IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

DEFENDANT'S REPLY BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

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The United States respectfully submits its reply in support of its Motion for Partial Summary Judgment (US MSJ) (ECF 129) against Claim I of the Second Amended Complaint, which asserts that the United States is liable for failing to monitor and maintain adequate collateral to secure the loan obligation of Barron Collier Co. (Collier) for the benefit of ITCA as one recipient of Collier's loan payments. Nothing in ITCA's opposition precludes the entry of summary judgment in favor of the United States.

ITCA's opposition confirms that the United States fulfilled its obligations under the Arizona-Florida Land Exchange Act (Act), which the parties agree controls here. Through this Act, Congress designated ITCA to receive 95 percent of a $34.9 million obligation imposed on Collier. Collier could satisfy its payment obligation either through a direct lump sum payment of $34.9 million, under which ITCA would receive its share of these proceeds at the time of the land exchange, or over a thirty-year payment term that involved annual interest payments by Collier at a fixed rate. Both options were intended to reach the same result: providing ITCA with its share of $34.9 million, in present value. Yet, ITCA incorrectly maintains that the United States should have secured thirty years of future, unaccrued interest payments.

Conspicuously missing from ITCA's briefing is statutory support for its legal theories.

ITCA's opposition identifies *no* statutory language requiring the United States to collateralize Collier's future interest payments; *no* statutory support for its argument that Congress intended that ITCA receive an extra "stream of revenue"; and *no* basis otherwise imposing *any* specific security obligations on the United States. This is because no such support exists. Rather, if the thirty-year option was selected, the Secretary of the Interior was to execute a "Trust Fund Payment Agreement," and to "hold in trust the security provided in accordance" with that agreement. Congress did not define the terms of the Trust Fund Payment Agreement (TFPA), which ITCA concedes did not even exist when the Act was passed. The TFPA's terms were to be negotiated in the Secretary's discretion, as the Ninth Circuit has established.

After the Secretary lawfully permitted Collier to proceed with the thirty-year option, he executed a TFPA with Collier. ITCA does not disagree that the TFPA effectively secured the present value of Collier's principal obligation. ITCA's *only* grievance is with the United States' alleged "failure" to secure Collier's future, unaccrued interest payments. But as with ITCA's other dismissed theories, this one is not supported by "the [Act], case law, or otherwise." *Inter-Tribal Council of Arizona, Inc. v. United States*, 956 F.3d 1328, 1345 (Fed. Cir. 2020). And while ITCA reluctantly concedes, following the Federal Circuit's ruling in this case, that the Act did not impose any obligation on the United States to make up for Collier's missed future interest payments, it nonetheless seeks to impose liability on the United States for these payments. Without any support in the Act, that effort must fail.

It has now been eight years since ITCA initiated this lawsuit, and six years since the United States realized, on behalf of ITCA, just under $48 million from Collier—a sum that exceeded the value of the collateral that the United States was required to hold in trust pursuant to the TFPA. Still, ITCA demands more money. This demand ignores the reality that ITCA has

already recovered the funds that Congress required the United States to secure, and this suit has thus outlived its purpose.

For these reasons, the Court should grant the United States' Motion for Partial Summary Judgment.

FACTS

At this stage, with the United States and ITCA having traded cross-motions for partial summary judgment, a detailed review of the material facts, which are straightforward and not in dispute, is unnecessary. To briefly recap, the Act, Public Law 100-696, 102 Stat. 4577, ratified an agreement between the United States and Collier under which Collier swapped certain Florida wetlands and received federally owned property in Phoenix, Arizona, known as the "Phoenix Indian School property." The Act directed Collier to pay $34.9 million to the United States to even the value of that exchange. The Act also directed these proceeds to be placed in educational trust accounts for the benefit of ITCA and the Navajo Nation, with 95 percent going to ITCA. Act, Sec. 405(a)(1)–(2), 405(e).

The Act authorized the Secretary to accept the $34.9 million from Collier as a lump sum or spread over thirty years, with thirty annual interest payments at a rate between 8.5 and 9.0 percent and a final payment of principal at year thirty. Act, Sec. 403(c), (c)(2), (c)(5). At Collier's request, the Secretary approved the second option, requiring the creation and execution of a TFPA specifying the terms of the financing provided to Collier. Act, Sec. 403(c)(4). Under this option, the United States was required to "hold in trust the security provided in accordance with the [TFPA]," which did not yet exist. Act, Sec. 405(c)(2). The Act itself did not delineate any security requirements, *Inter-Tribal Council of Arizona, Inc. v. United States*, 140 Fed. Cl. 447, 458 (2018) (*Dismissal Order II*), *aff'd in part, rev'd in part on other grounds*, *Inter-Tribal*

Council of Arizona, Inc. v. United States, 956 F.3d 1328 (Fed. Cir. 2020) (*Circuit Opinion*), leaving the decision to the discretion of the Secretary. *Inter-Tribal Council of Arizona, Inc. v. Babbitt*, 51 F.3d 199, 203 (9th Cir. 1995) (*Babbitt*). Nor did the Act make the United States responsible for any payments Collier failed to make. *Circuit Opinion*, 956 F.3d at 1345.

After deciding on the thirty-year option, Collier and the United States executed the TFPA along with a Promissory Note and Deed of Trust, which also constituted a part of the TFPA. To secure the loan, Collier pledged collateral in the Deed of Trust that gave the United States a lien on the Phoenix Indian School land that Collier retained after consummating the exchange, as well as Collier's development rights in two other downtown Phoenix lots.

Not long after the land exchange closed, Collier requested a partial release of the property liened under the TFPA. The Deed of Trust provided that, if Collier requested a release of any liened property, 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."

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

> (i) the unpaid principal plus accrued interest on the Promissory Note, less (ii) the value of United States Government-backed Securities and Deposited Monies held in the Trust Estate, and further less, after the expiration of two years from the Closing Date . . . (iii) the fair value, at the time of the calculation, of the Annuity.

US SOF (ECF 130) ¶ 25. Collier's first lien release request also triggered a collateral maintenance term in the Deed of Trust.[1] That term required Collier to supplement collateral to increase the value of the security if the value of the liened property fell below 130% of the Release Level Amount.

Collier made timely payments under the TFPA for fifteen years but ceased paying in

[1] Collier twice requested a release of lien, in 1998 and 2007.

2012. The United States then sued Collier under the TFPA's collateral maintenance term to force Collier to add collateral and assure that the amount of security was 130% of the Release Level Amount. *See United States v. Collier* (*Collier*), 2:14-cv-00161-PGR, ECF No. 1 (D. Ariz. 2014). In that suit, the United States won summary judgment, after demonstrating that 130% of the Release Level Amount was then $43,485,224. This sum reflected the principal obligation ($34.9 million) plus the accrued unpaid interest to date ($11,866,000, *i.e.,* four years of missed annual payments for years 2012–2015), less the value of any government-backed securities in the Trust Estate ($0) and the Annuity at that time ($13,315,828).

After the grant of summary judgment against Collier, Collier and the United States reached a settlement on July 18, 2017. When the settlement took effect, the estimated gross recovery from Collier was $54.5 million, consisting of $16 million cash, $13.5 million from the Annuity, and the $25 million appraised value of the Phoenix Indian School property. The United States General Services Administration (GSA) then sold the property at auction for $18.5 million, such that the total realized recovery from Collier was just under $48 million. After deducting GSA's statutorily authorized administrative costs ($77,902), Interior assigned 95 percent of the recovery from Collier for deposit into the trust account for the benefit of ITCA.[2]

While the United States was litigating against Collier, ITCA initiated this lawsuit. Since its filing, the United States has prevailed in establishing that it was not liable for Collier's missed payments or for breaching a duty to "obtain" adequate collateral. After returning from the

[2] ITCA speculates whether $25 million was a fair valuation because the property later sold for $18 million, ITCA Resp. (ECF 140) at p. 23, but ITCA offers no evidence or cogent argument that the United States was unreasonable in its valuation. This speculation from ITCA should thus be disregarded. In any event, no trustee is required to predict the future, and neither the United States nor the district court in Arizona could know how much the property would sell for. The court and the United States were entitled to rely on information reasonably available at the time.

Federal Circuit, where the court affirmed the dismissal of most of ITCA's claims, US MSJ at 13–15, the parties have both moved for summary judgment on the surviving portion of Claim I. Resolution of the cross-motions turns on what constitutes adequate security under the Act —an amount sufficient to cover principal and all future unpaid, unaccrued interest, as ITCA alleges, or the amount identified in the TFPA, which the United States recovered from Collier in 2017 and properly assigned for ITCA's benefit.

ARGUMENT

At the center of this litigation is ITCA's erroneous contention that the United States is liable for every payment the Act required Collier to make, including thirty years of future interest payments, plus the $34.9 million principal—despite the Federal Circuit's binding holding that the United States is *not* liable to make up for any payments Collier missed. ITCA specifically insists that by allowing Collier to make interest payments for thirty years with a $34.9 million lump sum payment at the end, the United States had a statutory trust duty to ensure that the trust received the full principal payment obligation *and* all thirty years of interest payments, regardless of whether the principal was collected ahead of time. ITCA's claim is an overreach and must fail.

The plain text of the Act rebuts ITCA's contention. The Act sets no specific level of required security, and instead specifies that the United States' collateral obligations must simply be "in accordance with the Trust Fund Payment Agreement." Act, Sec. 405(c). The United States need not have held in trust, nor demanded from Collier, any additional security beyond the amount established in the TFPA. Basic principles of finance and an analysis by the Congressional Budget Office further confirm that the Act's interest obligation was simply to compensate for the time value of money, not to serve as an extra income stream. The TFPA's terms, executed in the Secretary's discretion, fulfilled this purpose by requiring Collier initially

to furnish the trust with sufficient collateral to secure its principal payment obligation and, once any lien release occurred, to supplement this collateral if the trust's value was less than 130% of the Release Level Amount. This amount accounted for the outstanding principal obligation and any accrued interest. And when Collier failed to perform under the TFPA, the United States dutifully took legal action to enforce the TFPA's security requirements by successfully suing Collier. The United States won summary judgment and exacted a settlement in 2017, ultimately recovering $48 million from Collier on behalf of the trust beneficiaries. This sum exceeded the value of the collateral that the United States was required to hold in trust (130 percent of the Release Level Amount), and ITCA has now been made whole.

ITCA nonetheless maintains that the collateral was inadequate because it failed to secure all future interest for thirty years and that the United States remains liable for ten future interest payments that Collier was scheduled to pay, had the TFPA remained in force for the full thirty years. Nothing in the Act supports such liability. ITCA's rationale runs contrary to the plain language of the Act, fundamental principles of finance, as well as precedential holdings from the Federal and Ninth Circuits.

For these reasons, and because no genuine issue of material fact remains in dispute, the United States is entitled to summary judgment. *Little Six, Inc. v. United States*, 280 F.3d 1371, 1374 (Fed. Cir. 2002); RCFC 56(a).

1. The Act's plain language belies ITCA's strained construction of the duty to hold security

A. The Act does not require the United States to collateralize all future interest but simply to "hold in trust security provided in accordance with the Trust Fund Payment Agreement"

The Court's interpretation of the United States' trust duty must be driven by the provision

creating and defining this duty, that is, section 405(c)(2). *Circuit Opinion*, 956 F.3d at 1342. Indeed, the Court of Appeals identified section 405(c)(2) as the provision that "establishes a specific fiduciary duty" for the United States. *Id.* Far from "overstating" or "misplacing" reliance on this provision as ITCA alleges, the United States' argument is anchored properly in what the statute prescribes. Honoring the plain language of this provision, and the Act as a whole, reveals that the United States was not required to collateralize thirty years of interest payments.

Section 405(c)(2) directs: "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 Act is clear and its mandate unambiguous: the United States must hold in trust security "in accordance with the Trust Fund Payment Agreement," Act, Sec. 405(c)(2), for the purpose of securing Collier's payment obligations. *Circuit Opinion*, 956 F.3d at 1341. The Act by its express terms does not specify any security amount, either greater than or different from that adopted in the TFPA. *Dismissal Order II*, 140 Fed. Cl. at 458. Indeed, the Act could not possibly have prescribed the exact amount of security, for the TFPA did not even exist when the Act took effect. Instead, the terms were left open, and the Act vested the Secretary with discretion over the security, limited only by the terms agreed to in the TFPA. Act, Sec. 405(c)(2); *Babbitt*, 51 F.3d at 203.[3] No other

[3] ITCA misses the mark by suggesting that the Secretary lacked discretion to negotiate the terms of the TFPA. In *Babbitt*, the Ninth Circuit affirmed the district court's dismissal of ITCA's claim that the Secretary had accepted inadequate collateral from Collier. 51 F.3d at 203. The Court concluded that this action, along with others, were "committed to agency discretion" and "shielded from judicial review." *Id.* at 200, 203. The Ninth Circuit explained that "Congress did not design the [Act] to benefit only the Tribes" but "to serve several purposes" including disposing of the Phoenix Indian School and preserving the Florida ecosystem. *Id.* at 203. Congress thus "did not desire to create potential challenges" to the Secretary's decision-making. *Id.* Nothing in the Ninth Circuit opinion or the United States' statements in that litigation, including the United States' recognition that ITCA could later bring challenges for monetary damages against the United States in the Court of Federal Claims, are a concession of liability or

language in the Act imposes any collateral duty on the United States or defines the United States' security obligations. While true that the Act established payment obligations for the purchaser, those obligations are just that—the *purchaser's. Circuit Opinion*, 956 F.3d at 1345.

The United States' reliance on the TFPA is therefore not misplaced. The Act points expressly to the TFPA to understand the United States' duty with respect to collateral maintenance and remedies against Collier. So long as the United States complied with the TFPA, it abided by the Act's only security mandate: to "hold in trust the security provided in accordance with the Trust Fund Payment Agreement." It was not required to maintain some other amount—such as principal and future interest—if not set forth in the TFPA or the Act. And, as noted by the Federal Circuit, ITCA's theory that the United States had a duty to "negotiate terms in the TFPA and related documents to ensure adequate security" is unsupported by "the [Act], case law, or otherwise." *Circuit Opinion*, 956 F.3d at 1345. Rather, the Secretary had discretion to decide the adequacy of collateral and such decision-making was not subject to judicial review. *Babbitt*, 51 F.3d at 203. Accordingly, directing the Court to the TFPA is not contrary to the Act, but fully consistent with its terms.

As explained in detail in the United States' opening brief (US MSJ, pp. 21–22) the United States' trust duty should also be understood consistent with customary business practices and the Act's terms afforded their "ordinary, contemporary, common meaning[s]." *New York and Presbyterian Hosp. v. United States*, 881 F.3d 877, 882 (Fed. Cir. 2018). Collateral is designed to secure a principal owed on a debt in the event of default. The lender forecloses on

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an invitation to challenge the terms of the TFPA. And, as explained here, the Secretary exercised his discretion consistent with the Act by executing a TFPA that protected the present value of Collier's $34.9 million obligation.

collateral to recover the unpaid principal, plus perhaps unpaid accrued interest, but not all *future* interest. The recovered principal could be reinvested to earn "future" interest. It is axiomatic that the purpose of interest is to reimburse the time value of money, "making the same amount similarly valuable when paid at different times." *Holland v. Bibeau Const. Co.*, 774 F.3d 8, 17 (D.C. Cir. 2014); *Hicks v. Capitol Am. Life Ins. Co.*, 943 F.2d 891, 894 (8th Cir. 1991) (awarding unearned future interest as damages on a note "flies in the face of fundamental principles of finance and accounting"). ITCA provides no reason to depart from this basic economic reality.

The Congressional Budget Office's analysis provides a fundamental premise that disproves the basis of ITCA's argument for liability. This analysis demonstrates that the investment of $34.9 million over thirty years would not produce a different result than thirty years of interest payments with a lump-sum payment of the $34.9 million principal at the end of the thirty years. *See* 134 Cong. Rec. S13519-02, 1988 WL 176577, *2, 3 (Sep. 28, 1988). Put simply, a payment of cash at closing as compared to payment thirty years later, with thirty annual interest payments, would have the same present value. ITCA does not dispute as much. The thirty-year annual payment option was thus never intended to confer greater compensation than if Collier had paid a lump sum at the outset; rather, the fixed interest rate was merely a device to account for the time value of money.

ITCA's only rebuttal is that because "today's prevailing interest rates are much lower" than they were when the Act passed, ITCA Resp. at 28, investing the principal will not yield the same return as Collier's payments at the fixed rate. Thus, according to ITCA, Congress was not simply preserving the time value of money but guaranteeing ITCA's receipt of thirty payments of $2.9 million. ITCA fundamentally misunderstands Congress's use of a fixed interest rate to memorialize the CBO's predictions. The Act does *not* grant ITCA entitlement to thirty payments

of $2.9 million (and definitely not from the United States, as discussed further below); it *does* require the *purchaser* to make annual payments "equal to the interest due" on the $34.9 million obligation and establish an acceptable interest range. Act, Sec. 403(c)(2), (5). Congress's imposition of the selected range reflects an understanding of the CBO's analysis and an intent to ensure that ITCA would receive the present value of $34.9 million, whether it was in a lump sum at the time of the exchange that was then invested, Act, Sec. 405(c)(1), or in installments with interest over thirty years. The result of these two options was predicted to be the same, based on interest rate assumptions at that time. That interest rates have varied—advantaging ITCA when rates were falling—does not alter the conclusion that Congress intended that ITCA receive $34.9 million in present dollars, estimated using then-prevailing interest rates, nor does it entitle ITCA to claim more than enough to cover the present value of the principal.

ITCA also erroneously accuses the United States of "interject[ing] its own terms," ITCA Resp. at 15, into the Act. Not so. The United States urges only that the Court give the words used by the Act their ordinary meaning. ITCA does not deny that the United States' interpretation of the Act's terms are consistent with their ordinary meaning—for example, that "collateral," Sec. 402(h)(3)(D), is intended to secure a principal obligation,[4] or that "interest" ordinarily compensates for the time value of money.[5] Instead, ITCA continues to volley its unsupported

[4] ITCA erroneously asserts that the Act does not contain the word "collateral." ITCA Counterstatement (ECF 140-1) p. 8, ¶ 11; p. 25 ¶ 4. Yet, section 402(h)(3)(D) requires any offer to the United States to enter into a TFPA to include "a detailed description of the *collateral* to be provided by the offeror to secure the payment obligation under the [TFPA]" and "evidence of ownership and value of such *collateral* sufficient to permit the Secretary to determine such *collateral* is adequate to secure the payment obligations of the Purchaser under the [TFPA]")."

[5] ITCA's objection to the United States' referral to these payments as "annual interest payments" is unpersuasive. The Act recognizes that the annual payments prescribed under Section 403 are "annual payments equal to the interest due," with an 8.5-9.0 percent interest rate "used [to] determin[e] the interest due." Act, Sec. 403(b), (c)(5). The United States is not misrepresenting

position that "accrued interest," as it used in the TFPA, must mean all future (i.e. unaccrued) interest. This argument lacks merit and defies common sense. ITCA dedicates a page and a half to this novel argument but cites no legal authority or statutory language to support its view, instead relying entirely on its own misguided reading of the Act. Nothing in the Act supports ITCA's interpretation or indicates that imposing an interest obligation on Collier was anything more than a reflection of Congressional intent to compensate ITCA for time value of money, as corroborated by the CBO analysis. Adding ITCA's proposed gloss on the Act would violate basic canons of statutory construction that terms are to be given their ordinary meaning unless Congress directs otherwise.

Finally, the United States does not "ignore" the tribal interests represented in the Act—which, as the Ninth Circuit recognized, furthers policy interests beyond just ITCA's. *Babbitt*, 51 F.3d 199 at 203. "Congress did not design the AFLE to benefit only the Tribes. Congress intended the AFLE to serve several purposes simultaneously: to dispose of the School Property,

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the statute by using this terminology. Indeed, the Federal Circuit, this Court, and the District of Arizona have all similarly so described the Act. *E.g., Circuit Opinion*, 956 at 1340, n. 11 (describing the payments as "annual interest payments"); *Inter-Tribal Council of Arizona, Inc. v. United States*, 125 Fed. Cl. 493, 497 (2016) (same); *Collier*, 2016 WL 3537802, at *2 (same). Likewise, the United States is not misleading the Court by referring to the anticipated final lump sum payment as a "balloon payment." Again, both this Court and the District of Arizona have used this term when explaining the Act's payment arrangement. *Dismissal Order II*, 140 Fed. Cl. at 451("Under the payment scheme established in the Act, Collier was given the option of paying the full amount owed either as a lump sum or in annual installments over a period of 30 years with a final *balloon payment* of $34.9 million") (emphasis added); *Collier*, 2016 WL 3537802, at *2 ("The Act authorizes the Secretary of Interior to accept the $34.9 million from Collier . . . over time with *annual interest payments* on the $34.9 million at an interest rate of between 8.5% and 9.0% per annum for thirty years, followed by a *balloon payment* of the principal at the end of the thirty years.") (emphasis added). Nor does the United States' use of the term "loan" undermine the payment arrangement set out in the Act, which imposes on Collier a payment obligation in exchange for acquiring certain land that exceeded the value of the land Collier traded and established the terms by which Collier may complete this payment obligation over thirty years.

to finance tribal education, to preserve the Florida ecosystem, to create a park in Phoenix, and to expand the Phoenix VA hospital." *Id.* The United States' interpretation simply relies upon Congress's demonstrated intent for ITCA to receive its share of the present value of $34.9 million, regardless of when Collier made that payment.

B. ITCA's argument imposes nonexistent duties on the United States and ignores the Federal Circuit's holding

ITCA's theory that the United States is liable for failing to secure thirty years of interest payments (plus principal) finds no support in the language or provisions of the Act. ITCA is unable to identify *any* language in the Act directing the United States to secure Collier's future interest obligations or otherwise holding the United States liable for the payment obligations imposed upon Collier. ITCA cites *no* language imposing such a duty, nor does it identify any provision other than section 405(c)(2) that imposes a trust duty on the United States. No such provision or language exists. ITCA persists that the United States "ignore[s] the clear terms of the Act," ITCA Resp. at p. 17, but its assertion lacks any support and must fail.

To that end, the Court must reject ITCA's wholly unsupported argument that the fixed interest payments were a guaranteed "'stream" of 'income' or 'revenue[.]'" ITCA Resp. at p. 26. *No* language in the Act supports this theory. ITCA's invocation of its *own* testimony at a Congressional hearing prior to the Act's passage is unpersuasive. There, ITCA requested that Congress include a "guaranteed minimum [annual] cash flow" if the thirty-year option was selected. But Congress did not include such language in the Act; the Act says nothing about "cash flow" or "income stream," and the ultimate inclusion of a fixed interest rate does not speak to any collateral obligation of the United States. It ensures only that Collier would pay the present value of its $34.9 million principal obligation. As evidenced by the CBO report, this interest rate was meant to assure that ITCA received the real value of the $34.9 million

obligation if paid thirty years later rather than a lump sum at closing.

ITCA's arguments are also untenable given the Federal Circuit's holding in this case. ITCA argues that the United States' reliance on Section 405(c)(2) is "misplaced"—despite the Federal Circuit's own recognition of this provision as establishing the United States' trust duty. *Circuit Opinion*, 956 F.3d at 1342. At the same time, ITCA invokes section 403(c)(2) as placing the United States on the hook for Collier's payment obligations—even though the Federal Circuit expressly recognized that it was *ITCA*'s invocation of *this* provision that was misplaced. *Id.* at 1345–46. The Federal Circuit unequivocally held that section 403(c)(2), which delineates the purchaser's payment obligations, imposes payment duties only on *Collier*, not the Government. *Id.* (rejecting ITCA's contention that this Court "ignored the [Act's] mandates and erred under applicable case law[,]" instead concluding that ITCA's claim did "not [find] support in the [Act], case law, or otherwise.").[6]

Despite this Court and the Federal Circuit's rejection of ITCA's theory that the United States has a duty to make up for Collier's missed payments, ITCA unrelentingly attempts to hold the United States liable for Collier's payment obligations by resorting to the Act's trust provision to repackage its rejected theory. *E.g.*, ITCA Resp. at pp. 2, 4, 5, 6, 8, 17, 25, 29.[7] ITCA

[6] ITCA confuses the issues and the Federal Circuit's holding by declaring that the Federal Circuit did not use the word "guarantor" when dismissing its claim that the United States does not have to make Collier's missed payments and therefore the United States could still be liable for those "unpaid" payments. The Federal Circuit was clear, however: the Act's payment provisions imposed obligations *only* on Collier.

[7] What was previously a flawed theory that the United States "was required to make all Trust Fund Payments required but not made by Collier under the Act," ITCA Resp. at 8, fn. 3, has now morphed into an equally flawed theory that the United States was obligated "to secure all required but unpaid Trust Fund Payments or to be liable for otherwise making the Trust Funds whole." ITCA Resp. at p. 18; *e.g.,* p. 8 (arguing that the United States is "charged with fulfilling" Collier's payment obligations).

misguidedly believes that Collier's failure to pay all thirty interest payments creates liability for the United States. It cannot be that the United States is liable for all future interest payments when, *a fortiori*, the United States has no duty to make up for any payments Collier missed. ITCA's repeated references to section 403(c)(5) are also unhelpful; for this provision says nothing about the United States' duties but simply establishes an acceptable interest range.

ITCA's demand for an additional recovery from the United States despite receiving the benefit of Collier's obligation being fully satisfied ten years early—getting its dollar today instead of tomorrow—defies reason and would impose an unwritten obligation on the United States to pay more than the present value of the principal, when it is the law of the case that the United States has no trust duty to make up for lost payments. ITCA does not—and cannot—dispute that the deal was for $34.9 million, and Collier could have paid this in a lump sum at the time of the exchange. That is the money that Congress intended for ITCA (and the Navajo Nation) to have. The Act offered the option, if approved by the Secretary, for Collier to finance the payment over thirty years with interest, to assure that ITCA received the present value of the $34.9 million when paid in thirty years. Nothing in the record suggests that the requirement that security be held in trust was Congress's way of doing indirectly what it could have done expressly; that is, requiring the United States to make up for any of Collier's missed payments. Rather, the TFPA ensured that Collier, after any release occurred, would replenish the collateral if it fell below 130 percent of the Release Level Amount, which accounted for outstanding principal and accrued interest. The United States successfully sued Collier to enforce the TFPA's collateral maintenance terms and recovered a sum in excess of this amount.[8]

[8] Notably, although this Court did not previously rule on whether the United States was required to collateralize principal plus future interest or just principal (with accrued interest) when dismissing ITCA's Second Amended Complaint, the Court *did* hold that the United States

Finally, ITCA's invocation of the Act's legislative history and its own statements made at a Congressional hearing, highlighting tension in passing the Act and ITCA's displeasure with the thirty-year option, are unavailing. First, ITCA has not demonstrated an ambiguity here that would justify a resort to legislative history, *Indian Harbor Ins. Co. v. United States*, 704 F.3d 949, 956 (Fed. Cir. 2013) ("[R]eference to legislative history is inappropriate when the text of the statute is unambiguous"). Second, Congress voted to authorize the exchange through the Act, and the Secretary lawfully permitted Collier to proceed with the thirty-year option; whether there was debate prior to the Act's passage—and objection from ITCA—has no bearing on the question of what security the Act required the government to hold in trust. Likewise, ITCA's narrative of the negotiations with Collier do not yield any relevant information.[9]

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discharged its duty by suing to obtain additional collateral that would have covered principal plus four years of accrued interest; the Court gave *no* credit to ITCA's argument that the United States should have sought to recover all future interest.

[9] Unable to find anything in the Act that requires the United States to obtain more security than specified in the TFPA, ITCA has previously argued that its claim is supported by post-enactment statements from Interior officials purporting to acknowledge the United States had some duty to assure that the full amount owed by Collier to the Trust under the Act and the TFPA would be paid. As explained in the United States' Response to ITCA's Motion for Partial Summary Judgment (ECF 138, pp. 27–29), ITCA mislabels these statements as "legislative history" and fails to contextualize many of them, which, in any event, are immaterial to interpretating the Act. Individual opinions cannot, as a matter of law, create a trust duty for the United States. *See Mercier v. United States*, 786 F.3d 971, 977 (Fed. Cir. 2015) ("[E]quitable considerations cannot grant a money remedy Congress has not authorized[.]") (citing *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414 (1990)); *Penny v. Giuffrida*, 897 F.2d 1543, 1547 (10th Cir. 1990) ("[C]itizens . . . may not rely on government agents' incorrect interpretations of the law."). ITCA now contends that while these statement "by themselves" may not create a trust duty, they "are relevant, contemporaneous expressions of [the officials'] understanding of the Act" and thus relevant to the Court's statutory interpretation. ITCA, however, misplaces reliance on *AD Global Fund v. United States*, 67 Fed Cl. 657 (2005), when it contends that statements of Interior officials can be used to interpret the meaning of the Act. *AD Global* merely discusses circumstances in which legislative history may be used to determine the meaning of an ambiguous statute and accepts the notion that in some circumstances official agency statements to Congress about the meaning of proposed legislation can be instructive. *Id.* at 678; *Lindahl v. Off. of Pers. Mgmt.,* 470 U.S. 768, 788 (1985) (discussing relevancy of agency official's

For these reasons, the Act did not require the United States to secure all future interest payments. The United States recognizes that section 405(c)(2) gives rise to a statutory trust duty. Understanding that duty, however, requires giving proper meaning to the Act's plain language. ITCA's claim that its theory is "correct and consistently applies" the Act's provisions is simply false. ITCA Resp. at p. 2. Instead, ITCA fails to identify any statutory provision that required the United States to maintain more security than that specified by and obtained under the TFPA. Its bald assertions also ignore contrary holdings by the Federal and Ninth Circuits. Absent a directive in the Act creating liability for the United States' Collier's payment obligations—either directly as a guarantor for any missed payments or by defining the amount of collateral to be held in trust—imposing such liability would be inappropriate here. The Act plainly does not hold the United States liable for Collier's missed payments, nor does it require the Secretary to hold a defined amount of security in trust.

At bottom, the Act's only trust duty was to observe the security requirements set by the TFPA, in accord with basic common sense and business practices. ITCA cannot misconstrue the plain words of the statute to manufacture a fiduciary duty of the United States.

2. The United States discharged its trust duties when it recovered $48 million for the Trust Estate

The United States faithfully discharged its trust duties to ITCA by initiating suit against Collier to obtain additional collateral and obtaining a recovery from Collier that ensured the trust

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statements on proposed legislation). But ITCA cites no statements from Interior officials to Congress over *proposed* legislation but seeks to rely on agency statements discussing the enacted statute, most of which are made to ITCA or Collier. ITCA provides no authority that it is appropriate at all to rely on post-enactment remarks by agency officials to interpret an unambiguous statute.

beneficiaries were made whole.

The recovery was achieved through the United States' use of remedy provisions of the TFPA. Specifically, the Deed of Trust's "Maintenance of Collateral" provision in section 6.3(a). required Collier, after receiving a lien release under the TFPA, to monitor the level of security and to supplement that collateral, as necessary, with government-backed securities "if the remaining collateral in the Trust Estate falls below the 130% level." *Collier*, 2016 WL 3537802, at *9. This meant that if, as happened here, the value of the collateral dropped, the United States was entitled to rely on this provision of the TFPA to assure collateral supplementation.

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

This Court and the Federal Circuit left unanswered the question of what security was required to be held in trust. Also unanswered was whether the United States' recovery from Collier made ITCA whole for the United States' alleged breaches, if proven. *Circuit Opinion*, 956 at 1340, n. 11.

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

beneficiaries financially whole. The Act required the United States to hold security as set out in the TFPA, and the TFPA in turn required Collier to maintain 130% of the Release Level Amount, which, at time of settlement, was $47.1 million.[10] The $48 million settlement proceeds clearly exceed this amount. That is the *only* security that the United States was required to hold in trust. The settlement recovery thus placed ITCA in the same position it would have been in had the Trust Estate been adequately collateralized throughout its life. And ITCA's contention that the United States is liable for "all required but unpaid Trust Fund Payments" (ITCA Resp.at p. 18) that Collier was obligated to make (that is, the future payments associated with years 2017–2026 that were not captured in the settlement) is an end run around the Federal Circuit's holding that the United States' is not liable for Collier's missed payments.

Finally, ITCA's allegations that the United States committed various breaches of trust—for example, not conducting independent appraisals of the trust property when it released liens in 1996 and 2007, or not demanding additional collateral from Collier sooner—are dead ends. Regardless of the alleged instances, and although the Federal Circuit may have been "troubled' by these allegations, the United States can only be held liable for "damages sustained as a result of a breach of the duties[.]" *United States v. Navajo Nation*, 556 U.S. 287, 291 (2009). ITCA fails to identify any damages it suffered from these alleged breaches. No such damages exist. Any harm that may have arisen from the alleged breaches was fully remedied through the recovery from Collier. This settlement provided ITCA with complete recovery of the value of

[10] The Release Level Amount at the time of settlement was $36,232,500, representing the principal obligation ($34.9 million) plus the five annual payments of $2,966,500 for years 2012–2016 that had accrued and gone unpaid at the time of the July 2017 settlement ($14,832,500), less the value of the Annuity at that time ($13.5 million) and any government-back securities ($0). And 130% of $36,232,500 is $47.1 million. US MSJ, p. 28. ITCA does not dispute that the United States recovered this money and appropriately assigned ITCA its share.

security that the United States was required to hold in trust, ensuring ITCA was made whole. Accordingly, ITCA has now received all it is entitled to from the United States.

CONCLUSION

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

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Respectfully submitted,

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