. Plaintiff has failed to establish that the Court's decision was incorrect, much less provided new facts or law that would support reconsideration.

C. Plaintiff's new arguments should be rejected because they are both inapplicable and were available during the parties' initial briefing on this case.

Plaintiff incorrectly seeks to buttress its reassertion that *Mescalero Apache* governs this case by citing to two additional sources of law – the Restatement of Trusts and contract law. These arguments should be rejected because they cite neither an intervening change in law nor new information that was unavailable when Plaintiff filed its Opposition. *Dairyland Power Coop.*, 2010 U.S. Claims LEXIS 14. Regardless, neither is applicable, as "statutes and regulations 'establish [the] fiduciary relationship and define the contours of the United States' fiduciary responsibilities.'" *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011) (citation omitted). And it is well-established that "common-law principles are relevant only when applied to a "specific,

applicable, trust-creating statute or regulation." Id. at 184. The Restatement of Trusts is therefore not generally applicable to the trust relationship between the United States and Plaintiff. But even if Section 98 of the Restatement of Trusts did apply in this case, the applicable subsection does not support Plaintiff's argument. In short, Plaintiff's arguments both fail on the merits and are too late under the standard for reconsideration.

First, Plaintiff misapplies Section 98 of the Restatement Third of Trusts. *See* ECF No. 26-1 at 2, 9, 10, 15 (relying on Section 90(b)). Section 98(b) addresses excuses for delay where the United States raises a defense of laches by stating that "if 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 THIRD OF TRUSTS: LACHES AND STATUTES OF LIMITATIONS § 98(b) (AM. LAW INST. 2012). Section 98(b) is inapplicable because: (1) the United States did not base its motion to dismiss on laches; (2) Plaintiff identifies no instance of it complaining about a relevant breach of trust; and (3) Plaintiff identifies no instance of the United States assured Plaintiff of corrective action.

Far more relevant is Section 98(c) of the Restatement Third of Trusts, which addresses statutes of limitations – the basis on which this Court dismissed Plaintiff's pre-2011 timber claims. *Id*. at § 98(c). Section 98(c) provides that "[i]ncreasingly, modern trust codes . . . allow a relatively short period for bringing suit against a trustee who has presented a report to the beneficiary adequately disclosing the potential existence of a claim for breach of trust." *Id*. (referencing Uniform Trust Code § 1005's one-year statute of limitations where the trustee "provides sufficient information so that the beneficiary . . . knows of the potential claim or should have inquired into its existence."). There can be

no reasonable disagreement that Plaintiff either knew or should have known about the potential claims at issue before 2011. Indeed, the Court correctly held that the Complaint admits that the 2005 Plan provided sufficient information to "put the Tribe on notice of its forest mismanagement claims." ECF No. 22 at 8 (citing Compl. ¶ 51).

Plaintiff's citation to contract law fares no better. It is well-established that the trust relationship is established by statutes and regulations. *Jicarilla Apache*, 564 U.S. at 177. Plaintiff cites to no case suggesting that contract law has any bearing on the trust duties established by Congress. Moreover, the contract law cases that Plaintiff relies upon hinge on the fact that a party anticipating that its contract will be breached has a duty to mitigate. *See Pac. Gas & Electric Co. v. United States*, 92 Fed. Cl. 175, 195 (2010). Plaintiff notably fails to identify how: (1) the United States admitted that it anticipated breaching any trust duty; (2) dead trees can be revived or forests thinned retroactively; or (3) Plaintiff has a similar duty to mitigate any of its alleged damages that might be implicated by an alleged breach.

D. Plaintiffs' effort to reargue its forest mismanagement claims fails on the merits.

Even if Plaintiff were entitled to reargue issues previously decided in the United States' favor by this Court, Plaintiff's recycled arguments fare no better. Plaintiff's argument that manifest injustice compels the reconsideration of this Court's dismissal of Plaintiff's pre-2011 claims fails for two reasons. First, Plaintiff identifies no error of law or mistake of fact, much less a manifest error or mistake. Plaintiff identifies no injustice it would suffer, much less new evidence of manifest injustice, from being forced to bring

its breach of trust claims in a statutorily-mandated, timely manner. Plaintiff's arguments should therefore be rejected.

Plaintiff's claim for undercutting suffers from a fatal inconsistency. Plaintiff contends that it could not bring a claim for failure to achieve the annual allowable cut from 2005-2011 because Plaintiff could not assess the whether the quantity of timber harvested in any of those years constituted a breach of trust. ECF No. 26-1 at 13-14. Plaintiff contends that it could not determine whether the quantity of timber cut annually from 2005-2011 breached trust duties without a 2014 Continuous Forest Inventory. Plaintiff eviscerates its own accrual theory by alleging that the United States "failed to achieve the average annual allowable cut in 2015 and 2016." Compl. ¶ 55. Plaintiff's own Complaint therefore proves that it can bring claims for an alleged failure to "achieve the average annual allowable cut" in 2015 and 2016 on an annual basis without the benefit of an inventory. Plaintiff was similarly able to bring claims for an alleged failure to "achieve the average annual allowable cut" in 2005, 2006, 2007, 2008, 2009, 2010, and through March 11, 2011.

Plaintiff's motion for reconsideration regarding the United States' alleged failure to achieve the annual allowable cut suffers from a second fatal inconsistency – simultaneously arguing that it could not promptly bring challenges to the quantity of timber cut before 2014 and challenging the quantity cut in 2015 and 2016. At all relevant times, Plaintiff was able to challenge the quantity of timber harvested in a year on an annual basis without waiting for additional information. *White Mountain Apache Tribe v. United States*, 11 Cl. Ct. 614, 679 (1987). Plaintiff admits that a "prudent trustee may well reserve timber volume to capitalize later, when markets are strong." ECF No. 26-1

at 14. If Plaintiff is correct, than the prudent trustee might also reserve timber from sale in the final year of a forest management plan. The prudence of the quantity of timber cut can be determined, at a minimum, on an annual basis. *See White Mountain Apache Tribe*, 11 Cl. Ct. at 679. Plaintiff identifies no basis for holding that Plaintiff was unable to challenge cuts on an annual basis before 2014 but became able to challenge timber cuts on an annual basis after 2014. Rather, the Complaint makes clear that Plaintiff was well aware of the quantity of timber harvested because Plaintiff: (1) admitted that it was processing the timber in its tribally-owned and operated sawmill; and (2) alleged that it was harmed by a failure to "maintain an adequate forest 'pantry' – the steady flow of product necessary to maintain a customer base." Compl. ¶¶ 53-56. In short, the Complaint and motion for reconsideration belie Plaintiff's assertion that it could not bring claims relating to the quantity of timber cut in 2005 until 2014.

Plaintiff's claim for thinning fares no better. As the United States argued in its motion to dismiss, Plaintiff knew the facts underlying its allegation that the thinning targets in the 2005 FMP were "insufficient to meet . . . fiduciary responsibilities" by 2005. ECF No. 9-1 at 15 (quoting Compl. ¶ 49). Indeed, Plaintiff's allegations that its forest needs thinning and that the 2005 Plan's thinning targets were inadequate are based on the 2005 Plan. Compl. ¶¶ 48-49. Plaintiff admits that it "carries out specific [thinning] projects" funded on an annual basis. ECF No. 16 at 18; Compl. ¶ 58; ECF No. 26-1 at 15 ("FMP sets specific and detailed forest stand treatment strategies and goals"). And Plaintiff undermines its accrual theory by acknowledging that one of the goals of annual thinning is to "reduce fire risk." ECF No. 26-1 at 16. Plaintiff does not suggest

how conducting thinning in 2014 might reduce fire risk in 2005. Plaintiff cannot escape that it knew all the material facts underlying its pre-2011 thinning claims prior to 2011.

Nor can Plaintiff provide any basis for reconsidering this Court's holding that Plaintiff's allegations regarding the 2005 Plan "indicates that it knew of the damage to the Tribe's forest" in 2005. ECF No. 22 at 8. The 2005 Plan reported "annual loss" from, among other things, mistletoe and spruce beetle. *Id*. Plaintiff does not suggest how trees killed by spruce beetle in 2005 could be resurrected in 2014. If Plaintiff believed that these losses constituted a breach of trust, it should have sued in a timely manner rather than allowing losses to accumulate. In short, Plaintiff's Motion provides no basis, much less new facts or law, for reconsideration.

Plaintiff's arguments regarding the United States' alleged promise to remedy a problem with trust management fare no better. First, Plaintiff cites cases suggesting that Plaintiffs are under a lesser duty to discover malfeasance with respect to their trust assets. ECF 26-1 at 8-9. Even if this was true, Plaintiff does not suggest any malfeasance occurred here. But the United States' recognition that beetles were attacking Plaintiff's timber is neither an admission of malfeasance nor an affirmative acknowledgement of any error. *Compare id.* at 17-18 *with Mojave Indian Tribe v. United States*, 23 Cl. Ct 417, 429 (1991). Plaintiff's claims that the United States failed to prevent insect damage, achieve annual allowable cut harvests, or meet its goals for thinning trees allege no malfeasance. Plaintiff does not suggest how any such alleged breach of fiduciary duty constitutes malfeasance. Second, Plaintiff is incorrect, ECF No. 26-1 at 8-12, that a forest management plan's acknowledgement of issues affecting Plaintiff's forests amounts to a promise to remedy a breach of trust.

Finally, Plaintiff's assertion, ECF 26-1 at 18, that it would "undermine trust management and overburden the judicial system" if Indian tribes were required to bring suit within six years of a breach of trust is devoid of merit. Plaintiff's alternative, that a tribe can allow alleged mismanagement to continue for fifteen or more years,[6] thereby allowing its forests to suffer additional damage every year would work a greater injustice. Plaintiff, having received the 2005 Plan's disclosures and its knowledge from assuming forest management responsibilities and running a sawmill, should instead be required to bring its allegations of trust mismanagement to the United States' attention so that they can be timely addressed. This is particularly true with respect to Plaintiff's claims that its forests are being actively damaged by mistletoe and beetles, and that a failure to adequately thin its forests increases the risk of forest fires. If Plaintiff truly believes that its forests are being damaged or threatened, it should bring those claims forward rather than increasing the alleged damage and risk by staying silent. Plaintiffs simply cannot overcome the proof (including their own admission) that they were on notice of their alleged claims and are bound by the statute of limitations. Their motion to reconsider offers no sustainable argument to the contrary.

E. Plaintiff's theory that claims relating to the 2005 forest management plan do not ripen until the plan concludes would, if true, render all of its remaining forest management-related claims unripe.

Plaintiff contends that its claims relating to the 2005 Plan could not accrue until the plan concludes. But that plan has not yet concluded and Plaintiff itself requested that it be extended. Letter from Superintendent, Ft. Apache Agency, to Chairman R. Lupe,

[6] The 2005 Plan has been extended to December 31, 2019.

White Mountain Apache Tribe (Mar. 3, 2015) (ECF No. 9-2 at page 4 of 151). In response, BIA "approved the request for extension of the current Forest Management Plan . . . to December 31, 2019." *Id.* To be clear, the 2005 Forest Management Plan's extension means that the plan will not conclude for almost two more years. So if Plaintiff truly could not bring claims relating to the 2005 Plan until the 2005 Plan's termination, it could not bring any of its remaining Forest Management claims until the 2005 Plan concludes in 2020. *See* *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998) (three-factor ripeness test examines "whether judicial intervention would inappropriately interfere with further administrative action" and "whether the courts would benefit from further factual development of the issues presented."); *James v. U.S. Dep't of Health & Human Servs.*, 824 F.2d 1132, 1138 (D.C. Cir. 1987) ("in the event that the dispute is resolved at the administrative level, judicial economy will be served"). The Complaint conclusively demonstrates that Plaintiff knew enough to bring claims before the 2005 Plan's expiration because it brought its claims before December 31, 2019. Plaintiff simply has not established that the statute of limitations does not begin to run until the 2005 Plan ends.

F. The Court should not disturb its dismissal of the woodland mismanagement component of Plaintiff's Forest Asset mismanagement claims.

This Court properly dismissed Plaintiff's pre-2011 claims for mismanagement of Plaintiff's woodlands. The United States and the Court addressed Plaintiff's woodlands claims as a component of Plaintiff's forest management claims because the Complaint, Plaintiff's briefs, and the applicable Forest Management Plans all treat woodlands as a component of forest management. The United States and the Court addressed Plaintiff's

woodlands claims in the manner that they were presented. Rather than providing a basis for treating Plaintiff's woodland claims differently than its forest management claims, Plaintiff's motion for reconsideration confirms that its forest and woodland claims were properly analyzed and dismissed together.

Plaintiff is simply incorrect, ECF No. 26-1 at 2-3, that the United States did not "directly address[]" Plaintiff's woodlands claims in its motion to dismiss. The United States identified Plaintiff's claims regarding "accessible commercial woodlands" as one component of Plaintiff's "forest asset" claims and argued that those claims "were not only knowable, but actually known to Plaintiff prior to March 15, 2011." (ECF No. 9-1 at 8 (citing Compl. ¶ 13). Similarly, the United States argued that Plaintiff's claims relating to the 2005 Plan's recommended 30,000 to 40,000 acres per year of prescribed burns in woodlands" were knowable and known to Plaintiff. *Id*. at 15 (quoting Compl. ¶ 49). To be clear, as evidenced by the above references to the United States' dismissal motion, Plaintiff misstates that the United States failed to address Plaintiff's woodlands claims. The Court's analysis need proceed no further.

Notably, the Complaint and Plaintiff's opposition to the United States' motion to dismiss presented Plaintiff's woodlands claims as part of Plaintiff's general forest asset claims relating to "forest mismanagement." The Complaint identified its woodland claims as a component of its "Forest Asset" Claims. Compl. at ¶¶ 42-60. Tellingly, Plaintiff referred to its "commercial forests and woodlands" as "the Tribe's **single** largest asset." *Id*. at ¶ 44 (emphasis added). And Plaintiff's Opposition referenced its woodlands claims only twice. Both instances illustrate how Plaintiff's "woodlands" claims are inextricably part of its forest management claims. ECF No. 16 at 3 ("The forestry-related

mismanagement allegations concern the technical adequacy of the Government's silvicultural management of over 1.3 million acres of forests and woodlands over decades."); *id*. at 10 ("Meaningful monitoring and long-term study is particularly challenging on the Fort Apache Indian Reservation, which contains over 1.3 million acres of ecologically diverse forests and woodlands in various states of recovery from known mismanagement prior to 1946."). Plaintiff presented its woodlands-related claims as a portion of its forest asset claims and failed to address Defendant's specific arguments relating to its woodlands. It cannot remedy that failure through a motion for reconsideration. *Dairyland Power Coop.*, 2010 U.S. Claims LEXIS 14, at *2-3.

Regardless, as discussed in Defendant's motion to dismiss and below, the documents the Parties cited in briefing Defendant's motion to dismiss establish that Plaintiff's woodland mismanagement claims are barred by the statute of limitations regardless of how Plaintiff presented those claims. Plaintiff's motion for reconsideration relies on the same IFMAT reports and 2005 Plan already addressed by the Court in its January 5, 2018 ruling. Plaintiff's reliance on materials it previously cited provides no basis for reconsideration. The IFMAT reports and 2005 Plan only reinforce the Court's previous decision dismissing Plaintiff's forest asset claims. Contrary to Plaintiff's assertion that it "includes only five terse pages on woodlands," ECF No. 26-1 at 19, the 2005 Plan treats woodlands as a component of Plaintiff's forests. For example, prescribed burns of "30,000 to 40,000 acres of woodlands annually" are proposed in the 2005 Plan's "Fuels Management" section. ECF No. 9-2 at 149. The 2005 Plan also disclosed ongoing "devastating" damage to woodlands from the pinyon needle scale. ECF No. 9-3 at 305. And, as before, Plaintiff's tribal resolutions make clear that Plaintiff

not only could have known, but actually knew, the state of its woodlands prior to 2011. Res. 2003-06 (Jan. 8, 2003) ECF No. 21-7 at 3 (Plaintiff's Tribal and Cultural staff would provide "essential information" to BIA in developing "Forest and Woodland Management Plan EA."); Briefs, Tribal Council Meeting (Dec. 2, 1998) ECF No. 21-22 at 4 ("BIA . . . presented the Woodland management activities. Res. No. 12-98-271 adopted for the Forest and Woodland Management Plan."); Res. 94-60 (Feb. 24, 1994) ECF No. 21-14 at 4 ("Tribe has a Forest Management Plan that continues the application of uneven aged forest management and provides substantial mitigation measures for wildlife throughout its forests, woodlands and riparian areas."); Res. 95-312a (Oct. 11, 1995) ECF No. 21-17 at 3, 7 (United States provides money under forestry administration for Plaintiff to hire "woodland enforcement officers" and "woodland forester."). There can be no reasonable dispute that (1) Plaintiff's citation to materials already addressed by this Court fails to establish a valid basis for reconsideration and 2) Plaintiff possessed actual knowledge of the manner in which its woodlands were managed.

Tellingly, Plaintiff's motion for reconsideration identifies "failure to derive value from the woodlands" as a forestry claim that "accrue[s] at the end of the FMP term." ECF 26-1 at 2. To be clear, the pre-2005 portion of Plaintiff's woodlands claims fail on the merits because Plaintiff admits – as it must – that its pre-2005 woodlands claims already accrued because they related to previous forest management plans.[7]

[7] And the Environmental Assessment for the 2005 Plan similarly provides that "Indian forest lands are defined in the National Indian Forest Resources Management Act to include both woodlands and timberlands." ECF No. 21-9 at 1.

Plaintiff's woodlands claims for the period between 2005 and 2011 fare no better. Plaintiff asserts that such woodlands claims could not accrue until the end of 2005 Plan. ECF No. 26-1 at 15-16. But the 2005 Plan sets forth an "objective" to, among other things, "[p]rovide a management system which will identify woodland products, values, locations, quantities, and ecologically sound utilization practices . . . [i]mprove wildlife habitat . . . [p]rotect watershed conditions . . . [and e]nhance livestock production." ECF No. 9-3 at 244-45.[8] The Complaint essentially copies the 2005 Plan's language, alleging that the United States failure to "conduct the management of woodlands necessary to identify and realize woodland values, to protect watershed function, to promote grazing, to promote wildlife habitat, and to obtain other important functions of woodlands." Compl ¶ 52. Because the 2005 Plan disclosed that that it was the United States' goal to develop a management system to identify woodland values, Plaintiff was aware of the material facts relating to Plaintiff's current claims in 2005.[9] The 2005 Plan's other disclosures regarding woodlands paralleled its disclosures regarding timber lands. For example, it disclosed that the "pinyon needle scale . . . has had a devastating effect on pinon pine through woodland areas on the Reservation. Populations of this insect are being monitored." ECF No. 9-3 at 305. In short, the 2005 Plan disclosed material facts regarding the management of Plaintiff's woodlands.

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[8] Also confirming that "[w]oodlands are a component of the overall forest resource," *id.*, and that "[n]on-recurring funding for woodland management activities is available," and Plaintiff "may apply for this funding each year." *Id*. at 247.

[9] The United States notes that Woodland values may be cultural and nonmonetary. *See* SECOND INDIAN FOREST MGMT. ASSESSMENT TEAM, AN ASSESSMENT OF INDIAN FORESTS AND FOREST MANAGEMENT IN THE UNITED STATES 44, 59 (2003) (ECF No. 9-1 at 14 n.2)..

Plaintiff's motion for reconsideration with respect to its woodland claims fails for two reasons. First, Plaintiff fails to meet the high standard for reconsideration because it misinterprets the Parties' briefs to this Court and presents arguments that Plaintiff could have made in its opposition. Second, Plaintiff's argument that it could not know the manner in which its woodlands were managed fails on the merits because Plaintiff manifestly knew the manner in which its woodlands were managed. The motion for reconsideration should be denied.

IV. CONCLUSION

For the foregoing reasons, this Court should deny Plaintiff's motion for reconsideration.

Respectfully submitted this 2nd day of March, 2018,

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CERTIFICATE OF SERVICE

I hereby certify that, on March 2, 2018, I electronically transmitted the foregoing using the ECF system for filing and transmission of a Notice of Electronic Filing to the ECF registrants in this case.

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