

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

**DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY  
JUDGMENT ON REMAINING CLAIM I ALLEGATIONS**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
INTRODUCTION .....	1
BACKGROUND .....	3
ARGUMENT .....	7
I.    ITCA Has Not and Cannot Establish That It Has Standing To Pursue Its Remaining Claim I Allegations .....	8
A.    ITCA Misconstrues Its Burden at This Stage .....	9
B.    ITCA Has Suffered No Ongoing, Cognizable Harm from the Alleged Breaches That Is Traceable to the United States and Redressable by This Court.....	11
II.    The Court Must Deny ITCA’s Relitigation Effort .....	16
III.    ITCA’s Evidentiary Challenges Merely Distract from the Undisputed Facts Establishing the United States’ Entitlement to Summary Judgment .....	17
CONCLUSION.....	21

## TABLE OF AUTHORITIES

### Cases

<i>Animal Legal Def. Fund v. Quigg</i> , 932 F.2d 920 (Fed. Cir. 1991) .....	14
<i>Fletcher v. United States</i> , 26 F.4th 1314 (Fed. Cir. 2022) .....	11
<i>Inter-Tribal Council of Arizona, Inc. v. United States</i> , 140 Fed. Cl. 447 (2018) .....	14
<i>Inter-Tribal Council of Arizona, Inc. v. United States</i> , No. 15-342, 2023 WL 4881967 (Fed. Cl. Aug. 1, 2023) .....	2, 6, 7, 9, 10, 11, 14, 15, 16, 17
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992) .....	9
<i>Confederated Tribes &amp; Bands of Yakama Nation v. Klickitat Cnty.</i> 1 F.4th 673 (9th Cir. 2021) .....	17
<i>Optium Corp. v. Emcore Corp.</i> , 603 F.3d 1313 (Fed. Cir. 2010) .....	20
<i>Outside the Box Innovations, LLC v. Travel Caddy, Inc.</i> , 695 F.3d 1285 (Fed. Cir. 2012) .....	17
<i>Round Valley Indian Tribes v. United States</i> , 97 Fed. Cl. 500 (2011) .....	11
<i>Spokeo, Inc. v. Robins</i> , 578 U.S. 330 (2016) .....	8
<i>Inter-Tribal Council of Arizona, Inc. v. United States</i> , 956 F.3d 1328 (Fed. Cir. 2020) .....	5, 7, 14
<i>White Mountain Apache Tribe v. United States</i> , No. 17-359 L, 2018 WL 11365074 (Fed. Cl. Jan. 5, 2018) .....	10

### Statutes

Public Law 100-696, 102 Stat. 4577 (November 18, 1988) .....	3
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**DEFENDANT’S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY  
JUDGMENT ON REMAINING CLAIM I ALLEGATIONS**

The United States respectfully submits this reply supporting partial summary judgment (ECF No. 155) against the remaining Claim I allegations in the Second Amended Complaint. These allegations assert that the United States maintained insufficient security, relative to a defined “release level amount,” in a trust estate held for the benefit of plaintiff, the Inter Tribal Council of Arizona (ITCA), and non-party Navajo Nation at various points in time prior to the United States’ recovery of \$48 million on behalf of these trust beneficiaries. But ITCA has identified no uncompensated injury due to the alleged breaches, in part because the \$48 million recovered by the United States remedied any harm that ITCA could have suffered as a result of the remaining claims. Moreover, ITCA’s arguments about missed interest payments are negated as a matter of law: the United States is not liable for any such payments that were the obligation of a third-party. With no cognizable harm remaining, ITCA lacks standing to pursue its remaining claims. The Court should, therefore, grant summary judgment for the United States.

**INTRODUCTION**

As this Court is aware, ITCA initiated this lawsuit nearly a decade ago after the United State sued Barron Collier Co. (Collier) when it ceased to pay on its \$34.9 million obligation to

the United States. Congress had dedicated the proceeds of the Collier funds to ITCA and the Navajo Nation. After ITCA brought this suit, the United States successfully enforced its contract with Collier, known as the Trust Fund Payment Agreement (TFPA), and recovered \$48 million, which proceeds were properly credited to trust accounts for ITCA and the Navajo Nation. Thus, over the course of the TFPA, ITCA received its share of Collier's \$34.9 million principal obligation with accrued interest, plus \$42 million in annual interest payments that Collier had paid prior to its breach, representing the full value of what was required to be held in trust pursuant to the TFPA.

Now, following decisions by this Court and the Federal Circuit rejecting ITCA's efforts to impose a greater obligation on the United States than either the TFPA or the authorizing statute require, it is irrefutable that "[ITCA] is in no way entitled to recover" from the United States ten \$2.9 million annual interest payments that Collier was scheduled to make. *Inter-Tribal Council of Arizona, Inc. v. United States*, No. 15-342, 2023 WL 4881967, at \*5 (Fed. Cl. Aug. 1, 2023). That left only a narrow set of Claim I allegations concerning the amount of collateral held by the United States prior to Collier's now-compensated breach. But the remaining claims are bereft of any compensable injury.

These leftover claims must therefore be dismissed for lack of standing. Having received its rightful share of the recovery from the *Collier* suit, ITCA has not and cannot identify any cognizable, uncompensated injury arising from the surviving claims. Rather than meaningfully confront this issue, ITCA futilely persists with its rejected theory that the United States is liable for failing to secure, and later recover, all thirty interest payments that Collier was scheduled to make. But this Court and the Court of Appeals have already foreclosed this theory by law of this case. Beyond that pointless effort, ITCA says next to nothing about the Claim I allegations that

actually remain in this litigation: ITCA never explains how it was harmed by the United States’ supposed failure to hold adequate security in the Trust Estate throughout the life of the TFPA given the United States’ ultimate recovery against Collier. Indeed, the *only* harm ITCA identifies is the loss of Collier’s scheduled interest payments. This harm arises not from the remaining allegations about the amount of collateral held at any given moment, but from ITCA’s erroneous insistence that the United States must compensate ITCA for Collier’s “unpaid” interest payments. Because ITCA offers no plausible evidence of injury arising from its last allegations in Claim I, the Court may enter summary judgment for lack of standing and does not need to make any factual finding as to whether any of ITCA’s last alleged breaches in Claim I actually occurred. In short, with no concrete injury remaining, no justiciable claim exists.

The Court should thus grant the United States’ Motion for Partial Summary Judgment.

## **BACKGROUND**

The parties agree that the facts material to resolving ITCA’s remaining Claim I allegations are undisputed. They need little review here.

In 1988, Congress passed the Arizona-Florida Land Exchange Act (Act). 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 elected to pay the \$34.9 million over thirty years with annual interest payments at a minimum rate of 8.5 percent, as it was statutorily authorized to do.

In accordance with the Act’s directive to “hold in trust the security provided in accordance with the Trust Fund Payment Agreement,” Act, Sec. 405(c)(2), the Secretary of the

Interior and Collier executed a trust fund payment agreement (TFPA), with accompanying instruments, including a Deed of Trust, under which Collier's payments would be made.

According to the TFPA, Collier provided collateral to a "Trust Estate" that secured its payment 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' collateral, which the United States was required to grant so long as the value of the remaining property (the "Unreleased Property") in the Trust Estate exceeded 130 percent 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 (i.e., the remaining collateral exceeded 130 percent of the Release Level Amount). Once Collier received its first partial release, it had an ongoing affirmative obligation to maintain the value of the Trust Estate at 130 percent of the Release Level Amount as required by the Deed of Trust's "Maintenance of Collateral Value" provision.

In December 2012, after fifteen years of timely 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 below the required amount. The United States demanded that Collier comply with its payment and collateral maintenance obligations under the TFPA, and then sued Collier in Arizona federal court, seeking specific performance of the Deed of Trust's Maintenance of Collateral Value provision. The United States prevailed on summary judgment and thereafter reached settlement

with Collier that had 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 percent of the Release Level Amount accounting for all accrued interest Collier had not paid.<sup>1</sup> From this recovery and all fifteen years of payments Collier had made since 1997, ITCA has received nearly \$88 million on its share of Collier's \$34.9 million obligation.

Against this backdrop and years of dispositive motions and an appeal, only a narrow set of Claim I allegations have survived dismissal. The litigation history, however, affects the contours of these claims. The Federal Circuit affirmed Judge Firestone's rejection of ITCA's claim, presented in Claim II of the Second Amended Complaint, that the United States had a duty to "collect, deposit, or make" payments that Collier itself failed to make under the TFPA. *Inter-Tribal Council of Arizona, Inc. v. United States*, 956 F.3d 1328, 1344-45 (Fed. Cir. 2020) (*Circuit Opinion*) (explaining that this claim was not "support[ed] in the [Act], case law, or otherwise."). The Federal Circuit also largely affirmed Judge Firestone's dismissal of Claim I of the Second Amended Complaint, including ITCA's challenges to the TFPA itself. The Federal Circuit held that such challenges were time-barred and stated that they were also not "support[ed] in the [Act], case law, or otherwise." *Id.* On remand, this Court explained that the Federal Circuit left open only the following Claim I allegations:

- That the United States did not hold sufficient security to grant Collier's lien release requests in 1997 and 2007 relative to the defined Release Level Amount;
- That the United States failed to act in response to the economic downturn in 2008;

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<sup>1</sup> 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, totaling some \$14,832,500, that had come due but gone unpaid at the time of the July 2017 settlement, less the value of the Annuity at that time (\$13.5 million) and any government-backed securities (\$0). And 130 percent of \$36,232,500 is \$47.1 million.



- That the United States lacked sufficient security in the Trust Estate in 2012, relative to the Release Level Amount, when Collier stopped making payments.

*Inter-Tribal Council of Arizona, Inc. v. United States*, No. 15-342, 2023 WL 4881967, at \*7-8 (Fed. Cl. Aug. 1, 2023) (*Summary Judgment Order*) (citing SAC ¶¶ 260-263).

This Court also reiterated, in granting in part the United States’ previous cross-motion for summary judgment and denying ITCA’s cross-motion reasserting that the United States was obligated to secure and recover all thirty years of interest payments Collier was scheduled to make under the TFPA, that the United States has “no obligation” to make up Collier’s payment obligations. *Id.* at \*8. This Court correctly explained that ITCA’s trust theory was “illogical,” *id.* at \*4, would render the Federal Circuit’s decision “academic,” *id.*, and was “redundant” of already dismissed claims, *id.* at \*7. ITCA’s efforts to recover further interest payments were thus “considered and rejected,” and this Court held that ITCA “cannot recover these payments under the remaining portion of Claim I.” *Id.* at \*6. Put bluntly, “[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 then delineated which Claim I allegations were dismissed:

- That the United States executed a TFPA that did not adequately secure Collier’s payment obligations and incentivized Collier’s breach (SAC ¶ 255);
- Alternatively, United States’ subsequent interpretation and application of the TFPA failed to comply with the Act’s security requirements and incentivized Collier’s breach (SAC ¶ 256);
- The TFPA failed to secure all thirty years of interest payments (SAC ¶ 257);
- In particular, “accrued interest” was not clearly defined to mean all thirty years of interest payments (SAC ¶ 258);
- The United States’ failure to negotiate a TFPA that secured all thirty years of interest payments was a breach of its statutory trust obligations (SAC ¶ 259);

- The United States’ failure to recover from Collier all thirty years of interest payments was a breach of its statutory trust obligations (SAC ¶ 264); and
- 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 (SAC ¶ 267).

*Id.* at \*7. Against this backdrop, the parties present their pending cross-motions.

### ARGUMENT

Notwithstanding ITCA’s ad nauseum protests about the security obtained under the TFPA and that the United States is liable for ten interest payments Collier was scheduled to make, the parties’ competing motions for summary judgment must be judged by what has already been decided: the United States has “no obligation,” *Summary Judgment Order*, 2023 WL 4881967, at \*9, under any theory, to satisfy Collier’s payment obligations. Not under a “duty to collect” theory, *Circuit Opinion*, 956 F.3d at 1344-45, nor a trust theory tethered to any alleged inadequacies of the TFPA’s terms or the United States’ enforcement thereof. *Summary Judgment Order*, 2023 WL 4881967, at \*1, 6-9.

Only a narrow set of Claim I allegations survive the Federal Circuit ruling, and each of them focuses on an alleged insufficient security in the Trust Estate at several points of time before Collier breached its payment obligations, including when the United States granted lien releases to Collier. This Court indicated that it likely needed additional facts relating to the value of the Trust Estate at relevant times compared to the Release Level Amount; the United States’ actions to preserve the value of the Trust Estate; as well as the extent of any resulting harm to ITCA. What the Court could not anticipate, however, is that additional facts are not needed to dispose of these last remaining claims, because ITCA can offer no evidence of a concrete, uncompensated harm sufficient for continued standing under Claim I.

The absence of injury is plain from ITCA's recent briefing. Once again, ITCA stakes its briefing on its rejected contention that the United States had to secure and recover all thirty years of interest payments from Collier. Despite the Court's invitation, ITCA presents no evidence to rebut the United States' showing that sufficient collateral existed at the time to grant both of Collier's lien release requests. Nor does ITCA even address the question that has been looming since ITCA received its share of the *Collier* settlement: What harm, if any, does ITCA still suffer that is traceable to the United States and redressable by this Court?

The answer is none. ITCA's *only* identifiable harm is the loss of ten interest payments Collier was scheduled to make—payments that this Court and the Court of Appeals have said ITCA cannot recover from the United States. Sidestepping any actual development of its remaining Claim I allegations, ITCA clings to its dismissed allegations; recycles rejected theories; misapplies the standing standard of review; and volleys distracting, irrelevant arguments. ITCA simply cannot fulfill its burdens in this litigation, either to prove the merits of its surviving claims or to show that standing exists to continue any pursuit of these claims.

For these reasons, the United States is entitled to summary judgment on the remaining Claim I allegations.

**I. ITCA Has Not and Cannot Establish That It Has Standing To Pursue Its Remaining Claim I Allegations**

ITCA bears the burden of establishing that it has “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). The parties agree that the Court should review the United States' standing challenge under the summary judgment standard captured in RCFC 56. US Response (ECF No. 160), p. 12; ITCA Response (ECF No. 162), p. 3. Pursuant to this standard, ITCA “can no longer rest on [] mere factual

allegations” “but must set forth by affidavit or other supporting evidence specific facts” establishing the elements of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 556 (1992); *Summary Judgment Order*, 2023 WL 4881967, at \*6 (dismissing at summary judgment ITCA’s claim that the United States breached a duty to hold the annuity at a private bank, rather than at Treasury, because ITCA failed to prove harm).

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. ITCA has not and cannot articulate how it remains harmed by the remaining allegations when it has already received the full benefit of what the TFPA required of the United States. More important, ITCA provides no specific facts, supported by admissible evidence, establishing that such harm does, in fact, exist. ITCA’s only identified harm is the loss of ten “unpaid” interest payments that Collier was to pay under the TFPA—damages that do not arise from the surviving allegations but instead from dismissed claims. But even this imagined injury is traceable to Collier’s conduct, not to the United States’ actions. The prerequisites for standing are plainly missing.

Accordingly, ITCA’s claims must be dismissed.

#### **A. ITCA Misconstrues Its Burden at This Stage**

Despite agreeing that Rule 56 governs whether it has standing to pursue the remaining Claim I allegations, ITCA Response, p. 3, ITCA fails to apply or meet this standard. As this Court correctly recognized in dismissing ITCA’s claim that the United States breached a duty to “hold and manage the Trust Estate” at Treasury, *Summary Judgment Order*, 2023 WL 4881967, at \*6, this standard demands dismissal where the plaintiff fails to establish, with reference to specific facts supported by admissible evidence, “how it was harmed.” *Id.*

Yet ITCA’s briefing never develops the surviving Claim I allegations beyond what is

pled in its complaint. ITCA offers *no* evidence showing any injury it is suffering because of the remaining alleged breaches, as explained further below. Instead, ITCA merely offers boilerplate language regarding the standing requirements at the *pleading* stage:<sup>2</sup>

- “[W]hen deciding standing, court must accept as true all material allegations of the complaint.” ITCA Response, pp. 5, 16 (internal quotations omitted);
- “ITCA’s allegations comport” with this Court’s case law. *Id.* p. 6;
- “ITCA properly alleges a suffered injury in fact[.]” *Id.* p. 7.

ITCA then invokes case law reviewing standing at the pleading phase, *e.g.*, ITCA Response, p. 5 (*citing White Mountain Apache Tribe v. United States*, No. 17-359 L, 2018 WL 11365074, at \*10 (Fed. Cl. Jan. 5, 2018)), and generally relies on the allegations in its complaint to support standing—many of which relate to dismissed claims. For example, ITCA:

- Cites now-rejected allegations related to United States’ purported duty to secure all thirty years of interest payments, ITCA Response, p. 6;
- Recites dismissed allegations and asserts that the United States’ recovery is insufficient because it “has not made [the] Trust Fund whole as required by the Act,” *id.* p. 7;
- Argues that alleging a monetary injury in the form of the unpaid payments owed by Collier is sufficient to establish an injury in fact, *id.* p. 8; and
- Contends that allegations that ITCA has not received what it believes it is owed under the Act is sufficient to establish standing, *id.* p. 9.

Notwithstanding that such allegations are irrelevant to the surviving claims of breach, allegations alone are insufficient to establish standing under Rule 56.

ITCA also asserts that it must “simply show the existence of a trust relationship with the government” to have standing. *Id.* p. 5 (internal quotations omitted). ITCA is mistaken. While

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<sup>2</sup> Indeed, ITCA’s briefing is comprised primarily of conclusory statements and parentheticals with minimal engagement with or analysis of the actual facts or remaining legal issues.

the existence of a trust relationship with the United States is a jurisdictional component of a tribal trust case, *Fletcher v. United States*, 26 F.4th 1314, 1322 (Fed. Cir. 2022), this does not relieve ITCA of its burden to establish the essential elements of standing—injury, causation, and redressability—supported by admissible evidence at this stage. Indeed, as noted above, this Court has already dismissed one of ITCA’s claims for lack of standing because ITCA failed to establish how it was harmed by the United States’ alleged breach. *Summary Judgment Order*, 2023 WL 4881967, at \*6; *see also Round Valley Indian Tribes v. United States*, 97 Fed. Cl. 500, 510 (2011) (applying essential elements of standing to Tribe in trust case).

ITCA cannot bypass its burden to establish the elements of standing with admissible evidence by invoking inapposite legal standards and relying on allegations alone.

**B. ITCA Has Suffered No Ongoing, Cognizable Harm from the Alleged Breaches That Is Traceable to the United States and Redressable by This Court**

ITCA has not and cannot satisfy the essential elements of standing. No identifiable injury, traceable to the United States and redressable by relief from this Court, exists.

First, ITCA fails to identify any concrete, ongoing harm arising from its supposed remaining breaches: that the United States released liens to Collier without adequate security and thereafter allowed the Trust Estate to become undercollateralized. Given the indisputable reality that the United States ultimately recovered \$48 million on behalf of the trust beneficiaries—a sum in excess of the amount of collateral required to be held in trust—it is unfathomable what harm ITCA could possibly be suffering as a result of any temporary decline in the estate’s value.

Rather than identifying any such harm, ITCA reverts to maintaining that its harm arises from the very conduct for which this Court and the Federal Circuit have already determined the United States has no liability: the failure to secure and later recover “all required but unpaid Trust Fund Payments” from Collier. ITCA Response, p. 9. This harm is plainly anchored to

ITCA's mistaken belief that the United States is on the hook for ten payments that were not paid by Collier or captured in the *Collier* settlement. But that belief is untenable in light of the law of this case and says nothing about "whether and to what extent" ITCA remains harmed by its few surviving claims. ITCA cannot meet its burden of establishing standing when its only identified, alleged harm arises from its misguided, now firmly rejected, premise.

It is telling that ITCA has very little to say about those few Claim I allegations that actually remain: that the United States lacked sufficient security in the Trust Estate, relative to the Release Level Amount, when it granted Collier's lien release requests and leading up to Collier's breach. With respect to these claims, ITCA merely rests on its allegations of what ITCA believes the United States' duties were (for example, to perform independent appraisals prior to granting the lien releases and to provide notice to ITCA of the lien releases) and how the United States breached those duties. ITCA Response, p. 10. It offers no actual evidence of breach,<sup>3</sup> but even if it could, these allegations offer nothing about any harm potentially suffered by ITCA as a result of the breaches, let alone establish that a harm actually exists. ITCA simply fails to identify any harm suffered by the United States' grant of the lien releases, its reliance on the Collier's appraisals, or its failure to demand additional security sooner or to provide notice to ITCA, given the ultimate recovery against Collier. The harm repeatedly identified by ITCA—ten interest payments owed by Collier—does not arise from any purported, temporary deficiency in the Trust Estate and is not recoverable from the United States.

The undisputed facts instead establish that no uncompensated harm exists arising from the surviving allegations. The \$48 million recovered by the United States exceeded the required

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<sup>3</sup> ITCA's failure of proof is addressed more specifically below and in the United States' Response, ECF No. 160, p. 24-29.

value of the Trust Estate, which was \$47.1 million at the time of the United States' settlement with Collier. This recovery placed ITCA in the same position it would have been had the Trust Estate been adequately collateralized during every moment of its operation. The remedy at any point when the value of the collateral fell below 130 percent of the Release Level Amount, following the first lien release, was to demand more security from Collier to bring the Trust Estate back to this level. That occurred upon settlement with Collier, and ITCA has not demonstrated that it would have been entitled to any different or greater recovery due to a hypothetical dip in the collateral value at any other time. Whether the collateral value dipped intermittently at any earlier point is immaterial, for ITCA can show no other harm. Through the United States' efforts against Collier, ITCA received its share of the \$34.9 million from Collier, with accrued interest. The United States recovered what would have been held in trust had it been adequately secured all along, and cured any potential temporary harms that could have arisen from how the value of the collateral was monitored or maintained at any given time.

ITCA's "causation" argument likewise must fail. ITCA asserts that the United States is at fault for its alleged harm—the loss of the future interest payments—because “the US as trustee failed to secure properly and fully the unpaid Trust Fund Payments . . . which consisted of the thirty \$2.9 million Annual Payment[s].” ITCA Response, p. 12. ITCA even concedes that “the gist” of its remaining claims is “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[.]” *Id.* p. 13. ITCA again contends that it “[sh]ould not matter to the Trust Funds if Collier did not pay; they [sh]ould still receive the full congressional guarantee via the fulfillment of the United States' duties.” *Id.* p. 14. But every Judge considering ITCA's recycled argument has rejected it: Congress did not make the United States guarantor of Collier's



payments. *Circuit Opinion*, 956 F.3d at 1344-45; *Summary Judgment Order*, 2023 WL 4881967, at \*1, 6-9; *Inter-Tribal Council of Arizona, Inc. v. United States*, 140 Fed. Cl. 447, 458 (2018).

The only trust duty regarding proceeds from the Collier financing was the United States’ obligation to deposit what was received into ITCA’s trust account for education, *Circuit Opinion*, 956 F.3d at 1344-45, which is not in dispute here.

ITCA’s remaining conclusory statements of causation—for example, that the United States’ lack of independent appraisals or quicker demands to Collier “establish a causal connection” between ITCA’s loss of the payments and the United States’ alleged breaches, ITCA Response, p. 12-13—are offered without a scintilla of evidence that links the alleged inactions to the alleged harm. Such statements, unsupported by the standard for determining standing at the summary judgment stage, cannot withstand the United States’ motion. *See also id.*, p. 25 (arguing without evidence that the United States’ “imprudent actions and failures encouraged Collier to stop making payments”). And, as explained in the United States’ motion, ECF No. 155, pp. 28-29, any argument that the United States’ actions could have facilitated Collier’s breach of its payment obligations is “speculative at best” and cannot establish injury or traceability. *Animal Legal Def. Fund v. Quigg*, 932 F.2d 920, 933 (Fed. Cir. 1991).

Finally, ITCA has not established that any injury is redressable by relief from this Court. ITCA maintains that awarding a sum equal to the ten interest payments owed by Collier would redress its injury. But this position wholly ignores decisions by this Court and the Federal Circuit that ITCA is *not* entitled to recover such funds from the United States. ITCA cannot square its requested relief with the law of this case that the United States is not liable for Collier’s payment obligations. Additionally, ITCA’s conclusory assertion that the Court must “accept[] as true” its allegation that the “*U.S. v Collier* recovery has not made its Trust Fund whole” ignores the

standard of review at this stage as well the limitations on the relief this Court may grant to ITCA.

ITCA's contention that "no prior decisions in this litigation preclude ITCA's remaining claims," ITCA Response, p. 15, is simply wrong. ITCA maintains that its surviving claims include "whether the Act required the US to hold in trust security for all required but unpaid Trust Fund Payments." In asserting as much, ITCA cherry-picks portions of this Court's Summary Judgment Order and entirely ignores critical aspects of the law of this case. *See generally* ITCA Response, pp. 15-17. ITCA refuses to accept that it cannot recover Collier's unpaid obligations from the United States; that this Court has already concluded that ITCA's attempt to recover such payments under a trust maintenance theory was "redundant" of its previously rejected "duty to collect" theory; that its challenges to the terms of the TFPA and the United States' interpretation thereof have all been dismissed; and all that remains is whether there was adequate security in the Trust Estate at various times, relative to the Release Level Amount,<sup>4</sup> and whether and to what extent ITCA suffered from any temporary deficiency in the Trust Estate. Its stubborn insistence that the United States is liable for failing to secure and recover all interest payments is nonsensical when held against this reality. That this Court left open the question of "whether and to what extent" ITCA remains harmed by the alleged breaches related to the United States' maintenance of the Trust Estate, as alleged in paragraphs 260 through 263 of the Second Amended Complaint, does not absolve ITCA of its burden to show a resulting cognizable harm that has never been compensated.

For these reasons, ITCA has fallen short of its burden to establish the essential elements of standing. Accordingly, the remaining Claim I allegations must be dismissed.

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<sup>4</sup> ITCA's briefing omits any mention of this Court's determination that the relative value of the Trust Estate is dependent on the Release Level Amount. *Summary Judgment Order*, 2023 WL 4881967, at \*9.

## II. The Court Must Deny ITCA's Relitigation Effort

Rather than confront the United States' standing challenge or advance arguments establishing the viability of its remaining Claim I allegations, ITCA again devotes its briefing to relitigating dismissed theories and claims. Notwithstanding that the Federal Circuit and this Court have unequivocally rejected ITCA's contentions that the United States must come through on ten interest payments Collier was scheduled to make, and expressly dismissed the allegations challenging the security obtained pursuant to the TFPA and the subsequent recovery received pursuant thereto, ITCA refuses to accede to these rulings and unabashedly maintains that:

- “[T]he Act unambiguously required the US to hold in trust security required for all required but unpaid Trust Fund Payments[.]” “the US failed to hold sufficient security for all required but unpaid Trust Fund Payments[.]” and the Act requires 30 years of annual payments[.]” ITCA Response, p. 1; *see also id.* pp. 18, 19.
- The United States chose to “hold less security” than “the Act allowed” and “did not recover from Collier all required but unpaid Annual Payments.” ITCA Response, p. 2.
- “The Act mandates that the US hold in trust security for the 30-year payment option.” *Id.* p. 18;
- “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[.]” *Id.*, p. 19.
- “Under the Act’s 30-year payment option, the US should have sought to recover all required but unpaid remaining Annual payments.” *Id.*, p. 29; *id.* (arguing that the United States misinterpreted “accrued interest” in the TFPA).
- “The US’ interpretation [of the Act] eliminates the clear requirements in the Act of thirty Annual Payments[.]” and “[t]he Act unambiguously required the US to secure all required but unpaid Trust Fund Payments.” *Id.* p. 24 (emphasis in original).
- “[T]he 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[.]” *Id.* p. 29-30.
- “[T]he recovery from *U.S. v. Collier* . . . only included 5 required but unpaid Annual Payments, leaving ten \$2.9 million Annual Payments unaddressed.” *Id.* p. 30.

ITCA's arguments are directly at odds with this Court's unequivocal confirmation that

“[ITCA] is in no way entitled to recover from the [United States] the \$2.9 million annual interest payments under Claim I.” *Summary Judgment Order*, 2023 WL 4881967, at \*5. The assertions quoted above fall entirely within ITCA’s dismissed claims and ignore the law of this case: the United States is under “no obligation” to make up “unpaid” payments that Collier was scheduled to make. *Id.* at \*4. Given that the United States is, as a matter of law, not responsible to make up for Collier’s missed payments, and that ITCA’s challenges to the adequacy of the TFPA (SAC ¶¶ 255-59) and the *Collier* recovery (SAC ¶ 264), have been dismissed, ITCA has *no* basis for these arguments. This Court should not entertain ITCA’s failed arguments offered in disregard of the Court’s decisions and holdings of the Federal Circuit. Instead, the Court ought to reject outright ITCA’s parroting of its extinguished legal theories.<sup>5</sup> *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). ITCA’s “claim to recover the value of all Collier’s outstanding \$2.9 million annual payments” from the United States has already been “considered and rejected,” *Summary Judgment Order*, 2023 WL 4881967, at \*6, and the Court need not conduct this review again.

### **III. ITCA’s Evidentiary Challenges Merely Distract from the Undisputed Facts Establishing the United States’ Entitlement to Summary Judgment**

ITCA’s challenges to the sufficiency of the United States’ evidence, specifically deposition testimony of Interior officials and other materials from the *Collier* litigation reflecting

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<sup>5</sup> Additionally, as explained in the United States’ Response, ECF No. 160, pp. 21-23, ITCA’s belated invocation of the Indian Canons 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. ITCA does not contend that the Act is ambiguous and so should not be permitted to cloud the remaining issues by injecting a new, yet ultimately unpersuasive, argument.

the United States' evaluation of the lien release requests and performance of the TFPA, ITCA Response p. 11, are unavailing. ITCA never advances a cogent argument as to how its evidentiary challenges undermine the United States' entitlement to summary judgment (or conversely bolsters ITCA's entitlement), but the United States nonetheless responds as follows.

First, the United States' motion does not turn on the disputed evidence. The following facts are undisputed—indeed, they are established by the parties' joint factual stipulations.

- In 1997, Collier submitted its first lien release request under section 6.2(a) of the Deed of Trust, seeking to obtain a partial reconveyance of the lien on its east side downtown lot. J-SOF ¶¶ 18, 19.
- Collier submitted a certified appraisal with this lien release request, valuing the Unreleased Property at \$63,923,00. J-SOF ¶ 20.
- At that time, the unpaid Principal Amount was \$34.9 million. J-SOF ¶ 23.
- The United States granted the lien release request in 1998 based on the \$63,923,00.00 value of the appraised, unreleased property. J-SOF ¶¶ 20, 21.
- In 2007, Collier requested a second lien release under section 6.2(a) of the Deed of Trust, seeking to obtain a partial reconveyance of the lien on its east side downtown lot. J-SOF ¶¶ 26-27.
- Collier submitted a certified appraisal with this lien release request, valuing the Unreleased Property at \$48 million. J-SOF ¶ 28.
- At that time, the value of the Annuity was \$7.446 million, and the amount of the unpaid Principal Amount was \$34.9 million J-SOF ¶¶ 31-32.
- The United States granted the lien release request in 2007 based on the \$48 million value of the appraised property. J-SOF ¶¶ 28-29.

Simple math, based on these facts, shows that sufficient collateral remained in the Trust Estate to grant the lien releases. For example, in 2007, 130 percent of the Release Level Amount would have been \$39.55 million;<sup>6</sup> the \$45 million value of the Unreleased Property clearly

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<sup>6</sup> The Release Level Amount in 2007 was approximately \$30.42 million (\$34.9 million + \$2.9665 million - \$7.446 million = \$30.42 million. 130% of that amount was approximately

exceeded that. Likewise, the \$63 million value of the Unreleased Property in 1997 exceeded 130 percent of the Release Level Amount, which would have been, at most, \$49.23 million at that time.<sup>7</sup> The *Collier* materials merely lend additional support to the parties' stipulated facts.

To the extent ITCA is maintaining that the Court should interpret "accrued interest" to mean all thirty years of interest payments, that position is baseless.

The facts stipulated to and the evidence presented by the parties establish that "accrued interest" has always been afforded its ordinary, commercial meaning. ITCA even agrees that while accrued interest is undefined in the Deed of Trust, the United States, when measuring the value of the Release Level Amount at various points in time, interpreted this term as interest earned each year but not yet paid. J-SOF ¶¶ 13, 14. This is reflected by both lien releases and the United States' recovery action against Collier. The releases were never contingent on the value of Unreleased Property exceeding 130 percent of a Release Level Amount based on interest payments that would come due in the *future*—which would have required the Unreleased Property in 2007, for example, to be worth approximately \$113 million.<sup>8</sup> And ITCA agrees that the United States sought to recover in the litigation against Collier the years of interest payments that had come due but gone unpaid. J-SOF ¶ 48. ITCA offers no evidence that Interior ever intended accrued interest to have a broad meaning or subsequently interpreted it that way.

Moreover, ITCA's challenge to the TFPA for failing to define accrued interest, as well as

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\$39.55 million (\$30.42 million x 130%).

<sup>7</sup> The Release Level Amount in 1997 was, at most, \$37.87 million (\$34.9 million + \$2.9665 million - \$0 annuity) (notwithstanding that the parties stipulated to one annuity payment of unknown amount having been paid at that time, J-SOF ¶ 24). 130% of that amount is approximately \$49.23 million (\$37.96 million x 130%).

<sup>8</sup> Basic math proves the extravagance of ITCA's assertion: 130% x (\$34.9 million + \$59.33 million [20 interest of future interest payments] - \$7.446) = \$112.82 million.

ITCA's attack on Interior's interpretation of the TFPA, have been dismissed. No claims survive on which ITCA can assert that "accrued interest" in the TFPA means all thirty interest payments.

Additionally, as outlined in the United States' Response, ECF No. 160, pp. 27-29, ITCA—which elected not to conduct any discovery in this case after nine years of litigation—offers no evidence showing that insufficient security existed in the Trust Estate to grant either lien release, or at any other relevant point in time prior to the United States' successful enforcement of the TFPA against Collier. Nor does ITCA challenge the accuracy of the appraisals presented by Collier. The undisputed evidence—the 1997 and 2007 appraisals—shows that the appraised value of the Unreleased Property exceeded 130 percent of the Release Level Amount, accounting for accrued interest, at the time of both lien releases. ITCA's failure to offer evidence supporting its allegations that the Trust Estate's value was deficient is fatal to these claims. *Optium Corp. v. Emcore Corp.*, 603 F.3d 1313, 1320 (Fed. Cir. 2010).

Accordingly, the Court can readily conclude that the United States is entitled to summary judgment on ITCA's claims that there was insufficient security in the Trust Estate.

ITCA has now had numerous opportunities to show its remaining allegations have merit and to identify how it was harmed by these imagined breaches. ITCA has failed to do so. Instead, ITCA has simply chosen to spill more ink on unviable theories that cannot be reconciled with the law of this case. ITCA has now twice represented to the Court that it has all the material facts it needs and has voluntarily elected not to pursue discovery. The Court should accept that ITCA has presented its best case and not allow a further opportunity to prosecute these last parts of Claim I. To do so would just provide ITCA yet another chance to relitigate old claims, wasting the Court and the parties' resources.

## 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.

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Respectfully submitted,

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