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.	)	

PLAINTIFF'S RESPONSE IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON CLAIM I IN THE SECOND AMENDED COMPLAINT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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SUMMARY OF ARGUMENT

Plaintiff the Inter-Tribal Council of Arizona (ITCA) has standing for its remaining claims alleged under Claim I of the Second Amended Complaint (SAC) (ECF No. 58), and the standing issue raised by the United States (US) is appropriately addressed under RCFC 56. All three elements required for standing – injury in fact; causal connection; and redressability -- are met and well-supported by the tribal breach of trust caselaw in this jurisdiction. No prior decisions in this litigation defeat ITCA's standing for its remaining claims and no prior decisions preclude this Court from reaching the merits of those claims.

On the merits of its remaining claims, ITCA is entitled to summary judgment. The text, structure, and purpose of the Arizona-Florida Land Exchange Act of 1988, Pub. L. No. 100-696 (1988) (Act), show that the Act unambiguously required the US to hold in trust security for all required but unpaid Trust Fund Payments into Indian education Trust Funds established to compensate Arizona Indian tribes for the closure of the Phoenix Indian School, an off-reservation Indian boarding school located on federal land that the US exchanged with the Barron Collier Company (Collier) for land in Florida for wildlife and conservation purposes. The Act did not give discretion to the US to hold less security than that, and the US failed to hold sufficient security for all required but unpaid Trust Fund Payments. The Act's Trust Fund Payments "30-year payment option" is decidedly unique – it requires 30 years of Annual Payments at a fixed minimum amount and a Final Payment at the end of 30 years-- and it is not a traditional financing arrangement as the US would recast it.

Alternatively, assuming *arguendo* that the Act is ambiguous regarding the amount of security that the US was to hold in trust, that ambiguity must be resolved in favor of ITCA. The substantive Indian canon of statutory construction – that statutory ambiguities must be resolved in

favor of the Indians – must be applied to hold that the Act required the US to hold in trust security for all required but unpaid Trust Fund Payments. Crucially, before it entered into the Trust Fund Payment Agreement (TFPA) with Collier, the US acknowledged that this interpretation of the Act is plausible. Contrary to its fiduciary obligations, the US chose to reject that interpretation in favor of a self-serving interpretation that the Act allowed it to hold less security.

As it administered the insufficient amount of security that it chose to hold in trust, the US failed to monitor the security, which consisted exclusively – over the advice of its own high-level officials and attorneys -- of real property interests, and when Collier stopped making Trust Fund Payments well-before the end of the 30-year payment option that the US had elected under the Act over ITCA's objections, the remaining required but unpaid Payments were grossly under-secured. In multiple other ways, the US failed its statutory and common law fiduciary duties which has left the Trust Funds short of their congressionally guaranteed amounts under the Act.

Neither the recovery by the US that it obtained when it sued Collier in district court in *United States v. Collier*, No. 2:14-cv-00161 (D. Ariz. filed Jan. 18, 2014) (*U.S. v. Collier*), nor the earnings on that recovery have made the Trust Funds whole in accordance with the Act. Based solely on its own self-serving interpretation of the Act that it need not secure all required but unpaid Annual Trust Fund Payments, the US did not seek to recover and did not recover from Collier all required but unpaid Annual Payments. And the earnings on the recovered Final Payment amount have been less than the Act's required minimum annual rate of return – 8.5% -- for the full 30-year period. As the US itself stated in acknowledging but rejecting ITCA's plausible interpretation of the Act, the US is now "obligated to make up the difference" in those earnings.

ARGUMENT

I. THE US' STANDING ARGUMENT IS APPROPRIATELY BROUGHT UNDER RCFC 56

While standing can be raised under appropriate conditions in a motion to dismiss, *see, e.g., Navajo Nation v. United States*, No. 21-1746, 2024 WL 1896133, at *7 (Fed. Cl. Apr. 30, 2024), in general, standing more appropriately is resolved on a summary judgment motion. *Blue Dot Energy Co., Inc. v. United States*, 61 Fed. Cl. 548, 554 (2004); *see also Israel Bio-Eng'g Project v. Amgen, Inc.*, 475 F.3d 1256, 1263, (Fed. Cir. 2007), *cert. denied*, 551 U.S. 1141 (2007), citing 13A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3531.15 (2d ed. 1984); *accord Rogers v. United States*, 95 Fed. Cl. 513, 514 n.1 (2010), citing 15 James Wm. Moore et al., *Moore's Federal Practice* § 101.30[1] (3d ed . 2010).

"Whereas motions to dismiss typically are considered "only upon the pleadings," *Jewelers Vigilance Comm., Inc. v. Ullenberg Corp*., 823 F.2d 490, 492 (Fed. Cir. 1987), summary judgment motions allow for the court to consider evidentiary matters "outside of the pleadings." *Osage Nation v. United States*, 57 Fed. Cl. 392, 393 n.1 (2003). "Certainly any of the evidentiary materials that are typically submitted in conjunction with a motion for summary judgment, such as affidavits, exhibits, depositions, admissions, answers to interrogatories, and the like should be considered to be 'outside the pleading[s],'" 2A James W. Moore & Jo D. Lucas, *Moore's Federal Practice* § 12.09[3] at 12-107 n.6 (2d ed. 1994), cited with approval in *Maniere v. United States*, 31 Fed. Cl. 410, 420 n.5 (1994).

In the past, and in connection with their current simultaneous summary judgment motions, both parties here have submitted and are relying on "matters outside the pleadings … presented to and not excluded by the court." *Nw. LA Fish & Game Pres. Comm'n v. United States*, 79 Fed. Cl. 400, 404-05 (2007), *aff'd sub nom. Nw. Louisiana Fish & Game Pres. Comm'n v. United States*

574 F.3d 1386 (Fed. Cir. 2009), *cert. denied*, 558 U.S. 1113 (2010), citing RCFC 12(c). *See, e.g.*, Pl.'s Memorandum in Support of its Motion for Summary Judgment, ECF No. 157-1 (containing three such exhibits). The parties also have submitted a Joint Statement of Undisputed Facts (JSOUF) for Purposes of Cross-Motions for Summary Judgment, ECF No. 154, which is supported by at least three other new exhibits, ECF Nos. 154-2 – 4 (Joint Exhibits 2, 3 and 4). These items of evidence and facts are distinguishable from the limited facts that a court can consider when a factual attack on jurisdiction is made under 12(b)(1). *See, e.g., Safe Air for Everyone v. Meyer,* 373 F.3d 1035, 1039 (9th Cir. 2004), *cert. denied*, 544 U.S. 1018 (2005); *see also Superior Waste Mgmt. LLC v. United States*, 169 Fed. Cl. 239, 259-262 (2024) (discussing challenging jurisdictional facts in a factual jurisdictional attack). And RCFC 12(d) provides that, "[i]f, on a motion under RCFC 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under RCFC 56." Thus, the US' standing argument is appropriately brought under RCFC 56 rather than under RCFC 12(b)(1) or 12(b)(6).

II. ITCA HAS STANDING FOR ITS REMAINING CLAIMS

Regarding standing generally and its required elements of proof, this Court has stated:

> The Federal Circuit has held that although the Court of Federal Claims is an Article I court, this Court 'applies the same standing requirements enforced by other federal courts created under Article III.' Whether a plaintiff has met these standing requirements is 'a threshold jurisdictional issue,' such that a 'lack of standing precludes a ruling on the merits.' To establish standing, a plaintiff must show: (1) that it has suffered an 'injury in fact,' an invasion of a legally protected interest that is '(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical,' (2) that there is a 'causal connection between the injury and the conduct complained of,' and (3) that the injury is likely to be redressed by a favorable decision.

Wyandot Nation of Kansas v. United States, 124 Fed. Cl. 601, 606-07 (2016), *aff'd*, 858 F.3d 1392 (Fed. Cir. 2017) (citations omitted). The plaintiff has the burden to establish standing. *Id*. at 607

(citations omitted); *accord Osage Nation*, 57 Fed. Cl. at 394 ("Standing is a threshold inquiry that plaintiff must establish"). The standing inquiry is independent of the merits inquiry, and when deciding standing, "courts must accept as true all material allegations of the complaint." *Warth v. Seldin*, 422 U.S. 490, 500-01 (1975), cited with approval in *Fredericks v. United States*, 125 Fed. Cl. 404, 413 (2016). As standing is a threshold jurisdictional issue, the court must address it first before reaching the merits. *Wavelink, Inc. v. United States*, 154 Fed. Cl. 245, 262-63 (2021) (citations omitted); *Fredericks*, 125 Fed. Cl. at 414 (court declines to address merits when addressing standing).

A. The US Ignores the Caselaw in this Jurisdiction Readily Upholding Standing in Tribal Breach of Trust Cases

The US argues ITCA lacks standing for its remaining claims under all three elements, *see supra*. U.S.' Motion for Partial Summary Judgment on Remaining Claim I Allegations, ECF No. 155 at 19-30 (US' Opening Brief). Notably absent is any reference by the US to the authority in this jurisdiction regarding standing in the context of tribal breach of trust claims. In this context, a plaintiff simply "must show the existence of a trust relationship with the government." *Fletcher v. United States*, 26 F.4th 1314, 1322 (Fed. Cir. 2022). When such a relationship exists, "plaintiffs have standing." *Id*.

Under this basic test, this Court routinely finds standing in tribal breach of trust cases. *E.g.*, *White Mountain Apache Tribe v. United States*, No. 17-359, 2018 WL 11365074, at *10 (Fed. Cl. Jan. 5, 2018) (where legislation imposes mandatory duties on the government as trustee for tribes, the tribes as beneficiaries of the trust relationship created by the legislation have standing to sue for breaches of those duties); *Round Valley Indian Tribes v. United States*, 97 Fed. Cl. 500, 510 (2011) (tribes have standing to allege mismanagement of tribal trust funds where complaint alleges breach of trust duties as trustee of tribes' trust funds); *Wolfchild v. United States*, 72 Fed. Cl. 511,

529-30 (2006) (tribe's interest in trust property satisfies standing for breach of trust claims, even though "the precise nature of the [tribe's] interest … remains unresolved"); *Osage Nation*, 57 Fed. Cl. at 394 (alleged mismanagement of tribal trust fund underlying breach of trust claim is sufficient interest in a claim by tribe to those funds to support standing, cited with approval in *Fletcher*, 26 F.4th at 1322).

ITCA's allegations comport with these cases. Specifically, ITCA alleges, *inter alia*, that:

- Its Claim I arises under the Act. SAC ¶¶ 53, 56, 60-61, 64 (the Act requires the payment of Monetary Proceeds into a Trust Fund for ITCA and its member tribes, and if the Monetary Proceeds / Trust Fund Payments are to be paid under the 30-year payment option, the US must hold in trust security for that option);
- the US as trustee is in breach of trust for failing to secure properly and fully the unpaid Trust Fund Payments required by the Act under the 30-year payment option. *Id*. at ¶¶ 12, 64, 84, 121-123, 126-130, 133-136, 172-186 (after electing the 30-year payment option of 30 $2.9 Annual Payments and a Final Payment of $34.9 million at the end of 30 years, the US as trustee and Collier executed a Promissory Note for that option by which Collier would pay annually into an Annuity which at the end of 30 years would equal $34.9 million Final Payment, and the US held as security for the 30 $2.9 million Annual Payments liens on 1) Collier's remaining 15-acres of the Phoenix Indian School property and 2) Collier's development rights and interest on two Downtown Lots in Phoenix that Collier acquired by exchanging the rest of the Phoenix Indian School property with the City of Phoenix);
- the US' releases of the liens on the Downtown Lots left only the lien on the 15-acre Phoenix Indian School property as security for the Annual Payments with more than

20 years left in the 30-year payment option (during which time a major economic downturn occurred and the value of the property declined), and the US did not appraise or otherwise determine the value of the property or request that Collier supplement the security until after Collier stopped making payments. *Id*. at ¶¶ 172-75, 178-86; *see also* JSOUF ¶¶ 22, 30, 34-35, 39, 43.

- when Collier stopped paying, the US admittedly held security that was insufficient to meet Collier's unpaid obligations. SAC ¶ 202; *see also* JSOUF ¶ 42.
- the recovery by the US from Collier in *U.S. v. Collier* has not made its Trust Fund whole as required by the Act. SAC ¶¶ 226, 244; and
- ITCA seeks money damages for the US' breaches of trust. *Id*. ¶¶ 268(c), 282.

The three specific standing elements as met by ITCA are discussed separately next.

B. Under Applicable Tribal Breach of Trust Caselaw Authority, ITCA's Allegations Meet all Standing Elements

1. Injury in Fact

ITCA properly alleges a suffered injury in fact, *i.e.*, "an invasion of a legally protected interest." *Fletcher*, 26 F.4th at 1322; *accord Navajo Nation*, 2024 WL 1896133, at * 8 ("To prove an invasion of a legally protected interest in the context of breach of trust claims, 'the plaintiffs must show the existence of a trust relationship with the government,'" citing *Fletcher*, 26 F.4th at 1322). ITCA alleges that the Act establishes a Trust Fund of which ITCA is a beneficiary and requires Trust Fund Payments into the Trust Fund. SAC ¶¶ 56-57. If the US elected the 30-year payment option for the Trust Fund Payments, the US was to hold in trust security for the Payments. *Id*. ¶¶ 60-61 and 64. Not all Payments were made. *Id*. ¶¶ 163-164, 190-193. The security that the US held did not cover all Payments required but not made, *id*. ¶¶ 178, 196, 202-03, and the

recovery by the US from Collier did not make the Trust Funds whole as required by the Act. *id*. ¶¶ 204, 226, 244.[1]

As in *White Mountain Apache*, *Round Valley*, *Wolfchild*, and *Osage Nation*, these allegations establish injury in fact / invasion of a legally protected interest. ITCA has shown a trust relationship and alleged monetary injury by the US to a Trust Fund of which it is a beneficiary. "[F]inancial harm" allegedly caused by breach of trust duties is a "concrete and actual injury in fact." *Wolfchild v. United States*, 62 Fed. Cl. 521, 538 (2004), *rev'd on other grounds*, 559 F.3d 1228 (Fed. Cir. 2009), *cert. denied*, 559 U.S. 1086 (2010)

The few cases in this jurisdiction denying standing for lack of an injury in fact are inapposite. For example, in *Crow Creek Sioux Tribe v. United States*, 900 F.3d 1350 (Fed. Cir. 2018), dismissal for standing -- for lack of an identified actual or imminent injury in fact – was affirmed where a tribe, claiming alleged mismanagement of its water rights, did not allege any government action that caused injury to its water rights in terms of the amount of water available for tribal use being insufficient to fulfill the purpose of its reservation or being insufficient in the future. 900 F.3d at 1355-57. The tribe's water rights,

> which give the Tribe the right to use sufficient water to fulfill the purposes of the Reservation, simply cannot be injured by government action that does not affect the Tribe's ability to use sufficient water to fulfill the purposes of the Reservation. The complaint in this case does not allege that the challenged government action has such an effect.

Id. at 1357; *see also Wyandot Nation*, 124 Fed. Cl. at 607 (tribe fails to meet standing requirement of actual and concrete injury in fact to assert breach of trust claims arising from land where tribe is not the owner or beneficiary of the land); *Hoopa Valley Tribe v. United States*, 597 F.3d 1278,

[1] The US insinuates that these allegations are tied to ITCA's "dismissed claim[s] or theor[ies]," US' Opening Brief at 21, but they are not. They are in support of ITCA's remaining claims.

1283-84 (Fed. Cir. 2010) (affirming lack of standing where tribe cannot show injury in fact or a legally protected interest in its claims because it waived them when it received its share of a settlement and retained no entitlement to the remainder of the settlement). Unlike *Crow Creek Sioux Tribe*, ITCA alleges specific governmental action – failure to hold in trust or failure to recover sufficient security – has harmed its Trust Fund. Unlike *Wyandot Nation*, ITCA is the beneficiary of the Trust Fund. Unlike *Hoopa Valley Tribe*, there is no applicable waiver here.

The US also argues that ITCA's claims rely on speculative and hypothetical facts. US' Opening Brief at 19-20 and 26-28. *White Mountain Apache* rejected a similar argument. "The Court notes on its face the Complaint adequately states a breach of fiduciary duty claim," where the tribe alleged that under a specific statute, the US had a fiduciary duty and allegedly breached that duty by taking or failing to take specific actions. 2018 WL 11365074, at *10. This Court emphasized that under applicable law, "in order to be entitled to relief, the factual allegations need not be detailed and must only be enough to rise 'above the speculative level.'" *Id*. (citation omitted). ITCA alleges that the Act imposed on the US a fiduciary duty to secure all required but unpaid Trust Fund Payments, and the US failed to secure those Payments, failed to recover from Collier a sufficient amount to account for all those Payments, and has not earned enough on what it did recover to account fully for the earnings required under the Act. SAC ¶¶ 12, 64, 135-36, 172-186, 226, 244, 263, 268(c). These allegations are not speculative or hypothetical and ITCA "as a beneficiary of the trust relationship created by the [Act] has standing." *White Mountain Apache,* 2018 WL 11365074, at *10.

The US argues that ITCA's breach of trust allegations are particularly speculative or hypothetical with respect to the time before Collier stopped making payments. US' Opening Brief at 19 and 26-28. These allegations include that the US:

- chose to secure the Trust Fund Payments with liens on real property or real property interests, against the advice of its own high-level officials and attorneys; SAC ¶¶ 95-101, 134-36.
- in releasing the liens on the Downtown Lots, did not perform its own independent appraisals of the Unreleased Property and relied entirely on the appraisals of an interested party, Collier; *id*. ¶¶ 172-175; *see also* JSOUF ¶¶ 20-22, 28-30;
- did not appraise or otherwise determine the value of the remaining 15-acre Phoenix Indian School property, the lien on which was all that was left in the Trust Estate after the release of the Downtown Lots liens, during a major economic downturn and until the *U.S. v. Collier* litigation; SAC ¶¶ 174-181, 197; *see also* JSOUF ¶¶ 39;
- did not demand that Collier substitute security at any time before or after the lien releases or the economic downturn; *id*. ¶¶ 184-86; *see also* JSOUF ¶¶ 43;
- did not provide notice to ITCA of the lien releases; *id*. ¶¶ 176; *see also* JSOUF ¶¶ 25, 33; and,
- did not disclose security insufficiency to ITCA until after Collier stopped paying or provide information to ITCA from which ITCA could independently calculate the value of the existing or remaining security, *id*. ¶¶ 177, 187-188; *see also* JSOUF ¶¶ 40-41.

In the face of these numerous and largely uncontested allegations that the US violated or acted inconsistently with its statutory and common law fiduciary duties and contrary to the interests of its trust beneficiaries, the US asks this Court to find that ITCA's allegations are "speculative," at least for standing purposes. That ask contradicts this jurisdiction's tribal breach of trust cases. *E.g., White Mountain Apache*, 2018 WL 11365074, at *10 (rejecting government's argument that tribe's alleged breach of trust claims fail standing because they are "merely

speculative and point to a future injury," where tribe as a beneficiary of a statutory trust relationship alleged that government breached mandatory fiduciary duties). Thus, for example, with respect to the releases of the liens on the Downtown Lots, the US argues that it was required to release those liens under the terms of the Deed of Trust, based on its mere unverified and inadmissible assertions that the negotiated terms for a lien release had in fact been met. US' Opening Brief at 27;[2] *see* Pl.'s Response to Def.'s SOUF ¶¶ 41-42, 54-56. But ITCA has standing to have this Court hear its non-speculative allegations and claims that the US is incorrect that the releases were required, *i.e*., that

[2] The US' authority for its argument that in fact it was required under the terms of the Deed of Trust to grant Collier's requested Downtown Lots lien releases includes the deposition testimony of the US' own officials in *U.S. v. Collier*. Def.'s SOUF ¶¶ 41-42, 54-56, ECF No. 156. On summary judgment, a party may rely on deposition testimony from a separate action only where the case involved the same parties and subject matter. *Hughes v. City of Chicago*, 673 F. Supp. 2d 641, 651 (N.D. Ill. 2009) (citations omitted). That is not the situation here; ITCA was not a party to *U.S. v. Collier*. As in *Hughes*, the US has "presented no authority in support of the proposition that a court may consider as competent evidence at the summary judgment stage deposition testimony gathered in another case." *Id*.; *accord Henriquez v. City of Farmers Branch*, No. 3:16-cv-868, 2022 WL 3127838, at *11 (N.D. Tex. July 8, 2022) (citations omitted) (testimony from another case was not competent evidence in opposition to summary judgment because it is hearsay and was neither reaffirmed in an affidavit by the witness in the present case nor supported by any showing that the prior testimony would be admissible under Fed. R. Evid. 804(b)(1) if offered at trial). The unverified testimony is hearsay and inadmissible in this case. Pl.'s Response to Def.'s SOUF ¶¶ 41-42, 54-56. "A party may not … rely on inadmissible hearsay in opposing a motion for summary judgment." *James v. United States*, 86 Fed. Cl. 391, 395 (2009) (citations omitted).

Similarly, Def.'s SOUF Exhibit 2, ECF No. 156-2, is the US' Statement of Undisputed Material Facts from *U.S. v. Collier*. As a filing in another case, that document is hearsay in this case. *Hodges v. Corizon Health, Inc*., No. 6:15-cv-521, 2019 WL 7476444, at *6 (D. Or. Sept. 10, 2019), *aff'd*, 837 Fed. App'x 466 (9th Cir. 2020) (citations omitted) (on summary judgment, "a court may not take judicial notice of facts presented [in other cases] for the purpose of considering those facts to be established in the case currently before [it]" and"[t]he court must limit its consideration to those facts presented by [the party opposing summary judgment] through documents produced, and affidavits and declarations filed, in this case"). Because in general, judicial findings of fact from another case are inadmissible hearsay, *see City of Rome, Georgia v. Hotels.com, L.P.,* No. 4:05-CV-249, 2012 WL 13024698, at *4 n.15 (N.D. Ga. July 9, 2012), *a fortiori*, a litigant's statements of fact from another case are inadmissible hearsay. "[H]earsay cannot by used to defeat a motion for summary judgment." *James*, 86 Fed. Cl. at 396 (citation omitted).

the facts show that the releases should not have been granted and that the Trust Estate was actually harmed by their granting. SAC ¶¶ 260-261.

2. Causal Connection

ITCA properly alleges a causal connection to its injuries that is traceable to the US. ITCA alleges that the US as trustee failed to secure properly and fully the unpaid Trust Fund Payments required by the Act under the 30-year payment option that the US elected and which consisted of thirty $2.9 million Annual Payments and a Final Payment of $34.9 million at the end of 30 years. SAC ¶¶ 12, 60-61, 64 and 84. As security for that option, the US, as trustee, and Collier executed a Promissory Note by which Collier would pay annually into an Annuity which at the end of 30 years would equal the $34.9 million Final Payment, and for the thirty $2.9 million Annual Payments the US held as security liens on 1) Collier's remaining 15-acres of the Phoenix Indian School property and 2) Collier's development rights and interest on two Downtown Lots in Phoenix that Collier acquired by exchanging the rest of Phoenix Indian School property with the City of Phoenix. *Id*. ¶¶ 121-123, 125-130, 133-136. Nothing in the Act required the US to choose real property as security for the Trust Fund Payments, and the US' own high-level officials and attorneys advised against the security consisting, at least exclusively, of real property or real property interests. SAC Exs. 4 and 5. After the US released the liens on the two Downtown Lots only the lien on the 15-acre Phoenix Indian School property remained as security for the Annual Payments with more than 20 years left in the 30-year payment option (during which time a major economic downturn occurred, and the value of the remaining property declined). *Id*. ¶¶ 172-82; *see also* JSOUF ¶¶ 34-35. But the US did not appraise or otherwise determine the value of the property or request that Collier supplement the security until after Collier stopped making payments. SAC ¶¶ 172-75, 180-86; *see also* JSOUF ¶¶ 39 and 43. When Collier stopped paying,

the US admittedly held security that was insufficient to meet Collier's unpaid obligations. SAC ¶ 202; JSOUF ¶ 42. The US' recovery from Collier in *U.S. v. Collier* has not made the Trust Funds whole as required by the Act. SAC ¶¶ 226, 244.

These allegations establish a causal connection between ITCA's alleged injuries and specific actions and failures by the US sufficient for standing traceability purposes. *See Fredericks*, 125 Fed. Cl. at 414 (alleged injuries to heirs from breach of trust (improper granting and approval of trust allotment land leases during probate) are traceable to the US); *Round Valley Indian Tribes*, 97 Fed. Cl. at 510 (alleged injuries from breach of duties as trustee of tribal trust funds are traceable to US); *Wolfchild*, 72 Fed. Cl. at 530 (alleged injuries from breach of trust (government administration of trust property by transfers of lands, improvements and monies) are "fairly traceable" to the actions of the government for standing purposes); *Wolfchild*, 62 Fed. Cl. at 538 (alleged injuries caused by US' breach of trust duties (transferring trust assets) satisfies traceability). ITCA's alleged harms were "allegedly caused by the defendant's breach of its fiduciary … duties." *Id*.

The US argues that ITCA's alleged injuries were caused by Collier, not the US, and that that defeats causal connection required for standing with respect to ITCA's claims against the US. US' Opening Brief at 20 and 28-30. It is undisputed that Collier did not make all Trust Fund Payments required by the Act. JSOUF ¶¶ 36-37. But that is the very gist of ITCA's remaining claims: that the US was required to hold in trust security for all required but unpaid Payments, so that if Collier stopped paying, the Trust Funds would receive their statutorily guaranteed amounts; or, alternatively, that any amount the US recovered from Collier, or the earnings thereon, needed to be sufficient to make the Trust Funds whole as required by the Act. The US' finger pointing at Collier does not obviate what ITCA is claiming, which is that Collier's actions should not have

harmed ITCA if the US had abided by its fiduciary duties. The US did not do so, and therefore the US' actions are the direct cause of ITCA's alleged harms. The US' argument that but for Collier's nonpayment, ITCA would not be harmed also is fundamentally contrary to the terms, structure, and purpose of the Act – Collier's nonpayment was precisely what the Act's security and guaranteed payment provisions were intended to protect against, so that it did not matter to the Trust Funds if Collier did not pay; they would still receive the full congressional guarantee via fulfillment of the US' fiduciary duties.

3. Redressability

ITCA properly alleges that its injuries are redressable. ITCA seeks money damages for the alleged breaches of trust that caused alleged harm to its Trust Fund. SAC ¶¶ 56, 268(c) and 282. This is a standard allegation that meets redressability. *See, e.g.*, *Fredericks*, 125 Fed. Cl. at 414 (alleged injuries to heirs from breach of trust (improper granting and approval of trust allotment land leases during probate) can be redressed by money damages); *Round Valley Indian Tribes*, 97 Fed. Cl. at 510 (alleged injuries from breach of duties as trustee of tribal trust funds and resulting economic injury can be determined in a specific amount). Awarding ITCA "damages is likely to redress [the alleged] harm by restoring [the Trust Fund's] financial position" as required by the Act. *Wolfchild*, 62 Fed. Cl. at 538.

Against redressability, the US argues at length that ITCA already has been made whole by the recovery in *US v. Collier*. *See, e.g.*, US' Opening Brief at 19, 21-23, 25. One of ITCA's remaining claims is *whether* ITCA has been made whole by the recovery in *U.S. v. Collier*. SAC ¶ 268(c); *Inter-Tribal Council of Arizona, Inc. v. United States*, No. 15-342, 2023 WL 4881967, at *7 (Fed. Cl. Aug. 1, 2023) ("the defendant will need to show more than its suit against Collier to defeat the plaintiff's remaining viable claim"). ITCA's position on the merits of that issue, recapped

infra, is that it has not. But ITCA's standing to have that claim heard does not turn on the merits of that claim (or the US' view of the merits of that claim). The standing inquiry is separate from the merits inquiry. "[T]he question of standing is whether the litigant is entitled to have the court decide the merits of the dispute." *Warth,* 422 U.S. 490 at 498, cited with approval in *Round Valley Indian Tribes*, 97 Fed. Cl. at 510. Indeed, "when deciding standing, 'courts must accept as true all material allegations of the complaint.'" *Warth*, 422 U.S. at 500-01, cited with approval in *Fredericks*, 125 Fed. Cl. at 413. Hence, ITCA's allegations, SAC ¶¶ 226, 244, 268(c), that the *U.S. v. Collier* recovery has not made its Trust Fund whole must be accepted as true at least for standing purposes, and at any rate, as shown *infra*, ITCA has not been made whole.[3]

C. No Prior Decisions in this Litigation Preclude ITCA's Remaining Claims, Let Alone Standing for those Claims

ITCA's remaining claims include whether the Act required the US to hold in trust security for all required but unpaid Trust Fund Payments (or whether the Act allowed the US to hold less), and whether the *U.S. v. Collier* recovery, or the earnings on that recovery, have made its Trust Fund whole as required by the Act. SAC ¶¶ 260-63, 268(c); *Inter-Tribal Council*, 2023 WL 4881967, at *5, *7 and *10. Much of the US' argument against ITCA's standing for its remaining claims is that this Court and the Federal Circuit have "firmly and categorically rejected" those claims *on the merits*. US' Opening Brief 21; *see also id*. at 22 and 24 (Because of "prior rulings of this Court and the Federal Circuit that the Act imposed no duty to cover missed payments by Collier," ITCA

[3] The US' haphazard standing argument is exemplified further by its statements, *e.g.,* "Resolution of the remaining claims depends not on whether ITCA's allegations are true, but on whether ITCA suffered a resulting harm arising from this alleged conduct, even if proven, that has not already been remedied." US' Opening Brief at 20. As set forth *supra*, in a standing inquiry, the court must accept as true all material allegations of the complaint. *Fredericks*, 125 Fed. Cl. at 413. And determining standing redressability does not entail addressing, let alone resolving, the claims' merits. *Round Valley Indian Tribes*, 97 Fed. Cl. at 510.

"cannot now relitigate[] the "rejected theory" of whether the US should have secured or recovered all required but unpaid Trust Fund Payments); *accord id*. at 24 (the "question as to the required value of collateral has now been resolved"); *accord id*. at 29 ("any injury based on Collier's failure to pay is not redressable – precedent and the law of the case wholly prevent the court from awarding ITCA relief in the form of the amount of interest payments that were owed by Collier"). But the US errs: the merits of the remaining claims have not been addressed, let alone rejected, and in any event should not factor in determining standing.

In essence, the US argues that the dismissal of Claim II (duty to collect) *necessarily* resolves Claim I (duty to secure or recover) in the US' favor on the merits and as a matter of standing. *See* US' Opening Brief 23 (having "lost" Claim II, no "harm remains" to ITCA); *accord id*. at 25 (the rejection of Claim II "leads to but one conclusion: ITCA has suffered no harm"); *accord id*. at 29-30 (*any* injury based on Collier's failure to pay is not redressable – precedent and the law of the case *wholly* prevent the court from awarding ITCA relief in the form of the annual interest payments that were owed by Collier") (emphasis added). That is unsupported procedurally (to rely on the merits of a claim to determine standing to have that claim heard) and contradicts the Federal Circuit's and this Court's rulings. As the Federal Circuit stated:

> the portion of Claim I that arises from the Government's alleged breach of its fiduciary duty to 'hold in trust the security' against Collier's payment obligations, states a claim over which the Court of Federal Claims has jurisdiction, and upon which relief can be granted. We therefore find that the Court of Federal Claims erred in dismissing the failure-to-maintain-sufficient-security portion of Claim I of the Complaint.

Inter-Tribal Council of Arizona, Inc. v. United States, 956 F.3d 1328, 1344 (Fed. Cir. 2020). As this Court on remand stated, there is an unresolved liability issue regarding:

> 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.

Inter-Tribal Council, 2023 WL 4881967, at *5; *see also id*. at *7 ("the defendant will need to show more than its suit against Collier to defeat the plaintiff's remaining viable claim"); *id.* *10 ("the defendant's lawsuit against Collier to recover outstanding funds does not automatically absolve the defendant of liability").[4]

Notwithstanding the dismissal of Claim II and portions of Claim I, ITCA has remaining claims and "has standing to pursue its [] remaining claims in this court." *Greenland Contractors I/S v. United States*, 131 Fed. Cl. 216, 224 (2017) (rejection of some claims by Federal Circuit on standing or other grounds does not *per se* affect remaining claims); *accord Wolfchild v. United States*, 96 Fed. Cl. 302, 328 (2010) *rev'd in part*, 731 F.3d 1280 (Fed. Cir. 2013) (where Federal Circuit explicitly abstained from addressing a claims' merits, there is no "law of the case" as to the merits of that claim); *see also Westdale Nw. Ctr., LP v. United States,* 154 Fed. Cl. 557, 578 (2021) (rejecting government's law of the case argument, and noting that "defendant reads too much into the order denying summary judgment [because] implicit in the denial of summary judgment is the need for additional evidence to ascertain" remaining issues that were not explicitly addressed). As in *Westdale Nw. Ctr.*, "no explicit" determination of the merits of ITCA's remaining claims has been made in this case and the US' law of the case argument otherwise should be rejected. *Id*.

[4] Indeed, the US contradicts itself on this point when, in its predicate to its entire brief, it acknowledges that "no court has considered ITCA's standing to assert [its] claims. *While the Federal Circuit ruled that the remaining allegations had not been sufficiently considered below*, it did not evaluate standing." US' Opening Brief at 18 (emphasis added); *accord id*. at 11(citation omitted) ("nor did the appellate court address whether the recovery in the *Collier* litigation was sufficient to remedy any" harm alleged by ITCA's remaining claims. Instead, the Federal Circuit wholly refrained from addressing the dispute of 'whether the security to be held by the Government was intended to secure all thirty years of required annual interest payments, i.e., Trust Fund Payments, or only accrued interest.").

III. ITCA IS ENTITLED TO SUMMARY JUDGMENT ON ITS REMAINING CLAIMS

A. The Act Required The US To Hold Security In Trust For All Required But Unpaid Trust Fund Payments

1. The Act is Unambiguous on this Point

The Act's plain language requires that, under the 30-year payment option, with a minimum annual rate of return of 8.5% for 30 years on $34.9 million (the Monetary Proceeds, *i.e.*, the difference in value between the Arizona and the Florida lands exchanged), the Trust Fund Payments must total $121.9 million after 30 years (($2.9 million x 30 years = $87 million) + $34.9 million = $121.9 million). Act §§ 403(c)(2), 403(c)(5) and 401(10)(a). The Act also mandates that the US hold in trust security for the 30-year payment option. *Id*. §405(c)(2).

In addition to its text, the Act's structure confirms that the US was to secure all required but unpaid Trust Fund Payments. "When interpreting the plain language of a statute, a court must also take into consideration" the structure of the statutory scheme. *Campo v. United States*, 169 Fed. Cl. 502, 514 (2024). The Act expressly links the election of the 30-year payment option and its specified payments with the duty to secure. *Id*. §§ 403(c)(2), 403(c)(5) and 405(c)(5). Without the 30-year payment option, there is no need for security. With the 30-year payment option, there must be security. The Act does not define "security," but the ordinary meaning of security is "collateral given or pledged to guarantee fulfillment of an obligation, especially a monetary obligation. Black's Law Dictionary (11th ed. 2019); *see also Van Prods., Inc. v. Comm'r of Internal Revenue*, 40 T.C. 1018, 1024-25 (1963) (the "ordinary meaning of security" is that "which makes

the enforcement or promise more certain than the mere personal obligation of the debtor or promisor.").[5]

Further, the Act makes receipt by the US of the Trust Fund Payments / Monetary Proceeds compulsory to the Land Exchange. Act §§ 401(9), 401(10), 401(19). Thus, the expressly linked purposes of the Act were to approve the Land Exchange and to compensate Arizona Indian tribes for the closure of the Phoenix Indian School upon which the exchanged Arizona land was located. As the US has stated, "a key aim of [the Act was] the funding of Indian education." Plaintiff's Opposition to Defendant's Combined Motion to Dismiss Pursuant to Rule 12(b)(6) and for Judgment on the Pleadings Under Rule 12(c) at 2, *United States v. Collier*, ECF No. 12; *id.* at 10 ("Congress dedicated the funds from Collier's cash component of the land exchange to address an important need in the wake of the former Phoenix Indian School's closure."), cited in SAC ¶ 71.

The Act's text, structure, and purpose direct that the US was to hold in trust security for all required but unpaid Trust Fund Payments, and they do not allow the US discretion to hold less security. The sole discretion that the Act gives to the US is the discretion, after consultation with ITCA and the Navajo Nation, to elect the Trust Fund Payments' method – lump sum at closing or

[5] In its Introduction, the US refers repeatedly to "Collier's $34.9 million obligation." US' Opening Brief at 1-2. This is a significant inaccuracy. The amount of $34.9 million correctly states the difference in value, as set forth in their Exchange Agreement, which was ratified by the Act, §§ 401(6) and 402(b), between the Arizona land and the Florida land. SAC ¶¶ 38-39. But the Act gave the Interior Secretary, discretion, after consulting with ITCA and the Navajo Nation, to receive the $34.9 million either as a lump sum at closing on the land exchange, or under the 30-year payment option, expressly defined by the Act as "30 annual payments equal to the interest due [on the $34.9 million at an annual rate of not less] than 8.5 percent or higher than 9.0 percent." *Id.* §§ 403(b) and 403(c). Once the Secretary elected the 30-year payment option, Collier's obligation consisted of 30 years of, at a minimum, $2.9 million Annual Payments and a Final Payment of $34.9 million at the end of 30 years, for a total of a minimum of $121.9 million (($2.9 million x 30 years = $87 million) + $34.9 million = $121.9 million). Later in its brief, *e.g.*, US' Opening Brief at 5, the US correctly states the obligation as consisting of both 30 Annual Payments and the Final Payment, but to the extent the US refers to the obligation as being only $34.9 million, that is inaccurate.

the 30-year payment option. Act § 403(b). No similar grant of discretion exists regarding the security for the Trust Fund Payments. This silence does not imply discretion to the agency. Hon. Joseph F. Weis, Jr., *A Judicial Perspective On Deference to Administrative Agencies: Some Grenades From the Trenches*, 2 Admin. L.J. 301, 305 (1988), cited with approval in *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 185 (3d Cir. 1995), *cert. denied*, 516 U.S. 1093 (1996) (Nygaard, J., dissenting). Indeed, "[i]f Congress has not clearly delegated a properly circumscribed power, then the agency should not obtain untrammeled discretion through legislative silence." Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 Admin. L.J. AM. U. 187, 204 (1992), cited with approval in *Elizabeth Blackwell Health Center,* 61 F.3d at 197 n.16 (Nygaard, J., dissenting). "Courts should not equate a mere lack of clarity with a delegation of decision-making authority to the agency," Cass. R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 445 (1989), cited with approval in *Elizabeth Blackwell Health Center,* 61 F.3d at 196 n.16 (Nygaard, J., dissenting).

Nor does § 405(c)(2)'s language, "in accordance with the Trust Fund Payment Agreement" implicitly grant the US the discretion for which it argues: unbridled discretion to determine whether to secure all or none of the Act's required Trust Fund Payments. Allowing the US to "stipulate the character of the annual payments," May 1992 Memorandum 3, *i.e.,* reduce them or the security for them, by virtue of a single phrase (*i.e.*, "in accordance with the TFPA") that renders superfluous multiple other provisions, *e.g.*, the fixed number and amount of the Trust Fund Payments, §§ 403(c)(2) and 403(c)(5), and vitiates a core purpose of the Act (compensation to Arizona tribes for a closing a boarding school over their objections), is contrary to basic statutory

construction principles.[6] "[A] statute is to be construed in a way which gives meaning and effect to all of its parts, and the Supreme Court has repeatedly stressed that '[i]n expounding a statute we [must] not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *Meeks v. West*, 216 F.3d 1363, 1367 (Fed. Cir. 2000) (citations omitted; brackets in original); *accord Flynn v. United States*, 46 Fed. Cl. 414, 417 (2000) (citations omitted) (in construing a statute, "the court must not be guided by a single sentence or phrase … [but] must try to read the statute as a whole, to give effect to all of its parts, and to avoid, if possible, rendering language superfluous").

Since the Act is unambiguous, the court should not even consider an interpretation by the US that is contrary to Act. "[W]hen a statute is clear and unambiguous, 'consideration of administrative interpretation contrary to such language is inappropriate; the agency cannot by its interpretation, override the congressional will as memorialized in the statutory language.'" *Mylan Pharm., Inc. v. Henney*, 94 F. Supp. 2d 36, 47 (D.D.C. 2000), *judgment vacated and appeal dismissed sub nom. on other grounds*, *Pharmachemie B.V. v. Barr Lab'ys, Inc.*, 284 F.3d 125 (D.C. Cir. 2002). The US' self-serving determination in the May 1992 Memorandum that it had

[6] To the extent that *Inter Tribal Council of Az. v. Lujan,* No. 2:92-cv-01890 (D. Ariz. Oct. 8, 1992) (Order of Oct. 30, 1992), SAC Exhibit 25, holds that the Act implicitly gave the US discretion to deal with Collier and to determine the security's adequacy, that does not resolve the issue here, which is whether the security was adequate as a matter of law, *i.e.*, in compliance with the Act. As discussed, *infra*, any agency discretion cannot be exercised in violation of its statutory source. And the district court in *Lujan* expressly stated that it had no authority to determine the merits of the security adequacy issue in the context of ITCA's claims for declaratory and injunctive relief. "The Secretary's decisions regarding the adequacy of the collateral and the closing date are precluded from judicial review under [the Act] subsection 402(h)." Order of Oct. 30, 1992 at 8; SAC Exh. 25, ECF No. 58-3 at 345.

Moreover, in *Lujan*, the US twice expressly acknowledged that, notwithstanding the resolution of ITCA's claims there, ITCA "remained free to pursue any further monetary remedy they believe they are entitled to in the United States Claims Court." Pl.'s SOUF ¶ 88. "Under contract and trust theories, plaintiff could seek relief under the Tucker Act for money damages." *Id*.

discretion to decide the amount of security to hold in trust is not entitled to any deference. The May 1992 Memorandum lacks legal authority, exhibits cursory and dubious reasoning, and makes determinations inconsistent with prior, contemporaneous, and subsequent agency statements. These characteristics defeat deference that might be accorded under *Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944).

Additionally, assuming *arguendo* that the Act gave the US discretion applicable to determining ITCA's remaining claims, that discretion must be exercised in accordance with the Act. Agency discretion is not unlimited; it cannot be exercised in a manner that is unauthorized or inconsistent with its congressional source. *See Farmworker Just. Fund, Inc. v. Brock*, 811 F.2d 613, 619-620 (D.C. Cir. 1987), *vacated on other grounds*, 817 F.2d 890 (D.C. Cir. 1987). Moreover, where, as here, the US acts in a fiduciary capacity for Indian tribes, any discretion "must still be exercised in accordance 'with the trustee's fiduciary duties.'" *W. Shoshone Identifiable Grp. by Yomba Shoshone Tribe v. United States*, 143 Fed. Cl. 545, 603 (2019). The applicable fiduciary duty here is to "hold in trust the security" for statutorily required and calculated Trust Fund Payments. Act § 405(c)(2); *see also Short v. United States*, 12 Cl. Ct. 36, 45 (1987) (while the Secretary does exercise discretion over tribal trust funds, "such discretion is not unlimited" … The [Secretary must act] consistent with the government's overriding fiduciary obligation to Indian tribes and … [t]he violation of these duties under the statute would give rise to an action for money damages").

Further antithetical to the terms, structure and purpose of the Act is the US' preferred characterization of the Trust Fund Payments as a "loan with interest payments" by the US to Collier, May 1992 Memorandum 3, *i.e*., a "traditional financing arrangement," *id*; *see* US' Opening Brief 5-6. This repackaging allows the US to argue that when Collier stopped paying, the US

needed only to have security to cover the principal (also referred to by the US as a "balloon payment," *id*. at 4-5) and any annual payments not made by Collier up to the point of the US' recovery of the principal. The US refers to annual payments not made by Collier up to the point of recovery as "accrued interest," and payments beyond that point as "future interest." *Id*. at 2, 3. 6, 9, 11, 12, 14-15, 16, 17, 21, 22, 23, 24, 25, 28. The US then relies on the indisputably undefined term "accrued interest" in the Deed of Trust, *see* JSOUF ¶ 13 ("Accrued interest" is not defined in the Deed of Trust or elsewhere in the TFPA"), to argue that when Collier stopped paying, the US was responsible for securing or recovering the Annual Payments only up to the point of recovery, and not beyond.

There is no support in the Act for this truncation of the Act's required Trust Fund Payments and security therefor.[7] Tellingly, the Act contains none of the typical financing arrangement terms used by the US for this argument – *e.g*., "loan," "principal," "balloon payment," "accrued interest," or "future interest." Pl.'s AUF ¶¶ 2, 3, 5. The US' efforts to insert these terms into and eviscerate the actual terms of the Act should be rejected. Rewriting statutes by interjecting non-existent terms and eliminating existing terms is impermissible.[8] "The court is obliged faithfully to apply the statute as written, not as a litigant would rewrite it." *Nez Perce Tribe v. United States*, 83 Fed. Cl. 186, 192 (2008); *accord Lowe v. United States*, 38 Ct. Cl. 170, 173 (1902), *aff'd*, 194 U.S. 193 (1904) ("Where the meaning of the statute is plain and there is no ambiguity, it is the duty of the

[7] Nor is there any support factually -- *e.g*., there is no evidence of the US lending any money to Collier.

[8] Outrageously, the US also states that ITCA alleges that the Annual Payments are "future interest payments." US' Opening Brief at 10 ("The Second Amended Complaint (SAC) ECF No. 58, alleges that the United States breached the following duties: … (3) to recover future interest payments from Collier."). Nowhere in the SAC does ITCA use the term "future interest payments." Pl.'s AUF ¶ 6. Just as litigants cannot rewrite statutes, they cannot rewrite another party's pleadings.

courts to enforce it according to its obvious terms and not to insert words and phrases so as to incorporate therein a new and distinct provision."). The US' interpretation eliminates the clear requirements in the Act of thirty Annual Payments, *i.e.*, a minimum annual return of 8.5% on $34.9 million for the full 30-year payment option and relegates ITCA to a rate of return far below that amount. That is exactly what the Act meant to avoid.

2. Alternatively, Any Ambiguities Must be Resolved in Favor of ITCA

The Act unambiguously required the US to secure all required but unpaid Trust Fund Payments. Nevertheless, it is now apparent that, before it entered into the TFPA with Collier, the US made a strategic, self-serving decision to regard the Act as ambiguous concerning the amount of security that the US was required or allowed to hold in trust. May 1992 Memorandum at 2-3. But crucially, the US expressly acknowledged that ITCA's interpretation of the Act – that the Act required the US to secure all required but unpaid Trust Fund Payments, is plausible. *Id*. Accordingly, should this Court determine that the Act is ambiguous, it must resolve that ambiguity by the substantive Indian canon of statutory construction. *Bear v. United States*, 112 Fed. Cl. 480, 486 (2013); *Shoshone Indian Tribe of Wind River Rsrv. v. United States*, 364 F.3d 1339, 1352 (Fed. Cir. 2004), *cert. denied*, 544 U.S. 973 (2005). "[I]n cases involving the rights of Native Americans, the Court must always keep in mind that '[t]he governing canon of construction requires that 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *Cherokee Nation v. U.S. Dep't of the Interior*, 531 F. Supp. 3d 87, 96 (D.D.C. 2021) (citations omitted). Applying this canon, ITCA's interpretation of the Act, which the US agrees is plausible, must prevail.

B. The US had a Duty to Monitor the Security that it Held in Trust and Violated That Duty

The Act required the US to hold in trust security for the Trust Fund Payments, § 405(c)(2), and the US was required to act as a prudent trustee in fulfilling this statutory trust duty. *Inter-Tribal Council,* 2023 WL 4881967, at *9 (citations omitted); *ITCA II*, 956 Fed. 3d at 1343 (citations omitted). ITCA has alleged and argued numerous duties and numerous instances of the US' failures to act as a prudent trustee in connection with these duties. For example, the May 1992 Memorandum and the December 1992 Memorandum show that the US placed its interests above those of its trust beneficiaries. Pl.'s SOUF ¶¶ 71, 99-100. Although not required by the Act, the US agreed with Collier that Collier's Trust Fund Payments obligations were non-recourse against Collier personally, so that if Collier stopped making payments, the only remedy for the US would be *in rem* against the security that the Act required the US to hold in trust. JSOUF ¶ 7. Although not required by the Act, and against the advice of its own high-level officials and attorneys, the US chose real property interests as the Trust Fund Payments' sole security. Pl.'s SOUF ¶¶ 53, 55; JSOUF ¶ 6. In releasing the liens on the Downtown Lots which served initially as part of the security, the US relied entirely on the appraisals of an interested party, Collier. JSOUF ¶¶ 20-22, 28-30. When the security had diminished due to the lien releases and there was a major economic downturn, the US did not ask Collier to supplement the security until after Collier stopped making Trust Fund Payments. *Id*. ¶¶ 34-35, 43. The US did not provide information to ITCA about the security, including the US' actions regarding the security, until after Collier stopped making payments. *Id*. ¶¶ 25, 33, and 40-41. These imprudent actions and failures encouraged Collier to stop making payments well before the end of the 30-year payment option, at which time the US admittedly held security that was insufficient to satisfy Collier's remaining obligations. Pl.'s SOUF ¶ 106.

In addition to the fiduciary duties that ITCA already has identified, the US had a duty to monitor the security that it was required to hold in trust. *See Citizens & S. Nat'l Bank v. Haskins,* 254 Ga. 131, 136, 327 S.E.2d 192 (Ga. 1985) (discussing evidence of failure to monitor the trust estate as part of claim that trustee failed "to exercise the necessary care and skill over the trust assets which was a continuing duty"); *see also White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1378 (Fed. Cir. 2001), *aff'd and remanded*, 537 U.S. 465 (2003) ("Under the common law of trusts, it is indisputable that a trustee has an affirmative duty to act reasonably to preserve trust property …Comment (b) to [the Restatement (Second) of Trusts § 176 (1959)] … makes clear that this obligation extends to the protection of the trust property from loss or damage"; *accord id*. citing George G. Bogert, *The Law of Trusts and Trustees* § 582 (2d ed. 1980) ("The trustee … is obligated to … do *all acts necessary* for the preservation of the trust res which would be performed by a reasonably prudent man employing his own like property for purposes similar to those of the trust.") (emphasis added).

The Deed of Trust Section 6.3(a) – a negotiated and agreed-to term not required by the Act – allowed the US to demand additional security from Collier if the value of the Trust Estate fell below 130% of the Release Level Amount. JSOUF ¶ 16. As the holder of the security in trust, Act § 405(c)(2), the US in the first instance was in the best position to have the knowledge of, or the ability to know, the value of the security and to monitor it for compliance with the Act and applicable common law trust duties like the duty to monitor the trust estate and the affirmative duty to preserve trust property and protect it from loss or damage. *See Turner v. Victoria*, 15 Cal.5th 99, 121, 532 P.3d 1101, 1111, 311 Cal.Rptr.3d 44. 56 (2023) (emphasizing the "informational advantages held by insiders like a trustee" to learn about breaches of trust); *see also White Mountain Apache Tribe*, 249 F.3d at 1378 (citations omitted); Bogert, § 582.

The US states repeatedly that the duty to monitor the security was on Collier solely to the exclusion of the US. US' Opening Brief 6-8. In support of this statement, the US cites Def.'s SOUF and the JSOUF. None of the cited materials—or any other authority -- support the point. What the materials support is that under certain specified conditions set forth in the Deed of Trust, if met, Collier must supplement the security and that the US could demand that Collier do that. JSOUF ¶¶ 15-16. But the materials do not address *who* monitors the value of the security or *how* that is done. For sure, the cited JSOUF paragraphs, ¶¶ 15-17, do not contain the word "monitor," and ITCA takes serious issue with the US adding non-existent terms to a joint document. Pl.'s AUF ¶ 8.

Nor did the district court in *U.S. v. Collier* address the monitoring duty, let alone hold that the duty was on Collier exclusively. *See* Def.'s SOUF ¶ 44 ("the Maintenance of Collateral Value provision imposed a continuing affirmative duty on Collier to monitor and maintain 130% collateral in the Trust Estate," citing, *inter alia*, *United States v. Barron Collier Co.,*, No. CV-14-00161, 2016 WL 3537802, at *6 (D. Ariz. June 29, 2016)). The monitoring duty issue was argued by the parties in *U.S. v. Collier*, 2016 WL 3537802, at *8-9, but the court's holding was simply that the Deed of Trust "imposes a continuing obligation on Collier to supplement the Trust Estate with government-backed securities if the remaining collateral in the Trust Estate falls below the 130% level," without reference to monitoring. *Id*. at *9. Regarding monitoring, the district court simply noted that the Deed "§ 6.3 does not include explicit terms regarding the obligation to monitor the collateral or a method for valuation of collateral." *Id*. To the extent that the US states or implies to this Court that the duty to monitor issue was reached and resolved in *U.S. v. Collier*, that is inaccurate. Pl.'s AUF ¶ 7.

In any event, assuming *arguendo* that the US had a duty to monitor the security, the uncontested facts are that the US did not monitor the security, at least until it was suing Collier after Collier stopped making payments. JSOUF ¶¶ 11-12, 14-16, 22, 30, 34-35, 39, 43. Further supporting this finding are the US' assertions, based on deposition testimony of its own officials in *U.S. v. Collier*, that it "relied on Collier to monitor and maintain the value of the Trust Estate," Def.'s SOUF ¶¶ 45, 59, and that it "was not aware that the value of the Phoenix Indian School property had dropped prior to notification from Collier in 2012." *Id*. ¶ 62 These assertions are tantamount to admissions against interest by the US that it did not monitor the security. Pl.'s Response to Def.'s SOUF ¶¶ 45, 59, 62. They also evidence a post-hoc litigation position effort by the US to argue for an impermissible transfer of a fiduciary duty to a third party. *See Truckers United for Safety v. Mead*, 251 F.3d 183, 186 (D.C. Cir. 2001) (absent express authorization by Congress, an agency cannot transfer a duty imposed by Congress on an agency to a third party). As the trustee, the holder in trust of security for statutory Trust Fund Payments, the US had at least a common law, if not a statutory, duty to monitor the security, and it failed to do so.

C. Neither The Recovery In *U.S. v. Collier* Nor The Earnings On The Recovery Have Made The Trust Funds Whole In Accordance With The Act

The Act defined the 30-year payment option as consisting of 30 Annual Payments at a minimum annual rate of return of 8.5% on $34.9 million (*i.e*., 30 Annual Payments of a minimum of $2.9 million) and at the end of 30 years the Final Payment of the $34.9 million. Act §§ 403(c)(2)(B) and 403(c)(5).[9] Collier made 15 years of Annual Payments, during which time Collier also made payments into the Annuity that at the end of 30 years was to equal the $34.9 million Final Payment. JSOUF ¶¶ 4, 36.

[9] Consistent with the Act, the Promissory Note also required 30 Annual Payments (and the Final Payment). JSOUF ¶ 3.

When Collier stopped paying, Collier stated that approximately $66.5 million due the Trust Funds remained unpaid. Pl.'s SOUF ¶ 108. This included the $34.9 million Final Payment (subject to reduction of about $13 million that Collier had paid into the Annuity), and 15 $2.9 million Annual Payments (*i.e.*, a total of $44.5 million in Annual Payments). *Id*. ¶¶ 108, 111. The US acknowledged in *U.S. v. Collier* that recovery from Collier of just the $34.9 million Final Payment would not satisfy the unpaid Annual Payments. *Id*. ¶ 110. Again, it is undisputed that Collier stopped paying before the end of the 30-year payment option.

But the US did not seek to recover *all* required but unpaid remaining Annual Payments. Instead, the US sought initially to recover initially only 4 unpaid Annual Payments and ultimately only 5 unpaid Annual Payments. *Id*. ¶¶ 112 -115; *see also* JSOUF ¶¶ 48, 50. This was based on the US' theory that it needed to recover only Annual Payments that were due up to the point of recovery of the $34.9 million Final Payment. Pl.'s SOUF ¶¶ 113 -115; *see also* US' Opening Brief n.3. This theory is grounded in the US' interpretation of "accrued interest" in the Deed of Trust as meaning only Annual Payments "as they came due … each year," US' Opening Brief 14; *see also* JSOUF ¶ 14 ("when the United States sued Collier in *United States v. Collier*, the United States interpreted the term "accrued interest' as interest earned each year but not paid"); *id*. ¶ 48. Since the recovery occurred in 2016, the amount in the recovery that was attributed to the unpaid Annual Payments was $16 million, representing the years 2012, 2013, 2014, 2015, and 2016. JSOUF ¶¶ 48, 50. According to the US, "it is indisputably established that the United States fully recovered the value of collateral that was required to be held in trust." US' Opening Brief 22.

But the amount recovered does not make ITCA whole as required by the Act. Under the Act's 30-year payment option, the US should have sought to recover all required but unpaid remaining Annual Payments. Nothing in the Act allowed recovery of the Annual Payments to be

limited if Collier stopped paying; the US chose to do that of its own volition. May 1992 Memorandum at 3. The US should have chosen its plausible interpretation of the Act that all Annual Payments were due from the inception of the 30-year payment option. *Id*. 2-3. Indeed, this interpretation would explain the lack of terms like "accrued interest" and "future interest" in the Act; unlike a traditional financing arrangement, the Act's unique 30-year payment option provides that all Annual Payments have accrued once the option begins. The Promissory Note's negotiated and agreed-to prohibition of prepayment of the Annual Payments (and the Final Payment), Pl.'s SOUF ¶ 101, further supports the interpretation that the Act's 30-year payment option was not a traditional financing arrangement.

The US' statement, US' Opening Brief 15, that "the United States' interpretation of accrued interest prevails" in this case misses the point. As this Court stated, one of ITCA's remaining claims is "the precise amount of security the United States was required to maintain …[*i.e*.,] sufficient to secure the principal amount and all 30 annual interest payments … [or] only…the annuity and interest payments as they came due." *Inter-Tribal Council*, 2023 WL 4881967, at *5. As the US acknowledged in the May 1992 Memorandum, it is plausible that the Act required the US to hold in trust sufficient security such that, if Collier were to stop paying, the US would recover "both the full principal and the remaining stream of annual … payments." May 1992 Memorandum 2-3. In the US' own words, the Act plausibly guaranteed the Trust Funds, "thirty annual interest payments of $2.966,500 … and the $34.9 million in principal," even if Collier stopped paying. *Id*. at 2-3.

Instead, the recovery from *U.S. v. Collier*, about $48 million, of which ITCA's share is approximately $45.6 million, JSOUF ¶¶ 52-53, only included 5 required but unpaid Annual Payments, leaving ten $2.9 million Annual Payments unaddressed. To date, including the recovered amounts, the Trust Fund Payments have totaled approximately $91.5 million, which is

$30.4 million less than the $121.9 million minimum amount guaranteed the Trust Funds by the Act under the 30-year payment option.

Additionally, in exchange for the 30-year payment option, the Act required, in the form of the Annual Payments, that a minimum of 8.5% per annum be earned on $34.9 million for 30 years, *i.e.*, a minimum of $2.9 million per year for 30 years. Act § 403(c)(5). However, with respect to the $34.9 million Final Payment, the earnings on that approximate recovered amount have been less than the minimum 8.5 % annual rate of return on $34.9 million required by the Act for the full 30-year payment option time period. Pl.'s SOUF ¶ 117. Under the admittedly plausible reading of the Act, according to the US, "the Government [is] obligated to make up the difference between Collier's 8.5 percent interest and the rate it [has earned] … for the remainder of the thirty year period." May 1992 Memorandum 3.

CONCLUSION

For the reasons stated above and in ITCA's Opening Brief on Summary Judgment, ITCA is entitled to judgment as a matter of law on its remaining claims, and the US' summary judgment motion should be denied.

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Respectfully submitted,

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