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.	)	

PLAINTIFF'S POST-TRIAL BRIEF

KELLI J. KEEGAN
Johnson Barnhouse & Keegan 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
Johnson Barnhouse & Keegan 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

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Plaintiff Western Shoshone Identifiable Group (WSIG) respectfully submits this post-trial brief addressing its claims in this case.

I. APPLICABLE LEGAL STANDARDS AND BURDENS OF PROOF

A. The Government's Duty To Prudently Invest Indian Trust Funds

"The executive branch has been charged by Congress with a fiduciary responsibility for the productive investment of funds held in trust for the Indians through the enactment and amendment of investment statutes that create specific fiduciary duties. A breach of those fiduciary duties gives rise to a Tucker Act claim for damages." *Chippewa Cree Tribe of the Rocky Boy's Reservation v. United States*, 69 Fed. Cl. 639, 662 (2006) (Hewitt, J.) (*Chippewa Cree I*).[1] Indian judgment funds held by the Government are trust funds and the Government has a fiduciary responsibility to invest those funds as required by relevant statutes. *See Chippewa Cree Tribe of the Rocky Boy's Reservation v. United States*, 73 Fed. Cl. 154, 173 (2006) (Hewitt, J.) (*Chippewa Cree II*). A breach of fiduciary duty occurs when Indian funds held in trust are mishandled, misappropriated, or mismanaged. *Short v. United States*, 50 F.3d 994, 998 (Fed. Cir. 1995).

Indeed, the Supreme Court has made precisely these points with respect to the Docket 326-K funds at issue here. "The final award of the Indian Claims Commission placed the Government in a dual role with respect to the Tribe: the Government was at once a judgment debtor, owing $26 million to the Tribe, and a trustee for the Tribe responsible for ensuring that the money was put to productive use and ultimately distributed in a manner consistent with the best interests of the Tribe." *United States v. Dann*, 470 U.S. 39, 49-50 (1985) (emphasis added). The Court noted "the legal strictures ensuring that the money will be applied to the benefit of the Tribe. We have, for

[1] *Chippewa Cree I* details the history of the two principal statutes governing the investment of Indian trust funds, 25 U.S.C. §§ 161a and 162a. *See* 69 Fed. Cl. at 656-59.

example, held that the United States, as a fiduciary, is obligated to make the funds productive and is fully accountable if those funds are converted or mismanaged." *Id.* at n.13.

Because the Government acts as trustee when investing Indian trust funds, "the duty of care owed by the United States is not mere reasonableness, but the highest fiduciary standards." *Jicarilla Apache Nation v. United States*, 112 Fed. Cl. 274, 287 (2013) (*Jicarilla Apache III*).[2] "[T]he United States must be held to the 'most exacting fiduciary standards' in its relationship with the Indian beneficiaries." *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1348 (Fed. Cir. 2004).

The United States has a fiduciary duty to invest Indian trust funds so as "to maximize the trust income by prudent investment." *Cheyenne-Arapaho Tribes v. United States*, 512 F.2d 1390, 1394 (Ct. Cl. 1975); *Jicarilla Apache III*, 112 Fed. Cl. at 289. In *Cheyenne-Arapaho*, the court traced the history of the statutes governing the investment of Indian trust funds and noted that Congress has provided various alternatives. Pursuant to 25 U.S.C. §§ 161a, 161b, Indian trust funds deposited in the Treasury are to earn interest at the rate provided in the appropriate treaty or appropriations bill or, if no interest rate is specified, at the rate of 4%. Alternatively, pursuant to 25 U.S.C. § 162a, trust funds may be placed in banks paying a higher rate of interest or invested in public-debt obligations of the United States and in bonds, notes, or other obligations guaranteed

[2] There are three decisions by Judge Allegra in the *Jicarilla Apache* case that address the Government's duties with respect to the investment of tribal trust funds. The first decision, *Jicarilla Apache Nation v. United States*, 88 Fed. Cl. 1 (2009) (*Jicarilla Apache I*) included some discussion of fiduciary duties but focused primarily on whether the plaintiff tribe was entitled to discover certain documents as to which the Government asserted attorney-client privilege. The Federal Circuit upheld Judge Allegra's ruling on this discovery issue, *In re United States*, 590 F.3d 1305 (2009), but the Supreme Court reversed. *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011). Judge Allegra's second decision, *Jicarilla Apache Nation v. United States*, 100 Fed. Cl. 726 (2011) (*Jicarilla Apache II*), was issued after the Supreme Court's ruling and addressed two motions for partial summary judgment. Judge Allegra's third decision, *Jicarilla Apache III*, was issued following the Phase 1 trial.

by the United States.[3] Given these alternatives, "[t]he fiduciary duty which the United States undertook with respect to these funds includes the obligation to maximize the trust income by prudent investment …." 512 F.2d at 1394 (internal quotation marks and citations omitted).

In *Jicarilla Apache II*, Judge Allegra carefully reviewed *Cheyenne-Arapaho* and subsequent decisions addressing the trust obligations owed to Indians. He concluded that *Cheyenne-Arapaho* remains binding circuit precedent, 100 Fed. Cl. at 733-34, and that it is correctly decided. *Id.* at 734-38. Judge Allegra noted that *Cheyenne-Arapaho* "used common law principles not to establish the fiduciary obligations, but rather 'to inform [its] interpretation of statutes and to determine the scope of liability that Congress has imposed.'" *Id.* at 735 (quoting from the Supreme Court's statement that, in determining the contours of the Government's fiduciary duties with respect to Indians, "[w]e have looked to common-law principles to inform our interpretation of statutes and to determine the scope of liability that Congress has imposed." *United States v. Jicarilla Apache Nation*, 564 U.S. at 177). Judge Allegra rejected the Government's "assertion that *Cheyenne–Arapaho* has, *sub silentio*, been overruled, [and] the wooden interpretation of the United States' statutory duties upon which that claim is based." *Id.* at 738.

Moreover, Congress has reaffirmed the Government's obligation to invest tribal trust funds so as to maximize the return on them. When it enacted the American Indian Trust Fund Management Reform Act ("Trust Reform Act"), Pub. L. No. 103–412, 108 Stat. 4239 (1994),

[3] Since their enactment in 1974, the regulations implementing the Indian Tribal Judgment Funds Use or Distribution Act of 1973, Pub. L. No. 93–134, 87 Stat. 466, have required judgment funds to be invested under 25 U.S.C. § 162a. *See* 25 C.F.R. § 60.11 (*recodified* at 25 C.F.R. § 87.11 in 1982). Thus, holding judgment funds in the Treasury and paying 4% interest on them is not an option available to the Government.

Congress enumerated a number of Government duties with respect to the investment of Indian trust funds. Section 303 of the Act explicitly recognizes the Government's obligation to maximize the return on the investment of all trust fund monies:

> **(B) Investments** The Special Trustee shall ensure that the Bureau [of Indian Affairs] establishes appropriate policies and procedures, and develops necessary systems, that will allow it--
>
> > (i) properly to account for and invest, as well as maximize, in a manner consistent with the statutory restrictions imposed on the Secretary's investment options, the return on the investment of all trust fund monies

25 U.S.C. § 4043(b)(2)(B) (emphasis added). The Trust Reform Act "reaffirmed and clarified preexisting duties; it did not create them." *Cobell v. Norton*, 240 F.3d 1081, 1100 (D.C. Cir. 2001). "The legislative history of the 1994 Reform Act indicates that Congress intended the Act to merely reaffirm and codify the existing fiduciary duties of the Government to invest [Indian] funds outside the Treasury in order to maximize the return on those funds." *Goodeagle v. United States*, 122 Fed. Cl. 292, 295 (2015) (Wheeler, J.). "Failure to prudently invest both tribal and individual Indian funds results in a breach of fiduciary duty, and creates a cause of action in this Court. Plaintiffs are correct in their assertion that this fiduciary duty existed long before the enactment of the 1994 Reform Act …." *Id.*

In 2001 the Department of the Interior promulgated regulations regarding the management of Indian trust funds. These regulations say very little about how the trust funds are invested, but one provision does recognize the Government's obligation to invest prudently. 25 C.F.R. § 115.809 provides:

> **§ 115.809 May a tribe recommend to OTFM how to invest the tribe's trust funds?**
> Tribes may recommend certain investments to OTFM, but the recommendations must be in accordance with the statutory requirements set forth in 25 U.S.C. §§ 161a and 162a. The OTFM will make the final investment decision based on prudent investment practices.

(Emphasis added.)

"Like other trustees, the BIA must administer the trust as a prudent person would, in light of the purposes, terms, and other circumstances of the trust." *Jicarilla Apache III*, 112 Fed. Cl. at 290. "This duty of prudence has three prongs: the [Government] must apply care in investigating the investments available for the funds; it must employ a reasonable degree of skill in selecting among those investments; and it must be cautious in preserving the trust estate while seeking a reasonable return on investment." *Id.* "Because ... the permissible investments in which [a Tribe's] ... trust funds must be placed have been spelled out by Congress, ... defendant's prudent discharge of the requirements of care and caution is limited to selecting the highest yielding investment instruments of suitable maturity available for trust funds." *Osage Tribe of Indians of Okla. v. United States*, 72 Fed. Cl. 629, 667-68 (2006) (Hewitt, J.) (*Osage II*) (internal quotations omitted). "The requirement of skill obliges the [Government] to obtain the highest rate of return available consistent with the prudent management of the statutorily-mandated investments." *Jicarilla Apache III*, 112 Fed. Cl. at 290 (citing *Osage II*, 72 Fed. Cl. at 668). The Government breaches its duty to invest prudently if it invests tribal trust funds in a manner that is too short-term and fails to take appropriate advantage of the higher yields available on longer-term instruments. *Id.* at 290, 300.

In order to maximize the return on investment of trust funds, the Government must take into account capital appreciation and gain as well as trust accounting income. *See Restatement (Third) of Trusts, Prudent Investor Rule* § 90 cmt. e (2007). As trustee, the Government has "the responsibility to keep informed so that when a previously proper investment becomes improper, perhaps because of the opportunity for better (and equally safe) investment elsewhere, funds can be reinvested." *Cheyenne-Arapaho*, 512 F.2d at 1394. This includes the "purchase or [sale of]

eligible securities in the secondary market when doing so would enhance yield or liquidity." *Id.* at n. 6. Thus, "[i]f the breach of trust causes a loss, including any failure to realize income, capital gain, or appreciation that would have resulted from proper administration, the beneficiaries may surcharge the trustee for the amount necessary to compensate fully for the consequences of the breach." *Tohono O'odham Nation v. United States*, 79 Fed. Cl. 645, 657 (2007) (Bruggink, J.) (quoting *Restatement (Third) of Trusts, Prudent Investor Rule* § 205 cmt. i (1992)), *rev'd on other grounds*, 559 F.3d 1284 (2009), *rev'd*, 563 U.S. 307 (2011).

The prudent investor standard is objective. *See Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir. 1984). The fiduciary's actions are evaluated based on the information available to the fiduciary at the time of each investment decision and not from the vantage point of hindsight. *See In re Citigroup ERISA Litig.*, 662 F.3d 128, 140 (2d Cir. 2011). "Whether [a] fiduciary has acted prudently requires consideration of both the substantive reasonableness of the fiduciary's actions and the procedures by which the fiduciary made its decision …." *Fish v. GreatBanc Trust Co.*, 749 F.3d 671, 680 (7th Cir. 2014). As then-Judge Scalia observed, "there are two related but distinct duties imposed upon a trustee: to investigate and evaluate investments, and to invest prudently." *Fink v. Nat'l Sav. and Trust Co.*, 772 F.2d 951, 962 (D.C. Cir. 1985) (Scalia, J., concurring and dissenting). "[T]he determination of whether an investment was objectively imprudent is made on the basis of what the trustee knew or should have known." *Id.* (emphasis in the original).

B. No Deference Is Owed To The Government's Interpretation Of Its Trust Investment Obligations

In evaluating whether the Government prudently invested tribal trust funds, this Court does not defer to the agency's interpretation of its trust obligations. *Chevron* deference is inapplicable and the Government's investment policies are not entitled to any deference because of the "Indian

canon" of construction, which requires that the Government's investment obligations be construed liberally in favor of the Indians.

There is no presumption that the Government's investment decisions were prudent simply because the investments it made were all permitted by law. The Supreme Court has soundly rejected the notion that there should be any such presumption of prudence regarding fiduciaries' investment decisions. *See Fifth Third Bancorp v. Dudenhoeffer*, __ U.S. __, 134 S.Ct. 2459, 2467 (2014). As Judge Straub pointed out – in a dissent that anticipated the Supreme Court's rejection of any presumption of prudence – "deference to the investment decisions of [a] fiduciary renders moot [the] 'prudent man' standard of conduct." *In re Citigroup ERISA Litig.*, 662 F.3d at 147-48 (Straub, J., dissenting).

Nor is there any basis under administrative law principles for this Court to defer to the Government's views about prudent investment. "Deference in accordance with *Chevron* … is warranted only 'when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'" *Gonzales v. Oregon*, 546 U.S. 243, 255-56 (2006); *see also Aqua Prods., Inc. v. Matal*, 872 F.3d 1290, 1332, 1338-39 (Fed. Cir. 2017) (en banc) (opinions of O'Malley, J., and Reyna, J.). The Government has not promulgated any regulations that bear on whether particular investments are or are not prudent.

In fact, there are only two regulations that address how the Government invests tribal trust funds. The first, 25 C.F.R. § 115.711, provides merely that "OTFM manages trust fund investments and its investment decisions are governed by federal statute. *See* 25 U.S.C. §§ 161(a) and 162a." The second, 25 C.F.R. § 115.809, provides that "[t]ribes may recommend certain investments to OTFM, but the recommendations must be in accordance with the statutory

requirements set forth in 25 U.S.C. §§ 161a and 162a. The OTFM will make the final investment decision based on prudent investment practices." Thus, other than stating that it will follow "prudent investment practices," the Government has not provided any authoritative interpretation of how it exercises its investment authority under these statutes. The various investment policies that the Government has adopted over the years lack the force of law and do not warrant *Chevron* deference in determining whether the Government has prudently invested Indian trust funds. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

The "Indian canon" of construction, rather than any deference to the agency's views, governs the construction of the Government's fiduciary duties under the investment statutes and regulations at issue in this case. "[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). This canon also applies to the construction of agency regulations bearing on Indians. *See United States v. Osage Wind, LLC*, 871 F.3d 1078, 1091 (10th Cir. 2017). The Federal Circuit has applied the Indian canon in construing statutes relating to the investment of tribal funds. *See Shoshone Indian Tribe*, 364 F.3d at 1352. The Indian canon of construction prevails over *Chevron* deference in construing statutes or regulations. *See Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461-62 (10th Cir. 1997); *Cobell v. Salazar*, 573 F.3d 808, 812 (D.C. Cir. 2009).[4] The canon also prevails over any lesser form of deference that might be given to agency policy statements and manuals.

[4] The D.C. Circuit opined that *Chevron* deference applies "with muted effect" in reviewing an agency's interpretation of statutes it is entrusted to administer for the benefit of the Indians, but "the Indians' benefit remains paramount." *Cobell v. Salazar*, 573 F.3d at 812.

C. The Burdens Of Proof As To Liability And Damages

WSIG has the burden to prove that the Government committed a breach of trust and that a loss resulted. "If, but for the breach, the [trust fund] would have earned even more than it actually earned, there is a 'loss' for which the breaching fiduciary is liable." *Dardaganis v. Grace Capital Inc.*, 889 F.2d 1237, 1243 (2d Cir. 1989). However, the risk of uncertainty as to the amount of the loss falls on the Government – it bears the burden of proving that the loss would have been less than shown by WSIG. "It is a principle of long standing in trust law that once the beneficiary has shown a breach of the trustee's duty and a resulting loss, the risk of uncertainty as to the amount of the loss falls on the trustee." *Confederated Tribes of Warm Springs Reservation of Oregon v. United States,* 248 F.3d 1365, 1371 (Fed. Cir. 2001) (*Warm Springs*). Thus, "[w]here 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 burden of proving that the funds would have earned less than that amount is on the fiduciaries found to be in breach of their duty. Any doubt or ambiguity should be resolved against them." *Id.* (quoting *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985)); *see also Jicarilla Apache III*, 112 Fed. Cl. at 304-05; *Osage Tribe of Indians of Okla. v. United States*, 96 Fed. Cl. 390, 407-09 (2010) (*Osage IV*).

D. The Measure Of Damages For Imprudent Investment

The measure of damages for breach of trust is the profit which would have accrued to the trust if there had been no breach. "In determining the amount of damages for a breach of the trustee's fiduciary duty with regard to investments of the trust property, courts attempt to place the beneficiary in the position in which it would have been absent a breach." *Warm Springs*, 248 F.3d at 1371. "[T]he recovery from a trustee for imprudent or otherwise improper investments … would be the difference between (1) the value of those investments and their income and other product at

the time of surcharge and (2) the amount of funds expended in making the improper investments, increased (or decreased) by a projected amount of total return (or negative total return) that would have accrued to the trust and its beneficiaries if the funds had been properly invested." *Restatement (Third) of Trusts, Liability of Trustee for Breach of Trust* § 100 cmt. (b)(1) (2012).

"[I]t is important to remember what the Federal Circuit taught in [*Warm Springs*] regarding the calculation of damages in a case like this, specifically: (i) among several alternative investment strategies that are equally plausible, the court should presume that the funds would have been used in the most profitable way; (ii) the burden of providing that the funds would have earned less than this figure is on the United States, as the breaching fiduciary; and (iii) any doubt or ambiguity regarding the foregoing should be resolved against the United States." *Jicarilla Apache III*, 112 Fed. Cl. at 310.

"Losses to a [trust fund] from breaches of the duty of prudence may be ascertained, with the help of expert analysis, by comparing the performance of the imprudent investments with the performance of a prudently invested portfolio." *Evans v. Akers*, 534 F.3d 65, 74 (1st Cir. 2008). This court has approved the use of a market index as a benchmark for determining the performance of a properly invested portfolio in order to calculate damages. *See Jicarilla Apache III*, 112 Fed. Cl. at 307-10. A number of other courts have likewise approved the use of market indices for this purpose. *See, e.g.*, *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).

E. Application Of These Legal Standards To This Case

Pursuant to 25 U.S.C. § 162a, the Government has a fiduciary duty to invest the judgment funds at issue in this case so as to maximize the trust income by prudent investment. The burden

is on WSIG to prove that the Government breached this duty and that a loss resulted. In evaluating whether the Government breached its duty, the Court owes no deference to the Government's interpretation of its fiduciary obligations or its views about prudent investment.

If WSIG satisfies its burden, the Government bears the burden of proving that the loss would have been less than shown by WSIG. More specifically, (i) the Court must presume that, where several alternative investment strategies are equally plausible, the trust funds would have been used in the most profitable way; (ii) the burden of providing that the funds would have earned less than this figure is on the Government; and (iii) any doubt or ambiguity in applying these principles must be resolved against the Government.

II. THE EVIDENCE REGARDING LIABILITY

A. Overview

The trust funds at issue were created by three separate judgments:

(1) In 1977, the Indian Claims Commission (ICC) awarded $26,145,189.89 to plaintiff WSIG under Docket 326-K for a purported taking of approximately 24 million acres of Western Shoshone lands located in what is now Nevada and southeastern California. The ICC's award was subsequently affirmed by the Court of Claims and the award was deposited into a tribal trust fund account in the U.S. Treasury on December 19, 1979. (Stipulation No. 13)[5]

(2) In 1991, the U.S. Claims Court awarded WSIG an additional $823,752.64 for Docket 326-A-1. These funds were deposited into a trust account at the U.S. Treasury on March 25, 1992. (Stipulation Nos. 14, 16)

[5] The stipulations cited in this brief are contained in ECF 131 entitled "Parties' Revised Joint Stipulations Of Fact."

(3) In 1995, the U.S. Court of Federal Claims awarded WSIG $29,396.60 for Docket 326-A-3. These funds were deposited into a trust account at the U.S. Treasury on September 15, 1995. (Stipulation Nos. 17, 19)

On July 7, 2004, Congress passed the Western Shoshone Claims Distribution Act, Pub. L. No. 108-270, 118 Stat. 805 (2004) ("Distribution Act") (JX-373) which established a mechanism for the use and distribution of the WSIG trust funds. The Act required that the Secretary of the Interior promulgate regulations governing the establishment of the Western Shoshone Judgment Roll, and following promulgation of the regulations, the Secretary was required to establish the Roll. Section 3 of the Act directed the Secretary to distribute all of the funds awarded in Docket 326-K on a per capita basis to individuals listed on the Judgment Roll. Section 4 of the Act directed the Secretary to establish a permanent trust with the Docket 326-A-1 and A-3 funds, which would be known as the Western Shoshone Education Trust Fund, and further directed that only the investment income from the trust could be distributed to individuals listed on the Judgment Roll and their descendants for educational purposes.

On March 5, 2007, the Secretary issued final regulations that established an enrollment process to allow individuals to apply for inclusion on the Judgment Roll. (Stipulation No. 62) The cut-off date for receiving those applications was at the end of 2010. (Stipulation Nos. 67, 68) The Bureau of Indian Affairs (BIA) reviewed the applications, determined eligibility, and completed a final roll of eligible individuals on September 28, 2012. (Stipulation No. 71) Final per capita distributions of the Docket 326-K trust fund were made thereafter. (Stipulation No. 73)

The issue of liability turns on whether the WSIG trust funds should have been invested in longer-term Government securities than those in which they were actually invested during the period at issue. By law, the Government can invest tribal trust funds only in a specified range of

investments, including public debt obligations of the United States and securities (bonds) guaranteed by the United States. 25 U.S.C. § 162a.

The principal investment issue in choosing among these bonds is deciding upon the length and mix of the maturities in the portfolio. The term structure of bonds (sometimes called the yield curve) is typically upward sloping, meaning that longer-term maturities offer larger average returns than shorter-term maturities. As Rocky Hill Advisors (RHA) noted in its expert report, "[a] 2007 study of the past 80 years found that in 72 of those years (90% of the time) the yield curve was upward sloping and that, on average over all of those years, long-term Treasury bonds tended to yield about 1-1/2% more than short-term Treasury bills." (JX-420 at p. 06031, ¶ 1) Thus, "the maturity structure of any fixed-income investment portfolio is the single most significant determinant of the portfolio's potential returns."[6] (*Id.* at p. 06030, ¶ 2)

Longer-term bonds do carry greater interest rate risk than shorter-term bonds if they are sold prior to maturity because their value fluctuates more with changes in the current interest rate. This could result in either a capital gain or a capital loss. Thus, bond investors who seek to maximize return would take advantage of the premium that longer-term instruments typically earn over shorter-term investments unless their near-term cash flow needs would make longer-term bonds too risky.

The experts agree on this. Dr. Starks, in her report, states that "an investor who does not expect significant cash flow needs until some future period may be well positioned to take

[6] The relationship between maturity structure and investment returns is well-recognized. *See Jicarilla Apache III*, 112 Fed. Cl. at 290 ("The BIA's heavy reliance on short-term investments reduced the yield on Jicarilla's portfolios by failing to take appropriate advantage of the higher yields available on longer-term instruments."); *Abbott v. Lockheed Martin Corp.*, 725 F.3d 803, 806 (7th Cir. 2013) ("Because they hold longer-duration instruments, [stable-value funds] generally outperform money market funds, which invest exclusively in short-term securities.").

advantage of the typical premium long-term investments earn over short-term investments." (JX-423 at p. 06960, ¶ 86) Dr. Starks and RHA further agree that "the term structure of a prudent portfolio should match the investment horizon of the underlying funds." (JX-427 at p. 07207, ¶ 12) "[Their] fundamental disagreement lies in [their] respective beliefs as to what the appropriate investment horizon of the WSIG [Docket 326-K] funds should have been during the relevant period." (*Id.*)

This frames the issue on which liability turns: what was the appropriate investment horizon for the WSIG funds during the period at issue based on what the Government then knew or should have known?

B. The Docket 326-K Trust Funds

1. The investment horizon of the funds

The investment horizon of the Docket 326-K funds during the period at issue is driven by two fundamental considerations: (1) by law, the funds could not be distributed without a congressionally-approved use or distribution act; and (2) given the diverse composition of the WSIG, the actual process of enrolling eligible recipients once a distribution act was approved would be very time-consuming. There were various developments during the course of the relevant period that shed light on these two issues, particularly on the outlook for enacting distribution legislation for the funds.

a. The need for Congress to enact distribution legislation

The Indian Tribal Judgment Funds Use or Distribution Act, Pub. L. No. 93-134, 87 Stat. 466 (October 19, 1973) requires a congressionally-approved use or distribution act before any judgment funds awarded to an Indian tribe or group can be distributed. As of 1980, the Act provided that the Secretary of the Interior had 180 days from the fund appropriation date to submit a use and distribution plan for the fund to Congress. A 90-day extension could be requested, but

such a request had to be approved by both the appropriate House and Senate Committees. A use and distribution plan would become law, after sitting before Congress for 60 days, if no action was taken to disapprove it. If the Secretary failed to submit a plan within the 180-day deadline and no 90-day extension was approved, then legislation was required to be passed through the Congress and signed by the President before judgment funds could be used or distributed. (Stipulation No. 32; JX-14)

The Secretary did not submit a use and distribution plan by the 180-day deadline and, instead, sought an extension of the deadline. On August 4, 1980, the Senate Committee declined to extend the time period for the Docket 326-K trust funds. (JX-114) This meant that there would be no "fast track" approval of a plan by Congress. Instead, the regular legislative process would have to be followed before any distribution plan could become law.

Further, the Senate noted that the outcome of the pending *Dann* litigation, which was then on appeal to the Ninth Circuit, would affect any viable distribution plan:

> It appears that a significant number of Western Shoshone people oppose acceptance of the award at this time. There is pending litigation in the case of U.S. v. Dann in the U.S. District Court for the district of Nevada in which title to certain land and the date of compensable taking are still in issue. The outcome of that case could clearly have a strong bearing on the course of action the Congress, the Department and the Western Shoshone people might wish to pursue.

(JX-114 at p. 00953, ¶ 3)

b. The time-consuming distribution process

Following the enactment of the Indian Tribal Judgment Funds Use or Distribution Act in 1973, the Department of the Interior promulgated regulations governing the preparation of distribution plans. From inception, one of the regulations addressed "Insuring the proper performance of approved plans." It provides:

> A timetable prepared in cooperation with the tribal governing body shall be included in the plan submitted by the Secretary for the implementation of all

> programming and enrollment aspects of a plan. At any time within one calendar year after the approval date of a plan, the Area Director shall report to the Commissioner on the status of the implementation of the plan, including all enrollment and programming aspects, and thenceforth shall report to the Commissioner on an annual basis regarding any remaining or unfulfilled aspects of a plan. The Area Director shall include in his first and all subsequent annual reports a statement regarding the maintenance of the timetable, a full accounting of any per capita distribution, and the expenditure of all programming funds.

25 C.F.R. § 60.12 (1974) (emphasis added) (*recodified* at 25 C.F.R. § 87.12 in 1982). This regulation thus anticipates that distribution plans will commonly take multiple years to execute.

It was clear to the Bureau of Indian Affairs (BIA) as early as 1973 that the process of actually distributing the Docket 326-K award would be challenging and very time-consuming. A February 15, 1973 BIA memorandum noted that "beneficiaries would be comprised of the Western Shoshone membership of both organized Western Shoshone or partly Western Shoshone entities, and individual nonenrolled descendants" and that "it is mandatory that planning begin now in terms of the identification of beneficiaries, the disposition of the funds, and the dissemination of useful information to interested groups and individuals." (JX-13 at p. 00252, ¶¶ 2, 3) "[E]arly attention to this case is necessary if we hope to avoid the confusion and the very time consuming problems encountered with the rather similar Northern Paiute judgment." (*Id.*) The distribution of the Northern Paiute judgment had taken 16 years. (Nunes: Tr. 258:22 – 259:2)

A March 11, 1980 BIA research memorandum on the distribution of the award in Docket 326-K made clear how challenging it would be to identify eligible individuals. (JX-51) It noted that "[t]he Western Shoshone entities were and are extremely scattered." (*Id.* at p. 00570, ¶ 3) It concluded that "the representatives of the Western Shoshone are those Shoshone and their descendants who remain after precluding the Wind River, Fort Hall, Washakie, Utah, and Boise and Bruneau Shoshone, the Indians of California, and the splinter groups described above." (*Id.*, ¶ 2) It found that eligible Western Shoshone could be found in ten different Nevada tribes and

two additional California tribes. (*Id.* at pp. 00571-00572) It added that "Western Shoshone descendants may be found in many States." (*Id.* at 00571, ¶ 1)

In late 1989, as the *Dann* litigation was winding down, Rep. Vucanovich introduced proposed distribution legislation that included deadlines which would have required the judgment roll to be developed and the distribution to be made within 390 days after enactment of the bill. (JX-231 at pp. 2116-17, §§ 3(b), 4(a)) The Department of the Interior "strongly opposed" this legislation for a number of reasons, including that "[t]he timeframes cited in the bill for publication of regulations, the time allotted for applications to enroll, and the time cited for the preparation of the Final Judgment Roll, are unrealistically short." (JX-238 at p. 02207, ¶ 3 and p. 02209, ¶ 3)

In 1991, Rep. Vucanovich introduced similar distribution legislation with essentially the same proposed deadlines for developing a distribution roll and effectuating the distribution. (JX-246 at pp. 02399-403, §§ 2(b), 3) The Department of the Interior testified that it would support enactment of this bill "if it is amended to meet our concerns regarding finalization of the judgment rolls for the distribution of funds." (JX-252 at p. 02533, ¶ 2) The Department detailed its concerns as follows:

> Among issues of concern are the tight timeframes specified in the legislation in which the Secretary is to fulfill certain administrative responsibilities. Some of these timeframes would be impossible to meet. Section 2(b)(2) of H.R. 3897 directs "the governing bodies of each Western Shoshone Tribe" to bring current its membership roll in accordance with the membership requirements of each respective tribe. Section 2(b)(3) requires the Secretary to prepare a supplementary roll of individuals not included in section 2(b)(2) who otherwise meet the standards set forth in the legislation. While the process of updating the tribal rolls may be completed in a relatively short period of time, the overall technical process of bringing the supplemental roll into final form could take far longer than the timeframes allotted in the bill. If the supplemental roll is considered a lineal descendancy roll, regulations necessary for its implementation will require considerable time to formulate, approve, and publish. The 90-day timeframe in section 5 to develop regulations to implement the provisions of the legislation and the 11-month period to publish the final judgment roll provided in section 2(c) do

> not provide adequate time to prepare a lineal descendancy roll in light of Administrative Procedures Act requirements.

(*Id.* at p. 02534, ¶ 2) (emphasis added).

In May 1998 the BIA again noted in an internal memorandum that "the development of a payment roll will be a tremendous and expensive task once the distribution plan is approved." (JX-302 at p. 03535, ¶ 4)

After the Distribution Act was ultimately enacted in 2004, and after three years were spent developing regulations governing the preparation of a payment roll, Daisy West of the BIA estimated that it would take an additional 2-3 years until the application period closed and an initial distribution could be made and would take 6-10 years before a final distribution would take place. (JX-389, at p. 05418, ¶ 1) Ms. West's assessment of how long the enrollment process would take was made in February 2007, but it should have been available to the BIA years earlier. Ms. West had been with the BIA since 1972 and, as of 2002, was responsible for preparing judgment fund distribution plans. (JX-360 at p. 04157) She had been involved in monitoring the potential distribution of the WSIG trust funds since at least 1998. (JX-312 at p. 03582, ¶ 2) In 2002, she testified before the Senate Committee on Indian Affairs with respect to a WSIG distribution act (JX-360 at p. 04155), which proposed to distribute the Docket 326-K funds in the same manner as the legislation ultimately enacted in 2004. (Compare JX-350 at pp. 03955-03958 with JX-373 at p. 05041)

In sum, as Judge Lettow has noted, the "planning for a distribution in *Western Shoshone* [was] made difficult not only by the number and scattered nature of the individual claimants but also by the lack of cooperation by many of the Western Shoshone and their tribal organizations in developing a plan." *Wolfchild v. United States*, 108 Fed. Cl. 578, 586 (2013). The BIA knew or should have known at all relevant times that, whenever distribution legislation was enacted, the

process of compiling a payment roll and then distributing the Docket 326-K funds would itself be a multi-year undertaking.

c. The "land base" issue and the Dann litigation (the 1980s)

The March 11, 1980 BIA research memorandum regarding planning for distribution of the award in Docket 326-K observed that a significant number of potential beneficiaries were opposed to accepting the award because they feared it would cause them to lose any claim to recovering their land or some portion of it:

> For many years, a significant element among the Western Shoshone people … has maintained that most of the Nevada tract was never ceded or taken. … [They] believ[e] that the granting of an award would deprive all Western Shoshone of the land itself or at least jeopardize their claim to such land. … The acceptance of an award, in fact the award itself, is genuinely regarded by these people to constitute a sale of their lands. They will not accept the decision of the Indian Claims Commission and the Court of Claims that the Nevada lands were all taken by 1872.

(JX-51 at p. 00562, ¶ 2) The memorandum went on to note that "We are aware also that the Dann case, involving Western Shoshone who are occupying federal grazing lands in Nevada which they hold to be theirs by virtue of the Ruby Valley Treaty, is pending." (*Id.* at 00564, ¶ 1)

The *Dann* case raised the issues of whether and when the Western Shoshones' aboriginal title to the land had ever been extinguished. The district court originally ruled that aboriginal title had been extinguished by the collateral-estoppel effect of the Indian Claims Commission's judgment in 1962. *United States v. Mary and Carrie Dann*, Civil No. R–74–60 (Jan. 5, 1977). But, in 1978 the Ninth Circuit had reversed this decision, and ruled that "[w]hatever may have been the implicit assumptions of both the United States and the Shoshone Tribes during the litigation ..., the extinguishment question was not necessarily in issue, it was not actually litigated, and it has not been decided." *United States v. Dann*, 572 F.2d 222, 226–227 (9th Cir. 1978). The case was remanded to the district court to address the extinguishment issue.

In April 1980 the district court ruled that the Western Shoshones' aboriginal title had been extinguished on December 6, 1979, when the ICC judgment became final:

> The judgment of the Indian Claims Commission is now final as of December 6, 1979. The legal effect of the judgment for the purposes of the instant case is to extinguish the aboriginal Indian title to the lands of the Western Shoshone Indians.… Until the Indian Claims Commission judgment became final, such aboriginal Indian title had not been extinguished.

(JX-54 at p. 00578, ¶ 2) While this decision concluded that aboriginal title had been extinguished, its finding that title had not "transferred" until 1979 raised another issue: whether the ICC decision had correctly valued the Western Shoshone lands as of 1872, rather than 1979. Both parties appealed the district court's ruling to the Ninth Circuit.

It was against this backdrop that, on August 4, 1980, the Senate Committee declined to extend the time for preparation of a use and distribution plan for the Docket 326-K trust funds. (JX-114) As noted above, Senator Melcher explained:

> It appears that a significant number of Western Shoshone people oppose acceptance of the award at this time. There is pending litigation in the case of U.S. v. Dann in the U.S. District Court for the district of Nevada in which title to certain land and the date of compensable taking are still in issue. The outcome of that case could clearly have a strong bearing on the course of action the Congress, the Department and the Western Shoshone people might wish to pursue.

(JX-114 at p. 00953, ¶ 3) In fact, the outcome of the *Dann* litigation could have upended the ICC judgment in whole or in part.

The Government understood that the enactment of any distribution legislation would have to await the outcome of the *Dann* litigation. A September 5, 1980 letter from the Interior Solicitor to the Chairman of the Western Shoshone Sacred Lands Association, stated:

> A request for a 90-day extension of time … was denied by the Senate Select Committee on Indian Affairs. Accordingly, under the 1973 Act authorizing legislation will be necessary before there may be any use or distribution of the judgment fund. That should present sufficient opportunity to address questions

> which may be raised by United States v. Dann, referred to in your letter and accompanying petition.

(JX-118 at p. 00967, ¶ 3) Similarly, a December 30, 1980 letter from the Acting Director of the BIA Office of Indian Services to Senator Alan Cranston noted:

> Ms. Esteves' desire that the process of distributing the funds be speedily implemented is quite understandable … [but] a significant faction among the Western Shoshone people rejects the award and is seeking title to the land. In particular, this faction is supporting the continuance of litigation in United States v. Dann which pertains to Western Shoshone land title issues. Probably, all interested parties will have to await the outcome of the appeal in the Dann litigation.

(JX-124 at p. 00979, ¶ 2; emphasis added)

One year after the extension was denied, in August 1981, the Acting Deputy Assistant Secretary – Indian Affairs (Operations) wrote a memorandum to the BIA Phoenix Area Director noting that the Department of the Interior did not intend to propose any distribution legislation to Congress until the *Dann* litigation was resolved:

> Primarily due to the status of the Dann litigation, in which some Western Shoshone people assert title to a vast portion of Nevada, the Senate Select Committee on Indian Affairs denied an extension of the date for the submittal of a Secretarial Plan. The case is on appeal. If the plaintiffs' assertions are denied, we will then propose legislation.

(JX-137 at p. 01073, ¶ 2)

The following year, in 1982, the Deputy Assistant Secretary – Indian Affairs (Operations) wrote a memorandum to the BIA Phoenix Area Director suggesting that the BIA might meet with the tribal governing bodies of the four "successor" Western Shoshone tribes (Te-Moak, Duckwater, Yomba, and Ely) to start working with them toward the development of proposed distribution legislation, but cautioning that "the actual introduction of legislation may not be possible until the Dann litigation is completed." (JX-144 at p. 01128, ¶ 3)

The Phoenix Area Director held a meeting with leaders of the four successor tribes on May 11, 1982. During that meeting, they discussed various issues including:

> 3) A commitment from the BIA to not begin compiling a descendancy roll in anticipation of distribution of the Western Shoshone judgment.
>
> 4) A commitment from the BIA that the Interior Department will not attempt to draft legislation to distribute the Western Shoshone judgment prior to an actual written agreement between representatives of the United States and a Western Shoshone negotiating team (including primarily representatives of Western Shoshone tribal governments) on an appropriate draft of proposed legislation to achieve an overall settlement of Western Shoshone land claims …

(JX-147 at p. 01132) The Phoenix Area Director responded to these tribal requests in writing and essentially agreed to both:

> Item No. 3
>
> Since we cannot develop any kind of roll for distribution purposes without an approved plan, we have no problem agreeing to this.
>
> Item No. 4
>
> As far as draft legislation for the distribution of the Western Shoshone judgment, we can decide our course of action within the Area, however, we cannot make a commitment for the Central Office or the Department. We expect any legislation developed would have the direct input of the affected Tribes and individuals that have an interest in the award.

(JX-150 at p. 01140)

The following year, in May 1983, the Ninth Circuit issued its decision in *Dann* and ruled that "'payment' of the Western Shoshone claim has not occurred within the meaning of 25 U.S.C. § 70u(a), and that the Danns are not precluded by that statute from asserting aboriginal title as a defense to this trespass action." *United States v. Dann*, 706 F.2d 919 (9th Cir. 1983); JX-156.

The Ninth Circuit's decision thus further complicated the situation and caused the Director of the BIA's Office on Indian Services to describe the prospects for developing distribution legislation as follows in an August 3, 1983, letter to Rep. Vucanovich:

> For some time we and the Congress have been awaiting a Court of Appeals decision in the Dann case, Carrie and Mary Dann having contended that the Western Shoshone still retain aboriginal title to the Nevada portion of the lands claimed. On May 19, 1983, the Court ruled that no evidence had been presented by the Government establishing that aboriginal title had been lost. We do not know whether this decision will be appealed to the Supreme Court. Meanwhile, the Western Shoshone people are scheduling a series of general meetings in an effort to develop a proposal that would incorporate the distribution of the funds and the utilization of the subject lands. The situation has become, as a result of the decision, extremely confused and under the circumstances we are most reluctant to submit proposed legislation for only the monetary award.
>
> Undoubtedly, considerable time will have elapsed before the Western Shoshone people, the Secretary of the Interior and the Congress are able to reach agreement in this complex matter.

(JX-163 at p. 01267, ¶¶ 2, 3; emphasis added) Ultimately, the Government decided to appeal to the Supreme Court and the Court granted certiorari, thereby further prolonging the litigation.

Four months later, in December 1983, the Assistant Secretary for Indian Affairs wrote a letter to Senator Andrews, the Chairman of the Select Committee on Indian Affairs in which he again underscored the significance of the *Dann* litigation and also noted the difficulty of attempting to resolve the underlying land restoration issue given the absence of a single representative or governing body for the WSIG:

> In this instance the Dann case [United States v. Dann, 706 F. 2d 919 (9th Cir. 1983)] has been one of the complicating factors since it has provided an argument that land should be a factor in a final settlement since title has not been properly extinguished. Presently, groups of Western Shoshone have been discussing proposed legislation to secure both the monetary settlement and a portion of the lands in Nevada. A particularly difficult problem exists with respect to any land restoration approach due to the virtual absence of a successor tribe or tribes representative of all the recommended beneficiaries. Consequently, meaningful planning has not yet occurred.

(JX-170 at p. 01453)

The Supreme Court issued its decision in February 1985, ruling that "payment" for the WSIG lands had occurred when the judgment award funds were placed into the Treasury account

in December 1979. But the Court explicitly left open the issue whether the Danns might possess individual aboriginal rights. *United States v. Dann*, 470 U.S. 39 (1985). The case returned to the lower courts for further proceedings.

Meanwhile, the Department of the Interior had been having ongoing discussions with an umbrella WSIG group, the Western Shoshone National Council, about a potential land restoration that might pave the way to achieving consensus on a distribution of the award funds. But, by a letter dated June 30, 1986, the Department terminated these negotiations, after more than two years, because the gulf between the parties' positions was so great that it had concluded that further negotiations would be futile. The Department suggested that "one possible avenue for moving these issues forward is to separate the 'land claim' issue from the Judgment Award distribution process. We could work together to develop legislation that would distribute those funds while still preserving any claims the Western Shoshone believe they have against the United States." (JX-203 at p. 01927, ¶ 4)

The Government's proposal to separate the land claim issue from the distribution issue was spurned by the Western Shoshone National Council, which said that it would cooperate in effecting a distribution only if the Docket 326-K award was deemed to be payment of damages for trespass to Western Shoshone lands by the United States, rather than payment for a taking of the lands. The Council also renewed its request that the Government agree to stay the *Dann* case pending enactment of a comprehensive legislative solution. (JX-207)

A year later, in July 1987, the situation remained deadlocked. The Chairman and Vice-Chairman of the Senate Select Committee on Indian Affairs identified the causes of the deadlock in a letter to the Assistant Secretary for Indian Affairs:

> As you know, the Western Shoshone National Council will not accept payment of the funds awarded by the Indian Claims Commission as a satisfactory solution to

> their claims since this would leave the Bands …, without a land base. … The Select Committee on Indian Affairs denied [the 1980] request [for an extension of time] for two reasons: (1) because of the legal questions created by the initial decision in the Dann case, and (2) to allow time for the Western Shoshones to develop a legislative proposal that would provide for an appropriate land base.

(JX-219 at p. 02013, ¶ 2) Although the Senators plainly hoped to nudge the parties toward an agreement on a land base, the stalemate continued.

The *Dann* litigation proceeded and eventually made its way back to the Ninth Circuit for a third time. The Ninth Circuit issued a decision in 1989 that effectively put an end to the litigation. *United States v. Dann*, 865 F.2d 1528 (9th Cir. Jan. 11, 1989), *amended*, 873 F.2d 1189 (9th Cir. Apr. 27, 1989), *cert. denied*, 493 U.S. 890 (Oct. 10, 1989); JX-227.

d. The unresolved "land base" issue (the 1990s)

Upon the conclusion of the *Dann* litigation, Rep. Vucanovich introduced the Western Shoshone Claims Distribution Act, H.R. 3384, on September 28, 1989, which proposed a per capita distribution of the Docket 326-K trust funds. (JX-231) A hearing was held on this bill on April 26, 1990, where it was opposed by the BIA, the Western Shoshone tribal governments, and the Western Shoshone National Council. The tribes opposed the bill because it did not recognize Western Shoshone land and treaty rights or provide a land base. (JX-238 at pp. 02289-02335) The bill died in Committee. (Stipulation No. 50)

Rep. Vucanovich waited until the next Congress and then introduced similar legislation on November 22, 1991, H.R. 3897. (JX-246) A hearing was held on this bill on April 30, 1992. The BIA supported this bill, but it was still opposed by the tribes and died in Committee. (JX-252 at pp. 02545-02556, 02567-02638; Stipulation No. 51) Following this hearing, the Chairman of the House Committee on Interior and Insular Affairs wrote a letter to Rep. Vucanovich on June 19, 1992, stating, "there still appears to be a wide diversity of opinions and suggested approaches regarding the distribution of the Docket Funds …. While I believe we are closer to a resolution of

this issue than we were in the 101st Congress, the Committee will not consider the measure until there is more of a consensus among the tribal governments." (JX-254 at p. 02756, ¶¶ 1, 2) In other words, distribution legislation was dead until consensus supporting it could be developed among the tribal governments.

No such consensus could be developed during the 1990s. The relevant history was later summarized by the Assistant Secretary for Indian Affairs in congressional testimony. He explained that tribal governments had been unanimous in their opposition to distribution in the early 1990s, and that this situation did not start to change until 1997. Then the changes in tribal positions came slowly and with some temporary reversals along the way. Even as of 2002, full consensus among the tribes had not been achieved:

> Although the tribal governments were unanimous in their opposition [to distribution] in the early 1990's, since 1997 three of the four tribal councils have modified their position to support the distribution of the judgment funds. The Te-moak Tribal Council enacted Resolution 97-TM-10 on March 6, 1997 adopting a plan for the distribution of these funds and requested the Department to support it. That resolution was rescinded by the next tribal council in the summer of 2000. The current tribal council rescinded that action in January of this year [2002] and reinstated the 1997 resolution.
>
> The Duckwater Shoshone Tribal Council enacted Resolution No. 98-D-12 on March 18, 1998, supporting the Western Shoshone claims distribution proposal. On March 10, 1999, they enacted Resolution No. 99-D-07 reaffirming the earlier resolution supporting the Western Shoshone claims distribution proposal.
>
> The Ely Tribal Council enacted Resolution No. 2001-EST-44 on October 9, 2001 supporting S. 958 and H.R. 2851.
>
> We have been advised that the Yomba Tribal Council continues to oppose the distribution.

(JX-360 at pp. 04153-04154) Because of the continued tribal opposition, no further distribution legislation was introduced in Congress during the remainder of the 1990s.

e. Renewed efforts to enact distribution legislation (2000-2004)

As some of the tribes began to support a distribution, proposed legislation to effect a distribution was once again introduced in Congress. On June 27, 2000, Senator Reid introduced S. 2795, the Western Shoshone Claims Distribution Act. (JX-346) No hearings were held on this bill and it died at the end of the 106th Congress. (Stipulation No. 52) On May 24, 2001, Senator Reid again introduced the legislation as S. 958, the Western Shoshone Claims Distribution Act. (JX-350) This bill was passed by the Senate late the following year, on November 14, 2002 (JX-362) and was referred to the House, where it died. (Stipulation No. 54)

In 2003, with the start of a new Congress, Senator Reid and his Nevada colleagues renewed their efforts to enact distribution legislation. On February 25, 2003, Rep. Gibbons introduced H.R. 884, the Western Shoshone Claims Distribution Act. (JX-364) On March 13, 2003, Senators Reid and Ensign introduced S. 618, the Western Shoshone Claims Distribution Act. (JX-365) The membership of WSIG was still split over this legislation. The House Report, issued in October 2003, noted that "[d]uring the hearing and later markup of the bill, there was considerable discussion concerning whether a majority, and how large a majority, of the Western Shoshone people favor a distribution of the judgment funds." (JX-369 at p. 04982, ¶ 2) But the Report concluded that "there was no evidence provided by dissidents to prove that enactment of this bill of the judgment funds would affect the legal rights of the Western Shoshone [to any land]." *Id.*

Eventually, on July 7, 2004, this legislation was enacted as The Western Shoshone Claims Distribution Act, Pub. L. No. 108-270, 118 Stat. 805 (2004). (JX-373; Stipulation No. 57)

f. The process of effecting a distribution (2004-2012)

Enactment of the Distribution Act was only the first step in the process of actually effectuating a distribution of the Docket 326-K award funds. The Act required the Secretary to establish a judgment roll that would be the basis for distributing the funds – a complex and time-

consuming process that required identification and verification of eligible recipients. Almost a year after the Act became law, the BIA published a proposed rule on May 19, 2005 regarding an enrollment process for individuals to apply for a share of the award. (Stipulation No. 61) At that time, the BIA estimated that, once the enrollment process was established (through a final rule), the application period would last two years. 70 Fed. Reg. 28859, 28860 (May 19, 2005). It then took almost two years, until March 5, 2007, for the BIA to issue final regulations that actually established the enrollment process. (Stipulation No. 62)

On February 12, 2007, shortly before the final enrollment regulations were issued, Daisy West, the Chief of the BIA Division of Tribal Government Services, sent an email to the Office of the Special Trustee in which she projected when the actual distribution of the award funds would occur.

> The final enrollment regulations are with Mike Olsen for his signature. … The first distribution of funds will be in approximately 2 to 3 years when the application period closes. At that time we will make a partial per capita to approximately 2,500 individuals. The partial per capita share will be approximately $11,000, plus interest earned between now and the date the payment is made. The partial payment will be approximately $27.5 million in today's dollars. The balance of the Docket 326-K funds will be distributed in 6 to 10 years."

(JX-389 at p. 05418, ¶ 1) At that point the total amount in the trust fund exceeded $157 million. (*Id.* at p. 05419) Thus, Ms. West projected that the majority of the funds would not be distributed for 6 to 10 years.

Ms. West's projections of the timeframes proved to be generally accurate. It took three years, until May 2010, for the BIA to establish a final deadline for receiving applications: August 2, 2010. (Stipulation No. 67) This deadline subsequently was extended until December 2010 for one group of individuals. (Stipulation No. 68) The first partial per capita payments (totaling approximately $70 million) were made to 3,187 recipients beginning in March 2011, four years after

Ms. West's email. (JX-415) The BIA completed the per capita roll on September 28, 2012, and final distributions (totaling approximately $118 million) were made shortly thereafter, five years and eight months after Ms. West's email. (JX-417; JX-423 at p. 07032)

2. The Government's actual investment of the funds

The Government did not invest the Docket 326-K funds in a consistent manner throughout the period at issue. To the contrary, the maturity structure of the portfolio varied significantly, and with no evident logic.

a. The 1980s and 1990s

From 1979-1992, the Government held the funds in very short-term instruments: until 1989, the weighted average maturity of the portfolio never exceeded one year. (Plaintiff's Demonstrative Exhibit labeled "Kevin Nunes Direct Examination – Page 6 of 9 "WS EX-12") In 1993, the Government sharply increased the maturity of the portfolio until it reached a peak maturity of 11.1 years measured by weighted average maturity, or approximately 8 years if the "call" date[7] is measured and an adjustment is made for prepayments of mortgage-backed securities. (*Id.*; see also JX-423 at p. 07020; JX-425 at p. 07111, ¶¶ 97-98) Thus, in less than one year, the Government transformed the portfolio from a short-term maturity structure to a structure that was long-term or nearly so. But the Government did not maintain this new maturity structure. Instead, the portfolio's maturity structure drifted downwards and fluctuated for the remainder of its

[7] The issuer of a callable bond can redeem the bond at some agreed point(s) before the bond reaches its date of maturity. These are known as the "call date(s)." On the call date(s), the issuer has the right, but not the obligation, to buy back the bonds from the bond holders at a defined call price. Kevin Nunes testified that almost 85% of the callable bonds that the Government purchased for the WSIG trust funds during the period at issue actually did get called. (Nunes: Tr. 311:12-15)

existence.[8] If the "call" date is used as the relevant measure of maturity (as the experts agreed it should be), the maturity structure trended steadily downwards back into the range of short-term investments. (JX-423 at p. 07020) From December 1997 onward, the weighted average years to call of the portfolio was less than three years.

There is no record whatsoever of why the Government, as trustee, invested the Docket 326-K funds as it did during the 1980s and 1990s. And there is no evidence that the Government ever, during these years, assessed the investment horizon of the funds or prepared an investment plan for the funds. This absence of evidence establishes that the Government's investment process was not prudent. "In determining whether fiduciaries have breached their duty of prudence, we ask whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment." *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 356 (4th Cir. 2014) (internal quotation marks and citation omitted). "By conducting no investigation, analysis, or review of the circumstances surrounding the [challenged transaction], [defendant] acted with procedural imprudence no matter what level of scrutiny is applied to its actions." *Id.* at 360. Here, there is simply no evidence that the Government conducted the requisite investigation, analysis, or review in structuring the investments at issue.[9] "[I]t bears emphasizing that any gaps in the BIA's records must be weighed in plaintiff's favor. In this regard, it is well-accepted that if a trustee fails to keep proper accounts, all doubts will be resolved against [the trustee] and not in [the trustee's] favor."

[8] Mr. Nunes noted that, after the spike in maturity in 1993, "the portfolio immediately begins to drift back to a much shorter term structure. And, again, it's indicative of a lack of a plan, and there appears to be no rhyme or reason to what's going on here." (Nunes: Tr. 281:18-21)

[9] Dr. Goldstein noted the absence of any such evidence in his testimony. (Goldstein: Tr. 967:10 – 968:13; 1029:15-20) RHA made the same observation in its testimony (Nunes: Tr. 278: 5-14; 281: 9-21) and expert report (JX-420 at p. 06035, ¶ 1).

Jicarilla Apache III, 112 Fed. Cl. at 305 (internal quotation marks omitted) (citing *Warm Springs*, 248 F.3d at 1373); *accord Osage Tribe of Indians of Okla. v. United States*, 75 Fed. Cl. 462, 475 (2007) (*Osage III*) ("doubts should be resolved against the trustee when proper trust records are missing").[10]

Further, there is no evident logic to the Government's fluctuating investment approach over the course of this period. The changes in the maturity structure of the portfolio do not correspond to developments regarding the *Dann* litigation, efforts to resolve the underlying "land base" issue, or efforts to enact distribution legislation. Instead, as Kevin Nunes testified, the Government's short-term investment of the Docket 326-K funds during the 1980s was consistent with its "business as usual" short-term approach to investing all tribal trust funds (including the Jicarilla funds) during that period. (Nunes: Tr. 277:2 – 278:4) The shift of the 326-K funds to a significantly longer-term portfolio in 1993 corresponded to a general change in the Government's investment approach based on the recognition that, even if a tribe had cash flow needs, it should be investing in 3-7 year maturities.[11] (JX-259 at p. 02771) Dr. Starks suggested that the Government's change in approach in 1993 might have been based on a widening spread between the yields for short-term and longer-term securities, and claimed the Government had taken note of this spread in late 1992. (JX-423 at p. 06981, ¶ 144; Starks: Tr. 642:3 – 643:8) But Dr. Starks

[10] Indeed, the absence of any investment plan can itself constitute a breach of fiduciary duty. *See Liss v. Smith*, 991 F. Supp. 278, 296 (S.D.N.Y. 1998). Prudence "requires the fiduciary to be prudent—that is to say, not to undertake a course of action without determining (and documenting) that the course has a reasonable probability of success and that the fiduciary has the required skill sets to execute it successfully." *Restatement (Third) of Trusts, Prudent Investor Rule* § 90, Reporter's Notes on cmt. d (quoting P. Collins, "Prudence," 124 Banking L.J. 29, 42 (2007)).

[11] Mr. Nunes described this as "a wholesale change in approach" by the Government. (Nunes: Tr. 280:24-25). Dr. Starks agreed that it was a marked change, "a programmatic switch." (Starks: Tr. 730:15-17)

conceded on cross-examination that the interest rate spread the Government referenced in 1992 was the spread between the yields of Treasuries and agency bonds, not the yield spread between different maturities from the same issuer of bonds. (Starks: Tr. 767:4 – 768:19; JX-259 at p. 02771) Further, Dr. Goldstein demonstrated that there is no correlation between changes in the yield spreads across maturities and the Government's investment of the 326-K funds. (JX-425 at pp. 07132-07136; Goldstein: Tr. 992:5 – 996:8)

b. The 2000s

During the post-2000 period, there still is no evident logic to the Government's investment approach. From October 2000 – June 2007, the maturity structure of the portfolio was two years or less, and from March 2002 – November 2004, it was one year or less. (JX-423, Exs. 1 and 2A, at pp. 07020-07033) The maturity structure was actually shorter during the four years before passage of the Distribution Act than it was during the years thereafter, which is completely illogical. (JX-423 at p. 07020) Based on "years to call," the weighted average maturity of the portfolio was 0.6 years in July 2004, when the Distribution Act became law. (*Id.* at p. 07029) Subsequently the maturity of the portfolio increased gradually until it peaked at or above 2.5 years during the period November 2008 – May 2009, which was 4-5 years after enactment of the Distribution Act. (*Id.* at p. 07031) The maturity of the portfolio stood at 1.9 years in February 2007 when Daisy West projected that the initial distribution was still 2-3 years away and the final distribution was likely 6-10 years away. (*Id.* at p. 07030) Yet the Government left the maturity structure essentially unchanged for more than a year and then increased it marginally, to around 2.5 years. (*Id.* at p. 07031) None of this makes any sense; it certainly does not constitute prudent investment of the funds.

Unlike the 1980s and 1990s, when there is no record outlining the Government's investment approach, there are two documents that discuss the investment of the 326-K funds at different points after 2000. The first is a single-page document, dated April 29, 2003, that relates to a "management review" of the Western Shoshone accounts. It states: "Investment approach: As the securites [sic] mature, reinvest the principal and interest not to exceed two year [sic]. The tribes at some point in the future may settle and distribute the funds." (JX-367 at p. 04974) This document does not further explain the basis for the two-year limit. It does not discuss the prospects for, or timing of, a settlement and distribution of the funds, or whether those prospects have changed from previous years. Nor does it discuss the prospects for the distribution legislation that had recently been reintroduced in Congress or the timeframe needed to effect any distribution if and when legislation was enacted. In sum, it does not reflect any meaningful assessment of the investment horizon for the funds based on the relevant facts.[12]

The second document is another single-page management review dated October 25, 2005, which states: "Receipt of award: as the securities mature, reinvest the principal and interest not to exceed 2008. Settlement of docket 326-K is in the horizon." (JX-392 at p. 05485) It is true that distribution of the 326-K funds then was "in the horizon" because the Distribution Act had been enacted the previous year. But there is no discussion of how long the time horizon for distribution actually is, nor is there any discussion of the numerous steps required to effect a distribution. At that point, the Department of the Interior was in the midst of drafting the regulations that would establish an enrollment process. Those regulations would not issue for another 16 months. And, when the regulations did issue, Daisy West of the BIA, projected that an initial distribution was

[12] Mr. Nunes commented that the explanation of the two-year limit provided in this document is "about as fuzzy as you could possibly get." (Nunes: Tr. 287:4-5)

still 2-3 years away and a final distribution was 6-10 years away. Thus, this document, like the previous one, omits any meaningful assessment of the investment horizon for the funds based on the relevant facts and available information.[13]

The only exhibit that reflects an effort by the Government to assess the actual investment horizon for the Docket 326-K funds is the email exchange with Daisy West that occurred on February 12, 2007, more than 27 years after the account had been established in 1979. (JX-389 at pp. 05418-19) Ironically, the Government did not heed Ms. West's projections as it invested the funds.

3. The experts' opinions

The Court has received the experts' respective credentials, and will assess how their demeanor on the witness stand affected their credibility. This brief focuses on the substance of their divergent opinions regarding whether the funds were prudently invested.

a. Plaintiff's experts (RHA and Dr. Goldstein)

RHA concluded that the Government did not follow a prudent investment process. "The Government unquestionably breached its trust responsibilities to the WSIG by: a. Failing to develop a detailed understanding of the cash flow requirements of the WSIG funds; b. Failing to develop a detailed investment plan for the WSIG funds; and c. Failing to properly align the maturity structure of the WSIG portfolio with the maturity capacity/investment horizon of the funds." (JX-424 at p. 07072)

[13] Mr. Nunes testified that the investment plans that RHA prepares for its clients range from 8-20 pages in length, plus supporting documents. (Nunes: Tr. 285:23 – 286:3) He added that "neither one of [the management reviews] is one that would pass muster in my world [as an investment plan]." (Nunes: Tr. 286:19-20)

RHA opines that, for most of the period at issue, the Government's investment approach was imprudent because the maturity structure of the portfolio was far too short-term given the maturity capacity (investment horizon) of the funds. The point at which the Government knew – or certainly should have known – that a longer maturity structure was necessary occurred in August 1980. This is when Congress (1) denied the Department of the Interior's request for an extension of time to submit a distribution plan and (2) signaled that it was not prepared to act on any distribution legislation until the *Dann* litigation was resolved and consensus on distributing the funds could be achieved within WSIG. This August denial letter from Congress "set in stone" the necessity for a full legislative process. (Nunes: Tr. 268:11-12) Mr. Nunes testified:

> Once they then request the extension for the 90 days, of course, it's denied, and, again, that resets everything. Now the Government is going to have to go through a full legislative process. In order to do that, they are going to have to be able to come up with a distribution plan. In order to do that, they are going to have to achieve consensus. And, you know, all of the indications are those are going to be nigh on to impossible to do. So to us, again, that was a logical line of demarcation, to say this is long-term money, and the portfolio has to be transitioned to a long-term portfolio.

(Nunes: Tr. 270:7-19) Further, by this point the Government already knew that, even if Congress was able to enact distribution legislation, the complex process of developing a payment roll and effecting the distribution would take additional years. Mr. Nunes pointed to the 1973 BIA memorandum (JX-13 at p. 00252, ¶ 2) discussing "the enormous task that, again, developing a roll and distributing the funds will be, and they reference concerns that it will be eerily similar to the Northern Paiute judgment which, if I recall, was 16 years -- if I'm not mistaken -- for the funds to be distributed." (Nunes: Tr. 258:22 – 259:2)

In RHA's view, these circumstances indicated that the Docket 326-K funds had a long-term investment horizon and should have been invested in a long-term portfolio to maximize the investment return. RHA believes that a prudent portfolio would have been broadly diversified,

with maturities ranging from 1-30 years, and a weighted average maturity of around 15 years. (Nunes: Tr. 320:1-11)

There were no developments during the 1980s that changed the investment horizon for the funds. While the *Dann* litigation eventually concluded at the end of the decade, "it didn't appear to resolve the issue of a land base at all, and it didn't bring any of the entities any closer to any kind of an agreement that might ultimately lead to a distribution plan." (Nunes: Tr. 272:8-11) If anything, the parties had grown further apart. "[A]s this has gone on through the entire decade, it seems to be moving more apart than toward a resolution." (Nunes: Tr. 176:3-5)

Nor did the investment horizon change during the 1990s. (Nunes: Tr. 272:16-19) The successor Western Shoshone tribes unanimously opposed both of the distribution bills introduced by Rep. Vucanovich because they did not provide for a land base. Congress then made clear that distribution legislation would not be considered until some tribal consensus in support of a distribution could be achieved. No consensus emerged at any time during the 1990s. (Nunes: Tr. 252:17 – 254:7, 257:4-21) In 1994, the Government acknowledged that "the plight of one of the Western Shoshone is one of the most difficult problems in all of Indian affairs." (JX-270 at p. 02801, ¶ 1)

Some tribes began to favor a distribution at the end of the 1990s, but this did not alter the investment horizon. "So we're seeing a little bit of a change. Again, I would caution, we didn't think significant enough at this point to alter our viewpoint on the maturity structure of the funds." (Nunes: Tr. 261:4-7) "[T]hat's an indication that change might be coming, it is not substantial enough to indicate actual change. And so we would adhere to the long-term portfolio." (Nunes: Tr. 272:25 – 273:3) RHA opines that the 326-K funds should have remained in a diversified long-term portfolio until July 2004 when the Distribution Act was finally enacted. "[I]t's the first time

that … the Government would have known that funds now are absolutely going to be distributed. It's still indeterminate as to when, but it is, again, a fait accompli that they will now be disbursed." (Nunes: Tr. 273:10-14)

Mr. Nunes disagreed with Dr. Starks' contention that putting the funds in a long-term portfolio from 1980-2004 would have exposed them to excessive interest rate risk, *i.e.* risk of incurring a loss if interest rates changed and the securities had to be sold. (Nunes: Tr. 1131:2-7) He testified in rebuttal (without any sur-rebuttal from Dr. Starks) that a "well-understood fact is that diversification mitigates risk in any portfolio." (Nunes: Tr. 1131:20-21) He explained that:

> So we talked already about diversification in my testimony, but there's a couple of different kinds of diversification that [the RHA long-term] portfolio would have. Certainly, what I'll refer to as vertical diversification, which means you're going to have -- and certainly in our model we use a highly diversified portfolio based on maturities. So we have one-years and we have 30-years and we have a whole bunch of stuff in between. So you have got diversification from that standpoint.
>
> As important and probably didn't get discussed during my original testimony is that you're also going to have what I've always referred to as seasoning. Seasoning is when you are buying -- as your portfolio grows over time, you're buying securities, again, across the maturity spectrum, but also across the horizontal timeline. And so you have -- you're buying assets for the portfolio in all different interest rate environments, rising, falling, highly volatile, not so volatile, and so you get this additional measure of diversification, i.e., seasoning, that, again, is another risk-mitigating factor, and it's -- it's not to be underemphasized, the importance of that.

(Nunes: Tr. 1132:4 – 1133:2) Mr. Nunes provided an example to demonstrate his point about the portfolio becoming more "seasoned" as time passes:

> So if you went back to 1994, 23 years ago, and you bought a 30-year Treasury bond, it probably would have had -- based on Fed data, it would have had a coupon of about 8 percent, because that was the prevailing rate for 30-year Treasuries at that time. So if you bought that bond for your portfolio and owned it for 23 years, to 2017, it's now a seven-year bond.
>
> If, in 2014, as part of your portfolio strategy, you bought a ten-year Treasury, it's now three years later, that ten-year Treasury is now also a seven-year bond, but because you bought the ten-year in 2014, the coupon on that would be about 2 1/2 percent. And, again, I'm rounding off for simplicity's sake.

> So here we would be in September of 2017, we would own two seven-year bonds, one with an 8 percent coupon and one with a 2 1/2 percent coupon. And for the sake of argument, let's assume that seven-year rates are 3 percent -- they are not, but let's assume they are just for illustrative purposes.
>
> So I own one seven-year bond that's going to have a capital loss because its coupon is 2 1/2, but prevailing rates are 3, so it's underwater. If I had to sell it, it would sell at a loss. But my 8 percent seven-year bond, which used to be a 30, the 8 percent seven-year bond is going to sell at an enormous premium.
>
> Now, multiply that by 50, 60, 80, 100 different securities bought over a lengthy timeline and that's the seasoning component that mitigates risk.

(Nunes: Tr. 1138:20 – 1139:22)

In other words, interest rate risk is mitigated by two forms of diversification. The first is having diversification among maturities so that the portfolio always has a significant portion of short- and intermediate-term securities that are less sensitive to interest rate changes.[14] The second form of diversification occurs over time as securities mature and are replaced, or new securities are purchased with income from the portfolio. Because the market interest rate will be fluctuating as these purchases occur, the portfolio will end up containing securities of comparable maturity that carry different interest rates because they were purchased at different times. This increases the likelihood that, if the securities must be sold prior to maturity, any losses on some of them will be counterbalanced by gains on others.

In addition, interest rate risk is further mitigated by the fact that before any distribution could occur, distribution legislation would have to be enacted and then the enrollment process would have to be formulated and implemented. These preconditions provide "for lack of a better term, [a] buffer in this whole process, because we know with award funds that before they can go anywhere, a distribution plan has to be passed, and then there are all kinds of steps that happen

[14] Bonds with shorter maturities return investors' principal more quickly than long-term bonds do. Therefore, a change in the interest rate will affect their value for a shorter period of time. This reduces the impact of the change (positive or negative) upon the value of the bond.

after that." (Nunes: Tr. 1133:5-9) The time needed to effectuate the distribution provided ample opportunity to adjust the maturity structure of the portfolio and mitigate any interest rate risk once the distribution legislation was enacted. (Nunes: Tr. 1135:6-11) Mr. Nunes testified that, when banks adjust the maturity structure of their portfolios, they typically take 6-12 months to effect the change. (Nunes: Tr. 1153:4 – 1154:23)

Although the Government significantly lengthened the maturity structure of the 326-K portfolio for a brief period in 1993, its investment approach remained imprudent. (Nunes: Tr. 413:5-13) Mr. Nunes acknowledged that this longer maturity structure was "more in line with … what the Government's knowledge should have been regarding the maturity capacity or the investor horizon for these funds." (Nunes: Tr. 413:16-20) But this move in the right direction did not mean that the portfolio had become prudent. As Mr. Nunes noted:

> It's still shorter than we think would have been prudent, and, of course, it only lasts for a blip on the radar screen before the portfolio drift takes the funds right back down into a much shorter structure than would be prudent.

(Nunes: Tr. 413:21-25)

The issue in this case is whether the Government's investment practices were too short-term and constituted a breach of trust. Because "the breach arises from a pattern of investment rather than from investment in a particular [instrument]," *Dardaganis v. Grace Capital Inc.*, 889 F.2d at 1244, the inquiry focuses broadly on the investment practices rather than on individual investment decisions. The Government's brief foray into longer-term investment does not alter the conclusion that its investment practices remained imprudent throughout this period.

RHA opines that the long-term maturity structure of the 326-K portfolio should have been adjusted when the Distribution Act was enacted in July 2004. "Primarily relying on Daisy West's estimate of how long [the distribution] would take … we felt that this was a point in time where

the portfolio would be repositioned from a long-term portfolio to a broadly diversified intermediate-term portfolio." (Nunes: Tr. 273:17-25)[15]

A final adjustment to the maturity structure became appropriate at the start of 2011 when the initial disbursements were about to begin. This change was necessary because "you can't distribute securities to individual recipients. It has to be cash. So you need to convert the portfolio to cash." (Nunes: Tr. 274:13-15)

RHA used a transition period of one-year in 1980-1981 for the funds to be shifted into a diversified long-term portfolio and a period of six months in 2011 for the funds to be shifted from an intermediate-term portfolio into cash. Mr. Nunes explained that "[b]uilding a portfolio is something that you do over time. You don't buy all your securities on one day. When you're coming out of a structure, to reposition into a different structure, you have a lot more flexibility, and so it can be done prudently at a little bit of a faster pace." (Nunes: Tr. 275:3-8)

Dr. Goldstein, as a rebuttal expert, was not asked to directly address the issues of liability or damages. Nonetheless, in the course of rebutting Dr. Starks' opinions, he expressed views that corroborate RHA's analysis. Dr. Goldstein noted that "disagreement inside a group does not tend to make things go faster." (Goldstein: Tr. 982:1-2) He opined that "WSIG's continuous and repeated refusal to accept the judgment award funds would/should have been (and was) understood by the BIA to indicate that it would be many years before a disbursement plan would even be filed with Congress for most of the period." (JX-425 at p. 07081, ¶ 22(b)) "[T]he BIA's expected investment horizon for the WSIG fund would not have been less than 10-15 years between 1980 and 2004. Post-2004, an

[15] As discussed above, while Ms. West's email was written in February 2007, her assessment of how long the distribution process would take should have been available to the BIA in 2004 when the Distribution Act was enacted. Ms. West had been involved in monitoring the potential distribution of the WSIG trust funds since at least 1998. (JX-312 at pp. 03582-83) As of 2002, she was responsible for preparing judgment fund distribution plans. (JX-360 at p. 04157).

investment horizon of 3-10 years would have been consistent with the evidence." (*Id.* at p. 07082, first partial paragraph continued from previous page; *see also* Goldstein: Tr. 1025:11-21) "In the case of the WSIG award, the evidence strongly points to a relatively long-term investment horizon through the 1980 to 2004 period. The highly short-term portfolio holdings chosen by the BIA, especially during the 1980s, are therefore not consistent with a prudent approach." (JX-425 at pp. 07130-07131, ¶ 143; Goldstein: Tr. 1002:22 – 1003:12).

b. Defendant's expert (Dr. Starks)

Dr. Starks opines that the investment of the Docket 326-K funds was prudent at all times. (Starks: Tr. 736:16-22) She opines that, only with the benefit of hindsight, is it apparent that the funds could have been invested longer term and, even then, that they could only have been invested in a marginally longer term manner before 1993 and after 2007. (JX-423 at pp. 06937, 06985)

Dr. Starks admitted that she had not seen any documents that explained why the Government invested the Docket 326-K funds as it did during the 1980s, and that she did not know which individuals made those investment decisions. (Starks: Tr. 724:5-14) She had not seen any evidence that the BIA ever conducted an analysis of the investment horizon of the funds during the 1980s. (Starks: Tr. 726:4-7) Nor had she seen any written investment plan for the funds during the 1990s. (Starks: Tr. 726:9-13) She did not attempt to interview any of the individuals who invested the funds during the 1990s because she didn't know who they were. (Starks: Tr. 727:7-10) She did not know what information those individuals had available to them about the investment horizon of the funds. (Starks: Tr. 727:11-20) She had not seen any evidence that the Government conducted an analysis of the investment horizon of the funds during the 1990s. (Starks: Tr. 728:10-16) Likewise, she had not seen any written investment plan for the funds for the period from 2000 forward. (Starks: Tr. 731:4-7) She did not know which individuals were

making the investment decisions during this period and did not have any "direct evidence" about why they invested the funds as they did. (Starks: Tr. 732:1-10)

Dr. Starks asserted that, "[i]n this case, there was no known investment horizon [for the funds]. There was a lot of uncertainty." (Starks: Tr. 750:14-15) When asked about the investment horizon as of September 1980, she responded that "I see that there's a lot of uncertainty, and Congress could act at any time." (Starks: Tr. 753:21-22) There are several flaws in Dr. Starks' argument that the Government's short-term investment practices were justified by the "uncertainty" of the investment horizon.

First, as Dr. Goldstein noted, "what's possible and what's probable are not the same." (Goldstein: Tr. 1035:10). Prudent investment decisions are based on probabilities not possibilities. From its inception, the prudent investor rule has been predicated on the assessment of probable outcomes. "The prudent investor rule … has its origins in the dictum of *Harvard College v. Amory*, 9 Pick. (26 Mass.) 446, 461 (1830), stating that trustees must 'observe how men of prudence, discretion, and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested.'" *Knight v. C.I.R.*, 552 U.S. 181, 193 (2008) (quoting *Restatement (Third) of Trusts*, *Prudent Investor Rule* Reporter's Notes on § 227 (1990); emphasis added). Likewise, the Federal Circuit has observed that "the probability of each outcome, the expected rate of return, and the price of the options … are all factors a prudent investor might consider when deciding whether to invest." *Stobie Creek Invs. LLC v. United States*, 608 F.3d 1366, 1376 (Fed. Cir. 2010) (emphasis added).

While a prudent investor may want to consider all "possible" outcomes before making an investment decision, the critical issue is to assess the likelihood of those various possibilities

occurring. As then-Judge Alito noted, "any prudent investor, in deciding whether to invest in [a company] on particular terms, would have taken into account the range and likelihood of possible outcomes in the Trustees' appeal …." *In re Cont'l Airlines*, 91 F.3d 553, 572 (3d Cir. 1996) (en banc) (Alito, J., dissenting) (emphasis added). The touchstones for prudent investing are probabilities and likelihoods, not mere "possibilities." In this case, while it was always possible for Congress to enact distribution legislation at any time, it was also extremely unlikely that Congress would do so absent some substantial degree of consensus among WSIG in favor of that legislation. And it was even more unlikely that Congress would ever act quickly. "It is common knowledge in the legal area, at least, that the legislative process is slow and deliberate." *Spalding and Son, Inc. v. United States*, 24 Cl.Ct. 112, 152 (1991). "The legislative process, even prodded by administrative lobbying, is slow." *United States v. Consolidated Mines & Smelting Co.*, 455 F.2d 432, 446 (9th Cir. 1971).

Second, Dr. Starks focused on the uncertainty inherent in forecasting when Congress would enact distribution legislation while ignoring the second essential step in the distribution process – developing and carrying out an enrollment procedure. This second part of the process was the responsibility of the BIA, and the agency was in the best position to forecast how long it would take. As discussed above, the BIA was fully aware that effectuating a distribution would be "a tremendous and expensive task once the distribution plan is approved." (JX-302 at p. 03535, ¶ 4)

Third, there is no evidence that the Government in fact made any contemporaneous efforts to assess the investment horizon of the 326-K funds. Thus, Dr. Starks' opinion is subject to the same criticism that Judge Allegra made in *Jicarilla*, where Dr. Starks opined that the Government's short-term investment approach was dictated by tribal liquidity needs. Judge Allegra rejected this contention on the merits and then added, "Defendant's liquidity arguments

have a decidedly hollow ring for one final reason—there is no indication that, during the period in question, the BIA ever attempted to perform a serious analysis of Jicarilla's cash flow to aid its investment planning." *Jicarilla Apache III*, 112 Fed. Cl. at 298. Dr. Starks' argument here rings hollow for the same reason – there is no indication that, until 2007, the BIA ever attempted to analyze the investment horizon of the 326-K funds to aid its investment planning.

Dr. Starks conceded that, during the 1980s, the Government could have "go[ne] out a little bit longer than what they did" with the maturity structure of the Docket 326-K portfolio. (Starks: Tr. 756:18-20) But she was "not clear" in her mind about how much farther the maturity structure could prudently have been extended – whether the Government could have extended it, for example, to five years. (Starks: Tr. 756:20-21)

Although Dr. Starks defended the prudence of the Government's short-term investment practices during the 1980s, she opined that the Government's sharp increase of the maturity structure of the portfolio in 1993 was also prudent. (Starks: Tr. 757:18 – 758:1; 762:15-18) She acknowledged that this new maturity structure was either long-term or close to long-term, depending on whether adjustments are made to take account of the call dates of certain securities and the likely prepayment of mortgage-backed securities. (Starks: Tr. 758:2-6, 758:12-25, 762:9-14, 763:15-21)

Yet Dr. Starks said that it would also have been prudent had the Government, instead, left the funds in a shorter term portfolio.

> While it is my opinion that the Government would not have acted imprudently had it maintained the WSIG funds in shorter-term investments (due to the continued uncertainty, and unclear timeline of eventual disbursements), I also believe that moving the funds into securities with a somewhat longer [Weighted Average Days To Maturity] at this stage of the period was within the range of prudence.

(JX-423 at p. 06982, ¶ 147) But Dr. Starks said she was "not sure" how much shorter-term a maturity structure would have been prudent at this point; "I didn't measure how much that shorter maturity would have been." (Starks: Tr. 763:6-12) Dr. Starks' opinion that two very different investment approaches – one short-term and one long-term – would both have been prudent for the 326-K funds at the same time is not credible. This is not a situation where two different investment approaches may be prudent because, for example, there are two beneficiaries who have different investment horizons or risk tolerances. Nor is Dr. Starks positing a situation where two slightly different investment approaches for the same beneficiary might both be within the range of prudence. Given the investment horizon of the 326-K funds in 1993, any short-term investment approach was outside the range of prudent choices, as RHA opined and as common sense dictates.

Dr. Starks emphasized that the investment horizon for the Docket 326-K funds "was uncertain the entire time." (Starks: Tr. 770:10-14) But she did not explain why, given that continuing uncertainty, it became prudent in 1993 for the Government to sharply increase the maturity structure of the portfolio. She was unable to tie the Government's dramatic change in investment approach to any specific developments regarding the investment horizon for the funds:

> Q. Were there any specific developments that made the Government better positioned in 1993 to evaluate when a distribution plan would be passed than it had been before?
> A. As I said, they had had over a decade of experience with trying -- and where they were working to get resolution so that this distribution could be paid out, and they had just seen, in 1989, a bill introduced and fail, and in 1991, a legislative bill introduced -- be introduced and fail.
> Q. All right. So if the bills were introduced in '89 and '91, why the delay until '93 in increasing the maturity structure?
> A. Well, as I believe I've already testified, there was a programmatic shift in the BIA at that time. Also yield spreads were widening. So I think we have multiple things going on.

(Starks: Tr. 771:11 – 772:2) Dr. Starks did not explain why the Government's increasing years of experience with the situation should come into play only in 1993, as opposed to some earlier time.

Her argument that the yield spreads were widening does not explain the Government's change in investment approach for the reasons discussed above in Section II.B.2.a. And her reference to the BIA's programmatic shift in its investment practices does not tie to any development with respect to the 326-K funds.

When she was asked why the shift to a longer term maturity structure couldn't have been made earlier, say in 1990, Dr. Starks said:

> Ah, I don't know the answer to that question. As I said, to me, there was a lot of uncertainty. I don't know exactly what the Government knew, but in looking and trying to put my -- be in their shoes on an ex ante basis, I see reasons for them to have done what they did.

(Starks: Tr. 765:3-8) Dr. Starks never explained what those "reasons" were, however.

Dr. Starks also was unable to tie the Government's subsequent shortening of the maturity structure of the portfolio – by more than half between 1993 and 1997 – to any specific developments regarding the investment horizon of the funds:

> Q. Now, what happened during this period that made it prudent for the Government to shorten the maturity of the portfolio by more than half?
> A. The -- one thing is that I -- I believe the yield spreads were getting smaller, and so it wasn't as – you know, they didn't need to take on that risk because they weren't getting enough reward for the risk. I also believe that that's the time when some of the tribes were writing and being very vocal about wanting distribution.
> Q. Well, isn't it true that the first tribe didn't come -- start supporting distribution until 1997?
> A. I -- I -- I don't recall. I think there was -- in the record, it's difficult to see because there were, from my understanding, the smaller groups that were very vocal, and there were a lot of people that, early on, wanted the money to be distributed.

(Starks: Tr. 775:20 – 776:11) Changes in the yield spread do not affect the investment horizon of the funds. And, as discussed above, changes in the yield spread do not explain the changes that occurred in the maturity structure of the 326-K portfolio. Dr. Starks was simply wrong about the

tribes starting to become vocal proponents of a distribution during this period; in fact, all of the tribes continued to oppose a distribution absent a resolution of the "land base" issue.

Dr. Starks acknowledged that, by 2001 – three years before the distribution legislation was enacted – the maturity structure of the portfolio had shrunk to less than one year. (Starks: Tr. 777:9-13) She could not provide a persuasive rationale for this very short-term investment approach.

> Q. Right. So you think it was prudent to assume that the distribution would occur within a year?
> A. There were a number of cases in which I saw that distribution did occur within a year, and some of those cases were in -- or there's one case that was in Dr. Goldstein's sample.
> Q. Well, I'm not asking about other cases that are used in an example. I'm asking in the context of this case. Do you think it was reasonable to project an investment horizon of just one year as of about 2001, to project that the funds would be distributed within a year?
> A. I -- I think there was a lot of uncertainty about the investment horizon. I think there were case – and part of this uncertainty comes from how long does it take to get the tribes -- to get -- to get the roll constructed. And I can look at other cases in which it was a short time period.

(Starks: Tr. 777:21 – 778:13) Dr. Starks was then shown the 1998 BIA memorandum stating that "we do anticipate the development of a payment roll will be a tremendous and expensive task once the distribution plan is approved." (JX-302 at p. 03535, ¶ 4) She said "I've never seen this memo before." (Starks: Tr. 780:20)

When asked if this memorandum changed her opinion about the investment horizon as of 2001, Dr. Starks said "I have not seen this document. I -- I can't have my opinion be affected by this document without reading the entire document. You've shown me one sentence -- two sentences. I don't know what this document is." (Starks: Tr. 781:17-20)

Dr. Starks was also unable to explain why the Government lengthened the maturity structure of the Docket 326-K portfolio after distribution legislation was finally enacted.

> Q. Okay. So how does it make sense that, since you've got that hurdle of the legislation out of the way, that the maturity structure of the portfolio increases for a period of several years after that?
> A. Ah, I don't know, and, again, I think there's a -- there's a range of prudence in here, that -- you know, perhaps the Government knew, had some sense of how long it was going to take. I -- again, it looked like logical decisions that were made given the economics at the time.

(Starks: Tr. 783:3-12)

Dr. Starks criticizes RHA for relying on the timeframes in Daisy West's 2007 email to assess what the Government should have known, in 2004, about when the 326-K funds would be distributed. (JX-423 at p. 06983, ¶¶ 149, 150) But, as demonstrated above, Ms. West had been involved in monitoring the potential distribution of the WSIG funds since at least 1998 and, upon passage of the Distribution Act in 2004, could have assessed how long the enrollment process would take.

Further, Dr. Starks claims that Ms. West's email "does not make clear how large a portion of the funds the Government expected this 'balance' [that would not be distributed for 6-10 years] to be." (JX-423 at p. 06983, ¶ 152) This is simply wrong. The first email in the chain states that the total amount then in the 326-K account was $157,459,310.23. (JX-389 at p. 05419) Ms. West's email explicitly states that "The partial payment [expected in 2-3 years] will be approximately $27.5 million in today's dollars. The balance of the Docket 326-K funds will be distributed in 6 to 10 years." (JX-389 at p. 05418, ¶ 1) Dr. Starks acknowledges that "it may have been optimal for the Government to target a slightly longer [maturity] *if* it had reason to believe that a significant portion of the distributions would not be occurring at the front end of the anticipated distribution window." (JX-423 at p. 06984, ¶ 153; emphasis in the original) In fact, the Government <u>had</u> precisely such evidence in the form of Ms. West's email, and RHA properly

relied on that email in assessing the investment horizon of the funds following the enactment of the Distribution Act.[16]

In sum, Dr. Starks fails to demonstrate that the Government's investment of the Docket 326-K funds was prudent during the time period at issue. She proffers *post hoc* justifications for the unexplained investment decisions that the Government made. She cannot explain why the Government's varying and widely divergent approaches to investing the Docket 326-K funds were all prudent. She cannot tie the variations in the Government's investment approach to contemporaneous developments that affected the outlook for when the funds would be distributed. She stresses that it was always "uncertain" when a distribution plan would be enacted but fails to analyze the real issue: what the likely or probable timeframe was at any point in time. And she steadfastly ignores the extended time period that the Government always knew would be needed to effectuate a distribution even once a distribution plan was enacted. Indeed, she was not even aware of a key exhibit – the 1998 memorandum confirming that the Government anticipated the development of a payment roll would be "a tremendous and expensive task." Finally, she misreads the Daisy West email, and appears to be unaware that Ms. West was in a position to project the distribution timeframe when the Distribution Act was passed. Dr. Starks provides no persuasive reasons for rejecting the opinions of RHA and Dr. Goldstein that, based on all of the available evidence, the Docket 326-K funds clearly had a long-term investment horizon from late 1980 until the Distribution Act was enacted in 2004 and an intermediate-term horizon thereafter up until 2011 when the judgment roll was closed. Only at that point, when the first round of distributions became imminent, did the investment horizon of the funds become short-term.

[16] Furthermore, this type of analysis by the BIA – estimating the time it would take to implement an actual distribution plan, *i.e.*, create a roll – could have and should have been done throughout the 27-year period prior to 2007.

4. Liability has been proven

Here, as in the *Jicarilla* case, Mr. Nunes and Dr. Goldstein "convincingly testified that no prudent trustee would have invested the Nation's trust funds in the way that the BIA did. The BIA's heavy reliance on short-term investments reduced the yield on Jicarilla's portfolios by failing to take appropriate advantage of the higher yields available on longer-term instruments." *Jicarilla Apache III*, 112 Fed. Cl. at 290.

During the period from 1980-1992, as in the *Jicarilla* case, the Government invested the tribal trust funds by "us[ing] a static investment approach that fell far short of its fiduciary obligation to maximize trust income through prudent investment." *Id.* at 300. In 1993, the Government significantly increased the maturity structure of the 326-K portfolio but this increase still did not match the investment horizon of the funds and so failed to maximize the investment return. Furthermore, the Government soon allowed the maturity structure to drift downwards and revert to the very short-term structure of the 1980s. Nor did the Government's short-term investment approach become prudent in 2004 when the investment horizon of the 326-K funds was reduced by the passage of the Distribution Act. The maturity structure of the portfolio still fell short of the appropriate investment horizon, which diminished the return on the funds.

In fact, for the entire period at issue, the Government breached its fiduciary duty to WSIG; it is, therefore, "under a duty to pay [WSIG] the investment income lost by its imprudent management." *Jicarilla Apache III*, 112 Fed. Cl at 300.

C. The Docket 326-A Trust Funds

1. The investment horizon of the funds

The trust funds from Dockets 326-A-1 and 326-A-3 came into existence on March 25, 1992, and September 15, 1995, respectively, during the midst of the protracted debate about the disposition of the Docket 326-K funds. For several years, these two additional funds were

"indistinguishable" from the Docket 326-K funds in terms of their ultimate disposition and their investment horizon. (Nunes: Tr. 302:15-24)

By December 1, 1998, however, the BIA knew that the Docket 326-A funds would be used to establish a permanent education fund for the benefit of WSIG, rather than being distributed. A proposal to create an education fund with the Docket 326-A awards and to distribute the Docket 326-K award per capita had been presented at two public hearings earlier that year and had been overwhelmingly approved by the attendees. And the BIA had drafted a bill providing for this disposition of the funds. (JX-312 at p. 03583, ¶ 1) Indeed, the Government acknowledged in its opening statement that, "in 1998, these funds were earmarked for use as a permanent education account, whose principal was never to be paid out and whose earned interest was to be used for educational purposes." (Government: Tr. 55:14-18)

Thereafter, all of the proposed distribution legislation that was introduced in Congress provided for a 100% per capita distribution of the Docket 326-K funds and the establishment of a permanent education fund with the awards from Docket 326-A. The draft legislation always provided that the principal amount of the 326-A funds should not be expended or disbursed, and that only the income would be expended for educational grants and administrative expenses.

The significance of these developments, as RHA points out, is that the Government actually knew at least from December 1, 1998 onward that the 326-A funds would never be distributed and so had a long-term investment horizon, *i.e.* they should be invested to take advantage of the premium that longer-term instruments typically earn over shorter-term investments. (Nunes: Tr. 303:24 – 304:18)

2. The Government's actual investment of the funds

From the start of 1992 until the latter part of 2005, the maturity structure of the Docket 326-A funds was approximately the same as the structure of the 326-K funds. In late 2005, the nominal maturity structure increased significantly but, measured by years-to-call, the actual maturity structure remained relatively unchanged at less than, or barely above, two years. As of December 31, 2007, "[t]he average weighted portfolio maturity equals 1.6 years (effective maturity)." (JX-392 at p. 05477) The weighted average maturity of the portfolio did not increase until the start of 2009, when it spiked briefly to almost 10 years. Then the maturity structure drifted back down and stayed in the range of 6 to 8 years until the start of 2012, when it increased to 14 years. Thereafter it remained above 10 years. (See term structure chart for the A funds at Plaintiff's Demonstrative Exhibit labeled "Kevin Nunes Direct Examination – Page 8 of 9 "WS EX-14")

The only exhibits that discuss the Government's investment approach for the 326-A funds are the two management reviews discussed above with respect to the 326-K funds. The April 29, 2003 management review states that the "[i]nvestment approach" for all of the WSIG accounts is: "As the securites [sic] mature, reinvest the principal and interest not to exceed two year [sic]. The tribes at some point in the future may settle and distribute the funds." (JX-367 at p. 04974, ¶ 1) Yet this review goes on to note that "[t]he proposed use of Dockets 326-A-1 and 326-A-3 are principal restriction of the award, with income to be used for educational grants and other forms of educational assistance to tribal members and descendents [sic]." (*Id.* at ¶ 2) Thus, there is no evident connection between the two-year limit and the 326-A funds.

Robert Winter, who was involved in these management reviews, was asked why the investment of the 326-A funds was limited to two years given the proposed use of the funds, and the following colloquy ensued:

> A. -- I can't go long term based on a proposal.
> Q. You can't?
> A. No.
> Q. So instead you go two years based on a proposal?
> A. I go two years based on the uncertainty. I don't go two years based on a proposed use of these funds, because if the proposed use does not materialize, I've just -- and I've gone out 15, 20 years, I've really put that portfolio at risk.
> Q. Well, if you discussed the proposed legislation, you would know the proposed legislation confirmed that it was going to go into an education fund, wouldn't you?
> A. Yes, but I don't know if that legislation was going to happen.
> Q. I see. So in your view, that makes things so uncertain that you had to default to a two-year investment horizon for the 326-A funds. Is that correct?
> A. Yes.

(Winter: Tr. 518:14 – 519:7) Mr. Winter's contention that the future of the 326-A funds was so uncertain that the Government had to invest them in a very short-term manner strains credulity. It flies in the face of the rule that prudent investment is based on probabilities, not possibilities. Further, it smacks of the discredited proposition that the Government is obliged to preserve the trust corpus above all else. *See Jicarilla Apache III*, 112 Fed. Cl. at 293. Finally, it ignores the fact that – in the extremely unlikely event that Congress ignored the desires of WSIG and decided to distribute the 326-A funds – additional years would still be needed to effectuate the distribution, which would provide ample time to reposition the portfolio.

The October 25, 2005, management review states that the "Investment approach" for the 326-A funds is: "Funds are invested in short, intermediate and long securities." (JX-392 at p. 05485, ¶ 1) This vague, all-encompassing "approach" says nothing about what the investment plan actually is or about the desired maturity structure for the funds. In fact, at the time this document was created and for more than three years thereafter, the actual maturity structure of the

funds was a mere two years. No substantial part of those funds was being invested in intermediate- or long-term securities at all.

3. RHA's opinion

Only RHA offered an opinion on whether the Docket 326-A funds were prudently invested. The Government chose not to have Dr. Starks address this issue, although it obviously could have done so without compromising its position that plaintiff lacks standing to pursue a claim regarding the 326-A funds. And, because Dr. Goldstein's role was limited to rebutting Dr. Starks, he likewise did not address the 326-A funds.

RHA opined that, through 1998, the 326-A funds should have been invested in the same manner as the 326-K funds, in a diversified long-term portfolio (which included short- and intermediate-term securities) with an average maturity of around 15 years, and that the Government's actual investment approach during this period was imprudent because it was too short-term. (Nunes: Tr. 306:5-13) At the end of 1998, when it became apparent that the 326-A funds would never be distributed, the funds should have been shifted into an entirely long-term portfolio. (Nunes: Tr. 310:3-7; JX-312) "[W]e think that that's the prudent approach when you have funds whose principal can never be invaded." (Nunes: Tr. 307:1-3)

But, instead of lengthening the maturity structure of the 326-A funds once they were earmarked for an education trust fund, the Government allowed the maturity structure of the funds to become shorter – which is "further indication that there's really no plan here, that this is just sort of happening for whatever reason that we can't really identify." (Nunes: Tr. 306:14 – 307:11) And the actual maturity structure of the portfolio was even shorter and more imprudent when measured by the years to call. (Nunes: Tr. 311:16 – 312:6) Mr. Nunes testified that the Government's investment of the 326-A funds remained imprudent "[u]ntil maybe 2012-ish"

because "it still is much shorter than we think would be optimal and prudent." (Nunes: Tr. 312:7-13) In 2012 and 2013, "I guess the good news is the portfolio is now a long-term portfolio. We would opine -- have opined that it's still probably a little shorter than it should be, but you're splitting hairs now, and I don't think that's what we want to do here." (Nunes: Tr. 312:15-20)

4. Liability has been proven

The Government breached its fiduciary obligations to WSIG with respect to the investment of the Docket 326-A funds by, once again, "failing to take appropriate advantage of the higher yields available on longer-term instruments." *Jicarilla Apache III*, 112 Fed. Cl. at 290. Until the end of 1998, the investment of the 326-A funds was imprudent for the same reasons as the 326-K funds. Thereafter – once the 326-A funds were earmarked for an education fund – the imprudent nature of the Government's investment practices was even more blatant than with respect to the 326-K funds. Unlike the 326-K funds, there was no need to anticipate that the 326-A funds would ever eventually be distributed and to diversify the portfolio with some amount of short- or intermediate-term securities. Thus, there is no argument whatsoever for investing the 326-A funds in the short-term manner that the Government did.

Indeed, the evidence regarding the investment of the 326-A funds reinforces the conclusion that the Government invested the 326-K funds imprudently. This evidence shows that, from 1999 until 2012, the persons responsible for investing the 326-A funds were not conducting the requisite analysis of the investment horizon for those funds, or else were not paying attention to the available evidence. The same persons were investing the 326-K funds and were ignoring the investment horizon of those funds, as well.

III. THE EVIDENCE REGARDING DAMAGES

A. The Docket 326-K Trust Funds

1. RHA's investment model

To calculate damages, RHA used the same investment model it has previously used in other tribal breach of trust cases and which was accepted by Judge Allegra in the *Jicarilla* case. *See Jicarilla Apache III*, 112 Fed. Cl. at 307-10. RHA describes this model as follows:

> The IM [investment model] is a mathematical model that utilizes an appropriate investment portfolio proxy to calculate the investment returns that would have resulted if the Government had prudently invested and managed WSIG's trust funds. The IM applies historical benchmark earnings rates to the trust account balances that were available for investment (i.e., investable balances) at any point during the relevant period and computes the resulting investment returns and corresponding accretion of principal as these returns are periodically reinvested. The resulting total return calculated by the IM for the period at issue is then compared to the actual return that was obtained by the Government, the difference being damages resulting from the Government's breach of its investment responsibilities as of the end of the analysis period.

(JX-420 at p. 06044, ¶ 2)

a. Potential benchmarks

In selecting an investment benchmark for use in this case, RHA "looked at how would we emulate the achievable returns in the market in a passive, nonjudgmental way, using the most conservative securities we possibly could, but a portfolio whose theoretical term structure was more closely aligned with what the actual term structure of this money should have been." (Nunes: Tr. 290:3-9) To do so, RHA looked to indices that are fully compliant with the statutory limitations on the investment of Indian trust funds. (Nunes: Tr. 290:11-14) They examined various indices that were restricted to Treasury and federal agency bonds and concluded that only the Lehman (now Barclays) U.S. Treasury indices were fully compliant with the statutory restrictions. (Nunes: Tr. 290:18 – 291:5) Further, these U.S. Treasury indices would be an inherently conservative

benchmark of investment performance because the yield on Treasury bonds is typically less than the yield on agency bonds. (Nunes: Tr. 291:5-20)

The various Barclays Treasury indices are "an absolute passive measure of the market" that "involves no portfolio manager managing the money." (Nunes: Tr. 292:2-5) The indices 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.

The Barclays indices include all of the relevant Treasury bonds outstanding in the market at a given time:

- the Barclays U.S. Treasury (UST) index includes all Treasury bonds with maturities between 1-30 years.
- the Barclays Long-Term U.S. Treasury (LT) index includes all Treasury bonds with maturities between 10-30 years.

(Nunes: Tr. 293:11-16, 294:5-7) Accordingly, the composition of the benchmark as between various maturities at any time reflects market forces rather than any judgment by RHA. As Judge Allegra explained:

> Under [the U.S. Treasury] index, the allocation as between short-, medium-, and long-term bonds at any point reflects market forces (i.e., all relevant obligations outstanding) rather than any judgment by plaintiff's experts or others regarding what that mix should have been. Put another way, the Barclays UST is a passive, mechanical representation of market performance for a defined debt instrument market. In measuring performance, the Barclays index also includes, on a quarterly basis, the gains and losses on the bonds being tracked, thereby providing for the further accretion of principal.

Jicarilla Apache III, 112 Fed. Cl. at 307. Likewise, the allocation of the LT index over the range of maturities from 10-30 years reflects market forces in the same way.

b. Selecting the appropriate benchmarks

Mr. Nunes emphasized that RHA is not opining that the Government should have invested the WSIG funds in the same manner as the benchmark. "We're using the benchmark only as a means to represent achievable returns in the market." (Nunes: Tr. 291:25 – 292:2) "We're not dictating what the portfolio actually should have looked like." (Nunes: Tr. 292:22-23) He explained:

> The discipline is that [a prudent portfolio is] going to be properly aligned in its maturity structure, and it's going to be a diversified portfolio. And the benchmark gives us that measure of what that would look like in the market in real time, because this is real market performance over, you know, whatever it is, the 30-odd year time horizon.

(Nunes: Tr. 292:24 – 293:5)

In the *Jicarilla* case, RHA used the Barclays UST index as the benchmark for prudent investment performance. (Nunes: Tr. 293:11-13) There, the trust funds at issue always had some near-term liquidity constraints because the tribe could withdraw the funds at any time and, in fact, made withdrawals on a recurring basis. Thus a prudent portfolio for those funds would have kept a significant portion of the funds in short- and intermediate-term securities to mitigate any interest rate risk that might be created by a withdrawal of some funds. This made the Barclays UST the appropriate benchmark because it includes a substantial component of short- and intermediate-term securities. "It's a broadly diversified index of securities that go from one year to 30 years, so it really covers almost the entirety of the Treasury market. And on average, it has an average maturity -- that fluctuates, because it's based on investor sentiments in the market -- but on average, it's typically in, say, a range of maturity from -- anywhere from about 6 ½ years, maybe up to about eight-ish years." (Nunes: Tr. 293:14-21)

In contrast, the 326-K funds had no near-term liquidity constraints until distribution legislation was enacted and the enrollment process was completed. Once the Distribution Act became law in 2004, the liquidity constraint on the funds was tied to the completion of the enrollment process. Thus, for the time period before enactment of the Distribution Act, RHA believes that a significant portion of the funds should have been invested in a long-term fashion, which made the Barclays UST index inappropriate as a benchmark. Consequently, RHA created a long-term benchmark by utilizing a 50/50 mix of the Barclays UST index and the Barclays LT index to achieve a model portfolio that contains a majority of long-term bonds while still remaining diversified with significant components of short- and intermediate-term bonds.

> For the long-term portion, we knew that the Barclays UST did not properly align itself with the long-term nature of the funds at that point, and so we looked at a blend of the Barclays U.S. Treasury, as well as the Barclays Long-Term U.S. Treasury.
>
> … So by blending the two together, we were able to get a maturity structure that we felt was much more in line with what we felt prudence said that the 326-K funds should have been all along that timeline of long term.
>
> And what that translates into is a maturity structure that averages -- and it ranges a little bit, as you can see from the line -- but it's around, you know, 13 1/2 to 14 years, and it maybe goes as long as maybe 16 years.

(Nunes: Tr. 293:25 – 294:16) This benchmark had a weighted average maturity of around 15 years, but was still broadly diversified. About 55% of the portfolio consists of long-term bonds with maturities in excess of ten years (McLean: Tr. 837:4-18), 25% of the portfolio consists of short-term bonds with maturities of 1-5 years (Nunes: Tr. 296:5 – 297:1), and the remaining 20% consists of intermediate-term bonds.

RHA concluded that an intermediate-term maturity structure would have been prudent for the 326-K funds during the period between enactment of the Distribution Act in 2004 and January 2011, at which point the initial distribution of the funds became imminent. Mr. Nunes explained

that, during this six-and-a-half year period, "it's now a fait accompli that the money is going to be distributed, but according to, again, the information, primarily relying on Daisy West's estimate, which turns out to be fairly accurate, there was still a fairly lengthy window of time expected before funds would actually be distributed, and a broadly diversified intermediate-term index we believe is a prudent way to manage the funds during that window of time." (Nunes: Tr. 295:12-20) Accordingly, RHA used only the Barclays UST index as its investment benchmark for this period.

c. Applying the benchmarks

RHA built two transition periods into its investment model: a transition period of one-year in 1980-1981 for the funds to be shifted from cash into a diversified long-term portfolio and a period of six months in 2011 for the funds to be shifted from an intermediate-term portfolio back into cash. Mr. Nunes explained that "[b]uilding a portfolio is something that you do over time. You don't buy all your securities on one day. When you're coming out of a structure, to reposition into a different structure, you have a lot more flexibility, and so it can be done prudently at a little bit of a faster pace." (Nunes Tr. 275:3-8)

RHA, however, did not utilize a transition period in 2004 when the funds were shifted from a long-term portfolio to an intermediate-term portfolio because the Distribution Act had been enacted. Mr. Nunes could not recall why RHA did not include a transition period to effectuate this shift. (Nunes: Tr. 298:7) He added, "In hindsight, I wish we had, because I think it would be more consistent. The one thing I can say, though, is that if we had used a transition period, because portions of the portfolio would have stayed longer [term] longer, then it would have increased our damage calculations by some amount. I don't think it would have been overly significant." (Nunes: Tr. 298:7-13) (emphasis added) The damages would have increased because a transition

period would have left some of the funds (a portion that would have steadily diminished during the transition period) in higher yielding long-term securities. Thus, RHA's omission of a transition period actually diminishes the damages calculation by a small amount.

Utilizing their investment model with these different benchmarks for the different sub-periods, RHA calculated that WSIG's total damages resulting from imprudent investment of the 326-K funds over the entire period at issue to be $216,349,883.10. (Nunes: Tr. 300:12-24; JX-420 at p. 06052)

2. Mr. McLean's alternative benchmark portfolios

To counter the damages opinion offered by RHA, the Government presented the testimony of Justin McLean. There are numerous problems with his testimony. Mr. McLean was asked to assume liability, but his report makes the unusual disclaimer that:

> I have not been asked to assume that RHA's liability opinions are correct; I have been asked to assume that the Court finds one or more breaches of fiduciary obligations by the U.S. Because these breaches (if any) are unknown to me, and will be unknown to the parties until the Court renders its liability determinations, I present herein a range of damages based upon multiple potential liability findings.

(JX-422 at p. 06718, ¶ 6) Mr. McLean proffered a series of 12 alternative benchmark portfolios for the investment of the Docket 326-K funds that he asserted are more appropriate than the RHA investment model. (JX-422 at p. 06755; see also p. 06731) But none of these 12 portfolios provides a legitimate alternative to RHA's calculation of damages.

Three of Mr. McLean's alternative portfolios do not comply with the applicable law. Those three (#6, #7, and #8 in JX-422 at p. 06755) purport to "correct" the RHA model by removing the "windfall profits" (*i.e.* the capital gains) caused by the significant interest rate declines that occurred during the 1980s. (JX-422 at p. 06728) But calculating damages in this manner is contrary to the governing law, which provides that, "[i]n determining the amount of damages for

a breach of the trustee's fiduciary duty with regard to investments of the trust property, courts attempt to place the beneficiary in the position in which it would have been absent a breach." *Warm Springs*, 248 F.3d at 1371. Indeed, Mr. McLean grudgingly admitted that these portfolios are inconsistent with the rule in *Warm Springs*. (McLean: Tr. 906:16 - 907:14) Had the Government invested the 326-K funds in longer-term instruments, as RHA opines that it should have, then those investments would have benefited from the prolonged decrease in bond interest rates during the 1980s. WSIG is entitled to receive these capital gains as part of its damages in order to be placed in the same position as it would have been absent a breach.[17]

Mr. McLean's other nine alternative benchmark portfolios are not tied to the evidence of liability in this case and so are irrelevant. *See Kempner Mobile Elecs., Inc. v. Southwestern Bell Mobile Sys.*, 428 F.3d 706, 712-13 (7th Cir. 2005) (damages testimony that is not connected to a theory of liability in the case is irrelevant). Mr. McLean disavows that he is opining on liability – on whether the Government's investment practices were prudent – yet these portfolios are inconsistent with the only evidence of liability in this case, which was adduced by WSIG. RHA

[17] The impact of *Warm Springs* explains Mr. McLean's coy answer when the Government asked him how the Court should handle capital gains in assessing WSIG's damages:

> Q. Earlier we talked about your analysis of how much of the Rocky Hill damage number is attributable to better yields and how much is attributable to capital gains and losses. In your opinion, does that analysis provide the Court with a way of assessing damages in the event the Court concludes that BIA had in any way fell short of its responsibilities to the Western Shoshone fund?
> A. I'm not going to tell the Court how it should assess damages. I found that to be useful information in understanding the damages model put forward by the Plaintiffs. I think it is enlightening how much of the damages comes from the unforeseeable interest rate changes, but I find it useful information. How the Court uses it is up to them.

(McLean Tr. 881:1-15) (emphasis added) Mr. McLean was careful never to contradict *Warm Springs* in his testimony, but these three alternative portfolios do so.

and Dr. Goldstein opined that the Government's investments were imprudent and that the Docket 326-K funds should have been invested in a much longer-term portfolio for most of the period at issue. In contrast, Dr. Starks opined that all of the investments made by the Government were prudent; therefore, there is no liability. Accordingly, there is no basis in the evidence for Mr. McLean to present "a range of damages based upon multiple potential liability findings."

Five of these other alternative portfolios (#9-#13 at JX-422 at p. 06755, alternatively labeled as A-E) are supposedly "consistent with the investment horizons in the Starks Report." (JX-422 at p. 06729, ¶ 35) They are based on paragraphs 156 and 157 in Dr. Starks' report where she says that, with the benefit of hindsight, the 326-K funds might have been invested slightly longer-term between 1980-1992 and from 2007-2011. (JX-423 at p. 06985; McLean: Tr. 910:12 – 913:22) But Dr. Starks did not opine that the Government's actual investment of the funds was imprudent during these periods. Thus, these five portfolios do not tie to any liability theory in this case and so are irrelevant as potential measures of damages. If the Court accepts Dr. Starks' testimony, then there is no basis for any damages award based on these paragraphs from her report. The irrelevancy of these five portfolios is vividly illustrated by Plaintiff's Demonstrative Exhibits labeled "Justin McLean Cross Examination – Pages 5, 6, 7, 8 and 9 "WS EX-20, 21, 22, 23 and 24" respectively), which show that the weighted average maturity of each of these alternatives is essentially the same as, or barely above, the weighted average maturity of the funds as they were actually invested by the Government.

Conversely, if the Court accepts RHA's opinion that the 326-K funds should have been invested in a much longer-term portfolio, then Dr. Starks' views of the investment horizon for the funds – and Mr. McLean's portfolios based on those views – are irrelevant to calculating damages.

Mr. Nunes testified that none of these portfolios would have been a prudent method of investing the funds because they are too short-term. (Nunes: Tr. 1166:10 – 1169:19)

The remaining four alternative portfolios (#2-#5 at JX-422 at p. 06755) proffered by Mr. McLean are based on proposals for the investment of all tribal trust funds made to the BIA by third parties during the 1980s. (McLean: Tr. 931:7-14) None of these proposals was ever actually implemented by the Government. (McLean: Tr. 935:18 – 936:5) None of these proposals was specific to the Western Shoshone funds. (McLean: Tr. 931:15-19; Nunes: Tr. 412:23-25) None of them correspond to Rocky Hill's liability opinion. Mr. Nunes testified that none of them would have been a prudent method of investing the 326-K funds. (Nunes: Tr. 413:1-3; 1162:12-18; 1164:12-18; 1165:8-15; 1166:2-9)

The Government did not offer any evidence that these four alternative portfolios would have been a prudent way of investing the 326-K funds. Dr. Starks did not say so in her reports or during her testimony. Yet Mr. McLean claimed that he was relying on Dr. Starks' opinion to establish that these portfolios would have been prudent methods of investing the 326-K funds:

> I am relying on Dr. Starks' opinion that the investment horizon over those periods could have been extended. I don't think she would suggest that if she felt it were imprudent. Clearly, a question you could ask her directly, but when I spoke to her and looked at her report, it seemed appropriate in her mind for me to be using that language the way I was using it.

(McLean: Tr. 937:12-18) But it is difficult to understand how Dr. Starks could have validated these portfolios as prudent approaches to investing the 326-K funds since all four of them involve investing the funds in a much shorter-term maturity structure during the 1990's than the Government actually adopted. (*See* Plaintiff's Demonstrative Exhibits labeled "Justin McLean Cross Examination – Pages 1, 2, 3 and 4 "WS EX-16, 17, 18 and 19" respectively) Although Dr. Starks opined that "the Government would not have acted imprudently [in 1993] had it maintained

the WSIG funds in shorter-term investments," (JX-423 at p. 06982, ¶ 147), she testified that she was "not sure" how much shorter-term a maturity structure would have been prudent; "I didn't measure how much that shorter maturity would have been." (Starks: Tr. 763:6-12) Since Dr. Starks never determined how short a maturity structure would have been prudent during this period, certainly she could not have validated the prudence of these four alternative portfolios.[18]

The alternative damages portfolios proffered by Mr. McLean (that were created by him and Dr. Alexander) are similar to the alternative damages portfolios that the Government proffered in the *Jicarilla* case, where Dr. Alexander opined that "[v]arious short-term benchmarks serve as more appropriate benchmarks should the Court find that the [Jicarilla trust funds were] mismanaged by BIA." (*Jicarilla* case exhibit JX 416-036, included in the record of WSIG case at ECF 133 at p. 51) But using short-term benchmarks to measure damages in either case is completely inconsistent with the premise that the Government breached its fiduciary duty by investing the trust funds in too short-term a manner. In reality, the McLean/Alexander alternative damages portfolios – in both *Jicarilla* and this case – are not legitimate alternatives to RHA's measure of damages but, rather, are thinly disguised attacks on RHA's opinion that the Government's investment practices were imprudent – an issue that Mr. McLean and Dr. Alexander supposedly are not addressing. Judge Allegra rejected Dr. Alexander's alternative benchmarks in *Jicarilla* for precisely this reason:

> [T]hese arguments [that the short-term investment strategy employed by the BIA was prudent and particularly attuned to the Nation's liquidity needs] are no more persuasive the second time around, in this damages context, even if they now take on a somewhat different cast. As such, based upon the strength of its liability findings, the court cannot remotely accept Dr. Alexander's damages model ….

[18] In any event, as discussed above, Dr. Starks' views of a prudent maturity structure are irrelevant to calculating damages if the Court finds the Government is liable because it invested the 326-K funds in too short-term a manner.

Jicarilla Apache III, 112 Fed. Cl. at 308-09. The same conclusion obtains here – Mr. McLean's alternative damages portfolios are inconsistent with the evidence regarding liability and so must be rejected.

3. Alleged "hindsight bias" of the RHA model

Finally, Mr. McLean suggests that the RHA investment model is hindsight-driven so as to maximize the amount of damages. He performed four analyses of how the total amount of damages would have changed if RHA had altered its investment model in certain respects. (DX-2012) None of these analyses casts any doubt on the integrity of the RHA investment model. As Mr. Nunes explained, all of them are premised on investment approaches that would have been imprudent; they "gerrymander a result by adding an imprudent step into the management of the funds." (Nunes: Tr. 1155:22-24)

Mr. McLean's four analyses, and Mr. Nunes' responses to them, were as follows:

1. If the RHA investment model had immediately invested the 326-K funds in the long-term portfolio in December 1979, the damages would decrease by roughly $70 million. But such an immediate and sudden change would have been imprudent. "To suggest that you would immediately dump the 26.1 million in cash, in a sense overnight, into whatever portfolio -- long term, short term, intermediate term -- it's just not the way it's done. … It's an -- it would be the epitome of imprudent management." (Nunes: Tr. 1155:24 – 1156:9)
2. If the model had utilized the Barclays UST index as its benchmark for the period from 1980-2004, rather than the 50/50 mix of the UST index and the LT index, the damages would have decreased by $71 million. It is no surprise that using a shorter-term benchmark would reduce the damages. But such a shorter-term investment approach would have plainly been imprudent. Mr. Nunes explained that "[w]hat [Mr. McLean is] suggesting is that the proper

term structure that's embedded in this model for the post-transition through 2004 period is the U.S. Treasury Index, which is a proxy for a roughly seven-year average life portfolio, and that is right in the middle of intermediate, and I don't think there's any question in our eyes, certainly, that these are long-term monies. It's just so obvious." (Nunes: Tr. 1157:1-8) Thus, this approach "offer[s] a reduced damage calculation [by] using imprudent practices." (Nunes: Tr. 1157:9-10)

3. If the first two alternatives are combined, so that the funds are immediately invested in December 1979 and the Barclays UST index is used as the benchmark for the entire period at issue, the damages would have decreased by roughly $110 million. Mr. Nunes pithily observed that "[t]his one sort of doubles down on imprudence, because it not only starts out by putting the money all in all at once into the UST, it's also putting it into a portfolio that is not properly aligned [with the investment horizon]." (Nunes: Tr. 1157:22-25)
4. If the model had utilized the Barclays UST index as its benchmark for the period from 1980-2004 and then utilized the 50/50 mix of the UST index and the LT index from 2004-2011, the damages would have decreased by roughly $57 million. Mr. Nunes dismissed this approach as having "no basis in prudent management." (Nunes: Tr. 1159:10-11) "[N]ow he's saying, let's misalign the '81 to 2004 period with the shorter index, and now let's really misalign post-2004 where now we have a Distribution Act, and now, in this scenario, he wants to go out to 15 years. There's no basis for it. This is just playing with numbers." (Nunes: Tr. 1159:15-20)

Mr. McLean's four "analyses" do not in any way support the conclusion that the RHA investment model is hindsight-driven. Potential indicia of actual hindsight bias in an investment damages model might include things like: (1) assumptions that would have appeared improbable

or unreasonable at the time of the investment but later turned out to be profitable, or (2) repeated changes of the investment approach in ways that coincide favorably with changes in the market that were unforeseeable at the time. There are no such indicia in the RHA investment model, and none of Mr. McLean's analyses is predicated on such indicia.

Further, the Federal Circuit has explained that consideration of objective evidence "guard[s] as a check against hindsight bias." *In re Cyclobenzaprine Hydrochloride Extended-Release Capsule Patent Litig.*, 676 F.3d 1063, 1079 (Fed. Cir. 2012). Thus, if an expert's opinion is rooted logically in the contemporaneous evidence, then it is unlikely to reflect hindsight bias. In this case, the RHA model is tied firmly to the objective evidence that was available in real time regarding the investment horizon for the 326-K funds during the course of the period at issue. The model adopts a maturity structure that matches the investment horizon and adjusts that structure only when the investment horizon changes, such as when the distribution legislation was enacted. There are no unexplained or improbable assumptions or changes in course. There is only one abrupt change – in 2004 when the maturity structure shifts from long- to intermediate-term because of the enactment of the Distribution Act. Mr. Nunes testified candidly that using a transition period to effectuate this change would have been more appropriate but noted that the omission of a transition period had the effect of reducing the amount of damages, not increasing it.[19]

Additionally, Mr. Nunes explained the steps that RHA takes to avoid injecting hindsight bias into its investment model:

> The biggest factor we have to take out of it is using any kind of a representation of achievable market returns that involves human judgment. So we would never use a mutual fund's performance as a benchmark because there's professional management that's happening within that, and we want to make sure that we're

[19] As discussed above, a transition period would have increased the amount of damages because some of the funds (a portion that would have diminished during the transition period) would have remained invested in higher yielding long-term securities for a longer period.

> absolutely plain vanilla, we are absolutely conservative, fully compliant with the statutes, and passive to the nth degree.

(Nunes: Tr. 1148:12-20) Thus, the investment model uses passive indices that reflect the average investment performance of the market as a whole, either the entire U.S. bond market in the case of the Barclays UST or the long-term U.S. bond market in the case of the Barclays LT. Taking the human element out of the equation prevents the hindsight problem.

Mr. Nunes also specifically addressed the Government's argument that the RHA investment model involves "cherry picking" favorable developments in the market.

> From the standpoint of the Government's accusation that we're cherry-picking where we want to be when we want to be there, I would point simply to the fact -- as one example of why we're not, I would point simply to the fact that our investment model -- and I didn't count the periods -- has a ton of periods where we're using negative returns, because that's what the market was doing.
>
> Once we determined the proper term structure -- which, again, is all about the liability issue and what prudent management is -- once we determined that, the only changes we make to the model are when contemporaneous information says lengthen it, shorten it, whatever, and we've explained what we did at the various timelines in our model.
>
> When the market turns against us, we take our lumps. When the market's in [our] favor, it's just a mathematical exercise. … It would not be that hard to go back on that timeline and cherry-pick the best returns for which index at what time was looking better, and then craft a narrative around it, but that's not what we do.

(Nunes: Tr. 1149:8 – 1150:5)

In other words, RHA made a decision about what the maturity structure of the portfolio should be over the course of the period at issue, based on the evidence that was contemporaneously available. It then used the appropriate benchmarks in its investment model and ran the resulting calculations without regard to how they come out. "Once the maturity structure -- once we determine what we believe the prudent maturity structure should be, that's it. There's no custom tailoring based on market conditions whatsoever." (Nunes: Tr. 1151:7-10) Thus, in developing

its model, RHA did not run multiple potential investment benchmarks and compare the damages results that they provide. (Nunes: Tr. 1151:11-14) And, once RHA completed its investment model and computed a damages figure, it did not go back to try to tweak the model. (Nunes: Tr. 1151:15-19) The absence of these kinds of result-driven tactics supports the conclusion that the RHA model is sound.

In sum, all of the evidence refutes Mr. McLean's contention that the RHA investment model is hindsight-driven to maximize the amount of alleged damages. To the contrary, RHA created and utilized its investment model in a manner that is firmly tied to the objective, contemporaneous evidence and that rigorously excludes any reliance on hindsight.

4. RHA's damages calculation should be accepted

RHA's investment model "represent[s] a reasonable proxy for how the trust funds in question should have been invested" and "provides a reasonable and appropriate basis for calculating the damages owed here." *Jicarilla Apache III*, 112 Fed. Cl. at 310. The evidence supports these conclusions "even if the burden of proof on these issues were on [WSIG]." *Id.*

Significantly, however, the burden of proof is not on WSIG; it is on the Government. "[O]nce the beneficiary has shown a breach of the trustee's duty and a resulting loss, the risk of uncertainty as to the amount of the loss falls on the trustee." *Warm Springs*, 248 F.3d at 1371. The Federal Circuit has ruled that, (i) among several alternative investment strategies that are equally plausible, the court should presume that the funds would have been used in the most profitable way; (ii) the burden of proving that the funds would have earned less than this figure is on the Government, as the breaching fiduciary; and (iii) any doubt or ambiguity regarding the foregoing should be resolved against the Government. *Id.* Applying these rules in the *Jicarilla* case, Judge Allegra concluded:

> [T]he record amply shows that plaintiff's damages model reflects an investment strategy that was at least as plausible as the alternatives offered by defendant—indeed, a strategy much more plausible than those alternatives—requiring the court to presume that the funds would have been invested in this fashion. Defendant has not borne its burden of demonstrating otherwise.

Jicarilla Apache III, 112 Fed. Cl. at 310.

The evidence in this case leads to the same conclusion – the RHA investment model is far more plausible than any of the alternatives offered by the Government. Therefore, WSIG is entitled to the amount of damages calculated by the RHA model, which is $216,349,883.10. (JX-420, p. 06052)

B. The Docket 326-A Trust Funds

To calculate damages with respect to the Docket 326-A funds, RHA used two investment benchmarks. For the period from the inception of the two funds (in 1992 and 1995) through December 1998, RHA used the same benchmark as for the 326-K funds during that period – a 50/50 mix of the Barclays UST index and the LT index – because the investment horizon for the 326-A and 326-K funds were the same. (Nunes Tr. 313:17-21) By December 1998 the Government knew that the 326-A funds were earmarked for an education fund whose principal would never be invaded. Accordingly, RHA transitioned its benchmark for the 326-A funds over the first six months of 1999 from the 50/50 mix of the two indices to solely the LT index, reflecting the fact that these funds would never be disbursed. (Nunes: Tr. 314:3-10)

Using these benchmarks, the RHA investment model computed damages of $1,592,822.43 with respect to the 326-A funds. (Nunes: Tr. 314:25 – 315:10; JX-420 at p. 06052) The Government offered no response to RHA's damages calculation. Thus, WSIG is entitled to a damages award in the amount calculated by RHA.

IV. CONCLUSION

The evidence is overwhelming that the Government invested both the Docket 326-K funds

and the Docket 326-A funds in an imprudent manner that was far too short-term and thereby significantly reduced the investment return that was obtained. The Government paid little or no attention to the actual investment horizons for these funds and it disregarded relevant information that was available to it. Indeed, the Government did not even mount a defense with respect to its investment of the Docket 326-A funds.

RHA's investment model "represent[s] a reasonable proxy for how the trust funds in question should have been invested" and "provides a reasonable and appropriate basis for calculating the damages owed here." *Jicarilla Apache III*, 112 Fed. Cl. at 310. The Government has not offered a plausible alternative to that investment model. Three of its 12 alternative portfolios for the 326-K funds do not comply with the applicable law and the remaining nine do not correspond with the evidence of liability. The Government has not satisfied its burden of proving that the 326-K funds, if prudently invested, would have earned less than RHA has calculated. And the Government has not offered any rebuttal to RHA's calculation of damages with respect to the 326-A funds.

The Court should therefore enter judgment in WSIG's favor on its claims regarding investment of the Docket 326-K funds and Docket 326-A funds and should award damages in the total amount of $217,942,705.53.

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Respectfully submitted,

/s/ Kelli J. Keegan

KELLI J. KEEGAN
Johnson Barnhouse & Keegan 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
Johnson Barnhouse & Keegan 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 December 8, 2017, 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 WILSON
ANTHONY P. HOANG
PETER K. DYKEMA
TRENT CRABLE
United States Department of Justice
Environment and Natural Resources Division

MICHAEL BIANCO
JOSHUA EDELSTEIN
United States Department of the Interior
Office of the Solicitor

THOMAS KEARNS
REBECCA SALTIEL
United States Department of the Treasury
Bureau of the Fiscal Service
Office of the Chief Counsel

Attorneys for Defendant

/s/ Kelli J. Keegan
Kelli J. Keegan