IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

**RESPONSE TO PLAINTIFFS' SURREPLY**
**(IN SUPPORT OF THE UNITED STATES' MOTION TO DISMISS)**

Plaintiffs' arguments rest on three premises: (1) that while *U.S. v. Mitchell*, 463 U.S. 206 (1983) ("*Mitchell II*") establishes a strictly *statutory* basis for jurisdiction for Plaintiffs' claims; (2) *U.S. v. White Mountain Apache Tribe*, 537 U.S. 465 (2003) ("*White Mountain Apache*") creates a *factual* basis for jurisdiction, grounded in the United States exercise of "comprehensive control" of tribal assets; and (3) that the United States' motion to dismiss relies on the supposedly fact-based rationale of *White Mountain Apache*. All three premises are false.

**A. *Mitchell II* Does Not Give This Court Jurisdiction**

Plaintiffs assert that this Court has jurisdiction because this case involves "the same subject matter and laws considered by the Supreme Court in *Mitchell II*." Plaintiffs' Surreply in Response to Motion to Dismiss (Surreply) at 2 ECF No. 24; *see id*. ("*Mitchell II* is binding authority and requires the motion to dismiss be denied"). On one point Plaintiffs are correct,

namely, that the basis for decision in *Mitchell II* was "the statutes and regulations at issue" in that case (Surreply at 3, (quoting *Mitchell II*, 463 U.S. at 226)) and that, accordingly, "[t]he Court did not examine the factual conditions in the trust relationship." Surreply at 2.[1] But in arguing the precedential effect of *Mitchell II* on this case Plaintiffs are wrong.

Plaintiffs are wrong because this case does not involve the "same laws" and because the Supreme Court has tirelessly insisted that the jurisdictional question here is governed by *the specific statutory duty a plaintiff invokes*. Thus in *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) (*Navajo I*), the Supreme Court insisted that "analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." In *United States v. Navajo Nation*, 556 U.S. 287, 302 (2009) (*Navajo II*), the Court iterated that "the Tribe [must] identify a specific, applicable, trust-creating statute or regulation that the Government violated." *See generally United States v. Jicarilla Apache Nation*, 564 U.S. 162, 173-75, 185 (2011) (directing attention to the "specific trust-creating statute and regulations" at issue).

The specific statute invoked by the Complaint is the aspirational statement in the Indian Forest Management Act (NIFRMA) that tribes receive "the benefit of all the labor and profit that such Indian forest land is capable of yielding." 25 U.S.C. § 3104(b)(4). ECF No. 1 (Complaint) ¶ 12; *see also id*. ¶ 13(c) ("Since June 18, 2013, the United States has breached its fiduciary duties to Plaintiffs . . . By failing to otherwise manage the Yakama forestry program in a manner that

[1] The only exception to this is the Court's noting the fact that the plaintiffs in *Mitchell II*, unlike the Plaintiffs here, were allottees. 463 U.S. at 227 ("[T]he 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.")

allowed the Nation to receive . . . the benefit of all labor and profit that the Yakama Forest is capable of yielding.")[2]

But, as we have shown, the cited requirement of NIFRMA does not create actionable duties under *Mitchell I*, *Mitchell II*, *Navajo I*, *Navajo II*, and *Jicarilla*. U.S. Motion at 15-17; U.S. Reply at 13-16. Indeed, NIFRMA itself expressly disavows any Congressional intent to give Plaintiffs a right to sue. U.S. Reply at 15-16.

**B. Plaintiffs' Comprehensive Factual Control Theory Is Not the Law**

The asserted statutory/factual dichotomy of *Mitchell II* and *White Mountain Apache* is a red herring. Plaintiffs state:

> This Court has jurisdiction under the Indian Tucker Act in two circumstances: (1) where a statutory and/or regulatory regime vests comprehensive fiduciary responsibilities with the United States to manager [sic] certain tribal trust assets, [*Mitchell II*]; and alternatively, (2) where the United States holds tribal assets in trust without corresponding, comprehensive fiduciary management responsibilities but then proceeds, in fact, to exercise comprehensive control over those assets, [*White Mountain Apache*].

Surreply at 1. Plaintiffs' reading of *White Mountain Apache* is untenable. The issue in that case, as stated by the Court through Justice Souter, was "whether *the 1960 Act [Pub. L. 86–392, 74 Stat. 8]* gives rise to jurisdiction over suits for money damages against the United States." *White Mountain Apache*, 537 U.S. at 469 (emphasis added). As was true in *Mitchell II*, the basis for decision in *White Mountain Apache* was *statutory*. The Court's resolution of this issue was,

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[2] The *only* other bases for liability alleged in the Complaint are the United States' alleged "fail[ure] to prepare and approve sufficient timber sales to achieve the maximum [annual allowable cut] authorized by applicable law" under the parties' Forest Management Plan (Complaint ¶ 13(a)) – a claim that has been abandoned (*see* United States' Reply Brief 4-5, ECF No. 17 (U.S. Reply) – and the United States' alleged failure to fulfill an alleged Treaty promise to keep Plaintiffs' lumber mill fully occupied. Complaint ¶ 13(b). The treaty claim is touched on below, and in our previous filings. *See* United States' Motion to Dismiss 20-23, ECF No. 15 (U.S. Motion); U.S. Reply at 6-13.

accordingly, that "*[t]he 1960 Act* goes beyond a bare trust and permits a fair inference that the Government is subject to duties as a trustee and liable in damages for breach." *Id*. at 474 (emphasis added).

As *White Mountain Apache* affirms, Plaintiffs cannot bring suit unless "a statute creates a right capable of grounding a claim within the [Tucker Act's] waiver of sovereign immunity," and that can be true "if, but only if, [the statute] 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *Id*. at 472 (quoting *Mitchell II*, 463 U.S. at 217). It is true that Justice Souter's opinion (joined without qualification only by Justices Stevens and O'Connor) draws attention to the fact that the government *availed itself* of the authority given it by the statute -- by taking possession of the property at issue -- and that the government's control was therefore a matter of fact as well as a matter of statutory authority. *See id*. at 466-67 (noting that "the Government has to this day availed itself of its option [to take possession]" and alluding to "a fiduciary [that is] actually administering trust property.") But this aspect of Justice Souter's opinion is, emphatically, not the operative legal principle.

First, the concurring opinion of Justice Ginsburg (joined by Justice Breyer) confirms that the decisive factor is not factual control but, rather, the legal authority conferred by the statute. "The 1960 Act," Justices Breyer and Souter emphasized, "authorizes the Government to use and occupy the fort. . . . The Act 'invest[s] the United States with discretionary authority to make direct use of portions of the trust corpus . . .'" *White Mountain Apache*, 537 U. S. at 480 (Ginsburg, concurring (quoting the majority opinion, *White Mountain Apache*, 537 U.S. at 475)); *see also id*. at 481 ("the 1960 Act in fact created a trust not fairly characterized as 'bare,' given the trustee's authorized use and management.") All focus is on the statute and the authority it confers, not on the question whether the government has or has not exercised the authority given.

More importantly, Plaintiffs' "comprehensive control" theory was unambiguously rejected by the Supreme Court in *Navajo II*.

> The Federal Circuit's opinion also suggested that the Government's "comprehensive control" over coal on Indian land gives rise to fiduciary duties based on common-law trust principles. . . . The Federal Government's liability cannot be premised on control alone. The text of the Indian Tucker Act makes clear that only claims arising under "the Constitution, laws or treaties of the United States, or Executive orders of the President" are cognizable . . . . 28 U.S.C. § 1505. In *Navajo I* we reiterated that the analysis must begin with "specific rights-creating or duty-imposing statutory or regulatory prescriptions." 537 U.S., at 506 . . . . If a plaintiff identifies such a prescription, and if that prescription bears the hallmarks of a "conventional fiduciary relationship," *White Mountain*, 537 U.S., at 473 . . . then trust principles (including any such principles premised on "control") could play a role in "inferring that the trust obligation [is] enforceable by damages," *id*., at 477 . . . . But that must be the second step of the analysis, not (as the Federal Circuit made it) the starting point.

*Navajo II*, 556 U.S. at 301.[3] Plaintiffs' argument here is precisely the same argument as that rejected by the Supreme Court in *Navajo II*. If there were any doubt that Plaintiffs' "comprehensive control" theory has been rejected, the Court put that doubt to rest in *Jicarilla*.

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[3] The Court's rejection of the "comprehensive control" interpretation of *White Mountain Apache* was presaged by the dissent in that case, which opined that "the majority gives far too much weight to the Government's factual 'control' over the Fort Apache property, which is all that distinguishes this case from *Mitchell I*." 537 U.S. at 484-85 (Scalia, dissenting). As the dissent explained:

> The majority holds that the United States "has obtained control at least as plenary as its authority over the timber in *Mitchell II*." *Ante*, at 1133. This analysis, however, "misconstrues . . . *Mitchell II* by focusing on the extent rather than the nature of control necessary to establish a fiduciary relationship." 46 Fed. Cl. 20, 27 (1999). The "timber management *statutes* (3)27 and the *regulations* promulgated thereunder," *Mitchell II*, 463 U.S., at 222, 103 S.Ct. 2961 (emphasis added), are what led the Court to conclude that there was "pervasive federal control" in the "area of timber sales and timber management," *id.*, at 225, n. 29, 103 S.Ct. 2961. But, until now, the Court has never held the United States liable for money damages under the Tucker Act or Indian Tucker Act based on notions of factual control that have no foundation in the actual text of the relevant statutes.

*Id*. at 485 (alterations original).

There the Court insisted that 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." *Jicarilla Apache Nation*, 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). And as we have noted, the Federal Circuit has not missed the import of *Navajo II* and *Jicarilla*. In *Hopi Tribe v. United States*, 782 F.3d 662 (Fed. Cir. 2015) the Court of Appeals 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).

### C. The United States' Statutory Arguments are NOT Fact-Based, and the Materials Plaintiffs Submitted are Irrelevant to the Jurisdictional Issue Presented

At pages 17-20 of our motion and supporting memo, we argued the "the Federal Government does not exercise plenary control over Plaintiff's timber assets." The argument is that *Congress* has not exercised such control, and that the governing *statutes* conclusively demonstrate as much. As we concluded (U.S. Motion at 20 (emphasis added)):

> This Court lacks jurisdiction over Plaintiffs' statutory breach of trust claims because **Plaintiffs can point to no money-mandating statutorily-imposed duty** from which it may fairly be inferred that Congress intended to . . . accept liability for money damages. Plaintiff's claim fails for the same reasons the Tribe's claims failed in *Navajo I*: "**they assume substantive prescriptions not found in [the statute]**." *Navajo I* at 510; *id*. at 513 (citation omitted) ("Here again, as the Court of Federal Claims ultimately determined, … **the Tribe's assertions are not**

> **grounded in a specific statutory or regulatory provision that can fairly be interpreted as mandating money damages**.")

Plaintiffs cannot by *ipse dixit* transform our facial challenge to jurisdiction into a fact-based challenge. Our arguments are and at all times have been based on the relevant statutes and the two documents (the Treaty, and the Forest Management Plan) that are integral to Plaintiffs' Complaint.

Most of the more than 1200 pages of exhibits Plaintiffs submitted with their Opposition papers assertedly demonstrate the United States' breaches of statutory and Treaty duties. *See* Pls.' Opp. 11-20, 28-29, ECF No. 14. Because those duties are either nonexistent, or nonactionable, or both, the alleged breaches (none of which we concede) are irrelevant.

Plaintiffs also included several documents that were prepared and distributed prior to June 18, 2013. *See, e.g.*, Exhibits 18, 19, and 21 to Jones Declaration (ECF 14-1 at 836-1154, 1173-74.) All the matters addressed in these exhibits were resolved by the June 18, 2013 settlement of the Yakama Tribe's prior lawsuit and are irrelevant.[4] Plaintiffs also included several letters of correspondence between the Yakama Nation and BIA over the last few years as a way of showing the nature of the parties' dispute. *See* Exhibits 7, 8, 22, 23, 24, 25 to Jones Declaration (ECF No. 14-1 at 567-72, 1176-92). The correspondence can have no bearing on this Court's jurisdiction and should be disregarded.

The materials Plaintiffs emphasize in their latest filing are agency "manuals and handbooks." Surreply at 8 (citing ECF No. 14-1, Exhs. 1-6, 8-12). Such materials cannot confer jurisdiction because they "do[] not have the force and effect of law." *Stone Forest Indus., Inc. v.*

[4] *Nez Perce Tribe v. Jewell*, No. 06-cv-2239 (D.C. Dist. Ct.), Joint Stipulation of Dismissal With Prejudice of Claims of Plaintiff Yakama Nation, ECF Nos. 219, 229 (June 14, 2013 and Oct. 24, 2013).

*United States*, 973 F.2d 1548, 1551 (Fed. Cir. 1992) (quoting *Hoskins Lumber Co. Inc. v. United States*, 24 Cl. Ct. 259, 266 (1991); *see also Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) ("agency manuals, and enforcement guidelines . . . lack the force of law.")[5] In order to be relevant here, it must be shown that such handbooks or manuals constitute "enforceable regulation[s] of an executive department" that "can be fairly interpreted to create a substantive right to monetary compensation from the United States." *Hamlet v. United States*, 63 F.3d 1097, 1102 (Fed. Cir. 1995) (citations and internals quotation marks omitted). Plaintiffs do not so much as attempt to satisfy this standard.[6]

### D. The Evidentiary Materials Plaintiffs Submitted on their Treaty-Based Claim Cannot Change the Plain Language of the Treaty Itself

Regarding Plaintiffs' Treaty-based claim, our argument from the beginning has been that the cited Treaty unambiguously and on its face says *nothing* even vaguely supportive of the duty Plaintiffs ask the Court to invent. U.S. Motion at 20-23; U.S. Reply at 1, 6-13 ("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

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[5] Plaintiffs also supplied hundreds of pages of "statements of high-ranking BIA officials" and "background information" relating to those statements. Surreply at 8 (citing ECF No. 14-1, Exhs. 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 18, 19, 20, 21, 22, 23, 24, 25, 26; ECF No. 14-2 and ECF No.14-3). These materials are equally irrelevant because such statements, "like interpretations contained in policy statements, agency manuals, and enforcement guidelines . . . lack the force of law . . .". *Arizona Health Care Cost Containment Sys. v. McClellan*, 508 F.3d 1243, 1254 (9th Cir. 2007) (citing *Christensen*, 529 U.S. at 587.)

[6] Plaintiffs cite *Kisor v. Wilke*, 139 S. Ct. 2400 (2019) as support for their introducing these materials, Surreply at 8, which is unhelpful because *Kisor* does no more than outline the limited circumstances in which internal agency regulatory interpretations are entitled to deference. *See* 139 S. Ct. at 2417 ("To begin with, the regulatory interpretation must be . . . the agency's authoritative or official position, rather than any more *ad hoc* statement . . . Next, the agency's interpretation must in some way implicate its substantive expertise. . . Finally, an agency's reading of a rule must reflect fair and considered judgment") (citations and internal quotation marks omitted). The case certainly does not stand for the proposition for which Plaintiffs cite it.

Treaty obligations out of thin air."). *See South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 505-06 (1986) (construing treaties in favor of the Indians does not allow reliance on ambiguities that do not exist, nor does it permit disregard of the clearly expressed intent of Congress).

Plaintiffs claim that they have "submitted additional jurisdictional facts that bear on the appropriate interpretation of the Treaty of 1855." Surreply at 7 (citing ECF No. 14-1, Exhs. 14, 15, 16.) The cited exhibits are:

- Exhibit 14 – Transcript of "proceedings at the Council in the Walla Walla Valley" June 9th and 11th, 1855. ECF 14-1 at 706-826.
- Exhibit 15 – "A Sketch Showing the Cayuse, Walla Walla, Yakama, And Nez Perce Purchases & Reservations." ECF 14-1 at 827.
- Exhibit 16 – "A Sketch Showing the Cayuse, Walla Walla, Yakama, And Nez Perce Purchases & Reservations" (a different version of Exhibit 15). ECF 14-1 at 828.

Plaintiffs discuss these materials in their Opposition brief (Pls.' Opp. at 26-27) but nowhere in their 122 pages is there the slightest suggestion of a commitment to keep the Yakama mill fully supplied with timber.

It is true that in construing Indian treaties courts often consult their context and purpose. But that is not a license to disregard plain language or to invent obligations that are simply not there. Thus, while the Federal Circuit allows courts to "examine not only the language, but the entire context of [the] agreement," that is only true when the language of a treaty provision "only imperfectly manifests its purpose." *McManus v. United States*, 130 Fed. Cl. 613, 621 (2017) (quoting *Nat'l Westminster Bank, PLC v. United States*, 512 F.3d 1347, 1353 (Fed. Cir. 2008)). "The interpretation of a treaty . . . begins with its text." *Medellin v. Texas*, 552 U.S. 491, 506 (2008). The "clear import" of a treaty's text "controls unless application of the words of the

treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories." *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180 (1982) (citation and internal quotation marks omitted); *Starr Int'l Co., Inc. v. United States*, 910 F.3d 527, 537 (D.C. Cir. 2018); *Maximov v. United States*, 373 U.S. 49, 54 (1963) ("[I]t is particularly inappropriate for a court to sanction a deviation from the clear import of a solemn treaty between this Nation and a foreign sovereign, when, as here, there is no indication that application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.")

The materials and argument Plaintiffs have proffered give the Court no justification for transforming a treaty promise to supply a lumber mill into a promise to supply both a lumber mill and sufficient lumber to keep the mill operating at capacity in perpetuity.

**CONCLUSION**

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

Respectfully submitted,

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December 22, 2020

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 22nd day of December, 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