

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.	)	

**MOTION FOR PARTIAL SUMMARY JUDGMENT**  
**ON REMAINING CLAIM I ALLEGATION**

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**MOTION FOR PARTIAL SUMMARY JUDGMENT**  
**ON REMAINING CLAIM I ALLEGATION**

This Motion seeks summary judgment in favor of the United States for the one remaining allegation asserted by the Inter-Tribal Council of Arizona, Inc. (ITCA) in Claim I of the operative complaint: “The United States’ failure to have sufficient security in the Trust Estate when Collier defaulted was a breach of trust in violation of the Act.” Second Amended Complaint, ¶ 263.

As this Court is well aware, ITCA sued the United States ten years ago, after the Barron Collier Co. (Collier) ceased paying on its 30-year, \$34.9 million obligation to the United States, the proceeds of which Congress dedicated to ITCA and nonparty Navajo Nation. That was before the United States successfully enforced its agreement with Collier and recovered \$48 million on behalf of ITCA (and Navajo Nation). It is undisputed that, from that recovery, the United States ensured that ITCA received its share of the Collier loan proceeds with accrued interest. Even before receiving its \$45.6 million share of the Collier recovery, ITCA had received over \$42 million from interest payments made by Collier, such that ITCA has already received nearly \$88 million on Collier’s \$34.9 million obligation.

Now, the parties return to this Court for their third round of summary judgment briefing. Only one narrow Claim I allegation remains, alleging that the United States is liable for more

damages because of the deficiency in the value of the collateral for Collier's debt, known as the Trust Estate, at the time Collier breached its payment obligations under its agreement with the United States. Through a series of dispositive motions and one appeal, the court has already rejected ITCA's claims that the United States is liable to make up for payments that Collier failed to pay; for agreeing with Collier to a level of collateral that secured principal and accrued interest but not all future interest; for granting partial, contractually-required lien releases to Collier in 1998 and 2007; and for failing to take action to have Collier boost the collateral in the Trust Estate during the 2007 economic downturn, before Collier ceased its payments.

This Court should now finally conclude that the United States has no further liability for any damages allegedly relating to a deficiency in the Trust Estate's collateral value when Collier breached. The undisputed record establishes that the United States discharged its duties under the governing act by ensuring that ITCA received its rightful share of the recovery against Collier. Nothing in the relevant statute obligated the United States to maintain the Trust Estate at a level sufficient to ensure ITCA received principal plus thirty years of interest payments, or to otherwise compensate ITCA for any delta between what it has already received and what Collier would have paid. ITCA cannot invoke common law to impose additional duties on the United States beyond those in the governing statute. Moreover, ITCA has not, will not, and cannot identify any specific, uncompensated harm it has sustained as result of the remaining alleged breach, for which the United States is liable. Despite numerous adverse rulings over ten years of litigation, ITCA continues to cling to a misguided theory that the United States is responsible for funds that the Act allegedly "guaranteed" ITCA. This theory has been expressly and firmly rejected by this Court and the Federal Circuit. With no viable theory for liability or damages, ITCA's remaining Claim I allegation must be dismissed.

Accordingly, under Rule 56 of the Rules of the United States Court of Federal Claims (RCFC), the United States respectfully requests partial summary judgment rejecting the breach alleged in paragraph 263 of the Second Amended Complaint.

### **QUESTION PRESENTED**

After ITCA initiated this lawsuit, the United States successfully enforced its Trust Fund Payment Agreement (TFPA) with Collier, recovering enough to satisfy the full \$34.9 million principal owed by Collier with accrued interest, according to the terms of the TFPA. ITCA has received its proper share of that recovery. Through successive dispositive motions, ITCA's complaint has pared to a single Claim I allegation: "The United States' failure to have sufficient security in the Trust Estate when Collier defaulted was a breach of trust in violation of the Act." Second Amended Complaint ¶ 263. ITCA insists that the United States was required to demand collateral from Collier sufficient to cover not only the \$34.9 million principal but also all of Collier's thirty years of interest payments, and that the failure to maintain that level of collateral entitles ITCA to recover from the United States the difference in the funds it has received and what it would have received had Collier paid the loan over thirty years. *See, e.g.*, ECF No. 170, Joint Status Report, pp. 3-4. But law of the case holds that the United States is neither a guarantor of Collier's payments nor under any obligation to make up any payments Collier missed. The governing statute imposes no duty on the United States to ensure that ITCA received compensation beyond what it has already received. The United States "owes no fiduciary duty to the tribes apart from its obligations under the [Arizona-Florida Land Exchange Act]." *Inter-Tribal Council of Ariz., Inc. v. Babbitt*, 51 F.3d 199, 203 (9th Cir. 1995).

One single claim remains, relating to the value of collateral (i.e., the Collier Trust Estate) at the time Collier breached the TFPA. Whether ITCA suffered any cognizable injury resulting from Collier's breach requires acknowledgment of the following: the Federal Circuit has held

that the United States is not responsible for Collier's payment obligations and barred ITCA from challenging the TFPA; this Court has dismissed ITCA's challenges to the United States' oversight of the Trust Estate in the years prior to Collier's breach; the TFPA did not make ITCA a third party beneficiary; and ITCA has already received its full share of the \$48 million recovered from Collier through the United States' successful enforcement of the TFPA. Accordingly, is the United States entitled to summary judgment given that no actionable duty existed to maintain the Trust Estate at a level sufficient to ensure ITCA received the full value of thirty interest payments that Collier was scheduled to make?

### **STATEMENT OF FACTS**

Despite the protracted nature of this litigation and its complex history, no disputes of material facts exist. The following summary covers the relevant background given the previous rulings in this case.

#### **I. Factual background**

##### **A. Congress approved the Act**

On November 18, 1988, Congress approved a complicated land exchange between the United States and Collier by passing the Arizona-Florida Land Exchange Act (Act), which was in Title IV of the Arizona-Idaho Conservation Act of 1988, Public Law No. 100–696, 102 Stat. 4571 (1988). Under the Act, the United States would acquire title to about 108,000 acres of wetlands in Florida, and Collier would receive federal land in Phoenix, Arizona commonly known as the Phoenix Indian School property. Act, Sec. 402; US-SOF<sup>1</sup> ¶¶ 1-3.

The Act required Collier to pay \$34.9 million to the United States because the Phoenix

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<sup>1</sup> The United States relies upon its Statement of Undisputed Material Facts (US-SOF), filed this same day, and the parties' Joint Statement of Undisputed Facts (J-SOF), filed on April 17, 2024. ECF No. 154.



Indian School property was worth more than the Florida land. US-SOF ¶ 4; *see also* Act, Sec. 402(h). The Act authorized the Secretary of the Interior to accept the \$34.9 million as either a lump sum payment or over thirty years with annual interest payments and a balloon payment of the principal in year thirty. Act, Sec. 403(b); US-SOF ¶¶ 5, 6. Under the thirty-year payment option, the Secretary was required to execute a Trust Fund Payment Agreement (TFPA) with Collier under which the annual interest payments were to be made to the United States. Act, Sec. 403(c)(4). The United States was also required to “hold in trust the security provided in accordance with the Trust Fund Payment Agreement.” Act, Sec. 405(c)(2); US-SOF ¶ 7. The Act does not require the United States to make any payments if Collier fails to make them. *Inter-Tribal Council of Ariz., Inc. v. United States*, 956 F.3d 1328, 1345 (Fed. Cir. 2020) (*Circuit Opinion*); *Inter-Tribal Council of Ariz., Inc. v. United States*, No. 15-342, 2023 WL 4881967, at \*4 (Fed. Cl. Aug. 1, 2023) (*Summary Judgment Order*). Nor does the Act impose liability on the United States if the TFPA did not collateralize all thirty years of Collier’s interest payments under the thirty-year payment option. *Summary Judgment Order*, 2023 WL 4881967, at \*7 (dismissing paragraphs 255 through 259 of ITCA’s second amended complaint attacking the TFPA as well as paragraph 264 challenging the United States failure to recover all thirty annual payments); Oral Arg. Tr. 42:17-21 (rejecting argument that all payments were “accrued” or “vested” at the outset of the TFPA).<sup>2</sup> The Act left this decision to the discretion of the Secretary. *Inter-Tribal Council of Ariz., Inc. v. Babbitt*, 51 F.3d 199, 203 (9th Cir. 1995) (*ITCA v. Babbitt*).

The Act directs that all of Collier’s payments be used to establish two Indian education trust accounts, the Arizona Inter-Tribal Trust Fund (Trust) and the Navajo Trust Fund (Navajo Trust), and it requires those trust funds to be used for specific educational and child-welfare

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<sup>2</sup> This refers to the oral argument transcript from August 7, 2024.

purposes. Act, Sec. 405. The Act specifies that 19 tribes belonging to ITCA are to receive 95 percent of all money paid by Collier. Act, Sec. 405(e); US-SOF ¶¶ 8-12.

**B. In accord with the Act, the United States executed a TFPA with Collier, and Collier made 15 years of payments as required**

The Secretary accepted Collier's request to make annual interest payments for thirty years, with a balloon payment of principal at year thirty. US-SOF ¶ 13. The United States and Collier executed the Trust Fund Payment Agreement on December 18, 1992, agreeing to a land exchange, loan repayment, and collateralization on the terms described therein. The arrangement between Interior and Collier under the Act uses three main instruments: the Trust Fund Payment Agreement, a Deed of Trust, and a Promissory Note, which constitute a part of the "Trust Fund Payment Agreement." US-SOF ¶¶ 14-15; J-SOF ¶¶ 1-2. ITCA is neither a party to nor a third-party beneficiary of any of these instruments. US-SOF ¶ 16.

The Promissory Note required Collier to pay thirty annual interest payments of \$2,966,500 (reflecting an 8.5% rate), and also to make thirty payments into a private annuity that was to equal the \$34.9 million principal sum at the end of the thirty-year term. US-SOF ¶¶ 17-18; J-SOF ¶¶ 3-4. The Promissory Note was secured by the Annuity and the "Trust Estate," that is, the collateral pledged for the loan. US-SOF ¶ 19; J-SOF ¶ 5. To secure the loan, Collier gave the United States a lien on the Phoenix Indian School property that Collier retained after consummating the exchange, as well as Collier's rights in two other Phoenix lots referred to as the "Downtown Lots."<sup>3</sup> US-SOF ¶ 28-29; J-SOF ¶ 6. The loan was also to be nonrecourse. US-SOF ¶ 20; J-SOF ¶ 7.

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<sup>3</sup> This initial collateral structure reflected a side deal that Collier made with the City of Phoenix, before consummating the transaction with the United States, to exchange part of the Indian School land for development rights in other lots owned by the City in downtown Phoenix. US-SOF ¶ 29.

The Deed of Trust required the United States to grant Collier's request for a lien release so long as the value of the remaining collateral in the Trust Estate ("Unreleased Property") exceeded 130% of a defined "Release Level Amount." US-SOF ¶ 21-24; J-SOF ¶¶ 8-11. The Release Level Amount is defined as: "(i) the unpaid principal plus accrued interest on the Promissory Note, less (ii) the value of United States Government-backed Securities and Deposited Monies held in the Trust Estate, and further less, . . . (iii) the fair value, at the time of the calculation, of the Annuity." US-SOF ¶ 25; J-SOF ¶ 12. Once Collier obtained a lien release, the Deed of Trust's "Maintenance of Collateral Value" provision imposed a continuing obligation on Collier to monitor the value of the collateral in the Trust Estate and to supplement this collateral if it fell below 130% of the Release Level Amount. US-SOF ¶¶ 26-27; J-SOF ¶¶ 15-17.

After consummation of the land exchange in December 1996, Collier began making its annual interest payments to Interior and deposits in the Annuity in December 1997. US-SOF ¶¶ 30-31. Collier made 15 annual interest payments, totaling \$44,497,500, without issue, from 1997 to 2011. US-SOF ¶ 32; J-SOF ¶ 36. The United States duly deposited 95 percent of those payments (\$42,272,625) into the Trust. US-SOF ¶ 33. Collier also made 15 required payments into the Annuity, totaling \$9,662,000 as of November 30, 2012. US-SOF ¶ 34.

**C. As required by the TPFA, the United States granted Collier's partial lien release requests in 1998 and 2007.**

Collier twice requested a release of lien, in 1998 and 2007, both of which the United States granted after reviewing certified appraisals because the value of the Unreleased Property exceeded 130 percent of the Release Level Amount. US-SOF ¶¶ 35-38, 41-44; J-SOF ¶¶ 18-24, 26-32; *see* ECF No. 167, Order (granting summary judgment for the United States on ITCA's challenges to the lien releases). The 1998 Lien Release triggered the Maintenance of Collateral

Value provision in the Deed of Trust, imposing a continuing, affirmative duty on Collier to monitor the value of collateral in the Trust Estate and to supplement it if it ever fell below 130% of the Release Level Amount. US-SOF ¶¶ 39, 45. After the second lien release, Collier continued to fulfill its payment obligations through 2011. US-SOF ¶¶ 40, 46; J-SOF ¶ 36.

**D. The United States successfully enforced the TPFA following the 2007 Lien Release and Collier's failure to fulfill its payment obligations in 2012**

Collier's annual interest and Annuity payments were due December 18 of each year, beginning in 1997. US-SOF ¶ 30. After 15 years of timely payments without incident, Collier did not make its annual payment in December 2012 and notified Interior in January 2013 that it did not intend to make further payments. Collier also stated that the value of the Phoenix Indian School property, previously appraised at \$48 million in 2007, had dropped to \$6 million as a result of the significant economic downturn in 2008. US-SOF ¶ 47; J-SOF ¶ 36-38.

Interior promptly demanded that Collier make its payments. Interior also noted that the value of the Unreleased Property appeared to be less than 130% of the Release Level Amount and demanded that Collier supplement the Trust Estate as required by the Maintenance of Collateral Value provision. US-SOF ¶¶ 48, 50; J-SOF ¶ 42.

Collier refused to comply, so the United States sued Collier in district court in Arizona in January 2014. The United States sought specific performance of the Deed of Trust's Maintenance of Collateral Value provision. US-SOF ¶ 51-52; J-SOF ¶¶ 44-45. Following discovery, the United States moved for summary judgment, explaining that 130 percent of the Release Level Amount at that time was \$43,485,224.<sup>4</sup> US-SOF ¶¶ 54-59; J-SOF ¶¶ 46-48.

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<sup>4</sup> This sum reflected the principal obligation (\$34.9 million) plus the accrued interest to date (\$11,866,000, *i.e.*, four years of missed annual interest payments), less the value of any government-backed securities in the Trust Estate (\$0) and the Annuity at that time. (\$13,315,828). US-SOF ¶¶ 55-59.

Because the value of the collateral in the Trust Estate was only \$25 million,<sup>5</sup> Collier was clearly in breach of its duties. US-SOF ¶ 60; J-SOF ¶ 48. The district court agreed and granted summary judgment in favor of the United States on June 29, 2016. US-SOF ¶¶ 61-62; J-SOF ¶ 17; *United States v. Barron Collier Co.*, No. CV-14-00161-PHX-PGR, 2016 WL 3537802, \*6, 9 (D. Ariz. June 29, 2016). The district court concluded that the Deed of Trust's Maintenance of Collateral provision imposed "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." *Collier*, 2016 WL 3537802, at \*9; US-SOF ¶¶ 61-62; J-SOF ¶ 17.

Collier and the United States thereafter executed a settlement on July 18, 2017, under which Collier surrendered the Phoenix Indian School parcel, the Annuity, and \$16 million cash to the United States. When the settlement took effect, the estimated gross recovery from Collier was \$54.5 million, consisting of \$16 million cash, \$13.5 million from the Annuity, and \$25 million based on the appraised value of the Indian School property. The United States General Services Administration (GSA) sold the Phoenix Indian School property for \$18.5 million, such that the total recovery from the settlement was just under \$48 million. After deduction for GSA's statutorily authorized administrative costs (\$77,902), 95% of the sale proceeds was deposited in trust for the benefit of ITCA. US-SOF ¶¶ 63-68; J-SOF ¶¶ 50-51.

ITCA's share of the settlement recovery is approximately \$45.6 million. US-SOF ¶ 69; J-SOF ¶ 52. In addition to the settlement recovery, ITCA previously received its share of the annual interest payments made by Collier from 1997 through 2011, totaling \$42,272,625.00,

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<sup>5</sup> The value of the Phoenix Indian School land was appraised at \$25 million in September 2015. US-SOF ¶ 53; J-SOF ¶ 49.

such that ITCA has received \$87,872,625 on Collier's \$34.9 million principal obligation. US-SOF ¶ 70.

## **II. The case's current posture**

### **A. ITCA's Complaint**

The operative complaint alleges three claims for breach of trust, filed after this Court dismissed, in part, ITCA's original complaint; dismissed ITCA's first amended complaint entirely; and permitted ITCA to file a second amended complaint to allege what claims survived the United States' settlement with Collier. ECF Nos. 22, 48, 58. The Second Amended Complaint (SAC), ECF No. 58, alleges that the United States breached the following duties:

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

As summarized below, prior decisions of this Court and the Federal Circuit have disposed of the Claim I and II allegations numbered 255 to 262 and 264 to 267, leaving only the Claim I allegation numbered 263.

### **B. This Court's Dismissal of Claims I and II and the Federal Circuit's Partial Affirmance**

On October 17, 2018, this Court dismissed Claims I and II and narrowed Claim III. ECF No. 69. The Court then entered partial final judgment on Claims I and II, allowing ITCA to appeal the dismissal of those claims to the Federal Circuit. ECF No. 84. The Court stayed Claim III pending resolution of Claim I. ECF No. 87.

The Federal Circuit affirmed this Court's dismissal of ITCA's claim alleging that the

United States had a duty to make up Collier's missed payments as well as ITCA's challenges to the TFPA, stating that neither claim was "support[ed] in the [Act], case law, or otherwise."

*Circuit Opinion*, 956 F.3d at 1344-45. The Federal Circuit also held that any challenges to the TFPA were time-barred, *id.*, and acknowledged the Ninth Circuit's decision shielding the Secretary's collateral decision from judicial review. *Id.* at 1334 n.5.

The Federal Circuit did, however, narrowly reverse one aspect of this Court's dismissal concerning ITCA's allegation that the United States breached a "duty to maintain" by failing to adequately preserve the value of the Trust Estate over time. The Federal Circuit stated that dismissal of this claim was premature "at this stage of the proceeding," *id.* at 1340, and refused to conclude that ITCA had not stated a claim for relief on this alleged breach of fiduciary duty. *Id.* at 1343. Whereas this Court held that the United States had discharged its duty by suing Collier to obtain additional security, the Federal Circuit determined that the Second Amended Complaint contained sufficient allegations relating to the United States' management of the trust property that, if proven, might show that the government breached a duty to preserve the Trust Estate. *Id.*

The Federal Circuit did not address what potential harm, if any, arose from the breaches as alleged, nor did that court address whether the recovery in the *Collier* litigation was sufficient to remedy any such harm. Instead, the Federal Circuit concluded that, because the government acknowledged that Collier's debt was under-collateralized and because the complaint alleged injury due to under-collateralization stemming from the government's alleged breach of its duty to preserve collateral (for example, granting lien releases without proper appraisals), that ITCA should have the opportunity to develop its maintenance of collateral claims. *Id.* at 1340 n.11.

### **C. The Parties' Cross-Motions for Summary Judgment**

#### **i. This Court's First Summary Judgment Ruling**

On remand, and with permission of this Court, the parties filed simultaneous motions for partial summary judgment on the surviving portions of Claim I relating to whether the United States had failed to maintain sufficient security at various times throughout the life of the Trust Estate. In sum, the United States argued that the TFPA appropriately secured Collier's principal obligation, with accrued interest, which had now been realized through the *Collier* litigation. Conversely, ITCA maintained that the TFPA should have secured all thirty years of interest payments (or, alternatively, that the term "accrued interest" in the TFPA should be construed to cover *all* interest). Thus, ITCA asserted that the United States was liable for failing to secure, and later recover, all future payments from Collier—notwithstanding that the Act plainly imposed no such duty on the United States to secure all interest payments

This Court granted in part and denied in part the United States' Motion for Partial Summary Judgment (ECF No. 129). The Court denied ITCA's Motion for Partial Summary Judgment (ECF No. 137). In granting the United States' motion in part, the Court reiterated, consistent with the Federal Circuit and the dismissal of Claim II, that the United States "is in no way" liable for any deficiency in Collier's annual interest payments. *Summary Judgment Order*, 2023 WL 4881967, at \*5. The Court held that ITCA could not revive this dismissed claim by resort to the Act's trust provisions. *See generally id.* at \*4-5 (explaining that ITCA's position was "illogical" and would have "rendered [the Federal Circuit's decision] academic"). The Court confirmed that no challenge to the TFPA survived the Federal Circuit's ruling. *Id.* at \*7.

Although the Court granted partial summary judgment to the United States, the Court explained that "a portion" of ITCA's claim for breach of duty to maintain sufficient security remained viable on remand, specifically those allegations stated in the operative complaint



paragraphs 260 through 263, *id.* at \*6-7, but that additional factual development was needed. ITCA's remaining Claim I allegations were that the United States: (1) did not hold sufficient security to grant Collier's lien release requests in 1998 and 2007; (2) failed to take action in response to the economic downturn in 2007; and (3) lacked sufficient security in the Trust Estate in 2012 when Collier stopped making payments. *Id.* at \*7-8. The Court explained that these remaining allegations could not be resolved at summary judgment because there was "a genuine dispute of material fact as to the value of the trust fund over time relative to the required value of the trust fund." *Id.* at \*1. This dispute involved two questions: (1) whether the United States complied with specific provisions of the Deed of Trust; and (2) whether the United States acted as a "prudent person" would have in the management of the Trust Estate with respect to the remaining allegations of Claim I. *Id.* at \*8.

With respect to the first issue, the Court explained that it was unclear whether the United States complied with the Deed of Trust's provision requiring the Trust Estate to be maintained at a certain amount. *Id.* For example, neither party had presented evidence of the value of the Trust Estate "relative to the Release Level Amount" at the time of either lien release. *Id.* at \*9. As to the second issue of whether the United States acted as a "prudent person," the Court explained that an open question remained as to whether the United States acted reasonably under common law to maintain the value of the Trust Estate at the required level. *Id.* Whether the United States should have done more, such as performing independent appraisals or demanding collateral sooner, required more factual development.

Finally, the Court acknowledged that the parties disputed "whether and to what extent the plaintiff remains harmed by the defendant's alleged breach." *Id.* at \*9.

## ii. This Court's Second Summary Judgment Ruling

One year later, the parties returned to court on cross-motions for partial summary judgment. ECF Nos. 155, 157. Both parties sought summary judgment in their favor on the remaining Claim I allegations that the United States breached its duties to ITCA by granting Collier's lien releases (SAC ¶¶ 260 and 261), by failing to take action during the 2007 economic crisis (SAC ¶ 262), and by allowing the estate to be undercollateralized when Collier breached the TFPA in 2012 (SAC ¶ 263).

The United States focused its summary judgment briefing on establishing that ITCA could not establish any concrete, uncompensated harm arising from the alleged breaches. The United States also submitted appraisals showing that it had appropriately granted Collier's lien release requests and otherwise acted prudently to preserve the value of the Trust Estate by successfully enforcing the TFPA. ITCA again argued that the United States is "liable for the difference in what the trust funds actually have gotten and what the Act guaranteed[.]" Oral Arg. Tr. 5:2-6, and continued to challenge the TFPA notwithstanding this Court's conclusion that no such allegations survived the Federal Circuit's ruling. ITCA submitted no evidence refuting the integrity of the appraisals used by the United States, nor did it develop any theory as to how the United States breached any alleged duty to preserve beyond insisting that the United States is "liable under the law for what Congress guaranteed [the] trust funds," *id.* 48:7-9, that is, "the 8.5 percent rate of return" on \$34.9 million. *Id.* 58:25.

This Court granted the United States' motion in part, and it denied ITCA's motion entirely. The Court agreed that the United States was entitled to summary judgment on the allegations in paragraphs 260 through 262 of the Second Amended Complaint challenging the United States' actions relating to the lien releases and economic crisis. ECF No. 167.

At oral argument, the Court “fully accept[ed]” the United States’ “recitation that the Government is not on the hook” for money that “Collier wound up shorting the Plaintiff.” Oral Arg. Tr. 21:25, 22:1-2; *see also* 20:16-18 (“[T]he Plaintiff may not impose on the United States liability for Collier’s failure to perform, full stop.”). The Court also rejected ITCA’s argument that Collier’s thirty years of interest payments “were vested” and had “accrued from the start of the 30-year period” such that the Act required the United States to secure all interest payments. *Id.* 42:1-16. The Court explained, “that’s an argument that tries to make the Government the guarantor of Collier’s obligations. . . . The Government is not the guarantor for that . . . that interpretation is actually just foreclosed by the decision saying the Government is not the guarantor.” *Id.* 42:17-23.

The Court questioned, however, whether the United States might be liable for “some portion of [the] delta” for failing to have adequate security in the Trust Estate when Collier breached. *Id.* 22:20-22. The Court specifically wondered to what extent the United States’ trust duties are informed by fiduciary principles outside “the four corners of the Act[.]” *id.* 56:17, and whether “the United States has fiduciary obligations that arise separate and apart from what Congress says in the Act.” *Id.* 56:14-16; *see id.* 53:8-10 (questioning whether the United States “had some separate duty to ensure that if Collier reneged . . . [ITCA] would not be harmed.”). For these reasons, the Court did not grant summary judgment to either party on paragraph 263.

### **iii. Post-Summary Judgment Proceedings**

In response to the Court’s Order, ECF No. 167, the parties submitted a joint status report on October 11, 2024. ECF. No. 170. The United States represented that the parties “remain[ed] vastly apart in their view of what issues remain open and what legal theories continue to be viable.” *Id.* p. 9. ITCA insisted that an open question remained whether the United States was

required to secure all thirty years of interest payments so that ITCA received the “amounts due as guaranteed by the Act.” *Id.* p. 7. The United States countered that any “guarantee” theory was foreclosed by the law of the case but offered to submit targeted briefing further explaining how the law of fiduciaries informs the nature of the United States’ trust obligations under the Act. *Id.* p. 10. The United States also suggested that limited discovery may assist the Court in its final resolution of Claim I. *Id.* p. 11. The Court agreed and directed the parties to engage in discovery, which the parties completed in good faith.

Even with the benefit of discovery, “the Parties still [could] not agree about what issues are unresolved and what legal theories continue to be viable.” ECF No. 179, p. 5. Following discovery, the parties submitted a joint status report on May 7, 2025, reflecting as much. ITCA maintained the United States is liable unless ITCA “receive[s] the minimum full amount required by the Act’s 30-year Payment Option.” *Id.* p. 3. The United States asserted that this theory is foreclosed by the law of the case and that litigation should focus on the Court’s narrow questions regarding the common law of fiduciaries. *Id.* p. 5-6. Despite the differing perspectives, the parties agreed that no additional discovery was necessary and that the remaining Claim I allegations could be resolved through cross-motions for summary judgment. *Id.* p. 2.

The Court granted the parties’ request for cross-motions for summary judgment.

### **ARGUMENT**

The United States is entitled to summary judgment on ITCA’s remaining Claim I allegation: that the under-collateralization of the Trust Estate in 2012 constitutes a breach of the United States’ trust duties under the Act. ITCA cannot identify any outstanding fiduciary obligation that entitles ITCA to additional compensation from the United States on top of the \$88 million it has already received. The undisputed facts and law of this case instead demonstrate that the United States fully discharged its limited duties under the Act and that ITCA has

sustained no damages for which the United States is liable. Still, ITCA refuses to accept the law of this case and insists the United States is responsible for guaranteeing that ITCA receives its 95 percent share of \$34.9 million plus 30 full years of interest.

When reviewing ITCA's sole surviving Claim I allegation, however, the Court should focus on the substance of the narrow allegation that remains and disregard any attempt by ITCA to resurrect dismissed claims or rejected theories. The United States has already prevailed in defeating ITCA's guarantor arguments, attacks on the TFPA, and challenges to the lien releases. It is within the confines of these decisions that the Court must assess the viability of ITCA's remaining claim.

The Court's analysis of the remaining claim must also be driven by the Act's terms, which limit and define the United States' trust duties. Although the Court has expressed some uncertainty over whether and to what extent the common law of fiduciaries imposes duties "separate" from those defined in the Act, the law is clear: the only trust duties enforceable against the United States are those imposed by the Act. ITCA cannot invoke common law to impose additional duties on the United States beyond what is in the statute. Common law trust principles are only available as an aid to understanding the nature of a statutory duty. But if the statute is silent on a duty, the common law cannot be used to create it.

A plain reading of the Act shows that the United States' sole statutory duty was to hold property in trust in accordance with the terms of the TFPA for the purpose of securing Collier's payment obligations. The Federal Circuit has inferred from this the common law "duty to preserve" the trust property, which was to be valued at 130% of the Release Level Amount pursuant to the terms of the TFPA. ITCA's alternative position that the United States was required to maintain collateral valued at \$34.9 million plus thirty years of interest payments finds

no support in the Act and is at odds with the law of the case.

When the value of the Trust Estate fell below the required amount, the United States faithfully discharged its duties by successfully enforcing the TFPA to recover from Collier sufficient funds to bring the value of the Trust Estate back to its requisite value. Because the United States fully recovered the amount required to be held in the Trust Estate, ITCA cannot identify any damages it has sustained arising from the temporary reduction in the Trust Estate's collateral value. The United States is thus entitled to summary judgment on ITCA's remaining Claim I allegation.

Finally, granting summary judgment to the United States is fully consistent with the Federal Circuit's ruling in this case. At the pleading stage, the Federal Circuit held that ITCA should be allowed to develop certain "maintenance" allegations that, if proven, could establish the United States' breach of trust duties. After targeted discovery and two rounds of summary judgment, ITCA has failed to develop or prove the merits of these claims. Indeed, several theories were dismissed in the last round of summary judgment. As is evident from ITCA's position statements and its discovery responses, ITCA view of its own remaining Claim I allegation is an impossibility given the law of the case. After repeated rounds of briefing, ITCA's adherence to a rejected theory of liability dooms Claim I in full.

## **I. Summary Judgment Standard of Review**

Summary judgment is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Little Six, Inc. v. United States*, 280 F.3d 1371, 1374 (Fed. Cir. 2002); RCFC 56(a). If both parties move for summary judgment, "the court must evaluate each motion on its own merits, resolving all reasonable inferences against the party whose motion is under consideration." *Little Six*, 280 F.3d at 1374; *see also ATK Thiokol*,

*Inc. v. United States*, 68 Fed. Cl. 612, 628 (2005), *aff'd*, 598 F.3d 1329 (Fed. Cir. 2010) (“The fact that both parties have moved for summary judgment does not relieve the trial court of responsibility to determine the appropriateness of summary disposition.”). Where the party with the burden of proof fails to introduce evidence supporting its claim, “summary judgment is properly granted against that party.” *Optium Corp. v. Emcore Corp.*, 603 F.3d 1313, 1319-20 (Fed. Cir. 2010).

**II. ITCA’s “guarantee” theories are no longer viable, and the Court should focus its review on the narrow Claim I allegation that remains and disregard arguments contrary to the law of this case**

At the outset, the United States notes that the parties continue to disagree markedly on the open issues in this litigation. This is evident in the parties’ joint status reports, and the United States anticipates those disparate views to be visible in the parties’ briefing as well.

Despite these differing views, it is beyond dispute that the following allegations, and their accompanying theories, have all been rejected and dismissed (citing paragraphs of the Second Amended Complaint):

- ¶ 255: The United States negotiated and agreed to a TFPA and related documents that failed to comply with or meet the Act’s Trust Fund Payments security requirements, and also agreed to nonrecourse provisions for Collier not permitted by the Act that allowed, and in fact, incentivized, Collier to breach its obligations at Collier’s convenience.
- ¶ 256: Alternatively, the United States’ subsequent interpretation and application of the TFPA and related documents as written failed to comply with or meet the Act’s Trust Fund Payments security requirements, which, coupled with the agreed upon nonrecourse provisions for Collier allowed, and in fact, incentivized, Collier to breach its obligations at Collier’s convenience.
- ¶ 257: The TFPA and related documents did not make clear, as they should have, that under the annual payment method the Act required the United States to hold sufficient security both for the \$34.9 million final payment and for all thirty years of \$2.9 million annual payments which could not be prepaid, i.e., all thirty years of the congressionally-mandated minimum rate of return of 8.5% on \$34.9 million.

- ¶ 258: In particular, the Deed provision regarding accrued interest was not clearly defined to mean any and all unpaid \$2.9 million annual payments for the annual payment method's entire thirty year period.
- ¶ 259: The United States' failure to negotiate terms in the TFPA and related documents to ensure adequate security for the Trust Funds Payments obligations in full was a breach of trust in violation of the Act.
- ¶ 260: The United States' failure to have sufficient security in the Trust Estate to make a partial release of the Trust Estate in 1998 was a breach of trust in violation of the Act.
- ¶ 261: The United States' failure to have sufficient security in the Trust Estate to make a partial release of the Trust Estate in 2007 was a breach of trust in violation of the Act.
- ¶ 262: The United States' failure to do anything regarding the Trust Fund Payments security as a result of the economic downturn in 2007 was a breach of trust in violation of the Act.
- ¶ 264: The United States' failure to recover from Collier sufficient security or cash to meet in full the Trust Fund Payments obligations was a breach of trust in violation of the Act.
- ¶ 267: Because the United States' duties under the Act regarding the Trust Fund Payments security are continuing unless and until the Act's Trust Fund Payments obligations are satisfied in full, the United States' breaches of trust in violation of the Act regarding the security also are continuing.
- ¶ 268: As a result of its breaches of trust in violation of the Act's Trust Fund Payments security requirements, the United States is liable to ITCA for at least the following amounts:
  - a. 95% (ITCA's allocation) of the \$34.9 million final payment required under the Trust Fund Payments annual payment method
  - b. 95% (ITCA's allocation) of the \$2.9 million annual payments unpaid by Collier for seven years to date: 2012, 2013, 2014, 2015, 2016, and 2017, and any later year or fraction of a year until the \$34.9 final payment is received; and

*Summary Judgment Order*, 2023 WL 4881967 at \*7; ECF No. 167.

Accordingly, under this Court's and the Federal Circuit's various rulings resulting in the dismissal of these claims, ITCA cannot hold the United States liable as a guarantor for Collier's



payment obligations. Additionally, ITCA's challenges to the terms of the TFPA or the United States' interpretation or application thereof have all been dismissed. This includes any arguments that the United States should have obtained more collateral than what the TFPA secured; that the Trust Estate was required to be maintained at any value other than what the TFPA required, that is, 130% of the Release Level Amount; that the release provisions were inadequate in any way; or that the term "accrued interest" in the Release Level Amount should be construed to include all thirty interest payments. Finally, the United States is not liable for granting either of Collier's lien requests or for failing to take action to preserve the Trust Estate during the 2007 economic crisis.

All that remains is the allegation that "[t]he United States' failure to have sufficient security in the Trust Estate when Collier defaulted was a breach of trust in violation of the Act." SAC ¶ 263. To avoid reopening or relitigating closed issues, the United States focuses on the narrow, surviving claim, informed by the previous decisions in this case, to provide answers to the Court's inquiries. The United States will not revisit issues on which it has already prevailed except when necessary to inform the present dispute.<sup>6</sup>

As ITCA's position statements signal, ITCA appears poised to reprise its contention that the United States is liable for money ITCA would have gotten from *Collier* had Collier not breached its thirty-year payment obligation to the United States, based upon its misguided insistence that the United States was obligated to maintain enough security to cover all thirty years of payments and that the United States is "responsible for making the Trust Funds whole in terms of their amounts due as guaranteed by the Act." ECF No. 170, Joint Status Report, p. 7. ITCA's discovery responses confirm that ITCA suffered no harm from the under-

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<sup>6</sup> The United States incorporates by reference specific portions of earlier briefing where useful.

collateralization of the Trust Estate in 2012, relative to the Release Level Amount, but that ITCA is just seeking to recover Collier's future interest payments. *See* US-SOF ¶¶ 71-74. These issues have been resolved through the various rulings in this case. No viable path remains for ITCA to show that the United States is responsible for making up these other payments Collier missed.

The United States respectfully requests that the Court decline to revisit decided issues and train its analysis on resolving the single ground for Claim I liability that remains.

### **III. No fiduciary obligation remains that entitles ITCA to recover additional funds from the United States**

To survive judgment, ITCA must identify an unremedied loss for which the United States bears a legal responsibility. Put another way, ITCA must identify a specific statutory duty, explain how the United States breached that duty, and prove the damages it sustained as a result of that breach. *Cobell v. Norton (Cobell VIII)*, 392 F.3d 461, 477 (D.C. Cir. 2004). ITCA's inability to do so entitles the United States to summary judgment.

Because there is no common law trust between ITCA and the United States, the United States owes "no fiduciary duty" to ITCA beyond its express obligations under the Act. *ITCA v. Babbitt*, 51 F.3d at 203. The Court has acknowledged that ITCA cannot recover the outstanding interest payments from the United States, but it questioned whether the United States may have "separate" duties outside the "four corners of the Act" that would make it liable for "some portion of [the] delta" between what ITCA has received through the *Collier* settlement recovery and its earnings and what ITCA would have received if Collier had fulfilled its thirty-year obligation. Oral Arg. Tr. 22:20-22; 56:14-17. The answer is that no duty exists outside the Act.

Basic tenants of trust law require the Court to identify a specific obligation "created by" the governing statute that gives rise to the United States' responsibility for such compensation. *White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1373-74 (Fed. Cir. 2001), *aff'd*

*and remanded*, 537 U.S. 465 (2003). “If there is no fiduciary obligation, then there is no claim for money damages for the alleged breach of that obligation. *Id.*; *White Mountain Apache Tribe*, 537 U.S. at 477 (“To find a specific duty,” a “source of law [is] needed”). While common law can assist the Court in understanding the nature of the United States’ statutory duties, the common law cannot be invoked to impose additional duties on the United States not found in the Act. *See, e.g. Cobell VIII*, 392 F.3d at 472.

The Act contains no provision establishing a duty that can hold the United States accountable for any additional compensation to ITCA. Instead, the Act establishes the United States’ sole statutory duty: to hold in trust security in accordance with the TFPA. The Act did not require the United States to obtain (or maintain) any specific level of security but left this decision to the Secretary’s discretion. The TFPA thus sets the collateral to be held in trust and, according to this agreement, the Trust Estate was to maintain collateral at a value of 130% of the Release Level Amount following the lien releases. ITCA’s insistence that the United States was required to hold additional security in trust finds no support in the Act and is rebutted by the law of this case, which insulates the TFPA from ITCA’s ongoing attack. The Federal Circuit has recognized that the duty to hold trust property incorporates the common law duty to act reasonably to preserve that property, however that common law duty cannot be invoked to establish that the United States had some greater duty, not found in the Act, to maintain more collateral than what the TFPA required.

The United States fully and faithfully discharged its duty to hold property in trust, and any related duty to preserve that property, by successfully enforcing the TFPA to ensure that the collateral value of the Trust Estate was at its requisite level. Because the United States did recover sufficient funds to return the Trust Estate to that level, ITCA can identify no uncompensated harm

it has suffered arising from the under-collateralization of the Trust Estate in 2012 for which the United States could be liable. As ITCA's discovery responses confirm, ITCA is disinterested in the United States' efforts to preserve the Trust Estate and instead remains committed to theorizing that the United States is responsible for making sure ITCA gets the funds it believes the Act guaranteed it. The Court should not entertain this theory.

**a. The United States owes no fiduciary duty to ITCA apart from the Act**

The United States "owes no fiduciary duty to [ITCA] apart from its obligations under the [Act]." *ITCA v. Babbitt*, 51 F.3d at 203.<sup>7</sup> That is because there is "no common law trust" between ITCA and the United States. *Id.* While the United States "incurs specific fiduciary duties toward particular Indian tribes when it manages or operates Indian lands or resources," the Phoenix Indian School was "was not part of Indian lands" but "was owned and controlled by the United States government." *Id.* ITCA thus has "no interest in the School Property." *Id.* ITCA's "only interest is in the proceeds of the [] Trust Fund," which was "created by the [Act]." *Id.*

Accordingly, in a case such as this where there is no common law trust, the Court's analysis of whether ITCA sustained any damages because of the Trust Estate's under-collateralization in 2012 for which the United States may be liable must be driven by the United States' duties "rooted in and outlined by" the Act as the statute creating the fiduciary relationship. *Cobell VIII*, 392 F.3d at 472. Rather than focusing on "general trust" principles, the court's "analysis must train on specific rights-creating or duty-imposing statutory or regulatory

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<sup>7</sup> As discussed in detail in the United States' initial summary judgment brief, ECF No. 129 pp. 6-7, ITCA lost its first challenge to the TFPA decades ago in the Ninth Circuit. The Ninth Circuit rejected ITCA's argument that the TFPA failed to adequately collateralize Collier's obligations and held that the Secretary's decisions as to the adequacy of collateral were "shielded from judicial review" "because they [were] committed to agency discretion by law." *ITCA v. Babbitt*, 51 F.3d at 201, 203.

prescriptions.” *United States v. Navajo Nation (Navajo Nation I)*, 537 U.S. 488, 506 (2003) (explaining basic Indian Tucker Act principal that “a tribe must identify a substantive source of law that establishes specific fiduciary or other duties”); *see also United States v. Navajo Nation (Navajo Nation II)*, 556 U.S. 287, 301 (2009) (discussing Indian Tucker Act’s requirement to identify a “source of law” such as “the Constitution, or any Act of Congress or any regulation of an executive department,” 28 U.S.C. §1505, creating any alleged duty). The governing “fundamental document . . . that creates the trust relationship” “alter[s]” common law trust obligations and thus must be closely examined to understand that relationship and the duties owed. *White Mountain Apache*, 249 F.3d at 1380 (internal quotations omitted).

Here, unless the Act articulates a “fiduciary obligation . . . there is no claim for money damages for the alleged breach of that obligation.” *White Mountain Apache*, 249 F.3d at 1374; *See Circuit Opinion*, 956 F.3d at 1341 (identifying section 405(c)(2) of the Act as the “substantive source of law” establishing the United States’ fiduciary relationship with ITCA).<sup>8</sup>

“Once a statutory obligation is identified,” courts can “look to trust law to find a particular common law duty” implicit within the statutory obligation to help “particularize that obligation.” *Cobell VIII*, 392 F.3d at 472 (discussing *White Mountain Apache Tribe*, 537 U.S. at 475); *White Mountain Apache*, 249 F.3d at 1377 (explaining that after the court “determine[s] that a fiduciary obligation exists by virtue of the governing statute[,]” the court can look to the common law “for assistance in defining the nature of the obligation.”). However, the identification of a fiduciary relationship does not mean that a party automatically “invokes all

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<sup>8</sup> This case is distinct from most tribal trust cases that the Court of Claims has considered. Here, the TFPFA and the underlying land exchange never involved tribal trust property. *ITCA v. Babbitt*, 51 F.3d at 203. Rather, the land swap and financing, including the collateral (or Trust Estate), were matters exclusively between Collier and the United States; ITCA is not even a third party beneficiary of those agreements. US-SOF ¶ 16.

rights that a common law trust entails,” and the Court cannot impose “additional duties” on the United States that are not “grounded” in the relevant statute. *Cobell VIII*, 392 F.3d at 472, 476.

Thus, while the common law may help inform a specific statutory duty, the Court cannot rely on common law to create rights beyond those expressed by statute.

For example, the Supreme Court granted certiorari in *White Mountain Apache* and queried whether a statute, “in placing property in trust and simultaneously providing for the Government-trustee’s use and occupancy, is fairly interpreted to mandate compensation for the harm caused by maladministration of the property” such that plaintiffs had properly invoked Indian Tucker Act jurisdiction. 537 U.S. at 480 (Ginsburg, J., concurring). The Supreme Court, affirming the Federal Circuit’s decision, held that implicit in such a statute was the “duty of the common-law trustee to act reasonably to preserve [the] property[.]” *Id.* at 471. This duty was inferable because “a fiduciary administering trust property may not allow it to fall into ruin on his watch.” *Id.* at 475.

Thus, under *White Mountain Apache*, a common law duty to preserve may be inferred from the United States’ statutory duty to hold property in trust to support a party’s claim for money damages where the government fails to “preserve the trust property from loss, damage or diminution in value.” *White Mountain Apache Tribe*, 249 F.3d at 1380. Even then, the Federal Circuit correctly recognized that the relevant statute “modified” common law trust obligations, *id.*, so the trial court would need to closely review the governing statute when deciding the merits to determine whether any compensable breach actually occurred. *Id.* (explaining that courts “must . . . examine the particular statute, treaty, or other fundamental document . . . that creates the trust relationship” to understand the government’s obligations and reasonableness of its actions).

*White Mountain Apache*, thus, provides no support at all for imposing a liability upon the United States for any common law obligation that is *not* made cognizable through its expression in the governing statute; to do otherwise would constitute error. In *Cobell VIII*, for example, the D.C. Circuit reversed portions of the district court’s injunctive order—despite agreeing that the government had a duty to preserve trust property—for “fail[ing] to ground it in the defendants’ *statutory* trust duties and in specific findings that Interior breached those duties.” 392 F.3d at 465 (emphasis added). There, Interior was obligated to manage and invest funds on behalf of individual Native Americans. *Id.* at 464. To remedy alleged account mismanagement, the district court issued an injunction, which, among other things, listed sixteen common law duties and ordered the government to explain how it would comply with each and prescribed specific procedures for Interior’s management of the trust accounts. The district court issued the injunction without making findings as to how Interior breached duties that would entitle plaintiffs to the relief ordered. *Id.* at 465.

The Court of Appeals explained that while the lower court invoked *White Mountain Apache* to support “the incorporation of common law trust duties . . . it ignore[d] the Supreme Court’s actual approach.” *Id.* at 472. Under this approach, courts must first identify a “statutory obligation[.]” *Id.* Once that statutory obligation is identified, courts may consider common law duties implicit therein to help “flesh out the statutory mandates.” *Id.* at 472-74. But allowing resort to common law principles to “particularize” a statutory obligation does not mean that all trust relationships invoke “all” common law rights, *id.* at 472, if those common law rights are not born from the relevant statute. *Id.*; *Navajo Nation II*, 556 U.S. at 301 (explaining that courts can consider general trust principles as the “second step” in deciding whether a damages remedy is inferable and only after identifying a “specific . . . duty-imposing” statutory provision). The

challenged injunction was flawed for ignoring that step: “abstract[ing] the common law duties from any statutory basis.” *Cobell VIII*, 392 F.3d at 471. The order also lacked specific findings as to how the United States owed and breached the purported duties, *id.* at 474-75, and imposed “several additional duties” on the United States not supported by statute. *Id.* Rather than merely ensuring that the government “conformed to the law,” the district court overstepped by “ma[king] the law conform to the court’s views as to how [] trusts may best be run.” *Id.* at 477. The D.C. Circuit reversed these portions of the injunction, explaining that “a court’s authority is limited to considering specific claims that [the government] breached particular trust duties, understood in light of the common law of trusts, and to ordering specific relief for those breaches.” *Id.* at 477 (explaining that the court cannot “micromanage” government’s effort to comply with trust duties).

Accordingly, to hold the United States liable for damages, the Court must first identify a statutory duty and explain how the United States’ actions or inactions breached that specific duty. The Court may consider common law duties implicit within an identified statutory duty to further understand the contours of that duty, but it may not impose duties on the United States unless they can be traced to the statutory source of law. Put simply, there can be no “separate” fiduciary duty outside of what Congress has stated in the Act. Absent an express statutory basis, no right of action for breach of trust can exist.

**b. The United States has faithfully fulfilled its duties under the Act**

The Court must examine the Act to determine the United States’ obligations and the reasonableness of its actions. *White Mountain Apache Tribe*, 249 F.3d at 1380. Such an examination reveals that the United States has discharged its only statutory duty—to hold in trust security in accordance with the TFPA. No basis exists in the Act to hold the United States liable



for any gap between what ITCA has received and what Collier would have paid, as the law of this case establishes. Any attempt by ITCA to impose broad, unarticulated duties must fail.

**i. The United States’ only duty under the Act is to “hold in trust the security provided in accordance with the” TFPA**

The Act defines the United States’ duties, *ITCA v. Babbitt*, 51 F.3d. at 203, and requires only that the United States “hold in trust the security provided in accordance with the Trust Fund Payment Agreement,” Act, Sec. 405(c)(2), for the purpose of securing and encouraging Collier’s payment obligations. *Circuit Opinion*, 956 F. 3d at 1341 (identifying section 405(c)(2) as the “substantive source of law” “establish[ing] the specific fiduciary duty”). The Act, by its express terms, does not impose any specific security amount, either greater than or different from that specified in the TFPA. *Inter-Tribal Council of Ariz., Inc. v. United States*, 140 Fed. Cl. 447, 458 (2018). Instead, the Act vests the Secretary with discretion with regard to security, limited only by the terms of the TFPA. Act, Sec. 405(c)(2); *ITCA v. Babbitt*, 51 F.3d at 203. The TFPA thus sets forth the United States’ trust duty with respect to collateral maintenance, and the United States need not have held in trust any additional security beyond that specified in the TFPA.

Rulings from this Court and the Federal Circuit confirm this proposition and inform the United States’ duties. First, the Act does not require the United States to make payments if Collier failed to make them. *Circuit Opinion*, 956 F.3d 1328, 1345; *Summary Judgment Order*, 2023 WL 4881967, at \*4. The Federal Circuit also affirmed dismissal of ITCA’s challenges to the TFPA itself, holding that any such challenges were time-barred and stating that they were also not “support[ed] in the [Act], case law, or otherwise.” *Circuit Opinion*, 956 F.3d at 1344-45. On remand, this Court confirmed that ITCA’s challenges to the TFPA were all dismissed. *Summary Judgment Order*, 2023 WL 4881967 at \*7-8 (dismissing ¶¶ 255 through 259, 264, and 267 of the Second Amended Complaint and recognizing that these claims were “time-barred”

and “redundant” of other dismissed claims). The Court further confirmed ITCA’s allegations relating to the value of the trust estate turn on the value of the Trust Estate “relative to the Release Level Amount,” *Summary Judgment Order*, 2023 WL 4881967, at \*9. The Release Level Amount accounts for accrued interest and not future (unaccrued) interest, and this Court expressly rejected ITCA’s interpretation of “accrued interest” to include all thirty years of interest payments, correctly observing that as “an argument that tries to make the Government the guarantor of Collier’s payment obligations.” Oral Arg. Tr. 42:17-19; *Summary Judgment Order*, 2023 WL 4881967, at \*9 (dismissing SAC ¶ 258, challenging the TFPA for failing to define “accrued” to include all interest payments). The well-established law of the case doctrine prohibits the court from revisiting these decided issues. *Outside the Box Innovations, LLC v. Travel Caddy, Inc.*, 695 F.3d 1285, 1301 (Fed. Cir. 2012)

Invoking common law trust principles, this Court and the Federal Circuit have also interpreted the United States’ duty to hold security in trust as requiring the United States to “act reasonably to preserve the trust property[.]” *Summary Judgment Order*, 2023 WL 4881967 at \*9; *Circuit Opinion*, 956 F.3d at 1343 (citing *White Mountain Apache*, 249 F.3d at 378). The Act does not prescribe any particular method for “preserving” the trust estate.<sup>9</sup>

The duty to preserve nonetheless cannot create additional monetary obligation for the United States not found in the Act and only runs as far as the duties “outlined by the Act.” *Cobell VIII*, 392 F.3d at 472. If the law of the case establishes that the United States has no statutory

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<sup>9</sup> As explained herein, the Federal Circuit did hold that certain actions, *if proven*, could constitute breaches of the United States’ duties notwithstanding the United States’ lawsuit against Collier. *Circuit Opinion*, 956 F.3d at 1343. But this Court appropriately dismissed ITCA’s allegations captured in paragraphs 260 through 262 of the Second Amended Complaint because ITCA did not carry its burden at summary judgment to prove these allegations or identify any damages sustained as result. Any effort from ITCA to revive those allegations should be a non-starter.

duty to fulfill Collier's payment obligations, or to execute a trust agreement that secured sufficient collateral to ensure the recovery of Collier's thirty interest payments, it necessarily follows that the United States had no duty to maintain any collateral beyond that which is secured by the TFPA. Instead, the duty to preserve reflects the United States' duty to protect the collateral securing Collier's payment obligations, which was to be valued at 130 percent of the Release Level Amount following Collier's lien releases (the challenges to which have now been dismissed), "from loss, damage or diminution in value." *White Mountain Apache Tribe*, 249 F.3d at 1380.

The Act thus cannot be interpreted as requiring the United States to secure \$34.9 million plus "8.5% on \$34.9 million for 30 years" as ITCA insists. ECF No. 179, p. 3-4. The Act is clear, and its mandate unambiguous: the United States need only hold in trust security in accordance with the TFPA. Implicit in this statutory duty is the obligation to act reasonably to preserve the value of the security relative to the Release Level Amount. No other statutory duties exist, and no other common law duties can be imposed to create greater liability than that set by the Act. More specifically, ITCA cannot identify any statutory duty that required the United States to maintain more security than that specified by and obtained under the TFPA or otherwise take responsibility for any difference in what ITCA expected and what it received.

**ii. ITCA's attempts to impose broader duties should be rejected as inconsistent with the Act and the law of the case**

Notwithstanding the contrary legal rulings and lack of statutory support, ITCA remains wedded to the position that the United States had a trust duty to ensure that ITCA and Navajo Nation receive the full principal payment obligation and all thirty years of interest payments, regardless of when the principal was received. *See generally*, ECF No. 179, Joint Status Report, p. 3 (asserting that because the Act mandates a \$34.9 million payment with 30 years of interest

payments, “the Act required Defendant to hold security sufficient to ensure that the Trust Funds would receive the minimum full amount required by the Act’s 30-year Payment Option.”); *see also* US-SOF ¶ 71-74. ITCA’s claim is an overreach and must fail.

For the reasons stated above, ITCA’s attempt to create this heightened collateral duty lacks any foundation in the Act or the TFPA. Such a duty is simply not stated anywhere in the Act, which sets no specific level of required security but left this decision to the Secretary’s discretion. Without a “substantive source of law” imposing this duty, *Navajo Nation I*, 537 U.S. at 488, ITCA’s claim must be dismissed. *Id.* at 513 (rejecting tribes’ breach of trust claims that were “not grounded in a specific statutory or regulatory provision”). The Court even asked counsel for ITCA at oral argument last year whether the Court “ha[d] to find that Congress expected, when it enacted the Act, that it expected – that the Interior Department would hold enough security to cover the principal plus \$90 million,” i.e. all thirty years of interest payments, for ITCA to obtain its requested relief for remaining claim. Oral Arg. Tr. 34:25, 35:1-3. ITCA responded, “not necessarily” because there were thirty “guaranteed annual payments” owed under this Act. Oral Arg. Tr. 35:4-13.

ITCA is simply wrong. The “guarantor” argument has been categorically rejected, so the Court identified *precisely* what it must find to conclude that the United States breached a duty to hold adequate security by failing to maintain sufficient collateral to secure all thirty years of interest payments. And the Court cannot hold the United States liable for any “delta” absent a corresponding statutory duty and breach thereof. *See e.g., Cobell VIII*, 392 F.3d at 465 (reversing district court because it “failed to ground [its order] in the defendants’ statutory trust duties and in specific findings that Interior breached those duties.”); *White Mountain Apache*, 249 F.3d at 1374 (if there is “no fiduciary obligation” in the governing statute then there “is no claim for

money damages for the alleged breach of that obligation.”).

ITCA’s position also cannot be reconciled with the law of the case. Requiring the United States to maintain security at this level would effectively place the United States on the hook for the interest payments the Act directed Collier to make. Regardless how ITCA attempts to reframe this rejected theory, the practical effect of adopting ITCA’s interpretation would make the United States a guarantor of *Collier’s* duty to pay. If the United States has no duty to make up Collier’s payment obligations, there can be no duty to maintain the Trust Estate at level sufficient to cover both the \$34.9 million and all thirty years of interest. To hold otherwise would render the Federal Circuit’s decision meaningless.

All of ITCA’s challenges to the TFPA for failing to obtain “adequate” security have been dismissed. Any argument from ITCA that the Release Level Amount is anything other than what is outlined in the TFPA—130% of the unpaid principal obligation plus accrued interest—is refuted by the prior rulings of this Court and the Federal Circuit that the Act imposed no duty to cover missed payments by Collier. The law of the case delineates the duty of the United States in a way that renders Interior’s negotiation and enforcement of the TFPA immune from ITCA’s final attack. *Intergraph Corp. v. Intel Corp.*, 253 F.3d 695, 697 (Fed. Cir. 2001) (“The doctrine of law of the case generally bars retrial of issues that were previously resolved.”).

ITCA simply cannot transfer the Act’s duties prescribed for Collier, as the purchaser, onto the United States. First, the Federal Circuit has already expressly rejected ITCA’s interpretation of section 403(c)(2) of the Act. The Federal Circuit explained that section 403(c)(2) of the Act “impose[s], at most, a duty upon *Collier*, not the Government” and that ITCA’s invocation of this section was “misplaced.” *Circuit Opinion*, 956 F.3d at 1345-46 (emphasis added).

Second, the Act’s 8.5% mandated interest rate does not represent a separate revenue “stream” to which ITCA was entitled, as ITCA has stated throughout this litigation. *E.g.* ITCA ECF No. 140, p. 26. Interest simply represents the time value of money, “making the same amount similarly valuable when paid at different times.” *Holland v. Bibeau Const. Co.*, 774 F.3d 8, 17 (D.C. Cir. 2014). By setting this particular interest rate, Congress ensured that ITCA would realize the full value of the \$34.9 million obligation if paid over time rather than in a lump sum. *See* 134 Cong. Rec. S13519-02, 1988 WL 176577, p. 3 (Sep. 28, 1988) (explaining that security valued at \$34.9 million dollars at the inception of the trust would be expected to produce the same amount of money after thirty years as thirty annual interest payments with a final lump sum payment of \$34.9 million).<sup>10</sup> Congress, to facilitate the exchange between Collier and the United States, allowed Collier to complete its payment obligation over thirty years and directed the Secretary of Interior to execute, in his discretion, a trust agreement that secured Collier’s payment obligation and ensured the tribes got the \$34.9 million to which they were entitled. Ultimately, Collier did not see those thirty years through, but the United States made sure that ITCA received its share of the present day value of the \$34.9 million. That is all that the Act required. *See* Oral Arg. Tr. 54:3-4 (“What did Congress think it was doing?”).

*Nothing* in the Act suggests that the United States somehow had a fiduciary duty to maintain the Trust Estate’s collateral at the level suggested by ITCA or to otherwise compensate ITCA for any delta between the scheduled interest payments had the principal been paid over the remaining years and what that principal has actually yielded when it was collected ten years early. Without a statutory basis, the Court cannot impose such duties on the United States. This

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<sup>10</sup> A full explanation of the Congressional Budget Office’s report and the mandated interest rate can be found in the United States’ summary judgment brief, ECF No. 129, pp. 20-22.

conclusion is reinforced by the Federal Circuit’s unequivocal holding that the United States is not responsible for Collier’s payment obligations.

**iii. The United States fully discharged its duties under the Act**

By successfully pursuing Collier and enforcing the TFPA to recover \$48 million from Collier, the United States faithfully fulfilled its duty to “hold in trust” security in accordance with the TFPA and any related duty to preserve the security held in trust. The United States discharged its duty to “preserve” by recovering the full value of the security that was required to be held in the Trust Estate (130% of the Release Level Amount). The “Maintenance of Collateral” provision thus not only served as a mechanism for monitoring collateral sufficiency but helped assure sufficient collateral (as defined by the TFPA) existed. *Collier*, 2016 WL 3537802, at \*9. As happened here, if the value of the collateral dropped, the United States was entitled to rely on this provision of the TFPA to assure collateral preservation. Indeed, the United States successfully obtained a judgment requiring Collier to supplement the security, which recovery was properly deposited into the tribal trust accounts of ITCA and Navajo Nation.

The parties agree that the United States ultimately recovered \$48 million from Collier on behalf of ITCA and Navajo Nation. No serious dispute exists that this sum exceeds the required value for the Trust Estate at the time of recovery, which was \$47.1 million.<sup>11</sup> It is therefore indisputable that the United States preserved the value of collateral required by the TFPA, with the proper 95 percent share allocated to ITCA, placing ITCA in the same position it would have

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<sup>11</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 that had come due and gone unpaid at the time of the July 2017 settlement (\$14,832,500), less the value of the Annuity at that time (\$13.5 million) and any government-back securities (\$0). And 130% of \$36,232,500 is \$47.1 million.

if the value of the Trust Estate had been adequate when Collier breached. Accordingly, the United States discharged its duty to preserve the Trust Estate's property by successfully enforcing the TFPA and recovering \$48 million on behalf of ITCA and Navajo Nation.

The Court can only hold the United States liable if "it has found that the government's actions (or inactions) breached a legal duty." *Cobell VIII*, 392 F.3d at 476 (D.C. Cir. 2004); *see also Navajo Nation II*, 556 U.S. at 287 (plaintiff must show "that the Government has failed faithfully to perform [its] duties"). Only then may the Court order an appropriate remedy. Here, however, where the United States successfully enforced the provisions of the TFPA and recovered what was due from Collier, no such breach exists.<sup>12</sup>

**c. ITCA has no uncompensated damages it can recover**

Even if the United States could be held liable for some breach due to the collateral deficiency in the Trust Estate, it can only be held liable for "damages sustained as a result" of that breach. *Navajo Nation II*, 556 U.S. at 291; *Cobell VIII*, 392 F.3d at 477 (explaining that court's authority is limited to awarding "specific relief" for an established breach of duty). ITCA has sustained no such damages.

ITCA has suffered no harm for which it can recover additional damages from the United States. This conclusion is compelled by the United States' recovery of the full value of what was required to be held as collateral under the TFPA and ITCA's receipt of its rightful share. ITCA has consistently failed to identify any damages it has suffered, other than its rejected theory of entitlement to all of Collier's future interest payments. Without concrete injury, ITCA's claim

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<sup>12</sup> Additionally, ITCA's failure to support its claim entitles the United States to summary judgment. *Optium Corp.*, 603 F.3d at 1320 (explaining that party with burden of proof must properly support claim at summary judgment to survive opponent's motion).



must be dismissed.<sup>13</sup>

ITCA's discovery responses further confirm that it does not seek damages arising from any mismanagement in the Trust Estate causing a deficiency in the Trust Estate's collateral value relative to the Release Level Amount, nor from any particular action (or inaction) that may have contributed to such a deficiency at the time of Collier's breach. US-SOF ¶¶ 71-74. ITCA's *only* alleged injury arises from the United States' purported failure to have sufficient security in the Trust Estate to guarantee that ITCA received its share of the \$34.9 million payment plus thirty years of interest at a rate of 8.5%. *Id.* As thoroughly demonstrated already, ITCA's theory of damages finds no support in the Act, case law, or otherwise.

#### **IV. Granting summary judgment for the United States is consistent with the Federal Circuit's ruling**

Granting summary judgment for the United States because ITCA has failed to develop its claims at summary judgment is consistent with the Federal Circuit's ruling, which reflected the appellate court's caution at the initial pleading phase. As the Circuit panel noted, "Because [the] case was dismissed on the pleadings," the Federal Circuit was required to "take the facts in the Complaint as true." *Circuit Opinion*, 956 F.3d at 1332, n.3. Judge Firestone's only error was prematurely dismissing ITCA's "failure-to-maintain-sufficient-security portion of Claim I at *this stage of the proceedings*[,]” *id.* at 1340 (emphasis added), without allowing ITCA to develop its allegations on the merits and establish what harm, if any, ITCA may have sustained as a result of these alleged breaches—that is, those allegations set forth in paragraphs 260 through 263 of the Second Amended Complaint. *Id.* at 1342-43. This Court has now, after discovery and three

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<sup>13</sup> Any argument that but-for the remaining alleged breaches Collier would have completed its thirty-year payment obligation is inherently hypothetical and has never been presented by ITCA. No factual basis exists to prove that if the United States acted differently at any point in time it would have caused Collier to continue to make payments in 2012 and beyond.

rounds of dispositive briefing, fully afforded ITCA an opportunity to establish liability on Claim I. But on the undisputed record before the Court, ITCA has simply failed to do so.

### **CONCLUSION**

For the reasons set forth herein, the Court should grant the United States summary judgment on what remains of Claim I.

July 18, 2025

Respectfully submitted,

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