

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 SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

On April 6, 2018, this Court issued an Order requesting supplemental briefing from the White Mountain Apache Tribe (Tribe) on its motion for reconsideration. This brief responds to the Court's six questions. *See* Order, ECF 36.

1. The BIA made express promises to remedy deficiencies in its management under the FMP (2005-2014), as detailed in the Administrative Record.

BIA made express promises to the Tribe in the 2005-2014 Forest Management Plan (“FMP”) that BIA would design, implement, and monitor the FMP to remedy deficiencies in its management in furtherance of its trust obligations to the Tribe.

The FMP’s first sentences set forth a broad and express promise to implement the FMP over the ten-year planning period:

The Forest Management Plan (FMP) provides the management direction by which program activities will be regulated during the planning period in order to meet long-term resource objectives. The FMP includes action plans for conducting the

five major forestry programs, necessary to ensure the development, maintenance, protection, and enhancement of the White Mountain Apache Tribe's forest lands in a perpetually productive state.

2005-2014 FMP, ECF 9-2, at 14 (emphasis added).¹ This initial description establishes the contents of the FMP as express promises to carry out specific measures during the planning period as part of the Government's fiduciary obligation to the Tribe.

Throughout the FMP, the Government acknowledges existing deficiencies and promises to remedy those deficiencies by taking specific actions over the ten-year planning period. In each instance, the Tribe was entitled to rely on the Government's promises, and the related claims for breach of trust accrued at the end of the 10-year planning period. *See Apache Tribe of the Mescalero Reservation v. United States*, 43 Fed. Cl. 155, 163 (1999); *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 429 (1991), *aff'd*, No. 95-5014, 1995 U.S. App. LEXIS 23960 (Fed. Cir. 1995); Restatement 3d of Trusts, § 98 (2012).

The Tribe provides citations to claim-specific promises in the FMP below:

Timber Volume (Annual Allowable Cut)

- Stating an objective to "prepare sales of sufficient volumes of timber to meet the annual allowable cut." ECF 9-2 at 23.

¹ The Tribe regrets the Court's frustration with erroneous citations in the motion for reconsideration. The errors mainly derive from the fact that the Government published two 2005-2014 FMPs with identical content but different pagination. The Government submitted a copy of one version to the Court, while the Tribe cited to the pagination in the other version. The Tribe will hereafter cite to the FMP version before the Court, ECF 9-2 and ECF 9-3, and refer to the ECF pagination for all citations to factual materials. Also for the Court's convenience, the Tribe submits: (1) highlighted portions of the record cited in this brief as Exhibit 1, and (2) a table cross-referencing the erroneous citations from the motion for reconsideration and the reply with the correct citations as Exhibit 2.

- Stating that “[t]he planned management period will annually harvest 40.3 million board feet (Gross MMBF) for \$24.34 million in gross annual revenue.” ECF 9-3 at 148; *see also* harvest schedule of 10-year cutting budget, ECF 9-3 at 154-59.

Thinning

- Stating an objective to “utilize a variety of silvicultural tools including commercial harvesting, precommercial thinning, prescribed fire . . . to move stand structure, composition, and other characteristics toward that of the target forest.” ECF 9-2 at 22.
- Stating an objective to “[m]anage natural and activity-created wildland fuels to reduce wildfire size, intensity, behavior, and threat to life and property.” ECF 9-2 at 23.
- Stating standard to “[m]anage stand densities to promote vigorous tree growth and reduce susceptibility to damages due to insects, disease, wildfire, and other agents.” ECF 9-2 at 37.
- Stating that “treatments such as 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.” ECF 9-2 at 113, 114.
- Acknowledging overstocking and stating objectives to “[i]mplement silvicultural thinning prescriptions and guidelines to meet desired stand objectives and conditions” and to “[t]reat the required acreage to maintain a sustainable and healthy forest.” ECF 9-3 at 53.

Insects and Disease

- Stating an objective to “[c]onduct surveys to determine the extent of forest pest populations and the need for treatments to control insects, disease, or other damaging agents.” ECF 9-2 at 22.
- Stating that “[i]ntegrated pest management (IPM) strategies will be utilized to manage pests within the constraints of laws and regulations and to meet Forest Management objectives.” ECF 9-2 at 41.
- “Management will take a proactive approach to avoid the detrimental effects of catastrophic fire and epidemic insect and disease outbreaks.” ECF 9-2 at 113.
- Stating objective to “[p]lan, execute, and report insect and disease control projects.” ECF 9-3 at 2.
- Stating 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 Suppression will be initiated through timely detection, surveillance, and evaluation actions.” ECF 9-3 at 2.
- Acknowledging that “[l]osses to insects and diseases continue to be of concern to the BIA Branch of Forestry and the White Mountain Apache Tribe. Forest activities designed to

help ameliorate the outbreaks will continue to be practiced where a positive outcome can be expected.” ECF 9-3 at 143.

Woodlands

- Stating that “treatments such as 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.” ECF 9-2 at 113.
- Stating objective to “[p]rovide a management system which will identify woodland products, values, locations, quantities, and ecologically sound utilization practices.” ECF 9-3 at 88.

Forest Inventory and Modeling

- “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.” ECF 9-3 at 16.
- Stating objective to “[s]chedule CFI activities and analyses so completion is achieved prior to expiration of the current management period.” ECF 9-3 at 16.
- Stating objective to “[m]onitor forest management activities for treatment effectiveness and environmental compliance.” ECF 9-3 at 32.
- Stating objective to “[p]rovide an administrative monitoring process of woodland activities to ensure that management objectives are met.” ECF 9-3 at 88.
- “All these [insect and disease] outbreaks will continue to be monitored annually.” ECF 9-3 at 143.

These statements constitute express and specific promises to carry out the measures necessary to remedy previous deficiencies and restore forest health over a ten-year period.

As part of development of the FMP, BIA developed a range of alternatives in an accompanying environmental assessment (EA). *See generally* ECF 21-9. The EA sheds light on the promises in the FMP because it was the primary means of explaining the FMP to the Tribe and its members and demonstrates BIA’s intent in preparing the FMP. *See* ECF 21-9 at 12 (“The WMAT and its constituent communities define the primary public targeted for involvement in this EA process.”); *see also* Tribal Resolution No. 01-2003-06, ECF No. 21-7 at 2-4.

The EA confirms that the FMP's standards and objectives are express promises, by detailing past forest management deficiencies and related forest conditions and providing a summary of how the FMP will remedy those deficiencies. For example, the EA states what BIA planned to achieve by implementing the FMP:

Forest health will improve by treating the forest for diseases, insects, fire and excessive timber stocking levels. Monitoring will provide early detection, degree of severity, extent of activity and trend analysis of diseases and insect activity across the Reservation. Continuing Forest Inventory (CFI) provides data on the total volume, growth, harvest, and mortality used in a Forest Inventory Analysis. The Proposed Action harvests timber, thins noncommercial timber species and treats residual biomass. The action will reduce timber stocking levels providing for optimal growth in the residual forest: reduce fire ignition, behavior and severity. Harvesting is the most practical control measure for disease infestations and insect outbreaks.

ECF 21-9 at 4. Indeed, in this case the Government admits that the EA informed the Tribe that past forest management did not meet statutory mandates, and recommended adoption of the preferred alternative as the FMP to resolve that deficiency. *See United States' Reply Memo. in Support of Motion for Dismissal at 8 (ECF 21).*

The EA further confirms that the FMP contains promises by describing the deficiencies in past management, *see ECF 21-9 at 16-17*, and the specific measures by which BIA planned to fulfill the express promises relating to harvest volumes,² thinning,³

² "The AAC . . . would be 40.3 MMBF gross Increased mgt. of smaller tree size classes resulting in larger trees in future Projected gross annual revenue from timber is estimated at \$20.0 million for the upcoming period." ECF 21-9 at 41; *see also* ECF 21-9 at 37, 73.

³ "Approximately 7,000 acres of forest lands would be precommercially thinned annually." ECF 21-9 at 35; *see also* ECF 21-9 at 68. "An average of 30,000 acres of timber and 20,000 acres of woodland would be prescribed burned annually." ECF 21-9 at 35; *see also* ECF 21-9 at 69, 81.

insects and disease,⁴ woodlands,⁵ and monitoring.⁶ Upon information and belief, the intent of the parties will be buttressed by further communications between BIA and the Tribe regarding the development and approval of the FMP that are not in the record at this early stage of the case, but would be developed during discovery.

The express promises set forth in the FMP constitute sufficient “assurances” to delay claim accrual. Restatement of Trusts 3d. § 98 (2012). Based on the National Indian Forest Resource Management Act (“NIFRMA”), the BIA has a trust obligation to carry out the promises. *United States v. Mitchell*, 463 U.S. 206, 226-27 (1983). NIFRMA commands that the “Secretary shall undertake forest land management activities on Indian forest land, either directly or through contracts, cooperative agreements, or grants,” and that such activities must be carried out “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(a)-(b). NIFRMA regulations provide that:

an appropriate forest management plan shall be prepared and revised as needed for all Indian forest lands. Such documents shall contain a statement describing 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.

⁴ “Approximately 50% of the forest stands with a mistletoe rating greater than .4 would be harvested with one of two mistletoe prescriptions.” ECF 21-9 at 34-35. “Mistletoe infection levels are expected to decrease with increased treatments.” ECF 21-9 at 41.

⁵ “Green post and pole or fuelwood harvesting would be instituted in woodland areas to thin woodland stands, improve the health and vigor of residual trees, and to increase and improve herbaceous production.” ECF 21-9 at 35. “Additional revenue could be generated through the sale of woodland or pole-size material. Potential to recover 18,540 cords from pole harvest.” ECF 21-9 at 41.

⁶ “Monitoring the implementation of plan objectives is necessary to ensure that plan objectives are being met, that projects are being implemented as planned and that projects are effective in achieving the desired condition. Feedback from monitoring efforts will be used to evaluate activities, procedures, objectives, and long range goals.” ECF 21-9 at 142.

25 C.F.R. § 163.11(a) (emphasis added). BIA must carry out the measures set forth in the FMP. As a result, BIA’s decision to include measures in the FMP constitutes an express promise as a matter of law, because inclusion demonstrates a binding intention to complete those measures.

2. BIA made implied promises during the development, approval, and implementation of the FMP, but the Tribe does not rely on those promises in its motion for reconsideration.

As set forth above, the BIA made express promises in the FMP that correspond to the Tribe’s forestry claims. Those express promises are sufficient to delay claim accrual until non-performance. *See Mescalero Apache*, 43 Fed. Cl. at 163; *Fort Mojave Apache*, 23 Cl. Ct. at 429; Restatement 3d of Trusts, § 98 (2012). BIA also made implied promises in the development, approval, and implementation of the 2005-2014 FMP. While the Tribe is not relying on such promises for its motion, the record contains evidence of implied promises (and discovery would undoubtedly produce additional evidence).

For example, in Tribal Resolution No. 01-2003-06, the Tribal Council described the Government’s trust responsibilities relating to development of the FMP, described ongoing meetings between the Government and the Tribe regarding development of the FMP, and specified its understanding that the Government is responsible for developing and selecting the preferred alternative for the FMP. *See* ECF No. 21-7 at 2-4. In Tribal Resolution No. 10-2001-274, the Tribe requested that “the Bureau of Indian Affairs prepare a report as to the extent to which the prior ten year Forest Management Plan’s economic and forest management goals have been actualized and achieved not only in table form, and by appropriate and detailed analysis but in a

comprehensive narrative with appropriate references to documentation.” ECF 21-8 at 3. The BIA’s regional forester, regional director, and regional trust administrator all signed the FMP, indicating an intent to approve and be bound by the document. ECF 9-2 at 5. These documents evidence implied promises and confirm that the Tribe and Government viewed the FMP as setting forth express promises to be fulfilled over ten years.

3. Upon approval of the FMP, the Government made express promises to remedy management deficiencies as set forth in the FMP.

The date of the express promises is the date of final approval of the FMP, which is February 23, 2005. ECF 9-2 at 5. The scope of the remedy promised over the ten-year planning period is to accomplish the “objectives” and “standards” set forth in the FMP and in so doing ensure “the development, maintenance, and enhancement of Indian forest land in a perpetually productive state.” 25 U.S.C. § 3104(b)(1). Many examples of the scope of the remedy, organized by Tribal claim, are provided in Section 1 *supra*. Through discovery and expert testimony at trial, the Tribe will establish the measures required to fulfill the FMP’s express promises and the resulting remedy.

4. The Tribe is not relying on specific implied promises.

Please see response to Question 2 *supra*.

5. The remedies promised in the FMP were to be accomplished by the end of the 10-year FMP period in 2014.

The FMP 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) (emphasis added). The specified period therefore sets

the performance date of the express promises in the FMP. Here, as indicated on the cover of the FMP, the specified period for performance is ten years. *See* ECF 9-2 at 2 (titled “Forest Management Plan 2005-2014”).

Performance is due in ten years in large part because the harvest levels and silvicultural prescriptions are based on analysis of forest inventory that predicts the needs for the next ten years, and assumes that further analysis will occur at the end of the ten-year period. *See* ECF 9-3 at 16-17. At the end of the ten-year period, performance of the stated standards and objectives were measurable, and the claims accrued. *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988).

The ten-year performance date is exemplified by the FMP’s promises regarding commercial timber harvest. The timber harvest level approved is an annual number of board feet anticipated for harvest over the ten-year period, also known as the “annual allowable cut,” or AAC. The Government derives the AAC by studying the forest inventory from the previous ten-year period, and based on growth and response to forest management, projected forward ten years to develop annual harvest maximums, the “ten-year cutting budget,” and a harvest schedule. ECF 9-2 at 7; ECF 9-3 at 19.

6. The FMP sets standards and objectives to be completed by the end of the ten-year period and therefore claims for non-performance accrue at the end of the ten-year period.

The Government has argued that the extension of the FMP from 2014 to 2019 should delay claim accrual until 2019. The flaw in that logic is that the FMP extension does not relieve or extend the Government’s obligations to perform the promised standards and objectives set forth in

the FMP within the ten-year planning period. The extension is simply an acknowledgment that the Government is tardy in the preparation of the next FMP. The text of the extension states that the purpose of the extension is to allow completion of “FMP prerequisites,” which appears to refer to preparation of the next FMP. *See* ECF 9-2 at 3. The Tribal Council’s discussion of an extension for the previous FMP (1991-2000) indicates that extensions are a stopgap to provide additional time for the next FMP to be prepared. *See* ECF 21-7 at 4; *see also* ECF 9-2 at 16 (FMP stating that Tribe must have an FMP in place in order to access federal funding and have logging occur). Importantly, as discussed in response to Question 5, the analysis and prescriptions set forth in the FMP were planned for completion in the ten-year period. The extension does not include any new inventory, analysis, prescriptions, or cutting budgets, and does not excuse delay in past performance.

The Government’s logic is further flawed in that its failure to timely perform the planning necessary to properly manage the Tribe’s forests using current information (including the failure to prepare a new FMP) is a breach of trust in itself, as alleged in Complaint ¶45, and the Government should not benefit from its own failures. *See Park Props. Assocs., L.P. v. United States*, 82 Fed. Cl. 162, 173 (2008) (“[a]n express promise to perform on the happening of an event warrants implication of a promise to refrain from actively impeding its happening, and breach of this implied promise is legally as serious as the breach of the express.”) (citations omitted).

Respectfully submitted this 20th day of April, 2018.

s/ Brian W. Chestnut
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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 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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