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 IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON REMAINING CLAIM I ALLEGATION

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DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON REMAINING CLAIM I ALLEGATION

The United States respectfully submits this reply supporting its motion for partial summary judgment (ECF No. 182) against the remaining Claim I allegation in the Second Amended Complaint. This allegation asserts that the United States is liable because the value of the collateral the United States held to secure the $34.9 million payment obligation of the Barron Collier Co. (Collier) was below its requisite level when Collier breached its obligations in 2012. After Collier breached, the United States successfully enforced its security agreement with Collier and recovered sufficient funds ($48 million) to ensure the beneficiary tribes received $34.9 million with accrued interest. After a decade of litigation and multiple dispositive motions, ITCA cannot identify any uncompensated injury due to the temporary under-collateralization in 2012. Moreover, ITCA's arguments about the United States' liability for funds allegedly still owed are negated as a matter of law: the United States is not liable for any funds that were the obligation of a third-party. The Court should thus grant summary judgment for the United States.

INTRODUCTION

This case arises out of Collier's breach of its obligation to pay $34.9 million with interest over thirty years in exchange for federal property known as the "Phoenix Indian School." Pursuant to the Arizona-Florida Land Exchange Act, Congress required Collier to pay those funds to the United States and dedicated the proceeds to ITCA and non-party Navajo Nation. For its part, the United States was required to execute, in the sole discretion of the Secretary of the Interior (Secretary), a "Trust Fund Payment Agreement" (TFPA) and to "hold in trust" collateral to secure Collier's payment obligations in accordance with the terms of that agreement. When Collier breached the TFPA, the United States successfully sued to enforce the agreement and ensured that the tribes received $34.9 million dollars with accrued interest.

While the United States was in the process of enforcing the TFPA through litigation against Collier, ITCA sued the United States in this Court seeking, under various theories, to hold the United States liable for all the money Collier was scheduled to pay over thirty years. This case between ITCA and the United States has now been pending for over ten years and has seen four complete rounds of dispositive motions (including two rounds of cross-motions for summary judgment) and one appeal, the result of which has significantly narrowed the scope of ITCA's claims against the United States. At issue here is a single allegation: "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." SAC ¶ 263.

In light of earlier decisions of this Court and the Federal Circuit, it is irrefutable that the United States is not a guarantor for Collier and thus "[ITCA] is in no way entitled to recover" from the United States payments that the Act required Collier to make. *Inter-Tribal Council of Arizona, Inc. v. United States* No. 15-342, 2023 WL 4881967, at *5 (Fed. Cl. Aug. 1, 2023) (*Summary Judgment Order*). Additionally, the Federal Circuit affirmed dismissal of all challenges to the TFPA, *Inter-Tribal Council of Arizona, Inc. v. United States*, 956 F.3d 1328, 1345 (Fed. Cir. 2020) (*Circuit Opinion*), and this Court has rightly rejected all alternative theories that would effectively put the United States "on the hook" for the funds Collier was scheduled to pay. *Summary Judgment Order*, 2023 WL 4881967, at *7; Oral Arg. Tr. 21:25, 22:1-2.[1] The Ninth Circuit also decided decades ago that the Act granted the Secretary discretion to decide the terms of the TFPA, including how much collateral to hold in trust. *Inter-Tribal Council of Ariz., Inc. v. Babbitt*, 51 F.3d 199, 203 (9th Cir. 1995) (*ITCA v. Babbitt*).

[1] This refers to the oral argument transcript from August 7, 2024.

One would never know from ITCA's briefing, however, that so much has already been decided. Notwithstanding that ITCA has lost every attempt to hold the United States liable for money that Collier was scheduled to pay and that this Court has rejected every backdoor attempt to recover that money from the United States, ITCA's arguments have not evolved.

In sum, ITCA maintains it is entitled to the "difference" between what it has received and what it would have received from *Collier* "at the end of the thirty years." *E.g.* ECF No. 186, p. 27. ITCA insists the United States is liable for such funds because the government should have held "sufficient security" to collateralize all thirty years of Collier's interest payments to "make the Trust Funds whole . . . if Collier stopped paying." *Id.* According to ITCA, the United States "must satisfy the amounts due [to] the Trust Funds." *Id.* ITCA's theory and demand for damages is completely devoid of merit—even after discovery and multiple opportunities to muster support for its empty claim. Instead, ITCA persists in ignoring the law of this case that the United States is not liable for "for Collier's failure to perform, full stop." Oral Arg. Tr. 20:16-18

To that end, ITCA refuses to advance any theory that comports with the narrow parameters set by this Court. The Court generously afforded ITCA the opportunity to explore the remaining Claim I allegation and address any harm it potentially suffered because of the under-collateralization in 2012, with an express warning that the United States was not "liable for deficiencies in Collier's payments." Oral Arg. 18:19-20. ITCA, however, has offered no viable theory and has instead stuck to a spin-off of its rejected guarantor theory. ITCA simply does not and cannot identify any remaining uncompensated harm for which the United States could be liable. The reality is instead that the United States passed on a full recovery of the funds to which ITCA was entitled and fully discharged its duties under the Act. Nothing more is left for ITCA to recover.

For these reasons, the United States is entitled to summary judgment on the remaining Claim I allegation. After ten years and now a third round of cross-motions for partial summary judgment, it is time for Claim I to be put fully to rest.

BACKGROUND

The parties agree that the material facts are undisputed. Little review is needed here. (At this point, the Court can probably recount all salient facts from memory.)

In 1988, Congress passed the Arizona-Florida Land Exchange Act (Act). 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. Collier elected to finance the payment, agreeing to annual interest payments at a minimum rate of 8.5 percent, over 30 years, with a balloon payment at the end, as it was statutorily authorized to do.

In accordance with the Act's directive to "hold in trust the security provided in accordance with the Trust Fund Payment Agreement," Act, Sec. 405(c)(2), the Secretary and Collier executed a TFPA, with accompanying instruments, including a Deed of Trust, under which Collier's payments would be made. According to the TFPA, Collier pledged 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, and required the United States to grant, partial collateral releases if the value of the remaining property in the Trust Estate

exceeded 130 percent of the "Release Level Amount." The Release Level Amount accounted for the principal obligation less the value of the annuity, plus accrued interest.

Collier twice sought releases of liens, in 1997 and 2007, which the United States granted after reviewing appraisals showing sufficient collateral would remain in the Trust Estate if the releases were granted. Once Collier received its first release, it had an ongoing affirmative obligation to maintain the value of the Trust Estate at 130 percent of the Release Level Amount as required by the Deed of Trust's "Maintenance of Collateral Value" provision.

In December 2012, after fifteen years of timely 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 below the required amount. The United States demanded that Collier add collateral to comply with its obligations under the TFPA, and then sued Collier in Arizona federal court, seeking specific performance of the Deed of Trust's Maintenance of Collateral Value provision. After prevailing on summary judgment, the United States reached a settlement with Collier with an expected recovery of $54.5 million. Collier assigned ownership of the Phoenix Indian School property to the United States, which then sold the property. That sale, together with cash and transfer of the annuity, realized $48 million on behalf of the trust beneficiaries, which exceeded 130 percent of the Release Level Amount.[2] From this recovery and Collier's fifteen years of payments, ITCA has to date received nearly $88 million on its share of Collier's $34.9 million obligation.

[2] 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 (the accrued interest for years 2012-2016, totaling some $14,832,500) that had come due but gone unpaid at the time of the July 2017 settlement, less the value of the Annuity at that time ($13.5 million) and any government-backed securities ($0). And 130 percent of $36,232,500 is $47.1 million.

Still, ITCA has maintained this suit against the United States for additional damages but cannot demonstrate what those may be. After years of dispositive motions and an appeal, only one narrow Claim I allegation has survived dismissal: "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." SAC ¶ 263. The litigation history, however, shapes the contours of this claim.

The Federal Circuit affirmed Judge Firestone's rejection of ITCA's claim, presented in Claim II of the Second Amended Complaint, that the United States had a duty to "collect, deposit, or make" payments that Collier itself failed to make under the TFPA. *Circuit Opinion*, 956 F.3d at 1344-45. The Federal Circuit also largely affirmed Judge Firestone's dismissal of Claim I of the Second Amended Complaint, including ITCA's challenges to the TFPA itself. *Id.* at 1344-45. The Federal Circuit narrowly reversed the Court's dismissal order only to the extent the order prematurely dismissed ITCA's allegations at the pleading stage that the United States breached a duty to preserve the value of the collateral in the Trust Estate over time. *Id.* at 1340.

On remand, this Court explained that the Federal Circuit left open only the "duty to preserve" claims set forth in paragraphs 260 through 263. *Summary Judgment Order*, at *9. 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 so doing, 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 resorting to the Act's trust

provisions, *Id.* at *4-5, and 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, specifically those allegations in paragraphs 260 through 263 of the operative complaint, *id.* at *6-7, but that additional factual development was needed.

One year later, the parties briefed a second round of summary judgment cross-motions, ECF Nos. 155, 157, as to the remaining allegations in Claim I: that the United States breached its duties to ITCA by granting Collier's lien releases (SAC ¶¶ 260 and 261), by failing to take action following the 2007 economic downturn (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 granted summary judgment on the allegations in paragraphs 260 through 262 of the Second Amended Complaint. ECF No. 167. The Court queried, however, whether 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 . . . the Act." *Id.* 56:14-16. For these reasons, the Court denied summary judgment to both parties on the allegation in paragraph 263.

After fulfilling the Court's order to complete discovery, the Court granted the parties' joint request to cross-move again for summary judgment on the remaining Claim I allegation.

ARGUMENT

After several rounds of dispositive motions and discovery, no doubt remains that the United States has no liability under Claim I and is entitled to summary judgment.

First, this Court should reject ITCA's misguided argument that the United States "is liable for "damages owed [to] the Trust Funds under the Act," ECF No. 186, p. 2, because the "the Act required the US to hold in trust sufficient security to satisfy the amounts due [to] the Trust Funds." *Id.* ITCA is simply wrong, and its theory violates both the law of this case and the mandate rule. This case has *repeatedly* confirmed that the United States is not "on the hook" for payments that the Act directed *Collier* to pay. This Court and the Federal Circuit, as well as the Ninth Circuit, have also categorically rejected ITCA's challenges to the TFPA. This Court has further rejected all alternative theories that would effectively make the United States a guarantor for Collier's obligations. No matter how many times ITCA protests that its "sufficient security" theory is not the same as its rejected "guarantor" argument, that is exactly what it is. ITCA is still after the funds *Collier* was scheduled to pay for which the United States is "in no way" liable.

For these reasons, this Court should not entertain ITCA's unrelenting, meritless attack on the United States' collateral decision-making. No viable claim survives that supports ITCA's theory, and ITCA's efforts to make the United States responsible for money that *Collier* was scheduled to pay must end.

Indeed, ITCA's theory is plainly defeated by both the law and undisputed facts. The Act imposed no duty on the United States to hold any specific level of collateral to secure all thirty years of Collier's payment obligations. The Act instead granted the Secretary discretion to set the terms of the TFPA and "hold in trust security in accordance" with that agreement. The Ninth Circuit confirmed this fact decades ago when ITCA first challenged the deal between Collier and the United States. By executing and enforcing a TFPA that ensured the tribes would receive $34.9 million with accrued interest, the United States fully discharged its duty to ITCA. This

conclusion is confirmed by the fact that ITCA cannot identify any uncompensated injury for which the United States is liable.

Finally, ITCA implicitly concedes that the common law cannot be invoked to impose additional duties on the United States beyond what the Act provides. Precedent only sustains this conclusion: the United States owed no duties to ITCA beyond what is stated in the Act.

I. ITCA's "sufficient security" theory violates the law of the case and the mandate rule

At the outset, it is critical to note that most of ITCA's briefing is simply incompatible with the law of this case and the mandate rule.

ITCA theorizes "that [the] US should have held in trust sufficient security to satisfy the amounts due [to] the Trust Funds," ECF No. 186, p. 3, and "that the US is liable . . . for both the $34.9 million" and the "difference between the actual return on the $34.9 million" and "8.5% [interest] on the $34.9 million for the remainder of the 30 year period." *Id.* To support this theory, ITCA devotes *pages* to deconstructing the Act's text, discussing the legislative history, reviewing the Indian Canons of Constructions, and generally attacking the amount of collateral that the United States decided would appropriately secure Collier's payment obligations. But *none* of these contentions can be linked to the lone surviving allegation in Claim I. The history of this case makes that plain. The Act imposed payment obligations only on Collier, *Circuit Opinion*, 956 F.3d at 1345, and the United States is "not liable for deficiencies in Collier's payments." Oral Arg. 18:19-20 Additionally, as detailed below, the Federal Circuit and this Court have already rejected ITCA's challenges to the TFPA and its "sufficient security" theories. The well-established law of the case doctrine prohibits revisiting these decided issues. *Outside the Box Innovations, LLC v. Travel Caddy, Inc.*, 695 F.3d 1285, 1301 (Fed. Cir. 2012). Similarly, the "mandate rule" "forecloses" this Court's "reconsideration of issues implicitly or explicitly

decided on appeal," including ITCA's baseless attacks on the TFPA. *Amado v. Microsoft Corp.*, 517 F.3d 1353, 1360, 1364 (Fed. Cir. 2008).

The United States has already provided several detailed recitations of this case's procedural history, but, in light of ITCA's inability to reconcile or abide by binding decisions of the courts, it is worth emphasizing that the following allegations, including *all* allegations challenging the TFPA for failing to "negotiate terms to . . . ensure adequate security," *Circuit Opinion*, 956 F.3d at 1344-45, or otherwise seeking to hold the United States responsible for any "Trust Fund Payment obligations," have been categorically dismissed (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 [that] *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*** *. . . to meet in full the Trust Fund Payments obligations* was a breach of trust in violation of the Act.
- ¶ 267: 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.

Summary Judgment Order, 2023 WL 4881967 at *7 (delineating dismissed claims).

This Court and the Federal Circuit have unequivocally rejected all these claims:

- Nothing in the "[Act], case law, or otherwise" imposed a duty on the United States to "negotiate terms in the TFPA and related documents to ensure adequate security" or to "make" Collier's "Trust Fund Payments." *Circuit Opinion*, 956 F.3d at 1344-45.

- The allegation that the United States' is obligated "to assume all Collier's financial obligations upon Collier's default . . . lacks legal foundation." *Summary Judgment Order*, 2023 WL 4881967, at *5.

- The United States is in "no way" "liable for any deficiencies" in Collier's obligations. *Id.*

- "[H]olding the defendant liable [under Claim I] for annual payments it had no legal obligation to pay would be illogical" and "render" "the Federal Circuit's decision on Claim II . . . academic." *Id.* at *4.

- ITCA's allegation that "the United States' failure to recover from Collier sufficient security . . . to meet in full the Trust Fund Payment obligations," SAC ¶ 264, "is redundant of Claim II" and "must be dismissed." *Id.* at *7.

- "[T]he Government is not on the hook" for money that "Collier wound up shorting the Plaintiff." Oral Arg. Tr. 21:25, 22:1-2.

- "[T]he Plaintiff may not impose on the United States liability for Collier's failure to perform, full stop." *Id.* 20:16-18.

- The term "accrued interest" in the TFPA should not be interpreted to mean all future interest payments because that would "make the Government the guarantor of Collier's obligations." Oral Arg. 42:17-23.

Displaying selective amnesia toward this history, ITCA *still* maintains its entitlement to all outstanding funds that the Act directed *Collier* to pay over the thirty-year term. ITCA's insistence that it is not repackaging rejected theories and dismissed claims is absurd, and the United States does not "misstate" anything. ECF No. 186, p. 2. As made evident through ITCA's briefing and discovery responses, ITCA is, in fact, seeking to recover the money *Collier* was scheduled to pay, for which the United States has *no* responsibility. For example, ITCA argues:

- "The US should have held a sufficient amount of security to satisfy the amounts due [to] the Trust Funds." ECF No. ECF No. 186, p. 3; pp. 1-6, 8, 10, 12-14, 17, 21-22, 27, 28 (reiterating that the United States is liable for "the amounts due [to] the Trust Funds").

- The United States must pay "damages owed [to] the Trust Funds under the Act." *Id.*

- "[T[he US is liable to the Trust Funds for both the $34.9 million and the difference between the actual return on the $34.9 million and the Act's mandated minimum rate of return of 8.5% on the $34.9 million." *Id.* p. 3.

- The United States "is liable for all resulting damages" caused "if Collier stopped paying." *Id.* at 4; *see also id.*, pp. 12, 28.

- The United States has "a duty . . . if Collier stopped paying . . . [to] make the Trust Funds whole." *Id.* p. 19.

- The United States must "provide for the full amounts due [to] the Trust Funds." *Id.* p. 27.

- The United States is responsible for the "$122 million" ITCA was to receive "at the end of the 30 years." *Id.*

- "[T]he US is liable in damages for the difference in the amounts due [to] the Trust Funds under the Act, and what the Trust Funds have and will receive for the remainder of the 30-year period." *Id*. p. 29.

- The United States is liable for the "$34.9 million Final Payment and . . . 8.5% [interest] calculated on the $34.9 million for the full time period of the Act's 30-year Payment Option once Collier stopped paying." US-SOF, Exh. 10, p. 5 (Plaintiff's Interrogatory Responses); *id.*at 6 (arguing that the United States is liable for the "difference").

Make no mistake: by seeking to hold the United States liable "for the full amounts due [to] the Trust Funds," ITCA's "sufficient security" theory is, in substance, another attempt to hold the United States' responsible for Collier's "unpaid" interest payments. Placing a duty on the United States to "make the Trust Funds whole" "if Collier stopped paying" is *no different* than making the United States' responsible for Collier's payment obligations. But the United States is in "no way" responsible for the "difference" between what ITCA has received and what the Act directed *Collier* (and only Collier) to pay. Full stop.[3]

[3] Additionally, and as noted in the United States' Response, ECF No. 188, p. 17, ITCA's assertion that it is not "challenging the terms" of the TFPA is nonsense. ECF No. 186, p. 17. Under the Act, the TFPA was the mechanism by the United States held collateral in trust, and it reflects the Secretary's collateral decision-making. ITCA cannot challenge the "sufficiency of the security" the United States decided to hold in trust without attacking the TFPA.

In sum, all that ITCA has to say about the United States' decision not to require Collier's collateral to be sufficient to secure all thirty annual interest payments is simply irrelevant at this stage. This dialogue only reflects a deliberate attempt to relitigate dismissed claims and resurrect rejected theories of liability. Adopting ITCA's position would be completely at odds with what has already been decided in this case—and what the Ninth Circuit decided decades ago.

The United States need not rehash every single issue on which it has already prevailed but will briefly review its positions below to aid the Court's review.

II. The Act did not require the United States to hold sufficient collateral to secure $34.9 million plus thirty years of interest payments

The prior decisions in this case render ITCA's theory untenable. This theory finds no support in the Act and, 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 make up for any shortcoming in Collier's payments or to execute a TFPA that secured thirty years of payments.

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. *Circuit Opinion*, 956 F 3d at 1340, 1342; *Summary Judgment Order*, 2023 WL 4881967, at *5. The Act, by its express terms, imposed no specific collateral amount. Instead, the

Act vested the Secretary with discretion regarding security, limited only by the terms of the TFPA.[4] Act, Sec. 405(c)(2); *ITCA v. Babbitt*, 51 F.3d at 203.[5]

Nothing in the Act required the United States "to hold in trust security sufficient to satisfy the amount due [to] the Trust Funds," as ITCA contends. ECF No. 186, p. 1. Nor does the Act contain any provision requiring 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. Indeed, rulings from this Court, the Federal Circuit, and the Ninth Circuit 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.[6] ITCA's attempt to fabricate a heightened collateral duty finds no foundation in the Act and, without a "substantive source of law" imposing this duty, ITCA's

[4] The United States incorporates by reference its previous full discussions of the United States' defense of the TFPA, found in the following filings: ECF No. 129, pp. 17-26; ECF No. 138, pp. 17-29; ECF No. 143, pp. 7-17; ECF No. 160, pp. 15-23.

[5] ITCA's summary of the United States' argument is confusing and not informative. The United States never presented two "different" interpretations of the Act, one allowing for "unlimited" discretion and one allowing for "broad" discretion. The United States' position has always been that the Act afforded the Secretary discretion to set the terms of the TFPA and decide the amount of collateral to hold as security for Collier's payment obligations. Once the TFPA was set, it became the sole document that defined the collateral value the United States was required to hold to secure Collier's payment obligations.

[6] ITCA accuses the United States of offering "little" "textual or interpretative support" for its position. ECF No. 186, p. 15. The United States need not bore the Court with an extensive retelling of issues on which it has already won summary judgment. Instead, the United States appropriately focused its briefing toward answering the Court's last remaining questions surrounding the common law of fiduciaries. In any event, the United States *did* provide ample legal support on its interpretation of the Act, including a commonsense review of the Act's plain language, the CBO report analyzing the Act's implications, and, most notably, the prior rulings from this Court, the Federal Circuit, and the Ninth Circuit, that fully align with the United States' position and wholly refute ITCA's misguided theory.

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 . . . provision").

In its contrary argument, ITCA (once again) ignores the full text of section 405(c)(2) and disregards the Federal Circuit's express rejection of ITCA's interpretation of section 403(c)(2). Read in full, section 405(c)(2), which is the only section of the Act imposing a duty on the United States, simply states that the United States is to "hold in trust security provided in accordance with the terms of a Trust Fund Payment Agreement." *Circuit Opinion*, 956 F. 3d at 1342 (identifying section 405(c)(2) as the "substantive source of law" "establish[ing] a specific fiduciary duty"). But section 405(c)(2) makes no reference to the United States "satisfying" the "Trust Funds"—ITCA's suggestion otherwise is a fiction and is contradicted by the law of this case that the United States is *not* responsible for Collier's payment obligations. Moreover, the purpose of the section is not to place the United States "on the hook" if Collier fails to perform, but to require some collateral to secure and encourage Collier's payments.[7] *Circuit Opinion*, 956 F.3d at 1342; *Summary Judgment Order*, 2023 WL 4881967, at *5. The amount of collateral, of course, was left to the Secretary's discretion.

ITCA's continued reliance on section 403(c)(2) is also meritless. The Federal Circuit has already expressly rejected ITCA's interpretation of this section, stating that it "impose[s], at most, a duty upon Collier, not the Government." *Circuit Opinion*, 956 F.3d at 1345-46. And the defined interest rate in section 403(c)(5) merely ensured that ITCA received the same value if the

[7] ITCA criticizes the United States' assertion that the purpose of section 405(c)(2) is to "encourage" Collier's continued payments—but that is this Court's interpretation of the Act. *Summary Judgment Order*, 2023 WL 4881967, at *5 (explaining that "[t]here is a fundamental difference between the defendant's obligation to hold sufficient collateral in trust to encourage Collier's continued performance and the defendant's obligation to assume all Collier's financial obligations upon Collier's default . . . the latter supposed obligation lacks legal foundation.")

money was paid tomorrow, rather than today. *See Holland v. Bibeau Const. Co.*, 774 F.3d 8, 17 (D.C. Cir. 2014) (explaining that interest "mak[es] the same amount similarly valuable when paid at different times."); 134 Cong. Rec. S13519-02, 1988 WL 176577, p. 3 (Sep. 28, 1988).[8] The Act does not speak to additional "cash flows," as ITCA suggests. Indeed, Collier could have paid the principal obligation in cash at the time of the exchange. If it had, the tribes would have received $34.9 million dollars. Ultimately, ITCA *did* receive its share of the $34.9 million dollars with accrued interest. In other words, ITCA received the present-day value of the $34.9 million—plus the benefit of receiving it ten years early.

ITCA also unpersuasively tries to minimize the Ninth Circuit's decision in *ITCA v. Babbitt* on the grounds that ITCA was seeking injunctive relief in that case, not damages. This distinction is unavailing.

Harkening back to when the United States and Collier were negotiating the TFPA's terms in the early 1990s, ITCA sued 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). Just as here, ITCA alleged that the security the Secretary contemplated obtaining 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

[8] 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.

402(h) of the [Act]." *Id.*, ECF No. 23 at 8 (district court's order).[9] The Ninth Circuit affirmed the dismissal. *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*. at 200.

ITCA cannot wish away *Babbitt* by refusing to accept it. That ITCA was seeking injunctive relief there and damages here does not alter the import of the Ninth Circuit's legal conclusion that the Secretary had discretion to make the collateral decision. The "issue[] of how much security the Act required the US to hold in trust . . . never [was] reached in . . . *Babbitt*," as ITCA states, ECF No. 186, p. 18, but that is because the Act did not dictate any amount; it granted discretion to the Secretary to decide. In so ruling, the Ninth Circuit inherently rejected the contention that any obligation existed to obtain a specific amount of collateral and dismissed ITCA's claim that the Act required all payments to be collateralized.[10] Accordingly, ITCA's assertions here cannot be squared with the Ninth Circuit's binding decision on this issue.[11]

Additionally, and for the reasons already stated in earlier summary judgment briefing, ECF No. 160, pp. 20-23, the Court should disregard ITCA's half-hearted, belated ambiguity argument. ITCA has maintained throughout this litigation that the Act is *unambiguous*. *E.g.*, ECF

[9] 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 in that prior case is at ECF No. 130, Exhibit 6.

[10] While ITCA's brief includes significant hyperbole regarding the risk that ITCA would receive *nothing* if the Secretary had discretion to decide the terms of the TFPA, nothing of the sort happened here. Because of and pursuant to the TFPA's terms, ITCA received its share of the $34.9 million land value (with interest through the year of that settlement) ten years early.

[11] The United States never conceded any sort of liability in the *Babbitt* litigation, as ITCA suggests, ECF No. 186, p. 19, by acknowledging that ITCA could later bring challenges for monetary damages against the United States in the Court of Federal Claims.

No. 186, p. 19 ("ITCA maintains that the Act . . . is unambiguous.").[12] To the extent ITCA really is now contending that the Act is ambiguous, it should be judicially estopped from doing so. *Trs. in Bankr. of N. Am. Rubber Thread Co. v. United States*, 593 F.3d 1346, 1353 (Fed. Cir. 2010) ("Where a party assumes a certain position in a legal proceeding . . . he may not thereafter . . . assume a contrary position) (internal quotations omitted). The Court should thus not entertain any suggestion otherwise at this late stage. The Act's provisions are, indeed, unambiguous. As such, resorting to its legislative history is improper. *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"). Moreover, nothing in the legislative history actually supports ITCA's interpretation.[13] For example, ITCA suggested Congress "establish a guaranteed minimum annual cash flow," ECF No. 186, p. 22, but Congress never adopted such language.

Finally, the Court should disregard ITCA's attempt to conflate duties owed by the United States to tribes when the government "manages or operates Indian lands or resources," i.e., a "trust corpus," *Babbitt*, 51 F.3d at 203, with the United States' limited statutory duties under the Act here. This case does not involve Indian trust land. The Phoenix Indian School property had been federal property, "not part of Indian lands," and thus "the school property is not properly the subject of a trust corpus." *Id.* Accordingly, ITCA's only "interest is in the proceeds of the . . . Trust Fund . . . created by the [Act]," so the "government owes no fiduciary duty to [ITCA] apart from its obligations under the Act." *Id.* For these reasons, ITCA's reliance on Indian trust cases,

[12] As explained in earlier briefing, incorporated here by reference, ITCA consistently maintained that the Act was unambiguous up until the second round of summary judgment briefing—and only after suffering major losses in this Court and at the Federal Circuit. ECF No. 160, pp. 20-23.

[13] A full discussion of the Act's legislative history can be found in the United States' earlier summary judgment briefing at ECF No. 160, pp. 20-23, which is incorporated by reference.

such as *Fletcher* and *Jicarilla Apache Nation,* is misplaced. *Fletcher v. United States*, No. 19-1246, 2025 WL 2218490, at *1 (Fed. Cl. Aug. 5, 2025); *Jicarilla Apache Nation v. United States*, 112 Fed. Cl. 274, 279 (2013). ITCA offers no attempt to explain the import of these authorities here and, as explained below, ITCA never seriously disputes that the United States owes no fiduciary duty to ITCA beyond those in the Act.

III. No fiduciary obligation remains that entitles ITCA to recover additional funds

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. Indeed, because of the recovery against *Collier*, ITCA has no uncompensated damages that it can recover from the United States.

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 these duties by recovering the full value of the security that was required to be held in the Trust Estate (130% of the Release Level Amount). This settlement recovery exceeds the required collateral value for the Trust Estate at the time of recovery, which, as noted above, was $47.1 million. The United States thus preserved the value of collateral required by the TFPA, with the proper 95 percent share allocated to ITCA, placing ITCA in the very position it would have been in if the value of the collateral in the Trust Estate had been adequate when Collier breached.

Even if the collateral deficiency in the Trust Estate in 2012 could somehow by recast as a breach of trust, the United States 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). 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. Tellingly, ITCA has consistently failed to identify any compensable damages it has suffered.

For these reasons, the Court should find that the Secretary fully discharged the statutory duty to "hold in trust security provided in accordance" with the TFPA by executing an agreement that ensured ITCA received its rightful share of the full obligation.

IV. The common law imposes no additional duties on the United States

Because the land exchange involved no "common law trust" between ITCA and the United States, the United States "owes no fiduciary duty to [ITCA] apart from its obligations under the [Act]." *ITCA v. Babbitt,* 51 F.3d at 203. Accordingly, the Court cannot impose any greater common law duty upon the United States beyond those expressed by statute.

Indeed, ITCA does not dispute the United States' position, offered in response to this Court's inquiry, that the common law cannot be invoked to impose additional duties on the United States. Rather, ITCA concedes that the "Court need not turn to common law to determine [the United States' obligations]." ECF No. 186, p. 10. The Court should thus accept the United States' explanation, ECF No. 182, pp. 24-28, that its duties are limited to those in the Act.

Notwithstanding that ITCA presents *no* legal argument supporting the invocation of common law and does not dispute that doing so would be inappropriate, ITCA nonetheless illogically argues that "to the extent the Court determines that [considering] common law is appropriate" here that the United States did not "act as a prudent trust under common law." ECF No. 186, pp. 10-11. The Court can wholly disregard the unsupported argument. The United States could not have breached a common law duty when no common law duty exists.[14]

[14] The Court should also ignore all of ITCA's arguments regarding the United States' investment duties, which solely relate to the stayed Claim III and are irrelevant here.

CONCLUSION

For the reasons set forth herein, the Court should grant the United States summary judgment on what remains of Claim I.

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