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 RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON REMAINING CLAIM I ALLEGATION

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DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON REMAINING CLAIM I ALLEGATION

The United States respectfully requests that this Court deny Plaintiff Inter-Tribal Council of Arizona, Inc.'s (ITCA) Motion for Partial Summary Judgment on the remaining Claim I allegation in the Second Amended Complaint, ECF No. 184, and grant the United States' Cross-Motion, ECF No. 182.[1] ITCA has now had ten years and at least four opportunities to articulate a cognizable claim under Claim I, dating back to Judge Firestone's order, *see* ECF Nos. 47, 48, asking ITCA identify a harm it suffered that has not already been remedied by the United States' $48 million recovery against the Barron Collier Co. (Collier) in 2017. Still, ITCA remains unable to establish such injury. It is time, after three summary judgment motions, to end the quest.

This case traces back to Collier's breach of its 30-year, $34.9 million obligation to the United States, the proceeds of which Congress dedicated to ITCA and nonparty Navajo Nation. Following Collier's breach and ITCA's commencement of this lawsuit, the United States successfully enforced its security agreement with Collier, recovered $48 million on behalf of ITCA (and the Navajo Nation), and ensured that ITCA received its share of the Collier loan proceeds with accrued interest. Even before receiving its $45.6 million share of the Collier recovery, ITCA had received over $42 million from interest payments made by Collier, such that ITCA has already received nearly $88 million on Collier's $34.9 million obligation.

Now, after multiple rounds of dispositive motions and some discovery, only one narrow Claim I allegation remains. ITCA asserts that the United States is liable for more damages because of a deficiency in the value of the collateral held to secure Collier's debt, known as the

[1] The United States incorporates by reference its Counterstatement to ITCA's Statement of Facts, filed this same day.

Trust Estate, at the time Collier breached its payment obligations under its security agreement with the United States. This Court and the Federal Circuit have already decided that the governing statute (the Arizona-Florida Land Exchange Act) did not require the United States to make up any payments that Collier failed to pay or to obtain collateral from Collier that secured not only principal and accrued interest but also future interest. The law of the case has also established that the United States is not liable for granting partial, contractually-required lien releases to Collier in 1998 and 2007 or for not demanding that Collier boost collateral during the 2007 economic downturn, before Collier ceased its payments.

Ignoring these rulings, ITCA clings to a misguided theory that the Act required the United States to demand enough collateral from Collier to secure Collier's $34.9 million obligations plus 30 years of interest payments, ECF No. 184-1, p. 5, and that the United States is liable for "damages because the Trust Funds have yet to be made whole." *Id.* p. 36. Specifically, ITCA seeks to recover the difference between what ITCA has already received and what ITCA insists that the Act obligated Collier to pay. The theory is untenable: it is irreconcilable with the law of this case, unsupported by the Act, and must be rejected. On the contrary, as the United States' Cross-Motion demonstrates, the United States has fully discharged its duties under the Act, and ITCA has no remaining compensable injury.

For these reasons, the Court should deny ITCA's motion and instead grant partial summary judgment to the United States, rejecting the last remaining breach alleged in paragraph 263 of the Second Amended Complaint.

INTRODUCTION

While this suit was pending, the United States successfully enforced its Trust Fund Payment Agreement (TFPA) with Collier, recovering enough to satisfy the full $34.9 million

principal owed by Collier along with accrued interest, according to the terms of the TFPA. ITCA does not dispute that it received its proper share of that recovery. Now, after a series of dispositive motions, only one narrow Claim I allegation remains: "The United States' failure to have sufficient security in the Trust Estate when Collier defaulted was a breach of trust in violation of the Act." Second Amended Complaint ¶ 263. The Federal Circuit has held that the United States is not responsible for Collier's payment obligations under the TFPA and barred ITCA from challenging the TFPA. This Court has dismissed ITCA's challenges to the United States' oversight of the collateral in the Trust Estate in the years prior to Collier's breach; the TFPA did not make ITCA a third-party beneficiary; and ITCA has already received its full share of the $48 million recovered from Collier through the United States' successful enforcement of the TFPA.

Still, ITCA insists that the United States was required to demand collateral from Collier sufficient to cover not only the $34.9 million principal but also all thirty years of Collier's interest payments, and that the failure to hold that level of collateral entitles ITCA to recover from the United States the difference in the funds it has received and the extra interest it would have received had Collier fulfilled all its payment obligations under the Act and the TFPA.

The Court should not entertain this argument. It is well-settled as a matter of law that the United States is no guarantor of Collier's payments. Nor does the Act impose any obligation on the United States to make up any "difference" in funds that Collier was scheduled to pay under the Act and what Collier ultimately paid. These issues were decided several years and multiple dispositive motions ago. This Court and the Federal Circuit have rejected *all* challenges to the adequacy of the collateral obtained by the United States. Indeed, the Ninth Circuit in a prior suit concluded *decades* ago that the Secretary of the Interior had discretion to decide what collateral

was adequate, unequivocally rejecting ITCA's attempt to block the deal unless the United States demanded additional collateral. *Inter-Tribal Council of Ariz., Inc. v. Babbitt*, 51 F.3d 199, 203 (9th Cir. 1995) *(ITCA v. Babbitt).* In the face of this history, ITCA's "sufficiency" arguments are simply not viable.

Nothing in the Act required the United States to obtain collateral sufficient to secure $34.9 million plus thirty years of interest payments or to otherwise assume responsibility for "mak[ing] the Trust Funds whole" as ITCA contends. *See e.g.*, ECF No. 184-1, p. 27. The Act imposed one duty on the United States: to "hold in trust" security in accordance with the TFPA, and the Act granted the Secretary of the Interior discretion to decide the terms of that agreement. *ITCA v. Babbitt*, 51 F.3d at 203. Holding the United States liable for purportedly failing to hold collateral valued at "8.5% [interest] on $34.9 million for 30 years plus the $34.9 million," ECF No. 184-1, p. 5, is entirely unsupported by the Act and cannot be squared with the law of this case and the Ninth Circuit's ruling in *Babbitt.*

Finally, ITCA does not even address this Court's question whether and to what extent the common law of fiduciaries influences the analysis of the remaining Claim I allegation. The Court should not afford ITCA another opportunity to identify any "common law" claim. As the United States establishes in its competing Cross-Motion, ITCA cannot invoke common law to impose additional duties on the United States beyond those in the governing statute.

Accordingly, the Court should resolve the cross-motions for partial summary judgment on the remaining Claim I allegation in the United States' favor and dismiss Claim I with prejudice.

BACKGROUND

I. Factual Background

The material facts are not in dispute, and they need little review here.

In 1988, Congress passed the Arizona-Florida Land Exchange Act (Act), which was in Title IV of the Arizona-Idaho Conservation Act of 1988, Public Law No. 100–696, 102 Stat. 4577 (1988). The Act authorized a land exchange in which the United States acquired title to wetlands in Florida, and Collier received the "Phoenix Indian School property" in Phoenix, Arizona. The Act required Collier to pay $34.9 million to the United States to equalize the value of the exchange, 95 percent of which was to be deposited in an education trust account for the benefit of ITCA.

The Act allowed Collier to pay that $34.9 million over thirty years with annual interest payments at a minimum rate of 8.5 percent. The Secretary of the Interior was directed to execute a trust fund payment agreement (the TFPA) with Collier under which payments would be made to the United States, along with "security provided in accordance with the Trust Fund Payment Agreement." Act, Sec. 405(c)(2). As this Court and the Federal Circuit have both recognized, the Act does not require the United States to make payments if Collier failed to make them. *Inter-Tribal Council of Arizona, Inc. v. United States*, 956 F.3d 1328, 1345 (Fed. Cir. 2020) (*Circuit Opinion*); *Inter-Tribal Council of Arizona, Inc. v. United States*, No. 15-342, 2023 WL 4881967, at *4 (Fed. Cl. Aug. 1, 2023) (*Summary Judgment Order*). The Act did not impose any specific security requirements, *Inter-Tribal Council of Arizona, Inc. v. United States*, 140 Fed. Cl. 447, 458 (2018)*, aff'd in part, rev'd in part*, *Circuit Opinion*, 956 F.3d at 1328, leaving this decision to the discretion of the Secretary. *Inter-Tribal Council of Arizona, Inc. v. Babbitt*, 51 F.3d 199, 203 (9th Cir. 1995) (*ITCA v. Babbitt*).

In accordance with the Act, the Secretary and Collier executed the TFPA, with accompanying instruments including a Deed of Trust. Under the TFPA, Collier provided collateral to a "Trust Estate" that secured its payment obligations. Collier was also required to make annual interest payments of $2.9 million for thirty years (equal to the statutory minimum interest rate) as

well as a payment into an annuity designed to equal the $34.9 principal obligation at the end of the thirty years.

The Deed of Trust permitted Collier to seek partial releases of the United States' liens, which the United States was required to grant so long as the value of the remaining property in the Trust Estate exceeded 130% of the "Release Level Amount." The Release Level Amount was defined to cover the principal obligation less the value of the annuity, plus accrued interest. Collier twice sought a release of lien, in 1997 and 2007, which the United States granted after reviewing appraisals from Collier showing that sufficient collateral would remain in the Trust Estate if the releases were granted. Once the first release was granted, Collier had an ongoing affirmative obligation to maintain the value of the Trust Estate at 130% of the Release Level Amount as specified in the Deed of Trust's "Maintenance of Collateral Value" provision.

Before the deal between the United States and Collier was officially consummated, ITCA sued in 1992 to enjoin the United States from entering the TFPA with Collier. *Inter-Tribal Council of Arizona, v. Lujan,* No. 2:92-cv-01890-SMM (D. Ariz. 1992). In that suit, ITCA alleged that the security obtained by the United States under the TFPA constituted "a violation by the Secretary under the terms of the [Act] which requires that the payment of all amounts due be adequately collateralized at the time of closing." *Id*. ITCA sought to enjoin "the Secretary from agreeing to inadequately collateralize the trust fund payments." *Id.*, ECF No. 1 (ITCA's complaint). The district court denied relief, finding that "the Secretary's decisions regarding the adequacy of the collateral . . . are precluded from judicial review under subsection 402(h) of the [Act]." *Id.*, ECF No. 23 at 8 (district court's order).[2] The Ninth Circuit affirmed the dismissal for

[2] The complaint from *ITCA v. Babbitt* can be found on this Court's docket at ECF No. 130, Exhibit 5. The district court's ruling is at ECF No. 130, Exhibit 6.

lack of subject-matter jurisdiction and failure to state a claim. *ITCA v. Babbitt,* 51 F.3d at 201, 203. The appellate court held that the Secretary's decisions as to the adequacy of collateral were "shielded from judicial review" "because they [were] committed to agency discretion by law." *Id*. Accordingly, the United States and Collier proceeded to execute and implement the TFPA. ITCA was neither a party nor third-party beneficiary to the TFPA.

In December 2012, after fifteen years of making annual payments, Collier informed the United States that it would no longer honor its payment obligations and that the value of the Phoenix Indian School property, i.e. the remaining collateral in the Trust Estate, had dropped significantly, as low as $6 million, which was well below 130% of the Release Level Amount. After Collier ignored the United States' demands to resume its payment obligations and to add collateral to the Trust Estate as the TFPA required, the United States sued Collier in district court in Arizona in January 2014, seeking specific performance of the Deed of Trust's Maintenance of Collateral Value provision. The United States prevailed on summary judgment and thereafter executed a settlement with Collier with an expected recovery of $54.5 million comprised of cash, the annuity, and the Phoenix Indian School property. Following the sale of the Phoenix Indian School property, the United States realized $48 million on behalf of ITCA and the Navajo Nation, which amount exceeded 130% of the Release Level Amount at the time of settlement, accounting for five years of interest payments that had accrued.

II. Procedural Background

The United States provided a thorough recitation of the procedural history of this case in its Cross-Motion, ECF No. 182 at p. 10-18; however, given ITCA's attempt to reopen closed issues, several critical points warrant restating.

ITCA's Second Amended Complaint (SAC), ECF. No 58, Claim I alleges that the United

States breached two duties relevant here:

1. It failed to negotiate a TFPA that obtained sufficient security; and
2. It failed to maintain sufficient security after the execution of the TFPA.

Claim II, which alleged the United States failed to "collect, deposit, and make the payments" not timely made by Collier has been fully litigated and rejected. The Federal Circuit affirmed Judge Firestone's ruling that the Act imposes no duty on the United States to collect, deposit, or make payments owed by Collier. *Circuit Opinion*, 956 F.3d at 1344-45 (explaining that this claim was not "support[ed] in the [Act], case law, or otherwise.").

This Court and the Federal Circuit have also largely rejected the Claim I allegations. The Federal Circuit affirmed Judge Firestone's dismissal of ITCA's challenges to the TFPA itself, holding that any such challenges were time-barred and stating that they were also not "support[ed] in the [Act], case law, or otherwise." *Circuit Opinion*, 956 F.3d at 1344-45. Because the original dismissal occurred at the pleading stage, however, the Federal Circuit concluded it was premature to dismiss ITCA's allegations that the United States breached a "duty to maintain" by failing to adequately preserve the value of the Trust Estate over time. *Id.* at 1340 (stating that dismissal of this claim was premature "at this stage of the proceeding").

On remand, this Court considered the remaining Claim I allegations over two rounds of summary judgment briefing and further narrowed ITCA's Claim I. In the first round, the Court granted in part and denied in part the United States' Motion for Partial Summary Judgment (ECF No. 129) and denied ITCA's Motion for Partial Summary Judgment (ECF No. 137). In granting the United States' motion in part, the Court reiterated, consistent with the Federal Circuit and the dismissal of Claim II, that the United States "is in no way" liable for any deficiency in Collier's annual interest payments. *Summary Judgment Order*, 2023 WL 4881967, at *5. The Court held

that ITCA could not revive this dismissed claim by resort to the Act's trust provisions. *See generally id.* at *4-5 (explaining that ITCA's position was "illogical" and would have "rendered [the Federal Circuit's decision] academic"). The Court also confirmed that no challenge to the TFPA survived the Federal Circuit's ruling. *Id.* at *7.

Although the Court granted partial summary judgment to the United States, the Court explained that "a portion" of ITCA's claim for breach of duty to maintain sufficient security remained viable on remand, specifically those allegations in paragraphs 260 through 263 of the operative complaint, *id.* at *6-7, but that additional factual development was needed.

ITCA's remaining Claim I allegations were that the United States: (1) did not hold sufficient security to grant Collier's lien release requests in 1998 and 2007; (2) failed to take action in response to the economic downturn in 2007; and (3) lacked sufficient security in the Trust Estate in 2012 when Collier stopped making payments. *Id.* at *7-8. The Court explained that these remaining allegations could not be resolved at summary judgment because there was "a genuine dispute of material fact as to the value of the trust fund over time" "relative to the Release Level Amount." *Id.* at *1, 9. The Court also acknowledged that the parties disputed "whether and to what extent the plaintiff remains harmed by the defendant's alleged breach." *Id.* at *9.

One year later, the parties briefed a second round of summary judgment motions as to the remaining allegations in Claim I. ECF Nos. 155, 157. Both parties sought summary judgment in their favor on the remaining Claim I allegations that the United States breached its duties to ITCA by granting Collier's lien releases (SAC ¶¶ 260 and 261), by failing to take action during the 2007 economic crisis (SAC ¶ 262), and by allowing the estate to be undercollateralized when Collier breached the TFPA in 2012 (SAC ¶ 263).

After careful consideration, the Court again granted the United States' motion in part and denied ITCA's cross-motion. The Court agreed that the United States was entitled to summary judgment on the allegations in paragraphs 260 through 262 of the Second Amended Complaint challenging the United States' actions relating to the lien releases and economic crisis. ECF No. 167. Additionally, at oral argument, the Court "fully accept[ed]" the United States' "recitation that the Government is not on the hook" for money that "Collier wound up shorting the Plaintiff." Oral Arg. Tr. 21:25, 22:1-2; *see also* 20:16-18 ("[T]he Plaintiff may not impose on the United States liability for Collier's failure to perform, full stop."). The Court also rejected ITCA's argument that Collier's thirty years of interest payments "were vested" and had "accrued from the start of the 30-year period" such that the Act required the United States to secure all interest payments. *Id.* 42:1-16. The Court explained, "that's an argument that tries to make the Government the guarantor of Collier's obligations. . . The Government is not the guarantor for that . . . that interpretation is actually just foreclosed by the decision saying the Government is not the guarantor." *Id.* 42:17-23.

The Court questioned, however, to what extent the United States' trust duties are informed by fiduciary principles outside "the four corners of the Act[,]" *id.* 56:17, and whether "the United States has fiduciary obligations that arise separate and apart from what Congress says in the Act." *Id.* 56:14-16; *see id.* 53:8-10 (questioning whether the United States "had some separate duty to ensure that if Collier reneged . . . [ITCA] would not be harmed."). For these reasons, the Court denied summary judgment to both parties on paragraph 263.

The Court thereafter ordered the parties to complete limited fact discovery. After doing so in good faith, the Court granted to parties' joint request to cross-move again for summary judgment on the last remaining Claim I allegation.

ARGUMENT

All that is left of Claim I is one narrow allegation related to the value of collateral securing Collier's payment obligations when Collier breached the TFPA. ITCA's challenges to the TFPA and the settlement recovery, as well as its various attempts to hold the United States liable for Collier's own payment obligations, have all been rejected. ITCA's briefing, however, ignores this reality, and ITCA's theory of this case remains stubbornly unchanged after ten years of litigation and multiple dispositive motions. ITCA still wants what it has always wanted: the money the Act directed *Collier* to pay.

ITCA's briefing now seeks to relitigate this rejected issue. ITCA insists that the United States violated the Act by failing to hold collateral sufficient to secure "8.5% [interest] on $34.9 million for 30 years plus the $34.9 million" and is thus liable for the "difference" between what ITCA received from the government's recovery against Collier and what the Act required Collier to pay. ITCA's insistence that the United States was required to hold this level of collateral is a legal impossibility given the law of the case, and the Court should not entertain this argument.

Nothing in the Act imposes a duty upon the United States that renders it liable for any additional compensation to ITCA. Instead, the Act establishes the United States' sole statutory duty: to hold in trust security in accordance with the TFPA. The Act did not require the United States to obtain (or maintain) any specific level of security but left that decision to the Secretary's discretion. Thus, the proper amount of collateral under the Act is whatever the TFPA specified be held in trust. The TFPA imposed a duty upon Collier to maintain the Trust Estate at a value of 130% of the Release Level Amount following the first lien release. The United States fully and faithfully discharged its duty to hold property in trust by successfully enforcing the TFPA to ensure that the collateral value of the Trust Estate was at its requisite level. Because the United States did

recover sufficient funds to remedy the collateral deficiency, ITCA can identify no uncompensated harm it has suffered arising from any under-collateralization in 2012 for which the United States could remain liable.

Finally, ITCA fails to address the Court's expressed query regarding the relevancy of the common law of fiduciaries to the remaining Claim I allegation. As established in the United States' Cross-Motion, the common law can help inform the United States' statutory duty under the Act, but it is only the Act—not the common law—that gives rise to a cognizable claim for damages.

I. Standard of Review

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

II. ITCA's "security" argument is foreclosed by the law of the case and the mandate rule

The well-established law of the case doctrine "bars retrial of issues that were previously resolved." *Intergraph Corp. v. Intel Corp*., 253 F.3d 695, 697 (Fed. Cir. 2001); *Outside the Box Innovations, LLC v. Travel Caddy, Inc.,* 695 F.3d 1285, 1301 (Fed. Cir. 2012) ("[T]he law of the case doctrine prohibits a court from revisiting an issue once it has been decided in pending

litigation.") (internal quotations omitted). Similarly, the "mandate rule" "forecloses" this Court's "reconsideration of issues implicitly or explicitly decided on appeal" "minus those explicitly reversed or remanded." *Amado v. Microsoft Corp.*, 517 F.3d 1353, 1360, 1364 (Fed. Cir. 2008) (internal quotations omitted). Accordingly, ITCA cannot relitigate issues that this Court or the Federal Circuit already resolved in the United States' favor. By seeking to hold the United States liable for the "difference" between what ITCA has received and what the Act directed *Collier* to pay over thirty years, ITCA's motion unabashedly seeks to relitigate decided questions. In so doing, ITCA's motion ignores several key holdings made by this Court and the Federal Circuit, improperly circumventing the law of the case and violating the mandate rule.

A. ITCA's procedural recitation misstates the open issues

At the outset, ITCA's procedural recitation misstates the issues open for this Court's review, misreading rulings by the Federal Circuit and this Court.

First, ITCA claims that the Federal Circuit viewed the "Claim I" question of "how much security the Act required the US to hold in trust 'over time'" as distinct from the Claim II "collection issue." ECF No. 184-1, p. 3. ITCA insists that the Federal Circuit's partial reversal requires this Court to now decide as a matter of law the exact amount of security the United States was supposed to hold as collateral, which ITCA says is $34.9 million plus 30 interest payments. ITCA is wrong.

The Federal Circuit divided ITCA's Claim I allegations into two categories: allegations challenging the TFPA, and allegations questioning whether the United States breached a "duty to preserve" over time. The Federal Circuit expressly affirmed dismissal of the former, stating that ITCA's allegations that the Act required the United States to "negotiate terms in the TFPA and related documents to ensure adequate security" were not "support[ed] in the [Act], case law, or

otherwise." *Circuit Opinion*, 956 F.3d at 1344-45. The Federal Circuit also held that any challenges to the TFPA were time-barred, *id.*, and acknowledged the Ninth Circuit's decision shielding the Secretary's decision on collateral from judicial review. *Id.* at 1334 n.5.

The Federal Circuit narrowly reversed the Court's dismissal order only to the extent the order prematurely dismissed ITCA's allegations that the United States breached a "duty to maintain" by failing to adequately preserve the value of the collateral in the Trust Estate over time. *Id.* at 1340. The Federal Circuit determined that the Second Amended Complaint contained sufficient allegations relating to the United States' management of the trust property that, if proven, might show that the government breached a duty to preserve the Trust Estate. *Id.* The Federal Circuit reasoned that, because the government acknowledged that Collier's debt was under-collateralized and because the complaint alleged injury due to under-collateralization stemming from the government's alleged breach of its duty to preserve collateral (for example, granting lien releases without proper appraisals), ITCA should have the opportunity to develop its maintenance-of-collateral claims. *Id.* at 1340 n.11. Of course, ITCA did not develop these claims on remand, and this Court granted summary judgment in the United States' favor. ECF No. 167 (dismissing paragraphs 260 through 262 of the operative complaint).

As this Court's summary judgment rulings further confirm, the Federal Circuit remanded only the "duty to preserve" claims set forth in paragraphs 260 through 263. *Id.* at *9. ITCA's broader reading of the Federal Circuit's decision "conflicts with the text" of the opinion. *Id.* at *5. Accordingly, what has been useful for the Court at this stage is factual development regarding the United States' efforts to preserve the value of the collateral over time and explanation regarding the effect, if any, of the common law of fiduciaries. The Federal Circuit's remand is not a license for ITCA to "relitigate" foreclosed claims, *id*, such as any accusation that

the United States failed to "ensure adequate security." *Circuit Opinion*, 956 F.3d at 1344-45 (affirming dismissal of allegation that the Act required the United States to "negotiate terms in the TFPA and related documents to ensure adequate security").

ITCA also disregards critical portions of this Court's first summary judgment ruling by arguing that this Court also left open the issues of "how much security the Act required the U.S. hold" and whether the United States has "further liability" because the *Collier* recovery was supposedly insufficient. ECF No. 184-1, p. 5.

This Court's first summary judgment ruling explained that ITCA's allegations relating to the value of the collateral in the Trust Estate turn on the value of that collateral "relative to the Release Level Amount," *Summary Judgment Order*, 2023 WL 4881967, at *9. The Release Level Amount by its terms includes accrued interest but not future (unaccrued) interest. Oral Arg. Tr. 42:17-23 (rejecting ITCA's argument that the accrued interest should mean all future interest owed). ITCA contends, however, that this Court's ruling left "unresolved" the appropriate level of the Trust Estate for purposes of adjudicating the remaining allegation. ITCA's briefing never acknowledges or reconciles the Court's assessment that the viability of the remaining allegation depends, in part, on the value of the Trust Estate "relative to the Release Level Amount." *Id.* at *9. ITCA's logic thus forgets the inconvenient fact that the Court has already resolved how to measure the appropriate level of collateral, and that does not include future interest.

B. ITCA's "security" theory cannot be reconciled with the law of the case and violates the mandate rule

ITCA's theory that the Act required the United States to hold collateral sufficient to secure "8.5% on $34.9 million for 30 years plus the $34.9 million" cannot be reconciled with the law of this case and therefore must be rejected. *Intergraph Corp.*, 253 F.3d at 697 ("The doctrine

of law of the case generally bars retrial of issues that were previously resolved."). Additionally, the Federal Circuit rejected ITCA's allegation that the TFPA failed to "ensure adequate security," *Circuit Opinion*, 956 F.3d at 1344-45, so considering this issue on remand would violate the mandate rule. *Amado*, 517 F.3d at 1364.

First, as noted above, "how much security the Act required the US to hold in trust," ECF No. 184-1, is no longer an open question. This Court has already determined that the TFPA established the level of collateral the United States was required to hold to secure Collier's payment obligations. The Court also rejected the argument that "accrued interest" in the TFPA should be interpreted to mean *all* interest payments, explaining "that's an argument that tries to make the Government the guarantor of Collier's obligations." *Id.* 42:17-23. ITCA's position that this collateral was to be valued higher than the plain text in the TFPA is thus refuted by the prior rulings of this Court.

To that end, all of ITCA's challenges to the TFPA for failing to obtain "sufficient security" have been dismissed, so no surviving allegation exists to which ITCA can tether its contention that the Act required the United States to secure all thirty years of interest payments and is liable for any difference between what ITCA has received and what *Collier* was scheduled to pay. Specifically, the Court has already rejected the following related allegations (quoting from the Second Amended Complaint, with emphasis added):

- ¶ 255: The United States negotiated and agreed to a TFPA and related documents *that failed to comply with or meet the Act's Trust Fund Payments security* requirements[.]

- ¶ 256: Alternatively, the United States' subsequent interpretation and application of the TFPA and related documents as written *failed to comply with or meet the Act's Trust Fund Payments security requirements[.]*

- ¶ 257: The TFPA and related documents did not make clear, as they should have, that under the annual payment method *the Act required the United States to hold*

> ***sufficient security*** *both for the $34.9 million final payment and for all thirty years of $2.9 million annual payments which could not be prepaid, i.e., all thirty years of the congressionally-mandated minimum rate of return of 8.5% on $34.9 million.*

- ¶ 258: In particular, the Deed provision regarding accrued interest was not clearly defined to mean any and all unpaid $2.9 million annual payments for the annual payment method's entire thirty-year period.

- ¶ 259: The United States' *failure to negotiate terms in the TFPA and related documents to ensure* ***adequate security*** for the Trust Funds Payments obligations in full was a breach of trust in violation of the Act.

- ¶ 264: The United States' failure to recover from Collier ***sufficient security*** *or cash to meet in full the Trust Fund Payments obligations* was a breach of trust in violation of the Act.

Circuit Opinion, 956 F.3d at 1344-45 (rejecting ITCA's allegation that the United States failed to "negotiate terms in the TFPA and related documents to ensure adequate security"); *Summary Judgment Order*, 2023 WL 4881967 at *7 (confirming that no challenges to the TFPA survived on remand).

Accordingly, under this Court's and the Federal Circuit's various rulings resulting in the dismissal of these claims, ITCA's challenges to the terms of the TFPA for failing to ensure "sufficient" or "adequate" security have all been dismissed. This includes any arguments that the United States should have obtained more collateral than what the TFPA secured; that the Trust Estate was required to be maintained at any value other than what the TFPA required (i.e., 130% of the Release Level Amount); or that the release provisions in the TFPA were somehow inadequate.

Though ITCA claims that it is not currently "challeng[ing] the TFPA or related documents," ECF No. 184-1, p. 3, the statement rings hollow. Under the Act, the TFPA was the mechanism by which the United States obtained and maintained collateral to secure Collier's

payment obligations. Act, Sec. 405(d)(2) (requiring United States to "hold in trust the security provided in accordance with the Trust Fund Payment Agreement"). ITCA cannot challenge the sufficiency of the security without calling into question the TFPA. But the well-established law of the case renders the United States' negotiation and enforcement of the TFPA immune from ITCA's final attack. *Outside the Box Innovations,* 695 F.3d at 1301.[3] Additionally, because the Federal Circuit affirmed Judge Firestone's dismissal of ITCA's challenge to the TFPA for failing to "ensure adequate security," *Circuit Opinion*, 956 F.3d at 1344-45, "the mandate rule preclude[s] [this] court from revisiting the issue." *Retractable Techs., Inc. v. Becton Dickinson & Co.*, 757 F.3d 1366, 1373 (Fed. Cir. 2014).

ITCA attempts to get around the law of the case by insisting that the Court "need not revisit 'the security for unpaid payments issue' in determining the remaining independent security sufficiency" issue. This is nonsense. The crux of ITCA's "sufficient security" theory is that the United States should have maintained enough collateral to ensure ITCA got paid $34.9 million plus all 30 years of interest payments whether or not Collier discharged its payment obligations, rendering the United States liable for "damages because the Trust Funds have yet to be made whole." *See, e.g.*, ECF No. 184-1, p. 2 ("[W]hen Collier stopped paying, the US should have had sufficient security" to "account for" the "8.5% rate of return" and "the $34.9 million"); *id.* p. 17 (discussing "annual payments" that "remain unpaid"); *id.* p. 27 (asserting it was "Congress's intent to ensure . . . the Trust Funds would receive . . . the congressionally directed

[3] As noted in the United States' Cross-Motion, ECF No. 182, p. 32, ITCA represented to the Court at last year's oral argument that it was not asking the Court to find that the government was required to hold enough security to cover the principal plus $90 million," i.e. all thirty years of interest payments. Oral Arg. Tr. 34:25, 35:1-3. But this is exactly what ITCA is now asking the Court to do. To be clear, that would have required the United States to demand collateral valued at over *$120 million* on a $34.9 million obligation.

minimum ***even if Collier stopped paying***.") (emphasis in original).

All these assertions, however, seek to make the United States the guarantor of Collier's payments, a point that has been soundly rejected here and before the Federal Circuit. ITCA's error turns on its misguided belief that the United States was required by the Act to make up any payments that Collier missed. *See e.g.* ECF No. 184-1, p. 6 ("ITCA is due the difference between what the Act requires the US to deliver to the Trust Funds and what has actually been delivered to the Trust Funds."); *id.* p. 24 (arguing that the United States is liable for the "difference between the actual return on the $34.9 million . . . and the Act's mandated minimum rate of return on the $34.9 million as of the same time, through the full thirty year annual payment time period"); *id.* p. 35 (stating that "the [United States] is liable . . . for the difference between the amount the trust funds actually have received and the minium [sic] amount the Act required."). The Act's payment obligation fell solely upon Collier, not the United States, *Circuit Opinion*, 956 F.3d at 1345-46, so any theory that makes the United States liable for the "difference" in what ITCA has received and what it expected to receive under the Act is *no different* than claiming the United States was guarantor of Collier's payments. As this Court has already held, the United States is "in no way" responsible for making up for Collier's shortcomings. *Summary Judgment Order*, 2023 WL 4881967, at *5; *id.* at *8 (dismissing paragraph 267 that the "United States' duties under the Act regarding the Trust Fund Payments security are continuing unless and until the Act's Trust Fund Payments obligations are satisfied in full").

No wordsmithing or reframing by ITCA (e.g., omitting problematic buzzwords such as "guaranteed" or "unpaid" payments) can revive this doomed theory. The Act does not impose that duty upon the United States, and the TFPA never required the United States to maintain the Trust Estate at level sufficient to cover both the $34.9 million and all thirty years of interest.

ITCA also harps throughout its briefing that the Court must resolve the remaining Claim I allegation "without conflation" with the "dismissed" claims, but ITCA's entire theory of the case does nothing *but* conflate the open allegation with the rejected allegations. For example, ITCA acknowledges that paragraph 264, challenging "the United States' failure to recover from Collier sufficient security . . . to meet in full the Trust Fund Payment obligations" has been dismissed. ECF No. 184-1, p. 6. The Court specifically dismissed this allegation because it "was redundant of Claim II." *Summary Judgment Order*, 2023 WL 4881967, at *7. But ITCA unabashedly challenges the sufficiency of the Collier recovery throughout its briefing with total disregard for the claim's dismissal. Indeed, the supposed insufficiency of the Collier recovery is essential to ITCA's damages theory:

- "The settlement recovery did not fulfill the Act's requirements to the Trust Fund, and . . . the United States is liable for the difference." ECF No. 184-1, p. 1.
- "ITCA's remaining Claim I issues are based upon . . . whether the recovery in *U.S. v. Collier* has made the Trust Funds whole." *Id.* p. 2.
- "The recovery the US obtained via a settlement with Collier did not include unpaid annual payments[.]" *Id.* p. 17.
- "The recovery sought and obtained in *U.S. v. Collier* did not account for the $34.9 million to earn a minimum annual rate of return of 8.5% for the full 30-year period." *Id.*
- "[N]otwithstanding *U.S. v. Collier*, as a matter of law the US has remaining liability and should be subject to damages because the Trust Funds have yet to be made whole as the Act required." *Id.* p. 36.

ITCA cannot prevail on a "security" theory that depends on an allegation this Court has unequivocally rejected.[4] Moreover, ITCA never explains how it can rely on paragraph 263—

[4] ITCA's discussion of the lien releases and the 2008 economic downturn, ECF No. 184-1, pp. 17-18, is also irrelevant. The United States has already won summary judgment on those claims.

challenging "the United States' failure to have sufficient security in the Trust Estate when Collier defaulted" to argue that the United States should have secured all thirty years of interest and is liable for the "difference" in what the United States recovered and what the Act required Collier to pay. Since the Court has already rejected the "difference" theory as a matter of law, ITCA's construction of the alleged wrong in paragraph 263 is groundless.

III. The Act did not require the United States "to hold in trust security sufficient to ensure" that ITCA received its share of $34.9 million plus thirty years of interest

It is unnecessary at this late stage for the United States to engage with ITCA's re-litigation attempt or to reassert its defenses of the TFPA, which are set out fully in the United States' previous successful summary judgment briefing and incorporated here by reference (ECF No. 129, pp. 17-26; ECF No. 138, pp. 17-29; ECF No. 143, pp. 7-17; ECF No. 160, pp. 15-23, given the law of this case. Per the holdings of the Federal Circuit, the Ninth Circuit, and this Court, the Act granted the Secretary discretion to determine the level of collateral necessary to secure Collier's payment obligations and imposed no obligation on the United States to compensate for any shortcoming in Collier's payments or to execute a TFPA that secured all thirty years of interest payments.

Nevertheless, to assist the Court in its final resolution of Claim I, the United States will briefly recap why ITCA's theory lacks merit, notwithstanding that it is not viable at this stage.

A. The Act required only that the United States "hold in trust the security provided in accordance with the TFPA," which the Secretary had discretion to execute

As fully set out in the United States' Cross-Motion, ECF No. 182, pp. 28-36, the Act defines the United States' duties, *ITCA v. Babbitt*, 51 F.3d. at 203, and requires only that the

United States "hold in trust the security provided in accordance with the Trust Fund Payment Agreement," Act, Sec. 405(c)(2), for the purpose of securing and encouraging Collier's payment obligations.[5] *Circuit Opinion*, 956 F. 3d at 1342 (identifying section 405(c)(2) as the "substantive source of law" "establish[ing] a specific fiduciary duty"). The Act, by its express terms, does not impose any specific collateral amount, either greater than or different from that specified in the TFPA. *Inter-Tribal Council of Ariz., Inc. v. United States*, 140 Fed. Cl. 447, 458 (2018). Instead, the Act vested the Secretary with discretion with regarding security, limited only by the terms of the TFPA. Act, Sec. 405(c)(2); *ITCA v. Babbitt*, 51 F.3d at 203.[6] The United States owes "no fiduciary duty" to ITCA beyond its express obligations under the Act. *ITCA v. Babbitt*, 51 F.3d at 203. The TFPA thus sets forth the United States' trust duty with respect to collateral maintenance, and the United States need not have held in trust any additional security beyond that specified in the TFPA.

This reading of the Act is compelled by rulings from this Court, the Federal Circuit, and the Ninth Circuit, which confirm that the Act does not require the United States to make payments if Collier failed to make them, nor did the Act require the United States to obtain in the TFPA any specific level of security. *Circuit Opinion*, 956 F.3d 1328, 1344-45; *ITCA v. Babbitt*, 51 F.3d at 203; *Summary Judgment Order*, 2023 WL 4881967, at *4-5, 7-9. Instead, the Secretary of the Interior had discretion to decide the terms of the TFPA. *ITCA v. Babbitt*, 51 F.3d at 203.

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[5] For the reasons stated in the United States' earlier briefing, ECF No. 160, pp. 20-23, the Court should disregard ITCA's half-hearted, belated ambiguity argument.

[6] It is telling that, when advancing its position that the Act did not grant the government discretion, ECF No. 184-1, pp. 29-30, ITCA *never* addresses the Ninth Circuit's binding contrary decision in *ITCA v. Babbitt.* Accepting ITCA's argument on this issue would require the Court to depart from the Ninth Circuit's holding that the Act gave discretion to the Secretary.

Notwithstanding the contrary precedent and lack of statutory support, ITCA remains wedded to the position that the United States had a trust duty to ensure that ITCA and the Navajo Nation receive not only the full principal obligation but all interest payments, regardless of when the principal was received. ITCA's contention is absurd.

ITCA cannot identify any statutory provision that required the United States to maintain more security than what it obtained under the TFPA or to otherwise cover any shortfall between what ITCA expected and what it received. That is because no such provision exists. The Act says no such thing—it sets no specific level of required security, instead leaving this decision to the Secretary's discretion. ITCA's attempt to fabricate a heightened collateral duty lacks any foundation in the Act or the TFPA. Without a "substantive source of law" imposing this duty, ITCA's claim must be dismissed. *United States v. Navajo Nation*, 537 U.S. 488, 513 (2003) (rejecting tribes' breach of trust claims that were "not grounded in a specific statutory or regulatory provision").

Instead, ITCA's entire theory rests on its incorrect reading of two sections of the Act: section 403(c)(2), which required "the purchaser" (Collier) to make thirty annual interest payments, and section 403(c)(5), which established that "[t]he interest rate to be used in determining the interest due" on the annual payments be not "lower than 8.5 percent or higher than 9.0 percent."

The Federal Circuit has already expressly rejected ITCA's interpretation of section 403(c)(2) of the Act in affirming dismissal of ITCA's "duty to collect" claim. The Federal Circuit explained that section 403(c)(2) of the Act "impose[s], at most, a duty upon *Collier*, not the Government" and that ITCA's invocation of this section is "misplaced." *Circuit Opinion*, 956 F.3d at 1345-46 (emphasis added). ITCA cannot transfer the Act's duties prescribed for Collier,

as the purchaser, onto the United States.

Likewise, section 403(c)(5) merely specifies an interest rate range that *Collier* was to pay if it financed the $34.9 million over 30 years. Congress thus provided a means for ITCA to realize the real value of the $34.9 million obligation whether paid in cash or over time. *See* 134 Cong. Rec. S13519-02, 1988 WL 176577, p. 3 (Sep. 28, 1988) (explaining that 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).[7] The Act does not include the words "rate of return" or contemplate any additional stream of revenue to ITCA; nor does it require the United States to pay any of that interest.

For these reasons, the Act cannot be interpreted as requiring the United States to secure "8.5% on $34.9 million for 30 years plus the $34.9 million," as ITCA insists. ECF No. 184-1, p. 5. *Nothing* in the Act suggests that the United States had a fiduciary duty to maintain the Trust Estate's collateral at the level argued by ITCA or to otherwise compensate ITCA for any delta between the scheduled interest payments had the principal been paid over the remaining years and what that principal actually yielded when it was collected ten years early.[8] The Act is clear, and its mandate unambiguous: the United States need only hold in trust security in accordance with the TFPA. This conclusion is reinforced by the Federal Circuit's unequivocal holding that

[7] A full explanation of the Congressional Budget Office's report and the mandated interest rate can be found in the United States' summary judgment brief, ECF No. 129, pp. 20-22.

[8] Indeed, ITCA's demand for additional funds despite receiving the benefit of that obligation being fully satisfied 10 years *early*—in other words, 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 loan obligation, when it is already law of the case the United States had no trust duty to make up any lost payments.

the United States is not responsible for Collier's payment obligations.

B. The May Memorandum is irrelevant

ITCA again invokes a May 1992 internal Interior memorandum (the "May Memorandum") as "particularly import[ant] to remaining Claim I issues," ECF No. 185, p. 12, but does so without ever developing a meaningful legal argument about its relevance to the present dispute. It is not. This memorandum reflects Interior's deliberations regarding Collier's "financial obligation under the Trust Fund Payment Agreement." ECF No. 184-1, Exh. B, p. 2.[9] But ITCA's challenges to the TFPA have all been dismissed. And statements by Interior officials cannot create any duty for the United States.[10]

In any event, ITCA's reading of the document is strained. The May Memorandum is consistent with the United States' position throughout this litigation (and the 1990s litigation in the Ninth Circuit) and merely confirms that the Act is "silent" on the issue of what amount of security is required to be held in trust, that the Secretary has discretion to make that decision, and that securing the principal and interest payments as they came due was consistent with the Act and a "normally accepted business practice." *Id*. at 3. The memorandum further noted that if

[9] This memorandum further illustrates that ITCA's current theory is a repackaging of its attack on the TFPA. The document expressly addresses the United States and Collier's obligations regarding the "Trust Fund Payment Agreement." *See generally* ECF No. 184-1, Exh. B. ITCA cannot challenge the sufficiency of the security obtained without challenging the TFPA.

[10] ITCA's other references to statements from Interior officials are also irrelevant and unhelpful. As explained thoroughly in earlier brief, the challenges to the TFPA have all been dismissed, and statements from government officials cannot create a statutory 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."). Moreover, a full review of Interior's commentary from this time bolsters the United States' position. ECF No. 138, pp. 28-29.

Collier were to default and collateral securing the principal were liquidated, ITCA would get the $34.9 million and thus "be in the same position they originally advocated for," *id.* at 4, that is, receiving a lump sum payment, and "in fact, would have realized a windfall from the years in which they did receive the 8.5 percent interest," *id.*—which is precisely what happened here.

C. The United States is not liable for damages because it discharged its duty under the Act

The United States has discharged its only statutory duty—to hold in trust security in accordance with the TFPA. No basis exists in the Act to hold the United States liable for any gap between what ITCA has received and what Collier would have paid, as the law of this case establishes.

By successfully enforcing the TFPA to recover $48 million from Collier, the United States faithfully fulfilled its duty to "hold in trust" security in accordance with the TFPA and any related duty to preserve the security held in trust. The United States discharged its duty to "preserve' by recovering the full value of the security that was required to be held in the Trust Estate (130% of the Release Level Amount). The parties agree that the United States, through its enforcement of the TFPA, ultimately recovered $48 million from Collier. No serious dispute exists that this sum exceeds the required value for the Trust Estate at the time of recovery, which was $47.1 million.[11] It is therefore indisputable that the United States preserved the value of collateral required by the TFPA, with the proper 95 percent share allocated to ITCA, thus placing ITCA in the same position it would have if the value of the Trust Estate had been adequate when

[11] The Release Level Amount at the time of settlement was $36,232,500, representing the principal obligation ($34.9 million) plus the five annual payments of $2,966,500 for years 2012-2016 that had come due and gone unpaid at the time of the July 2017 settlement ($14,832,500), less the value of the Annuity at that time ($13.5 million) and any government-backed securities added to the collateral ($0). And 130% of $36,232,500 is $47.1 million.

Collier breached.

Even if the collateral deficiency in the Trust Estate in 2012 could somehow by recast as a breach of trust by the United States, it can only be held liable for "damages sustained as a result" of that breach. *United States v. Navajo Nation*, 556 U.S. 287, 291 (2009); *Cobell v. Norton*, 392 F.3d 461, 477 (D.C. Cir. 2004) (explaining that court's authority is limited to awarding "specific relief" for an established breach of duty). ITCA has sustained no such damages for which it can recover from the United States. This conclusion is compelled by the United States' recovery of the full value of what was required to be held as collateral under the TFPA and ITCA's receipt of its rightful share. ITCA has consistently failed to identify any damages it has suffered, other than its rejected theory of entitlement to all funds *Collier* was scheduled to pay under the TFPA. The truth is that ITCA has suffered no compensable damages.

For these reasons, the Court should not consider ITCA's "security" arguments, which are nothing more than repackaging of dismissed claims and non-viable theories. To the extent the Court entertains such arguments, the United States maintains, as explained more fully in its previous briefing, that the Secretary fully discharged the statutory duty to "hold in trust security provided in accordance" with the TFPA by executing an agreement that guaranteed ITCA and the Navajo Nation received the full $34.9 million principal obligation with accrued interest pursuant to the TFPA.

IV. No "common law" duty saves ITCA's Claim I

This Court's summary judgment rulings left open a narrow question whether the common law of fiduciaries imposes any liability on the United States for a breach of trust as alleged in paragraph 263 of the Second Amended Complaint. ITCA, however, makes no effort at all to pursue, much less establish, any common law duty for which the United States could possibly be

liable for breach. Indeed, the phrase "common law" does not appear in ITCA's Motion.

The Court should accept ITCA's silence as its concession that the United States owed no common law duty here and not afford ITCA any further chance to argue such a theory. On the contrary, binding precedent clearly holds that the United States "owes no fiduciary duty to [ITCA] apart from its obligations under the [Act]." *ITCA v. Babbitt,* 51 F.3d at 203; *see also* United States' Cross-Motion, ECF No. 182, pp. 22-27 (thoroughly demonstrating the lack of any actionable common law duty here). Simply put, the common law cannot save the last vestige of Claim I.

CONCLUSION

For the foregoing reasons, the Court should deny ITCA's motion for partial summary judgment and instead grant the United States summary judgment on what remains of Claim I.

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