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

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INTRODUCTION AND SUMMARY OF ARGUMENT

Pursuant to the Arizona-Florida Land Exchange Act of 1988, Pub. L. No. 100-696 (1988) (Act), the Secretary of the Interior (Interior) elected the 30-year option by which the Trust Funds established by the Act were due both a $34.9 million final payment (defined in the Act § 401(10) as "Monetary Proceeds") at end of 30 years and annual payments for 30 years reflecting a minimum annual rate of return of 8.5% on the $34.9 million Monetary Proceeds (collectively herein, "the amounts due the Trust Funds"). The 30-year option required the US to enter into a Trust Fund Payment Agreement (TFPA) with Collier pursuant to which the annual payments "will be made," *id*. § 403(c)(4), and to hold in trust security sufficient to satisfy the amounts due the Trust Funds. *Id*. § 405(c)(2). Collier stopped paying before the end of 30 years and the US admits that it did not have sufficient security when Collier stopped paying.

The parties disagree about how much security the US was required to hold and the governing source of that obligation. ITCA argues that the Act required the US to hold in trust sufficient security to satisfy the amounts due the Trust Funds per the Act, and the Act did not give the US discretion to hold less than that. Of course, Collier's annual payments to the Trust Funds, and its payments to the Annuity which secured the $34.9 million final payment, reduced the amount of security that the US was required to hold over time. The US argues that under the Act it had unlimited discretion such that it need hold no security at all, or, alternatively, that it could arbitrarily define the amount of security it needed to hold via the terms it negotiated in the TFPA.

The parties also disagree about the extent of the US' liability and damages under the Act, *i.e.*, whether, notwithstanding the recovery by the US from a settlement with Collier in *United States v. Barron Collier Co.*, No. CV-14-00161-PHX-PGR, 2016 WL 3537802 (D. Ariz. June 29, 2016) (*U.S. v. Collier*), the US has any remaining liability for its failure to hold sufficient security when Collier stopped paying. The US argues that its recovery from Collier fully satisfied any

liability that the US had to the Trust Funds when Collier stopped paying. ITCA agrees that the recovery mitigated some of the US' damages for the US' lack of sufficient security but contends there is still liability and uncompensated for damages owed the Trust Funds under the Act. The parties agree that this Court can resolve these threshold legal issues as matters of law under the Act, *i.e.*, there are no material facts in dispute. *See also QED Grp. LLC v. United States,* No. 24-1961C, 2025 WL 2218523, at *1 (Fed. Cl. Aug. 5, 2025) (parties request that court interpret a statute).[1]

ARGUMENT

A. THE US MISSTATES AND THEREFORE DOES NOT ADDRESS ITCA'S REMAINING CLAIM I SECURITY SUFFICIENCY ARGUMENT

1. ITCA's Security Sufficiency Argument is Not a "Guarantor" Argument

SAC Claim I (the security claim) alleges the US failed to hold in trust sufficient security for the amounts due the Trust Funds. SAC ¶¶ 254-268. The remaining Claim I allegation in SAC ¶ 263 alleges that when Collier stopped paying, the security that the US held was insufficient. The US has admitted this allegation as follows: "the United States admits only that the collateral in the Trust Estate … as of December 18, 2012, 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, 2012 through December 18, 2026." Def.'s Response to Pl.'s First Set of Requests for Admission, RESPONSE to Request No. 1 at 4, Pl.'s Memo. in Support of its Mot. for Summ. J.

[1] The parties have reported previously that once the Court addresses the remaining portions of ITCA's Second Amended Complaint (SAC), ECF No. 58, the Court should then address any damages calculation in future proceedings "if ITCA were to prevail on summary judgment." Joint Status Report 7 (Dec. 15, 2023), ECF No. 151; *see also* Joint Status Report 9 (Oct. 11, 2024), ECF No. 170 ("ITCA is willing to submit its calculations of the actual earnings on the amount that the US recovered in *U.S. v. Collier* that is attributed to the $34.9 million Final Payment if that would assist the Court in its resolution of ITCA's remaining claims").

on the Remaining Claim I Issues in the Second Amended Complaint, Exhibit A, ECF No.184-2 (Def.'s Response).

Because the US held insufficient security, ITCA also alleges that the US is liable to the Trust Funds for both the $34.9 million and the difference between the actual return on the $34.9 million and the Act's mandated minimum rate of return of 8.5% on the $34.9 million for the remainder of the 30 year period. SAC ¶ 268(c). As discussed, *infra*, to date, this Court has neither dismissed nor addressed these remaining Claim I allegations.

ITCA's security sufficiency argument is not the "guarantor" argument the US suggests—*i.e.*, it is not an argument that the US had a duty to collect from Collier or otherwise make Collier's unpaid payments. *See, e.g.*, Def.'s Mot. For Partial Summ. J. on Remaining Claim I Allegation 3, ECF No. 182 (Def.'s Mot.) (mischaracterizing ITCA's remaining Claim I argument as being whether the US is "a guarantor of Collier's payments [] or under any obligation to make up any payments Collier missed"). ITCA acknowledges the prior holdings in this case dismissing ITCA's Claim II (the collection claim), SAC ¶¶ 269-75, *Inter-Tribal Council of Arizona, Inc. v. United States*, 140 Fed. Cl. 447 (2018), *aff'd in part and rev'd in part*, *Inter-Tribal Council of Arizona, Inc. v. United States,* 956 F.3d 1328 (Fed. Cir. 2020), on the ground that the Act does not require the US to collect from Collier or make annual payments that Collier did not make.

ITCA's security sufficiency argument is an independent, alternative argument to the dismissed Claim II. It is based on the Act and alleged in SAC ¶¶ 263 and 268(c), which have not been dismissed. The argument is that US should have held in trust a sufficient amount of security to satisfy the amounts due the Trust Funds. Over the 30-year period, the amount of security required fluctuated based on amounts paid by Collier and the prevailing market conditions; *i.e.*, the amount required was not static because market conditions changed and because each annual

payment by Collier to the Trust Funds, and each payment by Collier into the Annuity towards the $34.9 million final payment, reduced the total amount of security the US needed to hold. But the US had to hold sufficient security so that, when Collier stopped paying, the security could be invested by the US to satisfy all remaining amounts due the Trust Funds as prescribed by the Act, again, considering amounts already paid by Collier.

The record in this case is clear that this is a plausible construction of the Act's fiduciary obligations imposed on the US. As the US has acknowledged, sufficient security meant that if Collier stopped paying, and the security the US held was insufficient to satisfy the amounts due the Trust Funds, the US is liable for "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 payment period." *See* Ex. 26 to Def.'s Redacted Statement of Facts in Support of Collier's Mot. for Summ. J., *U.S. v. Collier*, ECF No. 182-01, June 2, 2016, attached to Pl.'s Memo. in Support of its Mot. for Summ. J. on the Remaining Claim I Issues in the Second Amended Complaint, ECF No. 184-1, as Exhibit B, ECF No. 184-3 (May 1992 Memo). Because the US did not have sufficient security to meet its obligations under the Act, it is liable to ITCA for all resulting damages.

Given the US' misstatement of ITCA's actual argument in its recent Motion filing, the US utterly fails to address ITCA's position on the required security. Instead, the US repeatedly argues against an argument that ITCA is not making, contending that ITCA's remaining Claim I arguments are "collection" / "guarantor" arguments foreclosed by the law of the case doctrine. Def.'s Mot. at i, 3, 18, 30-31, and 33. But the law of the case doctrine is inapplicable to ITCA's actual and undecided security sufficiency argument.[2]

[2] The US also persists in referring to the 30-year option as a "loan." Def.'s Mot. 1, 3, 6. The Act does not provide for or even contain the term "loan," and no lending under the Act has occurred. The Act's 30-year option is a carefully crafted unique arrangement by which Congress expressly

2. The Security Sufficiency Argument Remains Unaddressed and Not Barred by Law of the Case

As noted above, SAC ¶¶ 263 and 268(c), which are the bases for ITCA's security sufficiency argument, have not been dismissed. Nor was the security sufficiency argument addressed by the Court of Appeals. The Court of Appeals expressly declined to address this argument because it was immaterial to the appeal's determination, and "because the Court of Federal Claims did not pass on this issue below[.]" 956 F.3d 1341 n.11. That it was not addressed on appeal and has not been dismissed on remand means that it remains open for this Court's consideration. *Sys. Div., Inc. v. Teknek LLC*, 59 Fed. App'x 333, 342 (Fed. Cir. Feb. 21, 2003) (unaddressed, unresolved issues of independent claims remain for district court's consideration); *Doko Farms v. United States*, 956 F.2d 1136, 1141 (Fed. Cir. 1992) (district court's dismissal of one claim leaves open the merits of a separate claim).

The law of the case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Fillmore Equip. of Holland, Inc. v. United States*, 105 Fed. Cl. 1, 15 (2012), *aff'd*, No. 2013-5048, 2013 WL 5450651 (Fed. Cir. June 18, 2013) (citation omitted). "Law of the case is a judicially

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set forth amounts due Trust Funds and mandated the US to "hold in trust the security" for the amounts due. In no way is this a "typical loan" arrangement. "There exists a strong presumption that 'Congress expresses its intent through the language it chooses' and that the choice of words in a statute is therefore deliberate and reflective." *Shoshone Indian Tribe of Wind River Rsrv. v. United States*, 364 F.3d 1339, 1347 (Fed. Cir. 2004), *cert. denied*, 544 U.S. 973 (2005) (citations omitted). "Had Congress wanted to adopt [the US'] interpretation, it could have drafted language to effectuate that result." *Energy E. Corp. v. United States*, 645 F.3d 1358, 1362 (Fed. Cir. 2011). That the US agreed to no prepayment for the 30-year option also undercuts its "typical loan" contention. *See* Pl.'s SOUF ¶ 102. Similarly, the US insists on attributing the term "future interest payments" to ITCA's SAC, Def.'s Mot. 10, but neither the SAC nor the Act contain that term. Plaintiff's Additional Undisputed Facts (Pl.'s AUF) ¶¶ 3 and 6. Characterizing the 30-year option as a typical loan with future interest payments might support the US' arguments, but there simply is no loan with future interest payments at issue here.

created doctrine, under which 'a court will generally refuse to reopen or reconsider what has already been decided at an earlier stage of the litigation[,]'" *id.* (citation omitted), including on appeal, *Lacks Indus., Inc. v. McKechnie Vehicle Components USA, Inc.*, 300 Fed. App'x 904, 907 (Fed. Cir. Nov. 21, 2008), *cert. denied*, 556 U.S. 1257 (2009) (citation omitted). But issues not decided by the appellate court "are not covered by the law of the case doctrine." *Id.* (citation omitted). And "[l]aw of the case … is not established with respect to issues not actually [decided] by [the district] court." *Exxon Corp. v. United States*, 931 F.2d 874, 877 (Fed. Cir. 1991) (citation omitted). The US has not established and cannot establish law of the case for the security sufficiency argument.

B. ITCA'S SECURITY SUFFICIENCY ARGUMENT IS SUPPORTED BY THE ACT'S TEXT AND STRUCTURE

1. The Act's Security Mandate Was to Ensure That the Amounts Due the Trust Funds Would Be Satisfied

Under the 30-year option, the Act required the US to "hold in trust the security" for the amounts due the Trust Funds. Act § 405(c)(2). This is a statutory fiduciary mandate. *See United States v. White Mountain Apache Tribe*, 537 U.S. 465, 469 (2003) (construing similar statutory language that declared property to be "held by the United States in trust" for a tribe to establish a fiduciary relationship with attendant fiduciary obligations). The security mandate applies to both § 403(c)(2) and § 403(c)(5) because these sections "must be read together, since the one refers to the other." *Grayson v. United States*, 141 Ct. Cl. 866, 869 (1958) (*per curiam*). Thus, § 405(c)(2)'s security mandate encompasses § 403(c)(5)'s expressly fixed minimum annual rate of return (8.5%) on the $34.9 million Monetary Proceeds for 30 years.

Section 403(c)(5)'s express annual minimum rate of return is straightforward, "reliable and easily calculable." *See Campbell v. Royal Bank Supplemental Exec. Ret. Plan*, 646 F. Supp. 3d 629, 649 (E.D. Pa. 2022), *aff'd sub nom.*, *Campbell v. Bd. Of Directors of Bryn Mawr Tr. Co.*, No.

22-2723, 2024 WL 4380142 (3d Cir. Oct. 3, 2024) (discussing statutory rates of return). It is a reasonable, "useful and appropriate" rate because it is "grounded in market-based reality." N. Mody and E. Schulz, *Anchors Away! An Appeal for Reference Rates When Calculating Prejudgment Interest*, 53 les Nouvelles 236, 240 (Sept. 2018); *accord* Major Vivian C. Shafer, *The New Military Thrift Savings Plan: Worth Consideration*, 2000-SEP Army L. 1, 8 (Sept. 2000) (discussing statutory rates of return based on market rates); *see also* J. Elkin, F. Smith, & J. Binford, *Cramdown Interest: Formulas for Determining Risk, Rate and Return*, 14 Bankr. L. & Prac. 4 (2005) (discussing Bankruptcy Code provision which in effect requires a market rate of return as a stream of payments). The Act's minimum 8.5% annual rate of return is based expressly on "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[.]" Act § 403(c)(5). This provision reflects the prevailing market conditions for interest rates on 30-year US Treasury bonds at the time of the Act's enactment, which hovered around 8.5%. *See* YCHARTS, https://ycharts.com/indicators/30_year_treasury_rate_annual (last visited Aug. 29, 2025).

Most importantly, § 403(c)(5) has a purpose – like other statutory fixed rates of return, it guards against economic volatility including market fluctuations and inflation. *See, e.g., In re Joint E. and S. Districts Asbestos Litig.*, 798 F. Supp. 940, 942 n.2 (E.D.N.Y 1992), *rev'd sub nom. on other grounds*, *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346 (2d Cir. 1993) (statutory fixed rates of return are designed to protect against inflation). Thirty years is a significant period during which economic volatility is almost certain to occur. And Congress long has guaranteed minimum rates of return by the US as trustee to safeguard tribal trust funds. *See Cheyenne-Arapaho Tribes of Indians of Oklahoma v. United States*, 512 F.2d 1390, 1393 (Ct. Cl. 1975), cited with approval in

White Mountain Apache Tribe of Arizona v. United States, 20 Cl. Ct. 371, 379 (Cl. Ct. 1990) (discussing pre-1880 tribal trust fund statute with guaranteed minimum rate of return). With good reason – as this Court recently stated, the federal government assumed "the role of trustee" for tribal funds and resources, *Fletcher v. United States*, No. 19-1246, 2025 WL 2218490, at *1 (Fed. Cl. Aug. 5, 2025), and "[t]he government did not do a very good job" with this role as evidenced by "past litigation [in which] courts have ruled that the government violated the law by failing to provide an accounting of the trust funds for over a century, and that it breached at least some [other] fiduciary duties." *Id*.

Thus, in construing the Act to determine how much security the US was required to hold in trust, all language found in § 403(c)(5) must be given meaning. "Where possible, we interpret statutes to give meaning to every word[.]" *City of Wilmington v. United States*, 68 F.4th 1365, 1371 (Fed. Cir. 2023); *accord Vesser v. Off. of Pers. Mgmt.*, 29 F.3d 600, 605 (Fed. Cir. 1994) (citations omitted) ("it is a 'settled rule that a statute, must, if possible, be construed in such fashion that every word has some operative effect'"). "The cardinal principle of statutory construction is to save and not to destroy[,]" *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 20 (1937), and thus courts are obligated to "give effect, if possible, to every clause and word of a statute[.]" *Inhabitants of Montclair Twp. v. Ramsdell*, 107 U.S. 147, 152 (1883). Put another way, an amount of security or a security obligation that does not account for § 403(c)(5)'s fixed annual minimum rate of return for the 30-year period renders § 403(c)(5)'s terms superfluous, and thus, is in violation of the Act, *i.e*., it is a breach of the Act's fiduciary security mandate imposed on the US.

2. Because the US Did Not Hold Enough Security, the US Was and Has Been Unable to Invest the Security to Satisfy the Amounts Due the Trust Funds

The fiduciary security mandate imposed on the US included a duty to hold sufficient security so that if Collier stopped paying, the security, once invested, would make the Trust Funds

whole. This is confirmed by the Act's text and structure. *See Metro. Area EMS Auth.y v. Sec'y of Veterans Affs.*, 122 F.4th 1339, 1345 (Fed. Cir. 2024) (in addition to text, traditional tools of statutory construction include a statute's structure). The security mandate is in § 405, entitled "Establishment of the Arizona Indian Trust Funds." For statutory interpretation purposes, the "structure of a statute, i.e., the location of the provision [at issue] within the [statute]" is meaningful. *United States v. Waste Indus.*, 556 F. Supp. 1301, 1308 (E.D.N.C. 1982), *rev'd sub nom. on other grounds*, *United States v. Waste Indus., Inc.*, 734 F.2d 159 (4th Cir. 1984). And the security mandate is under the Act's subheading entitled "Investment." This subheading corroborates Congress' intent that the mandate's requirements included having sufficient security for the US to invest to make the Trust Funds whole. *See Shell Oil Co. v. United States*, 751 F.3d 1282 (Fed. Cir. 2014) (Reyna, J., dissenting) (headings can be helpful statutory interpretation tools); *see also In re Forest*, 134 F.4th 1198, 1202 (Fed Cir. 2025) citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 221 (2012) ("titles and headings are permissible indicators of [statutory] meaning").

Additionally, § 405(c)(2) provides that the security shall be held in trust by the "Secretary of the Treasury" (not Interior).[3] As a federal agency, Treasury predates Interior, and was the original agency where tribal trust funds historically were deposited. *See, e.g.,* Act of Jan. 9, 1837, 5 Stat. 135 (1837); Act of Sept. 11, 1841, 5 Stat. 465 (1841), cited in *Cheyenne-Arapaho Tribes,* 512 F.2d at 1393. Today, Interior is the primary agency in charge of tribal trust funds, including their investment, but Congress' deliberate choice in the Act for Treasury to hold the security has meaning. Four percent was the minimum interest rate for tribal trust funds deposited in Treasury

[3] ITCA provides this textual discussion not in support of its dismissed allegation in SAC ¶ 266, alleging that the failure of Treasury to hold in trust the security was a breach of trust, but in support of its remaining SAC allegations.

until 1984. Just before the Act's enactment, the Act of Oct. 4, 1984, Pub. L. No. 98-451 (1984), amended 25 U.S.C. § 161a(a) to provide that tribal trust funds deposited in Treasury must bear interest "at rates determined by the Secretary of the Treasury, taking into consideration current market yields on outstanding marketable obligations of the United States of comparable maturities." At the time of this amendment (1984), market interest rates were 9.5 %. *See* H.R. Rep. No. 98-988, 2 (1984). "The amendment was adopted with the understanding that this would insure a higher rate of return for Indian tribes[,]" *id.,* and it would "enable the Federal Government better to fulfill its trust responsibility to the Indians and provide a more equitable return on the funds." S. Rep. No. 98-410 (1984).

Certainly, in 1988, Congress was familiar with Treasury's and Interior's obligations in holding and investing tribal trust funds. *See Jicarilla Apache Nation v. United States*, 112 Fed. Cl. 274, 279 (2013) (discussing the US' fiduciary obligations to manage tribal trust funds pursuant to historic federal policy beginning in 1820 and the subsequent enactment of various statutes beginning in 1827). It is therefore reasonable to conclude that ITCA's allegations and the US' own contemporaneous reading of the Act, *supra*, are correct: Congress intended the US to hold and maintain sufficient security for the all of the amounts due the Trust Funds under the Act, so that if Collier stopped paying, the security, when invested, would satisfy those amounts, taking into account amounts already paid by Collier.

3. Common Law Supports but is Not Needed to Confirm the Act's Fiduciary Security Obligations and the US' Breaches of the Same

Because the Act provides for the US' fiduciary obligations at issue here, the Court need not turn to common law to determine those obligations. *Jicarilla Apache Nation v. United States*, 564 U.S. 162, 173-74 (2011); *Confederated Tribes & Bands of the Yakama Nation v. United States*, 171 Fed. Cl. 692, 716 (2024). However, to the extent the Court determines that common law is

appropriate in determining the US' fiduciary duties here, instances of the US' failures to act as a prudent trustee under common law abound. Most pertinent to the admitted breach of trust to hold sufficient security at the time Collier stopped paying, *supra*, are the following common law breaches of trust that the US committed.[4] Although not required by the Act, and against the advice of its own high-level officials and attorneys, the US chose real property interests as the sole means of security. Pl.'s SOUF ¶¶ 53 and 55; JSOUF ¶ 6. And, while ITCA agrees the US had discretion to select real property as a means of security, the US had a duty to monitor reasonably any security it chose, but particularly real property whose values can fluctuate, sometimes even widely. [5] But, while Collier was paying, the US did not monitor the security. JSOUF ¶ 39. Nor, while Collier was paying, did the US ask Collier to supplement the security when market conditions were low, thereby foregoing inexplicably its own negotiated tools to protect the amount of security for the Trust Funds. *Id*. ¶ 43. The failures to monitor the security or require Collier to supplement the security directly resulted in the US having insufficient security when Collier stopped paying.

Similarly, the fiduciary duty to invest prudently is a fundamental common law trustee's duty. Restatement (Third) of Trusts § 90 (2007), cited in *W. Shoshone Identifiable Grp. v. United*

[4] The US correctly states that the Court of Appeals reversed the dismissal of and remanded ITCA's SAC allegations that the US failed to maintain sufficient security, 956 F.3d at 1344, but incorrectly states that ITCA has failed to prove its "maintenance" allegations at least while Collier was paying. Def.'s Mot. 18. In fact, as stated, *infra*, the US admitted or agreed to most of them in the JSOUF.

[5] The US continues to assert that the duty to monitor the security was on Collier. Def.'s Mot. 8, citing Def.'s SOF ¶¶ 39 and 45. Neither these citations nor any other authority supports the point. The district court in *U. S. v. Collier* expressly noted that the Deed of Trust "§ 6.3 does not include explicit terms regarding the obligation to monitor the collateral or a method for valuation of collateral[.]" 2016 WL 3537802, at *9; Pl's AUF ¶ 7. This Court has not made a determination about the US' duty to monitor the security. *Inter-Tribal Council of Arizona, Inc. v. United States,* 2023 WL 4881969, at *9 (Fed. Cl. Aug. 1, 2023). Thus the US' statement that monitoring the security was Collier's duty is unsupported, inaccurate, and inconsistent with the common law of trusts.

States, 143 Fed. Cl. 545, 608-13 (2019). And the exercise of the common law duty to invest the security here should have been guided by the Act's express terms regarding the minimum annual rate of return of 8.5% on $34.9 million for 30 years. The common law fiduciary duty to invest, of course, is subject to the terms of the trust and any applicable law. Restatement (Third) of Trusts § 90 (2007) (General Comment a. Scope of the rule).

Thus, just as the statute requiring the government to hold and allowing it to use real property under its trusteeship until it reverted to a tribe implied a duty on the government to preserve and not waste the property or be liable for damages, *White Mountain Apache*, 537 U.S. at 475, the Act here, which required the US to hold in trust security to secure the amounts due the Trust Funds, necessarily includes a duty on the government to hold in trust sufficient security and reasonably monitor and preserve (including by seeking supplemental security from Collier as needed) the security to meet the Act's requirements. If it failed in these duties and subsequently failed to hold sufficient security at the time Collier stopped paying (as it did), the US is liable for any resulting damages. As in *White Mountain Apache*, the Act vested the US (at least *vis-à-vis* the Trust Funds' beneficiaries) with "exclusive control" over the security for the duration of its statutory fiduciary obligations. *Id*. at 465. Therefore, the duties to hold and preserve sufficient security to meet the obligations were "incumbent on the United States as trustee." *Id* at 475.

C. THE US' ARGUMENTS FOR DISCRETION REGARDING THE SECURITY SUFFICIENCY ARE CONTRARY TO THE ACT AND OTHERWISE UNSUPPORTED

The US appears to take two similar, though different, positions regarding the discretion for which it argues pertaining to the amount of security it was to hold in trust. One is that the Act gave it complete and unrestrained discretion over the amount of security to hold, including discretion to decide to hold no security at all. The other is that the Act gave it wide discretion to set the security

amount in the TFPA. ITCA refers to the first argument as being for unlimited discretion and the second argument as being for broad discretion, though in any event both arguments are unfounded.

1. The US' Argument for Unlimited Discretion is Unsupported by the Act

The argument for unlimited discretion disavows any statutory limits. "The Act did not require the United States to obtain (or maintain) **any** specific level of security but left this decision to the Secretary's discretion." Def.'s Mot. 23 (emphasis added). By this argument, the US had to secure all or even none of the amounts due the Trust Funds.

This argument is completely unsupported – and indeed contradicted – by the Act. Statutory interpretation "starts with the statutory text." *Siemens Gov't Techs., Inc. v. United States*, 176 Fed. Cl. 450, 456 (2025) (citation omitted). The terms "unlimited" and "discretion" are not in the security mandate section, § 405(c)(2). By contrast, for example, § 403(b) expressly does confer discretion. "Subject to the requirements for consultation under subsection (c)(3), the Secretary [of the Interior] may, in his discretion, elect to receive the Trust Fund Payment[s] … in the form of either a lump sum payment or 30 annual payments, calculated in accordance with subsection (c)."

The total absence of any discretionary language in § 405(c)(2) – let alone unlimited discretion for the security's sufficiency – means that the US did not have unlimited discretion under the Act. *Adam Sommerrock Holzbau, GmbH v. United States*, 866 F.2d 427, 429 (Fed. Cir. 1989) (citation omitted); *Wright v. Collins*, 145 F.4th 1336, 1342 (Fed. Cir. 2025) (where "[t]he statutory text contains no [such] provision … courts must 'resist reading words or elements into a statute that do not appear on its face'") (citation omitted). The express conferral of discretion in § 403(b) but not in § 405(c)(2) also is telling. "[W]here 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 purposefully in the disparate inclusion or exclusion." *INS 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). Further, Congress' silence or ambiguity regarding agency discretion generally calls for a presumption that there is no discretion. *Backcountry Against Dumps v. E. P. A*., 100 F.3d 147, 151 (D.C. Cir. 1996).

The US' argument that it could do whatever it wanted in terms of the amount of security for the Trust Funds is at odds with the Act in other ways. Most critically, it would defeat the Act's fundamental purpose of the bargained-for funding for Arizona Tribes' education. Act, §§ 401(2) and 405. But for the establishment of the Trust Funds, Congress would not have approved the Land Exchange in the first place. *Id*. §§ 401(10) and 405. Thus, the US' argument for unlimited discretion to set the amount of security for the Trust Funds at whatever it wanted (even at nothing) would render these sections and §§ 403(c)(2) and 403(c)(5) meaningless. This should be rejected.

By contrast, ITCA's reading of § 405(c)(2), especially *in pari materia* with §§ 403(c)(2) and 403(c)(5), to determine the required amount of sufficient security – the amounts due the Trust Funds – gives meaning to all relevant sections of the Act, which makes the "statutory scheme coherent and consistent." *Sunoco, Inc. v. United States*, 908 F.3d 710, 715 (Fed. Cir. 2018), *cert. denied*, 140 S. Ct. 46 (2019) (interpreting statutory language based on its "interrelationship among three [corresponding] sections [in] the [statute]); *see also Sucic v. Wilkie*, 921 F.3d 1095, 1098 (Fed. Cir. 2019) ("It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'") (citations omitted).

2. The US' Argument for Broad Discretion Also Fails

Similar to its unlimited discretion position, but not quite the same, the US appears to take the alternative position that under the Act it "had no duty to maintain any collateral beyond that

which is secured by the TFPA." *E.g.*, Def.'s Mot. 31. This is an argument for broad discretion regarding the amount of security the US was to hold in trust, and it appears to hinge entirely on the qualifying phrase in § 405(c)(2), "in accordance with the Trust Fund Payment Agreement." The US offers little, if any, other textual or interpretative support for this construction of the Act, most likely because applicable statutory textual and interpretive principles defeat the argument that the Act gave the US wide latitude to determine the Trust Funds' security sufficiency based solely upon its negotiated terms with Collier in the TFPA and related documents.

The broad discretion argument contravenes basic grammatical and statutory interpretation rules. *See Hirsch v. United States*, 153 Fed. Cl. 345, 354 (2021*), rev'd on other grounds*, No. 19-236C, 2022 WL 3209327 (Fed. Cir. Aug. 9, 2022) (statutory interpretation includes consideration of a provision's grammatical structure). Section 405(c)(2) 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." The Section's grammatical structure tells us that the "security provided," which the Treasury Secretary was to hold in trust, is tethered to the 30-year option under § 403(c)(2). It does not tell us, as the US contends, that the TFPA would determine the amount of security required. Rather, it says only that the Secretary "shall hold in trust" the security "in accordance with" the TFPA. As ITCA has argued, the phrase "in accordance with" authorizes the TFPA to say what type of security shall be held, but it does not say that the TFPA may set the amount of security required; the Act does that.

Additionally, interpreting "in accordance with" as giving the US discretion to dictate the amount of security it was required to hold through the terms of the TFPA would render § 403(c)(5) superfluous. A lone phrase cannot be used to eliminate or render superfluous other provisions of

the Act. *See Amaro v. Gerawan*, No. 1:14-cv-00147-DAD-SAB, 2016 WL 4440966 at *3 (E.D. Cal. Aug. 23, 2016) (rejecting defendants' interpretation of statutory phrase "in accordance with" where it would render a good portion of the statute meaningless "by dampening, if not outright nullifying, the statute's requirement[s]"); *see also Manor Care, Inc. v. United States,* 89 Fed. Cl. 618, 624 (2009), *aff'd*, 630 F.3d 1377 (Fed. Cir. 2011) (court refuses to "selectively pluck one clause ... and give it overriding effect without giving meaning to many others").

Nor can a single phrase be used to defeat an overarching purpose of a statute. "Interpretation of a statutory provision at issue cannot occur in a vacuum. A court has the 'duty … 'to construe statutes, not isolated provisions.'" *Obsidian Sols. Grp., LLC,* 153 Fed. Cl. 334, 342 (2021), *aff'd*, 54 F.4th 1371 (Fed. Cir. 2022) (citations omitted); *accord Merck Sharp & Dohme B.V. v. Aurobindo Pharma USA, Inc.*, 130 F.4th 1363, 1368 (Fed. Cir. 2025) (citation omitted) (the "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context"); *see also Cotter Corp., N.S.L. v. United States*, 127 F.4th 1353, 1370-71 (Fed. Cir. 2025) (discussing Supreme Court cases construing statutory phrases such as "in connection with" "arising out of" and "in relation to," and noting that the Court finds these phrases indeterminate and therefore they must be construed in the context of "the particular statute's structure, other provisions, and objectives," and in any event they "do[] not mean that anything goes"). A fundamental purpose of the Act was to provide Trust Funds for the benefit of Arizona Tribes' education and related purposes specified in § 405(d). The US' discretion argument would defeat that purpose.

"[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013), cited in *Deckers Outdoor Corp. v. United States*, 714 F.3d 1363, 1371 (Fed. Cir.

2013), *cert. denied*, 572 U.S. 1129 (2014). Thus, courts in this jurisdiction routinely reject the government's construction of statutory sections that would deny operative effect or meaning to other provisions. *E.g.*, *Vesser*, 29 F.3d at 605; *Saunders v. Sec'y of the Dep't of Health & Hum. Servs.,* 25 F.3d 1031, 1035 (Fed. Cir. 1994). This rejection occurs often in the Indian law context where the US claims discretion in its role as trustee for tribes. *See, e.g., Wolfchild v. United States*, 96 Fed. Cl. 302, 347 (2010), *rev'd in part,* 731 F.3d 1280 (Fed. Cir. 2013) (rejecting government's interpretation of breadth of Secretary's discretion [which] would render meaningless statutory trust fund provisions – Congress "did not provide the Secretary with such broad discretion so as to negate" specific statutory provisions); *see also Shoshone Indian Tribe of the Wind River Rsrv. v. United States*, 56 Fed. Cl. 639, 649 (2003) ("The court finds that the discretion afforded the Secretary under the regulations is not so broad as to require the dismissal of this claim"). Similarly, by the Act here, Congress did not leave to the whims of the US as trustee a security mandate for multi-million dollar amounts due Trust Funds for Indian education.

Ironically, the US' argument for broad discretion based on what it negotiated in the TFPA also is undercut by the US' correct understanding that the US' fiduciary duties are created through statutes. The Act indisputably required the US to hold security in trust. The US' argument that the amount of security it needed to hold was "limited only-by-the-TFPA" suggests that the Act's lack of a definitive amount of security required meant that Interior could define its fiduciary duties in a contract with a third party. As the Court of Appeals held, the negotiated terms in the TFPA are "separate and distinct from those imposed on the Government [under the] AFLEA and do[] not, and indeed cannot, relieve the Government of obligations arising from its statutory fiduciary duty." 956 F.3d 1343 n.13 (citation omitted). The US acknowledges that a blank-check approach to establishing the US' trust duties is at odds with the general rule that the US' fiduciary duties are

strictly bound by the four corners of statutes. Def.'s Mot. 22-28.[6]

Nor does *Inter-Tribal Council of Arizona, Inc. v. Babbitt*, 51 F.3d 199 (9th Cir. 1995) (*Babbitt*) support the US' broad discretion argument. *See* Def.'s Mot. 5 and 29. *Babbitt* affirmed the district court's dismissal, for lack of subject matter jurisdiction and failure to state a claim, of ITCA's claims in *Inter-Tribal Council of Arizona, Inc. v. Lujan*, No. 2:92-cv-01890 (D. Ariz. Oct. 8, 1992) (*Lujan*), Order of Oct. 30, 1992, SAC Exhibit 25, ECF No. 58-3. ITCA's claims in *Lujan* included claims for declaratory and injunctive relief on the grounds that the Secretary of the Interior's decisions granting a four-year extension to Collier for closing on the Land Exchange, accepting inadequate security, and agreeing to a non-recourse provision were in violation of the Act and arbitrary and capricious. 51 F.3d 200.

Lujan held that the under the Act the district court had no jurisdiction to review the Secretary's decisions and actions in the context of claims for declaratory and injunctive relief because the Act expressly precluded judicial review of these decisions and actions by the Secretary. *Lujan*, Order of Oct. 30, 1992 at 8. *Babbitt* affirmed the *Lujan* holdings, ruling that the Act shielded the Secretary's decisions and actions from judicial review in the declaratory and injunctive relief context. 51 F.3d 203. But judicial review preclusion itself means that the merits of the issues of how much security the Act required the US to hold in trust, and whether the US held sufficient security in trust, never were reached in *Lujan* or *Babbitt*. *Steenholdt v. FAA*, 314 F.3d 633, 637-39 (D.C. Cir.

[6] As ITCA's SAC ¶ 259, alleging that the US' failure to negotiate for sufficient security in the TFPA was a breach of trust, has been dismissed, ITCA does not make an argument here challenging the terms of the TFPA. But ITCA always has argued, and maintains its argument, that the TFPA had to be construed consistent with the Act. Additionally, ITCA takes issue with the US' statement that the purposes of the Act's security mandate and the TFPA were to "encourage" Collier's payments. Def.'s Mot. 29. That is not what the Act says, nor what Congress intended; rather, the Act's 30-year option required the US to hold in trust security for the Trust Fund Payments and enter into a TFPA with Collier pursuant to which the Payments "will be made." Act, § 403(c)(4). Which, as is now known, did not happen.

2003) (preclusion from judicial review of an issue is preclusion from reaching the issue's substantive merits).[7]

Moreover, in *Lujan*, in arguing against district court jurisdiction over the declaratory and injunctive relief sought there, the US "expressly acknowledged that, notwithstanding the resolution of ITCA's claims in that case, ITCA is 'free to pursue any further monetary remedy they believe they are entitled to in the United States Claims Court,' and '[u]nder contract and trust theories, plaintiffs could seek relief under the Tucker Act for money damages.'" SAC ¶ 162. Thus, the US' reliance on *Babbitt* (or *Lujan*) for its broad discretion argument on the merits of the remaining security issues in this action is misplaced.

3. Assuming *Arguendo* the Act Is Ambiguous, It Must be Construed in ITCA's Favor

a. The Indian Canon of Construction Compels ITCA's Construction

ITCA maintains the Act unambiguously required the US to hold sufficient security in trust to make the Trust Funds whole if Collier stopped paying. But even assuming *arguendo* that the Act is ambiguous on this point, the ambiguity must be resolved by the long-standing canon of 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.,* 364 F.3d at 1352; *see also Cherokee Nation v. United States Dep't of the Interior*, 531 F. Supp. 3d 87, 96 (D.D.C. 2021) (citations omitted) ("in cases involving the rights of Native Americans, the Court must always

[7] Additionally, it is questionable whether at the time of *Lujan* the security sufficiency issues could have been fully and fairly litigated on the merits since the US and Collier had not completed their TFPA negotiations and the matter was not ripe. JSOUF ¶ 1 (the US and Collier executed the TFPA on December 18, 1992). Litigation of an issue in a subsequent action is not precluded when there was no adequate opportunity or incentive to obtain a full and fair adjudication in the initial action. *Gorski v. United States*, 104 Fed. Cl. 605, 615-16 (2012) (citation omitted).

keep in mind that '[t]he governing canon of construction requires that 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'").

This Indian canon of construction is "rooted in the unique trust relationship between the United States and the Indians." *Oneida Cnty., N.Y. v. Oneida Indian Nation of New York,* 470 U.S. 226, 247 (1985). "The very purpose of the canon[] is to test whether, indeed, Congress clearly and intentionally limited whatever tribal sovereign rights might be at issue [and] to avoid any causal, ambiguous, implicit, mistaken, or unintended erosion of such rights." Bryan H. Wildenthal, *Federal Labor Law, Indian Sovereignty, and the Canons of Construction*, 86 Or. L. Rev. 413, 493 (2008). It is a "substantive canon of construction," *Procopio v. Wilkie*, 913 F.3d 1371, 1385 (Fed. Cir. 2019) (O'Malley, J., concurring). Thus, it "provide[s] an interpretive methodology for protecting fundamental constitutive, structural values against all but explicit congressional derogation." 1 Felix S. Cohen, *Handbook of Federal Indian Law* § 2.02[2] (Lexus 2024).

"[T]he original and continuing purpose of the canon[] is to safeguard Indian rights against loss unless it is clear that Congress adequately considered the Indian interests and intentionally took action diminishing those interests." Scott C. Hall, *The Indian Law Canons of Construction v. The Chevron Doctrine: Congressional intent and the Unambiguous Answer to the Ambiguous Problem*, 31 Conn. L. Rev. 495, 538 (2004). To the extent this canon protects Indians against unfair bargaining and self-dealing by the US, the canon's application is particularly important here. The record amply shows that the US, in administering its trust duties, consistently placed its own interests over those of ITCA. *See, e.g.*, Ex. 28 at 8 to Def.'s Statement of Facts in Support of Collier's Mot. for Summ. J., *U.S. v. Collier*, ECF No. 146-07, Dec. 23, 2015), attached as Exhibit D to Pl.'s Mot., ECF No. 184-5 (Interior's number one reason for reaching agreement with Collier was to acquire the Florida lands; potential compensation to ITCA (and the Navajo Nation) – which

Interior always had opposed anyway, Pl.'s SOUF ¶¶ 13 and 30-31 – was reason number five).[8] Especially in light of this, any ambiguity about whether the Act required the US to hold an amount of security sufficient to secure the amounts due the Trust Funds, or alternatively, left the US with discretion to determine the amount of security, if any, must be resolved by choosing the first interpretation, which safeguards the Trust Funds against the US' evident self-interest and compromising ITCA member Tribes' education interests to obtain the Florida lands.

b. The Legislative History Supports ITCA's Construction

If there is statutory ambiguity, courts may "turn to the statute's legislative history to determine its meaning." *Garvey v. Wilkie*, 972 F.3d 1333, 1337 (Fed. Cir. 2020), *cert. denied*, 142 S. Ct. 79 (2021); *accord Zavislak v. United States*, 29 Fed. Cl. 525, 529 (1993). The Act's legislative history supports ITCA's interpretation that the US was required to secure the amounts due the Trust Funds, and its trust duties including investing the security to meet the amounts due. The legislative history does not support the US' argument that the Act gave it any discretion regarding the amount of security it was to hold in trust. Nor does the legislative history support the US' argument that ITCA seeks in this case more than that to which it is entitled under the Act.

i. Congress did not anticipate the US having any discretion to decide the amount of sufficient security in the TFPA, but, rather, understood that the amount required was provided by the Act

During Congress' consideration of the bills that became the Act, Collier proposed that it be allowed to defer payment of the $34.9 million for 30 years. Pl.'s SOUF ¶ 28. In response, ITCA

[8] The post-enactment outcome of the Act illuminates precisely why the Indian canon of construction must control any ambiguity. As the Act intended, the US received the Florida land and Collier received the Phoenix Indian School property. But because of the US' failure to hold sufficient security, Arizona Tribes have failed to receive the full value for Indian education called for by the Act that was compulsory to the Land Exchange.

testified that a 30-year deferral raised concerns of "fluctuation of interest," and so it took the position that if there were such a deferral, Congress should "establish … a guaranteed minimum [annual] cash flow" to the Trust Funds. Pl.'s SOUF ¶ 29; *see also* 134 Cong. Rec. H5913 (daily ed. July 12, 1988) (statement of Rep. John J. Rhodes III) (what became § 403(c)(5) was "included at the request of the Indians, so they can be sure they can maximize their rate of return."). As a result, once Congress was amenable to Collier's proposed 30-year option, it added § 403(c)(5) in response to ITCA's concerns about the risks associated with the option, to include an express minimum annual rate of return of 8.5% on the $34.9 million for 30 years. Congress then also added § 405(c)(2)'s security mandate to work in concert with the amounts due the Trust Funds.

Regarding the security mandate, the legislative history lacks any reference to the US having discretion. *Cf.* H.R. Rep. No. 100-744, pt. 1, at 11 and 16 (1988) (the Act expressly gives the Interior Secretary discretion regarding the Trust Fund Payment method). Notably, there also is no mention in the legislative history of the US' highly touted "in accordance with" phrase. The House Committee Report states only that, "[i]f payment into the trust funds is made in the form of annual payments, the Secretary of the Treasury is directed to hold the security provided by the Purchaser in trust." *Id*. 17. Any reference to the TFPA, let alone any indication that the TFPA trumps the Act, *see* Def.'s Mot. 23 ("the TFPA thus sets the collateral to be held in trust" and the US had no greater duty "to maintain more collateral than what the TFPA required") is non-existent. Thus, the Act's legislative history supports ITCA's construction of the Act for the amount of security to be held in trust and not the US' unlimited or broad discretion arguments.

ii. The damages ITCA seeks in this case are not gratuitous

The US suggests that the Trust Funds have received more than what Congress ever intended and therefore that the amounts they have received, and the damages that ITCA seeks, are

gratuitous. This depiction is premised on cabining what the Trust Funds are due under the Act to the $34.9 million in Monetary Proceeds only. *See, e.g.*, Def.'s Mot. 34 (the Act only ensures $34.9 million to tribes). By taking this limited and erroneous view of the Act, the US seeks to justify its contention that the Trust Funds' receipt of around $88 million far exceeds what the Act provided, and there is no basis for damages under SAC Claim I. *Id*. But the gratuitous scenario blatantly ignores the Act's key terms, overall structure, and intent outlined above. The Act provides for payment of the $34.9 million via both a lump sum and a 30-year option, because both were intended and designed to ensure that the Trust Funds would receive the same amount **regardless which payment method was elected**.

ITCA maintains that the Act on this point is unambiguous. But to confirm the Act's terms, or if this Court finds that they are ambiguous, *see supra*, the Court can turn to legislative history. "A court's interpretation of statutory language should consider only the actual text enacted by the legislature, without resort to legislative history." *Hirsch*, 153 Fed. Cl. at 355 (citation omitted). "Nevertheless, a court may consider the legislative history of a statute to ensure that it does not show a 'clearly expressed legislative intention' contrary to the Court's interpretation of the statutory language." *Id*.

At the Joint Hearing on the bills that became the Act, Nora Garcia, Chairperson of the Fort Mojave Tribe and Vice-President of ITCA, and John Lewis, Executive Director of ITCA, delivered statements and testimony. *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. 60 (1988) (Joint Hearing). Ms. Garcia reiterated ITCA's strong preference for the Phoenix Indian School to stay open "for no less than 15 years while educational, economic, and social resources are developed

in local Indian communities." *Id*. ITCA did not want the School closed, at least until appropriate alternative arrangements were made. *Id*. Senator DeConcini responded sympathetically to ITCA's preference that the School stay open; however, he explained his belief that there was little chance of this happening. *Id*. 65.

Alternatively, in the event of the School's closure, ITCA urged Congress to establish trust funds for Tribes served by the School into which the substantial difference in value between the Florida lands and the Phoenix Indian School property would be paid as compensation to the Tribes for the School's closure. *Id*. 60; *see also* SAC ¶ 34. This was a unique circumstance – in the entire history of the US closing or transferring hundreds of federal Indian boarding and day schools, no tribe ever had (or has) received compensation, let alone trust funds, for a school's closure. But for Arizona Tribes served by the Phoenix Indian School, the extraordinary value of the School's property made a difference. And because Collier needed congressional ratification of the Land Exchange so it could get the valuable Indian School property in exchange for its Florida lands, Collier supported creation of the Trust Funds as ITCA proposed. Joint Hearing 133 (Statement of Roy E. Cawley, Jr., President, Real Estate Division, Barron Collier Company). Interior did not support the Trust Funds' creation, *id*. 118 (Statement of Susan Reece, Acting Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior), but Congress, mindful of ITCA's concerns, nevertheless agreed to create them. "We should give first priority to seeing that all the cash proceeds [from the Land Exchange] go into a trust fund for the education needs of the Indian children." *Id*. 38 (remarks of Senator DeConcini, D-AZ).

By the time of the Joint Hearing, though Collier had agreed originally to pay the $34.9 million as a lump sum at closing on the Land Exchange, Pl.'s SOUF ¶¶ 19-20, it instead proposed deferring payment of the $34.9 million for 30 years. *Id*. ¶ 28. ITCA strongly preferred receiving

the lump sum payment over the deferral. But ITCA proposed that if there were to be a deferral, or a deferral option, Congress should be certain to fix the annual rate of return on the $34.9 million Monetary Proceeds at a minimum of 8.5% annually (consistent with the existing market rate conditions for 30-year US Treasury bonds, *see, supra*) for the 30-year deferral period. *Id*.¶ 29. This was critically important to ITCA because it would provide for stability in annual payments to the Trust Funds during the deferral period to meet the Tribes' annual educational needs. *Id*.

At the Joint Hearing, Senator DeConcini's concern about which method of payment would be best for the Tribes – *i.e.*, lump sum or 30 years – was quite evident. He asked ITCA's representatives about how the options differed in terms of the *investment, i.e*., the rate of return "options to the Secretary [of the Interior]." Joint Hearing at 65. Mr. Lewis explained that ITCA's proposed fixed annual rate of return for the deferral period was out of concern about interest fluctuations and educational needs. "We were trying to at least establish the accommodation for a guaranteed minimum cash flow." *Id*. 66. Senator DeConcini then probed further into ITCA's proposed annual rate of return range of 8.5 to 9%, *i.e*., noting he could see the reason for the floor, but not the ceiling. *Id*. Mr. Lewis explained, "[w]e felt, in approaching that, that appeared to be a reasonable projection of the treatment of that particular interest-bearing activity." *Id*.

The Statement of Representative Morris K. Udall, D-AZ, in support of the bills, also addressed, *inter alia*, "the closure of the school and the establishment of the Trust Funds." *Id*.105. With respect to the Trust Funds' establishment, Representative Udall stated that "the FUNDS may be established in a lump sum payment [of $34.9 million] … OR [] the funds may be established by … 30 annual payments, at not less than the amount would have been if the United States had made the investment" of the lump sum [of] the final payment [of $34.9 million]. *Id*. 107. Like Senator DeConcini, Representative Udall was focused on the lump sum and 30-year options being

no different in terms of the amounts the Trust Funds ultimately would receive, considering the US' fiduciary investment obligations cognized by Congress.

The Joint Hearing shows that, to offset the risky 30-year deferral option for the $34.9 million Monetary Proceeds, Congress understood and adopted ITCA's legitimate concerns for protection and assurance in the form of a reasonable and justifiable statutory fixed annual minimum annual rate of return for the Tribes' annual educational needs. Congress also understood that had the $34.9 million been paid as a lump sum, ITCA could have received a similar annual rate of return over 30 years as a steady stream of income for Indian education. This is because, under then existing market interest rate conditions (which the Act expressly codified in § 403(c)(5)), if the $34.9 had been paid upfront, it could have been invested by the US in 30-year US Treasury bonds with a locked-in annual rate of return at the contemporaneous market rate comparable to the statutorily fixed 8.5% minimum. In fact, this is precisely what the Congressional Budget Office stated about the lump sum and 30-year options in its Cost Estimate:

> [I]t is assumed that … [the] lump sum payment[] is received in the second quarter of fiscal year 1991. It is further assumed that such payment[] will be invested in long-term Treasury securities[.]
>
> Under CBO interest rate assumptions, the investment of the $34.9 million payment would yield about $1.8 million in fiscal year 1991 and about $3.1 million a year thereafter….If the DOI permits installment payments … the federal government would instead receive a payment of $3.1 million in fiscal year 1991 and a like amount in each of the following 28 years. The final installment of about $38 million would include [the] principal payment of $34.9 million.

Cong. Budget Office Cost Estimate – H.R. 4519, 134 Cong. Rec. S13519-02, 1988 WL 176577 (Sept. 28, 1988). In the end, because Congress was assured that under either option (lump sum or 30-years) the projected return to the Trust Funds would be the same, Congress ultimately approved both payment options. But a minimum annual rate of return of 8.5% on $34.9 million for 30 years

is exactly what Congress understood and expected the Trust Funds to receive under either the lump sum or the 30-year option.

To ensure the full amounts due the Trust Funds under the 30-year option, Congress required the US to hold in trust security for those amounts. And if Collier stopped paying, which was known to be a legitimate risk, the security should be sufficient so that, once invested by the US, it would provide for the full amounts due the Trust Funds, considering Collier's payments. This explains why the security mandate is in the Act's Establishment of the Trust Funds Section "Investment" subsection, *see supra*. The references in the legislative history to investment confirm Congress' intent.

Thus, contrary to the US' *post-hoc* argument that the Trust Funds have received all and more than they are due, ITCA's security sufficiency argument is not opportunistic at all. ITCA merely seeks precisely what Congress intended – that the Trust Funds get what the Act provided for them, whether the $34.9 million was paid by Collier as a lump sum at closing and invested by the US in 30-year US Treasury bonds at contemporary fixed rates or, alternatively, under the 30-year option, with sufficient security. Either way, under ITCA's correct reading of the Act, the Trust Funds would receive around $122 million at the end of 30 years, not the $88 million that the US insists is gratuitous. The $88 million is quite short of what Congress intended the Trust Funds would receive under either the lump sum or the 30-year option.

c. The US has Admitted that ITCA's Construction of the Act is Appropriate

The US acknowledged as early as 1992 that the Act's fiduciary security mandate was to have sufficient security for the amounts due the Trust Funds. The US also acknowledged that at the time Collier stopped paying, absent sufficient security, it is liable for "the difference between Collier's 8.5 percent interest and the rate it [has earned] … and the rate it [is] able to earn by

investing in Government securities for the remainder of the thirty year period." May 1992 Memo 3. There is nothing unreasonable about ITCA's view that the Act obliged the US to hold in trust security sufficient to ensure the amounts due the Trust Funds or risk being liable for the difference in damages, as this is a mirror image of the US' own interpretation of the Act before Collier started and stopped paying.

D. THIS COURT SHOULD HOLD THAT AS A MATTER OF LAW THE US IS IN BREACH OF ITS STATUTORY FIDUCIARY SECURITY DUTY AND LIABLE TO ITCA FOR RESULTING DAMAGES

At least when Collier stopped paying, the US as trustee admittedly held insufficient security. Def.'s Response 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. This is an admitted breach which this Court should adopt as a matter of law. *See Perez v. Hutchinson*, No. 1:12-CV-00236-EJL, 2016 WL 7256785, at *3 (D. Idaho Dec. 15, 2016), *aff'd sub nom.*, *Acosta v. Hutcheson*, 710 Fed. App'x 310 (9th Cir. 2018) (given admitted breach of fiduciary duties, court grants summary judgment as a matter of law). *U.S. v. Collier* mitigated the damages for which the US is liable because of the breach, but *U.S. v. Collier* did not erase the breach. The post-breach actions and conduct of a trustee, even the US, cannot "undo" a breach. "Interior can[not] undo its past actions … [to] mend the breaches of trust[.]" *Cobell v. Norton*, 283 F.Supp.2d 66, 239 (D.D.C. 2003), *vacated in part on other grounds*, 392 F.3d 461 (D.C. Cir. 2004); 4 Austin W. Scott & William F. Fratcher, *Scott on Trusts* § 294.1 100 (4th ed. 1989) (when "the trustee has already committed a breach of trust … it is unnecessary for the beneficiaries to call upon him to undo what he has done;" but by virtue of the trust relationship it is the beneficiary's right to bring an action for damages based on the fiduciary's breach of trust).

Thus, after declaring that as a matter of law the US was in breach of trust for holding insufficient security when Collier stopped paying, this Court should hold that as a matter of law the US is liable for damages as a result of the breach. *See United States v. Podell*, 436 F. Supp. 1039, 1041 (S.D.N.Y. 1977), *aff'd*, 572 F.2d 31 (2d Cir. 1978) (government argues that admitted acts constitute a breach of fiduciary duty and establish liability therefore as a matter of law). And "[o]nce a breach of the government's fiduciary duty is established, the question becomes the appropriate measure of damages[,]" *Short v. United States*, 50 F.3d 994, 998 (Fed. Cir. 1995). ITCA's argument is that as a matter of law the US is liable in damages for the difference in the amounts due the Trust Funds under the Act, and what the Trust Funds have and will receive for the remainder of the 30-year period. *See also* SAC ¶ 268(c). With a ruling on liability as a matter of law, ITCA is prepared to establish the monetary amount for which the US is liable as damages in subsequent proceedings before this Court. *See Wright v. United States*, 53 Fed. Cl. 466, 469 (2002) (once liability is established, issue of damages remains).

CONCLUSION

For the reasons stated above and in ITCA's Memorandum in Support of its Motion for Summary Judgment on the Remaining Claim I Issues, ITCA's Motion for Summary Judgment should be granted.

Dated this 29th day of August, 2025.

Respectfully submitted,

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