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

REPLY IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

This Court has held that the under-harvest allegations in Plaintiffs' other lawsuit (No 19-1966L) falls within this Court's jurisdiction over forestry management as recognized in *United States v. Mitchell* ("*Mitchell II*"), 463 U.S. 206, 217 (1983). Because the Supreme Court has insisted that the Court's jurisdiction depends upon the question whether Congress has charged the government with the *specific* duties invoked (a point Plaintiffs necessarily concede), the fire prevention and fire suppression duties alleged in the present suit are a different matter. And while Plaintiffs' Opposition Brief (ECF No. 33) ("Opp.") offers a virtual hailstorm of statutory and regulatory citations, *none* of the materials cited comes close to imposing money-mandating trust duties to prevent or suppress wildfires.

Plaintiffs also fail to overcome the many obstacles to their taking claim that controlling Federal Circuit caselaw present, as confirmed by the recent decision in *Johnson v. United States*, No. 22-584L, 2023 WL 1428603 (Fed. Cl. Jan. 31, 2023). And neither the continuing claims doctrine, nor the recency of the Cougar Creek fire, can change the fact that Plaintiffs' claims of fire-related forest mismanagement accrued much more than six years before Plaintiffs filed their complaint.

Accordingly, Plaintiffs' Amended Complaint should be dismissed.

ARGUMENT

A. Plaintiffs' Taking Claim Is Not Actionable

The recent decision in *Johnson v. United States*, No. 22-584L, 2023 WL 1428603 (Fed. Cl. Jan. 31, 2023) confirms that Plaintiffs have failed to state a takings claim within this Court's jurisdiction. There, as here, plaintiff alleged that negligence and inattention by the government caused a forest fire to damage plaintiff's property. The court dismissed the claim, first, on the grounds of the "basic principle of our circuit's takings jurisprudence [] that government inaction cannot give rise to a Fifth Amendment takings claim; rather, the government may be liable for an invasion of property only if the invasion results from an affirmative government act." *Johnson*, 2023 WL 1428603, at *5 (citing *St. Bernard Par. Gov't v. United States*, 887 F.3d 1354, 1360 (Fed. Cir. 2018)). Here, as in *Johnson*, Plaintiffs do not allege that the fire resulted from "an affirmative government act." 2023 WL 1428603, at *5; *see St. Bernard*, 887 F.3d at 1360-62 ("[o]n a takings theory, the government cannot be liable for failure to act, but only for affirmative acts by the government.")

Beyond this, the *Johnson* court noted, "plaintiffs must also allege facts that, when assumed to be true, satisfy yet additional conditions for an inverse condemnation. In particular, this Court applies a two-prong test the Federal Circuit adopted in *Ridge Line, Inc. v. United States*, [346 F.3d 1346, 1355-57 (Fed. Cir. 2003)], characterized as "'[1] causation and [2] appropriation.'" *Johnson*, 2023 WL 1428603, at *6 (citing *Cary v. United States*, 552 F.3d 1373, 1375-76 (Fed. Cir. 2009).

The *Johnson* court concluded that the plaintiff's claim satisfied neither factor. First, "the government's failure to engage in alternative or additional fire control measures does not amount to an affirmative act sufficient to satisfy *St. Bernard*." *Johnson*, 2023 WL 1428603, at

*8. And the plaintiff likewise could not allege actionable causation. *Id*. at 8 (distinguishing *TrinCo Inv. Co. v. United States*, 722 F.3d 1375 (Fed. Cir. 2013)). Here, as we have showed, Plaintiffs cannot satisfy the appropriations test either.[1]

In our moving papers we discussed the decisions in *St. Bernard*, *Ridge Line*, *Cary*, and *TrinCo*, and how those decisions dictate dismissal of Plaintiffs' takings claim. The decision in *Johnson* demonstrates that Plaintiffs' arguments do not alter that conclusion. The *Johnson* court's discussion of the *Cary* decision, for example, directly refutes Plaintiffs' effort to redefine the causation requirement.

> In the series of events the plaintiffs alleged, something other than the government's firefighting started the wildfire that damaged the plaintiffs' property…. Fire suppression may have increased the risks of subsequent wildfires, but a specific wildfire and the resulting destruction were not likely (*i.e.*, foreseeable) consequences of the fire suppression policy at issue….. 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. A takings claim requires a continuous 'chain of causation' that connects an alleged government action to an alleged injury, and the plaintiffs' allegations could not avoid breaks in such a chain…. According to the Federal Circuit, [t]he key difference between the flood cases and the instant controversy in *Cary* is that the policy of suppressing fires did not set the fire in motion as the dams did the floods.

Johnson, 2023 WL 1428603, at *6 (cleaned up and internal citations omitted). Count Two should be dismissed because Plaintiff has not stated a takings claim and the Court therefore lacks jurisdiction.

B. The Parties Agree That, Unless There Is A Statute Or Regulation Specifically Imposing Money-Mandating Duties With Respect To Fire Prevention And Suppression On Indian Lands, This Court Lacks Jurisdiction

With respect to the breach of trust claim (Count One), the Court lacks jurisdiction unless

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[1] Plaintiffs (Opp. at 39) try to satisfy the appropriation test by reference to *Ridge Line*'s alternative phrasing, specifically, that the government "preempt the owner's right to enjoy his property for an extended period of time." But the court in *Cary* disposed of the same argument in the specific context of wildfire. *Cary,* 552 F.3d at 1381.

Plaintiffs can satisfy the Supreme Court's two-part test in *United States v. Navajo Nation*, 556 U.S. 287, 290 (2009) ("*Navajo II*"). The parties agree that, under the first prong of the Supreme Court's test, Tucker Act jurisdiction depends upon statutory (or regulatory) impositions of *specific* duties. *See* Opp. at 9 (noting that under *Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015) the United States only has such fiduciary duties as it "*specifically* accepts by statute or regulation," reflecting the Supreme Court's admonition that "[t]he 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" (quoting *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) ("*Navajo I*") (emphasis added))). Thus "[s]ubstantive sources of law must establish *specific* fiduciary responsibilities that the United States owes to an Indian tribe under an explicit statutory provision," and "tribes must point to *specific* statutes [or] regulations that 'establish the fiduciary relationship and define the contours of the [Government's] fiduciary responsibilities.'" Opp. at 9 (emphasis added) (quoting *Inter-Tribal Council of Ariz. v. United States*, 956 F.3d 1328, 1337–38 (Fed. Cir. 2020); *id*. ("Plaintiff must point to *specific* statutory language defining the government's fiduciary role") (citing *Navajo II,* 556 U.S. at 290) (emphasis added)).[2]

This Court has held that it has jurisdiction over Plaintiffs' claims that the United States has failed to produce adequate timber harvests. *Confederated Tribes & Bands of the Yakama Nation v. United States*, 153 Fed. Cl. 676 (2021). Whether this Court has jurisdiction over Plaintiffs' claims that the United States failed to adequately prevent and suppress wildfires on

[2] The same rule applies to rights based on treaties which, "when ratified by Congress, became statutes of the United States." *Cherokee Nation or Tribe of Indians in Okl. v. State of Okl.*, 402 F.2d 739, 745 (10th Cir. 1968), *rev'd on other grounds sub nom. Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970).

the Yakama Reservation, however, is a different question. For the reasons set forth in our moving papers and below, the answer to that question is no.

C. Plaintiffs Fail to Identify Treaty, Statutory, Or Regulatory Duties Vesting This Court With Jurisdiction Over Their Fire Prevention And Suppression Claims

Plaintiffs allege that the "United States' specific fiduciary duties owed to the Yakama Nation in preventing and suppressing wildfires…are plainly contained in federal statutes and regulations." Opp. at 12. Specifically, Plaintiffs assert that 25 U.S.C. §§ 196 and 406-407 and 16 U.S.C. § 594 impose trust duties on the United States to "manage the Yakama Forest so as to prevent wildfire risk." *Id.* Plaintiffs further assert that 25 U.S.C. §§ 5109, 3103(4)(D), and 3104(a), and 25 C.F.R. §§ 163.1, 163.10(a), and 163.28, impose trust duties on the United States to "manage the Yakama Forest so as to prevent wildfire risk," "prevent wildfires throughout the Yakama Forest," "prepare to suppress wildfires within the Yakama Forest" and "suppress wildfires that occur throughout the Yakama Forest." *Id.* at 12-13.

Plaintiffs' arguments consist entirely of sweeping assertions supported by string cites that generally ignore the actual language of the statutes and regulations cited, relying instead on reference to the "comprehensive federal forest management framework." Opp. at 13. A review of their language reveals that the authorities Plaintiffs cite are devoid of the specific rights-creating, duty-imposing prescriptions required to give this Court jurisdiction.

25 U.S.C. § 196 authorizes the President, in his discretion, to sell dead timber on Indian land. [3] The statute does not reference wildfires, nor does it contain any language that can be

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[3] The Section provides:

> The President of the United States may from year to year in his discretion under such regulations as he may prescribe authorize the Indians residing on reservations or allotments, the fee to which remains in the United States, to fell, cut, remove, sell or otherwise dispose of the dead timber standing, or fallen, on

read as creating money-mandating duties to manage the Yakama Forest in a manner to prevent wildfires. So too with 25 U.S.C. §§ 406 and 407.[4] These timber harvest statutes simply authorize the sale of timber (by the Secretary, or with the Secretary's consent) on allotted and unallotted land. *See Mitchell II*, 463 U.S. at 209, 222 (finding that Sections 406 and 407 provide "broad authority for the sale of timber on reservations" and establish the United States' responsibilities "in managing the harvesting of Indian timber."). Neither Section 406, nor Section 407 say one word about wildfire prevention or suppression.

16 U.S.C. § 594 is similarly unavailing, authorizing the Secretary to protect and preserve timber on Federal and Indian lands from fire, disease, and insects.[5] While Section 594 does

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> such reservation or allotment for the sole benefit of such Indian or Indians. But whenever there is reasonable cause to believe that such timber has been killed, burned, girdled, or otherwise injured for the purpose of securing its sale under this section then in that case such authority shall not be granted.
> Feb. 16, 1889, c. 172, 25 Stat. 673.

[4] As the Supreme Court summarized them in *United States v. Algoma Lumber Co*, 305 U.S. 415, 417 (1939):

> Section 7 of the Act of Congress of June 25, 1910, 36 Stat. 855, 857, 25 U.S.C.A. s 407, provides that the 'timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales shall be used for the benefit of the Indians of the reservation in such manner as he may direct'. Section 8 of the Act, 25 U.S.C.A. s 406, provides that 'The timber on any Indian allotment held under a trust or other patent containing restrictions on alienations, may be sold by the allottee with the consent of the Secretary of the Interior and the proceeds thereof shall be paid to the allottee or disposed of for his benefit under regulations to be prescribed by the Secretary of the Interior.'

[5] 16 U.S.C. § 594 (Sept. 20, 1922, c. 349, 42 Stat. 857):
[T]he Secretary of the 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 the public lands, national parks, national monuments, Indian reservations, or other lands under the jurisdiction of the Department of the Interior owned by the United States, either directly or in cooperation with other departments of the Federal Government, with States, or with owners of timber; and appropriations are authorized to be made for such purpose.

reference wildfire protection, its language is clearly discretionary. *Authorizing* the Secretary to take actions is a far cry from *creating specific trust duties* to do so. And the Federal Circuit has held that Congress *does not* create specific trust duties when it is only *authorizing* the Secretary to take actions. *See Wolfchild v. United States*, 731 F.3d 1280, 1289 (Fed. Cir. 2013) ("[The] Secretary's authority to act does not support an inference of the asserted duty to act (enforceable by a suit for money damages")).

The vacated decision in *Blackfeet Tribe*, No. 1:12-cv-00429 at ECF No. 183, relied upon by Plaintiffs (Opp. at 10), suffers from the same illogic.[6] *Blackfeet* (citing 25 U.S.C. § 406(e)) alludes to "the obligation of the Government to prevent 'loss of values resulting from fire.'" ECF No. 183 at 3. The cited statute (also cited by Plaintiffs (Opp. at 12)) merely *authorizes* the Secretary to sell timber without tribal consent in emergency situations arising from "natural catastrophes."[7] As noted, Congress's granting *authority* for Interior to act does not amount to

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[6] "[A] decision that has been vacated has no precedential authority whatsoever . . . . When a judgment has been rendered and later set aside or vacated, the matter stands precisely as if there had been no judgment." *Hardy v. United States*, 153 Fed. Cl. 287, 292 (2021), *recons. denied*, 156 Fed. Cl. 340 (citation and internal quotation marks omitted). Plaintiffs (Opp. at 11) tout the "persuasive value" of the *Blackfeet* decision, which we respectfully question. Like Plaintiffs, the court in *Blackfeet* mistakenly (it seems) read the same statutes and regulations Plaintiffs cite here as imposing wildfire-related duties, which they do not do. *Blackfeet* at 3 (citing 25 U.S.C. § 406(e), 25 U.S.C. § 3103(4), and 25 C.F.R. § 163.1). And while *Mitchell II* did not involve wildfire, the court found *Mitchell II* dispositive, apparently reading *Mitchell II* as establishing that the government's fiduciary duties regarding *many* aspects of forest management entail fiduciary duties as to *all* aspects of forest management. But that logical leap conflicts with the Supreme Court's specificity requirement that Plaintiffs here concede.

[7] 25 U.S.C. § 406:

> (e) Emergency sales
>
> The timber on any Indian land held under a trust or other patent containing restrictions on alienations may be sold by the Secretary of the Interior without the consent of the owners when in his judgment such action is necessary to prevent loss of values resulting from fire, insects, disease, windthrow, or other

the creation of an *enforceable trust obligation*.

Accordingly, contrary to Plaintiffs' assertion, 25 U.S.C. §§ 196 and 406-407 and 16 U.S.C. § 594 do not impose trust duties on the United States to manage the Yakama Forest in a manner to prevent wildfire.

25 U.S.C. § 5109 directs the Secretary to "make rules and regulations" for sustained-yield management of Indian forestry units, livestock grazing, and range protection. [8] To be sure, this Court has noted that the "1910 and 1934 forest management statutes . . . . [were] considered in *Mitchell II* when determining whether breach-of-trust claims rooted in these statutes are jurisdictional under the Indian Tucker Act." *Confederated Tribes & Bands of the Yakama Nation*, 153 Fed. Cl. at 698. In contrast to the present case, both *Mitchell II* and *Yakama Nation* are timber harvest cases, and the statutes involved there say nothing about fire. And, as explained below and in our opening brief, to the extent the Tribe is asserting that fire prevention is part of maintaining forest revenues under principles of sustained yield, the Tribe has inadvertently claim split the breach of trust claim in this case from its other case.

Plaintiffs (Opp. at 11, 13, 16, 18), like the *Blackfeet* opinion, also rely upon the definitional section of NIFRMA, 25 U.S.C. § 3103(4). The section defines "forest land management activities" as "all activities performed in the management of Indian forest lands," and proceeds to give an extraordinarily detailed and exhaustive list of such activities. Because the detailed content of the definition is important to an understanding of its purpose, we append

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natural catastrophes.

[8] 25 U.S.C. § 466, June 18, 1934, c. 576, § 6, 48 Stat. 986: "The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management . . . ".

its text for convenience as Exhibit 1.[9]

Plaintiffs read the definitional language in subsection (D) (which includes "protection against losses from wildfire"), together with the directive in Section 3104 that the "Secretary shall undertake forest land management activities on Indian forest land," as establishing a money-mandating duty to manage Tribal forests for fire protection.[10]

This Court has noted that definitional provisions in a statute do not create affirmative duties. *Evans v. United States*, 107 Fed. Cl. 442, 450 (Ct. Cl. 2012). Plaintiffs (Opp. at 18-19) question the applicability of *Evans*, but that case, like this one, raised the question of whether Congress had imposed money-mandating duties on the government so as to give the Court jurisdiction. 107 Fed. Cl. at 450 ("The absence of a money-mandating source is 'fatal to the court's jurisdiction under the Tucker Act') (quoting *Peoples v. United States*, 87 Fed. Cl. 553, 565–66 (2009)). Plaintiff invoked definitional provisions in the statutes and regulations applicable to Native American inheritance matters; the Court noted (unremarkably) that such definitions do not create "a substantive right pursuant to which an individual claimant like [plaintiff] might be entitled to monetary relief from the United States." *Id*. at 451. As a result, neither the statute nor the regulation "mandate monetary compensation by the federal government for possible damages sustained, as required to establish jurisdiction in this court under the Tucker Act." *Id*. at 450. The same is true here.

There is at least some superficial appeal to the argument that, when Section 3104 states

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[9] Plaintiffs also cite 25 C.F.R. § 163.1, which adopts the definitions in 25 U.S.C. § 3103.

[10] Opp. at 18. Plaintiffs (*id*. at 18-19) also invoke 25 C.F.R. § 163.10(a), which simply carries over the same language from 25 U.S.C. § 3104.

that the Secretary "*shall* undertake forest land management activities," and when Section 3103 defines "forest land management activities" as including several specifics, each item listed in the definition is thus mandated by Section 3104. But given the extraordinary breadth of the definition in Section 3103(4), reading Sections 3103 and 3104 together as creating money-mandating duties produces absurd results.

To illustrate: Does the government have a money-mandating duty to engage in aerial photography (3103(4)(B))? Can a Tribe sue the government if it is unhappy with the government's "handling of legal matters", or its "personnel management" (3103(4)(A)(ii-iii))? Does the Court have jurisdiction to award damages against the government for perceived shortcomings in "*all aspects* of the development, preparation and revision" of forest inventory and management plans (3103(4)(B))?; in "*all aspects* of detect[ing] and evaluat[ing] insects and disease" (3103(4)(E)(i))? For providing financial assistance for forestry-related education (3103(4)(H))? These obviously rhetorical questions – and a dozen others just like them – make an inescapable point: that Congress's definition of "forest land management activities" in Section 4103(4) is intended to be all-encompassing, and *not* as establishing an astonishingly broad and absurdly detailed list of mandatory responsibilities answerable in damages. To read the section otherwise would completely disregard Congress's express admonition that NIFRMA *not* be construed to "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.

Indeed, the provision's breadth is even greater than the exhaustive list of activities it enumerates because, by defining the term as "including" those activities, the provision must normally be construed as open-ended. *Charleston Area Med. Ctr., Inc. v. United States*, 940 F.3d 1362, 1367 (Fed. Cir. 2019) (citations omitted). Construing the statute as creating open-

ended money-mandating trust duties would be anathema to the Supreme Court's repeated admonitions that the government's trust duties must be express and specific. *Navajo I*, 537 U.S. at 506 ("the analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions"); *id*. at 509 (requiring "discrete statutory and regulatory provisions"); *Navajo II*, 556 U.S. at 296 (same); *United States v. Jicarilla Apache Nation,* 564 U.S. 162, 177 (2011) (When a "Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, ... neither the Government's 'control' over [Indian assets] nor common-law trust principles matter.")

Finally, Plaintiffs cite 25 C.F.R. Parts 163.1, 163.10(a), 163.28. Section 163.1 simply reproduces the definitions in 25 U.S.C. 3103(4). Section 163.10(a) simply reproduces the requirement in 25 U.S.C. § 3104 that "[t]he Secretary shall undertake forest land management activities on Indian forest land . . .". And Section 163.28, similarly to 25 U.S.C. §§ 196 and 594, merely *authorizes* the Secretary to engage in wildfire prevention and suppression activities. Thus, 25 C.F.R. §§ 163.1, 163.10(a), and 163.28 fail to impose trust duties on the United States to manage the Yakama Forest to prevent wildfires, prevent wildfires, prepare to suppress wildfires, or suppress wildfires as Plaintiffs' allege.

D. *Navajo III* Confirms That Plaintiffs Have Not Identified Actionable Trust Duties

Plaintiffs' argument is based on the premise that the United States has argued *Navajo III* overruled *Mitchell II* (Opp. at 28). This is a strawman. Our moving papers neither stated nor suggested that the Supreme Court overruled *Mitchell II*. The argument is that *Mitchell II* did not involve wildfires and nowhere suggested that the United States has money-enforceable trust duties to manage fire risk. *Mitchell II*—and the statutes and regulations from which the trust duties there arose—were limited to claims involving "sales of timber from Indian lands." 463

U.S. at 219-220.

Plaintiffs do not argue that their claims satisfy *Navajo III*. Instead, Plaintiffs claim (Opp. at 28) that *Navajo III* is distinguishable because it did not deal with NIFRMA. But Plaintiffs' insistence that NIFRMA supports the claims in this case completely overlooks Congress's statement, plain and unambiguous, that NIFRMA does not expand the federal government's trust responsibilities. 25 U.S.C. § 3120. Plaintiffs tacitly try to avoid this provision in NIFRMA by stating that NIFRMA only "clarifies" duties previously recognized in *Mitchell II*. Opp. at 31, 32. But *Mitchell II* did not create or recognize enforceable trust duties regarding management of fire risk. By its terms NIFRMA cannot "clarify" duties that were not touched upon either by *Mitchell II*, or the statutes and regulations *Mitchell II* analyzed.

Plaintiffs' argument (Opp. at 29-30) that the Supreme Court acted improperly in strictly construing the treaty at issue in *Navajo III* highlights that the position Plaintiffs advance in this case is inconsistent with *Navajo III* and the cases that it reaffirms -- *Navajo I*, *Navajo II*, and *Jicarilla*. Plaintiffs ask this Court to do what the Supreme Court has prohibited in holding that "Indian treaties cannot be rewritten or expanded beyond their clear terms." *United States v. Navajo Nation*, 143 S. Ct. 1804, 1813–14 (2023) ("*Navajo III*") (quoting *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943)) (also citing *Jicarilla*, 564 U.S. at 173–174, 177–178, *Navajo I*, 537 U.S. at 506–507, *Mitchell I*, 445 U.S. at 542, 546).

True, we are dealing here with statutes and regulations, and not with a treaty, because Plaintiffs' newest complaint has dropped their treaty-based claim. But it is simply untrue that *Navajo III* does not apply here because the purported trust duties at issue there were alleged to have arisen in a treaty rather than a statute (or regulation). *Navajo III* makes no such distinction, because the Court there stated that the rules it applied govern the interpretation of "the text of a

treaty, *statute, or regulation*." *Navajo III*, 143 S. Ct. at 1814 (emphasis added). Indeed, the Court was careful to refer to "a treaty, statute, or regulation" every time it invoked the basic rules of *Navajo II*. *See id.* at 1813-15. The Court thus did no more than apply the commonplace principle that "[t]he interpretation of a treaty, like the interpretation of a statute, begins with its text." *Golan v. Saada*, 142 S. Ct. 1880, 1891 (2022), judgment entered, 213 L. Ed. 2d 1107 (June 29, 2022) (citation and internal quotation marks omitted).

Navajo III bears heavily on this case. And Plaintiffs' attempt to avoid it altogether merely underscores that it (like the *Navajo I*, *Navajo II*, and *Jicarilla* decisions it reaffirmed) renders Plaintiffs' position untenable.

E. If The Court Reaches Step Two Of The *Navajo II* Jurisdictional Test, Plaintiffs Have Also Failed To Show That It Is Satisfied

Because none of the statutes or regulations Plaintiffs cite impose specific trust duties on the government to prevent or suppress wildfires the Court need not consider the second prong of *Navajo II*, which, as Plaintiffs acknowledge, "requires plaintiffs to demonstrate that [the alleged] fiduciary duties specifically flow from a substantive source of law that is money-mandating." Opp. at 14 (citing *United States v. White Mountain Apache*, 537 U.S. 465, 472 (2003)).

Mitchell II does not help Plaintiffs. *Mitchell II* found money-mandating duties relating to the harvest and sale of Tribal timber. The case involved no alleged duties to prevent or suppress forest fires —a very different subject— and "[t]he 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. *Navajo I*, 537 U.S. at 506 (emphasis added). Nor can NIFRMA rescue Plaintiffs' claim, because Congress directed that that statute *not* be construed to "expand the trust responsibility of the United States toward Indian forest lands." 25 U.S.C. § 3120.

Plaintiffs (Opp. at 16) cite to BIA's Indian Affairs Manual (Ethan Jones' Declaration, Exh. H) and to Interior's Indian Trust Responsibilities Manual (*id*., Exh. I), but neither says nor suggests anything about money-mandating duties, and Plaintiffs do not suggest otherwise. Indeed, the only reference to wildfires in either document[11] is a reference in the BIA Manual to Sections 1855 and 1856 of the criminal code, which establish criminal fines and imprisonment for private persons who deliberately start fires that damage federally-owned lands (including lands held in trust for Indians). 18. U.S.C. 1855, 1866 (June 25, 1948, c. 645, 62 Stat. 788). If anything, this reference suggests that the United States is not financially responsible for wildfires on Indian land.

Plaintiffs also cite *The Confederated Tribes of Warm Springs Reservation of Oregon v. United States,* 248 F.3d 1365 (Fed. Cir. 2001), which, like *Mitchell II* and *Yakama Nation*, involved timber harvest issues (*id*. at 1370) and had nothing to do with wildfires.

Plaintiffs thus fail to show that their Amended Complaint can survive the *Navajo II* jurisdictional test. And Plaintiffs' efforts to argue the merits of their fire prevention/suppression claim (Opp. at 13-14) are improper. Our argument is that the authorities Plaintiffs invoke do not create money-mandating duties, and "[i]f a trial court concludes that the particular statute simply is not money-mandating, then the court shall dismiss the claim for lack of subject matter jurisdiction under Rule 12(b)(1)." *Adair v. United States*, 497 F.3d 1244, 1251 (Fed. Cir. 2007) (citations omitted). And, "[o]f course, the court may not consider [a party's] arguments on the merits of any of plaintiffs' claims until it has first ruled that it has jurisdiction over that claim."

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[11] The BIA Manual also notes that 16 U.S.C. § 594 (September 20, 1922) "[a]uthorizes the Secretary of the Interior to protect timber on Indian lands from fire, disease, or insects", but as we have noted, authorizing and compelling are two different things.

Flathead Joint Bd. of Control of Flathead, Mission & Jocko Valley Irr. Districts v. United States, 30 Fed. Cl. 287, 292 (1993), *aff'd sub nom. Flathead Joint Bd. of Control of Flathead, Mission & Jocko Valley Irr. Dist. v. United States*, 59 F.3d 180 (Fed. Cir. 1995) (citation omitted).

F. Claims Relating To The Cougar Creek Fire Are Actionable, If At All, Only In The Context Of Plaintiffs' Forestry Case

Plaintiffs (Opp. at 21) summarize their case thus: "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." But Congress has not created specific money-mandating duties of "fire prevention, fire planning, [and] fire suppression." This Court has previously found forest management duties under 406, 407, and NIFRMA; to the extent Plaintiffs are using those duties as basis for this suit, the two suits are effectively the same. In other words, the claims in this case boil down to a claim of under-harvest—that, because of Interior's actions, the Tribe did not get the intended yield for its trust resources. But that is the same basic factual context for what Plaintiffs refer to (Opp. at 11) as their "Failure to Cut" case, and the Court cannot allow this case to proceed without violating the rule against claim-splitting (and consolidation of the two cases (Opp. at 21) would serve little purpose).

Plaintiffs' answer is that because claim-splitting analysis is (assertedly) coterminous with claim-preclusion analysis, the final judgment requirement for claim preclusion defeats our claim-splitting argument. Opp. at 19-20 (arguing that, "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" (citing *Phillips/May Corp. v. U.S.*, 524 F.3d 1264, 1267 (Fed. Cir. 2008))). But the argument fails because, "[w]hile it is correct that a final judgment is necessary for

traditional claim preclusion analysis, it is not required for the purposes of claim splitting." *Katz v. Gerardi*, 655 F.3d 1212, 1218 (10th Cir. 2011); *accord*, *Scholz v. United States*, 18 F. 4th 941, 952 (7th Cir. 2021). Indeed, "[t]he 'claim splitting doctrine' applies where a second suit has been filed *before the first suit has reached a final judgment*." *Zephyr Aviation III, L.L.C. v. Keytech Ltd*., No. 8:07-CV-227-T-27TGW, 2008 WL 759095, at *6 (M.D. Fla. Mar. 20, 2008) (emphasis added). Thus, if the Tribe is correct and there are money-mandating duties with respect to fire prevention that arise from the United States' duties to manage the Tribe's forest for sustained yield, it is attempting to purse two aspects of the same claim in different cases. The present case should therefore be dismissed.

G. The Statute Of Limitations Bars Many If Not All Of Plaintiffs' Claims

1. Plaintiffs concede that the 2013 settlement bars any predating claims

Plaintiffs tacitly concede that the parties' June 18, 2013, settlement precludes litigation of any claims arising before that date. Plaintiffs state that 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." Opp. at 27.[12]

2. Plaintiffs' breach of trust claim accrued before June 30, 2015

We showed in our moving papers, and will not repeat here, the evidence demonstrating that the alleged mismanagement underlying Plaintiffs' Amended Complaint was well known to Plaintiffs long before the Cougar Creek fire ignited. If there were merit in Plaintiffs' arguments regarding the United States' fiduciary duties to manage the Yakama Forest so as to minimize the risk of fire (and to minimize the damage that a fire might cause), and if there is merit in

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[12] Plaintiffs (Opp. at 27) do note that their forest products subsidiary was not a party to the settlement, but do not contend that the government owes fiduciary duties to the subsidiary.

Plaintiffs' allegations that the United States for many years violated those duties, Plaintiffs could have brought suit long ago. Plaintiffs do not deny that, if their allegations are accepted as true, the value of the forest was diminished by the alleged mismanagement long ago. The only difference 2015 brought was a compounding of that damage as to one portion of the forest. The cases we have cited establish that a statute of limitations begins to run when a plaintiff has been harmed and knows it. The statute does not await the full accumulation of all possible consequential damage.

And Plaintiffs do not dispute the logic and analogousness of the medical monitoring cases we cited, instead (Opp. at 24) just maligning their provenance. If Plaintiffs' allegations are all accepted as true (which we allow only for purposes of our motion), the condition of the forest was highly analogous to the lungs of a long-term smoker who had not yet contracted cancer.

3. The continuing claims doctrine does not save Plaintiffs' claims

"The continuing claims doctrine allows the adjudication of claims that would otherwise be untimely when the claims are 'inherently susceptible to being broken down into a series of independent and distinct events or wrongs, each having its own associated damages,' and when at least one of these events falls within the limitations period." *Rosales v. United States*, 89 Fed. Cl. 565, 579 (2009) (*quoting Brown Park Estates–Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1456 (Fed. Cir. 1997)). "The continuing claim doctrine is inapplicable . . . 'where a single governmental action causes a series of deleterious effects, even though those effects may extend long after the initial governmental breach.'" *Voisin v. United States*, 80 Fed. Cl. 164, 177 (2008) (quoting *Boling v. United States*, 220 F.3d 1365, 1373 (Fed. Cir. 2000)).

Here, just as Plaintiffs have failed to identify any statutes or regulations demonstrating

that the United States has fiduciary duties, Plaintiffs also fail to identify any statutes or regulations demonstrating continuous statutory or regulatory duties for wildfire prevention or suppression. If there is no continuous duty, there can be no continuing claims for breach of trust. *See Mitchell v. United States*, 10 Cl. Ct. 787, 788 (1986) ("*Mitchell IV*"), modifying 10 Cl. Ct. 63 (1986). Plaintiffs here have not attempted to support their assertion that the claims can be broken into a series of independent and distinct wrongs.

Further, even if the continuing claims doctrine applied here, it would not allow Plaintiffs to be awarded damages for prior alleged acts occurring outside the six-year statute of limitations. Rather, the doctrine would merely enable Plaintiffs to seek damages for alleged mismanagement occurring within the six-year period before the filing of the Complaint, or after June 30, 2015. The doctrine is not intended to revive stale claims. Instead, it is intended to prevent "the defendant from escaping all liability for its wrong and thus 'acquiring a right' to continue its wrongdoing, while retaining intact the 6-year statute of limitations set forth by Congress in section 2501." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1581 (Fed. Cir. 1988). In *Mitchell IV*, for example, the court found that the BIA's duty to replant trees following logging was continuous under 25 U.S.C. § 466 and 25 C.F.R. § 163.3 and "on each day the BIA failed in its duty to regenerate . . . there arose a new cause of action." 10 Cl. Ct. at 788. The Tribe thus was able to bring its regeneration claim, but only for the six-year period preceding the complaint. Similarly, in *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 672 F.3d 1021 (Fed. Cir. 2012), the Federal Circuit found that one of the claims asserted a continuing trespass, so if the Tribe could establish that the government had a duty to eject trespassers, it "can seek damages for trespasses which occurred within six years of the filing of this suit and all trespasses that occurred after the filing of this suit."

Thus, even under the continuing claims doctrine, Plaintiffs can only pursue claims of mismanagement that arose after June 30, 2015. To the extent that Plaintiffs' claims rely on actions the government took (or failed to take) before June 30, 2015, the statute of limitations would still bar claims related to those actions or inactions.

CONCLUSION

Plaintiffs' Amended Complaint should be dismissed.

Respectfully submitted this 8th day of September 2023.

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