IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The United States respectfully requests that this Court deny Plaintiff Inter-Tribal Council of Arizona, Inc.'s (ITCA) Motion for Partial Summary Judgment on Claim I in the Second Amended Complaint (ECF No. 137), which asserts that the United States is liable for failing to monitor and maintain adequate collateral to secure the loan obligation of Barron Collier Co. (Collier) for the benefit of ITCA as one recipient of Collier's loan payments.[1]

This case has been pending since 2015 when ITCA, a council of federally recognized Indian tribes, sued the United States over certain funds that Congress designated ITCA to receive in trust from the proceeds of a secured $34.9 million loan the Department of Interior (Interior) extended to a developer, Collier. ITCA filed this suit while the United States was pursuing its own suit against Collier in Arizona district court, after Collier had stopped paying on the loan. At the time ITCA sued, no one knew whether the United States' suit against Collier would recover anything. By 2017, however, the United States had won summary judgment against Collier and executed a settlement agreement with an anticipated recovery of $54 million in a combination of cash, annuity, and real property in downtown Phoenix. The United States

[1] As set forth in the United States' Motion for Partial Summary Judgment (US MSJ) (ECF 129), the United States is entitled to summary judgment on this claim. The United States incorporates by reference its motion and accompanying statement of material facts (US SOF) (ECF 130).

realized just under $48 million in proceeds from the settlement and duly deposited ITCA's statutory share in ITCA's trust account. With that recovery, ITCA has been made whole, and this suit has outlived its purpose. But ITCA demands still more money, insisting that the United States should pay all future interest. No such liability exists. The paltry evidence ITCA does offer does nothing more than highlight disputed issues of fact that, at best, preclude summary judgment in ITCA's favor.

INTRODUCTION

As part of a land swap agreed to between Collier and the United States, the Arizona-Florida Land Exchange Act (Act), Public Law 100-696, 102 Stat. 4577, established an Indian education trust fund based on payments to be made by Collier under a "Trust Fund Payment Agreement." The Act directed Collier to pay $34.9 million to the United States to equalize the value of land exchanged between Collier and the United States. The statute authorized Collier to pay its obligation over thirty years with interest, requiring Collier to make thirty annual interest payments of $2.9 million and a balloon payment of principal at the end. The statute generally required the United States to hold in trust security in accordance with the Trust Fund Payment Agreement (TFPA) and to deposit Collier's payments into trust for ITCA and another tribe, but it did not make the United States responsible for any of Collier's missed payments.

The United States executed the TFPA with Collier and, under that agreement, obtained collateral securing Collier's principal payment obligation. After fifteen years of loan payments without incident, Collier ceased paying and attempted to abandon its obligations in 2012. The United States promptly urged Collier to resume timely payments and then sued Collier to enforce collateral-maintenance terms of the loan. The United States thereafter secured summary judgment against Collier and in 2017, successfully settled with Collier to obtain additional

security sufficient to make ITCA whole. The United States recovered a sum in excess of the value of the collateral that the United States was required to hold in trust under the TFPA, which accounted for the full principal obligation plus five years of unpaid accrued interest through the date of settlement, *infra* p. 31–32, thereby resolving all of Collier's obligations about ten years early. The United States then appropriately assigned the settlement proceeds to ITCA's trust account.

ITCA posits that because "the Act required Collier to make Trust Fund Payments consisting of 30 years of Annual [interest] Payments" that "the Act also require[d] the US as trustee [to] hold sufficient security in trust for all required Annual [interest] Payments[.]" ITCA Memorandum (ECF No. 137-1), p. 2. But the plain text of the statute does not require the United States to secure Collier's future interest obligations or otherwise delineate any specific security requirements. Instead, the Act committed the adequacy of collateral in securing Collier's payment obligations to the discretion of the Secretary in agreeing to the TFPA's terms. The TFPA has no requirement for covering future interest. ITCA nonetheless maintains that the United States must account for "[t]en $2.9 million Annual Payments . . . [that] were not made by Collier," *id.* p. 17—but this Court and the Federal Circuit have already held that the United States is not a guarantor for Collier and is not required to fulfill Collier's payment obligations. ITCA's argument also ignores the reality that it received the full value of the funds that Congress intended it to receive.

For these reasons, the Court should deny ITCA's request for summary judgment on ITCA's claim that the government breached its fiduciary duty to maintain sufficient collateral for

Collier's payment obligations.[2]

QUESTION PRESENTED

1. The Act establishing an Indian education trust fund based on proceeds from a Department of Interior loan to Collier directs the United States to "hold in trust the security provided in accordance with the Trust Fund Payment Agreement." The Ninth Circuit has already established that the Act afforded the Secretary of the Interior discretion to determine the adequacy of collateral in securing Collier's payment obligations. When Collier ceased payment on the loan, the United States sued Collier to force Collier to maintain the value of the trust estate at 130% of a defined "Release Level Amount" as set by the TFPA and obtained a judgment against Collier. The United States won a sum in excess of the value of the collateral that the United States was required to hold in trust under the TFPA and appropriately assigned proceeds to ITCA's trust account. Therefore, has the United States discharged its fiduciary duty such that ITCA's Motion for Partial Summary Judgment must be denied?

BACKGROUND

1. The case's current posture

After returning from the Federal Circuit, where the court affirmed the dismissal of most of ITCA's claims, *see* US MSJ at 13–15, the parties have both moved for summary judgment on ITCA's claim that the United States failed to maintain sufficient security at various times

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[2] This claim is part of Claim I of the Second Amended Complaint (SAC). The remaining portion of Claim I (alleging that the United States had a duty to obtain certain collateral when it negotiated the TFPA) and Claim II (alleging that the United States had a duty to make up Collier's missed payments) have been dismissed. Claim III of the SAC alleges a breach of trust for failure to prudently invest the Trust money and for failure to account. This Court has narrowed the scope of this claim, and stayed its litigation. A complete procedural recitation can be found at pages 9–15 of the United States' Motion for Partial Summary Judgment.

throughout the life of the Trust and when it recovered the settlement money from Collier. SAC ¶¶ 260–65. The parties agree that the Court has one narrow question to answer at this juncture to resolve both cross-motions: what constitutes adequate security under the Act —an amount sufficient to cover future unpaid interest, as ITCA alleges, or the amount identified in the TFPA accounting for accrued interest?

2. ITCA's factual and procedural recitation contains incomplete and unsupported facts and ignores key Federal Circuit holdings

The parties do not dispute the material facts of this case. Put simply, through the Act, Congress ratified an agreement between the United States and Collier under which Collier would swap certain Florida wetlands and receive federally owned property in Phoenix, Arizona. (The latter site was commonly referred to as the Phoenix Indian School property because Interior had previously operated a school for Native Americans there.). Because the Phoenix Indian School land was worth more than the Florida wetlands, Collier agreed to pay $34.9 million to the United States to equalize the swap. The Act directed that the proceeds were to be placed in educational trust accounts for the benefit of ITCA and the Navajo Nation.[3] The Act authorized the Secretary to accept a lump-sum payment of $34.9 million from Collier or allow Collier to spread the payment over thirty years with annual interest payments at a rate between 8.5 and 9.0 percent, with a final balloon payment of principal at year thirty. The Act specified that payments were to be made and security held by the United States in accordance with the TFPA, which had not yet been finished. After the Act took effect, Collier sought—and Interior approved—use of a 30-year secured loan. Collier and Interior thereafter worked out the terms of the TFPA, and the deal

[3] The remaining five percent is deposited into the Navajo Trust for the benefit of the Navajo Nation. Act, Sec. 405(e). The Navajo Nation is not a party to this litigation.

became effective in 1996.

For the next fifteen years, Collier made timely payments under the TFPA, but Collier ceased paying in 2012. The United States then sued Collier. The loan was nonrecourse, so the United States could not sue for missed payments, but it could and later did successfully sue to enforce the TFPA's collateral terms. Those terms, and specifically a "Maintenance of Collateral" provision, required Collier to maintain collateral at a level according to a specified formula in the TFPA designed to amply cover the principal debt. Under this provision, once a release of any liened property occurred, Collier was to supplement the collateral if it fell below 130% of the "Release Level Amount," which accounted for Collier's outstanding principal obligation and any accrued interest. When Collier ceased making payments, the United States sued over the collateral, obtained summary judgment against Collier, and thereafter struck a settlement that netted a recovery of $48 million. No one disputes that these proceeds were then properly assigned for ITCA's benefit.

ITCA clouds these basic facts with allegations that lack factual support as well as "sound bite" statements from government officials that have been robbed of all context. The sound bites, in any event, have no legal authority, and are ultimately immaterial to resolving the key issue presented to the Court. ITCA's procedural recitation also omits key portions of the Federal Circuit's decision in this case.

1. ITCA misrepresents statements by government officials or takes them out of context

First, the Court is obligated to disregard ITCA's "factual" statements that completely lack evidentiary support. For example, ITCA proffers *no* support for its statement that "the nonrecourse provision [in the TFPA] incentivized Collier to breach its Trust Fund payment

obligations at Collier's convenience." US Counterstatement ¶ 94.[4]

Additionally, ITCA invokes statements from government officials as support for its position that the United States was required to collateralize Collier's future interest payments. Several of these statements demand context or clarification.[5]

For example, following the passage of the Act, Interior honored a statutory duty of consulting with the tribes regarding their preference for Collier's payment options. ITCA references one remark from that meeting by a Department of Interior Attorney, David Watts, that "we're not only securing the $35 million at the end of the 30 year period but we also want to secure payments of those annual interest payments." ITCA SOUF ¶ 48. Yet, ITCA ignores the attorney's other key remarks about the loan that reflect his understanding of the thirty-year payment obligation. ITCA's brief omits Attorney Watts's statements indicating that Interior's goal is to ensure that ITCA receives the "present day value" of the $34.9 million principal obligation. US Counterstatement ¶ 48. He also explains that "trust income" will either be "annual interest payments . . . paid under the 30 year option or interest that will be earned under the lump sum option," *id.*, and confirms that "[t]here is very little difference in regard to the $35 million and what it is worth 30 years from now, *it's going to be the same,*" because the accruing interest guarantees that "30 years from now, [there will] be $35 million." *Id.*(emphasis added).

Other Interior officials, including Attorney David Moran, echoed the goal of ensuring

[4] The United States relies upon its Counterstatement to Plaintiff's Statement of Undisputed Material Facts (Counterstatement), filed contemporaneously and incorporated herewith.

[5] As argued below, statements from government officials cannot create a statutory trust duty for the United States. *Infra,* p 27. These statements are thus ultimately immaterial to the issue presented, and the Court need not resolve them in order to grant the United States' Motion for Partial Summary Judgment. If the Court believes that there is a genuine issue of material fact arising from the officials' statements, then ITCA's motion must be denied.

that ITCA received the present-day value of the $34.9 million if paid over 30 years. *Id.* ¶ 50. ("[P]roperly collateralizing" was important to ensure that "30 years out that money is there"); *id.* (reiterating the need to ensure that $34.9 million would be there "at the end of 30 years"). Attorney Moran reiterated this goal in his testimony associated with the United States' litigation against Collier. He confirmed that Interior's "concern was basically getting the dollar value . . . at the end of the day . . . [of] the $34 million dollars." *Id.* ("We wanted assurance at the end of the day that we were going to get the value of the . . . deal that we'd made."). Attorney Moran further testified that the Act contemplated ITCA receiving either a lump sum payment that would be invested and earn interest, or the 30-year plan which would provide ITCA with interest payments "in the interim." *Id.*

Additionally, Attorney Watts does not state that, if Collier selects the thirty-year option, that the United States will obtain collateral with sufficient value to secure the $34.9 million principal obligation *plus* thirty years of annual payments estimated to be $3 million—which would require Collier to produce over $120 million in collateral. Instead, he (and others) communicated that the United States would demand $45-60 million in collateral, reflecting an overcollateralization of the principal to account for "inflation and market factors." *Id.* ¶¶ 48, 50-51. It was understood that this would "safeguard" the tribes' interest if Collier were "to go under." *Id.* ¶ 50.

Other documents cited by ITCA do not support the statements for which they are offered. ITCA cites a draft Interior memorandum entitled "Collier Land Exchange: Establishment of Indian Trust Funds," shared with the Assistant Secretary for Indian Affairs, as support for the

United States' alleged duty to secure all future unpaid interest payments.[6] *Id.* ¶ 51. But the citation supports the opposite view, reflecting an understanding that only the principal need be secured. And, consistent with Interior officials' statements made at the meeting with ITCA and the Navajo Nation and elsewhere, the memorandum specifically recommends overcollateralization of "the obligation being insured (i.e. the 34.9 million principal) . . . to allow for inflation and possible devaluation of the collateral." *Id.* The only discussion of overcollateralization was to ensure payment of the principal value in case of market volatility. *Id.* (Assistant Secretary explaining that, in the event of Collier's default, the United States must be able to "liquidat[e] the assets held in collateral in order to secure the $34.9 million in *principal*.") (emphasis added); *id.* (Assistant Secretary recommending $50 million in collateral); *id.* (identifying Interior's goal of ensuring "protection for the $34.9 million in principal at the end of the 30 years"); *id.* (explaining options as sufficiently collateralizing principal to so that, if Collier were to default, $34.9 million could be recovered and invested); *id.* (recommending overcollateralization of approximately 130%). Interior incorporated this goal into the TFPA by requiring that the value of the collateral be 130% of a defined "Release Level Amount" for any liens to be released and mandating that Collier maintain security at 130% of the remaining accrued obligation. *Id.* ¶ 50 ("[O]nce it was determined that we were going to be taking interest payments and purchasing the annuity at the end of 30 years . . . we went back and forth over a several month period of deciding what the level of collateral would be at any particular point. We agreed to 130 percent."); *id.* ("[W]e took the annual payments, and the way we covered the risk on that was being assured that it was collateralized at 130 percent.")

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[6] As explained in the United States' Counterstatement ¶ 51, this document is privileged and has been placed under seal by this Court. The United States offers its explanation to the extent the memorandum is considered by the Court.

2. ITCA omits key portions of the Federal Circuit's decision

On appeal, the Federal Circuit affirmed this Court's conclusion that the Act imposes no obligation on the United States to pay if Collier fails to do so. *Inter-Tribal Council of Arizona, Inc. v. United States*, 956 F.3d 1328, 1345 (Fed. Cir. 2020) (*Circuit Opinion*).

ITCA's summary of the Federal Circuit decision ignores conclusions that are critically relevant here. Namely, ITCA continues to invoke section 403(c)(2) of the Act as creating liability for the United States for thirty annual interest payments. But this section merely states that:

> "[T]he *Purchaser* shall make —
>
> (A) 30 annual payments equal to the interest due on an amount equal to that portion of the Monetary Proceeds that is properly allocable to the Trust Fund for which such election is made; and
>
> (B) at the time of the last annual payment, a payment equal to that portion of the Monetary Proceeds that is properly allocable to the Trust Fund for which such election is made.

Section 403(c)(2) (emphasis added). The Federal Circuit expressly concluded that section 403(c)(2) of the Act imposes payment duties only on *Collier*. In holding that the United States was not a guarantor for Collier, the appellate court unequivocally rejected ITCA's contention that this Court "ignored the [Act's] mandates and erred under applicable case law[,]" *id.* at 1345, instead concluding that ITCA's claim did "not [find] support in the [Act], case law, or otherwise." *Id.* at 1345–46. The Federal Circuit confirmed that "those portions of the [Act] cited by ITCA for support," including section 403(c)(2), "impose, at most, a duty upon *Collier*, not the Government" and that ITCA's arguments were "misplaced." *Id.* ITCA lacks candor when it fails to acknowledge this adverse ruling and nonetheless tells this Court that the United States is liable for section 403(c)(2)'s "Payment mandates [that] remain unfulfilled." ITCA

Memorandum, p. 24–25.

3. The material facts are not in dispute

The material facts, summarized below and detailed in the United States' cross-motion, are not in dispute.[7]

A. The passage of the Act and consummation of the TFPA

The Act approved a complicated land exchange between the United States and Collier that required Collier to pay $34.9 million to the United States. 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. Act, Sec. 403(b); US SOF ¶ 5. The Act directs that all of Collier's payments are to be used to establish two Indian education trust accounts, the Arizona Inter-Tribal Trust Fund (Trust) and the Navajo Trust Fund (Navajo Trust). Act, Sec. 405(a)(1)–(2); US SOF ¶ 7. The Act specifies that ITCA is to receive 95 percent of the money paid by Collier. Act, Sec. 405(e); US SOF ¶ 8.

At Collier's request, the Secretary approved use of the thirty-year payment option, requiring the creation and execution of a Trust Fund Payment Agreement specifying the terms of the financing provided by the United States to Collier. Act, Sec. 403(c)(4). Under this option, the United States was required to "hold in trust the security provided in accordance with the Trust Fund Payment Agreement." Act, Sec. 405(c)(2); US SOF ¶ 6. The Act did not delineate any

[7] In addition to including (and misrepresenting) statements from government officials that have no evidentiary value or legal weight, ITCA's factual recitation contains numerous facts that are likewise immaterial to resolving the issue at bar. For example, ITCA argues an exchange agreement predating the Act did not include a thirty-year payment option. ITCA SOUF ¶ 19. ITCA also invokes several pieces of legislative history that are never developed in its argument and are not material here. Those statements are identified in the United States' Counterstatement.

security requirements, *Inter-Tribal Council of Arizona, Inc. v. United States*, 140 Fed. Cl. 447, 458 (2018) (*Dismissal Order II), aff'd in part, rev'd in part on other grounds*, *Circuit Opinion*, 956 F.3d 1328, leaving this decision-making to the discretion of the Secretary. *Inter-Tribal Council of Arizona, Inc. v. Babbitt*, 51 F.3d 199, 203 (9th Cir. 1995) (*ITCA v. Babbitt*). The Act does not require the United States to make any payment if Collier fails to make them. *Circuit Opinion*, 956 F.3d at 1345.

After the Secretary accepted Collier's request to make annual interest payments for thirty years, with a balloon payment of the principal, US SOF ¶ 10, Collier and the United States executed the Trust Fund Payment Agreement along with a Promissory Note and Deed of Trust constituting a part of the TFPA. *Id.* ¶ 12.

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, which was supposed to equal the $34.9 million principal sum at the end of the thirty-year term. *Id.* ¶ 14, 15. 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. *Id.* ¶ 16. 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 development rights in two other Phoenix lots, referred to as the Downtown Lots. *Id.* ¶¶ 22, 23.

The Deed of Trust also provided that, if Collier requested a release of any liened 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." *Id.* ¶ 24.

The TFPA, in the Deed of Trust, defines the Release Level Amount 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.

Id. ¶ 25.

Collier twice requested a release of liens, in 1998 and 2007. *Id.* ¶¶ 26–27. Though ITCA faults the United States for failing to conduct independent appraisals of the property held as security when the second lien was requested, the United States did have an appraiser evaluate and confirm that Collier's appraisal methodology was proper for use with the lien release. US Counterstatement ¶ 106.

After the United States granted the second release as required by the TFPA, the collateral for Collier's loan consisted of the Phoenix Indian School, which remained in the Trust Estate, plus the Annuity. US SOF ¶ 27.

Collier's first lien release request in 1998 triggered another term of the Deed of Trust. That term required Collier to supplement collateral by adding Government-backed securities or employing other methods to increase the value of the collateral if the value of the liened property fell below 130% of the Release Level Amount. *Id.* ¶ 28. Requiring Collier to maintain the collateral at this amount provided Interior with further assurance that Collier would fulfill its obligations notwithstanding that the loan was nonrecourse. US Counterstatement ¶ 100. This collateral maintenance term and Collier's duty under it were central to the United States' successful suit and $54.5 million settlement against Collier after it ceased payments on the loan in 2012.

B. The United States successfully sues Collier to supplement collateral

From 1997 to 2011, Collier made fifteen annual interest payments to the United States

without incident. US SOF ¶ 31. Collier also made required deposits into the private annuity. *Id.* ¶ 32. But 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. *Id.* ¶ 36.

After efforts to cure Collier's arrearage failed, the United States sued Collier in district court in Arizona in January 2014. *Id.* ¶ 38; *see United States v. Collier*, 2:14-cv-00161-PGR, ECF No. 1 (D. Ariz. 2014). The United States sought specific performance of the Deed of Trust's maintenance-of-collateral-value provision. At the close of discovery, the United States moved for summary judgment, explaining that 130% of the Release Level Amount at that time was $43,485,224. US SOF ¶ 40. This sum reflected the principal obligation ($34.9 million) plus the accrued interest unpaid to date ($11,866,000, *i.e.,* four years of missed annual payments for years 2012–2015), less the value of any government-backed securities in the Trust Estate ($0) and the Annuity at that time ($13,315,828). *Id.*

The district court agreed and granted summary judgment in favor of the United States on June 29, 2016. *Id.* ¶ 43; *United States v. Barron Collier Co.*, No. CV-14-00161-PHX-PGR, 2016 WL 3537802, *9 (D. Ariz. June 29, 2016) (*Collier*). Thereafter, Collier and the United States reached a settlement on July 18, 2017, under which Collier surrendered title to 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 the $25 million appraised value of the Indian School property. *Id.* ¶¶ 46–47. The United States General Services Administration (GSA) sold the Indian School property for $18.5 million, such that the total realized recovery from the settlement was just under $48 million. After deduction for GSA's statutorily authorized administrative costs ($77,902), Interior assigned 95 percent of the settlement proceeds for

deposit into the trust account for the benefit of ITCA.[8] *Id.* ¶¶ 50–51.

ARGUMENT

Despite successfully recovering Collier's principal debt more than ten years ahead of the schedule set in the TFPA, ITCA insists that the United States is liable for ten "unpaid" annual interest payments (years 2017–2026) that were not recovered once the loan was resolved with Collier. (ITCA Memorandum, p. 17). Each of ITCA's arguments can be swiftly rejected by the plain language of the Act, well-established principles of statutory construction, and binding precedent in this case.

First, ITCA argues that the Act's plain language "imposes on the US a Fiduciary Duty to Secure All Required Trust Fund Payments at their Statutorily Required Amounts." *Id.* at 20. ITCA's resort to the Act's "plain language," however, fails because ITCA *never* accurately quotes the relevant language. Instead, ITCA rephrases the operative provision (section 405(c)(2)) and relies heavily on section 403(c)(2), even though the Federal Circuit has already held that section 403(c)(2) imposes a duty only on *Collier*—*not* the United States. Seizing on its false premise, ITCA then argues that the United States' trust duty to collateralize Collier's obligations must also impose a continuing duty to ensure that ITCA receives all thirty years of payments. Thus, ITCA's reliance on sections 405(c)(2) and 403(c)(2) is misplaced; the Federal Circuit 's construction of 403(c)(2) precludes the very conclusion ITCA seeks to have this Court draw.

ITCA also argues that the legislative history of the Act is instructive. But legislative

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[8] Interior received the $16 million in cash (95% of which is held for ITCA) from the settlement on July 26, 2017. *Id.* ¶ 48. Due to the long-term nature of the Annuity's holdings, it was not prudent to convert them immediately to cash, and thus Interior held the Annuity investments, cashing them out over time as they matured, with deposit into trust. *Id.* ¶ 49. The United States General Services Administration (GSA) sold the Indian School property for $18.5 million, such that the total recovery from the settlement was just under $48 million.

history should only be used to interpret an ambiguous statute, and ITCA concedes the Act is unambiguous. *Id.* at 21, 23. But even if the history of the Act were considered, it does not bolster ITCA's theory of liability. Additionally, post-enactment statements from agency officials do not qualify as legislative history or give insight into Congressional intent, nor can they create a statutory duty for the United States. Even then, many of the agency documents and statements invoked by ITCA support the United States' position.

Finally, ITCA contends that the United States is in breach of its trust duties until ITCA receives all future unpaid interest. But the United States faithfully discharged its trust duties by successfully suing to enforce the TFPA's security requirements.[9] As a result of the United States' legal action, ITCA has been made whole, and its request for summary judgment must be denied.

1. Standard of Review

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

[9] ITCA also has a two-page section of its argument entitled "The Act is unique." This section does not identify any duties of the United States or advance any particular argument entitling ITCA to summary judgment. It merely asserts that the act is "unique" because it allowed a 30-year payment with interest rather than a lump sum payment at the outset. ITCA cites no authority supporting this position or for applying a different standard of statutory construction.

appropriateness of summary disposition.”).

2. The plain language of the Act does not require the United States to collateralize all future interest

A. ITCA ignores the plain language of the Act

At issue here is whether the United States’ duty to “hold in trust” security for Collier’s payment obligations required it to collateralize all future interest payments, as ITCA alleges. Section 405(c)(2) of the Act simply states: “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.”[10]

The parties agree that the plain language of the Act should guide the Court’s analysis. *See* ITCA Memorandum, p. 21, 23 (advocating for plain language approach and stating that the statute is unambiguous). Indeed, “[i]t is well established that ‘when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.’” *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004).

Astoundingly, however, ITCA’s 37-page brief and 25-page statement of facts conspicuously omit the accurate text of section 405(c)(2). ITCA nonetheless contends, without explanation or proper quotation of section 405(c)(2), that the plain language of the statute supports its position. Without using the *actual* wording of section 405(c)(2), ITCA’s plain language arguments ring completely hollow.

[10] “The federal government owes a fiduciary obligation to all Indian tribes as a class” and “also incurs specific fiduciary duties toward particular Indian tribes when it manages or operates Indian lands or resources.” *ITCA v. Babbitt*, 51 F.3d at 203. But because the Phoenix Indian School “was not part of Indian lands” and instead “owned and controlled by the United States government,” the United States owed no fiduciary duty to the Tribes apart from its obligations under the Act. *Id.*

Rather than confront the actual language of this provision, ITCA uses an incomplete quote, striking the clause "in accordance with the Trust Fund Payment Agreement" as "unremarkable," ITCA Memorandum, p. 22 and replacing it with its own interpretation of section 405(c)(2). *See, e.g., id.* at 21 (stating that "'the Secretary of the Treasury shall hold in trust the security' for the 30-year payment period"); *id.* p. 22 ("[The Act] requires the US to 'hold in trust the security' for the Trust Fund Payments[.]"). ITCA's contention that section 405(c)(2)'s qualifying phrase requiring security to be held "in accordance with the Trust Fund Payment Agreement" is "unremarkable" is absurd. Section 405(c)(2) is *the* provision creating the United States' trust duty, and the qualifying phrase defines the United States' trust duty. *Circuit Opinion*, 956 F.3d at 1340, 1342 (identifying section 405(c)(2) as "the provision creating a statutory trust duty for the United States."). ITCA cannot ignore this provision's language simply because it sinks ITCA's position, and ITCA's request that this Court discount this clause as "unremarkable" violates the canon of construction that statutory provisions must be read as a whole. *Nero v. Mosby*, 890 F.3d 106, 124 (4th Cir. 2018). The Court "must construe" the entire text of section 405(c)(2) "to have meaning and avoid interpretations that would turn some statutory terms into nothing more than surplusage." *Id.* (internal quotations omitted); *Sharp v. United States*, 580 F.3d 1234, 1238 (Fed. Cir. 2009) (same). Interpreting this provision necessarily "depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 958 (9th Cir. 2013) (internal quotations omitted).

ITCA further contends the language in section 405(c)(2) dictating that the United States must hold the security "in accordance the Trust Fund Payment Agreement" cannot be used by

the United States to "ignore or violate other mandates of the Act" or to justify "secur[ing] less than the Act required," parroting throughout its brief the baseless claim that "multiple express terms of the Act support" its position. *See*, *e.g.*, ITCA Memorandum, pp. 17, 22, 24. ITCA identifies *no* language that imposes a duty on the United States to secure Collier's future interest payments, nor does it identify any provision other than section 405(c)(2) that imposes a trust duty on the United States. No such provision or language exists. ITCA cites no actual "mandates" that the United States is supposedly violating. ITCA cannot merely lob unsubstantiated arguments and expect to prevail.

As presented in the United States' cross-motion and reiterated here, the Act is clear and its mandate unambiguous: the United States need only hold in trust security "in accordance with the Trust Fund Payment Agreement," Act, Sec. 405(c)(2), for the purpose of securing Collier's payment obligations. *Circuit Opinion*, 956 F.3d at 1341. The Act by its express terms does not identify any specific security amount, either greater than or different from that adopted in the TFPA. *Dismissal Order II*, 140 Fed. Cl. at 458. Indeed, no TFPA even existed when the Act took effect; the terms were left open. Instead, the Act vests the Secretary with discretion with regard to security, limited only by the terms agreed to in the TFPA. Act, Sec. 405(c)(2); *ITCA v. Babbitt*, 51 F.3d at 203. Thus, the Court can confidently look to the TFPA to understand the United States' duties with respect to collateral maintenance. So long as the United States complied with the TFPA, it abided by the Act's *only* security mandate: to "hold in trust the security provided in accordance with the Trust Fund Payment Agreement." It was *not* required to maintain some other amount—such as principal *and* future interest—if not set forth in the TFPA or the Act. As noted by the Federal Circuit, ITCA's theory that the United States had a duty to "negotiate terms in the TFPA and related documents to ensure adequate security" was

unsupported "by the [Act], case law, or otherwise." *Circuit Opinion*, 956 F.3d, at 1345. Rather, the Secretary had discretion to decide the adequacy of collateral and such decision-making was not subject to judicial review. *ITCA v. Babbitt*, 51 F.3d at 203.

Additionally, as explained in detail in the United States' cross-motion (US MSJ, p. 22) the United States' trust duty should be understood consistent with customary business practices and the Act's terms afforded their "ordinary, contemporary, common meaning[s]." *New York and Presbyterian Hosp. v. United States*, 881 F.3d 877, 882 (Fed. Cir. 2018); *Massachusetts Mut. Life Ins. Co. v. United States*, 782 F.3d 1354, 1367 (Fed. Cir. 2015). Collateral is designed to secure a principal owed on a debt in the event of default. US MSJ, p. 21. The lender forecloses on collateral to recover the unpaid principal, plus perhaps unpaid accrued interest, but not all *future* interest. This is because the purpose of interest is simply to reimburse 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). It is axiomatic that a "dollar today is worth more than a dollar tomorrow," *Hicks v. Capitol Am. Life Ins. Co.*, 943 F.2d 891, 895 (8th Cir. 1991), "because money in hand can be immediately reinvested to earn more money." *In re Pringle*, No. 05-CV-144S, 2006 WL 2528502, at *2 (W.D.N.Y. Aug. 31, 2006); *Hicks*, 943 F.2d at 894 (awarding unearned future interest as damages on a note "flies in the face of fundamental principles of finance and accounting").

The Congressional Budget Office even confirmed that the collateral terms, over the life of the loan to Collier, afforded an equivalent return. The CBO analysis demonstrates that 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. *See* 134 Cong. Rec. S13519-02, 1988 WL 176577, *3 (Sep. 28, 1988). Stated

simply, when the Act was passed, the CBO informed Congress that payment of cash at closing as compared to payment of thirty annual interest payments, with a lump sum principal paid at the end, would have the same present value. The thirty-year annual payment option was not intended to provide greater compensation than if Collier had paid a lump sum at the outset; rather, the interest payments guaranteed that the trust beneficiaries were compensated for the time value of money. US MSJ, p. 22–23.

For these reasons, the Act imposed no requirement that the United States secure all future interest payments. The United States does not dispute that section 405(c)(2) gives rise to a statutory trust duty. But understanding that duty requires giving proper meaning to the Act's plain language—something ITCA refuses to do. ITCA cannot identify any statutory duty that required the United States to maintain more security than that specified by and obtained under the TFPA. Instead, ITCA has grounded its position in ignoring this language and baldly asserting that the Act requires what ITCA says it requires without any support in the Act. In reality, the only trust duty was to observe the security requirements set by the TFPA, in accord with basic common sense and business practices. Any attempt to impose a collateral duty beyond what the TFPA requires finds no support in the Act and would impose upon the discretion given to the Secretary under the Act. Accordingly, ITCA's argument must fail.[11]

B. ITCA's arguments ignore that the Federal Circuit has already held that the United States is not a guarantor for Collier

Lacking support in the Act for its future interest claims against the United States, ITCA resorts to the Act's impositions on *Collier.* Indeed, ITCA's brief is riddled with remarks about

[11] ITCA also contends that requiring security where the 30-year payment option was selected reflects Congress's intent for the United States to secure all future interest. But ITCA offers no support for "intent" other than its own unsubstantiated statutory interpretation.

Collier's obligations, relying on these obligations to extrapolate a theory of liability against United States. *See*, *e.g.*, ITCA Memorandum, p. 17 ("Collier admitted that these Annual Payment [*sic*] were due[.]); *id.* p. 16 ("The total recovery by the US in *U.S. v. Collier* was roughly $48 million, which is far less than what Collier stated was owed [*sic*] the Trust Funds[.]"). The crux of ITCA's position is that because Collier had thirty years of payment obligations, the United States had a duty to ensure ITCA received those payments by collateralizing all future interest. The Federal Circuit, however, has rejected ITCA's theory that the United States has a duty to make up for any of Collier's missed payments. ITCA cannot recycle this argument by resort to the Act's trust provision.[12]

First, ITCA's invocation of section 403(c)(2) of the Act, which provides for Collier to make thirty annual interest payments at a minimum rate (set in section 403(c)(5)) with a final payment at the end of thirty years, is misplaced. The Federal Circuit expressly rejected section 403(c)(2) as imposing any duty on the United States to make payments on Collier's behalf. That court stated unequivocally that this provision, and others on which ITCA relied, imposed duties only on *Collier.* ITCA thus cannot use this provision to fabricate a fiduciary duty of the United States to fulfill Collier's payment obligations. But this is precisely what ITCA attempts to do. *See*, *e,g.*, ITCA Memorandum, p. 20 (stating that the requirements of section 403(c)(2) are "unequivocal"; *id.* at p, 23 (arguing that the United States' trust duty must be determined by reference to the payment provision); *id.* at p. 24 (arguing that the United States' position nullifies the express language of section 403(c)(2) requiring thirty annual payments from Collier); *id.* at p. 25 (asserting that the "Act requires 30 Annual Payments . . . Fewer than those required Payments

[12] It is also worth noting that ITCA has no standing under the TFPA to complain about what Collier did or failed to do. ITCA is not a party to any of these instruments, US SOF ¶ 13, and the TFPA clearly provides that it had no third-party beneficiaries. US SOF, Exh. 1, Art. 9.7.

. . . have been made . . . In short, the Act's Payment mandates remain unfulfilled[.]"); *id.* at p. 31 (citing section 403(c)(2) as imposing a thirty-year duty on the United States).

ITCA misguidedly believes that Collier's failure to pay all thirty interest payments creates liability for the United States. *Id.* at p. 17 ("Ten $2.9 million Annual Payments due Indian educational Trust Funds under the Act remain unaccounted for by the US"); *id.* at p. 30 (insisting that the United States is liable for the "Annual Payments due under the Act but unpaid"); *id.* at p. 33 (asserting the United States is liable for any "[Annual] Payments [that] are not made"). But this logic is refuted by the Federal Circuit's ruling that the Act imposes no obligation on the United States to make payments if Collier fails to do so. *Circuit Opinion*, 956 F.3d at 1345 (dismissing ITCA'S allegation that the United States was liable because it "has not collected [or made] . . . any [missed] Trust Fund Payments."). It cannot be that the United States is liable for all future interest payments when, *a fortiori,* the United States has no duty to make up for any payments Collier missed.

Second, ITCA ignores the time value of money and the economic impact of having been paid the principal amount of the debt 10 years *sooner.* ITCA—again relying on section 403(c)(2)–argues that the United States has a continuing duty to ensure ITCA receives thirty years of payments, regardless of when Collier ceased paying or when the obligation was satisfied. To that end, ITCA volleys its unprecedented position that "accrued interest" means all future (i.e., unaccrued) interest. This argument lacks merit and common sense. ITCA cites *no* supporting authority, relying entirely on its own misguided reading of the Act. No language in the Act supports this interpretation or indicates that imposing an interest obligation on Collier was anything more than a reflection of the time value of money. As detailed in the United States' cross-motion and reiterated above, ITCA's interpretation would violate basic canons of statutory

construction that terms are to be given their ordinary meaning unless Congress directs otherwise.

ITCA does not—and cannot— dispute that the deal was $34.9 million, and Collier could have paid this in a lump sum at the time of the exchange. But the Act offered the option, if approved by the Secretary, allowing Collier to finance the payment over thirty years with interest, ensuring that ITCA received the present value of the $34.9 million when paid in thirty years. The United States agrees that the security held in trust, as specified in the TFPA were an effort to assure full payment by Collier—and that is precisely what has happened here. The TFPA ensured that Collier, after any release occurred, would replenish the collateral if it fell below 130 percent of the Release Level Amount as the TFPA specified. The United States successfully sued Collier to enforce collateral maintenance and recovered the full principal obligation plus five years of unpaid interest. US MSJ, p. 28. ITCA concedes it received this amount through the United States settlement with Collier. ITCA Memorandum, p. 15–16. It has therefore been made whole.[13]

Adopting ITCA's interpretation would grant ITCA *more* funds than Congress allocated to it. Future interest simply represents the time value of the principal obligation if it were paid at a later date. ITCA's demand for additional funds despite receiving the benefit of that obligation being fully satisfied ten years early—getting its dollar today instead of tomorrow—defies reason.

[13] ITCA also oddly seeks to rely on language in a brief filed by the United States in the litigation against Collier. *See* Case No. 2:14-161, ECF. No. 171, at 12 (Attached as Exhibit 7 to the United States' Counterstatement). ITCA falsely claims that the United States took a position in that litigation that the Deed of Trust's accrued interest provision covers all thirty years of payments. To the contrary, in the brief cited by ITCA, the United States was merely responding to a hypothetical counterfactual introduced by Collier. The United States nowhere asserted that all thirty years of interest had accrued and, more importantly, the Arizona District Court never took such a position when entering judgment in favor of the United States and calculating how much supplemental collateral Collier must provide.

It would impose an unwritten obligation on the United States to pay more than the present value of the loan obligation, when it is already law of the case that the United States has no trust duty to make up lost payments.

ITCA's theory lacks foundation in the plain language of the Act or the TFPA, undermines previous court holdings, and must be rejected.

3. The legislative history of the Act is consistent with the United States' plain language analysis

ITCA's invocation of the Act's legislative history is misplaced. "Legislative history is only an appropriate aid to statutory interpretation when the disputed statute is ambiguous." *United States v. Kouevi*, 698 F.3d 126, 133 (3d Cir. 2012); *Indian Harbor Ins. Co. v. United States*, 704 F.3d 949, 956 (Fed. Cir. 2013) ("[R]eference to legislative history is inappropriate when the text of the statute is unambiguous"). Because ITCA does not argue that section 405(c)(2) is ambiguous—to the contrary, it concedes that the Act is unambiguous–it would be inappropriate to consider legislative history here.[14] ITCA Memorandum, pp. 21, 23 (advocating for plain language approach and confirming that the statute is unambiguous).

In any event, ITCA's legislative history arguments, if considered, are meritless. ITCA states: "The bi-partisan support for the Act does not show any clearly expressed legislative intent contrary to the Act's language to require and secure all Trust Fund Payments at their statutorily calculated amounts." ITCA Memorandum, p. 26. But there is *no* statutory language dictating the United States "secure all Trust Fund Payments" that *Collier* was required to make. The assertion

[14] ITCA buries the following sentence in its brief, following a discussion of section 403(c)(2): "To the extent the Act is ambiguous . . .'[a]mbiguities must be resolved in favor of the Indians.'" It is unclear whether ITCA is stating that section 403(c)(2) or the Act as a whole might be "ambiguous." This catchall statement hardly suffices to advance a cogent argument in favor of ambiguity when ITCA otherwise maintains that the Act is unambiguous. ITCA does not argue that section 405(c)(2) is ambiguous.

is pure fiction.

The specific historical passages referenced by ITCA do *not* compel a different interpretation of the Act from that advanced by the United States. For example, ITCA points to a House Committee Report stating that the purchaser must pay $34.9 million and, if the 30-year payment option is selected, that "the *purchaser* is required to make annual payments each consisting of the interest due on the trust fund principal." *Id.* The report further states "[t]he interest rate to be used in determining the interest due on annual payments into the trust funds … may not be lower than 8.5 percent." *Id.* Much like section 403(c)(2), these statements simply reference obligations on the *purchaser.* They specify nothing about the United States' fiduciary duty.

Additionally, nothing in the Act or the legislative history indicates that the annual interest payments were intended as an extra revenue stream. US Counterstatement ¶ 28. ITCA's invocation of its *own* testimony at a congressional hearing prior to the Act's passage is unpersuasive. There, ITCA expressed concerns on fluctuating interest rates and requested that Congress include a "guaranteed minimum [annual] cash flow" if the 30-year option was selected. ITCA Memorandum, p. 11. The ultimate inclusion of a fixed interest rate of 8.5 to 9.0 percent does not speak to any collateral obligation of the United States. US Counterstatement ¶ 28. It ensures only that ITCA received the time value of money equivalent of the $34.9 million principal obligation if spread over thirty years. As evidenced by the CBO report, the interest rate assured that ITCA would receive the real value of the $34.9 million obligation if paid over thirty years rather than a lump sum at closing, accounting for the time value of money.

Finally, ITCA invokes a Joint Committee Report which notes that the Secretary, in exercising its discretion, was to confer with the tribes when deciding which method of payment

to accept from Collier. ITCA Memorandum, p. 41. This statement says nothing about what sum the United States was to hold as collateral (or even what type of collateral it would be), and it is undisputed that the Secretary *did* confer with the tribes on the payment options and lawfully chose to execute the 30-year option. That is not an issue before the court. US Counterstatement ¶ 41.

4. Only the Act defines the United States trust duties, not statements from government officials

The United States' trust duties are strictly defined by the Act, *Jicarilla Apache Nation v. United States*, 112 Fed. Cl. 274 (2013), which affords the Secretary discretion to execute the Trust Fund Payment Agreement. Unable to find anything in the Act that requires the United States to obtain more security than specified in the TFPA, ITCA argues that its claim is supported by statements from Interior officials purporting to acknowledge the United States had some duty to assure that all interest would be paid in any case.[15] But individual opinions cannot, as a matter of law, create a trust duty for the United States, nor do they provide ITCA with a monetary remedy not authorized by the Act. *See Mercier v. United States*, 786 F.3d 971, 977 (Fed. Cir. 2015) ("[E]quitable considerations cannot grant a money remedy Congress has not authorized[.]") (*citing Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414 (1990)); *Penny v. Giuffrida*, 897 F.2d 1543, 1547 (10th Cir. 1990) ("[C]itizens . . . may not rely on government agents' incorrect interpretations of the law.").

Regardless of statements made by Interior personnel, this Court must "observe the

[15] ITCA frames these statements as a part of the legislative history and thus relevant to the Court's statutory interpretation. This is incorrect. While remarks on *proposed* legislation to Congress may be instructive in the interpretation of an ambiguous statute, ITCA cites no authorities that post-enactment remarks from agency officials are relevant to discerning Congressional intent.

conditions defined by Congress for charging the public treasury." *Mercier*, 786 F.3d at 975. "[N]o money can be paid out of the Treasury" unless authorized by Congress. *Id.* at 976. Here, Congress did not authorize the government to serve as guarantor for any missed annual interest payments owed by Collier, nor did Congress require that the United States hold collateral sufficient to cover principal and all thirty years of interest payments. Imposing ITCA's requested liability on the United States goes beyond the statute and the obligations outlined in the TFPA, which have now been fully discharged by the United States. To charge the public treasury based on statements of government officials would be wholly improper. Accordingly, these statements are immaterial to the Court's resolution of the issue presented.

Notwithstanding that the officials' statements are immaterial here, several documents that ITCA proffers actually bolster the United States' position that ITCA was only intended to receive the present value of the principal obligation. For example, Interior attorneys consulting with ITCA following the Act's passage repeatedly expressed the goal of ensuring that ITCA received the full, present-day value of the $34.9 million obligation if paid over thirty years. US Counterstatement ¶¶ 48, 50. It was further conveyed to ITCA, consistent with the CBO report, that the thirty-year payment option would yield the same result as a lump sum payment. *Id.* The interest requirement merely reflected common sense and the general practice of reflecting the time value of money.

Interior officials further conveyed to ITCA that the United States was seeking to secure $45–60 million in collateral, which would oversecure the principal obligation to address risks from inflation and the devaluation of assets. This goal was shared with ITCA, circulated internally at Interior, and communicated to Collier. *See, e.g.*, *id.* (discussing with ITCA the goal of ensuring that "30 years out, [$35 million] is there), *id.* ¶ 51 (Interior recommending $50

million in principal); *id.* (Interior stating that the trust assets must be able to be liquidated to fulfill the principal obligation); *id.* ("[The] value of said collateral ought to exceed the value of the obligation being insured (i.e. the $34.9 million) . . . to allow for inflation and possible devaluation of the collateral."). The TFPA's terms, by requiring Collier to maintain security at 130% of the remaining accrued obligation once releases occurred, plainly reflect an effort to oversecure the debt, as contemplated by Interior officials prior to the TFPA's execution. *Id.* ¶ 48, 50–51. But these discussions and considerations do not suggest that ITCA would receive *more* than $34.9 million, in real dollars.

Other evidence proffered by ITCA also displays the United States' intent to provide ITCA with the present value of the principal obligation in the event of Collier's default. *Id.* ¶¶ 51, 64–66, 68 (communicating Interior's goal of ensuring the $34.9 million value is protected "30 years out" and considering options that would "establish sufficient collateral to secure Collier's principal obligation so that, upon default, the collateral can be liquidated and the $34.9 million recovered and invested[.]"). That the United States would demand enough collateral to secure the $34.9 million principal obligation plus thirty $2.9 million interest payments (i.e., over $120 million) is not supported by these documents.

Other commentary, to the extent it is entertained by the Court, must be considered against the backdrop and the reality of the negotiations with Collier.[16] At most, they create disputed

[16] For example, ITCA references statements from Interior to members of the Senate, stating that Interior was working to execute a TFPA that collateralized principal plus interest as well as various other sound bite statements from government officials. These statements do not detail the negotiations with Collier, or the collateral packages being contemplated by Interior. Attorney Moran testified in the *Collier* litigation that "Congress expected to hear from agencies on their performance of [statutory] mandates," and so Interior would provide the Senate with "pro forma notice[s]" that the deal with Collier was moving forward. US Counterstatement, ¶¶ 59, 60. Such statements, if they are entertained by the Court, merely create an issue of fact that must be resolved in the United States' favor at this time.

factual issues that preclude ITCA's entitlement to summary judgment.

5. The United States is not in breach of its statutory fiduciary duty but rather has fully discharged its trust duties

Finally, ITCA argues that the United States is in breach of its trust duty and "is liable for the difference between the amount that the Trust Funds have and the amount that the Act guaranteed the Trust Funds." ITCA Memorandum, p. 37.

The United States is not in breach of its trust duty, nor is it liable for more than what ITCA received from the settlement with Collier. The settlement was achieved through the remedy provisions of the TFPA, and that remedy enforced the collateral maintenance provisions in the TFPA. Thus, once the settlement terms were fulfilled, the United States discharged its trust duty for security, and ITCA is entitled to nothing more from the United States. As summarized herein and in the United States' cross-motion, the United States fulfilled its duties by initiating suit against Collier to obtain additional collateral and executing a settlement with Collier that ensured a recovery for ITCA.

The Deed of Trust's "Maintenance of Collateral" provision in section 6.3(a). required Collier, after receiving the lien release it was entitled to under the TFPA, to monitor the level of security and to supplement that collateral, as necessary, with government-backed securities. This 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. This provision thus served as the mechanism for monitoring collateral sufficiency as well as a form of collateral maintenance that required Collier to supplement the collateral if the value of security became deficient under the TFPA. This meant that if, as happened here, the value of the collateral dropped, the United States was entitled to rely on this provision of the TFPA to assure collateral supplementation.

That is precisely what the United States did. After the value of the trust estate fell below the minimum specified in the Deed of Trust and Collier shirked its duty to supplement the collateral, the United States drew upon the TFPA to force Collier to honor its collateral obligation by suing Collier for specific performance of the collateral maintenance provision. The United States won summary judgment requiring Collier to supplement the security and, after vigorous pursuit of Collier in court, secured a favorable settlement with a projected recovery of $54.5 million.

On appeal of this Court's original order dismissing ITCA's "duty to maintain" claim, the Federal Circuit determined that this claim could not be resolved on a motion to dismiss. It explained that this Court had left unanswered the question of what security was required to be held in trust, which is integral to resolving the issue of whether the United States was liable for damages arising from the alleged breach of its trust duty. The Federal Circuit similarly refrained from deciding what constituted adequate security—an amount sufficient to cover future unpaid interest, as ITCA alleged, or the amount identified in the TFPA that accounted for accrued interest—thus leaving unresolved whether the recovery from Collier remedied all injury suffered by ITCA as a result of the United States' alleged breaches, if proven. *Circuit Opinion*, 956 at 1340, n. 11.

The United States' view of collateral accurately reflects the statutory duty imposed on the United States and is consistent with basic business principles. The United States faithfully discharged its trust duty to "hold in trust security in accordance with the Trust Fund Payment Agreement" by vigorously and successfully litigating its claim against Collier to ensure the trust estate was adequately collateralized and thereafter executing a settlement that made the trust beneficiaries financially whole. The Act required the United States to hold security as set out in

the TFPA, and the TFPA in turn required Collier to maintain 130% of the Release Level Amount, which, at time of settlement, was $47.1 million.[17] US MSJ, p. 28. The $48 million settlement proceeds clearly exceed this amount. That is the *only* security that the United States was required to hold in trust. The settlement recovery thus placed ITCA in the same position it would have been in had the Trust Estate been adequately collateralized throughout its life.

ITCA nonetheless alleges the United States is liable for various breaches of its duty to hold sufficient collateral. ITCA fails, however, to identify how any of these allegations entitle it to damages when it has already been made whole by virtue of the settlement.

For example, ITCA asserts that the United States released liens on the Downtown Lots without conducting its own appraisal. But the United States did not blindly accept Collier's appraisal. Rather, it consulted with an appraiser to assess the appropriateness of Collier's appraisal methodology. At best, this argument suggests a triable issue of fact precluding a grant of summary judgment in ITCA's favor. However, given the settlement with Collier, ITCA suffered no harm from this alleged breach even if proven, and thus the Court should grant the United State' cross-motion.

ITCA also points to the United States' purported failure of delaying to demand additional collateral from Collier until Collier ceased paying. But this alleged breach has no bearing on the United States' liability. It is immaterial whether the value of the trust was replenished at the time of settlement or years earlier given that the United States did ultimately recover, on behalf of ITCA, the amount required to hold in trust to secure Collier's obligations.

[17] 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. US MSJ, p. 28.

ITCA also lobs several allegations related to the location of the security, contending that the Annuity was held at a private bank rather than Treasury. ITCA abandoned this allegation by failing to argue it on appeal of this Court's dismissal order. *Inter-Tribal Council of Arizona, Inc. v. United States*, 125 Fed. Cl. 493, 505 (2016) (dismissing ITCA's "location" claim in the ITCA's original complaint). Regardless, ITCA advances *no* argument or evidence of any harm suffered by this allegation. That the United States did not provide notice to ITCA of the lien release or the subsequent under collateralization of the estate also should not affect the Court's analysis. The United States' duty to hold sufficient security did not encompass any duty to notify ITCA. And, even if it did, any harm suffered by ITCA has now been remedied.

Finally, ITCA points to the government's decisions to allow a nonrecourse loan as well as the 2007 lien release that left the Phoenix Indian School property as the only property remaining as collateral. Even though the debt was nonrecourse, and the school remained the sole asset in the Trust Estate, the TFPA's Release Level Provision made any releases contingent on Collier's obligation being oversecured by 130% to guard against a devaluation of the collateral, compensating for concerns of real property valuation or related to the nonrecourse provision. And, in addition to the Trust Estate, Collier's obligation also remained secured by the Annuity.

Although the Federal Circuit may have been "troubled" by ITCA's allegations of breach, few of ITCA's claims survive scrutiny and only a breach of the Act is cognizable at law. The United States can only be held liable for "damages sustained as a result of a breach of the duties[.]" *United States v. Navajo Nation*, 556 U.S. 287, 291 (2009). ITCA has sustained no such damages. Any harm that may have arisen from the alleged breaches was fully remedied through the recovery from Collier. This settlement provided ITCA all it is entitled to from the United States.

CONCLUSION

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

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Respectfully submitted,

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