

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

THE WESTERN SHOSHONE	)	
IDENTIFIABLE GROUP, represented by	)	
THE YOMBA SHOSHONE TRIBE, a	)	
federally recognized Indian Tribe, et al.,	)	
	)	
Plaintiffs,	)	No. 06-896L
	)	
v.	)	Judge Marian Blank Horn
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

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**PLAINTIFF'S POST-TRIAL REPLY BRIEF**

KELLI J. KEEGAN  
Barnhouse Keegan Solimon & West LLP  
7424 4th St. NW  
Los Ranchos de Albuquerque, NM 87107  
Tel: (505) 842-6123 Ext. 105  
Fax: (505) 842-6124  
kkeegan@indiancountrylaw.com

*Attorney of Record for Plaintiffs*

**OF COUNSEL:**

RANDOLPH BARNHOUSE  
MICHELLE MIANO  
Barnhouse Keegan Solimon & West LLP  
7424 4th St. NW  
Los Ranchos de Albuquerque, NM 87107

STEVEN D. GORDON  
Holland & Knight LLP  
800 17th Street N.W., Suite 1100  
Washington, DC 20006  
Tel: (202) 955-3000  
Fax: (202) 955-5564  
steven.gordon@hklaw.com

## TABLE OF CONTENTS

I. INTRODUCTION .....	1
II. THE GOVERNMENT FAILS TO ACKNOWLEDGE AND CORRECT DR. STARKS’ FALSE TESTIMONY .....	2
A. Dr. Starks Wrongly Accused RHA Of Making A \$12.5 – \$16 Million Error .....	2
B. The Government Failed To Acknowledge And Correct Dr. Starks’ False Testimony .....	3
C. The Government Breached Its Duty Of Candor To The Court .....	5
III. DR. STARKS’ DAMAGES MODEL IS NOT CREDIBLE OR RELIABLE .....	7
A. Dr. Starks’ Model Is Based On Her <i>Ipse Dixits</i> And Is At Odds With The Evidence .....	7
1. Dr. Starks’ maturity structure is an unpersuasive <i>ipse dixit</i> .....	8
2. Dr. Starks’ investment methodology is completely implausible .....	11
B. Dr. Starks’ Model Is Undermined By Her Own Unacknowledged Error .....	11
IV. THE GOVERNMENT’S CRITICISMS OF RHA’S DAMAGES MODEL ALL FAIL .....	12
A. RHA’s Alternative Maturity Structures Are Based On The Law And The Evidence .....	12
1. RHA’s 10-year maturity structure is appropriate under <i>Warm Springs</i> .....	14
2. RHA’s 7.86-year maturity structure is the fairest summary of the various maturity structures during the non-breach period .....	15
B. RHA’s Benchmarks Are Appropriate Measures Of Investment Performance .....	17
1. RHA’s benchmarks are not an investment strategy .....	18
2. RHA’s benchmarks are appropriate measures of performance .....	22
3. RHA’s benchmarks were properly derived from the Barclays indexes .....	24
C. There Are No Errors In The Damages Calculations RHA Presented To The Court .....	26
1. RHA corrected its original calculation of the growth of the Funds during non-breach periods .....	26
2. RHA properly uses transition periods in its model .....	28
V. WSIG IS ENTITLED TO DAMAGES UP TO THE TIME OF TRIAL .....	32
VI. CONCLUSION .....	35
CERTIFICATE OF SERVICE .....	38

## TABLE OF AUTHORITIES

CASES	Page
<i>Alco Indus., Inc. v. Wachovia Corp.</i> , 527 F. Supp. 2d 399 (E.D. Pa. 2007) .....	21
<i>Byrum v. Office of Pers. Mgmt.</i> , 618 F.3d 1323 (Fed. Cir. 2010).....	6
<i>Cal. Ironworkers Field Pension Trust v. Loomis Sayles &amp; Co.</i> , 259 F.3d 1036 (9th Cir. 2001) .....	21
<i>Coast Fed. Bank, FSB v. United States</i> , 49 Fed. Cl. 53 (2001) .....	14
<i>Confederated Tribes of Warm Springs Reservation of Or. v. United States</i> , 248 F.3d 1365 (Fed. Cir. 2001) (Warm Springs).....	<i>passim</i>
<i>Donovan v. Bierwirth</i> , 754 F.2d 1049 (2d Cir. 1985).....	13
<i>Fusari v. Steinberg</i> , 419 U.S. 379 (1975).....	6
<i>Gratz v. Claughton</i> , 187 F.2d 46 (2d Cir. 1951).....	16
<i>Gray Panthers v. Schweiker</i> , 716 F.2d 23 (D.C. Cir. 1983) .....	6
<i>Hanover Ins. Co. v. United States</i> , 146 Fed. Cl. 447 (2019) .....	5, 6
<i>Housing Auth. of City of Slidell v. United States</i> , 149 Fed. Cl. 692 (2020) .....	6
<i>ICN Photonics, Ltd. v. Cynosure, Inc.</i> , 73 F. App'x 425 (Fed. Cir. 2003) .....	11
<i>In re Puda Coal Sec. Inc., Litig.</i> , 30 F.Supp.3d 230 (S.D.N.Y. 2014) .....	9
<i>Jicarilla Apache Nation v. United States</i> , 126 Fed. Cl. 118 (2016) .....	35
<i>Jicarilla Apache Nation v. United States</i> , 112 Fed. Cl. 274 (2013) ( <i>Jicarilla Apache III</i> ).....	<i>passim</i>
<i>John Morrell &amp; Co. v. Local Union 304A</i> , 913 F.2d 544 (8th Cir. 1990)) .....	25

<i>Kerner v. City and Cty. of Denver</i> , No. 11-CV-00256-MSK-KMT, 2016 WL 3639937 (D. Colo. July 8, 2016) .....	15
<i>K.L. v. Sec’y of Dep’t of Health and Human Servs.</i> , 134 Fed. Cl. 579 (2017) .....	9
<i>Maiz v. Virani</i> , 253 F.3d 641 (11th Cir. 2001) .....	21
<i>McAllister v. Sec’y of Health and Human Servs.</i> , 70 F.3d 1240 (Fed. Cir. 1995).....	32
<i>McPhail v. First Command Fin. Planning, Inc.</i> , 247 F.R.D. 598 (S.D. Cal. 2007) .....	30
<i>Messer v. E.F. Hutton &amp; Co.</i> , 833 F.2d 909 (11th Cir. 1987) .....	11
<i>Morton Bldg., Inc. v. Redeeming Word of Life Church</i> , 835 So.2d 685 (La. App. 1st Cir. 2002).....	5
<i>Osage Tribe of Indians of Okla. v. United States</i> , 75 Fed. Cl. 462 (2007) .....	32, 34
<i>Scentsational Techs., LLC v. Pepsi, Inc.</i> , No. 13-CV-8645-KBF, 2018 WL 1889763 (S.D.N.Y. Apr. 18, 2018) .....	9
<i>Shoshone Indian Tribe of the Wind River Reservation v. United States</i> , 364 F.3d 1339 (Fed. Cir. 2004).....	32, 34
<i>Story Parchment Co. v. Paterson Parchment Paper Co.</i> , 282 U.S. 555 (1931).....	25
<i>Texas v. United States</i> , No. CIV. B-14-254, 2015 WL 1540152 (S.D. Tex. Apr. 7, 2015) .....	6
<i>Transmatic. Inc. v. Gulston Indus., Inc.</i> , 180 F.3d 1343 (Fed. Cir. 1999).....	35
<i>United States v. American Home Assurance Co.</i> , 857 F.3d 1329 (Fed. Cir. 2017).....	35
<i>United States v. Shaffer Equip. Co.</i> , 11 F.3d 450 (4th Cir. 1993) .....	5, 6
<i>Washington v. Lee Tractor Co, Inc.</i> , 526 So.2d 447 (La. App. 5th Cir.), writ denied, 532 So.2d 131 (La. 1998) .....	5
<i>Williams v. Sec. Nat’l Bank of Sioux City</i> , 358 F. Supp. 2d 782 (N.D. Iowa 2005).....	21
<i>W. Shoshone Identifiable Grp. v. United States</i> , 143 Fed. Cl. 545 (2019) ( <i>W. Shoshone</i> ).....	<i>passim</i>

<i>Zhaoqing Tifo New Fibre Co., Ltd. v. United States</i> , 60 F.Supp.3d 1328 (Ct. Int'l Trade 2015) .....	19
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## **OTHER AUTHORITY**

President Lincoln's First Annual Message to Congress (Dec. 3, 1861) .....	6
<i>Restatement (Third) of Trusts, Liability of Trustee for Breach of Trust</i> § 100 cmt. (b)(1) (2012).....	21

## I. INTRODUCTION

The Government's expert, Dr. Starks, made a major error by claiming that Rocky Hill Advisors (RHA) inflated the amount of damages because its damages model reinvests the Docket 326 Funds monthly, rather than quarterly as RHA claimed. Dr. Starks testified that this discrepancy added some \$12.5-16 million to RHA's damages calculations. In fact, however, RHA's model does no such thing. It was Dr. Starks, not RHA, who made the multi-million dollar error. Since the damages trial concluded, the Government evidently confirmed that Dr. Starks had erred and that her testimony was wrong. Consequently, the Government's brief does not repeat Dr. Starks' accusation; it is conspicuously silent about this alleged flaw in RHA's damages model. But the Government does not admit Dr. Starks' error and correct the record. Doubtless, the Government is loath to undermine its star witness in this fashion, but it has a duty of candor to this Court. In order to determine the amount of damages to be awarded to the Western Shoshone Identifiable Group (WSIG), the Court needs to be accurately apprised by the parties of the material facts and which issues are legitimately disputed.

This error in Dr. Starks' testimony furnishes an additional reason why the Court should credit RHA's damages calculations instead of Dr. Starks' calculations. As explained in WSIG's opening brief, RHA's damages model is transparent, credible and reasonable. It is based on the Court's liability findings and on objective, verifiable data, rather than on RHA's own opinions. It utilizes two alternative maturity structures: a 10-year structure that is based on the *Warm Springs* presumption,<sup>1</sup> and a 7.86-year structure that is based on the average maturity structure of

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<sup>1</sup> *Confederated Tribes of Warm Springs Reservation of Or. v. United States*, 248 F.3d 1365, 1371 (Fed. Cir. 2001) (*Warm Springs*) ("Where several alternative investment strategies would have been equally plausible, the court should presume that the funds would have been used in the most profitable of these.")

the 326-K Fund during the non-breach period. Likewise, the model uses market-average rates of return as investment benchmarks.

In sharp contrast, Dr. Starks' damages model is based entirely on her own *ipse dixit* opinions, which cannot be independently evaluated or verified. Her proposed 5-year maturity structure conflicts with her previous opinions and is at odds with the evidence. And her proposed investment methodology (bond ladders) is completely implausible because the Government never used bond ladders in investing the Docket 326 Funds.<sup>2</sup> Moreover, it is now clear that Dr. Starks is not a reliable witness because she provided inaccurate, i.e. false, testimony to the Court about RHA's damages model.

Therefore, the Court should adopt one of the two alternative damages computations proffered by RHA, depending on its conclusion about whether the *Warm Springs* presumption is applicable to the choice of a maturity structure. If the Court finds that a 10-year maturity structure is appropriate, it should award WSIG damages in the total amount of **\$133,125,302** (RHA's Alternative A). Otherwise, it should award damages in the amount of **\$113,830,811** (RHA's Alternative B).

## **II. THE GOVERNMENT FAILS TO ACKNOWLEDGE AND CORRECT DR. STARKS' FALSE TESTIMONY**

### **A. Dr. Starks Wrongly Accused RHA Of Making A \$12.5 – \$16 Million Error**

One of Dr. Starks' major criticisms of RHA's damages model was that RHA had "miscalculat[ed] returns *throughout the period at issue* by incorrectly converting [Barclays] quarterly index returns to daily earnings rates." (JX-438, WSIG-TRIAL-08449, ¶ 14 (emphasis

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<sup>2</sup> Even if Dr. Starks' damages model were as plausible as RHA's model, the law would require adoption of RHA's model as the measure of damages. *See Warm Springs*, 248 F.3d at 1371; *Jicarilla Apache Nation v. United States*, 112 Fed. Cl. 274, 310 (2013) (*Jicarilla Apache III*).

in original).) She claimed that this miscalculation added \$15.5 million to the damages for the 326-K Fund under the 10-year maturity model, and \$12 million under the 7.86-year maturity model, plus another half-million dollars to the damages for the 326-A Funds. (DX-2120, WSIG-TRIAL-10683.) Dr. Starks was full-throated in making this accusation at trial. “My critique is that Rocky Hill said that they were reinvesting quarterly when, in fact, in their model, they are reinvesting monthly.” (Trial Tr. vol. 2, 388:1-3, July 22, 2020.) She was emphatic that RHA’s model “actually reinvests monthly.” (Trial Tr. vol. 2, 388:21, July 22, 2020.)

But Dr. Starks was wrong. A review of RHA’s model demonstrates that there is no compounding of earnings within a quarter. Instead, the model reinvests earnings quarterly in accord with the Barclays data it is using – it applies the same earnings rate for each day of a quarter to the balance in the account at the beginning of the quarter. At the end of the quarter, those daily earnings are totaled up and added to the beginning balance to become the new balance for the next quarter. Dr. Starks made the multi-million dollar error here, not RHA. After the trial, the Government apparently determined that Dr. Starks’ accusation is untrue because it does not repeat her contention in its brief. Although the Government launches multiple attacks on RHA and its damages model, the Government says nothing about this allegedly “pervasive” flaw in the model.

#### **B. The Government Failed To Acknowledge And Correct Dr. Starks’ False Testimony**

Significantly, however, the Government does not actually acknowledge Dr. Starks’ error and correct the record. In fact, it twice repeats Dr. Starks’ false claim indirectly in its brief (on pp. 61 and 69) by reproducing two exhibits (JX-438, Exhibit 1; DX-2124) which purport to summarize Dr. Starks’ “corrections” of RHA’s supposed errors, including this non-existent error. (Further, these exhibits overstate the magnitude of the non-existent error by using figures which



Dr. Starks, herself, had reduced by the time of trial – *see* DX-2120). This is not the level of candor to which this Court is entitled.

The Government’s entire damages case rests upon Dr. Starks. In its brief, the Government extols Dr. Starks and asks the Court to credit her testimony, and to discredit RHA based on her testimony. Yet it turns out that Dr. Starks made a multi-million dollar error in her testimony and a serious false accusation against RHA. A mistake of this magnitude seriously undercuts her reliability and credibility, and hence the Government’s position. Moreover, if Dr. Starks’ false contention went uncorrected, it could produce an unjust result in this case. Once the Government learned of Dr. Starks’ error, it was obliged to apprise the Court to ensure that her faulty testimony does not affect the outcome of this case. It failed to do so.

Instead, in an apparent effort to disguise its abandonment of Dr. Starks’ accusation, the Government criticizes Mr. Nunes on a new ground that sounds similar to Dr. Starks’ accusation. It contends that Mr. Nunes does not understand how frequently cash is reinvested within the Barclays indices because he testified that RHA’s damages model reinvests quarterly, in accord with the Barclays data it uses, “[b]ut the truth is that the Barclays indexes reinvest income monthly, not quarterly.” (Gov. Br. 66, ECF 207 at 71.)<sup>3</sup> This criticism is completely phony. Mr. Nunes testified that the Barclays indexes rebalance on a monthly basis. (Trial Tr. vol. 2, 233:15 – 235:1, July 22, 2020.) Indeed, the Government cites his testimony elsewhere in its brief to establish that “the Barclays indices rebalance monthly to maintain their characteristics.” (Gov. Br. 36, ECF 207 at 41.) While Barclays rebalances its indexes monthly, Mr. Nunes explained that it publishes its data in the form of monthly, quarterly and annual returns. RHA uses the quarterly return data. Mr. Nunes performed a validation exercise (JX-441) to show that

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<sup>3</sup> For ease of reference, the ECF number along with the page number appended by EFC are included with each citation to the Government’s brief.

use of any of the three different Barclays return rates produces the same result. (Trial Tr. vol. 1, 123:22 – 128:1, July 21, 2020.) RHA “made sure that there was absolutely no double-counting in the way Barclays comprises its indices for a month versus a quarter versus a year, and we validated that to make sure that we understood it.” (Trial Tr. vol. 1, 124:19-23, July 21, 2020.) Thus, the Government’s new contention that Mr. Nunes misconceives how often the Barclays indexes reinvest funds is preposterous.

### **C. The Government Breached Its Duty Of Candor To The Court**

The Government’s advocacy in its brief simply cannot be squared with its duty of candor to this Court. “The duty of candor is embodied in the Model Rules of Professional Conduct, Rule 3.3 (‘Candor Toward the Tribunal).” *Hanover Ins. Co. v. United States*, 146 Fed. Cl. 447, 450 (2019). Model Rule 3.3(a)(3) provides: “If ... a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.” “[F]ailure to correct false evidence, even if originally offered in good faith, violates Rule 3.3 of the Rules of Professional Conduct.” *Morton Bldg., Inc. v. Redeeming Word of Life Church*, 835 So.2d 685, 691 (La. App. 1st Cir. 2002) (citing *Washington v. Lee Tractor Co, Inc.*, 526 So.2d 447, 449 (La. App. 5th Cir.), *writ denied*, 532 So.2d 131 (La. 1998)). Further, “a general duty of candor to the court exists in connection with an attorney’s role as an officer of the court.” *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 457 (4th Cir. 1993). “While Rule 3.3 articulates the duty of candor to the tribunal as a necessary protection of the decision-making process, and Rule 3.4 articulates an analogous duty to opposing lawyers, neither of these rules nor the entire Code of Professional Responsibility displaces the broader general duty of candor and good faith required to protect the integrity of the entire judicial process.” *Id.* at 458 (citation omitted).

“The duty of candor is paramount, surpassing generalized notions relating to counsel’s obligations to other counsel, and in many respects, to the client.” *Hanover Ins. Co.*, 146 Fed. Cl. at 450. “Consequently, it is an attorney’s ‘continuing duty to inform the Court of any development which may conceivably affect the outcome’ of the litigation.” *Id.* (quoting *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring)). “Fabrications, misstatements, half-truths, artful omissions, and the failure to correct misstatements may be acceptable, albeit lamentable, in other aspects of life; but in the courtroom, when an attorney knows that both the Court and the other side are relying on complete frankness, such conduct is unacceptable.” *Texas v. United States*, No. CIV. B-14-254, 2015 WL 1540152, at \*5 (S.D. Tex. Apr. 7, 2015).

“Courts consistently have held that ‘counsel for the government, no less than their colleagues in the private sector, are bound by the same obligations to the court. There is, indeed, much to suggest that government counsel have a *higher* duty to uphold because their client is not only the agency they represent but also the public at large.’” *Housing Auth. of City of Slidell v. United States*, 149 Fed. Cl. 692, 702 (2020) (emphasis in original) (citing *Gray Panthers v. Schweiker*, 716 F.2d 23, 33 (D.C. Cir. 1983)). “It is not the duty of the Justice Department simply to try to win cases for the Government; as President Lincoln famously said, ‘It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same, between private individuals.’” *Byrum v. Office of Pers. Mgmt.*, 618 F.3d 1323, 1333 and n.6 (Fed. Cir. 2010) (quoting President Lincoln’s First Annual Message to Congress (Dec. 3, 1861), and noting that “this quotation is engraved at the entrance to our courthouse”).

Further, courts have not hesitated to sanction litigants, including the government, for breaches of the duty of candor. In *Shaffer*, a civil environmental case, the government failed to

disclose falsehoods in the deposition testimony of a key EPA employee and then moved for summary judgment relying on the administrative record assembled by this employee. The district court dismissed the government's case because of its nondisclosure, citing both Rule 3.3 and the general duty of candor to the court. On appeal, the Fourth Circuit affirmed the findings of ethical violations and the imposition of sanctions, but remanded for imposition of a sanction short of outright dismissal.

In sum, the Government has a duty to candidly and accurately present the facts to this Court. While it is free to present those facts in the light most favorable to it and to argue the most favorable inferences from those facts, it cannot mislead the Court about those facts or permit one of its witnesses to do so, whether deliberately or inadvertently. Rather, the Government, like plaintiff's counsel, has a paramount, affirmative duty of candor to the Court that requires it to correct the record to ensure that this case is decided on its merits. Accordingly, the Government was required to correct Dr. Starks' erroneous testimony. It is not sufficient for the Government to stay silent and simply not respond to WSIG's attack on this aspect of Dr. Starks' testimony, without acknowledging this major chink in her armor. However reluctant the Government may be to undermine the credibility of its star witness, it has no choice. The Court has a paramount need to be accurately apprised of the material facts, as well as which factual issues are legitimately disputed and must be resolved by it. The Government owes an accounting to this Court for this breach of its duty of candor.

### **III. DR. STARKS' DAMAGES MODEL IS NOT CREDIBLE OR RELIABLE**

#### **A. Dr. Starks' Model Is Based On Her *Ipse Dixit* And Is At Odds With The Evidence**

As explained in WSIG's opening brief, Dr. Starks' damages model is not plausible. Her model, like RHA's, consists of two principal elements: (1) establishing an appropriate maturity

structure (investment horizon) for the model portfolio, and (2) establishing an appropriate rate of return for that maturity structure. But, unlike RHA's model, these two elements in Dr. Starks' model are based entirely on her *ipse dixit* opinions.<sup>4</sup> The maturity structure that Dr. Starks uses is based on a new opinion that conflicts with her previous opinions and is at odds with the evidence. And the investment methodology (strategy) she selects to establish a rate of return is completely implausible because the Government never used it. Moreover, Dr. Starks' credibility and reliability have been undermined by her major error in criticizing the RHA damages model.

**1. Dr. Starks' maturity structure is an unpersuasive *ipse dixit***

To construct the first element of her model, Dr. Starks selected the shortest, lowest-yielding maturity structure from the 5-10 year range that the Court found prudent in its liability decision. Why? Dr. Starks never really explained other than to announce that this was her conclusion. "I believe that five years -- given, again, the Court's opinion, given the Government's policies, practices, and investment objectives, given the conditions at the time, and given the financial and economic theory -- that five years was the most plausible portfolio -- maturity." (Trial Tr. vol. 3, 470:4-9, July 23, 2020.) Dr. Starks stonewalled any probing of her opinion: "I considered a number of factors in deciding on what -- what was the most plausible model that met the conditions, the Court's opinion, the -- the Government's practices and policies, finance theory, so I took all of these into account and came up with what I thought was the most plausible. So I -- I didn't go and say, okay, well, let me -- let me consider if I use six years, seven years, eight years. Perhaps those are also plausible. I considered what I chose to be the most plausible, and that's what I worked on." (Trial Tr. vol. 3, 474:14-24, July 23, 2020.) In

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<sup>4</sup> Dr. Starks' insistence during trial that RHA's damages model reinvested funds monthly rather than quarterly fit this same *ipse dixit* pattern. She refused to explain her contention in other than the most conclusory terms, or to demonstrate its validity.

short, Dr. Starks asserted that a five-year maturity structure should be used to calculate damages because she said so. She did not disclose her reasoning.

Furthermore, Dr. Starks' new opinion that the investment horizon was 5 years from 1980 until June 2004 conflicts with a number of her previous opinions on the subject. She previously opined that: (1) a maturity structure much shorter than five years was appropriate during the period from 1980-1992 (JX-423, WSIG-TRIAL-06979, ¶ 138); (2) "she was 'not clear about' whether five years was a prudent maturity timeframe for the 326-K Fund [from 1980-1992]" (*W. Shoshone Identifiable Grp. v. United States*, 143 Fed. Cl. 545, 635 (2019) (*W. Shoshone*)); and (3) a maturity structure considerably longer than five years "was within a range of prudence" during the 1990s (*id.* at 639).

As this Court has cautioned, "[a]n expert opinion is no better than the soundness of the reasons supporting it' [and a court] does not need to credit 'expert opinion testimony that is connected to the existing data or methodology only by the *ipse dixit* of the expert.'" *K.L. v. Sec'y of Dep't of Health and Human Servs.*, 134 Fed. Cl. 579, 601 (2017) (citations omitted). "[C]onclusory opinions—often referred to as ipse dixit—fail to provide a methodology that would allow a court to assess reliability." *Scentsational Techs., LLC v. Pepsi, Inc.*, No. 13-CV-8645-KBF, 2018 WL 1889763, at \*3 (S.D.N.Y. Apr. 18, 2018). "[E]ven otherwise qualified experts may not simply offer conclusory opinions." *In re Puda Coal Sec. Inc., Litig.*, 30 F.Supp.3d 230, 250 (S.D.N.Y. 2014). Because Dr. Starks' choice of a five-year maturity structure, and her rejection of all other maturity structures in the 5-10 year range, is a subjective, conclusory opinion, its validity cannot be independently assessed by the Court. As such, her opinion is unpersuasive.

The Government attempts to support Dr. Starks' choice of a five-year maturity structure by arguing that, 80% of the time from 1992-1997, the 326-K portfolio had a weighted average years to call of under 7.5 years. (Gov. Br. 25, ECF 207 at 30.) But this data does not establish that a maturity structure of five years is the most plausible for calculating damages during the breach periods. To the contrary, it shows that the 326-K Fund was invested in a maturity structure longer than five years during the great majority of the 1992-1997 period. This undercuts, rather than supports, Dr. Starks' choice of a five-year maturity structure as the most plausible one.

Similarly, the Government argues that Dr. Starks' maturity structure is consistent with October 1992 guidance from the director of the Office of Trust Funds Management, Fred Kellerup, that tribal funds should be "invested in government bonds ranging from three to seven years." (Gov. Br. 25, ECF 207 at 30.) But what Mr. Kellerup actually advised was: "*Stay away from the long bond. There's no need for tribes to invest beyond 15 years. ... Even if you have cash flow needs, go for the three-to-seven year government securities.*" *W. Shoshone*, 143 Fed. Cl. at 662 (emphasis by the Court). Thus, he advised a maturity structure between 3-7 years for a tribe with cash flow needs, and a longer maturity structure for tribes without such needs. The Docket 326 Funds had no cash flow needs during the liability periods at issue in this case. Thus, Mr. Kellerup's guidance recommends a maturity structure for the Docket 326 Funds that exceeded seven years. Consistent with this guidance, the Government increased the maturity structure of the 326-K Fund in late 1992 and the first part of 1993 from less than two years to almost 10 years. (DX-2124, WSIG-TRIAL-10713.) Accordingly, Mr. Kellerup's guidance undercuts Dr. Starks' choice of a five-year maturity structure and, instead, supports the longer maturity structures used by RHA.

## 2. Dr. Starks' investment methodology is completely implausible

Dr. Starks took the same “because I say so” approach to selecting the second element of her model, a rate of return. Rather than use a neutral benchmark as RHA did, she selected a particular investment strategy – bond ladders. Not only is her choice based entirely on her own opinion, but it is contrary to the evidence in this case. First, the Government never used such ladders in investing the Docket 326 Funds. Second, the use of a rigid bond ladder is completely at odds with the ad hoc, variable manner in which the Government actually invested the 326-K Fund during the non-breach period. Third, the Government actually invested the Docket 326 Funds primarily in agency securities because of their higher return, rather than in Treasury bonds as Dr. Starks proposes.<sup>5</sup> (DX-2121, WSIG-TRIAL-10689.) For all of these reasons, Dr. Starks' chosen investment methodology is completely implausible. *See Messer v. E.F. Hutton & Co.*, 833 F.2d 909, 922-23 (11th Cir. 1987) (damages award was speculative where plaintiff had never before followed the proposed investment plan and his actual trading pattern was completely opposite the approach outlined in the plan).

### B. Dr. Starks' Model Is Undermined By Her Own Unacknowledged Error

As discussed above, Dr. Starks' damages model is unpersuasive because it is entirely dependent on the validity of her own judgments and conclusions, which cannot be independently evaluated or verified. *See ICN Photonics, Ltd. v. Cynosure, Inc.*, 73 F. App'x 425, 430 (Fed. Cir. 2003) (the conclusory nature of an expert opinion affects the weight of the expert's testimony).

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<sup>5</sup> RHA used the Barclays Treasury bond indexes for its damages model because they were the only indexes that were fully compliant with the statutory constraints on the investment of Indian trust funds. But Dr. Starks had no comparable limit on her damages model since she selected particular bond issues rather than using an index that measured the entire market. She could as easily have chosen higher yielding agency securities as lower yielding Treasury bonds. Her choice of Treasury bonds is evidence of her calculated effort, under the guise of her “expertise,” to construct a model that minimizes damages.



Furthermore, Dr. Starks' analyses and conclusions in this case have proven to be faulty. She made a multi-million dollar error in analyzing how RHA's damages model works and insisted under oath that the model is flawed when it is not. And neither Dr. Starks nor the Government has yet acknowledged her error to this Court. The magnitude of this error, and Dr. Starks' refusal to acknowledge it, undercut her reliability and credibility, and thereby undermine the foundation of her own "because I say so" damages model.

#### **IV. THE GOVERNMENT'S CRITICISMS OF RHA'S DAMAGES MODEL ALL FAIL**

RHA, like Dr. Starks, followed the same two basic steps to calculate damages. First, it established a maturity structure for the Docket 326 Funds during each of the breach periods. Second, it established a rate of return for each maturity structure. But, unlike Dr. Starks, RHA's approach toward each of these steps is transparent and objective; none of RHA's choices are based on its own opinion. Nonetheless, the Government criticizes both of these elements in RHA's damages model, and contends that RHA made a series of mistakes that inflate damages. These criticisms do not survive scrutiny.

##### **A. RHA's Alternative Maturity Structures Are Based On The Law And The Evidence**

The dispute between the experts about the appropriate maturity structure for the damages model relates principally to the 326-K Fund damages periods before the enactment of the Distribution Act in mid-2004.<sup>6</sup> As the Government recognizes (Gov. Br. 55, ECF 207 at 60), damages are to be calculated by "presum[ing] that the funds would have been treated like other

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<sup>6</sup> The experts also dispute the appropriate maturity structure for the 326-A Funds from their inceptions up until December 1998, but the impact of this dispute on the damages calculation is a small fraction of the impact of the maturity structure for the 326-K Fund. In any event, the dispute is the same as to the 326-A Funds – whether the appropriate maturity structure for calculating damages should be 5 years, as Dr. Starks opines, versus 10 years or 7.86 years, as RHA opines.

funds being invested during the same period in proper transactions. Where several alternative investment strategies were equally plausible, the court should presume that the funds would have been used in the most profitable of these.” *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985). Accordingly, both RHA and Dr. Starks looked to the maturity structure of the 326-K Fund during the non-breach period from 1992-1997 in order to establish a maturity structure for these damages periods. But they went about it very differently. Dr. Starks used her own judgment to choose what she deems to be the most plausible maturity structure in the range between 5-10 years that the Court found to be prudent. Not coincidentally, this was the shortest, least profitable maturity structure.

RHA, in contrast, followed the applicable law and employed a transparent line of reasoning. RHA first examined whether the Government had followed a discernable strategy regarding maturity structure during 1992-1997. At the start of this period, the Government increased the maturity structure of the 326-K Fund from less than two years to almost 10 years. Even Dr. Starks conceded that this was an investment strategy: “Whether it was a transition or whether it was a strategy that was changing, I -- I cannot tell you that, but it is -- it does have human intervention. It is an investment strategy decision.” (Trial Tr. vol. 3, 545:16-19, July 23, 2020.)

Thereafter, however, no true investment strategy can be discerned during the non-breach period. As Mr. Nunes explained, “the Government lengthened the portfolio to about 11 years, and then it immediately began to shorten somewhat substantially through roughly four years of this nonbreach period, shedding about 6 1/2 or so years of weighted average maturity in a roughly four-year period, as well -- so no clear pattern there whatsoever except that the

Government was reverting back to its old ways.” (Trial Tr. vol. 1, 87:2-9, July 21, 2020.)<sup>7</sup> The Court agreed with this assessment. It noted that, by 1998, the Government “appears to have drifted back to its old investment pattern from the 1980s and early 1990s.” *W. Shoshone*, 143 Fed. Cl. at 643 (emphasis added). And the Court commented that the Government’s various investment policies “did not give much direction on which investment practices and investments might be considered prudent or imprudent.” *Id.* at 622.

**1. RHA’s 10-year maturity structure is appropriate under *Warm Springs***

Thus, the record shows that the Government had no consistent strategy for the maturity structure of the 326-K Fund during the non-breach period. After it increased the Fund’s maturity structure to 10 years at the start of the period, it did not follow any discernable strategy. No alternative strategy can be identified that is more plausible than the 10-year maturity structure. In the context of a damages model, “plausible” means “realistic.” *See Coast Fed. Bank, FSB v. United States*, 49 Fed. Cl. 53, 55 (2001). Certainly, Dr. Starks’ 5-year maturity structure is no more realistic than the 10-year structure that the Government consciously adopted at the outset of the non-breach period. Accordingly, RHA properly resolved the choice of a maturity structure by turning to the legal presumption established in *Warm Springs*. It selected the most profitable alternative, which was the 10-year maturity structure. (JX-434, WSIG-TRIAL-07589.) RHA’s choice was based on the applicable law, not on its own opinion about what the maturity structure should have been.

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<sup>7</sup> RHA “took a look also at purchase activity to see if there was any kind of a pattern there, and it was absolutely nothing. It roams all over the map.” (Trial Tr. vol. 1, 87:14-17, July 21, 2020.) “[T]here was no consistent pattern in the data that we could tease out that would reflect that the Government had any plan whatsoever ....” (Trial Tr. vol. 1, 97:1-3, July 21, 2020.)

**2. RHA's 7.86-year maturity structure is the fairest summary of the various maturity structures during the non-breach period**

As an alternative to the 10-year maturity structure, RHA calculated the weighted average maturity structure of the 326-K Fund during the entire non-breach period, which turned out to be 7.86 years. (JX-434, WSIG-TRIAL-07589; Trial Tr. vol. 1, 89:6-16, July 21, 2020.) This was the fairest, most neutral method of selecting a maturity structure based on the way that the Government actually invested the 326-K Fund during the entire non-breach period.<sup>8</sup> The choice of any other maturity structure within the 5-10 year range is open to criticism as being subjective and either too low or too high, as the case may be, especially given the absence of any consistent (or evident) Government strategy. Unlike Dr. Starks, RHA did not impose its own judgment in deriving this maturity structure from the evidence.

The Government contends that RHA's use of average "years to maturity" is inconsistent with the Court's liability opinion, which instead used "years to call" because it comes closer to the actual maturity structure of the 326-K Fund. *See W. Shoshone*, 143 Fed. Cl. at 569. But, as WSIG explained in its opening brief, the "years to call" measure understates the actual maturity structure of the 326-K Fund to some extent and consequently understates the amount of damages. The actual maturity structure of the Fund during the non-breach period -- and the corresponding amount of damages -- is somewhere between the measures obtained by using "years to call" and "years to maturity." In this circumstance, as Judge Learned Hand explained, "when damages are at some unascertainable amount below an upper limit and when the

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<sup>8</sup> For example, in a recent employment discrimination case, the parties disagreed about how to calculate the hire date for a given job classification in order to calculate damages where multiple hires were made over the course of the period at issue. The court decided that "the most reasonable means of calculating a hire date in that situation is to calculate some sort of weighted average hiring date that falls in between actual dates of hire." *Kerner v. City and Cty. of Denver*, No. 11-CV-00256-MSK-KMT, 2016 WL 3639937, at \*2 (D. Colo. July 8, 2016).

uncertainty arises from the defendant's wrong, the upper limit will be taken as the proper amount." *Gratz v. Claughton*, 187 F.2d 46, 51-52 (2d Cir. 1951). The Government offers no reason why this rule is inapplicable here. Thus, RHA properly used the weighted average years to maturity rather than the weighted average years to call in order to calculate the amount of damages.

Furthermore, any marginal overstating of the maturity structure caused by use of weighted average years to maturity is counterbalanced by RHA's choice of "a very conservative portfolio . . . comprised of treasuries" – i.e. the Barclays indexes -- to measure investment performance and damages. (Trial Tr. vol. 2, 282:17-18, July 22, 2020.) RHA calculated damages based on the market-average return for Treasury bonds although the Government actually invested tribal trust funds primarily in (higher yielding) agency securities. (DX-2121, WSIG-TRIAL-10689.) Accordingly, there is no reason to conclude that RHA's resulting damages figure is not "a reasonable estimate of the damages [WSIG] is due." *W. Shoshone*, 143 Fed. Cl. at 627. The Government fails to address this argument as well.

Finally, the Government contends that RHA's 10-year and 7.86-year maturity structures require portfolios that include bonds with a maturity of 10 years and longer, and so would "run[] contrary to Interior's policy directives that discourage the purchase of long term bonds." (Gov. Br. 42, ECF 207 at 47.) This argument fails for two reasons. First, the presumptive 10-year maturity limit was only in effect for two years and permitted exceptions whenever warranted. Second, the Government has a legal duty to invest the Docket 326 Funds prudently and its policies cannot relieve it of that duty. Thus, the Government's policies cannot preclude RHA from using maturity structures in its damages model that are within the 5-10 year range that the Court has ruled was prudent. Notably, Dr. Starks uses bonds with maturities up to 28 years in

her damages model for the 326-A Funds in order to achieve a prudent maturity structure. (Trial Tr. vol. 3, 502:21 – 503:13, July 23, 2020.) The Government’s investment policies pose no greater obstacle to RHA’s damages model than they do to Dr. Starks’ model.

**B. RHA’s Benchmarks Are Appropriate Measures Of Investment Performance**

The second element in RHA’s damages model is establishing the rate of return for a portfolio with the chosen maturity structure. Again, RHA’s starting point was the manner in which the Government actually invested the 326-K Fund during the non-breach period. But the Government did not consistently follow any particular investment strategy during that period. As the Court observed in its liability decision, the Government’s investment policies do not mandate any particular strategy, *see W. Shoshone*, 143 Fed. Cl. at 622, 624, and the Government did not follow any consistent strategy in practice, *see id.* at 543, 657. Instead, “the Government’s investment methodology was essentially ad hoc, with no apparent consistency, both during the 1992-1997 period when the court found it prudently invested the 326-K Fund and during the periods when it imprudently invested the 326-K and 326-A Funds.” (JX-437, WSIG-TRIAL-08435.)

Therefore, rather than make a subjective decision about exactly how the Docket 326 Funds should have been invested – as Dr. Starks did -- RHA instead used benchmarks which reflect the market-average rate of return for a diversified portfolio with the chosen maturity structure. As Mr. Nunes explained, “[w]e are strategy- and portfolio-agnostic, and we want to be strategy- and portfolio-agnostic because we recognize that to achieve a certain term structure of a portfolio, it could be done any number of ways, and so the indexes are plain vanilla in that regard, and they provide us, again, with a sort of baseline. It’s the market average performance based on the rules of the index, without any subjectivity whatsoever.” (Trial Tr. vol. 1, 107:19 –

108:1, July 21, 2020.) RHA's approach assumes that prudent investment of the portfolio would have achieved results that match the market-average performance. No more and no less. (JX-437, WSIG-TRIAL-08436-37.) As Mr. Nunes testified, "[s]o I guess if this was a term paper, we're looking for a C or a C-plus here, because that's sort of the standard grade . . . ." (Trial Tr. vol. 1, 102:20-22, July 21, 2020.)

The Government contends that "the law does not support resorting to an outside benchmark where Interior's own record of prudent investment during non-breach periods can guide the Court in calculating damages here." (Gov. Br. 57, ECF 207 at 62.) But the Government did not follow any consistent investment strategy during 1992-1997. Indeed, the Government's own expert, Dr. Starks, does not attempt to emulate the Government's investment "strategy" during this period in constructing her damages model. Instead, she came up with an entirely new strategy, bond ladders, that the Government never used during the entire time it invested the Docket 326 Funds. In contrast, RHA utilized the Barclays indexes to develop objective, market-average rates of return for its damages model. Furthermore, RHA's use of market-average performance to calculate damages comports with the Government's investment policy, which specified that "portfolios should be structured to achieve at least a market-average rate of return throughout economic cycles . . . ." (JX-280, WSIG-TRIAL-03025, ¶ C.)

#### **1. RHA's benchmarks are not an investment strategy**

RHA's benchmarks are not an investment strategy. As Judge Allegra noted, RHA's benchmarks are "based neither upon the notion that there would be active management of the tribal trust funds nor upon any assumption that the funds would have been invested so as to generate an extraordinary performance that beat the market." *Jicarilla Apache III*, 112 Fed. Cl. at 308. RHA is "absolutely not" saying that the Docket 326 Funds should have been invested in

a manner that mimics the Barclays indexes. (Trial Tr. vol. 1, 111:2-5, July 21, 2020.) RHA “steadfastly refrain[s] from dictating any strategy for managing the funds whatsoever.” (Trial Tr. vol. 2, 279:3-5, July 22, 2020.) Its benchmarks simply provide a market-average rate of return for a portfolio with a particular maturity structure.

Nonetheless, the Government deliberately and persistently mischaracterizes the benchmarks as an investment strategy and criticizes them on that basis. It argues that “the ‘market returns’ that Plaintiffs’ index approach measures are ones that could only have been earned by investing in a very specific and risky way that would not have made sound financial sense *ex ante* and, more importantly, they would have violated the Interior Department’s obligation to hold investments to maturity.” (Gov. Br. 33, ECF 207 at 38.) “This is a wholesale mischaracterization of [RHA’s] position and goes perilously beyond the bounds of permissible zealous advocacy.” *Zhaoqing Tifo New Fibre Co., Ltd. v. United States*, 60 F.Supp.3d 1328, 1345 n.21 (Ct. Int’l Trade 2015).

The Government engages in a calculated, four-step mischaracterization campaign. It starts by asserting accurately that the Barclays indexes have rules that provide for monthly rebalancing and reinvestment, and for selling off bonds before maturity.<sup>9</sup> (Gov. Br. 35, ECF 207 at 40.) Barclays imposes these rules so that, at any given point in time, its indexes provide an accurate measure of the performance of the bond markets they track.

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<sup>9</sup> The Barclays U.S. Treasury (UST) index includes all Treasury bonds with maturities between 1-30 years. The Barclays 1-5 year U.S. Treasury (1-5 UST) index includes all Treasury bonds with maturities between 1-5 years. Thus bonds in these indexes are sold off when their maturity is less than 1 year. The Barclays Long-Term U.S. Treasury (LT) index includes all Treasury bonds with maturities between 10-30 years. Bonds are sold off when their maturity is less than 10 years.



Second, the Government asserts that, “[i]n practical terms this means that any investor trying to emulate the performance of the Barclays indices, would have to buy and sell bonds each month to match the index.” (Gov. Br. 36, ECF 207 at 41.) This statement is true but it is irrelevant and misleading. RHA does not propose to emulate the Barclays indexes, like an index mutual fund would do. Instead, it uses the Barclays indexes as a measure of the market-average performance of a diverse portfolio of Treasury bonds with a particular maturity structure.

Third, the Government asserts that “the frequent trading in long term bonds contemplated by Mr. Nunes’ index model would have presented a risky strategy that threatened losses in every month where interest rates rose and bond prices fell.” (Gov. Br. 37, ECF 207 at 42.) Here the Government crosses the line of permissible advocacy and makes a blatant misstatement. RHA does not “contemplate” using the Barclays indexes as an investment strategy. To the contrary, RHA uses the indexes in order to avoid picking a particular investment strategy for the purpose of measuring damages. By using the indexes, RHA assumes that the Government would have achieved a market-average return regardless of what investment strategy it followed.

Fourth, the Government repeats its deliberate mischaracterization throughout the remainder of its brief: (1) “it is important to note that Mr. Nunes’ model requires both frequent trading, *and* frequent transactions *involving long-term bonds*” (Gov. Br. 41, ECF 207 at 46) (emphasis in original); (2) “Mr. Nunes’s proposed investment strategy of buying and selling long term bonds on a monthly basis is completely inconsistent with the agency’s core policy and practices” (Gov. Br. 42-43, ECF 207 at 47-48); (3) “[b]eyond the unworkable and risky mechanics of Plaintiffs’ index-based investment strategy” (Gov. Br. 43, ECF 207 at 48); (4) “even if Mr. Nunes’ index-based approach fairly approximated a plausible set of alternative prudent investments—which it does not” (Gov. Br. 57, ECF 207 at 62); (5) “Mr. Nunes claimed

that deploying all of the funds at the beginning of this period into his hypothetical index portfolio” (Gov. Br. 62, ECF 207 at 67); (6) “Mr. Nunes’ proposed but-for investment approach is oblivious to risk: it requires the systematic buying and selling of securities every month, regardless of gain or loss on these transactions” (Gov. Br. 63, ECF 207 at 68).

Why does the Government engage in such pervasive mischaracterization? Because there is no legitimate criticism to be made of RHA’s actual use of the Barclays indexes as a measure of investment performance. The use of indexes for this purpose has been approved by the Restatement of Trusts<sup>10</sup> and by numerous courts,<sup>11</sup> including this Court in *Jicarilla Apache III*, 112 Fed. Cl. at 307.

As part of its mischaracterization campaign, the Government repeatedly contends that RHA’s benchmarks conflict with the Government’s general buy-and-hold policy or practice. But this is impossible because the benchmarks are not an investment strategy. RHA does not assert that the Government could not follow a buy-and-hold strategy. Its model simply assumes that a prudent investment strategy of whatever kind – passive buy-and-hold or active trading – would have yielded a market-average rate of return.

In addition, the Government asserts incorrectly that “Plaintiffs have argued that the constant rebalancing of the Barclays indices actually mitigates interest rate risk through what Plaintiffs call ‘seasoning’ ....” (Gov. Br. 51, ECF 207 at 56.) This is not so. WSIG never discussed “seasoning” in connection with RHA’s investment benchmarks. Instead, its discussion

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<sup>10</sup> *Restatement (Third) of Trusts, Liability of Trustee for Breach of Trust* § 100 cmt. (b)(1) (2012).

<sup>11</sup> See *Cal. Ironworkers Field Pension Trust v. Loomis Sayles & Co.*, 259 F.3d 1036, 1046-47 (9th Cir. 2001); *Maiz v. Virani*, 253 F.3d 641, 664 (11th Cir. 2001); *Alco Indus., Inc. v. Wachovia Corp.*, 527 F. Supp. 2d 399, 410 (E.D. Pa. 2007); *Williams v. Sec. Nat’l Bank of Sioux City*, 358 F. Supp. 2d 782, 804 (N.D. Iowa 2005).

related to whether the maturity structure of the 326-K portfolio needed to be shortened prior to July 2004. (WSIG Br. 12-13.)

## **2. RHA's benchmarks are appropriate measures of performance**

The Government also implies that the Barclays indexes are not fair or reasonable measures of the performance that the Government could be expected to achieve with its buy-and-hold approach to investing. It argues that “[t]he Barclays indices ... reported outsized gains during the period in question because ... the indices’ holdings are marked to market. Doing so produces reported gains that a buy-and-hold strategy *cannot* realize.” (Gov. Br. 41, ECF 207 at 46) (emphasis in original). This is true but misleading. A bond can only generate a capital gain (or loss) if it is sold before maturity. Thus, a pure buy-and-hold bond portfolio would never have any capital gains or losses. But this does not mean that a buy-and-hold investment approach cannot achieve a market-average return as calculated by the Barclays indexes.

As Dr. Goldstein explained, “[a]s long as an investor follows a buy and hold strategy, they can benefit from locking in rates while realizing no capital gains or losses.” (JX-425, WSIG-TRIAL-07142, ¶ 173.) This is because owning a bond is essentially like possessing a stream of future cash payments. Thus, if an investor purchases a 10-year bond with an 8% return and rates drop to 7%, the investor can either sell and realize an immediate capital gain (and re-invest at the now lower rate) or else hold the bond and continue receiving the above-market 8% return until the bond matures. There is no evidence that a buy-and-hold strategy cannot match the performance of an active strategy that involves selling bonds prior to maturity. If there were such evidence, then no one would follow buy-and-hold strategies. Furthermore, if buy-and-hold investing were inherently inferior to active trading, then the Government’s buy-and-hold policy and Dr. Starks’ bond ladder investment strategy would necessarily be imprudent. Neither Dr.

Starks nor the Government contends that this is the case. Accordingly, the Barclays indexes, which track the average performance of the entire market, are a fair measure of investment performance regardless of the particular strategy being employed.

Moreover, the Government, itself, has repeatedly used Barclays indexes as benchmarks for its performance in investing tribal funds. For instance, the OST Investment Policy, updated March 4, 2002, in effect September 2004, lists the Shearson Lehman (now Barclays) 1-5 year Government Bond Index as “[t]he benchmark that OST measures its performance against.” (JX-375, WSIG-TRIAL-05120, ¶ 60). And a November 2005 OST presentation lists two different Lehman (now Barclays) indexes – the 1-5 year U.S. Government Index and the Intermediate U.S. Government Index – as “performance benchmark[s].” (PX-1002, WSIG-TRIAL-10824) Further, it lists the performance of those two indexes for both the year 2000 and the year 2004. Clearly, the Government would not have selected the Barclays indexes as benchmarks if it believed they were inappropriate measures of the performance it could achieve with its investment policies.

The Government attempts to downplay the significance of these exhibits by arguing that they date from the 2000s and don’t shed light on the validity of the Barclays indexes as reasonable benchmarks during earlier periods. But the Government fails to identify any reason why this should be so, and there is none. The Government followed a predominantly buy-and-hold investment practice both before and after 2000. If the Barclays indexes are a reasonable benchmark of the Government’s investment performance during the latter period, then they are a reasonable benchmark during the former period as well. In sum, the Government’s suggestion that the Barclays indexes are an unfair measure of its investment performance is simply not credible.

### 3. RHA's benchmarks were properly derived from the Barclays indexes

The Government also suggests that RHA attempted to inflate damages by the way in which it combined the Barclays indexes in order to create its benchmarks. WSIG debunked this contention in its opening brief.

Because a 10-year maturity structure was in between the weighted average maturities of the Barclays UST and the Barclays LT, RHA combined these two indexes to derive that benchmark. Likewise, because the 7.86-year maturity structure was in between the weighted average maturities of the Barclays UST and the Barclays 1-5 UST, RHA combined those two indexes to derive that benchmark. In each instance, RHA started with the Barclays UST and added in as much of the longer index (Barclays LT) or shorter index (Barclays 1-5 UST) as necessary to achieve the desired maturity structure. RHA employed a neutral and objective rule to combine the indexes to create a benchmark – maximize the use of the Barclays UST, which is the most diversified index, and use only so much of the longer- or shorter-term index as necessary. RHA did not test alternative combinations before selecting this approach. (Trial Tr. vol. 2, 273:15-21, July 22, 2020.)

In order to criticize RHA's approach, Dr. Starks chose the period 1980-1992 and generated 87 alternative combinations of the three Barclays indexes that have a weighted average maturity of 10 years, and 98 alternative combinations that have a weighted average maturity of 7.86 years. These alternatives produced damages calculations that were slightly less than RHA's benchmarks: up to 4.57% less for the 10-year benchmark, and up to 5.67% less for the 7.86-year benchmark. These minor variances are unimpressive and do not discredit the RHA benchmarks. "The ascertainment of damages is not an exact science." *W. Shoshone*, 143 Fed. Cl. at 627 (citation omitted). "The wrongdoer is not entitled to complain that [damages] cannot be

measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.” *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931). Accordingly, a “court will not review the merits of various methods of calculation, so long as the method actually employed ... is designed to yield a reasonable approximation of damages.” *John Morrell & Co. v. Local Union 304A*, 913 F.2d 544, 558 (8th Cir. 1990) (internal quotation marks and citation omitted).<sup>12</sup> Here, the RHA benchmarks yield a reasonable approximation of damages.

None of Dr. Starks’ alternative benchmarks was constructed in the same manner as RHA’s benchmarks. Instead of combining the two Barclays indexes closest to the target maturity structure, all of her alternatives use an index whose maturity structure is farthest away from the target. Further, almost all of her alternatives combine three Barclays indexes, rather than only two. The exceptions which combine only two indexes exclude the Barclays UST – which is the mainstay of RHA’s benchmarks -- and instead combine the short-term Barclays 1-5 UST with the long-term Barclays LT.<sup>13</sup> Moreover, in contrast to RHA’s benchmarks, Dr. Starks’ alternatives are not based on any neutral, objective rule for combining the indexes. Rather, they involve a computer generating as many different combinations as possible. The fact that some of these random combinations yield slightly lower damages does not establish that RHA’s benchmarks are unreasonable, much less that they were designed to inflate damages.

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<sup>12</sup> *Morrell* held that it was not error to permit an expert to discuss eight models of damages calculations with a range of estimates from \$20 million to \$31 million.

<sup>13</sup> Starks’ 10-year alternative #1 [JX-438, WSIG-TRIAL-08790]; 7.86-year alternative #1 [JX-438, WSIG-TRIAL-08792].

**C. There Are No Errors In The Damages Calculations RHA Presented To The Court**

The Government also asserts that RHA made various errors in calculating damages that undermine the credibility of RHA's damages model and/or require deductions from its computations. Once again, the Government's contentions do not withstand scrutiny.

**1. RHA corrected its original calculation of the growth of the Funds during non-breach periods**

The Government harps throughout its brief on a "\$50 million error"<sup>14</sup> made by RHA in originally calculating the growth of the Docket 326 Funds during the non-breach periods, which RHA corrected well before the trial. (Gov. Br. 2, 57, 58, 59, 67, ECF 207 at 7, 62, 63, 64, 72.) Initially RHA had computed the growth of the Funds during the non-breach periods in "the manner in which returns of a portfolio are typically calculated in the investment world." (Trial Tr. vol. 1, 152:3-5, July 21, 2020.) Dr. Starks criticized this approach in her rebuttal report, arguing that it was more appropriate to determine the growth rate during those periods by simply dividing the ending balance by the starting balance. RHA accepted this criticism "as soon as we got the report and had a chance to digest it" because their approach had inadvertently "result[ed] in a larger growth rate in the non-breach period than was realized by the Government." (Trial Tr. vol. 1, 151:5-6, 152:5-7, July 21, 2020.) Accordingly, RHA adopted the approach advocated by Dr. Starks and advised the Government of this change during the deposition of Mr. Nunes. (Trial Tr. vol. 1, 121:17-25, 151:11-14, July 21, 2020.) Mr. Nunes addressed this issue forthrightly during his trial testimony and it played no role in the damages figures that RHA presented to the Court.

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<sup>14</sup> Actually, Dr. Starks pegged the size of this issue at \$47.7 million for RHA's ten-year maturity model and \$45.0 million for RHA's 7.86-year model. (JX 438 at WSIG-TRIAL-08448.)

The Government contends that this episode shows that RHA would love to inflate damages if it could, quoting a snippet of Mr. Nunes' testimony that he "hate[s] giving up possible money." (Gov. Br. 59, ECF 207 at 64.) But Mr. Nunes' actual testimony, in full, was that he had accepted Dr. Starks' critique somewhat reluctantly "Because I hate giving up possible money, but, you know, you do what you have to do when it's right." (Trial Tr. vol. 1, 151:23-24, July 21, 2020.)

In addition, the Government criticizes RHA for a minor structural error in its damages model that RHA caught, corrected, and self-reported after the first trial. This error added, for leap years, an extra day's interest in the damages calculations, thereby increasing RHA's total damages figure at the first trial by \$572,000 (a fraction of 1%). RHA caught and fixed this error in the process of preparing its damages computations for the second trial. The Government now contends that this episode "underscores the unreliability of [RHA's] model" (Gov. Br. 67, ECF 207 at 72), but this issue was so minor that the Government did not bother to question Mr. Nunes about it during the trial.

Thus, the Government contends that RHA should not be credited because (1) it made a mistake in its original damages calculation that it corrected well before the trial and readily acknowledged at trial, and (2) it caught, corrected, and self-reported a miniscule error in the damages calculation it presented at the first trial. But these errors do not affect the reliability of RHA's damages model, which can be independently evaluated and verified, unlike Dr. Starks' model whose key elements are based entirely on her own "because I say so" opinions.

Since RHA and Dr. Starks now calculate the growth of the Docket 326 Funds during the non-breach periods in the same way, all of their disputes relate to the calculation of damages during the breach periods. RHA's damages model is transparent and objective in this regard, and



none of it is based on RHA's own opinions. Instead, RHA's model uses neutral and objective criteria, i.e., it uses the average maturity structure of the 326-K Fund during 1992-1997 to create one of its two alternative maturity structures, and it uses market-average rates of return as investment benchmarks. Any assumptions in the RHA model that are favorable to WSIG, such as the 10-year maturity structure, are based on the law rather than RHA's opinion. The validity of all these components of RHA's damages model can be independently assessed and verified; and none of them is affected by RHA's initial mistake in calculating the growth of the Docket 326 Funds during the non-breach periods. Further, the fact that RHA caught, corrected, and self-reported the minor leap year error in its model that had gone undetected at the first trial enhances, rather than undercuts, its integrity and credibility. Therefore, in contrast to Dr. Starks, these acknowledged and corrected errors by RHA furnish no basis for distrusting the key components of its damages model.

## **2. RHA properly uses transition periods in its model**

The Government contends that RHA improperly used transition periods in its damages model to inflate the amount of damages by \$33 million in its 10-year maturity model and by \$27 million in its 7.86-year model. (DX-2120, WSIG-TRIAL-10683.) This issue primarily relates to the one-year period that RHA used to transition the 326-K Fund in 1980-1981 to a portfolio with a maturity structure of either 10 years or 7.86 years.<sup>15</sup> The Government notes that this one-year period "featured a historically unprecedented interest rate inversion" and argues that RHA's "model keeps the 326-K fund invested short term and does not follow Mr. Nunes's ten-year or 7.86-year bond indices until September 1981, at the precise moment when the Bond market had

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<sup>15</sup> For no apparent reason other than to toss around large numbers, the Government asserts that this initial transition period added \$70 million to RHA's damages calculation at the first trial according to its now-abandoned experts, Dr. Gordon Alexander and Justin McLean. (Gov. Br. 62, ECF 207 at 67.)

the ‘highest... Interest rate market in all of Bond history.’” (Gov. Br. 61, ECF 207 at 66) (citation omitted). But this overstates how the transition period worked. RHA’s model did not keep the 326-K Fund invested short-term for that entire year, waiting until the interest rate inversion ended and the bond market peaked. Instead, it steadily shifted 1/12<sup>th</sup> of the Fund into the target maturity structure each month throughout the transition period notwithstanding the gyrations of the market.

The Government criticizes RHA’s transition periods as being driven by hindsight. To the contrary, RHA uses transition periods precisely because, at the time investment decisions are made, it is not foreseeable what the market will do. The rationale for using a transition period is straightforward – it reduces the risk of incurring a substantial loss resulting from investing an entire fixed-income portfolio shortly before an adverse change in the market. This risk is especially significant when an investor is substantially lengthening the portfolio’s maturity structure, which will make it more vulnerable to changes in the interest rate. The Government denigrates RHA’s rationale but it conveniently ignores that Dr. Starks invoked the same rationale in support of her bond-ladder investment strategy. She explained that “the ladder approach mitigates reinvestment risk, as only a small portion of the overall portfolio is reinvested at market rates annually. In contrast, under bullet or barbell approaches, a large portion or all of the portfolio matures at the same point in time, exposing all of the investor’s funds to potentially adverse changes in interest rates . . . .” (JX-435, WSIG-TRIAL-08287, n.99) (emphasis added). In order to avoid exposing all of the investor’s funds at one time, a bond ladder mitigates risk by

spreading out the redeployment of the bond portfolio over time. (Trial Tr. vol. 3, 533:13-16, July 23, 2020.) RHA's transition periods do exactly the same thing.<sup>16</sup>

Moreover, the use of a transition period is supported by the evidence in this case. When the Government, itself, increased the maturity structure of the 326-K Fund from less than two years to almost 10 years in 1992-1993, it did so in steps over a period of almost six months. (DX-2124, WSIG-TRIAL-10713; Trial Tr. vol. 3, 545:12-19, July 23, 2020.) The Government chose to effectuate this change over time (as RHA proposes) rather than all at once. Now the Government ignores this inconvenient fact.

Quoting testimony by Dr. Longstaff and Dr. Starks, the Government argues that transition periods are unnecessary. (Gov. Br. 64, ECF 207 at 69.) But their testimony simply establishes that it is possible to sell and buy a \$26 million (or larger) portfolio of Treasury bonds quickly and that Wall Street firms like Salomon Brothers regularly make far larger trades. This does not establish that it is prudent for an investor to dramatically lengthen the maturity structure of his entire \$26 million bond portfolio all at once, thereby exposing all of his funds to potentially adverse changes in interest rates over the near term. To the contrary, Mr. Nunes testified that, when he was the Chief Financial Officer of a bank, he and his investment advisor took between 18-22 months to change the maturity structure of the bank's \$16 million fixed-income portfolio. (Trial Tr. vol. 1, 90:24 – 92:1, July 21, 2020.)

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<sup>16</sup> This same concept of mitigating risk by spreading out purchases for a portfolio over time is also employed with respect to stocks, where it is known as "dollar cost averaging." The rationale is that "you could invest your cash in a single lump sum, but how do you know you're getting the best price?" Dan Burrows, Dollar-Cost averaging: How does DCA work, and should you do it? (Apr. 17, 2020), <https://www.fidelity.com/insights/investing-ideas/dollar-cost-averaging-strategy>. "[B]y investing the same amount each period, the investor purchases more shares when the security price is low, and fewer shares when the price is high." *McPhail v. First Command Fin. Planning, Inc.*, 247 F.R.D. 598, 603 n. 6 (S.D. Cal. 2007).

The Government contends that RHA's use of transition periods in this case is contradicted by its approach in the Jicarilla case where it did not use a transition period. But Mr. Nunes explained that the Jicarilla funds were a small fraction of the amount of the 326-K funds: \$2.3 million as opposed to \$26.1 million. Likewise, in this case, RHA did not use transition periods in initially investing the two 326-A Funds given their small size. (Trial Tr. vol. 2, 268:25 – 271:5, July 22, 2020) (RHA did use a transition period when it later shifted the 326-A Funds to a completely long-term portfolio after they were earmarked for an education trust in December 1998).

Further, the Government completely misstates the facts in arguing that (1) “Mr. Nunes’s proposed but-for investment approach is oblivious to risk: it requires the systematic buying and selling of securities every month, regardless of gain or loss on these transactions,” (Gov. Br. 63, ECF 207 at 68) and (2) “[t]he initial transition period Plaintiffs suggest is ... the only supposed instance of risk aversion in their modelling, which just happens to occur in the one and only year during the decades at issue when ‘going long’ would have—with the benefit of hindsight—caused substantial losses.” (*Id.*) Both of these contentions contradict the record. As discussed above, the RHA benchmarks are not an investment strategy and do not dictate when securities must be bought or sold. Regardless of the particular strategy that was employed, however, RHA sought to mitigate risk by using transition periods whenever major changes were made to the maturity structure of the Docket 326 Funds. Accordingly, it incorporated three transition periods in its model: the first in 1980-1981 when the maturity structure of the 326-K fund was lengthened; the second in 1999 when the maturity structure of the 326-A Funds was lengthened after they were earmarked for an education trust; and the third in 2004 when the maturity

structure of the 326-K Fund was shortened following enactment of the Distribution Act. It is not true that the 1980-1981 transition period is some sort of telltale outlier in RHA's model.

## **V. WSIG IS ENTITLED TO DAMAGES UP TO THE TIME OF TRIAL**

Finally, the Government contends that WSIG's claim for damages after 2013 "lack[s] legal justification." (Gov. Br. 70, ECF 207 at 75.) To the contrary, it is the Government who does not cite a single case that supports its position -- because there is none.

WSIG's claim for damages up to the time of trial is fully supported by precedent. The Federal Circuit has held that "a recovery for past damages ordinarily includes not only those damages that the plaintiff incurred before filing the complaint, but also any damages that the plaintiff incurs up to the time of trial." *McAllister v. Sec'y of Health and Human Servs.*, 70 F.3d 1240, 1243 (Fed. Cir. 1995). Accordingly, in the *Jicarilla* case, Judge Allegra upheld the tribe's claim for the "investment income it claims was lost ... [that] would have been received if the amount of principal produced by proper investment practices ... were further invested properly up to the time of trial." *Jicarilla Apache III*, 112 Fed. Cl. at 311. He ruled that this recovery "does not represent [prejudgment] interest on the damages owed, but rather is an actual component of those damages." *Id.* Likewise, in the *Osage* case, Judge Hewitt agreed with the tribe that "initial damages must be treated as though such funds had been in trust all along, and additional damages must be assessed for the trustee's consequent failure to invest such funds." *Osage Tribe of Indians of Okla. v. United States*, 75 Fed. Cl. 462, 480 (2007). Their rulings follow the decision in *Shoshone Indian Tribe of the Wind River Reservation v. United States*, which held that a breach of trust "deprived the Tribes of not only trust principal, but also the interest that would have been generated on that principal had the Government not breached its fiduciary responsibilities. This decision therefore does not award pre-judgment interest, but

rather awards interest as a part of the damages sustained by the Government's breach." 364 F.3d 1339, 1352 n.7 (Fed. Cir. 2004).<sup>17</sup>

These legal rules accord with common sense. Had the Government not breached its fiduciary duty in investing the Docket 326 Funds, by the end of September 2013 there would have been many millions of additional dollars in those trust accounts: between \$74-114 million in the 326-K Fund and between \$1-1.4 million in the 326-A Funds.<sup>18</sup> What would have happened to those additional trust funds over the next seven years up until the time of the damages trial? Obviously, the additional monies in the 326-A Funds would have been invested in long-term securities, together with the monies that were actually in those accounts. Similarly, the Government would have been obliged to prudently invest the additional funds in the 326-K account pending their ultimate distribution following a final judgment in this case. That is precisely how RHA handled these funds in its damages model.

The Government attempts to deny this reality. It asserts that "there is simply no basis to continue to calculate damages in this case past September 30, 2013 — the date by which all alleged breaches of trust had ended and the 326-K Fund was completely distributed to its beneficiaries." (Gov. Br. 69-70, ECF 207 at 74-75.) This argument ignores that the breaches of trust found by the Court had continuing impact after the breaches ended because the additional income that should have been earned during the breach periods would have generated additional income in the following years. Therefore, the damages models of both RHA and Dr. Starks

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<sup>17</sup> In *Shoshone*, the Government was required by 25 U.S.C. § 612 to accrue interest at the rate of 4% on all proceeds deposited in trust accounts for the Shoshone and Arapaho Tribes.

<sup>18</sup> According to Dr. Starks, there would have been an additional \$73,816,515 in the 326-K Fund and \$987,920 in the 326-A Funds. According to RHA Alternative A, there would have been an additional \$113,810,587 in the 326-K Fund and \$1,423,328 in the 326-A Funds; according to RHA Alternative B, there would have been an additional \$97,142,131 in the 326-K Fund and \$1,328,643 in the 326-A Funds.

accrue additional damages after the 326-K Fund breaches ended in September 2006 and after the 326-A Funds breaches ended in January 2012. Dr. Starks, upon the instruction of Government counsel, stopped accruing those additional damages as of September 2013, but RHA did not.

The Government's argument also ignores that the additional funds that should have been in the 326-K account as of September 2013 were not distributed to the beneficiaries. The Government's contention that it has no liability after the 2013 distribution was completed is essentially the same argument that it made unsuccessfully in the *Osage* case. There it argued that damages should not include interest on royalties it failed to collect on behalf of the tribe because, had it collected those royalties, it would have promptly distributed them. Judge Hewitt rejected this argument in terms that are equally applicable here. "Defendant cannot escape liability for its breach in failing properly to manage the trust by arguing that it was required to disburse the funds, an act it was incapable of accomplishing due to its initial breach. Defendant's argument would, in effect, 'reward the [g]overnment for inaction that violates the [g]overnment's fiduciary duties to collect funds and accrue interest.'" *Id.* at 481 (quoting *Shoshone*, 364 F.3d at 1352 n.7). Likewise, here, the Government cannot escape liability for the period after September 2013 by arguing that it would have distributed all the funds in the 326-K account, including the accrued damages, by that date. Its obligation to disburse the 326-K funds cannot be transformed into a limit on its liability.

As a last gasp, the Government contends that, "[t]o the extent the Court finds that damages beyond the date of breach are appropriate, the Court should not compensate Plaintiffs beyond a payment to account for the time value of money." (Gov. Br. 72, ECF 207 at 77.) But a

payment for the time value of money constitutes prejudgment interest,<sup>19</sup> which is unavailable in this case and which WSIG does not seek. Therefore, Dr. Starks’ testimony about the calculation of prejudgment interest is irrelevant. *See Jicarilla Apache Nation v. United States*, 126 Fed. Cl. 118, 121 (2016) (Lettow, J.) (testimony about prejudgment interest is irrelevant where tribe seeks lost investment income). Moreover, as discussed above, both RHA and Dr. Starks already calculate damages beyond the dates of the breach periods based on their (differing) views of the yield that would have been earned thereafter through prudent investment of the Docket 326 Funds. There is no legal basis for shifting from this “investment yield” measure of damages to a “time value of money” measure as of October 2013. The measure of damages remains the same up to the time of trial.

## VI. CONCLUSION

RHA’s model “provides a reasonable and appropriate basis for calculating the damages owed here.” *Jicarilla Apache III*, 112 Fed. Cl. at 310. RHA’s approach to calculating damages is transparent and objective; none of it is based on RHA’s opinions. Its two alternative maturity structures are derived from the actual maturity structure of the 326-K Fund during the non-breach period – Alternative A is based on the *Warms Springs* legal presumption while Alternative B is based on the weighted average maturity during the non-breach period. Both Alternatives use market-average rates of return as investment benchmarks. The Government tries mightily to find some flaw or error in the RHA model but it fails to do so.

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<sup>19</sup> Prejudgment interest serves to compensate for the loss of use of money due as damages until judgment is entered. *See United States v. American Home Assurance Co.*, 857 F.3d 1329, 1333 (Fed. Cir. 2017); *Transmatic, Inc. v. Gulton Indus., Inc.*, 180 F.3d 1343, 1347 (Fed. Cir. 1999) (“[P]rejudgment interest, like all monetary interest, is simply compensation for the use or forbearance of money owed.” (citation omitted)).



The Government has the burden of proving that the Docket 326 Funds, if prudently invested, would have earned less than RHA has calculated. *See Warm Springs*, 248 F.3d at 1371. It has not done so. Dr. Starks' damages model is not credible because its maturity structure is based solely on her own *ipse dixit* opinion, which is at odds with the evidence. Likewise, her investment methodology (bond ladders) is completely implausible because the Government never invested the Docket 326 Funds in that manner. Finally, her reliability and credibility are undermined by her false accusation that the RHA model reinvests funds monthly rather than quarterly, a major error that she and the Government have failed to acknowledge.

Therefore, the Court should award WSIG damages in the total amount of **\$133,125,302** (RHA's Alternative A). If the Court finds that a 10-year maturity structure is inappropriate, it should award damages in the amount of **\$113,830,811** (RHA's Alternative B).

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Respectfully submitted,

/s/ Kelli J. Keegan

KELLI J. KEEGAN

Barnhouse Keegan Solimon & West LLP

7424 4th St. NW

Los Ranchos de Albuquerque, NM 87107

Tel: (505) 842-6123 Ext. 105

Fax: (505) 842-6124

kkeegan@indiancountrylaw.com

*Attorney of Record for Plaintiffs*

OF COUNSEL:

RANDOLPH BARNHOUSE

MICHELLE MIANO

Barnhouse Keegan Solimon & West LLP

7424 4th St. NW

Los Ranchos de Albuquerque, NM 87107

Tel: (505) 842-6123

Fax: (505) 842-6124

dbarnhouse@indiancountrylaw.com  
mmiano@indiancountrylaw.com

STEVEN D. GORDON  
Holland & Knight LLP  
800 17th Street N.W., Suite 1100  
Washington, DC 20006  
Tel: (202) 955-3000  
Fax: (202) 955-5564  
steven.gordon@hklaw.com

**CERTIFICATE OF SERVICE**

I hereby certify that on January 8, 2021, I filed the foregoing electronically through the CM/ECF system, which caused the following counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

JOSHUA P. WILSON  
PETER K. DYKEMA  
United States Department of Justice  
Environment and Natural Resources Division

*Attorneys for Defendant*

/s/ Kelli J. Keegan  
Kelli J. Keegan