IN THE UNITED STATES COURT OF FEDERAL CLAIMS

THE INTER-TRIBAL COUNCIL OF ARIZONA, INC., Plaintiff,	)	
v.	)	No. 15-342L (Judge Hertling)
THE UNITED STATES OF AMERICA, Defendant.	)	

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON REMAINING CLAIM I ALLEGATIONS

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The United States respectfully requests that this Court deny Plaintiff Inter-Tribal Council of Arizona, Inc.'s (ITCA) Motion for Partial Summary Judgment on the remaining Claim I allegations in the Second Amended Complaint, ECF No. 157, and grant the United States Cross-Motion (Cross-Motion), ECF No. 155.[1]

It is now well established that the United States is not responsible for the payment obligations of the Barron Collier Co. (Collier). Yet ITCA's motion again erroneously attempts to hold the United States liable for ten future interest payments Collier was scheduled to make and to resurrect dismissed legal claims related to Collier's thirty-year payment obligation (the proceeds of which Congress dedicated to ITCA and non-party Navajo Nation). ITCA ignores the $88 million it has realized from Collier's prior payments and the United States' recovery of principal and accrued interest, choosing instead to devote the focus of its brief on its already rejected theory that the United States is liable for all future interest payments that *Collier*—not the United States—was to pay. But multiple decisions by the Federal Circuit and this Court have established that the United States has *no* obligation to make up Collier's payment obligations.

[1] The United States incorporates by reference its Counterstatement to ITCA's Statement of Facts (US Counterstatement), filed this same day.

This Court should not entertain ITCA's failed arguments offered in disregard for the law of this case, which establishes that ITCA is "in no way entitled to recover" the purportedly "unpaid" interest payment from the United States.

With respect to the narrow set of claims that actually remain and relate to the value of the trust estate over the life of the United States' trust agreement with Collier, ITCA fails to satisfy its burden of proof and identifies no concrete harm arising from the remaining alleged breaches that is traceable to the United States and redressable by a remedy not foreclosed by this Court and the Federal Circuit.

For these reasons, the Court should deny ITCA's motion and instead grant the United States' Cross-Motion, ECF No. 155.

INTRODUCTION

The United States is not responsible for ten future interest payments that Collier was scheduled to make under its agreement with the United States and the governing statute. Following rulings from this Court and the Federal Circuit, ITCA is "in no way entitled to recover" these payments from the United States under any theory. *Inter-Tribal Council of Arizona, Inc. v. United States*, No. 15-342, 2023 WL 4881967, at *5 (Fed. Cl. Aug. 1, 2023). ITCA nonetheless stakes its current motion on its rejected theory that the United States is liable for these payments, attempting to resurrect dismissed damage claims related to the adequacy of the United States' trust agreement with Collier and subsequent recovery of $48 million from Collier in a successful enforcement of that agreement.

The reality here is that successive dispositive motions pared down the operative complaint to a few narrow allegations in Claim I, each relating to the value of the trust estate securing Collier's $34.9 million obligation at various points in time prior to Collier's breach of the trust fund payment agreement (TFPA) with the United States. It is undisputed that this $34.9 million was later collected in full, with accrued interest, through the United States' successful enforcement of the TFPA against Collier. ITCA has properly received its share of that recovery. Critically, based on the rulings by this Court and the Federal Circuit, ITCA's various challenges to the TFPA and the settlement recovery have all been expressly rejected, and, consistent with the dismissal of those claims, so have ITCA's attempts to hold the United States liable for any future interest payments Collier was scheduled to make. The United States simply has "no obligation" to make such payments. *Id.* at *8.

ITCA's motion here offers no meritorious arguments supporting any entitlement to more damages but merely recycles its rejected theories. Faced with this Court's clear identification of the few remaining allegations of breach of trust that remained open and those that were closed, *id.* at *7-8, ITCA clings to the ten years of future interest that Collier did not pay and recycles its rejected theory that the governing statute required the United States to execute a TFPA that secured all thirty years of future interest payments. Given that the United States is, as a matter of law, not responsible for Collier's payment obligations, and that ITCA's challenges to the adequacy of the TFPA (SAC ¶¶ 255-59) and the *Collier* recovery (SAC ¶ 264), have all been dismissed, ITCA has *no* basis for these arguments. The Court should reject ITCA's parroting of rejected legal theories.

What is evident from ITCA's briefing, which devotes only a handful of pages to the few allegations that actually remain as identified by this Court, is an utter inability to identify any concrete injury arising from the remaining allegations. Indeed, ITCA's motion here in essence supports the United States' Cross-Motion, ECF. No. 155. ITCA has not and cannot articulate how it remains harmed by these alleged breaches when ITCA has already received the full benefit of what the TFPA required of the United States. It is plain from ITCA's current briefing that no cognizable, uncompensated harm exists that can be traced to the conduct of the United States and redressed by relief not foreclosed by this Court and the Federal Circuit. The *only* concrete harm ITCA identifies is the loss of Collier's "unpaid" future interest payments—damages that do not arise from the remaining allegations but instead from dismissed claims that are traceable only to *Collier's* conduct, not that of the United States. Accordingly, ITCA's claims must be dismissed because ITCA cannot satisfy the essential elements of standing.

Additionally, ITCA has not satisfied its burden to prove that the trust estate fell below the requisite value at any relevant point in time, or that the United States acted imprudently in its efforts to preserve the value of the trust estate.

For these reasons, the Court should deny ITCA's motion, and instead grant summary judgment for the United States.

BACKGROUND

I. Factual Background[2]

The material facts are not in dispute, and they need little review here.

In 1988, Congress passed the Arizona-Florida Land Exchange Act (Act), which was in

[2] As summarized here as well as made evident in the United States' Counterstatement, submitted with this Response, ITCA's briefing is filled with extraneous and immaterial background information. Because ITCA has lost its challenges to the TFPA, ITCA's continued attack on the TFPA—specifically ITCA's insistence that the TFPA did not comply with the Act because it protected only accrued but not future interest—is irrelevant. ITCA's resort to legislative history and extraneous internal documents from Interior that ITCA invokes is a red herring. The only facts that matter now are those relevant to the surviving claims, which, consistent with this Court's prior summary judgment ruling, relate to the value of the trust estate over time relative to the "Release Level Amount"; the United States' efforts to preserve the trust estate; and the effect of the United States' recovery against Collier on any potential harm to ITCA arising from these few remaining alleged breaches.

Title IV of the Arizona-Idaho Conservation Act of 1988, Public Law No. 100–696, 102 Stat. 4577 (1988). The Act authorized a land exchange in which the United States acquired title to wetlands in Florida, and Collier received the "Phoenix Indian School property" in Phoenix, Arizona. The Act required Collier to pay $34.9 million to the United States to equalize the value of the exchange, 95 percent of which was to be deposited in an education trust account for the benefit of ITCA.

Collier was permitted to pay the $34.9 million over thirty years with annual interest payments at a minimum rate of 8.5 percent. The Secretary of the Interior was directed to execute a trust fund payment agreement (TFPA) with Collier under which payments would be made to the United States, which was to "hold in trust the security provided in accordance with the Trust Fund Payment Agreement." Act, Sec. 405(c)(2). As this Court and the Federal Circuit have repeatedly recognized, the Act does not require the United States to make payments if Collier failed to make them. *Inter-Tribal Council of Arizona, Inc. v. United States*, 956 F.3d 1328, 1345 (Fed. Cir. 2020) (*Circuit Opinion*); *Inter-Tribal Council of Arizona, Inc. v. United States*, No. 15-342, 2023 WL 4881967, at *4 (Fed. Cl. Aug. 1, 2023) (*Summary Judgment Order*). The Act did not impose any specific security requirements, *Inter-Tribal Council of Arizona, Inc. v. United States*, 140 Fed. Cl. 447, 458 (2018) (*Dismissal Order II), aff'd in part, rev'd in part*, *Circuit Opinion*, 956 F.3d at 1328, leaving this decision to the discretion of the Secretary. *Inter-Tribal Council of Arizona, Inc. v. Babbitt*, 51 F.3d 199, 203 (9th Cir. 1995) (*ITCA v. Babbitt*).

In accordance with the Act, the Secretary executed a TFPA, with accompanying documents including a Deed of Trust, with Collier. According to the TFPA, Collier provided collateral to a "Trust Estate" that secured its payments obligations. Collier was also required to make annual interest payments of $2.9 million for thirty years (equal to the statutory minimum interest rate) as well as a payment into an annuity designed to equal the $34.9 principal obligation at the end of the thirty years. The Deed of Trust permitted Collier to seek partial releases of the United States' liens, which the United States was required to grant so long as the value of the remaining property in the Trust Estate exceeded 130% of the "Release Level Amount." The Release Level Amount accounted for the principal obligation less the value of the annuity, plus accrued interest. Collier twice sought releases of liens, in 1997 and 2007, which the United States granted after reviewing appraisals from Collier showing that sufficient collateral would remain in the Trust Estate if the releases were granted. After the first release was granted, Collier had an ongoing affirmative obligation to maintain the value of the Trust Estate at 130% of the Release Level Amount pursuant to the Deed of Trust's "Maintenance of Collateral Value" provision.

In December 2012, after fifteen years of successful payments, Collier informed the United States that it would no longer honor its payment obligations and that the value of the Phoenix Indian School property, i.e. the remaining collateral in the Trust Estate, had dropped significantly to $6 million, which was well below 130% of the Release Level Amount. After Collier refused to comply with the United States' demands to resume its payment obligations and to supplement the Trust Estate in accordance with the TFPA, the United States sued Collier in district court in Arizona in January 2014, seeking specific performance of the Deed of Trust's Maintenance of Collateral Value provision. The United States prevailed on summary judgment and thereafter executed a settlement with Collier with an expected recovery of $54.5 million comprised of cash, the annuity, and the Phoenix Indian School property. Following the sale of the Phoenix Indian School property, the United States realized $48 million on behalf of the trust beneficiaries, which amount exceeded 130% of the Release Level Amount at the time of settlement, accounting for five years of interest payments that had accrued.

In total, ITCA has received nearly $88 million on its portion of Collier's $34.9 million obligation, including its $45.6 million share of the *Collier* recovery and $42 million from interest payments made by Collier prior to its breach of the TFPA.

II. Procedural Background

The United States provided a thorough recitation of the procedural background of this case in its Cross-Motion, ECF No. 155 at p. 10-17; however, given ITCA's attempts to reopen closed issues, several critical points warrant restating.

ITCA's Second Amended Complaint (SAC), ECF. No 58, alleges two claims that are relevant here and assert that the United States breached duties:

1. to negotiate a TFPA that obtained sufficient security (Claim I);
2. to maintain sufficient security after the execution of the TFPA (Claim I);
3. to recover future interest payments from Collier (Claim I);
4. to "collect, deposit, and make the payments," not timely made by Collier (Claim II).

Claim II has been fully rejected. The Federal Circuit affirmed Judge Firestone's ruling that the Act imposes no duty on the United States to collect, deposit, or make payments owed by Collier. *Circuit Opinion*, 956 F.3d at 1344-45 (explaining that this claim was not "support[ed] in the [Act], case law, or otherwise.").

This Court and the Federal Circuit have also largely rejected the Claim I allegations. The Federal Circuit affirmed Judge Firestone's dismissal of ITCA's challenges to the TFPA itself, holding that any such challenges were time-barred and stating that they were also not "support[ed] in the [Act], case law, or otherwise." *Circuit Opinion*, 956 F.3d at 1344-45.

And, most recently, this Court granted in part the United States' first cross-motion for summary judgment (Summary Judgment Order). *Summary Judgment Order*, 2023 WL 4881967, at *1. In that motion, the United States demonstrated that ITCA's theory that the United States breached a trust duty by executing a TFPA that secured only principal and accrued interest, and subsequently recovering everything but future interest payments from Collier under that TFPA, was not viable given the Federal Circuit's ruling. This Court agreed.

Consistent with the Federal Circuit holding, this Court reiterated that the United States is not liable for any deficiency in Collier's missed payments. *Id.* at *4. The Court correctly explained that ITCA's theories would, if accepted, render the Federal Circuit's decision "academic," *id.*, and so were "redundant" of dismissed claims, *id.* at *7. This Court even observed that ITCA's attempt to "hold the defendant liable for annual payments it had no obligation to pay" was "illogical." *Id.* at *4. The Court confirmed that the United States "is not liable for payments that another party failed to deposit into the trust fund," *id.* at *1, and that this issue "ha[d] already been decided" and "may not be relitigated[.]" *Id*. This Court reiterated: "[ITCA] is in no way entitled to recover from the [United States] the $2.9 million annual interest payments under Claim I." *Id.* at *4.

This Court considered that additional factual development was needed to resolve a narrow set of Claim I allegations that survived the Federal Circuit's ruling, contained in paragraphs 260 through 263 of the Second Amended Complaint. Those allege that there was insufficient security in the Trust Estate at several points in time prior to Collier's breach of its payment obligations, including when the United States granted lien releases to Collier. *Id.* at *7-8. To resolve these claims, the Court requested additional facts related to the value of the Trust Estate at relevant times "relative to the Release Level Amount," *id.* at * 9; the United States' actions to preserve the value of the Trust Estate; as well as the extent of any harm ITCA suffered as a result of these alleged breaches. *Id.* at *8-9. The Court reasoned that "[t]here is a fundamental difference between the [United States'] obligation to hold sufficient security in trust to encourage Collier's continued performance and the [United States'] supposed obligation to assume all Collier's financial obligation[s]," *id.* at *5, stressing that "the latter supposed obligation lacks legal foundation." *Id.*

To aid in the parties' litigation of this case, the Court delineated the allegations in ITCA's SAC that were dismissed, which are worth repeating here in relevant part:

- ¶ 255: The United States negotiated and agreed to a TFPA and related documents that failed to comply with or meet the Act's Trust Fund Payments security requirements, and also agreed to nonrecourse provisions for Collier not permitted by the Act that allowed, and in fact, incentivized, Collier to breach its obligations at Collier's convenience.

- ¶ 256: Alternatively, the United States' subsequent interpretation and application of the TFPA and related documents as written failed to comply with or meet the Act's Trust Fund Payments security requirements, which, coupled with the agreed upon nonrecourse provisions for Collier allowed, and in fact, incentivized, Collier to breach its obligations at Collier's convenience.

- ¶ 257: The TFPA and related documents did not make clear, as they should have, that under the annual payment method the Act required the United States to hold sufficient security both for the $34.9 million final payment and for all thirty years of $2.9 million annual payments which could not be prepaid, i.e., all thirty years of the congressionally-mandated minimum rate of return of 8.5% on $34.9 million.

- ¶ 258: In particular, the Deed provision regarding accrued interest was not clearly defined to mean any and all unpaid $2.9 million annual payments for the annual payment method's entire thirty year period.

- ¶ 259: The United States' failure to negotiate terms in the TFPA and related documents to ensure adequate security for the Trust Funds Payments obligations in full was a breach of trust in violation of the Act.

- ¶ 264: The United States' failure to recover from Collier sufficient security or cash to meet in full the Trust Fund Payments obligations was a breach of trust in violation of the Act.

- ¶ 267: Because the United States' duties under the Act regarding the Trust Fund Payments security are continuing unless and until the Act's Trust Fund Payments

> obligations are satisfied in full, the United States' breaches of trust in violation of the Act regarding the security also are continuing.

Id. at *7.

Accordingly, ITCA is foreclosed from arguing that the United States breached its trust duty (and remains in breach until Collier's payment obligations are fulfilled (SAC ¶ 267)), by negotiating a TFPA that did not comply with the Act (SAC ¶ 255); by interpreting and applying the TFPA in a way that did not comply with the Act (SAC ¶ 256); by executing a TFPA and related documents that did not secure thirty years of annual interest payments (SAC ¶ 257); by failing to define "accrued interest" to include thirty annual interest payments (SAC ¶ 258); by failing to negotiate a TFPA that secured all of Collier's payment obligations (SAC ¶ 259); and by failing to recover all future interest payments owed by Collier (SAC ¶ 264).

All that remains of Claim I are the follow allegations: the United States (1) did not hold sufficient security to grant Collier's lien release requests in 1998 and 2007 (SAC ¶¶ 260-61); (2) failed to act in response to the economic downturn in 2008 (SAC ¶ 262); and (3) lacked sufficient security in the Trust Estate in 2012 when Collier stopped making payments (SAC ¶ 263). *Id.* at *7-8. The Court's review at this stage should focus solely on those allegations, informed by the law of the case.

ARGUMENT

All that is left of Claim I are a few narrow allegations related to the value of the Trust Estate at certain points in time. ITCA's challenges to the TFPA and the settlement recovery, as well as its various attempts to hold the United States liable for *Collier's* future interest payments have all been rejected. ITCA's briefing, however, is at odds with this reality.

Instead, the bulk of ITCA's briefing is dedicated to relitigating decided issues.

Specifically, ITCA insists that the United States violated the Act by executing a TFPA that did not secure all future interest payments and remains liable for ten future (i.e. unaccrued) interest payments that Collier was scheduled to make but that were not recovered in the United States' settlement with Collier. The law of the case bars this re-litigation, and the Court should disregard those portions of ITCA's brief that do not comport with the rulings of this Court and the Federal Circuit.

Instead, in reviewing the parties' cross-motions for summary judgment, the Court need only focus on those few surviving claims related to the value of the Trust Estate over time. The Court can begin by asking whether ITCA has fulfilled its burden to establish that it remains harmed by the alleged breaches—even if they could be proven—given the United States' recovery against Collier. The answer to that question is plain and simple: ITCA has not met this burden. The only concrete harm identified by ITCA concerns the missed interest payments Collier was scheduled to pay—damages that are decidedly not recoverable. Because ITCA is unable to identify any other concrete harm traceable to the United States and redressable by relief not foreclosed by this Court, ITCA's remaining theories in Claim I must be dismissed for lack of standing under RCFC 56.

Notwithstanding that ITCA's remaining claims are subject to dismissal for lack of standing, ITCA has also not carried its burden to prove that the United States committed the alleged breaches. ITCA presents no evidence showing that the collateral in the Trust Estate was inadequate, relative to the Release Level Amount, to grant Collier's lien release requests in 1997 or 2007. In fact, the evidence before the Court shows that Collier was entitled to the lien releases based on the appraised value of the Trust Estate at the time of Collier's requests. Additionally, ITCA's undisputed facts do not establish that the United States acted unreasonably in its efforts to preserve the Trust Estate—a genuine issue of fact reserved for trial.

I. Standard of Review

A. Summary Judgment Standard of Review

Summary judgment is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Little Six, Inc. v. United States*, 280 F.3d 1371, 1374 (Fed. Cir. 2002); RCFC 56(a). If both parties move for summary judgment, "the court must evaluate each motion on its own merits, resolving all reasonable inferences against the party whose motion is under consideration." *Id.*; *see also ATK Thiokol, Inc. v. United States*, 68 Fed. Cl. 612, 628 (2005), *aff'd*, 598 F.3d 1329 (Fed. Cir. 2010) ("The fact that both parties have moved for summary judgment does not relieve the trial court of responsibility to determine the appropriateness of summary disposition.").

B. The Court Should Apply RCFC 56 In Resolving the United States' Motion for Partial Summary Judgment

In its April 22, 2024 order, ECF No. 159, this Court inquired whether the United States' Motion for Partial Summary Judgement, ECF No. 155, which challenges ITCA's standing to pursue the remaining theories, was "appropriately brought under RCFC 56, or whether it is better considered under RCFC 12(b)(1) or 12(b)(6)." ECF No. 159 at 1. The Court noted that this "distinction is important because, under RCFC 56, a court may not make any factual findings; under RCFC 12(b), courts may make findings concerning jurisdictional facts." *Id.* The Court requested that the parties "address whether the defendant's motion is best considered under RCFC 56 or RCFC 12(b)" in the present briefing. *Id.*

The Court should apply RCFC 56 when considering the United States' motion. While often considered under Rule 12(b), "the issue of a party's standing may also be raised by a motion for summary judgment," *Rogers v. United States*, 95 Fed. Cl. 513, 514 (2010), and decided under RCFC 56. *See, e.g.*, *Blue Dot Energy Co. v. United States*, 61 Fed. Cl. 548, 554 (2004) (explaining that standing may be "more appropriately resolved at the summary judgment stage" where it "concerns facts relevant to the particulars of the case"); *Summary Judgment Order*, 2023 WL 4881967, at *6 (dismissing at summary judgment ITCA's claim that the United States breached its trust duty by holding the annuity at a private bank, rather than at Treasury).

Application of RCFC 56 recognizes that "[w]hat is required to establish standing depends on the stage of the proceeding." *Salmon Spawning & Recovery All. v. U.S. Customs & Border Prot.*, 550 F.3d 1121, 1132 (Fed. Cir. 2008) (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). "[T]he proof required to establish standing increases as the suit proceeds." *Superior Waste Mgmt. LLC v. United States*, 169 Fed. Cl. 239, 261 (2024). As the Supreme Court explained in *Lujan*, "each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Id*. While the plaintiff may rely on "general factual allegations of injury," *Lujan*, 504 U.S. at 56, to overcome a motion to dismiss, the plaintiff "can no longer rest on such mere factual allegations" at summary judgment "but must set forth by affidavit or other supporting evidence specific facts" establishing the elements of standing. *Id.*; *Mil.-Veterans Advoc. v. Sec'y of Veterans Affs.*, 7 F.4th 1110, 1121–22 (Fed. Cir. 2021) (explaining that at summary judgment, "instead of resting on mere allegations, a plaintiff must set forth by affidavit or other evidence specific facts to adequately support its contentions") (internal quotations omitted).

Mindful that this litigation has already seen multiple dispositive motions and has been pending for nine years, the United States urges the Court to demand that ITCA produce the proof required at summary judgment to overcome the United States' motion, just as it did in dismissing ITCA's claim relating to the location of the annuity. *Summary Judgment Order*, 2023 WL 4881967, at *6. ITCA and the United States agree that the pending claims can be resolved at summary judgment without discovery, Joint Status Report, ECF No. 151 at p. 7, and have stipulated to certain undisputed facts material to these claims. *See generally* Joint Statement of Undisputed Facts, ECF No. 154. In these circumstances, it is appropriate to apply the summary judgment standard and require ITCA to "set forth by affidavit or other supporting evidence specific facts" establishing the elements of standing, as this Court has done previously. ITCA may not skirt its failure of proof by relying on general or unsupported allegations of harm nearly a decade into litigation; doing so would only prolong an already lengthy case. The United States recognizes that RCFC 56 permits no fact-finding, as contrasted with jurisdictional facts examined under Rule 12(b). *Rogers v. United States*, 95 Fed. Cl. 513, 514–15 (2010). Now, however, the facts material to the Court's analysis are not in dispute, so no factual finding should be necessary.[3]

[3] Alternatively, if the Court determines that the United States' motion is more properly considered under RCFC 12(b), the United States requests that any dismissal be with prejudice. Dismissal with prejudice is appropriate where it is "unlikely that the plaintiff will be able to cure the standing problem." *Univ. of Pittsburgh v. Varian Med. Sys., Inc.*, 569 F.3d 1328, 1332 (Fed. Cir. 2009). As demonstrated in the United States' briefing, ITCA cannot cure its standing challenges: ITCA has not and cannot identify any concrete injury arising from the remaining allegations of breach that is traceable to the United States and redressable by this Court.

II. The Court Should Reject ITCA's Challenges to the TFPA and the *Collier* Recovery

A. ITCA's Efforts to Revisit Dismissed Claims and Hold the United States Liable for Collier's "Unpaid" Future Interest Payments Violates the Law of the Case

The well-established law of the case doctrine "bars retrial of issues that were previously resolved." *Intergraph Corp. v. Intel Corp*., 253 F.3d 695, 697 (Fed. Cir. 2001); *Outside the Box Innovations, LLC v. Travel Caddy, Inc.,* 695 F.3d 1285, 1301 (Fed. Cir. 2012) ("[T]he law of the case doctrine prohibits a court from revisiting an issue once it has been decided in pending litigation.") (internal quotations omitted). By seeking to hold the United States liable for ten "unpaid" future interest payments owed by Collier through its continued attack on the TFPA and the *Collier* settlement recovery, this is precisely what ITCA's motion seeks to do.

ITCA's motion here ignores several key elements of the Court's Summary Judgment Order. Significantly, this Court confirmed that none of ITCA's challenges to the TFPA and the *Collier* recovery—and specifically ITCA's theory that the United States was liable for failing to secure and later collect ten future interest payments—survived the Federal Circuit's ruling. *Summary Judgment Order*, 2023 WL 4881967 at *7-8 (dismissing ¶¶ 255 through 259, 264, and 267 of the Second Amended Complaint and recognizing that these claims were "time-barred" and "redundant" of other dismissed claims). To hold otherwise would be "illogical," *id.* at *4, and render the Federal Circuit's decision "academic." *Id.* Consistent with this analysis, this Court reiterated: "[ITCA] is in no way entitled to recover from the [United States] the $2.9 million annual interest payments under Claim I." *Id.*

Second, this Court confirmed that the *only* surviving Claim I allegations are those contained in paragraphs 260 through 263 of the Second Amended Complaint that ask whether the Trust Estate had adequate security, relative to the Release Level Amount, at the time of the lien releases, during the economic recession, and when Collier stopped paying.

ITCA nonetheless clings to a theory that it is owed all the unpaid, future interest that Collier was to pay under the TFPA. This repeated assertion contravenes this Court's directive to focus on the few surviving allegations, and it ignores the "fundamental difference between the defendant's obligation to hold sufficient collateral in trust to encourage Collier's continued performance and the defendant's supposed obligation to assume all Collier's financial obligations," *id.* at *5, the latter of which "lacks legal foundation." *Id.* Indeed, ITCA's argument pays little heed to this Court's Summary Judgment Order, notwithstanding that the Court's conclusion that the United States is under "no obligation," *id.* at *9, under any theory, to satisfy Collier's payment obligations. *Id.* at *1.

In complete disregard for this Court's order, ITCA still insists: "[t]he Act unambiguously required the United Sates to hold in trust security for all required but unpaid Trust Fund Payments," P. MSJ, ECF 157-1 at p. 15, and thus the United States is on the hook for those payments. Relying on this rejected premise, ITCA maintains that the United States is liable for ten interest payments that Collier was scheduled to make but that were not captured in the 2017 settlement:

- "The recovery . .. from *U.S. v Collier* has not made the Trust Funds whole . . . because the recovery included only 5 of 15 unpaid Annual Payments," *id.* at p. 16;
- "The Act's structure confirms the US' duty to secure all required but unpaid Trust Fund Payments . . . .":
- The compensation due [*sic*] ITCA is all required but unpaid Trust Payments which were to be secured in full by the US," *id.* at p. 18;
- "[W]ith respect to the required but unpaid $2.9 million Annual Payments, the recovered amount included 5 of 15 of those payments," *id.* at p. 38;
- "[T]he US' recovery for Collier's unpaid Annual payments . . . represent[ed] 5 unpaid Annual payments and [left] 10 unpaid $2.9 million Annual Payments unaddressed." *Id.*

These are the very same arguments ITCA presented and this Court rejected last year. *E.g.*, P. MSJ, ECF No. 137-1 at p. 17 ("Ten $2.9 million Annual Payments due to Indian educational Trust Funds under the Act remain unaccounted for by the US"); *id.* ("The US failed to secure these Annual Payment as the Act required . . . the US did not hold in trust sufficient security to compensate for these unpaid but due Annual payments)"; *id.* at p. 30 (insisting that the United States is liable for the "Annual Payments due under the Act but unpaid"); *id.* at p. 33 (asserting the United States is liable for any "[Annual] Payments [that] are not made").

ITCA's question presented reveals its detour into rejected assertions: "whether . . . the United States was required to hold in trust security for all required but unpaid Trust Fund Payments." P. MSJ, 157-1 at p. 1. This question has already been resolved and decided against ITCA: "the defendant is not liable for payments that another party failed to deposit into the trust fund," *Summary Judgment Order*, 2023 WL 4881967, at *1, saying even then that this issue had been decided and "may not be relitigated." *Id.* As a result, "the United States has no obligation to pay the trust fund payments on Collier's behalf," *id.* at *8, and "the plaintiff is not entitled to recover payments that Collier failed to make from the United States." *Id.*

Thus, the law of the case bars ITCA from revisiting these decided issues. *Outside the Box Innovations, LLC*, 695 F.3d at 1301; *Summary Judgment Order*, 2023 WL 4881967, at *1 ("the defendant is not liable to [Collier's] payments" and the issue "may not be relitigated"). Arguments from ITCA challenging the adequacy of the TFPA and the corresponding *Collier* settlement recovery do nothing to advance the surviving allegations regarding the value of the Trust Estate over time or the United States' actions to "encourage Collier's continued performance," *id.* at *5, of the TFPA. Indeed, the Court already advised ITCA the remaining issue is "fundamental[ly] different" and "has no plausible connection to" the United States' supposed obligation to pay. *Id.*

ITCA seizes on one passage from this Court's Summary Judgment Order in defense of its re-litigation attempt:

> [T]he only liability issue that remains unresolved is the precise amount of security the United States was required to maintain in the Trust Estate. For example, if the collateral should have been sufficient to secure the principal amount and all 30 annual interest payments, the United States should have maintained the Trust Estate at a higher value. If the collateral only needed to secure the annuity and interest payments as they came due, the United States potentially could have maintained the Trust Estate at a lower value.

Id. ITCA relies exclusively on this excerpt to resurrect its rejected legal theories that the United States remains liable for "all required but <u>unpaid</u> Payments," P. MSJ, ECF 157-1 at p. 16 (*emphasis in original*), owed by Collier. *Id.* ITCA's selective reading disregards critical portions of this Court's order and the case history.

First, ITCA ignores the portion of this Court's Summary Judgment Order explaining that ITCA's remaining allegations relating to the value of the trust estate turn on the value of the Trust Estate "relative to the Release Level Amount," *Summary Judgment Order*, 2023 WL 4881967, at *9, which accounts for accrued interest and not future (unaccrued) interest.[4] ITCA's interpretation of the Summary Judgment Order as leaving "unresolved" the appropriate level of the Trust Estate for purposes of adjudicating the remaining allegations ignores the resolution of this issue. It should not go unnoticed that ITCA's briefing never addresses the Court's statement that the viability of the remaining allegations depends, in part, on the value of the Trust Estate

[4] While ITCA has previously argued, as an alternative to its primary argument that the TFPA was insufficient for securing only accrued interest, that "accrued interest" should be interpreted to include future (i.e. unaccrued interest) interest, ITCA has now abandoned this argument. In any event, ITCA would also be foreclosed from raising this argument given that its allegations challenging the TFPA for failing to define "accrued interest" as well as the United States' interpretation of the TPFA have been dismissed.

"relative to the Release Level Amount," *id.* at *9, nor does ITCA make any attempt to reconcile its arguments with this determination from the Court.

Second, as explained, this Court unequivocally stated that ITCA's allegations challenging the terms, interpretation, and execution of the TFPA (paragraphs 255 through 259 of the Second Amended Complaint), as well as ITCA's attempts to hold the United States responsibility for failing to recover all interest payments (paragraphs 264 and 267 of the Second Amended Complaint), were *all* dismissed. The *only* surviving Claim I allegations are in paragraphs 260 through 263 of the Second Amended Complaint. These allegations question whether there was adequate security in the Trust Estate, relative to the Release Level Amount, at the time of the releases, during the economic recession, and when Collier stopped paying. That is *all* that remains of Claim I, and there is no surviving allegation on which ITCA can anchor its contention that the Act required the TFPA "to secure all required but unpaid trust fund payments, future and annual," P. MSJ, ECF No. 157-1 at p. 16, and that the United States is liable for the "unpaid payments." *Id.*

To that end, ITCA's insistence that an open issue remains regarding the adequacy of the security obtained and later collected under the TFPA is untenable in light of the law of the case. ITCA's position, once again, ignores the Federal Circuit's holding that nothing in the Act imposes a duty on the United Sates to make Collier's missed payments, as well as this Court's conclusion that ITCA's Claim I allegation challenging the *Collier* recovery as inadequate was "redundant" of ITCA's "duty to collect" theory, *Summary Judgment Order*, 2023 WL 4881967, at *7, and that ITCA's interpretation of the Act's trust provisions would render the Federal Circuit's ruling "academic." *Id.* at *4. ITCA's current interpretation of the Summary Judgment

Order goes one step further, rendering both the Federal Circuit's decision *and* this Court's Summary Judgment Order academic.

Indeed, one would never know from ITCA's briefing that this Court already issued an order rejecting the very arguments that ITCA now raises as "illogical" and "redundant" of dismissed theories, or that the Federal Circuit already decided that the United States is not liable for future interest payments owed by Collier. ITCA's briefing *never* mentions that its Claim I allegations related to the TFPA and the *Collier* recovery have been dismissed, let alone offers *any* attempt to reconcile its current position with the dismissal of those claims or this Court's confirmation that Collier's payments are not recoverable. ITCA cannot wish away these rulings by pretending they do not exist.

For these reasons, the Court need not give ITCA's continued challenges to the TFPA and the *Collier* recovery any attention. The United States respectfully urges the Court to disregard those portions of ITCA's motion attempting to hold the United States liable for "unpaid" payments owed by Collier as baseless attempts to relitigate closed issues.

B. ITCA's New "Ambiguity" Argument Does Not Justify Reopening Decided Issues

It is unnecessary now for the United States to engage with ITCA's re-litigation attempt or to reassert its defenses of the TFPA, which are set out fully in the United States' previous successful summary judgment briefing and incorporated here by reference (ECF No. 129, p. 17-26; ECF No. 138, p. 17-29; ECF No. 143, p. 7-17), given the law of this case. Per the holdings of the Federal Circuit, the Ninth Circuit, and this Court, the Act granted the Secretary discretion to determine the level of collateral necessary to secure Collier's payment obligations but imposed no obligation on the United States to compensate for any shortcoming in Collier's payments.

The United States will nonetheless briefly address ITCA's new, yet equally unpersuasive, challenge to the TFPA.

First, ITCA's assertion that the Court should apply the Indian Canon of Construction, which directs that any statutory ambiguities be resolved in favor of the Indians, *Confederated Tribes & Bands of Yakama Nation v. Klickitat Cnty.*, 1 F.4th 673, 683 (9th Cir. 2021), lacks merit. The Act's plain language unambiguously defines the United States' trust duties with respect to the Trust and its beneficiaries. *Jicarilla Apache Nation v. United States*, 112 Fed. Cl. 274 (2013) (explaining that the government's trust duties are defined by "applicable statutes.").

ITCA does not actually argue that the Act is ambiguous, meaning that "it is capable of being understood by reasonably well-informed persons in two or more different senses." *Thomas v. Metro. Life Ins. Co*., 631 F.3d 1153, 1161 (10th Cir. 2011). Instead, ITCA actually maintains that the Act is *unambiguous*—P. MSJ, ECF No. 157-1 at p. 20 ("ITCA's view is that the Act unambiguously required the US to secure all required but unpaid Trust Fund Payments")—but invokes, for the first time, a May 1992 internal Interior memorandum (the "May Memorandum")[5] to assert that Interior "made a strategic decision . . . to view the Act's security requirements as ambiguous, <u>and</u> as capable of two plausible interpretations," *id.* at 23 (emphasis in original), one of which purportedly supports ITCA's belief that the United States was required to execute a TFPA securing all thirty years of payments. *Id.* at 21. According to ITCA, because an Interior official may have personally believed at one time that the Act was ambiguous, the Court should give ITCA the benefit of the Indian Canon of Construction. *Id.* at 21-23.

[5] Although ITCA states that this document was "not disclosed to ITCA," P. MSJ, ECF No. 157-1 at p. 28, this document was produced years ago. US Counterstatement ¶ 75, and any claim that the United States' alleged failure to disclose this memorandum "violated the Act's express duty to consult regarding the Trust Fund Payment option" is time-barred. 28 U.S.C. § 2501.

But even ITCA recognizes that "statutory ambiguity cannot be determined by referring to the parties' interpretations of the statute." *John v. United States*, 247 F.3d 1032, 1041 (9th Cir. 2001). Even if the Interior official authoring the May Memorandum believed the Act was ambiguous, that says nothing on whether the Act *is* ambiguous.

Additionally, notwithstanding that ITCA is prohibited from challenging the terms of the TFPA at this juncture, ITCA's reading of the document is strained. The May Memorandum is consistent with the United States' position throughout this litigation and merely confirms that the Act is "silent" on the issue of what amount of security is required to be held in trust, that the Secretary has discretion to make the decision, and that securing the principal and interest payments as they came due was consistent with the Act and "normally accepted business practice." P. MSJ, 157-1, Exh. A. The memorandum further noted that if Collier were to default and collateral securing the principal were liquidated, ITCA would get the $34.9 million and thus "be in the same position they originally advocated for," *id.*, that is, receiving a lump sum payment, and "in fact, would have realized a windfall from the years in which they did receive the 8.5 percent interest," *id.*—which is precisely what happened in reality. ITCA's "ambiguity" argument also runs afoul of the Federal Circuit, the Ninth Circuit, and this Court's interpretations of the Act's plain language as granting the Secretary discretion to determine the level of collateral necessary to secure Collier's payment obligations but imposing no obligation on the United States to compensate for any deficiency in Collier's payments.

In short, ITCA's last ditch attempt to revive its challenges to the TFPA is unavailing. ITCA should not be permitted to cloud the remaining issues and resurrect the dismissed allegations by injecting a new argument for the first time nine years into litigation and only after multiple court rulings rejecting its challenges to the TFPA. *See Bradley v. Vill. of Univ. Park,* *Illinois*, 59 F.4th 887, 897 (7th Cir. 2023) (explaining that a party "may waive a non-jurisdictional issue or argument in many ways, such as by failing to raise the issue or argument in the district court, either at all or in a timely fashion, [or] by failing to raise it at all in the party's opening brief on appeal[.]"). Until now, ITCA has never meaningfully asserted that the Act was ambiguous and, therefore, the Indian Canon of Construction has no application here.[6]

Finally, because the Act is unambiguous, ITCA's invocation of the Act's legislative history is misplaced, and, in any event, the legislative history supports the United States' interpretation of the Act, as explained in the United States' earlier briefing, ECF No. 138, p. 25-27.

For these reasons, the Court should not consider ITCA's challenges to the TFPA and the related settlement recovery. To the extent the Court entertains such arguments, the United States maintains, as explained more fully in its previous briefing, that the Secretary fully discharged the statutory duty to "hold in trust security provided in accordance" with the TFPA by executing an

[6] For example, ITCA previously buried the following sentence in its summary judgment brief: "To the extent the Act is ambiguous . . .'[a]mbiguities must be resolved in favor of the Indians.'" ECF No. 133-1, p. 31. It is unclear whether ITCA was stating a specific provision or the Act as a whole might be "ambiguous." This catchall statement hardly suffices to advance a cogent argument in favor of ambiguity when ITCA has otherwise maintained that the Act is unambiguous—*e.g.*, *id.*, p. 21, 23 (advocating for plain language approach and stating that the statute is unambiguous); ECF No. 38, p. 7 ("[T]he Act . . . expressly guarantee[d] that both the principal amount and 30 consecutive annual payments at a fixed interest rate amount [would] be paid into the Trust Funds."); ECF No. 142, p. 1 ("These are breaches of trust for which ITCA is entitled to money damages from the US in the amount needed to make its Trust Fund whole as the Act unambiguously requires."); COA Case No. 19-1758, ECF No. 10, p. 9 (The Act expressly set the term of the annual payments option as being a 30-year period . . . The Act's text is a classic imposition of a duty that continues unless and until the Trust Fund Payments are made in full.") ; *id.* ECF No. 14, p.1 ("The Act expressly required the US to secure in trust all Indian education Trust Fund Payments required by the Act."). *Edge Sys. LLC v. Aguila*, 635 F. App'x 897, 908 (Fed. Cir. 2015) (finding that party waived argument where it presented only "conclusory statements" but did "not advance developed arguments").

agreement that guaranteed the trust beneficiaries received the full $34.9 million principal obligation with accrued interest pursuant to the TFPA.

III. ITCA Has Not Established Entitlement to Summary Judgment on Its Remaining Claim I Allegations, Which Should be Dismissed for Lack of Standing

A simple perusal of ITCA's brief reveals that it has not done anything to prove entitlement to judgment on the actual issues that the Court saw as undecided: that the United States: (1) did not hold sufficient security to grant Collier's lien release requests in 1998 and 2007; (2) failed to take action in response to the economic downturn in 2008; and (3) lacked sufficient security in the Trust Estate in 2012 when Collier stopped making payments. ITCA bears the burden of proving these alleged breaches. *Summary Judgment Order*, 2023 WL 4881967, at *10. Distilled to their core, three factual issues are relevant to resolution of these allegations: 1) the value of the Trust Estate over time relative to the Release Level Amount; 2) the United States' actions to act prudently to preserve the value of the Trust Estate; and 3) whether and to what extent ITCA remains harmed by the remaining allegations of breach.

ITCA has offered nothing to prove these in its favor as a matter of law. On the contrary, the last question runs against ITCA as a matter of law, robbing it of legal standing for lack of a concrete and redressable injury. That is the crux of the United States' Cross-Motion.

ITCA also presents no evidence establishing that there was, in fact, insufficient collateral to grant Collier's lien release requests. ITCA likewise presents no evidence as to the value of the Trust Estate at any other point in time prior to Collier's breach of the TFPA, which prompted the United States to demand additional security from and sue Collier. And whether the United States acted prudently to preserve the Trust Estate is a question of fact, and ITCA has not presented undisputed facts entitling it to summary judgment on this issue.

For these reasons, the Court should grant summary judgment to the United States on the remaining allegations of breach, or alternatively deny ITCA's motion and reserve the remaining questions for trial.

A. ITCA Fails to Identify Any Concrete Harm, Traceable to the United States and Redressable by this Court, Arising from the Remaining Alleged Breaches

ITCA's last remaining allegations under Claim I reflect a futile quest because no identifiable injury, traceable to the United States and redressable by this Court, exists to support standing. At summary judgment, ITCA's failure to "set forth by affidavit or other evidence specific facts that show the elements of standing," *Summary Judgment Order*, 2023 WL 4881967, at *6, is dispositive. *Id.*

Considering that ITCA's challenges to the TFPA and the Collier recovery have been unequivocally resolved in favor of the United States, it is telling that ITCA devotes most of its brief to challenging the sufficiency of the TFPA and the corresponding *Collier* recovery, rather than on its surviving claims and answering the Court's question of "whether and to what extent" ITCA remains harmed by the remaining alleged breaches. ITCA's brief confirms that it has suffered no cognizable injury proximately resulting from any apparent failure of the United States to ensure that the value of the Trust Estate remained at 130 percent of the Release Level Amount at any point in time. Indeed, the record is that the United States ultimately recovered a sum in excess of this amount from Collier.[7] The harm consistently identified by ITCA is the loss

[7] The Release Level Amount at the time of settlement was $36,232,500, representing the principal obligation ($34.9 million) plus the five annual payments of $2,966,500 for years 2012-2016 that had come due and gone unpaid at the time of the July 2017 settlement ($14,832,500), less the value of the Annuity at that time ($13.5 million) and any government-back securities ($0). And 130% of $36,232,500 is $47.1 million.

of the ten interest payments Collier was scheduled to make that were not captured in the 2017 settlement.

Although this Court contemplated that the United States had an "obligation to hold sufficient collateral in trust to encourage Collier's continued performance," *Summary Judgment Order*, 2023 WL 4881967 at *5, ITCA offers only speculative remarks to reach its conclusion that "[t]he United States' "actions and failure [*sic*] to act were imprudent and incentivized Collier to stop paying." P. MSJ, ECF No. 157-1 at 37. As explained in the United States' pending Cross-Motion, such a sentiment, dependent on the unknown potential actions of Collier and offered without any specific facts supported by admissible evidence, is too speculative to confer standing. ECF No. 155, p. 19-28. In that same vein, ITCA's identified harm (the loss of the ten interest payments) is traceable to the conduct of Collier, *not* the United States, and it is purely speculative that the United States' actions or inactions led to Collier's breach. *Id.*, p. 28-29. Additionally, this harm is not redressable through relief from this Court given that ITCA is "in no way entitled to recover" these payments from the United States. *Id.*

ITCA's failure to identify any concrete, uncompensated injury other than its rejected theory of entitlement to future interest leads to but one conclusion: ITCA has suffered no harm arising from the allegations in paragraphs 260 through 263 of the Second Amended Complaint for which it has not already been compensated. For these reasons, and as explained fully in the United States' Cross-Motion, the Court should dismiss the allegations contained in paragraphs 260 through 263 of the Second Amended Complaint for lack of standing.

B. ITCA Has Not Established That the United States Breached Its Trust Duties

Notwithstanding that ITCA's remaining allegations in paragraphs 260 through 263 must be dismissed for lack of standing, ITCA has not established that the United States breached a trust duty to ITCA by authorizing either lien release or by not requesting additional security from Collier sooner. *Summary Judgment Order*, at *9 (summarizing ITCA's remaining allegations as asking whether "defendant should have performed independent appraisals before releasing Collier's liens, should have disclosed to ITCA sooner than it did that the collateral in the Trust Estate was low, and should have demanded Collier provide substitute security earlier than [2012]").

1. ITCA Presents No Evidence Showing That The Value of the Trust Fund Over Time Was Insufficient Relative to the Release Amount

To resolve whether the United States was guilty of the surviving breaches, the Court has indicated that it must be able to determine whether there was sufficient security in the Trust Estate, relative to the Release Level Amount, at the times identified as crucial by ITCA: the two lien releases in 1998 and 2007 and in 2012 when Collier stopped paying. *Summary Judgment Order*, at *9. The Court specifically advised that it was unable to resolve ITCA's remaining Claim I allegations in the parties' first round of summary judgment because neither presented evidence of the value of the Trust Estate relative to the Release Level Amount at these crucial points.

Still, ITCA offers *no* evidence showing that there was insufficient security in the Trust Estate to grant Collier's releases. The only evidence before the Court, that is, the Collier appraisals, shows that the value of the Trust Estate exceeded the requisite amount at the time of both lien releases. ECF No. 156, US-SOF ¶¶ 41-42, 49-55; ECF J-SOF ¶¶ 20, 23-24, 28, 31-32. ITCA offers no evidence whatsoever challenging the accuracy of Collier's appraisals. ITCA cannot prevail on summary judgment on its claims that there was insufficient collateral in the Trust Estate to grant lien releases when it has no contrary evidence about the lien releases.

Similarly, ITCA presents no other evidence regarding the value of the Trust Estate at any other time prior to December 2012, when Collier notified the United States that the value of the Phoenix Indian School property had dropped and the United States promptly requested that Collier supplement the Trust Estate, and thereafter sued Collier. Without any evidence regarding the value of the Trust Estate prior to Collier's breach and the United States' demand, ITCA has not shown any need to request collateral sooner. ITCA is not entitled to summary judgment on these claims when it offers no supporting evidence regarding the value of the Trust Estate "relative to the Release Level Amount" at any time.

Rather, the Court should grant the United States summary judgment on these claims. Where, as here, the party with the burden of proof, fails to introduce evidence supporting an essential element of its claim, "summary judgment is properly granted against that party." *Optium Corp. v. Emcore Corp.*, 603 F.3d 1313, 1320 (Fed. Cir. 2010). Summary judgment is the "put up or shut up" stage of litigation, *Brown v. CACH, LLC*, 94 F.4th 665, 667 (7th Cir. 2024) (internal quotations omitted), and ITCA has twice had the opportunity to address its allegations on summary judgment. ITCA has offered no evidence on either occasion (instead choosing to invest in relitigating and recycling dismissed theories) after electing not to conduct any discovery in nine years of litigation.

Instead, the parties agreed that the facts material to the remaining allegations could be stipulated to for purposes of summary judgment. Joint Status Report, ECF No. 151 at p. 7 ("The Parties believe that the remaining factual issues identified by the Court can be resolved . . . through stipulation and that no fact discovery or expert witnesses are needed at this time."). The parties thereafter worked amicably to submit their Joint Statement of Undisputed Facts, ECF No. 154. That statement, along with ITCA's own Statement of Undisputed Facts, ECF No. 158, reflects the world of facts ITCA believes is necessary to prosecute its remaining claims. The Court should take that as ITCA's best case and refuse ITCA additional chances to further develop these theories.

The Court was previously concerned that neither party had submitted evidence regarding the value of the Trust Estate at the time of the lien releases, and the United States has now submitted the appraisals from that time showing that the releases were proper based on the relative value of the Trust Estate. ITCA has submitted no countervailing evidence as to the value of the Trust Estate when the releases were granted. ITCA has also presented no evidence as to the value of the Trust Estate over time to show that there was any actionable breach of trust due to an under-collateralization of the Trust Estate and the United States' demands on Collier. The Court should not afford ITCA another do-over and instead recognize that ITCA cannot prove its claims.

2. ITCA Has Not Established That The United States Breached Any "Duty to Preserve"

ITCA also has not established that the United States breached any purported common law duty to preserve. The United States' legal duties to ITCA are defined by the governing statute. *Jicarilla*, 112 Fed. at 274. The Act does not prescribe any particular method for "preserving" the trust estate. Instead, the Act afforded the Secretary discretion to execute a TFPA for the purpose of securing and encouraging Collier's payments. While the Court may "look to common law" for assistance in understanding the "nature of [the United States' obligation," *White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1377 (Fed. Cir. 2001), the Court should be mindful not to impose duties on the government that are not "rooted in and outlined by" the Act. *Cobell v. Norton*, 392 F.3d 461, 472 (D.C. Cir. 2004).

Invoking common law trust principles, this Court and the Federal Circuit have interpreted the United States' duty to hold security in trust as requiring the United States to "act reasonably to preserve the trust property," that is, "as a prudent person would." *Summary Judgment Order*, at *9. Whether the United States breached any purported duty to act prudently as the trustee of the estate is a question of fact, *see e.g, Aspen Consulting, LLC v. Sec'y of Army*, 25 F.4th 1012, 1016 (Fed. Cir. 2022), and the Court must "resolv[e] all reasonable inferences against [ITCA.]" *Little Six, Inc.*, 280 F.3d at 1374.

The facts presented here, viewed in the light most favorable to the United States, do not prove, as a matter of law, that the United States breached any duty to preserve.

First, while ITCA asserts that the United States breached its trust duty to act prudently by "fail[ing] to do its own appraisals" when granting Collier's lien release requests, P. MSJ, 157-1 at 33, its brief does little to bolster this argument.

For example, ITCA's cited case law, such as the 1977 Court of Claims decision in *Coast Indian Community*, is unhelpful in establishing ITCA's supposed entitlement to summary judgment. That decision was not at summary judgment, but after a trial, where the trust beneficiaries proffered an expert testimony to show the government's appraisal was flawed. *Coast Indian Cmty. v. United States*, 550 F.2d 639, 645-46, 653-54 (Ct. Cl. 1977). In contrast, ITCA offers no evidence to undermine the validity of the appraisal relied upon by the United States but merely voices general discontent that an independent appraisal was not performed. *See also LNC Invs., Inc. v. First Fid. Bank*, No. 92 CIV. 7584 MBM, 1997 WL 528283, at *19 (S.D.N.Y. Aug. 27, 1997) (denying summary judgment because "[w]hether it was necessary, in order to satisfy the prudent person standard, for the trustees to obtain their own appraisals . . . is a question of fact."). ITCA's conclusory remark that the lack of an independent appraisal from

Interior somehow means the agency relied on an appraisal with "similar[] limit[ations]" in *Coast Indian Community*. P. MSJ, 157-1 at p. 34, is nothing more than conjecture.[8]

Moreover, through its execution and enforcement of the TFPA, the United States faithfully fulfilled its trust duty. The Act imposed no specific obligation on the United States to conduct independent appraisals but granted the Secretary discretion to set the terms of the TFPA and "to hold in trust security" accordingly. That TFPA granted Collier certain rights in exchange for certain obligations. Collier was entitled to a lien release so long as the value of the estate exceeded 130 percent of the Release Level Amount and, following any release, Collier had a continuing, affirmative obligation to ensure that the Trust Estate maintained that value. No term in the Act imposes a specific duty on the United States to conduct independent appraisals at any point, and the Court may not impose one solely through reliance on the common law. *See Cobell,* 392 F.3d at 471 (allowing reference to common law principles does not mean that "the district court may simply copy a list of common law trust duties from the Restatement and then order Interior to explain how it will satisfy them").

In any event, by relying on certified appraisals (the integrity of which is unchallenged by ITCA) when granting the releases pursuant to those terms, and later successfully enforcing the TFPA against Collier, the United States acted prudently in its efforts to hold adequate security in trust. *Montanans for Responsible Use of Sch. Tr. v. Darkenwald*, 2005 MT 190, ¶ 50, 328 Mont. 105, 121, 119 P.3d 27, 38 (recognizing that "an independent appraisal represents the most reliable method of ensuring that the trust receives full market value" but declining to adopt a per

[8] OST did not indicate that Collier's appraisal was "limited" as ITCA suggests, P. MSJ, 157-1 at p. 34. OST merely stated that it was not able to conduct an independent appraisal given "strict time constraints of the review" and "due the complexity" of the analysis required. US Counterstatement ¶ 105.

se rule that an independent appraisal is required where the State had discretion in "ensuring the trust received full market value" from any sale of trust property). The TFPA's collateral maintenance provision also served a critical function in the United States' preservation of the Trust Estate: it ensured the United States could recover additional security from Collier to cover Collier's outstanding principal obligation with accrued interest, as evidenced by the *Collier* litigation. Accordingly, far from being derelict in its duties, the United States faithfully executed and enforced a TFPA that ensured the tribes received the $34.9 million with accrued interest.

ITCA volleys a series of other arguments against the United States' actions that are either not viable at this stage or never developed. For example, ITCA offers no cogent arguments and cites no legal authorities supporting its belief that the United States is at fault for:

- not requesting additional collateral sooner given that the United States did request and successfully collected the full value of collateral required to be held in trust (130 percent of the Release Level Amount);
- not notifying ITCA of the lien releases, notwithstanding that ITCA identifies no duty to give notice or harm from this alleged breach;
- recovering only $48 million from Collier when it initially estimated the settlement recovery to be $54.5 million based on the independently appraised value of the Phoenix Indian School property at the time of *Collier* litigation, J-SOF ¶ 49;
- "taking no action" after the economic recession, as alleged in paragraph 262 of the second amended complaint; ITCA does not identify what it specifically believes the United States was required to do or how ITCA suffered a resulting harm.

Other arguments from ITCA constitute further impermissible attacks on the TFPA. ITCA asserts that the non-recourse provision of the TFPA incentivized Collier's breach, but this argument reflects the dismissed claim in paragraph 255 of the Second Amended Complaint. *See* SAC ¶ 255 (alleging the United States breached its trust duty by agreeing to the non-recourse provision). Similarly, ITCA has no basis to allege that the United States committed a breach by selecting real property as security. That real property served as the collateral securing Collier's payment obligations was a product of the terms of the TFPA. These terms are outside the reach of ITCA's surviving claims.

Moreover, even if the Court could agree that the United States did not act prudently, for example, by relying on appraisals from *Collier* or by not seeking additional security sooner, the United States thereafter, in furtherance of its trust duty, took appropriate action to preserve the value of the estate by suing Collier for specific performance. Indeed, the remedy at any point in time if the value of the collateral fell below 130 percent of the Release Level Amount, following the first lien release, was to demand additional security to bring the Trust Estate back to this level. This has already happened: the United States' successful lawsuit against Collier, which realized a recovery at 130 percent of the Release Level Amount, remedied any potential harm arising from a temporary depreciation of the Trust Estate's value. To that end, as explained above, ITCA has identified no remaining harm caused by the alleged breaches, even if proven.

CONCLUSION

For these reasons, Defendant respectfully urges the Court to deny Plaintiff's motion for partial summary judgment and grant Defendant's cross-motion for partial summary judgment.

May 22, 2024

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