IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

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

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SUMMARY OF ARGUMENT

The Arizona-Florida Land Exchange Act of 1988, Pub. L. No. 100-696 (1988) ("Act"), in § 405(c)(2), places a duty on the Defendant United States ("US") to "hold in trust security." This provision is the heart of the remaining threshold Second Amended Complaint ("SAC"), ECF No. 58, Claim I security sufficiency issue which, as explained by the Court of Appeals, requires answering the question of the amount of security the Act required the US to hold in trust. Plaintiff the Inter-Tribal Council of Arizona, Inc., ("ITCA") has shown how the plain text and construction of the Act, accounting for all prior court rulings in this matter, lead to the conclusion that the amount is one sufficient to secure the amounts that Congress made due the Trust Funds under the Act's 30-year option, *i.e.*, $34.9 million at the end of 30 years plus a minimum annual rate of 8.5% on the $34.9 million for each of the 30 years.

Rather than offer any meaningful interpretation of the Act to rebut ITCA's argument, the US continues to avoid the substance of the Claim I security sufficiency issue, mischaracterizing ITCA's argument about the amount of security required under the Act by setting up straw men arguments like the putative "law of the case doctrine." The question of what the Act required about the amount of security was remanded to this Court in 2020 and it remains unaddressed. This issue is not foreclosed by law of the case or otherwise. The US' efforts to sidestep or mischaracterize ITCA's actual arguments on its remaining Claim I issues should be rejected.

The Court also should avoid the US' misleading suggestion that the only thing left undecided on the security sufficiency issue is whether it can be grounded solely in common law. ITCA has argued consistently that the amount of security the US was required to hold in trust is determined by the Act (which should be the focus of the Court's resolution of the remaining Claim I issues) though common law supports ITCA's argument. The Act required the US to hold in trust an amount of security sufficient to satisfy the amounts due the Trust Funds under the Act's 30-

year option, *i.e.*, $34.9 million at the end of 30 years and a minimum annual rate of 8.5% on the $34.9 million for each of the 30 years.

The US eventually makes its way back to the Act—barely. Without any real textual or contextual analysis, the US' answer to how much security the Act required it to hold in trust is astounding, since it concludes the security could be whatever amount it decided, in its unlimited discretion. This conclusion is based completely on a single cherry-picked and unexamined phrase in § 405(c)(2), "in accordance with" the Trust Fund Payment Agreement (TFPA), which was triggered by the Act with the election of the 30-year option. *Id*. § 403(c)(4). Rather than offering an appropriate interpretation of this lone phrase in its context within the text of § 405 or § 403, or even the more broadly the purposes of the Act, the US instead conclusorily asserts 1) the Act is silent on the amount of security required, and 2) as a result, it "vested the Secretary with discretion [] regarding security, limited only by the terms of the TFPA." Def.'s Resp. to Pl.'s Mot. for Summ. J. ("Def.'s Resp. Br.") 22, ECF No. 188. The US is wrong on both counts.

Unlimited discretion on the part of the US to determine the amount of security it was required to hold in trust under the Act (which the US openly acknowledges could include none), finds no support in the Act's express language and such an interpretation would nullify express terms, such as the central express minimum annual rate of 8.5% on $34.9 million in Monetary Proceeds for 30 years. The Act's single phrase "in accordance with" on which the US relies for its implicit discretion conclusion lacks any supporting textual or contextual analysis. And the US' carte blanche discretion conclusion would defeat the fundamental compensatory funding-for-Indian-education purpose of the Act.

The Court should not be sidetracked by the US' tactics. ITCA urges the Court to interpret the entire § 405(c)(2), in the context of the Act's related sections purpose, to address the threshold

unaddressed question posed by the security sufficiency issue—how much security did the Act require the US to hold in trust? Concomitantly remaining unaddressed as a matter of law and for this Court's determination is whether, notwithstanding the recovery by the US from the settlement in *United States v. Collier*, No. 2:14-cv-00161 (D. Ariz. June 29, 2016) (*U.S. v. Collier*), the US is liable to the Trust Funds for damages as a result of its breach of the fiduciary duty to have sufficient security for the amounts due the Trust Funds under the Act when Collier stopped making payments. The US' argues that, by the *U.S. v. Collier* settlement recovery, it has "fully addressed" all and beyond what the Trust Funds are due. But that assumes the points at issue remanded and unaddressed, which are the amount of security the Act required the US to hold in trust and whether, notwithstanding its recovery in *U.S. v. Collier*, the US has further liability to the Trust Funds based on the statutory requirement. ITCA provides clear answers to these questions. The US evades and obfuscates them. ITCA is thus entitled to summary judgment, and the Court should grant ITCA's motion and deny the US' motion.

ARGUMENT

I. The Threshold Remaining Claim I Security Sufficiency Issue That has Not Been Addressed and that the US Continues to Evade is the Amount of Security that the Act Required the US to Hold in Trust

A. The Amount of Security Required is a Statutory Issue, Not a Common Law Issue

The Act required the US to "hold in trust the security," Act § 405(c)(2), and the Claim I issue that ITCA has pleaded and argued about the amount of security that the US was required to hold in trust is grounded solely in the Act. *See* SAC ¶ 263. The Court of Appeals anticipated that upon remand of the security sufficiency issue, this Court would address both what was to be secured and the amount of security required. *Inter-Tribal Council of Arizona, Inc. v. United States*, 956 F.3d 1328, 1340-41 and n.11 (Fed. Cir. 2020). There is conventional understanding of the difference between what is to be secured (*i.e.*, a debt obligation) and the amount of security to be

held for it. *See, e.g.*, 12 C.F.R. 223.14(a)-(b) (setting minimum collateral values (*i.e.*, amounts of security to hold) for purposes of extending credit under the Federal Reserve Act of 1913, 12 U.S.C. § 371c, which are anywhere from 100-130% of the borrower's entire payment obligation (*i.e.*, the thing to be secured)).

The US asserts that it had "discretion [] regarding security, limited only by the terms of the TFPA." Def.'s Resp. Br. 22. This begs the question of what, if anything, did the Act require the US to secure. And if the US means to say that the Act authorized the US to determine what to secure, the US offers no language in the Act to support this. ITCA offers the sensible position, *i.e.*, that the Act determined what the US was to secure, and that that was the amounts due the Trust Funds.

What was to be secured and the amount of security required are determined by the Act. What the US was to secure was the amounts due the Trust Funds under the 30-year option in § 403(c), *i.e.*, the $34.9 million final payment at the end of 30 years, and a minimum annual rate of 8.5% on the $34.9 million for each of the 30 years. The amount of security the US was required to hold in trust was an amount sufficient to secure these amounts due the Trust Funds. So while what was to be secured under the Act was fixed, the amount to be held did vary over time, as Collier made payments to the Trust Funds and to the Annuity, and as contemporaneous market conditions changed.

The US balks at the notion that the amount of security ITCA argues was required to hold in trust could have "been valued at over *$120 million* on a $34.9 million obligation. Def.'s Resp. Br. 18 n.3 (emphasis in original). Similarly, the US claims that ITCA argues that the amount of security that the US had to hold was $34.9 million plus all 30 annual payments. *Id.* 13 and 19-20. Neither are accurate representations of ITCA's argument, which, as stated *supra*, is that the amount

of security the US had to hold changed over time based on amounts paid by Collier and contemporaneous market conditions.

The amount of security the Act required is in § 405(c)(2)'s grammar, read in *pari materia* with §§ 403(c)(2) and 403(c)(5). The US must "hold the security provided." By use of the definitive article "the" before "security," the language is identifying a specific security that the US was required to hold. Definition of *the*, *Merriam-Webster.com*, https://www.merriam-webster.com/dictionary/definite%20article (last visited Sept. 19, 2025). That specific security is the security provided for the 30-year option. *Accord* §§ 405(c)(2), 403(c)(2) and 403(c)(5). The only way to secure the 30-year option is security in an amount that, after investment, ensures the Trust Funds receive $34.9 million plus an annual minimum rate of 8.5% on $34.9 million by the end of the 30-year period.

In any event, the US states that the Act is silent about the amount of security it was to hold in trust. Def.'s Resp. Br. 22 and 25. If this Court agrees that the Act is silent on this point, the Court need not defer to the US' self-serving interpretation of the Act. The Court should proceed to determine independently what amount of security the Act required. *Kaptan Demir Celik Endustrisi Ve Ticaret A.S. v. United States*, 756 F. Supp. 3d 1312, 1320 n.4 (Ct. Intl. Trade 2025) (after *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024), "courts exercise their independent judgment in deciding statutory meaning when the statute is silent or ambiguous"). And as ITCA has argued, "Congress's failure to grant an agency a given power is not an ambiguity as to whether that power has, in fact, been granted." *Am. Bus Ass'n v. Slater*, 231 F.3d 1, 8 (D.C. Cir. 2000) (Sentelle, J., concurring). Rather, "statutory silence on the granting of a power is a *denial* of that power to the agency." *Id*. (emphasis in original).

ITCA maintains that the Act is not ambiguous about the amount of security the US was required to hold in trust. But should this Court determine that the Act is ambiguous on this point, the Indian canon of construction, that ambiguities in a statute like the Act, passed for the benefit of Indians, must be applied. And when applied, the canon compels construction of the Act in ITCA's favor. *Bear v. United States*, 112 Fed. Cl. 480, 486 (2013). And ITCA's ambiguity argument is not "belated," as the US states, Def.'s Resp. Br. 22 n.5. ITCA has made this argument throughout its summary judgment briefing in this litigation.

The US acknowledges that its fiduciary duties are defined only by statute. Def's Resp. Br. 28. Curiously then, the US argues that ITCA cannot invoke common law to impose additional duties on the US beyond those in the Act and complains that ITCA has not addressed "whether and to what extent the common law of fiduciaries influences the analysis of this issue." *Id*. 4 and 12. Because ITCA's position is fully supported by the Act, ITCA need not argue common law in support of its position. Nevertheless, ITCA has identified appropriate common law that supports its position, *e.g*., the trustee's duty to preserve the trust property and the trustee's duty to invest prudently. Pl.'s Resp. in Opp. To Def.'s Mot. for Partial Summ. J. ("Pl.'s Resp. Br.") 10-12, ECF No. 186. And ITCA does not concede any common law claims that it might have. *See* Def.'s Resp. Br. 28.

But to the extent the US argues or implies that this Court has held that only common law can support ITCA's remaining security sufficiency issue, *id*. 27-28, that argument is not supported in the law. As this Court correctly recognized, any inquiry into common law fiduciary duties of the US necessarily is predicated on a fiduciary duty in a statute. *Inter-Tribal Council of Arizona, Inc. v. United States*, No. 15-352, 2023 WL 4881967, at *9 (Fed. Cl. Aug. 1, 2023). There may be common law duties in addition to statutory duties, but they do not eliminate or reduce the statutory

duties. *Id*., citing *White Mountain Apache Tribe v. United States*, 249 F.3d 1364 (2001), *aff'd and remanded*, 537 U.S. 465 (2003) (common law may be used to assist in defining the US' statutory fiduciary obligations). So ITCA is not left with only common law as the US contends. The US' efforts to recast what it acknowledges is a statutory interpretation issue, albeit one that has not yet been addressed, into a purely common law issue should be rejected.

B. The Statutorily Required Amount of Security Remains an Unaddressed Issue Not Foreclosed By Law of The Case or Otherwise

The US argues that ITCA is trying to relitigate foreclosed claims. *See, e.g*., Def.'s Resp. Br. 14-15. ITCA is not relitigating; it is addressing issues left open under Claim I which call for this Court's consideration on remand. The Court of Appeals reversed and remanded the dismissal of Claim I's allegations that the US failed to hold in trust sufficient security. 956 F.3d at 1344. The dismissal's reversal was unequivocal. "We find that the Court of Federal Claims erred in dismissing the failure-to-maintain-sufficient-security portion of Claim I." Id. at 1344. And the remand encompassed the issue of the amount of security required. *Id*. at 1340 n.11 (noting that "the parties dispute" the amount required issue but taking "no position on the issue" since it was immaterial to the appeal's determination "and also because the Court of Federal Claims did not pass on this issue below"). And given the remand, "we expect that this [amount required] issue will ultimately need to be resolved." *Id*.[1]

On remand, this Court acknowledged the open security sufficiency issue and correctly stated it as follows: the "issue that remains unresolved is the precise amount of security the United States was required to maintain in the Trust Estate." *Inter-Tribal Council*, 2023 WL 4881967, at

[1] Because the security sufficiency issue was both not decided and expressly was remanded, the US' mandate rule argument, Def.'s Resp. Br. 13 and 15-16, is irrelevant.

*5, referencing 956 F.3d at 1340-41 n.11. The Court recited, *id*. at *1, the Act's security mandate section, § 405(c)(2), but did not interpret it. A description of a statutory section is not statutory interpretation. *Thiel-Mack v. Baptist Cmty. Health Servs., Inc.*, No. 24-2681, 2025 WL 842936, at *4 (E.D. La. Mar. 18, 2025). It also is not a holding, *Martinez v. Fed. Home Loan Mortg. Corp*., 943 F. Supp. 280, 285 n.2 (S.D.N.Y. 1996). The Court's 2023 Opinion left undismissed the allegations in SAC ¶¶ 260-263, and this Court has yet to interpret the Act to resolve the issue of the amount of security required.

At oral argument on Summary Judgment Motions in August 2024, ITCA argued that the issue of how much security was required by the Act remained open. Oral Argument Transcript 41:5-10. About the allegations in SAC ¶¶ 260-62 (the failure to have sufficient security at the time of the lien releases in 1998 and 2007 and the 2008 economic downturn), the Court stated that even if these allegations were true, ITCA could not show harm from them. Oral Argument Transcript at 24:4-15. Accordingly, at the conclusion of oral argument, the Court dismissed these allegations. Order (Aug. 7, 2024), ECF No. 167.[2] The Court did not rule on the issue of the amount of security the Act required the US to hold in trust. And, importantly, the Court did not dismiss SAC ¶ 263

[2] The dismissal for inability to show harm from these stipulated-to-allegations does not mean that the US was not in breach of its fiduciary duties and liable for any harm from the breaches. Determinations of liability and harm typically are separate inquiries, *see* RCFC 42(c) (Separate Determinations of Liability and Damages). And while there can be no damages without liability, *Ultra-Precision Mfg. Ltd. v. Ford Motor Co.*, 338 F.3d 1353, 1359 (Fed. Cir. 2003), there can be determinations of liability for which there are no harms. *See, e.g., Shakopee Mdewakanton Sioux Cmty. v. FBCV, LLC*, No. 2:10-CV-10-JCM-RJJ, 2011 WL 4527177, at *6 (D. Nev. Sept. 26, 2011) (granting summary judgment on liability but denying monetary relief where plaintiff failed to show harm); *see also White Mountain Apache Tribe of Arizona v. United States,* 11 Cl. Ct. 614, 665 (1987), *aff'd*, 5 F.3d 1506 (Fed. Cir. 1993), *cert. denied*, 511 U.S. 1030 (1994) (US takes the position that even assuming its liability, plaintiff suffered no damages). The inability to show harm for these allegations was because Collier was still making payments when and after these alleged breaches occurred.

(or SAC ¶ 268(c), discussed *infra*), which alleges that the US' failure to have sufficient security when Collier stopped paying was a breach of trust in violation of the Act.

Thus, the Court of Appeals remanded the security sufficiency issue, no subsequent proceedings in this Court have foreclosed it, and it is preserved in SAC ¶ 263. The US' law of the case and mandate arguments to the contrary, Def.'s Resp. Br. 12-21, are incorrect.

C. The US Continues to Misrepresent ITCA's Remaining Claim I Security Sufficiency Issue to Make it Appear Foreclosed

The US persistently avoids addressing ITCA's plaint articulation of the remaining Claim I threshold security sufficiency issue -- the amount of security that the Act required – in a failed effort to make it appear foreclosed. For example, the US continues to recast ITCA's security sufficiency argument as an argument that the US is the "guarantor" of Collier's unpaid payments, *i.e*., that the US failed to collect or make those payments. Def.'s Resp. Br. 2, 3, 11-13, 19, and 23-24. The US also continues to say, incorrectly, that ITCA is challenging the terms of the TFPA. Def.'s Resp. Br. 3 and 14-18.

These are both straw men argument and intended to distract from ITCA's actual remaining Claim I issue contentions. ITCA acknowledges the affirmed dismissal of its Claim I allegations challenging the US' failure to ensure adequate security when it negotiated the TFPA, 956 F.3d at 1345, and ITCA is not challenging the TFPA. ITCA also acknowledges the dismissal of Claim II (the failure to collect or make payments issue), *id*. at 1345-46, and ITCA is not making a guarantor argument. Collier's requirements under the Act are not at issue here. But independent of the Act's requirements on Collier, and notwithstanding the obligations in the TFPA on Collier and the US, ITCA argues that the Act imposed requirements on the US to hold sufficient security that have not been addressed or resolved in this litigation. As the Court of Appeals acknowledged, Collier's

obligations are separate and distinct from those imposed on the US under the Act and do not and cannot relieve the US "of obligations arising from its statutory duty." *Id*. at 1342 n.13.

II. The US' Argument for Unlimited Discretion to Determine in the TFPA the Amount of Security it was Required to Hold in Trust Lacks Textual Analysis for its Reliance on the Single Phrase "in accordance with" and Disregards Applicable Statutory Interpretation Principles

A. The US' Relies Solely on the Single Phrase "in accordance with," Without Analysis

The US contends the Act gave it broad or even unlimited discretion to decide for itself in the TFPA the amount of security it was to hold in trust. For this contention the US does not and cannot rely on any express provision of the Act. *Cf*. Act § 403(b) (discretion whether to receive the Monetary Proceeds as a lump sum at closing or under the 30 year option is express). The Act is a statute with both discretionary and non-discretionary sections, which is common. *See New York Pub. Int. Rsch. Grp. v. Whitman*, 321 F.3d 316, 331 (2nd Cir. 2003). And 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) ("[T]here 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.").

The US' argument for its implicit discretion hinges, without further textual or contextual analysis, on the lone prepositional phrase, "in accordance with." A phrase not defined in the Act. Where the terms at issue are not defined in the statute, absent an indication that Congress intended otherwise, "[t]he Court therefore must endeavor to … [give them] their ordinary meaning at the time Congress adopted them." *Leming v. Sec'y of Health & Hum. Servs.*, 154 Fed. Cl. 325, 331

(2021) (citations omitted). References and tools to determine ordinary meaning can include standard dictionaries, *id*. at 331-33, as well as common meanings of words and grammatical rules. *Nez Perce Tribe v. United States*, 83 Fed. Cl. 186, 189 (2008). The purpose, structure, and context of the statutory provision in which the terms appear may be considered. *Leming* at 333; *Blueport Co., LLP v. United States,* 76 Fed. Cl. 702, 716 (2007), *aff'd sub nom.*, *Blueport Co., LLC v. United States*, 533 F.3d 1374 (Fed. Cir. 2008), *cert. denied*, 555 U.S. 1153 (2009). Comparisons with other sections of the same statute also may be considered. *Charleston Area Medical Center, Inc. v. United States*, 138 Fed. Cl. 626, 631 (2018), aff'd, 940 F.3d 1362 (Fed. Cir. 2019). The US proffers none of these.

ITCA's textual and contextual analysis is the best reading of the Act. The phrase "in accordance with" simply means that the TFPA dictates *how* the security, the amount of which already has been determined by the Act, may be held.[3] The phrase "in accordance with" generally means "in a way that agrees with or follows." Definition of *in accordance with*, *Merriam-Webster.com*, https://www.merriam-webster.com/dictionary/in%20accordance%20with (last visited Sept. 19 2025). And, in this case, what the US was to do "in accordance" with the TFPA was "hold" the security. The verb "hold" means to possess or own or have at one's disposal; it

[3] Congress also likely intended the US to determine in the TFPA and related documents such things as the type of security to hold in trust. *See* 956 F.3d at 1340 (the Court of Appeals' descriptive statement that the TFPA "defines the security to be held" is followed directly by references to the Note, the Annuity, and the Trust Estate, which are the types of security to which the US agreed with Collier). But these are aspects pertaining to the 'manner in which', or how, the security would be held. They do not speak to the amount of security the US was required to hold, which is determined by the Act. And while the Court of Appeals noted that the US had discretion under the Deed of Trust to release the liens and obtain government-backed securities, *id*. at 1341, as noted, *supra*, it also stated that the TFPA and related documents' obligations are "separate and distinct from those imposed on the Government pursuant to the AFLEA … and do[] not and indeed cannot relieve the Government of obligations arising from its statutory fiduciary duty." 956 F.3d at 1343 n.13.

does not mean to determine the amount of what one is to hold, *i.e.*, the security. *See* definition of *hold*, *Merriam-Webster.com*, https://www.merriam-webster.com/dictionary/hold (last visited Sept. 19, 2025). The language Congress chose must be given its appropriate grammatical meaning. Thus, the phrase "in accordance with" means only that the US could determine in the TFPA how or in what manner to possess the security, the amount of which already was provided by the Act.

B. The US ignores the Act's other Terms and Structure

Absent express discretion in the Act, the US can argue only that its discretion to determine the amount of security is implicit. Implicit agency discretion requires an inquiry into all applicable statutory sections and the overall statute. *See Nat'l Wildlife Fed'n v. U.S. EPA*, 980 F.2d 765, 770-72 (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). Multiple sections and purposes of the Act defeat the argument that a lone phrase like "in accordance with" renders the amount of the security optional or even null. The Act required the US to hold the security in trust. Act § 405(c)(2). This is not a requirement that lives in a vacuum. The security in trust was for Indian education Trust Funds that were compensation to Arizona tribes for closure of an off-reservation Indian boarding school located on extremely valuable land in Phoenix – land that the US wanted to exchange for wildlife refuge lands it had long coveted in Florida. An interstate Land Exchange that without the creation of the Trust Funds, Congress would not have approved. And if Interior chose to elect the 30-year option for payment of the Monetary Proceeds to the Trust Funds, the Act required Interior to enter into a TFPA pursuant to which the Payments "will be made." *Id.* § 403(c)(4). The security for which was not optional or discretionary under the Act.

Other statutory construction principles confirm that the US' broad or unlimited discretion argument is without merit. Broad or unlimited discretion would render other sections of the Act

meaningless or superfluous, which is not permitted. *Am. Bosch Magneto Corp. v. United States*, 6 F. Supp. 455, 459 (Ct. Cl. 1934); *accord Boeing Co. v. Sec'y of Air Force*, 983 F.3d 1321, 1328 (Fed. Cir. 2020) (citation omitted). In particular, it would eliminate Congress' decision to set an express minimum annual rate of 8.5% on $34.9 million for 30 years under the 30-year option along with the $34.9 million final payment to the Trust Funds. Neither an agency nor a court has "authority to eliminate [an explicit] statutory right." *Jennings v. Merit Sys. Prot. Bd.*, 59 F.3d 159, 162 (Fed. Cir. 1995) (Newman, J., dissenting). And it would interject a formidable term, "discretion," into the Act, which also is impermissible. *Adam Sommerrock Holzbau, GmbH v. United States*, 866 F.2d 427, 429 (Fed. Cir. 1989) (citation omitted)) ("Courts have no right, in the guise of construction of an act, to either add words to or eliminate words from the language used by [C]ongress.").

And as ITCA has argued, any discretion the US had about the security had to be exercised in accordance with the Act. A holding of committed-to-agency-discretion for purposes of precluding APA judicial review "in no way precludes judicial review of agency decisions that are contrary to law." *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 622 (D.C. Cir. 1987), *vacated on other grounds sub nom.*, *Farmworkers Justice Fund, Inc. v. Brock*, 817 F.2d 890 (D.C. Cir. 1987). "[A]gency discretion is defined by and circumscribed by law. Whatever the *extent* of a particular agency's discretion under a particular statute, it does not encompass the authority to contravene statutory commands." *Id*. (emphasis in original). And 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).

ITCA maintains that the Act unambiguously did not give the US discretion to hold less security than Congress expected and the Act required. But as ITCA has argued, if the Court finds ambiguity in the Act, the Indian canon of construction must be applied, and the Act must be construed in ITCA's favor. *Bear,* 112 Fed. Cl. at 486; *see also Backcountry Against Dumps v. E.P.A.*, 100 F.3d 147, 151 (D.C. Cir 1996) (Congress' silence or ambiguity regarding agency discretion generally calls for a presumption that there is no discretion).

The US argues, Def.'s Resp. Br. 3, 5-7 and 22, that the decisions in *Inter-Tribal Council of Arizona, Inc. v. Lujan*, No. 92-cv-01890 (D. Ariz. Oct. 1992) (*Lujan*), *aff'd*, *Inter Tribal Council of Arizona, Inc. v. Babbitt*, 51 F.3d 199 (9th Cir. 1995) (*Babbitt*), conclusively resolve in its favor its broad or unlimited discretion argument. That is wrong. Those cases held that the Act prohibited judicial review of the declaratory and injunctive relief Administrative Procedures Act claims regarding the Secretary of the Interior's decision on the four-year extension on closing the Land Exchange, because it was determined that that decision by Interior was committed to agency discretion under the Act § 402(h). *Babbitt*, 51 F.3d at 202-03. There was no similar determination of discretion about Interior's decisions and actions under §§ 403 or 405.

Thus, 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*. Appropriately, the Court of Appeals here did not cite *Lujan* or *Babbitt* as dispositive of the merits of these issues. *See also Steenholdt v. F.A.A.*, 314 F.3d 633, 637-39 (D.C. Cir. 2003) (preclusion from judicial review of an issue is preclusion from reaching the issue's substantive merits).

III. The US is Liable To the Trust Funds for Damages Beyond What it Recovered in *U.S. v. Collier*

Whether the US is liable under the Act to the Trust Funds for damages beyond what it recovered in *U.S. v. Collier* remains an open issue in this case that should be addressed by this

Court as a matter of law. The US incorrectly argues that its recovery from the settlement in *U.S. v. Collier* fully addresses its liability for its admitted breach of trust for failing to have enough security when Collier stopped paying. Def.'s Resp. Br. 26-27. ITCA argues that while the *U.S. v. Collier* recovery served to mitigate the US' damages due to this breach of trust, the recovery does not address fully the damages owed the Trust Funds from that breach under the Act.[4]

A. The Proceedings to Date Have Left this Issue Open

In reversing and remanding the Claim I security sufficiency issue, the Court of Appeals disagreed with this Court's 2018 holding that the US was not required to do anything more than it did in filing *U.S. v. Collier*. 956 F.3d at 1339. On remand, this Court correctly stated that "the defendant will need to show more than its suit against Collier to defeat the plaintiff's remaining viable claim." *Inter-Tribal Council*, 2023 WL4881967, at *7; *see also id.* at *10 ("the defendant's lawsuit against Collier to recover outstanding funds does not automatically absolve the defendant of liability").

The Court did not rule on this issue, but it summarized "the parties['] dispute [of] the effect of the [*U.S. v. Collier*] settlement on the plaintiff's claim" as follows: "The defendant argues that the Trust Estate now exceeds 130 percent of the Release Level Amount, and that the plaintiff therefore has been made whole." *Id*. at *9 (citation omitted). "The plaintiff argues that the $48 million settlement will not return 'anywhere near' the value that it believes it is owed." *Id*. There is an outstanding Claim I issue about "whether relief may be available to the plaintiff for the alleged discrepancy on the rate of return to the trust fund." *Id*. at *8.

[4] This factors into ITCA's damages argument; it is not a challenge for a breach of any fiduciary duty under the Act. *See* Def.'s Resp. Br. 20-21 (falsely asserting ITCA's remaining Claim I issue challenges the sufficiency of the recovery).

Thus, this Court has not dismissed SAC ¶ 268(c), which alleges that "as a result of its breaches of trust in violation of the Act's Trust Fund Payments 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 of 8.5% on the $34.9 million as of the same time, through the full thirty year annual payment time period, i.e., calendar year 2026." At the August 2024 oral argument, in clear reference to the non-dismissed SAC ¶ 268(c), the Court acknowledged that "under the terms of the Act, Plaintiff thinks it's entitled to 8.5 percent interest." Oral Argument Transcript 60:8-10.

B. The Court Should Rule on this Issue as a Matter of Law

ITCA has alleged and argued that under the terms and structure of the Act and with the support of common law, the US had a duty to hold in trust sufficient security to account for the Act's 8.5% annual minimum rate on $34.9 million for 30 years. As per the undismissed SAC ¶ 268(c), ITCA seeks a ruling as a matter of law that the US is liable for the difference between the actual return on the $34.9 million, and the Act's mandated minimum annual rate of 8.5% on the $34.9 million through the full 30 year period, i.e., calendar 2026, considering Collier's payments. ITCA has stated that the earnings by the US on the portion of the *U.S. v. Collier* settlement recovery that could be attributed to the $34.9 million final payment have been less than 8.5% per annum. SAC ¶ 214. With a ruling on the US' liability under the Act as a matter of law, ITCA is prepared to show in an evidentiary hearing or otherwise the actual rate of return versus the Act's required amounts to the Trust Funds under the 30-year option, and the shortfall associated therewith. *See MNS Wind Company, LLC v. United States*, 87 Fed. Cl. 167, 168 (2009) ("At this stage, [plaintiff] seeks only to establish the Government's liability [on summary judgement], without assessing damages yet.").

CONCLUSION

For the reason stated above and in Plaintiff's Memorandum in Support of its Motion for Summary Judgment on The Remaining Claim I Issues in the Second Amended Complaint and Plaintiff's Response in Opposition to Defendant's Motion for Partial Summary Judgment on Plaintiff's Remaining Claim I Allegation, Plaintiff's Motion for Summary Judgment should be granted and Defendant's Motion for Partial Summary Judgment should be denied.

Dated this 19th day of September, 2025.

Respectfully submitted,

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