In the United States Court of Federal Claims

No. 17-359 L
(Filed: June 19, 2018)

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WHITE MOUNTAIN APACHE TRIBE, *
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Plaintiff, *
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v. *
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THE UNITED STATES, *
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Defendant. *
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ORDER

On February 2, 2018, Plaintiff filed a Motion for Reconsideration ("Plt. Mot. Recon.") of the Court's Order and Opinion dated January 5, 2018. The Plaintiff requested that the Court reconsider its dismissal of two narrow subsets of the Tribe's forest management breach of trust claims: claims arising from the Government's non-performance of management obligations set forth in the Tribe's 2005-2014 Forest Management Plan, ("2005 FMP") and claims arising from the Government's mismanagement of the Tribe's woodlands. In compliance with the Court's February 7, 2018, Order, Defendant filed its Response in opposition ("Opp. to Recon.") on March 2, 2018, and Plaintiff replied on March 16, 2018. The Court then ordered supplemental briefing which was completed on May 4, 2018, with the Plaintiff's Supplemental Brief in Support ("Plt. Supp.") and the Defendant's responding Supplemental Brief ("Def. Supp."). This matter is fully briefed and ripe for decision.

For the reasons set forth below this Court **GRANTS IN PART** and **DENIES IN PART** Plaintiff's Motion for Reconsideration.

I. STANDARD OF REVIEW

On a motion for reconsideration and/or clarification of an interlocutory decision where the merits of the case have not yet been addressed, Rule 54(b) of the Rules of the United States Court of Federal Claims ("RCFC") governs rather than Rule 59(e) which pertains to final judgments.[1] *See L-3 Communs. Integrated Sys., L.P. v. United States*, 98

[1] Plaintiff cites to both RCFC 54(b) and 59(a). Plt. Mot. Recon. at 3.

Fed. Cl. 45, 48 (2011) (citing *Alpha I, L.P. ex rel. Sands v. United States*, 86 Fed. Cl. 126, 129 (2009); *Pickney v. United States*, 85 Fed. Cl. 392, 393 (2009). Rule 54(b) provides, in relevant part that

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

RCFC 54(b).

Furthermore, Rule 59(a) provides that a court may grant a motion for reconsideration on all or some of the issues as follows:

> A) for any reason for which a new trial has heretofore been granted in an action at law in federal court; B) for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court; or C) upon the showing of satisfactory evidence, cumulative or otherwise, that any fraud, wrong, or injustice has been done to the United States.

RCFC 59(a).

"The decision whether to grant reconsideration lies largely within the discretion of the [trial] court." *See L-3 Communs. Integrated Sys., L.P.* 98 Fed. Cl. at 48 (citing *Alpha I, L.P. ex rel. Sands*, 86 Fed. Cl. at 129. The standard for a reconsideration motion is "as justice requires." *See L-3 Communs. Integrated Sys.*, 98 Fed. Cl. at 48 (2011). "[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.

"Reconsideration is 'not intended, however, to give an unhappy litigant an additional chance to sway the court.'" *Haggart v. United States*, 133 Fed. Cl. 568, 573 (2017) citing *Martin v. United States*, 101 Fed. Cl. 664, 671 (2011). "Additionally, a motion for reconsideration is unavailing where the moving party 'raise[s] an issue for the first time that was available to be litigated earlier in the case.'" *Haggart*, 133 Fed. Cl. at 573 citing *Martin*, 101 Fed. Cl. at 671.

II. DISCUSSION

The Plaintiff argues reconsideration is necessary to prevent an injustice as this Court has misapprehended some of the Plaintiff's arguments related to "two narrow subsets of the Tribe's forest management breach of trust claims." Plt. Mot. Recon. at 4. The Plaintiff's' two narrow subsets of claims for reconsideration by this Court are:

(1) Claims arising from the Government's non-performance of management obligations set forth in the Tribe's 2005-2014 Forest Management Plan, and
(2) Claims arising from the Government's mismanagement of the Tribe's woodlands.

Plt. Mot. Recon. at 1.

Regarding the 2005 FMP, the Plaintiff appears to have two arguments: (1) the accrual date for claims of breach of fiduciary duty must be the date of the end of the FMP, namely, December 31, 2014, because, even if it was aware of breaches, the number and extent of them would not be determined until the end of the FMP period, and (2) that the FMP included promises to remedy problems that had been identified; consequently, Plaintiff was justified in not suing until the time had passed to remedy these problems--again, December 31, 2014. Plaintiff also argues that the Court considered all of its forestry claims together, and that it failed to appreciate the diversity of its forestry claims prior to 2011. In other words: "because the Tribe was on sufficient notice of some forest facts to investigate further, the Tribe knew or should have investigated and known of all its claims." Plt. Mot. Recon. at 1. Regarding woodlands, Plaintiff's basic argument is that the Government and the Court lumped this claim together with forestry management claims in general, when they should have been treated separately. Plt. Mot. Recon. at 19.

In its March 2, 2018, Opposition to the Motion for Reconsideration, the Government summarizes its arguments as follows:

> 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.

Opp. to Recon. at 1.

The Court requested supplemental briefing on the first question: (1) to ascertain whether there were implied or express promises in the 2005 FMP to remedy problems that were identified, and (2) to explore whether Plaintiff's claims were unripe, because it requested an extension of the FMP to 2019. That is, if Plaintiff could not know its claims

before the end of the FMP, does it not follow that it could not know until the end of the extension of the FMP in 2019?

The Court's Order and Opinion dated January 5, 2018 ("2018 Order") held that the forestry management claims prior to March 15, 2011 were time-barred, that date being six years before the present action was filed. The Court concluded that in 2005 Plaintiff was aware of its forest management claims, at least to the extent to put it on inquiry, based on its statement in the complaint:

> For example, the 2005-2014 Forest Management Plan estimates an annual loss of approximately $800,000 due to mistletoe infection. The Forest Management Plan also estimates that the Tribe has lost over 100 million board feet of timber to spruce beetle….

Compl. at ¶ 51.

A. The Court Justifiably Considered All the Forestry Claims Together.

Plaintiff argues that the Court considered all of Plaintiff's forestry claims together and that it failed to appreciate the diversity of its forestry claims prior to 2011. According to Plaintiff's Motion for Reconsideration, the specific forestry claims that it is asserting include: "failure to attain the ten-year cutting budget (undercutting), failure to thin, failure to remedy insects and disease, failure to derive value from the woodlands, and failure to monitor and evaluate the forest." Plt. Mot. Recon. at 1-2. Rather than reconsider *en bloc* its forest management claims, the Plaintiff requests the Court to "reconsider and expressly declare that the *specific claims* set forth [in the Motion to Reconsider] relating to the non-performance of the 2005-2014 Forest Management Plan first accrued in 2014, and thus are not barred by the statute of limitations." Plt. Mot. Recon. at 2 (emphasis added).

However, Plaintiff's Response to the Motion to Dismiss ("Plt. Resp. to Mot. to Dismiss") does not break down its breach claims into specific claims as Plaintiff does in its Motion to Reconsider. A perusal of the Response indicates to the Court that the Plaintiff was largely content with lumping all of its forest management claims together. For example, in its Response, Plaintiff observes:

> [T]he claims alleged here involve ongoing mismanagement of a 1.3 million acre forest over decades, with no single, discrete decision that breached a fiduciary duty, but rather a cumulative failure to sustainably manage the Tribe's resources according to the standards imposed by federal law.

Plt. Resp. to Mot. to Dismiss at 9.

As far as the Court can discern, the only specific claims mentioned in the Response refer to "bark beetle and mistletoe infestation," Plt. Resp. to Mot. to Dismiss at

16, "thinning or road construction," Plt. Resp. to Mot. to Dismiss at 18, and "annual allowable cut." Plt. Resp. to Mot. to Dismiss at 19.

Upon further reflection, however, the Court now appreciates that the general treatment of Plaintiff's forestry claims in its Response was due to its object of seeking discovery of the details of the broad claim of forest mismanagement before the Court decided the Government's Motion to Dismiss rather than on a detailed rebuttal of the Government's Statute of Limitations arguments. In its Response, Plaintiff states: "Following discovery, the Tribe will winnow its claims and provide the Court with a specific set of claims coupled with the scope of time applicable to each claim." Plt. Resp. to Mot. to Dismiss at 1. This context likely explains why Plaintiff's Response was a combination of general and specific claims. Nevertheless, as far as the Statute of Limitation arguments are concerned, the Court concludes that it was justified in treating Plaintiff's forestry management claims together, although this conclusion is not dispositive of Plaintiff's argument on reconsideration regarding the accrual date of the claims post-2005.

B. The Impact of the 2005 FMP on Accrual

Plaintiff argues for a December 31, 2014, accrual date in part because it could not have known the number and extent of the BIA's breaches of fiduciary duty until the end of the 2005 FMP period, and because the 2005 FMP included promises to remedy them. *See* Plt. Mot. Recon. at 6, 12.

1. The Number and Extent of Plaintiff's Claims

The Court is sympathetic to Plaintiff's claim that it could not know the number and extent at least of some its claims related to the 2005 FMP until the end of the plan period.

Plaintiff's Reconsideration provides the Court for the first time with a detailed description of the nature and function of an FMP. As its name indicates, an FMP is a plan. It looks to the future; we know the time period in the future to which the 2005 FMP is directed. Furthermore, that it may include facts known in 2005 does not preclude its function as a plan for the future. Indeed, it makes sense that, in a chronological series of plans, later plans would look at the accomplishments and failures of previous plans, as well as the status quo. The basic regulation regarding forest management planning describes the forward-looking nature of an FMP:

> [A]n 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*.

25 C.F.R. § 163.11 (emphasis added).

Enlightened by Plaintiff's description of an FMP (which Defendant in its Opposition does not contest), the Court is now persuaded that it is possible that the number and extent of Plaintiff's claims related to the 2005 FMP could not have been known until the end of the plan.

a. The Mescalero Cases

Plaintiff cites the *Mescalero* cases as support for its argument that accrual should be determined at the end of an FMP, but the Court is not persuaded that they clearly support Plaintiff's position. (The Court uses the phrase, "*Mescalero* cases," because there are two, and both are needed to understand the Court's reasoning: *Apache Tribe of the Mescalero Reservation v. United States*, 43 Fed. Cl. 155 (1999) ("*Mescalero II*") and *Apache Tribe of the Mescalero Reservation v. United States*, Civ. No. 92-403L (Fed. Claims, July 23, 1993) ("*Mescalero I*")). The Court, in its opinion deciding the Government's Motion to Dismiss, did not discuss the *Mescalero* cases, so it takes this opportunity to do so.

The Plaintiff fastens on this language in *Mescalero* II:

> Any claim for mismanagement of defendant's silvicultural obligations during the period of the 1989 FMP could not be made prior to its expiration on December 31, 1998. Similarly, a claim for mismanagement of defendant's obligations under the 1979 FMP could not be established until the end of the ten year cutting budget on December 31, 1988. *The Tribe could not attain knowledge of whether a claim existed until after the ten year cutting budget expired.*

Mescalero II, 43 Fed. Cl. at 161 (emphasis added).

Two FMPs were at issue in these cases: one in 1979, the other in 1989. The complaint was filed on June 15, 1986. The complaint was for breaches of fiduciary duty regarding silvicultural operations from 1979 to 1992. In denying the Government's Motion to Dismiss and its Motion for Summary Judgment, *Mescalero II* held that there was sufficient evidence of breaches of fiduciary duty "during the period of the 1979 FMP (January 1, 1979, through December 31, 1988)." *Mescalero II*, 43 Fed. Cl. at 162 (1999).

Yet, *Mescalero I*, in its discussion of the Statute of Limitations, states that the plaintiff may proceed on claims "after June 15, 1986," which is six years before the date of the complaint. *Mescalero I*, Civ. No. 92-403L at 3. Therefore, despite the fact that the FMP began in 1979, the *Mescalero I* decision only permits plaintiff to proceed on claims for part of the 1979 FMP period. But, it seems as if *Mescalero II* revised *Mescalero I* regarding the undercutting claim, for the former case states: "The statute of limitations

does not bar the Tribe's claim for undercutting the 17.9 mmbf AAC in the years 1979 through 1988." *Mescalero II*, 43 Fed. Cl. at 165.

To add to the complexity of the *Mescalero* cases, the court in *Mescalero II* raises the distinction between liability and damages: "Although plaintiff has prevailed on the mismanagement contention in the trial limited to liability issues, substantial problems affect measurement of damages due to mismanagement of the Tribe's timber resources." *Id.* at 169. Indeed, it is only in this context that the decision addresses "awareness," observing there is a problem regarding "the degree that the Tribe was unaware of potential mismanagement under the 1979 FMP." *Id.*

The Government, in its Opposition, states that the *Mescalero* cases are inapposite and already addressed in this Court's opinion. It also picks the decision apart, concentrating on factual distinctions between the *Mescalero* cases and the instant case. This Court does not believe that the Government appreciated the thrust of Plaintiff's argument regarding the *Mescalero* cases. Nevertheless, the Court agrees with the Government that the *Mescalero* cases are not grounds for reconsideration. First, the cases are not binding on this Court, and second, the actual holdings in these cases are hard to identify and harmonize.

2. Promises in the 2005 FMP to Remedy

Another of Plaintiff's arguments that its claims under the 2005 FMP did not accrue until 2014 is based on the contention that the Bureau of Indian Affairs ("BIA") made promises in the FMP to remedy certain problems; consequently, the Plaintiff was justified in waiting for these remedies to occur before filing suit:

> The claims do not accrue upon the Tribe's awareness of some forestry management problems at the beginning of the FMP period because the Tribe's trustee *promised* to fulfill its trust duties by remedying the problems over a set period of time. Only at the end of the FMP period, when it became evident that the *promised* remedy did not occur, had all the events fixing the Government's liability taken place and the claims accrued.

Plt. Mot. Recon. at 1 (emphasis added).

To address this argument, the Court observed in its Order for Supplemental Briefing that Plaintiff had emphasized in its Reconsideration—far more than in its prior briefing—promises made by the BIA to remedy certain problems. From prior briefing, the Court was unsure whether Plaintiff was arguing that these promises were express or implied. Therefore, the Order asked Plaintiff to identify the promises.

In its response to the Court's Order for Supplemental Briefing, Plaintiff states that it does not rely on any implied promises during development and implementation of the FMP for this motion for reconsideration, although—somewhat puzzlingly—it states that

there *are* implied promises.[2] But Plaintiff maintains that the BIA made express promises to remedy deficiencies in its management under the FMP. *See* Plt. Supp. at 1.

However, when pressed for specific examples, the Plaintiff identifies no express promise to remedy deficiencies. Rather, Plaintiff cites language that identifies forest management issues but provides no promise to remedy deficiencies.

For example, Plaintiff states that the initial page of the FMP "set forth a broad and express promise to implement the FMP over the ten-year planning period." Plt. Supp. at 1. However, the language Plaintiff quotes is that the 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 . . . ." Plt. Supp. at 1-2; *see also* Def. Mot. to Dismiss, Ex. 1 at 1.

However, on that same introductory page, the FMP states that "[p]rogram implementation is dependent upon funding levels and other Congressional or Departmental mandates which could impact program execution. . . . Periodic revisions may be necessary to incorporate management direction or to meet unanticipated demands or changing Tribal priorities." Def. Mot. to Dismiss, Ex. 1 at 1. This language alone underscores the flexibility and contingent nature of the FMP.

In other words, it is consistent with, for example, the idea that land use plans are statements of priorities rather than express promises. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 71 (2004) ("[U]nlike a specific statutory command requiring an agency to promulgate regulations by a certain date, a land use plan is generally a statement of priorities; it guides and constrains actions, but does not (at least in the usual case) prescribe them. It would be unreasonable to think that either Congress or the agency intended otherwise, since land use plans nationwide would commit the agency to actions far in the future, for which funds have not yet been appropriated.").

Other examples set forth by the Plaintiff fare no better. Plaintiff provides "an objective to 'prepare sales of sufficient volumes of timber to meet the annual allowable cut,'" as an express promise. Plt. Supp. at 2. This language seems to indicate general and aspirational goals, which are not express promises. *See Ctr. for Biological Diversity v. Provencio, 2012 U.S. Dist. LEXIS 50457, *31-32 (D. Ariz. Jan. 23, 2012)* (generalized or vague goals are unenforceable).

Another example provided by the Plaintiff, "the planned management period will harvest 40.3 million board feet (Gross MMBF) for $24.34 million in gross revenue." *See* Def. Mot. to Dismiss, Ex. 1 at 314. However, that same page of the FMP notes that the

[2] "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)." Plt. Supp. at 7.

market in 1997 used for pole timber is no longer available such that "it is very speculative to ascertain what value, if any, that pole timber will have in the near or distant future;" and several pages later "it should be noted that the estimated sale volumes are for planning purposes only and are not to be considered targets." Def. Mot. to Dismiss, Ex. 1 at 314, 325. This language clearly disavows any notion of an express promise.

With regard to thinning operations which Plaintiff acknowledged that it was conducting during this time, the statements Plaintiffs cite are again objectives and best practices, sprinkled with words such as "utilizing a variety" and "to optimize" and "to the extent possible." Pl. Supp. at 3 citing Def. Mot. to Dismiss, Ex. 1 at 13, 109-10.

In yet another example, related to controlling insect and disease damage to the forest, the Plaintiff calls the Court's attention to "strategies will be utilized to manage pests within constraints of laws and regulations and to meet [FMP] objectives." Pl. Supp. at 3 citing Def. Mot. to Dismiss, Ex. 1 at 33. The FMP states that it is taking a "proactive approach to avoid the detrimental effects of catastrophic fire and epidemic insect and disease outbreaks" and rather than dictate specific course of action states "a full range of silvicultural treatments will be available for use." Def. Mot. to Dismiss, Ex. 1 at 109.

All of the above leads the Court to the conclusion that the 2005 Forestry Management Plan was just that—a plan. It is plausible that some of the provisions of the FMP are implied promises, although it seems that Plaintiff has eschewed such an argument. Nevertheless, this conclusion does not disturb the Court's holding that it is possible that the number and extent of Plaintiff's claims under the 2005 FMP cannot be determined until the end of the FMP term, as this conclusion does not depend on promises to remedy but on the nature of the FMP as a plan.

C. The Court Addressed the Woodlands Claims in the Manner in which They Were Presented.

Regarding the second issue for reconsideration, the Plaintiff argues that neither the Court's decision nor the Government's Motion to Dismiss directly addressed the mismanagement of the Tribe's woodlands. Plt. Mot. for Recon. at 5. The Tribe argues that the Complaint alleged breaches of fiduciary duties explicitly related to the mismanagement of its woodlands and these are distinct from the forestry mismanagement claims regarding its timberlands. Compl. ¶52, *see also* ¶¶13 and 14.

The Plaintiff argues that the Government did not rebut the Tribe's allegations related to woodlands and "therefore this Court must take the Tribe's allegations as true and draw all inferences in favor of the Tribe . . . ." Plt. Mot. for Recon. at 20. Thus, the Court should clarify its opinion and order and declare the portion of the forestry mismanagement claims related to woodlands under the motion to dismiss as denied and go forward.

Defendant argues that both the Court and the Defendant addressed the Plaintiff's woodlands claims in the manner they were presented. Specifically, that the Plaintiff's

woodlands claims were presented in the Complaint and the brief as a component of the forest assets that were more generally addressed under the claim for forestry mismanagement. *See* Compl. ¶¶ 42-60. Furthermore, the Defendant argues that this argument of a failure to distinguish the woodlands portion of the claim could have been raised in Plaintiff's opposition brief.

In the Complaint, the Plaintiff's Claim II was an alleged breach of trust by mismanagement of non-monetary trust assets by the Government from 1946 to the present. Compl. at 21. The Plaintiff described this claim as a breach of trust of forest assets and repeatedly referred to the "forests and woodlands" as components of the forest assets allegedly mismanaged. *See* Compl. ¶¶ 42-60. For example, in the Plaintiff's own words, "[t]he Reservation's commercial forests and woodlands are the Tribe's single largest asset." Compl. at ¶44.

The Defendant responded to the Complaint with arguments in kind by considering the woodlands a portion of the forestry mismanagement claim as presented. For example, the Defendant argued that a portion, the pre-2011 portion, of Plaintiff's non-monetary trust assets related to forest asset mismanagement should be dismissed as time barred. *See* Def. Mot. to Dismiss. at 6. The Defendant addressed the claims regarding woodlands as one component of the Plaintiff's forest assets and argued those claims should be dismissed. *See* Def. Mot. to Dismiss at 8 citing Compl. ¶13. In similar fashion, this Court's opinion referenced the forests and woodlands as components of the forest assets under the alleged forestry mismanagement claim of breach of fiduciary duty.

Tellingly, the Plaintiff's opposition brief only referenced its woodlands twice and in both instances woodlands are linked to forestry mismanagement.[3] In that brief, Plaintiff presented its woodlands-related claims as portions of its forest asset claims and failed to address the Defendant's specific arguments relating to woodlands. In other words, the Plaintiff failed to raise a discreet argument that the Defendant had not properly supported in its motion to dismiss the portion related to the woodlands.

In its discussion of the impact of the 2005 FMP on claim accrual, the Court concluded that it is possible that the number and extent of Plaintiff's claims related to the 2005 FMP could not have been known until the end of the plan. The Court reached this conclusion despite the fact that it found that it had rightly considered the general and specific claims together. Similarly, the 2005 FMP may affect Plaintiff's claims regarding woodlands.

[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." Plt. Resp. to Mot. to Dismiss at 3. "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." *Id.* at 10.

III. Summary and Conclusion

The Court rejects Plaintiff's contention that the Court did not justifiably treat together the general and specific forest management claims, on the one hand, and the woodlands and the forest management claims, on the other. It also disagrees with Plaintiff's position that the 2005 FMP contained express promises to remedy. However, the Court is now persuaded that there is merit to Plaintiff's argument that the extent and number of at least some of its claims could not be known until the end of the 2005 FMP.[4] The function and language of an FMP, as explained in the Motion for Reconsideration, is an important factor in leading the Court to this conclusion. However, the Court is not prepared to hold that Plaintiff's claims under the 2005 FMP could not have accrued earlier.[5]

The Government's argument regarding the Statute of Limitations arose in the context of a discovery dispute. Plaintiff had argued that discovery was necessary to establish the accrual date for its claims. The Court is now of the same mind regarding Plaintiff's claims under the 2005 FMP. Therefore, the Court will allow discovery regarding Plaintiff's claims under the 2005 FMP so that the parties and the Court might more clearly determine the accrual date (or dates) of Plaintiff's claims under the 2005 FMP. It would be an injustice not to do so.

This ruling, however, does not disturb the Court's prior decision that the claims not based on the 2005 FMP are time-barred. Furthermore, the Court's ruling does not preclude the Government from renewing a motion to dismiss based on the Statute of Limitations after discovery nor does it forbid Plaintiff from tailoring its claims under the 2005 FMP in light of discovery.

A. The Extension of the 2005 FMP

The Plaintiff asked for, and was granted, an extension of the 2005 FMP to 2019. Def. Mot. to Dismiss, Ex. 1 at 3. The Government, therefore, raised the logical argument that Plaintiff's reasoning regarding claim accrual at the end of the 2005 FMP should apply to its extension as well, with the result that Plaintiff's claims related to the 2005

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[4] As the Court noted in footnote 1 of its previous decision, "[I]n some similar cases with complex claims related to breach of fiduciary duty in managing forests on Indian reservations, other judges in this Court first denied the Government's Motion to Dismiss permitting discovery to more fully develop the factual record. *See*, *e.g.*, *Apache Tribe of the Mescalero Reservation v. United States*, 43 Fed.Cl. 155 (1999); *see also San Carlos Apache Tribe v. United States,* No. 14-1045 (Fed. Cl. July 31, 2015)." *White Mountain Apache Tribe v. United States*, No. 17-359 L at 5 n.1 (Fed. Claims, January 5, 2018).

[5] *Mescalero I* stated that the plaintiff may proceed on claims "after June 15, 1986," which was six years before the date of the complaint, despite the fact that claims has been made under a 1979-1988 FMP. *Mescalero I*, Civ. No. 92-403L at 3.

FMP are unripe. Opp. to Recon. at 1. Indeed, the Court was so intrigued by this argument that it ordered supplemental briefing so that this issue could be fleshed out. To the Court's surprise, however, the Government modified its position in its supplemental brief: "Defendant does not argue that the Plan's extension through 2019 delays claim accrual." Def. Supp. at 10. Therefore, this issue is moot, and, in any event, the Court is persuaded that the representations in the 2005 FMP were to be accomplished by 2014.

For the reasons set forth above, the Court hereby **GRANTS IN PART** and **DENIES IN PART** Plaintiff's Motion for Reconsideration. The parties are directed to meet and confer and file a proposed litigation schedule **within 30 days** from the date of this Order.

IT IS SO ORDERED.

s/ Edward J. Damich
EDWARD J. DAMICH
Senior Judge