IN THE UNITED STATES COURT OF FEDERAL CLAIMS

THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.	No. 21-1664-EHM Judge Edward H. Meyers Electronically filed

PLAINTIFF'S RESPONSE TO THE UNITED STATES' MOTION TO DISMISS [ORAL ARGUMENT REQUESTED]

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I. INTRODUCTION

In August 2021, the Tribes filed a complaint for the United States' many breaches of trust and resulting damages in connection with a series of historically catastrophic fires that began less than six years prior and have continued to occur up to and beyond the date of filing. In response, and before any other proceedings in this case, the United States asks this Court to dismiss this action based on arguments that the claims are not money-mandating, filed too late under the statute of limitations, and waived by a 2012 settlement.

The United States' motion in this case relies upon arguments that have been rejected repeatedly by the United States Supreme Court, Federal Circuit and this Court. In *United States v. Mitchell*, 463 U.S. 206 (1983) ("*Mitchell II*"), the Supreme Court held that forestry claims are money-mandating based on the statutes and regulations in place at that time. Since then, the statutory and regulatory regime has only become more robust, resulting in even more specific duties owed to tribes with respect to forest management. *Mitchell II* remains binding precedent and is frequently relied upon by the Court of Claims. Based on *Mitchell II* alone, the motion should be rejected, as courts have repeatedly done to reject efforts to dismiss breach of trust forestry claims.

The United States' statute of limitations argument fares no better. The Tribes' claims are based on the Government's errors and omissions from after the 2012 settlement agreement to the present that relate to the catastrophic fires that first occurred in 2015. The fires that serve as the foundation for this lawsuit, which all occurred within six years of the filing of the Complaint, are the time at which the claims accrued. This Court recently rejected the same argument by the United States in an analogous case.

II. STATEMENT OF FACTS

The Colville Tribes and its Reservation. Plaintiff is a federally recognized Indian tribe that occupies the Colville Reservation in eastern Washington. ECF No. 1 ¶ 8. The Tribes have approximately 9,429 enrolled members. *Id.* The Colville Tribes rely on sound management of the Reservation's resources to sustain the Tribes' way of life and economy in perpetuity. *Id.* ¶ 17. The present-day Colville Reservation boasts tremendous natural resources, rich ecosystems, and stunning scenery. Almost two-thirds of the Reservation land area is classified as forest land. *Id*. ¶ 16. The Tribes' single largest asset are more than 913,000 acres of forest acres on the Reservation, of which over 650,000 acres are commercial. *Id*. ¶ 18.

The Tribes rely on its lands and natural resources to generate revenue, to provide employment for Tribal members, to provide cultural and natural benefits, and to serve as a self-sustaining permanent homeland. If managed correctly, the Reservation's natural and renewable resources would sustain the Tribes and its members into the foreseeable future. *Id.* ¶ 19.

Breach of Trust Lawsuit Filed Due to Catastrophic Fires. This lawsuit was filed August 4, 2021, because of a series of unprecedented forest fires on the Reservation which have had tremendously harmful impacts on the Tribes' way of life and economy. The Colville Tribes allege that the United States breached its duties with respect to the forest in many varied ways, all of which contributed to the losses suffered by the multiple fires in August 2015 to the present. The United States' breaches of trust related to forest health, fire prevention, fire suppression, roads and post-fire rehabilitation caused extensive damage to the Tribes and their resources, including commercial forests, soils, water, fisheries, and cultural resources. The very large fires that began in August 2015 have continued until the time the complaint was filed and beyond.

The United States has assumed many fiduciary duties to the Tribes with respect to the forest and related resources it holds in trust for the Tribes. In the Complaint, the Tribe's cite to many statutes and regulations that establish those fiduciary duties. *Id.* ¶¶ 21-22, 28-29, and 37. As described in the Complaint, the U.S. Supreme Court has held that the breach of those statutes and regulations mandate compensation for damages sustained as a result of the breach of the duties imposed. *Id.* ¶ 23. Because the United States holds the Tribes' land and resources in trust, it has assumed the obligations of a trustee to administer the trust with the great skill and care and is therefore judged with the most exacting fiduciary standards. *Id.* ¶ 25-26.

Inadequate Funding for Forest Management and the Systems to Support and Protect the Forest. Poor management of the Colville Tribal forest lands provided an opportunity for devastating forest fires. As a result of a systemic lack of funding from the United States to fulfill trust responsibilities owed to the Colville Tribes and chronic staffing shortages, the United States failed to fulfill its duties with respect to forest health, fire prevention, and fire suppression. To compound those fundamental problems, poor road maintenance was not addressed and forest rehabilitation after the fires has been inconsequential.

Catastrophic Forest Fires from August 2015 to the Present. The United States' Motion fails to acknowledge that the Tribes' Complaint covers the North Star and Tunk Block fires, but also the subsequent major fires that occurred on the Reservation. It also attempts to downplay the 2015 fires on the Colville Reservation by citing to statistics about Pacific Northwest fires more broadly. Motion ("Mot.") at 2, 4-5. However, the Colville Reservation was the epicenter of those fires. In 2015, about 62% of the acres burned across the entire Pacific Northwest were on the Colville Reservation. Mot. at 4-5. 800,000 of the 1.2 million board feet lost on Tribal trust lands in the Pacific Northwest region were on the Colville Reservation. *Id.*;

ECF No. 1 ¶¶ 4 and 58. There have been very substantial additional losses since.

We start with the North Star fire. The North Star Fire began on the Colville Reservation on August 13, 2015, and grew quickly, reaching 14,000 acres within one day and reached 35,000 acres by August 17. ECF No. 1 ¶¶ 47-48. By August 21, the fire had grown to 126,000 acres and was at zero containment. *Id.* ¶ 52. On August 23, the fire was up to 147,000 acres. *Id.* By August 26, the fire was at 155,000 acres. *Id.* Extreme smoke conditions pervaded the Reservation, and the public was advised to stay indoors. The Tribes distributed smoke masks to their members. *Id.*

The Colville Tribes did not receive any air tanker or other major federally deployed suppression resources until the North Star Fire exceeded 100,000 acres. ¶ 53. It was not until August 26, almost two weeks after the North Star Fire started and after over 100,000 acres of timber trust land had burned, that fire fighters from the National Guard and U.S. Army began arriving to assist crews on some of the fires. ¶¶ 53-54. By September 1, the North Star Fire had finally moved up in priority as the number one fire in the nation and available personnel increased the understaffed fire-fighting work force. Fifty-seven days after initial ignition, the North Star Fire finally ended, having burned 165,000 acres on the Colville Reservation and 218,138 acres total. It was Washington state's largest fire in 2015. *Id.* ¶¶ 55-56.

To make matters worse, the Tunk Block Fire started on August 14, 2015, and crossed onto the Reservation from state and federal land. Like the North Star Fire, the Tunk Block Fire encountered huge amounts of available fuel on the Reservation, and limited suppression resources were provided by the United States. It burned for 64 days and ultimately burned approximately 165,947 acres. About half of the fire was within the Colville Reservation. The Tunk Block Fire ended October 15, 2015. *Id.* ¶ 57.

Together the North Star and Tunk Block Fires burned more than 240,000 acres on the

Colville Reservation, with enormous damage to trust resources. The fires burned at high intensity. Collectively, the fires burned more than 590 square miles and more than 800,000 board feet of the Tribes' valuable commercial timber. The lost timber represented approximately 20 percent of the commercial timber on the Reservation. This was—and remains—the single largest loss of board feet of timber on an Indian reservation in recorded history. *Id.* ¶ 58. Approximately one-third of the Tribes' commercial forest resources have been burned during the six years prior to this suit. *Id.* ¶ 61 (map).

Since the North Star and Tunk Block fires, there have been additional catastrophic, high intensity fires on the Colville Reservation that have damaged trust resources, including the Cold Creek Fire, and Bridge Creek Fire. As of the filing of the Complaint in August 2021, more than 60,000 acres had already burned before the typical height of fire season. *Id.* ¶¶ 5, 59. The Tribes will explain in later proceedings that major fires after the filing of the Complaint burnt at least tens of thousands more acres, and at this rate the Reservation will be largely devoid of commercial timber within a decade.

The United States' breaches of trust caused damages suffered by the Colville Tribes from these fires and greatly increase the opportunity for more large-scale devastating fires in the near future.

Breaches of Trust. The scale and intensity of the above-described fires and the damage they caused were the result of a combination of breaches of fiduciary duty. First, the United States breached its fiduciary duties to adequately manage fuels and maintain the health of the Tribe's forests. The Government failed to carry out sufficient prescribed burns and thinning, and failed to address overstocking and lack of tree species diversity, which have proven to reduce fire

risk and severity. *Id.* ¶¶ 64-72. As a result, the breaches created opportunities for wildfires, and the fires that occurred were catastrophic. *Id.* ¶¶ 6, 59, 63.

Second, the United States breached its fiduciary duties by failing to put in place the systems, people and resources needed to address wildfires. This includes firefighting staff, equipment, fire detection systems, and fire breaks. As a result, the size and resulting damage of fires was disastrous. *Id.* ¶¶ 85-89.

Third, the United States breached its fiduciary duties to suppress fires that occurred. Based in part on the tragic results of the North Star and Tunk Block Fires, there is a documented systemic problem with the extent and deployment of federal resources to protect land held in trust by the United States for tribes, including the Colville Tribes lands. The United States repeatedly and systematically deprioritized protection of the Tribes' trust resources. These breaches increased the opportunity for fires on the Colville Reservation and contributed to their extraordinary size and severity. *Id.* ¶¶ 90-94.

Fourth, the United States breached its fiduciary duties to rehabilitate the forest after the fires occurred and mitigate harm to the trust asset. The United States failed to restore damaged roads, control soil erosion, treat noxious and invasive weeds, conduct mulching and seeding, clean and repair culverts, and conduct tree replanting. As a result, commercially valuable timber development did not occur, and wildlife, fisheries, and other cultural resources diminished. *Id.* ¶¶ 95-104.

Fifth, the United States breached its fiduciary duties to perform road maintenance, which is necessary to conduct the above forest-related activities. The United States is aware that forest roads do not meet applicable legal standards, but fails to employ the personnel and resources needed to address this glaring deficiency. *Id.* ¶¶ 79-84.

Forest Fire Damages 2015 to the Present. While the specific amount of money damages has not been quantified, the complaint is very specific about the damages the Tribes seek to recover. The four "Damages" paragraphs in the Complaint state that the damages sustained are the result of forest fires which began to accrue in August 2015. *Id.* ¶¶ 43-46.

While the 28-page Complaint is rife with details, it notes that the Tribes, as the beneficial owner of the lands, do not have all the facts at its disposal and may discover other fire-related claims as the case proceeds:

> This complaint discusses some of the United States' breaches of its fiduciary duties. The failure of the United States to account to or otherwise keep the Tribes informed about the condition and status of Tribal trust property prevented the Tribes from discovering the full extent of its claims. The violations are described in detail herein, but form an illustrative rather than exhaustive list.

¶ 63.

III. STANDARDS OF REVIEW

In response to motions to dismiss pursuant to Rule 12(b)(1), the plaintiff bears the burden to allege sufficient facts to establish the Court's subject matter jurisdiction. *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011). The court accepts "as true all undisputed facts asserted in the plaintiff's complaint and draw[s] all reasonable inferences in favor of the plaintiff." *Id*. When asked to dismiss a complaint for lack of subject matter jurisdiction based on the face of the complaint, the Court has the *limited* task of determining whether the Tribes have stated a claim that could prevail if the Tribes supported it with evidence:

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.

Schener v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by *Davis v. Scherer*,

468 U.S. 183 (1984). Even if it appears on the face of the pleadings that a recovery is "very remote and unlikely," a motion to dismiss should not be granted "unless it appears beyond doubt" that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Id*; *see Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989); *Rosebud Sioux Tribe v. United States*, 75 Fed. Cl. 15, 22-23 (2007).

When reviewing a Rule 12(b)(6) motion, the court accepts all allegations of material facts as true and construes them in the light most favorable to the nonmoving party. *Anaheim Gardens v. U.S.*, 444 F.3d 1309, 1315 (Fed. Cir. 2006). "[A] complaint should not be dismissed for failure to state a claim, unless the complaint fails to state a claim to relief that is plausible on its face." *Inter-Tribal Council of Arizona, Inc. v. United States*, 956 F.3d 1328, 1338 (Fed. Cir. 2020) (internal quotation omitted). A claim survives when the plaintiff pleads factual allegations that allow the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The "plausibility standard is not akin to a 'probability requirement,' but asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

Rule 12(b)(6) review is generally limited to the contents of the complaint, the public record, and the contents upon which the complaint necessarily relies. *See Advanced Cardiovascular Systems, Inc. v. Scimed Life Systems, Inc.*, 988 F.2d 1157, 1164-65 (Fed. Cir. 1993). When matters wholly outside the pleadings are considered, the court will convert the 12(b)(6) motion to dismiss as one for summary judgment and will treat the motion as such. *Id.; Mendez v. United States*, 121 Fed. Cl. 370, 385-86 (2015). A court need not consider matters outside pleadings at all, but if the court decides to consult such matters and convert the motion

into one for summary judgment, it must inform the parties and set a schedule for submitting additional affidavits and documents if parties wish. *Gordon v. Nat'l Youth Work All.*, 675 F.2d 356, 361 (D.C. Cir. 1982).

IV. ARGUMENT

A. As Established in the Seminal *Mitchell II* Decision, the Court of Claims Has Jurisdiction Under the Tucker Act and Indian Tucker Act.

The United States argues that the Court lacks jurisdiction because the authority the Tribes "cites in the Complaint does not establish specific fiduciary duties, money-mandating in breach, related to forest management and fire prevention, nor to the maintenance of the roads at issue in this suit." Mot. at 12. The United States is incorrect. The Tribes rely on 25 U.S.C. §§ 406 and 407, 25 U.S.C. § 5109, the National Indian Forest Management Act (NIFRMA), 25 U.S.C. § 3101 *et seq.*, and associated regulations as the source of specific, money-mandating duties, and has adequately alleged breach of those duties. Decades of jurisprudence from the United States Supreme Court, Federal Circuit and this Court firmly establish that the United States' fiduciary duties to manage forests on Indian reservations are money-mandating and give rise to jurisdiction in the Court of Claims.

The opinions in the seminal cases *United States v. Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*") and *United States v. Mitchell*, 463 U.S. 206 (1983) ("*Mitchell II*") guide the appropriate analysis and dictate denial of the Government's motion. In the *Mitchell* cases, the Supreme Court considered whether the United States' mismanagement of allotted forest lands beneficially owned by members of the Quinault Indian Nation gave rise to Court of Claims jurisdiction under the Tucker Act and Indian Tucker Act. Plaintiffs alleged breaches of trust arising from various management failures, including, *inter alia*, failure "to manage timber on a sustained-yield basis," and failure "to develop a proper system of roads and easements for timber

operations." *Id.* At 210. The United States moved to dismiss the claims, asserting (as it does here) that such claims did not adequately allege a breach of trust and that the Court of Claims accordingly lacked jurisdiction.

In *Mitchell I*, the Supreme Court considered only whether the General Allotment Act created enforceable fiduciary duties. The Court ruled that the Act did not do so and directed dismissal of claims brought pursuant to the General Allotment Act and remand to consider the other statutory bases for plaintiffs' claims. *Id.* at 211.

On remand, the Court of Claims "ruled that the timber management statutes, 25 U. S. C. §§ 406, 407, and 466, various federal statutes governing roadbuilding and rights of way, §§ 318 and 323-325, statutes governing Indian funds and Government fees, §§ 162a and 413, and regulations promulgated under these statutes imposed fiduciary duties upon the United States in its management of forested allotted lands." *Id.* This Court concluded that the statutes and regulations required compensation for damages sustained as a result of the Government's breach of its duties. On review the second time, in what would become known as *Mitchell II*, the Supreme Court affirmed this Court, observing that the Department of the Interior "exercises 'comprehensive' control over the harvesting of Indian timber." *Id.* At 209 (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980)). The Court held that:

> Because the statutes and regulations in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for damages sustained. Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust.

Mitchell II, 463 U.S. at 225-226 (citations omitted). The Court held that money damages are implied by the statutory scheme and comprehensive nature of the trust relationship:

> A trusteeship would mean little if the beneficiaries were required to supervise the

> day-to-day management of their estate by their trustee or else be precluded from recovery for mismanagement.
>
> In addition, by the time Government mismanagement becomes apparent, the damage to Indian resources may be so severe that a prospective remedy may be next to worthless. For example, if timber on an allotment has been destroyed through Government mismanagement, it will take many years for nature to restore the timber.

Id. At 227-28 (emphasis added). The Court's concerns with loss of timber and associated revenue as a result of Government mismanagement have been proven prescient in this case.

The Supreme Court affirmed denial of the United States' motion to dismiss, and the case proceeded at the Court of Claims through several phases considering many aspects of forest management. For example, *Mitchell v. U.S.*, 10 Cl. Ct. 63 (1986) ("*Mitchell IV*"), discusses claims arising from the United States' failure to timely replant after logging and the resulting lack of regeneration. The series of cases stands for the proposition that the detailed legal framework governing the United States' management of Indian forestlands creates specific fiduciary duties, recoverable for breach in money damages. The *Mitchell* line of cases remain good law, and the United States does not contend otherwise.

In passing NIFRMA, Congress built on the statutory and regulatory regime which the Supreme Court held in *Mitchell II* to be money-mandating, by specifying detailed and comprehensive requirements governing the Department of Interior's management of forests on Indian forest lands to ensure accountability. Congress expressly did not diminish or expand the trust responsibility. 25 U.S.C. § 3120. Rather, Congress confirmed that "the United States has a trust responsibility toward Indian forest lands," but noted that "existing Federal laws do not sufficiently assure the adequate and necessary trust management of those lands." 25 U.S.C. §§ 3102(2), (3). Congress was keenly aware of the Court's holding and reasoning in *Mitchell II*, recognized compliance challenges presented by the brevity and lack of specific direction in the

existing statutory regime, and passed NIFRMA to direct the United States' compliance with its trust responsibilities. *See* S. Rpt. 101-402 at 6 (101st Cong., 2d Sess. 1990) (stating ("[c]onsistent with prior Acts of Congress and the Supreme Court's decision in *Mitchell II*, the Committee amendment finds that the 15,990,000 acres of Indian forest lands…are a perpetually renewable and manageable resource for which the United States has a trust responsibility.") and H. Rpt. 101-835 at 13 (101st Cong., 2d Sess. 1990).

Following the seminal *Mitchell II* case, the Federal Circuit and this Court have regularly asserted jurisdiction over claims for money damages stemming from the government's mismanagement of tribal forest resources under forest management statutes. *See Confederated Tribes of the Warm Springs Reservation v. United States*, 248 F.3d 1365, 1370-71 (Fed. Cir. 2001) (finding the government breached fiduciary duties in managing tribal forest land); *Apache Tribe of Mescalero Reservation v. United States*, 43 Fed. Cl. 155, 162-63 (1999) (same); *Navajo Tribe of Indians v. United States*, 9 Cl. Ct. 336, 344-45 (1986) (same). Recently, this Court has twice rejected similar motions to dismiss brought by the United States in which a Tribe alleged breach of trust relating to forestry. *See Confederated Tribes & Bands of the Yakama Nation v. United States*, 153 Fed. Cl. 676, 695-96 (2021) (same); *The Blackfeet Tribe of the Blackfeet Reservation v. United States ("Blackfeet Tribe")*, Civ. No. 12-429L, ECF No. 62 (Fed. Cl. Aug. 21, 2015) (same) (attached in Appendix as Exhibit 1).[1] The United States' repeated attempts to forward the same arguments, contrary to both Supreme Court and this Court's precedent, should

[1] The parties settled the dispute in *Blackfeet Tribe*, and the order denying the motion to dismiss was subsequently vacated. *See* Civ. No. 12-429L, ECF No. 183 (attached in Appendix as Exhibit 2). The Court may consider applicable reasoning set forth in the vacated opinion as persuasive. *See, e.g.*, *Faith Hosp. Asso. v. United States*, 225 Ct. Cl. 133, 147 n.22, 634 F.2d 526, 535 (1980) (concluding that reasoning in an applicable vacated case "is certainly of persuasive value and instructive.").

again be rejected.

1. The Tribes satisfy the two-step inquiry set forth in Navajo II.

The United States relies upon a pair of cases relating to the Navajo Nation in its motion. *See, e.g.*, Mot. at 12, 13, 17. These cases, known as *Navajo I* and *Navajo II*, rely on the *Mitchell* cases in setting forth a two-step inquiry that is generally required in a breach of trust case brought by an Indian tribe to invoke jurisdiction under the Indian Tucker Act. The *Navajo* cases built upon the "instruct[ion]" in the "pathmaking" *Mitchell* cases, but did not call into question the reasoning and holding of *Mitchell I* and *Mitchell II*. *United States v. Navajo Nation* ("*Navajo I*"), 537 U.S. 488, 503, 506 (2003); *see also United States v. White Mt. Apache Tribe*, 537 U.S. 465, 479 (2003) (Ginsburg, J., concurring, explaining how the Mitchell and Navajo cases are "properly aligned").

Under *Navajo* and *Navajo II*, the plaintiff tribe must first "identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government failed to faithfully perform those duties." *United States v. Navajo Nation*, 556 U.S. 287, 290 (2009) (*Navajo II*) (quoting *United States v. Navajo Nation* ("*Navajo I*"), 537 U.S. 488, 506 (2003)). The Tribes must then demonstrate that "the relevant source of law can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the governing law] imposes." *Id.* at 290-91 (quoting *Navajo I*, 537 U.S. at 506).

a. The Tribes satisfy step one of *Navajo II* because the Complaint identifies specific fiduciary duties.

"To establish that the United States has accepted a particular fiduciary duty, an Indian tribe must identify statutes or regulations that both impose a specific obligation on the United States and 'bear[] the hallmarks of a conventional fiduciary relationship.'" *Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015) (quoting *Navajo II*, 556 U.S. at 301). "[T]he analysis

must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Navajo I*, 537 U.S. at 506.

Here, with respect to step one of the *Navajo II* inquiry, the Tribes rely on much of the same comprehensive statutory authority the Supreme Court determined creates specific fiduciary duties in *Mitchell II*—namely 25 U.S.C. §§ 406(a), 406, 407, 25 U.S.C. § 5109 (formerly 25 U.S.C. § 466), 25 U.S.C. § 318a, and 25 C.F.R. part 163. *See* ECF No. 1 at ¶¶ 28-29; *Mitchell II* 463 U.S. at 222 ("The timber management statutes, 25 U. S. C. §§ 406, 407, 466, and the regulations promulgated thereunder, 25 CFR pt. 163 (1983), establish the 'comprehensive' responsibilities of the Federal Government in managing the harvesting of Indian timber…The Department of the Interior – through the Bureau of Indian Affairs – 'exercises literally daily supervision over the harvesting and management of tribal timber.'… Virtually every stage of the process is under federal control."). These statutes repeatedly require Secretarial oversight and approval in the management of forest land and sale of forest resources, and authorize implementation of the regulations found at 25 C.F.R. § 163. As decided in *Mitchell II*, these authorities alone are sufficient to establish specific fiduciary duties and overcome the United States' arguments to the contrary.

The Tribes' strong position is buttressed by its express reliance upon NIFRMA, which builds upon and further details the United States' specific and mandatory trust duties. *See* ECF No. 1 at ¶¶ 22-23, 29. NIFRMA mandates that "[t]he Secretary *shall* undertake forest land management activities on Indian forest land, either directly or through contracts, cooperative agreements, or grants under the Indian Self-Determination Act." 25 U.S.C. § 3104(a) (emphasis added). "Forest land management activities" is defined broadly as "all activities performed in the management of Indian forest lands," specifically including, "forest land development, including

forestation, thinning, tree improvement activities, and the use of silvicultural treatments to restore or increase growth and yield to the full productive capacity of the forest environment," and "protection against losses from wildfire, including acquisition and maintenance of fire fighting equipment and fire detection systems, construction of firebreaks, hazard reduction, prescribed burning, and the development of cooperative wildfire management agreements." 25 U.S.C. § 3103(4)(C), (D).

NIFRMA not only requires the United States to carry out forest management, it further mandates that the referenced "forest land management activities undertaken by the Secretary *shall* be designed to achieve the following objectives," 25 U.S.C. § 3104(b) (emphasis added), which include:

> (7) the development, maintenance, and enhancement of Indian forest land in a perpetually productive state in accordance with the principles of sustained yield and with the standards and objectives set forth in forest management plans by providing effective management and protection through the application of sound silvicultural and economic principles to—
>
> (A) the harvesting of forest products,
> (B) forestation,
> I timber stand improvement, and
> (D) other forestry practices;
>
> (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 the use of good method and order in harvesting so as to make possible, on a sustained yield basis, 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.

This exhaustive and mandatory list is buttressed by the regulatory requirements cited by the Tribes in the Complaint, which largely reflect the statutory requirements of NIFRMA. *See, e.g.*, 25 C.F.R. §§ 163.10, 163.30.

In sum, the authority the Tribes rely upon in the Complaint, which includes both the statutes and regulations deemed to create specific fiduciary obligations in *Mitchell II*, and the comprehensive and mandatory requirements of NIFRMA, constitutes the "specific rights-creating or duty-imposing statutory or regulatory prescriptions," *Navajo I*, 537 U.S. at 506, required to satisfy step one of the two-part test.

b. The Tribes satisfy step one of *Navajo II* because the Complaint alleges breach of trust based on specific statutory duties.

The Tribes also satisfied the "step one" requirement from *Navajo II* to adequately allege breaches of trust in the Complaint. The Tribes' alleged breaches connect to applicable statutory and regulatory provisions, including the overarching requirement to maintain the forest in a "perpetually productive state," 25 U.S.C. § 3104(b)(1), and specific requirements found both in statutes, regulations, and the prescriptions of the Integrated Resources Management Plan, which assists in implementation of applicable law.

While the United States faults the Tribes for citing "just two statutory provisions," Mot. at 15, this criticism is inaccurate and unfounded. The Tribes adequately identified the relevant authorities at the Complaint stage of pleading, when the Tribes must only provide a "short and

plain statement" of the grounds for jurisdiction, relief, and damages. *See* RCFC 8(a). In doing so, the Tribes identified both the statutes relied upon in *Mitchell II*, as well as the entirety of NIFRMA. *See* ECF No. 1 at ¶¶ 22-23, 28, 29. The Tribes' focus on 25 U.S.C. § 3104 is logical because: (1) the structure of NIFRMA centers on that main statutory provision which directs the duties of the United States and incorporates detailed definitions and terms from the remainder of the statute and regulations; and (2) NIFRMA was enacted in large part to provide specificity for the underlying fiduciary obligations set forth in broader terms in existing forestry statutes and regulations.

The more specific allegations and their statutory bases are detailed below.

The Tribes allege breach of trust arising from failure to manage fuels is detailed at Complaint ¶¶ 62-69, which relies in part on the statutory direction for "protection against losses from wildfire," "hazard reduction," and "prescribed burning." *See* 25 U.S.C. § 3103(4)(D).

The Tribes allege breach of trust arising from failure to fund and carry out adequate thinning to prevent overstocking and promote forest health. Complaint ¶¶ 70-78. These allegations rely in part on the statutory direction for "timber stand improvement," 25 U.S.C. § 3104(b)(1)(C), as well as 25 U.S.C. § 3103(4)(C), which requires "thinning, tree improvement activities, and the use of silvicultural treatments to restore or increase growth and yield to the full productive capacity of the forest environment."

The Tribes allege breach of trust arising from failure to maintain forest roads. Complaint ¶¶ 79-84. 25 U.S.C. § 406 requires Secretarial approval of timber sales, which necessitate roads. 25 U.S.C. §§ 407 and § 5109 directs that the Secretary shall carry out sustained yield management, which also necessitate functional forest roads. Additionally, 25 U.S.C. § 318a authorizes appropriations for roads. NIFRMA specifically requires "improvement and

maintenance of extended season primary and secondary Indian forest land road systems" as part of forest land management. 25 U.S.C. § 3103(4)(J). Functional, well-maintained roads are integral to every aspect of forest management, including fuel treatments, fire prevention, thinning, and commercial operations. Proper maintenance is a key aspect of protection of water resources from runoff, 25 U.S.C. § 3104(b)(6) and the protection of fisheries and cultural resources, 25 U.S.C. § 3104(b)(7).[2]

The Tribes allege breach of trust arising from failure to conduct adequate fire prevention, Complaint ¶¶ 85-89, and further allege breach of trust arising from inadequate fire suppression resources, including the systematic prioritization of off-Reservation lands over trust resources, Complaint ¶¶ 90-94. 25 U.S.C. § 406(e) directs the Secretary to "prevent loss of values resulting from fire." NIFRMA likewise requires "protection against losses from wildfire," including "acquisition and maintenance of fire fighting equipment and fire detection systems, [and] construction of firebreaks." 25 U.S.C. § 3103(4)(D). The protection of forests for all of the commercial and non-commercial uses denoted in 25 U.S.C. § 3104, 25 U.S.C. §§ 406, 407, and related authority necessitates that the forest not needlessly burn down. Implementing regulations additionally authorize the Secretary to "maintain facilities and staff, hire temporary labor, rent fire fighting equipment, purchase tools and supplies, and pay for their transportation as needed," in order "to maintain an adequate level of readiness to meet normal wildfire protection needs and extinguish forest or range fires on Indian land." 25 C.F.R. § 163.28(a).

Finally, the Tribes allege breaches of trust arising from failure to adequately rehabilitate

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[2] The Tribes reference violation of the Tribes' Forest Practices Water Quality Act as supporting the breach of trust arising from failure to maintain roads. *See* ECF No. 1 ¶ 80. The Tribe does not argue here, as the United States suggests, that violation of the Forest Practices Water Quality Act independently gives rise to a breach of trust.

forests on the Reservation after fires. Complaint ¶¶ 95-103. 25 U.S.C. § 406(a) requires the Secretary to consider "the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs," which relies in part on replanting after harvest or disturbance, 25 U.S.C. § 406(e) requires the Secretary to "prevent loss of values resulting from fire," and 25 U.S.C. §§ 407 and 5109 requires sustained yield forestry, which necessitates replanting. NIFRMA specifically includes "assessment of damage caused by…fire," 25 U.S.C. § 3013(4)(F), and "forestation," 25 U.S.C. § 3103(4)(C), as required aspects of management. *See also* 25 C.F.R. § 163.28(c) (authorizing funds for emergency rehabilitation measures needed to stabilize soil and watershed on Indian land damaged by wildfire.") and 25 C.F.R. § 163.32 (forest development "shall consist of reforestation, timber stand improvement projects, and related investments to enhance productivity of commercial forest land.")

c. Recent Court of Claims caselaw demonstrates that the Tribes' claims satisfy step one of Navajo II.

This Court has twice recently allowed claims similar to the Tribes' claims to proceed. In *Blackfeet Tribe*, the Tribe based its' claims on a fire that started in Glacier National Park and then spread onto the Tribe's Reservation. *Blackfeet Tribe*, Civ. No. 12-429L, ECF No. 62 (Fed. Cl. Aug. 21, 2015). The Tribe asserted that the Government failed to "protect and preserve Blackfeet Tribal forest trust lands," and did not perform "essential fuel treatments, timber harvesting, and forest management . . . to protect the Blackfeet Tribe's forest trust lands from the risk of wildfires," thereby failing "to conserve the economic, wildlife, recreational, aesthetic, cultural, religious, and other traditional values of the Blackfeet Tribe's forest trust lands." *Id.* at 1 (citing Compl. ¶ 31).

The United States sought summary judgment dismissal, arguing as it does here that specific fiduciary duties were not breached. *Id.* at 2. The Court soundly rejected the United

States' arguments. The Court held that "Supreme Court precedent is dispositive of the Government's concerns," and that *Mitchell II* is controlling. The Court further held that:

> The 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). See also 25 C.F.R. § 163.1 (stating the same definitions). When the statutory structure creates such a comprehensive set of responsibilities, the duties Plaintiff ascribes to the Government in its complaint are either explicitly stated or can be fairly inferred from the language of the statutes. There is no basis to the Government's contention that every detail of the duties owed to the Tribe must be expressly stated in the statutes.

Id. at 3. This Court's analysis and conclusion are correct and highly persuasive here.

Just this past year, in *Confederated Tribes & Bands of the Yakama Nation v. United States*, 153 Fed. Cl. 676 (2021), the Court considered the Yakama Nation's claims alleging breach of trust for the United States' failures to comply with NIFRMA, implementing regulations, and the Treaty of 1855. The United States moved to dismiss, raising many of the same arguments it does here, and again the Court disagreed. As one basis for its claims, the Tribes argued that "NIFRMA, along with the network of statutes and regulations analyzed by the Court in *Mitchell II*, creates enforceable fiduciary duties requiring the government to meet minimum timber-harvest targets." *Id.* at 687. The United States contended that *Mitchell II* did not apply because it precedes NIFRMA, and that NIFRMA does not create specific trust duties. Again, the Court rejected the United States arguments, ruling that "[t]he government has well-established fiduciary responsibilities in the forest management context." *Id.* at 695.

Here, the United States argues that the Tribes' reliance on NIFRMA is misplaced, because NIFRMA 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." Mot. at 16 (citing 25 U.S.C. § 3120) (emphasis

added). The United States reads this provision to mean that "Congress expressly disclaimed that the Forest Management Act establishes *any* specific fiduciary duties." Mot. at 16 (emphasis in original).

The fatal flaw in the United States' argument is that the trust responsibility is created by the unique history and relationship between the United States and the Tribes, and has existed since long before NIFRMA. *See Seminole Nation v. United States*, 316 U.S. 286, 296 (1942) ("this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people."). The statutory observation that NIFRMA thus does not "diminish or expand the trust responsibility," thus is correct but of no moment in these proceedings. The trust responsibility existed before the statute, and the statute explains and details the specific, enforceable duties the United States must carry out in order to fulfill its trust responsibility to the Tribes.

The function of the statute to detail specific, enforceable trust duties is particularly clear with respect to NIFRMA. NIFRMA was passed in 1990, and preceding NIFRMA, it was already well-settled that the United States had specific, enforceable trust duties governing all aspects of management of Indian forestlands. *Mitchell II* had long been decided and Congress was expressly aware of its holding. In acknowledgement of its solemn trust duties, Congress passed NIFRMA to provide more detail on how to implement those duties, because "the forest lands of Indians are among their most valuable resources," "the United States has a trust responsibility toward Indian forest lands," and "existing Federal laws do not sufficiently assure the adequate and necessary trust management of those lands." 25 U.S.C. §§ 3101 (1)-(3). Given this context, 25 U.S.C. § 3102 confirms that NIFRMA explains and specifies well-established trust duties, but neither diminishes nor expands those duties.

The United States' reliance on analogy to the cursory analysis of the Indian Agricultural Act in *El Paso Nat. Gas Co. v. United States*, 409 U.S. App. D.C. 367, 402 (2014) is likewise flawed. The only relevant question presented in that case was whether that statute, which is not relied up on by the Tribes here, *independently* created enforceable trust duties. There was not the support of 25 U.S.C. §§ 406, 407, and other forestry statutes, and the court expressly contrasted its analysis with the authorities presented in *Mitchell II*. *See El Paso Nat. Gas.*, 750 F.3d at 894-95. In that context, the statement that the Act did not create any duties had more meaning, because it was not built on already established and recognized duties. Moreover, three sentences of analysis of a different statute does not overcome the directly applicable precedent of *Mitchell II*, *Warm Springs*, 248 F.3d at 1370, and the numerous Court of Claims cases that found the forestry statutory and regulatory regime to support money-mandating claims.

2. The Tribes meet "step two" of the Navajo II test by relying on sources of law that create money-mandating duties.

The second step of the *Navajo II* test requires plaintiffs demonstrate the fiduciary duties specifically flow from a money-mandating statute. *See White Mountain Apache*, 537 U.S. at 472. The United States attempts to extend two cases not involving Indian tribes, *Perri v. United States*, 340 F.3d 1337, 1342 (Fed. Cir. 2003) and *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007 (Ct. Cl. 1967), to assert that in order to be money-mandating a statute or regulation must detail the amount of money to be paid or how to determine such an amount. Mot. at 13. This characterization is inaccurate. Under binding Supreme Court precedent, the money-mandating "source of law need not explicitly provide that the right or duty it creates is enforceable through a suit for damages." *Navajo II*, 556 U.S. at 290. Rather, "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 Tribe*, 537 U.S. at 472); *see also White Mountain Apache Tribe*, 537 U.S. at 480 ("The dispositive question, accordingly, is whether the [substantive source of law] . . . is fairly interpreted to mandate compensation. . . .").

The Supreme Court in *Mitchell II* found the forest management statutes are money-mandating. *Mitchell II*, 463 U.S. at 226. The Court observed "[b]ecause the statutes and regulations at issue in this case clearly establish fiduciary obligations of the government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal government for damages sustained." *Id.* The Court further observed "[g]iven the existence of a trust relationship, it naturally follows that the [g]overnment should be liable in damages for the breach of its fiduciary duties." *Id.* at 226.

Relying on *Mitchell II*, the Federal Circuit in *Warm Springs* reaffirmed that the same forest management statutes are money-mandating. *See Warm Springs*, 248 F.3d at 1370 (Fed. Cir. 2001). The court observed "[t]ribes 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." *Id.* Specifically, the Court found in the "case of a breach consisting of a sale of timber assets for less than their full value, the tribes are entitled to recover [damages]." *Id.* at 1371.

This Court's recent decisions in *Blackfeet Tribe* and *Yakama Nation* reaffirmed that the authorities relied upon in *Mitchell II*, as well as NIFRMA, are money-mandating.

3. The United States attempts to improperly parse different aspects of forest management.

The United States argues that "an examination of the text of 25 U.S.C. §§ 3104 and 3108 reveals that they do not impose specific fiduciary duties on the United States regarding fuels

management, thinning, maintenance of forest roads, fire prevention, fire suppression, or burned area rehabilitation." Mot. at 16. In related points, the Government argues that 25 U.S.C. § 406 and 407 are limited to "the harvest and sale of timber," and that "timber sale statutes are simply inapplicable to the claims in this case." Mot. at 20.

These arguments fail under the above-referenced precedent, including *Mitchell II.* They also misconstrue the relevant authority and the basic nature of forestry. Timber may only be sold from Indian forestlands with approval from the United States. 25 U.S.C. §§ 406, 407. The lands must be managed by the United States under rules based "on the principle of sustained-yield management." 25 U.S.C. § 5109. As the Supreme Court has recognized, this close control over the value of forests creates a comprehensive fiduciary obligation to manage the forests. *Mitchell II* 463 U.S. at 222 ("The timber management statutes, 25 U. S. C. §§ 406, 407, 466, and the regulations promulgated thereunder, 25 CFR pt. 163 (1983), establish the 'comprehensive' responsibilities of the Federal Government in managing the harvesting of Indian timber…The Department of the Interior -- through the Bureau of Indian Affairs – 'exercises literally daily supervision over the harvesting and management of tribal timber.'… Virtually every stage of the process is under federal control."). That is why the *Mitchell* line of cases extends to replanting—there will be no timber to sell if the forests are not replanted, thinned, and protected from fire and disease. *See Mitchell IV*, 10 Cl. Ct. 63 (1986).

The same recognition of the holistic nature of forest management is reflected in the more detailed provisions of NIFRMA. The statute describes the overarching fiduciary duty to require that "Secretary shall undertake forest land management activities on Indian forest land," 25 U.S.C. § 3104, with management activities broadly defined to encompass every aspect of forest management, 25 U.S.C. § 3103(4). Forest lands are both commercial and non-commercial, and

provide a wide variety of benefits. 25 U.S.C. § 3101(1)(C), (D); 25 U.S.C. § 3103(3).

In short, forests cannot provide benefit to the trust beneficiaries if the trees are not planted, grown, and protected. The United States' attempts to parse duties governing harvest and sale from management are misdirected and inconsistent with the established trust relationship and statutory scheme.

4. The Indian Self-Determination Education and Assistance Act and any contract thereunder does not undermine the fiduciary duties owed the Tribes.

The United States suggests but does not contend that its fiduciary obligations are diminished because the Tribes have a role in forest management under Indian Self-Determination Education and Assistance Act ("ISDEAA") contracts. Mot. at 16-17. However, both the ISDEAA and analogous caselaw make clear that the Tribes' role under its ISDEAA contracts do not in any way diminish the principle that breaches of forestry-related fiduciary duties are money-mandating.

The Complaint alleges that the United States controls management of the Tribes' forest. E.g., ECF No. 1 ¶¶ 22 and 24 and Claim I. Under the forestry statutes and regulations cited and facts alleged in the Complaint and cited in above, the BIA has control over and responsibility for undertaking forest management activities on Indian lands, even where some forestry activities are ultimately carried out by a tribe under grants or cooperative agreements. 25 U.S.C. §§ 406, 407; 25 U.S.C. § 5109; 25 U.S.C. § 3104(a); 25 C.F.R. §§ 163.10, 163.3. Indeed, the Tribes only recommended approval of the 2001 IRMP (which incorporates the Forest Management Plan and remains the governing forest plan), but the United States is the approving authority to approve and issue the Record of Decision. ECF No. 7-1 at 19. With respect to the wildfires, it is the BIA Branch of Wildland Fire Management that prepared the Fuels Treatment Assessments for the

Colville Reservation., ECF No. 7-2 at 2. This is consistent with the ISDEAA which expressly states that nothing in the Act requires the termination of any existing trust responsibility of the United States to Indian people. 25 U.S.C. § 5332(2).

In *Shoshone Indian Tribe of Wind River Reservation, Wyo. v. U.S.*, 58 Fed. Cl. 77 (2003), the Eastern Shoshone Tribe and the Northern Arapaho Tribe brought an action against the United States for breach of fiduciary duty. The United States sought to dismiss the case on the basis that the Tribes had taken over audit royalty collection responsibilities under a cooperative agreement between the tribes and the United States through the Federal Oil and Gas Royalty Management Act ("FOGRMA"), 30 U.S.C. § 1732. *Id* at 83. However, the Court held that because FOGRMA expressly stated that "nothing in this chapter shall be construed to reduce the responsibilities of the Secretary … the court believes that the Cooperative Agreement does not operate to reduce the government's fiduciary responsibility here and that FOGRMA did not intend or require that it do so." *Id* at 86. Like FOGRMA, the ISDEAA expressly states that self-determination contracts and agreements do not diminish existing United States trust responsibilities, including existing money-mandating forestry management fiduciary duties. Thus, any ISDEAA contract between the Tribes and United States does not reduce the Government's existing fiduciary duties.

B. The Statute of Limitations Does Not Bar the Tribes' Claims.

The United States seeks dismissal of three of the Tribes' claims: breaches of trust for failure to manage fuels, maintain roads, and conduct adequate fire prevention. Mot. at 29. Thus, it acknowledges that the other claims made by the Tribes, including relating to fire suppression and forest restoration are timely. For those claims it seeks to dismiss, the United States only asks for the dismissal of claims that accrued prior to 2015: "to the extent that Plaintiff advances forest and fire management claims for the period six or more years before the suit was brought, it must show that such claims accrued within the statute of limitations." Mot. at 35 (emphasis added). In

fact, the Tribes do not make claims that accrued prior to 2015. The Tribes only seek to recover for claims based on fires that occurred in 2015 and beyond; fires which the Government acknowledges (Mot. at 29) are within the six-year limitations period.

1. The Tribes' claims are timely because they accrued when the fires caused damage.

The statute of limitations governing the Tribe's claims for breach of trust under the Indian Tucker Act is six years, and that six-year period begins to run when the "claim first accrues." 28 U.S.C. § 2501. As the Government acknowledges (Mot. at 28), actions are sufficient to convey a breach of trust when "when all the events which fix thegovernment's alleged liability have occurred *and* the plaintiff was or should have been aware of their existence." *Hopland Band of Pomo Indians*, 855 F.2d 1573, 1577 (Fed. Cir. 1988) (emphasis in original) (citation omitted). *Hopland* noted "the distinction . . . between tolling the commencement of the running of the statute (a tolling of the accrual) and tolling the running of the statute once commenced (a tolling of the statute) . . . because the former routinely is allowed while the latter rarely is." *Id.* at 1578. Determining when the claim accrues depends on the nature of the claim and can be highly fact specific. *See John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1357 (Fed. Cir. 2006), *aff'd*, 552 U.S. 130 (2008).

The Tribe, as a trust beneficiary, is "permitted to rely on the good faith and expertise of [its] trustees," and therefore is "under a lesser duty to discover malfeasance relating to [its] trust assets." *Shoshone Indian Tribe of Wind River Reservation v. United States*, 364 F.3d 1339, 1347 (Fed. Cir. 2004) (citation omitted); *Cobell v. Norton*, 260 F.Supp.2d. 98, 104 (D.D.C. 2003); *Manchester Band of Pomo Indians v. United States*, 363 F. Supp. 1238 (N.D. Cal. 1973). This is particularly true in the forestry context, where monitoring requires a high degree of technical information, sophistication, and resources. Federal acknowledgment of the complexity and

expense of forestry "led to federal management in the first place." *Mitchell II*, 463 U.S. at 227.

A claim does not accrue until the claimant has suffered damages. *Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998) (accrual of claim when developer began to suffer damages); *Shoshone Indian Tribe v. United States,* 93 Fed. Cl. 449, 455 (2010); *Rosebud Sioux Tribe v. United States*, 75 Fed. Cl. 15, 24 (2007) ("It is too well established to require citation of authority that a claim does not accrue until the claimant has suffered damages.") (internal quotation marks omitted). In *Rosebud Sioux,* the Tribe's September 2005 complaint was not dismissed as untimely even though its claims started by an alleged breach -- the United States' voiding of the Rosebud Tribe's lease – that occurred more than six years prior to the filing of the lawsuit in part because "it is apparent that at least some alleged damages were incurred within the statutory period." *Rosebud Sioux Tribe v. United States*, 75 Fed. Cl. 15, 24 (2007).

As set forth in the Complaint, the Tribes brought this suit because of the many, catastrophic fires that occurred on its Reservation starting in August 2015. Applying the above rules, the Colville Tribes' claims did not accrue until the first of those fires (the North Star Fire) started on August 13, 2015, because the damages from that fire and subsequent fires on the Reservation that are part of this lawsuit did not occur until then. The Complaint describes the fires from mid-August 2015 to the present, and then alleges that the damages claimed flow from those fires. Complaint ¶¶ 43-46. Until then, it was not possible to meet the *Hopland* accrual standard because the fires had not occurred, and the Tribes could not have known they would occur until they did. As a result, the Tribes' claims are all timely. As described below, this result is consistent with several recent prior rulings by this Court in which the United States' motions to dismiss breach of trust forestry claims brought by tribes based on the statute of limitations

were denied.

Judge Wheeler applied the above principles and rejected the Government's same arguments in *Blackfeet Tribe*[3] where the Tribe claimed breach of fiduciary duty based on a fire that originated in Glacier National Park and traveled onto the Blackfeet Reservation. *Blackfeet Tribe*, Civ. No. 12-429L, ECF No. 62 (Fed. Cl. Aug. 21, 2015). Specifically, the Tribe claimed that the Government failed to "protect and preserve Blackfeet Tribal forest trust lands," and did not perform "essential fuel treatments, timber harvesting, and forest management . . . to protect the Blackfeet Tribe's forest trust lands from the risk of wildfires." *Id.* at 1.

As in this case, the Government asked this Court to dismiss the Complaint because, even though the fire itself was within the six-year period, the failure to perform fiduciary duties claimed by the Tribe occurred more than six years before suit was filed. *Id.* at 4. The Court disagreed: "The Government's position is incorrect. As the Tribe points out, until the Red Eagle Fire occurred in late July 2006, the Tribe had not suffered any damages. Without a claim for money damages, this Court would have lacked jurisdiction of the Tribe's claim. In this Court, a claim does not accrue until the claimant has suffered damages." *Id.*

One year later, Judge Bruggink rejected similar arguments. *San Carlos Apache Tribe v. United States*, No. 14-1045 (Fed. Cl. July 31, 2015) (Order Denying Motion to Dismiss) (attached in Appendix as Exhibit 3). In that case, the San Carlos Apache Tribe claimed forest mismanagement going back many decades. The Government asked the Court to dismiss claims prior to six or more years from the filing of suit based on the open and notorious nature of the Tribe's forest and because the Tribe operated a forest management program under the Indian Self-Determination Education and Assistance Act. Reply Brief in Support of United States'

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[3] As mentioned above at 12, this opinion was vacated when the parties settled.

Motion for Partial Dismissal at 4-7 (attached in Appendix as Exhibit 4). Nevertheless, Judge Bruggink denied the motion.

In *White Mt. Apache Tribe v. United States*, No. 17-359C, 2021 U.S. Claims LEXIS 2791, at *1 (Fed. Cl. Dec. 16, 2021), only claims prior to the six-year statute of limitations period were dismissed, and not all such claims. In its Motion, the Government contends that the Court held that White Mountain Apache's "forest management claims were barred by the statute of limitations." Mot. at 34-35. This is not completely accurate.

In contrast to this case, the *White Mountain Apache* case was not based on forest fires that occurred within six years of filing suit. Rather, the White Mountain Apache claimed over 70 years of forest mismanagement. *White Mountain Apache v. United States*, No. 17-359 (Fed. Cl. Jan. 5, 2018) (Order on Partial Motion to Dismiss) (attached in Appendix as Exhibit 5) at 1. Even then, Judge Damich did not do what the Government seeks here – a dismissal of the entire case based on the statute of limitations. Rather, in the initial decision (which is cited by the Government), the Court dismissed the claims accrued prior to the six-year limitations period. *Id.* at 8.

In *White Mountain Apache* and this case (a) there are forestry mismanagement claims, (b) the work of the tribes' own experts and IFMAT reports are cited by the United States as evidence of tribal knowledge of its claims (*White Mountain* at 6-7), and (c) the tribes were involved in forest management through the Indian Self-Determination Education and Assistance Act. However, the Government took a different approach in *White Mountain Apache*: it only sought dismissal of claims outside the six-year limitations period. Thus, the claims that accrued during the six years prior to the filing of that suit were not dismissed. Further, on reconsideration, the Court clarified that many forest management could be pursued up to 12 years prior to suit being

filed based on claim accrual principles. *White Mountain Apache*, No. 17-359 L (Fed. Cl. June 19, 2018) (Order on Plaintiff's Motion for Reconsideration) (attached in Appendix as Exhibit 6) at 11.

The Colville Tribes are not making claims for pre-August 2015 damages. Similarly, the Tribes are not making claims for damages that were ongoing prior to the North Star Fire. The Tribes are not making claims when the consequences of the acts become most painful, fully calculable or complete, as alleged by the United States (Mot. at 35), but rather are making claims for when the consequences of the breaches of trust began. Thus, this case is very different than the legislative takings cases cited by the United States.

In *Navajo Nation*, the Federal Circuit held that accrual occurred when the Nation knew of the legislation that prohibited it from developing the land without consent. *Navajo Nation v. United States*, 631 F.3d 1268, 1269 (Fed. Cir. 2011). The court noted that accrual occurs upon the key act, "not upon the time at which the *consequences* of the acts become most painful." Likewise, in *Fallini v. United States,* 56 F.3d 1378, 1382 (Fed. Cir. 1995), the Fallinis alleged that federal legislation deprived them of their right to exclude wild horses who were drinking from important water sources owned by the Fallinis. The Federal Circuit held that, it was the enactment of the statute, not the individual intrusions by the horses, to which a court must look to determine if there has been a taking. *Id.* In contrast to these cases, there is no legislative act giving rise to the Colville Tribes' claims. And this is not a case of incremental damage, such as the gradual loss of water resources. Instead, as set out in the Colville Tribes' Complaint, the catastrophic fires resulted in accrual of the Tribes' claims.

The other cases principally relied on by the Government are also inapposite. For example, *Quapaw Tribe of Okla. v. United States*, 111 Fed. Cl. 725 (2013), concerned a one-time

transfer of land and degradation of land that had been formally designated a Superfund site more than six years prior. In *Menominee Tribe of Indians v. United States*, 726 F.2d 718, 722-23 (Fed. Cir. 1984), the Tribe assumed sole responsibility for forest management by special federal statute specific to the Menominee Tribe (not the ISDEAA) over six years before suit was filed. *Shoshone Indian Tribe v. United States,* 672 F.3d 1021 (Fed. Cir 2012), arose from the alleged illegal conversion of leases 20 years prior to the filing of the complaint, when the tribes were notified and took formal action to approve the conversion. The Federal Circuit ruled that such notification and approval were sufficient for purposes of claim accrual. *Id.* at 1034. However, the Federal Circuit did not dismiss claims arising within six years of filing suit, as the Government seeks here, due to the claims being "continuing." *Id.* at 1041.

Finally, as in *San Carlos Apache* and *White Mt. Apache*, any plans, reports and actions cited by the United States in the many years leading up to the fires does not change this outcome. First, as acknowledged by the United States, the governing forest management plan was approved by the United States 14 years prior to the fires, and the underlying environmental assessment was before that. Mot. at 3 and 32-33; ECF No. 7-1 at 10, 19. Clearly, it would have been premature for the Tribe to have sued then based on risk of future fires occurring more than a decade later. Second, despite any Tribal knowledge alleged by the United States based on the IFMAT reports[4] or the Tribes' role as a cooperating party to assist with the forest, it is the United States as trustee which must ensure the forest was managed in fulfillment of the sacred statutory and regulatory responsibilities it owed the Tribes. See Part A, above. Moreover, while the IFMAT reports identified the threat of forest fires, and any cooperative role may have led to

[4] The Tribes have not "admit[ted]" participation in IFMAT site visits, as alleged by the United States. Mot at 31.

knowledge of such a threat, the catastrophic fires had not occurred until 2015 and within the six-year limitations period. The potential of wildfire is not sufficient for the claim to accrue. Finally, the Government cites (Mot. at 34-35) to a plan developed by the Tribes in 2013 to restore its natural resources, including plants, animals and aspects of the forest, but that was a restoration plan "to repair the damage" that existed up until 2013, not future damages. ECF No. 7-6 at 32. The present lawsuit is about damages that were not known and occurred years later.

Because the catastrophic fires only started in 2015, this is not a circumstance where the Tribes were "not aware of the full extent of their injury" or the harms were "most painful." Mot. at 29. Rather, the claims began to accrue only when the 2015 catastrophic fires began and claims have continued to accrue in subsequent years due to the later fires. Therefore, the Tribes' claims are timely.

2. Because the Tribes' claims are extant they are timely under the Continuing Claim Doctrine.

As explained above, the Tribes' claims are timely under fundamental accrual rules. While not necessary to deny the Government's Motion to Dismiss, it is also accurate that the alleged breaches are continuing; those that occurred prior to the limitations continued into the limitation period. The Government's many forest management duties, as set forth in statutes and regulations are complex, ongoing and interrelated. They include the discrete acts that the United States has failed to carry out to the present time. In particular, the Tribes have alleged that the Government has: failed to thin the forest due to overstocking; failed to carry out prescribed burns; failed to address lack of tree species diversity; failed to put in place the systems, people and resources needed to address wildfires, including firefighting staff, equipment, fire detection systems, and fire breaks; failed to organize and deploy sufficient federal resources to fight fires; failed to rehabilitate the forest after the fires occurred, including tree replanting, roads

restoration, soil erosion control, noxious and invasive weeds treatment, mulching and seeding, culverts cleaning and repair; and failed to adequately repair and maintain roads to support the above forest management activities. Under applicable law, these are continuing claims.

"The rationale underlying the 'continuing claim' doctrine . . . is that it prevents the defendant from escaping all liability for its wrong and thus 'acquiring a right' to continue its wrongdoing, while retaining intact the 6-year statute of limitations set forth by Congress in section 2501." *Hopland Band*, 855 F.2d at 1581. "The continuing claim doctrine operates to save later arising claims even if the statute of limitations has lapsed for earlier events." *Ariadne Fin. Servs. Pty. Ltd. v. United States*, 133 F.3d 874, 879 (Fed. Cir. 1998).

"In order for the continuing claim doctrine to apply, the plaintiff's claim must be inherently susceptible to being broken down into a series of independent and distinct events or wrongs, each having its own associated damages." *Brown Park Estates-Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1456 (Fed. Cir. 1997). A continuing claim requires "recurring, individual actionable wrongs." *Id.* at 1459. The doctrine does not apply to "a claim based upon a single distinct event, which may have continued ill effects later on." *Id.* at 1456; *see also Ariadne*, 133 F.3d at 879; *Hayes v. United States*, 73 Fed. Cl. 724, 729 (2006). "[T]he claim will not be barred provided that at least one wrongful act occurred during the statute of limitations period and that it was committed in furtherance of a continuing wrongful act or policy or is directly related to a similar wrongful act committed outside the statute of limitations." *Felter v. Norton*, 412 F. Supp. 2d 118, 125 (D.C. Cir 2006); *Rosebud Sioux Tribe*, 75 Fed. Cl. 1 at 24.

In the present case, each of the Colville Tribes' claims can be broken into a series of independent and distinct wrongs, such as the failure to thin trees, create a fire break, hire

personnel, or provide fire-fighting equipment. And each contributed to the resulting specific fires as will be established through discovery and expert testimony as this case proceeds. The breaches are not "single distinct event[s]" that did not continue like a legislative act, failure to renew a lease or decision to void a lease. Because of the ongoing breaches of the United States, the Tribes' claims are not time-barred.

Applying the continuing claim doctrine, this Court has rejected Governmental motions to dismiss in many breach of trust cases, including forestry cases. In *Mitchell v. United States*, 10 Cl. Ct. 63 (1986), opinion on reconsideration, 10 Cl. Ct. 787 (1986), the plaintiffs sued the government to recover damages allegedly arising from the mismanagement of their Indian trust timber resources. 10 Cl. Ct. at 65. As in this case, the plaintiffs claimed that the Secretary of the Interior failed to properly discharge his duties under federal timber statutes and the government moved to dismiss regeneration and stumpage claims that it contended involved events occurring more than six years prior to the commencement of the suit. *Id.*

This Court concluded that the BIA had a continuing duty to maintain the tracts of timberland in a state of productivity. *See Mitchell IV*, 10 Cl. Ct. at 788. This Court found that an ongoing breach of this to be a "continuing duty as creating a series of individual actionable wrongs." *Id.* According to this Court, "the existence of a continuing duty to regenerate meant that on each day the BIA failed in its duty to regenerate a given [area], there arose a new cause of action." *Id.* The court concluded that "those causes of action which arose in the six-year limitations period may be sued upon." *Id.* This Court explained further:

> Hence, if the BIA allowed a particular tract to remain unproductive for decades, plaintiffs' claim regarding that tract is not forever lost. Rather, plaintiffs can sue for damages stemming from those breaches which occurred in the six years immediately preceding the filing of suit.

Id.

The regeneration claim in *Mitchell* is closely analogous to the Tribes' claims of failure to protect the Colville forest through prescribed burns, thinning, fire breaks, tree diversity and having adequate firefighting personnel and equipment. Both the *Mitchell* regeneration claims and the Colville forest management claims are on an individual tree and tract basis and are grounded on the failure to accomplish statutory goals of forest management for health and productivity.

There are other examples of the continuing claim doctrine's applications to breach of trust claims. In *Apache Tribe of the Mescalero Reservation v. United States*, this Court explained that "under statutes, regulations, and forest management plans, the government clearly had a continuing duty to manage plaintiff's timber resources." 43 Fed. Cl. 155, 171 (1999) (citing United States v. *Mitchell*, 463 U.S. 206, 224 (1983)). Managing the forest lands included administrating all aspects of the program, such as protecting the timber and reforestation. *Id.* The Court opined these duties are not isolated projects, but rather are year-in and year-out, continuing responsibilities and found that the Tribe had made continuing claims that are timely. *Id.*

As referenced above, in *Shoshone Indian Tribe*, the Federal Circuit found that claims for failure to evict trespassers was a continuing claim even though the original breach of trust was decades prior to the filing of the lawsuit when the underlying oil and gas leases became void. 672 F.3d 1041. In *Oenga v. United States*, this Court found that the duty to monitor the lease was a continuing one, even though the duty imposed by federal regulations to monitor the lease agreement began more than six years prior to the filing of the plaintiffs' claim. 91 Fed. Cl. 629, 646 (2010). And in *Cherokee Nation of Okla. v. United States*, the Government argued that the tribe's claim to ownership of non-navigable riverbed lands was time-barred because the alleged trespass and unauthorized use lands first accrued 79 years before the statute of limitations period.

26 Cl. Ct. 798, 799 (1992). This Court disagreed, holding that because the claims were continuing those claims that "first accrued before April 21, 1983, but which continued extant during the six year statutory period potentially remain actionable." *Id.* 26 Cl. Ct. at 804.

Given the ongoing nature of the Government's forest management duties, dismissal is not warranted. As explained in the next section, the forest, the management of the forest, and the resulting damages are not simple. The Tribes will need the opportunity to assess the nature of the alleged breaches, some of which allegedly occurred from 2012 leading up to the catastrophic fires, some of which allegedly occurred during the fires, and some of which allegedly have continued to the present as more catastrophic fires have occurred. With that information and the help of expert testimony, the Tribes will be in a position to identify the breaches, causation and resulting damages with specificity.

3. Dismissal at this initial stage of the case and in light of the complex nature of the claims is not warranted.

At this nascent stage of the case, and in light of the breadth, complexity and magnitude of the claims, denying this motion is wholly appropriate. Denial is also consistent with the approach this and other courts generally take with breach of trust claims – even when the claims cover many decades. As Judge Damich recently observed in one of those cases: "[I]n some similar cases with complex claims related to breach of fiduciary duty in managing forests on Indian reservations, other judges in this Court first denied the Government's Motion to Dismiss permitting discovery to more fully develop the factual record. *See*, *e.g.*, *Apache Tribe of the Mescalero Reservation v. United States*, 43 Fed. Cl. 155 (1999); *see also San Carlos Apache Tribe v. United States,* No. 14-1045 (Fed. Cl. July 31, 2015)." *White Mountain Apache Tribe v. United States*, No. 17-359 L at 11 n.4 (Fed. Claims, June 19, 2018) (attached in Appendix as Exhibit 6).

The present case, which only covers claims that accrued within the six-year limitations period, should not be dismissed on statute of limitations grounds. As acknowledged by the United States, the forest is a large and complex system. Mot. at 2-3. The conditions which allowed the historically large fires were also complex, resulting from Governmental failures in forest, personnel, equipment, roads and fire management. And the claims are ongoing, with an unfortunate variety of breaches of fiduciary duty continuing to the present day, catastrophic fires persisting well beyond the filing of the Complaint, and minimal post-fire restoration and rehabilitation, replanting and restoration of the forest and related cultural resources, roads and culverts.

Denying the Motion is appropriate especially because of the fact-specific inquiry that must take place via discovery in this case, even if accrual was not clear. *John R. Sand & Gravel Co.*, 457 F.3d at 1357. Parsing out which portions of the Government's breaches give rise to the damages arising from August 2015 to the present is a fact-intensive inquiry that will depend heavily on the discovery and analysis of facts and the work of experts qualified to opine on many related forestry issues. As acknowledged by this and other courts, the United States, as trustee with the exclusive legal responsibility to manage the forest, possesses the information needed to establish the claims and associated damages.

C. The 2012 Settlement Does not Bar the Claims in this 2021 Case.

The United States asks this Court to dismiss claims from well before this lawsuit was commenced: "to the extent that the Complaint includes claims regarding the United States' alleged breaches of trust relating to fuels management, thinning, forest road maintenance, and fire prevention accrued prior to May 16, 2012, those claims are barred by the doctrines of waiver and release and must be dismissed." However, the Tribes are not making claims that accrued prior to 2012. Because the 2012 Settlement does not waive, release, limit or impact the Colville

Tribes claims in this case, the Tribes' claims should not be dismissed.

The earlier Colville case was very different than the current case in that it was in a different court and the settlement covered a much broader time period and set of claims. The 2005 Complaint was filed in U.S. District Court and only sought injunctive relief. The Tribes' claimed that the United States had breached its fiduciary duties in managing large sums of money it held in trust for the Tribes for many decades and requested that the Court order a trust fund accounting. Exh. 4, Mot. to Dismiss. Forestry claims were not mentioned in the Complaint.

In 2012, the parties reached a settlement. The Settlement Agreement included payment for a very broad set of breach of fiduciary claims going back more than 100 years. Exh. 5, Motion to Dismiss; Exh. 6 at 31, Mot. to Dismiss ("settlements resolved claims going back more than 100 years"). Section 4 of the Settlement Agreement contained a broad and lengthy waiver and release of claims and damages "occurring before the date of this Court's entry of this Joint Stipulation of Settlement as an Order." ¶ 4, Exh. 5, Mot. to Dismiss.

Section 6(a) provided that claims and damages caused by the United States after the settlement are not waived or released:

> [N]othing in this Joint Stipulation of Settlement shall diminish or affect in any way Plaintiff's ability, subject to the provisions of Paragraph 13 below, to assert a claim for harms or damages allegedly caused by Defendants after the Court's entry of this Joint Stipulation of Settlement as an Order.

Thus, by the Settlement Agreement's unambiguous terms, the waiver and release does not release subsequent "claims for harms or damages," including the claims of this case which arise out of fires that occurred from 2015 to the present. *Apache Tribe of the Mescalero Reservation v. United States*, 43 Fed. Cl. at 158, 171 (1999) (stipulation for settlement did not bar later claims).

As the case proceeds through discovery in preparation for trial, the Tribes will discover the facts and develop their claims with the help of experts in technical fields. Through that

process, the Tribes will determine the extent to which the Government's post-settlement breaches contributed to the fires that are the subject of this lawsuit.

V. CONCLUSION

For all the reasons stated herein, the Tribes respectfully request that the Court deny the United States' motion to dismiss.

Respectfully submitted on this 4th day of March, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that, on March 4, 2022, I used the ECF system and electronically transmitted the foregoing document to the Clerk of the Court for filing and transmittal of a Notice of Electronic Filing to the ECF registrants in this case.

/s/ Brian W. Chestnut
BRIAN W. CHESTNUT