No. 19-01758

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

INTER-TRIBAL COUNCIL OF ARIZONA, INC.,

Plaintiff / Appellant,

v.

UNITED STATES,

Defendant / Appellee.

Appeal from the U.S. Court of Federal Claims
Case No. 1:15-cv-00342-NBF
Judge Nancy B. Firestone

OPENING BRIEF OF PLAINTIFF-APPELLANT INTER-TRIBAL COUNCIL OF ARIZONA, INC.

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June 10, 2019

FORM 9. Certificate of Interest Form 9

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Inter-Tribal Council of Arizona v. **United States**

Case No. **19-1758**

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☒ (appellant) ☐ (respondent) ☐ (appellee) ☐ (amicus) ☐ (name of party)

Inter-Tribal Council of Arizona, Inc.

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Inter-Tribal Council of Arizona, Inc.	Not applicable	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

Melody L. McCoy
Kim Jerome Gottschalk
Native American Rights Fund
1506 Broadway
Boulder, CO 80302

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

Inter-Tribal Council of Arizona, Inc. v. United States, No. 15-342L, pending in the U.S. Court of Federal Claims

6/10/2019
Date

/S/ Melody L. McCoy
Signature of counsel

Please Note: All questions must be answered

Melody L. McCoy
Printed name of counsel

cc: _____

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a), Appellant Inter-Tribal Council of Arizona, Inc. (ITCA) requests oral argument on this appeal.

STATEMENT OF RELATED CASES

Pursuant to Fed. Cir. Rs. 28(a)(4) and 47.5(b), ITCA states that the following pending case will be directly affected by this Court's decision in this pending appeal: *Inter-Tribal Council of Arizona, Inc. v. United States,* No. 15-342L in the U.S. Court of Federal Claims.

JURISDICTIONAL STATEMENT

Pursuant to Fed. Cir. R. 28(a)(5), ITCA states that the basis for this appeal is the judgment entered on March 18, 2019 pursuant to Rule 54(b) of the U.S. Court of Federal Claims. Appx1.

STATEMENT OF THE ISSUES

1. Whether the court below erred in dismissing, for failure to state a claim, ITCA's claim that the Arizona-Florida Land Exchange Act, Pub. L. No. 100-696 (1988), Appx100-117, required the United States (US) to hold in trust sufficient security for the Act's required Trust Fund Payments which consisted of: (1) 30 years of annual payments of $2.9 million each year at the statutorily-guaranteed minimum annual rate of 8.5% on $34.9 million; and, (2) a final payment of $34.9 million at the end of 30 years, or be liable in damages for breach of trust if there was a default on the payments and the security was insufficient to make the Trust Funds created by the Act whole?

2. Whether the court erred in dismissing part of ITCA's security sufficiency claim as time-barred, when, under the Act, the US was required to hold in trust adequate security for the statutorily-mandated Trust Fund Payments for the entire 30 year payment period and this was a continuing duty preventing the running of the general statute of limitations, 28 U.S.C. § 2501, or alternatively, when ITCA filed its damages claim within six years of when it knew or should have known of the US'

failure to hold adequate security and when events had occurred to fix the US' alleged liability such that ITCA could seek damages?

3.Whether the court erred in dismissing, for failure to state a claim, ITCA's claim that the Act imposed on the US the fiduciary duty to collect in full all Trust Fund Payments required under the Act, or be liable for breach of trust for failure to do so?

STATEMENT OF THE CASE

This is a case about the failure of the US to fulfill its statutory fiduciary duties under the Arizona-Florida Land Exchange Act, Pub. L. No. 100-696, 102 Stat. 4577 (1988), Appx101-117, and other federal statutes, to properly secure, collect, and invest Trust Fund Payments for Indian educational purposes following the closure of the Phoenix Indian School, an off-reservation federal Indian boarding school located on land that was owned by the US (Arizona land or Phoenix Indian School property).

A. The Arizona-Florida Land Exchange Act

The Act ratified, under certain statutorily mandated terms and conditions, the interstate Land Exchange Agreement executed between the US and the Barron Collier Company (Collier) for the Phoenix Indian School property and lands owned by Collier in Florida. Appx101-103, §§ 401(5), (6), (7), (9), (12), (17). The Arizona land was worth more than the Florida land, and the Act defines the difference in

value between the lands exchanged – $34.9 million – as the Land Exchange's "Monetary Proceeds." Appx102, § 401(10).

The Act makes "receipt by the United States of Monetary Proceeds" compulsory to the Land Exchange, Appx102, §§ 401(9), (10), (19),.and mandates that the Monetary Proceeds "shall be paid to the United States," Appx102, § 401(10), Appx111, § 403(a), with 95% of these funds to be deposited into the "Arizona InterTribal Trust Fund" for the benefit of Tribes that were members of ITCA at the time of the Act. Appx101, § 401(2), Appx115, § 405(a)(1), § 405(b)(1)(A), Appx116, § 405(e)(1), [1]

The Act provided for the Trust Fund Payments to be received by either: (1) a lump sum payment at the Land Exchange's closing, or (2) spreading them out, calculated as the Act required, over a 30-year period. Appx103, § 403(b), Appx111, § 403(c)(2). Collier insisted, and the US agreed, to the 30-year payment option. Appx51, ¶ 73, Appx54, ¶ 84. This required Collier to pay, and the US to secure and collect, each of "30 annual payments" of $2.9 million, and the final payment of $34.9 million at the end of 30 years. Appx111, § 403(c)(2)(A). The $2.9 million annual payment amount was based on a minimum annual rate of return of 8.5% on the $34.9

[1] Under the Act, the remaining 5% of the Trust Fund Payments must be deposited in a Trust Fund for the Navajo Nation. Appx102, §401(11), Appx111, §403(a), Appx115, § 405(a)(2), §405(b)(1)(A), Appx116, §405(e)(2). For the sake of simplicity in this brief, the Trust Fund Payment amounts are stated in their total value for the benefit of both ITCA and the Navajo Nation.

million set in the Act. Appx112, § 403(c)(5). In other words, in exchange for authorizing a deferral of the payment of the $34.9 million for 30 years, Congress took the extraordinary step of mandating that there must be 30 annual payments made, calculated based upon a minimum 8.5% interest rate, plus a final payment of $34.9 million.[2] The Act expressly required the US to hold in trust the security provided for the 30 year payment option. Appx115, § 403(c)(4).

B. The Trust Fund Payment Agreement

Since the 30-year payment option was elected, the Act required the Secretary of the Interior (Interior) to execute a Trust Fund Payment Agreement (TFPA) with Collier, pursuant to which the payments "will be made." Appx115, §403(c)(4), Appx340-368. The executed TFPA included a Promissory Note (Note), Appx349-350, §§ 3.1-3.2, Appx470-481, from Collier issued to the US promising, as the Act required, payment of both the "Principal Amount" of $34.9 million, and an "Annual Interest Payment," *id,* calculated "at the rate of eight and one-half percent (8.5%) per annum" as the Act required. Appx473, § J. Significantly, and uniquely, the Note prohibited prepayment of both the Principal Amount and the Annual Interest Payments. Appx471, § C.

[2] ITCA is unaware of any other comparable federal statutory mandate or arrangement in Indian law or elsewhere. The US itself asserted in *Collier* that the Act's payment arrangement is "unique." Plaintiff's Reply in Support of its Motion for Summary Judgment at 12, *United States v. Collier,* (D. Ariz. Mar. 1, 2016) (ECF No. 171).

The TFPA provided for an Annuity, Appx351-353, §§ 5.1-5.3, which secured the final payment under the Note. Appx470-471, § B. Collier was to make annual payments into the Annuity, which would be held by a private bank, according to an agreed-upon schedule. Appx470, § A. The TFPA also provided for a "Trust Estate" as defined in a Deed of Trust (Deed) from Collier to the US. Appx350-351, § 3.2, §§ 4.1-4.3. The Trust Estate consisted of the remaining portion of the Phoenix Indian School property still owned by Collier, as well as liens on development rights in property in downtown Phoenix (Development Rights) that Collier acquired by exchanging most of the original Phoenix Indian School property with the City of Phoenix. Appx350, § 4.1.

The Deed allowed Collier to request a release of portions of the Trust Fund Payments' security if the value of the remaining security "still exceeds 130% of a defined Release Level Amount." Appx441, § 6.2. The "Release Level Amount" included in its definition and calculation, "the unpaid principal plus accrued interest on the Promissory Note." *Id*. The Deed also prescribed a "Maintenance of Collateral Value" provision, which stated that, in the event there was a security release (*i.e.,* a release of the liens on the Development Rights), and the fair value of the remaining unreleased security fell below 130% of the Release Level Amount, Collier shall add to the Trust Estate U. S. Government-backed securities sufficient in value to restore

the fair value of the unreleased security to 130% of the Release Level Amount. Appx442, § 6.3.

The US also agreed in the TFPA that Collier's debt was "nonrecourse" in terms of personal liability, and thus the only remedy for the US upon Collier's default would be *in rem* against the remaining security. Appx350, §§ 3.2, 4.1, Appx352-353, § 5.2, Appx 358-359, § 9.5. The nonrecourse provisions were negotiated terms agreed to by the US, not mandated by the Act. While the TFPA, Note and Deed were executed in 1992, Appx343, upon Collier's demand, to which the US acquiesced, the final closing of the Land Exchange, which triggered Collier's payments obligations, did not occur until the end of 1996. Appx60-61, ¶s 113, 116.

C. Collier's 15 Years of Payment and Default

Collier made 15 annual payments beginning in 1997, after which Collier defaulted. Appx70, ¶163, Appx74, ¶190. It was established by the US as an undisputed fact in *United States v. Barron Collier, Co.,* No. 2:14:cv-00161-PGR (D. Ariz. filed Jan. 28, 2014) (hereinafter, *Collier*), that Collier never intended to make all the required Trust Fund Payments. Appx73, ¶189. Within one year from when Collier began making payments (1998), and again, at the ten-year mark of making payments (2007) Collier requested releases of liens on the Development Rights, which the US granted. Appx71, ¶172.

At the time of Collier's default, 15 annual payments of approximately $2.9 million, plus the final payment of $34.9 million, remained to be paid to the US under the Act, leaving a total of approximately $78.4 million due to the Trust Funds by year 2027. Appx76, ¶203. Upon Collier's default the US revealed to ITCA that the security for the Trust Fund Payments was grossly deficient from what the Act required. Appx74, ¶196, Appx75, ¶202.

D. The Litigations Resulting from the Collier Default

The US sued Collier in the *Collier* case to "supplement the security," but did not seek to recover all remaining annual payments and the entire final payment amount due under the Act. Appx77, ¶s210-213. The US ultimately settled with Collier and recovered $16 million in cash, the Annuity worth, upon full maturity, approximately $13.5 million, and 15 remaining acres of land from the Phoenix Indian School parcel, which the US sold in 2018 for $18.5 million. Appx81, ¶226, Appx84-85, ¶242-244. The total recovery was roughly $48 million, which is approximately $30.4 million less than what was owed the Trust Funds when Collier defaulted.

While *Collier* was pending, ITCA filed this action to recover money damages from the US that were owed its Trust Fund under the mandates of the Act, and under the general statute governing investment of tribal trust funds, 25 U.S.C. § 162a. Appx86, ¶253. The US argued below that it was never required by the Act to hold

sufficient security for both the final payment and all of the annual payments to the Trust Funds, or to collect all of the remaining annual payments and the full final payment following Collier's default. The US also argued that ITCA's claims were barred by the six-year general statute of limitations, 28 U.S.C. § 2501.

The lower court granted in part and denied in part the US' motion to dismiss ITCA's Second Amended Complaint. Appx9-33. While the court held, as it had previously with regard to ITCA's original Complaint,[3] that the Act imposes a duty on the US to hold adequate security, the court agreed with the US that ITCA's claim going to the failure of the US to ensure sufficient security in the 1992 TFPA was barred by the statute of limitations. Appx25-26. The Court disagreed with the US, however, that ITCA's claim was time-barred where ITCA alleged that the US failed to ensure that Collier maintained sufficient security for remaining unpaid annual payments and the final payment after the Land Exchange closed in 1996 and the US released the liens in 1998 and 2007, and thereafter, up until Collier's default. Appx26. Instead, the court dismissed this portion of the security claim for failure to state a claim, finding that the efforts of the US in *Collier* fulfilled any obligations

[3] The court granted in part and denied in part the US' motion to dismiss ITCA's original complaint. *InterTribal Council of Arizona v. United States,* 125 Fed. Cl. 493 (Fed. Cl. 2016). The court expressly held that the Act is money-mandating with respect to ITCA's security sufficiency claim, thereby establishing its subject matter jurisdiction over that claim. 125 Fed. Cl. at 501-503.

the US had under the Act and the TFPA and Deed. Appx26-27. The court also dismissed, for failure to state a claim, ITCA's claim alleging a duty on the part of the US to collect and pay all Trust Fund Payments required under the Act. Appx28. Upon ITCA's motion, Rule 54(b) judgment was entered on the dismissed security and collection claims. Appx1-8.[4]

SUMMARY OF ARGUMENT

The lower court's erroneous rulings stem primarily from its failure to interpret correctly the express and unambiguous terms and structure of the Act regarding the money-mandating fiduciary duties of the US. With respect to the security sufficiency claim, the court also ignored terms and misinterpreted key terms in the TFPA and related documents, or alternatively, erroneously elevated key terms over the Act's requirements. These errors led the court to conclude that the Act or Deed authorized the US to hold less security than was needed to secure all the Trust Fund Payments required by the Act.

The court also erred in holding that ITCA needed to file suit for damages on its security claim within six years of the execution of the TFPA, Note and Deed in 1992, despite the continuing nature of the security obligations imposed under the

[4] ITCA's investment claims are not at issue in this Rule 54(b) appeal. *See* Appx90-91. The lower court held that it has subject matter jurisdiction over these claims, 125 Fed. Cl. at 504-505, but dismissed the pre-April 2009 investment claims on statute of limitations grounds. Appx29-33. Neither party has appealed these rulings at this point in the litigation.

Act, and the fact that ITCA had no means by which to know the dollar value of the security by that time (since it did not exist) until after the Land Exchange closed in 1996), or at any time thereafter during Collier's payment period, including when the liens were released in 1998 and 2007.

Finally, the court ignored the Act's mandates and erred under applicable case law regarding the liability of the US for breach of trust in collection cases when it dismissed ITCA's claim for damages based upon the US' failure under the Act to collect and pay all of the Act's required remaining annual payments and the full final payment after Collier's default.

ARGUMENT

I. The Standard Of Review For All Issues Before This Court Is *De Novo*

This Court reviews *de novo* a trial court's dismissal of claims for failure to state a claim and on statute of limitations grounds. *Anoruo v. United States*, 759 F. App'x 956, 960 (Fed. Cir. 2019) (citations omitted). Failure to state a claim upon which relief can be granted generally means that the claim is not based on a plausible legal theory. *Hutchinson Quality Furniture, Inc. v. United States*, 827 F.3d 1355, 1361 n.4 (Fed. Cir. 2016) (citations omitted).

Thus, the threshold issues here are whether ITCA has pled plausible legal theories regarding its security and collection claims. *Hutchinson Quality Furniture*, 827 F.3d at 1361 n.4; *accord Starr Int'l Co., Inc. v. United States*, 856 F.3d 953, 980

(Fed. Cir. 2017), *cert. denied*, 138 S. Ct. 1324 (2018). The security claim's timeliness then can be reviewed. *See Coda Dev. S.R.O. v. Goodyear Tire & Rubber Co.*, 916 F.3d 1350, 1361 (Fed. Cir. 2019) (statute of limitations is an affirmative defense that goes beyond a claim's sufficiency); *see also White Mountain Apache Tribe v. United States,* 249 F.3d 1364, 1382 n.15 (Fed. Cir. 2001), *aff'd,* 537 U.S. 465 (2003) (reversing dismissal for failure to state a claim but remanding for determination of limitations issues which had not yet been reached).

II. ITCA's Security Sufficiency Claim Is A Plausibly-Stated And Timely Claim Upon Which Relief Can Be Granted

A. The Security Sufficiency Claim Is Plausibly Stated

The plausibility of ITCA's security claim is a "legal question requiring statutory interpretation." *BASR Partnership v. United States*, 915 F.3d 771, 776 (Fed. Cir. 2019). The lower court failed to give effect to Congress' intent as manifested in the Act's express statutory language and overall structure. Instead, the court focused on certain terms of the TFPA and related documents which were agreed to contractually by the US and Collier. Appx25-26. The security duty at issue here, however, is the one established by the Act, and imposed on the US. This issue entails what the Act required the US to secure, both when the Land Exchange closed in 1996, and then every year after until all the Trust Fund Payments required under the Act were satisfied.

As noted, the Act expressly provides that the 30-year payment option must consist of 30 annual payments of $2.9 million (based on the Act's mandated minimum annual rate of return of 8.5% on the $34.9 million), and a final payment of $34.9 million at the end of 30 years. Appx111, § 403(c)(2). Upon election of the 30-year payment option, "the Secretary of the Treasury shall hold in trust the security provided in accordance with the Trust Fund Payment Agreement." Appx115, § 405(c)(2).[5] The Act directed the US to enter into the TFPA pursuant to which all payments would be made and secured.Appx112, § 403(c)(4). Nothing about this directive reduces or modifies the Act's payment and security requirements. Hence, the terms of the TFPA had to be consistent with the Act, or they *per se* violated the Act.

"[T]he starting point for interpreting a statute is the language of the statute itself." *W. Co. of N. Am. v. United States*, 323 F.3d 1024, 1029 (Fed. Cir. 2003) (citation omitted). Contrary to this basic principle, the lower court gave little, if any, weight to the Act's text. Appx22-27. In unequivocal terms, the Act mandates that security shall be held, who shall hold it, and how it shall be held. Appx112, §

[5] ITCA is unaware of any other federal statute, in Indian law or elsewhere, that uses the language "hold (or "held") in trust" to impose a mandatory fiduciary duty on the United States, other than the statute at issue in *White Mountain Apache Tribe*, 249 F.3d at 1369. Of course, this Court's reversal of the Court of Federal Claims' dismissal of the Tribe's claims in that case for failure to state a claim was affirmed by the Supreme Court. 537 U.S. at 468-471.

403(c)(4). The Act's security mandates are triggered only by the election of the 30-year payment option, which thus sets the time period for which the duty begins and continues until it ends, *i.e.*, when the payments are fully satisfied. Appx111, § 403(c)(2). Other than the 30-year temporal limitation, nothing in the Act provides for elimination or modification of the security duty. Absent clearly expressed legislative intent to the contrary, a statute's language "must ordinarily be regarded as conclusive." *W. Co. of N. Am. v. United States*, 323 F.3d at 1029 (citation omitted).

The court also disregarded contemporaneous statements of US officials and attorneys at the highest level who were charged with implementing the Act. *See AD Glob. Fund, LLC ex rel. N. Hills Holding, Inc. v. United States*, 67 Fed. Cl. 657, 678 (Fed. Cl. 2005), *aff'd*, 481 F.3d 1351 (Fed. Cir. 2007) (statements of agency officials, especially to Congress, are persuasive statutory interpretation tools). At the Act's required consultation with ITCA regarding the two payment options, Appx111-112, § 403(c)(3). Solicitors for Interior involved in the TFPA negotiations made clear they understood the US had to secure both the $34.9 million final payment at the end of the 30-year period and the annual payments. Appx202.

"Any serious mismanagement of the trust funds, or any serious mismanagement of collateral or the establishment of the collateral [means] the legal liability [is] on behalf of the United States to make up the difference." Appx205.

According to this same Solicitor, "proper collateral" was important to ensure that, "30 years out there's going to be $35 million there and that each year there will be a payment of income from that of at least 8.5[%] or else the United States becomes liable." *Id*. (emphasis added). Stated another way, if Collier were "to go under, [the United States is] still … going to be liable for the yearly payments of approximately $2.6 to $2.7 million …. [for] thirty years." Appx213-214.

As the US continued to negotiate the TFPA with Collier, the US provided written confirmation of its understanding of the Act to Congress:

> As provided in section 403(c)(6) of the Act, the Department and Collier must execute a mutually acceptable Trust Fund Payment Agreement to secure 30 years of interest payments and a final payment of $34.9 for the Indian trust funds, which are part of the Exchange Agreement.

Appx246 (emphasis added); *accord* Appx257. And, when Collier expressed "confoundment" with Interior's proposed security terms, he was rebuffed.

> We have maintained the only position [Interior] may legally assume in this situation, [which is] that of a prudent banker. Furthermore we are charged with a unique trust responsibility on behalf of the Indians. We do not believe the Secretary can compromise that responsibility by any measure, even if it means no deal at all.

Appx273. In 1992, as time was about to expire for closing the Land Exchange with Collier, the US continued to assure ITCA that it would abide by the Act's security mandates when finalizing the security terms in the TFPA. Then-Interior Secretary Lujan boasted, "I can almost guarantee you we're going to have almost 200 percent

collateral." Appx292. He continued, "You are entitled to 3 million dollars a year … plus the 35 million dollars after the 30 years are up." Appx295.

These communications, set forth in more detail in the Second Amended Complaint, Appx51- 62, ¶s 76-118, show the contemporaneous understanding of the US regarding its obligations under the Act. When the US and Collier finally reached a payment agreement in principle in 1992, Secretary Lujan reiterated to ITCA that the US would secure all of the annual payments and the final payment. Appx321-324. In response to a question from a Tribal Leader about the remote possibility that Collier might go bankrupt, Secretary Lujan's Counselor responded, "We don't see any remote possibility, but our trust responsibility says that we have to take that into consideration [or] the tribes can sue us for breaching our trust responsibility for not getting collateral in case there is the remotest possibility they went bankrupt." Appx333.

Consistent US' correct contemporaneous understanding of the unique requirements of the Act, the Note called for Collier's payment of 30 "Annual Interest Payments" "at a rate of eight and one-half percent (8.5%)" and the final "Principal Amount" of $34.9 million. Appx473, § J. The Note also prohibited prepayment of both payments, showing that the US understood that, in exchange for a 30-year deferral of the $34.9 million payment owed the Trust Funds from the Land Exchange, the Act required all annual payments for the entire 30-year period and the

final payment at the end of 30 years to make the Trust Funds whole. Appx471, § C Despite these terms, with very little analysis, the lower court concluded that the US was only required to secure the payments up until the point of Collier's default, whenever that might be.

The court's error is grounded in its interpretation of the Deed, where the US agreed to secure the 30 years of annual payments with real property interests, including the remaining 15 acre Phoenix Indian School property and liens on the Development Rights.[6] Appx350, § 4.1. Moreover, the Deed allowed Collier to request a release of the liens if the value of the remaining security "still exceeds 130% of a defined Release Level Amount." Appx441, § 6.2. The Release Level Amount was defined as follows:

> the unpaid principal plus accrued interest on the Promissory Note, less (ii) the value of United States Government-backed Securities and Deposited Monies held in the Trust Estate, and further less, after the expiration of two years from the Closing Date ... (iii) the fair value, at the time of the calculation, of the Annuity."

[6] Other terms in the TFPA, the Note, and the Deed, however, clearly violated the Act. In particular, nonrecourse terms prohibited typical remedies for default, such as personal liability, and left the US with only an *in rem* remedy against whatever security existed at the time of default. These provisions put the Act's Trust Fund Payments' obligations seriously at risk and incentivized Collier's default because, after the release of liens in 1998 and 2007, and the market crash in 2008, the US failed to require Collier to supplement the security with U.S. Government-backed securities as provided for in the Deed, leaving only the remaining Phoenix Indian School property valued at $6 million as security for the remaining payments due under the Act.

Id. (emphasis added). Another provision of the Deed, "Maintenance of Collateral Value," stated that if, after a partial security release, the fair value of the remaining unreleased security fell below 130% of the Release Level Amount, Collier must add U.S. Government-backed securities sufficient in value to restore the fair value of the unreleased security to 130% of the Release Level Amount. Appx442, § 6.3.

After the initial lien release in 1998, and up and until default, both the Deed and its formula for calculating the Release Level Amount should have been construed by the lower court in a manner consistent with the Act. Thus, the lower court should have construed the term "accrued interest" in the Release Level Amount to mean the total number of annual payments that were due and owing (but yet unpaid) under the Act in any given year, during the 30-year period. Instead, the court agreed with the US, that "accrued interest" only refers to the single annual payment due in any given year. Appx27. This was in error.

The lower court demonstrated its misunderstanding of the requirements of both the Act and the Note when, in citing the Release Level Amount, it explains that the "Release Level Amount is (i) the unpaid principal plus accrued interest on the Promissory Note [$34.9 million]." Appx14, fn.5 It is unclear why, in discussing the Release Level Amount, the court inserted the bracketed reference to, "[$34.9 million]" as if to explain the terms of the Note. Whatever the court intended, this is not what the Note said; the Note instead reflected the Act's requirements that the

Trust Fund Payments included both all 30 years of annual payments and the final payment. Appx473, § J.

Thus, in order to calculate the Release Level Amount consistent with the Act and the Note, "accrued interest" must include all of the unpaid annual payments, not a single payment in any given year, thereby ensuring that all annual payments and the final payment were fully secured throughout the 30-year period. Alternatively, the lower court should have held that it was a violation of the Act for the US to construe "accrued interest" as only requiring the annual payment due in any particular year. Instead, the court held that the US met it fiduciary obligations under the Act when it sued Collier to recover "amounts owed to make up the 130% of the Release Level Amount, *i.e.*, the missed four annual payments of $2.9 million before Colliers defaulted (sic) and the lump sum amount of $34.9 million minus…the annuity and remaining property held in security." Appx27. This was error.

In any event, the US' once-correct understanding of its statutory fiduciary security duty under the Act was later abandoned. Certainly, the US has taken a totally inconsistent position for purposes of this litigation.[7] The US seizes on the

[7] In at least one instance in *Collier*, the US calculated accrued interest as including not just the payments that Collier had not made to date which, at that time, was 2015, but also the eleven post-2015 annual payments, thus admitting that "accrued interest" does or should include any and all unpaid annual payments for the entire 30-year period. Appx65-66, ¶144. The US should be held to that interpretation in this action. *Id*. at ¶ 144; *see Comm'r v. Belridge Oil Co.*, 267 F.2d 291, 294 (9th

Act's language "in accordance with the TFPA," Appx115, § 405(c)(2), and argues that this language operates to allow it to hold less security than the Act required. That is specious. The "in accordance with the TFPA" language cannot reduce the explicit fiduciary duties mandated by the Act.[8]

Further, the Act imposed the security duty on the US, and nothing in the Act transfers or allows that duty to be transferred to Collier, as the lower court suggested. Appx26-27. Absent express authorization by Congress, an agency cannot transfer a duty imposed by Congress on the agency to a third party. *Truckers United for Safety v. Mead*, 251 F.3d 183, 186 (D.C. Cir. 2001); *United States v. E. I. Dupont De Nemours*, 432 F.3d 161, 181 (3rd Cir. 2005) (Rendall, J., dissenting). The Act's language "in accordance with the TFPA" is not such an authorization. There is no support for Congress' imposition of a security duty on Collier.[9]

Cir. 1959) (private parties are held to positions taken in litigation and so is the government).

[8] The US knew full well that it was acting pursuant to a statutory fiduciary duty with respect to obtaining the security that it was required to hold in trust. Before the 30-year payment option was chosen, the US wrote that, "[t]he most important factors to be considered in analyzing these two [trust fund payment] options are the degree of security provided the Department in fulfilling its trust responsibilities to the beneficiaries of the trust…." Appx224. After the 30-year option was chosen, the US reiterated that while it had "reluctantly consented to act as [Collier's] bankers," and had tried to accommodate Collier, it nevertheless had to fully meet its "trust responsibilities to the Indian Tribes." Appx262.

[9] Nor does *Collier* stand for the proposition that the Act's security duty was on Collier. Appx26-27. Because the security was insufficient when Collier defaulted,

In sum, ITCA's security claim is based on solid legal theories. It also is supported by sufficiently alleged facts. When Collier defaulted the security was admittedly insufficient. Appx74, ¶196, Appx75, ¶202. The US is liable for what it failed to secure.

B. ITCA's Challenge To The Security Terms Of 1992 In The TFPA And Related Documents Is Not Time-Barred

The lower court concluded that ITCA is time-barred from seeking damages based upon the insufficient security terms in the 1992 TFPA and related documents. Appx25. The court rejected ITCA's argument that no portion of the security claim can be time-barred because under the Act the US had a continuing duty with respect to the security. Appx25-26. The court also erred in finding that ITCA "knew" the dollar value of the security and knew it was insufficient when the TFPA and related documents were executed in 1992. Appx26-27. Each of these conclusions rests on flawed analyses and fails to construe well-pled allegations under appropriate standards for a motion to dismiss.

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the US sued Collier to force Collier to "supplement the security" that, under the Act, the US had the duty to hold. As the federal district court held, the US' claims against Collier were entirely contractual, not statutory. *United States v. Barron Collier Co*, No. CV-14-00161-PHX-PGR, 2016 WL 3537802, at *1 (D. Ariz. June 29, 2016). Even if the contractual provisions were consistent with the Act, they did not and could not transfer, eliminate or reduce the statutory security duty imposed on the US.

The Act expressly required that, "[i]f a Trust Fund Payment is made in the form of annual payments … the Secretary of the Treasury shall hold in trust the security provided in accordance with the Trust Fund Payment Agreement." Appx115, § 405(c)(2). The Act expressly set the term of the annual payments option as being a 30-year period. Appx111, § 403(c)(2). The Act's text is a classic imposition of a duty that continues unless and until the Trust Fund Payments are made in full. Other than the 30-year temporal limitation, nothing in the Act modifies or qualifies the security duty's continual nature.[10]

Where a statute or regulation imposes a continuing duty, the duty "is subject to the continuing claims doctrine." *Oenga v. United States*, 91 Fed. Cl. 629, 646 (Fed. Cl. 2010). "Under the continuing claim doctrine, when a defendant owes a continuing duty, a new cause of action arises each time the defendant breaches that duty." *Id*. (citation omitted); *accord Shoshone Indian Tribe of Wind River Reservation, Wyo. v. United States*, 672 F.3d 1021, 1035 n.9 (Fed. Cir. 2012) (where the government has a continuing duty, every time the government fails to comply with the duty a new cause of action arises).

[10] Nor, absent congressional authorization, could a contract such as the TFPA itself modify or qualify a continuing duty imposed by a statute. As discussed in Section A, *supra*, the TFPA needed to comply with the Act's continuing duty, or itself be a breach of trust.

Once it begins, an uncorrected breach of a continuing duty becomes on-going, such that even if the breach began six years before a claim is filed, the statute of limitations is not a complete defense. *Oenga v. United States*, 91 Fed. Cl. at 646. Thus, the proper inquiry in this case is whether the US was in breach within six years of the filing of this lawsuit with respect to the US' security duty, and ITCA alleges that the answer to that question is, yes, it was, because the security was insufficient to cover all of the mandated Trust Fund Payments in full upon default. As in *Oenga*, "the government's ongoing failure to monitor and ensure compliance with" its continuing duty allows recovery for those duties in the present action for up to six years before it was filed in April 2015. *Id*. at 647; *see also Shoshone*, 672 F.3d at 1035 n.9 (distinguishing a continuing duty claim from a claim for damages for the cumulative effect of alleged breaches by the government for actions that began outside of the limitations statute).

The continuing claims doctrine makes exactly what and when ITCA knew about the security terms in the TFPA and related documents irrelevant. Nevertheless, assuming *arguendo* that the doctrine is somehow inapplicable here, a cause of action for breach of trust accrues only when the trustee repudiates the trust and the beneficiary has knowledge of that repudiation. *Shoshone*, 672 F.3d at 1030 (citations omitted; emphasis in original). "The trustee may repudiate the trust by taking actions inconsistent with his responsibilities as a trustee or by express words."

Id. (citations omitted). Placing the beneficiary on notice that a breach has occurred is sufficient to establish the beneficiary's knowledge of the repudiation. *Id*. at 1030-31 (citation omitted).

Under this precedent, the security sufficiency claim accrued at the earliest in March 2013, when the US disclosed to ITCA that Collier had defaulted and the security was deficient. Appx75, ¶198. Contrary to the lower court's determination, Appx26, that was the first time that ITCA had or could have had actual knowledge of the facts material to this claim sufficient to fix the US' liability, entitling ITCA to file this suit for damages. *See Martinez v. United* States, 333 F.3d 1295, 1303 (Fed. Cir. 2003), *cert. denied*, 540 U.S. 1177 (2004) (citation omitted) (a claim against the US "accrues as soon as all events have occurred that are necessary to enable the plaintiff to bring suit, *i.e.,* when 'all events have occurred to fix the Government's alleged liability, entitling the claimant to demand payment and sue here for … money'").

The lower court failed to comprehend that ITCA's knowledge of the security terms, Appx26, is not the same as knowing the dollar value of the security or whether it was, in fact, deficient. In fact, ITCA did not know the specific dollar value of the security package in 1992 and could not have, since the value did not begin to be fixed until the Land Exchange closed. Collier did not begin making payments into the Annuity until 1997, and the liens on the Development Rights did not attach until

after the Land Exchange closed in 1996. Even after the closing, ITCA did not know the dollar value of the security (*i.e.*, the remaining Phoenix Indian School property, or the liens on the Development Rights), and given Phoenix's fluctuating real estate market, it had no way of forecasting what the value of these real property interests would total at any given point in time during the 30-year payment period. These facts, set forth in the Second Amended Complaint, Appx62, ¶ 138, Appx72, ¶177, Appx, ¶s187-188, must be construed in ITCA's favor on a motion to dismiss for limitations grounds, which the lower court did not do. *Setness v. Sec'y of Health and Human Servs*., No. 13-996V, 2015 WL 1736916, at *2 (Fed. Cl. Mar. 26, 2015) (citations omitted); *accord Kortlander v. United States*, 107 Fed. Cl. 357, 364 (Fed. Cl. 2012).[11]

Under *Shoshone,* the proper inquiry for a breach of trust claim limitations defense is awareness of the material facts. 672 F.3d at 1031 (emphasis in original). ITCA took issue with the TFPA's security terms in *ITCA v. Lujan,* No. 2:92-CV-01890-SMM (D. Ariz. filed Oct. 8, 1992), and was told by the courts in that case that under the Act itself it could not seek declaratory or injunctive relief regarding those terms, since the Act incorporates the Administrative Procedures Act, 5 U.S.C.

[11] Moreover, to the extent there is a dispute about what ITCA knew and when, such a factual dispute should not be resolved at the motion to dismiss stage. *ABB Turbo Sys. AG v. Turbousa, Inc.*, 774 F.3d 979, 985-986 (Fed. Cir. 2014).

§§ 553-558 and §§ 701-706, prohibition on judicial review for certain actions by Interior connected with the Land Exchange. Appx68-69, ¶s157-161. *ITCA v. Lujan*, however, did not address whether the security was in fact sufficient. Indeed, the US expressly acknowledged in *ITCA v. Lujan* that, notwithstanding the resolution of ITCA's claims in that case, ITCA remained "free to pursue any further monetary remedy they believe they are entitled to in the United States Claims Court," and that "[u]nder contract and trust theories, plaintiffs could seek relief under the Tucker Act for money damages." Appx69, ¶162.[12]

It is also noteworthy that after *ITCA v. Lujan*, the US did not involve ITCA in the specific acquisition or maintenance of the security. The US never told ITCA of its decisions to release the liens on the property in 1998 and 2007, nor of the security's valuation at those times. Appx64, ¶138, The US did not do appraisals of the property or take any other action regarding the security in connection with the lien releases or the major economic downturn in 2007-2008. Appx72, ¶s174-175, Appx73, ¶s180-181. Therefore, unlike in *Shoshone*, ITCA had neither actual knowledge of, nor any reasonable way of knowing, "all of the material facts that

[12] Had ITCA attempted to assert, at any time prior to Collier's default, a claim for damages based on alleged insufficient security, such a claim almost certainly would have been deemed speculative and unripe. *See Cloutier v. United States,* 19 Cl. Ct. 326, 330 (Cl. Ct. 1990), *aff'd*, 937 F.2d 622 (Fed. Cir. 1991) (rejecting claim "[w]ithout proof that some damage has already occurred" as "simply not ripe" and noting that potential for future damages "is entirely speculative").

established the Government's liability" for its security claim until the US informed ITCA that Collier had defaulted and the security was deficient. *Shoshone*, 672 F.3d at 1034. It was Collier's default, coupled with the security being insufficient in fact, and the US' disclosure of that fact, that triggered ITCA's claims here, and the claims are timely.

III. ITCA's Collection Claim Is A Plausibly-Stated Claim Upon Which Relief Can Be Granted

The lower court disagreed with ITCA that the Act required the US to collect from Collier all Trust Fund Payments required under the Act, and that the US' failure to collect all of the payments is a breach of trust for which the US is liable. Appx27-28. To the extent that the court found no support in the Act for the plausibility of this claim, that finding was in error.

Statutory interpretation starts with the language of the statute itself. *Indian Harbor Ins. Co. v. United States*, 704 F3d. 949, 954 (Fed. Cir. 2013). Regarding the Trust Fund Payments, the Act's plain language is that the "Monetary Proceeds shall be paid to the US for deposit in the" Trust Funds. Appx111, § 403(a). (emphasis added). "Monetary Proceeds means… the cash amount required to be paid to the United States by Collier." Appx102, § 401(10)(A) (emphasis added). Under the annual payment option, "the Secretary is directed to execute the Trust Fund Payment Agreement pursuant to which such annual payments will be made." Appx112, § 403(c)(4) (emphasis added). The Trust Funds "shall consist of…an amount equal to

the sum of…that portion of the Monetary Proceeds properly allocable to" it. Appx115, §405(b)(1)(A) (emphasis added).

The Act does not merely authorize the Trust Fund Payments; it mandates them, and it mandates them unequivocally. Other than providing for the Trust Fund Payments to be made either in a lump sum or over a 30-year period, there are no discretionary, permissive or qualifying statutory provisions regarding the payments. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife,* 551 U.S. 644, 661 (2007) (citations omitted) (as used in statutes, the word "shall" is a mandatory, non-discretionary, imperative command or directive). In dismissing ITCA's collection claim, the lower court did not employ this basic statutory interpretation analysis and thus did not adhere to the clearly expressed intent of Congress regarding the Trust Fund Payments.

Rather, the court focused on the Act's lack of express provision for "the government's liability in the event of a default by Collier" on the required Trust Fund Payments. Appx28. The court failed to recognize that the Act's express security requirements are precisely such provisions. Congress did not need to require the US to collect all the payments when it had required the US to secure all the payments. The Act's security provisions are intended to ensure that the payments will be made in full, and they must be given meaning and effect. *See Kellogg Brown & Root Servs., Inc. v. United States*, 728 F.3d 1348, 1368 (Fed. Cir. 2013), *cert.*

denied, 135 S. Ct. 167 (2014) (citations omitted) (a basic principle of statutory interpretation is that a statute must be construed in a way that gives meaning and effect to all of its parts); *accord Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F3d 1041, 1052 (Fed. Cir. 2012), *cert. denied*, 568 U.S. 816 (2012) (citations omitted) (no part of a statute should be rendered inoperative, superfluous, void, insignificant or meaningless).[13]

The collection claim's plausibility is further supported by cases that deal with the US' collection duties for monies owed by third parties to tribes. Notwithstanding the lack of express collection duties in the statutes and regulations involved in those cases, this Court has held that the laws' provisions mandating payments from third parties imply the government's collection duties. *E.g.*, *Shoshone Indian Tribe v. United States*, 364 F.3d 1339, 1350 (Fed. Cir. 2004), *cert. denied*, 544 U.S. 973 (2005); *see also Osage Tribe v. United States*, 68 Fed. Cl. 322, 325-328 (Fed. Cl. 2005). Likewise, the Trust Fund Payments, which are expressly required by the Act, obligate the US to collect those payments. Such obligation is even clearer here than

[13] Even if there were no clear and express security provisions, the lower court failed to explain why silence in the statute regarding default works to the advantage of the US. Under principles deeply rooted in the Supreme Court's federal Indian law jurisprudence, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

in *Shoshone* or *Osage* because of the Act's Trust Fund Payments' express security mandates. Appx115, §405(c)(2).

ITCA has stated a solid collection claim, and alleged sufficient facts to support that claim. The US did not collect and did not seek to collect the full value of all remaining payments due once Collier defaulted. Appx77-78, ¶s208-213. The *Collier* settlement leaves 10 payments uncollected. Appx81, ¶226[14] The value of the annuity at full maturity and the value of the property as sold from *Collier* did not amount to the full unable-to-be-prepaid final payment of $34.9 million. Appx80-85, ¶s226-244.

CONCLUSION

For the reasons stated above, the Court of Federal Claims' dismissal of Claims I and II of the Second Amended Complaint should be reversed.

Respectfully submitted this 10th day of June, 2019,

/s/ Melody L. McCoy
Melody L. McCoy
Attorney of Record for the Inter-Tribal Council of Arizona

[14] The fact that these 10 payments were to be paid on an annual basis from 2016 until 2026 is not relevant to the question of *whether* the Act establishes a specific fiduciary duty to collect them. It may be relevant to the issue of *how to appropriately calculate* the US' liability for failing to collect them, *e.g.,* discounting them to present value. *See Osage Tribe v. United States*, 75 Fed. Cl. 462, 468 (Fed. Cl. 2007) (citation omitted) (the court should attempt to place the beneficiary in the position in which it would have been absent the breach of trust).

ADDENDUM

ADDENDUM TABLE OF CONTENTS

In the United States Court of Federal Claims

No. 15-342 L
Filed: March 18, 2019

INTER-TRIBAL COUNCIL OF ARIZONA, INC.

RULE 54(b) JUDGMENT

v.

THE UNITED STATES

Pursuant to the court's Order, filed March 18, 2019, granting-in-part and denying- in-part, plaintiff's motion for entry of final judgment, and directing the entry of judgment pursuant to Rule 54(b), there being no just reason for delay,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that Claims I and II of plaintiff's second amended complaint are dismissed.

Lisa L. Reyes
Clerk of Court

By: s/ Debra L. Samler

Deputy Clerk

NOTE: As to appeal to the United States Court of Appeals for the Federal Circuit, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $505.00.

In the United States Court of Federal Claims

No. 15-342L
(Filed: March 18, 2019)

INTER-TRIBAL COUNCIL OF ARIZONA, INC., Plaintiff, v. THE UNITED STATES, Defendant.	Rule 54(b); Partial Judgment

ORDER ON PLAINTIFF'S MOTION FOR ENTRY OF PARTIAL FINAL JUDGMENT

Pursuant to Rule 54(b) of the Rules of the United States Court of Federal Claims ("RCFC"), Inter-Tribal Council of Arizona, Inc. ("ITCA") moves for entry of final judgment for Claims I, II, and a portion of Claim III of its Second Amended Complaint (ECF No. 58), that the court dismissed in its October 17, 2018 opinion, *Inter-Tribal Council of Az. v. United States*, 140 Fed. Cl. 447 (2018). (ECF No. 74). The claims in ITCA's Second Amended Complaint were as follows: Claim 1, breach of trust by the government for failure to secure with sufficient security all Trust Fund Payments due under the Arizona-Florida Land Exchange Act ("AFLEA" or "Act")[1] owed by Barron Collier Co. ("Collier"); Claim II, breach of trust for the government's failure to collect all fifteen-remaining annual Trust Fund payments from Collier and for the government to

[1] The Arizona-Florida Land Exchange Act was Title IV of the Arizona-Idaho Conservation Act of 1988, Pub. L. No. 100-696, 102 Stat. 4571, 4577-93 (1988).

make up those payments; and Claim III, breach of the government's fiduciary obligations to properly and prudently invest Trust Fund payments that have been collected and deposited. The court dismissed Claims I and II in their entirety. The claims based on insufficient initial security requirements were found to be time-barred and the claims related to the government's breach of its fiduciary obligations to make up payments were dismissed for failure to state a claim. *Inter-Tribal,* 140 Fed. Cl. at 455-58. Additionally, the court dismissed the portion of Claim III that sought payments for breach of trust that occurred more than six years prior to the filing of the suit by ITCA on the grounds that this portion of the claim was barred by the six-year statute of limitation in 28 U.S.C. § 2501. *Id.* at 458-60.

In its motion for entry of judgment pursuant to Rule 54(b), ITCA argues that the court's dismissal of Claims I, II, and the portion of Claim III barred by the statute of limitations are final dispositions on separate and distinct claims for the purposes of Rule 54(b) and that there being no just reason for delay the court should enter a final judgment so that ITCA can appeal the court's rulings. The government opposes ITCA's motion for entry of partial final judgment under Rule 54(b) for two reasons. First, with regards to Claims I and II, the government argues that a Rule 54(b) motion is not appropriate because ITCA has not made the required showing of the harm it will suffer if it is required to wait to appeal the dismissal of these claims until the court resolves the outstanding portion of Claim III. Second, the government argues that the Claim III cannot be separated for purposes of entering a final judgment and thus a partial final judgment under Rule 54(b) is improper. For the following reasons, the plaintiff's motion

for entry of partial final judgment is **GRANTED** as to Claims I and II and **DENIED** with regard to the dismissed portion of Claim III.

I. LEGAL STANDARDS

Rule 54(b) provides that "[w]hen an action presents more than one claim for relief . . . or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." Recognizing that litigation has become increasingly complex, "[i]n the interest of sound judicial administration, Congress enacted Rule 54(b) to 'relax[] the restrictions upon what should be treated as a judicial unit for the purposes of appellate jurisdiction.'" *W.L. Gore & Assocs., Inc. v. Int'l Med. Prosthetics Research Assocs., Inc.*, 975 F.2d 858, 861 (Fed. Cir. 1992) (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 432 (1956)).

In *Curtiss-Wright Corp. v. General Elec. Co.*, the Supreme Court explained that courts must apply a two-part test to determine whether partial judgment under Rule 54(b) is warranted. 446 U.S. 1 (1980). First, the court must "determine that it is dealing with a 'final judgment'" *Id*. at 7. A final judgment contains two components: first "[i]t must be a 'judgment' in the sense that it is a decision upon a cognizable claim for relief," and second "it must be 'final' in the sense that it is 'an ultimate disposition of an individual claim entered in the courts of a multiple claim action.'" *Id*. Second, the court must find that there is no just reason for delay and "take into account the judicial administrative interests as well as the equities involved." *Id*. at 8.

The Federal Circuit has explained that the "separateness of the claims for relief" for the purposes of Rule 54(b) "is a matter to be taken into account in reviewing the trial court's exercise of discretion in determining that there is no just reason to delay the appeal." *W.L. Gore*, 975 F.2d at 862 (citation omitted). The Federal Circuit has further explained that "[e]ven for claims that arise out of the same transaction or occurrence, sound case management may warrant entry of partial final judgment." *Intergraph Corp. v. Intel Corp.*, 253 F.3d 695, 699 (Fed. Cir. 2001). In this connection, the Federal Circuit has also held, however, that where claims are intertwined such that the court could face the same issue twice on appeal, entry of judgment under Rule 54(b) is not proper. *See Vermont Yankee Nuclear Power Corp. v. United States*, 346 F. App'x 589, 591 (Fed. Cir. 2009) and *Boston Edison Co. v. United States*, 299 F. App'x 956, 958 (Fed. Cir. 2008).

II. DISCUSSION

ITCA argues that an entry of partial judgment under Rule 54(b) for Claims I and II is appropriate because the court's dismissal of the Claims I and II is a final decision with regard to these respective claims and there is no just reason for delay. ITCA maintains that Claims I and II are separate from the remaining portion of Claim III because there is no factual overlap. Pl.'s Mot. at 5. Specifically, ITCA argues that the facts relating to Claims I and II involve the government's conduct prior to the collection and deposit of Trust Fund Payments that were due from Collier under the Act while the remaining portion of Claim III involves the government's conduct after it collected those payments from Collier. *Id.* Additionally, ITCA argues that there is no just reason for delay of entry of a Rule 54(b) judgment on Claims I and II. *Id*. at 6. ITCA argues that the ability to

appeal the court's dismissal of Claims I and II would be in the interest of judicial efficiency because if the Federal Circuit reverses this court's decision, any amounts owed to ITCA could be added to the court's determination of any amounts owed under Claim III. *Id.* With regard to Claim III, ITCA argues that whether the statute of limitations is a bar to its claim for payments received more than six years ago, the court's dismissal of a portion of Claim III is also final and separate from the merits of the claim. ITCA argues that there is no just reason for delay regarding Claim III on the grounds that if the Federal Circuit determines that the statute of limitations is not a bar to the dismissed portions of its claim, it too can be added to the court's determination of the amounts owed for underinvestment by the government.

In response, the government does not contest that the court's dismissal of Claims I and II is a "final" disposition of those claims and that they are separate from the remaining portion of Claim III; rather, the government argues that ITCA has not shown that there is no just reason for delay. Def.'s Resp. at 5. Specifically, the government argues that the remaining portion of Claim III will likely be resolved in the next few months and that ITCA has not shown any harm that would result if ITCA has to wait that short amount of time to appeal the dismissal of Claims I and II. *Id.* at 4 (citing *Abbey v. United States*, 101 Fed. Cl. 239, 244 (2011) (denying a Rule 54(b) judgment because the movant failed to show that it would be harmed due to the delay in appeal)). Furthermore, the government argues that if the court were to grant ITCA's 54(b) motion with respect to Claims I and II, it would create a piecemeal appeals of interrelated issues which would waste judicial resources. *Id.* at 6.

ITCA contends that the government's arguments against entry of a judgment under Rule 54(b) are not valid. ITCA argues that an appeal of Claims I and II has no bearing on Claim III and with regard to the remaining portion of Claim III that there is no basis to believe the matter will be resolved in a matter of months. Pl.'s Reply at 9 (citing *White Mountain Apache Tribe v. United States*, No. 17-359L, 2018 WL 6293242 (Fed. Cl. Dec. 3, 2018) (two-year old tribal breach of trust case remains pending with unresolved jurisdictional issues).

The court agrees with ITCA regarding Claims I and II and finds that entry of judgment pursuant to Rule 54(b) is appropriate to Claims I and II of its Second Amended Complaint. First, it is undisputed that the court's dismissal of these two claims in its October 17, 2018 opinion is a "final judgment" of these claims. *Curtiss-Wright Corp*, 446 U.S. 1, 7 (1980). Next, the court finds that there is no just reason for delay for entry of final judgment for Claims I and II. The amounts ITCA claims are owed in Claims I and II are completely distinct from the remaining portion of Claim III that is currently pending before the court. If the Federal Circuit were to determine that the government breached its trust obligations the amounts owed should be determined without delay. Therefore, the court hereby **GRANTS** ITCA's motion for a Rule 54(b) judgment for Claims I and II.

With regard to the entry of partial judgment under Rule 54(b) for the portion of Claim III that was dismissed for lack of subject matter jurisdiction due to the six-year statute of limitation, the court finds that the government has the better argument and the motion is thus denied. The court agrees with the government that there has been no final disposition of the merits of Claim III and as such an entry of a Rule 54(b) judgment for

the portion of Claim III that was dismissed is be premature. There has not been a final resolution of the claim as required by the Supreme Court in *Curtiss-Wright Corp.* Because the court finds that there has not been a final resolution of the claim there is the possibility of duplicative appeals involving the same claim. For this reason alone, ITCA's motion for entry of judgment under Rule 54(b) for the portion of Claim III that was dismissed as time-barred is hereby **DENIED**.

CONCLUSION

For the reasons stated above the court now **GRANTS-IN-PART** and **DENIES-IN-PART** the plaintiff's motion for entry of final judgment under Rule 54(b). Accordingly, there being no just reason for delay, the Clerk of the Court shall enter judgment dismissing Claims I and II of ITCA's Second Amended Complaint pursuant to Rule 54(b).

The parties shall submit a joint status report with proposed next steps for resolving the remaining portion of Claim III of ITCA's Second Amended Complaint by **March 25, 2019**.

IT IS SO ORDERED.

s/Nancy B. Firestone
NANCY B. FIRESTONE
Senior Judge

In the United States Court of Federal Claims

No. 15-342L
(Filed: October 17, 2018)

INTER-TRIBAL COUNCIL OF ARIZONA, INC., Plaintiff, v. THE UNITED STATES, Defendant.	Indian Tribe Claims; Breach of Trust Obligations; Breach of Fiduciary Duty; Indian Tucker Act, 28 U.S.C. § 1505; Arizona-Florida Land Exchange Act of 1988, Pub. L. No. 100-696; 25 U.S.C. § 162a; Motion to Dismiss; Subject Matter Jurisdiction; Rule 12(b)(1); Failure To State a Claim; Rule 12(b)(6); Statute of Limitations; 28 U.S.C. § 2501.

Melody L. McCoy, Boulder, CO, for plaintiff.

Phillip M. Seligman, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, with whom were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Ruth A. Harvey*, Director, and *Michael J. Quinn*, Senior Litigation Counsel, for defendant.

OPINION ON DEFENDANT'S MOTION TO DISMISS

FIRESTONE, *Senior Judge*.

Pending before the court is the United States' (the "government's") motion to dismiss (ECF No. 59), under Rules 12(b)(1) and 12(b)(6) of the Rules of the Court of Federal Claims ("RCFC"), Inter-Tribal Council of Arizona's ("ITCA") Second Amended Complaint (ECF No. 58) in this breach of trust action. This court previously dismissed portions of ITCA's initial complaint for lack of jurisdiction on February 22, 2016. *Inter-Tribal Council of Az., Inc. v. United States*, 125 Fed. Cl. 493 (2016). In dismissing portions of ITCA's initial complaint the court examined the government's

legal obligations under the Arizona-Florida Land Exchange Act (the "Act")[1]; 25 U.S.C. § 162a; and the American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, 108 Stat. 4239 (1994) (the "Trust Fund Reform Act"). In that same decision, the court also addressed related ongoing district court litigation brought by the government against a private corporation to enforce provisions of the Act and the agreements entered into under that Act. *United States v. Barron Collier Co.*, no. CV-14-00161-PHX-PGR, 2016 WL 3537802, (D. Ariz. June 29, 2016). The government sued Barron Collier Co. ("Collier") for failing to abide by an agreement to make certain payments required by the Act under an agreement Collier signed with the government. The district court litigation has since ended and under the terms of a settlement reached in the district court litigation, approximately $48 million has been paid into trust accounts for the benefit of the plaintiffs in this litigation ("settlement payment"). The plaintiffs in this case contend that the $48 million payment has not resolved their dispute with the United States and have filed this Second Amended Complaint.[2]

In its second amended complaint, ITCA renews its claims for breach of trust in connection with the government's alleged failure to meet certain trust obligations under the Act. The government has moved to dismiss ITCA's claims in its Second Amended Complaint for lack of jurisdiction and for failure to state a claim for relief. For the reasons set forth below the government's motion is **GRANTED-IN-PART** and

[1] The Arizona-Florida Land Exchange Act was Title IV of the Arizona-Idaho Conservation Act of 1988, Pub. L. No. 100-696, 102 Stat. 4571, 4577-93 (1988).
[2] During oral argument the government explained that as part of the settlement with Collier the government received $16 million in cash, $18.5 million from the sale of the Indian School Property, and $13.5 million from the Annuity. Oral Argument at 14:01:00-14:01:30.

DENIED-IN-PART.

I. Background Facts

A. The Arizona Florida Land Exchange Act

As discussed in more detail in the court's initial decision, ITCA's complaint stems from the government's alleged failure to meet its trust obligations under the Arizona-Florida Exchange Act. The following facts are taken from plaintiff's Second Amended Complaint and are not disputed.

In 1985, the United States Department of the Interior ("DOI") offered land – roughly 100 acres – in the heart of central Phoenix, Arizona to the Collier in exchange for land Collier owned in Florida and that DOI wanted for a wildlife refuge. Second Am. Comp. at ¶¶ 20-22. The Arizona land that DOI exchanged had been the site of the Phoenix Indian School ("School"), a federal Indian boarding school that since 1891 had served primarily Arizona Indian tribes.[3] DOI had, however, determined that the School was no longer needed and should be closed. *Id*. at ¶¶ 15-18 and 23-26. On May 15, 1988, DOI and Collier entered into a Land Exchange Agreement ("Exchange Agreement") that required congressional approval. *Id*. at ¶¶ 36-41.

At the time of the exchange, the School property was worth $34.9 million more than the Florida land owned by Collier, and the ITCA urged Congress to require that if the School was closed and the land exchanged, the land value differential be placed into a trust fund for the education of Arizona Indian tribes who had used the school in the

[3] The Ninth Circuit noted in 1995 that ITCA had "no interest in the School Property, which was owned and controlled by the United States government. *Inter Tribal Council of Az. v. Babbitt*, 51 F.3d 199, 203 (9th Cir. 1995).

past. *Id.* at ¶¶ 28, 34, 38-39, 40-41, 43, 48. Congress, in response, passed the Act which is the subject of this litigation. The government does not dispute that "a key aim of [the AFLEA was] the funding of Indian education." *Id.* at ¶ 71; *see also id.* at ¶ 217, *citing* Order at 17, 20, *United States v. Barron Collier Co.*, No. 2:14:cv-00161-PGR (D. Ariz. July 7, 2016) (ECF No. 188) (Second Am. Compl., Ex. 3). As enacted, the Act provided for the $34.9 million differential to be paid as Trust Fund Payments "to the United States … for deposit" into two separate Trust Funds established by the Act for the benefit of Arizona Indian tribes. Arizona-Idaho Conservation Act of 1988, Pub. L. No. 100-696, § 401(19), 102 Stat. 1988. The Act provided that ITCA member tribes as of January 1, 1988 are to receive 95% of the land value differential in the Arizona InterTribal Trust Fund ("AITF" or "Trust Fund"), and that the Navajo Nation will receive the remaining 5% in a separate trust. *Id.* at §§ 401(11) and 405(e)(2).

Under the payment scheme established in the Act, Collier was given the option of paying the full amount owed either as a lump sum or in annual installments over a period of 30 years with a final balloon payment of $34.9 million. Second Am. Compl. at ¶ 44. Collier selected the annual payment option. *Id.* at ¶ 84. Under the legislation, Collier was obligated to make (1) "30 annual payments equal to the interest due" on the $34.9 million, and that "[t]he interest rate to be used in determining the interest due" on the annual payments be not "lower than 8.5 percent or higher than 9.0 percent," and (2) payment of the $34.9 million at the time of the last annual payment. Arizona-Idaho Conservation Act of 1988, Pub. L. No. 100-696, §§ 403(b) and 403(c)(5), 102 Stat. 1988; Second Am. Compl. at ¶ 45.

With the annual payment option, the Act required DOI to execute a Trust Fund Payment Agreement ("TFPA") with Collier "pursuant to which such annual payments will be made." Arizona-Idaho Conservation Act of 1988, Pub. L. No. 100-696, §§ 403(b) and 403(c)(5), 102 Stat. 1988. Additionally, with the annual payment option, the Act required "the Secretary of the Treasury" to "hold in trust the security provided in accordance with the" TFPA. *Id.* at § 405(c)(2).

B. The Trust Fund Payment Agreement and Collier's Default

The government and Collier negotiated and executed the TFPA and several related documents, including a Deed of Trust, a Promissory Note, and an Annuity. Second Am. Compl. at ¶¶ 119-133.[4] The Deed of Trust contains the definition of the Trust Estate, and this Trust Estate, along with the Annuity, secured the Promissory Note executed by Collier for the Trust Fund Payments in full. *Id.*

The Trust Estate originally consisted of: (1) 15 acres of the remaining Phoenix Indian School property retained by Collier after it exchanged with the City of Phoenix

[4] In October 1992, ITCA sued to enjoin the United States from entering into the TFPA with Collier. *Inter-Tribal Council of Az., Inc., v. Lujan,* No. 2:92-cv-01890-SMM (D. Ariz. 1992) (attached to the Second Amended Complaint as Ex. 24) (1992 ITCA Complaint); Second Am. Compl. at ¶¶ 152-156. In that suit, ITCA alleged that the security obtained by the United States under the TFPA constituted "a violation by the Secretary under the terms of the [Act] which requires that the payment of all amounts due be adequately collateralized at the time of closing." 1992 ITCA Comp. at ¶¶ 39-40; Second Am. Compl. at ¶¶ 155-56. ITCA sought to enjoin the Secretary from agreeing to inadequately collateralize the trust fund payments. 1992 ITCA Compl.; Second Am. Compl. at ¶ 156. The district court denied relief, finding that "the Secretary's decisions regarding the adequacy of the collateral . . . are precluded from judicial review under subsection 402(h) of the [Act]." Second Am. Compl. at ¶ 157. The Ninth Circuit affirmed the district court's dismissal for lack of subject-matter jurisdiction and failure to state a claim on the grounds that "the actions of the Secretary are precluded from judicial review." *Inter-Tribal Council of Az., Inc. v. Babbitt,* 51 F.3d 199, 200 (9th Cir. 1995); Second Am. Compl. at ¶ 161.

other Indian School land for development rights in two Downtown Phoenix lots and (2) liens on the development rights in the Downtown lots. *Id*. at ¶¶ 135-36. The government also agreed in the Deed of Trust that upon Collier's request, the government is required to release the liens so long as "the value of the remaining security 'still exceeds 130% of a defined Release Level Amount.'" *Id.* at ¶ 139. Another provision of the Deed of Trust provided that if the remaining unreleased security fell below 130% of the Release Level Amount, Collier would add sufficient funds to the Trust Estate so that the security equaled at least 130% of the Release Level Amount.[5] *Id.* at ¶ 141. Numerous terms in the TFPA and related documents provided that Collier's obligations were "nonrecourse" against Collier personally, and that resort for payment of such obligations were to be made solely *in rem* against the Trust Estate. *Id.* at ¶¶ 145-148.

Beginning in 1997, Collier made 15 annual payments of $2,966,000 to the United States, and 15 annual payments into the Annuity. *Id.* at ¶¶ 163-164. Within a year of beginning to make payments, and again, at the ten-year mark of making payments, Collier requested releases of the Downtown Lot liens. The government granted both requests. *Id.* at ¶ 172. This left 15 acres of the former Indian School land in the Trust Estate to secure the Trust Fund Payment obligation. *Id*. at ¶ 178.

Around the time of the second lien release in 2008, the United States economy

[5] Pursuant to Section 6.2(a) of the Deed of Trust the "Release Level Amount" is "(i) the unpaid principle plus accrued interest on the Promissory Note [$34.9 million], less (ii) the value of the United States Government-backed Securities and Deposited Monies held in the Trust Estate, and further less, after the expiration of two years from the Closing Date . . . (iii) the fair value, at the time of the calculation, of the Annuity." Thus per the terms of the Deed of Trust the level of security never was intended to cover the 30 years of annual payments of $2.9 million in interest payments but rather only sought to secure the $34.9 million payment for the School property.

suffered a significant recession which caused property values, including those in Phoenix, to decline. *Id.* at ¶ 179. The government did not at that time take any action to determine whether sufficient security remained in the Trust Estate. *Id*. at ¶¶ 180-182. The Deed of Trust requires that, when the value of the Trust Estate no longer represents sufficient security, Collier must substitute security in the form of U.S. Government-backed Securities. After 2011, Collier stopped making annual payments. *Id.* at ¶ 190. On January 7, 2013, Collier gave written notice to the government that it would no longer be making any additional payments. *Id.* at ¶194. The government determined that Collier was in default and wrote Collier that the security level was deficient. *Id*. at ¶ 196. In March 2013, the United States shared this information with ITCA. *Id*. at ¶ 198.

C. The Government's Litigation Against Collier and Settlement

In January 2014, the government sued Collier in the United States District Court for the District of Arizona ("district court") seeking specific performance of the Deed of Trust's supplemental security provisions to address what the government characterized as "grossly" insufficient security. *Id.* at ¶ 202. The government also sought the unpaid annual payments that Collier had not made for the years 2012, 2013, 2014, and 2015. *Id*. at ¶ 209. According to Collier, when it stopped making payments, its remaining obligations consisted of another $44,497,500 in interest payments (15 annual payments) and $22 million in remaining principal, for a total of approximately $66.5 million through the end of 2026. *Id.* at ¶ 203. As of July 22, 2016, the value of the Annuity was $13,452,569. *See* Joint Status Report, at 4, *U.S. v. Collier*, (ECF No. 191) (attached as Exhibit 31 to the Second Amended Complaint). The value of the Indian School land was

appraised at $25 million in September 2015. Second Am. Compl. at ¶ 206.

The district court agreed with the government that the Deed of Trust imposed an ongoing duty on Collier to add government-backed securities to the Trust Estate when the fair value of the Trust Estate fell below 130% of the Release Level Amount. *Id.* at ¶ 215; *United States v. Barron Collier Comp.*, No. CV-14-00161-PHX-PGR, 2016 WL 3537802 at *9 (D. Ariz. June 29, 2016). The court further agreed this duty is enforceable and that the United States is entitled to specific performance of the duty as a matter of law. *Id.*; Second Am. Compl. at ¶ 218. The court, *inter alia*, ordered Collier to supplement the Trust Estate with government-backed securities in the amount of "(a) $20,452,281.00 and (b) $10,565.00 multiplied by the number of calendar days between July 22, 2016 and the date of performance." Second Am. Compl. at ¶ 220.[6]

Eleven months later, in July 2017, the government and Collier reached and executed a settlement in the district court litigation. *Id.* at ¶ 221. In August 2017, the government reported to this court that the Collier "settlement has a projected gross recovery of $54.5 million, consisting of $16 million in cash, $13.5 million in an annuity, and land in Phoenix with a 2015 appraised value of $25 million." *Id.* at ¶ 226. According to Statements of Account received by ITCA from Interior's Office of the Special Trustee ("OST"), on or about July 26, 2017, the $16 million was placed and held

[6] In a Joint Status Report filed in July 2016, the United States stated that since the district court had expressly acknowledged "that Collier's collateral maintenance obligation is a continuing one, Collier's present collateral maintenance obligation as of July 22, 2016 is $20,452,281." Second Am. Compl. at ¶ 219.

in an unsegregated "Collier Settlement Account" (*i.e.*, a joint account for both ITCA and the Navajo Nation) and was invested in overnight U.S. Treasuries. *Id*. at ¶¶ 227-30. OST Statements of Account for the Collier Settlement Account also show deposits representing partial maturations of the Annuity. *Id*. at ¶¶ 240-41. In March 2018, the government sold the 15 acre Indian School property via online auction for $18.5 million. *Id*. at ¶¶ 242-44. The government deducted the administrative costs of this sale in the amount of $77,902.00, from the sale price. Def.'s Mot. to Dismiss Second Am. Compl. ("Mot. to Dismiss") at 9. The total actual gross recovery from the Collier settlement thus is roughly $48 million ($16 million + $13.5 million + $18.5 million).[7] *Id.*

D. The Procedural History and Present Posture of the Case

As noted above, ITCA filed the pending suit against the United States in 2015. The government filed a motion to dismiss ITCA's initial complaint, which the court granted-in-part and denied-in-part on February 22, 2016. *Inter-Tribal Council of Az., Inc. v. United States*, 125 Fed. Cl. 493 (2016). In its opinion, this court dismissed Claim I of ITCA's initial complaint regarding ITCA's allegation that the Act established a fiduciary duty on the government to make payments into the Trust Fund if Collier failed to do so. The court held that although "[t]he Act expressly requires Collier to make payments to the government and requires the government to collect those payments and deposit a portion of the payments into the AITF . . . [t]he Act does not . . . impose any obligation on the government to make payments if Collier fails to make payments." *Id.*

[7] During oral argument the government's counsel noted that the total amount of money that will have been deposited into ITCA's Trust fund is $88 million. Oral Argument at 14:01:00-14:02:00

at 501. With regard to Claim II of ITCA's initial complaint, regarding the government's alleged breached of its fiduciary duties under the Act for failing to hold and maintain sufficient security, this court held that it had jurisdiction because the Act required the government to ensure that there was adequate security to cover Collier's payment obligations. *Id.* at 503. The court also held that with regards to the portion of Claim II in the initial complaint where ITCA alleged a breach of trust based on the government's release of liens placed on Collier's property in 1998 and 2007 may be barred by the six-year statute of limitations but that the statute of limitations issues were tied to the merits of the claim and thus could not be dismissed at that stage of the proceedings. *Id.* Finally, with regard to Claim III of ITCA's initial complaint, ITCA's allegation that the government failed to meet its fiduciary duties under the Act and other statutes to invest the funds held in trust prudently, the court held that "the complaint does not allege any facts to show that the government breached" its duty to invest prudently and that "the ITCA does not allege any facts to show that the government has not accounted properly and fully for the AITF funds." *Id.* at 505. Thus, the court dismissed Claim III of ITCA's initial complaint for failure to state a claim pursuant to Rule 12(b)(6).

Subsequent to the court's decision granting-in-part and denying-in-part the government's motion to dismiss ITCA's initial complaint, ITCA filed its First Amended Complaint. (ECF No. 34). The government moved to dismiss the First Amended Complaint under Rules 12(b)(1) and (6). (ECF No. 35). While the motion to dismiss was pending, the court ordered supplemental briefing on the status and relevance of the

pending settlement between the United States and Collier in the United States District Court for the District of Arizona. (ECF No. 40). Following supplemental briefing and notice to the court that the United States had settled its suit against Collier, the court conducted a status conference on August 30, 2017. The court rejected ITCA's First Amended Complaint, terminated the government's motion to dismiss ITCA's First Amended Complaint, and gave ITCA until October 30, 2017 to file a second amended complaint which would include only the claims that survived following the district court settlement with Collier. (ECF No. 48). The case was then referred to this court's mediation program and stayed pending mediation. (ECF No. 52).

After mediation proved unsuccessful, ITCA filed the subject Second Amended Complaint. (ECF No. 58). Stripped to its essence, ITCA's Second Amended Complaint is based on ITCA's contention that the government is liable for breach of trust because in the government's settlement with Collier, the government did not seek or obtain all 30 years of interest payments together with the guaranteed $34.9 million at the end of that period. Claim I alleges that the United States breached the Act by failing to obtain and maintain sufficient security at various times throughout the life of the Trust on the grounds that the amount of security obtained from Collier in 1996 was not sufficient to cover the full amount of what Collier was obligated to pay through 2026. Second Am. Compl. at ¶¶ 254-68. Claim II alleges a breach of trust based on the government's alleged failure to collect and deposit or make up the trust payments that the Act required Collier to make. *Id.* at ¶¶ 269-75. In Claim III, ITCA alleges a breach of trust for

failure to prudently invest Trust money. *Id.* at ¶¶ 276-81. This claim contains allegations that the United States failed to prudently invest the trust funds throughout the term of the trust, including the $16 million in cash it recently received from the Collier district court settlement. *Id.* at ¶ 279.

The government has moved to dismiss the Second Amended Complaint on jurisdictional grounds under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6). Oral argument on the government's motion was heard on October 11, 2018.

II. DISCUSSION

A. Background Legal Principles and Standard of Review

It is well-settled that this court's jurisdiction over breach of trust claims is premised on the Tucker Act, 28 U.S.C. § 1491(a)(1), and the Indian Tucker Act, 28 U.S.C. § 1505. *United States v. Mitchell*, 445 U.S. 535, 538-39 (1980) and *United States v. Navajo Nation*, 556 U.S. 287, 290 (2009) (*Navajo Nation II*). However, because neither of these Acts create any substantive money-mandating rights against the United States, the source of such money-mandating rights must be found in a separate, independent statute. *Navajo Nation II*, 556 U.S. at 290. As the Federal Circuit explained in *Adair v. United States*, 497 F.3d 1244 (Fed. Cir. 2007):

> If 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). If, however, the court concludes that the facts as pled do not fit within the scope of a statute that is money-mandating, the court shall dismiss the claim on the merits under Rule 12(b)(6) for failing to state a claim upon which relief can be granted.

497 F.3d at 1251 (citations omitted).

In ruling on a motion to dismiss pursuant to Rule 12(b)(1), the court "must accept as true all undisputed facts asserted in the plaintiff's complaint and draw all reasonable inferences in favor of the plaintiff." *Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011). "When a federal court reviews the sufficiency of a complaint . . . its task is necessarily a limited one." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Specifically, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Id.*

"When considering whether to dismiss an action for failure to state a claim [under 12(b)(6)], the court must assess whether 'a claim has been stated adequately' and then whether 'it may be supported by [a] showing [of] any set of facts consistent with the allegations in the complaint.'" *Brocade Commc'n Sys. v. United States*, 120 Fed. Cl. 73, 78 (2015) (citing *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 563 (2007)). "The court must accept all factual allegations in the complaint as true and make all reasonable inferences in favor of the plaintiff." *Id.* (citing *Bell Atl. Corp.*, 550 U.S. at 555-56). The "factual allegations must be substantial enough to raise the right to relief 'above the speculative level.'" *Id.* (citing *Bell Atl. Corp.*, 550 U.S. at 555). "[T]he complaint must contain facts sufficient to 'state a claim that is plausible on its face.'" *Martin v. United States*, 96 Fed. Cl. 627, 630 (Fed. Cl. 2011) (citation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation

omitted). The plausibility standard is not a probability requirement, but is more than a sheer possibility. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

B. The Court Lacks Jurisdiction Over Portions of Claim I of the Second Amended Complaint and for Remaining Portions of Claim I, ITCA has Failed to State a Claim.

As noted, at the heart of ITCA's Second Amended Complaint is its legal contention that by agreeing to allow Collier to pay $2.9 million per year for 30 years in interest payments and to pay the $34.9 million lump sum payment at the end of those 30 years, the government had a trust obligation under the Act to ensure that the Trust would receive the full amount owed at the end of the 30 years and that the government would be liable for the difference in what was paid by Collier and what was owed if Collier failed to fulfill its obligation.

In Claim I, ITCA argues that the government breached its trust responsibility by failing to secure with sufficient security the full payments to be made by Collier under the Act and thus the government must pay the difference between what Colliers paid and owed into the Trust Fund had all payments, including all remaining annual payments, been made. Specifically, ITCA claims it is entitled to the difference between the $48 million paid into the Trust Fund from the settlement with Collier and the amount it would have received if the remaining 15 annual payments of $2.9 million were paid along with the lump sum of $34.9 million.

ITCA argues that there are three instances where the government failed to ensure that there was sufficient security as required by the Act. First, ITCA maintains that the government initially failed to ensure that the government had adequate security for the

entire amount of the trust fund obligations through the 30 year period, when it negotiated the TFPA in 1992. Second Am. Compl. at ¶¶ 257-59. Second, ITCA argues that the government improperly granted Collier's 1998 and 2007 requests for a partial release of the liens without securing sufficient security. *Id.* at ¶¶ 260-62. Third, and finally, ITCA maintains that Collier's default in 2013 on its payment obligations was the result of the government's failure to ensure that there was adequate security. *Id.* at ¶ 263.

The government argues that Claim I must be dismissed on the grounds that ITCA's Claim I is barred by the six-year statute of limitations governing actions for breach of trust. 28 U.S.C.§ 2501 provides that "[e]very claim of which [this court] has jurisdiction shall be barred unless the petition theron is filed within six years after such claim first accrues." This court's six-year statute of limitation applies to "Indian tribes in the same manner as against any other litigate seeking legal redress or relief from the government." *Hopeland Band of Pomo Indians v. United States,* 855 F.2d 1573, 1576 (Fed. Cir. 1988). "It is well established that statutes of limitations for causes of action against the United States, being conditions of the waiver of sovereign immunity, are jurisdictional in nature." *Martinez v. United* States, 333 F.3d 1295, 1316 (Fed. Cir. 2003). "A cause of action cognizable in a Tucker Act suit accrues as soon as all events have occurred that are necessary to enable the plaintiff to bring suit, i.e., when 'all events have occurred to fix the Government's alleged liability, entitling the claimant to demand payment and sue here for his money.'" *Id.* at 1303 (citation omitted).

The government argues that ITCA's claim that the government failed to secure sufficient security in the TFPA per the requirements of the Act when the land exchange

closed in 1996 is time barred by the six-year statute of limitations set forth in 28 U.S.C. § 2501. The government notes that ITCA knew the dollar value of the security set in the TFPA and related documents at the time those documents were executed and that the security did not cover all the value of all 30 annual interest payments of $2.9 million and the principal of $34.9 million. Indeed, the government argues that ITCA had sued to stop the government from entering in its agreement with Collier because the ITCA believed that the security requirement was inadequate. *See* fn. 4. The government makes the same statute of limitations argument with regard to the other two portions of ITCA's Claim I involving the government's decisions in 1998 and 2007 to allow Collier to release the liens to allow for the sale of certain properties that were held as security, arguing that these allegations are also time-barred because government authorized those actions more than six-years before ITCA sued the government in this action for breach of trust.

ITCA argues, in response, that no portion of Claim I is time-barred because the government had an on-going duty to ensure that Collier maintained adequate security. ITCA argues because the government has continually failed to ensure that there is adequate security up to and including the past six-years, Claim I is not time-barred. In support of this contention, ITCA relies on this court's decision in *Onega v. United States* 91 Fed. Cl. 629 (2010). In *Onega*, this court found that the government's failure to abide by a regulatory obligation to both enforce and monitor a lease of an Alaska Native allotment constituted an ongoing breach rather than a single event and thus the plaintiff could recover for damages up to six years before the suit was filed in accordance with

the statute of limitations imposed by 28 U.S.C. § 2501. *Id.* at 647. ITCA argues that the statutory obligation imposed by the Act and enumerated in the TFPA to maintain sufficient security was an ongoing obligation and thus their claim is not barred by the statute of limitations.

Additionally, ITCA argues that even if the continuing claims doctrine outlined in *Onega* does not apply to the government's obligation to maintain sufficient security, the claim should not accrue until March 2013 at the earliest. ITCA maintains that pursuant to the Federal Circuit's decision in *Shoshone Indian Tribe of Wind River Reservation, Wyo. v. United States*, a cause of action for a breach of trust only accrues when the trustee repudiates the trust and the beneficiary has knowledge of that repudiation. 672 F.3d 1021, 1031 (Fed. Cir. 2012). Specifically, ITCA argues that unlike the tribe in *Shoshone*, ITCA was not involved in the acquisition or maintenance of the Trust Fund secuirty and did not have either actual knowledge or any reasonable way of knowing that the Government had failed to secure sufficient security until it was informed by the government in March 2013. *Id.* at 1031-32.

The court agrees with the government, that to the extent ITCA is claiming the initial security requirements imposed on Collier by the TFPA were not sufficient to cover the full amount owed by Collier in the event of default, i.e. the 30 annual payments of $2.9 million and the final lump sum payment of $34.9 million, the claim is barred by the six-year statute of limitations. ITCA needed to challenge the adequacy of the government's agreements with Collier regarding the amount of security needed to cover Collier's payment obligation within six years of when the amount was set. ITCA

did file a law suit in 1992 challenging the security requirements under the TFPA.[8] (ECF No. 58, Ex. 25). Thus, ITCA has known about the security requirements since the inception of the TFPA. Additionally, the court finds that this allegation is not similar to the one addressed by the court in *Onega,* because this portion of ITCA's Claim I is based on a challenge to the establishment of the obligation and not a claim based on the continuing violation of that obligation. Because ITCA clearly knew about the terms of the TFPA and the amount of security that Collier was required to hold more than six years before it filed this lawsuit, this portion of Claim I is time-barred.

As to the other portion of Claim I, that is ITCA's claim that the government breached its trust obligation by failing to ensure that Collier maintained sufficient collateral as required by the Deed of Trust when the collateral amount fell below 130% of the Release Level Amount when it released liens in 1998 and 2007 as well as when Collier defaulted in 2013, the court finds this portion of Claim I is not time barred but must be dismissed for failure to state a claim.

This court previously held in *Inter-Tribal Council of Az. Inc* that the Act does not impose upon the government the obligation to make any payments if Collier fails to pay, but the Act does impose on the government a duty to ensure that Collier fulfills the security requirements as provided for in the Deed of Trust. 125 Fed. Cl. at 502. Thus, the government had responsibility for ensuring that Collier had adequate security as required under the Deed of Trust. The government, however, fulfilled that obligation

[8] Although the TFPA was signed in 1992, "the transaction did not finally close until four years later, in December 1996." *Barron Collier Company*, 2016 WL 3537802 at *2.

when it sued Collier in federal district court for the amounts owed to make up the 130% of the Release Level Amount, i.e. the missed four annual payments of $2.9 million before Collier defaulted and the lump sum amount of $34.9 million minus the amount in the annuity and remaining property held in security. The district court found that Collier, per the terms in the Deed of Trust, was required to make up the difference between the collateral provided by Collier and the 130% Release Level Amount and ordered Collier to do so. *United States v. Barron Collier Co.*, No. CV-14-00161-PHX-PGR, 2016 WL 3537802 at *12 (D. Ariz. June 29, 2016). Eventually, the district court case was settled with a court-approved settlement.

The court finds that neither the Act nor the Deed of Trust required the government to do anything more than it did in filing suit in district court to obtain the additional security from Collier. Under its initial trust agreement with Collier, the government's right to recover was limited to the amounts Collier held as security. Having sued Collier to obtain additional security to meet the 130% of the Release Level Amount as mandated by the trust agreement, the government fulfilled its trust obligations. Therefore, ITCA has not stated a claim for relief in Count I for a breach of trust.

C. ITCA has Failed to State a Claim in Claim II of its Second Amended Complaint.

In moving to dismiss Claim II of ITCA's Second Amended Complaint, the government argues that ITCA has failed to state a claim for breach of trust on the grounds that the government does not have a trust obligation to make up any payments

Collier fails to make and that by suing Collier to raise the amount of security to 130% of the Release Level Amount and placing the payments in Trust, together with selling the School property, the government has fulfilled its obligations under the Act. ITCA argues that the government had a trust obligation to collect all 15 remaining annual payments from Collier under the Act and that by seeking to collect only four of the remaining fifteen payments, the government breached its duty and is required to make up the difference.

The court agrees with the government that ITCA's Claim II is nothing more than a repackaging of Claim I in its initial complaint which this court dismissed on the grounds that "[t]he Act does not . . . impose any obligation on the government to make payments if Collier fails to make payments." *Inter-Tribal Council*, 125 Fed. Cl. at 501. In this connection the court finds the plaintiff's counsel's concession during oral argument that the Act does not address the government's liability in the event of a default by Collier on interest payments is telling. Oral Argument at 16:53:00-16:53:50. The Act did not expressly identify any security requirements and the Deed of Trust, which was entered into pursuant to the Act, only imposed on the government the obligation to ensure that Collier held sufficient security to meet the 130% of the Release Level Amount in the event that a lien was released. The government did not ignore this obligation because it sued Collier to force Collier to provide sufficient security pursuant to the Deed of Trust. The government was not required to do more and is not liable for any deficiencies in Collier's annual interest payments. Therefore, this claim must be dismissed for failure to state a claim upon which relief can be granted.

D. The Court Lacks Jurisdiction Over Claim III of the Complaint to the Extent it Claims a Breach of The Government's Fiduciary Obligations to Invest Prudently ITCA's Trust Fund Going Back More Than Six Years.

Finally, in Claim III ITCA argues that the government has violated its trust obligations by failing to prudently invest ITCA's allocation of the 15 annual payments of $2.9 million received from Collier and the $16 million in cash that the government received as part of its settlement with Collier. Specifically, ITCA argues that by investing in short term Treasury bonds rather than longer term investment vehicles that have higher interest rates, the government has failed to prudently invest the Trust Funds.

The government argues that this claim should be dismissed for lack of jurisdiction to the extent ITCA is complaining of the government's investments decisions made more than six years prior to April 2, 2015, when ITCA filed this lawsuit, because the claim is barred by the six-year statute of limitations provided for in 28 U.S.C. § 2501. The government maintains that ITCA has been on continual notice of the government's investment of the trust funds because by its own admission the OST has provided ITCA with Asset and Transaction Statements/Statements of Account since October 1, 1998. *See* Second Am. Compl. at ¶¶ 168-69; Pl.'s Resp. at 39. As such, the government argues that this court does not have jurisdiction for the portion of Claim III that involved investment decisions that took place more than six-years prior to the filing of this lawsuit.

To the extent that any portion of Claim III is not barred, the government argues that the remaining portion of Claim III should be dismissed for failure to state a claim because ITCA has failed to point to any financial impropriety by the government and

has only offered conclusory allegations that depositing trust funds in short term Treasury bonds is a trust violation. The government notes, that this court previously dismissed a similar claim made by ITCA in their initial complaint because it did not allege sufficient facts to state a claim that the government had breached its investment and accounting duties. *Inter-Tribal Council,* 125 Fed. Cl. at 505. In this connection, the government notes that the court in dismissing ITCA's initial claim directed ITCA to "seek an accounting in federal district court to identify any breach of the government's investment and accounting duties and proceed with an action if it discovers any financial impropriety[,]" which ITCA has never sought. *Id.*

In response, ITCA argues that it has alleged sufficient facts for this court to draw a reasonable inference that the government is liable for underinvestment of the money deposited into the Trust Fund. ITCA argues that in this court's February 22, 2016 decision granting-in-part and denying-in-part the government's motion to dismiss ITCA's original complaint, the court found "that the plain language of the [Act] requires the government to 'invest in accordance with the requirements of' section 405(c)(1) of the Act if it chooses to invest a portion of the Trust Income not used by the Secretary in any year. '" *Inter-Tribal Council,* 125 Fed. Cl. at 505. ITCA relies on several decisions of this court where the government was found liable for underinvestment of funds pursuant to 25 U.S.C. §162a. *Jicarilla Apache Nation v. United States,* 112 Fed. Cl. 274 (2013); *Chippewa Cree Tribe, et al. v. United States,* 69 Fed. Cl. 639 (2006). In *Jicarilla Apache Nation,* this court found that the government had an obligation to prudently invest the funds held in trust and that the government had failed to do so when it invested a large amount of the trust funds in short-term low interest yielding

investments. 112 Fed. Cl. at 300. Similarly in *Chippewa Cree Tribe*, the court found that the government was obligated to prudently invest funds held in trust for the benefit of the Indian Tribes designated as the beneficiary. 69 Fed. Cl. at 662. In *Chippewa Cree Tribe*, the court also found that Chippewa Cree Tribe's claim was not barred by the six-year statute of limitations because the tribe had not been provided a "meaningful accounting" and thus the claim had not accrued prior to the filing of the law suit. *Id.* at 664. Based on these precedents, ITCA argues that its complaint with regards to Claim III is sufficient to state a cognizable claim because the government has failed to prudently invest the trust funds by investing in low-yielding investment vehicles. ITCA also argues that no portion of Claim III is barred by the six-year statute of limitations because ITCA has never been provided a "meaningful accounting" from which it could have known of the government's underinvestment decisions.

The court agrees with the government that to the extent that ITCA's Claim III challenges investments made six years prior to April 2, 2015, those allegations must be dismissed pursuant to Rule 12(b)(1) because they are outside the six-year statute of limitations set forth in 25 U.S.C. § 2501. ITCA's argument that it never received a meaningful accounting is without merit. Unlike the plaintiffs in *Chippewa Cree Tribe*, ITCA has received regular reports on how the trust funds have been invested since October 1, 1998. As such, ITCA has had notice on how the government invested the unspent trust funds. In its complaint ITCA acknowledges that the accounting statements show "the investments made by OST" for the trust and "show that the investment portfolio's maturity structure selected by OST for the [trust funds] was too short." Second Amend. Compl. at ¶¶ 169-70. ITCA has acknowledges that it has received

accounting statements since the first payment made by Collier in 1998. The court thus finds that to the extent that Claim III encompasses a claim for a breach of trust based on the government's failure to prudently invest trust funds more than six years prior to the filing of this law suit, the claim is barred by the six-year statute of limitations.

The court finds that with regards to ITCA's claim that the government has failed to prudently invest the trust funds in the six years prior to filing suit because it has invested the funds in short-term low interest yielding investment vehicles within the last six years, ITCA has alleged sufficient facts to establish a claim upon which relief can be granted. This court on numerous occasions has found that the government can be liable for failing to prudently invest in accordance with 25 U.S.C. §162a[9] when it has invested in low-yielding short-term investment vehicles. *See Jicarilla Apache Nation*, 112 Fed. Cl. at 289; *Chippewa Cree Tribe*, 69 Fed. Cl. 639 (2006); *Osage Tribe*, 72 Fed. Cl. 629 (2006). Furthermore, in *Mitchell v. United States*, 463 U.S. 206, 226 (1983), the Supreme Court found when a statute or regulations "clearly establish fiduciary obligations of the Government in the management and operations of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal government for damages sustained." In fact, the government acknowledged during oral argument that ITCA may have a cognizable claim within the statue of limitations with regards to at least the investment of the trust funds that the government has held from the 2017 settlement with Collier. Oral Argument at 16:58:30-16:59:30. For these

[9] 25 U.S.C. §162a provides in relevant part "[t] he Secretary of the Interior is hereby authorized in his discretion . . . to withdraw from the United States Treasury and to deposit in banks to be selected by him the common or community funds of any Indian tribe . . .for the benefit of individual Indians."

reasons, the court finds to the extent that ITCA claims a breach of trust based on the government's failure to prudently invest the trust funds going back six years from the filing date of this law suit, ITCA has stated a claim upon which relief can be granted and thus cannot be dismissed.

CONCLUSION

The court finds that it lacks jurisdiction to hear Claim I of ITCA's Second Amended Complaint due to the six-year statute of limitations and for failure to state a - claim upon which relief can be granted. The court also finds that it lacks jurisdiction to hear Claim II of ITCA's Second Amended Complaint for failure to state a claim upon which relief can be granted. Finally, the court finds that it lacks jurisdiction to hear the portions of Claim III which occurred prior to April 2, 2009, due to the six-year statute of limitations. Accordingly, the government's motion to dismiss is **GRANTED-IN-PART** and **DENIED-IN-PART.** The parties shall file a joint status report by **November 15, 2018** with proposed next step for resolving this litigation.

IT IS SO ORDERED.

s/Nancy B. Firestone
NANCY B. FIRESTONE
Senior Judge

EFFECT ON EXISTING FACILITIES

SEC. 305. Nothing in this title shall affect electrical generating and transmission and irrigation pumping and transmission facilities in existence within the boundaries of the monument, or the right to operate, maintain, repair, upgrade, and modify such facilities. Such facilities are hereby expressly determined to be compatible and consistent with the purposes of this title.

CONTINUING PALEONTOLOGICAL RESEARCH

SEC. 306. In order to provide for continuing paleontological research, the Secretary shall incorporate in the general management plan provisions for the orderly and regulated use of and research in the monument by qualified scientists, scientific groups, and students under the jurisdiction of such qualified individuals and groups.

MINING PROHIBITION

SEC. 307. Subject to valid existing rights, Federal lands and interests therein, within the monument, are hereby withdrawn from disposition under the public land laws and from entry or appropriation under the mining laws of the United States, from the operation of the mineral leasing laws of the United States, and from operation of the Geothermal Steam Act of 1970, as amended.

AUTHORIZATION OF APPROPRIATIONS

SEC. 308. There are hereby authorized to be appropriated not to exceed $5,000,000 to carry out the purposes of this title.

TITLE IV—ARIZONA-FLORIDA LAND EXCHANGE

DEFINITIONS

SEC. 401. For purposes of this title:

(1) The term "Administrator" means the Administrator of Veterans' Affairs.

(2) The term "Arizona InterTribal Trust Fund" means the fund established pursuant to section 405(a)(1) of this title in the Treasury of the United States for the benefit of Arizona Tribes that were members of the InterTribal Council of Arizona on January 1, 1988, and the members of such tribes.

(3) The term "Arizona Tribe" means an Indian tribe that has a reservation located partially or totally in the State of Arizona.

(4) The term "City" means the City of Phoenix, Arizona.

(5) The term "Collier" means the nongovernmental parties to the Exchange Agreement identified in the Exchange Agreement as Barron Collier Company, Collier Development Corporation, and Collier Enterprises.

(6) The term "Exchange Agreement" means the Agreement Among the United States, Collier Enterprises, Collier Development Corporation, and the Barron Collier Company, executed on May 15, 1988, and subsequently submitted to the Committee on Interior and Insular Affairs of the House of Representatives and the Committee on Energy and Natural Resources of the Senate.

(7) The term "Florida Lands" means the lands that would be conveyed to the United States by Collier under the terms of the Exchange Agreement or this title, and other lands owned by Collier and located within the boundaries of the Florida Panther National Wildlife Refuge to be acquired by purchase by the United States and managed as part of such Refuge, other than those lands identified for conveyance to the United States pursuant to agreements for purchase and sale of such lands executed by Collier prior to January 1, 1988.

(8) The term "InterTribal Council of Arizona" or "ITCA" means the corporation organized and existing under the laws of the State of Arizona under the name InterTribal Council of Arizona, Inc., or a successor to such corporation organized and existing under the laws of the State of Arizona, the membership of which includes thirteen or more of the Arizona Tribes that were members of the ITCA on January 1, 1988.

(9) The term "Land Exchange" means the transaction providing for the acquisition by the United States of title to lands in Florida owned by Collier and the receipt by the United States of Monetary Proceeds in exchange for the acquisition by Collier of title to land within the School Property.

(10) The term "Monetary Proceeds" means either—

(A) the cash amount required to be paid to the United States by Collier upon closing of the Land Exchange, or

(B) the amount required to be paid to the United States by a Purchaser other than Collier upon closing of the Purchase Transaction, less the amount required to be paid from the account for acquisition of the Florida Lands and reimbursement of costs established under section 402(i) of this title.

(11) The term "Navajo Trust Fund" means the fund established pursuant to section 405(a)(2) of this title in the Treasury of the United States for the benefit of the Navajo Tribe and its members.

(12) The term "Phoenix Exchange Property" means the land within the School Property to be conveyed to a Purchaser under the Land Exchange or the Purchase Transaction, which land shall be the School Property less any parcel of land to be conveyed to the City of Phoenix or transferred to the Veterans' Administration upon closing of the Land Exchange or Purchase Transaction pursuant to section 402 of this title.

(13) The term "Planning and Development Agreement" means the Memorandum of Agreement between the City of Phoenix, Arizona, Collier Enterprises and Barron Collier Company approved by the City Council of Phoenix, Arizona, on July 1, 1987, including any amendments or modifications of such Memorandum of Agreement subsequently agreed to by the parties, or, as the context may require, an agreement between the City of Phoenix, Arizona, and a Purchaser other than Collier that is identical in all material respects to such Memorandum of Agreement.

(14) The term "Public Planning Process" means the land use planning and zoning process applicable to the School Property under the Planning and Development Agreement or other State or local law and regulation applicable to the planning and zoning of such property.

(15) The term "Purchase Transaction" means the cash purchase of the Phoenix Exchange Property by a Purchaser other than Collier under section 402(h) of this title.

(16) The term "Purchaser" means Collier or, in the event that Collier does not accept the offer of the United States to acquire the Phoenix Exchange Property under either section 402(h)(1) or section 402(h)(6) and (7) of this title, any other person that acquires the Phoenix Exchange Property under a Purchase Transaction.

(17) The term "School Property" means the real property used by the Secretary on January 1, 1988, for the Phoenix Indian High School in Phoenix, Arizona.

(18) The term "Secretary" means the Secretary of the Interior.

(19) The term "Trust Fund Payment" means the payment to the United States of the Monetary Proceeds for deposit into, as the context requires, the Arizona InterTribal Trust Fund or the Navajo Trust Fund, in the form of a lump sum payment or annual payments as determined under section 403 of this title.

(20) The term "Trust Fund Payment Agreement" means an agreement providing for payment by the Purchaser of annual Trust Fund Payments for deposit into the Arizona InterTribal Trust Fund or the Navajo Trust Fund or, as the context may require, an agreement between the United States and a Purchaser other than Collier that is identical in all material respects to such Trust Fund Payment Agreement.

(21) The term "Trust Income" to the Arizona InterTribal Trust Fund or the Navajo Trust Fund means the interest earned on amounts deposited into each such trust fund and any amounts paid into each such trust fund in the form of annual Trust Fund Payments.

(22) The term "Veterans' Administration Property" means the property adjacent to the School Property owned by the United States and under the jurisdiction and control of the Veterans' Administration on January 1, 1988.

DISPOSITION OF SCHOOL PROPERTY

SEC. 402. (a) AUTHORIZATION OF DISPOSAL.—The Secretary is authorized to dispose of the School Property and use the Monetary Proceeds only in accordance with this title. The provisions of this title shall govern the disposal of such property and other provisions of law governing the disposal of Federal property shall not apply to the disposal of the School Property.

(b) EXCHANGE AGREEMENT.—The Exchange Agreement is ratified and confirmed and sets forth the obligations, duties, and responsibilities of the parties to the Exchange Agreement. The Secretary shall implement the Exchange Agreement in accordance with its terms and conditions; except that, the Secretary may, with the concurrence of Collier, make minor and technical amendments in land descriptions and instruments of conveyance, as set forth in the agreement, upon 30 days prior written notice to the House Interior and Insular Affairs and Senate Energy and Natural Resources Committees.

(c) CONVEYANCE OF LANDS; TRANSFER OF JURISDICTION.—If the Phoenix Exchange Property is conveyed under the Land Exchange

or a Purchase Transaction, the Secretary is authorized and directed, subject to the requirements of this section, to—

(1) convey to the City by quitclaim deed a parcel of 20 acres of the School Property upon election by the City to accept such conveyance under subsection (e);

(2) transfer jurisdiction and control of a parcel of 11.5 acres of the School Property to the Veterans' Administration pursuant to subsection (f); and

(3) transfer jurisdiction and control of a parcel of 4.5 acres of the School Property to the Veterans' Administration pursuant to subsection (g).

(d) PRELIMINARY NOTICE.—(1) On a date no later than 135 days prior to acceptance by Collier of the offer of the United States under the Exchange Agreement, Collier shall provide preliminary notice in writing of its intent to accept such offer to—

(A) the Secretary;

(B) the Mayor of the City;

(C) the Administrator of Veterans' Affairs;

Indians. (D) the InterTribal Council of Arizona;

(E) the governing body of the Navajo Tribe; and

(F) the Governor of the State of Arizona.

The provision of this preliminary notice by Collier shall not affect Collier's right to accept or not to accept the offer of the United States under the Exchange Agreement and in accordance with subsection (h) (1) or (7).

(2) Notwithstanding any provision of the Exchange Agreement, Collier may not provide preliminary notice under paragraph (1) prior to the later of one year following the date of enactment of this title or the submission of a Specific Plan for the Phoenix Exchange Property as provided in the Planning and Development Agreement.

(e) ELECTION BY CITY.—(1) Within 15 days after receipt of notice to the Mayor of the City under subsection (d), the City may advise the Secretary in writing that it elects to accept conveyance of a parcel of 20 acres of land within the School Property identified for conveyance to the City by mutual agreement with Collier in accordance with the Public Planning Process.

(2) On or after conveyance of the Phoenix Exchange Property under the Land Exchange or Purchase Transaction, the Secretary shall convey to the City such parcel of 20 acres of the School Property as the City may elect to receive under paragraph (1), subject to the requirements of this section: *Provided*, That if the City and the Purchaser have not identified 20 acres for conveyance to the City in accordance with the Public Planning Process at the time of closing of the Land Exchange or the Purchase Transaction, the Secretary shall convey to the city a parcel of land consisting of the northernmost 20 acres of the School Property.

(3) Nothing in this title shall be construed as a limitation on the authority of the Purchaser and the City to enter into agreements to exchange, on an acre-for-acre basis, land within the School Property conveyed to the Purchaser for land conveyed by the United States to the City or owned by the City contiguous to the School Property.

(4) Any conveyance to the City by the United States under this subsection shall include the requirement for a right of reverter in favor of the United States restricting the use of such land perpetually to provide for public open space and recreation.

(5) Any conveyance by the Purchaser to the City of land within the School Property pursuant to exchange shall include a right of

reverter in favor of the United States restricting the use of such land perpetually to provide for public open space and recreation. The conveyance by exchange of land to the Purchaser from the City shall extinguish any right of reverter restricting the use of land so conveyed to the Purchaser.

(6) Nothing in this subsection shall be construed to alter any right of the City to purchase additional acres of land within the School Property from the Purchaser pursuant to the Planning and Development Agreement or as may otherwise be agreed to by the City and the Purchaser.

(f) TRANSFER TO THE VETERANS' ADMINISTRATION.—(1) Upon the closing of the Land Exchange or the Purchase Transaction, the Secretary shall transfer to the Veterans' Administration jurisdiction and control of a parcel of 11.5 acres (including improvements located thereon) within the School Property to be used for expansion of the Veterans' Administration Medical Center in Phoenix, Arizona.

(2) Such parcel shall be the portion of land designated as Tract C on the metes-and-bounds surveys in the southeast quarter of section 20, township 2 north, range 3 east, of the Gila and Salt River Meridian, Arizona, conducted by the Bureau of Land Management of the Department of the Interior, dated March 22, 1988.

(3)(A) The Administrator shall cooperate with the City in the planning and development of land transferred under this subsection for the purpose of ensuring comprehensive planning of the School Property in accordance with the objectives of the Public Planning Process. The general authorities of the Administrator, including but not limited to those contained in sections 5022(a)(2) and 5024 of title 38, United States Code, shall be available to the Administrator for the purposes of this subsection.

(B) The Administrator shall, within six months after the date of the enactment of this title and every six months thereafter until the cooperative planning referred to in subparagraph (A) is completed, transmit a report to the Committee on Interior and Insular Affairs and the Committee on Veterans' Affairs of the House of Representatives and the Committee on Energy and Natural Resources and the Committee on Veterans' Affairs of the Senate. Each such report shall contain a description of the efforts made by the Veterans' Administration in carrying out such planning during the period for which the report is submitted. Reports.

(C) The Secretary shall enter into a memorandum of understanding with the Administrator for the temporary use by the Administrator of the gymnasium constructed on the School Property in 1975. Such temporary use shall not extend beyond the interim period before the transfer or development of the property on which the gymnasium is located.

(g) TRANSFER TO THE STATE OF ARIZONA.—(1) Upon the closing of the Land Exchange or the Purchase Transaction, the Secretary shall transfer to the Veterans' Administration jurisdiction and control of a parcel of 4.5 acres (including improvements located thereon) within the School Property which shall be under the jurisdiction and control of the Veterans' Administration until disposed of in accordance with paragraph (3) or (4).

(2) Such parcel of land shall be contiguous to the parcel of land transferred to the Veterans' Administration under subsection (f) and to the Veterans' Administration Property. Such parcel shall be identified by mutual agreement of the City, the Administrator,

Collier, and the State of Arizona in accordance with the objectives of the Public Planning Process for use by the State of Arizona as a site for facilities owned and operated by such State as a home for veterans.

(3) The Administrator shall convey such parcel (including improvements located thereon), without reimbursement, to the State of Arizona when—

(A) the Administrator of Veterans' Affairs has approved the State of Arizona's application for assistance in construction of a State veterans' facility on such parcel pursuant to section 5035 of title 38, United States Code; and

(B) the State of Arizona has appropriated sufficient funds to pay for its portion of the costs of construction of such facility.

(4) If the State of Arizona does not submit an application for assistance described in paragraph (3)(A) and appropriate the funds described in paragraph (3)(B) within three years after such parcel is transferred to the Veterans' Administration under this subsection, the Administrator of Veterans' Affairs shall transfer jurisdiction and control of such parcel to the Secretary.

(5) Such land shall be offered by the Secretary for sale to the City, subject to a right of reverter in favor of the United States restricting the use of such land perpetually to provide for public open space and recreation, at a price determined by the Secretary which shall be representative of the value of such land discounted to account for such restrictions in use. In the event that the City does not accept the offer of the United States to purchase such land within six months from the date such offer is made, such land shall be offered for sale to the Purchaser at fair market value. The amount received from any sale of such land shall be deposited in the Arizona InterTribal Trust Fund and in the Navajo Trust Fund in accordance with the allocation described in section 405(e).

Indians.

(h) OFFERS TO PURCHASE.—(1) Upon receipt by the Secretary of the notice of election to receive the parcel of land by the City of Phoenix under subsection (e), but in no event later than 15 days after receipt of preliminary notice to the Secretary by Collier under subsection (d), the Secretary shall notify Collier that, notwithstanding the provisions of subsection (d)(1), Collier may accept the offer of the United States to acquire the Phoenix Exchange Property under the terms of the Exchange Agreement, subject to the requirements that if the fair market value of the Phoenix Exchange Property stated in the current, independent appraisal obtained by the Secretary under subsection (m)(4) is greater than $80,000,000, then Collier shall pay, in addition to the amount required to be paid under paragraphs 13 and 14 of the Exchange Agreement, an amount equal to the difference between the fair market value stated in such appraisal and $80,000,000. If Collier notifies the Secretary that it does not accept the offer of the United States under this paragraph, a Purchaser may acquire the Phoenix Exchange Property pursuant to the requirements of paragraphs (2) through (9) of this subsection.

(2)(A) Upon receipt of notice by Collier that it does not accept the offer of the United States under paragraph (1), but in no event later than 15 days following receipt of such notice, the Secretary shall initiate the bidding process under this section by soliciting and advertising widely for sealed bids for purchase of the Phoenix Exchange Property: *Provided,* That no such bid will be accepted unless such bid offers a price of no less than the minimum acceptable price set forth in subsection (h)(4). The Secretary shall solicit

Federal Register, publication.

and advertise widely for such bids by publishing notice that the Secretary will receive offers by persons other than Collier to purchase the Phoenix Exchange Property in the Federal Register and in newspapers of general circulation and other appropriate publications, including newspapers in Phoenix, Arizona. Such notice shall include—

(i) an accurate description of the Phoenix Exchange Property, and an identification of any parcels of land within the School Property elected for conveyance to the City pursuant to subsection (e), transferred to the Veterans' Administration pursuant to subsection (f), or conveyed to the State of Arizona pursuant to subsection (g);

(ii) the name and address of State and local offices from which information concerning the zoning and other legal requirements applicable to such property may be obtained;

(iii) a description of the terms and conditions for purchase of the Phoenix Exchange Property established under this title pursuant to which the Secretary may accept an offer to purchase the Phoenix Exchange Property;

(iv) a statement of the minimum price that the Secretary may accept for sale of the Phoenix Exchange Property under paragraph (4) of this subsection;

(v) a description of the other terms and conditions for purchase of the Phoenix Exchange Property that the Secretary determines are necessary to ensure that the rights and obligations of a Purchaser under this section are comparable in all material respects to the rights and obligations of Collier under the Exchange Agreement, except as otherwise provided in this title;

(vi) a statement establishing requirements for deposit of bond or other guarantee of credit in an amount determined by the Secretary; and

(vii) any other information that the Secretary, in his discretion, determines is reasonably necessary to permit a bona fide potential purchaser to evaluate the terms and conditions for purchase of the Phoenix Exchange Property.

(B) Upon request, the Secretary shall make available to any potential purchaser a copy of the Exchange Agreement or any other document in the possession of the Secretary which the Secretary in his discretion determines is reasonably necessary to permit a bona fide potential purchaser to evaluate the proposal of the United States to sell the Phoenix Exchange Property.

(3) Any person seeking to acquire the Phoenix Exchange Property by purchase under this section shall, within 90 days after publication of notice in the Federal Register under paragraph (2)(A), deliver to the Secretary in the form prescribed in such notice, a written offer to purchase the Phoenix Exchange Property which offer shall—

(A) offer to purchase the entire Phoenix Exchange Property for cash in a single transaction at a price greater than the minimum acceptable price established under paragraph (4);

(B) by its terms be irrevocable for a period of at least 120 days from the date such offer is delivered to the Secretary and be legally binding on the offeror upon acceptance of such offer by the United States;

(C) offer to enter into a Purchase Agreement with the United States under the terms and conditions for purchase of the

Phoenix Exchange Property described in the notice by the Secretary under paragraph (2);

(D) contain an offer to the United States to enter into a Trust Fund Payment Agreement in a form prescribed by the Secretary consistent with the requirements for payment of the Trust Fund Payment in the form of annual payments under section 403, which agreement shall be legally binding upon the offeror upon election of the Secretary to receive payment of the Monetary Proceeds in the form of annual payments under section 403 of this title, including: (i) a detailed description of the collateral to be provided by the offeror to secure the payment obligation under the Trust Fund Payment Agreement upon such election of the Secretary to receive payment in the form of annual payments, and (ii) evidence of ownership and value of such collateral sufficient to permit the Secretary to determine whether such collateral is adequate to secure the payment obligations of the Purchaser under the Trust Fund Payment Agreement;

(E) contain evidence that the offeror has made an offer to the City of Phoenix, legally binding by its terms on the offeror upon approval by the City Council of Phoenix, Arizona, to enter into the Planning and Development Agreement;

(F) contain full and substantial evidence of the capacity of the offeror to enter into and perform each of the obligations required to be undertaken by the offeror under the terms described by the Secretary in accordance with paragraph (2) including a description of any financing arrangements to be undertaken by the offeror in order to perform the payment obligation of the Purchaser upon closing of the Purchase Transaction;

(G) meet any other requirements prescribed by the Secretary in the notice published under paragraph (2)(A) which are reasonably necessary to ensure that any offer accepted by the United States under this subsection will provide public benefits to the United States comparable to those provided to the United States under the Land Exchange; and

Securities.

(H) be accompanied by the deposit of a bond or other guarantee consistent with the requirements prescribed by the Secretary under paragraph (2).

(4) The minimum acceptable price for sale of the Phoenix Exchange Property is a cash amount equal to the sum of the amount required to be deposited into the account for purchase of the Florida Lands and reimbursement of costs under subsection (i) and an amount equal to the amount required to be paid by Collier under paragraphs 13 and 14 of the Exchange Agreement.

(5)(A) The Secretary shall review any offer to purchase the Phoenix Exchange Property delivered to the Secretary within 90 days after publication of notice under paragraph (2)(A) for the purpose of determining whether such offer meets the requirements under paragraph (3) or other requirements set forth in the notice of the Secretary pursuant to paragraph (2). The Secretary shall identify for consideration as qualifying offers all such offers that meet such requirements subject to the limitations of subparagraph (B).

(B) In determining whether an offer is a qualifying offer under this paragraph, the Secretary shall exclude from consideration any offer that the Secretary in his discretion determines—

(i) does not meet the requirements set forth in the notice of the Secretary pursuant to paragraph (2);

(ii) is made by an offeror without adequate capacity to enter into or perform the payment obligations under this title or the Trust Fund Payment Agreement; or

(iii) has failed to identify collateral that is adequate to secure the obligations under the Trust Fund Payment Agreement.

(C) The Secretary shall, within 105 days after publication of notice in the Federal Register, select from among the qualifying offers the best qualifying offer, which shall be the single offer from among the qualifying offers that contains an offer to pay to the United States the highest lump sum cash payment upon closing of the Purchase Transaction: *Provided,* That nothing in this paragraph shall be construed to limit or alter the right of the Secretary to elect to receive payment of the Monetary Proceeds in the form of annual payments under section 403 of this title.

(6) Within 105 days after publication of notice in the Federal Register under paragraph (2)(A), the Secretary shall advise Collier whether the Secretary has identified a qualifying offer or offers. In the event that the Secretary has not identified any such qualifying offer, he shall advise Collier that Collier may accept the offer of the United States to Collier under the terms of the Exchange Agreement and this title. In the event that the Secretary has identified a qualifying offer, the Secretary shall provide Collier with a copy of the best qualifying offer, and shall advise Collier that Collier may accept the offer of the United States under the Exchange Agreement subject to the requirement that Collier pay, rather than the amount required to be paid under paragraphs 13 and 14 of the Exchange Agreement, the difference between an amount equal to 105 percent of the price to be paid under the best qualifying offer and $45,100,000.

(7) Collier may accept the offer of the United States by notice to the Secretary within 30 days of receipt of notice under paragraph (6) that Collier accepts such offer under the terms of the Exchange Agreement and subject to the requirement, if any, for additional payment under paragraph (6). If Collier accepts the offer of the United States under this paragraph, closing of the Land Exchange shall occur under the terms of the Exchange Agreement and this title.

(8) If Collier does not accept such offer, the Secretary shall accept the best qualifying offer. If no qualifying offer has been received within the period specified in paragraph (3), the Secretary shall maintain the School Property in accordance with subsection (k) of this section, and notify the Committees on Interior and Insular Affairs and Veterans' Affairs in the House of Representatives, and the Committee on Energy and Natural Resources in the Senate within 60 days of the Secretary's notice to Collier under paragraph (6). Closing of the Purchase Transaction under this subsection shall occur within 90 days after acceptance by the United States of the best qualifying offer, subject to the requirements respecting deposit of payment under subsection (i).

(9) No action of the Secretary under this subsection shall be subject to the provisions of 5 U.S.C. 553 through 558 or 701 through 706.

(i) ACCOUNT FOR PURCHASE TRANSACTION AMOUNTS.—(1) Upon closing of the Purchase Transaction, there shall be established in the Treasury of the United States an account into which shall be

deposited from the amount paid to the United States under the Purchase Transaction, at the direction of the Secretary, an amount equal to the sum of—

(A) $49,400,000, less any amount received by Collier in consideration of the conveyance to the United States of any portion of the Florida Lands prior to the closing of the Purchase Transaction, and

(B) an amount equal to the costs determined by the Secretary as reimbursable to Collier under paragraph (2), based on information to be provided to the Secretary by Collier at the time that Collier provides preliminary notice under subsection (d).

(2) For purposes of this subsection, reimbursable costs of Collier shall include—

(A) all costs, including fees for attorneys and consultants and appraisal costs paid or incurred by Collier in connection with the Public Planning Process and planning and zoning of the School Property, and

(B) an amount for compensation of general administrative costs and overhead, which shall be an amount equal to the costs reimbursable to Collier under subparagraph (A) multiplied by a factor of 0.8.

Florida.

(3) Upon conveyance by Collier to the United States of title to the Florida Lands pursuant to this subsection, the Secretary shall cause to be paid to Collier from the account established under paragraph (1): (A) $49,400,000, less any amount previously paid to Collier by the United States in consideration of conveyance of any portion of the Florida Lands, and (B) an amount equal to the total amount of costs reimbursable to Collier under this subsection, as determined by the Secretary.

(j) CONVEYANCE OF TITLE.—Upon conclusion of the procedures under subsection (h), the Secretary is authorized and directed to release and quitclaim to the Purchaser all right, title, and interest of the United States to the Phoenix Exchange Property.

(k) REVERSION.—Any land within the School Property not conveyed to the Purchaser or the City or transferred to the Veterans' Administration upon closing of the Land Exchange or the Purchase Transaction or which reverts to the United States under subsection (e)(4) or is transferred to the Secretary under subsection (g)(4) and is not sold to the City or the Purchaser shall be maintained under the administrative jurisdiction, management and control of the National Park Service and shall not be disposed of until authorized by an Act of Congress: *Provided, however,* That such lands shall not be considered a unit of the National Park System.

(l) STATE AND LOCAL AUTHORITY.—Nothing in this title shall be construed to supersede, abrogate, enlarge, diminish, or otherwise alter the exercise of authority of the State of Arizona, the City or other State and local authority with respect to planning and zoning of the School Property under applicable State or local law.

(m) SPECIFIC PLAN REPORTS.—(1) No later than 30 days after the submission of the Specific Plan as provided for in the Planning and Development Agreement, the Comptroller General of the United States shall submit to Congress a report analyzing the Specific Plan, particularly as it relates to the final proposals for zoning of the Phoenix Exchange Property, the alternatives considered, the reasons for rejection of the alternatives, and the effect of the rezoning

proposals on the potential value of the property relative to the effects of other zoning proposals.

(2) Within 60 days after acceptance of the Purchasers' offer under subsection (h)(8), or acceptance by Collier of the offer of the United States under subsection (h) (1), (6) or (7), whichever is later, the Comptroller General shall provide a further report on all actions taken subsequent to the submission of the Specific Plan relative to disposition of the Phoenix Exchange Property, particularly as they relate to the value received by the United States and the process by which such value was determined.

(3) The Comptroller General shall transmit all reports required by this section to the Committees on Interior and Insular Affairs and Education and Labor of the House of Representatives and the Committee on Energy and Natural Resources and the Select Committee on Indian Affairs of the Senate.

(4) Within 45 days following submission of the Specific Plan as provided for in the Planning and Development Agreement, the Secretary shall obtain, at Collier's expense, a current, independent appraisal of the Phoenix Exchange Property, based upon the zoning requirements stated in such Specific Plan, which appraisal shall determine the fair market value which Collier must give for the Phoenix Exchange Property if such property is acquired by Collier pursuant to the provisions of subsection (h)(1).

PAYMENT TO THE TRUST FUNDS

Indians.

SEC. 403. (a) DEPOSIT OF MONETARY PROCEEDS.—The Monetary Proceeds shall be paid to the United States for deposit in the Arizona InterTribal Trust Fund and the Navajo Trust Fund in accordance with this section and section 405 of this title.

(b) ELECTION OF LUMP SUM OR ANNUAL PAYMENTS.—Subject to the requirements for consultation under subsection (c)(3), the Secretary may, in his discretion, elect to receive the Trust Fund Payment for deposit in the Arizona InterTribal Trust Fund or the Navajo Trust Fund, or both, in the form of either a lump sum payment or 30 annual payments, calculated in accordance with subsection (c). The Secretary shall provide notice of such election to the Purchaser within 90 days after receipt of notice from Collier that it intends to accept the offer of the United States under the Exchange Agreement pursuant to section 402(d).

(c) METHOD OF PAYMENT.—(1) If the Secretary elects to receive a Trust Fund Payment in the form of a lump sum payment, the Purchaser shall, at the time of closing, pay to the United States an amount equal to that portion of the Monetary Proceeds that is properly allocable to the Trust Fund for which such election is made.

(2) If the Secretary elects to receive a Trust Fund Payment in the form of annual payments, the Purchaser shall make—

(A) 30 annual payments equal to the interest due on an amount equal to that portion of the Monetary Proceeds that is properly allocable to the Trust Fund for which such election is made; and

(B) at the time of the last annual payment, a payment equal to that portion of the Monetary Proceeds that is properly allocable to the Trust Fund for which such election is made.

(3) Prior to making any election as to form of the Trust Fund Payment under this subsection, the Secretary shall consult with—

(A) the InterTribal Council of Arizona, concerning the form of the Trust Fund Payment to the Arizona InterTribal Trust Fund; and

(B) the governing body of the Navajo Tribe, concerning the form of the Trust Fund Payment to the Navajo Trust Fund.

(4) If the Secretary elects to receive a Trust Fund Payment in the form of annual payments under subsection (c)(2), the Secretary is directed to execute the Trust Fund Payment Agreement pursuant to which such annual payments will be made.

(5) The interest rate to be used in determining the interest due on annual Trust Fund Payments payable by the purchaser shall be the interest rate being offered on bonds payable in 30 years sold by the United States on the date that notice of the election of the form of the Trust Fund Payment is made by the Secretary plus 0.25 percent, except that in no event shall such interest rate be lower than 8.5 percent or higher than 9.0 percent.

(6) Closing of the Land Exchange or the Purchase Transaction shall occur no sooner than 90 days after notice of the Secretary's election is provided to the Purchaser, except that if the Secretary elects to receive a Trust Fund Payment in the form of annual payments under subsection (c)(2), closing of the Land Exchange or the Purchase Transaction shall not occur unless a Trust Fund Payment Agreement has been executed.

(d) CASH PROCEEDS.—Any cash proceeds to the United States from the sale of land within the School Property offered to and accepted by the City or the Purchaser subsequent to closing of the Land Exchange or the Purchase Transaction shall be in the form of a lump sum payment, unless otherwise agreed to by the parties, payable to the United States for deposit into the Arizona InterTribal Trust Fund and the Navajo Trust Fund pursuant to section 405 of this title.

CLOSURE OF THE PHOENIX INDIAN HIGH SCHOOL

SEC. 404. (a) CLOSURE.—Notwithstanding any other provision of law, the Secretary shall close the Phoenix Indian High School on a date determined by the Secretary, which date shall be no earlier than June 1, 1990, and no later than September 1, 1990.

(b) NOTICE.—By January 30, 1990, the Secretary shall notify the tribal governing body of each Arizona Tribe affected by the closing of the Phoenix Indian High School and each person, or parent or guardian of each person, enrolled as a student at the Phoenix Indian High School on January 1, 1991, of the date of closing of the Phoenix Indian High School as determined by the Secretary under subsection (a).

(c) INDIVIDUAL EDUCATION PLANS.—(1) Beginning January 30, 1990, but in no case later than March 1, 1990, the Secretary, through the Assistant Secretary of Indian Affairs, shall—

(A) identify each eligible Indian student who is enrolled or preenrolled for attendance at the Phoenix Indian High School, as of the date of enactment of this title, or who attended the Phoenix Indian High School during the academic year 1988-89, and who did not graduate from a secondary program, and shall—

(i) contact each student, or the parents or guardians of record of each such student,

(ii) notify each student that the Phoenix Indian High School is to be closed at the date established by the Secretary under subsection (a),

(iii) inform each of the alternatives available to each student and their families, including attendance at the Bureau operated facility at Riverside, California, and

(iv) develop the individual education plans required under subparagraph (B);

(B) develop for each student identified under subparagraph (A) an individual education plan, which shall be formulated in a cooperative fashion between Bureau education and other appropriate social services. Each individual education plan shall, at the minimum, include—

(i) an identification of the student;

(ii) an identification of the special educational, social, or academically related cultural needs of each student;

(iii) a description of the consultation and discussions with the student and the parent involved in the formulation of this plan;

(iv) an identification of the alternative service provider chosen by the student or parent to provide educational services;

(v) any actions taken, pursuant to the requirements to protect confidentiality, to contact and coordinate the alternative service provider, the tribe, any appropriate Bureau social service entities, and the Office of Indian Education Program; and

(vi) set out in detail the actions to be taken by the Bureau of Indian Affairs to supplement the program provided with additional services and support for the student, where the student attends a non-Bureau funded program or a Bureau funded program which does not include the services described within the plan; and

(C) take such steps as are necessary to establish a formal internal mechanism for implementing the findings and recommendations of the plans developed under subparagraph (B).

(2)(A) Any other provision of law notwithstanding, the Secretary shall, for the fiscal years ending prior to September 30, 1992, reserve from funds appropriated under section 1128 of Public Law 95-561 and other Bureau of Indian Affairs accounts presently providing support to the Phoenix Indian High School during the fiscal year 1990 an amount equal to the amount determined under subparagraph (B) for the purpose of implementing subparagraph (C).

(B)(i) The amount reserved for the fiscal year ending September 30, 1991, shall be equal to the sum of three-fourths the amount generated under the Indian Student Equalization Formula during fiscal year 1990 for the Phoenix Indian High School plus three-fourths the amount generated under the accounts referenced in subparagraph (A), such funds to be reserved from the respective accounts and administered pursuant to subparagraph (C).

(ii) The amount reserved for the fiscal year ending September 1992 shall be equal to the sum of one-half the amount generated under the Indian Student Equalization Formula during fiscal year 1990 for the Phoenix Indian High School plus one-half the amount generated under the accounts referenced in subparagraph (A), such funds to be reserved from the respective accounts and administered pursuant to subparagraph (C).

(C) From funds reserved pursuant to subparagraph (B), the area education director and the area director shall jointly administer a program to implement the individual education plans developed under paragraph (2), with particular emphasis being placed on monitoring the performance and attendance of students covered by the individual education plans. From such funds, they shall also, to the extent funds are available, conduct such activities as may be necessary to determine those eligible Indian students who reside within the State of Arizona or the jurisdiction of the Phoenix Area Office of the Bureau of Indian Affairs who are of legal age to be attending school but who are not enrolled in any program.

(d) TRANSFER OF JURISDICTION.—Within 60 days after closure of the Phoenix Indian High School under subsection (a), the Secretary shall transfer administrative jurisdiction, management and control of the school property from the Bureau of Indian Affairs to the National Park Service: *Provided,* That, prior to the disposition of the School Property under the terms of the Exchange Agreement or otherwise, the National Park Service shall manage and control such School Property in a manner consistent with the requirements of the Exchange Agreement and subsection (e), except that the Administrator may, during the interim period of administration, take such actions as are necessary to protect the improvements located on the 11.5 acres of land and 4.5 acres of land to be transferred to the Veterans' Administration pursuant to subsections (f) and (g) of section 402. During the interim period of administration the School Property shall not be considered a unit of the National Park System.

California.

(e) TRANSFER OF RESOURCES.—(1) Any other provision of law notwithstanding, the following shall apply to the Sherman Indian School, located in Riverside, California, and operated by the Bureau of Indian Affairs, or its successors, effective on the date of enactment:

(A) The attendance boundaries used by the Bureau of Indian Affairs to govern placements in the Sherman Indian School is expanded to include all of the attendance boundary served in the fiscal year 1991 by the Phoenix Indian High School.

(B) Subject to school board approval, the superintendent of the Sherman Indian School is authorized to pay the recruitment and retention allowance authorized under section 1131(h)(3) of Public Law 95-561.

(C) The Secretary shall inventory all Bureau of Indian Affairs educational property, including personal property, currently located at the Phoenix Indian High School. The superintendent of the Sherman Indian School, and their designees, shall have first option on all materials located at the Phoenix Indian High School and the Secretary shall take all steps necessary to move the materials chosen by the superintendent of the Sherman Indian School to the school as expeditiously as possible. Remaining property shall be made available to other off-reservation boarding schools.

(D) Subject to the provisions of subsection (d), the personnel ceilings at the Sherman Indian School shall be immediately adjusted to reflect employees who transfer from the Phoenix Indian High School and any increase in the student population projected by the closure.

(2) With respect to any employee employed at the Phoenix Indian High School prior to the closure of the academic program—

(A) for the purpose of conducting the reduction in force associated with the closure of the Phoenix Indian High School, Phoenix Indian High School and the Sherman Indian School in Riverside, California shall be considered as one employment area; and

(B) for those who do not elect to exercise the above, or to whom they do not apply, outplacement assistance, including where available job retraining programs, professional résumé and other job placement assistance.

ESTABLISHMENT OF THE ARIZONA INDIAN TRUST FUNDS

SEC. 405. (a) ESTABLISHMENT.—Upon disposal of the School Property and receipt by the United States of the Monetary Proceeds, there shall be established in the Treasury of the United States—

(1) a fund to be known as the Arizona InterTribal Trust Fund; and

(2) a fund to be known as the Navajo Trust Fund.

(b) AMOUNTS IN FUNDS.—Each Trust Fund established under this section shall consist of—

(1) an amount equal to the sum of—

(A) that portion of the Monetary Proceeds properly allocable to each such Trust Fund;

(B) that portion of the cash proceeds from the sale by the United States to the City or the Purchaser of additional acres of land within the School Property pursuant to subsection (g)(5) of section 402 of this title properly allocable to each such Trust Fund; and

(C) any interest accruing on any amount deposited in each such Trust Fund,

(2) less the amount of Trust Income from the Trust Fund used by the Secretary pursuant to subsection (d).

(c) INVESTMENT.—(1) If a Trust Fund Payment is made in the form of a lump sum payment under section 403(c)(1) of this title, the Secretary of the Treasury shall invest the amount of such lump sum payment in interest-bearing deposits and securities in accordance with the Act of June 24, 1938 (25 U.S.C. 162a).

(2) If a Trust Fund Payment is made in the form of annual payments under section 403(c)(2) of this title, the Secretary of the Treasury shall hold in trust the security provided in accordance with the Trust Fund Payment Agreement.

(3) At the direction of the Secretary, the Secretary of the Treasury may invest in accordance with the requirements of paragraph (1) any portion of the Trust Income not used by the Secretary in any year.

(d) USE OF TRUST INCOME.—(1) The purpose of these trust funds is to supplement, not supplant, current Federal efforts. The Secretary shall not reduce, rescind, alter or change any distribution of funds to which any Indian tribe or students covered by this section may otherwise be entitled or eligible under any other Federal authority. The Congress also expresses its intention that in determining the amount of any funds to provide services to Indian tribes or students covered by this section, there shall be no amendment, alteration, limitation, or reduction within future congressional action occasioned by the presence of these funds.

(2) Trust Income may be used only for—

Education. Children and youth.

(A) supplemental educational and child-welfare programs, activities, and services for the benefit of—

(i) those Arizona Tribes that were members of the Inter-Tribal Council of Arizona on January 1, 1988, in the case of payments from the Arizona InterTribal Trust Fund; and

(ii) the Navajo Tribe, in the case of payments from the Navajo Trust Fund;

(B) the design, construction, improvement, or repair of related facilities; and

(C) the payments referred to in paragraph (4).

(3)(A) To carry out the purposes of paragraph (2), the Secretary, pursuant to appropriations, may make grants—

(i) from the Arizona InterTribal Trust Fund to Arizona tribes that were members of the InterTribal Council of Arizona on January 1, 1988, public school districts on or near reservations of such Tribes in the State of Arizona, and the InterTribal Council of Arizona; and

(ii) from the Navajo Trust Fund to the Navajo Tribe or public school districts on or near the Navajo Reservation in the State of Arizona.

(B) The Secretary shall require, as a condition for making any grant to a public school district, the approval of the governing body of the Arizona Tribe the children of which are to be served by such grant.

(4)(A) An amount equal to 5 percent of the Trust Income during the preceding fiscal year shall be paid annually by the Secretary—

(i) to the InterTribal Council of Arizona from the Arizona InterT ibal Trust Fund; and

(ii) to the governing body of the Navajo Tribe from the Navajo Trust Fund.

Education. Children and youth.

(B) Payments made under this paragraph shall be used for education, child welfare, community development, and general administrative purposes, and may be made only pursuant to an annual budget adopted by the vote of—

(i) a majority of the members of the InterTribal Council of Arizona, in the case of payments to the Arizona InterTribal Trust Fund; and

(ii) the governing body of the Navajo Tribe, in the case of payments to the Navajo Trust Fund.

(C) The limitation on the amount of payments under this paragraph shall not be construed as a limitation on the authority of the Secretary to make grants to the InterTribal Council of Arizona or the Navajo Tribe under paragraph (3).

(5) None of the Trust Income may be used for scholarship grants for higher education.

(e) ALLOCATION.—In depositing into the Trust Funds the Monetary Proceeds, any payment by the State of Arizona, or the cash proceeds from the sale of land within the School Property—

(1) the amount properly allocable to the Arizona InterTribal Trust Fund shall be 95 percent of the total amount of such payment or cash proceeds to the United States; and

(2) the amount properly allocable to the Navajo Trust Fund shall be 5 percent of the total amount of such payment or cash proceeds to the United States.

SEC. 406. ADMINISTRATION OF NEW LANDS FUNDS.—Subsection (c)(2)(B) of section 12 of Public Law 93-531 (25 U.S.C. 640d-11) is amended by adding at the end thereof of the following new clause:

"(B) : *Provided further,* That for administrative purposes such funds shall be maintained in a separate account.".

SEC. 407. CLARIFICATION OF ELIGIBILITY.—Public Law 93-531 is amended by adding at the end thereof the following new section:

"SEC. 32. Nothing in this Act prohibits the Commissioner from providing relocation assistance to families certified as eligible, regardless of their current place of residence, with funds appropriated to implement Public Law 93-531.". 25 USC 640d-31.

TITLE V—SANTA RITA PUBLIC LANDS EXCHANGE

PAYMENT OF FEDERAL DEBT

SEC. 501. The Secretary of the Interior, acting through the Bureau of Land Management, shall convey to the State of Arizona, a portion of the lands in the Santa Rita Experiment Station lying outside of the National Forest System, (comprising 50,810.94 acres as generally depicted on map AZ-020-01, subpart A, dated September 13, 1988), which the Secretary deems necessary to satisfy the remaining Federal debt to the State of Arizona, as of the date of enactment of this title, for relinquishments of lands for the Central Arizona project pursuant to the provisions of the Act of June 20, 1910. The map referenced in this section shall be on file and available for public inspection in the offices of the Arizona State Bureau of Land Management and of the Bureau of Land Management in Washington, D.C.

LAND ACQUISITION

SEC. 502. (a) STATE LANDS ACQUISITION.—Upon completion of the actions authorized in section 501, the Secretary shall utilize the remaining Federal lands in the Santa Rita Experiment Station, described in section 501, to acquire through exchange, pursuant to the exchange provisions of the Federal Land Policy Management Act of 1976, all of the State trust lands within Catalina State Park (as generally depicted on map AZ-020-02, subpart B, dated September 13, 1988), Buenos Aires National Wildlife Refuge (as generally depicted on map AZ-020-05, subpart A, dated September 13, 1988), the Black Canyon Corridor (as generally depicted on map AZ-020-03, Subpart A, dated September 13, 1988), Arivaca Lake (as generally depicted on map AZ-020-05, subpart B, dated September 13, 1988), the Madera-Elephant Head Trail area (as generally depicted on map AZ-020-01, subpart C, dated September 13, 1988), and near Lake Pleasant (as generally depicted on map AZ-020-03, subpart B, dated September 13, 1988). The maps described in this subsection shall be on file and available for public inspection in the offices of the Arizona State Bureau of Land Management and of the Bureau of Land Management in Washington, D.C. Public information.

(b) ADDITIONAL ACQUISITION AUTHORITY.—The Secretary is also authorized to acquire the State lands described in subsection (a) by purchase or eminent domain to the extent determined by him to be appropriate.

(c) LANDS TO BE INCLUDED IN THE NATIONAL WILDLIFE REFUGE SYSTEM.—Those lands within the Buenos Aires National Wildlife Refuge that are acquired in accordance with this title shall be added to the National Wildlife Refuge System and managed in accordance with the National Wildlife Refuge System Administration Act of 1966.

CERTIFICATE OF SERVICE

I hereby certify that on June 10th, 2019, a copy of the foregoing Opening Brief of Plaintiff-Appellant Inter-Tribal Council of Arizona, Inc. was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. The following participants in this case were registered CM/ECF users at the time of this filing and that service will be accomplished by the appellate CM/ECF system to the following:

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Dated this 10th day of June, 2019.

Respectfully submitted,

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