IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Legislative Materials

Agency and Administrative Materials

Other Authorities

INTRODUCTION AND SUMMARY OF ARGUMENT

The parties have filed simultaneous Motions for Summary Judgment (ECF Nos. 129 and 137) on Claim I of the Second Amended Complaint (SAC) (ECF No. 58). Pursuant to the Scheduling Order of January 12, 2023 (ECF No. 127), Plaintiff the Inter-Tribal Council of Arizona (ITCA) now files this Response Brief in Support of ITCA's Motion and in Opposition to Defendant United States' (US) Motion.

The Federal Circuit reversed this Court's dismissal of ITCA's SAC Claim I, that the US as trustee failed to secure Trust Fund Payments required under the Arizona-Florida Land Exchange Act, Pub. L. No. 100-696, 102 Stat. 4577 (1988) (Act) (SAC Exhibit 1). "[T]he portion of Claim I that arises from the Government's alleged breach of its fiduciary duty to 'hold in trust the security' against Collier's payment obligations [] states a claim over which the Court of Federal Claims has jurisdiction, and upon which relief can be granted." *Inter-Tribal Council of Az. v. United States*, 956 F.3d 1328, 1344 (Fed. Cir. 2020) (citation omitted). The Federal Circuit recognized that to resolve this Claim, this Court would need to decide the issue of whether the security had to cover all Payments required but not made under the Act when Collier defaulted, as ITCA maintains, or a lesser amount, as the US maintains. *Id*. at 1340 n.11. The US agrees that the Federal Circuit found 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 breaches of its trust duty." Def.'s Motion for Partial Summary Judgment at 28 (Def.'s Motion). Resolution of this issue depends on a correct view of what Congress intended in the Act.

ITCA and the United States agree that the terms of the Act control the outcome of the claim at issue here. "In any event, the United States' trust duties are strictly defined by the Act." Def.'s

Motion at 20; *accord id*. at 23 ("Economics aside, the United States' trust duties are defined by 'applicable statutes.' *Jicarilla Apache Nation v. United States*, 112 Fed. Cl. 274 (2013)"). The difference is that ITCA correctly and consistently applies the Act's Trust Fund Payments and Payments security provisions, but the US' disregards the dictates of Congress and relies on the arrangements that it made with Collier, arrangements which the US now deems to be nothing more than an "ordinary loan" governed by "general financial principles." But absent clearly expressed legislative intent to the contrary, a statute's language "must ordinarily be regarded as conclusive." *W. Co. of N. Am. v. United States*, 323 F.3d 1024, 1029 (Fed. Cir. 2003) (citation omitted). There is no contrary legislative history here and all interpretive tools support the clear language of the Act – language that required payment of $34.9 million to the Trust Funds after 30 years and an annual rate of return on the $34.9 million of not less than 8.5% for 30 years.

Moreover, since the US argues that it was permitted to secure fewer Trust Fund Payments than the Act required and admits that it has not otherwise accounted to the Trust Funds for those Payments, ITCA's available relief and the US' liability for that deficit must be addressed in this this case as money damages. Despite the US' arguments to the contrary, the prior district court cases, *InterTribal Council of Arizona v. Lujan*, No. 2:92-cv-01890 (D. Ariz. 1992), *aff'd*, 51 F.3d 199 (9th Cir. 1995) (*Lujan*), and *United States. v. Collier*, No. 2:14-cv-00161 (D. Ariz. 2016) (*U.S. v. Collier*), do not preclude the relief sought here or absolve the US of damages liability. The US itself said twice in *Lujan* that resolution of ITCA's declaratory and injunctive relief claims in that case does not preclude claims against the US for money damages for breach of trust. And the US and the district court in *U.S. v. Collier* correctly acknowledged that the claims there were contractual claims between the US and Collier that did not address, let alone resolve, claims under the Act such as are at issue here.

ARGUMENT

I. CONGRESS CREATED A UNIQUE TRUST FUND PAYMENTS ARRANGEMENT AND REQUIRED THE US AS TRUSTEE TO SECURE THE PAYMENTS, BUT TO CIRCUMVENT ITS FIDUCIARY DUTY, THE UNITED STATES IGNORES THE EXPLICIT STATUTORY ARRANGEMENT AND ARGUES THAT THE ARRANGEMENT IS AN "ORDINARY LOAN" GOVERNED BY "GENERAL FINANCIAL PRINCIPLES"

The Act provided for the closure of the Phoenix Indian School so that the US could exchange the School property for Collier's Florida lands. Act §§ 401(7), 401(12), 401(17), and 404(a). The Act ratified the Land Exchange Agreement between Collier and the US. *Id*. §§ 401(6) and 401(9). The Exchange Agreement stated that the School property was worth $34.9 million more than the Florida land. Pl.'s SOUMF ¶ 18 (ECF No. 137-2). The Act defines the $34.9 million as "Monetary Proceeds" and mandates its payment and deposit as a "Trust Fund Payment" to the Trust Funds created by the Act. *Id*. §§ 401(2), 401(11), 401(19), and 403(a). "The Secretary [of the Interior] is authorized to dispose of the School Property and use the Monetary Proceeds only in accordance with this Title." *Id*. § 402(a).

A subsection of the Act entitled "ELECTION OF LUMP SUM OR ANNUAL PAYMENTS" provides in relevant part that, "subject to the requirements for consultation under subsection (c)(3), the [Interior] Secretary may, in his discretion, elect to receive the Trust Fund Payment for deposit in the Arizona InterTribal Trust Fund or the Navajo Trust Fund, or both, in the form of either a lump sum payment or 30 annual payments, calculated in accordance with subsection (c). Act § 403(b). The next subsection entitled "METHOD OF PAYMENT" provides in relevant part that, "(2) If the Secretary elects to receive a Trust Fund Payment in the form of annual payments, the 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. *Id*. § 403(c)(2). That subsection also provides that "If the Secretary elects to receive a Trust Fund Payment in the form of annual payments under subsection (c)(2), the Secretary is directed to execute the Trust Fund Payment Agreement pursuant to which such annual payments will be made." *Id*. § 403(c)(4). It further provides that "The interest rate to be used in determining the interest due on annual Trust Fund Payments payable by the purchaser shall be the interest rate being offered on bonds payable in 30 years sold by the United States on the date that notice of the election of the form of the Trust Fund Payment is made by the Secretary plus 0.25 percent, except that in no event shall such interest rate be lower than 8.5 percent or higher than 9.0 percent." *Id*. § 403(c)(5).

The Act's Trust Fund Payments terms are clear: the 30-year payment option allowed by the Act requires both 30 Annual Payments of a minimum of approximately $2.9 million, calculated based upon the Act's expressly stated minimum annual rate of return of 8.5% on the $34.9 million and the payment of the $34.9 million as a Final Payment at the end of 30 years. A statutory construction inquiry can cease "if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *Cooper v. McDonough*, 57 F.4th 1366, 1369 (Fed. Cir. 2023) (citation omitted). Nevertheless, pertinent legislative history discussed briefly next confirms how Congress arrived at these express mandates.

A. At the Urging of ITCA, Congress Addressed the Possible Deferment of the Final Lump Sum Payment of $34.9 Million to the Trust Funds for 30 Years by Requiring that if Payment of the $34.9 Million were Deferred for 30 Years, 30 Years of Fixed Annual Payments Would be Made So As To Avoid the Risk of Fluctuating Interest

The US argues that the issues before this Court involve nothing more than an "ordinary loan" governed by "general financial principles" and "economics," but how many "ordinary loan" arrangements are directed by Congress? Indeed, the US' approach ignores the important interests that Congress considered in depth and in detail and addressed explicitly in the Act. *See generally* Pl.'s SOUMF ¶¶ 9-15 and 21-30.

With the closure of the Phoenix Indian School imminent, driven by the US' desire to exchange the School property for Collier's Florida land, ITCA strongly advocated for the creation of educational trust funds that would receive the $34.9 million land valuation differential. *Id*. ¶¶ 11 and 15. ITCA also opposed vehemently Collier's proposed deferment of the payment of the $34.9 million for 30 years. *Id*. ¶¶ 26-28. Alternatively, ITCA urged Congress – successfully -- that, in exchange for a 30-year deferral, in addition to the payment of $34.9 million after 30 years, 30 years of annual payments to the Trust Funds would be required at a minimum annual rate of return on the $34.9 million of not less than 8.5%, *i.e.*, the $34.9 million at the end of 30 years **and** 30 fixed annual payments of not less than approximately $2.9 million. *Id*. ¶¶ 27-28. ITCA testified at the Act's hearing in 1988 that it opposed the 30-year payment option, and that the option raised concerns of "fluctuation of interest." *Id*. ¶ 28. ITCA further testified that if the 30-year payment method were to be an option, Congress should "establish…a guaranteed minimum [annual] cash flow" to the Trust Funds. *Id*. After considering various options, Congress agreed with ITCA and added these terms to the Act.

Thus, the Act expressly provides that the 30-year payment option must consist of both: (1) 30 Annual Payments of approximately $2.9 million, based on the Act's mandated minimum annual rate of return of 8.5% on the $34.9 million, and (2) a Final Payment of $34.9 million at the end of 30 years. Act §§ 403(c)(2) and 403(c)(5). The Act's House Committee Report confirms that if the 30-year payment option is elected, Collier "is required to make annual payments each consisting of the interest due on the trust fund principal. The principal is due on the date of the final annual payment." H. R. Rep. No. 100-744, pt. 1, at 11 (1988). 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 per cent [per annum]." *Id*. at 16.

These terms are unequivocal and unique. The closure of no other Indian boarding school in the history of the United States has received such specific treatment by Congress to compensate tribes for a school's closure. "For the past fifteen years, the Department of the Interior has embarked upon a policy of closing off-reservation boarding schools." *Id*. at 8. "[T]he driving force behind most of these closures has not been the enhancement of educational opportunities for Indian children, but rather the achievement of [federal] budget savings." *Id*. "While the budget savings were achieved, the Department often made little effort to insure [sic] that the gap left by the closure of these schools would be met by other resources." *Id*. "To some extent, the programs to be funded by the Trust Funds established by this Act can meet those needs." *Id*. at 9; *see also id.* at 1 ("H.R. 4519 also is intended to provide a means to meet the continuing educational needs of Arizona Indian tribes").

B. The Act Requires the US as Trustee to Secure All Unpaid Trust Fund Payments -- Final and Annual – Required by the Act at their Statutorily Guaranteed Amounts, and the US' Argument that the Act allows it to Secure Fewer Payments is Unfounded

Part and parcel with the Act's clear Trust Fund Payments terms with respect to the 30-year payment option are the Act's terms for securing those Payments. The Act provides that "[i]f 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." Act § 405(c)(2). [1] Perhaps in an attempt to obfuscate this clear

[1] ITCA has argued consistently in this litigation that the US' fiduciary duty to secure the Trust Fund Payments is created by the Act. ITCA does not rely and never has relied, as the US

obligation, throughout this litigation, the US has persisted in making incorrect arguments and / or confusing statements about this statutory fiduciary duty. For example, as noted above, the US first tells this Court that "[i]n any event, the United States' trust duties are strictly defined by the Act." Def.'s Motion at 20; *accord id*. at 23 ("Economics aside, the United States' trust duties are defined by 'applicable statutes,' *Jicarilla Apache Nation v. United States*, 112 Fed. Cl. 274 (2013)"). The US then reverts to arguing, contrary to the terms of the Act, that "[t]he TFPA … sets forth the United States' trustee duties with respect to collateral maintenance." Def.'s Motion at 24. The US justifies its position relying primarily on a single phrase from the Act, "in accordance with the Trust Fund Payment Agreement." Act § 405(c)(2). The US posits that by virtue of this single phrase "the only duty [imposed by the Act on the US] was to observe the security requirements set by the TFPA, in accordance with basic common sense and business practices." Def.'s Motion at 25.

As ITCA has argued, the US' reliance on this qualifying phrase is overstated and misplaced. "By focusing narrowly on the [one] phrase … defendant disregards another 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Bradley v. United States*, 164 Fed. Cl. 236, 247 (2023), *appeal docketed*, No. 23-1707 (Fed. Cir. Apr. 6, 2023) (citations omitted). Yes, the Act required the US to enter into a TFPA if the 30-year payment option were

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asserts, Def.'s Motion at 26, n. 12, on agency officials' statements – by themselves – to create a trust duty. Rather, these statements are relevant, contemporaneous expressions of their understanding of the Act, some of which were made to Congress. *See generally* Pl.'s SOUF at ¶¶ 48-62 and 71. These are helpful tools of statutory interpretation, not government agents' incorrect interpretations of the law - they accurately reflect the Act's requirements. *See AD Glob. Fund., LLC ex rel. N. Hills Holding, Inc. v. United States*, 67 Fed. Cl. 657, 678 (2005), *aff'd*, 481 F.3d 1351 (Fed. Cir. 2007) (statements of agency officials, especially to Congress, are persuasive statutory interpretation tools).

chosen, and yes, that option was chosen and the US negotiated with Collier the terms of a TFPA as well as other instruments (the Promissory Note, the Annuity, and the Deed of Trust) that address the terms of security for the Trust Fund Payments. Act § 405(c)(2); Pl.'s SOUMF ¶¶ 80-91. But in negotiating the TFPA, the US was required to comply with the Act.[2] And in the Act, Congress made clear that the 30-year option consists of both 30 Annual Payments of approximately $2.9 million, based on the Act's mandated minimum annual rate of return of 8.5% on the $34.9 million, along with a Final Payment of $34.9 million at the end of 30 years. Act §§ 403(c)(2) and 403(c)(5). That was the deal that Congress struck, it was the deal that Collier accepted, and it was the deal that the US was charged with fulfilling. And the Act requires the US to act as a fiduciary to secure all required but unpaid Trust Fund Payments. Nothing in the Act vests the US with any discretion to allow for a reduction in the required Payments or the required security for the Payments.[3] Thus,

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[2] The US' point, Def.'s Motion at 26, n. 12, that statements by agency officials cannot of themselves create trust obligations, by the same token counsels that agency officials cannot alter statutory duties either inadvertently or deliberately, through negotiations or otherwise. *See Walmart Inc. v. U.S. Department of Justice*, 21 F.4th 300, 309 (5th Cir. 2021) (agency negotiation positions do not rise even to the level of administrative rules, procedure, practice, or policy; they are "devoid of legal force"); *Conrac Corp. v. United State*s, 558 F.2d 994, 1000 n.7 (Ct. Cl. 1977) (citation omitted) (government negotiator's agreement cannot have the practical effect of waiving a statutory duty); *Laurey v. United States*, 32 Ct. Cl. 259, 265-266 (1897) (where rights, duties and obligations are defined by statute, they cannot be taken away or abridged by agency regulations).

[3] The US incorrectly states that "[t]his Court and the Federal Circuit have also held that the United States is not a guarantor of Collier's payment obligations." Def.'s Motion at 2. Nowhere in the prior opinions of this Court or the Federal Circuit is the term "guarantor" found. *See Inter-Tribal Council of Arizona v. United States*, 125 Fed. Cl. 493 (2016); *Inter-Tribal Council of Arizona v. United States*, 140 Fed. Cl. 447 (2018); *Inter-Tribal Council of Arizona v. United States*, 956 F.3d 1328 (Fed. Cir. 2020). Presumably the US is referring to the dismissed SAC Claim II, that the US was required to make all Trust Fund Payments required but not made by Collier under the Act, which the Federal Circuit held must be dismissed because the Act's mandatory "make payment" language applied only to Collier, not the US. 956 F.3d at 1345-1346. But as the US concedes, "[t]he Act requires the US to hold 'security' or collateral sufficient to secure Collier's payment obligations." Def.'s Motion at 20. A "guarantor" is "someone who makes a guaranty or gives security for a debt." *Guarantor, Black's Law Dictionary* (11th ed. 2019).

to the extent the TFPA was required by the Act, the TFPA had to be consistent with, not displacive of, the Act's Payment and security requirements.

Boiled down, the US appears to argue that the phrase "in accordance with the TFPA" allows the US complete discretion *via* the TFPA, including discretion to decide to hold less security than the Act required. "The Act vests the Secretary [of the Interior] with discretion with regard to the security, limited only by the terms of the TFPA." Def.'s Motion at 24. This "tail wagging the dog" contention should be rejected. To the contrary, the Act charged the US with entering into a TFPA that guaranteed nothing less than if payment of the $34.9 million were deferred for 30 years, annual payments at a minimum annual rate of return on the $34.9 million of 8.5% would be paid for 30 years and the $34.9 million would be paid at the end of 30 years. The US can search the Act in vain for support for its "discretion" argument, but it will not find it.

Certainly, there is no express authority for it in the Act. The Act, § 405(c)(2), does not contain the term "discretion" with respect to the US' security duty; in fact, it contains the unequivocal mandate that "the Secretary of the Treasury shall hold in trust the security" for the Trust Fund Payments and the Act § 403(c)(5) requires that if the 30-year payment option is elected there must be an annual rate of return of no less than 8.5% on the $34.9 million Final Payment.[4] This is in contrast to § 403(b), Election of Lump Sum or Annual Payments, which provides that "[s]ubject to the requirements for consultation under subsection (c)(3), the Secretary [of the Interior] may, **in his discretion**, elect to receive the Trust Fund Payment[s] … in the form of either

[4] If there were any ambiguity in the statutory language, one could turn to the legislative history. Notably, the "in accordance with" phrase is not contained in the Act's House Committee Report, which states only that, "[i]f payment into the trust funds is made in the form of annual payments, the Secretary of the Treasury is directed to hold the security provided by the Purchaser in trust." H. R. Rep. No. 100-744, pt. 1, at 17; *see also id.* at 11 and 16 (confirming that the Act gives the Interior Secretary discretion regarding the Trust Fund Payment method, but not mentioning any "discretion" given regarding the Payments' security).

a lump sum payment or 30 annual payments, calculated in accordance with subsection (c)" (emphasis added). Under basic principles of statutory construction, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Immig. and Naturalization Serv. v. Cardoza-Fonseca,* 480 U.S. 421, 432 (1987) (citations omitted), cited with approval in *Pueblo of Santa Ana v. United States*, 214 F.3d 1338, 1341 (Fed. Cir. 2000). Further, Congress' silence or ambiguity regarding agency discretion generally calls for a presumption that there is no discretion. *Backcountry Against Dumps v. E. P. A.*, 100 F.3d 147, 151 (D.C. Cir. 1996).[5]

And, of course, even where Congress has conferred broad discretion on an agency, the agency must exercise that discretion in a manner consistent with the conferring act. *Liberty Maritime Corp. v. United States*, 928 F.2d 413, 419 (D.C. Cir. 1991); *accord Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 619-620 (D.C. Cir. 1987), *vacated on other grounds*, 817 F.2d 890 (D.C. Cir. 1987) ("an agency cannot exercise its discretion in a manner contrary to law"); *see also Shandong Huarong Gen. Corp. v. United States*, 25 C.I.T. 834, 159 F.Supp.2d 714, 719 (Ct. Int'l Trade 2001), *aff'd sub nom.*, 60 F. App'x 797 (Fed. Cir. 2003) ("Despite the broad latitude afforded [the agency] and its substantial discretion … the agency must act in a manner consistent with the underlying objective of" the authorizing act). "[T]he Court must not permit an agency in the exercise of discretion to ignore or frustrate the intent of Congress as expressed in substantive legislation that the agency is charged with administering." *Armco, Inc. v. United States*, 14 C.I.T.

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5 "[E]stablished governmental policy, as expressed or implied by statute, regulation or agency guidelines … [may] allow[] a Government agent to exercise discretion," *United States v. Gaubert*, 499 U.S. 315, 324 (1991), but ITCA knows of no established governmental policy on which the US relies for its argument in this case, or any applicable established policy otherwise.

211, 733 F. Supp. 1514, 1519 (Ct. Int'l Trade 1990).

Moreover, while the US argues "that the Act affords the Secretary discretion to determine sufficient collateral to secure Collier's payment obligations" the US also states that the Act "generally provides that the Government will hold that collateral in trust." Def.'s Motion at 18. So, the US agrees that under the Act its duty to hold security is a fiduciary duty. *See* Act § 405(c)(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"); *see also United States v. White Mountain Apache Tribe*, 537 U.S. 465, 469 (2003) (language in Pub. L. No. 86-392, 74 Stat. 8 (1960), that the former Fort Apache Military Reservation would be "held by the United States in trust for the White Mountain Apache Tribe," "expressly defines a fiduciary relationship" and makes property "expressly subject to a trust," *id*. at 474-75, and therefore imposes a fiduciary duty on the US for which the US can be liable for money damages if the duty is breached. *Id*.). Where the US acts in a fiduciary capacity for Indian tribes, any discretion "must still be exercised in accordance with the trustee's fiduciary duties." *W. Shoshone Identifiable Grp. v. United States*, No. 06-8961L, 2019 WL 2480154, at *54 (Fed. Cl. June 13, 2019). The paramount applicable fiduciary duty here is to "hold in trust the security" for all Trust Fund Payments required by the Act. Act § 405(c)(2).

Finally, the US erroneously argues that *Inter Tribal Council of Arizona, Inc. v. Lujan*, No. 92-cv-01890 (D. Ariz., filed October 8, 1992), *aff'd*, 51 F.3d 199 (9th Cir. 1995) (*Lujan*), supports its discretion argument. Def.'s Motion at 4, 7, 18, 20 nn. 8, 24, and 25. ITCA sued in *Lujan* to enjoin the US from "disposing of Federal real property in violation of Public Law 100-696 [(the Act)] … and further seeking relief in the nature of mandamus pursuant to 28 U.S.C. § 1361 to compel the Defendant, Manual Lujan, Secretary of the Interior of the United States … and other

Defendants, to comply with the terms of the [Act] insofar as it requires timely closing and payment of specified funds into an Arizona InterTribal Trust Fund and Navajo Trust Fund; and for declaratory relief regarding certain interpretation of certain provisions of the [Act] and underlying Agreements pursuant to 28 U.S.C. §§ 2201 and 2202." SAC ¶ 152, citing *Lujan* Complaint at 2, ¶ 1, SAC Exhibit 24.

In *Lujan*, ITCA was concerned primarily that "[t]he Secretary's decision to grant an extension of four or more years for Collier to defer making payment of [the Trust Fund Payments] constitutes a violation of Section 402(a) of the AFLE and constitutes arbitrary and capricious action on the part of the Secretary, and is in excess of or without requisite jurisdiction." SAC ¶ 153, citing *Lujan* Complaint at 18. Accordingly, ITCA sought "permanent declaratory and injunctive relief enjoining the Secretary from entering into any agreement with the Colliers whereby the time period for closing under the Land Exchange Agreement is extended for a period of four years …." SAC ¶ 154, citing *Lujan* Complaint at 22. ITCA also alleged in *Lujan* that under the Act, the Monetary Proceeds due the Trust Funds included both the thirty $ 2.9 million annual payments and the $34.9 million final payment. *Lujan* Complaint at 15 ("the monetary proceeds [to be secured include] interest and principal [payments] of more than $120 million"). SAC ¶ 155. Accordingly, ITCA also sought "permanent declaratory and injunctive relief … enjoining the Secretary from agreeing to inadequately [secure] the trust fund payments." SAC ¶ 156, citing *Lujan* Complaint at 22.

The district court denied injunctive relief, concluding that "the Secretary's decisions regarding the adequacy of the collateral and the closing date [of the land exchange] are precluded from judicial review under subsection 402(h)" of the Act. SAC ¶ 157, citing *Lujan* Order at 6, SAC Exhibit 25 (denying Plaintiffs' motion for preliminary injunction). The Act § 402(h)(9) referenced by the district court provides that, "No action of the Secretary under this subsection shall be subject to the provisions of 5 U.S.C. 553 through 558 or 701 through 706." Title 5 U.S.C. §§ 553-558 and 701-706 are the Administrative Procedure Act. SAC ¶ 158. The reference to the term "subsection" in the Act § 402(h)(9) refers to the Act, § 402(h), which is entitled Offers to Purchase, and § 402(h), Offers to Purchase, is the only subsection of the Act on which the district court relied in denying the preliminary injunction sought in *Lujan*. SAC ¶ 159, citing *Lujan* Order at 4-8, SAC Exhibit 25 (denying Plaintiffs' motion for preliminary injunction).

The district court then granted the Government's and Collier's motions to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. SAC ¶ 160, citing *Lujan* Order, SAC Exhibit 25 (granting defendants' motions to dismiss) (SAC Exhibit 26). But tellingly, in *Lujan*, the US twice expressly acknowledged that, notwithstanding the resolution of ITCA's declaratory and injunctive relief claims in that case, ITCA is "free to pursue any further monetary remedy they believe they are entitled to in the United States Claims Court." SAC ¶162, citing Federal Defendants [sic] Supplemental Memorandum in Opposition to Motion for Preliminary Injunction at 24-25, *Lujan*, Dkt. No. 15 (attached to Complaint, ECF No. 1, as Exhibit 38) and Federal Defendants [sic] Opposition to Motion for Temporary Restraining Order at 21, *Lujan*, Dkt. No. 4 (attached to Complaint, ECF No. 1, as Exhibit 36) ("Under contract and trust theories, plaintiffs could seek relief under the Tucker Act for money damages").

The Ninth Circuit affirmed the district court's dismissal for lack of subject matter jurisdiction and failure to state a claim. *Inter-Tribal Council of Arizona, Inc. v. Babbitt*, 51 F.3d 199 (9th Cir. 1995). But the Ninth Circuit expressly noted that the Act simultaneously served many purposes, including the disposition of the Phoenix Indian School property, the preservation of the Florida ecosystem, creating a public park in Phoenix, expanding the federal Veterans

Administration Hospital in Phoenix, and financing Indian education. 51 F.3d at 203. Thus, the Ninth Circuit concluded that judicial review of the Trust Fund Payments' security arrangements was foreclosed because "Congress probably did not desire to create potential challenges to the [Act] that would disrupt the 'complex and delicate administrative scheme' it had created." *Id.* (citation omitted). The Ninth Circuit simply was saying that no court was going to put other matters at risk so that it could investigate the security held in trust by the US at every point during the 30 years of Payments, *i.e.*, at every potential release of the security and at every downturn in the economy. This conclusion against judicial monitoring of agency action for declaratory and injunctive relief in no way forecloses ITCA's claim for money damages – a point that is bolstered by the US' ready admissions that ITCA's breach of trust money damages claims remained unaffected by the resolution of its claims in *Lujan*. *See also Chu v. United States*, 773 F.2d 1226, 1227 (Fed. Cir. 1985) (after U.S. Court of Appeals for the Second Circuit affirms district court judgment denying and dismissing claim for injunctive relief, it orders case transferred to Court of Claims for damages to be determined).

In sum, the US' argument that the Act gave the US unbridled discretion at least regarding the amount of security required for statutorily guaranteed Trust Fund Payments is wholly unsupported. Indeed, the result called for by the US would negate or render superfluous numerous of the Act's express provisions, which is an impermissible result. "Significantly, 'statutory interpretation is a holistic endeavor that requires consideration of a statutory scheme in its entirety.'" *Mattax v. McDonough*, 56 F.4th 1369, 1376 (Fed. Cir. 2023) (citation omitted). This Court should decline to "selectively pluck one clause ... and give it overriding effect without giving meaning to many others," *Manor Care, Inc. v. United States,* 89 Fed. Cl. 618, 624 (2009), *aff'd*, 630 F.3d 1377 (Fed. Cir. 2011). Nor should this Court defer to an agency's interpretation of a statute that is contrary to the intent of Congress evidenced by unambiguous language, *Weddel v. Sec'y of Dept. of Health and Human Servs.*, 23 F.3d 388, 391 (Fed. Cir. 1994) (citations omitted), or, if the language is ambiguous, contrary to legislative history, *see* n. 4, *supra*.

C. The US' Efforts to Convert the Act's Trust Fund Payments and Security Requirements Into an "Ordinary Loan" Arrangement are Contrary to the Act and Otherwise Unavailing

Collier did not have a "loan obligation" under the Act, *see* US' Motion at 1, because there is no loan. The Act defines Trust Fund Payments and requires them and their security; it does not define or require a loan. *See, e.g.*, Act § 401(19). In fact, the term "loan" is not found in the Act at all. Pl.'s Response to Def.'s SOUMF and Pl.'s Additional Undisputed Facts in Support of Pl.'s Motion for Summary Judgment and in Opposition to Def.'s Motion for Partial Summary Judgment ¶ 3 (Pl.'s AUF). Nevertheless, in a failed effort to make this case about nothing more than an "ordinary loan" arrangement, the US uses the term "loan" over 18 times in its Motion, *see generally* Def.'s Motion, and 4 times in its SOUMF in support of its Motion (ECF No. 130), including in the Declaration of Robert C. Craff, Exhibit 2 to US' SOUMF (ECF No. 130-2).

To direct more attention away from the unique Trust Fund Payments arrangement the Congress prescribed in the Act, the US also uses other terms not found in, and contrary to, the Act's express terms to support its arguments. For example, the US repeatedly refers to the "annual payments equal to the interest due," Act § 403(c)(2)(A), as "annual interest payments." *See generally* Def.'s Motion and US' SOUMF. It refers to the Monetary Proceeds, § 401(10), as a "balloon payment." *See generally* Def.'s Motion and US' SOUMF. But the terms "annual interest payments," "annual payments of interest," and "balloon payment" are terms not found in the Act. Pl.'s Response to US' SOUMF and Pl.'s AUF ¶¶ 1, 2. It is widely unacceptable to "interject terms into [a] statute not included and not intended by Congress." *United States v. Jones*, 965 F.2d 1507, 1522 (8th Cir. 1992), *cert. denied*, 506 U.S. 924 (1992) (Gibson, J., dissenting); *accord United*

States v. Abreu, 962 F.2d 1447, 1454 (10th Cir. 1992), *judgment vacated on other grounds*, 508 U.S. 935 (1993) (Brorby, J., dissenting); *United States v. Raynor*, 939 F.2d 191, 193 (4th Cir. 1991). "There exists a strong presumption that 'Congress expresses its intent through the language it chooses' and that the choice of words in a statute is therefore deliberate and reflective." *Shoshone Indian Tribe of Wind River Rsrv. v. United States*, 364 F.3d 1339, 1347 (Fed. Cir. 2004), *cert. denied*, 544 U.S. 973 (2005) (citations omitted).

The US' terms are nowhere in the Act, and there is no evidence otherwise that Congress intended the Trust Fund Payments to be an "ordinary loan" consisting of "annual interest payment" and a "balloon payment." For example, five days after it enacted the Act, Congress enacted the Home Equity Loan Consumer Protection Act of 1988, Pub. L. No. 100-709, 102 Stat. 4725 (1988), which expressly uses the term "loan" and expressly uses and defines the term "balloon payment;" *accord* 15 U.S.C. §§ 1665b (e)-(f) (also expressly using the term "loan" and expressly using and defining the term "balloon payment); *see also* Pub. L. No. 99-202, 99 Stat. 1666 (1985) (using the term "annual interest payments); *accord* Pub. L. No. 98-124, 97 Stat. 817 (1983) (using the term "annual interest payment"). "In short, if Congress had intended to create the [ordinary loan] scheme [that the US] envision[s], it would have done so in clearer terms." *Whitfield v. United States*, 543 U.S. 209, 219 (2005), *cited with approval in Suprema, Inc. v. International Trade Commission*, 742 F.3d 1350, 1375 (Fed. Cir. 2013) (Reyna, J., concurring-in-part, dissenting-in-part), *rev'd*, 796 F.3d 1338 (Fed. Cir. 2015) (*en banc* holding by Reyna, J.); *accord Saunders v. Sec'y of the Dept. of Health and Human Servs.*, 25 F.3d 1031, 1036 (Fed. Cir. 1994) ("if Congress had intended such a result, we believe that it would have made its intention clear in the statute").

Further straying from the Act's express terms, and equally unavailing are the US' vague references to irrelevant "ordinary loan" accounting and financial principles and practices. *See*

Def.'s Motion at 20 (reference to "basic principles of finance and laws of economics"); *id*. at 21 (references to "customary business practices" and "axiom of the marketplace"); *id*. at 22 (reference to "fundamental principles of finance and accounting"). The clincher is the US' statement that "Though the Act does not define what collateral the United States was to hold in trust (leaving this determination to the Secretary's discretion as described above), this duty should be consistent with **customary business practices**." *Id*. at 21 (emphasis added). This statement perfectly illustrates the defect in the US' approach. It is fundamental that a statute's terms cannot be overridden by administrative agency practices and policies, *In re Affinity Labs of Texas, LLC*, 856 F.3d 883, 893 (Fed. Cir. 2017), *cert. denied*, 138 S. Ct. 1692 (2018), let alone by "customary business practices" such as the US' inapt and unsupported proferred customs like "future interest is obtained from reinvesting or relending the recovered principal; it is not charged to the debtor." Def.'s Motion at 21.

The Act's 30-year payment option is a carefully crafted unique arrangement by which Congress guaranteed Trust Fund Payments consisting of 30 Annual Payments at a minimum rate of return of 8.5% on $34.9 million and a Final Payment of the $34.9 million at the end of 30 years. Act §§ 403(c)(2) and 403(c)(5). An integral part of that guarantee was the requirement for the US to "hold in trust the security" for the Payments. *Id.* § 405(c)(2). This is not an "ordinary loan" arrangement, and the US' resort to abstract consideration of typical accounting and financial principles and practices demonstrates a *post hoc* rationalization for the actions and conduct of the US, and it is improper. This Court should decline the US' invitation to ignore the clear terms of the Act to suit the US' *post hoc* vision of what Congress required.

II. THE *U.S. V. COLLIER* SETTLEMENT DOES NOT ABSOLVE THE US OF ITS FIDUCIARY DUTY UNDER THE ACT TO SECURE ALL REQUIRED BUT UNPAID TRUST FUND PAYMENTS OR TO BE LIABLE OTHERWISE FOR MAKING THE TRUST FUNDS WHOLE WITH RESPECT TO THOSE PAYMENTS

A. The History of the TFPA Terms at Issue in *U.S. v. Collier*

The US has admitted that its negotiations with Collier for the TFPA were "detailed and protracted." Pl.'s SOUMF ¶ 45. Over four years passed from the date of the Act's enactment, November 18, 1988, to the date the TFPA was executed, December 18, 1992. *Id.* ¶ 80. By agreement between Collier and the US, another four years passed before Collier was required to start making payments. *Id.* ¶ 96. During and after the TFPA negotiations, Collier appeared to have the upper hand *vis-à-vis* the US. Predictably, Collier insisted on the 30-year payment option. *Id.* ¶ 46. Over the objections of ITCA and the Navajo Nation, the US agreed to this option, because "election of the lump sum payment likely would 'preclude a deal from being made.'" SAC ¶ 80; *see also* SAC Exhibit 6 (the 30-year option "was the only decision likely to keep the exchange process viable"). Even after the Payment method election, difficulties persisted, primarily due to disagreement over the form of security for the Trust Fund Payments. *See, e.g.*, SAC Exhibit 7; SAC Exhibit 8; and SAC Exhibit 9 (all referring to differences about the security form as the primary reason for not yet reaching a TFPA).

On March 13,1992, the US wrote that it again had "reluctantly consented" to Collier's TFPA demands. SAC ¶¶ 91-92. The US stated that "[w]e accept at face value your business judgment that the portion of the Indian School Property that Collier will retain after completing the exchange with the City [of Phoenix for the other portion of the Phoenix Indian School property], along with Collier's rights in the DDA on the downtown property, represent a development value of at least $80 million." SAC Exhibit 12. The US' choice to use real property as the security for the Trust Fund Payments was against the advice of high-level Interior attorneys and officials who counseled consistently against it "because of the uncertain value of the [Phoenix Indian School] property … [and thus] securing the full amount of the Indian trust funds with the property would not be adequate in meeting our trust responsibilities." Pl.'s SOUMF ¶ 104 (citing letter from Interior Assistant Secretary for Indian Affairs Eddie Brown to Interior Secretary manual Lujan dated Sept. 24, 1991).[6] Astoundingly, nine months later Interior Secretary Lujan touted to ITCA that the real property security was a good thing. Pl.'s SOUMF ¶ 75; SAC ¶ 109 (with inclusion in the security of the lien on Collier's Downtown Development rights or interests, "I can almost guarantee you we're going to have almost 200 percent collateral"); *U.S. v. Collier* (US alleges that in August 1992, Secretary Lujan explained that if the US gained "a security interest in the Downtown Lots as part of the deal … that would assure the payment stream for Indian education funds, because the Downtown Lots were "where the value is"). Pl.'s SOUMF ¶ 75.

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[6] Besides the direct advice of its attorneys and officials, the US had ample other good reason to be concerned about real property generally, let alone the Phoenix Indian School property specifically, as security for the Trust Fund Payments. While Congress ratified the Exchange Agreement which had set $34.9 million as the difference in value between the Phoenix Indian School property and the Florida lands, the Act's House Committee Report sets forth the "difficult problem" of the "dramatically" varying "potential value" of the Phoenix Indian School property due to unknown zoning regulations and development plans and "other factors essentially unascertainable." H.R. Rep. No. 100-744, pt. 1, 6-7.

The three members of Congress that dissented from the Report were even more concerned about the "Unknown Value of the Phoenix Indian School" property and noted that the Report that was presented to Congress, U.S. Gen. Acct. Off., GGD-88-85, Land Exchange: New Appraisals of Interior's Collier Proposal Would Not Resolve Issues (1988), https://www.gao.gov/products/ggd-88-85, "raised serious and fundamental questions about the [property appraisal] procedures used by the Interior Department …[which] is a stinging rebuke of the proposed exchange." *Id*. at 32 (dissenting views of Miller, G, D-CA, Kildee, D, D-MI, and DeFazio, P, D-OR). The speculative value of the Phoenix Indian School property "led the GAO to recommend abandoning the exchange entirely." *Id*. at 32-33.

Indisputably, nothing in the Act required the US to choose real property or real property interests as the security to be held in trust for the Trust Fund Payments. But in the end, the security for the Trust Fund Payments consisted of: (1) a Promissory Note (Note) from Collier to the US, promising payment of both the "Principal Amount" of $34.9 million, and "Annual Interest Payment[s]" for 30 consecutive years calculated on the Principal Amount "at the rate of eight and one-half percent (8.5%) per annum," as required by the Act, *id*. ¶ 81; (2) an Annuity, to be held by a private bank, which secured the Final Payment under the Note and provided for Collier to make "30 annual payments [into the Annuity] which should be sufficient on the completion of such 30 annual payments to pay to the United States on 18 December 2026 a lump sum of $34,900,000," *id*. ¶¶ 83-84; and (3) a "Trust Estate" as defined in a Deed of Trust (Deed) from Collier to the US. *Id*. ¶ 85. At the time of the TFPA's execution (December 18, 1992), the Trust Estate consisted of the remaining portion (15 acres) of the Phoenix Indian School property still owned by Collier, and crucially, liens on development rights and interests in property in downtown Phoenix that Collier acquired by exchanging most of the original Phoenix Indian School property with the City of Phoenix. *Id*. ¶ 86.

Further demonstrating Collier's interests and negotiating power, the TFPA, the Note, and the Deed provided that Collier's debt was "nonrecourse" in terms of personal liability, and thus the only remedy for the US upon Collier's default would be *in rem* against the remaining security. *Id*. ¶ 91. As with many other terms in the TFPA and related documents, the nonrecourse provisions were negotiated terms agreed to by the US, not mandated by the Act. *Id*. ¶ 92. The US has admitted that "the intent of the parties was that the nonrecourse provisions [in the TFPA and related documents] allocate risk of [Collier's] nonpayment to the government." *Id*. ¶ 93. ITCA has alleged and argued that the nonrecourse provisions incentivized Collier to default. *Id.* ¶ 94. So did the US' actions and inactions regarding the security that occurred after the TFPA was executed.

B. The Actions and Inactions of the US with Respect to the Trust Fund Payments' Security that Occurred while Collier was Still Making Payments

The Deed allowed Collier to request a release of portions of the Trust Estate if the value of the remaining security "still exceeds 130% of a defined Release Level Amount." *Id.* ¶ 88. The Release Level Amount was defined as follows:

> 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.

SAC ¶ 140. The Deed also contained a "Maintenance of Collateral Value" provision which stated that if, after a partial security release (*i.e.*, a release of liens on the Downtown Development rights or interests), which the US should grant only if sufficient security would remain in the Trust Estate after granting the release, the fair value of the remaining unreleased security fell below 130% of the Release Level Amount, Collier must add U.S. Government-backed securities sufficient in value to restore the fair value of the unreleased security to 130% of the Release Level Amount. Pl.'s SOUMF ¶ 90.[7]

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[7] The US correctly notes that the district court in *U.S. v. Collier* held that if the remaining collateral in the Trust Estate falls below the 130% level, Collier was obliged under the Maintenance of Collateral provision to supplement the security with government-backed securities. Def.'s Motion at 26. And the US tells this Court that the Maintenance of Collateral provision was the "mechanism for monitoring collateral sufficiency." What the US omits is that it had the duty in the first instance, as the holder of the security in trust, and as the trustee who could release security, to determine whether the remaining security fell below the 130% level and to otherwise monitor the security. But the US failed to fulfill this fiduciary duty, directly incentivizing Collier's default. Pl.'s SOUMF ¶¶ 106, 111, 113.

Further to this point, any argument by the US that it was not required contractually to demand any supplemental security at all from Collier, is not determinative of the issue of whether, Almost immediately after Collier finally started making Trust Fund Payments, Collier requested, and the US granted, a lien release in 1998 and later, another lien release in 2007, right before the Great Recession of 2008. *Id.* ¶ 105. The US released both liens without performing its own appraisals of the Trust Estate security or otherwise determining whether sufficient security would remain in the Trust Estate after the releases to secure the Trust Fund Payments. *Id.* ¶ 106. The US did not provide notice to ITCA of its decisions to release the liens. *Id.* ¶ 110. The US states to this Court that "The Deed of Trust provided that, if Collier requested a release of any of the 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. Deed, Art. 6.2 (a), (b)." US' SOUMF ¶ 24 (emphasis added). The US also states that "Collier first requested a release of lien in 1998. Interior granted the lien release **as required by the TFPA**." *Id.* ¶ 26 (citations omitted; emphasis added). The US further states that "After the United States granted a second lien release in 2007, **as required by the TFPA**, the collateral for Collier's loan consisted of the Phoenix Indian School, which remained in the Trust Estate, and the Annuity." *Id.* ¶ 27 (citations omitted; emphasis added). But nowhere in the Def.'s SOUMF – or anywhere else in this litigation – does the US assert the facts needed to show that a release was **required** – *i.e.*, that the remaining security exceeded 130% of the Release Level Amount. The US cannot make such a showing even as to the amount it says Collier owed when Collier requested the lien releases, much less as to all unpaid Payments required by the Act.

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by not maintaining adequate security, the US has opened itself up to liability for what is owed the Trust Funds under the Act. *Cf.* the admission by the US that the "intent of the parties was that the nonrecourse provisions [in the TFPA and related documents] allocate risk of [Collier's] nonpayment to the government." *Id.* ¶ 93. In other words, the US' misinterpretation of the Act does not protect it from exposure to liability.

After the lien releases, with only the 15-acre Phoenix Indian School property remaining in the Trust Estate, there is no evidence or argument that the US determined or had any idea of the value of the remaining security, at least until sometime after Collier's default when it entered into settlement negotiations with Collier in *U.S. v. Collier*. *Id*. 107.[8] The US tells this Court that "[w]hen the value of the Phoenix Indian School property, plus the value of the Annuity, fell below the minimum specified in the Deed of Trust, Collier became automatically obligated to add government-backed securities to the collateral." Def.'s Motion at 27. What the US omits is that it did not exercise its fiduciary obligation to demand that Collier substitute security at any time before or after the lien releases in 1998 and 2007, or the economic turndown in 2008, *id*. ¶ 111, even though the US admits that it knew that the value of the remaining Phoenix Indian School property "fell below the required threshold sometime after the second lien release in 2007." *Id*. ¶ 108. In fact, the US only demanded that Collier provide substitute security after Collier defaulted on the Trust Fund Payments in 2011. *Id*. ¶ 112.

In addition, not before or immediately after releasing the liens, during or immediately after the economic downturn of 2008, or at the time of Collier's default, did the US disclose security insufficiency to ITCA, nor did the US provide information to ITCA from which ITCA could independently calculate the value of the existing or remaining security that the US held. *Id*. ¶ 113. And, although Collier's last payments were made in December 2011, *id*. ¶ 97, the US did not provide ITCA notice of Collier's default before March 20, 2013. *Id*. ¶ 114.

C. The Claims in and Settlement of *U.S. v. Collier*

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8 The US refers to the $25 million stipulated valuation of the Phoenix Indian School property during its settlement negotiations with Collier in *U.S. v. Collier* as the "best available information at the time." Def.'s Motion at 28, n. 14. It was the best available information because the US did not do its own due diligence to determine the value of the property before that time. And it was in fact over-valued by more than 25% as its subsequent sale would show. *See* Pl.'s SOUMF ¶ 122.

It was established by the US as an undisputed fact in *U.S. v. Collier* that Collier never intended to make all the Trust Fund Payments required by the Act. *Id*. ¶ 98. Before *U.S. v. Collier* was filed, Collier stated that at the time of default, 15 Annual Payments of approximately $2.9 million, plus the Final Payment of $34.9 million, remained to be paid to the US; considering the annual payments that Collier had made into the Annuity, Collier stated that approximately $66.4 million due the Trust Funds by year 2027 remained unpaid, including approximately $44.5 million in Annual Payments. *Id*. ¶¶ 99 and 117.

The US sued Collier in *U.S. v. Collier* primarily to have Collier supplement the security "to fulfill its contractual promises to the United States." *Id*. ¶ 99. The district court properly confined its analysis to these contractual terms; it did not and had no occasion to interpret the Act's statutory fiduciary duties *vis a vis* the US that are at issue here. *United States v. Collier*, 2016 WL 3537802, at *1 (D. Ariz. June 29, 2016). ITCA knows of no precedent that the resolution of contractual claims between the US and a third party necessarily affects the statutory duties of the US. In general, "the government cannot disavow a statutory obligation through contract interpretation." *Cotter Corp. (N.S.L.) v. United States*, 165 Fed. Cl. 138, 150 (2023), *appeal docketed*, No. 23-1826 (Fed. Cir. Apr. 28, 2023), (*citing Neb. Pub. Power Dist. v. United States*, 590 F.3d 1357, 1365 (Fed. Cir. 2010) (the government cannot use "contract interpretation as a means of avoiding its statutory obligations")). Nor, without express authorization from Congress, can the US transfer or allow its statutory duties to be transferred to Collier. *See, e.g., Truckers United for Safety v. Mead*, 251 F.3d 183, 186 (D.C. Cir. 2001) (absent express authorization by Congress, an agency cannot transfer a duty imposed by Congress on an agency to a third party). But while nothing in *U.S. v. Collier* precludes ITCA's claims in this case, the actions and litigation positions of the US there do inform the breach of fiduciary security claim at issue here.

The US acknowledged in *U.S. v. Collier* that recovery of just the $34.9 million Final Payment would not satisfy the Annual Payments obligations. Pl.'s SOUMF ¶ 116. But when the US sued Collier to require Collier to provide additional security under the TFPA, the US addressed only 4 of the 15 years of unpaid Annual Payments, reflecting those unpaid for years 2012, 2013, 2014, and 2015. *Id.* ¶¶ 118 and 120. In clear reference to the Deed's Release Level Amount terms, the US characterized these four unpaid payments as "interest accrued under the note," and their total as "an accrued interest balance." *Id.* ¶ 119. To this Court, the US states that in its motion for summary judgment in December 2015 in *U.S. v. Collier*, "130% of the Release Level Amount at that time was $43,485,224. This sum reflected the principal obligation ($34.9 million) plus the accrued interest to date ($11,866,000, *i.e.*, four years of missed annual payments), less the value of any government-backed securities in the Trust Estate ($0) and the Annuity at that time ($13,315,828)." Def.'s Motion at 8 (internal citations omitted).

The US incorrectly views the term "accrued interest" in the Release Level Amount as referring only to the single Annual Payment due in any given year. This is confirmed by the fact that, as time went on in *Collier*, the US added one more $2.9 million Annual Payment (presumably that of 2016) to what it sought to address. Pl.'s SOUMF ¶¶ 118 and 120. "[A]t the time of settlement … the five annual payments of $2,966,500 for years 2012-2016 … had come due and gone unpaid." Def.'s Motion at 28. The *U.S. v. Collier* settlement overall value ultimately included the value ($16 million in cash) of these 5 Annual Payments, but no more. *Id.* ¶ 122. That leaves 10 approximately $2.9 million required Annual Payments not recovered by the US in *U.S. v. Collier*, and not accounted for otherwise to the Trust Funds by the US.

In this Court, the US continues to rely on the Deed in support of its argument that its recovery in *U.S. v. Collier* completely satisfied, or even exceeded, its security trust duty under the Act. Def.'s Motion at 2, 18, 19, 26-29.[9] But the US' interpretation of the Deed's terms simply is inconsistent with the Act. To be consistent with the Act, the term "accrued interest" in the Deed's Release Level Amount must mean the total number of Annual Payments that were required (but yet unpaid) under the Act in any given year during the 30-year period. This interpretation is properly supported by the Note's terms, which are consistent with the Act, requiring the Trust Fund Payments to include both all 30 years of Annual Payments and the Final Payment. Pl.'s SOUF ¶ 81. The Note also correctly prohibits the prepayment of either the Annual Payments or the Final Payment, *id*. ¶ 82, showing the US' understanding, at least in negotiating the Note, and contrary to the US' litigation position now, *see* Def.'s Motion at 19 and 23, that the Act's express requirement of 30 years of Annual Payments at a fixed amount was intended to and does create a guaranteed "stream" of "income" or "revenue" to the Trust Funds.

The only way to interpret the Release Level Amount terms consistently with the Act and the Note is by understanding that under this Act all Annual Payments were "accrued" in the sense that they were all required from the inception of the 30-year period, although each year that an Annual Payment was made reduced the total number of accrued Annual Payments remaining. The US' argument for the more common meaning of "accrued" is inconsistent with and violative of the Act; it guts the Act's Payment and security requirements and leads to the absurd result that the amount of security that the US must hold in trust and the amount ultimately paid to the Trust

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9 In at least one instance in *U.S. v. Collier*, the US calculated accrued interest as including not just the payments that Collier had not made to date which, at that time, was 2015, but also the eleven post-2015 annual payments, thus admitting that "accrued interest" does or should include any and all unpaid annual payments for the entire 30-year period. SAC ¶144. The US should be held to that interpretation in this action. *Comm'r v. Belridge Oil Co.*, 267 F.2d 291, 294 (9th Cir. 1959) (private parties are held to positions taken in litigation and so is the government).

Funds depends not only on **when** Collier defaults and but on **when** the US recovers from Collier satisfaction for contractual obligations (*e.g.*, if Collier had made five Annual Payments and then defaulted, and the US and Collier reached a settlement of their claims one year after Collier defaulted, under the US' view, the US' recovery for the 25 Annual Payments required under the Act that Collier did not make would consist of the value of one Annual Payment). Thus, all required but unpaid Annual Payments and the Final Payment had to be secured fully throughout the 30-year period or, upon default and without full security, as happened here, the Act's Payment and security mandates remain unfulfilled. *See Hirsch v. United States*, 153 Fed. Cl. 345, 350 (2021) ("It is a 'cardinal principle' of interpretation that courts 'must give effect, if possible, to every clause and word of a statute'") (citations omitted).

And, while receiving "the principal," *i.e.*, the Final Payment of $34.9 million early may well have value, *see* Def.'s Motion at 19-20 and 29, it does not necessarily save the US in this situation due to the express terms of this extraordinary Act. For example, as noted above, the US admits that interest rates by 2012 had fallen as low as 2.92 percent; *id*. at 23 n.9; meaning that the time value of the earnings on $34.9 million would not be anywhere near the statutorily required amount. Assigning value to the receipt of the Final Payment prior to the expiration of the 30-year period in lieu of the remaining required but unpaid Annual Payments merely leaves the US liable for the difference between the actual value of the earnings on the Final Payment at prevailing interest rates from the time of deposit by the US of $34.9 million into the Trust Funds, and the minimum annual 8.5% rate of return on $34.9 million guaranteed by Congress for however many years of required Annual Payments remained unpaid when the $34.9 million was deposited.

For the same reason, the US' reliance on the Congressional Budget Office (CBO) Cost Estimate for the Act for its "time value of money" argument is wrong. Def.'s Motion at 18-21.

According to the US, "[b]efore passage of the Act in 1988, the Congressional Budget Office analyzed whether a lump sum payment at closing or thirty 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 thirty years) produce a different result in terms of funding for the Trust Funds. *See* 134 Cong. Rec. S13519-02, 1988 WL 176577 (Sept. 28, 1988) The CBO analysis shows that, given **then-prevailing interest rates**, security valued at $34.9 million dollars at the inception of the trust would be expected to produce the same amount of money after thirty years as thirty annual interest payments with a final lump sum payment of $34.9 million." Def.'s. Motion at 22-23 (emphasis added). Thus, the US argues, the Annual Payments were "intended only to recognize the time value of the loan, not an extra income stream." Def.'s Motion at 19; *id*. at 23 ("Congress did not intend an extra revenue stream").

The flaw in the US' approach is self-revealing: for example, today's prevailing interest rates are much lower and will not yield the statutorily required payments to the Trust Funds. As the US notes, "Those [annual] payments [that Collier made from 1997 – 2011] reflected an 8.5 percent rate, while by 2012, market interest had fallen as low as 2.92 percent on thirty-year Treasury bonds." Def.'s. Motion at 23, n. 9. This is correct; for example, in calendar year 1988 monthly interest rates ranged from 8.125% to 9.250%, https://www.ssa.gov/oact/progdata/interestrates1937-99.html, and it shows that without the statutorily guaranteed rate of return for all 30 Annual Payments set by Congress in the Act, the comparative equality of the lump sum and annual payment methods fails. And it was precisely this type of fluctuations in interest rates that ITCA urged Congress to avoid, and which Congress ensured against in the language of the Act. Pl.'s SOUMF ¶ 28. Shamelessly, the US refers to the receipt of the statutorily required return as "the fortuitous above-market interest [that the Trust

Funds] enjoyed during the first 15 years of interest payments." Def.'s. Motion at 23, n. 9. There was nothing fortuitous about it, it was guaranteed by Congress - a guarantee extending for all 30 Annual Payments which were supposed to by secured by the US – so that upon default, the US would have enough security to make the Trust Funds whole as the Act required. Act §§ 403(c)(2), 403(c)(5), and 405(c)(2).

Ironically, notwithstanding its dubious choice to use real property or real property interests as security for the Trust Fund Payments, the US nevertheless had sufficient tools in the TFPA and related documents to ensure that there was sufficient security to fulfill its fiduciary obligations under the Act. It could have, and was required to have, independently verified whether or not it was prudent to release the liens on the Downtown Development rights and interests in 1998 and 2007. It could have and should have – at any time prior to default – demanded that Collier provide government-backed securities to shore up the security held by the US, particularly after the "Great Recession" of 2008. Instead, for whatever reason, the US simply chose not to use the very tools that it negotiated to maintain sufficient security as required by the Act. The result of these failures culminated in Collier's "opportunistic" – and planned – default. *See* SAC Ex. 21, Expert Report of Matthew B. Greenblatt (Oct. 20, 2015) (discussing Collier's "opportunistic breach" because "Counsel [for Plaintiff the US] has directed me to assume that Collier's conduct under the circumstances alleged in the Amended Complaint [in *U.S. v. Collier*] constitutes an "opportunistic breach"); Pl.'s SOUMF ¶ 98 (US established in *U.S. v. Collier* as an undisputed fact that Collier never intended to make all the Trust Fund Payments required under the Act).

CONCLUSION

At the end of the day, every benefit Congress conferred to others under the Act as a result of the closure of the Phoenix Indian School has been realized except for the full amount of benefits that Congress intended for Indian education in Arizona through the Trust Funds. ITCA seeks nothing more than to see what Congress directed in the Act, and the US is liable for the money damages its acts and failures to act of its own volition created. There are no genuine issues of material fact that preclude summary judgment in this case with respect to Claim I of the Second Amended Complaint. Accordingly, summary judgment is appropriate and ITCA is entitled to judgment as a matter of law on its Second Amended Complaint Claim I.

Dated this 22nd day of May, 2023.

Respectfully submitted,

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