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.	No. 1:21-cv-01527-RTH

PLAINTIFFS' RESPONSE TO MOTION TO DISMISS
[ORAL ARGUMENT REQUESTED]

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I. INTRODUCTION

On August 10, 2015, lightning struck the Yakama Reservation, sparking a thick layer of duff that the United States allowed to build up on the floor of the Yakama Forest for decades. The resulting wildfire—later named the Cougar Creek Fire—spread through dense tree stands ravaged by spruce budworm and mountain pine beetle infestations, but left standing on the landscape by federal forest managers. The fire exploded through slash piles the size of semi-trucks that the United States left to rot throughout the Yakama Forest after failing to close out and clean up nearly two decades of timber sales. Thousands of acres went up in flames. The United States initially assigned firefighting resources to suppress the fire, but soon re-assigned many of those resources to other fires outside of the Reservation. The United States severely increased the wildfire risk in the Yakama Forest, failed to secure sufficient fire suppression resources, and failed to use the limited available resources to suppress the Cougar Creek Fire. As a direct and proximate result of the United States' actions and inactions, an area the size of Washington D.C. burned.

Federal statutes and regulations impose trust duties on the United States to prevent, prepare to suppress, and to suppress wildfire within the Yakama Forest. The United States has candidly acknowledged its failure to properly manage the Yakama Forest before the Cougar Creek Fire, and similarly acknowledged the increased risk of catastrophic wildfire as a direct result of its failure to manage the Yakama Forest. Regrettably, those acknowledgements were not accompanied with meaningful action to reduce the substantial and unnatural wildfire risk created by the United States before the lightning storm that caused the Cougar Creek Fire. The United States breached its trust duties and caused an unconstitutional taking of the Yakama Nation's property by choosing not to prevent and suppress the Cougar Creek Fire. The United States is

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liable to Plaintiffs in money damages for its breaches and Fifth Amendment taking of the Yakama Nation's forest resources.

The United States' 12(b)(1) and 12(b)(6) Motion to Dismiss Plaintiffs' breach of trust claims must be denied. Plaintiffs have identified substantive sources of law establishing the United States' money mandating duties to prevent, prepare to suppress, and to suppress wildfires within the Yakama Forest, and alleged that the United States has failed to faithfully perform those duties resulting in compensable damages. Plaintiffs have also alleged a facially plausible claim for breach of trust sufficient for this Court to draw reasonable inferences that the United States is liable in money damages.

The United States 12(b)(1) and 12(b)(6) Motion to Dismiss Plaintiffs' Takings Clause claim must also be denied. The Tucker Act expressly grants this Court jurisdiction over Takings Clause claims against the United States exceeding $10,000, and Plaintiffs have alleged a plausible Takings Clause claim under the two-part *Ridge Line* test. Plaintiffs alleged that the Cougar Creek Fire was the direct, natural, or probable result of the United States' failure to manage the Yakama Forest for wildfire risk, and decision to withdraw fire suppression resources from the Cougar Creek Fire (i.e. causation). These actions deprived the Yakama Nation and its Members of the ability to enjoy their property right to the Yakama Forest and the trees standing therein, to the benefit of the United States who was able to allocate those resources to other federal priorities (i.e. appropriation).

II. BACKGROUND

Plaintiff Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation") is a federally recognized Indian Tribe pursuant to its inherent sovereignty and the rights reserved in the Treaty of 1855. ECF No. 38 Ex. A, at 6. Plaintiff Yakama Forest Products ("YFP") is a

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wholly-owned subsidiary of the Yakama Nation that operates a commercial log sort yard and sawmill within the 1.4 million acre Yakama Reservation. ECF No. 38 Ex. A, at 6. YFP mills nearly all of the timber that is harvested from the Yakama Reservation's 650,000 acre forest ("Yakama Forest"). ECF No. 38 Ex. A, at 4. Trust revenues generated from YFP's operations are distributed to the Yakama Nation for governmental services, and to enrolled Yakama Members as per capita distributions. ECF No. 38 Ex. A, at 7.

The vicinity of the Cougar Creek Fire, in an area west of the Klickitat River known as "West Klickitat," was of particular commercial importance because of the old growth trees that defined the landscape. ECF No. 38 Ex. A, at 10. These commercial timber resources support an economy of loggers, truck drivers, resource managers, and the YFP sawmill, all of which are staffed almost exclusively by enrolled Yakama Members. ECF No. 38 Ex. A, at 7. Those hundreds of Yakama Members employed by the timber industry support many more in their families and the rural communities around White Swan, Glenwood, and across the Yakama Reservation. ECF No. 38 Ex. A, at 7.

No less important than the above-stated commercial and economic benefits, the Yakama Forest also serves a significant cultural purpose for the Yakama People. It is a source of the Yakama Nation's first foods—the salmon, the deer and elk, the berries, and the roots—that have sustained its People since time immemorial, just as those resources still sustain them today. ECF No. 38 Ex. A, at 7. It is a place for religious ceremonies, community gatherings, cultural practices, and recreation. ECF No. 38 Ex. A, at 7. The Yakama Nation, Yakama People, and Yakama Forest are inextricably linked through their shared history, culture, religion, economy, and modern use practices. ECF No. 38 Ex. A, at 7.

Despite the significant value of the Yakama Forest to the Yakama Nation, the United

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States has mismanaged the Yakama Forest and its timber resources for more than a century. The United States' forest health treatments have been inadequate, leading to infestations of Mountain Pine Beetle, Spruce Budworm, and Dwarf Mistletoe that stress trees and leave them more susceptible to fire. ECF No. 38 Ex. A, at 9. The United States allowed thick duff layers to build up on the forest floor, crowding out fire resistant tree species in favor of fir species that thrive in duff seed beds but are susceptible to fire when those duff beds burn. ECF No. 38 Ex. A, at 9. The United States removed huge swaths of West Klickitat from active forest management, further diminishing fuels reduction activities and dramatically increasing fuel buildup. ECF No. 38 Ex. A, at 9.

The Yakama Nation contracted the United States' Fuels Management Program in the early 2000's to conduct fuels treatments throughout the Yakama Forest, but the United States partially defunded the Fuels Management Program in 2010. Meanwhile, the United States was not closing out timber sales dating as far back as 1998, which meant that the final step of disposing slash piles on each commercial timber sale was not being completed. ECF No. 38 Ex. A, at 9. The Yakama Nation similarly contracted the United States' Wildland Fire Management Program to provide fire suppression services in the Yakama Forest, but the United States never equipped or staffed the Wildland Fire Management Program to handle so-called 'project fires' that require external federal fire suppression resources to suppress fires of the size and scope of the Cougar Creek Fire. By late-summer of 2015, the neglected landscape of West Klickitat was a tinderbox.

On August 10, 2015, a lightning strike ignited the Cougar Creek Fire. ECF No. 38 Ex. A, at 9-10. The wildfire burned through West Klickitat, ultimately damaging or destroying forest resources across more than 40,000 acres of the Yakama Reservation. ECF No. 38 Ex. A, at 10.

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When it first ignited, the United States ordered significant additional firefighting resources to suppress the wildfire. ECF No. 38 Ex. A, at 10. Within days, more than 300 firefighters were actively engaged in suppression activities under the Yakama Agency Bureau of Indian Affairs Superintendent's oversight. ECF No. 38 Ex. A, at 10. This dedication of resources did not last. ECF No. 38 Ex. A, at 10. Wildfires ignited in the northern Cascade Mountains outside the Yakama Reservation, and the United States immediately reassigned most of those firefighters to the other fires. ECF No. 38 Ex. A, at 10. The Yakama Nation was left without the necessary resources to suppress the Cougar Creek Fire, which burned through the Yakama Forest for weeks thereafter. ECF No. 38 Ex. A, at 10. As a direct result of the United States' actions, the Cougar Creek Fire burned more acres at a higher severity than it otherwise would have if the United States had managed the Yakama Forest for wildfire risk, secured sufficient firefighting resources, and diligently suppressed the Cougar Creek Fire. ECF No. 38 Ex. A, at 14.

At the time that the Cougar Creek Fire ignited, the United States knew of the significant fire risk in forests across Indian Country and specifically within the Yakama Forest. In 2013, the United States received the Indian Forest Management Assessment Team Report, which identified this significant and increasing fire risk as an ongoing breach of the United States' trust duties owed to Indian tribes. ECF No. 38 Ex. A, at 8-9. In 2014, the Bureau of Indian Affairs brought together an interdisciplinary team (the "Tiger Team") to perform an intensive review of federal management of the Yakama Forest. On January 29, 2015, the Director of the Bureau of Indian Affairs published the Tiger Team Report. ECF No. 38 Ex. A, at 8-9. In its opening paragraph, the Tiger Team Report described the federal forestry program at the Yakama Agency as being "on the verge of collapse". ECF No. 38 Ex. A, at 9. Additional findings directly addressed concerns regarding fire risk in the Yakama forest, with the Tiger Team Report noting that

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"[s]lash piles from past timber sales are so numerous that they are . . . creating a tremendous wildfire hazard", that, "all slash piles represent a threat to the Yakama forest in the form of excessive fuel loading in the event of a wildfire", that "once they start burning they prove extremely difficult to extinguish", and that "slash piles present a significant safety risk to wildland firefighters and severely complicate fire suppression efforts on the Yakama forest." ECF No. 38 Ex. A, at 9. Seven months later, a lightning strike ignited the Cougar Creek Fire. ECF No. 38 Ex. A, at 9-10.

Plaintiffs filed this case for breach of trust on June 30, 2021, less than six years following the ignition of the Cougar Creek Fire. ECF No. 1. Plaintiffs amended their complaint to assert a Fifth Amendment Takings Clause claim. ECF No. 30. Plaintiffs filed a second amended complaint to withdraw the Treaty of 1855 as a basis for Plaintiffs' claims. The United States filed a Motion to Dismiss, to which Plaintiffs now respond. ECF No. 41.

III. STANDARDS OF REVIEW

When considering a motion to dismiss under RCFC 12(b)(1), "[a] plaintiff bears the burden of establishing subject-matter jurisdiction by a preponderance of the evidence." *Inter-Tribal Council of Ariz. v. United States*, 956 F.3d 1328, 1337–38 (Fed. Cir. 2020) (quoting *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010)) (internal quotation marks omitted). "In determining jurisdiction, a court must accept as true all undisputed facts asserted in the plaintiff's complaint and draw all reasonable inferences in favor of the plaintiff." *Acevedo v. United States*, 824 F.3d 1365, 1368 (Fed. Cir. 2016) (citing *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011)). "If a Rule 12(b)(1) motion simply challenges the court's subject matter jurisdiction based on the sufficiency of the pleading's allegations—that is, the movant presents a 'facial' attack on the pleading—then those

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allegations are taken as true and construed in a light most favorable to the complainant." *Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); 2A James W. Moore et al., Moore's Federal Practice ¶ 12.07[2.-1], at 12-51 to -52 (1993)); *see also N. Hartland, L.L.C. v. United States*, 309 F. Appx. 389, 391 (Fed. Cir. 2009) (citing *Scheuer*, 416 U.S. at 236). When presented with a challenge to the Court's jurisdiction which "den[ies] or controvert[s] necessary judicial allegations . . . ," "the court may consider evidence outside the pleadings to resolve the issue." *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572 (Fed. Cir. 1996) (citing *Reynolds v. Army & Air Force Exchange Serv.,* 846 F.2d 746, 747 (Fed.Cir.1988)).

Similarly, when considering a motion to dismiss under RCFC 12(b)(6), the Court is "obligated to assume all factual allegations to be true and to draw all reasonable inferences in plaintiff's favor." *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995). The Court cannot rely on conclusory statements and legal assertions when determining whether the complaint contains sufficient allegations to plausibly claim breach of trust. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009). "A complaint should not be dismissed for failure to state a claim, 'unless the complaint fails to 'state a claim to relief that is plausible on its face.'" *Inter-Tribal Council of Ariz.*, 956 F.3d at 1338 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The complaint is facially plausible if the court can "draw the reasonable inference that the [d]efendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

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IV. ARGUMENT

A. The United States' Rule 12(b)(1) Motion to Dismiss Plaintiffs' Trust Claim must be Denied because Plaintiffs have Established that this Court has Subject Matter Jurisdiction.

1. The Supreme Court's "Two-Step" Test for Determining Whether an Indian Tribe has Properly Invoked this Court's Jurisdiction is Well-Established.

Generally, the United States cannot be sued without its consent. *U.S. v. Navajo Nation*, 556 U.S. 287, 289 (2009) ("*Navajo II*").[1] For suits brought by a federally recognized Indian tribe for monetary damages, Congress has expressly consented to being sued in the Court of Federal Claims under the Indian Tucker Act, 28 U.S.C. § 1505, and the Tucker Act, 28 U.S.C. § 1491(a). *Navajo II*, 556 U.S. at 290. The Tucker Act and the Indian Tucker Act do not create substantive rights; they are jurisdictional statutes that waive sovereign immunity for "claims premised on other sources of law . . . ." *Id.*

The Supreme Court has established a "two-part" test to determine whether an Indian tribe has properly invoked the Court of Federal Claims' jurisdiction under the Indian Tucker Act. *Inter-Tribal Council of Arizona, Inc.*, 956 F.3d at 1338 (quoting *Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015)). First, the Indian tribe must "'identify the substantive source of law that establishes specific fiduciary or other duties, and allege that the [United States] has failed faithfully to perform those duties.'" *Id.* (quoting *Navajo II*). Second, the trial court must 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

[1] The Confederated Tribes of the Colville Reservation has brought a similar action against the United States, alleging breach of trust arising out of a 2015 wildfire. *See Confederated Tribes of the Colville Reservation v. United States*, No. 21-1664. The United States has moved to dismiss that claim. The motion is currently under advisement and awaiting decision by the Court.

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imposes.'" *Id.* At the second step, the trial court may rely on common law principles of trust law to infer that Congress intended damages to remedy a breach. *Id.* (citing *Navajo II* and *United States v. Mitchell,* 463 U.S. 206, 210 (1983) ("*Mitchell II"*)).

2. *First Step*: Substantive Sources of Law Impose Fiduciary Duties on The United States to Manage and Protect the Yakama Forest From Wildfire, and the United States has Breached those Duties.

Substantive sources of law must establish specific fiduciary responsibilities that the United States owes to an Indian tribe under an explicit statutory provision. *See Inter-Tribal Council of Ariz. Inc*., 956 F.3d at 1338 ("tribes must point to specific statutes [or] regulations that 'establish the fiduciary relationship and define the contours of the [Government's] fiduciary responsibilities.'") (quoting *Shoshone Indian Tribe of Wind River Reservation, Wyo. v. United States*, 672 F.3d 1021, 1039-40 (Fed. Cir. 2012)). A statutorily created general-trust relationship between the government and the Indian tribe does not, by itself, establish fiduciary duties sufficient for Indian Tucker Act jurisdiction. *See United States v. Mitchell,* 445 U.S. 535 (1980) ("*Mitchell I"*). Plaintiff must point to specific statutory language defining the government's fiduciary role. *Navajo II*, 556 U.S. at 290.

The relevant inquiry is whether the government's statutory directive "bears the hallmarks of a 'conventional fiduciary relationship,'" with the Indian tribe. *Navajo II*, 556 U.S. at 301 (quoting *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 473 (2003)). The fiduciary responsibilities must flow from the statutory or regulatory language itself. *See Hopi Tribe*, 782 F.3d at 667 (United States is subject fiduciary duties that it "specifically accepts by statute or regulation."). The Court must "train on specific rights-creating or duty-imposing statutory or regulatory prescriptions" when considering whether the statute creates a sufficient fiduciary relationship for Indian Tucker Act jurisdiction. *United States v. Navajo Nation*, 537

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U.S. 488, 506 (2003) ("*Navajo I*").

This Court identified substantive sources of law imposing trust duties on the United States in the context of wildfire in *The Blackfeet Tribe of the Blackfeet Reservation v. United States*, No. 12-0429, Opinion and Order on Cross-Motions for Partial Summary Judgment, ECF No. 62 (Ct. Cl., issued Aug. 21, 2015 and vacated Dec. 28, 2017, ECF 183). In *Blackfeet Tribe*, the Tribe based its claims on a forest fire that started in Glacier National Park and then spread onto the Tribe's Reservation. The Tribe asserted that the Government failed to "protect and preserve Blackfeet Tribal forest trust lands," and did not perform "essential fuel treatments, timber harvesting, and forest management . . . to protect the Blackfeet Tribe's forest trust lands from the risk of wildfires," thereby failing "to conserve the economic, wildlife, recreational, aesthetic, cultural, religious, and other traditional values of the Blackfeet Tribe's forest trust lands." *Id.* at 1 (citing Compl. ¶ 31). The United States moved for summary judgment dismissal, arguing that specific fiduciary duties were not breached, and that statutes the Tribe relied upon were not money-mandating. *Id.* at 2.

In an opinion that was subsequently vacated upon the settlement of the parties (*see Blackfeet Tribe*, No. 1:12-cv-00429 at ECF No. 183), the Court rejected the United States' arguments, holding that "Supreme Court precedent is dispositive of the Government's concerns," and that *Mitchell II* is controlling. The Court further held that:

> "[t]he statutes in question specifically address the obligation of the Government to prevent "loss of values resulting from fire," 25 U.S.C. § 406(e), tree "thinning," the "use of silvicultural treatments," and "protection against losses from wildfire" through the "construction of firebreaks," 25 U.S.C. § 3103(4). See also 25 C.F.R. § 163.1 (stating the same definitions). When the statutory structure creates such a comprehensive set of responsibilities, the duties Plaintiff ascribes to the Government in its complaint are either explicitly stated or can be fairly inferred from the language of the

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> statutes. There is no basis to the Government's contention that every detail of the duties owed to the Tribe must be expressly stated in the statutes."

Id. at 3. The Court's opinion in *Blackfeet Tribe*, while later vacated and not binding on this court, contains a coherent legal analysis that Plaintiffs believe is probative here. *See, e.g., Faith Hosp. Asso. v. United States*, 225 Ct. Cl. 133, 147 n.22 (1980) (concluding that reasoning in an applicable vacated case "is certainly of persuasive value and instructive.").

Plaintiffs have filed a separate case with this Court asserting claims against the United States different than those claimed here. *See Confederated Tribes and Bands of the Yakama Nation et al. v. United States*, No. 19-1966 (Ct. Cl. Sept. 14, 2020) ("Failure to Cut Case"). Plaintiffs suggest this Court take notice of the United States' attempt to dismiss that case. In that Motion to Dismiss, the United States pointed to *Blackfeet Tribe* as an example of this Court finding that money-mandating trust duties exist in the realm of wildfire prevention and mitigation in Indian Country forests. *Id.* at ECF No. 17 at 25.

a. Comprehensive Timber Management Statutes and Regulations Impose Fiduciary Duties on the United States to Manage and Protect the Yakama Forest from Wildfire.

Numerous federal statutes and regulations impose fiduciary duties on the United States to manage and protect the Yakama Forest from wildfire, including the 1910 Act, 25 U.S.C. § 5109 (formerly 25 U.S.C. § 466), the National Indian Forest Resources Management Act (NIFRMA), and the General Forestry Regulations, 25 C.F.R. Part 163, promulgated by Interior. ECF No. 38 Ex. A, at 11-13. The Supreme Court has already determined that the 1910 Act, 25 U.S.C. § 5109, and Interior's General Forestry Regulations establish "'comprehensive' responsibilities" of the United States in "managing the harvesting of Indian timber." *Mitchell II*, 463 U.S. at 222. Wildfire prevention and suppression is (and has been since before *Mitchell II*) an express

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component of the United States' comprehensive forest management duties. *See, e.g.,* 25 U.S.C. §§ 3103(4)(D), 3104(a); 16 U.S.C. § 594; 25 C.F.R. § 163.28.

Congress passed NIFRMA after, and partially in response to, the *Mitchell II* decision. *See* S. Rep. No. 101-402, at 5, 6 (1990) (providing that S. 1289 was in response to a need to "clearly define the federal trust responsibility for management of Indian forest resources") (provided at Decl. of Ethan Jones in Support of Pls. Resp. to Mot. To Dismiss, Ex. F (February 18, 2023) ("Jones Decl.")); H.R. Rep. No. 101-835, at 15 (1990) (noting the "sweeping findings" of the *Mitchell II* case and the committee's intention for S. 1289 to "better enable the United States to meet its existing trust responsibility . . .") (provided at Jones Decl. Ex. G). NIFRMA did not alter the trust responsibility of the United States toward Indian forest lands after *Mitchell II*; rather, it expressly recognized that "the United States has a trust responsibility toward Indian forest lands," and "existing Federal laws do not sufficiently assure the adequate and necessary trust management" of those lands. 25 U.S.C. § 3101(2), (3). Its express purpose, therefore, was to allow the Secretary to take part in the management of Indian forest lands "in a manner consistent with the Secretary's trust responsibility . . . ." 25 U.S.C. § 3102(1).

The United States' specific fiduciary duties owed to the Yakama Nation in preventing and suppressing wildfires within the Yakama Forest are plainly contained in federal statutes and regulations. ECF No. 38 Ex. A, at 11-13. Those duties include the **duty to manage** the Yakama Forest so as to prevent wildfire risk, *see* 25 U.S.C. §§ 196, 406-407, 3103(4)(D), 3104, 5109; 16 U.S.C. § 594; and 25 C.F.R. Part 163; the **duty to prevent** wildfires throughout the Yakama Forest, *see* 25 U.S.C. §§ 3103(4)(D), 3104, 5109, and 25 C.F.R. Parts 163.1, 163.10(a), 163.28; the **duty to prepare** to suppress wildfires within the Yakama Forest, *see* 25 U.S.C. §§ 3103(4)(D), 3104, 5109, and 25 C.F.R. Parts 163.1, 163.10(a), 163.28; and the **duty to suppress**

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wildfires that occur throughout the Yakama Forest, *see* 25 U.S.C. §§ 3103(4)(D), 3104, 5109, and 25 C.F.R. Parts 163.1, 163.10(a), 163.28.

Those comprehensive duties fall within the comprehensive federal forest management framework that was recognized by the Supreme Court in *Mitchell II* and codified in NIFRMA. The United States has breached those fiduciary duties to Plaintiffs in the manner set forth in Section IV(A)(2)(b), below.

b. The United States Breached its Fiduciary Duties to Manage and Protect the Yakama Forest From Wildfire.

The United States breached its fiduciary duties to prevent and suppress wildfire within the Yakama Forest. Plaintiffs allege that the United States recognized the need for appropriate management activities to reduce wildfire risk in the Yakama Forest in the 2005 Forest Management Plan, but failed to take those management actions. ECF No. 38 Ex. A, at 8. Plaintiffs allege that the United States acknowledged the Yakama Forest's increasing wildfire risk in the 2013 Indian Forest Management Assessment Team Report, and in the Yakama Forestry 2014 Review Findings and Recommendations, but failed to take action to address this increasing wildfire risk. ECF No. 38 Ex. A, at 8-9. Specifically, Plaintiffs allege that the United States "failed to adequately address the substantial fire hazard, manage accumulating fuel loads, remove accumulated biomass, defend against insects and disease, dispose of slash piles from past timber sales, perform essential fuel treatments such as thinning and prescribed burning, construct adequate firebreaks, carry out adequate timber harvests . . . , adequately analyze the wildfire risk, prepare and plan for its wildfire response, or acquire necessary fire-fighting and detection equipment." ECF No. 38 Ex. A, at 9. Further, Plaintiffs allege that the United States breached its trust duties by failing "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[,]" and by redirecting "necessary

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fire suppression resources away from the Yakama Forest to other areas in the region, leaving the Forest exposed and vulnerable to the escalating damage." ECF No. 38 Ex. A, at 10.

As more fully set forth in Plaintiffs' Amended Complaint, ECF No. 38 Ex. A, at 11-13, these failures breached the United States' duties owed to Plaintiffs to protect the Yakama Forest from wildfires, prepare to suppress wildfires within the Yakama Forest, and actually suppress those wildfires when they ignite. When the Cougar Creek Fire ignited in 2015, it did not burn through a healthy, well-managed forest. Plaintiffs contend that had the United States met its fiduciary duties to the Yakama Nation leading up to the Cougar Creek Fire, low fuel loads and sufficient firefighting resources would have minimized both the intensity of the wildfire and the number of acres burned. The United States did not meet its fiduciary obligations, though. The wildfire burned the Yakama Forest at a much higher severity, and burned far more acres than it otherwise would have. ECF No. 38 Ex. A, at 14. Plaintiffs have identified substantive sources of law establishing the United States' duties to prevent and suppress wildfire in the Yakama Forest, and have alleged that the United States' breached those duties, thereby satisfying the first step of the *Navajo II* test for invoking this Court's jurisdiction under the Indian Tucker Act. ECF No. 38 Ex. A, at 10-14.

3. *Second Step*: The United States' Fiduciary Duties to Manage and Protect the Yakama Forest from Wildfire Mandate Compensation to Plaintiffs for the United States' Breaches of those Duties.

The second step of the *Navajo II* test requires plaintiffs to demonstrate that these fiduciary duties specifically flow from a substantive source of law that is money-mandating. *See White Mountain Apache,* 537 U.S. at 472. The "other source of law need not explicitly provide that the right or duty it creates is enforceable through a suit for damages." *Navajo II*, 556 U.S. at 290. The statute and regulations must be such that they "can fairly be interpreted as mandating

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compensation" by the United States for the damage sustained. *Roberts v. United States* 745 F.3d 1158, 1162 (Fed. Cir. 2014) (quoting *White Mountain Apache Tribe*, 537 U.S. at 472); *see also White Mountain Apache Tribe*, 537 U.S. at 480 (dispositive question is whether substantive source of law is "*fairly interpreted* to mandate compensation" (emphasis added)).

In the second step of the *Navajo II* analysis, the Court can look to common law trust principles when considering whether the statute provides for damages as a remedy for breach. *Inter-Tribal Council of Ariz. Inc.*, 956 F.3d at 1338. These common law principles may inform the "interpretation of statutes and to determine the scope of liability that Congress has imposed." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011). Principles of trust law can be relevant in drawing the inference that Congress intended damages to remedy a breach. *See Navajo II*, 556 U.S. at 291.

Relying on *Mitchell II*, the Federal Circuit in *The Confederated Tribes of Warm Springs Reservation of Oregon v. United States,* 248 F.3d 1365, 1370 (Fed. Cir. 2001), reaffirmed that those forest management statutes that Plaintiffs rely upon here are money mandating. The Court observed that "[t]ribes that own timber managed by the federal government enjoy the right of an injured beneficiary to seek damages for alleged breaches of the fiduciary obligations that are defined by the statutes and regulations that give the federal government the responsibility to manage Indian timber resources for the Indians' benefit." *Id.*

The Supreme Court did not address the implications of NIFRMA in its *Mitchell II* decision because Congress did not enact the law until 1990—seven years after the decision. Congress passed NIFRMA partially in response to *Mitchell II*. S. Rep. No. 101-402, at 5, 6 (1990) (provided at Jones Decl. Ex. F); H.R. Rep. No. 101-835, at 15 (1990) (provided at Jones Decl. Ex. G). Congress was no doubt aware of the claims for monetary damages arising from

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trust actions that tribes and individual Indian allottees were pursuing successfully against the United States under the 1910 Act and 25 C.F.R. Part 163. Congress, however, chose not to limit those claims and remedies when passing NIFRMA. To the contrary, it expressly provided that nothing in NIFRMA 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*," thus leaving in place the money-mandating duties and corresponding remedies recognized in *Mitchell II*. 25 U.S.C. § 3120 (emphasis added).

Interior itself recognizes the fiduciary duties Congress has imposed on it, which guide the discharge of its "responsibilities for the management and protection of trust Indian forest lands," including policies for forest management planning on Indian forest lands. Jones Decl. Ex. H, at 1. Interior has also adopted guidance for management of Indian trust assets, including Indian forest lands. Jones Decl. Ex. I. It is the policy of Interior to "discharge, without limitation, the Secretary's Indian trust responsibility" on Indian forest lands "with a *high degree of skill, care, and loyalty*." Jones Decl. Ex. I, at 2.

Plaintiffs' claim for breach of trust relating to the Cougar Creek Fire is based, in part, on the same comprehensive statutory and regulatory framework governing Indian-forest management—the 1910 Act, 25 U.S.C. § 5109, and Interior's General Forestry Regulations—that the Supreme Court reviewed in *Mitchell II* and concluded to be money mandating. *Compare Mitchell II*, 463 U.S. at 222, *with* ECF No. 38 Ex. A, at 11-13. The other statutes and regulations that Plaintiffs' rely upon only further strengthen the United States' trust duties to manage and suppress wildfires in Indian forests. ECF No. 38 Ex. A, at 11-13 (relying on, in relevant part, 25 U.S.C. §§ 196, 3103, 3104; 16 U.S.C. § 594; and 25 C.F.R. §§ 163.1, 163.10, 163.28, 163.31).

Plaintiffs have identified specific federal money-mandating fiduciary duties to prevent

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and suppress wildfire in the Yakama Forest, and conclusively alleged breaches of those fiduciary duties. The United States' Rule 12(b)(1) motion must be denied.

B. The United States' Rule 12(b)(6) Motion to Dismiss Plaintiffs' Trust Claim must be Denied because Plaintiffs have Stated a Plausible Claim for Relief.

A complaint should only be dismissed for failure to state a claim if it fails "to state a claim to relief that is plausible on its face." *Inter-Tribal Council of Arizona,* 956 F.3d at 1338. If the Court denies the United States' Rule 12(b)(1) motion, it should also deny its Rule 12(b)(6) motion because the Court will have necessarily concluded that Plaintiffs have stated a plausible claim for relief. The Court will have determined that Plaintiffs have identified substantive sources of law imposing fiduciary duties on the United States to prevent, prepare to suppress, and to suppress wildfires within the Yakama Forest, and that Plaintiffs have alleged that the United States breached those fiduciary duties. The Court will have also concluded that the breaches of those fiduciary duties give rise to a claim for money damages under the Indian Tucker Act. The United States seems to concede that this Court's decision denying the United States' Motion to Dismiss in Plaintiffs' separate Failure to Cut Case undermines any argument that Plaintiffs have failed to state a claim for relief under the suite of applicable federal forestry statutes. ECF No. 41 at 31-32. The United States contends, however, that those statutes "do not create standalone money-mandating duties for fire prevention and suppression." *Id.* at 38. It supports this contention by pointing out where statutes do not specifically mention "fire," and by minimizing the significance of the provisions that do. *Id.* at 38. It fails, however, to provide a satisfactory reason to carve out the United States' responsibilities for fire prevention, management, and response from the money-mandating duties that—as this Court noted in the Failure to Cut Case—"the Supreme Court found created jurisdiction in *Mitchell II."*

Confederated Tribes and Bands of the Yakama Nation et al. v. United States, No. 19-1966, ECF

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No. 31 at 23 (Ct. Cl. May 28, 2021).

Plaintiffs' claims are supported by the comprehensive federal timber management regulations. 25 C.F.R. § 163.10(a) states that the "Secretary shall undertake forest land management activities on Indian forest land . . . ." The phrase "forest land management activities" is defined in 25 C.F.R. § 163.1 to include "[p]rotection 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." This regulatory scheme mirrors the applicable statutory scheme in 25 U.S.C. §§ 3104(a) and 3103(4)(D), and plainly details the United States' duty to prevent and suppress wildfires within the Yakama Forest.

The United States cites *Evans v. United States*, 107 Fed. Cl. 442, 450 (Ct. Cl. 2012), for the proposition that definitions do not create money mandating duties. In *Evans*, this Court dismissed a pro se plaintiff's challenge to the United States' probate of his deceased mother's will. 107 Fed. Cl. 442. The plaintiff's claims were based, in relevant part, on a statute and regulation—25 U.S.C. § 372(a)(1)(A) and 25 C.F.R. § 15.2—both of which offer definitions related to Indian probate proceedings. *Id.* at 450-51. In analyzing those definitions for the presence of money mandating trust duties, the Court reasoned that "definitions do not *by themselves* grant this, or any other plaintiff, independent rights." *Id.* at 450 (emphasis added). Unlike *Evans*, Plaintiffs do not offer 25 C.F.R. § 163.1—a series of definitions relevant to tribal forestry—as the sole source for the existence of a money mandating trust duty here. Rather, the comprehensive timber management statutes and regulations establish the United States' trust duties. For example, 25 C.F.R. § 163.10(a) contains a money-mandating trust duty to undertake certain "forest land management activities," which are defined in 25 C.F.R. § 163.1. This

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regulatory trust duty derives from the agency's delegated authority under NIFRMA, which affirmed the money mandating trust duties recognized in *Mitchell II.* In other words, unlike *Evans*, the definitions in 25 C.F.R. § 163.1 are clearly actionable insofar as they define terms in a separate regulation that establishes a money mandating trust duty.

25 C.F.R. §§ 163.28 and 163.31 are also relevant in that they are intended to "implement the provisions of the National Indian Forest Resources Management Act." General Forestry Regulations, 60 Fed. Reg. 52,250 (Oct. 5, 1995) (codified at 25 C.F.R. Part 163). Section 163.28 sets forth the types of activities that the Secretary is authorized to undertake in carrying out its trust duties set forth in 25 U.S.C. § 3104(a) and 25 C.F.R. § 163.10(a). This comprehensive regulatory framework further informs the trust duties, discussed above, that the United States must prevent and suppress wildfires within the Yakama Forest. Plaintiffs have alleged a plausible claim for relief, and the United States' Rule 12(b)(6) motion to dismiss Plaintiffs' trust claims should be denied.

C. The United States' Claim Splitting Argument is Wrong and Should be Rejected.

The United States asserts that the prohibition against claim-splitting precludes litigating claims in this action because of Plaintiff's separate Failure to Cut Case currently pending before this Court. The concept of "claim splitting" is best viewed through the lens of the claim preclusion doctrine as the two are closely related. *Alyeska Pipeline Service Co. v. United States,* 231 Ct. Cl. 540, 545-48 (1982) (discussing claim splitting synonymously with claim preclusion). Claim preclusion generally bars the litigation of matters that could have been litigated in an earlier action. *Phillips/May Corp. v. U.S.*, 524 F.3d 1264, 1267 (Fed. Cir. 2008). Claim preclusion applies when "(1) the parties are identical or in privity; (2) the first suit proceeded to a final judgment on the merits; and (3) the second claim is based on the same set of transactional

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facts as the first." *Id.* at 1268 (quoting *Ammex, Inc. v. United States*, 334 F.3d 1052, 1055 (Fed.Cir.2003)). There is no dispute that the parties to this action are identical to the parties in the Failure to Cut Case. However, even if the United States could establish that this action is based on the same transactional facts as the Failure to Cut Case, claim preclusion would not bar this action because there is no final judgment on the merits in the Failure to Cut Case. *See id.* (claim preclusion requires final judgment on the merits in the first suit).

The United States cites no case that holds otherwise. With the lone exception of *Lea v. United States*, 120 Fed. Cl. 440 (Fed. Cl. 2015), each of the United States' cited cases involved application of the claim preclusion doctrine to prior actions that were fully resolved by a final judgment or consent decree. *See Mars Inc. v. Nippon Conlux Kabushiki-Kaisha*, 58 F.3d 616 (Fed Cir. 1995) (applying doctrine after final judgment); *Foster v. Hallco Mfg. Co.*, 947 F.2d 469 (Fed. Cir 1991) (applying doctrine after consent decree); *Alyeska Pipeline Service Co.,* 688 F.2d 765 (applying doctrine after final judgment); *Gregory v. Chehi*, 843 F.2d 111 (3rd Cir. 1988).

As for *Lea*, there the plaintiff filed several lawsuits in district court challenging the foreclosure of his property, all of which were dismissed. 120 Fed. Cl. at 443. The plaintiff then filed suit in this Court, again challenging the foreclosure of his property. *Id.* The United States moved to dismiss the complaint, and shortly before the court issued its ruling, the plaintiff, acting pro se, filed another action in this Court, which the United States also sought to dismiss. *Id.* Relying on its "broad discretion" to manage and control litigation pending before it, the Court dismissed the action without prejudice after determining that the subsequent action was "duplicative" of the first action. *Id.* at 446-47.

This present action is not "duplicative" of the Failure to Cut Case. The Failure to Cut Case arises out of the United States' failure, in short, to ensure the maximum sustainable harvest

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for the timber located on the Yakama Forest. Failure to Cut Case, ECF No. 1 at 1, 5. There, Plaintiffs specifically allege that the United States breached its fiduciary duties by failing to prepare and approve sufficient timber sales by failing to provide an adequate timber supply for Yakama Forest Products, and by failing to manage the Yakama forestry program in a manner that would allow the Yakama Nation to not only receive the stumpage value from its forest lands, but also the benefit of all labor and profit that the Yakama Forest is capable of yielding. *Id.*

In contrast, here Plaintiffs' trust claim arises out of the United States' failure to adequately maintain and protect the Yakama Forest and its resources from damages caused by the 2015 Cougar Creek Fire. ECF No. 38 Ex. A, at 4, 13. Plaintiffs allege that the United States breached its money mandating trust duties with respect to forest management, fire prevention, fire planning, fire suppression, and did not take steps reasonably necessary to protect the Yakama Forest from loss by wildfire. *Id.*

To the extent that the Court is concerned about the potential overlap between the Failure to Cut Case and this case, it should invite the parties to address whether the actions should be consolidated, in whole or in part, but only after ruling on the pending Motion to Dismiss. *See* RCFC 42 (if actions involve common question of law or fact, court may consolidate actions or issue any other order to avoid unnecessary cost or delay); s*ee also Walton v. Eaton Corporation*, 563 F.2d 66 (3rd Cir. 1977) (applying principle). Consolidation, at least in part, could promote judicial economy and minimize delay. Plaintiffs, however, believe that such determination is premature and respectfully ask that the Court decline to address this issue until after it rules on the pending Motion to Dismiss.

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D. Plaintiffs' Claim For Breach of Trust Is Not Barred By The Statute of Limitations or the Yakama Tribal Trust Settlement.

1. This Action is Not Barred By The Statute of Limitations.

The United States argues that a portion of Plaintiffs' breach of trust claim is barred by a six-year statute of limitations. ECF No. 41 at 41-51. The Court should reject this argument.

Tribal trust claims are generally subject to a six-year statute of limitations. 28 U.S.C. § 2501; *see also Hopland Band of Pomo Indians v. United States (Hopland)*, 855 F.2d 1573, 1576 (Fed.Cir.1988). The statute of limitations begins to run when the "claim first accrues." 28 U.S.C. § 2501. A claim first accrues "when all the events which fix the government's alleged liability have occurred and the plaintiff was or should have been aware of their existence." *Hopland*, 855 F.2d at 1577. Critically, in order for a claim to accrue, the plaintiff must have suffered damages. *Rosebud Sioux Tribe v. United States*, 75 Fed. Cl. 15, 24 (2007). This damages requirement makes sense, because without accrued damages there would be no justiciable controversy giving this Court jurisdiction over an ostensible claim for breach of trust. *See, e.g., Madison Services, Inc. v. U.S.*, 90 Fed. Cl. 673, 677-78 (2009) (case or controversy requirement applies to the Court of Federal Claims). Without actual damages, an alleged claim would not be "ripe," because it would rest on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998).

Plaintiffs allege their actual damages accrued when the Cougar Creek Fire ignited on August 10, 2015. Less than six years later, Plaintiffs filed its Complaint on June 30, 2021. ECF No. 1. All of the damages alleged in the Complaint (subsequently amended) were caused by the Cougar Creek Fire and occurred within the applicable six-year statute of limitations. ECF No. 38 Ex. A, at 14; *see also* RCFC 15(c). Plaintiffs' claim for breach of trust is, thus, not barred by the

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statute of limitations. *Rosebud Sioux Tribe*, 75 Fed. Cl. at 24.

Defendant relies on the Federal Circuit's decisions in *San Carlos Apache Tribe v. United States* to argue that Plaintiffs cannot wait until the full measure of damages are known to file their claims. ECF No. 41 at 49. To the contrary, *San Carlos Apache* makes clear that claim accrual occurs when all of the facts relevant to the Tribe's claim are known. *San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1354 (Fed. Cir. 2011). In that case, the Federal Circuit held that the Tribe knew all relevant facts to accrue its claim in 1935 when the United States negotiated and entered a decree expressly depriving the Tribe of access to water rights in the Gila River beyond the terms of the decree. *Id* at 1355. The Federal Circuit reasoned that in 1935, the Tribe knew all of the facts necessary to accrue the claim that it ultimately filed in 2009. *Id.*

The harm caused Cougar Creek Fire is an essential element of Plaintiffs' breach of trust claim. The claim, thus, did not accrue (because it could not) until the harm occurred on and after August 10, 2015. While some of the federal actions that exacerbated Plaintiffs' wildfire damages occurred more than six years before the filing of this suit, Plaintiffs did not actually incur those damages until the Cougar Creek Fire ignited. Plaintiffs are not arguing that the statute of limitations began to run when the full measure of damages was fixed—e.g., when the fire had been extinguished weeks after August 10, 2015, or after all salvage logging had been completed, or at any other time when the harm resulting from the fire has ceased or will cease. The Cougar Creek Fire ignited on August 10, 2015, at which point the six-year statute of limitations began to run. Plaintiffs filed suit within the six-year statute of limitations.

The United States nonetheless argues that Plaintiffs' claim accrued, at least in part, before the wildfire started and before Plaintiffs suffered any damages. The United States is incorrect. There is no logical support for the position that the statute of limitations would require wildfire

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plaintiffs to file their complaint before suffering damages caused by the wildfire. *See Portland Mint v. United States*, 160 Fed. Cl. 642, 662-63 (Fed. Cir. 2022) (courts should avoid construing statutes in manner that "causes absurd results" if possible). The United States' argument stands directly counter to traditional notions adopted by this Court that the accrual of a justiciable claim is predicated on the existence of actual damages. *Rosebud Sioux Tribe*, 75 Fed. Cl. at 24.

The United States also mischaracterizes the allegations in Plaintiffs' Amended Complaint by asserting that each of the allegations of breach in paragraph 22(a)-(j) are independent claims for relief that accrue for statute of limitations purposes as of the date of the breach. ECF No. 41 at 43, 48, 51 (multiple references to Plaintiffs' "eight pre-fire claims"). Plaintiffs' breach of trust claim is a single claim. ECF No. 38 Ex. A, at 10-14. Plaintiffs have included allegations regarding prima facie element for breach of trust—that is, duty, breach, causation, and damages. *Id.* The allegations relating to the United States' fiduciary duties are in paragraphs 20 and 21. The allegations of the United States' breach of those duties are in paragraphs 20 and 22, and the allegations relating to causation and damages are in paragraphs 20, 23-25. It is not legally correct for the United States to characterize each allegation of a breach of fiduciary duty to be a separate cause of action that accrues simply upon a breach of the duty but without resulting damages. *Rosebud Sioux Tribe*, 75 Fed. Cl. at 24. None of the cases cited by the United States support a contrary conclusion. ECF No. 41 at 49-51 (relying on cases decided outside this Court, interpreting state statutes and state court precedent, and addressing plainly distinguishable fact patterns related to tobacco and medical claims).

2. In the Alternative, the Continuing Claims Doctrine Applies to this Action.

Plaintiffs' Complaint was timely filed and their claims are not barred by the applicable six-year statute of limitations for the reasons stated above. However, should this Court find that

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Plaintiffs' claims accrued prior to June 30, 2015, the statute of limitations still does not preclude Plaintiffs' claims under the continuing claim doctrine.

As a general rule, the continuing claim doctrine contemplates that certain claims, which are "inherently susceptible to being broken down into a series of independent and distinct events or wrongs, each having its own associated damages," can survive the six-year statute of limitations as to those events or wrongs falling within the limitations period. *Kan. City Power & Light Co. v. United States*, 143 Fed. Cl. 134, 144 (2019) (internal quotations omitted). "The rationale underlying the continuing claim doctrine . . . is that it prevents the defendant from escaping all liability for its wrong and thus acquiring a right to continue its wrongdoing, while retaining intact the 6-year statute of limitations set forth by Congress in Section 2501." *Hopland,* 855 F.2d at 1581 (internal quotations omitted).

The continuing claim doctrine has been uniquely applied in the tribal forestry context to preserve tribal claims that are based in the United States' statutorily-prescribed continuing duties. In *Mitchell v. United States*, the Court reconsidered and reversed its prior decision dismissing tribal breach of trust claims on statute of limitations grounds. *Mitchell v. United States,* 10 Cl. Ct. 787 (1986). In reversing its decision, the Court looked to the statute at issue and found that Congress imposed a continuing duty on the United States to maintain Indian forest lands in a state of continuous productivity. *Id. at* 788. The Court reasoned that "the existence of a continuing duty to regenerate means that on each day the BIA failed in its duty to regenerate a given stand, there arose a new cause of action." *Id*. In other words, where Congress imposes an express continuing duty on the United States to manage Indian forest lands, a new cause of action accrues each day that the United States breaches that continuing duty.

Similar to *Mitchell*, the continuing claim doctrine applies here. The United States has

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statutorily prescribed continuing duties to manage the Yakama Forest in a perpetual state of production—including the prevention, management, and suppression of wildfires—the continuous breach of which accrues a new cause of action each day. Plaintiffs' Amended Complaint sets forth these statutorily prescribed duties at length. ECF No. 38 Ex. A, at 10-14. For example, in the context of the federal duty to manage fire risk, 25 U.S.C. § 3104(a) provides that the Secretary "shall undertake forest land management activities on Indian forest land . . . ." The term "forest land management activities" is defined to include "protection against losses from wildfire, including acquisition and maintenance of fire fighting equipment and fire detection systems, construction of firebreaks, hazard reduction, prescribed burning, and the development of cooperative wildfire management agreements . . . ." 25 U.S.C. § 3103(4)(D). By its plain language, this statutory fire risk management duty is both mandatory and continuing in the same way that the continuing duty operated in *Mitchell*.

Consistent with this Court's precedent, the breach of such a continuing duty accrues a new claim each day. The United States concedes that Plaintiffs' Complaint was filed less than six years after the Cougar Creek Fire. ECF No. 41 at 42. Accordingly, under the continuing claim doctrine, Plaintiffs' accrued a new trust mismanagement on the day that the Cougar Creek Fire ignited, and each day thereafter. Even if the Court were to accept the United States' argument that claims prior to June 30, 2015 are waived, Plaintiffs' continuous accrual of claims post June 30, 2015 is sufficient to maintain the present suit within the statute of limitations.

3. The Yakama Nation Tribal Trust Settlement Does Not Bar This Suit.

The United States argues that Plaintiffs have waived and released any claims "relating to the United States' alleged mismanagement of [the Yakama Nation's] non-monetary trust assets and resources . . ." through a June 18, 2013 settlement. ECF No. 41 at 51. Plaintiff Yakama

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Forest Products was not a party to that settlement and is not bound by its terms, but regardless, the settlement was not fashioned in a way to restrict prospective claims, and this present action alleges damages arising from the 2015 Cougar Creek Fire that fall outside the applicable settlement period. The Joint Stipulation of Settlement waives and releases:

> "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 the date of the Court's entry of this 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, *Nez Perce Tribe, et al., v. Kempthorne,* No. 06-cv-2239 (D.D.C. June 18, 2013), ECF 279 (emphasis added).

In accordance with the express language of the stipulation, therefore, Plaintiff Yakama Nation only released claims for damages based on harms suffered *before* the Court's June 18, 2013 entry of the stipulation. The harms caused by the Cougar Creek Fire were all incurred more than two years later—on August 10, 2015 and the subsequent days of the conflagration. The Court should summarily reject this argument.

E. *Navajo III* Is Not Relevant To This Case.

The United States Supreme Court's recent decision in *Arizona v. Navajo Nation*, 143 S. Ct. 1804 (2023) (hereafter "*Navajo III*"), is not relevant to this case. *Navajo III* addressed whether an 1868 Treaty between the United States and the Navajo Nation obligated the United States to quantify the Navajo Nation's on-reservation water rights such that the Navajo Nation could secure an affirmative injunction against the United States in federal district court. *Navajo III*, 143 S. Ct. at 1810. In rejecting the Navajo's claim, the Supreme Court extended the first step of the two-part jurisdictional test under the Indian Tucker Act to Treaty-based trust claims that

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seek injunctive relief against the United States in district court. *Id.* at 1813. It did not, however, change the jurisdictional test applicable to this case in any way. The Supreme Court did not alter the legal analysis for determining whether a federal trust duty owed to Tribes constitutes a general trust, a bare or limited trust, or a conventional trust to which common law trust duties attach. *Id.* at 1814. Nor does *Navajo III* expressly or even implicitly overrule *Mitchell II*, does not address the comprehensive statutory and regulatory scheme underlying *Mitchell II*, or interpret NIFRMA in any way. Rather, *Navajo III* merely represents an example of Treaty interpretation in a narrow context far afield from this case—where an Indian tribe sought an affirmative injunction obligating the United States "*to take affirmative steps*" to secure on-reservation water rights, rather than "simply not *interfere* with the reserved water rights." *Id.* at 1812 (emphasis in original).

Navajo III is materially distinguishable from this case. Plaintiffs are not raising Treaty-based claims, seeking injunctive relief, or vindicating water rights. *See* ECF No. 38 Ex. A. Plaintiffs' Second Amended Complaint identifies duty-creating language in federal statutes and regulations that fall squarely within (1) the comprehensive legal framework recognized in *Mitchell II* as establishing a conventional trust between the United States and Indian Tribes concerning Indian forest management, and (2) the statutory and regulatory scheme enacted by Congress to further specify those comprehensive trust duties (i.e. NIFRMA and its implementing regulations). ECF No. 38 Ex. A, at 10-14. The United States appears to be seeking to expand the scope of *Navajo III* far beyond a reasonable interpretation of its holding—as somehow overruling *Mitchell II*'s recognition that Congress can and has established a conventional trust for the management of Indian forests, including wildfire management. ECF No. 41 at 33. Relying on this baseless expansion, the United States asks this Court to treat its forest

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management duties as a limited or bare trust that does not mandate money damages for breach, despite decades of precedent to the contrary. ECF No. 41 at 32-33. The United States uses *Navajo III* as a vehicle to reassert the arguments already existing elsewhere in its brief, but a fair reading of *Navajo III* simply offers no support to the United States' argument that it is relevant to the facts and claims presented in this case.

1. *Navajo III* Does Not Change the Court's Two-Part Test for Analyzing Indian Tucker Act Jurisdiction.

Navajo III briefly sets forth the first element of the two-part test for analyzing this Court's Indian Tucker Act jurisdiction in a manner that is both consistent with existing law, and not in dispute between the parties. 143 S. Ct. at 1813 ("[t]he Federal Government owes judicially enforceable duties to a tribe only to the extent it expressly accepts those responsibilities," the analysis of which "must train on specific rights-creating or duty-imposing language in a treaty, statute, or regulations." (internal quotations omitted)); *accord. Mitchell II*, 463 U.S. at 216-17 ("[a] substantive right must be found in some other source of law, such as the Constitution, or any Act of Congress, or any regulation of an executive department." (internal quotations omitted)); *supra* Section IV(A)(1); ECF No. 41 at 30. Even the four dissenting justices in *Navajo III* agree with the majority's recitation of the first element of this two-part jurisdictional test (although they persuasively contend that the test is not applicable to the facts presented in that case). *Navajo III*, 143 S. Ct. at 1830 (Gorsuch, J., dissenting). *Navajo III* does not change this Court's two-part test for identifying its jurisdiction under the Indian Tucker Act.

The only place where the Supreme Court treads new ground in *Navajo III* is in the Court's novel application of the Indian Tucker Act's jurisdictional test. *Navajo III*, 143 S. Ct. at 1813-14. The Supreme Court engaged in a strict interpretation of an Indian Treaty that is inconsistent with the Court's well-established Indian canons of treaty interpretation and deep

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body of precedent interpreting Indian treaties, *Navajo III*, 143 S. Ct. at 1825-28 (Gorsuch, J., dissenting). *Navajo III* cannot reasonably be viewed as more than a narrow decision applicable only where a tribe seeks injunctive relief against the United States to affirmatively secure on-reservation water rights under the specific language of a treaty. The Yakama Nation is not raising treaty-based arguments, seeking injunctive relief, addressing water rights, or otherwise raising claims that are in any way comparable to those at issue in *Navajo III*. *Navajo III* is not relevant to this case.

2. *Navajo III* Does Not Interpret, Overrule, or Modify in Any Way Either *Mitchell II* or NIFRMA.

The United States points to *Navajo III*, and specifically Justice Clarence Thomas's concurrence, in an attempt to undermine *Mitchell II*. ECF No. 41 at 33. *Navajo III* does not cite or discuss *Mitchell II*, and no other justice joined Justice Thomas's concurrence. *Navajo III*, 143 S. Ct. 1804. The Supreme Court was focused on whether the Navajo Nation's 1868 Treaty established an affirmative federal duty above and beyond the federal government's general trust duty to tribes (*i.e.* a limited or bare trust), and found that the 1868 Treaty did no such thing. *Id.* at 1814. In contrast, *Mitchell II* addressed a comprehensive body of statutes and regulations that "clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians . . . thereby establish[ing] a fiduciary relationship . . . ." *Mitchell II*, 463 U.S. at 224. The facts and legal analysis underlying the conventional trust recognized in *Mitchell II* are plainly distinguishable from *Navajo III*, so it is unsurprising that the Supreme Court did not address *Mitchell II* directly. *Mitchell II* remains not only good law, but a cornerstone of Indian trust cases—having been cited in thousands of cases across every circuit and this Court. If the Court had intended to somehow overrule *Mitchell II* it would have done so expressly, rather than leaving litigants to guess as to whether a seminal case remains good law or

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not. *See Shalala v. Illinois Council on Long Term Care, Inc.,* 529 U.S. 1, 18 (2000) ("[t]his Court does not normally overturn, or . . . dramatically limit, earlier authority *sub silentio*."); *Agostini v. Felton,* 521 U.S. 203, 237 (1997) ("[t]he Court neither acknowledges nor holds that other courts should ever conclude that its more recent cases have, by implication, overruled an earlier precedent. Rather, lower courts should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). *Mitchell II* has not been overruled by implication, as the United States suggests.

The United States also argues that *Navajo III* "disposes of Plaintiffs' argument that [NIFRMA] creates the enforceable trust duties Plaintiffs allege to exist here." ECF No. 41 at 34. While *Navajo III* does not discuss NIFRMA either directly or indirectly—it is not a Indian forestry case, or more specifically a wildfire case, after all—the United States attempts to extend the statutory construction elements of *Navajo III* to the savings language of NIFRMA to argue that NIFRMA did not recognize money-mandating federal trust duties. ECF No. 41 at 34 (citing 25 U.S.C. § 3120). The plain language of NIFRMA and its legislative history prove otherwise.

Congress acknowledged in NIFRMA's purpose statement that the United States "has a trust responsibility toward Indian forest lands . . ." and that "existing federal laws do not sufficiently assure the adequate and necessary trust management of Indian forest lands." 25 U.S.C. §§ 3101(2), (3). The Supreme Court had recently recognized Congress's establishment of a conventional trust for Indian forest lands in *Mitchell II*, and Congress sought to clarify those existing money-mandating federal trust duties through NIFRMA. *See* S. Rpt. 101-402 at 6 (101st Cong., 2d Sess. 1990) ("[c]onsistent with prior acts of Congress and the Supreme Court's decision in *Mitchell II*, the Committee finds that . . . Indian forest lands . . . are a perpetually renewable and manageable resource for which the United States has a trust responsibility.").

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Congress was particularly concerned that the United States had not improved its Indian forest management since *Mitchell II* was decided, and wanted to provide greater specificity on how the United States should satisfy its comprehensive federal trust duties. H. Rpt. 101-835 at 13-14 (101st Cong., 2d Sess. 1990). NIFRMA therefore represents a clarification of the existing comprehensive federal trust duties owed to Indian forest land management, not an extinguishment of the conventional trust recognized in *Mitchell II*. The United States does not explain how *Navajo III* changes that interpretive exercise.

3. Federal Wildfire Management Statutes and Regulations for Indian Country Establish Money-Mandating Trust Duties Consistent with *Mitchell II's* Comprehensive Scheme.

The United States reasserts its statutory and regulatory construction arguments with added fervor following *Navajo III*. As explained above, *Navajo III*'s scope is far narrower than the United States' arguments allow, and inapplicable to the facts and claims presented here. *Mitchell II*'s examination of trust duties related to management of Tribal forests continues to control, and the jurisprudence and legislative actions that have since followed offer the appropriate legal framework to examine conventional trust duties created by statutes and regulations.

While the United States claims that Plaintiffs do not cite to any specific statutes and regulations which meet the money-mandating methodology from *Mitchell II*, a plain reading of NIFRMA and regulations promulgated under NIFRMA conclude otherwise. NIFRMA, and the regulations promulgated under NIFRMA, impose very specific federal wildfire duties to appropriately manage Indian forest land to limit wildlife risk, to prepare to suppress wildfires within Indian forest land, and to suppress wildfires once ignited within Indian forest land. 25 U.S.C. §§ 3103(4)(D), 3104, 5109 and 25 C.F.R. Parts 163.1, 163.10(a), 163.28. The United

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States' duties explicitly include, "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." 25 U.S.C. 3103(4)(D). By invoking NIFRMA and the regulations associated with NIRFMA, Plaintiffs have met their burden of identifying specific money-mandating statutes and regulations which create a conventional trust relationship under *Mitchell II*.

The United States' claim that NIFRMA does not meet the money-mandating methodology outlined in *Mitchel II* is misguided. Under *Mitchel II*, the Supreme Court determined that a series of statutes and regulations targeting timber and forest management created conventional trust duties so long as the duties implicated a fiduciary duty or money mandating scheme. Through NIFRMA's passage, Congress's explicit intent was not to "diminish or expand the trust responsibility of the United States toward Indian forest lands", but rather to define the specific trust duties already acknowledged by the Court in *Mitchell II*, recognizing that "existing Federal laws do not sufficiently assure the adequate and necessary management of Indian forest lands." 25 U.S.C. §§ 3120, 3101(3). Therefore, through NIFRMA and the regulations promulgated under it, Congress established a conventional trust relationship with all tribes for wildfire management in Indian Country. The United States therefore owes a conventional trust duty to the Yakama Nation for wildfire management, prevention, and suppression within the Yakama Forest.

F. The United States' Motion to Dismiss Plaintiffs' Fifth Amendment Takings Clause Claim Must Be Denied.

1. The United States' Rule 12(b)(1) Motion to Dismiss Plaintiffs' Takings Clause Claim Must Be Denied Because Plaintiffs Have Established that this Court has Subject Matter Jurisdiction.

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The Takings Clause of the Fifth Amendment provides, in relevant part, that property shall not "be taken for public use without just compensation." U.S. CONST. amend. V, cl. 4. Pursuant to the Tucker Act, this Court has exclusive subject matter jurisdiction over Takings Clause claims against the United States seeking more than $10,000 in compensation. *See* 28 U.S.C. § 1491(a)(1); *Jan's Helicopter Serv., Inc. v. Fed. Aviation Admin.*, 525 F.3d 1299, 1309–10 (Fed. Cir. 2008). "When a party pleads the predicates for a takings claim . . . the court possesses jurisdiction to entertain such claims." *Cacciapalle v. United States*, 148 Fed. Cl. 745, 775 (Ct. Cl. 2020) (citing *Hansen v. United States*, 65 Fed. Cl. 76, 81 (Ct. Cl. 2005)).

The United States' attempt to minimize Plaintiffs' Takings Clause claim by characterizing it as a tortious invasion of property rights claim is misplaced. ECF No. 41 at 28. It is true that the Tucker Act, as incorporated into the Indian Tucker Act, expressly divests the Court of jurisdiction over claims "sounding in tort." 28 U.S.C. §§ 1491(a)(1), 1505; *see also Brown v. United States*, 105 F.3d 621, 623 (Fed. Cir. 1997) ("[t]he Court of Federal Claims is a court of limited jurisdiction . . . [i]t lacks jurisdiction over tort actions against the United States."). The "historical origin and application of the basic principles of takings jurisprudence[,]" however, "reveal that there is no clear cut distinction between torts and takings." *Hansen*, 65 Fed. Cl. at 80; *see also Hippely v. United States*, 162 Fed. Cl. 414, 428 (Ct. Cl. 2022) ("[i]t is well established that takings law is rooted in common law property and tort law."). As such, "it is not fatal to a plaintiff's claim or this court's jurisdiction if the government alleges that the facts might give rise to a tort." *Hansen*, 65 Fed. Cl. at 80; *see also Wash. Fed. V. United States*, 149 Fed. Cl. 281, 291 (Ct. Cl. 2020). Where the predicates for a Takings Clause claim are present, "the plaintiff will prevail against a motion to dismiss challenging this court's jurisdiction." *Hansen*, 65 Fed. Cl. at 81.

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As discussed in more detail below, Plaintiffs have sufficiently pled a plausible Fifth Amendment Takings Clause claim under Rule 12(b)(6). The possibility that Plaintiffs have a viable tort claim has no impact on the scope of this Court's jurisdiction to hear Plaintiffs' Takings Clause claim. *See Hansen*, 65 Fed. Cl. at 80; *see also Wash. Fed.*, 149 Fed. Cl. at 291. This Court has subject matter jurisdiction over the claim, and the United States' Rule 12(b)(1) Motion to Dismiss must be denied.

2. The United States' Rule 12(b)(6) Motion to Dismiss Plaintiffs' Takings Clause Claim Must be Denied Because Plaintiffs Have Stated a Plausible Claim For Relief.

The Supreme Court has treated favorably the Federal Circuit's two-part test for considering Takings Clause claims, set forth in *Ridge Line, Inc. v. United States*, 346 F.3d 1346 1355-56 (Fed. Cir. 2003). *See Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 39 (2012). Under *Ridge Line*, a viable Takings Clause claim exists when a governmental invasion of a protected property interest is the "direct, natural, or probable result of an authorized activity" and the invasion "appropriate[s] a benefit to the government at the expense of the property owner, or at least preempt[s] the owner's 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 1355-56. For the reasons explained below, Plaintiffs have plausibly alleged that United States has both *caused* an invasion of Plaintiffs' protected property interest and has *appropriated* a benefit to itself, or at least preempted Plaintiffs' right to enjoy the burned area of the Yakama Forest for an extended period of time.

a. The United States Caused an Invasion of Plaintiffs' Protected Property Interests in the Yakama Forest.

To show that the United States caused an invasion of its protected property interests in the Yakama Forest, Plaintiffs must plausibly show that the burning of its forest lands by the

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Cougar Creek Fire across more acres and at a higher severity was the "likely, foreseeable result" of the United States' action and inaction. *See Cary v. United* States, 552 F.3d 1373, 1377 (Fed. Cir. 2009). Plaintiffs have sufficiently alleged all elements necessary to satisfy the causation prong of the *Ridge Line* test.

Plaintiffs allege that the Cougar Creek Fire was the direct, natural, or probable result (i.e. the likely and foreseeable result) of the United States' failure to manage the Yakama Forest for wildfire risk, and decision to withdraw fire suppression resources from the Cougar Creek Fire. ECF No. 38 Ex. A, at 15. The United States failed to close out timber sales by removing or funding the removal of slash piles. ECF No. 38 Ex. A, at 9. The United States did not conduct thinning or prescribed burn operations within the Yakama Forest, and did not otherwise sufficiently manage the fuel load buildup across the landscape. ECF No. 38 Ex. A, at 9. When the Cougar Creek Fire ignited, the United States initially detailed firefighting resources to fight the fire, but withdrew those resources shortly thereafter to protect non-Reservation assets. ECF No. 38 Ex. A, at 10. These actions deprived the Yakama Nation and its Members of the right to enjoy their property right to the Yakama Forest and the trees standing therein. ECF No. 38 Ex. A, at 15. The Cougar Creek Fire was the likely and foreseeable result of the United States' actions to Plaintiffs' detriment, satisfying the causation prong of the *Ridge Line* test.

The United States argues that Plaintiffs cannot satisfy the causation prong of the *Ridge Line* Test as a matter of law because a lightning strike ignited the fire, severing the chain of causation. ECF No. 41 at 21-23, 24-25. The United States relies on the Federal Circuit's decision in *Cary*, where plaintiffs sued the government under a Takings Clause claim for damages from a national forest fire started by a lost hunter that later spread to their property. *See Cary*, 552 F.3d at 1375. The plaintiffs alleged the government's national forest land management policies

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created a significant risk that a wildfire originating in the national forest would be fueled by the buildup of highly flammable vegetation, and then predictably spread to adjacent landowner's property. *Id.* The court held that "the hunter setting the fire was an intervening cause which broke any perceived chain of causation between the Forest Service's policies and the Cedar Fire." *Id.* at 1378-79. The court explained "there is no authorized act of allowing the growth of fuel loads [in the national forest], and there are no direct, natural, and probable paths between the actual authorized acts of suppressing fires and the Cedar Fire conflagration." *Id*.

Cary is distinguishable from the circumstances surrounding the Cougar Creek Fire because the United States supplied the fuel load that intensified and extended the Cougar Creek Fire. In explaining why the plaintiffs could not prevail, the *Cary* Court articulated a hypothetical scenario that would have established the United States' liability:

> "*This is not to say that the government may escape liability per se by finding an incidental intervening or contributing cause between their authorized action and the alleged injury*. Wherever there is an authorized action, the causation prong is satisfied for any injury which is the direct, natural, and probable result of that action. *For instance, had the government action been to accumulate fuel loads* in the CNF, *even without knowledge that such fuel loads would become a large conflagration upon any ignition, then any ignition, even one negligently started by unauthorized human hands, would be adequate for that government act to satisfy the causation prong*. This is because an ignition is the direct, natural and probable result of the government intentionally allowing fuel loads to accumulate in a fire zone, and a conflagration is the direct, natural, and probable result of this ignition in a forest with high fuel loads. . . . *The landowners would be correct that the government did not need to light the match to be liable, but to be a taking, it must have at least authorized supplying the fuel*."

Id. at 1379 (emphasis added). In other words, the chain of causation is not broken where the United States may not have directly started a wildfire, but federal policies and actions supplied the unnatural fuel buildup that causes a wildfire to burn more acres and many acres at a higher

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severity than the fire would have but for those fuel loadings.

The facts here are analogous to the *Cary* Court's hypothetical. The United States failed to properly maintain the Yakama Forest or remove timber sale slash piles, thereby directly supplying the fuel for the Cougar Creek Fire. This fact was observed by the United States' own Tiger Team, which reported in January 2015 that "[s]lash 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." ECF No. 31-3 at 65. Even though a lightning strike started the fire, it did not break the "chain of causation" between the United States' irresponsible accumulation of massive fuel loads and the devastation caused by the Cougar Creek Fire.

In addition to the dangerous fuel loads in the Yakama Forest, the United States' fire suppression tactics caused an invasion of Plaintiffs' protected property interests there. The case *Trinco Inv. Co. v. U.S.,* 722 F.3d 1375 (Fed. Cir. 2013) ("*Trinco*") is controlling precedent for the proposition that a federal fire-fighting agency's suppression tactics create a triable issue of fact for an inverse condemnation claim in the Court of Federal Claims. As alleged in the Amended Complaint, the United States "failed to devote appropriate fire suppression resources to the Cougar Creek Fire," and "redirected necessary resources away from the Yakama Forest to other areas in the region, leaving the Forest exposed and vulnerable to the escalating damage." ECF 38 Ex. A, at 10. In *Trinco*, the Court of Appeals for the Federal Circuit accepted that the U.S. Forest Service's decision to light fires adjacent to Trinco's property in order to suppress an ongoing wildfire could result in a compensable taking, but it remanded the case for consideration of whether the necessity doctrine absolved the government of liability. *Trinco,* 722 F.3d at 1380. In this case—as the United States admits—the doctrine of necessity is not at issue. ECF No. 41 at 22.

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Plaintiffs have plausibly alleged that the nature and extent of the invasion of its forest lands by the Cougar Creek Fire was the "likely, foreseeable result" of the United States' actions (and inactions) before and after the fire started. *See, e.g.,* ECF No. 38 Ex. A, at 10 ("*But for the United States' mismanagement*, Plaintiffs' economic and non-market losses would have been less than the losses that they actually suffered." (emphasis added)). Plaintiffs have, thus, satisfied the causation prong of the *Ridge Line* test.

b. The United States Appropriated A Benefit To Itself at Plaintiffs' Expense.

The United States challenges Plaintiffs' ability to meet the appropriation for a public purpose prong of the *Ridge Line* test by asserting that Plaintiffs cannot identify a public purpose that accrued as a result of the United States' actions here. ECF No. 41 at 25-26, *but see* ECF No. 38 Ex. A, at 15. *Ridge Line,* however, requires that the invasion *either* "appropriate a benefit to the government at the expense of the property owner, *or at least* preempt the owner's 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 (emphasis added). There can be no doubt that in the case of the Cougar Creek Fire, the United States' invasion preempted Plaintiffs' right to enjoy the Yakama Forest, and all the benefits it offers, for an extended period of time—and did not *merely inflict an injury that reduces its value*. The fire burned 41,530 acres on the Reservation and "deprived Plaintiffs of the economic benefit of that timber, obliterated significant spiritual and cultural sites, destroyed recreational uses enjoyed by Tribal members, shrunk wildlife habitat, and spoiled Forest aesthetic, viewshed, and other values." ECF 30 at 7.

The invasion also happened to appropriate a benefit to the United States at the expense of the property owner. *See Ridge Line*, 346 F.3d at 1355-56. In *Kelo v. City of New London*, 545 U.S. 469 (2005), the Supreme Court contemplated the definition of "public purpose" and

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determined that "without exception, our cases have defined that concept broadly[.]" *City of New London,* 545 U.S. at 480. There, the Supreme Court found that even a city's condemnation of private property for alternative private development purposes satisfied the "public use" criteria of the Fifth Amendment. *Id.* at 484.

Plaintiffs have satisfied the *City of New London'*s low bar for alleging that the United States' actions appropriated a public benefit at Plaintiffs' expense. Plaintiffs allege that the United States accrued significant resource benefits when it did not allocate funding, equipment, or staffing that it was otherwise appropriated by Congress to meet its duties to Plaintiffs with respect to wildfire. ECF No. 38 Ex. A, at 15. And Plaintiffs allege that the United States accrued a benefit when it chose to re-allocate resources from the ongoing suppression efforts for the Cougar Creek Fire to protect taxpayers and federal resources in other areas of the State of Washington. ECF No. 38 Ex. A, at 15. The United States was able to use those resources for its other purposes and funding priorities, and Plaintiffs should have the opportunity to explore those other purposes and priorities in discovery.

The United States argues that Plaintiffs cannot satisfy the appropriation element of the *Ridge Line* test because only affirmative or deliberate acts of government appropriation can sustain a Takings Clause claim—not "sins of omission" or "inaction." ECF No. 41 at 27. Plaintiffs consider the United States' series of failures to prevent and suppress the Cougar Creek Fire to be affirmative actions, but federal inaction is also a legitimate basis for a Taking Clause claim where the United States has an affirmative duty to act.

In *Georgia Power Co. v. United States*, this Court dismissed a Takings Clause claim under the premise that the alleged federal inaction, absent a duty, was insufficient to maintain a Takings Clause claim. 224 Ct. Cl. 521, 527 (1980). There, this Court held that the plaintiff

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needed to have identified a relevant federal duty before a Takings Clause claim could proceed based on allegations of federal inaction. *Id.* In a subsequent case, the Federal Circuit relied on *Georgia Power Co.* to explain the difference between federal actions that could sustain a Takings Clause claim, and federal inaction "*absent a duty to act*" that could not. *St. Bernard Parish Gov't v. United States*, 887 F.3d 1354, 1362 (Fed. Cir. 2018) (emphasis added). In essence, a Takings Clause claim can be based on either federal action, or federal inaction where the United States is under a duty to act.

As set forth in Section IV(A)(2)(a) above, the timber management statutes and regulations impose significant affirmative duties on the United States to prevent, prepare to suppress, and suppress wildfires within the Yakama Forest. The United States had an affirmative duty imposed by Congress to ensure that if the Cougar Creek Fire were to ignite, it would do so in a forest managed for wildfire risk, and would be diligently suppressed with an appropriate dedication of wildfire resources and strategy. ECF No. 38 Ex. A, at 11-13. For the purpose of maintaining a Takings Clause claim, it is irrelevant whether the United States' failures to meet its duties to act were caused by federal action or inaction.

The United States relies on *Teegarden v. United States*, 42 Fed. Cl. 252 (1998), to argue that firefighting resource allocation disputes are not actionable. ECF No. 41 at 27-28. *Teegarden* pre-dates and therefore does not discuss the *Ridge Line* appropriation prong, and regardless, this case is plainly distinguishable. Unlike here, the United States was under no duty to protect plaintiffs' property from wildfire in *Teegarden*. 42 Fed. Cl. at 256-57 (identifying plaintiffs' property as private). The wildfire at issue in *Teegarden* did not implicate tribal timber lands managed by the United States for the tribe's benefit, and it did not implicate property that the United States has an express duty to protect.

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c. Resolving Material Factual Disputes is Inappropriate with a Motion to Dismiss

Plaintiffs have sufficiently alleged all of the elements to sustain a Fifth Amendment Takings Clause claim. Plaintiffs allege that the Cougar Creek Fire was the direct, natural, or probable result (i.e. the likely and foreseeable result) of the United States' failure to manage the Yakama Forest for wildfire risk, and decision to withdraw fire suppression resources from the Cougar Creek Fire. ECF No. 38 Ex. A, at 15. These actions deprived the Yakama Nation and its Members of the right to enjoy their property right to the Yakama Forest and the trees standing therein. ECF No. 38 Ex. A, at 15. The United States affirmatively chose to not manage the Yakama Forest for wildfire risk, not acquire sufficient firefighting capabilities to suppress wildfires in the Yakama Forest, and to remove deployed firefighting assets from the Cougar Creek Fire, appropriating a resource benefit to the United States and those members of the public who received these resources instead. ECF No. 38 Ex. A, at 13-15. Plaintiffs have established the predicates for a Takings Clause claim, and under that circumstance "the plaintiff will prevail against a motion to dismiss challenging this court's jurisdiction." *Hansen*, 65 Fed. Cl. at 81.

The United States' challenge to Plaintiffs' Takings Clause claim, based on apparent factual disputes about its affirmative role in exacerbating the Cougar Creek Fire, is inappropriate at this stage of the proceeding before fact-finding has occurred. *See Sharifi v. United States*, 143 Fed. Cl. 806, 814 (Ct. Cl. 2019) ("[t]hat argument may carry the day at summary judgment but, at this stage, would require fact-finding that is inappropriate in evaluating a motion to dismiss."). For example, Plaintiffs allege, and the United States disputes, that the United States deployed firefighting resources to fight the Cougar Creek Fire, and then affirmatively decided to withdraw those firefighting resources, allowing tens of thousands of acres of the Yakama Reservation—actively managed by the United States as trustee for the Yakama Nation's

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benefit—to burn. *Compare* ECF No. 38 Ex. A, at 10, *with* ECF No. 41 at 28-29. Plaintiffs allege, and the United States disputes, that the United States affirmatively chose to allow the buildup of dangerous fuel loads in the Yakama Forest, which predictably combusted and deprived the Yakama Nation of its property interests. *Compare* ECF No. 38 Ex. A, at 9, *with* ECF No. 41 at 27. Resolving these material factual disputes is inappropriate at this early stage of the litigation—when the Court must draw all reasonable inferences in favor of the plaintiff. *Acevedo*, 824 F.3d at 1368.

V. CONCLUSION

For the foregoing reasons, The United States' Rule 12(b) Motion to Dismiss should be denied.

Dated: September 1, 2023

s/ Ethan Jones

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served electronically by the Court CM/ECF system on September 1, 2023, upon all counsel of record.

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