**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

(Electronically filed on May 16, 2014)

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| JICARILLA APACHE NATION, | ) | |
| | ) | |
| Plaintiff, | ) | No. 02-25L |
| | ) | |
| v. | ) | Hon. Francis M. Allegra |
| | ) | |
| THE UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

**UNITED STATES' MOTION TO MODIFY PHASE 1 RULING**

The United States hereby respectfully moves, pursuant to Rules 7 and 54 of the Rules of the United States Court of Federal Claims, for an order modifying, in relevant part, the Court's ruling on the Phase 1 trial in this case, ECF No. 398. This motion is based upon the accompanying memorandum of points and authorities, the attached declaration of Dr. Gordon Alexander, and any arguments that may be advanced in reply, at argument, or with leave of Court.

## I. INTRODUCTION

For the reasons set forth herein, the United States respectfully requests that the Court modify its calculation of the nominal damages that should be awarded to plaintiff in Phase 1 of this case, based on the Court's findings regarding the United States' liability on plaintiff's investment mismanagement claims, see Jicarilla Apache Nation v. United States, 112 Fed. Cl. 274 (2013), ECF No. 398, thus conforming the Court's damages calculations to the Court's liability findings. In this motion, the United States does not seek to re-assert any of the legal arguments that it made as part of the Phase 1 trial or to amend any part of the liability findings in

the Court's Phase 1 trial ruling.[1/] Rather, the government requests only that the Court apply the model of plaintiff's expert, which uses the Barclays United States Treasury total return index ("Barclays UST"), to the Court's calculation of the amount of nominal damages for plaintiff's investment mismanagement claims, on an "account group by account group" basis. Further, the government requests that the Court express those re-calculated damages in nominal dollars as of the date of account closure or, if the account remained open with a positive balance, as of September 30, 1992. The government's request comports fully with the Court's holding that the Department of the Interior did not breach its fiduciary duties by not pooling Indian tribal trust accounts for investment purposes. Id. at 302. Accordingly, those re-calculated damages should be expressed as of account closure (or September 30, 1992, if the account remained open with a positive balance) in nominal dollars, and the parties in Phase 2 may address plaintiff's entitlement (if any) to, and the calculation of, an "award of interest as part of [plaintiff's] damages," see Shoshone Indian Tribe of the Wind River Reservation v. United States, 356 F.3d 1339, 1351 (2004), during "the extended period," see Jicarilla, 112 Fed. Cl. at 312—i.e., from account closure to the present.

The result of the United States' recalculation of Phase 1 damages awards, consistent with this Court's holding that it was prudent for the Department of the Interior to invest tribal trust funds separately, is summarized as follows:

[1/] The United States preserves those arguments for appeal.

| **Account Group** | **Account Closure Date**[2/] | **Underinvestment Gap at Account Closure**[3/] |
|---|---|---|
| 7455/7955 | 9/30/1992 | $1,279,207 |
| 7161/7661 | 2/1/1975 | $506,190 |
| 7411/7911 | 3/1/1977 | $321,300 |
| 9053/9553 | 4/1/1991 | $0 |
| 9066/9566 | 4/1/1991 | $0 |
| 7114/7614 | 10/1/1985 | $0 |
| 7379/7897 | 4/1/1988 | $11,657,091 |

## II. QUESTION PRESENTED

1. Whether the Court should modify its Phase 1 ruling so as to conform its damages findings to its legal and factual findings for Phase 1.

## III. STANDARD OF REVIEW

Because a final judgment has not been entered with respect to all issues, this motion is interlocutory in nature and thus governed by Rule 54(b) which provides, in part, that "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." The Court possesses the inherent power to modify its interlocutory orders, and, under common law principles, it may reconsider a prior decision, subject to the law of the case doctrine. See Wolfchild v. United States, 68 Fed. Cl. 779, 784-85 (2005). The Court may depart from the law of the case, however, upon, inter alia, the discovery of new evidence, intervening changes of legal authority, or a need to prevent manifest injustice.

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2/ As explained in Dr. Alexander's declaration, the account closure date was set at the date when the account balance was zero because of a tribal withdrawal or transfer or when the account balance went negative because of a tribal withdrawal or transfer and there were no subsequent postings to the account other than "negative interest."

3/ If the Rocky Hill Advisors Barclays UST investment model underperformed the United States actual investment return for the account group, there is no "underinvestment gap" and thus there would be zero damages.

Id. Interlocutory reconsideration is warranted "as justice requires." L-3 Commc'ns Integrated Sys., L.P. v. United States, 98 Fed. Cl. 45, 48 (2011). While the contours of interim reconsideration are imprecise, there remains "a good deal of space for the court's discretion." Cobell v. Norton, 224 F.R.D. 266, 272 (D.D.C. 2004).

As noted, instead of the rules governing motions to amend or alter final judgments, the doctrine of the law of the case applies to interlocutory decisions. Arizona v. California, 460 U.S. 605, 618-19 (1983); Exxon Corp. v. United States, 931 F.2d 874, 877 (Fed. Cir. 1991) ("Orderly and efficient case administration suggests that questions once decided not be subject to continued argument but the court has the power to reconsider its decisions until a judgment is entered."); Fla. Power & Light Co. v. United States, 66 Fed. Cl. 93, 95 (2005). "Under the law of the case doctrine, the Court has wider latitude to reconsider and modify an interlocutory order at any time before the entry of a final judgment, subject to the principle that questions once decided ought not to be subject to continued re-argument." Precision Pine & Timber, Inc. v. United States, 81 Fed. Cl. 235, 245 n.7 (2007). The law of the case doctrine, "[a]s most commonly defined . . . 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." Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 815-16 (1988) (internal quotation marks omitted). However, a trial court's finding of fact that has not been reviewed by an appellate court is "'subject to revision at any time before the entry of judgment.'" Banks v. United States, 93 Fed. Cl. 41, 52 (2010) (quoting United States v. Houser, 804 F.2d 565, 567 (9th Cir. 1986)).

## IV. RELEVANT PHASE 1 FINDINGS AND CONCLUSIONS

In its Phase 1 ruling, this Court made several findings of fact and conclusions of law that

are relevant to this motion.[4/]

First, the Court found that the Department of the Interior breached its duty to "administer the trust as a prudent person would, in light of the purposes, terms, and other circumstances of the trust," Jicarilla, 112 Fed. Cl. at 290, by failing to employ "a diversification strategy consistent with the modern portfolio theory," id. at 292. Had the Department of the Interior acted prudently, the Court held, it would have "employed a prudent investment strategy that employed a mix of short- and long-term investments." Id. at 291. The Court summarized that, "by investing the lion's share of plaintiff's trust funds in relatively low-yielding, short-term obligations, defendant breached its fiduciary duty" to plaintiff. Id. at 300.

Second, the Court held that the government "extensively considered pooling" tribal trust funds for investment purposes during the Phase 1 period. Id. at 301. The Court asked "whether the BIA's failure to implement pooling was imprudent and, by virtue of that imprudence, violated defendant's fiduciary duties to" plaintiff. Id. The Court held that the "evidence is insufficient to support a finding that defendant breached its fiduciary obligations by failing to pool . . . ." Id. at 302.

Third, the Court held that the proper means of assessing damages for improper management of plaintiff's trust funds is "by attempting to put the beneficiary in the position in which it would have been absent the breach." Id. at 304 (citation omitted). The Court held that "damages are to be calculated as 'the difference between what interest defendant paid for the funds and the maximum the funds could have legally and practically earned if properly invested outside.'" Id. (citation omitted). The Court found that "a portfolio patterned after the Barclays UST represented a reasonable proxy for how the trust funds in question should have been

[4/] See note 1, supra.

invested." Id. at 310.

Finally, while the Court held that plaintiff is likely entitled to "extension damages," id. at 311, the Court refused to assess those extension damages in Phase 1, id. at 311-12.

## V. DR. ALEXANDER'S REVISED CALCULATIONS

As this Court is aware, plaintiff's expert Rocky Hill Advisors, Inc., ("Rocky Hill") used in the Phase 1 trial an investment damages model that applied the Barclays UST total return index to "the aggregate balance of all [Jicarilla] accounts . . . ." JX420-041. Rocky Hill's "modeling is based on the real-world application of an aggregate pool of funds . . . ." JX421-003. Thus, the Rocky Hill model assumed pooling of tribal trust funds for investment purposes. Rocky Hill did not calculate investment mismanagement damages on an account group by account group basis. See generally JX420.

Dr. Alexander has replicated (and confirmed the accuracy of his replication of) the Rocky Hill damages model based upon information produced by plaintiff prior to the Phase 1 trial. Alexander Decl. ¶ 5. Dr. Alexander was asked to apply the Rocky Hill damages model, and the Barclays UST total return index, to the undisputed account balances and transactions for individual Jicarilla trust account groups[5/] in a manner that does not pool those account groups for investment purposes. Id. ¶ 3. In essence, Dr. Alexander has been asked to recreate Rocky Hill's damages model applying the Court's finding that it was prudent for the United States to invest Indian tribal trust accounts separately, rather than on a pooled basis.

Dr. Alexander has not been asked to form any opinions whether or how extension damages should be applied to investment mismanagement damages for any account groups. Alexander Decl. ¶ 3 n.4. As such, Dr. Alexander's replicated model began with February 22,

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[5/] An "account group" combines a principal account with its corresponding interest account.

1974, or the date of the first posting to an account group, whichever is later. Id. ¶ 7. Also, the replicated model ceased when an account group was closed, when an account group had a negative balance and all subsequent postings were only "negative interest," or September 30, 1992, whichever is later. Id. ¶ 8. The replicated model expressed the recalculated damages in nominal dollars. Id. ¶ 3 n.4. If the actual trust account group's investment performance exceeded the modeled account group's investment performance, the replicated model assigned no damages to that account group. Id. ¶ 4 n.7; see Jicarilla, 112 Fed. Cl. at 304 (finding that the Court has no jurisdiction to award nominal damages).

## VI. ARGUMENT

Expert opinion cannot sustain a judgment when the opinion "is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable." Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 242 (1993). Expert models and opinions that are not grounded in evidentiary factual foundation are inherently speculative and of no evidentiary value.

In the context of contractual damages, the United States Court of Appeals for the Federal Circuit has vacated damages awards by trial courts where the awards were based on expert models lacking in factual or evidentiary basis. For example, in Shockley v. Arcan, Inc., 248 F.3d 1349 (Fed. Cir. 2001), the Federal Circuit held that a plaintiff must supply "adequate evidence to enable the fact-finder to responsibly estimate future losses based on sound economic models and evidence, not pure guesswork." Id. at 1362. In rejecting an expert's model and vacating a damage award based upon that model, the Federal Circuit found that the underlying assumption that the plaintiff would have sold 80,000 units per year lacked factual underpinnings and, therefore, any basis in economic reality. Id. at 1363; see also Oiness v. Walgreen Co., 88 F.3d

1025, 1029-30, 1032 (Fed. Cir. 1996) (rejecting expert model "fraught with speculation" where "projections lacked evidentiary support" and reversing award of projected lost profits); Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1029, 1057 (8th Cir. 2000) (reversing trial court and finding that deficiencies in foundation of expert's opinion, such as expert's failure to "incorporate all aspects of the economic reality of the stern drive engine market," resulted in conclusions that were "mere speculation"); Kansas Gas & Electric Co. v. United States, 95 Fed. Cl. 257, 294 (2010) ("although [the model] appears to satisfy an economist's desire for a model of a rational market, it is unmoored from the specific factual underpinnings of [plaintiff's] claim and is an unreliable depiction of a 'but-for' world."), aff'd in part and reversed in part Kansas Gas & Electric Co. v. United States, 685 F.3d 1361 (2012).

The foregoing concepts articulated by the Federal Circuit also apply here, where the object of damages calculations are to place plaintiff in the same position it would have been "but for" established breaches of trust. As this Court found, a failure to pool tribal trust funds for investment purposes is not an established breach of trust.

As advocated by plaintiff, when assessing the "but for" measure of damages for investment mismanagement, "[a] return projection for 'properly invested' funds should reflect the standards of prudent investment, and should not rely on hindsight in selecting a benchmark for hypothetical performance." Plaintiff's Post-Trial Brief at 39, ECF No. 381 (citing RESTATEMENT (THIRD) OF TRUSTS § 100 cmt. b(1) (Tentative Draft No. 6, 2011)). It is black-letter law that a trustee cannot be assessed damages for acting prudently. "Absent a breach of trust, a trustee (a) is not liable for a loss or depreciation in the value of trust property or a failure to make a profit greater than actually generated. . . ." RESTATEMENT (THIRD) OF TRUSTS, § 99 (Tentative Draft No. 6, 2011); see also RESTATEMENT (SECOND) OF TRUSTS, § 204 (1959) ("The

trustee is not liable to the beneficiary for a loss or depreciation in value of the trust property, or for a failure to make a profit, not resulting from a breach of trust.").

This Court has held in Phase 1 that it was prudent for the Department of the Interior to invest Indian tribal trust funds separately. Thus, in the "but for" world the Department of the Interior would have invested each of plaintiff's account groups separately, not as part of a pool. Accordingly, any damages for investment mismanagement should be calculated on an individual account group basis, not on a pooled basis. Any damages model that pools plaintiff's tribal trust accounts for investment purposes is contrary to the Court's findings of fact and conclusions of law. In a similar situation, the Court reconsidered an expert's amortization calculation when the government showed that the expert's calculation was inconsistent with the Court's directive and would "result in double adjustment for inflation." Oenga v. United States, 97 Fed. Cl. 80, 84 (2011). Similarly, here, allowing the Rocky Hill damages model, with its pooling approach, to stand would result in an award of damages based upon conduct that the Court determined to be prudent and not a breach of trust.

To avoid the possibility of reversal on appeal, this Court should modify its Phase 1 damages opinion to conform its calculation of damages to its factual findings and legal conclusions. See, e.g., Georgia Kaolin Int'l v. M/V Grand Justice, 644 F.2d 412, 417 (5th Cir. 1981) (judgment based on testimony by expert who relied on demonstrably incorrect statistics cannot stand; case remanded to district court for redetermination of issue); Eastern Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 1000 (5th Cir. 1976) ("trial judge should exclude particular assumptions of other aspects of an expert's testimony which considered individually do not meet the 'minimum probative value'") (citation omitted); Herman Schwabe, Inc. v. United Shoe Machinery Corp., 297 F.2d 906, 911-13 (2d Cir. 1962) (expert testimony

inadmissible where basic assumption as to market share plaintiff would have garnered is completely unsupported), cert. denied, 369 U.S. 865 (1962). Dr. Alexander's replication of the Rocky Hill investment damages model correctly applies the Barclays UST total return index to each account group at issue in Phase 1. Thus, accepting Dr. Alexander's recalculated Phase 1 damages will rectify Rocky Hill's incorrect assumption that Indian tribal trust funds should have been pooled for investment purposes and conform the Court's Phase 1 damages award to its findings of fact and conclusions of law.[6/]

## VII. CONCLUSION

Wherefore, the United States respectfully requests that its motion be granted in full.

Respectfully submitted, May 16, 2014,

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[6/] The parties remain free, in Phase 2, to argue how any Phase 1 investment mismanagement damages should be brought forward.

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