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 MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON THE REMAINING CLAIM I ISSUES IN THE SECOND AMENDED COMPLAINT

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INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff, the Inter-Tribal Council of Arizona, Inc. (ITCA), submits this Memorandum in support of its Motion for Summary Judgment on the remaining Claim I issues in the Second Amended Complaint (SAC), ECF No. 58. Claim I arises under the Arizona-Florida Land Exchange Act of 1988, Pub. L. No. 100-696 (1988) (Act), which established Trust Funds in exchange for the closure of the Phoenix Indian School that served ITCA member Indian tribes. The closure allowed the United States (US) to exchange the Indian School land in Arizona for land in Florida owned by the Barron Collier Company (Collier) which the US wanted for a wildlife refuge. Because the Arizona land was worth $34.9 million more than the Florida land, the Act required Collier to pay that difference, defined by the Act as the "Monetary Proceeds," into the Trust Funds.

The US elected the Act's option to allow Collier to pay the Monetary Proceeds over a period of 30 years according to the following terms: 1) payment of a minimum annual rate of return of 8.5% on $34.9 million for 30 years, and 2) at the end of 30 years, the $34.9 million. Upon the election of this option, the Act required the US to enter into a Trust Fund Payment Agreement (TFPA) with Collier. The Act also required the US as trustee to secure the amounts due per the 30-year option, *i.e.*, the $34.9 million Monetary Proceeds *and* the minimum annual rate of return of 8.5% on $34.9 million for 30 years. Collier stopped paying after 15 years. Lacking sufficient security, the US sued Collier under the TFPA and, under a settlement, recovered from Collier about $48 million for the Trust Funds. *United States v. Collier*, No. 2:14-cv-00161 (D. Ariz. June 29, 2016) (*U.S. v. Collier*).

The settlement recovery did not fulfill the Act's requirements to the Trust Funds, and because the US failed to hold in trust sufficient security, the US is liable for the difference in the form of damages. The Act provides that under the 30-year option, the Trust Funds will receive

$34.9 million at the end of 30 years, and a minimum rate of return each year of 8.5% calculated on the $34.9 million for the full 30-year period. Thus, under the Act, when Collier stopped paying, the US should have had sufficient security so that, once collected and, if need be, reinvested by the US, it would account for 1) an amount equal to the minimum 8.5% annual rate of return calculated on the $34.9 million for the remainder of the 30-year period, and 2) the $34.9 million at the end of the 30-year period. The settlement recovery in *U.S. v. Collier* and its earnings to date have not accounted for this full amount.

To be clear: ITCA's remaining Claim I issues are based upon the questions of *how much security the Act required the US to hold in trust* and whether the recovery in *U.S. v. Collier* has made the Trust Funds whole under the Act. As discussed herein, these remaining Claim I issues are distinct and independent from and not based on ITCA's dismissed Claim II issue of whether the Act required the US to collect or make annual payments not paid by Collier.

QUESTIONS PRESENTED

1. Does the Act require the United States to hold in trust security sufficient to ensure that the Trust Funds receive both $34.9 million (the Monetary Proceeds) at the end of 30 years and an amount equal to the Act's mandated minimum rate of return of 8.5% calculated on the $34.9 million for the 30-year period?

2. Assuming that the Act requires the United States to hold in trust security as articulated in Question No. 1, and acknowledging that the United States has admitted to breaching its fiduciary duty to hold sufficient security when Collier stopped making payments, has the United States delivered to the Trust Funds the amount due the Trust Funds under the Act, taking into account the United States' recovery in *U.S. v. Collier*?

STATEMENT OF THE CASE

A. Procedural History of Claim I Post-2020 Remand to this Court

1. The Court of Appeals Preserved the Failure-to-Maintain Sufficient Security Portion of Claim I and Viewed it as Distinct from the Dismissed Claim II Failure-to-Collect Payments Claim

Claim I of ITCA's Second Amended Complaint (SAC), ECF No. 58, alleges, *inter alia*, that the US as trustee failed to hold sufficient security as the Act required. SAC ¶¶ 254-68. In 2020, the Court of Appeals reversed this Court's dismissal of a portion of that Claim I issue and remanded it to this Court for resolution. *Inter-Tribal Council of Arizona, Inc. v. United States,* 956 F.3d 1328, 1339-1344 (Fed. Cir. 2020). The threshold issue remanded in Claim I concerned how much security the Act required the US to hold in trust "over time," *id*. at 1339, which the Court of Appeals unequivocally stated would need to be resolved by this Court in the first instance. *Id*. n.11.[1]

The Court of Appeals did not reverse and remand SAC Claim II, that the US failed to collect or make all Trust Fund Payments required by the Act that Collier did not make.[2] *Id*. 1345-46. In affirming Claim II's dismissal, the Court of Appeals agreed with this Court that the Act does not require the US to collect or make those payments. *Id*. But the Court of Appeals unequivocally

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[1] The Court of Appeals affirmed this Court's dismissal of the other portion of Claim I, that the US failed to ensure adequate security when it negotiated the TFPA in 1992, on the grounds that this issue was time-barred by the general six-year statute of limitations for claims against the US, 28 U.S.C. §2501. 956 F.2d at 1339-40 and 1344-1345. On remand, this Court has dismissed SAC ¶¶ 255-59, which allege that many provisions in and terms of the TFPA and related documents were breaches of trust in violation of the Act. *Inter-Tribal Council of Arizona, Inc. v. United States,* 2023 WL 4881967, at *10 (Fed. Cl. Aug. 1, 2023). Accordingly, by this Motion, ITCA does not challenge the provisions and terms of the TFPA or related documents. However, ITCA maintains and expressly preserves its arguments that the TFPA and related documents must be construed to be consistent with the Act. As the Court of Appeals stated, the application of an act of Congress by an agency "may not be defeated by private contractual provisions." 956 F.3d 1343 n.13.

[2] This Brief refers to Claim II in shorthand as the "failure-to-collect claim" or "collection issue."

viewed Claim I as distinct and independent from Claim II. Claim II's dismissal did not preclude the remand of non-dismissed Claim I issues for this Court's consideration. Those Claim I issues can be summarized as, 1) how much security did the Act require the US to hold in trust, and 2) notwithstanding the recovery in *U.S. v. Collier*, is the US further liable to the Trust Funds under the Act.

Regarding the Claim I security sufficiency issue, the Court of Appeals stated that the Act "demonstrates Congress's expectation that the security was to be maintained at a level sufficient to secure Collier's payment obligations." *Id*. 1340. The Court of Appeals declined to reach the issue of how much security was "sufficient," but explicitly expected this Court to address the issue in the first instance. *Id*. 1341 n.11 ("we take no position on the issue … as this issue is not material to our present determination, and also because the Court of Federal Claims did not pass on this issue below…[T]his issue will ultimately need to be resolved").

The Court of Appeals also gave unambiguous instruction on the US' liability for a breach of trust for insufficient security. After acknowledging that this Court's dismissal of the security sufficiency issue was based on the reasoning that the US "was not required … to do anything more than it did in filing" *U.S. v. Collier*, 956 F.3d at 1339, *citing Inter-Tribal Council of Arizona, Inc. v. United States*, 140 Fed. Cl. 457, the Court of Appeals held, to the contrary, that *U.S. v. Collier* did not "relieve the Government of obligations arising from its statutory fiduciary duty." 956 F.3d, 1339 n.13.

2. On Remand, the Remaining Claim I Issues Risk Improper Conflation with the Dismissed Claim II Issue

Five years post-remand, after two rounds of summary judgment motions, the remanded portion of Claim I has been narrowed, with this Court dismissing SAC ¶¶ 255-62 and 264-268(b). *Inter-Tribal Council,* 2023 WL 4881967, at *10 (dismissing SAC ¶¶ 255-59, 264-67 and 268(a)

and 268(b)); Order (Aug. 7, 2024), ECF No. 167 (dismissing SAC ¶¶ 260-62). Not dismissed is SAC ¶ 263, which alleges that "[t]he United States' failure to have sufficient security in the Trust Estate when Collier defaulted was a breach of trust in violation of the Act." This allegation, along with the concomitant remaining allegation in ¶ 268(c) of the extent of the US' liability for the alleged breach of trust, are the remaining Claim I issues and are described in detail as follows.

The breach of trust alleged in SAC ¶ 263 – that the US held insufficient security when Collier stopped paying – now is undisputed. Defendant's Response to Plaintiff's First Set of Requests for Admission, RESPONSE to Request No. 1 at 4 ("the United States admits … that the collateral in the Trust Estate … as of December 18, 2021, was not sufficient to ensure that ITCA received its share of the value of the annual interest payments that Collier was scheduled to pay from December 18, 2018 through December 18, 2026"), attached hereto as Exhibit A; *see also* Joint Statement of Undisputed Facts (JSOUF) ¶ 42, ECF No. 154.

The existence of the US' liability for that breach of trust also has been established. When Collier stopped paying, because the US held insufficient security, it sued Collier. JSOUF ¶ 44, citing *U.S. v. Collier*. From a settlement with Collier, the US recovered about $48 million, of which ITCA's Trust Fund was entitled to receive 95%. JSOUF ¶¶ 51-52. Thus, *U.S. v. Collier* confirmed the existence of the US' liability to the Trust Funds for insufficient security and partially addressed the extent of that liability. The remaining post-remand issue is whether there is any further liability on the part of the US as trustee, as ITCA alleges, due to the difference between 1) what ITCA's Trust Fund has received and what it will earn on the Monetary Proceeds for the remainder of the 30-year period and 2) what the Act required, *i.e.*, a minimum annual rate of return of 8.5% on $34.9 million for 30 years plus the $34.9 million.

However, post-remand, the remaining Claim I issues risk improper conflation with the dismissed Claim II collection issue. ITCA acknowledges the dismissal of its failure-to-collect claim on the ground that the Act does not require the US to collect or make payments that Collier did not make. ITCA nevertheless argues independently under Claim I that the Act required the US as trustee to hold or collect and reinvest sufficient security to meet the Act's requirements to the Trust Funds if Collier stopped paying. ITCA further argues that because the US failed to do so, ITCA is due the difference between what the Act requires the US to deliver to the Trust Funds and what has actually been delivered to the Trust Funds, taking into account the recovery in *US v. Collier*. *See* SAC ¶ 268(c). ITCA's argument on the remaining Claim I issues is in keeping with the Court of Appeals' separation of the Claim I and Claim II issues: although the US was not obliged to collect or make Collier's unpaid payments, there remain distinct and independent issues about how much security the Act required the US to hold in trust, *see* 956 F.3d at n.11, and, based on how much security the Act required the US to hold, whether, notwithstanding the *U.S. v. Collier* recovery, the US has further liability to the Trust Funds under the Act, *id*. n.13.

3. The Remaining Open Claim I Issues Must Be Resolved Without Conflation

After remand, the remaining Claim I issues are viable and can and should be resolved by this Court without conflation with the dismissed Claim II collection issues. As noted above, and in keeping with the dismissal of Claim II, the Claim I allegation in SAC ¶ 264, that "[t]he United States' *failure to recover from Collier sufficient security* or cash to meet in full the Trust Fund Payments obligations was a breach of trust in violation of the Act" (emphasis added), has been dismissed. In contrast, not dismissed is SAC ¶ 263, which alleges that, "[t]he United States' *failure to have sufficient security* in the Trust Estate when Collier defaulted was a breach of trust in violation of the Act." (Emphasis added). Further as noted above, the breach of trust (insufficient

security) alleged in ¶ 263 has been established, but the question remains *how much* security the Act required the US to hold in trust.

The existence of liability for the breach also has been established, but the extent of liability remains to be determined. Regarding the extent of liability, and again, in keeping with Claim II's dismissal, this Court has dismissed SAC ¶ 268(b), which speaks to liability for Collier's unpaid annual payments. But SAC ¶ 268(c) – *which has **not** been dismissed* -- alleges that "[a]s a result of its breaches of trust in violation of the Act's Trust Fund security requirements, the United States is liable to ITCA for … 95% (ITCA's allocation) of the difference between the actual return on the $34.9 million once it has been recovered in full, and the Act's mandated minimum rate of return on the $34.9 million as of the same time, through the full thirty year annual payment time period, i.e., calendar year 2026." Notably, ¶ 268(c) is the precise interpretation of the full extent of the US' fiduciary liability for failure to hold sufficient security under the Act that the US itself has admitted is plausible. *See* Memorandum Re Collier Land Exchange, Decision on Scope of the Trust Fund Payment Agreement from Assistant Secretary for Indian Affairs and Assistant Secretary for Fish and Wildlife and Parks to The Secretary 2-3 (May 1992 Memo), attached hereto as Exhibit B.

B. Relevant Background for the Remaining Claim I Issues

1. The Phoenix Indian School and the Arizona-Florida Land Exchange

In 1891, the US Department of the Interior (Interior) opened the Phoenix Indian School, an off-reservation elementary and secondary boarding school, on land that the US owned in Phoenix, Arizona. Plaintiff's Statement of Undisputed Facts in Support of its Motion for Summary Judgment on the Remaining Claim I Issues in the Second Amended Complaint (Pl.'s SOUF) ¶ 3. Almost a century later, the US began to close "off-reservation [Indian] boarding schools [primarily to achieve federal] budget savings." *Id*. ¶ 4. When tribes nationwide served by the schools raised

concerns, Congress placed "limitations [and requirements on Interior's] discretion" to close or curtail them. *Id*. ¶ 5.

Around the same time (the 1980s) the US was considering acquiring Collier's Florida land for a federal wildlife refuge. *Id*. ¶ 6. Lacking the funds to purchase that land outright, the US offered to exchange various properties that it held. *Id*. ¶ 7. Collier was interested in the Phoenix Indian School property, which was estimated to be worth far more than the Florida land. *Id*. ¶¶ 8 and 19.[3]

In February 1987, Interior determined that the Phoenix Indian School was no longer required or needed. *Id*. ¶ 10. At a congressional hearing, ITCA opposed the School's closure and requested legislation providing either for its continued operation, or, in the alternative, if it were closed, that "an amount equal to [] forty five percent of the fair market value of the total amount of the Phoenix Indian School land be deposited into a trust fund for member tribes of" ITCA. *Id*. ¶ 11. Collier supported a land exchange whereby, *inter alia,* "the additional money needed to equalize the exchange … would establish the Arizona Indian Trust Fund." *Id*. ¶ 12. Interior supported the land exchange, but not the trust funds' creation or funding from the land equalization money. *Id*. ¶ 13.

In May 1988, Collier and the US negotiated an Exchange Agreement, which provided for a "Land Exchange" of Collier's Florida land for the Phoenix Indian School property. *Id*. ¶¶ 17-18. The Exchange Agreement required Collier to pay the US $34.9 million (the estimated difference

[3] By 1987, the Phoenix Indian School property was "considered prime land for development." *Id*. ¶ 14. "Given the apparent reality that the Phoenix Indian School will, in fact, close in the near future, the federal government [was] faced with having a very significant and valuable asset …." *Id*. "Appraisers … said that the school property is potentially the most valuable parcel of urban development land left in Phoenix, the State of Arizona, and possibly the western half of the United States." *Id*. ¶ 15.

in value between the Florida land and the Arizona land) in cash at the Land Exchange's closing. *Id*. ¶¶ 19-20. This Land Exchange was "the largest and one of the most complex interstate land exchanges ever consummated by" Interior. *Id*. ¶ 21.

2. The Arizona-Florida Land Exchange Act's Legislative History

Effectuation of an interstate land exchange required an act of Congress. *Id*. ¶ 22. A bill, H.R. 4519, 118th Cong. (1988), "the Arizona-Florida Land Exchange Act of 1988 … provide[d] for the disposition of lands in the city of Phoenix, known as the Phoenix Indian School property, in exchange for environmentally sensitive lands in Florida." *Id*. ¶ 23. "[T]he cash component [of the land exchange] would be transferred to trust funds to be used for primarily educational purposes of the Arizona Indian tribes who have used the school in the past." *Id*. ¶ 24. H.R. 4519 "would effect a major land exchange" and "[t]o accomplish this, the United States is agreeing to close the Phoenix Indian School and transfer to private interests most of the extremely valuable 104 acres on which the school sits in north central Phoenix." *Id*. ¶ 25. Simultaneously, S. 2420, 118th Cong. (1988), was "A bill to provide for the disposition of certain lands in Arizona under the jurisdiction of the Department of the Interior by means of an exchange of lands, and for other purposes." *Id*. ¶ 26.

However, Collier proposed, and the Act ultimately included an alternative to Collier paying the $34.9 million as a lump sum at closing. *Id*. ¶ 28. The alternative was that Collier pay the lands' difference in value by annual payments over a period of 30 years and a final payment at the end of 30 years. *Id*. ITCA's response proposal was that if the difference in value were to be paid over 30 years, the annual payments for the full 30 years must be no less than what would be earned on $34.9 million at a minimum annual rate of return of 8.5%. *Id*. ¶ 29. This proposal also was added to the legislation that was enacted. *Id*.

3. The Arizona-Florida Land Exchange Act of 1988

Congress enacted the Act, ratifying the Exchange Agreement. *Id*. ¶¶ 32 and 34. The Act provided for the Phoenix Indian School's closure, which was closed in 1990. *Id*. ¶ 33. To compensate Arizona tribes for the closure, the Act established two Trust Funds into which the lands' difference in value ($34.9 million), defined by the Act as the "Monetary Proceeds" would be paid. *Id*. ¶ 35. One Trust Fund is the Arizona Inter-Tribal Trust Fund (AITF), which is for the benefit of ITCA and 19 tribes (and their members) that were members of ITCA on January 1, 1988. *Id*. ¶ 36. The Act allocates 95% of the Monetary Proceeds to the AITF, and the other 5% to a separate Trust Fund established for the Navajo Nation. *Id*. ¶¶ 37-38.

The Act mandated that the payment to and receipt by the US of the $34.9 million Monetary Proceeds were compulsory to the Land Exchange. *Id*. ¶ 39. The Act required that the Monetary Proceeds be paid either by a lump sum at the Land Exchange's closing, or in the form of 30 annual payments and a final payment at the end of 30 years specified and calculated as the Act required (30-year option). *Id*. ¶ 40. The 30-year option is defined as "30 annual payments equal to the interest due" on the final payment of $34.9 million at a rate of return set by the Act "that in no event shall be lower than 8.5 percent or higher than 9.0 percent," plus the payment of $34.9 million at the end of 30 years. *Id*. ¶ 41.

The Act provided that before electing the payment option, Interior had to consult with ITCA and the Navajo Nation. *Id*. ¶ 42. The Act's House Committee Report states that, "While the Committee has given the Secretary the discretion, as trustee, to make this determination [regarding the payment option], it intends that the preference of the tribes, unless clearly outweighed by other considerations, will be given effect." *Id*. ¶ 43. If the 30-year option were chosen, the Act required the US to execute a TFPA with Collier pursuant to which the "payments will be made." *Id*. ¶ 44. Further, if the 30-year option were chosen, the Secretary of the Treasury was to hold in trust

security for that option. *Id*. ¶ 45.

4. Consultation on and the Election of the 30-Year Option and the Trust Fund Payment Agreement Negotiations

By the US' own admission, its TFPA negotiations with Collier were "detailed and protracted." *Id*. ¶ 46. By June 1991, Collier stated that it would not proceed with the Land Exchange unless it could use the 30-year option. *Id*. ¶ 47. Accordingly, in September 1991, Interior consulted with ITCA and the Navajo Nation. *Id*. ¶ 48.

At the consultation, in response to concerns of Tribe Leaders about the 30-year option, Interior attorneys and high-level Interior officials assured them that as trustee Interior would abide by the Act's security obligations. *Id*. ¶¶ 49-52. For example, Interior Solicitor's Office attorney David Moran stated that, "[a]ny serious mismanagement of the trust funds, or any serious mismanagement of collateral or the establishment of the collateral [means] the legal liability [is] on behalf of the United States to make up the difference." *Id*. ¶ 50. Moran also 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." *Id*. ¶ 51. He further stated that if Collier were "to go under, [the United States is] still … going to be liable." *Id*. ¶ 52.

Further, the Interior attorneys and officials readily acknowledged that having the security consist, especially exclusively, of real property would be problematic. *Id*. ¶ 53. Interior Solicitor's Office Attorney David Watts stated that he was "concerned about a portfolio that proposes exclusively in real estate." *Id*. Joseph Doddridge, Deputy Assistant to the Assistant Secretary for Fish and Wildlife and Parks stated, "Nobody knows what that property is going to be worth 10-15 years from now. Its [sic] tough to get rid of property in a bad market." *Id*. Moran agreed. "I mean real property quite frankly in a good market isn't all that liquid." *Id*.

After the consultation, Interior Assistant Secretary for Indian Affairs Eddie Brown reported to Interior Secretary Manual Lujan that electing the lump sum option likely would "preclude a deal from being made." *Id*. ¶ 54. Brown stated that the US "has a trust responsibility in negotiating the Trust Fund Payment Agreement owed to the Intertribal Council and the Navajo Nation and that [one of t]he most important factors to be considered . . . [is] the degree of security provided the Department in fulfilling its trust responsibilities to the beneficiaries of the trust." *Id*. ¶ 55. Brown also stated that "because of the uncertain value of the [Phoenix Indian School] property …, securing the full amount of the Indian trust funds with the property would not be adequate in meeting our trust responsibilities." *Id*. But before the end of the month, "over objections by the Indian beneficiaries[,]" Secretary Lujan agreed to Collier's demand for the 30-year option. *Id*. ¶ 57.

In March 1992, Assistant Secretary Brown expressed his frustration with the now months-long arduous negotiations with Collier.

> The Secretary has made several steps to try and accommodate Collier, while fully meeting his legal duties under the Exchange and his trust responsibilities to the Indian Tribes . . . As the beneficiaries of these proceeds, the InterTribal Council and the Navajo Nation have a major concern regarding the security of this anticipated flow of income over the next thirty years. In negotiating this Exchange, and particularly a collateral agreement to secure the Indian's [sic] interest, we have the responsibility of ensuring that only prudent financial analysis guides our decisions. This Exchange cannot diminish our obligation to protect the Indian tribes' financial interest in the Exchange.

Id. ¶ 63. Of particular import to the remaining Claim I issues in this case is Interior's documentation of the negotiations set forth in Memoranda in May and December 1992. These Memoranda articulate the US' interpretation of how much security the Act required it to hold in trust and the potential extent of the US' liability for failing to hold sufficient security.

a. The May 1992 Memo

Written sometime around May 15, 1992, the May 1992 Memo called for "a Secretarial

decision … to determine the specific scope of Collier's financial obligation under the Trust Fund Agreement." *Id*. ¶¶ 64 and 67. After quoting the Act § 403(c)(2) (the 30-year option), the Memo stated that "[t]he question posed by this language is whether Collier's obligation is to be treated as" a guarantee of thirty $2.9 million annual payments "even if Collier defaults" and the $34.9 million final payment, or, a "traditional" loan obligation with no obligation regarding the annual payments beyond default. *Id*. ¶¶ 68-69.

The May 1992 Memo inaccurately opined that the Act does not "address this issue," and acknowledged that *both* interpretations of the Act were plausible. *Id*. ¶¶ 68-70. The Memo then concluded with recommending the interpretation ***less protective of tribal interests***. "We believe the Secretary has the authority and discretion to determine the scope of the [Trust Fund Payment] agreement and specifically stipulate the character of the annual payments," [and thus] the Trust Fund Payment Agreement should view Collier's obligation as a traditional financing arrangement," *id*. ¶ 71. The May 1992 Memo was not disclosed to or discussed with ITCA (or the Navajo Nation). Defendant's Response to Plaintiff's First Set of Requests for Admission, RESPONSE to Request No. 4 at 6 ("the United States admits that it did not previously provide the identified memos [sic] to ITCA"); *accord id*. RESPONSE to Request No. 5; *accord* Pl.'s SOUF ¶ 73.

b. The Agreement in Principle and the Four-Year Extension

Having decided to view the Trust Fund Payments as a traditional financing arrangement, Interior proceeded to consider several options for the 30-year option's security. Pl.'s SOUF ¶¶ 74-76. In June 1992, Interior Secretary Lujan met with ITCA and the Navajo Nation to discuss these options. *Id*. ¶¶ 77-79. Two months later, Secretary Lujan again met with them to announce that the US had agreed to a four-year extension for the Land Exchange's closing. *Id*. ¶ 80. Four more years were needed for the US to have "enough collateral" to secure the 30-year option. *Id*. ¶ 81. Secretary

Lujan explained that, in addition to a lien on the now 15-acre Phoenix Indian School property, the security likely would include liens on Collier's rights and interests in two lots in Downtown Phoenix (Downtown Lots) that Collier had acquired by exchanging most of the original Phoenix Indian School property with the City of Phoenix. *Id*. ¶ 82. Regarding the Downtown Lots, Secretary Lujan touted that, "that's where the value is." *Id*. In response to a question from a Tribe Leader about whether Collier might go bankrupt, Counselor to the Secretary Timothy Glidden responded, "We don't see any remote possibility, but our trust responsibility says that we have to take that into consideration [or] the tribes can sue us for breaching our trust responsibility for not getting collateral in case there is the remotest possibility they went bankrupt." *Id*. ¶ 83.

In August 1992, Interior announced that it had reached with Collier a TFPA agreement in principle and an agreement to extend the Land Exchange closing for four years. *Id*. ¶¶ 84-85. The TFPA terms would have Collier make 30 consecutive annual payments of $2.96 million per year starting one year after the closing and the $34.9 million final payment at the end of 30 years. *Id*. ¶ 86. Collier's obligations would be secured by a lien on the 15-acre Phoenix Indian School property and liens on Collier's rights and interests in the two Downtown Lots. *Id*. ¶ 87. Execution of the TFPA was "contingent on a determination by the Secretary that appraisals support values on these properties to sufficiently collateralize Collier's obligations." *Id*. ¶ 88.

c. The December 1992 Memos

With the Agreement in principle and the four-year extension on closing, Interior proceeded to evaluate the sufficiency of the security. *Id*. ¶¶ 91-101. A draft memorandum dated December 1, 1992, from the Assistant Secretaries for Indian Affairs and Fish and Wildlife and Parks to the Interior Secretary, Memorandum Re Collier Land Exchange: Sufficiency of Collateral for Payments to the Indians Trust Funds Established by Public Law 100-696, Arizona Florida Land Exchange Act (Draft December 1992 Memo), attached hereto as Exhibit C, Pl.'s SOUF ¶ 91, stated

that the appraised value of the 15-acre Phoenix Indian School property was $21.6 million and the appraised value of the two Downtown Lots was $12 million. *Id*. ¶¶ 94-95. The Draft December 1992 Memo stated that based on these appraisals, the proposed security was "98.6%" of what Interior viewed as "adequate" security. *Id*. ¶ 97.

The draft December 1992 Memo was followed by a non-draft December 1992 Memorandum, (December 1992 Memo), attached hereto as Exhibit D; Pl.'s SOUF ¶ 92. The December 1992 Memo repeated the appraised values but added that the *estimated* value of the Downtown Lots was $13.8 to $15.87 million. Pl.'s SOUF ¶¶ 94-98. That estimate, of course, increased the value of the proposed security and increased its "adequacy" to be "101 to 107%" of what Interior viewed as "adequate" security. *Id.* ¶ 99. The December 1992 Memo then set forth "Pros and Cons of Proceeding with the Exchange," *id*. ¶ 100, and made "Recommendations," *id*. ¶101, to proceed.

5. The Trust Fund Payment Agreement

Collier and the US executed a TFPA on December 18, 1992. JSOUF ¶ 1. The TFPA provided for a Promissory Note (Note), promising Collier's payment to the US of both the $34.9 million and annual payments for 30 consecutive years of $2,966,500 million. *Id*. ¶¶ 2-3. The Note expressly prohibited prepayment of both the $34.9 million and the annual payments. Pl.'s SOUF ¶ 102.

The TFPA provided for an Annuity to secure the $34.9 million under the Note. JSOUF ¶¶ 4-5. Collier would make 30 annual payments into the Annuity that at the end of 30 years would equal $34.9 million. *Id*. ¶ 4. The Note also was secured by a "Trust Estate" as defined in a Deed of Trust (Deed) from Collier to the US. *Id*. ¶ 5. The Trust Estate consisted of liens on the remaining 15-acre Phoenix Indian School property and Collier's development rights and interests in the two Downtown Lots. *Id*. ¶ 6.

The Deed allowed Collier to request a release of portions of the Trust Estate (*i.e.,* the liens on the Downtown Lots) under certain conditions. JSOUF ¶¶ 8-12. Importantly, the Deed also contained a "Maintenance of Collateral Value" provision, which allowed the US, in the event the security became insufficient, to request Collier to add U.S. Government-backed securities to the Trust Estate to make up for the insufficiency. *Id*. ¶ 15. In *U.S. v. Collier*, the US relied on the Maintenance of Collateral Value provision as the mechanism by which it could demand additional security from Collier. *Id*. ¶ 16.

The TFPA, the Note, and the Deed provided that Collier's debt was "nonrecourse" in terms of personal liability, and thus the only remedy for the US if Collier were to stop paying would be *in rem* against the remaining security. *Id*. ¶ 7. As with many other provisions in the TFPA and related documents, the nonrecourse provisions were negotiated terms agreed to by the US, not mandated by the Act. Pl.'s SOUF ¶ 103. The US has admitted that "the intent of the parties was that the nonrecourse provisions allocate risk of [Collier's] nonpayment to the government." *Id*. ¶ 104.

6. Collier's 15 Years of Payments, the Lien Releases, and Collier's Default

Because of the agreement to defer closing on the Land Exchange for up to four years from October 1992, which agreement was upheld in *Inter Tribal Council of Az. v. Lujan*, No. 2:92-cv-01890 (D. Ariz. Oct. 8, 1992), Collier did not have to make payments before December 1997, which is when it made its first payment. Pl.'s SOUF ¶¶ 89-90. Within one year from then (*i.e.,* 1998), and again, at the ten-year mark of making payments (2007), Collier requested releases of the liens on the Downtown Lots. JSOUF ¶¶ 18-19 and 26-27. Relying on Collier's appraisals of the Unreleased Property, and without performing its own appraisals, the US released both liens, after which only the lien on the 15-acre Phoenix Indian School property remained in the Trust Estate. *Id*. ¶¶ 20-22 and 28-30.

The US did not provide notice to ITCA of the lien releases. *Id*. ¶¶ 25 and 33. The US did

not demand that Collier supplement the security at any time before or after the lien releases or the economic downturn in 2008. *Id.* ¶ 43. Not before or immediately after releasing the liens, or during or immediately after the 2008 economic downturn, did the US disclose security insufficiency to ITCA, nor did the US provide information to ITCA from which ITCA could independently calculate the value of the existing or remaining security. *Id.* ¶¶ 40-41.

In 2012, after making 15 annual payments beginning in 1997, and making some payments into the Annuity, Collier stopped paying. *Id.* ¶¶ 37-38. It was established by the US as an undisputed fact in *U.S. v. Collier* that Collier admitted it never intended to make all the Trust Fund Payments. Pl.'s SOUF ¶ 108. Collier stated that at the time of stopping payments, 15 annual payments of approximately $2.9 million, plus the $34.9 million, remained to be paid to the US; considering the payments that Collier had made into the Annuity, Collier stated that approximately $66.4 million due the Trust Funds by year 2027 remained unpaid. *Id.* ¶ 109.

7. U.S. v. Collier

The US sued Collier in federal district court primarily to have Collier supplement the security. JSOUF ¶¶ 45-46. The US acknowledged in *U.S. v. Collier* that recovery of just the $34.9 million would not satisfy the remaining unpaid annual payment obligations. Pl.'s SOUF ¶ 111. As noted above, Collier stated that when it stopped paying it owed approximately $44.5 million in annual payments, *i.e.*, 15 years of $2.9 million annual payments. *Id.* ¶ 112. The recovery the US sought in *U.S. v. Collier* initially included four and subsequently included five years (2012, 2013, 2014, 2015, and 2016) of $2.9 million annual payments. *Id.* ¶ 113; *see also* JSOUF ¶ 49. The recovery the US obtained via a settlement with Collier did not include unpaid annual payments beyond the five years. Pl.'s SOUF ¶¶ 113 and 116. The recovery sought and obtained in *U.S. v. Collier* did not account for the $34.9 million to earn a minimum annual rate of return of 8.5% for the full 30-year period. *Id.* ¶ 117.

The total recovery by the US in *U.S. v. Collier* was roughly $48 million. JSOUF ¶ 51. It consisted of $16 million in cash (apparently representing 5 years of unpaid annual payments); the Annuity worth, upon full maturity, approximately $13.5 million; and the remaining 15-acre Phoenix Indian School property, which the US and Collier had stipulated was worth $25 million, but which ultimately sold online by the U.S. General Services Administration in 2018 for only $18.5 million. JSOUF ¶¶ 50-52. The amounts recovered in *U.S. v. Collier* were deposited into accounts held in trust by Interior for ITCA (and the Navajo Nation). Pl.'s SOUF ¶ 118.

8. This Action by ITCA

While *U.S. v. Collier* was pending, ITCA filed this action seeking money damages from the US under the Act and the general statute governing investment of tribal trust funds, 25 U.S.C. § 162a. Pl.'s SOUF ¶ 120. ITCA raised three claims. This Court's dismissal of Claim II (the failure-to-collect claim) has been affirmed. *Inter-Tribal Council*, 956 F.3d at 1345-46. With respect to Claim III, that the US has failed to invest properly the annual payments that it did collect and deposit into ITCA's Trust Fund, this Court held that it has subject matter jurisdiction over this Claim, *Inter-Tribal Council of Arizona, Inc. v. United States*, 125 Fed. Cl. 493, 504-05 (Fed. Cl. 2016), but dismissed the pre-April 2009 investment claims on statute of limitations grounds. *Inter-Tribal Council of Arizona v. United States*, 140 Fed. Cl. 457, 460 (2018). As yet unappealed, Claim III remains pending before this Court. A portion of this Court's dismissal of Claim I (the failure to hold sufficient security) has been reversed and remanded to this Court. Post-remand, Claim I has been narrowed by this Court; the remaining issues are, as a matter of law, 1) how much security did the Act require the US to hold in trust and 2) whether, notwithstanding the recovery in *US v. Collier*, there is further (as yet uncompensated for) liability on the part of the US.

ARGUMENT

A. Standard of Review for Summary Judgment

RCFC 56(a) provides, in relevant part, that:

> A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

"The same standard applies when the parties have cross-moved for summary judgment." *Pac. Coast Cmty. Servs., Inc. v. United States,* 144 Fed. Cl. 687, 694 (2019), *aff'd*, 858 F. App'x 343 (Fed. Cir. 2021).

B. The Remaining Claim I Issues – 1) How Much Security did the Act Require the US to Hold and 2) The Extent of US Liability to the Trust Funds Notwithstanding the *US v. Collier* Recovery – Are Open Issues for this Court's Determination

1. The Court of Appeals Remanded the Remaining Claim I Issues, Unconflated with the Claim II Issues, for this Court's Resolution

SAC Claim I alleges that the US as trustee failed to hold sufficient security for Collier's debts to the Trust Funds as the Act required and, as a result, the US is liable for damages. This Court's dismissal in 2018 of a portion of Claim I, on the grounds that it failed to state a claim upon which relief could be granted, has been reversed and remanded. 956 F.3d 1339-1344. "[T]he Court of Federal Claims erred in dismissing the failure-to-maintain-sufficient-security portion of Claim I." *Id*. 1340. The Act "demonstrates Congress's expectation that the security was to be maintained at a level sufficient to secure Collier's payment obligations." *Id*. 1340. The security sufficiency claim is "a claim over which the Court of Federal Claims has jurisdiction, and upon which relief can be granted." *Id*. 1344.

The Court of Appeals nevertheless did not reach the Claim I issue of precisely *how much* security was "sufficient." *Id*. n.11. While noting the dispute between the parties on this issue, the

Court of Appeals stated that "we take no position on the issue … as this issue is not material to our present determination, and also because the Court of Federal Claims did not pass on this issue below." *Id*. But the Court of Appeals expressly expected that "this issue will ultimately need to be resolved." *Id*. Thus, the Court of Appeals provided clear guidance to this Court regarding further proceedings on this remanded open Claim I issue. *Cf. Taylor v. U.S. Patent and Trademark Office*, 385 Fed. Appx. 980, 983 (Fed. Cir. 2010) (remanding solely for the purpose of entering judgment and not for additional proceedings leaves open no issues for the district court to resolve).

The Court of Appeals' affirmance of the dismissal of Claim II (the failure-to-collect claim), on grounds of failure to state a claim upon which relief can be granted, did not obscure or otherwise affect its directions on Claim I. In affirming Claim II's dismissal, the Court of Appeals agreed with this Court that the Act does not require the US to collect from Collier or otherwise make payments that Collier did not make. *Id*. 1345-46. But the Court of Appeals unequivocally viewed Claims I and II as distinct and independent. It did not conflate Claim II (failure-to-collect) with Claim I (security sufficiency), the latter of which focuses on how much security the Act required the US to hold in trust. Stated another way, the failure-to-collect claim's dismissal did not preclude the remand for further proceedings on the security sufficiency claim, which is the primary issue before this Court now. Rather, it was a routine affirmance of one claim's dismissal while reversing the dismissal of a separate claim. *See, e.g., Normandy Apartments, Ltd. v. United States*, 100 Fed. Cl. 247, 251 (2011) (citation omitted); *see also Trauma Service Group, Ltd. v. United States*, 33 Fed. Cl. 426, 433 n.5 (1995), *aff'd*, 104 F.3d 1321 (Fed. Cir. 1997) ("Even if this court reaches the merits and dismisses [a] claim for failure to state a claim … *with* prejudice, such a dismissal would not bar [this] court's consideration of *a different claim*.") (emphasis in original).

The Court of Appeals also gave unambiguous instruction on the potential extent of the US' liability for a breach of trust based on insufficient security. It declined to follow this Court's dismissal of the security sufficiency claim based upon the idea that the US "was not required … to do anything more than it did in filing" *U.S. v. Collier.* 956 F. 3d 1339-40, citing *Inter-Tribal Council*, 140 Fed. Cl. 457. And it expressly held that the TFPA contractual obligations between the US and Collier at issue in *U.S. v. Collier* were "separate and distinct from those imposed on the Government pursuant to the" Act. 956 F.3d 1342 n.13. It further expressly held that those contractual obligations do not and "cannot relieve the Government of obligations arising from its statutory fiduciary duty." *Id*. (citation omitted).

Thus, in no way did the Court of Appeals foreclose this Court's consideration of the remanded issues of security sufficiency and liability extent. *See Engel Indus., Inc. v. Lockformer Co*. 166 F.3d 1379, 1383 (Fed. Cir. 1999) (only issues within the scope of the judgment appealed from actually decided "minus those explicitly reserved or remanded by the court [of appeals]- are foreclosed from further consideration"). These issues were "neither decided … nor foreclosed, but expressly reserved … for consideration" by this Court. *Wolfchild v. United States*, 731 F.3d 1280, 1299 (Fed. Cir. 2013), *cert. denied*, 572 U.S. 1009 (2014) (Reyna, J., concurring-in-part and dissenting-in-part).

2. On Remand, This Court has not Reached these Issues

The remanded security sufficiency and liability extent issues remain unresolved by this Court. The Court has narrowed Claim I's remanded portion by dismissing SAC ¶¶ 255-262 and 264-268b. *Inter-Tribal Council*, 2023 WL 4881967, at *10 (dismissing SAC ¶¶ 255-59, 264-67 and 268(a) and 268(b)); Order (Aug. 7, 2024), ECF No. 167 (dismissing SAC ¶¶ 260-62). Hence, under its remaining Claim I issues and by this Motion, ITCA is not rearguing the dismissed SAC ¶ 264 allegation, that "[t]he United States' failure to *recover from Collier sufficient security* or

cash to meet in full the Trust Fund Payments obligations was a breach of trust in violation of the Act." (Emphasis added). However, this Court has not dismissed SAC ¶ 263, which alleges that "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." (Emphasis added). Post-remand, the status of this remaining live issue is discussed next.

The breach of trust alleged in SAC ¶ 263 – that the US held insufficient security when Collier stopped paying – now is undisputed. Defendant's Response to Plaintiff's First Set of Requests for Admission, RESPONSE to Request No. 1 at 4 ("the United States admits … that the collateral in the Trust Estate … as of December 18, 2021, was not sufficient to ensure that ITCA received its share of the value of the annual interest payments that Collier was scheduled to pay from December 18, 2018 through December 18, 2026"); *see also* JSOUF ¶ 42 and Def's SOUF ¶ 63, both cited in Def's Motion for Partial Summary Judgment on Remaining Claim I Allegations 8 (referencing Interior's January 29, 2013 letter to Collier that the security was insufficient and demanding that Collier add security). What remains to be determined – as a matter of law – is how much security the Act required the US to hold, given the Act's requirement that the Trust Funds receive at the end of the 30-year period the $34.9 million as well a minimum rate of return of 8.5% per annum for 30 years on the $34.9 million.

The existence of the US' liability for the admitted breach of trust also is uncontested. When Collier stopped paying, because the US held insufficient security (due to its failed fiduciary duties), it sued Collier. *See* JSOUF ¶ 44, citing *U.S. v. Collier*. From a settlement with Collier, the US recovered about $48 million, of which ITCA's Trust Fund was entitled to 95% of the funds recovered. JSOUF ¶¶ 51-52. Thus, *U.S. v. Collier* affirmed the existence of and addressed – partially – the US' fiduciary liability to the Trust Funds for insufficient security. *See Massie v.*

United States, 166 F.3d 1184, 1189 (Fed. Cir. 1999) (liability substantive issues include both existence and extent); *accord Beure-CO. v. United States*, 16 Cl. Ct. 42, 52 n.12 (1988). What remains to be determined, and what is first and foremost a pure legal issue, is whether there is further liability on the part of the US as trustee under the Act.

This Court already has acknowledged both remaining issues. *See, e.g.*, *Inter-Tribal Council*, 2023 WL 4881967, at *5 (an "issue that remains unresolved is the precise amount of security the United States was required to maintain"); *Id*. at *7 (there must be a "determination of whether the United States breached its duty to maintain adequate security"); *Id*. ("defendant is not entitled to judgment as a matter of law that it fully discharged the fiduciary duties alleged under Claim I by" the *U.S. v. Collier* recovery); *Id*. at *10 ("defendant's lawsuit against Collier to recover outstanding funds does not automatically absolve the defendant of liability"). These statements are perfectly in accord with the Court of Appeals' opinion on these issues.

3. This Court Should Rule on All Remaining Claim I Issues as Matters of Law Without Conflation

On remand, this Court must reach the merits of the remaining Claim I issues, being mindful not to conflate them with the dismissed Claim II. *See Wolfchild v. United States*, 96 Fed. Cl. 302, 328 (2010), *rev'd in part on other grounds*, 731 F.3d 1280 (Fed. Cir. 2013), *cert. denied*, 572 U.S. 1009 (2014) (consistent with the appellate mandate, "the court may, and indeed, must" examine the merits of open claims on remand). To this end, the Court should determine the remaining security sufficiency and liability extent issues – as matters of law. These standalone issues are not negated by the Court of Appeals' holding that the U.S. did not have a fiduciary duty to collect Collier's missed annual payments. Rather, the remaining Claim I issues hinge on what amount of security the Act required the US to hold in trust and, based on its failure to hold that amount of security, what the extent of its liability is to the Trust Funds, beyond its recovery in *U.S. v. Collier*.

The Court of Appeals kept the Claim I and Claim II issues separate and remanded only the Claim I security sufficiency and extent of liability issues for this Court's consideration. In keeping with the Court of Appeals' decision, this Court has dismissed SAC ¶ 264, which speaks to the recovery of security from Collier for Collier's unpaid payments. At this juncture, ITCA is not arguing that issue, as it is no longer before the Court. *See Terry v. United States*, 103 Fed. Cl. 645, 656 (2012) (allegations within dismissed claim cannot be entertained by the court). And, even if it could, this Court need not revisit the "security for unpaid payments issue" in determining the remaining independent security sufficiency and liability extent issues. The remaining open sufficient security issue and the attendant extent of liability issue stand on their own, per the Court of Appeals' decision which makes clear that its affirmance of the failure-to-collect claim does not foreclose consideration of the distinct and independent claims for failure-to-maintain sufficient security and further liability. *See Grit Energy Sols., LLC v. Oren Techs., LLC*, 957 F.3d 1309, 1320 (Fed. Cir. 2020) (dismissal of unrelated claims does not bear on consideration of remaining standalone claims).

Regarding the extent of liability, also in keeping with the dismissal of the collection claim, this Court has dismissed SAC ¶ 268(b), which speaks to liability for Collier's unpaid annual payments. But while SAC ¶ 268(b) has been dismissed, SAC ¶ 268(c) *has not been dismissed.* This Claim alleges that "[a]s a result of its breaches of trust in violation of the Act's Trust Fund security requirements, the United States is liable to ITCA for … 95% (ITCA's allocation) of the difference between the actual return on the $34.9 million once it has been recovered in full, and the Act's mandated minimum rate of return on the $34.9 million as of the same time, through the full thirty year annual payment time period, i.e., calendar year 2026." This Court should proceed

to determine the remaining security sufficiency and liability extent issues as set forth in SAC ¶¶ 263 and 268(c) as matters of law unclouded by the dismissed Claim II collection issue.

C. The Act Required the US to Hold in Trust Security In An Amount Sufficient to Ensure that the Trust Funds would Receive the Minimum Amounts Due Under the Act, *i.e.*, a Minimum Annual Rate of Return of 8.5% on $34.9 Million for 30 Years and $34.9 Million at the End of the 30 Year Period

1. The Act's Fiduciary Security Mandate Is Effectuated and Self-Supporting

The issue of how much security the Act required the US to hold in trust is a question of law. *Kane Cnty., Utah v. United States*, 135 Fed. Cl. 632, 636 (2017) ("Statutory interpretation involves a question of law"). Statutory interpretation begins with the statute's text. *Id*. The Act here provides that "[if] a Trust Fund payment is made in the form of annual payments under section 403(c)(2) of this title, the Secretary of the Treasury shall hold in trust the security provided in accordance with the Trust Fund Payment Agreement." § 405(c)(2). This is a statutory fiduciary mandate for security ("shall hold in trust"). *See Osage Tribe of Indians of Oklahoma v. United States*, 68 Fed Cl. 322, 332 (2005) (discussing an act of Congress that established a specific fiduciary duty on the US). The statutory fiduciary security mandate was effectuated by the US' election of the Act's 30-year option. Pl.'s SOUF ¶ 57.

The Act provides that the 30-year option shall consist of "30 annual payments equal to the interest due on an amount equal to … the Monetary Proceeds," § 403(c)(2)(A), and "at the time of the last annual payment, a payment equal to … the Monetary Proceeds," *id*. § 403(c)(2)(B). The Monetary Proceeds is the $34.9 million, *see* § 401(10)(a) (defining Monetary Proceeds as the cash amount required to be paid to the United States by Collier upon closing of the Land Exchange).

In § 403(c)(5), the Act prescribes what "interest [is] due" as required by § 403(c)(2)(A). "The interest rate to be used in determining the interest due on the annual Trust Fund Payments … shall be the interest rate being offered on bonds payable in 30 years sold by the United States on

the date that notice of the election of the form of the Trust Fund Payment is made by the Secretary plus 0.25 percent, *except that in no event shall such interest rate be lower than 8.5 percent or higher than 9.0 percent*." *Id*. § 403(c)(5) (emphasis added). Thus, the Act expressly fixes the amount of the annual payments for 30 years at a minimum annual rate of return of 8.5% on the $34.9 million for the 30-year period. Sections 403(c)(2) and 403(c)(5) "must be read together, since the one refers to the other," *Grayson v. United States*, 141 Ct. Cl. 866, 869 (1958) (per curiam). Under these sections, the minimum amounts due the Trust Funds for the 30-year period are unambiguously defined and calculated.

The US' fiduciary security mandate in § 405(c)(2) is contingent upon the Secretary's election of the 30-year option in § 403(c)(2). While § 405(c)(2) – the fiduciary security mandate – refers specifically to § 403(c)(2), the fiduciary security mandate necessarily encompasses § 403(c)(5) -- the fixed minimum annual rate of return (8.5%) on the $34.9 million – because §§ 403(c)(2)(A) and 403(c)(5) "must be read together since, the one refers to the other." *Grayson*, 141 Ct. Cl. at 869. In other words, the fiduciary security duty under § 405(c)(2) is activated by the Secretary's election of the 30-year option per § 403(c)(2) but the amount of security then-required is provided by § 403(c)(5)—*i.e.*, the fixed minimum annual rate of return of 8.5% on the $34.9 million for the 30-year period. Thus, the Act's fiduciary security mandate is contingent upon and defined by the Act's text in §§ 403(c)(2) and 403(c)(5). And, therefore, the answer to how much security the Act required the US to hold in trust is dictated not just by the § 403(c)(2) payment definitions, but also by the expressly fixed minimum annual rate of return (8.5%) calculation in § 403(c)(5).[4]

[4] Other provisions of the Act illuminate the fiduciary security (also referred to as "collateral" in the Act) mandate. For example, § 402(h) provides that if the Land Exchange with Collier is not completed, the Secretary shall put the Indian School property up for sale. Under § 402(h)(3), all

All of these sections, "as parts of the same statute, must be construed together." *Jones v. United States*, 289 F.2d 825, 828 (Ct. Cl. 1961); *see also Wash. Med. Ctr., Inc. v. United States*, 545 F.2d 116, 180 (Ct. Cl. 1976) (reference omitted) ("all of the relevant sections of the statute should be read together."). Collectively, these sections demonstrate Congress' intent to ensure that as condition for closing the Phoenix Indian School and exchanging the property so the US could obtain property in the Florida Everglades for a wildlife refuge, the Trust Funds would receive – *via* the fiduciary security mandate in § 405(c)(2) – the congressionally directed minimum amounts due under §§ 403(c)(2) and 403(c)(5) ***even if Collier stopped paying***. In this regard, while the Act allowed the US to elect the 30-year option, it also put in place a statutory mechanism to protect the Trust Funds so that if the 30 year payments were not collected or made, the fiduciary security mandate would otherwise ensure that the US would have sufficient security to collect and, if need be, reinvest to make the Trust Funds whole.

The record is clear that in the wake of the Act's enactment, the US itself understood this. The US fully anticipated the possibility of Collier's non-payment and fully understood the import

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valid written offers to purchase the property had to meet certain conditions to be considered by the Secretary, including the requirement that the offeror agree "to enter into a Trust Fund Payment Agreement in a form prescribed by the Secretary *consistent with* the requirements for payment of the Trust Fund Payments in the form of annual payments under Section 403..." (emphasis added). Thus, under § 402(h)(3), Congress made clear that regardless of who was the Purchaser of the property, they would be required to enter into a Trust Fund Payment Agreement that was "consistent" with § 403 of the Act, including – if the 30-year option was elected – the security requirements of § 403(c)(5) that set the "interest rate to be used in determining the interest due" on the Monetary Proceeds at no less than 8.5% per annum. Further, § 402(h)(3) dictated that a valid offer must include: "(i) a detailed description of the collateral to be provided by the offeror to secure the payment obligation under the [TFPA]... and (ii) evidence of ownership and value of such collateral sufficient to permit the Secretary to determine whether such collateral is adequate to secure the payment obligations of the Purchaser under the [TFPA]." Even further, as a matter of "belt and suspenders" for sufficient security, Congress separately mandated in § 402(h)(5)(B) that in determining "whether an offer is a qualifying offer" the Secretary "shall exclude" from consideration any offer that it determined "(iii) has failed to identify collateral that is adequate to secure the obligations under the Trust Fund Payment Agreement."

of that risk to itself as the trustee. Thus, in the US' own words, "we … have to ensure that Collier pledge[s] enough collateral to cover not only the [$34.9 million], but also "an interest deficiency in the event of default." May 1992 Memo 3. Otherwise, "the government would be obligated to make up the difference between Collier's 8.5 percent interest and the rate [the government is] able to earn by investing [the security held] in Government securities for the remainder of the thirty year payment period." *Id*. Tellingly, nothing in the US' 1992 interpretation of the Act's fiduciary security mandate relates to or even mentions the US collecting or making Collier's missed payments. The US did not conflate the collection and security issues then and nor should this Court do so now.

Nor should the US' contractual obligations *vis-a-vis* Collier in the TFPA and related documents cloud the issue here of the US' statutory fiduciary security mandate. The Court of Appeals held that these "obligation[s are] separate and distinct from those imposed on the Government pursuant to the [Act]." 956 F.3d 1328 n.13. They "do[] not, and indeed cannot, relieve the Government of obligations arising from its statutory fiduciary duty." *Id*. These holdings are the law of this case and according to the law of the case doctrine they must be followed on remand. *See Abbey v. United States*, 124 Fed. Cl. 397, 407 (2015) (law of the case doctrine ensures that trial courts follow the decisions of appellate court); *accord Glass v. United States*, 53 Fed. Cl. 33, 34 (2002) (citation omitted) ("An appellate court's decision determines the law of the case and the trial court may not depart from it on remand.").

As the US itself understood, the Act required the US to hold enough security such that if Collier stopped paying, the security, when collected and reinvested by US, would earn an amount that would equal the minimum amounts due the Trust Funds for the remainder of the 30 year period (*i.e.*, 8.5% on the $34.9 million per year for 30 years, plus the final payment of $34.9 million at

the end of 30 years).[5] That is how much security the Act required the US to hold in trust as a matter of law. That is what ITCA has pled and argued based on the portion of its Claim I that has been remanded and the allegations that have not been dismissed. That is a plausible construction of the Act in the US' own contemporaneous unequivocal words. That should be this Court's ruling on summary judgment in ITCA's favor.

2. The Act Did Not Give the US Discretion to Hold Less Security

In 1992, as it struggled to negotiate with Collier the terms for its statutory fiduciary security mandate, the US rationalized away the Act's security mandate at the eleventh hour to complete the Land Exchange and settled on the position that the "Secretary has the authority and discretion" regarding how much security it was to hold in trust. May 1992 Memo 3. In this litigation, the US has taken this self-serving view of agency discretion to the extreme, as when the US argued on appeal that it had full discretion and zero fiduciary duty to secure the amounts due the Trust Funds under the Act. "[T]he Act left the negotiation of security, if any, to the discretion of the United States and imposed no money-mandating duty to obtain any particular amount of security." *Inter-Tribal Council of Arizona, Inc. v. United States*, No.19-1758, Corrected Brief for Appellee 17-18 (Fed. Cir. July 30, 2019), ECF No. 13. At the outset, on remand, this Court should take the opportunity to put to rest any remnant of this argument for completely unbridled discretion.

[5] Every annual payment Collier made to the US for the Trust Funds and every payment made to the Annuity that Collier maintained to pay the $34.9 million final payment correspondingly reduced the amount of security that the US needed to hold under the Act. The Act's fiduciary security mandate included the duty to reasonably monitor the security that it held in trust in light of, for example, current market conditions (like the 2008 economic downturn). But the US did not do that. JSOUF ¶ 39. And, to the extent the US determined that its security was not sufficient to fully secure all remaining amounts due the Trust Funds as required by the Act, it had the ability under the TFPA to demand that Collier supplement the security with government backed securities, but it did not do that either, until Collier stopped paying. *Id*. ¶ 43. By its own volition, the US left the Trust Funds under-secured, resulting in losses to the Trust Funds that Congress did not intend or permit under the Act.

More recently, the US has stated, for example, that, "[t]he Act vests the Secretary [of the Interior] with discretion with regard to the security, limited only by the terms of the TFPA." Def.'s Motion for Partial Summary Judgment 24 (Mar. 21, 2023), ECF No. 129. However, as it was in 1992, this evasive version of a statutory fiduciary mandate is nothing more than an argument for implicit agency discretion that is unsupported by the Act and contrary to basic principles of statutory construction.

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). No provision of the Act expressly gives the US discretion regarding the security it was to hold in trust. 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 § 403(b), which expressly 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) or 405(c)(2). That absence confirms that the discretion for which the US argues is implicit.

Ascertaining whether there is implicit 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). "Where Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *I.N.S. v. Cardoza-Fonseca,* 480 U.S. 421, 432 (1987) (citations omitted), cited with approval in *Pueblo of Santa Ana v. United States*, 214 F.3d 1338, 1341 (Fed. Cir. 2000). "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 Fed. 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.").

Further, Congress' silence or ambiguity in a statute does not imply discretion to the agency. Hon. Joseph F. Weis, Jr., *A Judicial Perspective On Deference to Administrative Agencies: Some Grenades From the Trenches*, 2 Admin. L.J. 301, 305 (1988), cited with approval in *Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 185 (3d Cir. 1995), *cert. denied*, 516 U.S. 1093 (1996) (Nygaard, J., dissenting). "If Congress has not clearly delegated a properly circumscribed power, then the agency should not obtain untrammeled discretion through legislative silence." Michael Herz, *Deference Running Riot: Separating Interpretation and Lawmaking Under Chevron*, 6 Admin. L.J. AM. U. 187, 204 (1992), cited with approval in *Elizabeth Blackwell Health Center,* 61 F.3d at 197 n.16 (Nygaard, J., dissenting). "Courts should not equate a mere lack of clarity with a delegation of decision-making authority to the agency," Cass. R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 445 (1989), cited with approval in *Elizabeth Blackwell Health Center,* 61 F.3d at 196 n.16 (Nygaard, J., dissenting). Thus, the Act here's silence calls for the conclusion that there is no discretion. *Backcountry Against Dumps v. E.P.A.*, 100 F.3d 147, 151 (D.C. Cir. 1996). It also may be interpreted as a denial of that power to the agency. *Am. Bus Ass'n v. Slater*, 231 F.3d 1, 9 (D.C.

Cir. 2000) (Sentelle, J., concurring) ("as this Court persistently has recognized, a statutory silence on the granting of a power is a *denial* of that power to the agency.") (emphasis in original).

Notably, the US itself cited no authority in 1992 for its determination that it had discretion regarding how much security it was to hold in trust. May 1992 Memo 3. Agencies "cannot rely on their own notions of implied powers." *Civ. Aeronautics Bd. v. Delta Air Lines, Inc*., 367 U.S. 316, 334 (1961); *see also* Ronald M. Levin, *Mead and the Prospective Exercise of Discretion*, 54 Admin L. Rev. 771, 780 (Spring 2002) ("Congress does not delegate to an agency the question of what Congress has delegated to the agency"). "The determinative question is not what the [agency] thinks it should do but what Congress has said it can do." *Civ. Aeronautics*, 367 U.S. at 322.

The statutory fiduciary security mandate here includes the obligation on the part of the US to hold security sufficient to account for the required 8.5% minimum annual rate of return on the $34.9 million in Monetary Proceeds for 30 years that are due the Trust Funds. The Act's express minimum 8.5% annual rate of return requirement must be given meaning. *Am. Bosch Magneto Corp. v. United States*, 6 F. Supp. 455, 459, 79 Ct. Cl. 195, 202 (Ct. Cl. 1934). The US' view that it had discretion to hold less security than needed to reinvest and earn at least 8.5% annually for the remainder of the 30-year period renders the 8.5% provision 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); *see also 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.").

Significantly, at issue here is a statutory fiduciary security mandate 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).

Finally, assuming *arguendo* that the Act gave the US discretion regarding the fiduciary security mandate (which it does not), that discretion must be exercised in a manner that *is consistent* with the Act. Agency discretion is not unlimited; it cannot be exercised in a manner that is unauthorized or inconsistent with its congressional source. *See Farmworker Just. Fund, Inc. v. Brock*, 811 F.2d 613, 619-620 (D.C. Cir. 1987), *vacated on other grounds*, 817 F.2d 890 (D.C. Cir. 1987). Moreover, where, as here, the US acts in a fiduciary capacity for Indian tribes, any discretion "must still be exercised in accordance 'with the trustee's fiduciary duties.'" *W. Shoshone Identifiable Grp. by Yomba Shoshone Tribe v. United States*, 143 Fed. Cl. 545, 603 (2019). The applicable fiduciary duty here is to "hold in trust the security" for statutorily required and calculated amounts due Trust Funds. Act § 405(c)(2); *see also Short v. United States*, 12 Cl. Ct. 36, 45 (1987) (while the Secretary does exercise discretion over tribal trust funds, "such discretion

is not unlimited" … The [Secretary must act] consistent with the government's overriding fiduciary obligation to Indian tribes and … [t]he violation of these duties under the statute would give rise to an action for money damages").

3. Assuming *Arguendo* that this Court determines that the Act is Ambiguous with respect to How Much Security the US was Required to Hold in Trust, ITCA's Interpretation Prevails under the Indian Canons of Construction

ITCA's view is that the Act is unambiguous regarding how much security the US was required to hold in trust, and thus this Court should not consider an interpretation by the US that is contrary to Act. "[W]hen a statute is clear and unambiguous, 'consideration of administrative interpretation contrary to such language is inappropriate; the agency cannot by its interpretation, override the congressional will as memorialized in the statutory language.'" *Mylan Pharm., Inc. v. Henney*, 94 F. Supp. 2d 36, 47 (D.D.C. 2000), *judgment vacated and appeal dismissed sub nom. on other grounds*, *Pharmachemie B.V. v. Barr Lab'ys, Inc.*, 284 F.3d 125 (D.C. Cir. 2002).

But whether an Act is ambiguous is a pure question of law to be determined by the courts. *John v. United States*, 247 F.3d 1032, 1041 (9th Cir. 2001) (Tallman, J. concurring) (citation omitted). Should this Court determine that the Act is ambiguous, this Court must exercise its independent judgment in deciding whether the US has acted in accordance with the Act. *Allen v. United States*, No. 2024-1117, 2024 WL 4002305, at *1 (Fed. Cir. Aug. 30, 2024) (citations omitted). It "may not defer to an agency['s] interpretation of law simply because a statute is ambiguous." *Id*. (citing *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024).

Further, in this instance, the ambiguity must be resolved by the long-standing canon of statutory construction that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit" *Bear v. United States*, 112 Fed. Cl. 480, 486

(2013) (citations omitted); *accord Shoshone Indian Tribe of Wind River Rsrv. v. United States,* 364 F.3d 1339, 1352 (Fed. Cir. 2004), *cert. denied*, 544 U.S. 973 (2005).

The Indian canon of construction is "rooted in the unique trust relationship between the United States and the Indians." *Cnty. of Oneida, N.Y. v. Oneida Indian Nation of New York State,* 470 U.S. 226, 247 (1985). It is a "substantive canon of construction," *Procopio v. Wilkie*, 913 F.3d 1371, 1386 (Fed. Cir. 2019) (O'Malley, J., concurring). It "provide[s] an interpretive methodology for protecting fundamental constitutive, structural values against all but explicit congressional derogation." 1 Cohen's *Handbook of Federal Indian Law* § 2.02[2] (Lexus 2024).

With statutes like the Act, passed for the benefit of Indian tribes, the interpretation in favor of tribal interests prevails over any contrary agency interpretation. *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997); *accord Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 144-45 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1010 (1989); *Procopio*, 913 F.3d at 1386 (O'Malley, J., concurring), citing *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001). Thus, if this Court determines that the Act is ambiguous regarding how much security the US was required to hold in trust, application of the Indian canon compels construction of the Act in favor of ITCA. This finds only reinforcement in the fact that the US acknowledged expressly in the May 1992 Memo that that construction is plausible.

4. Because The US Failed to Hold in Trust Sufficient Security as Required by the Act the US Is Liable as a Matter of Law for Damages to the Trust Funds for the Difference Between the Amount the Trust Funds Actually Have Received and The Minium Amount the Act Required

At least when Collier stopped paying, the US as trustee admittedly held insufficient security. Def's Response to Pl.'s First Set of Requests for Admission, RESPONSE to Request No. 1 at 4 ("the United States admits … that the collateral in the Trust Estate … as of December 18, 2021, was not sufficient to ensure that ITCA received its share of the value of the annual interest

payments that Collier was scheduled to pay from December 18, 2018 through December 18, 2026"); *accord* JSOUF ¶ 42. For that breach of trust, the existence of the US' liability under the Act to the Trust Funds has been established and addressed to some extent by *U.S. v. Collier*. *Id*. ¶¶ 44 and 51-52. But notwithstanding *U.S. v. Collier*, as a matter of law the US has remaining liability and should be subject to damages because the Trust Funds have yet to be made whole as the Act required.

The extent of the US' further liability is alleged in SAC ¶ 268(c): "the United States is liable to ITCA for … 95% (ITCA's allocation) of the difference between the actual return on the $34.9 million once it has been recovered in full, and the Act's mandated minimum rate of return on the $34.9 million as of the same time, through the full thirty year annual payment time period, i.e., calendar year 2026." Importantly, that is the precise extent of the US' liability in its own unequivocal words: "if Collier defaults and the $34.9 million … is recovered … the Government would be obligated to make up the difference between Collier's 8.5 percent interest and the rate it was able to earn by investing in Government securities for the remainder of the thirty year period."). May 1992 Memo 3. That is what this Court should rule as a matter of law.

The issue of the extent of the US' liability under the remaining Claim I issue "aris[es] from its statutory fiduciary duty" 956 F.3d n.13, to hold sufficient security, *id*. 1340, which it did not do. That liability at issue under the remaining Claim I issues is independent of any liability for failing to collect or make Collier's missed payments. Nothing in the US' own 1992 interpretation of the extent of its liability under the Act suggests otherwise. It is a separate and distinct non-dismissed open issue under the law of this case including the Court of Appeals' opinion and this Court's decisions.

The portion of the recovery in *U.S. v. Collier* that could be attributed to the Monetary Proceeds (*i.e.*, the $34.9 million) owed the Trust Funds at the end of 30 years is about $32 million. JSOUF ¶¶ 50-51 ($13.5 million recovered from the Annuity plus $18.5 million from the sale of the Phoenix Indian School property). "The 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." Pl.'s SOUF ¶ 119, citing SAC ¶ 214. But, in any event, the threshold issue is whether there is further liability of the US as trustee for breach of its fiduciary mandate under the Act. That issue is a standalone statutory interpretation issue that can be addressed as a matter of law on summary judgment, 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 summary judgment on liability; determination of recoverable damages is a matter for later determination); *see also JKB Sols. & Servs. LLC v. United States*, 170 Fed. Cl. 241, 248 (2024) (parties agree to file summary judgment motions on liability issues after completing fact discovery and to resolve any issues regarding damages in subsequent proceedings, if necessary).

CONCLUSION

There are no genuine issues of material fact that preclude summary judgment with respect to the remaining Claim I issues as set forth in the Second Amended Complaint ¶¶ 263 and 268(c), and accordingly ITCA is entitled to judgment as a matter of law on those issues.

Dated this 18th day of July, 2025.

Respectfully submitted,

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