IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

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

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Arizona-Florida Land Exchange Act of 1988, Pub. L. No. 100-696 (1988) (Act), provides in relevant part that, if the 30-year payment option is elected (which it was) for the Trust Fund Payments (Annual and Final) required under the Act:

> The interest rate to be used in determining the interest due on annual Trust Fund Payments payable by the purchaser shall be the interest rate being offered on bonds payable in 30 years sold by the United States on the date that notice of the election of the form of the Trust Fund Payment is made by the Secretary plus 0.25 percent, except that in no event shall such interest rate be lower than 8.5 percent or higher than 9.0 percent.

Act § 403(c)(5).

In its Second Amended Complaint (SAC), ECF No. 58,[1] Plaintiff, the Inter-Tribal Council of Arizona (ITCA), alleges that: (1)

> the United States was of the view that if the $34.9 million were recovered, earnings on that amount would obviate the need to recover separately for all of the remaining $2.9 million annual payments required by the AFLEA; however, the Act guaranteed a minimum rate of return of 8.5% on the $34.9 million for the entire thirty years, and in all likelihood earnings on the $34.9 million at market rate today will not produce the equivalent, i.e., $2.9 million per annum. Since the United States ultimately did not recover sufficient security or cash from Collier to cover the amount guaranteed by Congress, it has exposed itself to liability for that amount over and above what it recovers from Collier on ITCA's behalf.

SAC ¶ 214, and (2) the US is liable for the "difference between the actual return on the $34.9 million [final payment] once it [was] recovered … and the Act's mandated minimum rate of return

[1] ITCA's Statement of Undisputed Facts in Support of its Summary Judgment Motion (Pl.'s SOUF) ¶ 118, ECF No. 158, states that this action was filed "to recover money damages from the US that were owed its Trust Fund under the mandates of the Act (Claims I and II) and the general statute governing investment of tribal trust funds, 25 U.S.C. ¶ 162a. (Claim III)." Defendant the United States (US) disputes this statement, "to the extent it asserts ITCA's legal conclusion that the United States is liable for Collier's future interest payments…." Def.'s Counterstatement to Plaintiff's Statement of Undisputed Material Facts (Def.'s Counterstatement) ¶ 118, ECF No. 161. The US also counters that "[t]he original complaint ITCA filed is immaterial to any issue in this case as it was superseded by amended pleadings." *Id*. ITCA's stated fact, which cites to the SAC, is simply that this action was filed.

of 8.5% on the $34.9 million as of the same time, through the full thirty year annual payment time period, i.e., calendar year 2026." *Id*. ¶ 268(c). And this Court's Opinion and Order of August 1, 2023, expressly stated that ITCA's remaining Claim I issue "is whether relief may be available to the plaintiff for the alleged discrepancy on the rate of return to the trust fund." *Inter-Tribal Council of Arizona, Inc. v. United States*, No. 15-342, 2023 WL 4881967, at *8 (Fed. Cl. August 1, 2023); *see also* Pl.'s Memorandum in Support of its Mot. for Summary Judgment 38-40, ECF No. 157-1.

On simultaneous motions for Summary Judgment, in its Response Brief, ECF No. 160 (and in its Opening Brief, ECF No. 156) and Counterstatement, the US ignores this statutory rate of return issue, and focuses instead on arguments related to the terms of the Trust Fund Payment Agreement (TFPA) it entered into with Collier; the amount of security that the US held for the Trust Fund Payments;[2] the adequacy of the security relative to the value of the Trust Estate over time;[3] the Act's required but unpaid Trust Fund Payments; and the amount of money that the US

[2] The US disputes "to the extent [they are] construed as conceding liability" and / or as immaterial, Def.'s Counterstatement ¶¶ 53, 55, ITCA's statements wherein ITCA quotes Interior officials and attorneys as speaking against the security consisting, or consisting exclusively, of real property. Pl.'s SOUF ¶¶ 53, 55. In Def.'s Counterstatement ¶ 53, the US states that ITCA "improperly relies on privileged attorney-client information," presumably referring to the September 1992 Memorandum which is under seal in in this case. Pl.'s SOUF ¶ 53. The officials' and attorneys' statements are not an argument of concession; the statements speak for themselves, are relevant to the remaining statutory and common law breach of trust claims in this case, are not privileged, and at least with respect to Pl.'s SOUF ¶ 53, are supported by the September 1992 Memorandum which is under seal in but not stricken from this case. The same applies to Pl.'s SOUF ¶ 56, which the US disputes "to the extent it is construed as conceding liability" and as not material. Def.'s Counterstatement ¶ 56. The quoted letter is not an argument of concession; the letter speaks for itself and is relevant to the remaining claims in this case.

[3] The US disputes ITCA's characterization of Interior's review of Collier's 2007 appraisal of the remaining Phoenix Indian School property as "incomplete," Def.'s Counterstatement ¶ 105, but as the US states, the document "speaks for itself." *Id*. And the US disputes, "to the extent it is construed as conceding liability," and as immaterial, *id*. ¶ 106, its own admission in *U.S. v. Collier* that "the value of the Indian School lot fell below the required threshold sometime after the second lien release in 2007 … [and] remains below the required collateral maintenance amount." Pl.'s SOUF ¶ 106 (citation omitted). The US' admission speaks for itself.

recovered from Collier in *United States. v. Baron Collier Co.* (*U.S. v. Collier*), No. 2:14-cv-00161-PGR (D. Ariz filed Jan. 28, 2014), after Collier stopped making Payments.[4] Indeed, the US expressly misstates ITCA's remaining claims as being limited to "the value of the Trust Estate over time relative to the Release Level Amount or the United States' efforts to preserve the Trust Estate following the execution of the TFPA[.]" Def.'s Counterstatement ¶ 49; *id*. ("[These] are the only remaining Claim I allegations[.]").[5]

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[4] The US disputes ITCA's statements, Pl.'s SOUF ¶¶ 108, 111, quoting Collier's letter about remaining Trust Fund Payments when Collier stopped making payments, "to the extent ITCA implies that the United States is liable for Collier's payment obligations[.]" Def.'s Counterstatement ¶¶ 108, 111. ITCA does not argue that Collier's letter is the basis for the US' liability and the letter speaks for itself.

The US also disputes the "materiality" of ITCA's statement, Pl.'s SOUF ¶ 109, that "the US did not provide notice … of Collier's stopping payment before March 20, 2013[,]" and counters that "[t]he Act imposed no duty on the United States to give notice to ITCA about release of liens [and] [e]ven if such a duty existed, ITCA suffered no harm from this alleged breach." Def.'s Counterstatement ¶ 109. Presumably, the US means to counter that the US had no duty to give notice to ITCA about Collier's stopping payments, a legal argument with which ITCA disagrees, and ITCA also disagrees with the US' argument that ITCA suffered no harm.

[5] Because the US misstates ITCA's remaining claims, many of its counterstatements that ITCA's Statements of Undisputed Fact are "not material" or are "unrelated to the remaining Claim I allegations," *e.g*., Def.'s Counterstatement ¶¶ 3-5, 9, 11, 13-16, 21, 24-27, 30-31, 42-43, 46-50, 52-61, 63-75, 77-78, 80-87, 90-95, 96-100, are similarly misguided. For example, the US disputes, as "not material" and "unrelated to the remaining Claim I allegations," Def.'s Counterstatement ¶ 51, ITCA's statement that, when consulting with ITCA, Interior Solicitor's Office Attorney David Moran "stated that 'proper collateral' was important to ensure that, '30 years out there's going to be $35 million there and that each year there will be a payment of income from that of at least 8.5[%] or else the United States becomes liable,'" Pl.'s SOUF ¶ 51, citing SAC ¶ 78, citing SAC Ex. 4 at 12. But the statement shows a contemporaneous understanding by an Interior attorney of an interpretation of the Act -- at least on the statutory rate of return issue -- that coincides precisely with the interpretation for which ITCA argues. An interpretation that the US admitted in writing was plausible but then rejected and now argues against. *See Shepard v. Quinlan*, No. 89-2522, 1991 WL 221143, at *2 (D.D.C. Oct. 7, 1991) (where government concealed from the court the agency's statutory interpretation, and then successfully urged the court to adopt a contrary interpretation, court grants plaintiff's motion to vacate order dismissing action).

Though unaddressed by the US, the statutory rate of return issue is not a new argument, *see* US' Response Brief 20-22; it has been alleged and argued at least since the SAC. It is not being relitigated, *see* US' Response Brief 20 and Def.'s Counterstatement n.1, because to date no court has ruled on the issue. By the same token, it is not subject to, let alone foreclosed by, the law of the case doctrine based on any prior decision in this case, *see* US' Response Brief 11, 15-17, 19. Most importantly, it refutes the US' insistence that ITCA has been fully compensated by virtue of the recovery in *U.S. v. Collier*. *See* US' Response Brief 2-3, 7, 11, 15-17, 19-20, 23, 25, 32-33. The statutory rate of return issue is an open, post-recovery issue; ITCA argues that given the recovery in *U.S. v. Collier*, the US is liable as a matter of law for the difference in the actual earnings on the approximate amount of the Final Payment ($34.9 million) that the US recovered compared to the Act's mandated minimum annual rate of return (8.5%) for the entire 30 years of the 30-year payment option elected by the US. And the US itself has acknowledged expressly that this interpretation of the Act is plausible.

ARGUMENT

I. ITCA Has Standing for its Remaining Claims[6]

ITCA has standing for its remaining claims in this action, asserted in the SAC Claim I, because it has met its burden to show all three elements required for standing: (1) injury-in-fact; (2) causal connection; and (3) redressability. *Wyandot Nation of Kan. v. United States*, 124 Fed. Cl. 601, 606-07 (Fed. Cl. 2016), *aff'd*, 858 F.3d 1392 (Fed. Cir. 2017) (citations omitted).

[6] The parties agree that the US' standing argument is properly raised under RCFC 56 (summary judgment), rather than a Motion to Dismiss. Pl.'s Response to Def.'s Summary Judgment Motion 3-4, ECF No. 162; US' Response Brief 12-14. However, the US incorrectly argues that should this Court determine that the argument is more properly considered under RCFC 12(b), dismissal of ITCA's remaining claims with prejudice is appropriate because ITCA "cannot cure its standing challenges[.]" US' Response Brief n.3. That is incorrect because ITCA need not "cure" any standing challenges; standing has been established. *See infra.*

The injury-in-fact is that ITCA's Trust Fund has not received the full monetary value of Trust Fund Payments guaranteed by Congress in the Act. SAC ¶¶ 214, 268(c), 282. The causal connection is that this harm is attributable directly to the US which, upon the election of the 30-year payment option, was mandated by the Act to hold in trust security for the Act's Payments required by that option (30 Annual Payments of at least $2.9 million per payment and a Final Payment of $34.9 million). *Id*. ¶¶ 60-61, 64. The Annual Payments are based on the statutorily guaranteed minimum annual rate of return -- 8.5 % -- for 30 years on the Final Payment. Act §§ 403(c)(2) and 403(c)(5). When Collier stopped making Payments after fifteen years, the amount of security the US held admittedly was insufficient. Joint Statement of Undisputed Facts (JSOUF) ¶¶ 42, 46, ECF No. 154. The US sued and recovered from Collier the approximate amount of the Final Payment and five Annual Payments, SAC ¶¶ 178, 196, 202-04. The recovered amount is held by the US in trust accounts. SAC ¶¶ 228, 232, 241. The earnings on the approximate Final Payment amount since the recovery have been less than the 8.5% minimum annual amount guaranteed by the Act, *id*. ¶¶ 214, 268(c). The harm is redressable by a holding that the US is liable for the "difference between the actual return on the $34.9 million [final payment] once it [was] recovered … and the Act's mandated minimum rate of return of 8.5% on the $34.9 million as of the same time, through the full thirty year annual payment time period, i.e., calendar year 2026[.]" *Id*. ¶ 268(c).

In its Response Brief, the US argues generally that ITCA fails "to identify any concrete, uncompensated injury other than its rejected theory of entitlement to future interest[.]" US' Response Brief 26. Critically incorrect is the US' assumption that ITCA's harm is attributable solely to the failure of the US to recover only five of fifteen unpaid $2.9 million Annual Payments from Collier. *E.g.*, *id*. 4 ("The *only* concrete harm ITCA identifies is the loss of Collier's "unpaid"

future interest payments") (emphasis in original); *accord id*. 2, 11, 25-26. It is incorrect because it ignores ITCA's allegations and claims that the harm to its Trust Fund also is attributable to the actual annual earnings on the recovered approximate Final Payment amount being less than the statutorily guaranteed minimum annual rate of return (8.5%) on the Final Payment. This harm has not been addressed and the harm remains.

II. As a Matter of Law, the US is Liable for the Difference in the Actual Earnings on the Recovery of the Approximate $34.9 Million in *U.S. v. Collier* and the 8.5% Minimum Annual Rate of Return on $34.9 Million Guaranteed by the Act Under the 30-Year Payment Option

A. The Act's 30-Year Payment Option Unambiguously Guaranteed that the Trust Fund Payments Consist of a Minimum of 8.5% Per Annum Earnings on $34.9 Million for 30 Years plus the $34.9 Million at the End of 30 Years

The Land Exchange Agreement between Collier and the US required Collier to pay $34.9 million, the agreed-upon difference between the value of Collier's Florida land and value of the US' land in Arizona on which the Phoenix Indian School was located. SAC ¶¶ 36-39. The proposed legislation introduced (H.R. 4519 and S. 2420) needed to approve the Land Exchange provided that the $34.9 million would be paid into trust funds created to compensate Arizona Indian tribes for the closure of the Phoenix Indian School, thereby enabling the Land Exchange to occur. SAC ¶¶ 41-43.

"Although the Exchange Agreement specified only a cash deal, Collier knew that there was 'absolutely no way' Collier would make a lump sum cash payment of $34.9 million." US' Statement of Undisputed Material Facts (US' SOUF) ¶ 14, *U.S. v. Collier*, No. 14-161 (D. Ariz.) (ECF No. 151, filed Dec. 23, 2015), First Amended Complaint, Exhibit 5 at 3, ECF No. 34-1. "Collier thus drafted a financing option into the proposed legislation which would allow Collier to spread the payment over a period of thirty years." *Id*. ¶ 15.

In response to Collier's proposal, "ITCA succeeded in getting the proposed legislation to provide that the annual payments for thirty years would be no less than what would be earned on $34.9 million at a minimum [annual] rate of return of 8.5%." SAC ¶ 45, citing *Arizona-Florida Land Exchange Act of 1988: Joint Hearing on S. 2420 Before the S. Select Comm. on Indian Affairs and the H. Comm. on Energy and Natural Resources and the S. Subcomm. On Public Lands, National Parks and Forests*, 100th Cong. 65-66 (1988) (statement of ITCA), attached as Exhibit A. At the Joint Hearing, conducted on July 25, 1988, Senator DeConcini asked ITCA:

> We are advised that one of the provisions in the negotiations with the Inter Tribal Council of Arizona on how the trust funds would be invested gives a couple of different options to the Secretary. One is that the interest rate be used in determining the interest due on the trust fund payments payable by the purchaser shall be the interest rate being offered on bonds payable in 30 years sold to the United States, etc., and then it puts a floor and a ceiling on the interest rate of no lower than 8.5 percent or higher than 9.0 percent.
>
> Am I accurate that the Inter Tribal Council of Arizona wanted that provision in there? And if so, why did you want to put a ceiling on the amount of the interest rate?

Id. 65. ITCA responded that it wanted the provision because of concerns with "the fluctuation of interest" over a 30-year payment period. *Id.* 66. Thus, as ITCA explained, although it objected generally to the annual payment option (as opposed to a lump sum payment), if the 30-year payment option were to be an option, "[w]e were trying … to at least establish … a guaranteed minimum cash flow." *Id*.

Among the materials submitted by the US in *U.S. v. Collier* is draft proposed legislation dated as early as January 20, 1988, which contained the provision for the 30-year payment option:

> If the Secretary elects to receive a Trust Fund Payment in the form of annual payments, Collier shall make - - (A) 30 annual payments equal to the interest due on an amount equal to that portion of the Monetary proceeds that are properly allocable to the Trust Fund for which such election is made; and (B) at the time of the last annual payment, a payment equal to that portion of the Monetary Proceeds that are properly allocable to the Trust Fund for which such election is made.

US' SOUF ¶ 15, *U.S. v. Collier*, citing, *inter alia*, Plaintiffs' Appendix 263, ECF No. 151-1 at 20-21, attached as Exhibit B. And it contained the provision that if the 30-year payment option were elected:

> The interest rate to be used in determining the interest due on annual Trust Fund Payments payable by Collier shall be the interest rate being offered on bonds payable in 30 years sold by the United States on the date that notice of the election of the form of the Trust Fund Payment is made by the Secretary plus 0.25 percent, provided, that in no event shall such interest rate be lower than 8.5 percent or higher than 9.0 percent.

Id. at 21-22 (emphasis in original). With the substitution of the term "the Purchaser" for "Collier," the Act adopted the proposed language for these two sections verbatim. Act §§ 403(c)(2) and 403(c)(5).[7]

Together, these two sections provide that under the 30-year payment option, the Trust Funds are guaranteed the $34.9 million as a Final Payment at the end of 30 years and each year for 30 years, they are guaranteed a minimum of 8.5% earnings on the $34.9 million, *i.e*., 30 years of Annual Payments at a minimum of $2.9 million per year. *Id*. The 30 Annual Payments are a guaranteed stream – at a guaranteed minimum amount -- of income to the Trust Funds. On this point, the US argues – in error -- that "ITCA misrepresents the Act." Def.'s Counterstatement ¶ 29. "While ITCA requested that a 'guaranteed minimum cash flow' be included in the legislation, no such language was adopted in the Act. The Act merely provides for a fixed interest rate[.]" *Id*.

[7] While the Act is unique in compensating Indian tribes for the closure of a federal off-reservation Indian boarding school, Congress long has guaranteed minimum rates of return for Indian trust funds. For example, "[u]ntil 1880, tribal funds, rather than being deposited in the Treasury, were required by law to be invested, usually at a minimum rate of return of 5%." *Cheyenne-Arapaho Tribes of Okla. v. United States*, 512 F.2d 1390, 1393 (Ct. Cl. 1975), cited with approval in *White Mountain Apache Tribe of Az. v. United States*, 20 Cl. Ct. 371, 379 (Cl. Ct. 1990).

The problem for the US is that is a distinction without a difference. What the US admits is a "fixed interest rate" on the Final Payment for 30 years is precisely what results in a guaranteed stream of Annual Payments at a fixed minimum amount for 30 years. ITCA's concerns about market risk "fluctuating interest" affecting substantial Trust Fund Payments being spread out over a 30-year period were addressed specifically by Congress establishing, by way of a minimum "fixed interest rate" on the Final Payment, 30 years of guaranteed minimum Annual Payments to the Trust Funds and the Final Payment at the end of 30 years. In the US' own words, that was the bargained-for trade-off embedded in the 30-year payment option. *See U.S. v. Collier*, United States' Reply in Support of its Motion for Summary Judgment 17, ECF No. 171, Exhibit 7 to Defendant's Counterstatement to Plaintiff's Statement of Undisputed Material Facts, ECF No. 139-7 ("By allowing Collier to put off the $34.9 million payment 30 years into the future, Congress provided Collier something valuable – and that value was quantified by the 30 years of interest payments.").

Further to this point, in *U.S. v. Collier*, in deposing Collier's representative, Roy E. Cawley, Jr., the US relied on an Exhibit entitled "Proposals For Resolution of Remaining Issues Related To The Florida-Phoenix Indian School Land Exchange dated December 11th, 1987." *U.S. v. Collier*, Plaintiffs' Appendix (Updated), ECF No. 156-2 at 98, cited in US' SOUF ¶ 17, attached as Exhibit C. Referring to this Exhibit, the attorney for the US stated to the witness that the document's "second bulletpoint notes 'To maximize the possible revenue stream from trust fund, representatives of ITCA have indicated an interest in obtaining from Collier, as an alternative to a lump-sum payment, an annual payment over 30 years.'" *Id*. The proposed and enacted 30-year payment option captures this 30-year Annual Payment "revenue stream" to the Trust Funds (and the Final Payment at the end of 30 years) via the guaranteed minimum annual rate of return (or what the US' admits is a "fixed interest rate") on the Final Payment for 30 years.

And even though it now argues to the contrary, the US knows well that the Act's "fixed interest rate," *i.e.*, a fixed minimum rate of return on the $34.9 million Final Payment in the form of minimum Annual Payments for 30 years, guarantees, in addition to the Final Payment at the end of 30 years, a 30-year stream of Annual Payments to the Trust Funds. As required by the Act, the Secretary consulted with ITCA and the Navajo Nation on the Act's Trust Fund Payments' options. SAC ¶¶ 75-78. At the September 13, 1991 consultation, Interior Solicitor's Office Attorney David Moran explained the needed security for the Annual Payment portion of the 30-year payment option as follows: "*each year* there will be a payment of income … of at least 8.5[%] [on the $34.9 million] or else the United States becomes liable." *Id*. ¶ 78 (emphasis added).[8]

[8] Def.'s Counterstatement is replete with inapposite statements that "agency officials' statements have no legal authority," *e.g.*, ¶¶ 49-53, 56, 58, 61, 63-74, 77-78, 80-82, 99-100. *See, e.g.*, Def.'s Counterstatement ¶ 58 ("The United States disputes ITCA's characterization of the statement to the extent ITCA implies that Special Assistant Albert acknowledged or could create a trust duty to guarantee or secure Collier's future interest payments"); *accord id*. ¶ 61. ITCA does not argue and never has argued that the officials' statements – by themselves – are legal authority or the basis for creating a legal duty. Rather, these statements -- the accuracy of which the US does not dispute -- are relevant, contemporaneous expressions of the officials' understanding of the Act, and they are helpful tools of statutory interpretation. *See AD Glob. Fund, LLC ex rel. N. Hills Holding, Inc. v. United States*, 67 Fed. Cl. 657, 678 (2005), *aff'd*, 481 F.3d 1351 (Fed. Cir. 2007) (statements of agency officials are persuasive statutory interpretation tools); *see also Batterton v. Marshall*, 648 F.2d 694, 702 (D.C. Cir. 1980) (agency actions or statements, even where non-binding, or determinative of issues or rights, nevertheless "express the agency's intended course of action [and] its tentative view of the meaning of a particular statutory term.").

The same applies to the US' counterstatements that Interior's "news release does not define the United States' trust duties," Def.'s Counterstatement ¶¶ 83-87. ITCA does not argue that the news release defines trust duties, but the news release is an official publication of the type commonly used to aid statutory interpretation. *See Int'l Union, United Automobile, Aerospace & Agric. Implement Workers of Am. v. Brock*, 783 F.2d 237, 249 and n.15 (D.C. Cir. 1986) (agency announcements like press releases may be used in statutory interpretation); *accord In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 559 F.Supp.2d 424, 440 (S.D.N.Y. 2008) (agency publications like Questions and Answers are "within a wide range of documents" that may be considered in statutory interpretation).

The Secretary elected the 30-year payment option on September 25, 1991. SAC ¶ 84. Literally on the eve of that election, in a September 24, 1991 Memorandum from the Assistant Secretary to the Secretary, Collier Land Exchange: Decision on Form of Payment for Indian Trust Funds, the Assistant Secretary wrote that, "[t]hirty annual interest payments, with the principal due on the last payment, would provide a *steady stream of income* to the trust funds at a fairly good rate of interest – 8.5 to 9.0 percent." *Inter Tribal Council of Arizona v. Lujan* (*Lujan*), No. 2:92-cv-01890 (D. Ariz.), Administrative Record (A.R.), Dkt. 17, Doc. A at 2, (filed Oct. 21, 1992); SAC Ex. 5 at 2.

Similarly, the US' May 1992 Memorandum, Pl.'s Memorandum in Support of its Motion for Summary Judgment, Exhibit A, ECF No. 157-1, states that the Act § 403(c)(2) plausibly provides for:

> A contractual obligation by Collier to make thirty annual payments of $2,966,500 ($34.9 million x 8.5 percent interest), with $34.9 million due in the last payment, and the pledge of sufficient collateral to recover, in the event of default, both the full principal and the remaining *stream of annual trust fund payments* calculated to present value at the time of default, mitigated by the projected interest which the Government would earn on the principal for the remainder of the thirty year period…

May 1992 Memorandum 2 (emphasis added).[9] The May 1992 Memorandum then explains that the Secretary may decide "to establish by the terms of the Trust Fund Payment Agreement whether or

[9] The US does not dispute the May 1992 Memorandum or its contents. Def.'s Counterstatement ¶¶ 64-71. The US does dispute what it refers to as ITCA's implication that "'this memorandum' was not disclosed until this litigation. *Id*. ¶ 75. It is unclear whether the US' reference to "this memorandum" is to the May 1992 Memorandum, or to another memorandum to which ITCA refers as "the Albert and Doddridge Memorandum" dated May 27, 1992, cited in Pl.'s SOUF ¶¶ 72-74. With respect to the Albert and Doddridge Memorandum, ITCA agrees that that Memorandum was submitted by the US as Document T as part of the A.R. in *Inter Tribal Council of Arizona v. Lujan* (*Lujan*), No. 2:92-cv-01890 (D. Ariz.), A.R., Dkt. 17, Doc. T 70-76 (filed Oct. 21, 1992), *aff'd sub nom. Inter Tribal Council of Arizona v. Babbitt* (*Babbitt*), 51 F.3d 199 (9th Cir. 1995), SAC Ex. 5, ECF No. 58-2. But there is no evidence that the May 1992 Memorandum ever was "received by ITCA" in the *Lujan* / *Babbitt* case or otherwise. It is not included or referenced in any *Lujan* /

not the Indian tribes, who are beneficiaries of the trust funds, are guaranteed thirty annual interest payments of $2,966,500 even if Collier defaults and the $34.9 million in principal is recovered through the liquidation of collateral." *Id.* (emphasis in original).[10] Certainly, the absence of the term "guarantee" in the Act did not preclude the US' consistent pre-litigation interpretations that the Act plausibly made such a guarantee.

The US' positions in *U.S. v. Collier* also believe its "there's no guarantee" position in this case. *See, e.g.*, Joint Statement of Discovery Dispute [Redacted], ECF No. 157 at 15, attached as Exhibit D (US states that "Congress dedicated the payment stream to Indian education"); *accord id*. 22 (US argues that Interior Solicitor's Office Attorney David Moran's "main concern as an Indian law attorney was protecting *the payment stream due the tribes.*") (emphasis added). In its Summary Judgment Reply Brief, the US accused Collier of ignoring "the unique terms of the arrangement set by Congress, which *required a stream of interest-only payments* to the Indian

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Babbitt filings, including pleadings, briefs, Witness and Exhibit Lists, Hearing Transcripts, or Orders and Opinions, and the US does not offer any other evidence to support its dispute.

Counsel for ITCA in this litigation first saw the May 1992 Memorandum after the Court's Opinion and Order of August 1, 2023 in this case, ECF No. 144, which followed the oral argument on the pending simultaneous summary judgment motions. The Court's Opinion and Order suggested that factual disputes and factual development were needed to resolve ITCA's remaining claims, and the parties promptly proceeded to discuss whether discovery was necessary or appropriate. *See* Joint Status Report (filed Aug. 29, 2023), ECF No. 147. As part of assessing this, ITCA's Counsel reexamined in-depth the extensive filings in *U.S. v. Collier* and came across the May 1992 Memorandum and the December 1992 Memorandum as Exhibits to Collier's filings in that case.

[10] Presumably to downplay the May 1992 Memorandum's import, the US characterizes it as an isolated "personal opinion" of an ordinary federal official, which it is not. US' Response Brief 21. The May 1992 Memorandum is an official document authored by political appointees and addressed to an Executive Cabinet Secretary. It speaks to matters pertaining to "detailed and protracted" negotiations over a multi-million-dollar interstate Land Exchange which the US was determined to accomplish. SAC ¶ 46; *see also* December 1992 Memorandum (Pl.'s Memorandum in Support of its Motion for Summary Judgment, Exhibit C, ECF No. 157-1). It construes an Act of Congress that established fiduciary duties for the US as trustee for Indian Trust Funds and it makes recommendations from which official decisions were made and official actions were taken.

Trusts." United States' Reply in Support of its Motion for Summary Judgment 17, ECF No. 171 (emphasis added).

B. The Act's Guaranteed Minimum Annual Rate of Return on $34.9 Million for 30 Years Must be Given Meaning and Not Rendered Superfluous or Made Inoperative

The Act's guaranteed minimum 8.5% annual rate of return on $34.9 million for 30 years must be given meaning. *Am. Bosch Magneto Corp. v. United States*, 6 F. Supp. 455, 459, 79 Ct. Cl. 195, 202 (Ct. Cl. 1934). Otherwise, it is rendered superfluous, which is contrary to basic rules of statutory construction. *Id*. Courts should not presume that Congress incorporated "superfluous or meaningless provisions in a statute." 6 F. Supp. 458-59. "It is a 'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant' …. We are 'reluctant to treat statutory terms as surplusage in any setting.'" *Duncan v. Walker*, 533 U.S. 167, 174 (2001), quoted in *Boeing Co. v. Sec'y of Air Force*, 983 F.3d 1321, 1328 (Fed. Cir. 2020).

Significantly, at issue here is an express statutory guarantee coupled with other express emphatic language. Section 403(c)(5) provides in relevant part that, "*in no event shall* such interest rate be lower than 8.5 percent or higher than 9.0 percent." (emphasis added). The "elementary canon of construction that a statute should not be interpreted so as not to render one part inoperative" is particularly true of provisions "written in mandatory terms." *Gallo v. United States*, 529 F.3d 1345, 1349 (Fed. Cir. 2008). "In no event" is equivalent to stating that "there shall be no exception ... [and] when Congress includes the 'in no event' clause in a statute, Congress means what it says." *Kirkendall v. Dep't of the Army*, 479 F.3d 830, 855 (Fed. Cir. 2007), *cert. denied*, 552 U.S. 948 (2007) (Moore, J., concurring in part and dissenting in part) (citations omitted).

Under the 30-year payment option, the Act unambiguously guaranteed the Trust Funds a minimum annual rate of return on $34.9 million for 30 years, plus the $34.9 million at the end of

30 years, notwithstanding Collier's non-payment and any recovery from Collier by the US. That interpretation, which the US admits is plausible, *see* May 1992 Memorandum, is the only one that avoids rendering superfluous or inoperative the Act's express guarantee. "A statutory interpretation otherwise would violate the presumption against surplusage." *Frantzis v. McDonough*, 104 F.4th 262, 265, (Fed. Cir. 2024); *accord In re Bailey*, 182 F.3d 860, 875 (Fed. Cir. 1999) (Schall, J., dissenting) (citations omitted) ("A statute is to be read in its entirety in a manner that yields a logical and sensible result and does not render a part of the statute superfluous.").

C. Notwithstanding Any Discretion of the US Regarding the Trust Fund Payments' Security, the Statutory Rate of Return Issue Remains an Open Issue

Whether Congress has given an agency discretion is a question of law / statutory interpretation. *New York Pub. Int. Rsch. Grp. v. Whitman*, 321 F.3d 316, 327 (2nd Cir. 2003), citing *Nat'l Res. Def. Council, Inc. v. EPA*, 22 F.3d 1125, 1133 (D.C. Cir. 1994) (per curiam). Any discretion that the US had regarding the Trust Fund Payments' security does not resolve the issue of the express guaranteed minimum annual rate of return on $34.9 million for 30 years, as evidenced by the prior decisions in this case and in *Lujan* / *Babbitt*. The Federal Circuit's opinion in this case contains a single reference to the US' argued-for discretion. The Federal Circuit stated simply that "the Deed of Trust invested the Government with discretionary control *over the level of security* held in trust. . . ." *Inter-Tribal Council of Arizona, Inc. v. United States*, 956 F.3d 1328, 1341 (Fed. Cir. 2020) (emphasis added). Notably, in so stating, the Federal Circuit does not even cite to the Act. The Federal Circuit refers to *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 466 (2003), which states the general rule that a statute that expressly defines a fiduciary relationship can invest the US as fiduciary with discretionary authority over a trust corpus, but as the Federal Circuit explains, that proposition underlies the principle that the fiduciary relationship

"permits a fair inference that the Government is subject to duties as trustee. . . ." *White Mountain Apache Tribe*, 537 U.S. at 466, cited in 956 F.3d at 1342.

Lujan held that the Act gave the US discretion to negotiate with Collier the process for and date of closing on the Land Exchange and "the adequacy of the collateral." *Lujan*, Order of Oct. 30, 1992, SAC Exhibit 25, ECF No. 58-3 at 345-46. But the district court in *Lujan* expressly stated that under the Act itself it had no authority to determine the merits of whether the security the US held was adequate at least in the context of ITCA's claims for declaratory and injunctive relief in that case. "The Secretary's decisions regarding the *adequacy of the collateral and the closing date* are precluded from judicial review under [the Act] subsection 402(h)." *Id*. 345 (emphasis added).[11] The Ninth Circuit affirmed this limited holding. "We affirm on the grounds that the actions of the Secretary are precluded from judicial review because they are committed to agency discretion by law." *Babbitt*, 51 F.3d at 200.

[11] The US disputes "to the extent ITCA seeks an inference that the United States conceded liability on any claim[,]" Def.'s Counterstatement ¶ 88, ITCA's statements about the US acknowledging in *Lujan* that, "notwithstanding the resolution of ITCA's claims in that case, ITCA remained "free to pursue any further monetary remedy they believe they are entitled to in the United States Claims Court," and that"[u]nder contract and trust theories, plaintiffs could seek relief under the Tucker Act for money damages." Pl.'s SOUF ¶ 88, citing SAC ¶ 162, in turn citing Federal Defendants [sic] Supplemental Memorandum in Opposition to Motion for Preliminary Injunction 24-25, *Lujan*, Dkt. No. 15, and Federal Defendants [sic] Opposition to Motion for Temporary Restraining Order 21, *Lujan*, Dkt. No. 4, Exs. 38 and 36 to Complaint, ECF Nos. 1-8, 1-9, 1-11.

ITCA's statement is not an argument of a concession, but it is in support of its argument that the US' liability for ITCA's remaining claims in this case is not foreclosed by *Lujan*. The US' briefs in *Lujan* speak for themselves, as does the post-*Lujan* December 1992 Memorandum 9 ("In a forced sale, presuming the Phoenix market declines, we could receive less than $34.9 million. Failure to obtain the $34.9 million for deposit into the educational funds *or* failure to pay the annual interest payments will expose the United States to serious litigation with the tribes and the real potential for financial liability for any deficiency.") (emphasis added). Def.'s Counterstatement, ¶¶ 94-96, takes issue with ITCA's statements about the Draft December 1992 Memorandum and the December 1992 Memorandum, but the statements are accurate quotes from the Memoranda which speak for themselves.

These are very limited statements or holdings pertaining only to certain aspects of the Trust Fund Payments' security, which Congress addressed in a single section of the Act, Section 405(c)(2). They do not address the Trust Fund Payments' guaranteed minimum annual rate of return on $34.9 million for 30 years set forth in a different section, Section 403(c)(5), let alone hold or imply that any discretion of the US regarding the security resolves the express guaranteed minimum annual rate of return issue. No court to date has addressed the statutory rate of return issue; indeed, this Court's August 1, 2023, Opinion and Order expressly states that ITCA's remaining Claim I issue "is whether relief may be available to the plaintiff for the alleged discrepancy on the rate of return to the trust fund." 2023 WL 4881967, at *8. On this issue, there is no law of the case or other applicable preclusion, and any argument by the US otherwise is without merit.

D. The Act did not give the US Discretion to Earn Less than 8.5% Per Annum on $34.9 Million for all 30 Years

Turning to the merits of any argued-for discretion, the Act does not give the US discretion regarding the guaranteed minimum annual rate of return on the $34.9 million for 30 years. It is common for statutes to have both discretionary and non-discretionary sections. *See New York Pub. Int. Rsch. Grp.*, 321 F.3d at 331. In contrast to the Act § 403(b), which gives the Secretary, after consultation with ITCA and the Navajo Nation, discretion to elect the Trust Fund Payments method (lump sum or 30-years), there is no similar or comparable language in § 403(c)(5). Argued-for discretion requires inquiries into each applicable statutory section and the overall statute. *See Nat'l Wildlife Fed'n v. U.S. EPA*, 980 F.2d 765, 771-72 (D.C. Cir. 1992) (rejecting agency's attempt to create "unfettered" discretion which cannot be squared with the sections at issue or the statute as a whole). "A familiar principle of statutory construction … is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other

provisions of the same statute," *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006), cited in *Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1350 (Fed. Cir. 2015); *accord Federal Express Corp. v. U.S. Dep't of Com.*, 39 F.4th 756, 773 (D.C. Cir. 2022) (citation omitted) ("There is a 'strong presumption that Congress expresses its intent through the language it chooses[,]' including when it chooses to omit language that it used in a different part of a statute.").

Other statutory construction principles applicable here support a lack of discretion regarding the guaranteed minimum rate of return. The Supreme Court recently criticized the presumption of a silent or ambiguous statute necessarily being a delegation of discretionary authority to an agency. *Loper Bright Enter. v. Raimondo*, 144 S. Ct. 2244, 2265 and 2272 (2024). "Congress's failure to grant an agency a given power is not an ambiguity as to whether that power has, in fact, been granted." *Am. Bus Ass. v. Slater*, 231 F.3d 1, 8 (D.C. Cir. 2000) (Sentelle, J., concurring). Rather, "statutory silence on the granting of a power is a denial of that power to the agency." *Id*. (emphasis in original). And generally, neither an agency nor a court has "authority to eliminate [an explicit] statutory right." *Jennings v. Merit Sys. Prot. Bd.*, 59 F.3d 159, 162 (Fed. Cir. 1995) (Newman, J., dissenting); *accord Adam Sommerrock Holzbau GmbH v. United States*, 866 F.2d 427, 429 (Fed. Cir. 1989), citing *DeSoto Securities Co. v. Comm'r of Internal Revenue*, 235 F.2d 409, 411 (7th Cir. 1956) ("Courts have no right, in the guise of construction of an act, to either add words to or eliminate words from the language used by [C]ongress.").

E. As the US Itself Admitted, The Act Plausibly Holds the US Liable for the Difference in Earnings

Given the Act's express guarantee of a minimum 8.5% annual earnings on $34.9 million for 30 years, as the US itself has stated, when Collier stopped paying and the US recovered from Collier the approximate Final Payment amount, since the US was unable to "ensure that Collier pledged enough collateral to cover the [$34.9 million], *but also an interest deficiency*[,]" May 1992

Memorandum 3 (emphasis added), "the Government [is] obligated to make up the difference between Collier's 8.5 percent interest and the rate [the US] is able to earn by investing [the $34.9 million] *for the remainder of the thirty year payment period*." *Id*. (emphasis added). In the US' own words, this is a plausible interpretation of the Act and the concomitant liability of the US for the guarantee of 30 years of "fixed interest" on the $34.9 million, not just "fixed interest" up to the point of recovery of the $34.9 million, which is what the US in fact recovered and argues satisfies its obligations under the Act. *See, e.g.*, US' Response Brief 6, 23, 25.[12]

> Further to this point, as this Court has stated, there is an unresolved liability issue about
>
> the precise amount of security the United States was required to maintain in the Trust Estate. For example, if the collateral should have been sufficient to secure the principal amount and all 30 annual interest payments, the United States should have maintained the Trust Estate at a higher value. If the collateral only needed to secure the annuity and interest payments as they came due, the United States potentially could have maintained the Trust Estate at a lower value.

2023 WL 4881967, at *5. Perhaps consistent with its argued-for discretion, the US chose to allow Collier to pledge less security than needed to cover the $34.9 million and the minimum 8.5 % annual earnings on the $34.9 million for the full 30 years, and the US chose to recover from Collier amounts less than the $34.9 million and the minimum 8.5 % annual earnings on the $34.9 million for the full 30 years. As ITCA has argued, and as the May 1992 Memorandum shows, a plausible

[12] The US makes an unsupported assertion that ITCA has abandoned its argument that the term "accrued interest" in the Deed of Trust "should be interpreted to include future (i.e., unaccrued interest)." US' Response Brief 18 n.4. That is incorrect; ITCA has not abandoned this argument.

The US also disputes ITCA's statement, Pl.'s SOUF ¶ 110, that the US acknowledged in *U.S. v. Collier* that recovery of just the $34.9 million Final Payment would not satisfy the Act's Annual Payment obligations, "to the extent it is construed as conceding liability[,]" and as being not material. Def.'s Counterstatement ¶ 110. The US counters that its "position in the *Collier* litigation was driven by the Deed of Trust's Maintenance of Collateral Value provision." *Id*. The US' brief in *U.S. v. Collier* speaks for itself and is the best evidence of its contents.

interpretation of the Act is that the US made these choices at its own risk of being liable to ITCA for the difference in the actual earnings and the earnings required by the Act for the full 30-year period.[13] That is the essence of ITCA's remaining statutory rate of return claim, a right unambiguously guaranteed by the Act.

F. Alternatively, Assuming *Arguendo* that the Act is Ambiguous on this Point, the Indian Canons of Construction Must Be Applied to Construe the Act in ITCA's Favor

The Act unambiguously guarantees the Trust Funds a minimum rate of return of 8.5% on $34.9 million for all 30 years and does not give the US discretion to earn less without being liable for the difference. However, should this Court determine that the Act is ambiguous on this point, the Court must apply the Indian canons of construction and construe the Act in ITCA's favor. *Bear v. United States*, 112 Fed. Cl. 480, 486 (2013); *Shoshone Indian Tribe of Wind River Reservation. v. United States*, 364 F.3d 1339, 1352 (Fed. Cir. 2004), *cert. denied sub nom.*, 544 U.S. 973 (2005).

CONCLUSION

As a matter of law, the US is liable for the difference between the Act's guaranteed minimum annual rate of return on $34.9 million for the entire 30 years, and the actual earnings on the approximate amount of $34.9 million that it recovered from Collier and holds in trust. Summary judgment for ITCA on this issue of liability is appropriate, with the actual amount of damages to be determined via later proceedings. *See Energy Nw. v. United States*, 69 Fed. Cl. 500, 504 (2006) (court does not require litigant to prove its damages concurrent with motion for

[13] Again, the US ignores the statutory rate of return issue when it disputes ITCA's characterization of the US' admission in *U.S. v. Collier* that, "the intent of the parties was that the nonrecourse provisions [in the TFPA and related documents] allocate the risk of [Collier's] nonpayment to the [United States,]" Pl.'s SOUF ¶ 103, "to the extent it implies that the United States would be liable for Collier's future interest payments[.]" Def.'s Counterstatement ¶ 103. As the May 1992 Memorandum shows, the admission – that the US bore the risk of Collier's nonpayment – also applies to the statutory rate of return issue.

summary judgment on liability; determination of recoverable damages is a matter for later determination); *Messerschmidt v. United States*, 29 Fed. Cl. 1, 11 (1993), *aff'd* 14 F.3d 613 (Fed. Cir. 1993), *cert. denied*, 511 U.S. 1010 (1994) (on summary judgment, court bifurcates liability and damages because question of damages need only be addressed "until and unless" liability is found).[14]

For the reasons stated above and in ITCA's Summary Judgment Opening and Response Briefs, ITCA is entitled to judgment as a matter of law on its remaining claims, and the US' summary judgment motion should be denied.

Dated this 18th day of July, 2024.

Respectfully submitted,

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[14] The US disputes ITCA's statement, Pl.'s SOUF ¶ 117, that "[t]he earnings by the US as trustee on the portion of the recovery in *U.S. v. Collier* that could be attributed to a portion of the $34.9 million Final Payment amount have been less than 8.5% per annum. SAC ¶ 214[,]" (citation in original), on the grounds that "ITCA does not support this factual statement with any admissible evidence." Def.'s Counterstatement ¶ 117. RCFC 56(c)(2) allows for objections or disputes to facts that "*cannot* be presented" by admissible evidence (emphasis added). The US cannot meet this burden of "inability," *see Mirror Worlds Techs., LLC v. Facebook, Inc.*, 800 Fed. App'x 901, 910 (Fed. Cir. 2020), first and foremost because information about the earnings on an Indian trust account is within the possession and control of the trustee US. In any event, as ITCA argues, *supra*, proof of damages is not required at this stage of the proceedings but can and should be addressed following a ruling of liability.