IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, a federally recognized Indian Tribe, and YAKAMA FOREST PRODUCTS, an Instrumentality of the CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION. Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	)	Case No 19-1966L-RTH

REPLY MEMORANDUM IN SUPPORT OF THE UNITED STATES' MOTION TO DISMISS

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INTRODUCTION

Plaintiffs' Complaint asserts three claims: (1) the United States, in jointly managing Plaintiffs' forestry operations, failed to meet "annual allowable cut" (AAC) targets set by the Tribe's Forest Management Plan; (2) the United States, in jointly managing Plaintiffs' forestry operations, failed to furnish Plaintiffs' saw mill with enough lumber to keep the mill fully utilized, in violation of a promise allegedly made in the parties' 1855 Treaty; and (3) the United States, in jointly managing Plaintiffs' forestry operations, failed to fulfill the alleged statutory requirement that the Tribe receive the "benefit of all labor and profit that the Yakama Forest is capable of yielding." Complaint ¶ 13(a-c) (quoting, without citation, NIFRMA, 25 U.S.C. § 3104(b)(4)); *see* Brief in Opposition (ECF No. 14, hereafter "Opp.") at 27-28 (reaffirming these three bases for suit). None of these three claims states a cause of action over which this Court has jurisdiction.

The claim based on the forestry plan's AACs fails because the AACs do not and never did constitute enforceable promises, as Plaintiffs now concede (Section B, below).

The claim based on the 1855 Treaty fails because the Treaty does not make the promise Plaintiffs allege it makes, and, notwithstanding Plaintiffs' creative efforts, the Indian canons of construction cannot create Treaty obligations out of thin air (Section C).

The claim based on NIFRMA fails because the statute does not create money-mandating duties such as to sustain jurisdiction under the Indian Tucker Act. Indeed, the statute expressly disavows any intent to do so (Section D).

Plaintiffs mount two additional efforts to avoid the conclusion that this Court wants jurisdiction over Plaintiffs' claims. First, they argue that the Supreme Court's decision in *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*) establishes Tucker Act jurisdiction, when

subsequent decisions by the Supreme Court and by the Federal Circuit mandate the opposite conclusion (Section E). Second, Plaintiffs attempt to bury and distract the Court with irrelevant documents and argument assertedly showing the United States' forest management shortcomings. That these documents and arguments must be disregarded is the subject we address in Section A.

A. Plaintiffs' Exhibits Are to be Disregarded

The United States' motion to dismiss presents a facial challenge to jurisdiction. The 1,279 pages of exhibits that Plaintiffs filed with their Brief in Opposition are therefore both improper and irrelevant and must be disregarded. Had Plaintiffs stated an actionable claim, the United States would in due course refute Plaintiffs' gratuitous arguments and evidence on the merits. But because the Court, on the face of the Complaint, lacks jurisdiction, those arguments and evidence are only a distraction.

A motion to dismiss, under either Rule 12(b)(1) or 12(b)(6), can be either a facial challenge or a factual challenge. If a factual challenge, and if aimed at jurisdiction, plaintiff has the burden to establish jurisdictional facts and the court can consider evidence beyond the pleadings. *NeuroGrafix v. United States*, 111 Fed. Cl. 501, 505 (2013); *Muscogee (Creek) Nation v. Oklahoma Tax Comm'n*, 611 F.3d 1222, 1227 n.1 (10th Cir. 2010). But in resolving a facial challenge to jurisdiction, material outside the pleadings (with limited exceptions, as we will show) may not be considered.

The rule is straightforward: "The court may not consider evidence outside the pleadings when deciding a facial attack." *Johnson v. DTBA, LLC*, 424 F. Supp. 3d 657, 662 (N.D. Cal. 2019) (citing *MVP Asset Mgmt. (USA) LLC v. Vestbirk*, 2011 WL 1457424, at *1 (E.D. Cal. Apr. 14, 2011). Accordingly, in a facial attack on jurisdiction, the court "will disregard in its entirety

the factual recital [a party] offers"). *Moore v. Angie's List, Inc.*, 118 F. Supp. 3d 802, 813 (E.D. Pa. 2015); *see also N. Carolina Motorcoach Ass'n v. Guilford Cty. Bd. of Educ.*, 315 F. Supp. 2d 784, 790 (M.D.N.C. 2004) (In a facial attack on jurisdiction (where it is alleged that "the allegations in the Complaint fail, as a matter of law, to support subject matter jurisdiction") the court "will rely solely on the pleadings, disregarding affidavits or other materials, to determine whether Plaintiffs' Complaint contains sufficient allegations to support subject matter jurisdiction") (citation omitted); *King v. Riverside Reg'l Med. Ctr.*, 211 F. Supp. 2d 779, 781 (E.D. Va. 2002) (In a facial attack on jurisdiction, under either Rule 12(b)(1) or 12 (b)(6), "[t]he court construes all facts in favor of the plaintiff, and it relies solely on the pleadings, disregarding affidavits or other materials") (citation omitted); *Ketterson v. Wolf*, No. CIV.A. 99-689-JJF, 2001 WL 940909, at *4 (D. Del. Aug. 14, 2001) ("courts can consider documents outside the pleadings when analyzing Rule 12(b)(1) motions only if the motion presents a factual challenge") (footnote omitted); *James v. United States*, 86 Fed. Cl. 391, 394 (2009) ("When evidence is submitted challenging jurisdictional facts—that is, a factual rather than a facial attack on the pleadings—a court may consider this evidence under its obligation to determine whether it has jurisdiction and pursuant to RCFC 12(h)(3)"); *IHS Glob. Inc. v. United States*, 106 Fed. Cl. 734, 743 (2012) (same); *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000) (In deciding a facial challenge, a Court "must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff.") [1]

[1] Although it is true that in a facial jurisdictional challenge the Court must "take as true all well-pled factual allegations within [the] complaint," we note that the court must nonetheless "disregard any legal conclusions, legal contentions couched as factual allegations, and unsupported factual allegations within the complaint." *Gulf Coast Mar. Supply, Inc. v. United States*, 867 F.3d 123, 128 (D.C. Cir. 2017); *see also Muller v. Vilsack*, No. CV 13-0431 MCA/SMV, 2014 WL 12787997, at *2 (D.N.M. Sept. 30, 2014), *aff'd sub nom. Muller v. Perdue*, 744 F. App'x 555 (10th Cir. 2018) ("In reviewing a facial attack on the complaint, a

The case Plaintiffs cite as justifying their exhibits (Op. at 7 n. 4, 11 n. 5), *Shoshone Indian Tribe of the Wind River Reservation, Wyo. v. United States*, 672 F.3d 1021, 1030 (Fed. Cir. 2012), is not to the contrary. In that case, defendant sought dismissal on the basis that plaintiff's claim lay outside the limitations period, requiring scrutiny of the evidence on timeliness. 672 F.3d at 1030. Here the United States challenges the legal adequacy of Plaintiffs' allegations on their face.

The limited exception to this rule allows the court to consider documents outside the pleadings to the extent they are referred to, and either attached as exhibits or incorporated into, the complaint. The reasoning here is that a document that is integral to the complaint is a part thereof. *Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004) ("A complaint is deemed to include any written instrument attached to it as an exhibit, materials incorporated in it by reference, and documents that, although not incorporated by reference, are integral to the complaint.") (citations and internal quotation marks omitted)); *see also Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011). This reasoning allows consideration of the 1855 Treaty and the 2005 Forest Management Plan, upon which the Complaint expressly relies for two of its three theories of recovery. ECF No. 1 ("Compl.") ¶ 13(a-b) (although one of these theories – based on the Annual Allowable Cut set out in the 2005 Forest Management Plan – has been abandoned, as we show in the following section.)

B. Plaintiffs Concede That AAC Goals Do Not Support a Cause of Action

Plaintiffs' Complaint alleges that the United States "breached its fiduciary duties to Plaintiffs" by (*inter alia*) "failing to prepare and approve sufficient timber sales to achieve the

district court must accept the allegations in the complaint as true . . . but must ignore conclusory allegations of jurisdiction") (citations and internal quotation marks omitted), *see Groundhog v. Keeler*, 442 F.2d 674, 677 (10th Cir. 1971)").

maximum AAC authorized by applicable law." Compl. ¶ 13(a). In our motion to dismiss (ECF No. 11) ("Motion"), we showed that the annual allowable cut referenced in Yakama's Forest Management Plan is an aspirational goal, not a commitment, and that similar efforts to hold the United States liable in damages for failure to achieve a Tribal AAC have for this reason been rejected. Motion at 23-26, citing *White Mountain Apache vs. United States* (U.S. Court of Federal Claims, Case Number 17-359L) (June 19, 2018 Order on Motion for Reconsideration) (filed as Exhibit 3 to United States' Motion, ECF No. 11-3) and *Navajo Tribe of Indians v. U.S.*, 9 Cl. Ct. 336, 374 (1986).[2]

In their Opposition, Plaintiffs effectively drop their AAC claim, stating that "Plaintiffs do not allege that 2005 FMP [and the AACs that it sets] is the substantive source of law containing the United States' money mandating fiduciary duties related to the Yakama Forest; rather . . . , the fiduciary duties—including the duty to achieve the maximum sustainable harvest—derive from federal statutes and regulations, as well as the Treaty of 1855." Opp. at 37. Instead, as Plaintiffs now acknowledge, the alleged "failure to achieve a target AAC" is only offered as "*evidence* of a breach of the trust duty to achieve the maximum sustainable yield" derived from statute and Treaty. Opp. at 39 (emphasis added). We show below that the asserted Treaty and statutory bases for Plaintiffs action are wanting; the acknowledgement that the forest management plan is no longer advanced as creating actionable duties helps to clarify the issues, and that aspect of Plaintiffs' Complaint should accordingly be dismissed.

[2] Plaintiffs' discussion of *Navajo Tribe* highlights another fallacy in the idea that the AAC sets some sort of minimum cut. As the language ("annual *allowable* cut") suggests, the AAC sets a ceiling, not a floor. *See Navajo Tribe*, 9 Ct. Cl. at 376-79 (analyzing "what amount *up to the allowable cut* defendant should have cut in any given year") (emphasis added).

C. The 1855 Treaty Does Not Confer a Cause of Action

We showed in our Motion (at 20-23) that the Treaty of 1855 does not provide Plaintiffs a basis for suit here because it does not create the duties Plaintiffs allege. In their Opposition Plaintiffs try to create such duties by invoking the Indian canons of construction, arguing that ambiguities in the 1855 Treaty must be resolved in Plaintiffs' favor and that the Treaty must be read in accordance with the presumed understanding of the Tribe at the time of compacting. Opp. at 24-27. Plaintiffs' argument fails, because it can satisfy neither element of the two-part test for Indian Tucker Act jurisdiction. As Plaintiffs acknowledge, they must first "identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the [United States] has failed faithfully to perform those duties," *United States v. Navajo Nation* (*Navajo I*), 537 U.S. 488503, 506 (2003); and, second, the court must determine "whether the relevant source of substantive law 'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties the [governing law] impose[s].'" *Id*. (*quoting Mitchell II*, 463 U.S. at 519); *see Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015). The 1855 Treaty fulfills neither requirement, and the Indian canons of construction do not change this fact.

1. The Indian canons of construction cannot create treaty obligations contrary to the treaty's plain language

Plaintiffs rely upon Section 5 of the Treaty with the Yakamas, dated June 9, 1855, which provides:

> The United States further agree to establish at suitable points within said reservation, within one year after the ratification hereof, two schools, erecting the necessary buildings, keeping them in repair, and providing them with furniture, books, and stationery, one of which shall be an agricultural and industrial school, to be located at the agency, and to be free to the children of the said confederated tribes and bands of Indians, and to employ one superintendent of teaching and two teachers; to build two blacksmith's shops, to one of which shall be attached a tin-

> shop, and to the other a gunsmith's shop; one carpenter's shop, one wagon and plough maker's shop, and to keep the same in repair and furnished with the necessary tools; to employ one superintendent of farming and two farmers, two blacksmiths, one tinner, one gunsmith, one carpenter, one wagon and plough maker, for the instruction of the Indians in trades and to assist them in the same; to erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures; to erect a hospital, keeping the same in repair and provided with the necessary medicines and furniture, and to employ a physician; and to erect, keep in repair, and provided with the necessary furniture, the building required for the accommodation of the said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

Treaty With The Yakima, 1855, 12 Stat. 951, 1855 WL 10420. A copy of the 1855 Treaty is attached to our Motion as Exhibit 2 (ECF No. 11-2).

Notably, Section 5 is both explicit and detailed in specifying the ways in which the United States will "supply" the facilities called for. The schools will be "ke[pt] . . . in repair, and provid[ed] . . . with furniture, books, and stationery." As for the "shops" (blacksmith, tin-shop, gunsmith's shop, carpenter's shop, wagon shop and plough maker's shop) – these were to be "ke[pt] . . . in repair and furnished with the necessary tools." The "hospital" was to be "provided with the necessary medicines and furniture." All of these were to be provided with appropriate employees "for the period of twenty years."

The language relied upon by Plaintiffs provides only that the United States would "erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures." While tools and fixtures were to be supplied for the mills, the Treaty does *not* require the provision of grain for the flour mill or lumber for the saw mill. While the schools were to be kept supplied with books and stationary and the hospitals with medicine, the mills were *not* to be supplied with their consumables.

The Indian canons do indeed require that Treaty ambiguities be resolved in Indians' favor, but under a long line of Supreme Court decisions, the canons have no role to play where

the language of the Treaty does not suffer from ambiguities. "The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist." *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986); *see also DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 447 (1975) ("[a] canon of construction is not a license to disregard clear expressions of tribal and congressional intent"); *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 179 (1947) ("[w]hile it has long been the rule that a treaty with Indians is to be construed so as to carry out the Government's obligations in accordance with the fair understanding of the Indians, we cannot, under the guise of interpretation ... rewrite congressional acts so as to make them mean something they obviously were not intended to mean"); *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 353 (1945) ("[w]e stop short of varying [a treaty's] terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for the Congress"). In other words, "[t]he issue must present genuine questions of interpretation before the tribe may be given the benefit of the doubt." *Little Six, Inc. v. United States*, 43 Fed. Cl. 80, 83 (1999), rev'd, 210 F.3d 1361 (Fed. Cir. 2000), cert. granted, judgment vacated, 534 U.S. 1052 (2001), and aff'd, 280 F.3d 1371 (Fed. Cir. 2002)

Plaintiffs are also correct that, under the canons, a Tribe's contemporaneous understanding will be used to resolve Treaty ambiguities, but evidence that the parties had an understanding *at variance* with a Treaty's terms does not bring the canons into play. "Indian treaties cannot be re-written or expanded beyond their clear terms . . . to achieve the asserted understanding of the parties." *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943); *see also Babbitt v. Oglala Sioux Tribal Pub. Safety Dep't*, 194 F.3d 1374, 1379 (Fed. Cir. 1999) (quoting *Choctaw Nation*, 179 U.S. at 531) ("[I]n the absence of ambiguity the

agreement 'must be interpreted according to [its] natural and ordinary significance,' and only if the words are ambiguous, 'then resort may be had to such evidence, written or oral, as will disclose [the parties' intent].'")

Wolfchild v. United States, 731 F.3d 1280 (Fed. Cir. 2013) is illustrative. There, the statute invoked specifically authorized (but did not require) the Secretary to set aside land parcels for the Indian ancestors of the plaintiffs. Rejecting a damages suit for failure to make the land grants so authorized, the court noted simply that the statute "does not impose any duty on the Secretary to make the land grants that it authorizes. It therefore cannot 'fairly be interpreted as mandating compensation for damages sustained' from a failure to provide such lands." 731 F.3d at 1292 (quoting *Navajo II*, 556 U.S. at 291). Here, the Treaty Plaintiffs invoke does not even *authorize* the United States to manage timber operations on Plaintiffs' land so as to supply Plaintiffs' mill with raw lumber: it most certainly does not *require* any such operations, let alone require the provision of sufficient timber to keep the mill operating at 100% capacity.

Plaintiffs do not identify any ambiguity in a relevant treaty or statute that might be "interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 at 766; *Herrera v. United States*, 39 Fed. Cl. 419, 421 (1997), aff'd, 168 F.3d 1319 (Fed. Cir. 1998) ("The plaintiff seeks to create ambiguity where none exists."). Thus it is true here, as it was in *Minnesota Chippewa Tribe v. United States*, 11 Cl. Ct. 221, 246 (1986), that "Plaintiffs' references to transcripts of meetings between the government's commissioners prior to the bands' assent to the [statute] . . . and recitals of how the Indians would have understood the provision are simply insufficient to overcome the wording of the statute."

Plaintiffs' reliance on *United States v. Washington*, 853 F.3d 946 (9th Cir. 2017), *aff'd by an equally divided court*, 138 S. Ct. 1832 (2018) (Opp. at 25) is misplaced. At issue there was a

treaty provision guaranteeing to the tribal Plaintiffs "the right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory." 853 F.3d at 954[3]. The plaintiffs, Tribes of the Pacific Northwest, had historically depended on fishing for their livelihoods. Actions by the State (including, principally, the installation of culverts that eliminated salmon runs) and by white commercial fishermen, who installed fish wheels that decimated those runs, had left the plaintiff Tribes with little or nothing to live on. The United States brought suit to enforce the Tribes' fishing rights, arguing that the right to live on their designated reservations and to engage in their traditional fishing included an implied promise that there would be enough fish to live on. The Ninth Circuit agreed:

> Governor Stevens and his associates were well aware of the "sense" in which the Indians were likely to view assurances regarding their fishing rights. During the negotiations, the vital importance of the fish to the Indians was repeatedly emphasized by both sides, and the Governor's promises that the treaties would protect that source of food and commerce were crucial in obtaining the Indians' assent. It is absolutely clear, as Governor Stevens himself said, that neither he nor the Indians intended that the latter should be excluded from their ancient fisheries, and it is accordingly inconceivable that either party deliberately agreed to authorize future settlers to crowd the Indians out of any meaningful use of their accustomed places to fish.

853 F.3d at 964 (quoting *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676-77 (1979)).

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[3] The Treaty provision at issue read, in its entirety:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: Provided, however, That they shall not take shell fish from any beds staked or cultivated by citizens.

United States v. Washington, 853 F.3d at 962.

The *United States v. Washington* case vividly illustrates what Plaintiffs' case here is not. It is true, as Plaintiffs relate (Opp. at 26-27), that the reservation acreage provided the Yakamas was the main inducement for entering into the Treaty. But logging was emphatically not the Yakama's traditional livelihood, and there is no reference anywhere to the United States supplying the Yakama's mill with raw timber. The analogy might work if logging had been the Tribe's traditional livelihood, and if Plaintiffs alleged that the United States had clear cut the Tribe's reservation so that there were was no timber for the Tribe's mill (just as, in *United States v. Washington*, the fishing waters had been denuded of fish). But those are not our facts.

2. The Indian canons of construction cannot be used to imply congressional consent to damages liability that is not clearly expressed

The second requirement for Indian Tucker Act jurisdiction here is that the source of law invoked "can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties the governing law imposes." *Mitchell II*, 463 U.S. at 219. The issue is "whether the statutes or regulations [or treaty] at issue can be interpreted as requiring compensation." *Id*. at 218. This is *not* an issue of the waiver of federal sovereign immunity, as to which a rule of strict construction applies[4], because the Tucker Act itself provides the requisite waiver. *Mitchell II*, 463 U.S. at 218. But it remains true that congressional acts in derogation of sovereignty must be plainly expressed. *Klamath & Moadoc Tribes v. United States*, 296 U.S.

[4] "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *Mitchell II*, 463 U.S. at 212. The rule of strict construction effectively negates the Indian canon of construction, and the court's jurisdiction must be limited to that which Congress clearly intended. *See, e.g., United States v. Mottaz*, 476 U.S. 834, 851 (1986) ("[E]ven for Indian plaintiffs, a waiver of sovereign immunity cannot be lightly implied but must be unequivocally expressed.") (brackets and internal quotation marks omitted); *Chickasaw Nation v. Dep't of the Interior*, 120 F. Supp. 3d 1190, 1225 n. 81 (W.D. Okla. 2014), on reconsideration (Apr. 22, 2015) (citing *DeCoteau v. District County Court for Tenth Judicial District*, 420 U.S. 425, 447 (1975) ("The Indian canon of construction . . . does not dictate that waivers of sovereign Immunity must be broadly construed.")

244, 250 (1935) ("The Act grants a special privilege to plaintiffs and is to be strictly construed and may not by implication be extended to cases not plainly within its terms."); *Blackfeather v. United States*, 190 U.S. 368, 376 (1903) ("As these statutes extend the jurisdiction of the Court of Claims and permit the Government to be sued for causes of action therein referred to, the grant of jurisdiction must be shown clearly to cover the case before us, and if it do[es] not, it will not be implied."); *Chickasaw Nation v. United States*, 534 U.S. 84, 95 (2001) (Indian canon "is offset by the canon that warns us against interpreting federal statutes as providing exemptions unless those exemptions are clearly expressed"); *Redding Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir, 2015) (declining to apply the Indian canon in light of competing *Chevron* deference).

A cautious approach to inferring damages liability is particularly appropriate where Treaties are involved, in light of the general "rule that treaty violations are normally to be redressed outside the courtroom." *Canadian Transp. Co. v. U.S.*, 663 F.2d 1081, 1092 (D.C.Cir.1980). *See, e.g., U.S. v. Seminole Nation*, 299 U.S. 417, 421–25 (1937) (dismissing for lack of jurisdiction suit brought to enforce treaty and other rights where Congress had authorized by statute suits only for limited time; untimely amendment adding claims barred because the United States may not be sued without its consent).

To be sure, the Indian Tucker Act waives the United States' sovereign immunity in suits brought by Indian Tribes for Treaty violations[5]. But that does not mean, as we showed in the preceding sections, that Indian canons of construction can be used to insert obligations into Treaties that those Treaties simply do not contain. Even more so, the canons cannot be used to

[5] 28 U.S.C. § 1505 ("The United States Court of Federal Claims shall have jurisdiction of any claim against the United States . . . in favor of any tribe, band, or other identifiable group of American Indians . . . whenever such claim is one arising under the Constitution, laws or treaties of the United States . . .").

infer congressional acquiescence to liability for damages for alleged violations of those nonexistent obligations.

D. NIFRMA Does Not Give Plaintiffs a Cause of Action

Plaintiffs acknowledge that in order to maintain a statutory claim it must identify "specific money-mandating fiduciary duties" in the statute invoked. Opp. at 31. And while Plaintiffs rely on NIFRMA, NIFRMA contains no "specific money-mandating fiduciary duties" such as would confer jurisdiction. Certainly, there is nothing in NIFRMA that could conceivably be construed as requiring the United States to provide sufficient raw timber to keep Plaintiff's saw mill fully occupied. Nor is there anything in the Act suggesting that an AAC, or other aspirational goal in a Forest Management Plan, is a "money-mandating fiduciary duty."

As Plaintiffs acknowledge, NIFRMA was not enacted until after the Supreme Court's decision in *Mitchell II*, and thus, the language of the statute must be examined to determine whether it contains a money-mandating fiduciary duty. Plaintiffs begin by citing from the "Findings" preamble to the Act (Opp. at 23, citing 25 U.S.C. §§ 3101(2-3)), but Findings do not create specific prescriptions. *See El Paso Natural Gas Co. v. United States*, 750 F.3d 863, 898 (D.C. Cir. 2014) (rejecting the argument that congressional findings can form the basis of a specific fiduciary duty).

Plaintiffs then claim that NIFRMA requires that Plaintiffs receive "not only stumpage value, but also the benefit of all the labor and profit that the Yakama Forest are [sic] capable of yielding." Opp. at 23, citing and paraphrasing 25 U.S.C. § 3104(b)(4). This same statutory language is proffered by the Complaint as providing the basis for Plaintiffs' Claim for Relief. Compl. ¶¶ 12, 13(c). But these provisions do not indicate that Congress was imposing a specific statutory duty to manage forests in a particular way – so as, for example, to maximize sustainable

revenue. Instead, as discussed in our Motion (at 19-20), Congress intended for BIA and the Tribe to work together to formulate the management objectives for the forest, and to hold otherwise is inconsistent with the statute's express language and stated goals.

Nor can the Act be construed as imposing a liability-creating duty to maximize sustainable forest revenues. In the first place, NIFRMA lists multiple objectives Interior and the Tribe may decide to pursue -- including goals that are competing or mutually exclusive. *See* 25 U.S.C. § 3104. For example, the Act provides that a forest management plan can pursue the competing objectives of maintaining forest land in a perpetually productive state and retention of Indian forest land in its natural state, as determined by the Tribe. *Id*. § 3104(b)(5). Interior and the Tribe cannot simultaneously pursue both objectives but would need to choose (or strike a balance) between the two. Similarly, the Act endorses timber production as a means of creating employment and commercial opportunities but also encourages the protection of "grazing, wildlife, fisheries, recreation, aesthetic, cultural and other traditional values" or retaining the land "in its natural state" if the Tribe identifies the latter as its objective. *Id*. The statute does not rank competing objectives, nor does it require Interior to pursue a particular objective more strenuously or to the exclusion of the others. *Id*; *see also* 25 C.F.R. § 163.3(b) (listing forest management objectives).

Second, interpreting NIFRMA as imposing a specific duty on Interior to maximize sustainable revenue would also conflict with the role the Act assigns to Tribes in deciding or recommending forest management objectives.[6] The Act promotes and encourages the Indian

[6] The forest management regulations emphasize the Tribe's role in developing a forest management plan. In listing management objectives, 25 C.F.R. § 163.3(b) provides that a forest management plan should be prepared "with the full and active consultation and participation of the appropriate Indian Tribe" and supported by "written Tribal objectives." 25 C.F.R. § 163.11 provides that forest management plans require Secretarial approval and shall be based on

owners' active participation in managing timber and forest resources and setting management objectives. 25 U.S.C. § 3101. Interior is to prepare forest management plans with the Tribe's "full and active consultation and participation." *Id*. § 3104(b)(2). The Act authorizes the Secretary to enter into contracts, cooperative agreements, and grants with tribes, pursuant to the Indian Self-Determination Act, *id*. §§ 450f - 450n, to engage in "forest land management activities on Indian forest land," *id*. § 3104(a), and expressly acknowledges Tribal lawmaking authority, *id*. § 3108.

Third, the Indian Forest Management Act provides 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. The D.C. Circuit has held that this language means Congress did not intend to create any new fiduciary obligations with passage of this statute; instead, any specific fiduciary duty must come from another statute. *See El Paso Natural Gas Co*., 750 F.3d at 898-899 ("Congress was quite clear that '[n]othing in this chapter shall be construed to diminish or expand the trust responsibility of the United States toward Indian trust lands or natural resources, or any legal obligation or remedy resulting therefrom' . . . To construe the Act as independently creating an enforceable trust responsibility would contravene the plain intent of Congress") (referring to the parallel provision of the Indian Agricultural Act, 25 U.S.C. § 3742.) This Court should similarly hold

"objectives established by the tribe." 25 C.F.R. § 163.14 also refers to the Tribe's role in the sale of forest products; it provides that "open market sales of Indian forest products may be authorized" "[c]onsistent with the economic objectives of the tribe" and as authorized by Tribal resolution.

that the Indian Forest Management Act does not create a specific money-mandating fiduciary duty.[7]

Because the NIFRMA does not impose a specific duty that requires Interior to maximize revenues, it cannot be the source of the substantive duty Plaintiffs allege. *See generally Navajo II*, 556 U.S. at 294.

E. *Mitchell II* Does Not Give Plaintiffs a Cause of Action

Plaintiffs' Complaint asserts three bases for their lawsuit: the AAC targets set by the Tribe's Forest Management Plan; the alleged Treaty obligation to keep the Tribe's sawmill fully supplied with lumber; and the alleged statutory requirement to give the Tribe the "benefit of all labor and profit that the Yakama Forest is capable of yielding." Complaint ¶ 13(a-c) (quoting, without citation, NIFRMA, 25 U.S.C. § 3104(b)(4)); *see* Opp. at 27-28 (reaffirming these three bases for suit). The claim that the Forest Management Plan's AACs create enforceable obligations has been abandoned. As we have shown, the claims based on the 1855 Treaty, and NIFRMA, also fail. That leaves Plaintiff's argument that the Supreme Court's decision in *Mitchell II* is dispositive. *Mitchell II* is not dispositive.

First, the Supreme Court, in *Navajo II* and *Jicarilla*, has clarified *Mitchell II* in ways that make the decision inapplicable here. The stated basis for decision in *Mitchell II* was the government's control of the plaintiff's' timber operations. *See, e.g.*, 463 U.S. at 222 ("Virtually every stage of the process is under federal control."); *id*. at 225 n. 29 (noting the "pervasive federal control evident in the area of timber sales and timber management"); *id*. at 225 (noting

[7] The language of Section 3120 and the holding in *El Paso Natural Gas Co*. certainly refutes Plaintiff's suggestion that "the Supreme Court holding in *Mitchell II* and the express Congressional intent in NIFRMA" demonstrate that NIFRMA "contain[s] money-mandating trust duties." Op. at 35 n. 9.

the "Government['s] . . . elaborate control over forests and property belonging to Indians"); *id*. at 209 (noting that the plaintiffs' case was based on the fact that "the Department of the Interior . . . exercises 'comprehensive' control over the harvesting of Indian timber.") (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980)).

In its later decisions the Supreme was categorical in insisting that control alone is not enough. "The Federal Government's liability cannot be premised on control alone." *Navajo II*, 556 U.S. at 301. The point was hammered home again in *Jicarilla*: When a "Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, . . . neither the Government's 'control' over [Indian assets] nor common-law trust principles matter." 564 U.S. at 177 (alteration in original) (quoting *Navajo II*, 556 U.S. at 302). Because "[t]he Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute," the Court explained, "reliance on the Government's 'managerial control'" of trust assets "is misplaced." *Id*. & n.5 (quotation omitted). Accepting this guidance, the Federal Circuit in *Hopi* rejected plaintiff's argument that the Federal Government's "comprehensive control over water resources on the Hopi Reservation . . . pursuant to congressional authorization" established trust liability, on the grounds that "'[t]he Federal Government's liability cannot be premised on control alone.'" 782 F.3d at 670 (alteration in original) (quoting *Navajo II*, 556 U.S. at 301).

Second, even if comprehensive control were sufficient, the United States' control over Yakama timber is far from comprehensive. *See* Motion at 17-20. Plaintiffs do not dispute this. Thus *Mitchell II* does not control here, and Plaintiffs have failed to establish jurisdiction.

The cases Plaintiffs cite do not support a contrary conclusion, in part because they do not reflect the Supreme Court's clear dictates in *Navajo II* and *Jicarilla*. The Federal Circuit's

decision in *The Confederated Tribes of Warm Springs Reservation of Oregon v. United States*, 248 F.3d 1365 (Fed. Cir. 2001) did state, quite broadly, that "Tribes that own timber managed by the federal government enjoy the right of an injured beneficiary to seek damages for alleged breaches of the fiduciary obligations that are defined by the statutes and regulations that give the federal government the responsibility to manage Indian timber resources for the Indians' benefit." 248 F.3d at 1370 (citing *Mitchell II*, 463 U.S. at 226). Putting aside Plaintiffs' failure to identify a money-mandating statute or regulation supporting their claims, the decision in *Warm Springs*, like the Federal Circuit's decision in *Apache Tribe of Mescalero Reservation v. United States*, 43 Fed. Cl. 155 (1999) (both cited by Plaintiffs, Opp. at 30-31) predate the Supreme Court's *Navajo II* (2009) and *Jicarilla* (2011) decisions. And in *Apache Tribe of Mescalero Reservation*, the court's decision was driven by "the extent of the BIA control over timber operations on [Tribal land]," 43 Fed. Cl. at 167, which, as *Navajo II* teaches, is not enough. *Navajo II*, 556 U.S. at 301.

In addition, the BIA in *Apache Tribe of Mescalero Reservation* exercised a degree of control far beyond the cooperative arrangement between BIA and Plaintiffs here (which Plaintiffs do not contest). *See id.*:

> The 1979 FMP was planned and produced solely by BIA personnel; BIA had complete control of the management of timber resources. All sales of timber originated in the BIA. Tribal resolutions that applied to sales made, or to sales approved, were written by the BIA and presented to the Tribe for signature. The Tribe did not have the capacity to plan or produce the 1979 FMP. The Tribe did not plan, produce or approve the 1979 FMP.

The situation in *Apache Tribe of Mescalero Reservation* was thus similar to that in *Mitchell II*, where the government was managing allottee lands and therefore exercised *complete* control. *See Mitchell II*, 463 U.S, at 227 ("the Indian allottees are in no position to monitor federal

management of their lands on a consistent basis. Many are poorly educated, most are absentee owners, and many do not even know the exact physical location of their allotments.")

The unpublished decision in *The Blackfeet Tribe of the Blackfeet Reservation v. United States*, United States Court of Federal Claims, Case No. 12-429L (Aug. 21, 2015) (copy filed with Plaintiffs' Opposition as Exhibit 29 to Jones Declaration) does not predate *Navajo II* and *Jicarilla* but, like *Warm Springs* and *Apache Tribe of Mescalero Reservation*, the decision in *Blackfeet Tribe* relies heavily on the simple fact of control. *See id*. at 3:

> Indeed, "the Department of Interior – through the Bureau of Indian Affairs – 'exercises literally daily supervision over the harvesting and management of tribal timber.'" *Mitchell*, 436 U.S. at 222 (quoting *White Mountain*, 448 U.S. at 147). *See also Apache Tribe of the Mescalero Reservation v. United States*, 43 Fed. Cl. 155, 162-163 (1999) ("The Department of the Interior . . . exercises literally daily supervision over the management of the Tribe's timber."); *Confederated Tribes of the Warm Springs Reservation v. United States*, 248 F.3d 1365, 1370 (Fed. Cir. 2001) ("statutes and regulations . . . give the federal government the responsibility to manage Indian timber resources for the Indians' benefit.").

Also, the facts of *Blackfeet Tribe* are quite different. There plaintiffs alleged that the government had wrongfully failed to prevent (or mitigate) damage from forest fire, and the court found that "[t]he statutes in question specifically address the obligation of the Government to prevent 'loss of values resulting from fire,' 25 U.S.C. § 406(e), tree 'thinning', the 'use of silvicultural treatments,' and 'protection against losses from wildfire' through the 'construction of firebreaks,' 25 U.S.C. § 3103(4)." *Id*. at 3.

We also note that Plaintiffs' reliance on the *Blackfeet* decision (Opp. at 30, 34) is improper, as that decision was vacated. *The Blackfeet Tribe of the Blackfeet Reservation v. United States*, United States Court of Federal Claims, Case No. 12-429L, *Order on Motion to Vacate* (Dec. 28, 2017) (copy attached as Exhibit A). *See A123 Sys., Inc. v. Hydro-Quebec*, 626 F.3d 1213, 1219 (Fed. Cir. 2010) (vacated decision is "of no precedential value.")

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the United States' Motion to Dismiss, the United States respectfully requests that Plaintiffs' complaint be dismissed with prejudice.

Respectfully submitted,

JEAN E. WILLIAMS
Deputy Assistant Attorney General

/s/*Peter Kryn Dykema*
Peter Kryn Dykema
U.S. Department of Justice
Environment and Natural Resources Division
Natural Resources Section
P.O. Box 663
Washington, D.C. 20044-0482
peter.dykema@usdoj.gov
Phone: (202) 305 0436
Fax: (202) 305 0274
Attorney of Record for Defendant

September 14, 2020

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 14th day of September, 2020, the foregoing was filed using the Court's electronic case filing system which will cause electronic service on all counsel of record.

/s/*Peter Kryn Dykema*
PETER KRYN DYKEMA