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 REPLY 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

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INTRODUCTION AND SUMMARY OF ARGUMENT

The parties have filed simultaneous Motions for Summary Judgment on Claim I of the Second Amended Complaint (SAC), ECF No. 58, (ECF Nos. 129 and 137). In their Response Briefs, the parties continue to agree that there are no genuine issues of material fact that preclude their summary judgment motions. (ECF Nos. 138 and 140). Pursuant to the Scheduling Order of January 12, 2023 (ECF No. 127), Plaintiff the Inter-Tribal Council of Arizona (ITCA) files this Reply Brief in Support of its Summary Judgment Motion and in Opposition to Defendant United States' (US) Partial Summary Judgment Motion.

The US agrees that the Arizona-Florida Land Exchange Act, Pub. L. No. 100-696, 102 Stat. 4577 (1988) (Act) (SAC Exhibit 1) required Collier to make annual Trust Fund Payments for Indian education in amounts of $2.9 million for thirty years and a final payment after 30 years of $34.9 million. Def.'s Response to Pl.'s Motion for Partial Summary Judgment 2, ECF No. 138. The US agrees that the Act also required the US to hold in trust security for those payments. *Id*. But the US incorrectly argues that, notwithstanding these requirements, the Act allowed the US to secure however many, or whatever amount, of those Payments that it chose to secure, or alternatively, to seek to hold Collier responsible for however many, or whatever amount, of those Payments that Collier did not make. The US' incorrect interpretation of the Act renders multiple of the Act's express provisions superfluous, which is impermissible and untenable. As a result of the US holding in trust insufficient security and the US' decision to seek an insufficient recovery from Collier, the Trust Funds are short ten unpaid $2.9 million annual Trust Fund Payments. These are breaches of trust for which ITCA is entitled to money damages from the US in the amount needed to make its Trust Fund whole as the Act unambiguously requires.

ARGUMENT

I. THE FEDERAL CIRCUIT MADE CLEAR THAT THE PART OF CLAIM I IN THE SECOND AMENDED COMPLAINT DEALING WITH THE AMOUNT OF SECURITY THAT THE US MUST HOLD IN TRUST SURVIVES THE PART OF CLAIM I THAT WAS DISMISSED AS TIME-BARRED AND THE DISMISSAL OF THE SECOND AMENDED COMPLAINT CLAIM II; AND THE NON-DISMISSED PART OF CLAIM I ALSO SURVIVES THE NINTH CIRCUIT'S DECISION IN *ITCA V. BABBITT* (1995)

Although it moves for summary judgment on SAC Claim I, in responding to ITCA's simultaneous summary judgment motion, the US incorrectly argues or implies that the part of SAC Claim I regarding the amount of security that the Act requires the US to hold in trust is somehow precluded from being determined by this Court because of (1) the dismissal of a part of SAC Claim I as being time-barred; (2) the dismissal of SAC Claim II; and, (3) the Ninth Circuit's decision in *Inter-Tribal Council of Arizona, Inc. v. Babbitt*, 51 F.3d 199 (9th Cir. 1995).

For example, the Federal Circuit held that that the part of ITCA's Claim I regarding the US' "alleged failure to ensure adequate security when it negotiated" the Trust Fund Payment Agreement (TFPA) (which was executed in 1992), is time-barred in this case by virtue of the general six-year statute of limitations, 28 U.S.C. § 2501. *Inter-Tribal Council of Arizona, Inc. v. United States*, 956 F.3d 1328, 1345 (Fed Cir. 2020). The US argues that this supports its argument that the issue of how much security in trust it must hold for the Trust Fund Payments is either precluded or already conclusively resolved in its favor. Def.'s Response to Pl.'s Motion for Partial Summary Judgment 19-20. But the Federal Circuit clearly reversed dismissal of this part of Claim I, which is why we are back in this Court on summary judgment motions. 956 F.3d at 1345 ("We therefore find that the Court of Federal Claims erred in dismissing the failure-to-maintain-sufficient-security portion of Claim I of the [SAC]").

The US also incorrectly argues that the non-dismissed part of Claim I is precluded because "[T]he Federal Circuit has already held that the United States is not a guarantor for Collier['s payment obligations.]" Def.'s Response to Pl.'s Motion for Partial Summary Judgment 21. Nowhere in the Federal Circuit's opinion or in any prior opinions of this Court is the term "guarantor" found. Presumably, the US is referring to the dismissed Claim II, wherein ITCA contended that the US must make all Trust Fund Payments required but not made by Collier under the Act. The Federal Circuit held that Claim II must be dismissed because the Act's "make payment" duty applied only to Collier, not the US. 956 F.3d at 1345-46. But as the US concedes, "[t]he Act requires the United States to hold 'security' or collateral sufficient to secure Collier's payment obligations." Def.'s Motion for Partial Summary Judgment20. A "guarantor" is "someone who makes a guaranty or gives security for a debt." *Guarantor, Black's Law Dictionary* (11th ed. 2019).

Therein lies the US' error. With respect to Claim I, ITCA does not rely on the Act's "make payment" duty that has been held to extend only to Collier. ITCA's Claim I is that the Act imposes an independent fiduciary duty on the US to secure in trust the Payments. Of course, the Act connects the fiduciary duty to secure the Payments to the duty to make Payments, but the duty to secure and the duty to pay are independent claims in this case. Claim I is not, as the US argues, Def.'s Response to Pl.'s Motion for Partial Summary Judgment 22, a "recycle" or a "fabricat[ion]" of the dismissed Claim II. The US' professed outrage that "[i]t 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," Def.'s Response to Pl.'s Motion for Partial Summary Judgment 23, merely begs the question at issue in the Claim I simultaneous motions for summary judgment:

is the US in breach of trust and liable for failing to hold in trust security for Trust Fund Payments that the Act required but Collier did not make?

Similarly, the US tells this Court that "[t]he 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," Def.'s Response to Pl.'s Motion for Partial Summary Judgment 4, and "the Act vests the Secretary with discretion with regard to security, limited only by the terms agreed to in the TFPA," *id*. 19, citing *Inter-Tribal Council of Arizona, Inc. v. Babbitt*, 51 F.3d at 203. The US certainly correctly states its argument, but that is *not* what the Ninth Circuit held. The Ninth Circuit affirmed the district court's decision that ITCA's claims for declaratory and injunctive relief regarding the 4-year Extension Agreement between the US and Collier were precluded under the Act's specific section, § 402(h), that incorporates the Administrative Procedure Act sections that preclude judicial review of agency action. 51 F.3d at 202. "Thus, the challenged actions taken by the Secretary in signing the Extension Agreement with Collier are committed to his discretion and are not subject to judicial review." *Id*. at 203. This is not a broad holding that "the Act vests the Secretary with discretion with regard to security, limited only by the terms agreed to in the TFPA." Def.'s Response to Pl.'s Motion for Partial Summary Judgment 19. But even if this were the case (which it is not), as ITCA has argued, any discretion granted to and exercised by the Secretary regarding terms chosen for the TFPA nevertheless still was constrained by the Act, particularly the section which mandates expressly that "'[t]he interest rate to be used in determining the interest due on [30] annual Trust Fund Payments … in no event shall … be lower than 8.5 percent." Act § 403(c)(5). *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 Fed. 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 governing act); *accord Armco, Inc. v. United States*, 14 C.I.T. 211, 733 F. Supp. 1514, 1519 (Ct. Int'l Trade 1990) ("the Court must not permit an agency in the exercise of that discretion to ignore or frustrate the intent of Congress as expressed in substantive legislation that the agency is charged with administering").

In sum, *ITCA v. Babbitt* is not preclusive of Claim I in this case. Further, notwithstanding the dismissals of Claim II and a part of Claim I, the non-dismissed part of Claim I can proceed to its merits as the Federal Circuit expressly held. Even if there is an "overlap in facts" between dismissed and non-dismissed claims, that does not preclude judicial review of the non-dismissed entirely separate and independent claims. *See Adult Use Holdings, Inc. v. Faze Clan, Inc*., No. 1:21-cv-10313 (MKV), 2022 WL 4538338, at *6 (S.D.N.Y. Sept. 28, 2022). The merits of the non-dismissed part of Claim I remain undetermined and judicially reviewable in this litigation.

II. ITCA'S INTERPRETATION OF THE ACT GIVES MEANING TO ALL OF THE ACT'S TRUST FUND PAYMENT AND TRUST SECURITY PROVISIONS BUT THE US' INTERPRETATION DOES NOT

A. The Act's Trust Fund Payment and Trust Security Provisions

The Act defines "Monetary Proceeds" as "the cash amount ($34.9 million) required to be paid to the United States by Collier upon closing of the Land Exchange." Act § 401(10)(A). The Act also defines "Trust Fund Payment" as "the payment to the United States of the Monetary Proceeds for deposit into, as the context requires, the Arizona InterTribal Trust Fund or the Navajo Trust Fund, in the form of a lump sum payment or annual payments as determined under section 403 of this title. *Id*. § 401(19). In addition to the definitional sections, the Act expressly provides that "[t]he Monetary Proceeds shall be paid to the United States for deposit in the Arizona

InterTribal Trust Fund and the Navajo Trust Fund in accordance with this section and section 405 of this title. *Id*. § 403(a).

Subsection 403(c)(2) provides in relevant part that, "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). Subsection 403(c)(4) provides that "[i]f 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). Subsection 403(c)(5) provides that "[t]he 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).

Subsection 405(c)(2) 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).

B. ITCA's Interpretation of the Act gives meaning to all the Trust Fund Payment and the Trust Security Provisions, but the US' Interpretation of the Act Renders Multiple Provisions Superfluous

The parties disagree whether the Act, as ITCA argues, required the US to hold in trust

security for all Trust Fund Payments, final and annual, required by the Act that Collier did not make, or, as the US argues, allowed the US to hold in trust security for some lesser amount of the Trust Fund Payments. The parties agree that this is an issue of statutory construction. Statutory construction rules require that "[e]very statute must be construed from the words in it, and that construction is to be preferred which gives to all of them an operative meaning." *Early v. Doe ex dem. Homans,* 57 U.S. 610, 617 (1853). "[I]t is a settled rule of statutory interpretation that a statute is to be construed in a way which gives meaning and effect to all of its parts." *Saunders v. Sec'y of the Dep't of Health & Hum. Servs.*, 25 F.3d 1031, 1035 (Fed. Cir. 1994). As between ITCA's interpretation and the US' interpretation, ITCA's is the interpretation that gives meaning to all terms of the Act. The US' interpretation does not.

Specifically, ITCA's interpretation of the Act, that the US was required to hold in trust sufficient security for all required but unpaid Trust Fund Payments, final and annual, gives meaning to the following substantive (non-definitional) provisions in the Act: the Act's trust security terms in § 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 provided in accordance with the Trust Fund Payment Agreement"), and the Act's Trust Fund Payment terms in §§ 403(a) ("The Monetary Proceeds shall be paid to the United States for deposit in the Arizona InterTribal Trust Fund and the Navajo Trust Fund in accordance with this section and section 405 of this title"); 403(c)(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"); 403(c)(4) ("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"); and 403(c)(5) ("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 by lower than 8.5 percent or higher than 9.0 percent"). ITCA's interpretation of the Act "harmonizes" all of these sections and "gives meaning to every part of [every] subsection." *Magnesium Corp. of Am. v. United States*, 166 F.3d 1364, 1371 (Fed. Cir. 1999). "Statutory interpretations that give meaning to every clause of the statute are to be favored." *Id.*

In contrast, the US' interpretation of the Act, that the US had discretion to hold in trust security for fewer than all required Trust Fund Payments that Collier did not make, when comparing the same sections, *supra*, gives meaning only to the terms in § 405(c)(4) ("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"). The US' interpretation does not give meaning to the terms in 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 provided in accordance with the Trust Fund Payment Agreement"); § 403(a) ("The Monetary Proceeds shall be paid to the United States for deposit in the Arizona InterTribal Trust Fund and the Navajo Trust Fund in accordance with this section and section 405 of this title"); § 403(c)(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"); or, crucially, § 403(c)(5) ("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 by lower than 8.5 percent or higher than 9.0 percent") (emphasis added). In particular, the US' trust security discretion interpretation eliminates the key mandates that the annual Payments shall consist of 30 annual payments which shall be at a minimum annual interest rate [on $34.9 million] of not less than 8.5 percent. Act §§ 403(c)(2) and 403(c)(5).

The US argues generally that because the Payment mandates extend only to Collier, the Payment mandates are irrelevant to the US' trust security duty, *i.e.*, the US is "off the hook" on having to secure in trust all Payments that were required of Collier but that Collier did not make. *See, e.g.*, Def.'s Counterstatement to Pl.'s Statement of Undisputed Material Facts (Def.'s Counterstatement to Pl.'s SOUMF) ¶ 123, ECF No. 139 ("Collier's payment terms do not resolve the issue presented, that is, whether the United States fulfilled its trust duty for the security"). This argument, of course, ignores that the Act's Trust Fund Payment and trust security provisions must be read together; nothing in the Act allows their separation or implies Congress' intent to separate them. "[S]tatutory interpretation is a holistic endeavor that requires consideration of a statutory scheme in its entirety." *Meeks v. West*, 216 F.3d 1363, 1366 (Fed. Cir. 2000) (citation omitted). In fact, the Act expressly links them in the trust security terms section § 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 provided in accordance with the Trust Fund Payment Agreement." The US' interpretation of the Act, that Congress required Collier to make Trust Fund Payments, and required the US to secure in trust those Payments, but allowed the US to secure in trust however many of the Payments that it chose to secure fails to give meaning to multiple provisions of the Act and is otherwise implausible. It makes no sense that Congress set forth carefully crafted unique Indian education Trust Fund Payment requirements but left to the US' whims as trustee to secure in trust, or not to secure any or all of, those Payments.

Similarly, the US' reliance on the trust security section's specific terms "in accordance with the Trust Fund Payment Agreement" to eliminate the Act's multiple express Trust Fund Payment mandates, is misplaced. "When interpreting a statute … the court 'must look not only at the particular statutory provision in question, but also at the language and design of the statute as a whole.'" *Heinzelman v. Sec'y of Health & Hum. Servs.*, 681 F.3d 1374,1377 (Fed. Cir. 2012). A court "cannot determine the meaning of the statutory language without examining that language in light of its place in the statutory scheme." *BASR P'ship v. United States*, 795 F.3d 1338, 1343 (Fed. Cir. 2015). The court should "not entertain arguments that the clause's language" gives meaning to one term but "den[ies] any substantive meaning" to another phrase. *Figueroa v. United States*, 57 Fed. Cl. 488, 500 (2003), *aff'd*, 466 F.3d 1023 (Fed. Cir. 2006), *cert. denied*, 550 U.S. 933 (2007). "[I]t is important to remember basic principles of statutory construction that direct the court to construe a provision in a manner which gives meaning and effect to 'every clause and word of a statute.'" *Id.* (citations omitted). "If the court accepted defendant's argument, the court would render a segment of the [Act] meaningless." *Id.* "The government's … construction is unsupported by the plain language of the statute." *Hirsch v. United States*, No. 2021-2163, 2022

WL 3209327, at *4 (Fed. Cir. Aug. 9, 2022). "[T]he government" places much weight on "[a single phrase] … in isolation." *Id*. "In effect, the government urges us to read [other sections] out of the statute entirely. We decline to do so." *Id*. (citation omitted). "[T]he Supreme Court has repeatedly stressed that '[i]n expounding a statute, we [must] not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law." *Meeks*, 216 F.3d at 1367 (citation omitted; internal brackets in original).

ITCA's interpretation of the Act, not the US' interpretation, "gives meaning to all terms and provisions in the statute and is also consistent with the plain meaning of the terms." *Wolfe v. McDonough*, 28 F.4th 1348, 1356 (Fed. Cir. 2022). ITCA's "interpretation has the virtue of being the only one that gives meaning to all of the [Act's] terms—not only those in the [trust security duty subsection] but in the [Trust Fund Payment subsections] as well. *Abbott Lab'ys v. United States*, 84 Fed. Cl. 96, 106 (2008), *aff'd*, 573 F.3d 1327 (Fed. Cir. 2009). "By comparison, [Defendant's] limiting construction … renders portions of [the Act] surplusage … [or gives them] a … hollow ring." *Id*. This is "a result plainly at odds with the familiar axiom of statutory construction." *Id*. ITCA's "interpretation … gives meaning to all portions of the statute as required by the rules of statutory construction." *Bull v. United States*, 63 Fed. Cl. 580, 583-84 (2005).

III. THIS CASE INVOLVES STATUTORY TRUST FUND PAYMENT AND SECURITY REQUIREMENTS; IT DOES NOT INVOLVE A "LOAN" OR ANY "FUTURE INTEREST"

A. The Act's Trust Fund Payment Provisions

The Act defines "Trust Fund Payment" as "the payment to the United States of the Monetary Proceeds [$34.9 million] for deposit into" the Trust Funds established by the Act, § 401(19); § 403(a); *see also* § 405(b) ("Each Trust Fund established" by this Act "shall consist of . . . the Monetary Proceeds" as defined by the Act); requires the payment of the Monetary Proceeds

to the United States, § 401(9), and makes "receipt by the United States of Monetary Proceeds," compulsory to the Land Exchange, § 401(10). These mandates are unequivocal.

In lieu of a lump sum payment of the Monetary Proceeds at closing of the Land Exchange, the Act allows for the Trust Fund Payments to be paid via a 30-year payment option. Act §§ 401(19), 403(b), 403(c)(2). The 30-year payment option still requires a Final Payment of the full $34.9 million, but defers payment of that amount for 30 years, and in the meantime requires Annual Payments for the benefit of the Trust Funds for 30 years. Act § 403(c)(2). Further the Act fixes the amount of the Annual Payments at a statutory minimum rate of return on the $34.9 million at 8.5%, *i.e.*, no less than $2.9 million per year for 30 years. "The interest rate to be used in determining the interest due on annual Trust Fund Payments … in no event shall … be lower than 8.5 percent." Act § 403(c)(5). Thus, the Act expressly provides that the 30-year payment option must consist of both: (1) 30 Annual Payments of $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). These requirements also are unequivocal.

The Act further provides that if the 30-year payment option is elected, "the Secretary of the Treasury shall hold in trust the security provided in accordance with the Trust Fund Payment Agreement," Act § 405(c)(2), and defines the "Trust Fund Payment Agreement" as "an agreement providing for payment … of annual Trust Fund Payments for deposit into" the Trust Funds. Act § 401(20).

B. The US' "Loan" and "Future Interest" Characterizations of the Trust Fund Payments are Erroneous; They Have No Basis in the Act and are Otherwise Unsupported

Throughout this litigation, the US has persisted in referring to the Trust Fund Payments required by the Act as a "loan." *See, e.g.,* Def.'s Response to Pl.'s Motion for Partial Summary Judgment 1 ("This case [involves] a secured $34.9 million loan the Department of the Interior (Interior) extended to a developer, Collier"); *id*. 4 ("The Act establish[ed] an Indian education trust fund based on proceeds from a Department of Interior loan to Collier"); *id*. 5 ("After the Act took effect, Collier sought—and Interior approved—use of a 30-year secured loan").

The first use by the US of the term "loan" appears in the US' Motion to Dismiss the Original Complaint at 3 (ECF No. 10) ("To secure the loan, Collier entered into a Deed of Trust …."). But as ITCA alleged in its Original Complaint, the source of the US' use of the term "loan" appears to be *United States v. Collier,* No. 2:14-cv-00161 (D. Ariz. 2014). *See* Complaint ¶ 83, *United States v. Collier*, (ECF No. 1) ("The United States has averred recently in litigation that when Collier demanded the 30 year trust fund payments option, 'the United States agreed to give Collier a 30-year loan.' Complaint at 2, *United States v. Collier*, (ECF No. 1)"); *accord* First Amended Complaint 2, *United States v. Collier*, ECF No. 80, filed June 17, 2015 ("In response to Collier's demands, the United States agreed to give Collier a 30-year loan"); *see also* Joint Statement of Discovery Dispute 15, *United States v. Collier*, ECF No. 78, filed June 12, 2015 ("The United States is suing Collier to enforce collateral provisions of a loan extended by Interior").

As ITCA has made clear, however, the problem for the US is that there is no "loan" in this case. The Act does not provide for or even contain the term "loan." Pl.'s Response to Def.'s Statement of Undisputed Material Facts 15 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. The US cites no legal authority or factual basis in this case or in *United States v.*

Collier for the existence of a loan by the US to Collier, and ITCA knows of no legal or factual support for the existence of a such a loan.

Black's Law Dictionary defines "loan" as "[a] thing lent for the borrower's temporary use; esp. a sum of money lent at interest." Black's Law Dictionary (11th ed. 2019). Although the US states, *see supra*, that it "agreed to give Collier a 30-year loan" and that it "extended" a loan to Collier, there simply is no evidence that the US lent Collier any money, let alone money that Collier then used to pay Trust Fund Payments required under the Act.

Further, "Courts have defined 'loan' in a variety of contexts." *United States v. Basin Elec. Power Coop.*, 248 F.3d 781, 804 (8th Cir. 2001), *cert. denied*, 534 U.S. 1115 (2002). Over a century ago, the Second Circuit defined a loan as follows: "A loan of money is a contract by which one delivers a sum of money to another and the latter agrees to return at a future time a sum equivalent to that which he borrows." *In re Grand Union Co.*, 219 F. 353, 356 (2d Cir. 1914), *cert. denied*, 238 U.S. 626 (1915). Multiple circuit courts have followed this "classic definition of a loan." *Calcasieu-Marine Nat'l Bank of Lake Charles v. Am. Emps. Ins. Co.*, 533 F.2d 290, 296 (5th Cir. 1976), *cert. denied*, 429 U.S. 922 (1976). *See, e.g., United Va. Factors Corp. v. Aetna Cas. & Sur. Co.*, 624 F.2d 814, 816 (4th Cir. 1980); *United States Dep't of Health & Hum. Servs. v. Smith*, 807 F.2d 122, 124 (8th Cir. 1986). "After reviewing [these] well-settled definitions of the term in other circuits, this court has stated that where one party advances money to another, who in turn agrees to repay the loan with interest, there is a loan." *Basin Elec.*, 248 F.3d at 804 (citations omitted). Nothing in this case establishes that the US delivered or advanced money to Collier. Collier's Trust Fund Payment obligations were established by the Act, not by any act of lending by the US to Collier. Indeed, the US itself now takes issue with the use of the ordinary loan term "default" and states that the proper terminology for what Collier did was to "stop

payment." Def.'s Counterstatement to Pl.'s SOUMF ¶¶ 97, 99, 112 and 114 ("Undisputed to the extent the word "default" means stopped payment"). This supports ITCA's position that the terms and duties at issue here are grounded in the Act, not a fictitious "loan."

In any event, despite the US' efforts for over 8 years now to interject the term "loan" into this case, no court order or opinion in this case uses the term "loan" to describe the Trust Fund Payment provisions set forth in the Act. "This court cannot simply add phrases or words that do not appear in the statute; doing so would be phantom legislative action by this court. Had Congress wanted to adopt [the US'] interpretation, it could have drafted language to effectuate that result." *Energy E. Corp. v. United States*, 645 F.3d 1358, 1362 (Fed. Cir. 2011). A court's "duty is to fairly construe the terms of the statute, not to add to them." *Alcan Aluminum Corp. v. United States*, 165 F.3d 898, 902 (Fed. Cir. 1999) (citations omitted); *McDonnell v. United States*, 79 Ct. Cl. 484, 486 (1934) (as the words of a statute are plain, [the court is] not at liberty to add to or alter them to effect a purpose which does not appear on [the] face [of a statute] or from its legislative history).

Of course, the US' efforts to transform the statutory Trust Fund Payment requirements into an ordinary "loan" are the predicate to the US' vehement argument that the "loan" entailed "future interest" for which the US is not liable or, to the extent that it is liable, it has satisfied that liability via its recovery in *United States v. Collier*. *E.g.*, Def.'s Motion for Partial Summary Judgment 19, ECF No. 129 ("The United States was not required to hold collateral to cover all future interest payments"); *accord id.* 17 ("the United States is [not] liable for every payment Collier would be required to make, including thirty years of future interest payments").

Predictably, the US never specifically defines or cites any legal authority for what it means by "future interest." The US does make general statements like, "[i]t is an axiom of the marketplace that collateral is designed to secure a principal owed on a debt in the event of default. The lender

forecloses on collateral to recover the unpaid principal, plus perhaps unpaid accrued interest, but not all *future* interest. It is customary that future interest is obtained from reinvesting or relending the recovered principal; it is not charged to the debtor. This is because the purpose of interest is simply to reimburse the time value of money." Defs.' Motion for Partial Summary Judgment 21-22 (citations omitted); *see also* Def.'s.' Motion to Dismiss, SAC 23, ECF No. 59 ("Ordinarily, of course, collateral is meant to secure a principal amount of the debt. If a debtor defaults on a loan, the lender forecloses on the collateral to recover the unpaid principal, not all future interest. In banking at least, future interest is earned by reinvesting or relending the recovered funds; it is not charged to the debtor"). "For these reasons, the Act imposed no requirement that the United States secure all future interest payments." Def.'s Motion for Partial Summary Judgment 26.

In short, the US would like the Act's annual Trust Fund Payments to be "future interest" which then could be construed to be unvested or optional, as opposed to vested and required, which is what the Act provides. However, as with its wish that the Trust Fund Payments were a "loan" the US' wish for "future interest" suffers multiple problems. The Act does not provide for or contain the term "future interest," and the US does not and cannot cite any legal or factual authority for the annual Trust Fund Payments to constitute "future interest" as the US would have them be. The Trust Fund Payments are created by and governed by an act of Congress, not, as the US argues, a "loan" or the "marketplace." *See supra*.

Indeed, all authority indicates that the annual Trust Fund Payments required by the Act – all 30 of them -- were anything but unvested or optional. The Act makes the Monetary Proceeds compulsory to the Land Exchange, *i.e.*, without the Monetary Proceeds there would be no Land Exchange. Act § 401(9). The Act requires the Monetary Proceeds to be paid and deposited as Trust Fund Payments into the Trust Funds. Act §§ 401(10), 401(19), 403(a). If the 30-year payment

option is elected, the annual Payments are required annually for 30 years at a minimum of $2.9 million per year, along with the $34.9 million final payment at the end of 30 years. Act §§ 403(b), 403(c)(2), 403(c)(5). *See also* Def.'s Counterstatement to Pl.'s SOUMF ¶ 28 ("The Act merely provides for a fixed interest rate," citing Act § 403(c)(5)").

Lacking any authority, statutory or otherwise, for its "loan" and "future interest" argument, the US falls back on its "time value of money" theory. Def.'s Motion for Partial Summary Judgment 20-23 and 29; Defs.' Response to Pl.'s Motion for Partial Summary Judgment 21, 24, 27, and 29, ECF No. 138. "[T]he 'time value of money' is not a legal concept, but rather is a term of art in the financial community. It simply means that a dollar received today is worth more than a dollar to be received in the future." *In re Szostek*, 886 F.2d 1405, 1406 n.1 (3d Cir. 1989) (citation omitted); *see also Nature's Bakery, LLC v. Intransia, LLC*, No. 3:20-cv-00330-(MMD-EJY), 2022 WL 6819806, at *3 n.4 (D. Nev. Oct. 11, 2022) ("money now is generally worth more than money later," citing Jason Fernando, *Time Value of Money ("TVM") Definition*, INVESTOPEDIA (Updated March 28, 2023), https://www.investopedia.com/terms/t/timevalueofmoney.asp).

Under this theory, the US posits that it was only required to secure the $34.9 million (and not any of the annual Trust Fund Payments), because if Collier stopped paying, and the US had that amount in trust as security for Collier's payments, or if it recovered that amount from Collier, and deposited $34.9 million into the Trust Funds, the Trust Funds would be made whole regardless of whether <u>any</u> annual Payments were made. *See* Def.'s Response to Pl.'s Motion for Partial Summary Judgment 2 ("The United States executed the TFPA with Collier, and under that agreement, obtained collateral securing Collier's principal payment obligation." *i.e.*, the $34.9 million). The US argues to this Court that the annual Payments were "intended only to recognize the time value of the loan, not an extra income stream." Def.s Motion for Partial Summary

Judgment 19; *accord id*. 23 "the interest payments guaranteed that the trust beneficiaries were compensated for the time value of money—Congress did not intend an extra revenue stream"); Def.'s Response to Pl.'s Motion for Partial Summary Judgment 26 ("nothing in the Act or legislative history indicates that the annual interest payments were intended as an extra revenue stream").[1]

And as the US concedes, after Collier stopped paying, the security that the US was to hold in trust was less than $34.9 million. Def.'s Motion for Partial Summary Judgment 8 (when the US sued Collier, "the value of the collateral in the Trust Estate was only $25 million"). Although under the contractual terms that it negotiated and to which it agreed in the TFPA, the US' right to seek from Collier supplemental security was not dependent on whether Collier was paying or not paying, it was only when Collier stopped paying that the US sought to compel Collier to "supplement the security" required for the Trust Fund Payments. But as discussed next, notwithstanding the remaining security that the US held when Collier stopped making payments and what it recovered from Collier in *United States. v. Collier*, the US' "time value of money" theory does not hold water in this case given the express terms of the Act and / or the reality of the "marketplace" on which the US tries to rely.

[1] The US' position in this case varies from its argument in *United States. v. Collier* that in the Act, "Congress dedicated the payment stream to Indian education purposes for Arizona tribes." Joint Statement of Discovery Dispute 22, *United States v. Collier*, ECF No. 78, filed June 12, 2015; *accord* US' Reply in Support of its Motion for Summary Judgment 12, *United States. v. Collier*, ECF No. 171, filed March 1, 2016 ("the unique terms of the arrangement set by Congress … required a stream of interest-only payments to the Indian Trusts. By allowing Collier to put off the $34.9 million payment 30 years into the future, Congress provided Collier something valuable—and that value was quantified by the 30 years of interest payments. Collier had no right to avoid the interest payments by furnishing the principal amount before the end of the 30-year period"). The US' *United States v. Collier* position is more akin to acknowledging that the annual Payments are vested and / or required.

C. The Recovery by the US in *United States. v. Collier* Does not Satisfy the Statutory Requirements Given the Current Market Interest Rate Reality and the US is Liable for the Shortfall

Collier made 15 years of annual Trust Fund Payments to the US and 15 years of payments into the Annuity held by a private bank. It is undisputed that when Collier stopped paying, 15 years of annual Payments remained unpaid, and the $34.9 million, less what Collier had paid into the Annuity, remained unpaid. Pl.'s Statement of Undisputed Material Facts (Pl.'s SOUMF) ¶ 99; Def.'s Counterstatement to Pl.'s SOUMF ¶ 99, ECF No. 139. Collier stated that the unpaid amount due the Trust Funds by 2027 totaled approximately $66.4 million including 15 years of unpaid $2.9 million annual Payments. *Id*. This assessment accurately reflects the Act's Trust Fund Payment 30-year option requirements.

It also is undisputed that the US' recovery in *United States. v. Collier* was approximately $48 million. Pl.'s SOUMF ¶ 123; Def.'s Counterstatement to Pl.'s SOUMF ¶ 123 ("the US ultimately recovered $48 million from Collier"). Beginning in July 2017, and continuing through to a future date, the recovery was deposited into the Trust Funds. Def.'s Statement of Undisputed Material Facts (Def.'s SOUMF) ¶¶ 49-51. Forty-eight million (the recovered amount) is less than what Collier stated that he owed when he stopped paying ($66.4 million).

The US makes the point that $48 million is more than $34.9 million (which was the required Monetary Proceeds or lump sum Trust Fund Payment amount) and argues that it is more than the amount of security that the US was required to hold in trust under its TFPA terms ("130% of the Release Level Amount once liens were released"). Def.'s Motion for Partial Summary Judgment 20 and 28; Def.'s Counterstatement to Pl.'s SOUMF ¶ 116 ("The United States' position in the Collier litigation was driven by the TFPA's collateral maintenance provision"). But from 2017 to present, the Trust Funds have been earning far less than an annual

rate of return of 8.5%, which is the minimum annual rate of return on $34.9 million required by the Act. Act § 403(c)(5); *see also* Joint Case Management Report 2, *United States v. Collier*, ECF No. 37, filed November 18, 2014 ("After years of negotiation between Interior and Collier, the United States agreed in 1992 to finance the $34.9 million over 30 years at 8.5 percent"). And it is highly unlikely that by December 2027, $48 million, which began to be deposited into the Trust Funds in July 2017, will return anywhere near $66.4 million, which is the amount that Collier stated still was owed the Trust Funds when he stopped paying. Given the realities of the marketplace, which is precisely what Congress addressed in the Act by guaranteeing the number and amount of annual Payments, applying the "time value of money" theory to the amount of security that the US chose to hold in trust for the Trust Fund Payments and the amount of the US' chosen recovery from Collier, still leaves the Trust Funds short of what Congress guaranteed the Trust Funds. The US as trustee is liable for the shortfall.

CONCLUSION

There are no genuine issues of material fact that preclude summary judgment in this case with respect to SAC Claim I; accordingly, summary judgment is appropriate and ITCA is entitled to judgment as a matter of law on its SAC Claim I.

Dated this 7th day of July, 2023.

Respectfully submitted,

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