

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

MOTION TO DISMISS SECOND AMENDED COMPLAINT

CHAD A. READLER
Acting Assistant Attorney General

RUTH A. HARVEY
Director

MICHAEL J. QUINN
Senior Litigation Counsel

PHILLIP M. SELIGMAN
Trial Attorney
Commercial Litigation Branch
Civil Division
Department of Justice
P.O. BOX 875, Ben Franklin Station
Washington, DC 20044-0875
Telephone: (202) 307-1105

OF COUNSEL:

KENNETH A. DALTON
Director
KAREN F. BOYD
Attorney-Advisor
Indian Trust Litigation Office
Office of the Solicitor
United States Dept. of the Interior
Washington, D.C. 20240

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Attorneys for Defendant

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THE INTER-TRIBAL COUNCIL OF)	
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Plaintiff,)	No. 15-342L
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THE UNITED STATES OF AMERICA,)	
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MOTION TO DISMISS SECOND AMENDED COMPLAINT

Under Rules 12(b)(1) and (6) of the Rules of the United States Court of Federal Claims (RCFC), the United States respectfully requests dismissal of the second amended complaint for lack of subject-matter jurisdiction and for failure to state a claim upon which relief can be granted. Plaintiff, Inter-Tribal Council of Arizona, Inc. (ITCA), has filed another amended complaint against the United States that does little more than reassert claims this Court has already dismissed regarding the government’s loan agreement with the Barron Collier Co. (Collier), for which ITCA stands as one of the beneficiaries of Collier’s loan payments.

QUESTIONS PRESENTED

1. The statute establishing an Indian education trust fund based on future payments by Collier generally provides that the United States hold the security obtained from Collier in accordance with a Trust Fund Payment Agreement, an agreement that did not even exist when the statute was enacted. Because the statute is neither money-mandating nor imposes a specific duty upon the United States to negotiate for, or to obtain, a specific amount of security, should ITCA’s breach of trust claim alleging a duty to obtain more security than set by the terms of the Trust Fund Payment Agreement be dismissed for lack of subject-matter jurisdiction and for failure to state a claim?

2. The United States and Collier signed the Trust Fund Payment Agreement in 1992 and ITCA unsuccessfully sued to stop its implementation, in part because the United States allegedly had not obtained sufficient collateral. Although the land exchange between the United States and Collier closed in 1996, ITCA did not bring suit here until 2015, some 19 years after the closing. Is ITCA's claim that the United States failed to obtain sufficient security in the TFPA thus barred by the statute of limitations?

3. The District Court in Arizona entered judgment that the Trust Fund Payment Agreement required Collier to monitor and maintain adequate security for its required payments to the United States. The United States relied on this provision and sued Collier for breach of this duty, recovering a judgment that ordered Collier to supplement the security. In light of Collier's duty to maintain collateral, should ITCA's claim that the United States failed to monitor and maintain adequate security be dismissed for failure to state a claim?

4. The Court previously dismissed ITCA's breach of trust claim from the original complaint for lack of subject-matter jurisdiction, holding that the United States has no fiduciary obligation to make up Collier's missed payments. Should a substantially similar breach of trust claim in the second amended complaint also be dismissed?

5. This Court previously ruled that the United States had an obligation to invest prudently the trust funds now at issue, but dismissed ITCA's investment claim from the original complaint because ITCA alleged no facts to show how the government breached its duty. Although ITCA concedes that it has received regular account statements, ITCA has merely amended its complaint to allege an investment claim that still lacks sufficient facts to show a breach of any investment duty. Should this amended claim be dismissed for failure to state a claim?

STATEMENT OF FACTS¹

1. Congress gives ITCA a financial interest in the Arizona-Florida Land Exchange

On November 18, 1988, Congress approved a complicated land exchange between the United States and Collier by passing the Arizona-Idaho Conservation Act of 1988, Public Law No. 100–696, 102 Stat. 4577 (1988), Title IV of which is known as the Arizona-Florida Land Exchange Act (Act) (attached to the Second Amended Complaint as Exhibit 1). Second Amended Complaint (2AC) ¶¶ 2, 53. Under the Act, the United States would receive rights in about 108,000 acres of wetlands in Florida, and Collier would receive federal land in Phoenix, Arizona. The Arizona land Collier received is commonly known as the Phoenix Indian School property because Interior operated a school for Native Americans on the federally-owned land since 1891, but by 1988 the school was slated for closure. 2AC ¶¶ 15, 36.

The Act also required Collier to pay \$34.9 million to the United States to equalize the value of the trade. The payment was needed because the Phoenix Indian School land was worth more than the Florida land. 2AC ¶¶ 2, 39. The Act authorized the Secretary of the Interior to accept the \$34.9 million as either (i) a cash payment at closing or (ii) over time with annual interest payments at a rate between 8.5% and 9.0% per annum for thirty years, followed by a balloon payment of the principal in year thirty. 2AC ¶ 3. If the thirty-year payment option was selected, the Secretary was required to execute a Trust Fund Payment Agreement with Collier under which the annual payments were to be made to the United States. Act, Sec. 403(c)(4); 2AC ¶ 119. Also, under this option, the United States was required to “hold in trust the security

¹ For purposes of this brief only, the factual allegations of the second amended complaint are assumed to be true.

provided in accordance with the Trust Fund Payment Agreement.” Act, Sec. 405(c)(2); 2AC ¶ 64.

Congress mandated that payments made by Collier be deposited into trust accounts for ITCA and the Navajo Nation. The Act directs that all of Collier’s payments are to be used to establish two Indian education trust accounts, the Arizona InterTribal Trust Fund (Trust) and the Navajo Trust Fund (Navajo Trust). 2AC ¶¶ 57, 58. The Act specifies that 19 tribes belonging to ITCA are to receive 95 percent of the money paid by Collier. 2AC ¶¶ 9, 57.² The Act, however, does not require the United States to make any payment if Collier fails to make them.

2. In accord with the Act, Collier obtains a secured 30-year loan from the United States

The Secretary accepted Collier’s request to make annual interest payments for thirty years, with a balloon payment of the principal. 2AC ¶ 3. The agreement between Interior and Collier under the Act consists of three main instruments: a Trust Fund Payment Agreement (TFPA), a Deed of Trust, and a Promissory Note. 2AC ¶¶ 119-36.³ The Promissory Note and the Deed of Trust are exhibits to the TFPA and, according to the parties to the agreement, “constitute” a part of the “Trust Fund Payment Agreement” referred to in the Act. TFPA, Art. 1.1.

² The remaining five percent is deposited into the Navajo Trust for the benefit of the Navajo Nation. 2AC ¶ 58. The Navajo Nation is not a party to this litigation.

³ The TFPA (attached as Exhibit 19 to the Second Amended Complaint) is dated December 18, 1992. The Deed of Trust (attached as Exhibit 22 to the Second Amended Complaint) is dated December 18, 1992. The Promissory Note (attached as Exhibit 20 to the Second Amended Complaint) was executed by Collier on December 17, 1992 and received by the United States on December 18, 1992. ITCA is not a party to any of these instruments. Although dated in 1992, the transaction closed in 1996.

The Promissory Note required Collier to pay 30 annual interest payments of \$2,966,500 (reflecting an 8.5% rate), and also to make 30 payments into a private annuity, which was assignable to Interior if Collier defaulted on their payments. 2AC ¶¶ 127, 129-30. The annuity was supposed to equal the \$34.9 million principal sum at the end of the thirty-year term. 2AC ¶ 127. According to the TFFPA, the Promissory Note was secured by the Annuity and the “Trust Estate,” which the Deed of Trust defined as the collateral pledged for the loan. 2AC ¶ 133. The loan was also to be nonrecourse, in that “resort for payment of the Promissory Note shall be solely against the Annuity and the Trust Estate under the terms of the Deed of Trust. . . .” TFFPA, Art. 3.2; 2AC ¶ 145. After the land exchange closed in December 1996, Collier began making its annually scheduled payments of interest and annuity deposits in December 1997. 2AC ¶ 163.

To secure the loan, Collier pledged collateral in the Deed of Trust that gave the United States a lien on the portion of the Phoenix Indian School land that Collier would retain after consummating the exchange, as well as Collier’s rights in two other Phoenix lots. 2AC ¶ 136. 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, referred to as the Downtown Lots. 2AC ¶ 135. The Deed of Trust also provided that, if Collier requested a release of any lien property from the United States, the United States was required to grant the release so long as the value of the remaining collateral exceeded 130% of a defined Release Level Amount. 2AC ¶ 139.

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, after the expiration of two years from the Closing Date . . . (iii) the fair value, at the time of the calculation, of the Annuity.

2AC ¶ 140. Collier twice requested a release of lien, in 1998 and 2007. After the United States granted the second release, only the Phoenix Indian School land remained in the Trust Estate as collateral for Collier's loan. 2AC ¶¶ 172, 178.

Collier's lien release request triggered another term of the Deed of Trust. That term provided that Collier must supplement collateral by adding Government-backed securities or employing other methods of increasing the value of the collateral, if the value of the lien property fell below 130% of the Release Level Amount. 2AC ¶ 140. As described in further detail below, this collateral maintenance term and Collier's duty under it were the main issues when the United States sued Collier, after Collier ceased payments on the loan in 2012.

3. The Act directs how ITCA's trust funds are to be invested

The Act governs how trust funds are invested. Act § 504(c).⁴ The Act also governs the specific educational and child-welfare purposes for which trust funds and income may be used. 2AC ¶ 66. Collier began making payments in 1997. As Collier made each interest payment to

⁴ (c) INVESTMENT. — (1) If a Trust Fund Payment is made in the form of a lump sum payment under section 403(c)(1) of this title, the Secretary of the Treasury shall invest the amount of such lump sum payment in interest-bearing deposits and securities in accordance with the Act of June 24, 1938 (25 U.S.C. § 162a). (2) If a Trust Fund payment is made in the form of annual payments under section 403(c)(2) of this title, the Secretary of the Treasury shall hold in trust the security provided in accordance with the Trust Fund Payment Agreement. (3) At the direction of the Secretary, the Secretary of the Treasury may invest in accordance with the requirements of paragraph (1) any portion of the Trust Income not used by the Secretary in any year.

the United States, the United States deposited 95 percent of that payment into the Trust. 2AC ¶ 165. Under the Act, when Collier finally paid the principal, 95 percent of that amount would also be deposited into the Trust. 2AC ¶¶ 56, 57. Likewise, when the United States recovered settlement funds from Collier, 95 percent of those proceeds were deposited into the Trust in the same manner.

4. ITCA’s previous attempt to challenge the Collier loan’s terms

In October 1992, ITCA sued to enjoin the United States from entering into the TFPA with Collier. *Inter Tribal Council of Arizona, v. Lujan*, No. 2:92-cv-01890-SMM (D. Ariz. 1992) (attached to the Second Amended Complaint as Ex. 25) (1992 ITCA Complaint); 2AC ¶¶ 152-156. In that suit, ITCA alleged that the security obtained by the United States under the TFPA constituted “a violation by the Secretary under the terms of the [Act] which requires that the payment of all amounts due be adequately collateralized at the time of closing.” 1992 ITCA Complaint ¶¶ 39, 40; 2AC ¶ 155-56. ITCA sought to enjoin “the Secretary from agreeing to inadequately collateralize the trust fund payments.” 1992 ITCA Complaint ¶ 5; 2AC ¶ 156. The district court denied relief, finding that “the Secretary’s decisions regarding the adequacy of the collateral . . . are precluded from judicial review under subsection 402(h) of the [Act].” 2AC ¶ 157. The Ninth Circuit affirmed the district court’s dismissal for lack of subject-matter jurisdiction and failure to state a claim on the grounds that “the actions of the Secretary are precluded from judicial review.” *Inter Tribal Council of Arizona v. Babbitt*, 51 F.3d 199, 200 (9th Cir. 1995); 2AC ¶ 161.

5. Collier makes 15 years of payments and then defaults

From 1997 to 2011, Collier made 15 annual interest payments to the United States without incident, totaling \$44,497,500. 2AC ¶ 163-64. As required by the Act, the United States deposited ninety-five percent of those payments (\$42,272,625) into the Trust. 2AC ¶ 165. Collier also made 15 required payments into the private annuity, totaling \$9,662,000 as of November 30, 2012. 2AC ¶ 164. The annuity was managed by U.S. Trust/Bank of America, N.A. 2AC ¶¶ 231-32, 240.

But Collier ceased making its annual payments in 2012, and notified Interior that it did not intend to make further payments. AC ¶¶ 171-173. According to Collier, when it stopped making payments, its remaining obligations consisted of another \$44,497,500 in interest payments (15 annual payments) and \$22 million in remaining principal, for a total of approximately \$66.5 million through the end of 2026. 2AC ¶ 203. As of June 30, 2016, the value of the Annuity was \$13,452,569. *See* Joint Status Report, at 4, *U.S. v. Collier*, ECF No. 191 (attached as Exhibit 31 to the Second Amended Complaint). The value of the Indian School land was appraised at \$25 million in September 2015. 2AC ¶ 206.

6. The United States successfully sues Collier to supplement collateral

The United States sued Collier in district court in Arizona in January 2014. 2AC ¶ 202. The United States sought specific performance of the Deed of Trust's maintenance-of-collateral-value provision, or alternatively, imposition of a constructive trust on Collier's interests in the properties for which the United States had released liens in 1998 and 2007. 2AC ¶ 184.

On June 29, 2016, the United States won summary judgment on its specific performance claim. The district court concluded that the Deed of Trust's maintenance-of-collateral-value

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.” *United States v. Barron Collier Co.*, 2016 WL 3537802, *9 (D. Ariz. June 29, 2016); 2AC ¶ 215. In an August 18, 2016 judgment, the district court ordered Collier to provide government-backed securities valued at \$20,452,281, plus \$10,565 multiplied by the number of days between July 22, 2016 and the date of performance. 2AC ¶ 220. That litigation was stayed pending settlement negotiations and then dismissed after Collier and the United States executed a settlement on July 18, 2017. 2AC ¶ 221. At the time of the settlement, the estimated gross recovery 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. *See* Joint Status Report, at 4 (ECF No. 46-1). 2AC ¶ 226.

Interior received the \$16 million in cash (95% of which is held for ITCA) from the settlement on July 26, 2017. 2AC ¶ 228. Because of the long-term nature of the investments in the Annuity, it was not prudent to convert them immediately to cash, and thus Interior is holding on to the Annuity investments and cashing them out over time as they mature, for deposit into trust. *See* 2AC ¶ 240. The United States General Services Administration sold the Indian School property for \$18.5 million. 2AC ¶ 244. After GSA’s statutorily-authorized administrative costs from the sale are deducted, 95% of the balance will be held in trust for the benefit of ITCA.

7. ITCA’s suit against the United States and its present posture

On April 2, 2015, ITCA filed this suit against the United States, bringing three claims for breach of trust. The United States moved to dismiss the original complaint, Mot. to Dismiss (ECF No. 10), which the Court granted in part and denied in part. *Inter-Tribal Council of*

Arizona, Inc. v. United States, 125 Fed. Cl. 493 (2016). In Claim I, ITCA alleged that the United States had a fiduciary duty to collect, deposit, and make the payments not timely made by Collier. Complaint ¶¶ 141-144. The Court ruled that it lacked jurisdiction over Claim I because the Act did not establish a duty for the United States to substitute for Collier's missed payments. 125 Fed. Cl. at 500-501.

In Claim II, ITCA alleged that the United States had breached six different fiduciary obligations to hold and maintain trust property, all purportedly related to the collateral specified by the TFPA: (1) Failure to have Treasury hold the security; (2) Failure to maintain the Annuity Contract by making the annual principal payments into the annuity; (3) Failure to maintain the lien on land and development rights by incorrectly calculating the Release Level Amount; (4) Failure to assess whether the value of the collateral complies with the Deed of Trust; (5) Failure to obtain supplemental collateral in accordance with the Deed of Trust; and (6) waste resulting from unpaid property taxes. Complaint ¶¶ 147-48. The Court denied, in part, the motion to dismiss Claim II, concluding that the Act's provision requiring the United States to hold the security in trust in accordance with the TFPA allows the Court "to infer that the government has a duty to hold and maintain adequate security for the benefit of the trust." 125 Fed. Cl. at 502. In response to the United States' argument that these claims are barred by the statute of limitations, the Court reserved decision "at this stage of the proceedings" because "the statute of limitations issues are tied to the merits of Claim II." *Id.* at 503. The Court did, however, dismiss ITCA's claims based on the location of the security for failure to state a claim. *Id.* at 505.

In Claim III, ITCA alleged a breach of trust for failure to prudently invest Trust money and for failure to account. Complaint ¶¶ 151-53. Although the Court agreed that the United

States had an obligation to invest the Trust funds prudently, it dismissed Claim III because ITCA did not allege sufficient facts to state a claim that the United States had breached an investment or accounting duty. 125 Fed. Cl. at 505.

ITCA then filed a First Amended Complaint (ECF No. 34), which—like the original complaint—alleged three claims for breach of trust. The first claim in the amended complaint was nearly identical to Claim I in the original complaint that the Court dismissed. *See* First Amended Complaint (AC) ¶¶ 310-314. Claim II in the amended complaint was similar to Claim II in the original complaint, except that ITCA added a new claim for breach of a supposed duty to “obtain” sufficient security, *see* AC ¶ 318, and ITCA abandoned the claim for waste for unpaid property taxes. Claim III in the amended complaint was similar to Claim III in the original complaint, but ITCA added some minor allegations related to the mix of long and short-term investments. *See* AC ¶ 305.

The United States moved to dismiss the First Amended Complaint under RCFC 12. ECF No. 35. While this motion was pending, the Court ordered supplemental briefing on the status and relevance of a pending settlement between the United States and Collier. ECF No. 40. Following supplemental briefing and notice to the Court that the United States had settled its suit against Collier, the Court conducted a status conference on August 30, 2017. The Court then rejected the first amended complaint, giving ITCA until October 30, 2017 to file a second amended complaint demonstrating that its claims survived the settlement with Collier. ECF No. 48. The case was then stayed pending mediation. *See* ECF No. 52.

After mediation proved unsuccessful, ITCA filed the instant Second Amended Complaint. This version reiterates the same three basic claims alleged in the original and in the first amended complaint, except that the claims are now reordered and ITCA has added the

treatment of the Collier settlement monies to its underinvestment claim. The gravamen of the first two claims is that the United States is a guarantor for the payments of principal and interest that the Act required Collier to make. Claim I alleges that the United States breached the Act by failing to obtain sufficient security when it negotiated and executed the Trust Fund Payment Agreement in 1996. 2AC ¶¶ 255-259. Claim I also asserts that the United States failed to maintain sufficient security at various times throughout the life of the Trust, in particular: (1) when it released its liens on Collier property in 1998 and 2007; (2) when property values fell during the economic downturn in 2007; (3) when Collier stopped making payments; and (4) when it recovered the settlement money and security from Collier. 2AC ¶¶ 260-65. Claim I also reasserts the dismissed claim from the original complaint regarding the location of the security. 2AC ¶ 266.⁵

Claim II in the Second Amended Complaint simply reasserts the dismissed Claim I from the original complaint that the United States had a trust obligation to collect, deposit, and make the trust payments that the Act required Collier to make. 2AC ¶¶ 269-275.

In Claim III of the Second Amended Complaint, ITCA alleges a breach of trust for failure to prudently invest Trust money and for failure to account. 2AC ¶¶ 276-281. This claim is similar to the Claim III dismissed from the original complaint, except that ITCA has added some conclusory allegations regarding the mix of long and short-term investments, and ITCA alleges that the United States failed to prudently invest the \$16 million in cash it received from the Collier settlement. 2AC ¶ 279.

⁵ ITCA has also added to Claim I a new claim that it would be a trust violation if GSA's administrative sale costs are deducted from the proceeds of the sale of the Indian School property before being deposited into the Trust. 2AC ¶ 265. ITCA does not allege that this deduction had actually occurred yet at the time of the filing of the Second Amended Complaint.

ARGUMENT

1. Claim I should be dismissed for lack of subject-matter jurisdiction, or alternatively, for failure to state a claim.

ITCA's claims in the second amended complaint relating to the supposed inadequacy of the security for Collier's loan fall into two categories. First, ITCA makes a claim that the United States had a duty to obtain enough collateral from Collier to guaranty every payment Collier would be required to make, including 30 years of interest payments plus the \$34.9 million principal. Under that theory, ITCA claims the United States is liable for breach of a trust duty because the TFPA never required that amount of collateral but should have.

The "duty-to-obtain" claim fails for at least five independent reasons as demonstrated below:

(1) the Act 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), and nowhere requires the United States to obtain more or different security than that specified in the TFPA; (2) this claim is barred by the statute of limitations given that the loan agreement closed in 1996; (3) ITCA is collaterally estopped from challenging the terms of the TFPA because it already litigated this issue when it sued in 1992 in a failed challenge to the transaction; (4) this claim also fails because the United States was not acting as a trustee for ITCA when it negotiated the TFPA.; and (5) the duty-to-obtain claim fails because a 1988 Congressional Budget Office analysis confirms that the United States complied with the Act's security requirements. Under CBO interest rate assumptions, the investment of \$34.9 million over thirty years would not produce a different result than thirty years of interest payments with a lump-sum payment of the \$34.9 principal at the end of the thirty years.

ITCA's second category in Claim I is that the United States failed to maintain sufficient security throughout the life of the trust, and in particular at various key times, such as when liens were released or when Collier defaulted or when the United States sought to recover additional security from Collier in court. This second claim—the "duty-to-maintain" claim—is necessarily

dependent upon the success of the first claim because both claims rely upon ITCA's novel theory of "sufficient" security: namely, enough security to cover both Collier's required interest payments and the principal. Because the United States has complied with the terms of the TFPA as negotiated and executed, and the security provisions of the TFPA itself were not defective, as alleged in the duty-to-obtain claim, the duty-to-maintain claim must fail.

In short, both the duty-to-obtain claim and the duty-to-maintain claim should be dismissed because the Court lacks subject matter jurisdiction for such claims and because these claims fail to state claims upon which relief may be granted.

A. The Court lacks jurisdiction to entertain the duty-to-obtain claim because no money-mandating statute establishes a duty to obtain more security than set forth in the Trust Fund Payment Agreement.

(1) Jurisdiction exists only when a claim is supported by a money-mandating statute.

Subject matter jurisdiction may be challenged at any time. *Booth v. United States*, 990 F.2d 617, 620 (Fed. Cir. 1993). A plaintiff bears the burden of establishing jurisdiction, *McNutt v. General Motors Acceptance Corp. of Indiana*, 298 U.S. 178, 189 (1936), by a preponderance of the evidence, *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988). "Determination of jurisdiction starts with the complaint, which must be well-pleaded in that it must state the necessary elements of the plaintiff's claim, independent of any defense that may be interposed." *Holley v. United States*, 124 F.3d 1462, 1465 (Fed. Cir. 1997). Nonetheless, conclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

When deciding a motion to dismiss based upon either lack of subject-matter jurisdiction or failure to state a claim, this Court must assume that all undisputed facts alleged in the complaint are true and must draw all reasonable inferences in the plaintiff's favor. *Scheuer v.*

Rhodes, 416 U.S. 232, 236 (1974). If a defendant challenges the jurisdiction of the Court, however, the plaintiff cannot rely merely upon allegations in the complaint, but must instead bring forth relevant, competent proof to establish jurisdiction. *McNutt*, 298 U.S. at 189.

It is well-established that this Court has limited jurisdiction. *Inter-Coastal Xpress, Inc. v. United States*, 296 F.3d 1357, 1365-66 (Fed. Cir. 2002). Absent congressional consent to entertain a claim against the United States, the Court lacks authority to grant relief. *United States v. Testan*, 424 U.S. 392, 399 (1976).

The central provision granting consent to suit in this Court is the Tucker Act, 28 U.S.C. § 1491. *Testan*, 424 U.S. at 397. Under the Tucker Act, an action may be maintained in this Court only if it is “founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.” 28 U.S.C. § 1491(a)(1). The Indian Tucker Act, 28 U.S.C. § 1505, confers essentially the “same access” to relief. *United States v. Mitchell*, 445 U.S. 535, 540 (1980) (*Mitchell I*).

Although the Indian Tucker Act waives sovereign immunity by granting jurisdiction over certain claims, it does not itself create any substantive right of recovery against the United States. *United States v. Navajo Nation*, 556 U.S. 287, 290 (2009) (“*Navajo II*”). Rather, the statute confers jurisdiction upon the Court only when the substantive right exists. *Testan*, 424 U.S. at 398. The plaintiff must assert a claim arising out of other sources of law, such as a statute or regulation, *Navajo II*, 556 U.S. at 290, and not just any claim arising out of these sources of law will suffice. “The claim must be one for money damages against the United States . . . and the claimant must demonstrate that the source of substantive law he relies upon can fairly be

interpreted as mandating compensation by the Federal Government for the damages sustained.” *United States v. Mitchell*, 463 U.S. 206, 216-17 (1983) (*Mitchell II*) (citations omitted).

A plaintiff asserting a breach of trust claim under the Tucker Act or Indian Tucker Act must, therefore, clear “two hurdles” to invoke federal jurisdiction. *Navajo II*, 556 U.S. at 290. “First, [plaintiff] must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties.” *Id.* (citations and internal quotations omitted). The government’s duties must be defined by “specific, applicable, trust-creating statute[s] or regulation[s],” not “common-law trust principles.” *Id.* at 302. Second, “[i]f that threshold is passed,” plaintiff must show that “the relevant source of substantive law can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties” imposed by the governing law. *Id.* at 291 (citation omitted).

(2) The Act is not money-mandating and only requires the United States to hold the security obtained in accordance with the Trust Fund Payment Agreement.

ITCA’s broad duty-to-obtain more security claim does not clear the first *Navajo II* jurisdictional hurdle. The Act 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). Nowhere does the Act require the United States to obtain more or different security than that specified in the TFPA. Thus, this Court need look no further. With no money-mandating duty to support ITCA’s duty-to-obtain claim, the Court has no subject-matter jurisdiction to entertain this claim.

The Supreme Court recognizes that a governmental “trust is defined and governed by statutes rather than the common law.” *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 174 (2011). Statutes and regulations define the “contours of the United States’ fiduciary

responsibilities.” *Mitchell II*, 463 U.S. at 224. The United States is liable for money damages relating to trust responsibilities “only to the extent it expressly accepts those responsibilities by statute.” *Blackfeet Housing v. United States*, 106 Fed. Cl. 142, 149 (2012) (quoting *Jicarilla Apache Nation*, 564 U.S. at 177). As the Federal Circuit has stressed, “the United States is only subject to those fiduciary duties that it specifically accepts by statute or regulation.” *Hopi Tribe v. United States*, 782 F.3d 662, 667 (Fed. Cir. 2015). No specific rights-creating prescription or duty is imposed here by statute or regulation that requires the United States to obtain more security than was specified in the TFPA. The Court consequently has no jurisdiction over any claim alleging a broad trust duty to obtain more security than provided in the TFPA.

(3) No other statute or regulation imposes a money-mandating duty on the United States to obtain more security than provided in the TFPA.

As demonstrated above, the Act is not a money-mandating statute for purposes of ITCA’s duty-to-obtain claim, and ITCA alleges no other statute or regulation that imposes a money-mandating duty. In its complaint, ITCA provides examples of statements from individuals purporting to acknowledge on behalf of the United States that the full amount owed by Collier to the Trust under the Act and the TFPA would be paid. *See, e.g.*, 2AC ¶¶ 77-118. An individual statement—by definition—cannot constitute a money-mandating statute or regulation. The Court thus lacks subject-matter jurisdiction to entertain a claim for breach of trust for failure to obtain more security than provided in the TFPA.

(4) A duty-to-obtain claim is also barred by the statute of limitations.

In addition to a lack of a money-mandating statutory duty, ITCA faces another fundamental jurisdictional problem with its duty-to-obtain claim. The parties signed the TFPA in 1992 and the land exchange between the United States and Collier closed in 1996, but ITCA did not bring suit here until 2015, some 19 years after the closing. Thus, ITCA’s claim that the

United States failed to obtain sufficient security in the TFPA was made long after expiration of the six-year limitations period, rendering ITCA's claim barred by the statute of limitations.

ITCA's breach of trust claims in this suit are constrained by the six-year statute of limitations in 28 U.S.C. § 2501. *See Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576 (Fed. Cir. 1988). ITCA's trust claims regarding the sufficiency of the security obtained in the TFPA have been time-barred under Section 2501 since 2002, six years after the closing of the land exchange.

ITCA cannot argue that it was unaware of the terms of the TFPA or that it was unaware of the United States' interpretation of the amount of security required under the TFPA. On the contrary, ITCA's suit against the United States in 1992 alleged that the United States had not obtained sufficient security because the collateral did not cover both interest and principal. *See* 1992 ITCA Complaint ¶¶ 39, 40; 2AC ¶¶ 155-56 (ITCA sought to enjoin "the Secretary from agreeing to inadequately collateralize the trust fund payments").

If ITCA believed that the United States violated a trust obligation in failing to obtain sufficient security when it negotiated the TFPA, ITCA was required to assert such a claim in a timely manner. Instead, ITCA waited until December 15, 2016 to finally assert this claim in the first amended complaint. Even with relation back to its original 2015 complaint, ITCA's claim alleging that the United States failed to obtain sufficient security in the TFPA is barred by the statute of limitations.

B. Alternatively, the duty-to-obtain claim should be dismissed for failure to state a claim.

Even if the Court were to conclude jurisdiction does exist over ITCA's claim that the United States failed to obtain sufficient security in the TFPA, it should dismiss it for failure to state a claim for relief. First, collateral estoppel bars ITCA's duty-to-obtain claim because as

discussed above ITCA previously litigated the precise issue of whether the United States had discretion under the Act to negotiate the terms of the TFPA related to sufficiency of security. In addition, this claims also fails because the United States was not acting as a trustee when it negotiated the TFPA. Indeed, the TFPA expressly states that no third party beneficiaries exist under its terms. TFPA at 17. If any trust duty arose at all, it could not arise until the United States became obligated to deposit collections from Collier into the Trust Fund. Finally, ITCA has not alleged sufficient facts to show that the United States failed to obtain the security required under the Act.

A motion to dismiss under RCFC 12(b)(6) tests the legal sufficiency of a complaint in light of RCFC 8(a), which requires “a plausible ‘short and plain’ statement of the plaintiff’s claim, showing that the plaintiff is entitled to relief.” *K-Tech Telecomm., Inc. v. Time Warner Cable, Inc.*, 714 F.3d 1277, 1282 (Fed. Cir. 2013) (quoting *Skinner v. Switzer*, 562 U.S. 521, 530 (2011)). Legal conclusions in the complaint may be disregarded because although the court must “assume [the] veracity” of “well-pleaded factual allegations,” *Iqbal*, 556 U.S. at 679, conclusory allegations are not entitled to be assumed as true. *Iqbal*, 556 U.S. at 681. A plaintiff must plead enough factual allegations “to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A court should dismiss a complaint “when the facts asserted by the claimant do not entitle him to a legal remedy.” *Lindsay v. United States*, 295 F.3d 1252, 1257 (Fed. Cir. 2002).

(1) Collateral estoppel bars ITCA’s duty-to-obtain claim because it previously litigated the issue of sufficiency of security in the TFPA.

The Supreme Court has “long recognized that ‘the determination of a question directly involved in one action is conclusive as to that question in a second suit.’” *B&B Hardware Inc. v. Hargis Indus. Inc.*, 135 S. Ct. 1293, 1302 (2015) (quoting *Cromwell v. County of Sac*, 94 U.S.

351, 354 (1877)). The underlying rationale “is straightforward: Once a court has decided an issue, it is ‘forever settled as between the parties,’ . . . thereby ‘protect[ing]’ against “the expense and vexation attending multiple lawsuits, conserv[ing] judicial resources, and foster[ing] reliance on judicial action by minimizing the possibility of inconsistent verdicts.” *B&B Hardware Inc.*, 135 S. Ct. at 1302 (quoting *Baldwin v. Iowa State Traveling Men’s Ass’n*, 283 U.S. 522, 525 (1931), and *Montana v. United States*, 440 U.S. 147, 153-54 (1979)). “Collateral estoppel applies equally to findings of fact and conclusions of law.” *Franklin Sav. Corp. v. United States*, 56 Fed. Cl. 720, 736 (2003) (italics in original) (citing *Arizona v. California*, 530 U.S. 392, 414-15 (2000)).

Collateral estoppel bars re-litigation of any issue in ITCA’s second amended complaint if “(i) the issue previously adjudicated is identical with that now presented, (ii) that issue was ‘actually litigated’ in the prior case, (iii) the previous determination of that issue was necessary to the end-decision then made, and (iv) the party precluded was fully represented in the prior action.” *Kroeger v. U.S. Postal Serv.*, 865 F.2d 235, 239 (Fed. Cir. 1988) (quoting *Thomas v. Gen. Servs. Admin.*, 794 F.2d 661, 664 (Fed. Cir. 1986)); *see also Stephen Slesinger, Inc. v. Disney Enters., Inc.*, 702 F.3d 640, 644 (Fed. Cir. 2012); *Banner v. United States*, 238 F.3d 1348, 1354 (Fed. Cir. 2001).

All requirements for collateral estoppel are met here. First, in its 1992 suit against the United States, ITCA alleged that the security obtained by the United States under the TFPA constituted “a violation by the Secretary under the terms of the [Act] which requires that the payment of all amounts due be adequately collateralized at the time of closing.” 1992 ITCA Complaint ¶¶ 39, 40. In that action, ITCA also sought to enjoin “the Secretary from agreeing to inadequately collateralize the trust fund payments.” 1992 ITCA Complaint ¶ 5; 2AC ¶ 156.

These allegations were actually litigated, and the district court denied relief, concluding that “the Secretary’s decisions regarding the adequacy of the collateral . . . are precluded from judicial review under subsection 402(h) of the [Act].” *Inter Tribal Council of Arizona v. Lujan*, Order Denying Preliminary Injunction, at 6, ECF No. 23 (D. Ariz. Oct. 8, 1992). The Ninth Circuit affirmed the district court’s dismissal for lack of subject matter jurisdiction and failure to state a claim on the grounds that “the actions of the Secretary are precluded from judicial review.” *Inter Tribal Council of Arizona*, 51 F.3d at 200; 2AC ¶ 161. ITCA was also fully represented in its earlier suit.

ITCA’s duty-to-obtain more security claim in the second amended complaint raises the same issue concerning whether the United States obtained sufficient collateral in the TFPA that ITCA raised in the 1992 litigation. Obviously, the *relief* sought here is different from what ITCA sought in its 1992 suit against the United States. But the relief sought in the subsequent case need not be identical for collateral estoppel to apply. “[I]f the relief in the second suit is requested on a different basis from that in the first suit, collateral estoppel applies where ‘the question upon which recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties.’” *Underwood Livestock, Inc. v. United States*, 89 Fed. Cl. 287, 300 (2009) (quoting *Williams v. United States*, 86 Fed. Cl. 594, 602 (2009)). Even when the first court does not possess jurisdiction to entertain the claim presented in the second court, when an issue of law or fact has been resolved in the first court, the resolution of that issue has preclusive effect in the second court. *See Jensen v. United States*, 17 Cl. Ct. 583, 590 (1989) (plaintiff was collaterally estopped from alleging that United States was liable for taking water rights in a subsequent suit when a Washington state court already determined that plaintiff failed to identify a property interest in such water rights);

accord In re Assante, 470 B.R. 707, 713 (Bankr. S.D.N.Y. 2012) (collateral estoppel barred equitable subordination claim in bankruptcy because the claim was based upon allegations resolved in prior state court foreclosure action); *see also Gillmore-Gribble Apts., Inc. v. United States*, 182 Ct. Cl. 911, 912 (1968) (collateral estoppel barred developer's affirmative claim for rescission when district court previously rejected the developer's rescission defense in earlier suit); *Cheyenne-Arapaho Tribes of Okla. v. United States*, 33 Fed. Cl. 464, 469-70 (1995).

Because ITCA previously litigated the issue of the sufficiency of the security obtained in the TFPA, it is collaterally estopped from re-litigating the issue here. Its duty-to-obtain claim thus should be dismissed for failure to state a claim.

(2) ITCA has not stated a claim for relief since the United States was not acting as a trustee when it obtained the security in the TFPA.

Even if ITCA's claims were not subject to collateral estoppel, no statutory trust existed when the United States negotiated and executed the TFPA with Collier. Without a trust, ITCA is unable to state a claim that the security obtained in the TFPA violated a trust responsibility.

The terms of the Act plainly impose no trust duty until *after* the Indian School property was exchanged and *after* the United States began to receive payments from Collier. *See* Act, Sec. 405(a).⁶ The land exchange disposing of the Indian School property did not close until 1996, and Collier made its first payment on December 18, 1997. 2AC ¶ 163. Under the Act, then, the earliest that the Trust could have been established was in 1996 (when the land exchange

⁶ (a) ESTABLISHMENT. — Upon *disposal* of the School Property and *receipt* by the United States of the Monetary Proceeds, there shall be established in the Treasury of the United States —
 (1) a fund to be known as the Arizona InterTribal Trust Fund; and
 (2) a fund to be known as the Navajo Trust Fund.
 Act, Sec. 405(a) (emphasis added).

closed), and it is more likely that no trust duty even existed before December 18, 1997, when the United States received Collier's first payment.⁷

The Indian School land was United States property before the land exchange closed, and was never ITCA property, so no trust existed between the United States and ITCA with respect to the land. *See, e.g.*, 125 Fed. Cl. at 502 n.14 (noting that ITCA only has statutory trust claims here and not common law trust claims). ITCA is thus unable to state a trust claim against the United States for any actions the United States took or failed to take before the existence of the Trust. Therefore, ITCA's claim that the United States breached a trust duty to obtain more security when it negotiated the TFPA is irreparably defective and must be dismissed.

(3) ITCA has not stated a claim for relief because the United States complied with the Act's security requirements.

ITCA alleges that the value of the security obtained in the TFPA was inadequate because it secured only the \$34.9 million principal but not the 30 annual interest payments. *See* 2AC ¶ 257. Ordinarily, of course, collateral is meant to secure a principal amount of the debt. If a debtor defaults on a loan, the lender forecloses on the collateral to recover the unpaid principal, not all future interest. In banking, at least, future interest is earned by reinvesting or relending the recovered funds; it is not charged to the debtor. Before passage of the Act in 1988, the Congressional Budget Office analyzed whether a lump sum payment at closing or 30 annual payments equal to the interest due annually under the Act plus a balloon payment of the principal would ultimately (*i.e.*, at the end of 30 years) produce a different result in terms of funding for

⁷ *See* Restatement (Third) of Trusts § 2, comment i (2003) (“A trust cannot be created unless there is trust property in existence and ascertainable at the time of the creation of the trust.”); *see also id.* § 41 (“An expectation or hope of receiving property in the future, or an interest that has not come into existence or has ceased to exist, cannot be held in trust.”).

the Trust Funds. *See* 134 Cong. Rec. S13519-02, 1988 WL 176577 (Sep. 28, 1988).⁸ The CBO analysis demonstrates this rudimentary lending practice: “Under CBO interest rate assumptions,” the investment of \$34.9 million over thirty years does not produce a different result than thirty years of interest payments with a lump-sum payment of the \$34.9 principal at the end of the thirty years. *See* 1988 WL 176577 at 3.

The CBO analysis thus provides a fundamental premise that disproves the basis of ITCA’s argument for liability. When Congress passed the Act, the CBO had concluded that collateral sufficient to recover the principal was sufficient to cover the full interest payment stream. Indeed, had interest assumptions made in 1992—when the TFPA was negotiated—remained accurate, the United States would only need enough collateral to recover the \$34.9 million principal, not the entire stream of interest payments. It could reinvest the principal to earn “future” interest. The interest rate assumptions, did not, of course, remain accurate and the current prevailing interest rate is less than the 8.5% interest rate that Collier was required to pay. But no trustee is required to predict the future, and the United States is not required to be omniscient when it negotiates a loan agreement. *See Gila River Pima-Maricopa Indian Community v. United States*, 9 Cl. Ct. 660 (Cl. Ct. 1986) (reasonableness of BIA’s action in leasing trust land for partial development must be considered at the time decision was made). ITCA’s alleged facts, therefore, even if true, would not show that the security obtained in the TFPA was insufficient at the time that it was negotiated.

In any event, the United States’ trust duties are more strictly defined by “applicable statutes and regulations.” *Jicarilla Apache Nation*, 564 U.S. at 177. The Act defines the United States’ trust duties with respect to the Trust and its beneficiaries and, as demonstrated above, the

⁸ This CBO analysis was featured prominently in ITCA’s First Amended Complaint, *see* AC ¶¶ 68-69, but is inexplicably absent from the Second Amended Complaint.

Act does not require the United States to obtain any particular amount of security, but rather only requires the United States to “hold in trust the security provided in accordance with the Trust Fund Payment Agreement.” Act, Sec. 405(c)(2). The Act also gives the United States discretion with regard to security, limited only by the terms of the TFPA. The TFPA, then, while not the *source* of any enforceable trust duty, provides a safe harbor. Under the Act, if the United States complies with the terms of TFPA, then ITCA cannot prove a breach of a trust duty regarding the security. Thus, the second amended complaint does not—and cannot—state a cognizable claim, and ITCA’s duty-to-obtain security claim must be dismissed under Rule 12(b)(6).

C. ITCA’s trust claim for failure to maintain sufficient security should be dismissed for lack of jurisdiction and for failure to state a claim.

ITCA’s second theory of supposed trust liability in Claim I—that the United States failed to maintain sufficient security at various points during the life of the trust—also should be dismissed. ITCA uses the same calculation for sufficiency of security in this duty-to-maintain-claim as it does for the duty-to-obtain claim. As discussed above, since the United States complied with the terms of the TFPA related to security for the Trust, then the United States is not liable for a violation of any Trust duty to maintain security because the source of any such duty is the Act—and the Act only requires the United States to hold the security provided in accordance with the TFPA.⁹

The Deed of Trust, which is an exhibit to, and incorporated into the TFPA, contains a “Maintenance of Collateral” provision in section 6.3(a). The Arizona District Court, in granting

⁹ In ruling on the United States’ motion to dismiss the complaint, the Court decided that the Act’s provision requiring the United States to hold in trust the security provided under the TFPA allowed the Court “to infer that the government has a duty to hold and maintain adequate security for the benefit of the trust.” 125 Fed. Cl. at 502. Although the United States disagrees with the Court’s inference, the United States is not seeking reconsideration here, nor is reconsideration necessary to grant the instant motion to dismiss.

summary judgment in favor of the United States in its suit against Collier, determined that the Deed of Trust's maintenance-of-collateral-value 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." *United States v. Barron Collier Co.*, 2016 WL 3537802, *9 (D. Ariz. June 29, 2016) (emphasis added).

The United States was thus entitled to rely on this provision of the TFPA, which, throughout the life of the trust required Collier to monitor the level of security and to supplement that collateral, as necessary, with government-backed securities. Thus, the TFPA had a mechanism in place for monitoring collateral sufficiency. When Collier breached its duty to supplement collateral, the United States sued Collier for specific performance of the collateral maintenance provision and obtained a judgment requiring Collier to supplement security.

Although the parties to the Arizona litigation, as well as the court, estimated the Indian School property at an appraised value that turned out to be higher than the sale value, no trustee is required to predict the future and neither the United States nor the district court in Arizona could know how much the property would sell for when the amount of supplemental security owed by Collier was determined. The court and the United States were entitled to rely on the best available information at the time. Neither the United States, nor any trustee, is a guarantor or insurer of trust property. *See United States v. Mason*, 412 U.S. 391, 398 (1973) ("[I]t has long been recognized that a trustee is not an insurer of trust property."). And the United States was not an insurer or guarantor for the sale of the Indian School property.¹⁰

¹⁰ In the TFPA, the United States sought to ameliorate the risk of security valuation fluctuations by requiring Collier to maintain security at 130% of the remaining accrued obligation, thus in effect over-securing the debt.

The United States has complied with the provisions of the TFPA regarding maintenance of security and obtained a judgment from Collier to supplement the security as required under the TFPA. Under these circumstances, ITCA has not and cannot allege a cognizable claim that the United States has breached any trust duty related to maintaining sufficient security under the provisions of the TFPA and thus the duty-to-maintain component of Claim I must also be dismissed.

D. ITCA’s trust claim related to the location of the security should be dismissed for the same reason that the Court dismissed an identical claim from the original complaint.

ITCA re-alleges in the second amended complaint that the failure to have Treasury hold the security required under the Act is a breach of trust. 2AC ¶ 266. This claim relates to the location of the security and is identical in substance to the claim this Court dismissed from the original complaint. *Compare* Complaint ¶ 147 (“The United States’ failure to have Treasury hold the trust fund payments security in trust in accordance with Public Law No. 100-696, is a breach of trust”) *with* 2AC ¶ 266 (“The United States’ failure to have the Treasury hold the Trust Fund Payments security in trust was a breach of trust in violation of the Act”). In ruling on the motion to dismiss the original complaint, the Court dismissed ITCA’s claim based on the location of the security for failure to state a claim. 125 Fed. Cl. at 505. This is law of the case, and for the same reason, the Court should dismiss the identical claim in the Second Amended Complaint.

E. ITCA’s trust claim related to the deduction of sale costs is neither mature nor viable.

ITCA also alleges that to the extent that GSA deducts from the sale proceeds its costs for conducting the sale of the Indian School such a deduction violates the Act. 2AC ¶265. ITCA identifies no section of the Act which proscribes the customary deduction of such costs. Indeed,

Congress has specifically authorized GSA to deduct its sale expenses when it conducts the sale of property. *See* 40 U.S.C. § 571(b) (“ . . . the expense of the sale of . . . public property may be paid from the proceeds of the sale so that only the net proceeds are deposited in the Treasury”).

This claim thus also must be dismissed.

2. Claim II should be dismissed for lack of subject-matter jurisdiction for the same reason that the Court dismissed the identical claim from the original complaint.

ITCA’s claim that the United States has a fiduciary duty to make the trust payments not made by Collier should be dismissed for the same reason that the Court dismissed it the first time ITCA made this claim: the Court does not possess subject matter jurisdiction. As this Court has already concluded, and which is now law of the case, the Act did not establish a duty for the United States to make up Collier’s missed payments. *See Inter-Tribal Council of Arizona*, 125 Fed. Cl. at 500-501. With no new relevant allegations and no changed circumstances since this claim was originally dismissed, the Court should dismiss Claim II under RCFC 12(b)(1) for lack of jurisdiction.¹¹ Indeed, this conclusion is law of the case.

3. Claim III should be dismissed for failure to state a claim.

In ruling on the United States’ motion to dismiss the original complaint, the Court determined that although the United States had an obligation to invest Trust funds prudently, ITCA’s claim had to be dismissed because ITCA did not allege sufficient facts to state a claim that the United States had breached its investment and accounting duties. 125 Fed. Cl. at 505.

¹¹ In its motion to dismiss the original complaint, the United States also demonstrated that even if the Act could be interpreted as creating a fiduciary duty to make missed payments, this was not a money-mandating duty, *see Jicarilla Apache Nation*, 564 U.S. at 177, and that Claim I should be dismissed for failure to state a claim. *See* Motion to Dismiss at 10-12. In its order dismissing Claim I from the original complaint, the Court declined to reach these arguments because the Court concluded that the Act does not impose a fiduciary duty to make up Collier’s missed payments. 125 Fed. Cl. at 501 n. 13. If the Court were now to find such a duty, the United States respectfully requests that the Court consider these additional arguments from the original motion to dismiss, which are incorporated here by reference. Mot. to Dismiss at 10-12.

The Court directed that ITCA “seek an accounting in federal district court to identify any breach of the government’s investment and accounting duties and proceed with an action if it discovers any financial impropriety.” *Id.* at 505 n.16. ITCA did not seek an accounting, and although ITCA concedes that it has received regular statements of account from Interior for the Trust, ITCA has again failed to point to any financial impropriety. Instead, ITCA reasserts the same claim adding only a minor further allegation related to the mix of long and short-term investments, *see* 2AC ¶ 277, and a conclusory allegation that depositing the Collier settlement funds in the Treasury Overnighter is a trust violation, *see* 2AC ¶ 279. The United States has provided ITCA with account statements that are more than sufficient for ITCA to state a claim for the mismanagement of its trust funds, if any such mismanagement had occurred. ITCA’s failure to provide more specific allegations in its Second Amended Complaint in support of this investment claim, after being directed to do so by the Court, is fatal to ITCA’s claim. Indeed such conclusory allegations unsupported by factual assertions will not withstand a motion to dismiss. *Iqbal*, 556 U.S. at 679. This investment claim therefore has no merit and should be dismissed.

CONCLUSION

For these reasons, the defendant respectfully urges the Court to dismiss the Second Amended Complaint.¹²

May 16, 2018

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

RUTH A. HARVEY
Director

¹² If the Court denies the motion to dismiss, the United States requests that the Court grant defendant 60 days from the date of the order to file an answer to the amended complaint.

OF COUNSEL:

KENNETH A. DALTON

Director

KAREN F. BOYD

Attorney-Advisor

Indian Trust Litigation Office

Office of the Solicitor

Department of the Interior

Washington, D.C. 20240

MICHAEL J. QUINN

Senior Litigation Counsel

s/ Phillip M. Seligman

PHILLIP M. SELIGMAN

Trial Attorney

Commercial Litigation Branch

Civil Division

Department of Justice

P.O. BOX 875, Ben Franklin Station

Washington, DC 20044-0875

Telephone: (202) 307-1105

Phillip.seligman@usdoj.gov

Attorneys for Defendant