IN THE UNITED STATES COURT OF FEDERAL CLAIMS

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, a federally recognized Indian Tribe, and YAKAMA FOREST PRODUCTS, an Instrumentality of the CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION. Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	)	Case No 21-1527L-RTH

MOTION TO DISMISS

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INTRODUCTION

Plaintiffs' Second Amended Complaint asserts two claims seeking recovery for losses sustained in a forest fire known as the Cougar Creek Fire. First, Plaintiffs assert that, in managing Plaintiffs' forests, the United States breached fiduciary duties to the Yakama Nation. Specifically, Plaintiffs allege that defendant mismanaged those forests, and mismanaged the Cougar Creek Fire, in ways that exacerbated Plaintiffs' losses from the fire.

In their second claim, Plaintiffs allege that the United States' mismanagement of Plaintiffs' forests, and of the fire, effected a taking of Plaintiffs' property for which the Constitution requires compensation.

We show below that neither claim can proceed. Plaintiffs' claims are for the most part barred by the statute of limitations, and, to the extent they concern events before 2013, they are barred by the comprehensive release and waiver the Yakama Nation executed in settling a previous breach of trust lawsuit.

Regarding Plaintiffs' breach of trust claim, we show below that several of the authorities Plaintiffs invoke do not create the kind of money-mandating fiduciary duties that can sustain this court's jurisdiction. We hasten to acknowledge this court's conclusion in Plaintiffs' previous (and pending, but unrelated) forestry lawsuit that actionable duties *do* exist with respect to forest productivity. But any claims based on *those* duties are the subject of Plaintiffs' forestry case and cannot be litigated here without violating the rule against claim-splitting.

Plaintiffs' allegations of an unlawful taking do not state an actionable claim. Accepting all of Plaintiffs' allegations as true, they do not satisfy the time-honored principle that a taking has not occurred unless the government has deliberately appropriated private property for a public purpose.

FACTUAL AND LITIGATION HISTORY

A. Yakama Forest Management

Plaintiff Yakama Nation is a federally recognized Indian tribe. The 1855 Treaty with the Yakamas created the 1.4 million-acre Yakama Reservation ("Reservation") in south-central Washington state, approximately 650,000 acres of which are forested lands ("Yakama Forest" or "Forest"). *Id.* The Yakama Forest is currently managed pursuant to the Forest Management Plan for the Yakama Reservation dated September 2005, *see* ECF No. 38 (2nd Amended Complaint) ¶ 12, and the Wildland Fire Management Plan for the Yakama Reservation dated May 2001.[1]

In July 1991, the Yakama Nation contracted the Bureau of Indian Affairs (BIA), Yakama Agency's Forest Development program pursuant to the Indian Self-Determination and Education Assistance Act (ISDEAA), Pub. L. No. 93-638, 25 U.S.C. § 5301, et seq., as amended.[2] Under the P.L. 93-638 contract, the Yakama Nation assumed substantial responsibility for forest development operations that would otherwise be conducted by the BIA Yakama Agency. In November 2004, the Yakama Nation contracted the Yakama Agency's Hazardous Fuels Reduction (HFR) Program. Under that P.L. 93-638 contract, the Yakama Nation assumed substantial responsibility for HFR operations that would otherwise be conducted by the BIA

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[1] The Forest Management Plan and the Wildland Fire Management Plan are attached as Exhibits 1 and 2. They are jointly executed by government officials of the United States and the Yakama Nation. *See* Exh. 1 at I; Exh. 2 at [pdf 2nd page]. As such they are properly considered on this motion as "official public records." *Mehta v. Ocular Therapeutix, Inc.*, 955 F.3d 194, 198 (1st Cir. 2020); *Sebastian v. United States*, 185 F.3d 1368, 1374 (Fed. Cir. 1999); *Nat. Alternatives Int'l, Inc. v. Creative Compounds, LLC*, 918 F.3d 1338, 1343 (Fed. Cir. 2019) (applying Ninth Circuit law); *CODA Dev. S.R.O. v. Goodyear Tire & Rubber Co.*, 916 F.3d 1350, 1360 (Fed. Cir. 2019); *McCutchen v. United States*, 14 F.4th 1355, 1363 (Fed. Cir. 2021), *cert. denied*, No. 22-25, 2022 WL 16909171 (U.S. Nov. 14, 2022).

[2] 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.

Yakama Agency. Shortly thereafter, in December 2006, the Yakama Nation also contracted the Yakama Agency's Fire Management Program. Under that P.L. 93- 638 contract, the Yakama Nation assumed substantial responsibility for fire management operations that would otherwise be conducted by the Yakama Agency.[3]

B. Cougar Creek Fire

The 2015 fire season in the Northwest saw a record-breaking 500 wildfires burn more than 481,000 acres, a 463% increase above the 10-year average. Fuels Treatment Assessments, BIA, Northwest Region at 4 (2015) (hereinafter "BIA Fuels Report").[4] In August 2015, "widespread lightning storms sparked hundreds of forest fires across the Northwest," including approximately 340 wildfires on the Yakama, Colville, Warm Springs, Nez Perce, and Spokane Reservations. *Id.* at 2. The wildfires on the Reservations burned more than 407,000 acres, more than half of which were actively managed forest lands. 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. Ultimately, the wildfires on the Reservations in 2015 resulted in the loss of more than 1.2 billion board feet of commercial timber stands. *Id.* at 4.

The Cougar Creek Fire—the one at issue in this case—was a lightning-caused fire that started on August 10, 2015, in the Yakama Reservation approximately nine miles northwest of

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[3] The P.L. 93-638 Contracts are referenced in the Complaint (ECF No. 38 ¶ 8), as well as in the "Tiger Team Report" (Exhibit 3 at 1, 15), and the 2005 Yakama Forest Management Plan (Exhibit 1 at 8, 148-49, 155). The Tiger Team Report, like the Forest Management Plan and the Wildland Fire Management Plan, is jointly executed by government officials of the United States and the Yakama Nation (*see* Exh. 3 at [pdf 2nd page]) and as is properly considered on this motion as an official public record. *See* fn.1 *supra*.

[4] Attached as Exhibit 4. The BIA Fuels Report is properly considered on this motion as an official public record. Fn. 1 *supra*.

Glenwood, WA. 2015 Cougar Creek Fire Burned Area Emergency Response (BAER) Plan at iii.[5] The fire spread to 12,000 acres within the first 24 hours due to above average temperatures and strong winds. The Cougar Creek Fire burned for 41 days before it was suppressed on September 20, 2015. In the end, the Cougar Creek Fire burned a total of 53,498 acres and cost approximately $23.5 million to suppress. *Id.* at 5. Of the 53,498 acres the Cougar Creek Fire burned, approximately 41,530 acres were located within the Yakama Reservation. *Id.* Approximately 5,700 acres were located in the Gifford Pinchot National Forest. *Id.*

Ultimately, there were 4,601 wildfires in Washington and Oregon in 2015, burning a combined 1.8 million acres.[6] The severity and magnitude of the 2015 fire season is perhaps best understood on the national scale. That year, the United States saw 10,125,149 acres burned by wildfires, the highest wildfire acreage burned in a decade.[7]

C. Prior Yakama Tribal Trust Case

In December 2006, the Yakama Nation filed suit in the District Court for the District of Columbia alleging that the United States: (1) failed to provide a full and complete accounting of the Nation's trust funds and non-monetary trust assets; (2) mismanaged the Nation's trust funds; and, importantly for purposes of this motion, (3) mismanaged the Nation's natural resources and other non-monetary trust assets, including forest and timber resources. ECF No. 38 ¶¶ 68-82, *Nez Perce Tribe, et al., v. Kempthorne*, No. 06-cv-2239 (D.D.C. Dec. 28, 2006), ECF No. 1. The Yakama Nation sought a declaratory judgment that the United States breached its duty to provide

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[5] Attached as Exhibit 5. The BAER Plan is properly considered on this motion as an official public record. Fn. 1 *supra*.

[6] https://gacc.nifc.gov/nwcc/content/pdfs/archives/2015_NWCC_Annual_Fire_Report.pdf.

[7] https://www.predictiveservices.nifc.gov/intelligence/2015_Statssumm/annual_report_2015.pdf

a historical accounting as well as an affirmative injunction directing the United States to provide such an accounting. *Id.* On June 18, 2013, the District Court entered a minute order approving the Joint Stipulation of Settlement between the Yakama Nation and the United States (ECF No. 279), settling these breach of trust claims for $188 million. As relevant here, the stipulation of Settlement (attached as Exhibit 6) broadly waived all claims (known or unknown) related to the United States' management of Yakama's non-monetary assets, including "timber resources." Exh. 6 at 3-6, 9.

D. The Pending Yakama Forestry Case

In December 2019, the Yakama Nation and Yakama Forest Products filed suit in the CFC alleging that the United States breached its fiduciary duties by mismanaging the Yakama Nation's forest resources, including by failing to ensure that the full annual allowable cut (AAC) of the Nation's timber was achieved in 2019 and each prior year. ECF No. 38 ¶ 1, *Yakama Nation, et al., v. United States*, No. 19-1966L (Ct. Cl. Dec. 27, 2019), ECF No. 1. Specifically, the Yakama Nation claims in that case that the United States failed to: (1) prepare and approve sufficient timber sales to achieve the maximum AAC authorized by law; (2) provide an adequate log supply for Yakama Forest Products; and, importantly for purposes of this motion, (3) otherwise manage the Yakama forestry program in a manner that allowed the Nation to receive both the stumpage value from its forest lands and the benefit of all labor and profit the Yakama Forest is capable of yielding. *Id.* ¶ 13.

In May 2020, the United States moved to dismiss the Complaint pursuant to RCFC 12(b)(1) and 12(b)(6), arguing that the Federal Government lacks plenary control over the Yakama Nation's timber assets and that Plaintiffs failed to identify a money-mandating duty to achieve AAC goals. ECF No. 11. In addition, the United States argued that Plaintiffs failed to state a claim upon which relief may be granted because the Federal Government has no duty to

adhere to the AAC goals set forth in the 2006 Forest Management Plan (FMP). *Id.* On May 28, 2021, the Court denied the motion to dismiss, finding that the United States has well-established fiduciary duties for forest management under *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*) and that such duties are money- mandating. ECF No. 31 ("Forestry Case Order"). The Court also concluded that the Complaint contained a sufficient statement of the grounds for jurisdiction. *Id.*

E. Current Action

On June 30, 2021, the Tribe and Yakama Forest Products filed the present Complaint (amended July 27, 2023) in the Court of Federal Claims (CFC) pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1), and Indian Tucker Act, 28 U.S.C. § 1505, alleging that the United States breached its fiduciary duties to protect the Yakama Forest from damages caused by the 2015 Cougar Creek Fire. ECF No. 38 ¶¶ 1-2. In Count One of the Amended Complaint, Plaintiffs claim that the United States breached money-mandating duties for "forest management, fire prevention, fire planning, and fire suppression, and did not take the steps reasonably necessary to protect the trust resource from loss by fire." *Id.* ¶ 22. More specifically, Plaintiffs assert that the United States failed to:

> Properly manage the Yakama Forest to maintain the lands in a perpetually productive states in accordance with the principles of sustained yield;
>
> Maintain and improve timber productivity, grazing, wildfire, fisheries, recreation, aesthetic, cultural and other traditional values on Yakama Nation forest lands;
>
> Adequately remove accumulated biomass on the forest floor;
>
> Properly engage in adequate fire hazard reduction, including by failing to adequately construct firebreaks, conduct prescribed burnings and other fuel treatments, or control and protect against insects and disease.
>
> Conduct an adequate wildfire prevention program to prevent damage to natural resources on Indian land;
>
> Acquire and maintain adequate firefighting equipment and fire detection systems;

> Maintain an adequate level of readiness to meet wildfire protection needs and extinguish forest fires;
>
> Employ tactics in response to the Cougar Creek Fire that are consistent with the fiduciary standard of care;
>
> Devote adequate resources in response to the Cougar Creek Fire to protect and preserve the [Yakama] Nation's forestlands; and
>
> Take adequate steps to sell trust timber to prevent loss of values resulting from fire.

Id. Plaintiffs further assert that they suffered increased economic and non-market losses due to the Cougar Creek Fire because of these alleged breaches. *Id.* ¶ 24. Such losses allegedly include timber sales, forest productivity, wildlife and wildlife habitat, recreational uses, viewshed, cultural and religious sites, and other resources values. *Id.* Plaintiffs seek money damages of not less than $10 million. *Id.* ¶ 25.

In Count Two of the Amended Complaint, Plaintiffs allege that the Cougar Creek fire caused "an unconstitutional taking of Plaintiffs' interests in the trust timber and in the quality of its lands and resources, among other things, without just compensation." *Id.* ¶ 31. Plaintiffs allege that the United States' "actions and omissions in managing the Yakama Forest…as well as its insufficient suppression efforts related to the Cougar Creek Fire" caused the damage to Plaintiffs' property. *Id.* ¶¶ 29-30.

ARGUMENT

A. Standard of Review

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 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. *See Moyer v. United States*, 190 F.3d 1314, 1318 (Fed. Cir. 1999). If the defendant or the court questions jurisdiction, a plaintiff cannot rely solely on factual allegations in the Complaint but must provide adequate proof to establish jurisdiction. *McNutt*, 298 U.S. at 189.

RCFC 12(b)(6). 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) (citing *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 to 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'").

B. Count Two Should be Dismissed Because Plaintiffs Cannot State a Taking Claim

Plaintiffs' second claim for relief (ECF No. 38, ¶¶ 26-32) alleges that actions and omissions by the United States increased the damage inflicted on Plaintiffs' forests by the Cougar Creek fire. The claim is for inverse condemnation, which "is the means by which a landowner may recover just compensation under the Fifth Amendment for a physical taking of his property when condemnation proceedings have not been instituted." *St. Bernard Parish Government v. United States*, 887 F.3d 1354, 1359 (Fed. Cir. 2018) (citing *United States v. Clarke*, 445 U.S. 253, 257 (1980)). Longstanding precedent makes clear that property damage caused by a natural disaster like a wildfire caused by a lightning strike is not a taking by the

government for which the Fifth Amendment requires the taxpayer to pay. *See e.g., id.*at 1357-59 (no takings claim arising from Hurricane Katrina based on allegations of government inaction and failure to act); *Sanguinetti v. United States*, 264 U.S. 146, 147 (1924) (rejecting a taking claim associated with flooding from a government-constructed canal where, after the canal's construction, "there was a flood of unprecedented severity" followed by "recurrent floods of less magnitude in subsequent years.")

To state a taking claim Plaintiffs must satisfy the two-part test set forth in *Ridge Line, Inc. v. United States*, 346 F.3d 1346 (Fed. Cir. 2003). As noted in *Cary v. United States*, 552 F.3d 1373, 1377 (Fed. Cir. 2009), the *Ridge Line* "two part test . . . can be characterized as causation and appropriation."

In the causation prong, it must be shown that "the government intend[ed] to invade a protected property interest or [that] the asserted invasion [was] the direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action." *Ridge Line*, 346 F.3d at 1355 (citation omitted); *see also Cary* 552 F.3d at 1377 ("[T]o survive judgment on the pleadings, the landowners must plausibly show that the consumption of their property by fire was the likely, foreseeable result of [Federal Government] action.")

Where the causation test is satisfied, a plaintiff must also satisfy the appropriation requirement in order to state a taking claim: "[T]o constitute a taking, an invasion must appropriate a benefit to the government at the expense of the property owner, or at least preempt the owners' right to enjoy his property for an extended period of time, rather than merely inflict an injury that reduces its value." *Cary* 552 F.3d at 1380 (quoting *Ridge Line*, 346 F.3d at 1356).

Dismissal of Plaintiffs' taking claim is dictated by the fact that Plaintiffs can satisfy neither test, as demonstrated by the decision in *Cary*.

1. Dismissal of Plaintiffs' taking claim is mandated by the Federal Circuit's *Cary* decision

In recognition of the causation and appropriation requirements, Federal Circuit precedent forecloses Plaintiffs' taking claim here. *Cary* involved damage to the plaintiffs' properties from the 2003 "Cedar Fire" in southern California that was started, in the adjoining Cleveland National Forest, by a lost hunter's signal fire. 552 F.3d at 1375. The plaintiffs alleged—similar to what Plaintiffs allege here—that imprudent Forest Service fire suppression policies had led to "unnaturally thick stands of trees and underbrush" with the result that "[a]ny fire . . . , if not immediately controlled, would become a devastating firestorm." *Id.* Plaintiffs "accused the Forest Service of taking the known calculated risk that its land management policies in the [National Forest] would result in a taking of adjacent landowners' property in the event of a fire originating in the [National Forest] that spread outside its boundaries." *Id.*

The Court of Claims dismissed the Complaint, finding that the plaintiffs' allegations did not satisfy the *Ridge Line* causation requirement:

> At their core, claims of inverse condemnation involve physical invasions of private property by forces that the government itself has set into motion. That is not the case here. The government did not cause the Cedar Fire. Rather, as the facts demonstrate, a hunter started the fire. And unless one is prepared to say that the hunter was acting as the government's agent, causation cannot be attributed to the government. It must follow, then, that since the government was not an actor, it cannot be a taker. In reaching this conclusion, we remain mindful of plaintiffs' assertion that the Forest Service's fire suppression policies heightened the risk of a major conflagration. That fact may be relevant to a tort theory (a point on which the court intends to express no opinion), but not to a takings theory.

Cary v. United States, 79 Fed. Cl. 145, 148 (2007), *aff'd*, 552 F.3d 1373 (Fed. Cir. 2009).

In affirming, the Federal Circuit concluded that the Complaint satisfied neither the causation nor the appropriation requirements for a taking. As to the causation requirement, the court noted that "to survive judgment on the pleadings, the landowners must plausibly show that the consumption of their property by fire was the likely, foreseeable result of Forest Service

action." 552 F.3d at 1377 (discussing *Ridge Line*, 346 F.3d at 1356 and *Moden v. United States*, 404 F.3d 1335, 1342 (Fed. Cir. 2005)). Plaintiffs alleged that their losses were the direct result of government policies (fire suppression and recreational use), but the court held that, while these policies may have increased fire risks, the causal chain was broken by the fact that the fire was started by a third party. 552 F.3d at 1378. The same logic applies to Plaintiffs' second cause of action here.

Useful contrast is provided by the taking claim in *TrinCo Inv. Co. v. United States*, 722 F.3d 1375 (Fed. Cir. 2013). Plaintiff in *TrinCo* alleged that the United States deliberately destroyed its forests by setting a backfire on plaintiff's property intended to help control a pre-existing wildfire on National Forest lands. Subject to the possible application of the "doctrine of necessity" (not at issue in this case) the taking claim in *TrinCo* was allowed to proceed. 722 F.3d at 1380. Here, by contrast, the fire that caused the damage complained of was not set by the United States, and nothing the United States is alleged to have done was intended to cause the burning of Plaintiffs' forest resources.

The *Carey* court noted that it might reach a different result if the government had deliberately accumulated fire fuels. That is because, if the government "intentionally allow[ed] fuel loads to accumulate in a fire zone," there would be an "authorized act of allowing the growth of fuel loads" of which "conflagration" could be "the direct, natural, and probable result." *Cary*, 552 F.3d at 1379. But inadvertently creating the risk of a damaging fire, the court stressed, is not enough. *Id.* ("[T]he landowners attempt to rely on the insufficient general allegation that the risk of damage arose from the buildup of flammable vegetation."). Indeed, even knowingly taking a calculated risk is insufficient. The plaintiffs in *Cary* only alleged, the court stressed, "that the government knew of or increased a risk."

> Taking a calculated risk, or even increasing a risk of a detrimental result, does not equate to making the detrimental result direct, natural, or probable. The only relevant direct, natural, or probable result of the Forest Service policies pleaded by the landowners was a heightened risk, not a wildfire that would spread to neighboring properties. The hole in the causal chain is the conversion of this risk into a wildfire by the hunter who started it.

Id. at 1378. "For an injury to be a compensable taking," the court emphasized, "the court must determine that no break in the chain of causation existed between the suspected government authorized action and the injury." *Id.* at 1380.

Plaintiffs' allegations regarding the Cougar Creek fire fall squarely within the holding in *Cary*. Like the plaintiffs in *Cary*, Plaintiffs here allege that "outdated fire exclusion practices and overall forest mismanagement by the United States" has increased fire risk due to (*inter alia*) "forest densification . . . and increased fuel loading." ECF No. 38 ¶ 9; *see Id.* ¶ 17 ("accumulated biomass made fire suppression more difficult and led to greater losses"). Plaintiffs here (*Id.* ¶ 10) offer more elaborate allegations—accusing the United States of doing a poor job of "defending against insects and disease, removing accumulated biomass, disposing of slash piles from past timber sales, performing essential fuel treatments such as thinning and prescribed burning, constructing firebreaks, preparing and planning for wildfire response, acquiring necessary fire-fighting and detection equipment"—but in all cases it is as true here as it was in *Cary* that "[t]he only relevant direct, natural, or probable result of the [government] policies pleaded by the landowners was a heightened risk, not a wildfire." *Id.* at 1378. "Heightened risk" is in fact the allegation that ties together the whole of Plaintiffs' Complaint. *See* ECF 30 at ¶¶ 12 (noting "increasing fire hazard"); 14 (alleging "tremendous wildfire hazard"); 15 ("substantial fire hazard"); 21(i) (alleging the government's duty to "undertake . . .wildfire . . . hazard reduction"); 22(d) (alleging a failure to "[p]roperly engage in adequate fire hazard reduction").

Independently, the *Cary* court concluded, the plaintiffs' claim had to be dismissed for

failing "the appropriation prong of *Ridge Line*." *Cary*, 552 F.3d at 1380. The court held that:

> "Even where the effects of the government action are predictable, to constitute a taking, an invasion must appropriate a benefit to the government at the expense of the property owner, or at least preempt the owners' right to enjoy his property for an extended period of time, rather than merely inflict an injury that reduces its value." *Ridge Line*, 346 F.3d at 1356. The landowners have not pleaded and we cannot discern any reason to conclude that the invasion has appropriated any benefit to the government.

Id. The same is true here. Plaintiffs do not and cannot allege that the Cougar Creek Fire appropriated a benefit to the government. Just the opposite: the logging operations that, according to Plaintiffs, enhanced fire risk (by the creation of "slash piles" – ECF No. 38 ¶¶ 10, 15), were undertaken (with Plaintiffs) for Plaintiffs' benefit, not the government's. The remainder of Plaintiffs' allegations regarding fire-risk-enhancing conduct (*see id.*) amount to allegations of negligence that could in no way confer a benefit on the government or serve as the basis for a taking claim.

2. Plaintiffs' taking claim fails because Plaintiffs do not and cannot satisfy the causation requirement for a taking.

The *Cary* court's application of the causation requirement for a taking conforms to long-standing Claims Court jurisprudence. In *Columbia Basin Orchard v. United States*, 132 Ct. Cl. 445, 132 F. Supp. 707, 709 (1955), the court noted that, in order to prevail on an inverse condemnation claim, a plaintiff must prove, *inter alia*, that there was "an intent on the part of the defendant to take plaintiff's property or an intention to do an act the natural consequence of which was to take its property." The property loss "must have been the direct, natural or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action." *Id.* "An accidental or negligent impairment of the value of property is not a taking, but, at most, a tort." *Id.* at 710.

And, in *Thune v. United States*, 41 Fed. Cl. 49 (1998), the CFC found that a taking did

not occur when the plaintiff's property was accidentally destroyed by the U.S. Forest Service during a controlled burn. In *Thune*, the Forest Service attempted to burn several acres of sagebrush in order to "increase herbaceous forage production for elk." *Id.* at 50. An unexpected wind shift spread the fire to the plaintiff's hunting camp and destroyed it. The plaintiff claimed that the Forest Service's failure to maintain and control the fire constituted a taking of his property. *Id.* at 51, 52. The Court dismissed the claim, holding that "negligent or improper implementation of an authorized project sounds in tort" and does not give rise to a taking. *Id.* at 52 (citing *Hayward v. United States*, 30 Ct. Cl. 219, 221 (1895); *In re Chicago, Milwaukee, St. Paul and Pac. R.R. Co*., 799 F.2d 317, 326 (7th Cir. 1986)). The Court explained that the plaintiff had not stated a taking claim because his allegations did not show that the government intended to take his property or do an act the natural consequence of which was to take his property. *Id.*

So, too, here, where none of Plaintiffs' allegations satisfy the causation requirement for a taking. As noted, the core of Plaintiffs' Complaint is the allegation that the government, by its alleged actions and omissions, enhanced the risk of fire. ECF No. 38 at ¶¶ 12 (noting "increasing fire hazard"); 14 (alleging "tremendous wildfire hazard"); 15 ("substantial fire hazard"); 21(i) (alleging the government's duty to "undertake . . .wildfire . . . hazard reduction"); 22(d) (alleging a failure to "[p]roperly engage in adequate fire hazard reduction"). There is no allegation that the United States intended to take Plaintiffs' land. Any such allegation would, moreover, fail the plausibility requirement of *Ashcroft*. *See Twombly*, 550 U.S. at 555. The Cougar Creek Fire, after all, burned several thousand acres of National Forest land. Exh. 5 at iii.

3. Plaintiffs' taking claim also fails because Plaintiffs do not and cannot allege that their property was appropriated for a public purpose.

The *Cary* court's application of the *Ridge Line* appropriation requirement is also

grounded in long-standing Claims Court precedent. It is fundamental that in order to state a claim for a taking, plaintiffs must establish that "all or a part of that interest has been appropriated by the government for a public use." *Textainer Equip. Mgmt. Ltd. v. United States*, 115 Fed.Cl. 708, 712 (2014) (citing *Klamath Irrigation. Dist. v. United States*, 635 F.3d 505, 511 (Fed. Cir. 2011)). "Put another way, the government's actions must appropriate a benefit for the government at the expense of the property owner." *Id.* (citing *Moden*, 404 F.3d at 1339; *Ridge Line*, 346 F.3d at 1356)).

An important component of the appropriation for a public purpose requirement is that only deliberate—as opposed to negligent—acts are covered. Government inaction cannot serve as the basis for a taking. This principle was recently emphasized by the Federal Circuit in *St. Bernard Parish*, 887 F.3d at 1354, in which the plaintiffs alleged that the government's poor design and maintenance of New-Orleans area flood control measures (in particular, the Mississippi River-Gulf Outlet ("MRGO")) caused property losses arising from Hurricane Katrina. Allegations of negligence, the court held, do not state a taking claim.

> The Claims Court's finding of liability here is based in large part on the failure of the government to take action, particularly on its failure to maintain MRGO or to modify it. . . . . While the theory that the government failed to maintain or modify a government-constructed project may state a tort claim, it does not state a takings claim. A property loss compensable as a taking only results when the asserted invasion is the direct, natural, or probable result of authorized government action.

Id. at 1360. "In both physical takings and regulatory takings," the court observed, "government liability has uniformly been based on affirmative acts by the government or its agent." *Id.* at 1361. "Plaintiffs point to no case," the court continued, "where the government incurred takings liability based on inaction." Instead, "[t]akings liability must be premised on affirmative government acts. The failure of the government to properly maintain the MRGO channel or to modify the channel cannot be the basis of takings liability. Plaintiffs' sole remedy for these

inactions, if any, lies in tort." *Id.* at 1362 (footnote omitted).

With one exception, Plaintiffs' allegations here describe sins of omission—"inaction," to use the language of *St. Bernard Parish*—that cannot constitute a taking. *See* ECF No. 38 ¶ 10 (alleging failures to "defend[] against insects and disease," to "remov[e] accumulated biomass," to "dispos[e] of slash piles from past timber sales," to "perform[] essential fuel treatments such as thinning and prescribed burning, constructing firebreaks, preparing and planning for wildfire response, [and] acquiring necessary fire-fighting and detection equipment.").

Plaintiffs do try to satisfy the requirement of an intentional appropriation for public purposes, with two related allegations. First, and generically, Plaintiffs allege that "The United States' actions and omissions . . . were taken in furtherance of a public purpose, including but not limited to the allocation of federal resources to other federal priorities, and the protection of assets and resources from fire damage located outside the Yakama Reservation." ECF No. 38 ¶ 29. Second, Plaintiffs allege intentional malfeasance in the specific context of fire-suppression efforts (as opposed to fire-prevention efforts):

> The United States failed to devote appropriate fire suppression resources to the Cougar Creek Fire to a degree and in a manner that is consistent with its trust duty. The United States also, in violation of its trust duties, redirected necessary fire suppression resources away from the Yakama Forest to other areas in the region, leaving the Forest exposed and vulnerable to the escalating damage.

Id. ¶ 18. But in this situation the prioritization of federal funds and resources cannot constitute a taking, as illustrated by the decision in *Teegarden v. United States*, 42 Fed. Cl. 252 (1998).

Teegarden involved the July 1989 "Uintah Flat Fire" in Utah. The plaintiffs' land was damaged in the fire; their taking claim alleged that in fighting the fire the Forest Service had deliberately focused its firefighting resources elsewhere. The court explained:

> The lynchpin of plaintiffs' claim rests on their allegations that the Forest Service "deliberately and intentionally concentrated fire suppression manpower and

> equipment on the Mammoth Creek portions of the fire line, to the detriment and loss of the fire control in the vicinity of the West Fork Asay Creek," and that, "[a]s a direct, probable and foreseeable consequence of [this decision], the Uinta Flats Fire spread out of control into the West Fork of Asay Creek . . . and burned over private land belonging to plaintiffs. . . .

42 Fed. Cl. at 256. The court noted that a taking claimant must establish "that there was an intent on the part of the Government to take the owner's property," and that "[a]n accidental or negligent impairment of the value of private property is not a taking, but, at most, a tort." *Id.* (citing *Columbia Basin Orchard v. United States*, 132 F. Supp. 707, 709 (Ct. Cl. 1955)). "Thus," the court continued, it is critical to determine whether plaintiffs' cause of action resembles a "'tortious invasion of their property rights, or 'rises to the magnitude of an appropriation of some interest in [their] property permanently to the use of the Government.'" *Id.* (quoting *Baird v. United States*, 5 Cl. Ct. 324, 329 (1984) (quoting *National By–Prods., Inc. v. United States*, 405 F.2d 1256, 1273–74 (Ct. Cl. 1969))).

The key fact, the court noted, was that "plaintiffs have not identified any decision or action by the Forest Service indicating an intent to take plaintiff's property." *Id.* "Plaintiffs cannot impute to the Forest Service the intention to take land that it was unable to protect simply because the extent of the threat, aggravated by limited government resources, necessitated prioritization." *Id.* at 257 (footnote omitted).

The court in *Teegarden* also noted that resource allocation allegations also fail the causation requirement for a taking claim:

> The element of causation poses an even greater obstacle for plaintiffs to overcome. Although plaintiffs assert that the concentration of fire suppression manpower and equipment in areas of high priority manifested "an intent on the part of the defendant to do an act the natural consequence of which was to take [plaintiffs'] property," . . . plaintiffs cannot escape the incontrovertible fact that the Uinta Flat Fire, not the Forest Service, caused the destruction of plaintiffs' property. In the context of a claim for inverse condemnation, damages resulting from "a random event induced more by an extraordinary natural phenomenon

> than by Government interference" cannot rise to the level of a compensable taking, "even if there is permanent damage to property partially attributable to Government activity."

Id. (quoting *Berenholz v. United States*, 1 Cl. Ct. 620, 626 (1982) (quoting *Wilfong v. United States*, 480 F.2d 1326, 1329 (Ct. Cl. 1973))) (footnote omitted). Thus, Plaintiffs' allegation here that the government focused resources elsewhere does not, even if true, state a taking claim.

Because Plaintiffs' Complaint satisfies neither the causation requirement nor the appropriation requirement for a valid taking claim, Count Two must be dismissed.

C. Plaintiffs' First Count Must Also be Dismissed Because the Only Actionable Claim Alleged is the Subject of Plaintiffs' Forestry Case

Plaintiffs' first count ("Breach of Trust") should also be dismissed for lack of jurisdiction. The Complaint's alleged breaches of trust are not based upon any money-mandating statutory or regulatory trust duty; to the extent that statutory money-mandating duties *are* implicated, they are the subject of Plaintiffs' claims in their forestry case and cannot be re-litigated here. In addition, any claims of mismanagement prior to the Cougar Creek Fire are barred by the statute of limitations. Finally, Plaintiff's claims of mismanagement prior to the Yakama Tribal Trust Settlement are barred by the doctrine of waiver and release.

1. The provisions upon which Plaintiffs rely do not include money-mandating trust duties for forest fire prevention and response that can be litigated in this case.

The Federal Government cannot be sued without its consent and the existence of consent is a prerequisite for jurisdiction. *United States v. Navajo Nation* (*Navajo II*), 556 U.S. 287, 289 (2009). The terms of consent to be sued must be unequivocally expressed; they may not be implied. *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (*Mitchell I*) (quoting *United States v. King*, 395 U.S. 1, 4 (1969)). Plaintiffs assert that jurisdiction exists in this case under the Tucker Act, 28 U.S.C. § 1491, and Indian Tucker Act, 28 U.S.C. § 1505. Neither the Tucker Act,

nor Indian Tucker Act create 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 *Navajo I*, 537 U.S. at 506). The Federal Government has trust duties to Indian Tribes only to the extent that it expressly accepted those responsibilities by statute or regulation. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011); *Navajo II*, 556 U.S. at 301. "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." *Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015) (citing *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 296 (citation omitted); *see also Arizona v. Navajo Nation*, 143 S. Ct. 1804, 1813 (2023) (*Navajo III)* (citation omitted). "If that threshold is passed, the court must then determine whether the relevant source of substantive law 'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the governing law] impose[s].'" *Navajo II,* 556 U.S. at 290-91 (alterations in original) (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. *United States v. Testan*, 424 U.S. 392, 400-01 (1976) (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." *Perri*, 340 F.3d at 1340-41.

Plaintiffs allege that "a comprehensive legal framework, including the . . . federal timber management statutes, and the regulations promulgated thereunder, [have] imposed money-mandating fiduciary duties" the United States allegedly breached. ECF No. 38 ¶ 21. Specifically, Plaintiffs identify the National Indian Forest Resources Management Act (NIFRMA), 25 U.S.C. §§ 3101-3120; the sale of dead timber statute, 25 U.S.C. § 196; timber harvest statutes, 25 U.S.C. §§ 406, 407, and 5109; the timber protection statute, 16 U.S.C. § 594; 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 Cougar Creek Fire.

The United States recognizes that, in Plaintiffs' pending forestry case, this Court held that 25 U.S.C. §§ 406 and 407 and the National Indian Forest Resource Management Act impose money-mandating duties on the United States with respect to sustained yield, timber harvesting, and timber sales. Forestry Case Order at 7 (citing *Mitchell II*, 463 U.S. at 210, 226). But the statutory and regulatory authorities Plaintiffs otherwise cite do not impose money-mandating fiduciary duties on the United States with respect to biomass accumulation, fire hazard reduction

(e.g., fuels reduction, firebreaks, prescribed burns, and insect and disease control), wildfire prevention programs, firefighting equipment and fire detection systems, wildfire readiness, fire suppression tactics, or the allocation of resources for fire-fighting on the Yakama Reservation.

a. *Navajo III*

The Supreme Court recently affirmed the *Navajo I*, *Navajo II*, and *Jicarilla* holdings requiring tribes to identify, with specificity, substantive sources of law setting forth judicially enforceable trust duties in *Navajo III*, 143 S. Ct. 1804. In *Navajo III*, the Supreme Court concluded that treaty provisions setting aside the Reservation for the "use and occupation of the Navajo tribe," even when read in conjunction with subsequent statutes, did not impose an affirmative trust duty on the United States to secure water for the Tribe. *Id.* at 1813-14 (citation omitted). "The Federal Government," the Court stressed, "owes judicially enforceable duties to a tribe 'only to the extent it expressly accepts those responsibilities.'" *Navajo III*, 143 S. Ct. at 1813 (quoting *Jicarilla*, 564 U.S. at 177); *see also Navajo I*, 537 U.S. at 506; *Navajo II*, 556 U.S. at 295. This requirement comes from separation of powers principles, because "Congress and the President exercise the 'sovereign function' of organizing and managing 'the Indian trust relationship'" and "the federal courts in turn must adhere to the text of the relevant law." *Navajo III*, 143 S. Ct. at 1813.

Under *Navajo III,* Plaintiffs must identify a statute, treaty, or regulation that expressly establishes affirmative trust duties for fire prevention, fire planning, and fire suppression for this Court to exercise jurisdiction over Plaintiffs' claim for damages from a wildfire. *See* 2nd Am. Compl. ¶ 22, ECF No. 38. The Court may not infer a duty not explicitly stated in a statute or regulation. In violation of this principle, Plaintiffs rely on general forestry statutes regarding the sale and harvest of timber for the proposition that the United States accepted trust responsibilities

for the prevention of wildfire. *See* 2nd Am. Compl. ¶ 21(b)-(c) (discussing the United States alleged duty to protect against wildfire under 25 U.S.C. §§ 406–407). The plain language of these timber sale statutes does not specifically impose duties on the United States for fire hazard reduction, wildfire prevention, wildfire readiness, firefighting equipment and detection systems, fire suppression, or the allocation of firefighting resources. Plaintiffs' failure to identify such specific, rights-creating, duty-imposing language in 25 U.S.C. §§ 406 and 407 precludes this Court's jurisdiction. *Navajo III,* 143 S. Ct. at 1813.

In *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*), the Court examined the particular statutes and regulations the plaintiff identified and found that those statutes only specifically created an enforceable duty regarding the sale and harvest of Indian timber. *See id*. at 222 (examining the timber management statutes, 25 U.S.C. §§ 406–407, 466 and the regulations at 25 C.F.R. Part 163 (1982)). In *Navajo III*, Justice Thomas's concurrence cites *Mitchell II* as a case which "blurred the lines" between the general trust responsibility to tribes "on the one hand, and specific fiduciary obligations of the Federal Government that might be enforceable in court, on the other." 143 S. Ct. at 1817 (Thomas, J., concurring). The Supreme Court's decisions in *Navajo III* and *Jicarilla* make clear the requirement that plaintiffs identify specific rights-creating, duty-imposing treaty, statutory, or regulatory language for claims asserting breaches of trust. Those decisions also reject the idea that either "control," or the general trust relationship, can obviate that requirement. *See Navajo III*, 143 S. Ct. at 1815; *see also id.* at 1817 (Thomas, J., concurring) ("The Court's opinion today represents a step in the same direction, making clear that tribes' legal claims against the Government must be based on specific provisions of positive law, not merely an amorphous 'trust relationship.'"); *Jicarilla*, 564 U.S. at 177.

Similarly, as with 25 U.S.C. §§ 406 and 407, the remaining collection of forestry statutes and regulations Plaintiffs cited in the Complaint do not impose the wildland fire duties alleged. For example, Plaintiffs rely on statutes that delineate discretionary actions involving the sale of dead timber and general forestry health. *See e.g.*, 2nd Am. Compl. ¶ 21 (a) (Plaintiffs arguing that the United States has also expressly accepted a duty under 25 U.S.C. § 196 to conduct fire prevention and suppression responsibilities). But the Court cannot infer from those statutes a trust duty obligating the United States to conduct fire hazard reduction, wildfire prevention, wildfire readiness, firefighting equipment and detection systems, fire suppression, or the allocation of firefighting resources.

The same is true of Plaintiffs' reliance on 25 C.F.R. § 163.31(b). The regulation talks about preventing damage from insects, but says nothing about preventing damage from fire. The Supreme Court found a similar disconnect in *Navajo III* to be telling, where the Treaty said nothing about a duty to take affirmative steps to develop the Navajo's water resources. 143 S. Ct. at 1815 ("If anything, the treaty's express requirement that the United States supply seeds and agricultural implements for a 3-year period—like the treaty's requirement that the United States build schools, a chapel, and the like—demonstrates that the United States and the Navajos knew how to impose specific affirmative duties on the United States when they wanted to do so.")

Navajo III also disposes of Plaintiffs' argument that the National Indian Forest Management Act (NIFRMA), 25 U.S.C. §§ 3101, *et seq*., creates the enforceable trust duties Plaintiffs allege to exist here. *See* 2nd Am. Compl. ¶ 21 (e-i). Congress explicitly stated in NIFRMA 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. As *Navajo III* reiterated, "the Federal Government

owes judicially enforceable duties to a tribe 'only to the extent it expressly accepts those responsibilities.'" 143 S. Ct. at 1813 (quoting *Jicarilla*, 564 U.S. at 177). NIFRMA, therefore, cannot establish new trust duties because Congress explicitly disclaimed the creation of such duties in the statute.

In sum, *Navajo III* again affirms—as previously set forth in *Navajo I, Navajo II*, and *Jicarilla*—that the United States is liable *only* for breach of those duties specifically established by the *text* of a treaty, statute, or regulation. Plaintiffs have not identified any such source of law for the duties they allege to have been breached here, and have therefore failed to meet their burden to establish Tucker Act jurisdiction.

b. 25 C.F.R. part 163

Plaintiffs assert that the regulations in 25 C.F.R. part 163 "describe specifically and generally the United States' duties in managing the Yakama Nation's forest resources." ECF No. 38 ¶ 2(h). More specifically, Plaintiffs assert that the United States breached its fiduciary duties under 25 C.F.R. §§ 163.1, 163.10(a), 163.28(a)(b), and 163.31. We address each provision in turn.

Plaintiffs allege that the United States breached its fiduciary duties under Sections 163.1 and 163.10(a) to "undertake Indian forest land management to protect against insects and disease, to include detection and evaluation, preparation of project proposals containing project descriptions, environmental assessments and statements, and cost-benefit analyses necessary to secure funding; and field suppression operations and reporting." *Id.* ¶ 21(m). The quoted language is taken from Section 163.1 (subparagraph e). Section 163.1 is the definitions section of the BIA's forestry regulations, which do not create legal obligations or independent causes of action for damages. Accordingly, Section 163.1 is not a source of money-mandating duties for

Plaintiffs' claims.

Section 163.10(a) states that the "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 and Education Assistance Act." The regulation simply carries over the same language from Section 3104(a) of NIFRMA. As noted below in connection with Section 3104(a), the definition of "forest land management activities" cannot be read as imposing a binding, non-discretionary duty to carry out every single activity referenced in the definition.

Plaintiffs assert that the United States breached its duties under 25 C.F.R. § 163.31 "to protect and preserve Indian forest land from insects and disease, and to control and mitigate the harmful effects therefrom." ECF No. 38 ¶ 21(n). In quoting this language from Section 163.31(a), however, Plaintiffs omit the term "authorized." Such discretionary language undermines the assertion of a fiduciary duty. *See Wolfchild*, 731 F.3d at 1289.[8]

In contrast, Section 163.31(b) is not limited to mere authorization: it states that the Secretary "is responsible for controlling and mitigating harmful effects of insects and diseases…and will coordinate control actions with the Secretary of Agriculture." Even assuming this provision met the first prong of the *Navajo II* test, however, it says nothing of fire or fire risk.

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[8] The same is true of the allegations in paragraphs 21 (k) and (l) of the Amended Complaint, which, in quoting language from 25 C.F.R. § 163.28 (a) and (b), omit language showing that the provisions authorize – but do not obligate – the Secretary to take certain actions. The discretionary nature of these provisions is further supported by the preamble to the final rule for 25 C.F.R. part 163, which notes that the language in Section 163.28 was intentionally changed to replace the phrase "the Secretary will" with "the Secretary is authorized to" because "lack of funds may prevent the Secretary from being able to conduct the program." General Forestry Regulations, 60 Fed. Reg. 52,250, 52,255 (Oct. 5, 1995) (to be codified at 25 C.F.R. part 163).

And, even with respect to any harmful effects of insects and disease that could not be mitigated or controlled, Section 163.31(b) lacks language expressly or impliedly mandating the payment of money damages. Further, given the pervasive nature of insects and disease in forests, and the complexity of controlling outbreaks, interpreting this provision as being money-mandating would, in essence, make the Secretary a financial guarantor for forest health, an entirely unreasonable result. The second prong of *Navajo II* is therefore also unsatisfied.

c. The prohibition against claim-splitting precludes litigating in this case any alleged breaches of Plaintiffs' identified statutory duties

Plaintiffs' remaining sources for an alleged fiduciary duty cannot present viable breach of trust claims here because alleged breaches of the alleged duties are already being litigated in Plaintiffs' forestry case. Plaintiffs allege here that the United States breached its fiduciary duties under 25 U.S.C. §§ 406 and 407, 25 U.S.C §§ 3103(4)(D) and 3104. ECF No. 38, ¶ 21(e)-(g), (i). Specifically, Plaintiffs assert that the United States has a duty to "sell timber on Yakama Nation's trust lands in accordance with the principles of sustained-yield management or to convert the land to a more desirable use" (ECF No. 38, ¶ 21(c) (citing 25 U.S.C. § 407)) and that the United States has a duty to "operate and manage the Nation's forestlands on the principle of sustained-yield management and to protect those forestlands from deterioration." *Id.* ¶ 21(d) (citing 25 U.S.C. § 5109).[9] According to Plaintiffs, these include duties to "protect and preserve the Yakama Forest from damages caused by wildfire." ECF No. 38, ¶ 22.

As noted above, the Court has already concluded in Plaintiffs' pending forestry case that these provisions create money-mandating duties sufficient for Tucker Act jurisdiction. Forestry

[9] Section 5109 directs Interior to promulgate regulations. Despite Plaintiffs' citation, the provision has no relevance here.

Case Order. Indeed, broader duties that Plaintiffs invoke in the present case—the duties, generally stated, to maximize the forest's productivity and to pursue sustained yield—lie at the core of this court's decision in the forestry case sustaining its jurisdiction to hear Plaintiffs' breach of trust claims. *See* Forestry Case Order at 27 (noting NIFRMA's requirement the "government 'shall' undertake forest management activities, and these activities must strive to ensure the Tribe receives 'the benefit of all the labor and profit' the forest is capable of yielding."); *Id.* ("The list of objectives in 25 U.S.C. § 3104 clarify the government's fiduciary obligations to the tribes as recognized by the Court in *Mitchell II*, including the obligation [that] tribal forests are managed 'in a perpetually productive state in accordance with the principles of sustained yield.'")

The United States maintains that these statutory provisions do not create standalone money-mandating duties for fire prevention and suppression. Sections 406 and 407 say nothing about fire. *See* 25 U.S.C. §§ 406, 407. A statute should not be expanded to impose duties on the United States if it is, in fact, silent as to those duties. *See Ramona Two Shields v. United States*, 820 F.3d 1324, 1332-33 (Fed. Cir. 2016). To infer such duties would "vitiate Congress' specification of narrowly defined" obligations. *Jicarilla*, 564 U.S. at 177.[10] Section 406(a) authorizes the Secretary of Interior to approve the sale of timber on trust lands and remit the proceeds from such sales to the Indian owners. Other provisions in Section 406 address the sale of undivided and unrestricted interests in timber, representation of Indian landowners who are

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[10] Plaintiffs (ECF No. 38, ¶ 21(f)) also cite 16 U.S.C. § 594, which states, in pertinent part, that the "Secretary of Interior is authorized to protect and preserve from fire, disease, or the ravages of beetles, or other insects, timber owned by the United States upon…Indian Reservations…" Conferring discretionary authority does not impose mandatory fiduciary duties enforceable by a suit for money damages. *See Wolfchild v. United States*, 731 F.3d 1280, 1289 (Fed. Cir. 2013).

minors, and emergency sales of timber. 25 U.S.C. § 406(b)-(e). Section 407 authorizes the Secretary of Interior to approve the sale of timber on unallotted trust lands on a sustained-yield basis with the proceeds from such sales to be distributed as the Tribe determines. Section 407 also allows trust land to be converted to a "more desirable use."

NIFRMA, for its part, explicitly states 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. Putting that aside, Congress did, in NIFRMA, define "forest land management activities" as including: "protection against losses from wildfire, including acquisition and maintenance of fire-fighting equipment and fire detection systems, construction of fire breaks, hazard reduction, prescribed burning, and the development of cooperative wildfire management agreements." But 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). And, in any event, the term "forest land management activities" only becomes relevant for present purposes in Section 3104, which directs the Secretary to "undertake" forest management activities, 25 U.S.C. § 3104(a), with the objective of, among others, "development, maintenance, and enhancement of Indian forest land in a perpetually productive state in accordance with the principles of sustained yield…" *Id.* § 3104(b)(1). Plaintiffs' present Complaint recites the language in Section 3104(b)(1). *See* ECF No. 38 ¶ 22(a)-(b).

Thus, it appears Plaintiffs' theory with respect to these statutes is that the principle of

management for sustained yield implicitly includes money-mandating, fiduciary duties for fire prevention and suppression.[11] But—even assuming (without conceding) that Plaintiffs are correct on that point—any alleged breach of a fiduciary duty to provide for sustained yield is already being litigated in Plaintiffs' forestry case. As the court expressly held, Plaintiffs' forestry case implicates the United States' alleged obligation to see to it that "tribal forests are managed 'in a perpetually productive state in accordance with the principles of sustained yield.'" Forestry Case Order at 28 (quoting 25 U.S.C. § 3104(b)(1)). Thus, Plaintiffs' claims relating to sustained yield and timber harvesting and sales – all of which are addressed in the 2005 FMP – are already being litigated.

As the court noted in *Mars Inc. v. Nippon Conlux Kabushiki-Kaisha*, 58 F.3d 616 (Fed. Cir. 1995), "[i]t is well established that a party may not split a cause of action into separate grounds of recovery and raise the separate grounds in successive lawsuits; instead, a party must raise in a single lawsuit all the grounds of recovery arising from a single transaction or series of transactions that can be brought together." 58 F.3d at 619-20 (citing Restatement (Second) of Judgments § 24(2) (1982) (all actions arising from the same transaction or series of transactions are regarded as constituting a single cause of action); *Gregory v. Chehi*, 843 F.2d 111, 117 (3d Cir.1988) (for purposes of claim preclusion analysis, the term "claim" is defined "broadly in transactional terms, regardless of the number of substantive theories advanced in the multiple suits by the plaintiff") (citing Restatement (Second) of Judgments); *Foster v. Hallco Mfg. Co.*,

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[11] The Amended Complaint alleges, for example, that the United States has a duty "to sell timber on Yakama Nation's trust land in accordance with the principles of sustained-yield management" and to "to undertake forestland management activities to develop, maintain, and enhance the Nation's forestlands in a perpetually productive state in accordance with the principles of sustained yield." ECF No. 38 ¶ 21 (c, e).

947 F.2d 469, 478–79, (Fed. Cir. 1991) (same); *Alyeska Pipeline Service Co. v. United States*, 688 F.2d 765, 769–70, 231 Ct.Cl. 540 (1982) (same; "claim splitting cannot be justified on the ground that the two actions are based on different legal theories"), cert. denied, 461 U.S. 943 (1983)).

"To be considered duplicative, proceedings must, in general, involve the same parties, the same subject matter, the same relief, and similar issues." *Lea v. United States*, 120 Fed. Cl. 440, 446-47 (Fed. Cir. 2015) (citation omitted). Plaintiffs' sustained yield and timber harvesting and sales claims in this litigation easily meet this standard. The parties and subject matter are the same, and the claim—that the United States has violated a duty of management for sustained yield, including the under-harvest of Plaintiffs' forest—is the same.

2. Plaintiffs' claims relating to mismanagement prior to June 2015 are barred by the statute of limitations.

Even if Plaintiffs had identified a money-mandating duty that would not be precluded by the prohibition against claim splitting, Count One would largely be time-barred. "Every claim of which the United States 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), *rev'd on other grounds*, 559 F.3d 1228 (Fed. Cir. 2009) (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). Thus, the plaintiff "must offer relevant, competent evidence to show that it filed suit within six years of the accrual of its

claims." *Osage Nation v. United States*, 57 Fed. Cl. 392, 396 (2003) (citing 28 U.S.C. § 2501; *Reynolds*, 846 F.2d at 748; *Martinez v. United States*, 48 Fed. Cl. 851, 857 (2001)).

A cause of action accrues when all events which fix the Federal Government's alleged liability have occurred and the plaintiff was or should have been aware of their existence. *Hopland Band of Pomo Indians*, 855 F.2d at 1577; *Ingrum v. United States*, 560 F.3d 1311, 1314 (Fed. Cir. 2009). The proper focus of the inquiry is "the time of the [defendant's] acts, not upon 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) (quotation omitted). 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, the 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). The statute of limitations accrues when the plaintiff was "capable enough to seek advice, launch an inquiry, and discover through their agents the facts underlying their current claim." *Menominee Tribe of Indians*, 726 F.2d at 721.

In the present case, Plaintiffs seek compensation, in part, for damages supposedly occasioned by the United States' alleged forest mismanagement in advance of the Cougar Creek Fire (which occurred in August 2015). Plaintiffs filed the Complaint on June 30, 2021. Thus, all claims that accrued prior to June 30, 2015, are barred by the six-year statute of limitations. Eight of the ten allegations that Plaintiffs advance in the Complaint are for alleged mismanagement antedating the Cougar Creek Fire. Specifically, these are Plaintiffs' claims that the United States failed to (1) manage the forest in accordance with principles of sustained yield, (2) maintain timber productivity, (3) sell timber, (4) remove accumulated biomass, (5) reduce fire hazards

(e.g., fuels reduction, firebreak construction, prescribed burning, and insect and disease control), (6) conduct an adequate wildfire prevention program, (7) acquire and maintain adequate firefighting equipment and fire detection systems, and (8) maintain an adequate level of wildfire readiness. ECF No. 38, ¶ 22(a)-(g), (j).

Plaintiffs do not allege, let alone cite supportive evidence, that their claims for alleged mismanagement prior to the Cougar Creek Fire accrued within the applicable six-year statute of limitations. Indeed, given the date of the fire (August 10, 2015) and the beginning of the six-year statutory limitations period (June 30, 2015), there would only be six weeks of alleged mismanagement actions or inactions that could give rise to a timely Tucker Act claim. But the Amended Complaint does not allege that any fire prevention-related mismanagement activities occurred during that six-week period. To the contrary, the Complaint does not specify, or place temporal limitations on, the period preceding the fire during which such alleged breaches of trust occurred. Plaintiffs sidestep the issue, broadly stating that "…at all material times the United States breached its money mandating trust duties with respect to forest management, fire prevention, fire planning, and fire suppression." ECF No. 38, ¶ 22. "To defeat a motion to dismiss based on the statute of limitations, a plaintiff must establish 'jurisdictional timeliness.'" *Chemehuevi Indian Tribe v. United States*, 150 Fed. Cl. 181, 193 (2020) (citing *Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998). Plaintiffs failed to meet their burden with respect to the eight pre-fire claims.[12]

Ultimately, however, Plaintiffs knew, or should have known, of the United States'

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[12] Plaintiffs' claims regarding inadequate fire suppression tactics and the allocation of resources for the Cougar Creek Fire are within the statute of limitations, but subject to dismissal on other grounds.

alleged breaches well before June 2015 and the Cougar Creek Fire. In the Complaint, Plaintiffs reference findings from three documents as evidence of the United States' alleged breaches of trust prior to the Cougar Creek Fire: the 2005 FMP, the IFMAT III Report, and the Tiger Team Report. These same documents, combined with Plaintiffs' involvement in the management of their timber resources, demonstrate that Plaintiffs' mismanagement claims accrued well before June 30, 2015.

First, Plaintiffs reference the 2005 FMP, stating that "[t]he 2005 FMP recognized an increasing fire hazard in the Yakama Forest." ECF No. 38 ¶ 12. Of course, 2005 was ten years before 2015. And the FMP's contents were no surprise to Plaintiffs. Plaintiff Yakama Nation bore responsibility for forest management plans under their P.L. 93-638 contract for Forest Development. The 2005 FMP was "developed by the Yakama Nation and the [BIA]" with input from the Yakama Nation Department of Natural Resources, Yakama Nation Land Enterprise, Yakama Forest Products, Yakama tribal members, and the Yakama Tribal Council and General Council officers. Exh.1 at i-v; Yakama Nation Resolution T-021-04.

In addition to noting the increased risk of wildfires in the Yakama Forest, the 2005 FMP explained that "a number of changes in forest health have occurred over the last century on the Yakama Reservation." Exh.1at 1. The 2005 FMP explains that these forest health issues came to a head in 2000, when the "Yakama Tribal Council declared a forest health emergency on the Yakama Forest…by Tribal Resolution (T-095-00A)" due to "defoliators, bark beetles, and pathogens" that "increased tree mortality, wildfire hazard, and economic losses to the Yakama Nation." Exh.1 at 47. Plaintiff Yakama Nation's direct involvement in preparation of the 2005 FMP and documented actions to address forest health five years prior thereto, show that Plaintiffs were aware of the condition of their forest and the associated increase in wildfire risk at

least a decade prior to the Cougar Creek Fire.

Second, Plaintiffs refer to the Indian Forest Management Assessment Team (IFMAT) III Report, published in June 2013—eight years before Plaintiffs filed suit—stating that the report found that there was "significant and increasing risk to Indian forestlands from wildfire," "current staffing of Indian forest programs was inadequate," and "the United States was not meeting its trust responsibility for Indian forestlands." ECF No. 38 ¶ 13. To date, the IFMAT has issued three reports assessing the management of tribal forests – IFMAT I (1993), IFMAT II (2003), and IFMAT III (2013).[13]

The IFMAT Reports demonstrate that Plaintiffs were aware of the facts that form the basis of their claims for at least two, and as many as 25, years prior to the Cougar Creek Fire.

Plaintiffs chose to highlight select findings from the IFMAT III Report that Plaintiffs assert support their allegations of mismanagement. Other findings in the IFMAT III Report, however, provided Plaintiffs with sufficient notice of the breaches alleged in the present case to, at a minimum, cause an inquiry. For example, the IFMAT III Report found that "the health of tribal forests is threatened by density-related issues such as wildland fire, insects, and disease;" that there were "thinning backlogs on tribal lands;" that there were "tens of thousands of acres on which hazardous fuel reduction treatments are needed;" and that there were funding shortages for

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[13] The third IFMAT report is attached as Exhibits 7A and 7B. Materials cited in the Complaint may be referenced on a motion to dismiss without converting the motion to one for a summary judgment. *Goodwill Indus. of Cent. Oklahoma, Inc. v. Philadelphia Indem. Ins. Co.*, 21 F.4th 704, 709 (10th Cir. 2021), cert. denied, 142 S. Ct. 2779 (2022) ("when ruling on a 12(b)(6) motion" we will consider "documents incorporated by reference in the Complaint [and] documents referred to in and central to the Complaint, when no party disputes [their] authenticity") (quoting *Berneike v. CitiMortgage, Inc.*, 708 F.3d 1141, 1146 (10th Cir. 2013)); *In re SunEdison, Inc. Sec. Litig.*, 300 F. Supp. 3d 444, 487 (S.D.N.Y. 2018). The fourth IFMAT report was published on July 6, 2023. See https://www.itcnet.org/issues_projects/issues_2/forest_management/assessment.html

Indian forestry programs.[14] Exh. 7A at 6, 7. Similar findings were also published in the earlier IFMAT I and II Reports.

As part of all three IFMAT Reports, the IFMAT conducted site visits on the Yakama Reservation during which it met with Plaintiffs and reviewed conditions in the Yakama Forest. *Id*. at v.

Plaintiff Yakama Nation has close ties to the IFMAT. Plaintiff Yakama Nation has been directly involved in leadership of the Intertribal Timber Council (ITC), which is vested with authority to commission the IFMAT and oversee preparation of the IFMAT reports.[15] Specifically, Plaintiff Yakama Nation's employees have served on the ITC Oversight Review Committee for the IFMAT Reports since at least 2003. *See* Exh. 7A at v. With such intimate involvement in preparation of the IFMAT Reports, both as a participant Tribe and management officials within the ITC, Plaintiffs should be deemed aware of the contents of the reports. Thus, the IFMAT Reports should have alerted Plaintiffs to the need to investigate forest and fire management in the Yakama Forest at least 18 years prior to the filing of the Complaint in this

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[14] Any claim by Plaintiffs that the United States failed to allocate sufficient funds for forest and fire management on the Yakama Reservation, whether under P.L. 93-638 contracts or otherwise, are unavailing. The Department receives limited appropriations that must fund all forest and fire programs, functions, and services throughout Indian country. "The allocation of funds from a lump-sum appropriation is…[an] administrative decision traditionally regarded as committed to agency discretion." *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993). Thus, "[a] fundamental principle of appropriations law is that where 'Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on' the agency." *Id.* (quotation omitted).

[15] The Department of the Interior is required to obtain periodic assessments of the status of Indian forest resources and management pursuant to the National Indian Forest Resource Management Act (NIFRMA), 25 U.S.C. § 3111. The Department contracts with the Intertribal Timber Council (ITC) to oversee preparation of such assessments. Exh. 7A at 2. The ITC selects independent forestry experts to make up the IFMAT for each report and appoints an oversight committee to work directly with the IFMAT. *Id.* at 3.

case.

Third, Plaintiffs refer to the Yakama Forestry 2014 Program Review Findings and Recommendations Final Report ("Tiger Team Report"), released seven years before Plaintiffs filed suit. ECF No. 38 ¶ 14.[16] In particular, Plaintiffs cite the Tiger Team Report's findings that the "program's capacity had diminished to the point that it is on the verge of collapse" and "slash piles from past timber sales are so numerous that they are reducing the number of forested acres on the Yakama Reservation and creating a tremendous wildfire hazard." *Id.* Plaintiffs allege that despite the findings in the Tiger Team Report, the United States failed to adequately address these issues and manage the Yakama Forest "in a manner consistent with its fiduciary duties." *Id.* ¶ 15. As Plaintiffs state in the Complaint, the Tiger Team Report was prepared "in response to the concerns raised by the Yakama Nation about forest mismanagement." *Id.* ¶ 14. The Tiger Team Report demonstrates that Plaintiffs were on notice of their mismanagement claims well before the Cougar Creek Fire (August 2015) and the statute of limitations cut-off (June 2015).

And the Tiger Team Report's date is not its only evidence of claim accrual. The Report states that "[m]any of the issues identified in [the] report are not new to the BIA Yakama Agency, or the Tribe," as other "[r]eviews have taken place over the years." Exh 3. at 2. The Tiger Team Report notes that such reviews included a 2010 site visit by the BIA Central Office, 2012 review by the BIA Northwest Regional Office, and the 2013 Yakama Nation Forestry Summit. *Id.* "Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is [also] notice of everything to which such inquiry might have led." *Mitchell v. United States*, 10 Cl. Ct. 63, 68-71 (1986). Plaintiffs made several inquiries, resulting in multiple

[16] The Tiger Team Report, an official record (*see* fn. 1), is attached as Exhibit 3.

reviews and culminating in the Tiger Team Report. Exh. 3 at 2. The actions or inactions that resulted in Plaintiff Yakama Nation's inquiries evidence notice of the underlying facts and issues.

Fourth, Plaintiffs' direct involvement in the management of its forest resources shows that they had intimate knowledge of the alleged breaches giving rise to their eight pre-fire allegations well before the six-year statute of limitations cut-off on June 30, 2015. Plaintiff Yakama Nation established the management direction for its forest as set forth in the 2005 FMP and participated in other forest planning efforts. Plaintiff Yakama Nation has shared responsibility for the BIA's Forest Development, HFR, and Fire Management Programs since 1991, 2004, and 2006. *See* fn.3, *supra*.

Plaintiff Yakama Nation is therefore responsible for day-to-day management of the BIA programs for forest management planning, forest development, fuels reduction planning, fuels reduction and prescribed fire projects, biomass utilization, fire effects monitoring, fire planning, fire prevention education, pre-suppression, suppression, and fire preparedness functions, services, and activities. Plaintiffs cannot credibly argue that the Tribe's management of these programs left Plaintiffs with anything other than an in-depth knowledge and understanding of conditions in the Yakama Forest and all aspects of forest and fire management. Indeed, Plaintiffs state that "[b]y 2015 the landscape conditions in the Yakama Forest were badly deteriorated due to BIA's mismanagement and were ripe for a large, uncontrolled wildfire." ECF No. 38 ¶ 16. Implicit in this statement is Plaintiffs' acknowledgment that such alleged mismanagement occurred (and was known to the Plaintiffs) long before June 2015.

Plaintiffs may argue that their claims could not have accrued until August 10, 2015, when the Cougar Fire started. But Plaintiffs do not allege that the United States started the fire. Instead,

the relevant federal actions (or inactions) here are the alleged forest mismanagement predating the fire. "It is not necessary that the damages from the alleged [wrong] be complete and fully calculable before the cause of action accrues." *Fallini*, 56 F.3d at 1382. While the Cougar Creek Fire may be the point at which the United States' alleged breaches became most consequential to Plaintiffs, the above analysis reveals that August 10, 2015, is not the date upon which Plaintiffs' claims accrued.

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*, 631 F.3d at 1277. The fact that defendants' allegedly negligent forest management practices did not (as alleged) culminate in exacerbating the impacts of a wildfire until 2015 therefore does not relieve Plaintiffs of their obligation to bring suit when those practices became apparent. Risk-creation is itself actionable.

Analogous precedent is provided in suits seeking medical monitoring remedies. In *Donovan v. Philip Morris USA, Inc.*, 268 F.R.D. 1 (D.Mass. 2010), for example, plaintiffs were a class of smokers who had not developed lung cancer, but who sought reimbursement for medical monitoring expenses necessitated by defendants' having exposed them to increased cancer risks. Claims for medical monitoring costs by plaintiffs who are wholly non-symptomatic raise difficult policy questions, as the Court discussed in *Metro-N. Commuter R. Co. v. Buckley*, 521 U.S. 424, 438-444 (1997). But those questions do not arise here, where the United States' alleged actions and omissions are alleged to have caused several conspicuous conditions, including "forest densification, expansion of less fire adapted vegetation, and increased fuel loading," ECF

No. 38 ¶ 9; "numerous" "slash piles," *id.* ¶ 14; and "significant acreage with overly-dense stands and unhealthy forest conditions, including insects and disease and an excess of dead biomass," *id.* ¶ 16.

In cases of this kind, the statute of limitations has been held to run from the time when a plaintiff has a "significantly increased risk" of suffering disease. *Barnes v. Am. Tobacco Co*., 161 F.3d 127, 149 (3d Cir. 1998) (discussing Pennsylvania law). According to the Tiger Team Report and other documents cited in Plaintiffs' Complaint, the significantly increased fire risk caused by the United States' alleged actions and omissions dates back decades. And in medical monitoring cases, as elsewhere, the statute of limitations is "computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier." *Abbatiello v. Monsanto Co*., 522 F. Supp. 2d 524, 529 (S.D.N.Y. 2007) (applying New York Law) (citation and internal quotation marks omitted); *see also Carey v. Kerr-McGee Chem. Corp*., 999 F. Supp. 1109, 1120 (N.D. Ill. 1998) (applying Illinois law) (plaintiffs' claim for medical expenses arising from exposure to thorium tailings were time-barred because plaintiffs knew of their exposure more than two years before filing suit).

Viewing the facts in the light most favorable to Plaintiffs, the 2005 FMP, IFMAT Reports, Tiger Team Report, and P.L. 93-638 contracts demonstrate that Plaintiffs were aware of sufficient facts relating to the United States' alleged mismanagement to trigger a duty to investigate at least as early as 2005 and likely much earlier. *See Menominee Tribe*, 726 F.2d at 721 (finding that the date of accrual was when the Tribe was "capable enough to seek advice, launch an inquiry, and discover through their agents the facts underlying their current claim[s]"); *White Mountain Apache Tribe v. United States*, 2018 WL 11365074 at *5 (Fed. Cl. Jan. 5, 2018)

(finding that the Tribe's knowledge of a 2005 FMP and the IFMAT reports showed that it was aware of sufficient facts relating to its forest mismanagement claims to initiate an inquiry). Thus, Plaintiffs' eight pre-fire claims are barred by the statute of limitations.

3. Plaintiffs waived and released all claims that accrued prior to the Yakama Tribal Trust Settlement.

Even if the Court were to conclude that all of Plaintiffs' mismanagement claims are timely, the doctrines of waiver and release would still bar any of Plaintiffs' claims for alleged mismanagement that occurred prior to the Yakama Tribal Trust Settlement becoming effective on June 18, 2013. "It is axiomatic that a settlement agreement is a contract." *Greco v. Dep't of the Army*, 852 F.2d 558, 560 (Fed. Cir. 1988). "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. United States 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 2013, the United States and Yakama Nation executed a settlement agreement ("Yakama Tribal Trust Settlement") resolving breach of trust claims relating to the United States' alleged mismanagement of the Nation's monetary and non-monetary trust assets and resources. As part of the settlement, Plaintiff Yakama Nation waived and released:

> any and all claims, causes of action, obligations, and/or liabilities of any kind or nature whatsoever, known of unknown, regardless of legal theory, for any

> damages or any equitable or specific release, that are based on harms or violations occurring before the date of the Court's entry of [the] Joint Stipulation of Settlement as an order and that relate to Defendants' management or accounting of Plaintiff's trust funds or Plaintiff's non-monetary trust assets or resources.

Joint Stip. of Settlement ¶ 4, *Nez Perce Tribe, et al. v. Jewell, et al.*, No. 06-cv-2239 (D.D.C. Jun. 14, 2013), ECF No. 219 (attached as Exhibit 6). With respect to non-monetary trust assets and resources, the claims waived and released included, but were not limited to, those alleging that the United States:

- Failed to make the Yakama Nation's non-monetary trust assets or resources productive (*Id.* ¶ 4(b)(1));
- Failed to obtain an appropriate return on, or appropriate consideration for, the Yakama Nation's non-monetary assets or resources (*Id.* ¶ 4(b)(2));
- Failed to preserve, protect, safeguard, or maintain the Yakama Nation's non-monetary trust assets or resources (*Id.* ¶ 4(b)(4));
- Failed to manage the Yakama Nation's non-monetary trust assets or resources appropriately, including through the approval of agreements for the use and extraction of natural resources from the Nation's lands (*Id.* ¶ 4(b)(6));
- Failed to enforce the terms of any permits, leases, or contracts for the transfer, sale, encumbrance, or use of the Yakama Nation's non-monetary trust assets or resources (*Id.* ¶ 4(b)(7));
- Improperly or inappropriately transferred, sold, encumbered, allotted, managed, or used the Yakama Nation's non-monetary trust assets or resources (*Id.* ¶ 4(b)(10)); and
- Failed to manage the Yakama Nation's 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 arise from the United States' alleged mismanagement of Plaintiff Yakama Nation's non-monetary trust resources -- specifically, Plaintiff Yakama Nation's forest resources. In the Yakama Tribal Trust Settlement, Plaintiff Yakama Nation unambiguously waived and released any claims relating to the United States' alleged mismanagement of Plaintiff's non-monetary trust assets and resources that occurred prior to the date the court entered the Joint Stipulation of Settlement as an order. The court entered a

minute order approving the Joint Stipulation of Settlement on June 18, 2013. Accordingly, to the extent that the Complaint includes claims regarding the United States' alleged breaches of trust relating to forest and fire management activities that accrued prior to June 18, 2013, those claims are barred by the doctrine of waiver of release and must be dismissed.

CONCLUSION

Plaintiffs' Amended Complaint should be dismissed.

Respectfully submitted this 18th day of August 2023.

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