UNITED STATES COURT OF FEDERAL CLAIMS

Confederated Tribes of the Colville Reservation, Plaintiff, vs. The United States of America, Defendant	No. 21-1664 L

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE UNITED STATES' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

TABLE OF EXHIBITS

I. Introduction

In 2015, severe wildfires burned more than ten million acres across the United States. The Pacific Northwest, in particular, experienced a record-breaking number of fires, burning an unprecedented half a million acres—nearly 500 percent more than was burned on average in the prior decade. In this suit, Plaintiff seeks to recover money damages from the United States for the loss of timber and other resource values that resulted from two of those catastrophic wildfires—the North Star and Tunk Block Fires—both of which burned forest lands on the Colville Reservation. Plaintiff alleges that the United States breached money-mandating fiduciary duties to protect the Plaintiff's forests from these wildfires. Plaintiff's suit should be dismissed for several reasons.

First, Plaintiff's claim for damages stemming from the United States' alleged breach of trust duties allegedly owed to the Tribes should be dismissed because Plaintiff fails to identify a money-mandating duty that would support an award of damages. Trust duties, money-mandating in breach, spring only from specific statutes and regulations. An examination of the statutes and regulations Plaintiff cites in its Complaint, however, reveals no money-mandating duties related to forest management or fire suppression or response that the United States could have breached.

Second, even had Plaintiff alleged breach of a money-mandating trust duty, the suit comes too late for most of the claims. Plaintiff's Complaint was filed on August 4, 2021, and thus any alleged mismanagement that occurred before August 4, 2015 is outside of the six-year limitations period and this Court's jurisdiction. There can be no doubt that Plaintiff's claim alleging forest mismanagement was knowable—and indeed well known by the Tribe—before this suit was filed in 2021. This is clear, first, from the voluminous reports Plaintiff relies upon

in the Complaint that exhaustively detail the state of the Plaintiff's forest resources going back decades. But even more telling is the incontrovertible fact that since the 1990s the *Plaintiff itself* has been heavily involved in the management of its forest resources and, thus, well-aware of the state of its forest and any alleged mismanagement that was occurring.

Finally, on top of the statute of limitations, a prior settlement bars any claims of mismanagement that occurred prior to May 16, 2012. On that date, the Tribes waived and released claims against the United States brought in a different suit—including claims alleging mismanagement of its monetary and non-monetary trust assets and resources, such as its forest resources.

For these reasons, the United States respectfully moves under the Rules of the Court of Federal Claims ("RCFC") 12(b)(1), (b)(6) and 12(h)(3) to dismiss Plaintiff's Complaint. Specifically, (1) the Court lacks jurisdiction over the Complaint because Plaintiff has not alleged an applicable money-mandating duty, as required by the Tucker Act; (2) the Complaint is barred by the applicable statute of limitations to the extent it seeks compensation for mismanagement that predates August 4, 2015; and (3) the Complaint has been waived and released to the extent it seeks compensation for mismanagement that predates May 16, 2012.

II. Background

The Colville Reservation was established in 1872 as a home for the Colville, Lakes, San Poil, Nespelem, southern Okanogan, Moses/Columbia, Palus, Nez Perce, Methow, Chelan, Entiat, and Wenatchi bands. Exec. Order of April 9, 1872; Exec. Order of July 2, 1872. The Reservation is located in northeastern Washington and consists of approximately 1.4 million acres, bounded by the Columbia River to the south and east, the Okanogan River to the west, and the Colville National Forest to the north. Colville Indian Reservation Record of Decision and

Plan for Integrated Resources Management 2000-2014, at 21 (2001) ("2001 Resources Management Plan") attached herein as Exhibit 1.[1] Today, approximately 80% of Reservation lands are held by the United States in trust or restricted status and the remaining 20% of lands are held in fee. *Id.* at 22.

More than two-thirds of the Reservation is forestlands. Compl. ¶ 18.[2] Today, approximately 652,308 acres of those forestlands are commercial forests in various stages of growth. *Id.* Plaintiff has, for decades, been directly involved in the management of its forest resources, which provide the Tribes and tribal members with a critical source of revenue and employment. Compl. ¶¶ 18, 19. In 1992, the Tribes initiated the development of an Integrated Resource Management Plan for the management of natural resources on the Colville Reservation. Exhibit 1, 2001 Resources Management Plan at 29. The purpose of the Management Plan is to guide management decisions and satisfy the requirement that a Forest Management Plan be prepared for all Tribal forests. *Id.* at 31. The Management Plan the Colville Tribes prepared went into effect July 17, 2001 and remains in effect as the successor Management Plan—the Draft 2015 Management Plan—has not yet been approved. Compl. ¶ 74.[3]

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[1] The official government reports included as attachments are appropriate for the Court to take judicial notice of as their accuracy is not in question. *See Murakami v. United States*, 46 Fed. Cl. 731, 739 (2000) (noting court may take judicial notice of government documents including formal government report), *aff'd*, 398 F.3d 1354–55 (Fed. Cir. 2005); *Confidential Informant 59-05071 v. United States*, 134 Fed. Cl. 698, 721 (2017), *aff'd*, 745 F. App'x 166 (Fed. Cir. 2018) (same).

[2] Citations to the Complaint in this Motion are for background purposes and not admissions of any particular fact alleged in the Complaint.

[3] The 2015 Resources Management Plan, Forest Management Plan, and associated Environmental Impact Statement (EIS) are available online at https://www.colvilletribes.com/irmp.

In 2002, the Colville Tribes entered into a cooperative agreement with the Bureau of Indian Affairs ("BIA") pursuant to the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5701, *et seq.*, to transfer certain BIA forestry and wildfire programs, positions, and funding to the Tribes.[4] Under the cooperative agreement, the Colville Tribes began operating programs previously operated by the BIA. These programs included, among others, forestry, forest management, timber harvest, timber sales, forest management inventories and plans, forest protection, forest development, insect control, and wildland fire management (e.g., pre-suppression, suppression, fuels management, fire prevention, and rehabilitation) programs. The Tribes have operated those programs continuously since that time (in cooperation with the BIA) and receive both recurring (program) and non-recurring (project) funding from the BIA therefor.

This case concerns two fires that occurred during the 2015 fire season, which saw a record-breaking 500 wildfires burn more than 481,000 acres in the northwest—a 463% increase above the 10-year average. Exhibit 2, Fuels Treatment Assessments, BIA Northwest Region, at 4 (2015) ("BIA Fuels Report").[5] In August 2015, "widespread lightning storms sparked hundreds of forest fires across the Northwest," including approximately 340 wildfires on the Colville, Yakama, Warm Springs, Nez Perce, and Spokane Reservations. BIA Fuels Report at 2. The wildfires on the Reservations burned more than 407,000 acres, more than half of which were actively-managed forest lands. *Id*. The wildfires on the Reservations accounted for 81% of the BIA Northwestern Region's total fire occurrences and 99% of the total area burned in 2015 and resulted in the loss of more than 1.2 billion board feet of commercial timber stands. *Id.* at 4.

[4] The Self-Determination Act authorizes tribes to enter into contracts and cooperative agreements (commonly referred to as P.L. 93-638 contracts and cooperative agreements) to operate Federal Government programs serving their tribal members.

[5] Available at https://www.bia.gov/bia/ots/dfwfm/bwfm/forestry-fire-management-stories/fuels-treatment-assessments-northwest-region

The North Star Fire was a human-caused wildfire that started on August 13, 2015 approximately twelve miles north of Nespelem, Washington, on the Colville Indian Reservation. *Id*. at 11. The fire was fast moving and extreme, burning for fifty-seven days before being suppressed on October 8, 2015. *Id*. In the end, the North Star Fire was the largest wildfire in the state of Washington in 2015, burning 218,138 acres and costing approximately $48 million to suppress. *Id*. at 5, 11.

The Tunk Block Fire was a lightning-caused wildfire that started on August 14, 2015 approximately ten miles northeast of Omak, Washington on privately-owned land but spread to 165,947 acres and cost approximately $12 million to suppress. BIA Fuels Report at 5, 11. The Tunk Block Fire burned approximately 78,000 acres on the Colville Indian Reservation. *Id*. at 11.

By the time the North Star and Tunk Block Fires ignited, dozens of other large fires were burning in Washington and Oregon, as well as throughout the pacific and mountain west. Ultimately, there were 4,601 wildfires in Washington and Oregon in 2015, burning a combined 1.8 million acres. That year, the United States saw 10,125,149 acres burned by wildfires, the highest wildfire acreage burned in the past decade. Exhibit 3, National Interagency Coordination Center Wildland Fire Summary and Statistics Annual Report 2015, at 8-9 (2016).

III. Procedural History

A. Colville Tribal Trust Litigation

On December 27, 2005, the Confederated Tribes of the Colville Reservation filed suit in the U.S. District Court for the District of Columbia alleging that the United States breached its fiduciary related to the Tribes' monetary and non-monetary trust assets and resources. Exhibit 4, Compl. at 6, *Confederated Tribes of the Colville Reservation v. Salazar, et al.,* No. 05-cv-02471

(D.D.C. 2005), ECF No. 1. The Tribes sought a declaratory judgment that the United States breached its duty to provide a historical accounting as well as an affirmative injunction directing the United States to provide such an accounting. *Id.* at 10, 11. On May 16, 2012, the parties filed the Joint Stipulation of Settlement settling the Tribes' claims for $193 million. Exhibit 5, Joint Stipulation of Settlement, *Confederated Tribes of the Colville Reservation v. Salazar, et al.,* Case No. 05-cv-02471 (D.D.C. 2005), ECF No. 59, ¶ 2. The court entered the Joint Stipulation of Dismissal with Prejudice on September 28, 2012. In exchange for $193 million dollars, the Tribes agreed to a broad waiver and release of claims. The Tribes waived and released:

> *any and all* claims, causes of action, obligations, and/or liabilities of any kind or nature whatsoever, *known or unknown*, regardless of legal theory, for any damages or any equitable or specific relief, that are based on harms or violations occurring before [May 16, 2012] and that relate to Defendants' management or accounting of Plaintiff's trust funds or *Plaintiffs' non-monetary trust assets of resources*.

Exhibit 5 at ¶ 4. As an example of waived and released claims, the Settlement identified claims and allegations that the United States:

- Failed to preserve, protect, safeguard, or maintain the Tribes' non-monetary trust assets or resources (*id.* ¶ 4(b)(4));
- Failed to manage the Tribes' non-monetary trust assets or resources appropriately, including through the approval of agreements for the use and extraction of natural resources from the Tribes' lands (*id.* ¶ 4(b)(6));
- Failed to make the Tribes' non-monetary trust assets or resources productive (*id.* ¶ 4(b)(1));
- Failed to obtain an appropriate return on, or appropriate consideration for, the Tribes' non-monetary assets or resources (*id.* ¶ 4(b)(2)); and
- Failed to manage the Tribes' non-monetary trust assets or resources appropriately by failing to undertake prudent transactions for the sale, lease, use, or disposal of such trust assets or resources (*id.* ¶ 4(b)(11)).

B. Current Action

On August 4, 2021, Plaintiff filed the present suit in the Court of Federal Claims pursuant to the Tucker Act, 28 U.S.C. §1491(a)(1), and Indian Tucker Act, 28 U.S.C. § 1505. The Complaint alleges that the United States breached its "statutory, regulatory, and common law trust duties" relating to management and protection of the Tribes' forests in connection with the 2015 North Star and Tunk Block Fires. Compl. ¶¶ 1, 4. Plaintiff's Complaint brings a single omnibus claim seeking damages for "breach of trust by mismanagement of forest, road, and related trust assets," Compl. at 26. The claim encompasses five alleged breaches of: (1) "Fiduciary Duties Relating to Fuels Management and Forest Health" *id*. at 18; (2) "Fiduciary Duties Relating to Forest Roads" *id*. at 21; (3) "Fiduciary Duties Relating to Fire Prevention" *id*. at 22; (4"Fiduciary Duties Relating to Fire Suppression" *id*. at 23 and) (5) "Fiduciary Duties Relating to Forest Rehabilitation" *id*. at 24. Specifically, Plaintiff alleges that the United States failed to: (1) adequately manage fuels and conduct thinning operations to address overstocking; (2) perform necessary maintenance on forest roads; (3) conduct adequate wildfire prevention; (4) provide adequate fire suppression resources; and (5) conduct adequate forest rehabilitation following the fires. *Id*. ¶ 2. The alleged mismanagement falls into three categories.

The first category is alleged breaches of trust that occurred *prior* to the North Star and Tunk Block Fires. Specifically, this category relates to fuels management and thinning, forest road maintenance, and fire prevention all relate to forest and fire management practices before the fires occurred. Plaintiff alleges that the United States failed to conduct adequate fuels treatments and imposed restrictions on the use of prescribed burning that impaired the United States' and Tribes' ability to engage in appropriate fuels management. *Id*. ¶¶ 65, 66. Plaintiff also alleges that the United States failed to conduct adequate thinning to address overstocking and

lack of species diversity. *Id.* ¶ 70, 71. Plaintiff asserts that these alleged failures contributed to the size and severity of the fires and the damage the fires caused. *Id.* ¶ 78.

Plaintiff's claims regarding forest road maintenance and fire prevention also relate to forest and fire maintenance before the fires. Plaintiff alleges that the United States failed to properly design and maintain forest roads in compliance with the Tribes' Forest Practices Water Quality Act ("Water Quality Act"), which prescribes forest road construction and design standards. *Id.* ¶ 80. In addition, Plaintiff alleges that the United States has never employed forest road specialists. *Id.* ¶ 81. With respect to fire prevention, Plaintiff alleges that the United States did not provide adequate staff, resources, equipment, and detection systems; failed to construct sufficient fuel breaks; and did not maintain an adequate level of readiness to meet wildfire protection needs. *Id.* ¶¶ 86-88. Plaintiff claims that poorly maintained forest roads and lack of fire prevention imposed severe limitations on fire suppression and contributed to the ultimate resource damage caused by the fires. *Id.* ¶¶ 84, 89.

The second category is claims for alleged breaches of trust that occurred *during* the North Star and Tunk Block Fires. Plaintiff alleges that the United States failed to allocate adequate fire suppression resources to the Colville Reservation and prioritized the protection of "off-reservation non-trust property . . . over the Tribes' land and forests." *Id.* ¶¶ 90, 91. Plaintiff asserts there are "systemic flaws" in the United States' system for allocating and prioritizing fire suppression resources and that such flaws resulted in both a delay in the delivery of resources to the Reservation and the reallocation of resources assigned to the Reservation. *Id.* ¶¶ 92, 93. Plaintiff claims that these issues with the allocation and prioritization of fire suppression resources increased the fires' size, severity, and intensity and the resulting damages. *Id.* ¶ 94.

The final category is claims for alleged breaches that occurred *after* the North Star and Tunk Block Fires. Plaintiff alleges that the United States failed to provide the Tribes with the $36.78 million requested for restoration activities following the fires and made no effort to secure such funding. *Id.* ¶ 96. Plaintiff also asserts that, following the fires, the United States failed to return the forest to a productive state, restore damaged roads, control soil erosion, conduct mulching and seeding, clean and repair culverts, and replant. *Id.* ¶¶ 98, 99. In addition, Plaintiff alleges that the United States failed to implement or provide funding for the North Star and Tunk Block Burned Area Emergency Stabilization and Rehabilitation Plans, which provided for road restoration and maintenance, treatment of noxious and invasive weeds, planting of seedlings, gathering of cones, and nursery production. *Id.* ¶¶ 101, 102. Plaintiff claims that these issues with rehabilitation "delayed the development of commercially valuable timber" and harmed other resource values. *Id.* ¶ 103.

Ultimately, Plaintiff asserts that the alleged breaches of trust resulted in the loss of valuable commercial timber and developing stands that would have been harvested, delays in future harvests, and damages to cultural resources, forest roads, and air and water quality. *Id.* t ¶¶ 105-107. Plaintiff seeks unspecified money damages in excess of $50 million.

IV. Legal Standards

A. Lack of Subject Matter Jurisdiction

Under RCFC 12(b)(1), the Court must dismiss any claim for which it lacks subject matter jurisdiction. Jurisdiction must be established before the Court may proceed to the merits of a case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998). Courts are presumed to lack subject matter jurisdiction unless it is affirmatively indicated by the record. *Renne v. Geary*, 501 U.S. 312, 316 (1991) (citations omitted). Thus, plaintiffs bear the burden of proving, by a

preponderance of the evidence, facts sufficient to establish that the court possesses subject matter jurisdiction. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010).

Once the court's subject matter jurisdiction is questioned under RCFC 12(b)(1), the court accepts as true the non-jurisdictional factual allegations in the complaint and draws all reasonable inferences in the plaintiff's favor. *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995). The court may also look to evidence outside of the pleadings and inquire into jurisdictional facts to determine the existence of subject matter jurisdiction. *See Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988). In doing so, the court may examine relevant evidence to decide any factual disputes. *Moyer v. United States*, 190 F.3d 1314, 1318 (Fed. Cir. 1999).

B. Failure to State a Claim

A court should dismiss a complaint for failure to state a claim pursuant to RCFC 12(b)(6) "when the facts asserted do not give rise to a legal remedy." *Laguna Hermosa Corp. v. United States*, 671 F.3d 1284, 1288 (Fed. Cir. 2012) (citation omitted). When considering a motion to dismiss for failure to state a claim, the court accepts the allegations in the complaint as true and construes them in the light most favorable to the plaintiff. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). To survive a motion to dismiss under RCFC 12(b)(6), a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570).

To be plausible, a plaintiff's factual allegations must raise a right to relief above the speculative level. *Twombly*, 550 U.S. at 555. A claim has factual plausibility when the plaintiff

pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged. *Three S Consulting v. United States*, 104 Fed. Cl. 510, 523 (2012) (quoting *Twombly*, 550 U.S. at 555). Conclusory allegations of law and unwarranted inferences of fact do not suffice to support a claim. *Evans v. United States*, 107 Fed. Cl. 442, 448 (2014) (citing *Bradley v. Chiron Corp.*, 136 F.3d 1317, 1322 (Fed. Cir. 1998)). Further, courts are not bound to accept as true legal conclusions couched as factual allegations. *Twombly*, 550 U.S. at 557.

A complaint may also be dismissed under Rule 12(b)(6) when "existence of an affirmative defense . . . bar[s] the award of any remedy." *Corrigan v. United States,* 82 Fed. Cl. 301, 304 (2008) (internal citations omitted); *Englert v. United States*, No. 16-712C, 2016 WL 4987163, at *2 (Fed. Cl. Sept. 16, 2016). Affirmative defenses that have been considered on a motion to dismiss under Rule 12(b)(6) include "the plaintiff's execution of a release." Wright and Miller, 5B *Fed. Prac. & Proc. Civ.* § 1357 (3d ed.) (collecting cases); *see also Stanford v. United States*, 125 Fed. Cl. 570, 574 (2016), *aff'd*, 693 F.App'x 908 (Fed. Cir. 2017) (granting motion to dismiss, noting "even if the court had jurisdiction . . . Plaintiff released 'all claims[or] causes of action'").

V. Argument

Plaintiff's Complaint should be dismissed for lack of jurisdiction because the Complaint's alleged breaches of trust are not based upon a breach of any money-mandating statutory or regulatory trust duty. Even if the Court had jurisdiction to consider the Complaint, however, any claims of mismanagement prior to the North Star and Tunk Block Fires are barred by the statute of limitations. Moreover, Plaintiff's claims of mismanagement prior to the Colville Tribal Trust Settlement are barred by the doctrine of waiver and release.

A. Plaintiff failed to establish a waiver of sovereign immunity for its claims relating to the North Star and Tunk Block Fires.

In order to come within this Court's jurisdiction, Plaintiff must identify "substantive source of law that establishes specific fiduciary or other duties" owed to them that the United States has failed to fulfill, and which "can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of [those] duties." *United States v. Navajo Nation*, 556 U.S. 287, 290–91 (2009) (*Navajo II*); *see also Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015). Plaintiff has not done so here. The authority it 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. For this reason, the Court does not have jurisdiction over Plaintiff's Complaint and it should be dismissed.

1. To invoke this Court's jurisdiction, Plaintiff must allege a breach of a money-mandating fiduciary duty

The Federal Government cannot be sued without its consent, and the existence of consent is a prerequisite for jurisdiction. *Navajo II*, 556 U.S. at 289. The terms of consent to be sued must be unequivocally expressed and must not be implied. *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. King*, 395 U.S. 1, 4 (1969)) *(Mitchell I*). Plaintiff asserts that jurisdiction exists in this case under the Tucker Act, 28 U.S.C. § 1491, and Indian Tucker Act, 28 U.S.C. § 1505. Compl. ¶ 11. Neither the Tucker Act, nor Indian Tucker Act creates substantive rights enforceable against the United States; they are "simply jurisdictional provisions that operate to waive sovereign immunity for claims premised on other sources of law." *Navajo II*, 556 U.S. at 290 (citing *United States v. Testan*, 424 U.S. 392, 400 (1980)).

There are two hurdles a Tribe must clear to invoke jurisdiction under the Tucker Act or Indian Tucker Act for a claim alleging that the United States breached its trust obligations. *Id.*

"First, the tribe 'must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government failed to faithfully perform those duties." *Id.* (quoting *United States v. Navajo Nation* ("*Navajo I*"), 537 U.S. 488, 506 (2003)). The "Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011). A statute or regulation "that recites a general trust relationship between the United States and the Indian People is not enough to establish any particular trust duty." *Mitchell I*, 445 U.S. at 542-44. The analysis under the first hurdle must "train on specific rights-creating or duty- imposing statutory or regulatory prescriptions." *Navajo II*, 556 U.S. at 301. "If that [first] threshold is passed, the court must then determine whether 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). This second showing reflects the understanding that not all provisions conferring substantive rights mandate the award of money damages for a violation thereof. *Testan*, 424 U.S. at 400-01 (citing *Eastport S.S. Corp. v. United States* 372 F.2d 1002, 1009 (Ct. Cl. 1967)); *see Navajo I*, 537 U.S. at 506.

To be money-mandating in breach, "the allegation must be that the particular provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum." *Eastport S.S. Corp.*, 372 F.2d at 1007. A statute is not money-mandating where "it does not specify the amount to be paid or the basis for determining such amount." *Perri v. United States*, 340 F.3d 1337, 1342 (Fed. Cir. 2003). Unless the statute requires the payment of money damages, there has been no waiver of the government's sovereign immunity from liability for such damages, and the Court of Federal Claims [does] not have jurisdiction to entertain the claim." *Id.* at 1340-41.

2. The statues and regulations Plaintiff relies on do not contain the supposed fiduciary duties or are not money-mandating

Plaintiff alleges that the United States has a money-mandating fiduciary duty to: (1) adequately manage fuels and conduct thinning operations to address overstocking; (2) perform necessary maintenance on forest roads; (3) conduct adequate wildfire prevention; (4) provide adequate fire suppression resources; and (5) conduct adequate forest rehabilitation following the fires. Compl. ¶ 2. Plaintiff identifies the National Indian Forest Resources Management Act ("Forest Management Act"), 25 U.S.C. §§ 3101-3120; timber sale statutes, 25 U.S.C. §§ 406 and 407; and BIA forestry regulations, 25 C.F.R. part 163, as the sources of money-mandating fiduciary duties the United States allegedly breached in relation to the North Star and Tunk Block Fires. Plaintiff also cites, but does not directly address, several other statutes: 25 U.S.C. §§ 5109 (sustained yield management), 318a (appropriations for roads), and 162a(d)(8) (deposit of Indian moneys). Compl. ¶¶ 22-29. As discussed, below, Plaintiff failed to identify any substantive sources of law imposing specific money-mandating fiduciary duties on the United States for the supposed breaches alleged in this case. [6]

[6] Plaintiff also references several cases for the proposition "[i]t is well-settled that the United States has fiduciary responsibilities in managing Indian-owned forest land." Compl. ¶¶ 23, 27. (citing *United States v. Mitchell* (*Mitchell II*), 463 U.S. 206 (1983), *Confederated Tribes of the Warm Springs Reservation v. United States*, 248 F.3d 1365 (Fed. Cir. 2002), and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980)); *see id*. at ¶¶ 23, 27-28. To the extent Plaintiff is arguing that the caselaw itself (as opposed to specific statutory provisions those cases interpreted) establish money-mandating fiduciary duties, this is incorrect. As discussed above, "trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law." *Jicarilla*, 564 U.S. at 165; *Menominee Indian Tribe of Wisc.*, 577 U.S. at 257-258. Further, the fact that courts have found certain duties related to the management of Indian forest to be money-mandating, says nothing about whether the duties Plaintiff allege to have been breached in this case exist or are money-mandating.

a. Plaintiff has not identified a money-mandating fiduciary duty in the Forest Management Act

In the Complaint, Plaintiff alleges the Forest Management Act, 25 U.S.C. § 3101-3120, is a substantive source of United States' fiduciary duties for the management of Tribal forest lands, stating that "Congress delegated to the Secretary of the Interior the authority and responsibility to oversee the use of Tribal lands and the associated timber and other natural resources." Compl. ¶ 22. Plaintiff further states that the Forest Management Act "impose[s] comprehensive, money-mandating duties to manage the forests and forest roads on the Colville Reservation." *Id.* ¶ 29. Despite these sweeping statements, Plaintiff identifies just two statutory provisions that it alleges establish money-mandating fiduciary duties the United States breached in relation to its claims – 25 U.S.C. §§ 3104 and 3108.[7]

Plaintiff asserts that, through 25 U.S.C. § 3104, Congress directed Interior to ensure "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.'" Compl. ¶ 29 (quoting 25 U.S.C. § 3104). Plaintiff further asserts that 25 U.S.C. § 3108 requires the Secretary of the Interior to "comply with tribal laws pertaining to Indian forest lands, including laws regulating the environment or historic or cultural preservation…" *Id.* ¶ 80 (quoting 25 U.S.C. § 3108). Specifically, Plaintiff argues that the United States was obligated to comply with the Colville Tribes' 1985 Forest Practices Water Quality Act, which prescribes standards for the construction, design, and maintenance of forest

[7] Plaintiff cites the Forest Management Act's findings language, 25 U.S.C. § 3101(2) in a citation string for the proposition that "Congress has acknowledged that 'the United States has a trust responsibility toward Indian forest lands.'" Compl. ¶ 25. It does not appear that Plaintiff claims this provision imposes relevant money-mandating fiduciary duties on the United States. But, were Plaintiff to make such argument, it would fail. Congressional findings, such as those in 25 U.S.C. § 3101(2), cannot form the basis of a specific fiduciary duty. *See El Paso Natural Gas Co. v. United States*, 750 F.3d 863, 898 (D.C. Cir. 2014).

roads. *Id*. However, despite Plaintiff's claims, 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.

Section 3104 directs the Secretary of the Interior to "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). In addition, Section 3104 sets forth objectives for Indian forest land management activities. *See* 25 U.S.C. § 3104(b). Section 3108 directs the Secretary of the Interior to "comply with tribal laws pertaining to Indian forest lands…and cooperate with the enforcement of such laws on Indian forest lands," subject to the responsibilities set forth in 25 U.S.C. § 3101(2) and 3102(1) and unless prohibited by Federal law. Such cooperation includes assistance with the enforcement of Tribal laws, providing notice of such laws to persons conducting activities on Indian forest lands, and appearing in Tribal forums upon the Tribes' request. 25 U.S.C. § 3108(1)-(3).

There are several reasons to conclude that this provision—which gives Interior the power to allow Tribes to manage their own lands—does not impose independent fiduciary duties upon the agency as to management of those lands. For one, rather than "impose comprehensive, money-mandating duties to manage the forests and forest roads on the Colville Reservation" (Compl. ¶ 29), the statute says precisely the opposite. Congress expressly disclaimed that the Forest Management Act establishes *any* specific fiduciary duties, stating that "[n]othing in this chapter shall be construed to diminish *or expand* the trust responsibility of the United States toward Indian forest lands, or any legal obligation or remedy resulting therefrom." 25 U.S.C. § 3120 (emphasis added). In other words, any fiduciary duties would need to derive from a

different statutory or regulatory source. To find otherwise would read this language out of the statute entirely.

Moreover, the Supreme Court has held that it "would be out of line" for a statute to impose fiduciary duties where one of the principal statutory purposes is enhancing Tribal self-determination in the management of their resources. *See Navajo I,* 537 U.S. at 491 (citation omitted). While the findings and purposes sections of the Forest Management Act reference the United States' general "trust responsibility toward Indian forest lands," Congress promulgated the statute to increase Tribal participation in the management of Tribal forest lands. *See* 25 U.S.C. §§ 3102(1), 3104(a)-(b), 3108, 3110, and 3115. A reference to the general trust responsibility is not sufficient. As discussed above, to prevail, Plaintiff "must identify a substantive source of law that establishes *specific* fiduciary or other duties." *Navajo I,* 537 U.S. at 506 (emphasis added), not merely a reference to the "general trust relationship." *Id.; Jicarilla,* 131 S. Ct. at 2318

The D.C. Circuit has held that virtually-identical language in the American Indian Agricultural Resource Management Act ("Agricultural Management Act"), 25 U.S.C. § 3701, *et seq.*, evidenced Congress' intent not to create any fiduciary duties through promulgation of the statute. *See El Paso Natural Gas Co.*, 750 F.3d at 898. As with the Forest Management Act, the Agricultural Management Act findings and purposes sections mention the United States' trust responsibility. *See* 25 U.S.C. §§ 3701 and 3702. Similar to the Forest Management Act, the Agricultural Management Act includes a disclaimer stating that "[n]othing in this chapter shall be construed to diminish or expand the trust responsibility of the United States toward Indian trust lands or natural resources, or any legal obligation or remedy resulting therefrom." *Id.* § 3742.

In its analysis of the Agricultural Management Act, the D.C. Circuit held that "[a]lthough the Act mentions the Government's 'trust responsibility' in stating its findings and purposes…Congress was quite clear that "[n]othing in this chapter shall be construed to diminish or expand the trust responsibility of the United States…" *El Paso Natural Gas Co.*, 750 F.3d at 898. Accordingly, the D.C. Circuit found that "[t]o construe the Act as independently creating an enforceable trust responsibility would contravene the plain intent of Congress." *Id.* at 898-99. This Court should similarly construe the plain language of the Forest Management Act and hold that the statute does not create specific fiduciary duties.

Even if the Court were to find that Congress intended for the Forest Management Act to create enforceable fiduciary duties, however, 25 U.S.C. §§ 3104 and 3108 do not impose any specific duties relating to fuels management, thinning, forest road management, fire prevention, fire suppression, or forest rehabilitation—the duties Plaintiff alleges were violated here. Moreover, Plaintiff failed to plausibly allege that 25 U.S.C. §§ 3104 and 3108 are money-mandating. Plaintiff's conclusory statement that the Forest Management Act establishes money-mandating duties, without more, is insufficient to meet its burden. *See, e.g., Bradley*, 136 F.3d 1317, 1322 ("Conclusory allegations of law and unwarranted inferences of fact do not suffice to support a claim."). There simply is no language in 25 U.S.C. §§ 3104 or 3108 that can be fairly interpreted as requiring compensation in the event of breach, nor does Plaintiff's Complaint identify any such language. Accordingly, even if Plaintiff could clear the first hurdle of identifying specific fiduciary duties, it cannot clear the second hurdle and prove that Congress intended for such duties to be money-mandating.

b. 25 U.S.C. §§ 406 and 407 Do Not Impose the Duties at issue here

Plaintiff also cites two timber sale statutes, 25 U.S.C. §§ 406 and 407, as supposed substantive sources of law that establish the United States' fiduciary duties. Plaintiff asserts that "[t]he United States has a fiduciary responsibility to manage [the Tribes'] timber resources 'based upon a consideration of the needs and best interests of the Indian owner and his heirs.'" Compl. ¶ 28 (quoting 25 U.S.C. § 406(a)). Plaintiff further asserts that "the proceeds from the sale of timber harvested from the reservations must be used for the benefit of the Indians or transferred to them." *Id.* (citing 25 U.S.C. §§ 406, 407). But neither of the timber sale statutes is applicable to the claims and supposed fiduciary duties outlined in the Complaint—this case is about fires, not timber sales.

Sections 406 and 407 focus solely on the sale of timber on allotted and unallotted Indian lands held in trust. Section 406 authorizes the Secretary of the Interior to approve the sale of timber on trust lands and remit the proceeds of such sales to the Indian owners. *See* 25 U.S.C. § 406(a). Other provisions within 25 U.S.C. § 406 address the sale of undivided and unrestricted interests in timber, representation of Indian landowners who are minors, and emergency sales of timber. *See* 25 U.S.C. § 406(b)-(e). Section 407 authorizes the Secretary of the Interior to approve the sale of timber on unallotted trust lands on a sustained-yield basis with the proceeds to be distributed as the Tribe determines and allows trust land to be converted to a "more desirable use."

In *Mitchell II*, the Supreme Court held that 25 U.S.C. §§ 406 and 407 impose fiduciary duties relating to timber harvest and sales because they "provide authority for the *sale of timber* on reservations" and "establish the 'comprehensive' responsibilities of the Federal Government in managing the *harvesting* of Indian timber." 463 U.S. at 209, 222 (emphasis added). It is not

surprising that the Court found that the statutes, both of which include the phrase "sale of timber" in the title, establish fiduciary duties *for the harvest and sale of timber*. That does not mean that the timber sale statutes, by extension, establish the fiduciary duties for the United States related to forest and fire management. And the statutes certainly do not detail what those forest and fire management duties would be.

In the Complaint, Plaintiff sets forth no claims relating to the *harvest* and *sale* of timber or deposit of proceeds derived therefrom. Instead, Plaintiff claims that the United States breached its fiduciary duties to conduct fuels management or thinning in a particular manner and volume, maintain forest roads, provide a certain level of personnel for fire prevention, construct fuel breaks, prioritize the allocation of fire suppression resources to the Colville Reservation, provide a certain level of funding to restore Tribal forests following wildfires, and complete forest rehabilitation activities within a certain timeframe. The plain language of 25 U.S.C. §§ 406 and 407 cannot be reasonably interpreted as encompassing such duties. The timber sale statutes are simply inapplicable to the claims in this case.

c. 25 C.F.R. § 163.28 Does Not Impose Money-Mandating Duties

Next, Plaintiff asserts that "[t]he United States, through the Secretary of the Interior, promulgated numerous regulations that generally and specifically describe the Government's duties in managing the Tribes' land, timber, and other non-monetary assets including without limitation 25 C.F.R. Part 163, and the predecessors to those regulations."[8] Compl. ¶ 29. More specifically, Plaintiff asserts that "[a]pplicable regulations include 25 C.F.R. § 163.28, which

[8] The regulations in 25 C.F.R. part 163 went into effect on October 5, 1995. *See* 60 Fed. Reg. 52260 (Oct. 5, 1995). As discussed at pages 27-36, the statute of limitations bars any of Plaintiff's claims that accrued prior to August 4, 2015. Accordingly, any "predecessor regulations" to 25 C.F.R. part 163 are inapplicable to the claims at issue in this case.

authorizes the Secretary of the Interior to expend funds to prevent wildfire, restore conditions post-fire, and to use fire as a management tool on Indian reservations."[9] *Id.* Contrary to Plaintiff's assertion, 25 C.F.R. § 163.28 is not a substantive source of law that imposes fiduciary duties on the United States with respect to Plaintiff's claims.

Section 163.28 authorizes the Secretary of the Interior to maintain staff and facilities, hire temporary labor, rent firefighting equipment and supplies, and pay for the transportation thereof as needed 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). Section 163.28 also sets the rates of pay for firefighters and authorizes the use of reciprocal agreements with other fire organizations for mutual aid in wildfire protection, public education, expenditure of funds for emergency rehabilitation, and the use of fire to achieve Tribal land and resource management objectives. *Id.* § 163.28(a)-(d). While 25 U.S.C. § 163.28 acknowledges that wildfires occur on Indian forest lands and authorizes actions to combat them, it lacks the rights-creating duty-imposing prescriptions required to vest the Court with jurisdiction.

The plain language of 25 C.F.R. § 163.28 makes it clear that the actions described therein are discretionary. Each provision in the regulation states that the Secretary of the Interior "is authorized to" or "may" take certain actions. None of the provisions mandate that the Secretary *must* take any particular action. Broad discretionary language such as this does not provide the mandatory duty required. *See Wolfchild v. United States*, 731 F.3d 1280, 1289 (Fed. Cir. 2013) (holding that the "Secretary's authority to act does not support inference of the asserted duty to

[9] Though Plaintiff states that relevant regulations "*include* without limitation 25 C.F.R. Part 163" and the "[a]pplicable regulations *include* 25 C.F.R. § 163.28," no other regulations or regulatory provisions are cited in the Complaint. Broad, general statements implying that unidentified regulations may apply to the claims at bar are insufficient to invoke the Court's subject-matter jurisdiction.

act (enforceable by a suit for money damages")). The fact that the regulation *authorizes* the Secretary of the Interior, in their discretion, to take certain actions under the regulation does not impose a fiduciary duty to do so. The Secretary exercises such authority in their discretion to protect Indian forest lands as best as the agency can, given the limited resources Congress appropriates for such programs.

Even assuming the Court were to find that 25 C.F.R. § 163.28 does impose fiduciary duties on the United States, however, those duties would be completely different from the specific duties Plaintiff alleges were owed in the Complaint. The regulation does not address fuels management, thinning operations, maintenance of forest roads, or the allocation of fire suppression resources. While the regulation does address certain aspects of fire preparedness, fire prevention, and burned area rehabilitation, it does not *mandate* that the Secretary of the Interior hire a certain number of fire personnel, purchase or rent any particular equipment, expend any amount of funds on burned area rehabilitation, or complete such rehabilitation within a specific timeframe. Further, as the actions identified in 25 C.F.R. § 163.28 are discretionary, the regulation cannot be construed as providing an express or implied right to receive money damages. As a general rule, "[a] statute is not money-mandating when it gives the government complete discretion over the decision whether or not to pay an individual or group." *Doe v. United States,* 463 F.3d 1314, 1324 (Fed. Cir. 2006); *Samish Indian Nation v. United States*, 90 Fed. Cl. 122, 130 (2009), *aff'd in part, rev'd in part*, 657 F.3d 1330 (Fed. Cir. 2011), *cert. granted, judgment vacated in part*, 568 U.S. 936 (2012). Accordingly, the money-mandating fiduciary duties Plaintiff alleges are not grounded in 25 C.F.R. § 163.28.

d. 25 U.S.C. §§ 162a(d)(8), 318a, and 5109 are also insufficient

Finally, Plaintiff asserts that "[t]he Secretary of the Interior is directed to adhere to principles of sustained-yield forestry on all Indian forest lands under government supervision, and to manage the forested reservation land so as to ensure that the Indians receive 'the benefit of whatever profit [the forest] is capable of yielding.'" Compl. ¶ 28 (internal citations omitted). In support of this assertion, Plaintiff cites 25 U.S.C. §§ 162a(d)(8), 318a, and 5109. The statutes appear solely in a citation string; Plaintiff does not address them directly nor specifically allege that they impose money-mandating fiduciary duties the United States breached. To the extent that Plaintiff intended to advance such argument, however, it is unavailing for the reasons set forth below.

First, Section 162a authorizes the Secretary of the Interior to deposit Tribal trust funds in banks, invest collections from irrigation projects and power operations on irrigation projects, and invest Tribal trust funds in public debt obligations. 25 U.S.C. § 162a(a)-(c). At issue in the Complaint is 25 U.S.C. § 162a(d), which sets forth the Secretary of the Interior's trust responsibilities under the statute. Specifically, Plaintiff cites 25 U.S.C. § 162a(d)(8), which states that such trust responsibilities include "appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands." To the extent that Plaintiff's legal theory is that this provision provides a generic blanket trust responsibility for the management of natural resources on Tribal trust lands, such theory is unavailing. To avail itself of the Court's jurisdiction Plaintiff "must point to *specific* statutes and regulations that 'establish [the] fiduciary relationship and define the contours of the United States' fiduciary responsibilities.'" *Shoshone Indian Tribe of Wind River Rsrv., Wyo. v. United States*, 672 F.3d

1021, 1040 (Fed. Cir. 2012) (quoting *Jicarilla,* 131 S.Ct. at 2325) (emphasis added, alteration in original).

Moreover, Section 162a(d)(8) governs the deposit and investment of Tribal trust funds and is found in Title 25, Chapter 4, Section III – Deposit, Investment, and Care of Indian Monies. Thus, the trust responsibility referenced in 25 U.S.C. § 162a(d)(8) is related to such deposits and investments. To read 25 U.S.C. § 162a(d)(8) as establishing a generic and overarching trust responsibility for the management of natural resources on Tribal trust lands separate and apart from the deposit and investment of trust funds unmoors the provision from the statute in which it appears. Further, the Complaint is devoid of allegations that the United States failed to timely or properly deposit and invest Tribal trust funds. Accordingly, 25 U.S.C. § 162a(d)(8) is inapplicable to this case. Even were Plaintiff to advance such a claim, 25 U.S.C. § 162a(d)(8) does not speak to the payment of money damages to Indian beneficiaries if Interior fails to "appropriately manage" natural resources on trust lands.

Second, Plaintiff references 25 U.S.C. § 318a, which was enacted on May 26, 1928 and is commonly referred to as the Indian Reservation Roads Program. In short, because the forest roads at issue in this case are not alleged to be BIA-owned or Tribally-owned "public roads," 25 U.S.C. § 318a is inapplicable to this case.

Section 318a authorizes appropriations for the construction and maintenance of "Indian reservation roads not eligible to Government aid under the Federal Highway Act and for which no other appropriation is available, under such rules and regulations as may be prescribed by the Secretary of [the] Interior." The construction and maintenance of Tribal transportation facilities, including BIA-owned and Tribally-owned public roads, was originally governed by the 1920s-

era Reservation Roads Program. *See* 81 Fed. Reg. 78,456 (Nov. 7, 2016).[10] Today, this is carried out today pursuant to the Tribal Transportation Program, 23 U.S.C. §§ 201 and 202. *See id.*[11] The Tribal Transportation Program is jointly administered by the BIA and Federal Highway Administration with funding through Department of Transportation appropriations and the Highway Trust Fund. *Id.* The National Tribal Transportation Facility Inventory identifies the transportation facilities that are eligible for assistance under the Tribal Transportation Program. *See* 23 U.S.C. § 202(b)(1)(A). All transportation facilities included in the Facility Inventory must be "owned" by a public authority that is responsible for constructing, operating, or maintaining the facilities.[12] Tribal Transportation Program funds may be used for transportation planning, research, maintenance, engineering, rehabilitation, restoration, construction, and reconstruction of Tribal transportation facilities. *Id.* § 202(a)(1). The maintenance of BIA-owned roads is funded separately through the BIA Road Maintenance Program which remains authorized by 25 U.S.C. § 318a. The Maintenance Program is administered solely by the BIA with appropriations arising under the Department's BIA Indian programs budget. Unlike Tribal Transportation Program funds, Maintenance Program funds may be used *only* for the maintenance of existing BIA-owned roads, as identified on the Facility Inventory.

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[10] A "Tribal transportation facility" is a "public highway, road, bridge, trail, or transit system that is located on, or provides access to, Tribal land and appears on the National Tribal Transportation Facility Inventory. 23 U.S.C. § 101(a)(31). A "public road" is "any road or street under the jurisdiction of and maintained by a public authority and open to public travel. Id. § 101(a)(22).

[11] As part of the Surface Transportation and Assistance Act of 1982, Pub. L. No. 97-424, Congress created the Federal Lands Highway Program. The Highway Program address issues with access to Indian and Federal lands as well as issues with access within such lands. The Tribal Transportation Program is a funding category of the Highway Program. *See* 81 Fed. Reg. 78,456. The Tribal Transportation Program's implementing regulations are set forth in 25 C.F.R. part 170.

[12] A "public authority" is a "Federal, state, county, town or township, Indian Tribe, municipal, or other local government or instrumentality with authority to finance, build, operate, or maintain toll or toll-free facilities." 23 U.S.C. § 101(a)(21).

The BIA Division of Transportation, which administers the Tribal Transportation Program and Maintenance Program, views the Tribal Transportation Program as the sole authorization for the BIA to conduct construction, improvement, and limited maintenance activities on BIA-owned and Tribally-owned public roads on Indian lands. The Tribal Transportation Program, as a component of the Surface Transportation and Assistance Act, provides "Government aid" for public roads on the Facilities Inventory, thus making them "eligible for assistance" (*e.g.,* appropriations). The "maintenance" authorization under 25 U.S.C. § 318a, however, provides the BIA's authorization to carry out the Maintenance Program for BIA-owned roads on Indian lands. Accordingly, 25 U.S.C. § 318a authorizes funding for *public* roads. As the forest roads at issue in this case are not alleged to be BIA-owned or Tribally-owned public roads, 25 U.S.C. § 318a is inapplicable to the case at bar.

The legislative history of 25 U.S.C. § 318a further confirms that neither Congress, nor the Secretary of the Interior contemplated that appropriations under the statute would be used for the maintenance of forest roads of the kind at issue here, constructed during active timber sales for the sole purpose of providing non-public routes of ingress/egress for commercial timber operations. When Congress was considering the bill that is now 25 U.S.C. § 318a, the Secretary of the Interior advised that funding was needed for the survey, improvement, construction, and maintenance of roads on Indian lands "to connect the various Indian communities with the main Federal-aid highways" because such "local roads" were not "eligible to Government aid under the Federal Highway Act." S. Rep. No. 70-495 at 2 (1928). In addition, the Secretary expressed concern that the lack of improved roads on reservations impacted the Tribes' ability to transport crops to market, noting that the existing roads were "some of the worst roads in the country" and "practically impassible at times." *Id.* Thus, the statute's objective was to provide funding for the

improvement, construction, and maintenance of Indian reservation roads to facilitate on-reservation travel as well as access to Federal highways. Nothing in the legislative history nor Inerior's one hundred years of implementation suggests that it applies to non-public forest roads of the type at issue in Plaintiff's Complaint.

Last, Section 5109 is similarly inapplicable to this case. In 25 U.S.C. § 5109, Congress directs the Secretary of the Interior to

> make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity for such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, prevent soil erosion, to assure full utilization of the range, and like purposes.

Nowhere in the Complaint does Plaintiff allege that the Secretary of the Interior failed to promulgate such rules and regulations, nor can Plaintiff make such allegation. As the Complaint correctly, BIA regulations governing forest land management activities are set forth in 25 C.F.R. part 163. Compl. ¶ 28. Accordingly, 25 U.S.C. § 5109 does not create any of the fiduciary duties that Plaintiff alleges to exist and to have been breached here.

B. Plaintiff's mismanagement claims that accrued more than six years before the suit was filed and are thus barred by the statute of limitations.

Plaintiff alleges that the United States breached fiduciary duties prior to the North Star and Tunk Block Fires including alleged duties relating to fuels management and thinning, forest road maintenance, and fire prevention. Compl. ¶¶ 65, 66, 78. In addition to being barred because Plaintiff has not identified a money-mandating fiduciary duty as discussed above, the elements of Plaintiff's Complaint that concern actions taken outside the limitations period should be dismissed for this additional reason.

"Every claim of which the Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501. The statute of limitations in 25 U.S.C. § 2501 is "a jurisdictional limitation on the government's waiver of sovereign immunity" and must be strictly construed. *Wolfchild v. United States*, 62 Fed. Cl. 521, 547 (2004) (citing *Hopland Band of Pomo Indians v. United States*, 855 F. 2d 1573, 1576-77 (Fed. Cir. 1988)). The burden is on the plaintiff to prove by a preponderance of the evidence that the complaint was timely filed. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 134 (2008); *Sikorsky Aircraft Corp. v. United States*, 773 F.3d 1315, 1320 (Fed. Cir. 2014).

A cause of action accrues when all events which fix the government's alleged liability have occurred and the plaintiff was or should have been aware of their existence. *Hopland Band*, 855 F. 2d at 1577; *Ingrum v. United States*, 560 F. 3d 1311, 1314 (Fed. Cir. 2009). The court applies an objective standard in determining the date of accrual. *San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1350 (Fed. Cir. 2011). Therefore, a plaintiff does not have to possess actual knowledge of all the relevant facts for the cause of action to accrue. *Fallini v. United States*, 56 F.3d 1378, 1382 (Fed. Cir. 1995); *Menominee Tribe of Indians v. United States*, 726 F. 2d 718, 721 (Fed. Cir. 1984).

Breach of trust claims brought by tribes are subject to the same six-year statute of limitations under 28 U.S.C. § 2501 that applies to other litigation against the United States under the Tucker Act. *Hopland Band*, 855 F.2d at 1576, 1577-78 ("statutes of limitations are to be applied against the claims of Indian tribes in the same manner as against any other litigant seeking legal redress or relief from the government."). Statutes of limitations, therefore, accrue

when "Indians were capable enough to seek advice, launch an inquiry, and discover through their agents the facts underlying their current claim." *Menominee Tribe,* 726 F.2d. at 721.

Accordingly, the statute of limitations accrues against Indian tribes so long as the tribes were not prevented "from being aware of the material facts that gave rise to their claim," even if the tribes were not "aware of the full extent of their injury." *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 672 F.3d 1021, 1030-33 (Fed. Cir. 2012); *see also*, *San Carlos Apache Tribe,* 639 F.3d at 1350. Otherwise stated, "[r]egardless of . . . [the] trust relationship with the government, plaintiffs are charged with knowledge of their affairs and their rights at law." *Littlewolf v. Hodel*, 681 F. Supp. 929, 942 (D.D.C. 1988). The Federal Circuit has made clear that to determine when the statute of limitations begins to run, "the 'proper focus' must be 'upon the time of the [defendant's] acts, not upon the time at which the *consequences* of the acts [become] most painful.'" *Navajo Nation,* 631 F.3d at 1277 (quoting *Del. State Coll. v. Ricks,* 449 U.S. 250 (1980)).

Plaintiff filed the Complaint on August 4, 2021. Thus, all claims that accrued prior to August 4, 2015 are barred by the applicable six-year statute of limitations. The North Star Fire started on August 13, 2015 and the Tunk Block Fire started on August 14, 2015, so the fires themselves fall just within the statute of limitations. However, three of the alleged breaches of trust set forth in the Complaint relate to forest and fire management that occurred prior to the fires. Specifically, Plaintiff alleges that the United States "failed to adequately manage fuels on the Colville Reservation" (Compl. ¶ 64), "conduct thinning operations necessary to . . . prevent overstocking" (*id.* ¶ 71), "perform necessary road maintenance on forest roads" (*id.* ¶ 79), and "conduct adequate fire prevention." (*id.* ¶ 85). The Complaint does not specify the time period preceding the fires during which such alleged breaches occurred. Regardless, Plaintiff plainly

knew, or at the very least should have known, of the United States' alleged breaches of trust years before the North Star and Tunk Block Fires. As a result, these claims are barred by the statute of limitations. *See Quapaw Tribe of Okla. v. United States*, 111 Fed. Cl. 725, 733 (2013) (quoting *Shoshone*, 672 F.3d 1021 at 1035 n.9) (claim for breach of fiduciary duty related to non-monetary trust assets are barred where claim accrued before limitations period). This Court, therefore, lacks subject-matter jurisdiction over Plaintiff's claims for alleged mismanagement predating August 4, 2015, and those claims should be dismissed.

1. The reports Plaintiff relies upon make clear the state of their forests and alleged mismanagement was not unknowable

The facts necessary to put Plaintiff on notice of its present mismanagement claim are in the very documents upon which the Complaint relies. Plaintiff asserts that the 1993, 2003, and 2013 Indian Forest Management Assessment Team Reports ("Forest Management Reports") contain evidence of the United States' breaches of trust in this case.[13] Compl. ¶ 37. Plaintiff notes that Forest Management Reports I, II, and III "included visits to and review of the Colville Reservation and forest conditions on the Reservation" and "found that the United States failed to fulfill its trust obligations to Indian forestry generally." *Id.* ¶¶ 37-38. Plaintiff places particular emphasis on the findings in the Forest Management Report III, published in June 2013. The Complaint notes that the this Report "identified the well-known and growing threat of catastrophic fire resulting from inadequate fuel reduction and forest management" and found that "[t]he health of tribal forests is threatened by density-related issues such as wildland fire, insects, and disease." *Id.* ¶ 40. Plaintiff further states that the Forest Management Report III found

[13] The Indian Forest Management Assessment Team is an independent team of forestry experts commissioned by the Inter-Tribal Timber Council on behalf of the Department of the Interior to perform 10-year assessments of the status and management of Indian forest resources.

"thinning backlogs on tribal lands," "tens of thousands of acres on which hazardous fuel reduction treatments are needed," "overstocking," and chronic underfunding of "road maintenance on Indian lands" both in- and out-of-forest.[14] *Id.* ¶¶ 40-42.

As part of the Forest Management Report III, the Indian Forest Management Assessment Team "prepared a site report for the Colville Reservation." *Id.* ¶ 43. Plaintiff asserts that the site report "describes a systemic lack of funding from the United States" and "details failures with respect to forest health, fire prevention, and fire suppression." *Id.* ¶ 44. In support of these assertions, Plaintiff cites the report's findings that: (1) "programmatic funding has been undergoing a steady decline;" (2) "the fire management program has many shortfalls and disparities in funding including, planning, wildland fire suppression, protection of the wildland urban interface and hazardous fuels reduction;" (3) "roads on the Reservation are in need of maintenance;" and (4) "[i]t is difficult to fill job vacancies." *Id.* ¶¶ 44-46. Ultimately, since 1993, the Forest Management Reports have provided Plaintiff with consistent, detailed information regarding forest conditions and the United States' involvement in the management of Tribal forests. Taken together, the three Reports document the precise issues such as fire suppression, hazardous fuels that form the basis of Plaintiff's claims in this litigation.

2. Plaintiff's participation in forest management shows that the claims were in fact known to Plaintiff well before the limitations period

Further, Plaintiff undoubtedly knew of the information in the reports. Plaintiff admits that it participated in site visits with the Indian Forest Management Assessment Team during the preparation of all three reports that form the basis of this suit. Compl. ¶ 38. Moreover, Plaintiff

[14] Forest Management Reports I and II also found that forestry programs were generally underfunded, thinning backlogs existed, additional fuels treatments were needed, past trends in forest composition and density resulted in present-day overstocking, and funding for road maintenance was insufficient.

received a personalized site report in 2013 as part of the Forest Management Report III. *Id.* ¶ 43. Accordingly, even viewing Plaintiff's involvement in and knowledge of the Forest Management Reports in the most favorable light, Plaintiff has been on notice of the state of the forest and any claims relating to fuels management, thinning, forest road maintenance, and fire prevention since at least 2013.

Moreover, Plaintiff's direct involvement in the management of its forests and retention of forestry experts during negotiation of the Colville Tribal Trust Settlement further demonstrate Plaintiff's advance knowledge of its claims. As described above, in 1992, Plaintiff initiated an effort to prepare a Forest Management Plan for the Colville Reservation on its own. The 2001 Management Plan arising from that process covered the period from 2000 to 2014 and was approved on July 17, 2001. *Id.* ¶ 74. The 2001 Management Plan remained in effect at the time of the North Star and Tunk Block Fires as a new Management Plan had not yet been approved. *Id.* The Management Plan guides the management of all natural resources on the Colville Reservation, including forest resources, and was prepared with the assistance of "specialists from various natural resources fields." 2001 Management Plan at 30.

In the Record of Decision for the 2001 Management Plan, Plaintiff selected an alternative for implementation that addressed concerns with "the variance of forest structural age classes" and the "loss of timber from insect and disease." 2001 Management Plan at 10. The 2001 Management Plan also sets objectives for timber harvest, stand density, species composition, fuels reduction, and thinning; establishes silvicultural prescriptions; and prioritizes the reduction of total road density and protection of life and property from wildfire, among other things. *Id.* at 40-67. As part of the Management Plan process, Plaintiff was required to prepare an Environmental Impact Statement ("EIS") pursuant to the National Environmental Policy Act

("NEPA"). *Id.* at 7. Such an environmental review must include a detailed analysis of the affected environment (*e.g.*, current conditions for resources within the planning area). Thus, Plaintiff comprehensively evaluated the conditions within its forests during preparation of the Management Plan and structured management objectives accordingly.

In addition, in 2002, Plaintiff entered into a Self-Determination Act cooperative agreement with BIA through which certain BIA forestry and wildfire management programs, positions, and funding were transferred to Plaintiff. *See* Pub. L. No. 93-638, 88 Stat. 2203 (1975). Such programs included forest management, planning, development, administration, and protection; insect and disease control; and wildland fire management (which encompasses fire prevention and preparedness, fuels management, pre- suppression and suppression, and burned area rehabilitation). Plaintiff was directly involved in the day-to-day operation of these programs for 13 years prior to the North Star and Tunk Block Fires, and Plaintiff thus established the management direction for its forests and had substantial control over and involvement in the operation of the Federal Government programs.

Plaintiff cannot claim that it was unaware of the alleged forest mismanagement until the two fires in 2015. As the 2001 Management Plan indicates, issues with fuel loading, overstocking, road maintenance, and fire prevention do not, and did not, appear overnight. Accordingly, even assuming for the sake of argument that the United States breached its fiduciary duties for forest and fire management prior to the North Star and Tunk Block Fires (which it did not, as discussed at pages 12-26 above), Plaintiff was aware of such breaches years in advance.

These issues were also known to Plaintiff through their work with experts as part of their prior lawsuit and the subsequent development of a forest restoration plan. The Tribe employed

"Oregon State University College of Forestry and consultant Applegate Forestry, LLC to assess the cost to repair the damage to the Reservation's natural resources" during the Colville Tribal Trust Settlement Negotiations. Exhibit 6, 2015 Integrated Resources Management Plan ("2015 Management Plan") at 31. Such negotiations took place between 2010 and 2012. Following the negotiations, the Colville Business Council "established a task force" to "develop a comprehensive restoration plan based on the restoration plan developed during the settlement negotiations." *Id*. at 32. The Council approved the resulting Natural Resources Restoration Plan in May 2013. *Id*. at 36. The Plan's forest restoration goals included reducing overstocking, reducing the risk of resource damage from wildfires, conducting fuels treatment, and developing a fuels management program to reduce fire hazards. *Id*. Thus, Plaintiff received independent expert analysis of the conditions within its forests at least three years prior to the North Star and Tunk Block Fires and nine years before Plaintiff filed suit. In sum, Plaintiff knew, or should have known, of the alleged breaches of trust relating to fuels management, thinning, road maintenance, and fire prevention at least two years prior to the North Star and Tunk Block Fires and likely far longer.

A claim remarkably similar to the one Plaintiff brings here was dismissed on statute of limitations grounds in a case brought by the White Mountain Apache Tribe. *White Mountain Apache Tribe v. United States*, No. 17-359 L, 2018 WL 11365074 (Fed. Cl. Jan. 5, 2018). In that case, as here, the Tribe based "its forest resource mismanagement claims on the Indian Forest Management Assessments Team ('IFMAT') reports published in 1993 and 2003 as well as a 2005 forest management plan." *Id*. at *5. The Tribe in that case, in language that nearly mirrors that in the present Complaint, argued that these reports revealed forest mismanagement. The Court held that the Tribe's forest mismanagement claims were barred by the statute of limitations

as "[t]he Tribe's discussion of the 1993 and 2003 [IFMAT] reports demonstrate that it was aware of sufficient facts related to the Government's mismanagement of its forest . . . . " *Id.* The same is true here. Though the fires resulting from the alleged mismanagement in this case had not yet occurred by August 4, 2015, any of the defendant's act's that allegedly caused the fires had and the forest's susceptibility to fire was clear. As *White Mountain Apache* also observed, "[i]t is not necessary that the damages from the alleged [wrong] be complete and fully calculable before the cause of action accrues." *Id.*; *Fallini*, 56 F.3d at 1382. "[F]or purposes of determining when the statute of limitations begins to run, the 'proper focus' must be 'upon the time of the [defendant's] acts, not upon the time at which the consequences of the acts [become] most painful." *Navajo Nation*, 631 F.3d 1277 (quoting *Del. State Coll. v. Ricks*, 449 U.S. 250, 258 (1980)).

Here, Plaintiff did not provide specific dates, or a date range, for the alleged mismanagement that occurred prior to the North Star and Tunk Block Fires. It is Plaintiff's burden, however, to establish by a preponderance of the evidence that the court has jurisdiction to hear its claims. *John R. Sand & Gravel Co.*, 552 U.S. at 134; *Sikorsky Aircraft Corp.*, 773 F.3d at 1320. Accordingly, 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. Plaintiff failed to meet this burden. Any mismanagement that was occurring prior to August 4, 2015 was revealed in the extensive reports Plaintiff cites in its Complaint and known due to the Tribe's extensive involvement in the management of its forest. The state of the forest before the fires occurred in 2015 was not in any way concealed from Plaintiff, nor was it unknowable, and the Complaint does not allege any action within the past six-years that placed the forest in a significantly different state than it had

been in for years prior. Accordingly, Plaintiff's claims for alleged mismanagement preceding August 4, 2015 are barred by the statute of limitations and should be dismissed.

C. Plaintiff waived and released all claims that accrued prior to the Colville Tribal Trust Settlement.

Plaintiff's claim of mismanagement prior to the 2015 fire season are barred not only by the statute of limitations but also by the doctrine of waiver and release. Plaintiff waived and released in a prior settlement any claims of harm associated with forest mismanagement that occurred prior to May 2012.

Waiver is the "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). It is axiomatic that binding settlement agreements, stipulations, and stipulated judgments are enforceable in subsequent actions to bar re-litigation of the compromised or resolved claims. *Peckham v. United States*, 61 Fed. Cl. 102, 109 (2004). "The interpretation of a settlement agreement is an issue of law." *King v. Dep't of the Navy*, 130 F.3d 1031, 1033 (Fed. Cir. 1997) (citing *Mays v. U.S. Postal Serv.*, 995 F.2d 1056, 1059 (Fed. Cir. 1993)). When examining a settlement agreement, the court must "first ascertain whether the written understanding is clearly stated and was clearly understood by the parties." *King*, 130 F.3d at 1033. "In so doing, the words used by the parties to express their agreement are given their ordinary meaning, unless it is established that the parties mutually intended and agreed to some alternative meaning." *Id.* (citation omitted). Further, the contract must be interpreted "in a manner that gives meaning to all of its provisions and makes sense." *Jowett, Inc. v. United States*, 234 F.3d 1365, 1368 (Fed. Cir. 2000) (citations omitted).

In 2012, the United States and Confederated Tribes of the Colville Reservation executed a settlement agreement ("Colville Tribal Trust Settlement") resolving claims relating to harms to

the Tribes' monetary and non-monetary trust assets and resources. As part of the settlement, Plaintiff waived and released

> *any and all* claims, causes of action, obligations, and/or liabilities of any kind or nature whatsoever, *known or unknown*, regardless of legal theory, for any damages or any equitable or specific relief, that are based on harms or violations occurring before [May 16, 2012] and that relate to Defendants' management or accounting of Plaintiff's trust funds or *Plaintiffs' non-monetary trust assets of resources*.

Exhibit 5, *Confederated Tribes of the Colville Reservation v. Salazar, et al.,* Case No. 05-cv-02471 (D.D.C. 2005), ECF No. 59 ¶ 4. With respect to non-monetary trust assets and resources, the claims settled included, but were not limited to, claims and allegations that the United States:

- Failed to preserve, protect, safeguard, or maintain the Tribes' non-monetary trust assets or resources (*id*. ¶ 4(b)(4));
- Failed to manage the Tribes' non-monetary trust assets or resources appropriately, including through the approval of agreements for the use and extraction of natural resources from the Tribes' lands (*id*. ¶ 4(b)(6));
- Failed to make the Tribes' non-monetary trust assets or resources productive (*id*. ¶ 4(b)(1));
- Failed to obtain an appropriate return on, or appropriate consideration for, the Tribes' non-monetary assets or resources (*id*. ¶ 4(b)(2)); and
- Failed to manage the Tribes' non-monetary trust assets or resources appropriately by failing to undertake prudent transactions for the sale, lease, use, or disposal of such trust assets or resources (*id*. ¶ 4(b)(11)).

The breach of trust claims in the instant case arises from the United States' alleged management of Plaintiff's non-monetary trust resources—specifically, Plaintiff's commercial forests. In the Colville Tribal Trust Settlement, Plaintiff unambiguously waived and released any claims relating to harms from the United States' alleged mismanagement of Plaintiff's non-monetary trust assets and resources that occurred prior to May 16, 2012, the date the court entered the Joint Stipulation of Settlement as an order. Accordingly, 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.

VI. Conclusion

Plaintiff failed to identify any statutes or regulations that impose money-mandating fiduciary duties on the United States to conduct fuels management or thinning in a particular manner, maintain forest roads, provide a certain level of staffing for fire prevention, construct fuel breaks, prioritize the allocation of fire suppression resources to the Colville Reservation, provide a certain level of funding to restore Tribal forests following wildfires, or complete such rehabilitation activities within a certain timeframe. Thus, Plaintiff failed to establish a waiver of sovereign immunity for its claims, and this case should be dismissed pursuant to RCFC 12(b)(1) and 12(b)(6). Moreover, Plaintiff's claims prior to the fires in question are barred by the statute of limitations and the doctrines of waiver and release. The case should be dismissed.

Respectfully submitted on December 3, 2021,

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CERTIFICATE OF SERVICE

I electronically filed on this the 3rd day of December, 2021, the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ *Reuben Schifman*
REUBEN SCHIFMAN