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

MOTION TO DISMISS

The United States moves to dismiss Plaintiff's Complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"). The particular grounds for this motion are set forth in the accompanying memorandum of points and authorities and exhibits.

Respectfully submitted, this 26th day of May, 2020.

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THE UNITED STATES' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO DISMISS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

I. INTRODUCTION

The complaint in this case is admirable for its simplicity, but it must be dismissed because it fails to state a valid claim for breach of trust over which this Court would have jurisdiction. Plaintiff Confederated Tribes and Bands of the Yakama Nation (Yakama) is a federally recognized Indian Tribe. Complaint (ECF No. 1) ¶ 3.[1] Plaintiff Yakama Forest Products, wholly-owned by the Yakama Nation, was created in 1994 to promote the development and utilization of the Yakama's timber resources. *Id*. ¶ 4. The United States holds much of Yakama's lands in trust. *Id*. ¶ 6. Yakama's timber resources have been managed under a Forest Management Plan (FMP) adopted in 2005, *id*. ¶ 8; the FMP sets, among other things, a harvest standard called the Annual Allowable Cut (ACC). *Id*. ¶ 1.[2] According to the Complaint, the United States built a sawmill for Yakama under the Treaty with the Yakamas, dated June 9, 1855, Treaty with the Yakima, 1855, U.S.-Yakima Indians, June 9, 1855, 12 Stat. 951. *Id*. ¶¶ 3, 7.

The gravamen of the Complaint is that, for many years, Yakama's timber has been under-harvested. Plaintiffs allege that the United States has fiduciary duties to Yakama by Treaty, by statute, and at common law, and that the under-harvest of Yakama's timber (and resulting loss of possible revenues) has breached those fiduciary duties in three ways.

> Since June 18, 2013, the United States has breached its fiduciary duties to Plaintiffs in one or more of the following ways:
>
> > a. By failing to prepare and approve sufficient timber sales to achieve the maximum AAC authorized by applicable law;

[1] Given the stage of the proceedings, we cite to the Complaint. We do not intend to admit any facts as to the merits of Plaintiffs' claims.
[2] A copy of the FMP is attached hereto as Exhibit 1.

> b. By failing to provide an adequate log supply for [Yakama Forest Products]; and/or
>
> c. By failing to otherwise manage the Yakama forestry program in a manner that allowed the Nation to receive not only the stumpage value from its forest lands, but also the benefit of all labor and profit that the Yakama Forest is capable of yielding.

Id. ¶ 13.

The logic of the Complaint is that the AACs set by the FMP are legally enforceable commitments (*id*. ¶¶ 1, 9); that by building a sawmill for Yakama the United States committed to keeping it 100% utilized (*id*. ¶ 7); and that the United States' trust responsibilities include a duty to maximize revenues (to produce "all labor and profit that the Yakama Forest is capable of yielding" – *id*. ¶ 13(c)).

We show below that this Court lacks jurisdiction because Plaintiffs have not pled actionable trust duties; under controlling Supreme Court caselaw, the United States does not exercise sufficient control over Plaintiffs' resources to support Plaintiffs' suit, and Plaintiffs have not cited any actionable money-mandating trust responsibilities. We also show that the Complaint fails to state a claim warranting relief because the common law liabilities alleged (in contract, and in trust law) do not exist.

II. STANDARD OF REVIEW

A plaintiff must establish jurisdiction before the Court may proceed to the merits of a case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998). Courts are presumed to lack subject matter jurisdiction unless "the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (citation and internal quotation omitted). "[I]t is settled that a party invoking federal court jurisdiction must, in the initial pleading, allege sufficient facts to establish the court's jurisdiction." *DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1318 (Fed. Cir. 2006) (citation omitted). Once jurisdiction is contested, plaintiff

"bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence." *Reynolds v. Army & Air Force Exchange Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988) (citation omitted).

When deciding a motion to dismiss, the Court may review "the content of the competing pleadings, exhibits thereto, matters incorporated by reference in the pleadings, whatever is central or integral to the claim for relief or defense, and any facts of which the . . . Court will take judicial notice." *Crusan v. United States*, 86 Fed. Cl. 415, 417-18 (alteration in original) (internal quotation omitted), *aff'd*, 374 F. App'x 18 (Fed. Cir. 2009), *and aff'd sub nom. Frederico v. United States*, 374 F. App'x 15 (Fed. Cir. 2009). When a motion to dismiss challenges the Court's subject matter jurisdiction, the Court may look beyond the pleadings and inquire into jurisdictional facts to determine whether jurisdiction exists. *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991).[3] The determination of whether this Court has subject matter jurisdiction to hear Plaintiff's claims is a question of law. *Toxgon Corp. v. BNFL, Inc.*, 312 F.3d 1379, 1381 (Fed. Cir. 2002).

Dismissal under RCFC 12(b)(6) is required where the facts alleged in the Complaint do not entitle Plaintiff to a legal remedy. A motion to dismiss under RCFC 12(b)(6) tests the legal sufficiency of a complaint in light of RCFC 8(a), which requires "a plausible 'short and plain' statement of the plaintiff's claim, showing that the plaintiff is entitled to relief." *K–Tech Telecomm., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1282 (Fed. Cir. 2013) (internal

[3] In addition, and even where not referred to or attached to the complaint, the Court may also consider relevant documents where the parties do not dispute their validity. *See Collier v. CSX Transp. Inc.*, 673 F. App'x 192, 197 (3d Cir. 2016) (noting that "on consideration of a motion to dismiss, a court may consider unquestionably authentic exhibits in determining whether a plaintiff plausibly would be entitled to relief"); *Rogers v. Johnson-Norman*, 466 F. Supp. 2d 162, 170 n.5 (D.D.C. 2006); *Halldorson v. Sandi Grp.*, 934 F. Supp. 2d 147, 152 (D.D.C. 2013).

quotation mark omitted) (quoting *Skinner v. Switzer*, 562 U.S. 521, 530 (2011)). Legal conclusions in the complaint may be disregarded because, although the court must "assume [the] veracity" of "well-pleaded factual allegations," *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), "conclusory" allegations are "not entitled to be assumed true." *Id*. at 681 (citation omitted). A plaintiff must plead enough factual allegations "to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A court should dismiss a complaint "when the facts asserted by the claimant do not entitle him to a legal remedy." *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002).

III. ARGUMENT

A. The Federal Government Lacks Fiduciary Liability Here Because It Does Not Exercise Plenary Control over Plaintiff's Timber Assets and Because Plaintiff Cannot Identify a Specific Money-Mandating Directive to Achieve Minimum Harvest Targets

While Plaintiffs' complaint is admirably simple, its underpinnings require a brief discussion of recent Supreme Court jurisprudence defining the strictly limited scope of the United States' potential liability in trust to Indian Tribes.

1. This Court's jurisdiction to entertain Plaintiff's claims depends upon whether Plaintiff has alleged the breach of a money-mandating statutory or regulatory duty

Plaintiff asserts jurisdiction under both 28 U.S.C. § 1491 ("Tucker Act") and 28 U.S.C. § 1505 ("Indian Tucker Act"). Compl. ¶ 2. The Tucker Act, the principal statute governing the jurisdiction of this court, provides that the Court of Federal Claims has jurisdiction over claims against the United States that are founded upon the Constitution, a federal statute or regulation, or an express or implied contract with the United States. 28 U.S.C. § 1491(a)(1) (2000). The Indian Tucker Act further provides that the Court of Federal Claims has jurisdiction over claims brought by "any tribe, band, or other identifiable group of American Indians" against the United

States that are founded upon "the Constitution, laws or treaties of the United States, or Executive orders of the President," as well as claims that "otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group." *Id*. § 1505. But both the Tucker Act and the Indian Tucker Act are jurisdictional statutes only; neither creates "a substantive right enforceable against the Government by a claim for money damages." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003); *United States v. Navajo Nation* (*Navajo I*), 537 U.S. 488, 503, 506 (2003).

A plaintiff must therefore establish that defendant has violated a money-mandating duty; to prove that a statute or regulation is money-mandating, "the statute and regulations must be such that they 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *Roberts v. United States*, 745 F.3d 1158, 1162 (Fed.Cir.2014) (*quoting White Mountain Apache*, 537 U.S. at 472)); see also *United States v. Navajo Nation* (*Navajo II*), 556 U.S. 287, 290 (2009); *United States v. Mitchell* (*Mitchell II*), 463 U.S. 206, 217 (1983); *Blueport Co., LLC v. United States*, 533 F.3d 1374, 1383 (Fed.Cir.2008). The source of law granting monetary relief must be distinct from the Tucker Act itself. *See Navajo II*, 556 U.S. at 290 (holding the Tucker Act does not create "substantive rights; [it is simply a] jurisdictional provision[ ] that operate[s] to waive sovereign immunity for claims premised on other sources of law (e.g., statutes or contracts)."). "'If the statute is not money-mandating, the Court of Federal Claims lacks jurisdiction, and the dismissal should be for lack of subject matter jurisdiction.' " *Jan's Helicopter Serv., Inc. v. Fed. Aviation Admin*., 525 F.3d 1299, 1308 (Fed.Cir.2008) (*quoting Greenlee Cnty., Ariz. v. United States*, 487 F.3d 871, 876 (Fed.Cir. 2007)); *see also Fisher v. United States*, 402 F.3d 1167, 1173 (Fed.Cir.2005) ("[T]he absence of a money-

mandating source is "fatal to the court's jurisdiction under the Tucker Act."); *Peoples v. United States*, 87 Fed. Cl. 553, 565–66 (2009).

2. The Supreme Court's *Mitchell/White Mountain Apache* line of cases establish that a trust relationship does not create liability, and that complete, or plenary, control over the trust corpus can be one factor in establishing liability

The Supreme Court has taken pains to delineate the scope of the United States' potential liability to Indian Tribes for damages for breach of trust. Between 1980 and 2011 the Court issued six decisions that govern analysis on the subject. *See United States v. Mitchell* (*Mitchell I*), 445 U.S. 535 (1980) (*Mitchell I*); *Mitchell II*; *Navajo I*; *Navajo II*; *White Mountain Apache*; and *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011).

Analysis begins with *Mitchell I* and *Mitchell II*, both of which, arising out of the same litigation, involved the United States' alleged breach of fiduciary duties in managing forest resources on behalf of Indian allottees. The issue in *Mitchell I* was whether the 1887 Allotment Act, by itself, "authorizes the award of money damages against the United States for alleged mismanagement of forests located on lands allotted to Indians under that Act." 445 U.S. at 536.[4] In answering this question, the Court began with first principles: that "[t]he United States, as sovereign, is immune from suit save as it consents to be sued"; that "[a] waiver of sovereign immunity cannot be implied but must be unequivocally expressed"; and that "[i]n the absence of

[4] "Allotment" was a process by which Congress sought to integrate Native Americans into modern culture, replacing tribal identity. Section 1 of the General Allotment Act of 1887 authorized the President to "allot" to each Indian residing on a reservation up to 80 acres of agricultural land or 160 acres of grazing land found within the reservation. Act of Feb. 8, 1887, 24 Stat. 388 (1887), as amended, 25 U.S.C. § 331, *repealed by* Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, title I, § 106(a)(1), 114 Stat. 2007. Section 5 of the Act provided that the United States would retain title to such allotted lands in trust for the benefit of the allottees. ("Under § 2 of the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 462, the United States now holds title to these allotted lands indefinitely." (*Mitchell I*, 445 U.S. at 540-41)).

clear congressional consent, then, there is no jurisdiction in the Court of Claims more than in any other court to entertain suits against the United States." Id. at 538 (first alteration in original) (citations and interior quotation marks omitted). other court to entertain suits against the United States." Id. at 538.

The Allotment Act specifically provided that the United States would hold allotted lands in trust for the Indian owners. 24 Stat. 389, as amended, 25 U.S.C. § 348. The Court held, however, that this created a "bare" trust, *see Mitchell II*, 463 U.S. at 224, without imposing specific (and therefore enforceable) obligations regarding the management of resources: "the Act created only a limited trust relationship between the United States and the allottee[; … it] does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands." *Mitchell I*, 445 U.S. at 542. Congress's purpose in creating a trust relationship was limited to restricting allottees' alienation of the land and in securing immunity from state taxation, *id*. at 544, and therefore "[t]he General Allotment Act … cannot be read as establishing that the United States has a fiduciary responsibility for management of allotted forest lands. Any right of the respondents to recover money damages for Government mismanagement of timber resources must be found in some source other than that Act." *Id*. at 546.

Three years later, in *Mitchell II*, the case returned to the Supreme Court, the plaintiffs having proffered on remand the "some other source" (*id*.) for actionable trust responsibilities. The picture presented was in fact fundamentally different, because now the plaintiffs' case was based on the fact that "[t]he forest resources on the allotted lands have long been managed by the Department of the Interior, which exercises 'comprehensive' control over the harvesting of Indian timber." *Mitchell II*, 463 U.S. at 209 (quoting *White Mountain Apache Tribe v. Bracker*,

448 U.S. 136, 145 (1980)). "Comprehensive control," and the many legislative mandates that directed all aspects of forest management, were dispositive in *Mitchell II*. See id. at 222 ("[v]irtually every stage of the process is under federal control"); id. at 224 ("a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians.") As the Federal Circuit has put it, Mitchell II was decided at least partly on the basis of the Secretary's "exclusive authority to sell or approve the sale of timber on allotted Indian lands." Hopi Tribe v. United States, 782 F.3d 662, 667 (Fed. Cir. 2015) (emphasis added) (citation omitted).

On the facts of *Mitchell II*, the "comprehensive control" (463 U.S. at 209) that provided part of the basis for decision resulted from the fact that the lands at issue were *allotted* lands. In rejecting an argument that the plaintiff allottees' interests could be protected through "declaratory, injunctive or mandamus relief," for example, the Court noted that "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." *Id*. at 227. Because the allottees lacked the ability to participate in the management of the lands at issue, the government exercised *exclusive* control. *See Hopi*, 782 F.3d at 667 ("In *Mitchell II*, the Supreme Court addressed statutes and regulations granting the Secretary of the Interior the exclusive authority to sell or approve the sale of timber on allotted Indian lands") (citation omitted)).

The potential significance of *exclusive* government control of Indian assets is also illustrated by the Court's opinion in *White Mountain Apache*. *White Mountain Apache* involved a historic army post much of which the government occupied as authorized by the1960 statute under which plaintiff sued. The government held the land in trust for the Tribe, but Congress

had stipulated in 1960 to "the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed . . . ." Act of Mar. 18, 1960, Pub. L. No. 86–392, 74 Stat. 8. The right of occupancy – which the government had exercised (while allowing the property to deteriorate) – gave the government exclusive control of the trust corpus, bringing the case into line with *Mitchell II*. In the language of the *White Mountain Apache* opinion, the government's "control" of the property was "plenary." 537 U.S. at 475. Justice Ginsburg, concurring, emphasized t1hat this was a significant fact. *Id*. at 481 (Ginsburg, J., concurring) ("The plenary control the United States exercises under the Act as sole manager and trustee, I agree, places this case within *Mitchell II*'s governance"); *see also Hopi Tribe*, 782 F.3d at 668 (the key fact in *White Mountain Apache* was that the statute "authorized the United States to use the land exclusively.")

The lesson of *Mitchell II* and *White Mountain Apache* is thus clear: the United States' exercise of plenary – "sole" or "comprehensive" or "exclusive" – management over the Tribal trust corpus can be an element in establishing the government's trusteeship liability for damages. *Mitchell II*, 463 U.S. at 209; *White Mountain Apache*, 537 U.S. at 475; *Hopi Tribe*, 782 F.3d at 668. And, even then, the plaintiff would still need to identify the statute or regulations that create the money-mandating duty in question, as we show in the following section.

3. The Supreme Court's *Mitchell/Navajo/Jicarilla* line of cases establish that a trust relationship, and extensive involvement over a subject matter, do not create liability absent the imposition, and violation, of specific money-mandating duties

In addition, and regardless of whether management is plenary, *Mitchell II* and the *Navajo* cases establish that, where the government is managing tribal trust assets, damages liability can attach only where Congress (or a regulation) has imposed a specific money-mandating duty and the Tribe's grievance is premised on a violation of that same specific duty.

In *Navajo I* (the companion case to *White Mountain Apache*), the plaintiff alleged violations of the Indian Mineral Leasing Act of 1938 (IMLA), *see Navajo I*, 537 U.S. at 493 (citing 52 Stat. 347, *codified at* 25 U.S.C. § 396a *et seq*.), which authorized the leasing of unallotted Tribal lands for mineral exploitation where both the Tribe, and the Secretary of the Interior, approved the lease. *Id*. Plaintiff in *Navajo I* argued that the Secretary's approval authority, viewed in the context of the IMLA's history and the history of U.S.-Tribal relations, implied a duty to maximize Tribal revenues.

The majority disagreed. First, the *Navajo I* majority summarized *Mitchell I* and *II* (the "pathmarking precedents on the question whether a statute or regulation (or combination thereof) 'can fairly be interpreted as mandating compensation by the Federal Government'" – *Navajo I*, 537 U.S. at 503 (quoting *Mitchell II*, 463 U.S. at 218)) as establishing a two-step test:

> To state a claim cognizable under the Indian Tucker Act, *Mitchell I* and *Mitchell II* thus instruct, a Tribe must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties. … If that threshold is passed, the court must then 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. at 506 (alterations in original) (internal citation omitted) (*quoting Mitchell II*, 463 U.S. at 519); *see Hopi Tribe*, 782 F.3d at 667. As we will show below, Plaintiff's inability to surmount the first of these hurdles is fatal to their claim.

The point here is that the Supreme Court could not have been clearer in requiring that a Tribal plaintiff must allege "specific" statutory duties – and the breach thereof – to state a breach of trust claim coming within this Court's Tucker Act jurisdiction. Although "the undisputed existence of a general trust relationship between the United States and the Indian people can reinforce the conclusion that the relevant statute or regulation imposes fiduciary duties," the

Court stressed, "that relationship alone is insufficient to support jurisdiction under the Indian Tucker Act." *Navajo I*, 537 U.S. at 506 (citation, modifications, and internal quotation marks omitted). "Instead," the Court insisted, "*the analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions*." *Id*. (emphasis added); *see also id*. at 509 (requiring "discrete statutory and regulatory provisions"). And on this point the dissent in *Navajo I* was in complete agreement: "[T]he only issue here is whether the Tribe's claims address one or more *specific statutory obligations*, as in *Mitchell II*, at the level of fiduciary duty whose breach is compensable in damages." *Id*. at 521 (Souter, J., dissenting) (emphasis added). Concurring in *White Mountain Apache*, Justice Ginsburg summarized *Navajo I* (which she authored) thus: "the threshold question [was] whether the IMLA and its regulations impose[d] any *concrete substantive obligations*, fiduciary or otherwise, on the Government." 537 U.S. at 480 (Ginsburg, J., concurring) (emphasis added).

Alluding to the "plenary control" aspect of *Mitchell II*, the Court in *Navajo I* also pointed out that the IMLA at issue did not "assign[] a comprehensive managerial role" to the Secretary. 537 U.S. at 507. Indeed, the Court gave considerable weight to this factor. First, *Navajo I* involved *Tribal* property, not *allottee* property: the IMLA by its terms only applied to "unallotted lands within any Indian reservation . . . ." *Id*. at 494 (quoting 25 U.S.C. § 396a). And, rather than the "plenary" and "exclusive" control that the Secretary was given in managing the timber interests of allottees in *Mitchell II*, the IMLA at issue in *Navajo I* (which concerned leasing for exploitation of coal deposits) specifically contemplated that the Tribe that owned the land in question would actively participate in leasing activities. *Id*. at 493-94 ("In addition to provid[ing] Indian tribes with a profitable source of revenue . . . the IMLA aimed to foster tribal self-determination by giv[ing] Indians a greater say in the use and disposition of the resources

found on Indian lands" (alteration in original) (citations and internal quotation marks omitted)); *id*. at 508 (plaintiff's reading of the IMLA is contrary to the statute's goal of "enhance[ing] Tribal self-determination.").

Navajo II involved the same lawsuit as *Navajo I*. On remand the Federal Circuit had found actionable trust duties in other laws; the Supreme Court differed, leading to the same result – dismissal – as had been indicated by *Navajo I*. The Court decided the case by repeating its "emphasis on the need for courts to 'train on specific rights-creating or duty-imposing statutory or regulatory prescriptions.'" *Navajo II*, 556 U.S. at 296 (quoting *Navajo I*, 537 U.S. at 506). None of the laws cited by the petitioner satisfied this requirement, the Court held, and that was the end of the matter: "In *Navajo I* we reiterated that the analysis must begin with 'specific rights-creating or duty-imposing statutory or regulatory prescriptions.'" *Id*. at 301 (*quoting Navajo I*, 537 U.S. at 506).

The Court of Appeals in *Navajo II* had, looking at an array of statutes reminiscent of the timber management regime in *Mitchell II*, held that the Secretary's thoroughgoing control of Tribal coal mining created trust liability. *Navajo Nation v. United States*, 501 F.3d 1327, 1343 (Fed. Cir. 2007) (finding the relevant laws "support a finding that the government had comprehensive control of the management and collection of royalties from coal mining"), *rev'd and remanded*, 556 U.S. 287 (2009). Writing for the Court in *Navajo II*, Justice Scalia's response was categorical. "The Federal Government's liability," he wrote, "cannot be premised on control alone." 556 U.S. at 301. Instead, "analysis must begin with 'specific rights-creating or duty-imposing statutory or regulatory prescriptions.'" *Id*. (*quoting Navajo I*, 537 U.S., at 506). "If a plaintiff identifies such a prescription," Justice Scalia continued, "and if that prescription bears the hallmarks of a 'conventional fiduciary relationship,'… then trust principles (including

any such principles premised on 'control') could play a role in 'inferring that the trust obligation [is] enforceable by damages.' … But that must be the second step of the analysis, not (as the Federal Circuit made it) the starting point." *Id*. (emphasis omotted) (*quoting White Mountain Apache*, 537 U.S. at 473, 477).

The opinion in *Navajo II* thus appears to preclude any argument that, under *Mitchell II* and *White Mountain Apache*, the government's "plenary" and "exclusive" control of an Indian resource is sufficient to give this Court jurisdiction over breach of trust claims. That is certainly how the Federal Circuit has interpreted *Navajo II*. In *Hopi* 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).

The Supreme Court's decision in *United States v. Jicarilla Apache Nation,* 564 U.S. 162 (2011) confirms that comprehensive government control over Indian assets cannot by itself lay the basis for damages liability for breach of trust. The facts of *Jicarilla* differ from those here; the issue presented in that investment mismanagement case was whether the fiduciary exception to the attorney-client privilege attaches to government-tribal relations so as to strip the federal government of the protections of the privilege. (The Court held that, because the government, when managing tribal assets, has multiple responsibilities, including the responsibility to advance and protect federal policy and fiscal objectives, the exception does not apply. 564 U.S. at 178-87). But in the course of its decision the Court iterated the limiting principles of *Mitchell II* and *Navajo II*. Common-law principles, the Court noted, may "inform our interpretation of statutes and [help] to determine the scope of liability that Congress has imposed." *Id.* at 177

(citing *White Mountain Apache*, 537 U. S. 475-76), but it is the applicable statutes and regulations, not the common law, that "establish [the] fiduciary relationship and define the contours of the United States' fiduciary responsibilities." *Id*. (alteration in original) (quoting *Mitchell II*, 463 U.S. at 224). 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." *Id*. (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). This last observation, made in reference to the dissenting opinion in *Jicarilla*, reinforces the statements in *Navajo II* to the effect that "plenary control" rationale of *Mitchell II* and *White Mountain Apache* is not enough.

But even if plenary control alone were enough to support jurisdiction, Plaintiffs' suit must fail because Plaintiffs cannot invoke this Court's jurisdiction *either* under the theory that the government exercises exclusive control over Plaintiff's Tribal assets *or* by invoking "specific rights-creating or duty-imposing statutory or regulatory prescriptions."

4. Because Plaintiffs' Complaint does not satisfy the Supreme Court's standards for Tribal breach of trust claims This Court wants jurisdiction

Indian Tucker Act jurisdiction attaches to allegations that the Federal Government has breached trust responsibilities to Native Americans only where the "Tribe [can] identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *Navajo I*, 537 U.S. at 506. In the latter case, a plaintiff must further establish that 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*. (alteration in original) (quoting *Mitchell II*, 463 U.S. at 219). This is true even where the government exercises "plenary," "comprehensive," and "exclusive" control over Tribal or allottee assets (*Mitchell II*, *White Mountain Apache*); but even if exclusive control over the trust corpus were enough to sustain jurisdiction, Plaintiffs cannot show that, either.

a. Plaintiff cannot identify a specific money-mandating statutory directive to achieve maximum harvest targets

The statutory provision Plaintiffs cite as creating money-mandating duties is the reference in 25 U.S.C. 3401 to deriving "the benefit of all the labor and profit that such Indian forest land is capable of yielding." But that provision is just one of several "objectives" set out by Congress as governing management of Tribal timber resources:

> Indian forest land management activities undertaken by the Secretary shall be designed to achieve the following objectives—
>
> (1) the development, maintenance, and enhancement of Indian forest land in a perpetually productive state in accordance with the principles of sustained yield ******
> (2) the regulation of Indian forest lands through the development and implementation, with the full and active consultation and participation of the appropriate Indian tribe, of forest management plans which are supported by written tribal objectives and forest marketing programs;
> (3) the regulation of Indian forest lands in a manner that will ensure . . . continuous productivity and a perpetual forest business;
> (4) the development of Indian forest lands and associated value-added industries by Indians and Indian tribes to promote self-sustaining communities, so that Indians may receive from their Indian forest land not only stumpage value, but also the benefit of all the labor and profit that such Indian forest land is capable of yielding;
> (5) the retention of Indian forest land in its natural state when an Indian tribe determines that the recreational, cultural, aesthetic, or traditional values of the Indian forest land represents the highest and best use of the land;
> (6) the management and protection of forest resources to retain the beneficial effects to Indian forest lands of regulating water run-off and minimizing soil erosion; and

> (7) the maintenance and improvement of timber productivity, grazing, wildlife, fisheries, recreation, aesthetic, cultural and other traditional values.

25 U.S.C. § 3104(b). For at least three reasons these aspirational statements cannot impose the money-mandating duty that Plaintiffs suggest.

First, the stated objectives repeatedly and emphatically dictate that Tribal timber management is a shared responsibility. Thus timber management plans must be developed "with the full and active consultation and participation of the appropriate Indian tribe" and must, further, be "supported by written tribal objectives and forest marketing programs." 25 U.S.C. § 3104 (b)(2). The section thus contemplates an active partnership, which is fundamentally inconsistent with the notion that one of the partners is in effect a guarantor of results.

Second, the stated objectives are conflicting. Maximizing revenue is one goal, and one that is inherently in tension with the goals of preserving perpetual sustainability (Section 3104(b)(3)), avoiding erosion and runoff (Section 3104(b)(6)), and retaining forest lands in their natural state for the sake of "cultural, aesthetic, or traditional values". Section 3104(b)(3). If Congress intended that the United States be liable in damages for not achieving any one of the many goals set out in the statute, the result would be impossibly conflicting standards and virtually inevitable liability whatever policy balance is struck.

Finally, the language Plaintiffs rely upon is easily misunderstood when read out of context. While subsection (b)(4) does indeed refer to "the benefit of all the labor and profit that such Indian forest land is capable of yielding," it states that aspiration in the context of "the development of Indian forest lands and associated value-added industries by Indians and Indian tribes to promote self-sustaining communities." Again, it is a partnership that is contemplated in the context of complex and nuanced objectives. If Plaintiffs' reading were correct, Congress would have had to intend that the United States be liable in damages in the event that Indian

communities or industries fall below some undefinable level of self-sufficiency. That cannot be true.

b. The Federal Government does not exercise plenary control over Plaintiff's timber assets

Plaintiff cites two bases for its breach of trust claims. The statutory basis includes provisions governing the sale of tribal timber (25 U.S.C. §§ 406-407) and the National Indian Forest Resources Management Act, 25 U.S.C. §§ 3101-3120 (Miscellaneous Indian Legislation, Pub. L. No. 101–630, 104 Stat. 4531 (1990)). Complaint ¶ 11. The treaty basis for plaintiff's claims is the Treaty with the Yakamas, dated June 9, 1855, 12 Stat. 951 ("Treaty of 1855" or "Treaty"). Complaint ¶ 3. Neither basis satisfies the "plenary control" aspect of *Mitchell II* and *White Mountain Apache* even if, contrary to *Navajo II* and *Jicarilla*, plenary control were adequate to confer jurisdiction.[5]

First, the statutes. 25 U.S.C §§ 406-407, which govern sales of Indian lands and resources, do not give the Secretary exclusive control over anything. Repeatedly, Section 406 conditions the Secretary's authority "[u]pon the request of the owners." 25 U.S.C. § 406(b), (c). An exception is made only in an "emergency" to prevent loss from "natural catastrophes." 25 U.S.C. § 406(e). The main section provides that "the timber on any Indian land held under a trust or other patent containing restrictions on alienations may be sold by the owner or owners with the consent of the Secretary of the Interior," 25 U.S.C. § 406(a). Under this language, as

[5] Plaintiffs also cite "other federal law" as supporting their trust claims. Complaint ¶ 5. To the extent Plaintiffs mean by this to invoke federal common law, the invocation is futile because the United States has no common law trust liability to Indian Tribes. *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 895-96 (D.C. Cir. 2014) (a "trust responsibility can only arise from a statute, treaty, or executive order . . . ." (quotation omitted)); *Jicarilla*, 564 U.S. at 177 ("The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute.")

the court noted in *Barclay v. United States*, 333 F.2d 847, 859 (Ct. Cl. 1964) "the Secretary had no statutory authority to sell the timber that stood on allotments; his office was merely to approve or disapprove of such sales as the allottees might make. Only the allottee could transfer the ownership of the timber on his land." This section does not give the government anything like exclusive control.

Section 407 deals with "[s]ale of timber on *unallotted* lands." 25 U.S.C. § 407 (emphasis added). The section directs that timber sales should be made in furtherance of "sustained-yield management or to convert the land to a more desirable use." *Id*. But as the court noted in *Eastman v. United States*, 31 F. Supp. 754, 760 (W.D. Wash. 1940), *rev'd on other grounds*, 118 F.2d 421 (9th Cir. 1941), "[t]he Supreme Court has intimated very clearly that the aim of the Congress [in Section 406] was to broaden the rights of the Indians as to the sale of timber on lands valuable chiefly for that" (citing *United States v. Algoma Lumber Co.*, 305 U.S. 415 (1939). "And, while this was spoken of Section 407, which deals with unallotted lands, it applies with equal force to Section 406, which relates to allotted lands. The two sections were part of the same statute,— Chapter 431, 36 Stats. 857." *Id*. Because Sections 406 and 407 were intended to "broaden" Indian rights regarding timber and land sales, they resemble the statutory scheme in the *Navajo* cases which, the Supreme Court held, *disproved* the existence of a money-mandating duty. *Navajo I*, 537 U.S. at 493-94 ("[T]he IMLA aimed to foster tribal self-determination by giv[ing] Indians a greater say in the use and disposition of the resources found on Indian lands" (second alteration in original) (citations and internal quotation marks omitted)); *id*. at 508 (plaintiff's reading of the IMLA is contrary to the statute's goal of "enhance[ing] Tribal self-determination. . . .").

The National Indian Forest Resources Management Act leads to the same result. To be sure, the Act acknowledges that the United States "has a trust responsibility toward Indian forest lands." 25 U.S.C. § 3101(2). But it is "not enough to rely on the general trust relationship between the Native Americans and the [G]overnment." *Navajo I*, 537 U.S. at 506. And at the same time Congress went to great lengths to make clear that the Tribal owners have a large and important role to play in managing forest resources. The statute begins by noting that "[t]he purposes of this chapter are to--(1) allow the Secretary of the Interior *to take part in* the management of Indian forest lands, *with the participation of the lands' beneficial owners*." 25 U.S.C. § 3102(1) (emphasis added). The key management tool – the forest management plan -- is defined as "the principal document" describing "regulation . . . of Indian forest lands" and, the statute insists, it must "reflect[] and [be] consistent with a tribal integrated resource management plan." 25 U.S.C. § 3103(5); the "tribal integrated resource management plan," in turn, must itself be "approved by [the] Indian tribe." 25 U.S.C. § 3103(15). Forest management plans, in other words, are tools to be developed and implemented "with the full and active consultation and participation of the appropriate Indian tribe . . . ." 25 U.S.C. § 3104(2).

In other respects as well the statute insists on active (and often dispositive) tribal participation and control. Proceeds of timber management activities may be held in an "Indian forest land assistance account," but only "[a]t the request of an Indian tribe." 25 U.S.C. § 3109(a). And in all timber management activities, Congress directs that "the Secretary shall comply with tribal laws pertaining to Indian forest lands, including laws regulating the environment or historic or cultural preservation, and shall cooperate with the enforcement of such laws on Indian forest lands." 25 U.S.C. § 3108. This in many ways forest management

under the Act Plaintiff invokes is a far cry from the "exclusive" and "plenary" control at issue in Mitchell II and White Mountain Apache.

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 waive the United States' sovereign immunity and 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.") And even if plenary control over the trust corpus were sufficient, that element too is lacking.

c. Nor does the 1855 Treaty give Plaintiffs a cause of action

Plaintiff invokes Article 5 of the 1855 treaty, which obligates the United States "to erect one sawmill… keeping the same in repair and furnished with the necessary tools and fixtures." Plaintiff contends that, implicit in this language, is a promise to keep the sawmill furnished with sufficient lumber to keep the sawmill fully operational.[6] According to Plaintiffs, "[t]he United

[6] Section 5 in fact called for the provision of several structures and facilities:

> 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

States' promise [under the Treaty of 1855] of a sawmill naturally includes an assurance that there will be an adequate timber supply to run the mill." Complaint ¶ 7. But the Treaty's plain language includes no such assurance.

It is true that Indian treaties should "be construed liberally in favor of the Indians with ambiguous provisions interpreted for their benefit." *Oneida Cty., N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 247 (1985). But Plaintiff's effort to insert into the 1855 treaty an obligation to provide minimum quantities of lumber fails for two reasons. First, the Indian canons of construction are only available to resolve ambiguities; if there is no ambiguity, the canons serve no purpose. *Koi Nation of N. California v. United States Dep't of Interior*, 361 F. Supp. 3d 14, 49 (D.D.C. 2019), *appeal dismissed sub nom. Koi Nation of N. California v. United States Dep't of the Interior*, No. 19-5069, 2019 WL 5394631 (D.C. Cir. Oct. 3, 2019), "[t]he Indian canon of construction 'applies only to statutes that are . . . ambiguous . . . .'" (quoting *Ho-Chunk, Inc. v. Sessions*, 894 F.3d 365, 369 n.4 (D.C. Cir. 2018)).

Second, Plaintiff's effort to rewrite the 1855 treaty also conflicts with the basic principles that waivers of sovereign immunity must be unambiguous and the requirement that trust obligations must arise from clear money-mandating directives.

> 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 hereto as Exhibit 2.

The decision in *Harvest Inst. Freedman Fed'n v. United States*, 80 Fed. Cl. 197, 200–01 (2008), *aff'd*, 324 F. App'x 923 (Fed. Cir. 2009) is illustrative. In several Civil-War-era treaties the United States outlawed slavery by the signatory Tribes and guaranteed persons previously held as slaves ("Freedmen") "equal rights as members of the Tribes." 80 Fed. Cl. at 198. Plaintiffs in *Harvest Inst.* alleged that such treaties included an obligation to include Freedmen in allotments. The terms of the treaties at issue varied, but none of them, by their terms, obligated the United States to guarantee that the Freedmen would receive an allotment of real estate: "At most, the 1866 treaties instructed the Five Civilized Tribes that all former slaves adopted as members of the tribes should be treated as equal members of the tribe and enjoy all the rights of native citizens." *Id*. at 201. The court dismissed the complaint on two grounds; as relevant here, it held that "[t]he treaties in question do not provide a money-mandating remedy for their alleged violation." *Id*. at 198.

> Plaintiffs did not state a claim upon which we could grant them relief. To state a claim for relief, plaintiffs must "invoke a rights creating source of substantive law that can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *United States v. Mitchell*, 463 U.S. 206, 216–17, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) (internal quotations omitted); *United States v. Navajo Nation*, 537 U.S. 488, 506, 123 S.Ct. 1079, 155 L.Ed.2d 60 (2003). A claimant invoking the court's jurisdiction on the basis that the United States breached its trust must identify a statute, treaty, or regulation that imposes a fiduciary duty on the United States. *United States v. Mitchell*, 445 U.S. 535, 542–43, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980).
>
> Plaintiffs concede that it is "not enough to rely on the general trust relationship between the Native Americans and the [G]overnment." *United States v. Navajo Nation*, 537 U.S. at 506, 123 S.Ct. 1079. They point to *Navajo Nation* to suggest that the treaties did not have to be money-mandating for us to have jurisdiction. To be money-mandating, a statute, regulation, or treaty must impose a specific obligation on the part of the Government. This obligation may require performance or prevent it. If the Government breaches that obligation, plaintiffs may be entitled to money damages. The Court in *Navajo Nation* stated: "Those [obligations] need not, however, expressly provide for money damages; the availability of such damages may be inferred." *Id*. Plaintiffs read this to mean that

> the Government's obligation may be inferred. *While the right to money damages may be inferred, the governmental obligation may not.*

Id. at 200-201 (emphasis added).

Here, Plaintiff seeks to infer an obligation to provide certain quantities of lumber. But the treaty invoked says nothing of the kind, and the Court may not infer such an obligation.

B. Plaintiffs Fail to State a Claim Upon Which Relief May Be Granted Because the Government Has No Fiduciary Duty to Adhere to the AAC Goals Set Out in the 2005 FMP

Plaintiffs' claims rely heavily on alleged obligations that stem from the setting of AAC requirements in the 2005 from the FMPs. To this extent Plaintiffs' complaint should also be dismissed because it fails to state a claim upon which relief may be granted.

Plaintiffs contend that the FMPs create an enforceable duty that requires the Government to approve timber sales to achieve the "maximum AAC." The Government is obligated to prepare Forest Management Plans in conjunction with tribes under 25 C.F.R. §163.11. In pertinent part, the regulations provide that forest management plans shall be based on the principle of sustained yield management and objectives established by the tribe. 25 C.F.R. §163.11(a). Additionally, the regulation advises that forest harvest schedules shall support the objectives of the beneficial landowners and the Secretary and shall be directed towards achieving an approximate balance between net growth and harvest. *Id.*

Plaintiffs' claims here largely rest on the premise that the Government should be held financially liable for aspirational goals of the annual allowable cut, as set out in the 2005 FMP. Courts, however, recognize that FMPs are aspirational plans in nature and do not create legally enforceable duties. For example, when examining the FMPs prepared by the Department of Agriculture, the Supreme Court noted that FMPs are tools for agency planning and management, such that a legal challenge to an FMP—before specific logging proposals are

formulated – is unripe. *Ohio Forestry Ass'n Inc. v. Sierra Club*, 523 U.S. 726, 733-36 (1998). Additionally, courts have noted that FMPs prepared by the BIA and tribal entities are aspirational as well, as seen in an opinion issued in White *Mountain Apache vs. United States* (U.S. Court of Federal Claims, Case Number 17-359L) on a Motion for Reconsideration. *See* ECF No. 39, pg. 9 (deciding whether the Government was obligated to achieve the AAC recited in its 2005 FMP). Plaintiffs' claims in this case are substantially similar to the arguments made by the White Mountain Apache Tribe in its Motion for Reconsideration filed on February 2, 2018. *See* White Mountain Apache Motion for Reconsideration of the Court's January 5, 2018 Order, ECF No. 26, pgs. 10-12.

In that case, the White Mountain Apache Tribe ("Tribe") requested that the Court reconsider its January 5, 2018 Order dismissing the Tribe's forestry claims. *See* White Mountain Apache Motion for Reconsideration of the Court's January 5, 2018 Order, ECF 26, pgs. 10-12. The Tribe argued that the Government had to meet the AAC objectives contained in the FMP based on the holdings in *Apache Tribe of the Mescalero Reservation vs. United States* 43 Fed. Cl. 155 (1999) and *Ft. Mojave Indian Tribe v. United States* 23 Cl. Ct. 417 (1991).

In response, the Government argued that plaintiff's interpretation of *Mescalero Apache* was incorrect. The Court favored the Government's reasoning, finding that the *Mescalero* case did not present enough grounds for the court to reconsider its previous order. *See* Court's Order of Motion for Reconsideration, ECF 39, pg. 8.[7] In doing so, the Court looked to the 2005 FMP language, finding "no promise to remedy deficiencies." *Id*.

> 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

[7] A copy of this decision is attached hereto as Exhibit 3.

> use plan is generally a statement of priorities; it guides and constraint 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."). "

Id. The court specifically noted language in the White Mountain FMP that made it clear that FMPs are flexible and subject to change:

> [T]he 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.

Exh. 3 pg. 8

Similarly, the 2005 Yakama FMP was never intended to be a static, unchangeable agreement, as Yakama now claims. The FMP was intended as a guide to forestry operations, as noted in its opening language (Exh.1 pg. 7):

> The purpose and need for the Forest Management Plan (FMP) is to provide direction and guidance for forest management activities conducted by the Bureau of Indian Affairs (BIA), Yakama Agency, Branch of Forestry (BOF), and the Yakama Nation (YN) Department of Natural Resources (DNR) during the planning period.

The Yakama 2005 FMP specifically allows changes and reviews to the AAC. For example, Section 2.0.1 of the FMP (Exh. 1 pg. 179) states:

> 2.0.1. Program managers will review the timber sale priority schedule and consider if any schedule modifications should be recommended to the Timber Committee. For example, timber sales were reprioritized because of the western spruce budworm epidemic—areas with heavy defoliation and increasing mortality were moved up in the sale schedule and less threatened areas were moved back in the schedule. The managers will take into consideration changes in forest conditions, allottee requests, Timber Committee requests, work completed by the programs, and program staffing needs.

In fact, the preface to the 2005 FMP (*id*., pg. vi) notes: "The FMP will be reviewed periodically, and amended, revised, or replaced as necessary."

The court reached the same conclusion in *Navajo Tribe of Indians v. U.S.*, 9 Cl. Ct. 336, 374 (1986).

> [I]t is clear in the record that the allowable cut is not a required cut but a permitted cut. There is discretion involved in harvesting relative to an allowable cut. As observed earlier, while plaintiff harvested 34 million board feet of timber in 1982, it harvested only 26.6 million board feet in 1980. Various factors affect whether the allowable cut will become the required cut in any given year. In short, plaintiff has shown no basis in the statutes or regulations, or elsewhere, for holding that defendant's fiduciary duty obligated it annually to harvest the allowable cut.

The language of the FMP itself allows for good faith changes to the AAC to be made based on particular circumstances. Contrary to Plaintiff's claims, the numbers asserted in the 2005 FMP are not unchangeable. The FMP itself allows parties to amend these amounts, depending on the circumstances. Plaintiff wants this court to only interpret certain items of the FMP, but not consider how the AAC numbers, pursuant to the FMP, may be amended for good reason. The Court in this case should reach the same conclusion that the *White Mountain* and *Navajo* courts reached, that the FMPs are aspirational in nature and do not create any legally enforceable duties.

IV. CONCLUSION

For the foregoing reasons, the United States respectfully requests that Plaintiffs' complaint be dismissed with prejudice.

Respectfully submitted,

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May 26, 2020

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 26th day of May, 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