IN THE UNITED STATES COURT OF FEDERAL CLAIMS

THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION	)	
Plaintiff,	)	Case No. 21-1664 L
v.	)	Judge Edward H. Meyers
UNITED STATES OF AMERICA,	)	
Defendant.	)	

UNITED STATES' REPLY IN SUPPORT OF ITS MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

INTRODUCTION

The Supreme Court has consistently held that in order for this Court to have jurisdiction under the Tucker Act or Indian Tucker Act, a plaintiff must identify, among other things, a substantive source of law that establishes specific duties that the United States allegedly failed to perform. Plaintiff Confederated Tribes of the Colville Reservation fails to do so. Plaintiff alleges that the United States breached fiduciary duties owed to the Tribes related to: the management of forests to prevent fire risk and severity, fire prevention, fire suppression, roads, and post-fire forest rehabilitation. But Plaintiff fails to identify any source of law that establishes these specific duties. Instead, Plaintiff relies on laws and judicial opinions that only impose specific duties on the United States to manage the harvest and sale of tribal timber, but do not provide specific duties connected to the fire-related claims Plaintiff brings here. Plaintiff also asks the Court to infer duties other than those explicitly provided in statutes, but Supreme Court precedent prevents the Court from incorporating duties not specified by Congress. Further, Plaintiff's active role in managing its forest resources distinguishes this case from cases where courts found fiduciary duties based on the government's complete control over tribal resources (which, in any event, would not be sufficient to create trust duties for purposes of Tucker Act jurisdiction). As such, this Court should find that it lacks jurisdiction over Plaintiff's Complaint.

In addition, the majority of Plaintiff's claims accrued before August 4, 2015, and are therefore outside the jurisdictional statute of limitations. If, as Plaintiff alleges, the United States has a money-mandating duty to conduct fuels management, maintain forest roads, and engage in fire prevention, the causes of action arose at the time of the United States allegedly failed to perform those duties, which was well outside the six-year period before Plaintiff filed its Complaint. While the 2015 North Star and Tunk Block Fires were catastrophic events, they are irrelevant to the statute of limitations analysis presented here. The Court should reject Plaintiff's

argument that its claims only began to accrue when the 2015 catastrophic fires began and dismiss those claims that accrued more than six years before the Complaint was filed.

ARGUMENT

A. Plaintiff has Failed to Establish a Valid Waiver of Sovereign Immunity.

The Supreme Court has held that the first step "that must be cleared before a tribe can invoke jurisdiction under the Indian Tucker Act" for a non-contract claim is for the tribe to "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.'" *United States v. Navajo Nation,* 556 U.S. 287, 290 (2009) ("*Navajo II*") (quoting *United States v. Navajo Nation,* 537 U.S. 488, 506 (2003) ("*Navajo I*")). "The trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law . . . ." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011); *Menominee Indian Tribe v. United States*, 577 U.S. 250, 258 (2016) ("We do not question the 'general trust relationship between the United States and the Indian tribes,' but any specific obligations the Government may have under that relationship are 'governed by statutes rather than the common law.'" (quoting *Jicarilla*, 564 U.S. at 165)). Thus, the analysis must "train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Navajo II*, 556 U.S. at 29.

Plaintiff cannot merely parrot the findings in *United States v. Mitchell*, 463 U.S. 206 (1983) ("*Mitchell II*") to support its claims, but instead must rely on specific rights-creating or duty-imposing statutory or regulatory prescriptions related to its claims. Plaintiff fails to demonstrate such duties and therefore this Court lacks jurisdiction.

1. Mitchell II does not provide a waiver of sovereign immunity here.

Plaintiff argues that *Mitchell II* determined that the United States has money-mandating "fiduciary duties to manage forests on Indian reservations," and thus, the United States

necessarily has money-mandating duties to manage fuels, protect from fire protections, maintain forest roads, and rehabilitate forests post-fire. Pl. Resp. at 9. But *Mitchell II*'s holding that specific statutory and regulatory provisions created money-mandating duties for the harvesting and sale of Indian timber cannot be extended to mean Tucker Act jurisdiction exists for any and all forestry-related claims, regardless of the legal theory, the nature of the claims, or whether statute or regulations impose the duties allegedly breached. In *Mitchell II*, the Court found that "[t]he timber management statutes, 25 U.S.C. §§ 406 and 407, 466, and the regulations promulgated thereunder, 25 CFR Part 163 (1982), establish the 'comprehensive' responsibilities of the Federal Government in managing the *harvesting of Indian timber*." *Id.* at 222 (emphasis added); *Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015) (noting *Mitchell II*'s finding "that Congress had accepted a fiduciary duty to manage timber resources according to those specific prescriptions"). *Mitchell II* does not relieve Plaintiff from demonstrating specific statutory and regulatory language imposing fiduciary or other duties on the United States, particularly because Plaintiff alleges the breach of different duties than the harvest and sale claims at issue in that case.

In addition, this case differs significantly from *Mitchell II* because instead of the government exercising pervasive control over "virtually every stage" of timber harvest management, [1] Plaintiff is actively involved in forest management on its reservation, including wildland fire programs. Since 2002, Plaintiff has had a cooperative agreement with the Department of the Interior under the Indian Self-Determination and Education Assistance Act,

[1] After *Mitchell II*, the Supreme Court made clear that "[t]he Federal Government's liability cannot be premised on control alone." *Navajo II*, 556 U.S. at 301. Thus, even if even if BIA was solely in charge of the fire program, there would not automatically be money-mandating duties regardless of the statutory or regulatory provisions at issue.

25 U.S.C. § 5321, that transfers certain Bureau of Indian Affairs ("BIA") forestry and wildfire programs, positions, and funding to Plaintiff. Under the contract, Plaintiff, in cooperation with the BIA, has operated programs including timber harvest and sales, forest management inventories and plans, forest protection, and wildland fire management (including pre-suppression, suppression, fuels management, fire prevention, and rehabilitation). *See* U.S. Mem., Ex. 6, ECF 7-6, at 79–87, 92–105. Given Plaintiff's extensive involvement in forestry management, including fire prevention, suppression, and rehabilitation—and even assuming (incorrectly) that control alone would be sufficient to create Tucker Act jurisdiction—the *Mitchell II* holding based on "comprehensive control" of tribal resources does not apply.

2. Plaintiff has not identified statutory or regulatory prescriptions supporting its claims.

Plaintiff asserts that "the statutes and regulations deemed to create specific fiduciary obligations in *Mitchell II*, and the comprehensive and mandatory requirements of [the National Indian Forest Resources Management Act ("Forest Management Act")] constitute[] the 'specific rights-creating or duty-imposing statutory or regulatory prescriptions" required to satisfy step one of the test established in *Navajo II*. Pl. Resp., ECF No. 11, at 16. These provisions, however, do not provide specific fiduciary duties related to Plaintiff's claims.

As demonstrated in the United States' Memorandum in Support of its Motion to Dismiss, the statutes and regulations found to provide fiduciary duties for the sale and harvesting of Indian timber in *Mitchell II* do not provide specific duties with regard to fuels management, fire prevention, forest roads, fire suppression, or post-fire rehabilitation. U.S. Mem. in Supp. of Mot. to Dismiss, ECF No. 7 ("U.S. Mem."), at 14–27. The United States does not repeat those arguments here, but addresses the additional sources of law Plaintiff asserts in its Response.

a. The Forest Management Act does not provide enforceable fiduciary duties.

Plaintiff relies heavily on the Forest Management Act as a basis for the Secretary's alleged trust duties. Pl. Resp. at 14–19, 21–22. According to Plaintiff, the Act builds on the statutory and regulatory regime held to be money-mandating in *Mitchell II* by "specifying detailed and comprehensive requirements governing the Department of Interior's management of forests on Indian forest lands to ensure accountability." *Id.* at 11. But the Forest Management Act explicitly states that nothing in it "shall be construed to diminish or expand the trust responsibility of the United States toward Indian forest lands." 25 U.S.C. § 3120. Plaintiff asserts that this statutory provision is "of no moment in these proceedings," reasoning that the Act does not create new duties but merely details specific, enforceable trust duties that already existed independently. Pl. Resp. at 21. But Plaintiffs point to nothing in the statutory text that would support this reading. Instead, Plaintiff appears to rely on "the trust responsibility . . . created by the unique history and relationship between the United States and the Tribes, [which] has existed since long before NIFRMA." *Id.* The argument does not support Plaintiff's cause. The Supreme Court has held that the general trust "relationship alone is insufficient to support jurisdiction under the Indian Tucker Act." *Navajo I*, 537 U.S. at 506. To the extent that Plaintiff argues the Forest Management Act incorporated specific requirements from other statutes or regulations, Plaintiff would need to identify those specific rights-creating or duty-imposing statutory or regulatory prescriptions. It has not done so.

In addition, Plaintiff's suggestion that the Forest Management Act contains "specific, enforceable duties the United States must carry out in order to fulfill its trust responsibility" ignores that Congress adopted the Forest Management Act in part to increase the Tribes' participation in managing their forest land and establishing management objectives. 25 U.S.C.

§§ 3101, 3102. It would be incongruous for a statute that gives tribes more ability to control their resources to be found instead to establish additional fiduciary duties. *See Navajo I*, 537 U.S. at 491; *Blackfeet Hous. v. United States*, 106 Fed. Cl. 142, 151 (2012). (holding that statute that "actively seeks to empower entities such as plaintiff with the responsibility for the care of tribal property" did not establish fiduciary duties), *aff'd,* 521 F. App'x 925 (Fed. Cir. 2013). Thus, Plaintiff cannot rely upon the Forest Management Act as a statutory basis for the specific money-mandating trust duties Plaintiff claims exist.

Even if the Forest Management Act could be construed as giving the United States trust duties or reinforcing duties created by other statutes, its provisions do not contain the responsibilities Plaintiff asserts. For example, Plaintiff cites the definitions in § 3103. Definitions do not create legal obligations or independent causes of action. *See Evans v. United States*, 107 Fed. Cl. 442, 450 (2012) ("The definitions do not by themselves grant this, or any other plaintiff, independent rights."). The definition of a term in the definitional section of a statute simply specifies the meaning of the term wherever it appears in the statute. *See Fl. Dep't of Banking and Fin. v. Bd. of Govs. of Fed. Reserve Sys.,* 800 F.2d 1534, 1536 (11th Cir. 1986).

Nor does § 3104 establish money-mandating fiduciary duties. The section begins by stating 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). Under Plaintiff's interpretation, "forest land management activities" is defined as "all activities performed in the management of Indian forest lands," including, among many other items, "protection against losses from wildfire." 25 U.S.C. § 3103(4)(D). But this is insufficiently specific to detail the "contours of the United States' fiduciary responsibilities" with regard to wildfire protection or otherwise. *See Jicarilla*, 564 U.S.

at 177. Instead of creating specific obligations that the United States is required to undertake, § 3104 lists objectives the Secretary and the tribes may choose to endorse and strive to meet. 25 U.S.C. § 3104. Many of these objectives seek competing results that place commercial and profit-making goals in competition with aesthetic and environmental goals to preserve the forest in its natural state, protect wildlife, and preserve recreational opportunities and traditional values.[2] *Compare* 25 U.S.C. § 3104(b)(3) (regulating to promote harvesting Indian timber on a sustained yield basis) *with* 25 U.S.C. § 3104(5) (retaining Indian forest land in its natural state to protect recreational, cultural, aesthetic, or traditional values). The Forest Management Act does not instruct Interior to prioritize a particular goal or rank one of the competing objectives as superior to the others, but promotes flexibility based on tribal objectives. The regulations similarly do not provide any specific fiduciary duties. *See* 25 CFR Part 163. Thus, the Forest Management Act does not establish specific fiduciary duties supporting Plaintiff's claims here.

Several of Plaintiff's claims are based entirely on duties purportedly contained in the Forest Management Act. Plaintiff alleges breach of trust arising from failure to manage fuels, based on § 3103(4)(D), and breach of trust arising from failure to fund and carry out adequate thinning to prevent overstocking and promote forest health, based on § 3103(4)(C), and § 3104(b)(1)(C). Pl. Resp. at 17. But § 3103 is the definitions section of the statute, and § 3104(b)(1)(C) says only "timber stand improvement." For the reasons discussed above, Plaintiff has not identified a specific statutory or regulatory duty supporting these claims.

---

[2] Administrative law challenges to public land management activities offer a useful analogy in pointing out that "plans" are considered aspirational, not mandatory. Although an agency may not substitute new goals in place of statutory objectives, *see Indep't U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847, 854 (D.C. Cir. 1987), a court will not permit a party to challenge an agency action or a failure to act because each and every objective has not been met. *Lujan v. NWF*, 497 U.S. 871, 894 (1990).

b. The Court cannot infer additional trust responsibilities from statutory provisions providing certain fiduciary duties.

Plaintiff also asks this Court to infer a duty to maintain forest roads from statutory provisions regarding timber sale and sustained yield management. Pl. Resp. at 17. In Plaintiff's view, timber sales "necessitate roads," so the statutory provision requiring Secretarial approval of timber sales implicitly contains a duty to maintain forest roads. *See id.* (citing § 406). Similarly, Plaintiff argues that statutory provisions directing the Secretary to carry out sustained yield management" also should be read to include a duty to maintain functioning forest roads. *Id.* (citing § 407 and § 5109). This argument is not consistent with the law, because "[t]he Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *Jicarilla*, 564 U.S. at 177; *Blackfeet Hous.*, 106 Fed. Cl. at 149–51.

"When Congress provides specific statutory obligations, we will not read a 'catchall' provision to impose general obligations that would include those specifically enumerated." *Jicarilla*, 564 U.S. at 185. In *Jicarilla*, the statute at issue stated that the United States' trust responsibilities included, but were not limited to, a list of eight trust obligations. The Court rejected the argument that a statute can impose binding trust obligations other than those explicitly stated, finding that doing so "would vitiate Congress' specification of narrowly defined" obligations. *Id.*; *see also Two Shields v. United States*, 820 F. 3d 1324, 1332–33 (Fed. Cir. 2016) (requiring the Tribe to identify specific statutory obligations related to the plaintiff's claims); *Hopi Tribe*, 782 F.3d at 669–71 (finding no specific fiduciary obligation to ensure water quality on reservation). The Court therefore should not infer a duty to maintain forest roads from statutes that provide other trust responsibilities but should require Plaintiff to demonstrate an explicit statutory provision.

Plaintiff also argues a duty to provide roads from 25 U.S.C. § 318a, which authorizes appropriations for roads. But the appropriations issued under § 318a are solely for the maintenance of BIA-owned public roads. *See* U.S. Mem. at 24. Plaintiff does not allege that the forest roads at issue are BIA-owned public roads. In addition, an authorization of appropriations ordinarily does not establish a fiduciary duty. *See Lincoln v. Vigil*, 508 U.S. 182, 193–95 (1993).

Plaintiff's breach of trust claim for the Government's alleged failure to conduct adequate fire prevention and to provide adequate fire suppression resources, including prioritizing trust resources, similarly does not rely on explicit statutory provisions, but rather on inferences that must be drawn from statutory provisions establishing duties other than the ones claimed here. Pl. Resp. at 18. Specifically, Plaintiff argues that "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." Pl. Resp. at 18. Again, however, the Court cannot infer additional duties other than those imposed by Congress.

Plaintiff also erroneously argues that "§ 406(e) directs the Secretary to prevent loss of value resulting from fire." Pl. Resp. at 18. Section 406(e) instead vests the Secretary with discretion to sell timber from trust lands, without the owner's prior approval, to prevent loss from fire. It does not mandate that the Secretary protect timber from wildfire, or even require the emergency sales it authorizes. Nor do these regulations establish any binding duty to conduct adequate fire protection because they authorize the Secretary to take certain actions, but do not create a binding duty to do so. *See* 25 C.F.R. § 163.28(a). In fact, the preamble to the regulations noted that the language was changed from "The Secretary will" to "The Secretary i*s authorized to* conduct a wildfire prevention program," because "lack of funds may prevent the Secretary from being able to conduct the program." General Forest Regs., 60 Fed. Reg. 52250-

01, 52255 (Oct. 5, 1995) (emphasis added). Plaintiff has not shown a trust duty to conduct adequate fire protection.

Finally, Plaintiff alleges a duty to adequately rehabilitate forests on the Reservation after fires. Pl. Resp. at 18–19. Plaintiff again fails to identify any statutory or regulatory provision that expressly creates this duty. Still, Plaintiff argues it can be inferred from the duty to manage forests for sustained yield, for example, "which necessitates replanting." This argument should also be rejected because the Court cannot infer duties not stated by Congress.

Plaintiff's argument rests on the belief that the cited statutes and regulations, taken together, establish governmental control and, as such, courts can infer additional trust duties on the United States. Pl. Resp. at 14 ("These statutes repeatedly require Secretarial oversight and approval in the management of forest lands and sale of forest resources, and authorize implementation of the regulations found at 25 C.F.R. § 163."). But step one of the jurisdictional test requires that Plaintiff identify a statutory or regulatory provision that provides specific fiduciary duties. "The Supreme Court has made clear that 'the Federal Government's liability cannot be premised on control alone.'" *Hopi Tribe*, 782 F.3d at 670 (quoting *Navajo II*, 556 U.S. at 301). Thus, even if the government has elaborate control over Plaintiff's timber resources, it is not sufficient to establish a specific, money-mandating fiduciary obligation to conduct fuels management and thinning, construct and maintain forest roads, construct fuel breaks, ensure certain levels of staffing for fire prevention, prioritize the allocation of suppression resources to the Colville Reservation, provide all funding requested for burned area rehabilitation, or complete post-fire rehabilitation within a set timeframe.

c. *Blackfeet* is not persuasive authority.

Plaintiff relies heavily on a vacated, unpublished interim opinion and order to support its claims. Pl. Resp. at 12, 19–20; Op. and Order on Cross Mots. for Partial Summ. J., *Blackfeet*

Tribe v. United States, Civ. No. 12-429L, ECF No. 62 (Fed. Cl. Aug. 21, 2015), Pl. Resp. Ex. 1. The Blackfeet Tribe sued the United States in this Court for damages to Indian reservation land after a forest fire that started in Glacier National Park spread into the reservation and burned thousands of acres of woodland forest. *Id.* at 1. The parties cross-moved for partial summary judgment, and the court found that *Mitchell II* was dispositive as to the government's fiduciary duties because of its comprehensive control over tribal timber. The court later vacated the opinion, which it termed an "unpublished interim" order. Pl. Resp., Ex. 2.

The vacated *Blackfeet* opinion is not persuasive for several reasons. For one, the court misinterpreted and misapplied certain legal authorities and principles. The court, for example, stated that 25 U.S.C. § 406(e) obligates the government to prevent loss of values resulting from fire, when the plain language of that provision does not require the government to take any specific action. As discussed *supra*, § 406(e) gives the Secretary permission to sell timber without owner consent in order to avoid loss of value due to fire, but does not require it or otherwise create a duty to protect timber resources from fire. The *Blackfeet* opinion also found that the collection of these statutes gives the government "such a comprehensive set of responsibilities" that governmental duties can be "fairly inferred from the language of the statutes" and need not "be expressly stated in the statutes." *Id.*at 3. But as discussed *supra*, this is contrary to Supreme Court precedent requiring that the source of law establish "specific fiduciary or other duties." *Navajo II,* 556 U.S. at 290; *Jicarilla*, 564 U.S. at 177. In step two of the *Navajo II* framework—determining whether the already-identified specific regulatory or statutory duty is money-mandating—the court can consider whether money damages can be "fairly inferred" from a statute, but the court cannot draw that inference in its step one analysis (the step that is at issue here). "The substantive law must establish *specific* fiduciary

responsibilities the government owes to the tribe under an *explicit* statutory provision." *Confed. Tribes & Bands of the Yakama Nation v. United States*, 153 Fed. Cl. 676, 694 (2021) (citing *Inter-Tribal Council of Ariz. Inc. v. United States*, 956 F.3d 1328, 1338 (Fed. Cir. 2020)) (second emphasis added). The opinion also did not address whether the Blackfeet Tribe, like Plaintiff here, had extensive involvement in its forestry management, or discuss the Forest Management Act's goals of increasing Indian self-determination, which distinguishes the case from *Mitchell II*. In short, the opinion should not be viewed as a persuasive authority here.

To summarize, Plaintiff has not demonstrated a statutory or regulatory provision that places a specific fiduciary duty on the United States related to Plaintiff's claims. This Court therefore should dismiss Plaintiff's Complaint for lack of jurisdiction.

B. The Statute of Limitations Bars Plaintiff's Claims.

1. Plaintiff's fuels management, forest road maintenance, and fire prevention claims accrued before the 2015 fires.

In addition, even if Plaintiff had identified a specific, money-mandating duty, several of Plaintiff's claims should be dismissed because they accrued before August 4, 2015, and are therefore outside the statute of limitations. U.S. Mem. at 27–36. "When seeking to determine when a claim accrues, a court must decide when the plaintiff 'was or should have been aware' of the material facts that would establish the government's liability." *Blackfeet Hous.*, 106 Fed. Cl. at 145 (quoting *San Carlos Apache Tribe v. United States,* 639 F.3d 1346, 1350 (Fed. Cir. 2011)). Plaintiff cited to Forest Management Reports from 1993, 2003, and 2013 as evidence of the United States' breaches of trust in this case. Compl. ¶¶ 37–47; U.S. Mem. at 30–31. Plaintiff is also directly involved in managing its forests, worked with experts as part of a prior lawsuit, and helped develop a forest restoration plan. Thus, to the extent the United States has a fiduciary duty related to fuels management, forest road maintenance, and fire prevention,

Plaintiff possessed the facts to put it on notice of any alleged breaches of trust well before the 2015 fires occurred. *See* U.S. Mem. at 30–34; *see also Menominee Tribe of Indians v. United States*, 726 F.2d 718, 721 (Fed. Cir. 1984) (finding that statute of limitations was not tolled because the Tribe had sufficient information "to make inquiry or seek advice.").

Plaintiff's argument that its claims did not accrue until the wildfires occurred ignores the circumstances. Pl. Resp. at 28. If, as Plaintiff alleges, the United States has money-mandating statutory or regulatory obligations to conduct fuels management, maintain forest roads, and engage in fire prevention, Plaintiff's cause of action accrued when the alleged mismanagement occurred. If there was a duty to thin trees in a statute or regulation, for example, that duty would have been breached, and Plaintiff would have been entitled to bring suit, when the United States failed to carry out its responsibility by not undertaking the thinning that was supposedly required. *See Jones v. United States*, 801 F.2d 1334, 1335 (Fed. Cir. 1986) ("An action for breach of fiduciary duty accrues when the trust beneficiary knew or should have known of the breach."). Plaintiff is not required to wait until a catastrophic event results from supposed mismanagement before it can bring suit for an alleged violation of money-mandating trust duties of which it is already aware. The Federal Circuit "has 'soundly rejected' the notion 'that the filing of a lawsuit can be postponed until the full extent of the damage is known.'" *San Carlos Apache Tribe*, 639 F.3d at 1354 (quoting *Boling v. United States*, 220 F.3d 1365, 1371 (Fed. Cir. 2000)). The standard for claim accrual is the "time of the [defendant's] acts," not "the time at which the consequences of the acts [become] most painful." *Navajo Nation v. United States*, 631 F.3d 1268, 1277 (Fed. Cir. 2011). Thus, Plaintiff's claims for alleged breaches of trust relating to fuels management, forest road maintenance, and fire prevention all accrued when Plaintiff had knowledge of the alleged mismanagement, which was years before the fires occurred. *See White*

Mountain Apache Tribe v. United States, No. 17-359L, 2018 WL 11365074, at *6 (Fed. Cl. Jan. 5, 2018) (finding that forestry claims accrued when the Tribe had facts relating to its forest mismanagement claims regardless of whether Tribe knew the full extent of damage).

Plaintiff's reliance on *Shoshone Indian Tribe of Wind River Reservation v. United States*, 364 F.3d 1339 (Fed. Cir. 2004) is misplaced. There, the plaintiff tribe sought damages for breach of trust duty due to alleged mismanagement of trust funds, but not mismanagement of trust resources. "In such cases, a 'final accounting' is necessary to put the Tribe on notice of the breach." *San Carlos Apache*, 639 F.3d at 1355. But here, no such accounting was necessary, and Plaintiff was well aware of facts that provided notice of its mismanagement claims.

Plaintiff wrongly asserts that it should be held to a lesser duty of discovering "malfeasance" in this case because forestry requires a "high degree of technical information, sophistication, and resources." Pl. Resp. at 27. While Plaintiff implies that it lacks such technical information, sophistication, and resources, that implication is undermined by Plaintiff's involvement in the day-to-day management of its forest under a Cooperative Agreement with the BIA. For decades, Plaintiff has operated Federal Government programs for forestry, forest management, timber harvest, timber sales, forest management inventories, forest protection, forest development, insect control, and wildland fire management. *See supra*. It undoubtedly possesses the requisite information, sophistication, and resources to both know the condition of its forest and determine whether mismanagement is occurring.

In addition, Plaintiff worked with experts in its prior litigation against the United States and the subsequent development of a forest restoration plan. At the very least, then, Plaintiff had sufficient information to inquire into any breaches of trust. "The Federal Circuit has held that 'the running of the statute of limitations will not be tolled when the Indians were capable enough

to seek advice, launch an inquiry, and discover through their agents the facts underlying their current claim.'" *Brown v. United States*, 42 Fed. Cl. 538, 555 (1998) (quoting *Menominee Tribe*, 726 F.2d at 721), *aff'd,* 195 F.3d 1334 (Fed. Cir. 1999). Further, "the Indian beneficiary of a trust, no less than any other, is charged with notice [*i.e.,* knowledge] of whatever facts an inquiry appropriate to the circumstances would have uncovered." *Id.* at 554 (quotation omitted). Accrual of a claim is "determined under an objective standard" and Plaintiff does not have to possess actual knowledge of all the relevant facts in order for a cause of action to accrue. *See Fallini v. United States,* 56 F.3d 1378, 1380 (Fed. Cir. 1995). Thus, Plaintiff has no basis for arguing that it did not possess actual knowledge—let alone should have known—of the circumstances that form the cornerstone of its claims before 2015.

Plaintiff admits that there are clear parallels between this case and *White Mountain Apache*, where the plaintiff Tribe similarly based its forest resource mismanagement claims on Forest Management reports published more than six years before the Tribe brought suit; however, Plaintiff attempts to distinguish the cases by claiming that *White Mountain Apache* was not based on forest fires occurring within six years of filing suit, but on decades of forest mismanagement. Pl. Resp. at 30–31. To the contrary, *White Mountain Apache* demonstrates that Plaintiff could have brought claims for forest mismanagement before the fires occurred and, hence, that the claims are barred by the statute of limitations. Plaintiff also argues that, in *White Mountain Apache*, the Federal Government only sought to dismiss claims that were outside the six-year statute of limitations. But, here, too, the United States seeks only to dismiss on statute of limitation grounds those claims that accrued prior to August 4, 2015: those related to fuels management, forest road maintenance, and fire prevention.

In addition, Plaintiff misconstrues the *White Mountain Apache* court's decision on reconsideration. The court did not hold that the plaintiff's forest management claims could be pursued for up to twelve years prior to the suit being filed; instead, the court held that the plaintiff could obtain discovery for that period because documents created during that time may be relevant to claims falling within the six-year statute of limitations. Pl. Resp., Ex. 6 at 11. The court also did not hold that the earlier claims were valid, but reserved judgment on the accrual date and did "not preclude the Government from renewing a motion to dismiss based on the Statute of Limitations" at a later date. *Id.* Plaintiff's attempts to distinguish *White Mountain Apache* therefore fall short.

2. The Continuing Claims doctrine does not apply here.

Plaintiff asserts that its claims for alleged breaches of trust relating to fuels management, forest road maintenance, fire prevention, fire suppression, and post-fire rehabilitation are continuing in nature and thus, are not barred by the statute of limitations under the continuing claims doctrine.[3] While Plaintiff cites numerous cases discussing this doctrine, it overstates and

[3] It is unclear what fires are the subject of this litigation. Plaintiff's Complaint states that the case is for damages arising from the 2015 North Star and Tunk Block Fires and addresses those fires directly. Perhaps in an attempt to show "continuing violations," Plaintiff's Response, however, suggests that the case is for damages arising from "a series of unprecedented forest fires" from the August 2015 North Star Fire to the present, possibly even including "major fires after filing of the Complaint." Pl. Resp. at 2, 5. Plaintiff names the Cold Creek and Bridge Creek Fires, but do not identify any other fires. While the Complaint need only contain a short and plain statement of the claim, the United States is entitled to know the specific fires for which Plaintiff is seeking damages. Thus, should any claim survive, the United States requests that Plaintiff be required to make a more definite statement. "A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response." RCFC 12(e). A motion for a more definite statement is an " appropriate device[] to narrow the issues and disclose the boundaries of the claim and defense." *Williams v. United Credit Plan of Chalmette, Inc.*, 526 F.2d 713, 714 (5th Cir. 1976).

misconstrues the holdings of the cases in connection to the issues and facts of this matter. Further, many of the cases Plaintiff cites in support of its continuing claims argument involve trespass—an issue that is legally and factually distinct from alleged breaches of trust for forest and fire management.

"The continuing claims doctrine allows the adjudication of claims that would otherwise be untimely when the claims are 'inherently susceptible to being broken down into a series of independent and distinct events or wrongs, each having its own associated damages,' and when at least one of these events falls within the limitations period." *Rosales v. United States*, 89 Fed. Cl. 565, 579 (2009) (quoting *Brown Park Estates–Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1456 (Fed. Cir. 1997)). "The continuing claim doctrine is inapplicable . . . 'where a single governmental action causes a series of deleterious effects, even though those effects may extend long after the initial governmental breach.'" *Voisin v. United States*, 80 Fed. Cl. 164, 177 (2008) (quoting *Boling*, 220 F.3d at 1373).

Here, just as Plaintiff has failed to identify any statutes or regulations demonstrating that the United States has fiduciary duties, Plaintiff also fails to identify any statutes or regulations demonstrating continuous statutory or regulatory duties for fuels management, forest road maintenance, or fire prevention. If there is no continuous duty, there can be no continuing claims for breach of trust. *See Mitchell v. United States,* 10 Cl. Ct. 787, 788 (1986) ("*Mitchell IV"), modifying* 10 Cl. Ct. 63 (1986). Plaintiff here has not attempted to support its assertion that its claims can be broken into a series of independent and distinct wrongs.

Further, even if the continuing claims doctrine applied here, it would not allow Plaintiff to be awarded damages for prior alleged acts occurring outside the six-year statute of limitations. Rather, the doctrine would merely enable Plaintiff to seek damages for alleged mismanagement

occurring within the six-year period before the filing of the Complaint, or after August 4, 2015. Thus, even under the continuing claims doctrine, any money damages for alleged historical mismanagement that Plaintiffs believe led to the 2015 fires would still be time-barred. The doctrine is not intended to revive already stale claims. Instead, it is intended to prevent "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 of Pomo Indians v. United States*, 855 F.2d 1573, 1581 (Fed. Cir. 1988). In *Mitchell IV*, for example, the court found that the BIA's duty to replant trees following logging was continuous under 25 U.S.C. § 466 and 25 C.F.R. § 163.3 and "on each day the BIA failed in its duty to regenerate . . . there arose a new cause of action." 10 Cl. Ct. at 788. The Tribe thus was able to bring its regeneration claim, but only for the six-year period preceding the complaint. Similarly, in *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 672 F.3d 1021 (Fed. Cir. 2012), the Federal Circuit found that one of the claims asserted a continuing trespass, so if the Tribe could establish that the government had a duty to eject trespassers, it "can seek damages for trespasses which occurred within six years of the filing of this suit and all trespasses that occurred after the filing of this suit."

Thus, even under the continuing claims doctrine, Plaintiff can only pursue claims of mismanagement that arose after August 4, 2015. To the extent that Plaintiff's claims rely on actions the government took (or failed to take) before August 4, 2015, the statute of limitations would still bar claims related to those actions or inactions. Given that the North Star Fire started on August 13, 2015, and the Tunk Block Fire started on August 14, 2015, Plaintiff would have to

prove that any damage it suffered resulted from alleged mismanagement that occurred in the time between August 4 and August 14, 2015.[4]

Plaintiff's argument that the motion to dismiss should be denied because the claim accrual date is unclear and the case involves complex claims is unavailing. The Court routinely disposes of claims that are barred by the statute of limitations in breach of trust cases. *See Ute Indian Tribe of the U&O Indian Res. v. United States*, 145 Fed. Cl. 609, 625–28, 632 (2019); *Quapaw Tribe v. United States*, 111 Fed. Cl. 725, 727, 732–34 (2013); *Catawba Indian Tribe v. United States*, 24 Cl. Ct. 24 (1991), *aff'd*, 982 F.2d 1564 (Fed. Cir. 1993). Where here Plaintiff clearly had information to support the large majority of its breach of trust claim well before August 4, 2015, the Court should grant the United States' motion.[5] In addition, given that the statute of limitations is jurisdictional, the Court should determine whether it has jurisdiction before requiring the United States to go through the time-consuming and expensive discovery process. *See Rosales v. United States*, 89 Fed. Cl. 565, 577 (2009) (holding that a court must determine it has jurisdiction to hear the case before the merits phase).

In conclusion, Plaintiff's fuels management, forest road maintenance, and fire prevention claims accrued when any alleged mismanagement occurred, which was more than six years before the filing of the Complaint. Plaintiff also has not demonstrated that its claims can be broken into a series of independent and distinct wrongs such that the continuous claim doctrine applies. In any event, Plaintiff can assert claims only to the extent that they arose because of

---

[4] The statute of limitations would not apply to any alleged mismanagement related to events after the fires started, such as rehabilitiation, but, as explained above, Plaintiffs has not identified a money-mandating duty supporting those claims.

[5] It is Plaintiff's burden to prove that the complaint was timely filed and "failure to meet the requirements of 28 U.S.C. § 2501 precludes the court from having juridical power to hear his or her claim." *Mesa Grande Band of Mission Indians v. U.S.*, 121 Fed. Cl. 183, 190 (2015).

alleged mismanagement occurring after August 4, 2015, whether under the continuing claims doctrine or otherwise.

C. The 2012 Settlement Waived and Released any Claims that Accrued Before the Day it was Entered by the Court.

Plaintiff admits that the 2012 Settlement contained a "broad and lengthy waiver and release of claims and damages 'occurring before the date of th[e] Court's entry of this Joint Stipulation of Settlement as an Order.'" Pl. Resp. at 39, quoting Jt. Stip. of Settlement ¶ 4. Plaintiff appears to agree that claims arising before that date were waived and that it can challenge only "post-settlement" breaches. *Id.* at 39–40. As discussed above, Plaintiff's claims arose well before the fires in 2015, and under the doctrines of waiver and release, the Court should dismiss any claims relating to alleged mismanagement actions or inactions that occurred before May 16, 2012. *See* U.S. Mem. at 36–38.

CONCLUSION

Plaintiff has failed to identify any statutory or regulatory provisions that establishes binding fiduciary duties for its claims that the United States breached various trust duties related to fire prevention, suppression, and post-fire rehabilitation. The Court therefore lacks jurisdiction over Plaintiff's Complaint. In addition, Plaintiff's claims for alleged breaches of trust related to fuels management, forest road maintenance, and fire prevention are barred by the statute of limitations and should be dismissed. In any event, the Court should find that doctrines of waiver and release bar any claims associated with forest mismanagement that occurred prior to May 2012.

For the foregoing reasons, the United States respectfully requests that the Court dismiss Plaintiff's claims.

Respectfully submitted this 8th day of April, 2022.

TODD KIM
Assistant Attorney General
Environment & Natural Resources Division

s/ Devon Lehman McCune
DEVON LEHMAN McCUNE
U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section
999 18th St., S. Terrace, Suite 370
Denver, CO 80202
Tel: (303) 844-1487
Devon.mccune@usdoj.gov

DONDRAE MAIDEN
KRISTEN KOKINOS
MICHAEL BIANCO
ROBERT J. MERRITT
United States Department of the Interior
Office of the Solicitor
Indian Trust Litigation Office

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2022, a copy of the foregoing Federal Defendants' Response to Plaintiff's Supplemental Brief was filed through the Court's CM/ECF management system and electronically served on counsel of record.

/s/ Devon Lehman McCune
Devon Lehman McCune
Supervisory Attorney