IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

PLAINTIFF'S REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION

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I. INTRODUCTION

On February 2, 2018, the White Mountain Apache Tribe ("Tribe") moved for reconsideration of this Court's Opinion and Order partially granting the United States' motion to dismiss. *See* ECF 22 (Order); ECF 26 and 26-1 (Mot. for Recon. and Memo in Spt. of Mot. for Recon.). On March 2, 2018, the Government filed an Opposition to Plaintiff's Motion for Reconsideration (ECF 32). The Tribe herein replies in support of the motion for reconsideration.

Reconsideration is warranted for two narrow aspects of the Tribe's forestry claims: claims arising from the Government's failure to implement the goals and objectives of the 2005-2014 Forest Management Plan (FMP), and claims arising from the Government's failure to manage the Tribe's woodlands. As set forth in *Apache Tribe of the Mescalero Reservation* and *Fort Mojave Indian Tribe*, where the Government trustee sets forth a plan to resolve acknowledged problems in trust asset management as part of its ongoing trust obligations, the Tribe is entitled to rely on that promise, and claims for breach of trust accrue when the Government does not perform. This rule has a strong basis in trust and contract law, as well as in equity, for it would be unfair to require a trust beneficiary to rely on the trustee's experience and expertise, but then deprive the trust beneficiary of legal rights based on that reliance. The Court of Federal Claims has previously granted a motion for reconsideration to reevaluate the timing of claim accrual and the statute of limitations for a tribe's forestry-related claims against the Government. *See Mitchell v. United States*, 10 Cl. Ct. 787 (1986).

In response, the Government misidentifies the standard of review by confusing reconsideration of final judgments with reconsideration of interlocutory orders. This error creates an artificially high bar for reconsideration and undermines the entirety of the response. The Government also repeatedly mischaracterizes the Tribe's arguments, and fails to meaningfully

distinguish *Mescalero Apache*, *Fort Mojave*, and applicable trust and contract law. The Tribe's narrow motion for reconsideration should be granted.

II. STANDARD OF REVIEW

The Government incorrectly applies the standard of review for motions for reconsideration of a final judgment under Rule of Court of Federal Claims 59(e). The Court of Federal Claims has repeatedly and expressly ruled that the Government's approach is incorrect. Because the Tribe seeks "reconsideration and/or clarification of an interlocutory decision and the merits of this protest have not yet been addressed, Rule 54(b) of the Rules of the United States Court of Federal Claims ("RCFC") governs instead of Rule 59(e) or 60, which address reconsideration of final judgments." *L-3 Communs. Integrated Sys., L.P. v. United States*, 98 Fed. Cl. 45, 48 (2011) (citing *Alpha I, L.P. ex rel. Sands v. United States*, 86 Fed. Cl. 126, 129 (2009); *Pinckney v. United States*, 85 Fed. Cl. 392, 393 (2009)).

The correct standard is that reconsideration is available "as justice requires." *See L-3 Communs. Integrated Sys.*, 98 Fed. Cl. at 48 (2011). This discretionary standard is less rigorous than the standard applicable to final judgments under RCFC 59(e). *Wolfchild v. United States*, 68 Fed. Cl. 779, 784 (2005). "[T]he 'as justice requires' standard amounts to determining 'whether reconsideration is necessary under the relevant circumstances.'" *L-3 Communs. Integrated Sys.*, 98 Fed. Cl. at 49. Those circumstances include where 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." *Id.*

The Government repeats the wrong standard throughout its argument. For example, the Government cites *Dairyland Power Coop. v. United States*, No. 04-106C, 2010 U.S. Claims

LEXIS 14 (Fed. Cl. Feb. 22, 2010), where the plaintiff sought reconsideration of a final judgment pursuant to CFCR 59(e), six times. *See* Response at 2, 3, 4, 9, 18. That case has no bearing here.

The Government also states that 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." Response at 3 (citation omitted). Again, and as is evident from the quoted text, that argument only pertains to reconsideration of a judgment, not an interlocutory order. To the contrary, the standard for reconsideration of an interlocutory order, by including instances where a court has misunderstood a party or misapprehended an argument, explicitly envisions reconsideration based on arguments previously raised. *L-3 Communs. Integrated Sys.*, 98 Fed. Cl. at 49.

III. ARGUMENT

Justice requires reconsideration of this Court's Opinion and Order for two forestry related claims: claims relating to the Government's failure to implement the 2005-2014 FMP, and claims relating to the Government's failure to manage the Tribe's woodlands. The Court based its Opinion and Order on the conclusion that the Tribe knew or should have known of problems with forest management prior to 2011. However, that conclusion is not determinative of claim accrual for claims relating to failure to implement the FMP and, as a result, those claims require further analysis.

In the 2005-2014 FMP, the Government acknowledged forest management problems, and set forth a plan to remedy those problems pursuant to its ongoing trust obligations. The accompanying environmental assessment confirms that, based on input from the Tribe and others, the Government recognized "the annual allowable cut," "developing markets for small wood," "dwarf mistletoe," "bark beetles," and "overstocking" of "smaller trees" as "Driving Issues," and designed the FMP as the means to resolve those issues. *See* Environmental Assessment at 6-8

(identifying issues), 23-24 (describing forest health remedies to be implemented in selected alternative), 81-82 (describing selected AAC and importance to tribal economy over FMP period) (ECF 21-9). As mandated by the National Indian Forest Resources Management Act (NIFRMA), the Tribe relied on the Government to implement the FMP and to fulfill its trust obligations by remedying the acknowledged problems. *See Apache Tribe of the Mescalero Reservation v. United States*, 43 Fed. Cl. 155, 162 (1999) ("The Tribe, at all times pertinent to this action, has relied to its detriment on the technical expertise and advice of defendant, as trustee, in all matters relating to timber management."); 25 U.S.C. § 3104(b)(1).

The Government did not implement the FMP. Claims against the Government relating to failure to implement the plan accrued at the end of the plan's ten-year term, because that was the time at which the FMP term ended and it became clear that the Government would not fulfill its obligations. *Id.* at 165 ("The Tribe claims the failure to meet the 17.9 mmbf AAC constitutes mismanagement by the BIA that extends through the entire ten year cutting budget period of the 1979 FMP. The statute of limitations does not bar the Tribe's claim for undercutting the 17.9 mmbf AAC in the years 1979 through 1988.") The Government's trust obligations are of "an ongoing, continuing nature," and where the Government acknowledges that it "initially engaged in conduct inconsistent with its trust obligations" and provides a plan to remedy that conduct, as it did in the FMP and accompanying environmental assessment, the claim accrues when that remedy does not transpire. *Ft. Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 428 (1991).

The Tribe's woodlands have been largely ignored in the Government's past reports, the FMP, and the Government's briefing on the motion to dismiss. Woodlands are distinct from commercial timberlands, and there is insufficient evidence presented to support a determination that the Tribe knew or should have known of claims relating to its woodlands.

The Government's response does not meaningfully or accurately address the Tribe's arguments. Reconsideration is appropriate and necessary at this early stage in order to set litigation on a correct course and to preserve specific claims regarding the Tribe's forests and woodlands.

A. The Tribe's motion is based on arguments this court did not fully address, as contemplated by the standard of review for reconsideration of an interlocutory order.

The Government contends that the motion for reconsideration must be denied because the Court has already considered and rejected the Tribe's arguments. That contention is both legally and factually incorrect.

The correct "as justice requires" standard of review for an interlocutory order expressly envisions reconsideration where the court "has patently misunderstood a party" or "has made an error not of reasoning, but of apprehension." *L-3 Communs. Integrated Sys.*, 98 Fed. Cl. at 49. A court can only "misunderstand" or make an error of "apprehension" regarding arguments that were previously raised and considered by the Court. The presumption that arguments have already been briefed is inherent in the applicable standard of review. The cases cited by the Government do not stand for the proposition that a motion for reconsideration under Rule 54(b) must be denied if arguments were previously raised. *Dairyland Power Coop.* concerns reconsideration of a final judgment on damages and is inapplicable. *Whispell Foreign Cars* is anomalous in that it concerned a motion for reconsideration on an order arising from a motion for reconsideration. *Whispell Foreign Cars, Inc. v. United States*, 106 Fed. Cl. 777, 781 (2012). While the court in that case cited CFRC 54(b), it employed the standard for review of a final judgment and relied on case law for reconsideration of final judgments.

The Government's argument that this court already fully considered and rejected the Tribe's arguments is also factually incorrect. The Tribe seeks to explain arguments that the Tribe previously raised but that were not fully addressed in the Opinion and Order. *See L-3 Communs.*

Integrated Sys., 98 Fed. Cl. at 49. The motion for reconsideration primarily concerns the narrow argument that claims relating to failure to implement the 2005-2014 FMP did not accrue until 2014, because the FMP sets 10-year goals and objectives to fix identified problems with forest management and the Tribe reasonably relied on the trust fiduciary to achieve those goals and objectives. *See* Memo in Spt. of Mot. for Recon. at 8-9. The Tribe relies heavily on the case directly on point, *Apache Tribe of the Mescalero Reservation v. United States*, 43 Fed. Cl. 155, 162 (1999) (*Mescalero Apache*). *See* Memo in Spt. of Mot. for Recon. at 9. The Court did not address the application of *Mescalero Apache* to claims relating to failure to implement the FMP. *See* Opinion and Order, ECF No. 22.[1]

To the extent the Court addressed argument relating to the Government's implementation of the FMP, it appears that the Court misunderstood the Tribe's argument, because the Court focused solely on the question of whether the Tribe could have investigated and discovered the alleged breaches of fiduciary duty prior to the end of the FMP. The Tribe's argument is that, irrespective of whether the Government and Tribe were aware of earlier mismanagement, in the narrow circumstance where the trustee identifies forest management problems in a forest management plan and promises to address the problems, claims do not accrue until the end of the FMP. *See* Memo in Spt. of Mot. for Recon. at 8-18.

B. The Tribe's motion correctly identifies both the general standard for claim accrual and the standard for claim accrual in the narrow instance where a trust beneficiary relies on the trustee's promises to fix identified problems.

The Government next accuses the Tribe of ignoring the "correct legal standard for claim accrual" and contends that the "Plaintiff seeks to flip the standard for accrual on its head – making

[1] The Court's only reference to *Mescalero Apache* relates to whether to defer the determination of claim accrual until after discovery. Opinion and Order at 5 n. 1; *see also Apache Tribe of the Mescalero Reservation v. United States*, Civ. No. 92-403L (Fed. Claims, July 23, 1993) (ECF 16-1, Appendix to the Tribe's Response to United States' Partial Motion for Dismissal).

the United States, rather than Plaintiff, responsible for investigating Plaintiff's claims." *See* Response at 6. In doing so, the Government mischaracterizes the Tribe's motion which begins with the general accrual standard and explains that a more nuanced standard applies to a narrow subset of the Tribe's forestry claims. *See* Memo in Spt. of Mot. for Recon. at 1.

The Government is also incorrect that the Tribe seeks to subvert the general standard. The standard set forth in the Tribe's motion for reconsideration is entirely consistent with the more general standard that a claim accrues when the trust beneficiary "knew or should have known" of the breach. As explained in *Mescalero Apache,* 43 Fed. Cl. at 162 and *Fort Mojave* 23 Cl. Ct 417, the trust beneficiary may rely on the trustee to exercise its ongoing trust obligations and remedy acknowledged problems, and the trustee therefore cannot and should not know whether a breach has occurred until it becomes evident that the proposed solution has not occurred. Memo in Spt. of Mot. for Recon. at 2.

In its Memorandum, the Tribe showed that, under *Mescalero Apache and Fort Mojave*, analogous case law, and as supported by trust and contract law, its claims do not accrue until the end of the FMP period. Thus, the Tribe's alleged knowledge of the status of its forest and related operations is irrelevant. Despite this clear law, the Government repeatedly cites to alleged evidence of the Tribe's knowledge of its forest. Response at 5, 6, 7, 8, 10, 13, 14, 16, 18, 19, 20, 21. Such alleged knowledge does not affect the legal premise for the Tribe's motion: accrual occurs at the end of the FMP period.[2]

The Government fails to discuss *Fort Mojave* at all, and argues that *Mescalero Apache* is distinguishable because the White Mountain Apache Tribe has a forestry department that carries

[2] The Government cites to *White Mountain Apache Tribe v. Hodel*, 784 F.2d 921, 922 (9th Cir. 1986), *see* Response at 6 n. 3, for the proposition that the Tribe's participation in litigation relating to water rights somehow indicates that claims accrued for mismanagement of forest resources. Obviously, water and forests are different resources and the Government's argument has no merit.

out some forestry operations pursuant to contracts authorized by the Indian Self Determination and Education Assistance Act (ISDEAA), and the Tribe in *Mescalero Apache* did not. *See* 25 U.S.C. § 5321. The Government's attempted distinction is without merit. First, regardless of the Tribe's role and its alleged, associated knowledge, it is necessary to wait until the end of the FMP period to determine if there is a breach of trust. To the extent the Tribe carries out forestry operations, those operations are carried out under the supervision of BIA and must be in accordance with the FMP. *See* FMP at 3 ("All forested reservations, in trust or restricted status, shall have a current Forest Management Plan (FMP) which satisfies 25 CFR 163.11 prior to the authorization of activities or expenditure of funds for forest management activities…"). Thus, for purposes of determining accrual of claims or the Government's fiduciary obligations, it is immaterial whether the BIA or the Tribe carries out the given operations. The statement in *Mescalero Apache* that "[t]he Tribe, at all times pertinent to this action, has relied to its detriment on the technical expertise and advice of defendant, as trustee, in all matters relating to timber management," 43 Fed. Cl. at 162, is also true in this case and as a result the Government's attempted distinction fails. *See* Complaint (ECF 1), Pars. 20-26.

Second, the Government's argument is undermined by the applicable statutes. ISDEAA expressly does not authorize or require termination of the Government's trust obligations. 25 U.S.C. § 5332(2). Likewise, NIFRMA mandates funding of Tribal forestry programs, 25 U.S.C. § 3110, and states that "[n]othing in this chapter shall be construed to diminish or expand the trust responsibility of the United States toward Indian forest lands, or any legal obligation or remedy resulting therefrom." 25 U.S.C. § 3120. Indeed, the FMP recognizes the Tribe's role in forest

management through self-governance contracts, FMP at 3, and also clearly and repeatedly recognizes the Government's ongoing trust obligations to the Tribe. FMP at 1. [3]

The Government next seeks to distinguish *Mescalero Apache* because the White Mountain Apache Tribe owns a timber mill, whereas the Tribe in *Mescalero Apache* did not. This distinction also has no impact on the legal analysis. Whether the Tribe is aware of annual shortages in timber volume is irrelevant. The FMP sets forth a 10-year cutting budget, and the "Annual Allowable Cut" is an average over ten years. FMP at 152. For claim accrual, the critical question is the total volume (and resulting annual average) at the end of the 10-year period. *Mescalero Apache*, 43 Fed. Cl. at 165 ("The statute of limitations does not bar the Tribe's claim for undercutting the 17.9 mmbf AAC in the years 1979 through 1988."). Likewise, even if the Tribe was aware that a given year's thinning or insect management operations are insufficient, that does not mean that the FMP's goals and objectives will not be achieved by the end of the 10-year period. Silviculture involves management of the natural world, and fluctuates annually based on natural conditions such as fire, weather, stand maturity, and precipitation as well as management conditions such as staffing, forest access, and markets. In acknowledgment of inherent fluctuations, forest management on the Reservation occurs in 10-year cycles, and only at the end of the 10-year period can the Tribe can ascertain whether the Government has remedied mismanagement.[4]

[3] In an analogous situation, the Government unsuccessfully argued that a cooperative agreement under the Federal Oil and Gas Royalty Management Act diminished its fiduciary duty to collect mineral royalties in *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 58 Fed. Cl. 77, 84-86 (2003). The court noted that FOGRMA states that "nothing in this chapter shall be construed to reduce the responsibilities of the Secretary to ensure prompt and proper collection" (much like ISDEAA and NIFRMA), and found that the statute and cooperative agreement did not "operate to reduce the government's fiduciary responsibility", but rather was "designed to enhance the effectiveness of the discharge by the Secretary of his responsibilities." *Id.* at 86.

[4] The Government further suggests that, if *Mescalero Apache* applies, it serves to bar claims arising from the Government's failure to obtain the full value of timber sold. However, under a special statute passed after *Mescalero Apache* was decided, claims related to failure to collect stumpage

C. The Restatement of Trusts and principles of contract law provide applicable and persuasive support for *Mescalero Apache* and *Fort Mojave*.

The Government argues that neither Section 98 of the Restatement of Trusts nor contract law authority is relevant to the question of accrual. As shown below, both sources of authority demonstrate that the principle set forth in *Mescalero Apache* and *Fort Mojave*—that the trust beneficiary is entitled to rely on the promises of its trustee and claims for breach of trust do not accrue until those promises are broken—is well grounded in a long history of settled case law and recognized principles of equity and judicial efficiency.

1. The Restatement of Trusts is a useful tool to understand the Government's money-mandating trust obligations under the National Indian Forest Resources Management Act.

In the motion for reconsideration, the Tribe relied on Section 98 of the Restatement of Trusts, which states in part: "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." That principle supports claim accrual at the end of the 2005-2014 FMP, because the FMP is the mechanism by which the Government receives input from the Tribe and sets forth a plan by which it will remedy forest mismanagement over time.

The Government argues that the Restatement of Trusts does not apply to breach of trust claims in general, and further that the provision cited by the Tribe, Section 98(b), only concerns laches and therefore is inapplicable here. These contentions are both wrong.

Once a money mandating trust duty is established by an applicable statute or regulation, as the Government concedes is the case for the Tribe's forestry claims, the Restatement of Trusts

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fees are trust fund claims, that do not accrue until the Tribe has received a meaningful accounting from which it can determine a loss. *See Shoshone Indian Tribe v. United States*, 364 F.3d 1339, 1350 (Fed. Cir. 2004). This Court has already determined that the Tribe did not receive such an accounting, Opinion and Order at 11, and the Government did not seek reconsideration.

codifies the common law and is an informative and persuasive authority regarding the scope, extent, or implementation of the Government's fiduciary obligations. The Supreme Court and Court of Federal Claims routinely rely on the common law of trusts in breach of trust cases. In one particularly pertinent example, *Mitchell v. United States*, 10 Cl. Ct. 787, 789 (1986), the Court granted a motion for reconsideration and applied the common law continuing claim doctrine to determine the date of claim accrual for claims arising from the Government's mismanagement of a tribe's forest. In *Jicarilla Apache Nation v. United States*, 112 Fed. Cl. 274 (2013), the Court relied on the Restatement more than twenty times, in order to determine whether the Government's management of financial assets violated trust duties and to determine the scope and extent of damages. *See, e.g., id.* at 293; *see also United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475-77 (2003) (applying common law trustee duties to determine money damages claim is cognizable); *United States v. Mitchell*, 463 U.S. 206, 226 (1983). In short, trust common law and the Restatement of Trusts clearly constitute useful and persuasive authority in determining questions of claim accrual.

The Government's contention that the cited portion of Restatement of Trusts (3d) Section 98 does not apply because it references laches is also incorrect. As explained in the Restatement, laches is the equitable, common law predecessor to statutes of limitations. The two defenses arise from many of the same policy concerns—namely the avoidance of stale evidence and the benefits of settled legal relationships. That is why laches and the statute of limitations share the same section in the Restatement of Trusts. *See* Restatement Section 98, Reporter's Note comments b and c. The principles explained in Restatement Section 98 are therefore often applicable to interpretation of both laches and the statute of limitations. For example, the preceding sentence to the provision relied upon by the Tribe states "[a] trustee's concealment of misconduct, or of the

trust or the beneficiary's interest in it, excuses a beneficiary's failure to learn of the existence or effect of a breach of trust…." That exact principle has been adopted by the Federal Circuit to apply to claim accrual under 28 U.S.C. § 2501. *See Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988) (discussing equitable tolling of claim accrual based on fraudulent concealment of claims).

2. Contract law regarding claim accrual for non-performance of obligations provides a useful analogy for claims based on non-performance of the FMP.

In the motion for reconsideration, the Tribe argued that *Franconia Assocs. v. United States*, 536 U.S. 129 (2002) and similar cases support claim accrual at the end of the FMP period if the Tribe elects to await performance, based on the Supreme Court's determination that an injured party can either bring suit when it determines non-performance is likely, or, if the injured party to a performance contract "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 1 C. Corman, Limitation of Actions § 7.2.1, p. 488 (1991)).

The Government argues that contract law has no bearing whatsoever on the trust duties established by Congress. Response at 11. However, *Franconia Assocs.* is closely analogous to the present suit because it arose under the Tucker Act on appeal from the Federal Court of Claims, and the Supreme Court construed claim accrual for the non-performance of legally required duties and applied 28 U.S.C. § 2501.

Claim accrual under contract law provides persuasive authority because the FMP performs in a similar manner to a contract. The FMP sets forth the Government's understanding of the goals and objectives necessary to implement its trust obligations to the Tribe, and NIFRMA mandates that the Government 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." 25 U.S.C. § 3104(b)(1). Just as with a contract, it is more practical and efficient for a Tribe to allow the allotted time for the Government to deliver performance, rather than bring suit for an anticipatory breach that may yet be remedied. "[T]he 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." *Franconia Assocs. v. United States*, 536 U.S. at 146.

The "practical considerations" underlying the Court's decision in *Franconia Assocs.*, 536 U.S. at 146, are particularly persuasive here, given that the Tribe relies on timber harvest and milling as its primary economic resource, and that no logging may occur absent a forest management plan. The Court further observed that "[p]utting prospective plaintiffs to the choice of either bringing suit soon after the Government's repudiation or forever relinquishing their claims would surely proliferate litigation." *Id.* Similarly, the most efficient and fair outcome in the event that the Government fails to implement the FMP is for the Government and Tribe to attempt to remedy any deficiencies within the ten-year term. Requiring the Tribe to bring claims six years into implementation of an FMP in order to preserve legal rights would not only be enormously inefficient and detrimental to the trust relationship, it could potentially imperil the Tribe's ability to carry out its primary economic activity.

The Government faults the Tribe for not citing any cases referencing contract law in the trust context. The Tribe directs this Court's attention to *Menominee Tribe of Indians v. United States*, No. 134-67-B (Forest Mismanagement), 1980 U.S. Ct. Cl. LEXIS 1020 (Ct. Cl. Apr. 4, 1980), in which the court stated:

> Long prior to and throughout the period here in dispute, defendant established Menominee Forest Management policy through a series of forest management plans. There is no suggestion in the record that plaintiffs had any active role in the formulation of that policy. This long standing relationship, and the conduct of the

> parties, both illustrate that the parties considered themselves to be in a fiduciary relationship and that defendant was obligated thereunder to manage the forest for the benefit of the tribe. Such a long standing course of conduct, therefore, gave rise to a contract implied in fact in recognition and confirmation of the fiduciary relationship which had developed between the parties.

Id. at 5 (emphasis added). While the Tribe does not assert a claim based on implied contract, and had some role in the development of the FMP, *Menominee Tribe* demonstrates that this Court has long used the lens of contract law to construe the Government's forest management fiduciary obligations. Finally, the Government points out that the cited contract cases also discuss the plaintiff's obligation to mitigate damages. The Government's argument is premature and irrelevant to the Court's Opinion and Order and the Tribe's motion for reconsideration.

D. The Tribe's argument that claims accrue at the end of the FMP period is correct and well-supported.

Moving to the merits of the Tribe's argument, the Government contends that the Tribe "identifies no error of law or mistake of fact, much less a manifest error or mistake." Response at 11. Justice requires reconsideration because it appears that this Court misapprehended the Tribe's argument, and the consequences of that misapprehension are great. As alleged in the Complaint,

> The Reservation's commercial forests and woodlands are the Tribe's single largest asset. The Tribe's forests are a renewable resource. If properly managed under principles of sustained yield, the Tribe's forests would provide substantial revenue and employment for the Tribe and its members indefinitely. Sound management would also promote forest health, reduce fire risk, provide habitat for wildlife, and protect clean water for Tribal members and aquatic species. 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.

Complaint (ECF 1), ¶ 44. The Government's breaches of fiduciary duties in failing to implement the 2005-2014 FMP from 2005 to 2011 (the years in question in the motion for reconsideration) cost the Tribe substantial lost revenue, important jobs, years of tree growth, and created greatly increased fire risk. As the Government concedes, many of these failures cannot be completely

remedied, *see* Response at 13-14, and returning the forest to health will entail significant resources. Justice requires reconsideration before eliminating such important claims.

It would further be unjust to limit claims relating to the Government's failure to implement the FMP, because it would punish the Tribe for following and being subjected to the requirements of federal law. NIFRMA and its regulations require preparation of an FMP, requires the Tribe to contribute to its preparation, requires the Government to achieve the ten-year goals and objectives set forth in the FMP, and precludes logging on the Reservation absent a valid FMP. The Tribe reasonably relied on its trustee to follow federal law, and could not know until the end of the 10-year period that the Government would fail to do so.

The Government's other arguments on the merits also miss the mark. The main thrust of the Government's response is that the Tribe was aware of annual harvest volumes, thinning, and other forest management on an annual basis and so was required to bring its claims earlier. The Government does not address the Tribe's argument that: "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." Memo in Spt. of Mot. for Recon. at 12. For the limited subset of claims relating to the Government's failure to implement the FMP, the Tribe's knowledge of information indicating a potential breach is immaterial. The operative factual and legal question is when the Government failed to perform the goals and objectives set forth in the FMP.

The Tribe responds to the Government's claim-specific defenses below.

1. The Tribe's claims for failure to attain the ten-year cutting budget from 2005-2014 are consistent with the Tribe's claims that the Government failed to attain the annual allowable cut in 2015 and 2016.

The Government further argues that the Tribe's complaint is inconsistent, because the Tribe identifies claims in 2015 and 2016, thereby allegedly demonstrating that it is possible to

bring claims on an annual basis and that the Tribe should have done so for the years 2005 through 2011. Response at 12-13. The Government exaggerates the Tribe's position. The Tribe's motion only contends that the specific claims for failure to implement the ten-year plan stated in the FMP arise at the end of the FMP. That does not mean as a converse result that all forestry claims must accrue at the end of the FMP.

The Tribe set forth different claims, one of which was failure to attain the harvest levels set forth in the 2005-2014 FMP. Additionally, and separately, the Tribe alleged that the Government has not met the annual allowable cut in 2015 and 2016. When the Government failed to even approximate achieving the goals and objectives set forth in the FMP by the end of the FMP, it breached its fiduciary duty to the Tribe and the Tribe's claim based on failure to implement the FMP accrued. *See* Memo in Spt. of Mot. for Recon. at 15 ("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."). 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.

In contrast, the claims arising in 2015 and 2016 are distinct because they are untethered from a ten-year cutting budget. The AAC for these years is simply an extension of previous years, and the Government has provided no evidence to indicate that the harvest levels are based on attaining a projected cutting budget or reasoned goal. These claims are therefore different from the years 2005-2011, which were part of the FMP's ten-year plan. The Government attempts to create inconsistency where there is none.

In a related argument, the Government suggests that the Tribe's claim is not yet ripe, because the FMP was extended to 2019. That argument also fails due to the uncontested fact that

the FMP is a ten-year plan (it says as much on the cover of the plan), and there is no additional plan in place to address the years 2015-2019. The time to determine whether the Government performed is at the end of the ten-year period.[5] The Government simply failed in its statutory obligation to prepare a new FMP, and the Tribe allowed for an extension because, without some FMP in place, logging operations cannot occur on the Reservation.

2. The Tribe's claims for failure to implement the FMP relating to silvicultural prescriptions and management accrued in 2014, because the Government promised to remedy acknowledged problems by 2014 and did not.

For claims relating to forest health claims, such as thinning and insect and disease management, the Government acknowledged error in 2005 and then set forth a ten-year FMP to remedy those errors. Claims relating to failure to implement the silvicultural and management prescriptions of the FMP therefore arise in 2014. *Ft. Mojave*, 23 Cl. Ct. at 429.

In response, the Government argues that the FMP's recognition of forest health problems does not constitute acknowledgement of malfeasance. The Tribe never argues that the FMP acknowledges malfeasance, none of the Tribe's claims are based on alleged malfeasance, and the Government's response on that point is immaterial.

The Government further argues that the FMP does not acknowledge error. That contention is incorrect. Under NIFRMA, the Government has a comprehensive obligation to maintain a healthy and productive forest through forest land management activities. *See* 25 U.S.C. § 3104. The definition of "forest land management activities" includes, *inter alia*, "thinning," "protection against losses from wildfire," and "protection against insects and disease." 25 U.S.C. § 3103(4)(C), (D), (E). The purpose of the FMP is to assure that the Tribe's lands "remain in a

[5] The Government also mistakes the Tribe's position regarding the Continuous Forest Inventory (CFI). CFI is one important tool for measuring whether the Government implemented the FMP, but it is not the "sole and exclusive tool." Response at 5. Now that the FMP term is complete, the Tribe can independently assess the Government's performance.

continuously productive state." 25 U.S.C. § 3103(5). By law, the FMP must acknowledge errors in past management and must set forth a plan on how to fix those errors.

Furthermore, the FMP and associated environmental assessment expressly acknowledge that forest stands are overstocked (need thinning). FMP at 26. The Environmental Assessment confirms on page 6 that:

> During the past decade, however, an average of only about 2,000 acres per year has been pre-commercially thinned. This level of thinning has not kept up with harvest levels. The overall trend, based on an analysis of 40 years of continuous forest Inventory data, shows that stocking densities throughout the Fort Apache Indian Reservation are increasing. This increase in density of smaller trees leads to stagnation. Stagnation is condition where growth of individual trees decreases, first in diameter and then in height.

The FMP also acknowledges past errors in management of mistletoe, stating that "[f]ield inventories indicate that approximately 85 percent of the ponderosa pine timber stands are infected with dwarf mistletoe, with one-third of these stands being classified as heavy…With the increased number of smaller diameter trees in the sub-merchantable saw-log class showing signs of mistletoe infection, other funding sources were needed to augment the timber program to attain desired results." FMP at 266; *see also* Environmental Assessment at 6 ("A significant threat to forest health on the Fort Apache Indian Reservation is dwarf mistletoe…Over the past several decades mistletoe control efforts have increased but the disease has not yet been controlled.")

In sum, the FMP both by definition and expressly acknowledges errors and sets forth the path to fixing those errors, and the EA confirms the FMP. Claims relating to failure to implement the FMP therefore arise at the end of the FMP period, when it became evident that the Government did not perform its obligations.

E. The Government did not provide support for the dismissal of the Tribe's woodlands claims.

In the Memorandum, the Tribe established that the Government had made virtually no mention of the Tribe's woodlands claims in its motion to dismiss, and therefore did not establish that the Tribe's claims related to woodlands accrued prior to 2011. *See* Memo in Spt. of Mot. for Recon. at 18-20. This Court's Opinion and Order likewise had no specific discussion of the woodlands claims, suggesting that the Court did not fully apprehend that woodlands are wholly distinct from commercial forestland, and the claims related to those resources are also distinct.

In response, the Government first argues in passing that its arguments related to commercial forestland necessarily encompassed woodlands (without mentioning them), and then makes the arguments it failed to make in its motion to dismiss, pointing this Court to documents it should have cited previously. *See* Response at 19. However, the materials now set forth by the Government only demonstrate that: a) woodlands and commercial forest land are distinct resources subject to different management, and b) the Government did not address woodlands in its motion to dismiss. The Government did not adequately support its motion to dismiss the Tribe's woodlands claims when it had the opportunity to do so, and as a result that aspect of the motion should not have been granted.

Additionally, as with commercial forestlands, the Tribe's claims relating to failure to implement the FMP encompass the years 2005 to 2014, and accrued at the end of the FMP. The reasoning in *Fort Mojave* applies to the woodlands claim, because the FMP acknowledges a total lack of woodland management and promises to remedy that failure by "[p]rovid[ing] a management system which will identify woodland products, values, locations, quantities, and ecologically sound utilization practices." FMP at 215-219. The Tribe justifiably relied on its trustee to follow through on its stated objective, and could not ascertain until the end of the FMP term that its trustee would fail to do so. "[H]ere, the government affirmatively acknowledged that

it had erred, took the position that plaintiffs were entitled to the…rights in dispute, and commenced to take actions in furtherance of its trust responsibilities aimed at resecuring those rights for plaintiffs." *Ft. Mojave Indian Tribe*, 23 Cl. Ct. at 429. As a result, the woodlands claims for failure to implement the FMP and conduct management of woodlands accrued at the end of the FMP term, when there was a "final determination" that the Government would not fulfill its trust obligations. *Id.* at 430.

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 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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