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,	)	Filed Electronically February 2, 2018
Defendant.	)	

UNITED STATES' POST TRIAL BRIEF

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SUMMARY OF THE ARGUMENT

In December 1979, the United States Department of the Interior received into trust a $26,145,189.89 judgment awarded to the Western Shoshone Identifiable Group by the Indian Claims Commission.[1] ECF 131, Parties' Revised Joint Stipulations of Fact ("Stipulated Fact") 39. The judgment directed that the Fund be paid out in its entirety to the Fund's beneficiaries. As the trial record shows and Plaintiffs acknowledge, Interior did not know when the Fund would be distributed, Trial Transcript ("Tr.") 1189:11-24 (Nunes), and Congress had plenary power to direct a distribution at any time. Indian Tribal Judgment Funds Use and Distribution Act, Pub. L. No. 93-134, 87 Stat. 466 (October 19, 1973). Facing legislative uncertainty, and under statutory restrictions that constrained it to invest in fully-guaranteed government securities and bonds, Interior managed the Fund productively for 32 years, earning over $157 million in returns, and boosting the Fund's value by more than 500%. Stipulated Fact 70. During its life in trust, from 1979 to 2012, the Fund earned a 6.8% compound annual rate of return. Starks Demonstrative Exhibit 12; Tr. 648:6-19 (Starks).

Despite that track record of prudent and profitable investment, the Plaintiffs here — a group of Fund beneficiaries and affiliated tribes — allege a breach of fiduciary duty. Their argument is not that the United States acted in bad faith, or that it lost or misappropriated any portion of the $26.1 million. Rather, Plaintiffs contend that the $157 million in interest that the United States earned for the Fund was not enough, and that the United States breached its duties as a trustee by not making longer-term investments timed to the bond market in a way that hindsight now shows would have generated higher, private equity type returns.

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[1] The $26.1 million Western Shoshone Judgment Fund will be referred to as "the Fund" or the "326-K Fund."

Plaintiffs' legal arguments proceed from a mistaken view of the United States' statutory trust obligations, which are defined by the discretionary duties imposed by 25 U.S.C.A. § 162a, and are therefore subject only to abuse of discretion review. Even assuming that common law trust standards apply, Plaintiffs failed to prove their claims at trial. In an apparent departure from their pretrial filings, Plaintiffs now acknowledge that they hold the burden of proof as to their claims: "WSIG has the burden to prove that the Government committed a breach of trust and that a loss resulted." Plaintiffs' Post-Trial Brief (ECF 151) ("Pls.' Br.") at 9. *Compare with* Pls.' Statement of Disputed Issues of Fact and Law ("Pls.' Statement of Law") at 6 (ECF 132) (insisting on a government "burden to justify less than a maximum return"). But Plaintiffs failed to discharge this burden: Plaintiffs did not prove that the United States abused its discretion or that it made objectively unreasonable investments. Instead, Plaintiffs offered a critique based solely upon hindsight knowledge concerning (1) when Congress would act; (2) when the Fund would ultimately be disbursed; and (3) the precise nature and timing of a historic decline in interest rates from 1981 to 2012.

Plaintiffs' case-in-chief at trial consisted of testimony presented by a single witness — damages expert Kevin Nunes. Plaintiffs also provided rebuttal testimony from an expert in financial economics, Michael Goldstein. The testimony offered by these two experts was not credible, and did not establish a breach of trust. Plaintiffs' expert Mr. Nunes opined that the United States should have predicted in 1980 that the Fund would not be distributed for decades, and that (beginning in September 1981) the United States should have invested the Fund in a portfolio of bonds with a weighted average maturity of 15 years. JX 420 at WSIG-TRIAL 6050; Tr. 293:6-294:16 (Nunes). But Mr. Nunes has no special expertise or experience that would qualify him to predict the timing of Congressional action. Tr. 91:2-93:1 (Nunes). And the documents in the record showed that the investment time horizon for the Fund was fundamentally uncertain. Correspondence between Congress and Interior showed consistent efforts by powerful Senators and members of the Nevada Congressional delegation to develop legislation that would cause the distribution of the Fund in the near term, including bills introduced in 1989 and 1991, and renewed efforts at the end of the 1990s that led to the passage of the Western Shoshone Claims Distribution Act in July 2004. *See infra* Section I ¶¶ 24-34. The record does not reveal a single document — and Plaintiffs' experts were challenged to cite one — showing that anyone at the Department of the Interior knew or expected in 1980 (or 1981) that it would take 15 years or longer for Congress to pass distribution legislation, and over 30 years for a distribution to occur. Tr. 349:25-350:10 (Nunes). Moreover, Mr. Nunes's alternative investment model, which presents Plaintiffs' idea of what prudent investments would have looked like, suggests that Interior should have fully invested the Fund in a portfolio dominated by long-term bonds as of September 1981 — precisely the moment in time when interest rates reached their 60-year zenith. Tr. 1172:16-21 (Nunes). This testimony is plainly results-driven (suggesting $216 million in damages, in addition to the $157 million earned by Interior's prudent investments) and does not provide the court any realistic basis to conclude that the United States made objectively imprudent investment decisions given the information available at the time.

Dr. Goldstein's rebuttal opinions are even less probative and distort the factual record. At trial and in his expert report, Dr. Goldstein endorsed Mr. Nunes's testimony, and presented the Court with charts and data purporting to show that the United States should have adopted a long-term investment time horizon for the Fund. Specifically, Dr. Goldstein testified that, given its experience with the distribution of judgment funds awarded to other tribal groups, the United

States in 1980 should have expected that it would take an average of 9 to 17 years for the Fund to be paid out to its beneficiaries. JX 425 at WSIG-TRIAL 7108; Tr. 976:13-977:5 (Goldstein). On cross-examination, however, Dr. Goldstein admitted that his estimate of "9 to 17 years" was speculative, Tr. 1047:11-1048:21 ("my guess"); 1052:2-1053:25, and contradicted by evidence that established that several of the same judgment fund accounts featured in his testimony and chart were fully distributed just a few years after they were paid into trust. Tr. 1055:1-10 (Creek Nation 4.4 years — not 8 to 16 years); Tr. 1063-64; 1065:19-1066:1, 1069:16-1070:15 (Miami Indians 7.9 years — not 10 to 18 years); Tr. 1072:10-1076:17 (Iowa Tribes 3.1 years — not 7.6-15.6 years); Tr. 1077:19-1080:2 (Cheyenne Arapaho 2.8 years — not 7 to 15 years); Tr. 1080:4-1082:25 (Assiniboine Tribes 2.5 years — not 6.8 to 14.8 years).

In short, neither of Plaintiffs' trial witnesses provided the Court with any credible basis to find that the United States was "imprudent" by not investing the Fund in a portfolio heavily weighted towards long-term bonds. Rather, the trial showed that as a matter of investment judgment, Interior reasonably and capably made productive investments on behalf of the Fund, and that it complied with its statutory, regulatory, and policy requirements. And within these constraints, Interior discharged its duties skillfully and successfully, striking a balance between seeking high-yielding investments, and avoiding excessive interest rate risk in the event that Congress forced liquidation of the Fund.

Robert Winter, a senior official at the Office of the Special Trustee for American Indians with longstanding involvement in overseeing tribal trust investments, explained that since 1966, the Interior Department has followed a policy to hold bonds and securities to maturity, and to invest in a manner that seeks both to maximize returns and manage interest rate risk. Tr. 434:16-451:2; 462:2-467:17 (Winter). And the United States' expert Dr. Laura Starks explained that the

Fund's portfolio over the trust period met these policy standards and yielded productive results. Beginning in 1980, the United States invested the Fund in Jumbo CDs at banks nationwide, while retaining federal deposit insurance on every dollar of those millions in investments. Tr. 635:7-636:6 (Starks). The CD investments, typically held to maturity over a period of less than 1 year, performed comparably to 2-3 year bonds and sometimes earned yields higher than even longer-term bonds but without any of the interest rate risk associated with those longer-term investments. Tr. 637:22-638:24 (Starks); Starks Demonstrative Exhibit 11. In the early 1990s, when CD rates became less competitive with the yields on longer-term investments, the United States managed the Fund to buy longer-term agency securities, and held those securities to maturity, in accordance with Interior's policies. *See* Tr. 639:14-644:13 (Starks); Starks Demonstrative Exhibit 10; JX 259. As yield spreads decreased and interest rates fell in the late 1990s and early 2000s — a time that coincided with the consideration and passage of the Distribution Act — the United States invested the Fund in shorter-term agency securities and bonds, a strategy that lowered the risk profile of the Fund's portfolio as longer-term instruments offered less risk-adjusted value. Tr. 642:21-643:4 (Starks); JX 423 (Starks Report) at WSIG-TRIAL-06983 & Ex. 5. Robert Craff, the Regional Trust Administrator for the Western and Navajo Regions of the Office of the Special Trustee, testified that as Interior began developing the distribution regulations and beneficiary rolls, the Office of Special Trustee stayed in regular contact with Senator Reid's office and beneficiaries themselves, and managed the Fund for a distribution in the near term. Tr. 543:24-576:7 (Craff). Trial thus showed that at all times Interior managed the Fund strategically and proactively, responding to changes in the bond market and available information concerning the Fund's distribution — a record directly at odds with

Plaintiffs' effort to tie this case to the investment decisions held to constitute a breach of trust in *Jicarilla Apache Nation v. United States*, 112 Fed. Cl. 274 (2013).

Plaintiffs also failed to prove that the United States made objectively unreasonable investments in its management of the 326-A Funds. Plaintiffs contend that the United States should have known as early as 1998 that the 326-A funds were to be dedicated as educational trust funds with a long-term investment profile. Pls.' Br. at 50-51. But the legislation that established the purpose of the 326-A funds did not pass until 2004 — as part of the Distribution Act for the much larger 326-K Fund. *See* Pub. L. No. 108-270 § 4. Thus, the investment time horizon for the 326-A Funds was not certain to be long-term until that time. Thereafter, as Plaintiffs' acknowledge, the maturity structure of the portfolio of those funds increased significantly. Pls' Br. at 52. As with the larger 326-K Fund, the record shows that the United States managed the 326-A funds actively and appropriately. Moreover, as the United States has argued in prior briefing, Plaintiffs — none of whom are vested beneficiaries of the 326-A funds — lack standing to sue for any breach of trust in connection with those funds.

Even if the Court finds a breach of trust, it should reject Mr. Nunes's discredited damages model. As the trial record showed, Mr. Nunes carefully constructed this model to leverage hindsight knowledge of the bond market and the precise timing of the Fund's ultimate distribution. *See infra* Section V. Furthermore, as the United States demonstrated, Mr. Nunes's bond index approach would have been impossible to emulate as an actual investment strategy without the kind of frequent and risky trading that is barred by the Interior Department's policies. Tr. 451:3-454:16 (Winter). Reasonable alternative investment approaches were presented at trial, included those proposed to the United States in the 1980's by outside advisors such as Lehman Brothers, PriceWaterhouse, and Security Pacific Bank. Had the United States instead invested as those outside advisors recommended, the United States could have earned, at most, $9,748,650 more over the life of the Fund. Tr. 876:21-877:13 (McLean); McLean Demonstrative Exhibit 22.

I. FACTUAL RECORD OF THE UNITED STATES' TRUST MANAGEMENT

A. 326-K Fund

1. On August 15, 1977, the Indian Claims Commission entered a final award in *Western Shoshone Identifiable Group v. United States*, Docket Number 326-K, in the amount of $26,145,189.89, in favor of the WSIG. Stipulated Fact 9.

2. On February 21, 1979, the U.S. Court of Claims affirmed the Indian Claims Commission's damage award to the WSIG in the amount of $26,145,189.89. Stipulated Fact 11.

3. On December 19, 1979, the $26,145,189.89 was paid into trust and transferred from the Department of Treasury to the Department of Interior. The funds were deposited that day to trust account number 93342600 for the benefit of the WSIG. Stipulated Fact 13.

4. Under the Indian Tribal Judgment Funds Use and Distribution Act, the Secretary of the Interior had 180 days from the fund appropriation date to submit a use and distribution plan to Congress. Interior could request a 90-day extension of this deadline. If the Secretary did not submit a plan within the 180-day deadline and no 90-day extension was approved, then Congress had plenary power to develop and pass its own distribution legislation. Stipulated Fact 32.

5. At the time the $26,145,189.89 was paid into trust, the beneficiaries of the trust, and their affiliated tribal leaderships, held differing views on how and whether the

money should be distributed. JX 64 at WSIG-TRIAL 592-94 (June 14, 1980 Western Shoshone Planning Committee Meeting laying out various distribution proposals).

6. A large group of Fund beneficiaries were immediately in favor of a full per capita distribution. JX 360 at WSIG-TRIAL 4167 (Statement of Neal McCaleb, Asst. Secy. for Indian Affairs); JX 103 at WSIG-TRIAL 934; JX 116 at 961; JX 117 at WSIG-TRIAL 965-66.

7. But a vocal minority of tribal members opposed distribution. JX 360 at WSIG-TRIAL 4161 (Statement of Nancy Stewart); JX 103 at WSIG-TRIAL 934; JX 116 at WSIG-TRIAL 961; JX 117 at WSIG-TRIAL 965-66.

8. On June 20, 1980, the Acting Deputy Assistant Secretary of Indian Affairs made a formal request to the Senate Select Committee on Indian Affairs for a 90-day extension of the 180-day deadline to submit a distribution plan to Congress. Stipulated Fact 42.

9. On July 26, 1980, the Bureau of Indian Affairs held a public hearing in Elko, Nevada, on proposals for distribution for the Docket 326-K judgment award and "to hear and record testimony" on the Western Shoshone's "views on how the funds should be used or distributed." Stipulated Fact 43. At that hearing, a minority of Fund beneficiaries represented by the Sacred Land Association raised issues concerning the Western Shoshone's continuing claims to land, and the impact of the Fund distribution upon the continuing validity of those claims. JX 103 at WSIG-TRIAL 933-34.

10. Written testimony was overwhelmingly in favor of a per capita distribution. JX 116 at WSIG-TRIAL 961.

11. On August 4, 1980, the Chairman of the Select Committee on Indian Affairs, Senator John Melcher, sent a letter to the Acting Deputy Assistant Secretary of Indian Affairs, denying the Secretary's request for a 90-day extension of time to submit a distribution plan to Congress. Stipulated Fact 44.

12. In his letter, Senator Melcher recognized disagreement among a faction of the Western Shoshone Judgment Fund beneficiaries concerning the distribution of the Fund, and noted pending litigation in which certain beneficiaries were challenging the validity of the Judgment Fund award and its impact on their continuing claims to Western Shoshone aboriginal lands. JX 114 at WSIG-TRIAL 953 (discussing *United States v. Dann*). But Senator Melcher nevertheless encouraged the Department of the Interior to submit distribution legislation "early in the 97th Congress." *Id.* at WSIG-TRIAL 954.

13. At that time, the Interior Department believed that the *Dann* litigation was unlikely to change the legal conclusion that Western Shoshone aboriginal title had been extinguished. JX 120 at WSIG-TRIAL 970; JX 123 at WSIG-TRIAL 977. The Interior Department nevertheless signaled its intent to entertain Judgment Fund distribution proposals that included the restoration of some of the Western Shoshone's aboriginal land. JX 120 at WSIG-TRIAL 971; JX 123 at WSIG-TRIAL 978.

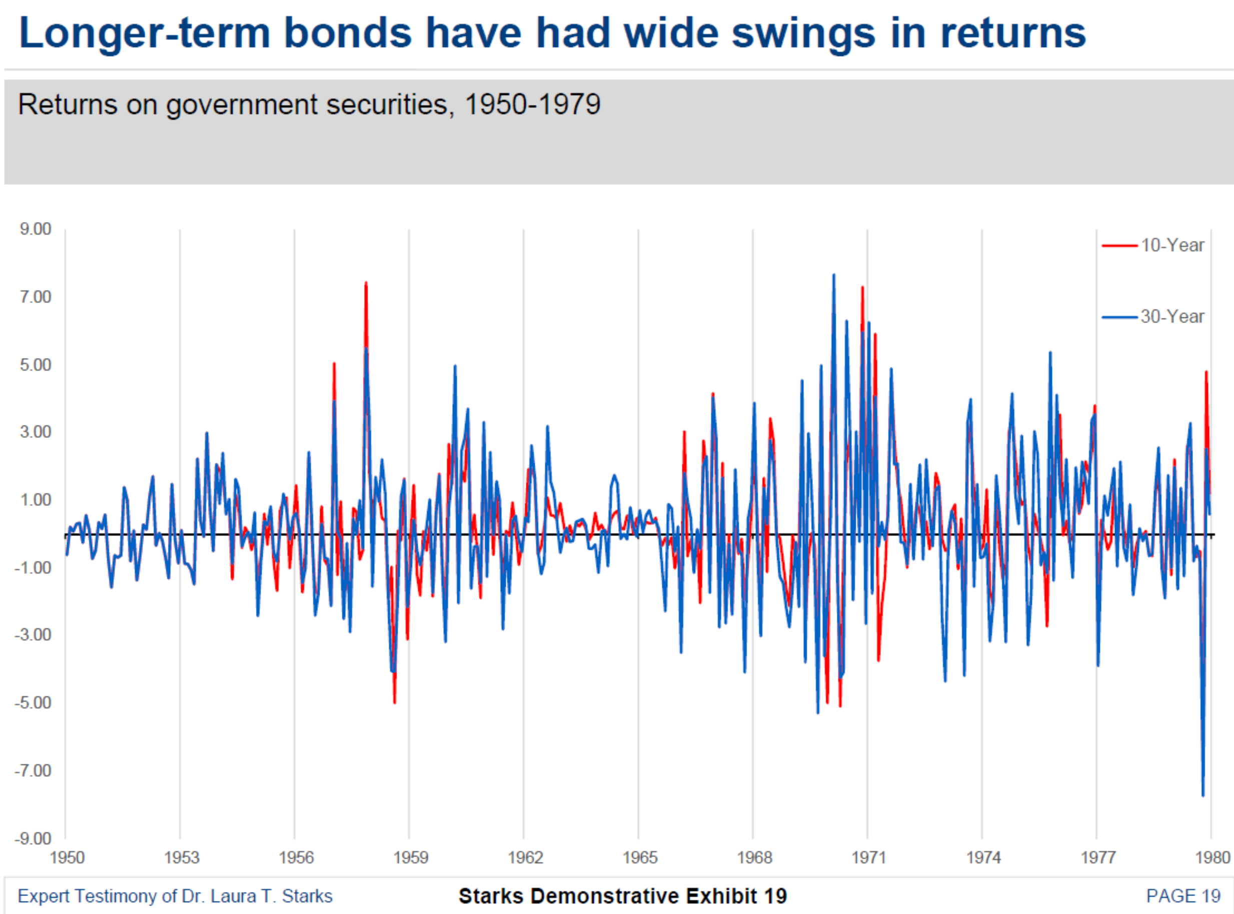
14. In a letter dated October 20, 1980, Interior Department Solicitor Clyde Martz stated his understanding that Interior planned to prepare special legislation to present in the 97th Congress. JX 120 at WSIG-TRIAL 971.

15. At this time, in late 1980, interest rates were extremely volatile and had been experiencing wild swings. Tr. 657:6-658:2 (Starks).

16. In the 30 years prior to 1980, "interest rates had been climbing." Tr. 693-694 (Starks); Starks Demonstrative Exhibit 27.

17. During the period 1950-1979, the experience of investors showed that "if you invested long-term and you needed money quickly, you could incur a loss of principal." Tr. 694:1-3 (Starks).

18. Between 1950 and 1979, returns on 10 year bonds and 30 year bonds swung wildly. Tr. 657:6-658:2 (Starks). An investor at this time who purchased a 10 or 30 year bond and sold that investment the next year could not predictably expect to liquidate their investment at a gain and would often experience a loss. *Id.*; Starks Demonstrative Exhibit 19.



19. Throughout the 1980s, the 326-K Fund was invested primarily in certificates of deposit (CDs) at banks throughout the United States. Tr. 635:1-19 (Starks).

20. As part of a larger CD program that Interior employed, the 326-K Fund was pooled together with other tribal funds under trust, and invested in Jumbo CDs, which pay higher interest rates than CDs of lower amounts. Unlike other holders of Jumbo CDs, Interior managed its CD pooling program in such a way as to retain full FDIC insurance for the tribal funds in the program. Tr. 635:7-636:6 (Starks); Tr. 367:7-368-6 (Nunes).

21. As a result, because the 326-K Fund was pooled with the funds of other tribes and capped at FDIC insurance levels in each Jumbo CD, the Fund was fully insured against

loss as required by 25 U.S.C. § 162a. Tr. 636:14-637:9 (Starks).

22. These investments were generally for periods under a year, but performed comparably to 2-year and 3-year Treasury securities, and in many cases these CDs provided yields higher than those offered by ten-year bond investments. Tr. 637:22-638:24 (Starks); Starks Demonstrative Exhibit 11.

23. The CD program therefore allowed Interior to avoid interest rate risk associated with longer-term investments, while achieving yields commensurate with those investments. Tr. 638:15-24 (Starks) (discussing CD program); Tr. 654:4-656:19 (Starks) (explaining interest rate risk); Starks Demonstrative Exhibits 11, 14-19.

24. During the 1980s, Congress and Interior, in consultation with tribal beneficiaries, continued to work to develop legislation that would cause the distribution of the 326-K Fund. Stipulated Facts 48-49; JX 210.

25. But the decade was marked by pervasive uncertainty concerning when the Fund would be distributed. Tr. 629:4-16 (Starks); Tr. 1034:2-3 (Goldstein) ("Congress gets to do whatever it wants").

26. On May 19, 1983, in the context of a trespass action brought by the United States against Mary and Carrie Dann, the Ninth Circuit ruled that aboriginal title to Western Shoshone lands where the Dann sisters grazed their cattle was not extinguished when the 326-K Fund was paid into trust. *United States v. Dann*, 706 F.2d 919, 925 (9th Cir. 1983).

27. Following this ruling, representatives of the faction of the 326-K Fund beneficiaries who wanted land rights to be included in any Fund distribution legislation

met with Interior Department representatives over a period of two years to negotiate a Western Shoshone land settlement. Stipulated Fact 49.

28. Those negotiations concluded, however, after the Supreme Court reversed the Ninth Circuit's ruling, holding that the Western Shoshone's aboriginal claims to lands that were subject to the ICC judgment had indeed been extinguished upon transfer of the $26,145,189.89 from the United States Treasury into trust with the Department of the Interior. *Dann v. United States*, 470 U.S. 39, 50 (1985).

29. In late 1986, the Nevada Congressional delegation sent a letter to the Secretary of the Interior expressing "concern[] that the Shoshone land rights question be resolved as quickly as possible," and urging the Interior Department "to consider resolution of the Shoshone controversy a priority." JX 210 at WSIG-TRIAL 1955-56.

30. By 1989, Nevada Representative Barbara Vucanovich introduced legislation in Congress to cause the per capita distribution of the 326-K Fund to its beneficiaries without any provision addressing land rights. JX 231 (H.R. 3384 (Vucanovich), Western Shoshone Claims Distribution Act, 101st Cong. (1st Sess. 1989)).

31. The 1989 legislation provided that distribution would occur within 390 days of the effective date of the Act: that "within **one hundred and twenty days** from the date of the Act, [t]he Secretary shall complete the Proposed Judgment Roll and shall publish the same in the Federal Register," that "[a]ny person claiming an interest as a Western Shoshone in said judgment funds, ... [w]ithin **sixty days** from the date of publication in the Federal Register, . . . may file an appeal with the Secretary contesting the inclusion or omission of the name of any person on or from such Proposed Judgment Roll," that "the

Secretary shall review such appeals and make a determination thereon within **ninety days** of the receipt of such appeals," that "[w]ithin **sixty days** after the disposition of all such appeals to the Secretary, the Final Judgment Roll . . . shall be published in the Federal Register and such roll shall be final upon publication," and that "within **sixty days** following the publication of the Final Judgment Roll, the judgment funds shall be distributed on a per capita basis to those on the Final Judgment Roll . . . ." JX 231 at WSIG-TRIAL 2116-17 (emphasis added).

32. The 1989 legislation did not succeed in Congress, but in 1991, Representative Vucanovich introduced similar distribution legislation. JX 246 (H.R. 3897 (Vucanovich), Western Shoshone Claims Distribution Act, 102d Cong. (1st Sess. 1991).

33. The 1991 legislation also provided for a per capita distribution of the Fund, but allocated a percentage of the distribution to tribes whose members were among the Fund's beneficiaries. JX 246 at WSIG-TRIAL 2401-02.

34. Like the 1989 legislation, the 1991 bill proposed that distribution of the Fund take place within a year and a half from passage of the Act providing that: "Not later than **one hundred and twenty days** after the date of the enactment of this Act, the Secretary shall complete and publish the proposed judgment roll in the Federal Register," that "[a]ny person claiming an interest as a Western Shoshone in the judgment funds . . . may, not later than **sixty days** after the later of the date of publication in the Federal Register . . . file an appeal with the Secretary contesting the inclusion or omission of the name of any person on or from the proposed judgment roll," that "[t]he Secretary shall review and make a determination regarding such appeals within **ninety days** after the receipt of such appeals,"

that "[n]ot later than **sixty days** after the disposition of all such appeals by the Secretary, the Secretary shall publish in the Federal Register the final judgment roll," and that "not later than **one hundred and fifty days** following the date of publication of the final judgment roll, the Secretary shall [begin] to distribute [the Fund] . . . on a per capita basis." JX 246 at WSIG-TRIAL 2401-02. (emphasis added).

35. In 1992, following the failure of the 1989 and 1991 distribution legislation, the Interior Department began to change its approach to the 326-K Fund investments, investing in agency securities and longer-term U.S. Treasuries. Tr. 639:14-21 (Starks); Starks Demonstrative Exhibit 10.

36. This change in investment strategy was accompanied by changes in the economics of fixed term investing during the early 1990s, Tr. 642:14-643:4 (Starks), and developments in banking that affected the CD program. *Id*. at 643:9-23; JX 259 at WSIG-TRIAL 2768, 2771.

37. In 1992, the yield spread — the difference between the yields on a longer-term bond and a shorter term bond — widened, meaning that investors in longer-term securities began receiving comparatively greater reward for taking on higher risk. Tr. 642:21-643:3 (Starks); JX 423 (Starks Report) at WSIG-TRIAL 6981 & Ex. 5.

38. At the same time, the savings and loan crisis was causing banking institutions to fail, and, although tribal CD investments were FDIC-guaranteed, the time and logistics involved in managing CDs, and potentially recovering those investments through deposit insurance, made Interior's CD program less attractive. Tr. 643:9-23 (Starks).

39. At this time, Interior shifted the balance of the 326-K Fund's investment

portfolio away from short-term CDs and took advantage of relatively attractive rates being offered in medium and longer-term investments. Tr. 639:14-641:5 (Starks); JX 423 (Starks Report) at WSIG-TRIAL 6982.

40. "In doing so, the Government continued to invest independently, and pursued a diversified investment approach for the WSIG funds consisting of short-, medium and long-term investments." JX 423 (Starks Report) at WSIG-TRIAL 6982.

41. The weighted-average-years-to-maturity of the investment portfolio for the 326-K Fund reached a peak of 11 years in September 1993. *Id*.; Tr. 640:18-641:5 (Starks). But some of the securities in the portfolio were mortgage-backed securities with prepayment features that caused them to pay down faster than the stated maturity date on the securities, Tr. 632:14-633:5 (Starks), and other securities had "call" features that allowed the issuer of the securities to cause the security to pay off on a certain date prior to the stated date of maturity. Tr. 632:10-12 (Starks). Looking at the portfolio in terms of years to call, and excluding mortgage-backed securities, the *expected* years-to-maturity of the 326-K portfolio reached a peak of 7 years in 1993. Tr. 640:9-17 (Starks); Starks Demonstrative Exhibit 10.

42. The weighted-average-years-to maturity and expected years-to-maturity (years to call without mortgage-backed securities) of the 326-K portfolio is depicted in Starks Demonstrative Exhibit 10:

Maturity of WSJF portfolio varies over time

Sources: Expert Report of Rocky Hill Advisors, Inc., January 21, 2015; Expert Report of Laura T. Starks, Ph.D., April 22, 2015.

Expert Testimony of Dr. Laura T. Starks **Starks Demonstrative Exhibit 10** PAGE 10

43. Pursuant to its investment policies, absent specific exceptions, Interior holds to maturity the bonds and securities it purchases under § 162a. Tr. 448:1-5 (Winter); JX 280 at WSIG-TRIAL 3029-3030; Tr. 467:6-17 (Winter) (comparing 1966 BIA policy (JX 5) to current policy of the Office of the Special Trustee (JX 280)). In concert with that policy, the weighted-average-years to maturity of the 326-K Fund portfolio shortened over the course of the 1990s as the longer-term securities that Interior purchased in the early 1990s matured. Starks Demonstrative Exhibit 10.

44. In October 1992, around the time that Interior began changing its investment strategy to reflect a portfolio of longer-term agency securities, bonds, and mortgage-backed securities, Fred Kellerup, who managed the tribal trust investment function at Interior, advised:

> Stay away from the long bond. There's no need for tribes to invest beyond 15 years. You're too far out if interest rates turn around. Shorten up on the maturity. Even if you have cash flow needs, go for the three-to-seven year government securities. Avoid the one-year CDs.

JX 259 at WSIG-TRIAL 2771.

45. Beginning in 1992 and during the early- to mid-1990s, the Docket 326-K Funds reflected Mr. Kellerup's advice. Tr. 642:3-645:9 (Starks); JX 259 at WSIG-TRIAL 2771; Starks Demonstrative Exhibit 10.

46. In the late 1990s, yield spreads began tightening again, meaning that yields on short-term bonds began to compare favorably with the yields on longer-term bonds. JX 423 (Starks Report), Ex. 5; Tr. 646:1-11 (Starks).

47. At this time, the weighted average years to maturity of the 326-K portfolio began to decrease, as Interior invested the 326-K Fund in shorter term agency securities. JX 423 (Starks Report) at WSIG-TRIAL 6983 & Ex. 5.

48. During this same time, between 1997 and 2001, though disagreement persisted, and the Dann sisters and others continued to press their land claims, certain Western Shoshone-affiliated tribal governments voted to distribute the 326-K Fund on a per capita basis, and without regard to land claims. JX 360 at WSIG-TRIAL 4153-4154 (noting votes of support for distribution by the tribal councils for the Te-Moak, Duckwater

Shoshone, and Ely Tribal Councils), WSIG-TRIAL 4156-57 (noting Dann sisters action before the Inter-American Commission on Human Rights); JX 363 (*Mary Dann and Carrie Dann v. United States,* Inter-American Commission on Human Rights, REPORT Nº 75/02, CASE 11.140).

49. Congressmen and Senators from Nevada introduced distribution legislation in 2000, 2001, 2002 and 2003. JX 346; JX 350; JX 352; JX 362: JX 364; JX 365: JX 373.

50. On June 27, 2000, Senator Reid of Nevada (106th Cong., 2nd Sess.) introduced S. 2795, Western Shoshone Claims Distribution Act. JX 346; Stipulated Fact 52.

51. On September 6, 2001, Congressman Gibbons of Nevada (107th Cong., 1st Sess.) introduced H.R. 2851, Western Shoshone Claims Distribution Act. JX 352; Stipulated Fact 53.

52. On November 14, 2002, Senator Reid of Nevada (107th Cong., 2nd Sess.) introduced S. 958, Western Shoshone Claims Distribution Act. The bill was reported out of Committee, passed by the Senate, and referred to the House Committee on Resources, where it died. JX 362; Stipulated Fact 54.

53. On February 25, 2003, Congressman Gibbons of Nevada (108th Cong., 1st Sess.) introduced H.R. 884, Western Shoshone Claims Distribution Act. JX 364; Stipulated Fact 55.

54. On March 13, 2003, Senators Reid and Ensign of Nevada (108th Cong., 1st Sess.) introduced S. 618, Western Shoshone Claims Distribution Act. JX 365; Stipulated Fact 56.

55. Bills H.R. 884 and S. 618 were passed by Congress and subsequently signed by President George W. Bush on July 7, 2004, and became P.L. 108-270, 118 Stat. 805, the Western Shoshone Claims Distribution Act. JX 373; Stipulated Fact 57.

56. The Western Shoshone Claims Distribution Act required that the Secretary 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. Stipulated Fact 58.

57. The Act provided that the Docket 326-K funds would be distributed on a per capita basis to the individuals listed on the Western Shoshone Judgment Roll. Stipulated Fact 59.

58. On May 19, 2005, the Bureau of Indian Affairs published a proposed rule setting forth an enrollment process to allow individuals to apply for a share of the funds. Stipulated Fact 61.

59. On March 5, 2007, the BIA promulgated regulations to implement the Western Shoshone Claims Distribution Act. The regulations, which became effective on April 4, 2007, were codified at 25 C.F.R. § 61.4(k) and governed the establishment of the Western Shoshone Judgment Roll. Stipulated Fact 62.

60. To be eligible for inclusion in the Western Shoshone Judgment Roll, a person was required to: (a) have at least ¼ degree of Western Shoshone blood; (b) be living on July 7, 2004; (c) be a citizen of the United States; and (d) not be certified by the Secretary to be eligible to receive a per capita payment from any other judgment fund based on an aboriginal land claim awarded by the Indian Claims Commission, the United States Claims

Court, or the United States Court of Federal Claims, that was appropriated on or before July 7, 2004. Stipulated Fact 63.

61. The regulations provided that: "Indian census rolls prepared by the Agents or Superintendents at Carson or Western Shoshone Agencies between the years of 1885 and 1940, and other documents acceptable to the Secretary will be used in establishing proof of eligibility of an individual to . . . [b]e listed on the judgment roll." Stipulated Fact 64.

62. Individuals who were denied eligibility had the right to appeal such decisions to the Assistant Secretary of the Interior for Indian Affairs under the administrative appeal process set forth in 25 C.F.R. § 62. Stipulated Fact 65.

63. On April 5, 2007, the Bureau of Indian Affairs began sending out application forms to Western Shoshone individuals. Stipulated Fact 66.

64. In late 2006, Robert Craff was made the Regional Trust Administrator for the Western and Navajo Regions of the Office of Special Trustee, and from that time until the final distribution in September 2012 he performed the duties of the Regional Trust Administrator overseeing the Western Shoshone Judgment Funds. Tr. 541:2–542:22 (Craff).

65. From 2006 until the final distribution in 2012, Mr. Craff or the Fiduciary Trust Officer under his supervision regularly met with beneficiaries of the Judgment Fund where they both provided the beneficiaries with information about the fund, its investments, and the planned distribution, as well as received information from the beneficiaries. Tr. 560:1-574:12 (Craff).

66. Craff testified that, during his time as Regional Trust Administrator overseeing the distribution of the judgment funds, many of the beneficiaries were interested in the

distribution occurring as soon as possible. Tr. 567:8-17; 574:19-575:1; 577:5-10 (Craff).

67. From 2006 until the final distribution in 2012, Mr. Craff regularly communicated with the Bureau of Indian Affairs to determine when the Judgment Funds might be distributed. Tr. 544:20-553:14; 578:1-13 (Craff).

68. From 2006 until the final distribution in 2012, Mr. Craff regularly communicated the information he received from the Bureau of Indian Affairs to the investment officers within the Office of the Special Trustee to provide the "time horizon" for the investment of the judgment funds, that is, the amount of time until the funds would be needed for distribution. Tr. 555:3-559:24 (Craff).

69. Senator Harry Reid's office followed the efforts to distribute the funds as soon as possible and communicated that interest to the Office of Special Trustee. Tr. 567:2-17; 574:15-576:7 (Craff).

70. During 2008 and 2009, Mr. Craff believed that the final distribution would likely occur before 2012. When asked why, he testified that:

> [A]ll along in this process . . . we talked very closely with the Bureau of Indian Affairs, and we would get, you know, their best guess, if you will, as far as when the distribution would occur. And . . . many times they would provide us with a date, things would happen, and it would get shifted . . . out a little bit farther. So [I was] reasonably confident that it would get distributed sooner rather than later, but not a precise time as far as when it would be distributed.

Tr. 578:4-13 (Craff).

71. On May 20, 2010, a notice was published in the Federal Register establishing the Bureau of Indian Affair's cut-off date for receiving applications. The Notice provided that applications "must be received by close of business . . . August 2, 2010." Stipulated Fact 67.

72. In its November 30, 2010 update, the Bureau of Indian Affairs noted that "[a] group of individuals were not given notice of the deadline date [to submit applications] 'by mail' and as a result an official notice was sent by mail on November 20, 2010. These individuals have until December 31, 2010 to submit their completed application(s)." Stipulated Fact 68.

73. As of January 2011, before distribution commenced, the Western Shoshone Judgment Fund balance totaled approximately $183.794 million. Stipulated Fact 70.

74. The $183.794 million represented an increase in the value of the 326-K Fund by over 500% from the time it was placed into trust in 1979 in the principal amount of $26,145,189.89. Stipulated Facts 11, 70; Tr. 647:25-648:19 (Starks); Starks Demonstrative Exhibit 12.

75. The Department of the Interior achieved an annual average compound rate of return of 6.8% through its investment of the 326-K Fund. Stipulated Facts 11, 70; Tr. 647:25-648:19 (Starks); Starks Demonstrative Exhibit 12.

76. The Bureau of Indian Affairs reported that the first partial distributions from the Western Shoshone Judgment Fund were made in 2011 to 3,187 persons who had been determined to be eligible for inclusion in the Western Shoshone Judgment Roll. The partial payment to each of these eligible persons was $22,013. Stipulated Fact 69.

77. On September 28, 2012, the Bureau of Indian Affairs completed the final roll of those eligible to receive Western Shoshone Judgment Funds. The Western Shoshone Judgment Roll contained the names of 5,361 eligible persons. After resolution of certain appeals in the following months, 54 additional persons were later determined to be eligible and were added to the roll, bringing the final total to 5,415. Stipulated Fact 71.

78. The Bureau of Indian Affairs reported that from 2007 to 2012 more than 9,600 applications were received, 902 appeals were processed, and 5,415 persons were determined to be eligible. Stipulated Fact 72.

79. The Bureau of Indian Affairs reported that it began making final distributions of the Docket 326-K funds to those listed on the Western Shoshone Judgment Roll starting in late September of 2012. It also reported that those eligible recipients who had previously received a partial distribution (in the amount of $22,013) received a final partial payment in the amount of $13,124.93 (for a total of $35,137.93). The Bureau reported that those eligible recipients who had not previously received a partial payment received a full, final payment of $35,137.93. Stipulated Fact 73.

B. 326-A Funds

1. On December 3, 1991, the U.S. Claims Court entered a judgment in *Western Shoshone Identifiable Group v. United States*, Docket Number 326-A-1, in the amount of $823,752.64 in favor of the WSIG and against the United States. Stipulated Fact 14.

2. On December 9, 1991, the Clerk of the U.S. Claims Court certified the Court's award to the General Accounting Office. "Pursuant to 31 U.S.C. § 724a (1976 ed., Supp. V), this certification automatically appropriated the amount of the award." Stipulated Fact 15.

3. On March 25, 1992, the General Accounting Office issued a voucher demonstrating payment in the amount of $823,752.64 from the Department of Treasury to the Department of Interior. Stipulated Fact 16. On March 25, 1992, the principal funds of $815,209.67 were deposited into trust account 90872600, and the interest funds of $8,542.97 were deposited into trust account 95872600. Stipulated Fact 16.

4. On June 16, 1995, the U.S. Court of Federal Claims entered a judgment in *Western Shoshone Identifiable Group v. United States*, Docket Number 326-A-3, in the amount of $29,396.60, in favor of the WSIG and against the United States. Stipulated Fact 17.

5. On June 20, 1995, the Clerk of the U.S. Court of Federal Claims certified the Court's award to the General Accounting Office. "Pursuant to 31 U.S.C. § 724a (1976 ed., Supp. V), this certification automatically appropriated the amount of the award." Stipulated Fact 18.

6. On September 15, 1995, the principal funds of $29,396.60 were deposited into trust account JA1009693.24. Stipulated Fact 19.

7. Prior to passage of the Western Shoshone Claims Distribution Act on July 7, 2004, there was no mandate from Congress for the use or purpose of the 326-A Funds. Tr. 480:18-481:5 (Winter); JX 367 at 4974.

8. The 2004 Act provided that the Docket 326-A-1 and A-3 funds would be held in a trust known as the Western Shoshone Education Trust Fund and be distributed to individuals listed on the Western Shoshone Judgment Roll, and their descendants, if they were chosen for an education award by a committee composed of tribal representatives. Stipulated Fact 60.

9. During the trust period preceding the passage of the 2004 Act, the 326-A Funds were managed in accordance with the uncertainty surrounding those Funds' ultimate purpose and investment time horizon. JX 367 at WSIG-TRIAL 4974; Tr. 518:18-22 (Winter).

10. Following passage of the 2004 Act, the 326-A Funds were managed in view of their Congressionally-mandated purpose as an educational trust with a long-term investment time horizon. Pls.' Br. at 52 (conceding that the "nominal maturity structure" of the 326-A Funds "increased

significantly" in 2005, reached 9 years in 2009, and ranged between 6 and 8 years until 2012 when it increased to 14 years).

II. LEGAL ANALYSIS APPLICABLE TO PLAINTIFFS' STATUTORY BREACH OF TRUST CLAIMS

A. Plaintiffs Bear the Burden to Prove Their Statutory Breach of Trust Claims

The parties agree that Plaintiffs bear the burden of proving that the United States committed a breach of trust in its management of the Western Shoshone Judgment Fund. Pls.' Br. (ECF 151) at 9. The parties also agree that the United States' trust obligations, relevant here, are statutory in nature, and are established by 25 U.S.C. § 162a. Stipulated Fact 24. Plaintiffs contend, however, that the Court should look to the common law "'to determine the scope of liability that Congress has imposed,'" Pls.' Br. at 3 (citing *Jicarilla Apache Nation v. United States*, 100 Fed. Cl. 726, 735 (2011)), and invites the Court to impose fiduciary duties on the United States that are not prescribed by statute, and are at odds with the plain language of § 162a. Pls.' Br. at 3-6.

As set forth further below, Supreme Court precedent clearly requires that this Court look to statutory language to interpret the scope and nature of Congress' fiduciary duties under the tribal trust laws. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 173 (2011) ("the applicable statutes and regulations 'establish [the] fiduciary relationship and define the contours of the United States' fiduciary responsibilities.'"). Because the statutory language here grants the Interior Department discretion and policymaking power over tribal investments, and instructs Interior to protect and insure investments against loss, that language controls the "contours of the United States' fiduciary responsibilities" and should guide the Court's analysis here. An abuse of discretion standard applies, and the Court should defer to the United States' reasonable policies and practices adopted in furtherance of its statutory mandate to make safe, risk-conscious investments in fully insured bonds, securities and bank deposits.

In the alternative, to the extent the Court looks beyond the governing statute, and adopts the common law standard for breach of trust, Plaintiffs still must prove that the United States' investments were objectively unreasonable and imprudent given the statutory and policy constraints on permissible investments, and based on the information available to the United States at the time of investment. *See* Restatement 2d of Trusts, § 181; *Jicarilla Apache Nation v. United States*, 112 Fed. Cl. 274, 290 (2013).

As Plaintiffs now apparently concede, the United States has no duty to affirmatively "disprove" a breach or to "justify less than a maximum return." *See* Pls.' Br. (ECF 151) at 9 ("WSIG has the burden to prove that the Government committed a breach of trust and that a loss resulted."). Burden shifting is appropriate only where Plaintiffs allege and supply proof of bad faith or self-dealing — issues that are not presented in this case. In that respect, this case has nothing in common factually with the *Cheyenne-Arapaho* case that fuels most of Plaintiffs' legal arguments.

1. The United States Is a Statutory Trustee With Discretion to Invest Tribal Trust Funds In a Specified Class of Risk-Free Investments

The Supreme Court has spoken clearly on the subject of the United States' trust obligations to Indian tribes and individuals. As a matter of first principle, the United States is "not a private trustee." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 173 (2011). Though the statute applicable here, 25 U.S.C. § 162a, "denominate[s] the relationship between the Government and the Indians a 'trust,' . . . that trust is defined and governed by statutes rather than the common law." *Id. See also United States v. Navajo Nation*, 537 U.S. 488, 506 (2003).

And the Court must train its analysis on the "specific rights-creating or duty-imposing statutory . . . prescriptions" of 25 U.S.C. § 162a. *Id*. "Any common-law duties applicable to a private trustee when the trustee actually controls trust property are not relevant, unless they are clearly accepted by statute or regulation." *Hopi Tribe v. United States*, 782 F.3d 662, 670 (Fed. Cir. 2015).

The parties agree that 25 U.S.C. § 162a is the statutory framework that applied at all times to the Interior Department's investment of the Western Shoshone Judgment Fund (Dockets 326-K and 326-A). *See* Stipulated Fact 24. Under Section 162a, "[t]he Secretary of the Interior . . . is authorized *in his discretion*, and *under such rules and regulations as he may prescribe*, to withdraw from the United States Treasury and to deposit in banks to be selected by him the common or community funds of any Indian tribe which are, or may hereafter be, held in trust by the United States." (emphasis added). The statute further provides that "the Secretary of the Interior *if he deems it advisable* and for the best interest of the Indians, *may* invest the trust funds of any tribe or individual Indian in any public-debt obligations of the United States and in any bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States." (emphasis added). The language of § 162a thus makes clear that the Interior Department's duty to invest tribal trust funds is *discretionary*, subject to Interior's own regulations and rulemaking, and subject to the fundamental requirement that the investments that Interior may make in its discretion be virtually risk-free because "unconditionally guaranteed as to both interest and principal by the United States."

Given the plain language of § 162a, and the Supreme Court's admonition to focus on its specific "duty-imposing" prescriptions, the Interior Department's investment of the Western Shoshone Judgment Funds is subject to review for abuse of discretion. As a pure matter of statutory interpretation, when Congress expressly grants an agency discretion over a power prescribed by statute, that agency's exercise of its discretion is reviewed for abuse of discretion. *See Duke v. Department of the Air Force*, 230 Ct. Cl. 977, 979 (1982); *Mitchell v. United States*, 664 F.2d 265, 274 (Ct. Cl. 1981); *see also Armstrong v. LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 733 (7th Cir. 2006) (Posner, J.). Trust law follows the same rule: "When a trustee has discretion with respect to the exercise of a power, its exercise is subject to supervision by a court only to prevent abuse of discretion." Restatement (Third) of Trusts, § 87 (2007); *Armstrong*, 446 F.3d at 733 (the standard of judicial review applied to fiduciaries in the exercise of discretionary judgments is abuse of discretion) (Posner, J.). Accordingly, the question that the Court needs to resolve as concerns the Plaintiffs' claims is whether they have proven that the Interior Department abused its discretion in its choice of investments for the Western Shoshone Judgment Funds.

2. Common Law Standards Do Not Define the United States Statutory Trust Duties

In their pre-trial Statement of Law, Plaintiffs dismiss the Supreme Court's rulings in *Navajo Nation*, *Jicarilla*, and *Hopi*,[2] deny that those cases require this Court to construe the United States' fiduciary trust obligations in accordance with the language of § 162a, and dispute that abuse of discretion review applies. Pls.' Statement of Law (ECF 132) at 8-10. They point primarily to Judge Allegra's 2013 ruling in *Jicarilla*, and to Judge Allegra's citation to rhetoric from older Court of Claims and Federal Circuit cases to the effect that the United States should be held to "exacting standards" in its conduct of tribal trust responsibilities. *Id*. (citing *Jicarilla*

[2] Plaintiffs do not cite these cases in their Post-Trial Brief, and ignore the Supreme Court's guidance on this subject altogether.

Apache Nation v. United States, 112 Fed. Cl. 274, 287-88 (2013) (citing *Shoshone Indian Tribe of the Wind River Reservation, Wyo. v. United States*, 364 F.3d 1339, 1348 (Fed. Cir. 2004) and *Yankton Sioux Tribe v. United States*, 623 F.2d 159, 163 (Ct.Cl.1980)). In their Post-Trial brief, Plaintiffs double-down on Judge Allegra's *Jicarilla* ruling, and on the generalized assertion that the United States should be held to common law standards in exercising its statutory trust duties. Pls.' Br. at 2.

The United States respectfully disagrees with Judge Allegra's ruling in *Jicarilla*, which is not controlling here. In *Jicarilla*, Judge Allegra construed the United States' trust obligations under § 162a to include common law fiduciary duties. *Jicarilla*, 112 Fed. Cl. at 287-88. His analysis focused on language in the Supreme Court's prior opinion in that case which states that "we have looked to common-law principles to inform our interpretation of statutes and to determine the scope of liability that Congress has imposed." *Jicarilla*, 112 Fed. Cl. at 287-88 (quoting *Jicarilla Apache*, 564 U.S. at 177). But Judge Allegra, and Plaintiffs here, ignore the very next sentence in the Supreme Court's *Jicarilla* opinion, which states that "the applicable statutes and regulations 'establish [the] fiduciary relationship and *define the contours of the United States' fiduciary responsibilities*.'" *Jicarilla Apache,* 564 U.S. at 177 (emphasis added). "The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *Id*. This direction from the Supreme Court is meaningful only if the Court credits the plain language of § 162a, which speaks explicitly in terms of *discretion*, and also emphasizes that a key investment imperative for the Department of the Interior shall be to invest in a manner that minimizes risk of loss.

Moreover, the cited language concerning "exacting" and "highest fiduciary" standards traces to decades-old cases involving situations where the government was accused of "corruption" and "self-dealing." *See e.g., Seminole Nation v. United States,* 316 U.S. 286, 295-97 (1942) (alleged Government complicity in transferring trust funds to "corrupt" and "faithless" tribal government); *Yankton Sioux Tribe v. United States,* 224 Ct. Cl. 62, 72-73 (1980) (reviewing standards applicable in cases involving "self-dealing" trustees). The rhetoric used in those cases does not undercut the Supreme Court's clear admonition in *Navajo* and *Jicarilla* that the United States statutory trust obligations be confined to the language of those statutory prescriptions. And the Court should not graft extra-statutory duties onto the United States' trust obligations as set forth in § 162a.

3. In the Alternative, and to the Extent the Court Applies Common Law, Plaintiffs Retain the Burden to Prove That the United States Made Objectively Unreasonable Investments

In the alternative, even if the Court finds that it must consult the common law, the Plaintiffs retain the burden to prove the United States made objectively unreasonable and imprudent investments. The black letter law of the Restatement requires that a trustee "use reasonable care and skill to make the trust property productive." *Manchester Band of Pomo Indians, Inc. v. United States,* 363 F. Supp. 1238, 1245 (N.D. Cal. 1973) (citing Restatement (Second) of Trusts, § 181); Bogert's Trusts And Trustees § 702 (2017); Restatement (Third) of Trusts § 90 (2007). "In the case of trust moneys, it is thus normally the duty of the trustee to invest it so that it will produce income." *Manchester Band,* 363 F.Supp. at 1245 (citing Restatement (Second) of Trusts, § 181). *Accord* Pls.' Br. at 1 (the United States as "a trustee for the Tribe [was] responsible for ensuring that the money was put to productive use") (quoting *United States v. Dann,* 470 U.S. 39, 49-50 (1985)). Moreover, "a trustee is entitled to the benefit of the presumptions of regularity and good faith." *Neel v. Barnard,* 24 Cal. 2d 406, 421 (1944). This is particularly the case where the trustee is conferred broad discretion with respect to the exercise of her duties. *See* Restatement (Second) of Trusts § 187 (1959). "[I]t has long been recognized that a trustee is not an insurer of trust property." *United States v. Mason*, 412 U.S. 391, 398 (1973).

The common law standard does not demand prescience and cannot mean that Interior was obligated to choose investments that proved in hindsight to be the highest income-earning investments. *See United States v. Sioux Nation of Indians*, 448 U.S. 371, 416 (1980) (rejecting a hindsight approach to evaluating federal tribal trust duties); *White Mountain Apache Tribe of Ariz. v. United States*, 11 Cl. Ct. 614, 672 (1987), *aff'd* 5 F.3d 1506 (Fed. Cir. 1993), *cert. denied* 511 U.S. 1030 (1994) (when assessing propriety of the United States' challenged timber cut determination, hindsight should not be applied, instead the focus is "the practices of harvesting timber that then were known during the period"); *See also Metzler v. Graham*, 112 F.3d 207, 209 (5th Cir. 1997) ("Prudence [under ERISA] is evaluated at the time of the investment without the benefit of hindsight.").

Rather, Plaintiffs' burden under the common law was to prove that, given the information available to Interior at the time, its investment decisions were unreasonable, imprudent, and inconsistent with its statutory obligations and policies. As Plaintiffs acknowledge, this is an objective standard. Pls.' Br. at 6 (citing *Katsaros v. Cody*, 744 F.2d 270, 279 (2d Cir. 1984)). The parties agree that the determination of whether an investment was objectively imprudent is made on the basis of what the trustee knew or should have known at the time the investments were made. *See id.* (citing *Fink v. Nat'l Sav. and Trust Co.*, 772 F.2d 951, 962 (D.C. Cir. 1985) (Scalia, J. concurring and dissenting).

4. The United States Has No Affirmative Burden to "Disprove" a Breach of Trust or "Justify" its Investments

In their pretrial submissions and post-trial brief, Plaintiffs invoke the *Cheyenne-Arapaho* case, which involved allegations of Government self-dealing. *Cheyenne-Arapaho Tribes of Indians of Oklahoma v. U. S.*, 206 Ct. Cl. 340 (1975). In that case, the tribes alleged that the United States breached its trust obligations to a tribe because it held the tribes' funds in the Treasury and failed to invest them – choosing to have the funds accrue only simple interest at 4%. *Id*. at 348. Among other things, the tribes alleged that the United States' actions enriched the government at the expense of the tribes because it was able to hold the tribes' money at lower than market rates rather than invest the funds productively outside the Treasury. *Id*. at 345 (the "petitions allege[d] that defendant breached its fiduciary duties . . . . by using the funds to its own benefit and to the detriment of the tribes."). Looking for a standard to apply to plaintiffs' claim, the *Cheyenne-Arapaho* court cited a D.C. District Court case with a similar fact pattern. *Id*. at 348 (citing *Blankenship v. Boyle*, 329 F. Supp. 1089, 1096 (D.D.C.1971)). In *Blankenship*, the plaintiffs brought claims for compensatory and punitive damages related to alleged breaches of trust and conspiracy. 329 F. Supp. at 1092. They alleged that trustees of a union workers pension fund colluded with union leaders and the bank in which the coal miners' union held its funds. *Id*. at 1095-96. Just as in *Cheyenne-Arapaho*, the allegation was that, with respect to a large portion of the trust corpus, the trustees did not act to invest the pension's funds, and instead held the funds in cash at the union bank — benefitting the bank and the union at the expense of the trust fund's beneficiaries. *Id*. In those circumstances — ones in which trust funds were not invested at all, and where the facts demonstrated a degree of bad faith and self-dealing by the trustees who held the funds for their own benefit and essentially borrowed the funds — the court applied a standard requiring the trustees to justify their conduct. *Id*. at 1096 (because "the beneficiaries were in no way assisted by these cash accumulations, while the Union and the Bank profited . . . . the burden of justifying the conduct is clearly on the trustees."). When the Court of Claims in *Cheyenne-Arapaho* cites *Blankenship* for the proposition that the United States should "justify" its investment conduct, it is citing that part of the *Blankenship* opinion that deals with the same alleged *prima facie* breach of duty — a failure to make any investment of the trust funds, and facts showing that the funds were held for the trustee's benefit and to the detriment of the beneficiary. *Cheyenne-Arapaho*, 206 Ct. Cl. at 348. Burden shifting under those circumstances — where a plaintiffs first establishes bad faith or self-dealing — is recognized at common law and in the ERISA context. *See e.g.*, *Matter of Estate of Snapp*, 502 N.W.2d 29, 32 (Iowa Ct. App. 1993) ("the burden of persuasion shifts to the fiduciary when 'there is some indication of self-dealing by the fiduciary'"); *Dezelan v. Voya Ret. Ins. & Annuity Co.*, No. 3:16-CV-1251, 2017 WL 2909714, at *11 (D. Conn. July 6, 2017). No such circumstances are present in this case, where Plaintiffs do not allege bad faith or self-dealing, and where the parties have stipulated that the United States earned over $157 million by investing the Funds for the benefit of the tribal beneficiaries who are suing here. Stipulated Facts 9, 70.

Moreover, though he cited and relied upon *Cheyenne-Arapaho*, Judge Allegra in *Jicarilla* did not reach a liability determination by imposing the burden of proof upon the United States. In *Jicarilla*, Judge Allegra cited the portion of *Cheyenne-Arapaho* in which the Court of Claims enunciates the bad-faith burden shifting standard: that "the trustee has the burden of proof to justify less than a maximum return." 112 Fed. Cl. at 289. But that is *not* the standard he applied to the tribe's "underinvestment" claim in that case. Rather, as articulated later in the opinion, Judge Allegra applied a standard of prudence, with the burden upon the tribe to show that the United States' investments were objectively imprudent:

> This duty of prudence has three prongs: the BIA 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. "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." The requirement of skill obliges the BIA to obtain the highest rate of return available consistent with the prudent management of the statutorily-mandated investments.

112 Fed. Cl. at 290 (citations omitted). The Court held the United States liable in that case because it found that "no prudent trustee would have invested the Nation's trust funds in the way that the BIA did." *Id*. No such circumstances are present in this case. Several outside advisors, including Mellon Bank, Security Pacific Bank, and Lehman Brothers, recommended an investment approach that is aligned much more closely with what the United States actually did here than the approach proffered by Plaintiffs. Tr. 836:6-837:3; 871:24-873:24 (McLean); JX 211 at WSIG-TRIAL 1960; JX 236 at WSIG-TRIAL 2165; JX 190.

5. Interior's Regulations and Policies Adopted in Furtherance of § 162a Are Entitled to Deference

Section 162a expressly grants to the Secretary of the Interior the authority to prescribe rules and regulations to guide a program of investments for tribal trust funds:

> The Secretary of the Interior is hereby authorized in his discretion, and under such rules and regulations as he may prescribe, to withdraw from the United States Treasury and to deposit in banks to be selected by him the common or community funds of any Indian tribe which are, or may hereafter be, held in trust by the United States . . . .

* * *

25 U.S.C. § 162a(a). As Plaintiffs acknowledge, the Department of the Interior has adopted certain basic, formal investment regulations. *See* Pls.' Br. at 7-8 (citing 25 C.F.R. §§ 115.809, and 115.711). Those regulations confirm that Interior makes tribal trust investments in conformity with statutory restrictions, and exercises independent judgment in accordance with what it deems "prudent investment practices." *Id*. As the trial record shows, tribal trust investments within Interior are guided by formal investment policies that track § 162a's statutory language, and provide detailed guidance for investment decision-making. *See* Tr. 434:4-472:23 (Winter) (discussing JX 280; JX 337; JX 345; JX 5; JX 214). These regulations and policies represent Interior's interpretation of its statutory responsibilities under § 162a, and provide formal guidance to allow its investment officers to conform to those interpretations. *Id*. The policies also comply with the Office of the Special Trustee's organic act, which directs that the Special Trustee "establish[] appropriate policies and procedures, and develop[] necessary systems that will allow it to . . . properly 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) (i); Tr. 473:15-474:19 (Winter).

The policies set forth investment objectives that include directives to hold securities to maturity, refrain from frequent trading, and balance the goal of achieving high returns against the imperative to minimize risk of loss. *See* Tr. 441:8-442:21; 447:19-451:2 (Winter) (discussing JX 280). As Messrs. Winter and Craff testified, Interior's investment policies are applied formally by a portfolio review committee that studies investments made for each tribal account and ensures the each account complies with policy. Tr. 431:23-434:3; 474:21-480:11 (Winter); Tr.

555:5-11 (Craff). Under these circumstances, Interior's investment policies, and the statutory interpretations represented by those policies "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance," and are entitled to deference in accordance with the standard articulated in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

In their post-trial brief, Plaintiffs admit that Courts defer to "an agency's interpretation of statutes it is entrusted to administer for the benefit of the Indians." Pls. Br. at 8 n.4, citing *Cobell v. Salazar*, 573 F.3d at 812. And they advance no argument why *Skidmore* deference is not appropriate here.[3] Rather, Plaintiffs contend that the Court must adopt an "Indian canon of construction" that resolves statutory ambiguities in favor of tribal entities. *Id.* at 8 (citing *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)). But Plaintiffs never explain what part of § 162a is "ambiguous;" nor do they point to any element of Interior's investment policies that interpret that statute in a manner that is disadvantageous to tribes. As Mr. Winter testified, the Bureau of Indian Affairs and Office of the Special Trustee have at all times interpreted § 162a to require the Interior Department to make productive investments for the benefit of tribal entities, and to match investments to expected cash flows to avoid liquidating bonds or securities at a loss. Tr. 462:7-467:17; 473:11-474:19 (Winter). Those policy imperatives flow right from the language of the statute, which authorizes Interior to invest tribal trust funds and admonishes the agency to limit investments to those insured by the full faith and credit of the United States. And there is nothing in Interior's interpretation of the statute that is unfavorable to tribal beneficiaries. The Court should assign due weight to Interior's investment

[3] Plaintiffs devote several paragraphs to explaining why *Chevron* deference does not apply to Interior's investment policies, but the United States does not argue otherwise.

policies, and to the investment decisions the record shows Interior made in compliance with those policies.

III. PLAINTIFFS FAILED TO PROVE THAT THE UNITED STATES BREACHED ITS FIDUCIARY DUTIES IN MANAGING THE WESTERN SHOSHONE JUDGMENT FUND

The United States managed the 326-K and 326-A funds productively and successfully. Given the uncertainty surrounding the investment timeframe for the Funds, and prevailing interest rate volatility, Interior acted as an innovative and skillful trustee, and earned excellent returns. Plaintiffs failed to carry their burden to prove that the United States abused its discretion or made objectively imprudent investments.

Plaintiffs' breach of trust case rests primarily on the argument that the United States should have, but did not, predict future events: that distribution of the 326-K Fund would not occur for decades after the trust was established, *and* that interest rates would decline in a way that made long-term investing more profitable. *See* Pls' Br. at 14 (arguing that liability turns on "what was the appropriate investment time horizon for the WSIG funds during the period at issue"). But the law does not require a trustee to predict the future. And the trial record shows that the investment timeline for the 326-K Fund was fundamentally uncertain. No document in the parade of 1980s-era correspondence that Plaintiffs introduced through their expert, Mr. Nunes, suggests that the United States had the information it would have needed in the 1980s (or 1990s) to invest the 326-K Funds with a long-term average maturity. And nothing other than hindsight knowledge concerning interest rate movements supports the notion that the United States should have known that a long-term investment strategy would have generated equity-type returns during the trust period.

Plaintiffs' secondary arguments — that the United States did not prepare written "investment plans," or develop "cash flow" analyses, Pls.' Br. at 30-31, 34 — ask the Court to impose duties upon the United States beyond what the law requires. The law requires that a trustee "use reasonable care and skill to make the trust property productive," *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. at 1245 (citing Restatement (Second) of Trusts, § 181), not that the trustee follow a particular written plan. And the trial record shows that the United States skillfully and successfully invested the 326-K Fund. Furthermore, as Dr. Starks explained and Plaintiffs did not refute, written "investment plans" were not in common use in the 1980s and the early 1990s. Tr. 721:12-20 (Starks). There is no dispute that the United States at all times relevant here maintained and applied formal investment policies for its tribal trust funds, Stipulated Facts 25-30, including the Western Shoshone Judgment Funds at issue here, and that investments on behalf of the Funds complied with those policies. Tr. 434:4-481:4 (Winter).

The trial record also shows that, viewed contemporaneously, Plaintiffs' alternative version of how the United States should have invested the 326-K Fund is objectively *imprudent*. Plaintiffs' suggestion that the United States should have placed a bet on interest rates and speculated on a long-term time horizon for distribution of the 326-K Fund — committing the Fund to a portfolio with a weighted average maturity of 15 years — is unsupported by contemporaneous facts, and out of step with the recommendations that Interior received from several outside advisors, including Mellon Bank, Security Pacific Bank, and Lehman Brothers, which recommended an investment approach aligned much more closely with what the United States actually did here. Tr. 836:6-837:3; 871:24-873:24 (McLean); JX 211 at WSIG-TRIAL 1958-62; JX 236 at WSIG-TRIAL 2165; JX-190 at WSIG-TRIAL 1815. It is also inconsistent with Mr. Nunes's testimony in *Jicarilla*. DX 2014 at WSIG-TRIAL 7582; Tr. 404:2-405:1 (Nunes).

A. The United States Successfully and Profitably Invested the Western Shoshone Judgment Fund (326-K Fund)

The parties agree and stipulate to the investment performance of the 326-K Fund. *See* Stipulated Facts 13, 70.[4] There is, therefore, no dispute that the United States, as trustee for the Fund, invested the Fund productively throughout its 32-year life, earning $157 million in returns and boosting the value of the Fund by over 500%. Plaintiffs do not allege that the United States lost or misappropriated any amount of the 326-K Fund. Nor do Plaintiffs allege any accounting irregularity or inaccuracy on behalf of Interior in its reporting concerning the investments made on behalf of the Fund. Rather, Plaintiffs' entire claim is an allegation that the United States did not invest the Fund productively enough; that a 6.8% annual average compound rate of return over 32 years is, on the facts of this case, a breach of trust. Plaintiffs are wrong.

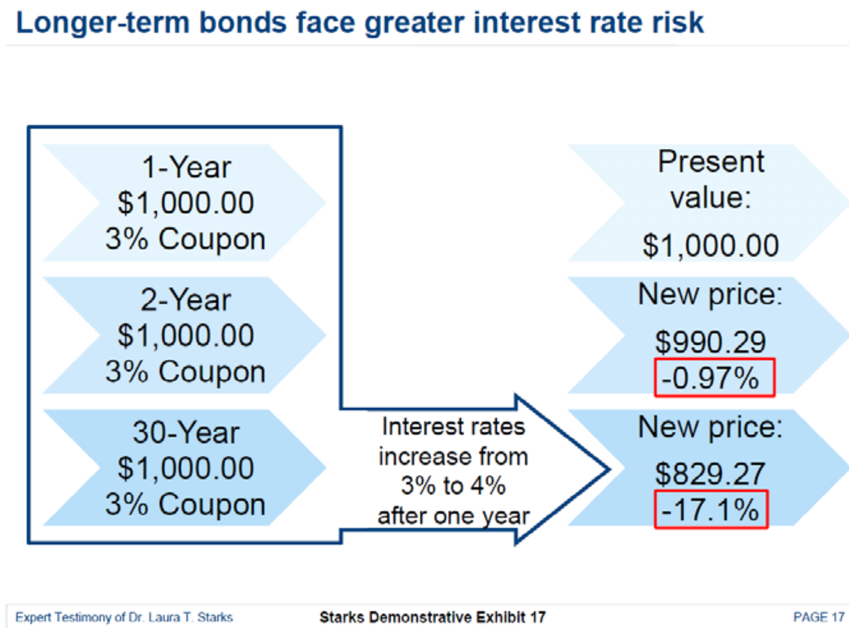
Under the Indian Tribal Judgment Funds Use and Distribution Act, Pub. L. No. 93-134, 87 Stat. 466 (October 19, 1973), Congress held plenary power to cause a total distribution of the Fund at any time. *See also* Tr. 1189:11-24 (Nunes); Tr. 1035:3-9 (Goldstein). Moreover, by statute, the United States was constrained to invest only in bonds, securities, and bank deposits backed by the full faith and credit of the United States. 25 U.S.C. § 162a. By policy, Interior managed the Fund by holding securities to maturity, and limiting the Fund's exposure to interest rate risk. Within these constraints, Interior discharged its duties skillfully and successfully, striking a balance between seeking high yielding investments, and avoiding excessive interest

[4] The parties also agreed to the admissibility and accuracy of the tribal account data reflecting the investments and performance of investments made on behalf of the 326-K and A Funds. *See* JX 423.

rate risk in the event that Congress forced liquidation of the Fund. The record also shows that Interior invested the Fund proactively, changing strategies in response to market changes, and in response to information it received concerning distribution of the Fund.

1. The United States' Investments in CDs, Agency Securities, and Treasuries Were Reasonable and Productive Investments that Appropriately Managed Interest Rate Risk

As Dr. Laura Starks testified, choosing appropriate and prudent fixed income investments requires a trustee to consider both the risk profile and time horizon appropriate to the funds under trust. Tr. 623:5-12 (Starks). Even under circumstances like those here, where the trustee is required to make investments that have no default risk (*i.e.*, that are fully backed by the United States), the trustee must evaluate interest rate risk — the risk that bonds or securities may lose value if interest rates change. Tr. 653:14-657:5 (Starks); Starks Demonstrative Exhibits 14-20. Because bond prices and interest rates are inversely related, when interest rates increase, bond prices fall. *Id*. And long-term bonds face greater interest rate risk than short-term bonds, because a greater number of future payments on a long-term bond are discounted in value by the change in rates:

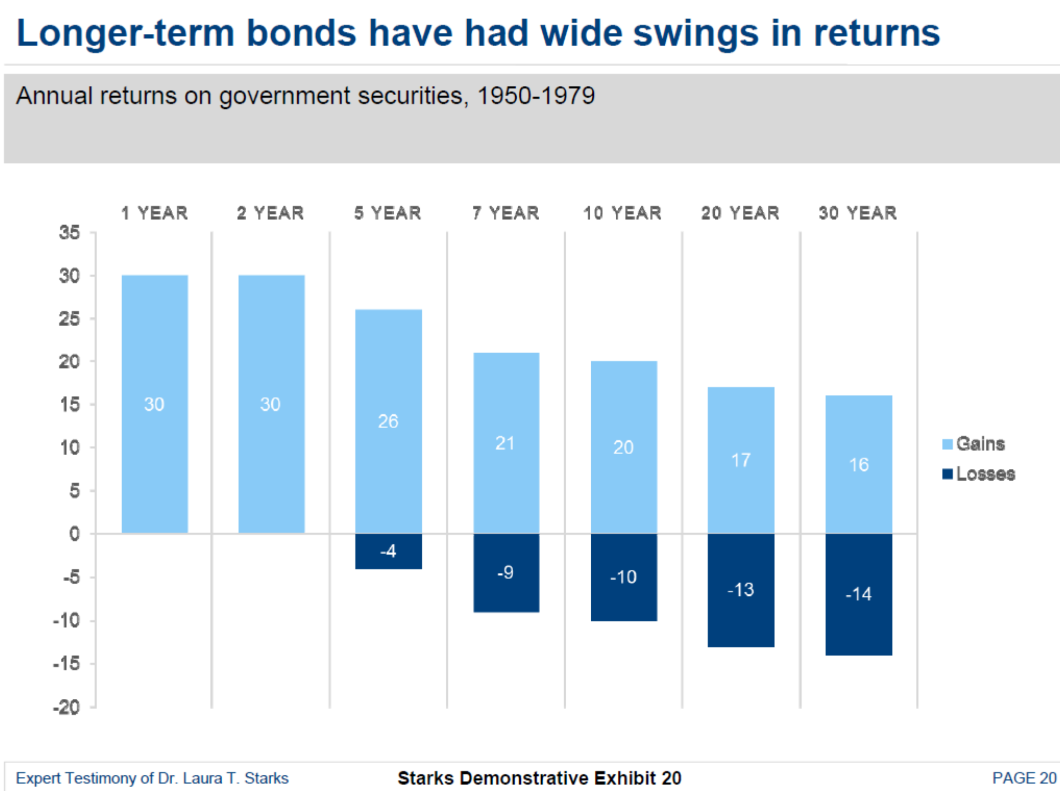


Starks Demonstrative Exhibit 17. In order to properly account for interest rate risk, a trustee must understand the likely time horizon for the funds under investment, and attempt to match the investment to the expected time horizon for the investment. JX 423 (Starks Expert Report) at WSIG-TRIAL 6959-59, ¶¶ 84-85. But that task is complicated in circumstances, like those in this case, when the time horizon for an investment is fundamentally uncertain.

Because "longer-term investments entail more risk, an investor who does not expect significant cash flow needs until some future period may be well positioned to take advantage of the typical premium long-term investments earn over short-term investments." *Id.* at ¶ 86. But long-term investors typically know with *certainty* that their investment time horizon is long-term. As Dr. Starks testified, "investors that would be likely to invest in long-term bonds as part of their portfolio would be pension funds, endowment funds, mutual funds," because those types of investors can count on holding their long-term investments to maturity. Tr. 680:17-681:3 (Starks). Pensions hire actuaries who can determine empirically the variables that effect when pension payments need to be made — for example, when employees are expected to retire, how many employees are expected to die prior to retirement, and how many employees might leave their jobs prior to their pensions vesting. Tr. 681:21-682:4 (Starks). And pension funds never have to liquidate their investments all at once — payments are made over time to individuals as they enter retirement. Tr. 681:14-17 (Starks). Likewise, endowment funds are explicitly established for the long-term, and make certain long-term investments that are intended to cover needs in the future — like repairs and upgrades to university facilities. Tr. 682:16-683:1 (Starks). Mutual funds are also able to make long-term investments, because they can estimate when investors will redeem their shares and set aside cash or short-term investments to cover those needs. Tr. 683:18-684:21 (Starks). And even if a mutual fund faces an unexpectedly high number of redemptions, the fund can borrow money to avoid liquidating long-term investments at a loss. Tr. 684:16-21 (Starks).

The circumstances and options facing the Department of the Interior in its role as trustee for the 326-K Fund were completely different from those of pensions, endowments, and mutual funds. Unlike a pension fund or endowment, Interior knew that it had to distribute the Fund all at once to its beneficiaries — not make payments at predictable intervals in the future. Tr. 685: 2-7 (Starks). Interior did not know when the Fund would be scheduled for distribution by Congress, and could not employ an actuary to determine what Congress would do. Tr. 1034:2-3 (Goldstein) ("Congress gets to do whatever it wants"). Rather, Interior was challenged to manage the Fund productively for an unknown period of time without incurring losses that could occur if interest rates swung and Interior was forced to liquidate the Fund for payment to its beneficiaries. In these respects, Interior's trusteeship over the 326-K Fund was similar to obligations charged to an escrow for a judgment fund. And as, Dr. Starks testified, escrows typically do not invest long-term. Tr. 685:8-686:6 (Starks); JX 423 (Starks Report) at WSIG-TRIAL 6961, ¶ 89.

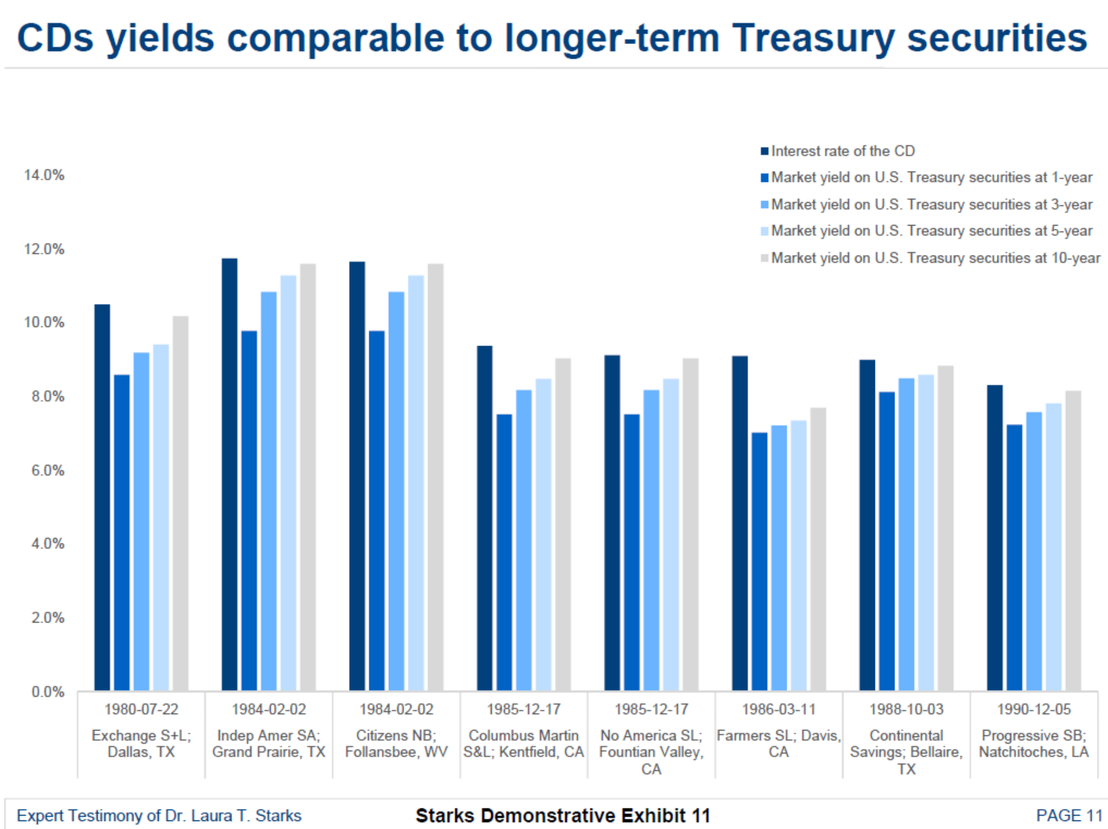
From Interior's perspective, and from an objective perspective in 1980, losing money on long-term bond investments was no theoretical concern. In the previous three decades, if a trustee were to purchase a 30-year bond and then sell it after one year, *almost half the time* the trust would suffer a loss:



Starks Demonstrative Exhibit 20. Accordingly, Interior was smart to invest the 326-K Fund in a way that sought high yields, but minimized exposure to interest rate risk given the unpredictable timing for the Fund's distribution. The CD program that Interior employed to invest the 326-K Fund throughout the 1980s was an appropriate and prudent strategy to achieve those investment goals.

a. The CD investments compared favorably and outperformed in some instances 2-3 year bonds during the early 1980s

As Dr. Starks testified, and the record shows, the 326-K fund was invested in certificates of deposit at banks throughout the country and pooled with other tribal funds so that Interior could purchase Jumbo CDs, but maintain the funds of each tribal entity within the FDIC deposit insurance limits. Tr. 635:7-636:6; 636:14-637:9 (Starks). These investments were generally for periods under a year, but they performed comparably to 2-year and 3-year Treasury securities, and sometimes outperformed longer-term bond investments. Tr. 637:22-638:24 (Starks). As Dr. Starks Demonstrative Exhibit 11 shows, some of the CD investments made on behalf of the Fund fetched higher yields than even 10 year bonds in periods throughout the 1980s:



Indeed, in a review of the Bureau of Indian Affairs investments published in 1983, Price Waterhouse remarked that "[f]rom the published returns of managed portfolios operating under security selection constraints similar to those imposed on the Indian trust funds by statute, there is no evidence that outside money managers would have improved on the investment performance during the period 1976-1983." JX 171 at WSIG-TRIAL 1559.[5]

Plaintiffs criticize Interior's CD investments on essentially two grounds. They contend that these investments were too short-term, and that Interior was investing many other tribal funds through the CD program — that the strategy was not evidently devised specifically for the 326-K Fund. But Plaintiffs' expert Mr. Nunes admitted on cross-examination that Interior's actual investments between 1979 and 1983 *outperformed* his alternative model during that time period. Tr. 370:16-21 (Nunes). Because of the high yields offered by the CDs, the CD selections were comparable to purchasing intermediate term bonds without taking on the

[5] Notwithstanding the judgment by this impartial expert, Mr. Nunes's model actually penalizes the government with tens of millions in damages for years during which Price Waterhouse said Treasury's investment performance could not have been improved upon.

> Q. Okay. And in the five years -- the first five years of your analysis -- the first five years of the Western Shoshone Judgment Fund, '79 through '83, there are significant damages under the RHA model in three of the five years?
> A. Yes.
> Q. And in the other two years, the RHA model actually underperforms BIA.
> A. That's correct.
> Q. Okay. Never trust a lawyer doing arithmetic, but I as I see it, those five would net out to about 35 million. Does it seem to you like I'm in the ballpark?
> A. I think that's pretty close.
> Q. Okay. So in a time period when Pricewaterhouse found BIA had achieved excellent investment results and could find no evidence that outside money managers could have improved on the performance, in those five years, you're telling the Court that BIA should be smacked with $35 million worth of damages?
> A. That's correct.

Tr. 370:16-371:10 (Nunes).

commensurate risk. Focusing solely upon the fact that the CDs had maturities of a year or less is misleading and misguided. Interior was able to achieve its returns at a substantially lower risk than had they invested longer-term as Plaintiffs argue it should have. Furthermore, Plaintiffs do not explain why it matters that Interior invested the 326-K fund in a manner similar to other tribal funds at this time. Given the uncertainty surrounding the Fund's distribution, and the low risk-high yield profile of these investments, the record shows that it was objectively reasonable for Interior to choose CD investments for these Funds. And, given how well the CD program performed relative to risk, it was objectively reasonable to invest other tribal funds in precisely the same way.

b. When the economic benefits of the CD program diminished relative to risk, the United States changed its approach

The record also shows that Interior changed its investment strategy when market conditions shifted. In 1992, the yield spread — which is the difference between the yields on longer-term bond and shorter term bonds — widened. Tr. 642:21-643:3 (Starks); JX 423 at WSIG-TRIAL 6981 & Ex. 5. At the same time, the savings and loan crisis was causing banking institutions to fail, and, though CD investments were FDIC-guaranteed, the time and logistics involved in managing CDs, and potentially recovering those investments through deposit insurance, made Interior's CD program less attractive. Tr. 643:9-23 (Starks). At this time, Interior shifted the weight of the 326-K Fund's investment portfolio away from short-term CDs and took advantage of relatively attractive rates being offered in medium and longer-term investments. Tr. 639:14-641:5 (Starks); JX 423 at WSIG-TRIAL 6982. In October 1992, around the time that Interior began changing its investment strategy to reflect a portfolio of longer-term agency securities, bond, and mortgage-backed securities, Fred Kellerup, who managed the tribal trust Investment function at Interior, advised:

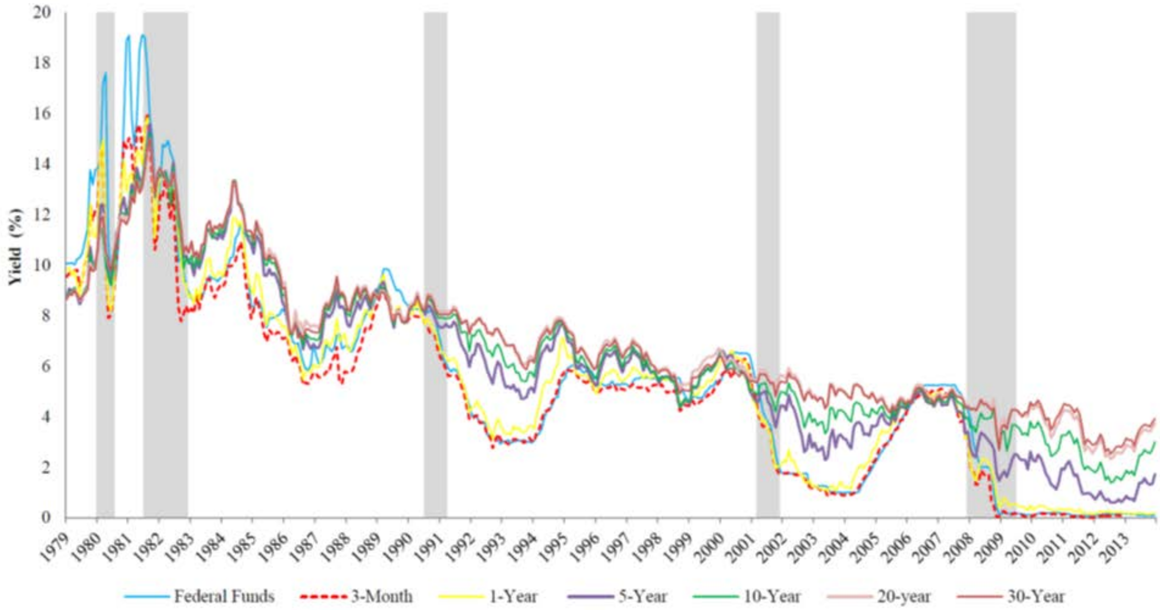
> Stay away from the long bond. There's no need for tribes to invest beyond 15 years. You're too far out if interest rates turn around. Shorten up on the maturity. Even if you have cash flow needs, go for the three-to-seven year government securities. Avoid the one-year CDs.

JX 259 at WSIG-TRIAL 2771. Beginning in 1992 and during the early- to mid-1990s, the Docket 326-K Funds reflected Mr. Kellerup's advice. Tr. 642:3-645:9 (Starks); JX 259 at WSIG-TRIAL 2771; Starks Demonstrative Exhibit 10. At trial Mr. Nunes conceded that the 326-K portfolio during this time period was reasonable. Tr. 356:14-22 (Nunes).

Plaintiffs contend in their Post-Trial brief that "there is no correlation between changes in the yield spreads across maturities and the Government's investment of the 326-K funds," and argue that Dr. Starks somehow conceded this point. Pls.' Br. at 31-32. Neither contention is true. Exhibit 5 of Dr. Starks' Expert Report (JX 423) clearly shows that yield spreads widened in the early 1990s and tightened in the late 1990s:

EXHIBIT 5

U.S. TREASURY YIELDS AND U.S. ECONOMIC RECESSIONS
MONTHLY, NOT SEASONALLY ADJUSTED
1979 – 2013



Moroever, as Dr. Starks testified, during this time — a decade after Interior received the 326-K Fund into trust, and following the failure of two proposed distribution acts in Congress, *see* JX 246; JX 210 --- Interior could have reasonably concluded that the investment time horizon for the Fund was somewhat longer, and therefore concluded that somewhat longer-term investments were appropriate. Tr. 644:6-22 (Starks).

c. **When a more certain timeline for the distribution of the 326-K Fund came into view, Interior appropriately shortened the maturities of its investments**

As the trial record shows, in the late 1990s and early 2000s, momentum gathered in the direction of per capita distribution legislation. Though the Western Shoshone-affiliated tribes remained in disagreement over the distribution, and the Dann sisters and others continued to press their land claims, *see* JX 360 at WSIG-TRIAL 4156-57; JX 363 (*Mary Dann and Carrie Dann v. United States*, Inter-American Commission on Human Rights, REPORT Nº 75/02, CASE 11.140), between 1998 and 2001, three of the tribal councils voted in favor of a per capita distribution, and beginning in 2000, the Nevada Congressional delegation pressed forward with distribution legislation. JX 360 at WSIG-TRIAL 4153-54 (Asst. Sec. of Interior McCaleb discussing tribal resolutions); JX 346; JX 350; JX 352; JX 362: JX 364; JX 365: JX 373. At this time, the longer-term securities Interior purchased in the early 1990s were maturing, and Interior chose to invest in shorter-term agency securities and bonds, maintaining that approach through the time of distribution, when, eventually, the 326-K Fund was placed in liquid investments and cash to facilitate distribution. See JX 367 at WSIG-TRIAL 4974 ("Investment approach: As the securities mature, reinvest the principal and interest not to exceed two year. The tribes at some point in the future may settle and distribute the funds."). In April 2003, approximately a year before the 2004 Western Shoshone Judgment Fund Distribution Act was passed, the 326-K Fund was valued at over $143.4 million. Between 2003 and 2011, when the Fund was ultimately distributed to its beneficiaries, Interior invested the Fund profitably, earning over $40 million in returns over this period. JX 367 at WSIG-TRIAL 4974; Tr. 479:4-21 (Winter).

During this time the investment group and tribal liaisons at the Office of the Special Trustee were constantly gauging the progress of the distribution process to determine how to invest the Fund. Tr. 543:19-578:13 (Craff). Robert Craff, who served as Regional Trust Administrator overseeing the Western Shoshone Judgment Funds, testified that from 2006 until the final distribution in 2012, he or those under his supervision regularly met with beneficiaries of the Judgment Fund where they both provided the beneficiaries with information about the fund, its investments, and the planned distribution, as well as received information from the beneficiaries. Tr. 560:1–574:10 (Craff). Mr. Craff explained that the Special Trustee received constant pressure from beneficiaries and from Senator Harry Reid Office, which was interested in initiating the distribution as soon as possible. Tr. 567:8-17, 574:15–577:25 (Craff). From 2006 until the final distribution in 2012, Craff regularly communicated with the Bureau of Indian Affairs to determine when the Judgment Funds might be distributed and communicated the information he received from the Bureau of Indian Affairs to the investment officers within the Office of the Special Trustee to provide the "time horizon" for the investment of the judgment funds. Tr. 544:2–547:11 (Craff).

As of January 2011, before distribution commenced, the Western Shoshone Judgment Fund balance totaled approximately $183.794 million. Stipulated Fact 70.

d. Interior's investments over the 326-K Trust period reflect the alert and dynamic investment management approach that Judge Allegra praised in *Jicarilla* ("a different case, indeed").

Throughout trial and in their Post Trial Brief, Plaintiffs have attempted to tie this case to Judge Allegra's decision in *Jicarilla Apache Nation v. United States*, 112 Fed. Cl. 274 (2013). Indeed, in their Post-Trial Brief, Plaintiffs go as far as to sum up their liability case by simply quoting from the *Jicarilla* opinion. In a section called "Liability has been proven," Plaintiffs quote Judge Allegra's conclusion in that case that the Bureau of Indian Affairs "us[ed] a static investment approach that fell far short of its fiduciary obligation to maximize trust income through prudent investment." Pls.' Br. at 50 (quoting *Jicarilla*, 112 Fed. Cl. at 300). But as the record shows, Interior's investment of the 326-K Fund was not "static" over the life of the trust, and reflects just the kind of alert and dynamic investment management approach that Judge Allegra actually praised in the *Jicarilla* case.

In *Jicarilla*, Judge Allegra faulted Interior for "fail[ng] to diversify [Jicarilla's] investments even after it began to diversify the investments of other Tribes." 112 Fed. Cl. at 292. He pointed to the same 1992 newsletter placed in evidence in this case (JX 259), in which Fred Kellerup advised "[e]ven if you have cash flow needs, go for the three-to-seven year government securities. Avoid the one-year CDs." *Id*. (quoting JX 259 at WSIG-TRIAL 2771). Judge Allegra stated that "[h]ad the BIA done for Jicarilla what it apparently did for these other Tribes this would be a different case, indeed." *Id*. at 292-93. Of course, in this case, Interior *did* shift the 326-K Fund out of CDs and into longer-term agency securities, beginning in the early 1990s. For this reason, among others, the case at bar really is a "different case, indeed." Not only does the record here show that Interior proactively managed the 326-K Fund, but the record also reflects the management of a very different type of account whose investment needs and risk profile are entirely different from the account issue in *Jicarilla*.

Unlike this case, the *Jicarilla* case involved "proceeds of labor accounts," which were funds over which the tribe had discretion, and could withdraw over time. *Id*. at 279, 288. The account was *not* a pure judgment award account earmarked for full distribution at a time unknown, and, according to Judge Allegra, it should have been managed and diversified as a fund to be maintained over the long-term. *Id*. at 290-91. Judge Allegra criticized Interior in *Jicarilla* for not analyzing the tribe's cash flows, and for failing to determine how and when the tribe might use the funds under trust. *Id*. at 298. The evaluations of risk that Interior employed here were very different, and tied directly to the purpose of managing what was essentially an escrow account. The 326-K Fund could not be made subject to a cash flow analysis because *there was only one expected cash flow* — a 100% per capita distribution of the account at an uncertain time in the future. Given the differences between the accounts, and the established record of investment here, which shows proactive management and investment responsive to the market and the timeline for distribution, the *Jicarilla* decision is of little comparative value to the Court's analysis here.

B. The United States Followed The Policies It Adopted to Implement its Statutory Trust Obligations

The trial record showed that Interior's investments of the 326-K Fund complied with policies that the agency adopted to carry out its statutory trust duties. Those policies, outlined in the testimony of Robert Winter, represent "a body of experience and informed judgment to which courts and litigants may properly resort for guidance," and are entitled to deference in accordance with the standard articulated in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The Court should treat Interior's compliance with these policies as strong and persuasive evidence that the agency complied with its statutory trust duties under § 162a.

1. The United States Reasonably Adopted Policies that Implement Section 162a's Requirement to Manage Risk in Its Investment of Tribal Trust Funds

Robert Winter, a senior manager at the Office of the Special Trustee for American Indians, testified extensively about the policies that the Special Trustee, and its predecessor, the Bureau of Indian Affairs, Office of Trust Funds Management, adopted to implement 25 U.S.C. § 162a. He identified key policy pillars that are laid out in detail in the 1997 and subsequent Special Trustee policies, JX 280 (1997 Policy); JX 337 (1999 Policy); JX 345 (2000 Policy); JX 380 (2005 Policy), and that also form the substance of the policy guidance issued by the Bureau of Indian Affairs in its 1966 Memorandum establishing the formal investment program at BIA. (JX 5) (1966 Policy). Tr. 462:2-467:17 (Winter). Each of these policy pillars relate back to Interior's interpretation of § 162a as requiring that Interior invest in a manner that protects principal. Tr. 438:3-443:25; 447:19-454:1 (Winter).

a. **Holding vs. Trading Policy**

One key principle adopted by Interior pursuant to its statutory mandate is a "Holding v. Trading" policy that requires its tribal trust investment officers to hold securities to maturity except in specific instances that are laid out in the policy. JX 280 at WSIG-TRIAL 3029-3030; Tr. 447:19-448:5 (Winter). The policy states that

> The substance of the portfolio activities will demonstrate the fundamental designation of the investment securities as portfolio assets with the intent and ability to hold to maturity. Infrequent investment portfolio restructuring carried out in conjunction with a prudent overall risk-management plan that does not result in a pattern of gains being taken and losses deferred will generally be viewed as an acceptable practice within the context of an investment portfolio.

JX 280 at WSIG-TRIAL 3030. As Mr. Winter testified, and the plain language of the policy shows, Interior will not actively trade securities in a tribe's portfolio, and will avoid investment activities that result in patterns of taking gains and deferring losses. Tr. 450:4-451:2 (Winter). The increased number of transactions required by a strategy requiring frequent sales of securities before maturity are "too risky and put[] the portfolio's principal at risk." Tr. 453:8-454:1 (Winter).

b. **Managing Interest Rate Risk**

By statute and policy, the agency is restricted to invest in a class of investments that are guaranteed against default risk: Interior cannot invest tribal trust funds in equities or municipal bonds, or in securities of any type not backed by the full faith and credit of the United States. 25 U.S.C. § 162a; JX 280 at WSIG-TRIAL 3025-29. But the agency has also adopted policies designed to protect against interest rate risk. Among the investment objectives listed in the Special Trustee's formal policies are directives related to "Liquidity" JX 280 at WSIG-TRIAL

3025. Mr. Winter testified that this investment concept is fundamentally tied to the agency's efforts to manage interest rate risk. Tr. 439:13-24 (Winter). "We refer to liquidity as understanding the cash flow needs of the portfolio, so that our portfolio needs to have adequate liquidity in instruments that can be converted readily into cash without there being a risk of loss at any point at which . . . . the tribe would require the need for those funds." Tr. 439:18-24 (Winter). Mr. Winter further explained that, although the market for government securities is "liquid" in the sense that "you can sell, you know, about anything for the right price," "if I need to get ready cash in place of a security that I own, depending on the market, I may incur a loss." Tr. 441:4-7 (Winter). Accordingly, under Interior's policies, investment officers must work to match the maturity of a portfolio of investments to the expected needs of the fund. If there is uncertainty concerning the time horizon for a fund, particularly in the case of a judgment award that will be paid out in its entirety, the agency tries "to base [its] maturity schedule on the earliest available date that the fund might be paid out," "[b]ecause . . . if I'm speculating down the road, perhaps at some point distant in time, and in fact, the earliest date does happen, . . . I've put the entire portfolio of that fund at risk depending on the market conditions at the time." Tr. 443:10-25 (Winter). *See also* Tr. 466:5-467:5 (Winter) (discussing JX 5 at WSIG-TRIAL 102) ("Government-backed securities, while basically safe, can result in losses unless held to maturity. Consequently, any investment program must be designed with built-in features to assure a high status of liquidity, thus providing ready cash when required either for emergency needs . . . . ").

c. Rate of Return

Mr. Winter also testified about the "rate of return objective," laid out in agency policy in different forms across the decades, and during the trust period relevant here. *See* Tr. 441:8-

442:21 (discussing JX 280 at WSIG-TRIAL 3025); Tr. 467:19-470:12 (discussing JX 15 at WSIG-TRIAL 259): Tr. 473:15-474:19 (discussing 25 U.S.C. 4043 § 2(b)) (Winter). He explained that, although it is has long been the agency's policy to invest productively and to seek high yields, "we need to adequately match those portfolios to the cash flow needs of the fund, because if I just go out and I'm searching for the highest rate regardless of maturity and I put the portfolio at risk of loss in certain market conditions, then I could be earning overall yield less than if I would have structured it appropriately in the first place." Tr. 441:24-442:7 (Winter). Consequently, the agency cannot simply chase high rates: it would not satisfy Interior's return maximizing mission to purchase a portfolio with a weighted average maturity of 15 years and then have to sell that portfolio early at a loss if the need to distribute the Fund arose. Tr. 470:7-12 (Winter).

d. Portfolio Review Procedures

Mr. Winter also testified at length about the procedures developed at the Office of the Special Trustee to ensure compliance with the agency's investment policies. Mr. Winter explained that the Portfolio Review Committee (or "Investment Management Committee") consists of "a group of senior leaders that are well versed in all of the management functions in OST, that meet with the investment group to review specifics about investments for all tribal trust funds annually." Tr. 432:4-7 (Winter). *See also* Stipulated Fact 30 ("the Investment Committee was responsible for reviewing investment accounts, at least annually, to ensure that portfolios were maintained in appropriate investments, and that portfolios were suitable and complied with legal and policy requirements"). The committee reviews not only the performance of accounts, but account objectives, which change over time. Tr. 432:16-18 (Winter). The committee has authority to challenge the investment approach applied with respect to particular accounts, and is empowered to direct changes to the strategic approach for an account where that is warranted. Tr. 433:5- 19 (Winter). At trial Mr. Winter reviewed examples of the portfolio review committee packages for sessions in which the 326-K and 326-A Funds were reviewed, and in which the Committee discussed and approved the investment strategies undertaken with respect to the Funds. Tr. 474:21-481:5 (Winter).

2. Plaintiffs Presented No Proof That the United States' Policies Were Unreasonable or That the United States Invested in a Manner Contrary to Its Policies

In their Post-Trial brief, Plaintiffs do not argue that Interior failed to comply with the policies applicable to the investment of the 326-K Fund. And Plaintiffs could make no such argument: the record demonstrates that the Fund was invested productively over the life of the trust, ("rate of return"), placed in securities and bonds held to maturity ("holding v. trading"), and kept out of long-term commitments that would have been inconsistent with the uncertain time-frame for the distribution of the Fund (liquidity/interest rate risk management). *See supra* Section I ¶¶19-23; 35-47; JX 280 at WSIG-TRIAL 3025, 3029-3030. Plaintiffs do not attack these policies as unreasonable. Plaintiffs' only argument is that Interior's investment policies lack the force of law and are not entitled to formal *Chevron* deference. Pls' Br. at 6-8. But, as Plaintiffs themselves acknowledge, Interior's investment policies *are* entitled to at least some deference. *Id.* at 8 n.4. The Court should credit the United States' undisputed adherence to its reasonable investment policies as strong evidence against Plaintiffs' claim of breach of trust here.

3. Plaintiffs' Attacks on the United States' Investment Processes Are Unfounded

Plaintiffs do attack the United States' investment process for management of the 326-K Fund, arguing specifically that Interior should have adopted a written "investment plan" or conducted a "cash flow analysis" for the 326-K Fund. Pls' Br. at 30-31, 34; 44. But, as Dr. Starks testified, and Plaintiffs do not dispute, written investment plans were not common in the 1980s or even the early 1990s, when most of the challenged investment decision-making in this case took place. Tr. 721:12-20 (Starks). After 1996, through the procedures adopted by the Office of the Special Trustee, Interior *did* adopt written policy statements and objectives that were reviewed as part of the Portfolio Review Committee procedures. *See* JX 280 (1997 OST Policy); Tr. 432:4-433:19 (Winter).

In the larger picture, Interior obviously did commit substantial resources to developing investment strategies and processes for the 326-K Funds. As Dr. Starks testified, and as she learned from interviews with officials at Interior responsible for developing the strategy,[6] Interior's CD program in the 1980s was an elaborate and innovative program that required intensive management and employed an auction process to find the highest yields. Tr. 635:7-638:24 (Starks). Interior worked around the usual FDIC insurance limits by pooling tribal resources to get Jumbo CD rates for FDIC-insured levels of risk. Tr. 635:25-636:6 (Starks). By keeping the maturity of the investment portfolio at or under a year and *consistently*

[6] Plaintiffs attempted at trial to criticize Dr. Starks for relying in this case upon interviews with John Vale and others at Interior that she conducted to understand the CD program at during her work for the *Jicarilla* case. Tr. 724:5-725:1 (Starks). But it is a fact that *Plaintiffs* in this case *did not interview or depose a single Government witness* to learn how the United States invested the 326-K Funds in the 1980s and 1990s, and *did not depose any fact witnesses at all* until the United States identified Messrs. Craff and Winter as trial witnesses.

outperforming 2-3 year bonds, the CD investments were perfectly suited to an escrow-type judgement fund account whose distribution date was uncertain. Tr. 638:1-24 (Starks) & Starks Demonstrative Exhibit 11. As discussed above, when the economics of the CD program changed, and a decade passed without a distribution act, Interior took on more interest rate risk to capture higher yields on agency securities — a strategy documented in the Kellerup memo both parties have cited extensively. JX 259 at 2771. After that, as the United States' investment documentation shows, the Fund was invested in primarily short-term instruments of a year or two in maturity to anticipate the distribution. *See supra* Section I ¶ 42, 46-47.

Furthermore, the premise of Plaintiffs' argument — that the United States must point to a written plan or process developed specifically for the 326-K Fund — is dubious and unsupported in the law. The standard applicable here (if abuse of discretion does not apply) is objective reasonableness. By reviewing the actions Interior took, "what they invested in," "what the market environment was," "what the economic environment was," and the correspondence in the record, Dr. Starks was able to make an objective assessment that the United States acted prudently here. Tr. 725:2-726:8. The Court should do the same. The single case Plaintiffs cite for the proposition that a trustee may be held liable for "absence of any investment plan" actually holds no such thing. *See* Pls.' Br. at 31 n.10 (citing *See Liss v. Smith*, 991 F. Supp. 278, 296 (S.D.N.Y. 1998)). The court in that ERISA case found a long string of failings by the trustee, *id*. at 290-96, including that the trustee did not develop and apply investment policies, which is clearly not the case here.

Plaintiffs' arguments about Interior's alleged failure to develop a "cash flow analysis," Pls.' Br. at 43-44, are equally unfounded legally, and make little sense on the facts presented here. The 326-K Fund was a judgment award fund with one expected cash flow: the per capita payment of the entire Fund at a date unknown. It is unclear how Interior could have been expected to "perform a serious analysis" of this cash flow "to aid its investment planning," *id.* (quoting *Jicarilla*, 112 Fed. Cl. at 298), when the timing of the distribution was fundamentally controlled by Congress, which had plenary power to act at any time. And after 2004, the record shows that Interior did act to make investments that matched its assessment of how long the distribution process would take – and did so with great success, earning around $40 million in returns over this seven year period. *See* Tr. 544:17-559:24, 578:1-13 (Craff); JX 367 at WSIG-TRIAL 4974; Stipulated Fact 70.

C. Plaintiffs' Suggested Alternative Investments Require Strategies Inconsistent With the United States' Investment Policies

The trial record not only demonstrates the objective prudence and success of Interior's investment strategies for the 326-K Fund, but reveals serious shortcomings in the alternative investment approach Plaintiffs argue the United States should have adopted. Investing to mimic the returns of a long-term bond index would have been impossible under Interior's policies and objectively imprudent given the contemporaneous information available to Interior in the 1980s and 1990s.

1. U.S. Bond Index Benchmark Could Not Be Replicated Without Frequent Trading and Excessive Risk

As Mr. Winter testified and Plaintiffs failed to dispute, the alternative investment strategy that Plaintiffs' expert Mr. Nunes suggests the United States should have adopted is barred by Interior's investment policies, Tr. 451:3-454:16 (Winter), and for good reason. Mr. Nunes suggests that the United States should have invested in a manner reflected in two Barclays indices that seek to replicate the behavior of certain United States treasury notes and bonds: the Barclays UST Long index, which is limited to long-term Treasury bonds (reflecting all public obligations of the U.S. Treasury with a remaining maturity of ten years or more), and the Barclays UST, which captures all public obligations of the U.S. Treasury with a remaining maturity of at least one year, and includes Treasury obligations with maturities ranging from one to 30 years. Tr. 293:6-294:5-16 (Nunes). Mr. Nunes creates a composite index, the "UST Hybrid," comprised of equal portions of the Barclays UST Long and the Barclays UST indices. This UST Hybrid has an average maturity of 15 years, which Mr. Nunes testified was the proper guidepost for how the United States should have invested from 1981-2004. Mr. Nunes further testified that the benchmark for what the United States should have done in the 2004-2010 period is the Barclays UST. *Id*. at 293:14-294:4 (Nunes).

As Mr. Winter testified, however, even if it were appropriate strategically for Interior to have invested in the kinds of long-term bonds Mr. Nunes suggests, the benchmarks he advances would have been impossible to replicate consistent with Interior's policies:

> Q. Is a U.S. Treasury Index something that the Office of the Special Trustee could go out and buy a share in?
> A. No.
> Q. Okay. Now, in order for you to attempt to achieve the results and investment profile of a U.S. Treasury Index, what would you have to do with the portfolio?
> A. I would have to be buying and selling those types of securities as are listed within that index on the frequency basis that that particular index turns those securities over.
> Q. Why would you have to do that?
> A. I would have to do that in order to mimic the performance.
> Q. Okay. Is that a practice that is -- would be permitted by the holding versus trading policy that you have just explained?
> A. No, it wouldn't.
> Q. Okay. Why not?
> A. Because it's specifically prohibited in our policy as something that is too risky and puts the portfolio's principal at risk.

Tr. 453:4-454:1 (Winter).

Mr. Nunes protests the notion that his Barclay's index "benchmarks" are actual "investment strategies," and says he offers them only to show the Court what the United States might have earned by investing long-term. Tr. 292:7-23 (Nunes). But, as Mr. McLean demonstrated, the vast majority of the profit the Nunes model produces ($210 of $216 million) is capital gains. Tr. 862:20 – 863:12 (McLean); McLean Demonstrative 20. And as Dr. Starks explained, the only way those capital gains can be generated is by active trading.

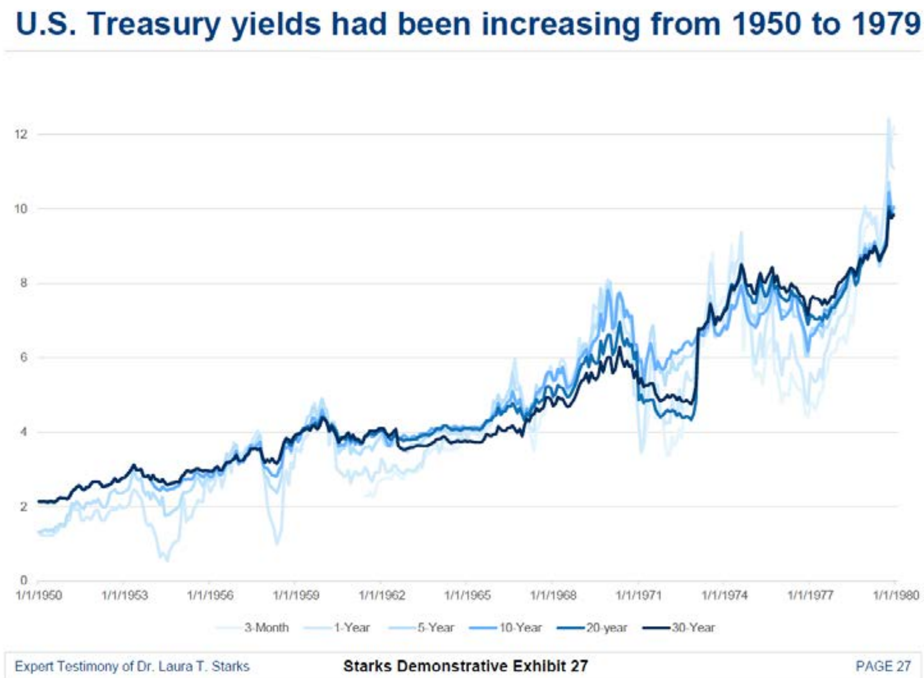
> Q. . . . . What would the Office of the Special Trustee have had to do to try to invest like -- and get returns like the way an index fund behaves?
>
> A. Well, it's my understanding that the Barclays Index, they rebalance monthly, and they put new bonds in and take bonds out. And so that would have required the Office of the Special Trustee to actually be selling bonds and buying new bonds, and there could be – there could be losses of principal on doing that, and you could have a -- and gain, and so you could have this pattern of gains and losses.

Tr. 697:17 -- 698:3 (Starks); *see also* Tr. 1210:18-1211:10 (McLean). Mr. Winter testified that, if he were overseeing a portfolio of investments presented to him during a Portfolio Review Committee annual review and he saw that an investment manager had attempted to mimic a U.S. Bond Index, the investment officer "would be ordered immediately to stop that practice." Tr. 454:2-16 (Winter).

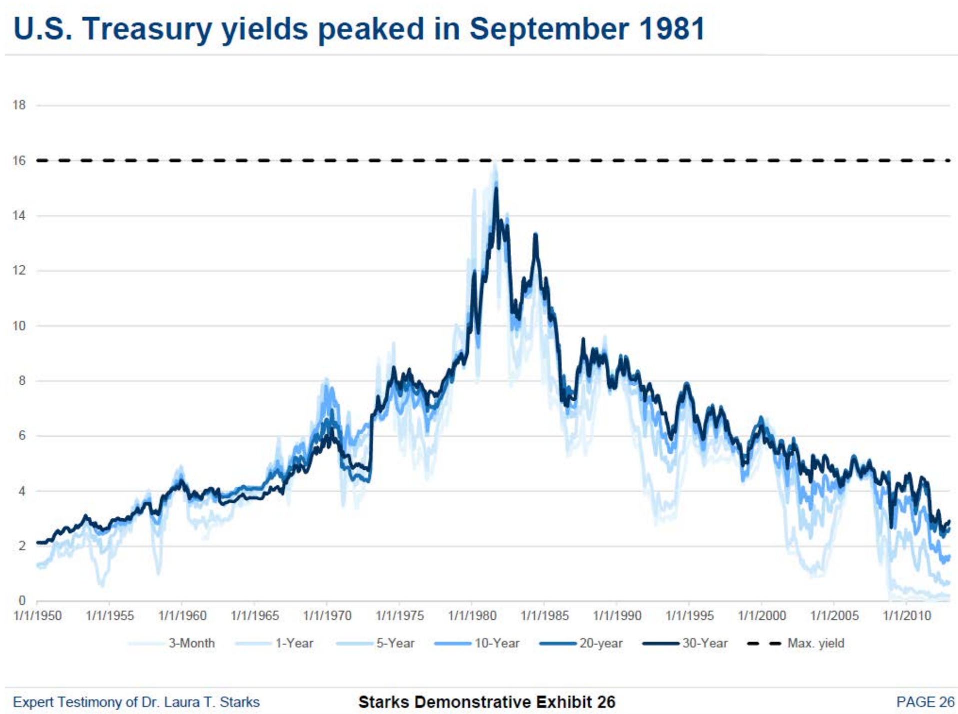
2. Substantial Investments in Long-term Bonds Would Have Posed Serious Investment Risks

In addition to the policy prohibitions that would have barred the United States from investing as Mr. Nunes suggests, the strategy itself is reckless and unwarranted on the facts of the case as they were known and understood to Interior at the time it was making investments. As discussed in greater detail in Section IV and V below, Plaintiffs' expert, Mr. Nunes, contends that the United States should have invested long-term beginning in 1981, buying and maintaining a portfolio of securities with a weighted average maturity of 15 years, including bonds with maturities as long as 30 years. Not a single document introduced at trial showed that Interior expected, or had reason to expect that the 326-K Fund would take 30 years or even 15 years to distribute. Rather, as the record instead showed, efforts to develop distribution legislation persisted throughout the 1980s, distribution legislation was pending in Congress in 1989 and 1991, and though a certain faction of Fund beneficiaries wanted to tie the distribution to Western Shoshone land claims, final legislation passed Congress *without resolving any land claims*. Tr. 1035:15-22 (Goldstein). Plaintiffs offer no reason why precisely the same legislation that passed in 2004 might not have passed in 1984 or 1994. Had that happened, and had interest rates not fallen throughout the trust period, the strategy Mr. Nunes proposes would have proven disastrous for the Fund's beneficiaries.

And, despite what the parties now know in hindsight, a fall of interest rates was not a known and predictable market change in 1980. As Dr. Starks demonstrated, interest rates had been volatile and steadily climbing for the past 30 years. Tr. 693:5-694:20 (Starks); Starks Demonstrative Exhibit 27:



In 1980, interest rates were not finished climbing. Rather, rates spiked to all-time heights in 1981 before dipping in 1982, then rising steeply again in 1984.



Starks Demonstrative Exhibit 26. And as Mr. Nunes himself admits, neither the Department of the Interior, nor anyone else can predict interest rate movements. Tr. 331:2-6 (Nunes). Though, with hindsight, a return to normalcy following the dizzying interest rate peaks of 1979, 1981, and 1984 gives a false impression of inevitability, the market experts at the time predicted nothing of the kind. Tr. 849:6-851:21 (McLean); McLean Demonstrative Exhibits 12-13; see also Tr. 832:4-13; 840:10-841:3 (McLean). Given the prevailing interest rate volatility and the uncertain time frame for distribution, Mr. Nunes's proposed long-term investment strategy — despite the way its performance looks in *hindsight* — would have been seen as reckless and imprudent in 1980, and totally incongruent with the way that Interior was being advised by top outside investment professionals.

Indeed Mr. Nunes said precisely that in *Jicarilla*, a case in which he advocated a portfolio (the Barclays UST portfolio – see Tr. 1192:16-1193:22 (Nunes)) with average maturity less than half what he espouses here for WSIG. And in that case, albeit with some coaxing by Judge Allegra, Mr. Nunes volunteered that to invest long term in the volatile interest rate environment of 1979-80 would be an unwise "bet on interest rates." DX 2014 at WSIG-TRIAL 7582; Tr. 404:2-405:1 (Nunes).

D. The United States' Actual Investment of the 326-K Fund Was Consistent With Contemporaneous Investment Strategies Proposed to the United States Department of Interior by Highly Regarded Outside Investment Firms

In the 1980s, Interior consulted with several outside investment experts about its tribal trust investment program. The proposals and recommendations those outside experts gave to Interior represent a valuable reality check. The outside experts were not acting altruistically. They had reason to hope that, if Interior outsourced its investment management function, they might pick up a substantial business portfolio.[7] But they had no reason to skew their recommendations one way or another; their only purpose was to recommend to Interior how tribal trust funds should be invested, and to showcase their expertise.

To be sure, none of these outside experts was looking specifically at the 326-K Fund. Instead, they were looking at tribal trust funds in the aggregate, and their recommendations involved the creation of one or more investment "pools." But common sense suggests that, if these outside experts had been asked to put together a customized proposal for the 326-K Fund, their proposal would be, if anything, more conservative than their recommendations for trust funds as a whole.[8] The reason for this is simple. The 326-K Fund had one distinguishing feature: unlike most tribal funds it was known with certainty that the entirety of the 326-K fund would be liquidated and disbursed. The only *unknown* was the timing, and a potential demand for cash in the relatively near term mandates shorter-term investment unless the investor is willing to put principal at risk, which Interior is prohibited from doing. Tr. 440:10-441:7 (Winter). *See also* Tr. 938:18-939:9 (McLean) (Security Pacific, in developing its proposal, sent questionnaires to several tribes (*see* JX 226), one of which held a judgment award slated for distribution; Security Pacific recommended that that fund be held entirely in short-term investments.).

[7] *See, e.g.*, JX 190 (October 30, 1984 Letter from Lehman Management Company) at WSIG – TRIAL 01815 ("The American Indian National Bank (AINB) and Lehman Management Co., Inc. (LEMCO) are jointly proposing to organize, manage, and administer a mutual fund to serve as an alternative investment vehicle for the American Indian Tribal Trust Funds.").

[8] *See* Tr. 939:1-9 (McLean): "Interestingly, a judgment award account was one of the ones in those Security Pacific documents that they suggested should be placed short term because the money would go right out. So to the extent that I'm using Security Pacific and it has longer-term investments from the intermediate and long-term investment horizons, that might overstate what would have been selected specifically for Western Shoshone in that case."

Also, it should be remembered that the proposals under discussion were intended to meet the needs of all (or at least a great many) tribal trust funds. *See* JX 236 at WSIG-TRIAL 2165. The outside experts – including some of the top financial advisors in the world – would have been well aware of the fact that some tribal trust accounts are designated as income-only, calling (under normal circumstances) for relatively long-term maturities. Presumably the outside experts designed their proposals to meet the needs of these funds, as well as those with shorter-term outlooks. Indeed, the proposals themselves were specifically designed to meet the needs of both shorter- and longer-term tribal investors, "and incorporated the knowledge that almost 70 percent of the funds under management were Judgment Awards." *See* JX-235, at WSIG-TRIAL 2133.

In all events, it is telling that *none* of the recommendations made by *any* of the outside experts involved portfolios even remotely approximating the long-term portfolio that Mr. Nunes hypothesizes. Not even close.

1. American Indian National Bank and Lehman Management Company

Mr. McLean summarized the proposal jointly made by AINB and Lehman.

> [Q] Is numbered paragraph 2 on Joint Exhibit 190, Bates page 1815, is this the proposal that the American Indian National Bank and Lehman Management Company jointly made for the investment of tribal trust funds?
> A. Yes. I believe this reflects their proposal.
> Q. And what did they propose?
> A. There were a number of details to it, but there were going to be two portfolios proposed that the tribal trust funds could be invested in, one being a money market portfolio with investments that had maturities less than a year; and the other being what they styled as an intermediate-term portfolio with maturities not to exceed five years.

Tr. 865:14-866:1 (McLean). The referenced paragraph is the following:

2/ The fund will contain two portfolios:

a) a "money market" portfolio invested in money market instruments with maturities not exceeding one year.

b) an intermediate-term portfolio invested in obligations with maturities not to exceed five years. Such maturities typically have higher yields than money market instruments.

JX 190 at WSIG-TRIAL 18150; *see also* Tr. 378:2-22 (Nunes). As Mr. McLean explained, the AINB/Lehman[9] proposal differed fundamentally from the portfolio Mr. Nunes hypothesizes, in two ways. First, the Nunes Portfolio is at least 55% long-term for most of the time period (*see* Tr. 837:8-18 (McLean)) – here defining "long-term" as having maturities of ten years or more), while the AINB/Lehman portfolios have no long-term components. Second, AINB and Lehman propose a money market (less than one year) portfolio component. Mr. Nunes only has WSIG invested short-term during the 1979-80 yield curve inversion; thereafter, for thirty years, there is no short-term component in the Nunes portfolio. Tr. 667 (Nunes). As Mr. Nunes agreed, "neither of the[] [AINB/Lehman] portfolios would remotely resemble a portfolio with an average rated maturity of 15 years." Tr. 382:12-16 (Nunes).

2. Price Waterhouse

As Mr. McLean explained, Price Waterhouse analyzed average returns and risk (volatility) associated with various model portfolios. Tr. 868:6-14 (McLean) ("these were five portfolio illustrations they created to look at possible alternatives that, in their mind, would

[9] Mr. Nunes agreed that "Lehman has long been the gold — had long been the gold standard in the indexing world" and was "one of the most prominent financial consulting firms in the world." Tr. 290:20-23, 381:10-14 (Nunes).

enhance expected return of the funds, while at the same point not putting the funds at tremendous risk.") The portfolios were as follows:

EXPECTED RETURNS FROM VARIOUS PORTFOLIOS

Portfolio Number	Mix	Expected Return	Standard Deviation*
1.	10% T-bills, 30% C.D.'s 30% Intermediates, 30% Long Term	11.20%	5.96% +
2.	5% T-bills-50% C.D.'s 25% Intermediates, 20% Long Term	10.92%	5.36% +
3.	22% T-bills, 70% C.D.'s 8% Long Term	10.02%	5.34%
4.	20% T-bills, 40% C.D.'s 40% Intermediates	10.40%	4.91% +
5.	22% T-bills, 70% C.D.'s 8% Intermediates	9.90%	5.32%

*Square Root of Portfolio Variance.
+ Dominant Portfolios.

Source: Calculations from data presented in Exhbiti IV-1

JX 171 at WSIG-TRIAL 1541. The point of the exercise was to optimize return and risk; the superior ("dominant") portfolios were marked with a "+" sign. Tr. 868:3-869:3 (McLean). Notably, all of these modeled portfolios have short-term securities (ranging from 40 percent to 92 percent of the fund), while Mr. Nunes does not have any in his suggested Barclays-based alternatives. Further, for the three portfolios that contain a long-term component, none apportion as much to long-term as Mr. Nunes in his proposed UST Hybrid alternative. Tr. 869:22-870:5 (McLean).

In the end, Price Waterhouse's initial proposal for the investment of tribal trust funds included only two portfolio options, neither of which included long-term securities.

Initially, we recommend that only two portfolio options[1] be offered:

- A short-term, highly liquid portfolio designed to allow rapid distribution of funds.
- A medium-term portfolio designed to optimize the expected returns on investment with respect to risk.

JX 171 at WSIG-TRIAL 1554. Mr. McLean explained that the "medium-term portfolio" consisted of "Treasuries between three and seven years." Tr. 869:15-21. This is nothing like the portfolio suggested by Mr. Nunes (Tr. 869:22-870:5), a point with which Mr. Nunes did not disagree. Tr. 376:23-377:8 (Nunes).

3. Security Pacific Bank

Security Pacific recommended two alternative portfolios, one for smaller funds and one for BIA's twenty-five largest accounts, which would have included 326-K. Tr. 872:6-13 (McLean). The portfolio allocations for the larger funds was as follows:

Short	Intermediate	Long	Total
Largest 25 Tribes' Balances			
502,951,615	403,801,440	151,186,781	1,057,939,836
48%	38%	14%	100%

JX 236 at WSIG-TRIAL 2165; see Tr. 873:1-74:15 (McLean). Mr. McLean also explained that, under the Security Pacific proposal for the larger accounts, the maximum maturity for any bond would be ten years (setting a cap on the "long" component in the portfolio), and that the "intermediate" component would track the Merrill-Lynch 1-3 year treasury index. Tr. 873:16-21 (McLean). As with the other outside experts' recommendation, Mr. Nunes agreed that this portfolio was "not anywhere close to a 15-year average maturity." Tr. 377:3-8 (Nunes). Indeed, because Security Pacific set the cap at ten years, their recommended portfolio – for those tribes with greater interest rate risk tolerance – would not contain a single security with a duration equal to the *average* maturity of Mr. Nunes's entire hypothetical portfolio for most of the years at issue.

All of the proposals discussed above suggested portfolios with a significant short-term component and a smaller (if any) long-term component. The proposals were evidently made with the understanding that tribes' tolerance for interest rate risk varies, and the proposals were evidently designed to accommodate that variation in risk tolerance. The fact that not one of the longer-term proposed portfolios even remotely approaches the fifteen–year average maturity prescribed by Mr. Nunes for most of the years at issue powerfully demonstrates that the Nunes' proposal lies far outside what well-informed objective experts regarded as the range of prudent investment. Moreover Mr. Nunes opts not to include any investment in securities of less than one year throughout the investment period, whereas all of the other recommended portfolios had a sizable component of short term securities included.

Mr. Nunes's only real response to these facts was to iterate that the maturity of the proposed portfolios differs greatly from that of his hypothetical portfolio. See, *e.g.*, Tr. 1164:12-1166:9 (Nunes) ("not even close … not even in the same ballpark.)" That much cannot be gainsaid, but it misses the point. Those who believed that the range of prudent maturities was similar to that implemented by Interior include AINB, Price Waterhouse, Lehman, Security Pacific Bank, Dr. Alexander, Dr. Starks, and Mr. McLean.

The only one who is in a different "ballpark" is Mr. Nunes.

E. The 326-A Funds Were Prudently Invested While Their Purpose Remained Uncertain, and Plaintiffs Concede They Were Appropriately Invested Longer-term Thereafter

Plaintiffs arguments concerning the 326-A Funds are very similar to those advanced in connection with their breach of trust claim with respect to the 326-K Fund: Plaintiffs argue that the United States knew or should have known that these funds had long-term investment horizons and failed to act accordingly. Pls.' Br. at 50-51. These arguments too, lack merit.

The 326-A Funds are also judgment award funds related to separate claims pressed by the Western Shoshone Identifiable Group against the United States. The Docket 326-A-1 Fund came into trust on March 25, 1992 in the principal amount of $823,752.64. Stipulated Fact 16. The Docket 326-A-3 Fund came into trust on September 15, 1995 in the principal amount of $29,396.60. Stipulated Fact 19. As of September 30, 2013, which is the damages date Plaintiffs' experts use in their analysis, these combined Funds were worth $2,022,891.50. JX 420 at WSIG-TRIAL 6052. The record therefore shows that the 326-A Funds were invested productively, earning $1,169,742.26 over the trust period, which includes several years of historically low interest rates following the 2008 recession. But Plaintiffs contend that these Funds should have earned an additional $1,592,822.43 over the period, arguing that Interior would have done better to have invested long-term (while interest rates were higher) during the beginning of the trust period. Pls.' Br. at 50-55, 71. Plaintiffs' argument suffers from precisely the same problems that plague its 326-K Fund claims: Plaintiffs look back in hindsight to cherry-pick profitable investments, and fail to take proper account of the uncertainty that attended these Funds prior to legislation passing in 2004 that designated the Funds for long-term educational purposes.

As Plaintiffs acknowledge, the 326-A Funds were not legally designated as long-term educational funds until 2004 with the passage of the Western Shoshone Claims Distribution Act *See* JX 373 at WSIG-TRIAL 5042 (Pub. L. No. 108-270, § 4). Prior to that time, the Funds were invested in shorter term investments to manage interest rate risk in accordance with Interior's policies. JX 367 at WSIG-TRIAL 4974; Tr. 518:18-22 (Winter). As Mr. Winter testified concerning the status of the 326-A Funds' investment as of 2003, investing the Fund in maturities of "two years based on [] uncertainty" is appropriate, because "if the proposed use does not materialize," "and I've gone out 15, 20 years" as Plaintiffs' experts suggest, "I've really put that portfolio at risk." *Id*. Plaintiffs only response to this testimony is to say that it "strains credulity," Pls.' Br. at 53, but that opinion does not prove that the United States made objectively unreasonable investments as the law requires for Plaintiffs' to make out a breach of trust claim.

Plaintiffs acknowledge that after 2004, and between 2004 and 2011, the stated maturities of the 326-A Funds portfolio did get longer, though Plaintiff complains many of these investments were "callable" so that they ended up maturing more quickly than the stated maturity dates. Pls.' Br. at 52. Plaintiffs also acknowledge that the average years to maturity of the portfolio "spiked [] to almost 10 years" in 2009 and "drifted back down and stayed in the range of 6 to 8 years until the start of 2012 when it increased to 14 years." *Id*. This is evidence that after the 2004 legislation, the United States did (and continues to) invest these Funds in conjunction with their legally-designated long-term purpose.[10] Indeed, Plaintiffs do not have any disagreement with the way the 326-A Funds have been invested since 2012, and make no claim with respect to the 2012-2013 period of the trust. Pls.' Br. at 55; Tr. 312:7-20 (Nunes).

In short, the United States managed the 326-A Funds productively at all times. Because the investment time horizon for these Funds was uncertain prior to 2004, the United States was well-justified in handling the 326-A Funds as short-term investments. And, after the 2004 Act passed, and the Funds were designated long-term, the United States invested the Funds in accordance with their purpose. These facts do not make out a breach of trust.

[10] As with every other trust period in this case, the maturities of the Funds' portfolio "spike" and "drift down," *because the United States employs a buy and hold strategy, see* Tr. 447:19-448:-5 (Winter) and so the "zig-zags" in maturities Plaintiffs pretend to find inscrutable very simply represent securities maturing over time. *See* Tr. 637:10-21 (Starks).

In all events, Plaintiffs lack standing to assert claims with respect to the Docket 326-A Funds. Congress mandated that the proceeds from the accounting claims in Docket 326-A-1 and 326-A-3 be placed into trust, and that the interest be used for educational grants or for other forms of educational assistance to be determined by a committee created by the Western Shoshone Claims Distribution Act, Pub. L. No. 108-270, 118 Stat. 805 (2004). That committee is not a plaintiff here, and Congress did not allocate any portion of these funds to the Western Shoshone Tribes or to the individuals suing here for breach of trust. The tribal plaintiffs have no right to these trust funds, and the individual plaintiffs have, at most, future contingent rights to the funds in Docket 326-A-1 and 326-A-3. At best, Plaintiffs' claims are derivative claims brought on behalf of the trust, *see e.g., Godfrey v. Kamin*, 19 Fed. Appx. 435, 437-38 (7th Cir. 2001), but it is the committee established by § 4 of the Western Shoshone Claims Distribution Act that has standing to sue on behalf of the Western Shoshone Educational Trust Fund.

The United States acknowledges that Judge Damich previously ruled that the Western Shoshone Tribes that are parties to this suit have standing to assert claims with respect to trust accounts held for the benefit of certain their tribal members. *Western Shoshone Identifiable Group et al. v. United States*, No. 08-696, 2008 WL 9697144 at *5-*7 (Fed. Cl. Oct. 31, 2008). The United States respectfully disagrees with that ruling, and notes that none of the tribes that are parties to this suit is a beneficiary — direct or otherwise — of the 326-A funds, and that none of the Tribes has styled its claims as derivative claims on behalf of the trust.

IV. PLAINTIFFS' ARGUMENTS FOR ALTERNATIVE INVESTMENTS DEPEND EXCLUSIVELY UPON HINDSIGHT

Plaintiffs argue that the United States misjudged the investment time horizon for the 326-K Fund, and should have known that the legislative process and distribution of the Fund would take decades. But the documentary record Plaintiffs rely on for this argument does not bear out. First, as Plaintiffs must and do concede, under the 1973 Use and Distribution Act, Congress held the power at all times to enact distribution legislation. Tr. 1189:11-15 (Nunes); Tr. 1034:2-3 (Goldstein) ("Congress gets to do whatever it wants"). Accordingly, there is no merit in Plaintiffs' suggestion that Congress could not act to distribute the Fund until consensus developed among Fund beneficiaries concerning how to effect the distribution. Tr. 1032:18-1033:22 (Goldstein discussing JX 425 at WSIG-TRIAL 7100). Ultimately, Congress did pass legislation without resolving the claims to land that caused a dissident faction of the Fund's beneficiaries to attempt to slow the distribution. Tr. 1035:15-22 (Goldstein). Second, Plaintiffs' contention that the United States' should have anticipated a long period *after* the enactment of legislation to effect a distribution of the Fund is completely undermined by the information available to Interior contemporaneously concerning the distribution of other Funds, which occurred relatively quickly. *See* Tr. 1047:11-1082:25 (Goldstein). And though the distribution of the Fund ultimately took longer than anticipated, as discussed above, the United States worked diligently to gather information about the progress of the distribution and used that information to inform its investment decision-making at that time – between 2007 and 2011. *See* Tr. 555:3-559:24 (Craff); JX 396; JX 397.

1. Plaintiffs' Hindsight Presentation of the Factual Record Is Selective and Misleading

According to Plaintiffs' expert Mr. Nunes, the United States should have read the tea leaves in 1980 to divine that no distribution legislation would be forthcoming for *decades*. *See* JX 420 at WSIG-TRIAL 6050. This assessment is quite obviously driven by the hindsight-aided knowledge of what actually unfolded over the 32-year period that the funds were held in trust.

At trial, Mr. Nunes walked through a parade of documents cherry-picked from the record in this case that show conflicts and obstacles to the passage of distribution legislation. But the primary obstacle Mr. Nunes identifies — disputes by a faction of the Funds' beneficiaries over rights to Western Shoshone tribal lands — was never resolved by legislation. And disputes over Western Shoshone land were ongoing before, during, and after the legislation and ultimate distribution. Tr. 679:8-680:4 (Starks); Tr. 1035:15-22 (Goldstein). Moreover, as the documentary record shows, Congress, the Interior Department, and groups of Fund beneficiaries actively pushed for some form of distribution legislation through the 1980s, leading, eventually to Acts of Congress introduced in 1989 and 1991. *See* Section I ¶¶ 29-34 *supra*. Mr. Nunes willfully ignored these documents in developing his analysis, and was unwilling to assign them any meaning when presented with this evidence on cross-examination.

For example, Mr. Nunes opined in his expert report and at trial that a letter from Senator John Melcher on the Senate Select Committee for Indian Affairs, which denied a 90-day extension for submission of a distribution plan in August 1980 should have signaled to Interior that "any potential per capita distribution would not be permissible for a significant length of time, and that prudent investment management required the Government to realign the portfolio structure to a much longer maturity." JX 420 at WSIG-TRIAL 6050; Tr. 270:7-271:8 (Nunes). But, on cross-examination, Mr. Nunes was confronted with the fact that the Melcher letter in fact states Senator Melcher's expectation that "the Department will submit appropriate legislation early in the 97th Congress," – *i.e.* the following year. Tr. 327:5-14 (Nunes). But Mr. Nunes testified that this aspect of the letter had no effect on his opinion that BIA was imprudent not to invest the Fund in a portfolio with average maturity of 15 years. Tr. 327:15-21 (Nunes). Nunes also acknowledged that the *Dann* litigation, involving Western Shoshone aboriginal title disputes, and mentioned in the Melcher letter as a reason that distribution legislation might take some time, was resolved by the Supreme Court in 1985. Tr. 328:3-7 (Nunes). But Mr. Nunes testified that this had "no effect" on his opinion that the United States should still have been investing the Fund long-term in 1985. Tr. 328:8-13 (Nunes).

Mr. Nunes was equally unmoved by an entire host of additional documents placed in evidence at trial, including a letter from the entire Nevada Congressional delegation in 1986 urging prompt action from Interior to find a solution to conflicts surrounding the distribution, JX 210, and actual legislation introduced by Representative Barbara Vucanovich in 1989 and 1991 that, if passed, would cause the distribution of the Fund within two years, JX 231 (H.R. 3384 (Vucanovich), Western Shoshone Claims Distribution Act, 101st Cong. (1st Sess. 1989)); JX 246 (H.R. 3897 (Vucanovich), Western Shoshone Claims Disbursement Act, 102d Cong. (1st Sess. 1991). And Mr. Nunes offered clear misinterpretations of several other documents he claimed supported his narrative. In one notable instance, Mr. Nunes read through a letter (JX 147) that he claimed memorialized a commitment by the United States' Department of the Interior not to develop Fund distribution rolls until Western Shoshone land claims were resolved, but, after reviewing a response to the letter (JX 150), it turned out that Interior made no such commitment. Tr. 150:2-153:1 (Nunes); Tr. 251:10-252:14 (Nunes).

More importantly, Mr. Nunes could point to no document that indicated that Congress would not act to cause the distribution of the Fund for 15 years, 20 years, 30 years, or any certain period of time. Tr. 349:25-530:10 (Nunes).

2. Dr. Goldstein's Testimony Concerning Judgment Fund Distributions Was Thoroughly Contradicted By The Trial Record

Plaintiffs also contend that the United States should have known that it would take many years post-legislation to complete a distribution. Specifically, Dr. Goldstein testified that, given its experience with the distribution of judgment funds awarded to other tribal groups, the United States in 1980 should have expected that it would take an average of 9 to 17 years for the Fund to be paid out to its beneficiaries. JX 425 at WSIG-TRIAL 7108; Tr. 976:13-977:5 (Goldstein). On cross-examination, however, Dr. Goldstein admitted that his estimate of "9 to 17 years" was speculative, Tr. 1047:17-1048:21; 1052:2-1053:8; Tr. 1047:11-1048:21 ("my guess"), and contradicted by evidence that established that several of the same judgment fund accounts featured in his testimony and chart were fully distributed just a few years after they were paid into trust. Tr. 1055:1-10 (Creek Nation 4.4 years not 8 to 16 years); Tr. 1063-1065:19-1066:1, 1069:16-1070:15 (Miami Indians 7.9 years not 10 to 18 years); Tr. 1072:10-1076:17 (Iowa Tribes 3.1 years not 7.6-15.6 years); Tr. 1077:19-1080:2 (Cheyenne Arapaho 2.8 years not 7 to 15 years); Tr. 1080:4-1082:25 (Assiniboine Tribes 2.5 years not 6.8 to 14.8 years).

Dr. Goldstein's "speculative estimate" made little sense on its own terms, and was apparently premised primarily upon a 2007 email from an employee at the Bureau of Indian Affairs named Daisy West to Robert Craff and others, explaining her view (in 2007) of how long it might take to complete the Judgment Fund distribution. Tr. 1051:3-1054:5 (Goldstein) (discussing the table at JX 425 at WSIG-TRIAL 7108 and JX 389 (E-mail from Daisy West to Robert Craff dated 2/12/2007)). As Mr. Craff testified at trial, this e-mail was only one data point among many others that informed his understanding of the distribution timeline, and was not the driving source of information available to investment officers at the Office of the Special Trustee as they made investments for the Fund during this period. Tr. 553:1-14; 576:9-578:13 (Craff). In all events, Mr. Goldstein did not provide any clear explanation why he used this email — *from 2007* — to support his opinion of what information Interior had available to it *in 1980* to make decisions about how long a distribution might ultimately take. And Dr. Goldstein admitted that it "definitely would have been better" to have "the actual amount of time that it took from the date of disbursement plan to actual cash going out for each one of these tribes" in the sample of pre-1980 judgment fund distributions he gathered to form his opinion. Tr. 1047:17-24. When presented with exactly that information at trial, however, it turned out that his "speculative opinion" was wildly inaccurate.

As it turned out, apart from the Northern Paiute example which Dr. Goldstein added to his "random sample" on purpose, Tr. 1043:17-1044:1, none of the examples he highlighted in his chart represented such long distribution time frames that would have caused Interior to believe that it should invest the Fund in 15 year or 30 year bonds. Rather, the median distribution timeline turned out to be 3.3 years, and several of the examples in Dr. Goldstein's chart proved to be instances in which the Interior Department was able to distribute judgment funds in under 4 years from receiving them into trust. Tr. 1055:1-1082:25 (Goldstein). If anything, the information Dr. Goldstein gathered supports the United States position in this case: that apart from rare outliers like the Northern Paiute, tribal judgment fund distributions can take place quickly and that the United States was smart to invest accordingly. *See also* JX 231 (1989 legislation proposing distribution of the 326-K Fund within 390 days); JX 246 (1991 legislation proposing distribution of the 326-K Fund in less than 2 years).

V. MR. NUNES'S DAMAGES MODEL IS UNRELIABLE AND USES HINDSIGHT KNOWLEDGE TO MAXIMIZE DAMAGES

A. Mr. Nunes's Hindsight-Driven Damages Model is Unreliable

Mr. Nunes criticizes the United States for achieving a 6.8% annual average compound rate of return over a thirty-one-year period — growing the $26 million Western Shoshone Judgment Fund ("WSJF") into a $183 million account between 1979 and 2011. He opines that the United States should have invested the Fund even more profitably — to achieve annual returns of approximately 9.2% over that same period. But Mr. Nunes's opinion is premised solely upon a hindsight-driven model that cherry-picks specific peaks and valleys in the U.S. bond market to lock in long-term gains that would have been impossible to predict *ex ante*. Indeed, Mr. Nunes admitted on the witness stand that he chose the date at which Treasury yields reached all time highs as the date by which he claims the United States should have fully invested in a portfolio of long-term bonds. Tr. 1172:16-21 (Nunes). As demonstrated by Dr. Alexander and Mr. McLean, Mr. Nunes's damages model is manufactured to maximize results such that even slight changes in the timing and order of the investments he claims the United States should have made reduce his damages calculations by *tens of millions* of dollars. Because his analysis is unreliable under the standard announced in *Daubert v. Merrell Dow*

Pharmaceuticals, Inc., 509 U.S. 579 (1993), the Court should assign Mr. Nunes's testimony no weight.

1. Mr. Nunes's Model

In order to calculate Plaintiffs' damages Mr. Nunes created an imaginary portfolio based on bond indices.[11] To create his imaginary portfolio, Mr. Nunes uses two different bond indices. The first is a Barclays index that seeks to replicate the behavior of all outstanding United States treasury notes and bonds (the "UST" fund). This Court has elsewhere described the Barclays UST index: "Th[e] index captures all public obligations of the U.S. Treasury with a remaining maturity of at least one year, and includes Treasury obligations with maturities ranging from one to 30 years." *Jicarilla Apache Nation v. Unites States*, 112 Fed. Cl. 274, 307 (2013). Second, Mr. Nunes uses another Barclays index that is limited to long-term Treasury bonds (reflecting all public obligations of the U.S. Treasury with a remaining maturity of ten years or more). Nunes Report (JX 420) at WSIG-TRIAL 6052. During those periods when the imaginary investment

[11] The Nunes portfolio is "imaginary" not only because it represents a counterfactual history, but also because it represents a financial impossibility; indices such as the Barclays index cannot be invested in directly. Someone attempting to replicate a Barclays bond index may face considerable logistical challenges based in part on the proprietary composition and weightings of the particular securities embedded in the portfolio, the ability to fully replicate the portfolio with limited investment funds, and, perhaps most importantly, the timing and magnitude of investors' cash flows that could make matching the precise composition the index difficult. *See, e.g.*, FRANK J. FABOZZI, BOND PORTFOLIO MANAGEMENT 516-17 (2nd ed. 2001). For Interior, moreover, replicating a Barclays index is contrary to governing law and policy in many ways, as Robert Winter explained. Tr. 453:4-454:1 (Winter). It is in fact difficult to understand what exactly the Nunes model is supposed to show; Mr. Nunes admitted that investing in the Barclays indexes is impossible, and he also admitted that replicating the model is not what he is suggesting. Tr. 1176:17-1178:9; 1190:4-7.

account for Plaintiffs was split evenly between the UST fund and the Barclays long-term bond fund, we refer to the resulting portfolio as the "Hybrid" investment.

Mr. Nunes divided the investment period in question into six different sub-periods, and hypothesized the investment of tribal funds during those periods as reflected below in Starks Demonstrative Exhibit 24 (which Mr. Nunes vouched for – Tr. 1171:3-21).

RHA Model Sub-Periods

Sub-Period	Time Period	Investment Strategy
1	12/1979 – 8/1980	Cash
2	9/1980-8/1981	Ratable transition: Cash to UST Hybrid
3	9/1981-7/2004	UST Hybrid
4	8/2004-12/2010	UST
5	1/2011-6/2011	Ratable transition: UST to Cash
6	7/2011-9/2013	Cash

As shown by the table, Mr. Nunes assumes that the Department of Interior keeps Plaintiffs' funds in cash and cash equivalents for the first eight months and then, over a twelve-month period, transitions from 100% cash to the UST Hybrid portfolio. For twenty-three years (from September 1981 until July 2004) Mr. Nunes assumes that Plaintiffs' funds are held in this predominantly long-term Hybrid bond account. In August 2004, the Barclays long-term component of the Hybrid portfolio is instantaneously liquidated thereby converting the portfolio to 100% UST. During the first six months of 2011 the UST funds are gradually converted to cash, which is where Plaintiffs' funds remain until disbursed.

2. A Results-Driven Damages Opinion Does Not Pass *Daubert*'s Reliability Standard

"*Daubert*'s requirements of reliability and relevancy continue to apply in a bench trial." *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 760 (7th Cir. 2010), citing *Attorney Gen. of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 779 (10th Cir.2009); *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1302 (Fed.Cir.2002) (while in "a bench trial, … no screening of the factfinder can take place, the *Daubert* standards of relevance and reliability for scientific evidence must nevertheless be met."). As a practical matter, however, we recognize that *Daubert*'s requirements are often relaxed in bench trials. *See, e.g.*, *Allison v. McGhan Medical Corp.*, 184 F.3d 1300, 1310 (11th Cir. 1999)). But there are limits. And here, where plaintiffs' damages "model" is demonstrably rigged to produce an inflated number, those limits have been exceeded.

Mr. Nunes's imaginary portfolio is fatally infected with hindsight bias. Alexander Report (JX 422) at WSIG-TRIAL 6720-21, 6725-29. It is demonstrably result-driven, designed to maximize damages at the expense of integrity. Though courts are often inclined to admit arguably flawed expert damage assessments while linking any demonstrated flaws to the weight to be given such testimony, demonstrably result-driven analyses are a different kettle of fish altogether. *Kansas Gas & Elec. Co. v. United States*, No. 04-99C, 2010 WL 8913518, at *5 (Fed. Cl. May 28, 2010) (where correcting a damage expert's assumptions would result in "[a] fifty-percent reduction in the amount claimed" that fact "signifies lack of reliability, not only diminished weight").

As the Supreme Court stressed in *Daubert*, expert testimony cannot be admitted unless its proponent demonstrates its reliability. *See Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 276 (5th

Cir.1998) ("The proponent need not prove to the judge that the expert's testimony is correct, but she must prove by a preponderance of the evidence that the testimony is reliable.") And, as numerous courts have held in applying *Daubert*, a results-driven analysis, or an analysis founded upon arbitrary assumptions, is *not* reliable, and therefore cannot be admitted. *Cummings v. Deere & Co.*, 589 F. Supp. 2d 1108, 1116 (S.D. Iowa 2008) (opinions that are "results-driven" are not "reliable"); *Stragent, LLC v. Intel Corp.*, No. 6:11-CV-421, 2014 WL 1389304, at *4 (E.D. Tex. Mar. 6, 2014) ("arbitrary assumptions" vitiate "the requisite indicia of expert reliability"); *R & R Int'l, Inc. v. Manzen, LLC*, No. 09-60545-CIV, 2010 WL 3605234, at *11 (S.D. Fla. Sept. 12, 2010) (use of arbitrary assumptions in lost profits model "fatally undermine[s] the reliability" of the model); *In re: Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Products Liab. Litig.*, MDL No. 2:14-mn-02502-RMG, 2016 WL 827067, at *1 (D.S.C. Feb. 29, 2016) (expert report excluded where, *inter alia*, it was "improperly results driven"); *id*. at *4 ("[t]his is the epitome of results-driven, litigation-driven expert testimony.")

3. As Dr. Alexander and Mr. McLean Demonstrated, Mr. Nunes's Model is Fundamentally Results-Driven

The crux of the rebuttal of Mr. Nunes offered by Dr. Alexander and Mr. McLean is that Mr. Nunes's hypothetical portfolio is fatally compromised by hindsight bias. Alexander Report (JX 422) at WSIG-TRIAL 6720 (Mr. Nunes's damage calculation results from "historical circumstances present during the damages period that were, in part, unique and unknowable *ex ante*" and from "interest rate movements" that were both "unpredictable and unparalleled"); *id* at WSIG-TRIAL 6722-23 (Nunes's damage calculation "considers the *ex post* return earned during the damages period, which would not be known at the time of the initial investment decision, rather than the *ex ante* expected return"); *id*. at WSIG-TRIAL 6724-26 ("The bulk of [Mr.

Nunes'] damages are from unforeseeable interest rate movements."). As further demonstrated by Dr. Alexander's declaration and Mr. McLean's trial testimony, the hindsight bias in Mr. Nunes's model is actually fine-tuned to maximize damages.

Several questions jump out when considering Mr. Nunes's conveniently constructed portfolio:

1. If, as Mr. Nunes insists (Nunes Report (JX 420) at WSIG-TRIAL 6030-33), long-term bonds are so very superior to short-term bonds, why does Mr. Nunes hold Plaintiffs' funds in cash – the shortest of short-term investments – for the better part of a year at the beginning of the investment period?

2. If the imaginary UST index portfolio is a prudent investment, why not just use the UST portfolio for the entire period preceding disbursements?

3. If the imaginary UST portfolio is a prudent investment, why not just use it rather than the Hybrid portfolio in sub-periods 2 and 3?

4. During the thirty years that represent ninety percent of the investment period, Mr. Nunes uses the Hybrid portfolio first, then the UST portfolio second. Why not use the UST portfolio first, and the Hybrid portfolio second? The Hybrid portfolio is longer-term, and Mr. Nunes repeatedly insisted that, as time went by without distribution legislation, the government had more reason to expect that a *per capita* distribution would not soon happen. Tr. 175:23-76:9; 260:15-24 (during the 1990s "the disputes were becoming wider, not narrower.").

In every single case the answer to these questions is the same: the imaginary portfolio is built the way it is built *in order to inflate Plaintiffs' damages*. The assumptions made, in every single case, are worse than arbitrary: they are biased to produce a higher damages result.

Because Plaintiffs declined the United States' request that they share Mr. Nunes's Excel model, Dr. Alexander was forced to recreate that model in order to explore the answers to the questions recited above. As Dr. Alexander explains, he was able to do so with a high degree of accuracy, replicating Mr. Nunes's damage calculation to within .009%. Alexander Declaration (DX 2012) ¶7.

	Period 1	Period 2	Period 3	Period 4	Period 5	Period 6	Damages
	12/79-8/80	9/80-8/81	9/81/7/0 4	8/04-12/10	1/11-6/11	7/11--	(MM)
Mr. Nunes	Cash	Cash to Hybrid	Hybrid	UST	UST to Cash	Cash	$216.35
Dr. Alexander	Cash	Cash to Hybrid	Hybrid	UST	UST to Cash	Cash	$216.37

a. ***Why hold cash at the outset?*** According to Mr. Nunes, the Government had every reason to believe, from the outset, that the *per capita* distribution would not occur for several years. JX 420 at WSIG-TRIAL 6035 ("there is a long history in the record that unequivocally supports our contention that very early in their life the Government should have known these funds would remain in trust for a considerable length of time and thus should have consistently invested them with a much longer-term structure."). Indeed, Mr. Nunes testified at his deposition that "[h]onestly, I think there is enough historical information from years, even before the funds were awarded, that would support strongly an argument that the funds – the government had knowledge that this was going to be, perhaps, their most challenging distribution, and we could have then used a long-term benchmark from day one."[12]

So why hold cash? Mr. Nunes offered numerous explanations. At trial, initially, he said this was "giving the Government the benefit of the doubt." Tr. 267:16-18 (Nunes). Given that, as we show below, holding the money in cash for eight months inflates damages by seventy million dollars, saying that this gives the government "the benefit of the doubt" is quite cynical. Mr. Nunes later offered two alternative explanations: that BIA would need eight months to do

[12] Nunes Dep. Tr. (ECF 119-1**)** at 24-25.

"due diligence" (even though they had been planning to receive and distribute the funds since 1973, *see* JX 13, and even though neither of the Nunes reports referred to due diligence in connection with this time period, see Tr. 855:8-13(McLean)); and "because there was uncertainty as to whether the distribution would be implemented quickly." Tr. 350:18-22 (Nunes); 854:14-16 (McLean). The "uncertainty" explanation, Mr. Nunes testified, hinges on the August 1980 Melcher letter which, Mr. Nunes explained, alerted the government to the advisability of a long-term investment horizon. JX 114; see also Tr. 138:12-140:6; 327:5-28:13; JX 420 at WSIG-TRIAL 6035 ("Of particular note is an August 4, 1980 letter that we believe is the first date on which the Government is put on notice that no distribution from Docket 326-K funds would be permissible for a significant length of time."). That letter in fact contemplates progress on distribution legislation "early in the [next] Congress" – a time frame measured in months rather than years. Letter from John Melcher, Chairman Senate Select Committee on Indian Affairs to Ralph R. Reeser dated August 4, 1980. JX 114. There is thus no reason to draw a line in August 1980 as Mr. Nunes does.

So why hold the WSIG funds in cash for eight months? *To inflate damages*. The first year of the investment period featured a historically unprecedented interest rate inversion – an inversion that Mr. Nunes himself characterizes as "massive." JX 420 at WSIG-TRIAL 6033. The result is that, during this period, cash represented, by far, the best investment possible for the tribe's money. As Mr. McLean put it (Tr. 831:8-15):

> Q. If BIA had a crystal ball, how would it have maximized income during this period?
> A. They would have wanted to keep their investments as short as possible in that time period.
> Q. And what does the Rocky Hill model have the Western Shoshone fund doing during this period?
> A. During that period, the Rocky Hill models has the investments in cash.

By holding the tribe's money in cash for this period Mr. Nunes increases his damages calculation *by seventy million dollars* ($69.9 MM). Tr. 855:3-856:6 (McLean); DX 2012 ¶¶ 8-10; McLean Demonstrative Exhibit 16:[13]

Rocky Hill's Fine-Tuning of its Damages Model
Example 1: No Cash in Sub-Periods 1 and 2

	Sub-period 1 12/1979-8/1980	Sub-period 2 9/1980 - 8/1981	Sub-period 3 9/1981 - 7/2004	Sub-period 4 8/2004 - 12/2010	Sub-period 5 1/2011-6/2011	Sub-period 6 7/2011-forward
RHA:	Cash	*Cash to UST Hybrid*	UST Hybrid	UST	*UST to Cash*	Cash
Example 1:	UST Hybrid	UST Hybrid	UST Hybrid	UST	*UST to Cash*	Cash

Damage Reduction: **$69.9 Million**

In trying at trial to criticize the Alexander/McLean analysis on this point Mr. Nunes only succeeded in digging himself into a deeper hole. Investment managers, he insisted, *never* deploy large amounts of money all at once. Tr. 1155:24-1156:9 ("[I]t's just not the way it's done … it would be the epitome of imprudent management.") Notice – first – that this explanation only seeks to rationalize the phase-in assumed by the Nunes model in sub-period number 2. It doesn't even attempt to explain why the money is all left in cash during sub-period number 1. But even more telling is the fact that Mr. Nunes's efforts to criticize the Alexander/McLean analysis are

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[13] As explained by Dr. Alexander (DX 2012 ¶¶ 8-10) and Mr. McLean (Tr. 853-54), they replicated Mr. Nunes's imaginary portfolio exactly with the sole exception that the tribe's funds are immediately invested in the Hybrid portfolio, instead of being held in cash for eight months and then transitioned from cash to the Hybrid portfolio over a twelve month period.

contradicted by Mr. Nunes himself *in at least four ways*. First, at deposition, Mr. Nunes said he actually considered investing the whole $26 million immediately (the impact of which, during a "massive" yield curve inversion, would be entirely predictable); second, Mr. Nunes's model in this case for the 326-A Fund invests every single dollar immediately. Third, Mr. Nunes's model transitions all at once from the UST Hybrid in sub-period 3 to the UST in sub-period 4 — there is no delay in deploying the money into the new securities. Finally, and most damning, Mr. Nunes's model in *Jicarilla* – in some ways similar to the model he uses here – invested every single dollar all at once in the UST index portfolio. Tr. 1192:16-1193:22:

> Q. McLean Demonstrative Number 16, which is drawn from DX-2012, the Alexander declaration, alters your model by deploying the Western Shoshone money immediately into the hybrid portfolio rather than leaving it in cash for a period and then transitioning. Do we understand this in the same way?
> A. Yes, we do.
> Q. Okay. And you testified earlier that you thought it would be quite unreasonable to do as Dr. Alexander and Mr. McLean had hypothesized here.
> A. It -- I think I testified it would be imprudent.
> Q. Imprudent, thank you. Now, am I right that in *Jicarilla*, you had the *Jicarilla* funds deployed 100 percent into the U.S. Treasury Fund, the UST?
> A. I believe that's the case, yes, for the '72 to '92 period in phase one.
> Q. And in '72, did you not in *Jicarilla* have every dollar put into the UST immediately?
> A. Yes, but that was a pool of cash that had been around for a while.
> Q. The answer is yes?
> A. Yes.
> Q. And in this case, in modeling damages for the 326-A funds, you deployed those dollars into your index model immediately, right?
> A. Yes, we did.
> Q. Now, focusing not on the transition so much as leaving the money in cash, do you recall testifying at deposition that you actually considered immediately transitioning and not leaving anything in cash?
> A. Yes.

What Mr. Nunes told the Court "would be the epitome of imprudent management" appears to be his standard practice, at least as a witness.

b. ***Why not invest in the UST portfolio for sub-periods 2-5?*** Even if Mr. Nunes is permitted to exploit the cash-advantaging interest rate inversion in 1979-1981, why did he not simply use the allegedly prudent UST portfolio for the entirety of sub-periods 3 and 4 and during the transitional sub-periods (2 and 5)? *To inflate damages*. Investing in the UST in this way would reduce Mr. Nunes's damages *by seventy one million dollars* ($71.0 MM).[14] DX 2012 ¶ 11; Tr. 856:7-857:5 (McLean); McLean Demonstrative Exhibit 17:

Rocky Hill's Fine-Tuning of its Damages Model
Example 2: Invest in the UST, rather than the Hybrid UST

	Sub-period 1 12/1979-8/1980	Sub-period 2 9/1980 - 8/1981	Sub-period 3 9/1981 - 7/2004	Sub-period 4 8/2004 - 12/2010	Sub-period 5 1/2011-6/2011	Sub-period 6 7/2011-forward
RHA:	Cash	*Cash to UST Hybrid*	UST Hybrid	UST	*UST to Cash*	Cash
Example 2:	Cash	*Cash to UST*	UST	UST	*UST to Cash*	Cash

Damage Reduction: **$71.0 Million**

Mr. Nunes's only response to this demonstration was to insist that the UST was so excessively short-term as to be an imprudent portfolio for WSIG funds. Tr. 1156:12-1157:12 (Nunes). But as Mr. Nunes explained, the UST index has a "seven-year average life" (Tr. 1157:4-5), whereas his "hybrid" portfolio has a fifteen year weighted average maturity. JX 420

[14] As explained by Dr. Alexander and Mr. McLean (DX 2012 ¶ 11), he replicated Mr. Nunes's imaginary portfolio exactly with the sole exception that, during sub-periods 2-5, the tribe's funds are invested in the UST portfolio. rather than the Hybrid portfolio

at WSIG-TRIAL 6050. As we have shown elsewhere, all contemporaneous recommendations by outside experts proposed portfolios of much *shorter* duration than seven years. *See supra* Section III. D. Also, the UST index was what Mr. Nunes used in his *Jicarilla* model. To state that the Alexander/McLean analysis of a UST-based model exercise is so short-term as to be beyond the realm of consideration is to play advocate, not expert.

c. *Why not invest in the UST portfolio for the entire period?*

Mr. Nunes apparently believes that investing all the tribe's funds in an imaginary UST portfolio would have been prudent. That is how he suggests the funds should have been invested for more than six years. So why not for the entire period? That is exactly what he proposed in *Jicarilla* – immediately investing all the Tribe's moneys in a UST index. Why not do the same here? The answer is the same -- *To inflate damages*. Investing in the imaginary UST fund for the entire period would reduce Mr. Nunes's damages *by one hundred and ten million dollars* ($109.9

MM). DX 2012 at ¶ 12; Tr. 857:11-22 (McLean); McLean Demonstrative Exhibit 18:[15]

Rocky Hill's Fine-Tuning of its Damages Model
Example 3: Begin the UST Strategy in December 1979

	Sub-period 1 12/1979-8/1980	Sub-period 2 9/1980 - 8/1981	Sub-period 3 9/1981 - 7/2004	Sub-period 4 8/2004 - 12/2010	Sub-period 5 1/2011-6/2011	Sub-period 6 7/2011-forward
RHA:	Cash	*Cash to UST Hybrid*	UST Hybrid	UST	*UST to Cash*	Cash
Example 3:	UST	UST	UST	UST	*UST to Cash*	Cash

Damage Reduction: **$109.9 Million**

Again, Mr. Nunes's response was, first, that it is never appropriate to invest all funds at one time, even though that is precisely what Mr. Nunes:

1. Told the Court in *Jicarilla* that that's what BIA *should have* done there;
2. Is telling this Court that that's what *should have* been done with the 326-A funds in this case; and
3. Considered doing with the 326-K Fund here. Tr. 1192:23-93:22 (Nunes).

Second, Mr. Nunes questions "putting [the funds] into a portfolio that is not properly aligned." Tr. 1157:22-25 (Nunes). Mr. Nunes's conception of "properly aligned" is not just contrary to

[15] As explained by Dr. Alexander (DX 2012 ¶ 12), he replicated Mr. Nunes's imaginary portfolio exactly with the sole exception that the tribe's funds are immediately invested in the UST portfolio in 1979 and held there until being transitioned to cash in 2011.

Interior's policies but also completely at odds with the contemporaneous recommendations of every objective third-party expert.

d. *Finally, why did Mr. Nunes invest in the Hybrid portfolio, then the UST portfolio, instead of the other way around?*

Mr. Nunes invests first in the imaginary Hybrid portfolio, then (in 2004) instantaneously liquidates the long-term bond index component of the Hybrid portfolio, thereby transitioning to the imaginary 100% UST portfolio. Why? Why not do it the other way around, starting with the UST portfolio and switching to the Hybrid portfolio? In this context it bears emphasis that – in Mr. Nunes's repeatedly expressed opinion – the likelihood of a distribution in the short-term became less, not more, for many years after 1980. Tr. 175:19-176:9; 260 ("the disputes were becoming wider, not narrower."). According to Mr. Nunes, a portfolio's "maturity capacity" is the touchstone for all investment decisions. Tr. 112:17-113:7, 114:2-15, 266:6-12, 302:25-303:7, 313:5-314:10, 413:15-20, 1143:15-21 (Nunes). If the "maturity capacity" dictates all, why not lengthen the maturity of the WSIG portfolio when the time to distribution is, according to Mr. Nunes, lengthening? The answer, again -- *To inflate damages*. Investing in the imaginary UST portfolio, then switching to the Hybrid portfolio in 2004, would reduce Mr. Nunes's damages *by fifty-seven million dollars* ($57.1 MM). Tr. 858:2-15 (McLean).[16]

4. Mr. Nunes's Damages Model is Inadmissible

This Court has consistently applied the rule that damages must be proven with "reasonable certainty." *Fifth Third Bank of Western Ohio v. United States*, 55 Fed. Cl. 223, 238

[16] As explained by Dr. Alexander (DX 2012 ¶ 13), he replicated Mr. Nunes's imaginary portfolio exactly with the sole exception that the tribe's funds are first invested in the Hybrid portfolio in 1979 and transitioned to the UST portfolio in 2004, rather than the other way around.

(2003) (*Winstar* case; defendant granted summary judgment); *Southern National Corp. v. United States*, 57 Fed. Cl. 294, 305-06 (2003) (same). *See also California Fed. Bank v. United States*, 54 Fed. Cl. 704, 715 (2002), *aff'd*, 395 F.3d 1263 (Fed. Cir. 2005) (rejecting "speculative" lost profits model); *Columbia First Bank, FSB v. United States*, 60 Fed. Cl. 97, 108 (2004) ("Plaintiff's model must be reasonably certain in order to provide this court with the justification for an award that is a fair and reasonable approximation of plaintiff's lost profits damages") (citation and internal quotation marks omitted). And as the Seventh Circuit stressed in *Target Mkt. Publ'g, Inc. v. ADVO, Inc.*, 136 F.3d 1139 (7th Cir. 1998), there is no "ironclad rule that a court may never exclude evidence because it is too 'speculative' as a matter of law."

> Indeed, *Daubert* and the Federal Rules of Evidence require that a district court be willing and able to do just that. …. The Supreme Court recently upheld a district court's decision to exclude expert testimony on the ground that it "did not rise above 'subjective belief or unsupported speculation.' " *General Electric Co. v. Joiner*, 118 S.Ct. 512, 516, 139 L.Ed.2d 508 (quoting 864 F. Supp. 1310, 1326 (N.D. Ga. 1994)). This Court, moreover, has not hesitated in the past to uphold a district court's decision to exclude expert testimony on similar grounds. *See, e.g.*, *Minasian v. Standard Chartered Bank, PLC*, 109 F.3d 1212, 1216 (7th Cir.1997); *Lester v. Resolution Trust Corp.*, 994 F.2d 1247, 1252–1253 (7th Cir.1993).

136 F.3d at 1142-43.

Dr. Alexander, in his report, explained at length the extent to which Mr. Nunes's analysis is infected by hindsight bias. Alexander Report (JX 422) at WSIG-TRIAL 6720-21; 6725-29. The numbers reviewed above dramatically illustrate the point. In every instance Mr. Nunes adopted assumptions that inflated damages by tens of millions of dollars.

DECLARATION (DX 2012) EXHIBIT 1

SUMMARY OF EXAMPLES
BASED ON RHA DAMAGES MODEL
DECEMBER 1, 1979 – SEPTEMBER 30, 2013

	Description	Damages (in millions)	Difference from RHA Damages
[1]	Declaration Exhibit 2 - Replicated RHA Methodology	$216.4	$0.0
[2]	Declaration Exhibit 3 - No Cash in Sub-Period 1 and 2	$146.4	($69.9)
[3]	Declaration Exhibit 4 - Invest in the UST, rather than the Hybrid UST	$145.4	($71.0)
[4]	Declaration Exhibit 5 - Begin UST Strategy in December 1979	$106.4	($109.9)
[5]	Declaration Exhibit 6 - Reverse UST Hybrid and UST Strategies	$159.3	($57.1)

Daubert does not allow the introduction of such "cherry picking" under the guise of expert testimony.

> It is apparent to the Court that rather than conducting statistical analyses of the data and then drawing a conclusion from these various analyses, Dr. Jewell formed an opinion first, sought statistical evidence that would support his opinion and chose to exclude his own contrary analyses from his report. This is unacceptable under *Daubert* and Rule 702. *See, e.g., Claar*, 29 F.3d at 502–03 ("Coming to a firm conclusion first and then doing research to support it is the antithesis of [the scientific] method."); *Barber*, 17 Fed.Appx. at 437 ("Because in formulating his opinion Dr. Hynes cherry-picked the facts he considered to render an expert opinion, the district court correctly barred his testimony because such a selective use of facts fails to satisfy the scientific method and *Daubert*."); *Fail–Safe, L.L.C. v. A.O. Smith Corp.*, 744 F.Supp.2d 870, 889 (E.D.Wis.2010) ("[I]t is readily apparent that Dr. Keegan all but 'cherry picked' the data he wanted to use, providing the court with another strong reason to conclude that the witness utilized an unreliable methodology."); *In re Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig.*, 524 F.Supp.2d 1166, 1176 (N.D.Cal.2007) (excluding expert testimony where expert "reaches his opinion by first identifying his conclusion ... and then cherry-picking observational studies that support his conclusion and rejecting or ignoring the great weight of the evidence that contradicts his conclusion").

In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Products Liab. Litig., 145 F. Supp. 3d 573, 587 (D.S.C. Nov. 20, 2015), order amended on reconsideration sub nom. *In re: Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Products Liab. Litig.*, MDL No. 2:14-mn-02502-RMG, 2016 WL 827067, at *5 (D.S.C. Feb. 29, 2016). *See also In re: Zoloft (Sertraline Hydrocloride) Products Liab. Litig.*, No. 12-MD-2342, 2015 WL 7776911, at *16 (E.D. Pa. Dec. 2, 2015) ("It is improper for an expert to take a results-driven approach to a question"); *Silicon*

Knights, Inc. v. Epic Games, Inc., No. 5:07-CV-275-D, 2011 WL 6748518, at *9-10 (E.D.N.C. Dec. 22, 2011) (use of arbitrary assumptions is fatal to a damages model's reliability under *Daubert*).

What Dr. Alexander and Mr. McLean showed is that the Nunes's model is so tightly rigged to inflate damages that almost any change in the assumptions made dramatically reduces the damages asserted. And Mr. Nunes's responses are wholly unsatisfactory because, in every instance, they are contradicted by what Mr. Nunes has said and done elsewhere. The Rocky Hill damages analysis does not pass *Daubert*; it should either be excluded altogether or assigned zero weight.

B. Mr. Nunes's Selective and Misleading use of Documents Further Undercuts the Reliability of his Expert testimony

Plaintiff's "proof" that the long delay in effectuating the congressionally-mandated distribution was foreseeable consists entirely of Mr. Nunes's selective quotation of snippets of government correspondence taken out of context. Plaintiffs' misleading use of the documentary record bespeaks the unreliability of Mr. Nunes's testimony.

1. Mr. Nunes's distorted reading of the documentary record undermines his credibility

Mr. Nunes cites a sentence from JX 51, a March 11, 1980 memo from William Hallet, Commissioner of Indian Affairs, to the Phoenix and Sacramento BIA Area Directors. The cited segment notes that ever since the original 1951 filing of the Western Shoshone ICC claim one faction of the tribe – principally the Battle Mountain Band of the Western Shoshone – believed that the Tribe still owned the land in question and on that basis opposed the Tribe's pursuing or accepting an ICC award. JX 51 at WSIG-TRIAL 562 ("For many years, a significant element among the Western Shoshone people, principally those associated with the North Central Nevada area, has maintained that most of the Nevada tract was never ceded or taken"); *see* Tr. 126:1-11 (Mr. Nunes's discussion of the quoted language). What Mr. Nunes neglected to mention was that the same memo explained that, in the ICC litigation, the Battle Mountain Band of the Western Shoshone filed a motion to intervene that sought to stay the litigation and present an amended complaint. JX 51 at WSIG-TRIAL 562. Mr. Nunes also neglected to mention that the same memo explained that the Battle Mountain effort to derail the Western Shoshone ICC claim was fully litigated and that the Battle Mountain Band lost. *Id*. at WSIG-TRIAL 00562-563. ("The petition was denied by the Commission on February 20, 1975, an appeal to the Court of Claims was denied on February 18, 1976, and the Supreme Court on October 12, 1976, denied the request of the Association that it be allowed to intervene.")

Mr. Nunes likewise failed to note that the same memo, JX 51, also explained that opponents of the ICC claim challenged the ICC award while seeking a determination by the Interior Department that the Western Shoshone still owned the land at issue, and that that appeal was also denied by the Court of Claims and the Supreme Court. *Id*. at WSIG-TRIAL 564. He also neglected to point out that the same memo emphasized that the dissenters' appeal "was made over the protests of the Western Shoshone General Council, the Western Shoshone Tribe of Nevada (incorporated in Nevada), the [Western Shoshone] Claims Committee and the great majority of the Western Shoshone people." *Id*.

If the reader of this memo were to draw any conclusions at all about the impact that the Tribe's dissenters might have on the investment horizon for the 326-K fund, the conclusion would be that, legally, the dissenters had, with the possible exception of the *Dann* litigation, run out of options. Indeed, in the very same memo the Commissioner of Indian Affairs concludes:

> Under the mandate of the 1973 Indian Judgment Funds Act we are, therefore, proceeding with the development of a Secretarial Plan or legislation for the disposition of the award. These processes must begin although we are aware of the bitter disappointment of those members of the Temoak Bands, and other Western Shoshone, who continue to assert ownership of the lands.

Id. at 4.

Similarly, Mr. Nunes drew attention to an July 31, 1980 letter, written by a leader of those Western Shoshone opposing acceptance of the ICC award (the "Sacred Lands Association"), insisting that, at a recent BIA-WSIG public meeting in Elko, Nevada, a large majority of the Western Shoshone who offered testimony were opposed to the award. See JX 108; Tr. 135:17-136:18 (Nunes) (Mr. Nunes's testimony on JX 108). But on cross examination Mr. Nunes could not disagree with contemporary accounts of the Elko meeting to the effect that a small band of award opponents staged the Elko meeting; that those who "testified" simply read material given them by others (that the "testifiers" in some cases couldn't pronounce); and that the Sacred Land Association staged the meeting and thereby effectively "dominated the Agenda." Tr. 345:25-349:24 (Nunes) (discussing JX 103). And elsewhere Mr. Nunes could not question contemporaneous accounts that throughout the relevant time period a vocal but small minority were responsible for the opposition to accepting the ICC award. Tr. 340:13-344:25 (Nunes) (discussing JX 360 at WSIG-TRIAL 4161-62, 4167).

Mr. Nunes's handling of JX 114 – the August 4, 1980 letter from John Melcher, Chairman of the Senate Select Committee on Indian Affairs, to Ralph R. Reeser, Acting Deputy Assistant to the Secretary of Indian Affairs – borders on the absurd. The letter explains the Committee's decision to deny BIA's request for a 90-day extension to submit a distribution plan. One reason was simple logistics: if the extension were granted, Congress would adjourn before its sixty-day disapproval period would expire. JX 114. The result of that denial was to require that Congress enact a distribution statute. 25 U.S.C. §1405 (b). Mr. Nunes concludes that BIA, on the basis of this letter, should have foreseen that distribution would take more than thirty years to complete and that it would therefore be prudent to lock up the 326-K account in a long-term portfolio with bonds as long as thirty years. According to Mr. Nunes, "this means that you're back to square one from the standpoint of developing, submitting, and getting approved a distribution plan. And now, instead of the sort of baked-in process that is there, now it's going to be a full legislative process, obviously a very time-consuming exercise." Tr. 139:22-140:3 (Nunes). But what the letter actually states, after reciting the Committee's reasoning, is this: "Under these circumstances, it is my conclusion that the extension should not be granted. I trust the Department will submit appropriate legislation early in the 97th Congress." JX 114 at WSIG-TRIAL 954. In other words, the Chairman expects that distribution legislation to be submitted within a matter of *months*. This, Mr. Nunes says, proves that BIA was imprudent in failing to conclude – to a degree of certainty sufficient to put the Tribe's money at risk – that the 326-K money should be locked up *for as much as thirty years*.

Similarly, Mr. Nunes cites JX 137, an August 20, 1981 memo from the Acting Deputy Assistant Secretary - Indian Affairs (Operations) to the Regional Director, for the fact that it alludes to the *Dann* litigation. Tr. 148:7-22 (Nunes). But the document squarely contradicts Mr. Nunes's central thesis that it was obvious at the time that distribution of the WSIG judgment would be delayed by decades. First, the memo states that once the *Dann* litigation was resolved appropriate legislation for distribution would be prepared and submitted – a process that would likely (and in fact did) consume a few years, not decades. JX 137 at WSIG-TRIAL 1074 ("The case is on appeal. If the plaintiffs' assertions are denied, we will then propose legislation.") Notably absent is any suggestion that distribution would or could be delayed further by internal dissention within the tribe. Second, the memo also emphasizes that planning for the funds should *not* await the outcome in *Dann,* but should instead proceed apace. *Id*. at WSIG-TRIAL 1073 ("The existence of the Dann litigation, however, does not inhibit further discussion with the eligible Western Shoshone entities on the programing potential of these funds. On the contrary, such possibilities can be thoroughly examined and proposals developed during this time"); *id*. at WSIG-TRIAL 01074 ("considering the size of the award and the social and economic needs of the tribes, the possibilities should be vigorously explored and pursued.") The same thinking is reflected in JX 144 at WSIG-TRIAL 1127-1128, a January 1982 memo on the same subject. Again, the Acting Deputy Assistant Secretary directs that – notwithstanding the pending *Dann* litigation – the department should proceed with preparation of distribution legislation, and meetings with the Tribe to discuss programmatic possibilities. JX 144 at WSIG-TRIAL 1127-28 (directing that BIA work with the Tribe to "develop programming proposals" and also that "we should now begin working with the beneficiaries on the development of the legislation which will be required in this instance.") Again and again (*see* Tr. 148:23-149:19) Mr. Nunes cites the documentary record to support a proposition with which the record is flatly inconsistent.

Mr. Nunes's handling of Joint Exhibits 147 and 150 is even more striking. JX 147 is a May 25, 1982 letter from WSIG lawyer Tom Luebben purporting to recap a meeting held between representatives of WSIG and BIA. According to Mr. Nunes, this letter memorialized agreements reached by WSIG and BIA. Tr. 150:3-153:25 (Nunes). In ruling on the United States' objection that Mr. Nunes was mischaracterizing the contents of the letter, the Court struck his testimony. Tr. 154:1-3 (Nunes). Undaunted, Plaintiffs attempted later to offer the same testimony, which the Court again struck. Tr. 249:13-250:17 (Nunes). Later, Mr. Nunes was required to address JX 150, which is Area Director James Stevens's June 8, 1982 response to Mr.

Leubben's May 25, 2002 letter (JX 147). On cross examination Mr. Nunes had to concede that on two points of alleged agreement (the development of Tribal programs and setting up workshops) the Area Director in fact imposed "significant qualifications." Tr. 333:6-19 (Nunes). The final "agreement" that Mr. Nunes's stricken testimony found in JX 147 concerned a requested "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." JX 147 at WSIG-TRIAL 01132. But the Area Director's response scuttled the alleged "agreement": "As far as draft legislation for the distribution of the Western Shoshone Judgment, we can decide our course of action [in the Area Office], however, we cannot make a commitment for the Central Office or the Department." JX 150 at WSIG-TRIAL 1140. On this point Mr. Stevens agreed to exactly nothing.

Equally telling is Mr. Nunes's handling of JX 13, a February 15, 1973 memo from the BIA Acting Director, Office of Community Services, to the Area Director, Phoenix Area Office. The document shows that planning for the distribution of the WSIG funds was already underway, even though the case had not been reduced to a final judgment and, as the memo itself recognizes, the final WSIG judgment might itself be appealed. The central paragraph is worth quoting:

> Basic agreement was reached by all concerned on several major points, the first being that although the Western Shoshone case as of October 11, 1972, has only reached the interlocutory stage, 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. We are aware that the award of $26,154,600, subject to allowable offsets, may be appealed by either or both parties, but we are in full agreement with the Agency and the Western Shoshone Claims Committee that early 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.

JX 13 at WSIG-TRIAL 252. The memo goes on to recite agreements reached about identifying beneficiaries and handling what were referred to as the Shoshone "splinter groups" involved in the *Dann* litigation. *Id*.

In other words, the memo reflects the fact that BIA was involved in advance planning for effectuating a distribution of the WSIG funds, even though the 326-K award might be years away from being finalized – and that Interior was fully and consciously determined to avoid the lengthy delays experienced in finalizing the Northern Paiute distribution. That, in all events, is an unbiased reading of the memo. But according to Mr. Nunes this very memo is proof that, when the 326-K judgment became final, everyone at Interior should have predicted that the distribution would actually take *twice as long* as the Northern Paiute distribution – and that Interior was in fact negligent in failing to gamble the entire award on that same prediction. Tr. [17]258-59; 265-66; 1145:1-19 (Nunes). To any contemporaneous observer, the import of JX 13 is exactly the opposite of what Mr. Nunes suggests.

2. Mr. Nunes's inaccurate testimony about his reliance materials further undermines reliability

Also bearing directly on the unreliability of Mr. Nunes's testimony is the fact that he misrepresented to the Court the materials disclosed in his expert reports. Sustaining an objection to Mr. Nunes's simply reading exhibit excerpts into the record, Tr. 157:18-163:20 (colloquy between the Court and Ms. Keegan), the Court tried to add some meaning to the exercise by

[17] Mr. Nunes took similar liberties with the record on the 2002 Distribution Act (JX 360), as reflected at Tr. 340:14-344:25 (Nunes); compare Tr. 257:9-21 (Nunes).

allowing Mr. Nunes to at least describe whether the exhibits cited were disclosed among his reliance materials in his expert reports. To begin, the Court ascertained that Mr. Nunes did in fact provide a list of reliance materials.

> THE COURT: Is there such a list in his report?
> MS. KEEGAN: Yes, there is, Your Honor. Yes, he reviewed -- what we're calling these is chronology documents. So he reviewed chronology documents, and there's a timeline in there, and then also that timeline goes through the documents.

Tr. 161:18-13 (Nunes). Mr. Nunes testified to the same effect on cross-examination.

> Q. Did you provide a documents looked at list?
> A. I think we did. Didn't we provide that yesterday?
> THE COURT: You can't ask for help here. You have got to answer from what you remember or look at the document.
> THE WITNESS: Okay, we did.

Tr. 334:9-15 (Nunes). The referenced "chronology" is Exhibit 4 to Mr. Nunes's January 21, 2015 Expert Report. JX 420 at WSIG-TRIAL 6098-6107. Referring to the Court's own record of the exhibits that Mr. Nunes had (selectively) read into the record, the Court then asked whether those documents were in fact among the witness's reliance materials.

> BY MS. KEEGAN:
> Q. Are the documents that we have gone through so far in your testimony, are these documents that you reviewed when you were preparing your initial report?
> A. Yes.
> THE COURT: All right. Now, let's hold on for a moment, because an appellate court would look at that and say, okay, what do we do with that? And part of my job is to create an appellate record that is usable. I like that same opportunity when we have to go write an opinion.
> So we're talking about -- let me see if I can help you here -- Exhibit 14 has been testified to; Exhibit 51, Exhibit 54, Exhibit 79, Exhibit 92, Exhibit 108, Exhibit 114, Exhibit 118, Exhibit 124, Exhibit 137, Exhibits 144, 147, 156, Exhibit 163, Exhibit 170, Exhibit 229. The only one of those that is probably not in the list is the document that was used on voir dire by the Defendant. So 229 has been testified to. Exhibit 420 is his expert report, so that wouldn't be in these "these" term that you used. And 429 has been testified to.
> Are those the documents, Mr. Nunes, that you reviewed or among the documents that you reviewed in preparing your expert report?

THE WITNESS: Yes. Among the documents, yes.

Tr. 162:24-63:24 (Nunes). This answer to the Court's queries were inaccurate. JX 92, for example, is written testimony apparently submitted on behalf of the Duckwater Shoshone Tribe in August 1980 (it is date-stamped August 5, 1980). Mr. Nunes testified about JX 92 at Tr. 136:19-38:11, but it is nowhere referenced in Mr. Nunes's chronology. JX 420 WSIG-TRIAL 6098-6107.

So too with JX 108, which is a July 31, 1980 letter from the Chairman of the Western Shoshone Sacred Lands Association to Ken Norton, Acting Superintendent, Bureau of Indian Affairs, Eastern Nevada Agency. Mr. Nunes testified about JX 108 at Tr. 135:17-136:18, but it is nowhere referenced in Mr. Nunes's chronology. JX 420 WSIG-TRIAL 6098-6107.

So too with JX 118, a September 5, 1980 letter from the Office of the Solicitor to Raymond Yowell of the Western Shoshone Sacred Lands Association. Mr. Nunes testified about JX 92 at Tr. 145:17-46:14, but it is nowhere referenced in Mr. Nunes's chronology. JX 420 at WSIG-TRIAL 6098-6107.

So too with JX 124, a December 30, 1980 letter from the Acting Director, Office of Indian Services, to Senator Alan Cranston. Mr. Nunes testified about JX 124 at Tr. 146:15-48:5, but it is nowhere referenced in Mr. Nunes's chronology. JX 420 at WSIG-TRIAL 6098-6107.

So too with JX 137, an August 20, 1981 memo by the Acting Deputy Assistant Secretary-Indian Affairs (Operations). Mr. Nunes testified about JX 137 at Tr. 148:6-22, but it is nowhere referenced in Mr. Nunes's chronology. JX 420 at WSIG-TRIAL 6098-6107.

So too with JX 147, a May 25, 1982 letter from Thomas Leubben to Jim Stevens, Area Director of the Phoenix Area Office. Mr. Nunes testified about JX 147 at Tr. 150:2-155:15, but it is nowhere referenced in Mr. Nunes's chronology. JX 420 at WSIG-TRIAL 6098-6107.

So too with JX 163, an August 3, 1983 letter to Congresswoman Barbara F. Vucanovich from the Director, Office of Indian Services. Mr. Nunes testified about JX 163 at Tr. 156:9-57:12, but it is nowhere referenced in Mr. Nunes's chronology. JX 420 WSIG-TRIAL 6098-6107.

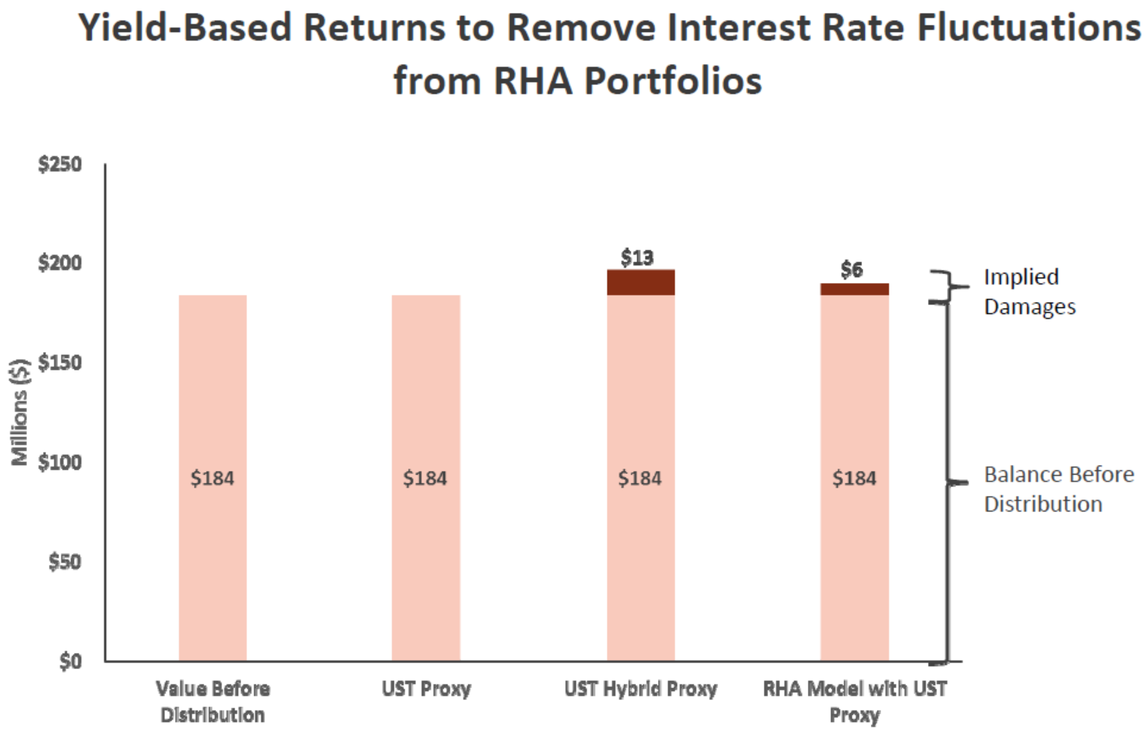
So too with JX 229, an August 6, 1989 newspaper article from the Reno Gazette-Journal. Mr. Nunes testified about JX 229 at Tr. 128:21-130:8, but it is nowhere referenced in Mr. Nunes's chronology. JX 420 at WSIG-TRIAL 6098-6107.

Of the sixteen exhibits about which the Court specifically inquired, eight, or half, were *not* cited in Mr. Nunes's document "chronology," Mr. Nunes's contrary testimony notwithstanding. These facts provide additional grounds for excluding Mr. Nunes's testimony or, at a minimum, assigning that testimony little or no weight. *Contreras v. Secretary of Health and Human Services*, 121 Fed. Cl. 230, 238 (2015), vacated on other grounds, 844 F.3d 1363 (Fed. Cir., 2017), (it was "manifest error" for magistrate to rely on testimony of expert witness without making findings on reliability and credibility in light of expert's having misrepresented his qualifications); *In re Hanford Nuclear Reservation Litigation*, 534 F.3d 986, 1014 (9th Cir. 2008) (District Court did not err in excluding expert testimony based on information not disclosed in expert report on which opposing party could not question the witness at deposition); *Pepe v. Jayne*, 761 F. Supp. 338, 344-45 (D.N.J. 1991) (not error to exclude expert testimony based on data not disclosed in expert's report).

VI. Damages for a Breach, If Any, Should Be Measured by the Reasonable Contemporaneous Alternatives Presented by Mr. McLean

A. The Alexander/McLean Yield-only Analysis Demonstrates That Plaintiffs' Damages Model Relies Almost Entirely on Harvesting Capital Gains and is Therefore an Impossibility

Dr. Alexander and Mr. McLean performed an analysis that removed capital gains from Mr. Nunes's damage calculation. Tr. 860:12 – 864:14 (McLean); JX 422 (Alexander Report) at WSIG-TRIAL 6728-29, 6824-44; McLean Demonstrative Exhibit 20. In other words, they isolated the damages that were attributable to the higher spreads typically associated with longer-term bonds, and eliminated the income attributable to capital gains from the sale of bonds prior to maturity. Because the capital gains are entirely the result of unpredictable interest rate movements – here, the largest and most sustained drop in interest rates in American history – the yield-only analysis captures the *foreseeable* component of Mr. Nunes's damages. Tr. 860:12 – 864:14 (McLean); JX 422 (Alexander Report) at WSIG-TRIAL 6728-29. Focusing on yield highlights the investment performance difference from the selection of the alleged improper securities, because Mr. Nunes's entire rationale for saying that the WSIG funds should have been invested in a long-term portfolio is the fact that, normally, but most certainly not always, longer-term bonds offer higher interest. JX 420 at WSIG-TRIAL 6030-33; Tr. 114:16 – 115:3 (Nunes).



The most telling result of the yield-only analysis is the right-hand column – "RHA Model with UST Proxy." This analysis duplicates Mr. Nunes assumption that WSIG funds are invested in the "hybrid" portfolio for most of the period at issue, then in the UST portfolio in the later years. Tr. 862:20 – 863:1 (McLean). If limited to yield-based returns – excluding unforeseeable capital gains – Mr. Nunes's damages drop precipitously, from $216 million to $6 million. Tr. 863:2 – 864:14 (McLean).

The fact that the vast majority of the added profits produced by the Nunes model are capital gains highlights the impossibility of the investment approach his model assumes. Mr. Nunes asserts that he is not saying that BIA should have sought to replicate the Barclays indices. Tr. 1190:4-7 (Nunes). But, as Mr. McLean demonstrated, $210 of the $216 million extra profits the Nunes model produces are capital gains. Tr. 862:20 – 863:12 (McLean); McLean Demonstrative Exhibit 20. But the only way those capital gains can be generated is by active trading -- Tr. 697:17-698:3 (Stark); Tr. 1210:18-1211:10 (McLean) -- which is prohibited by BIA policies and regulations. Tr. 451:3-454:16 (Winter).[18] BIA policies require a buy and hold strategy, and as Mr. McLean explained "a buy and hold strategy … would get nowhere close to what Rocky Hill's damages model is." Tr. 1215:18-21 (McLean).

Instead of using a model that exploits the unforeseeable and historic interest rate declines of the thirty year period at issue, Dr. Alexander and Mr. McLean developed an approach to estimating potential damages based on the contemporaneous proposals made by outside experts. Should the Court conclude that Plaintiffs have carried their burden of proving that BIA in some way fell short of its fiduciary duties, the contemporaneous proposals approach provides a sensible method of estimating damages.

B. AINB/Lehman and Security Pacific Portfolios Show that Using the Reasonable Alternatives Proposed by Outside Advisors Would Have Made Little Difference in the Investment Outcome At Issue Here

As discussed above, during the 1980s outside investment experts provided their recommendations as to how tribal trust funds should be invested going forward. Those experts, like BIA at the time but unlike Mr. Nunes today, did not know that interest rates would in the future stage record-setting declines. *See* Tr. 876:14-20 (McLean) ("As we discussed previously, sitting here in 2017 and looking back, we might be tempted to make decisions based on how interest rates actually moved, but we wouldn't know that at the time we were making

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[18] The hypothesized Nunes portfolio precisely reflects the "pattern of gains being taken" that Interior policy specifically prohibits. JX 280 at WSIG-TRIAL 3030

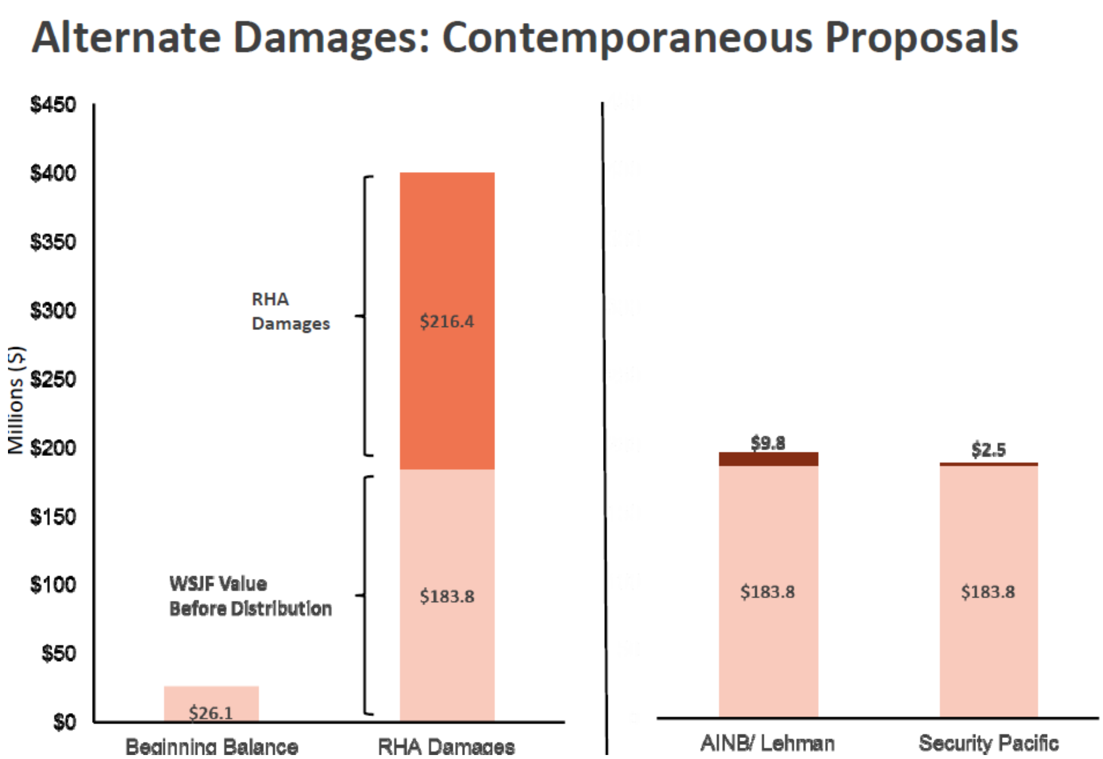
investments. So I tried to look to documents that expressed what people at the time were saying reasonable and appropriate portfolios would be.") Dr. Alexander and Mr. McLean therefore modelled what would have happened to the 326-K fund had it been invested (starting at its inception in 1979) according to the outside experts' recommendations. Tr. 874:16-875:6 (McLean). The exercise is revealing.

AINB/Lehman, Price Waterhouse and Security Pacific proposed portfolios with a mix of investment options. AINB/Lehman and Price Waterhouse suggested investments with a short-term and an intermediate-term component. Security Pacific proposed a portfolio with short, intermediate, and longer-term components. In all cases the portfolios weighted towards short-term investments imply zero (or negative) damages. In other words, BIA's actual investment of 326-K outperformed those portfolios.

	Value as of 9/30/2013	
Portfolio	Portfolio Value	Implied Damages
Actual WSIG Portfolio	$36,707	—
AINB/Lehman Method		
67% Money Market, 33% Intermediate	−$15,046,527	**None**
50% Money Market, 50% Intermediate	$9,785,357	**$9,748,650**
Security Pacific Method		
61% Short, 29% Intermediate, 10% Long	−$16,228,567	**None**
48% Short, 38% Intermediate, 14% Long	$2,497,733	**$2,461,027**

JX 422 (Alexander Report) at WSIG-TRIAL 6731. Given the ever-present possibility that Congress would force the liquidation and disbursement of the fund, a short-term investment approach would certainly have been reasonable. The fact that BIA outperformed the shorter-term portfolios contemporaneously recommended by objective, third-party experts provides fairly compelling evidence that BIA's investment of 326-K was in fact perfectly reasonable. The analysis, in other words, refutes liability.

Analysis of the relatively longer-term portfolios recommended by AINB/Lehman and Security Pacific leads to the same conclusion. In both cases, these funds would have outperformed BIA's actual investment of 326-K, but by amounts that, when viewed in perspective, are trivial. The analysis certainly demonstrates how extreme Plaintiffs' damage calculation is.



McLean Demonstrative Exhibit 22; Tr. 876:4-11 (McLean). .

Again, it is true that these proposals were not customized for WSIG. But for the reasons discussed in Section III (D) above, they provide perfectly valid benchmarks. They provide a realistic measure of damages, if such a measure is needed, without the taint of hindsight bias. Tr.

877:9-13 (McLean). More fundamentally, they confirm that BIA's actual investment of 326-K was perfectly reasonable, if not exceptional.[19]

CONCLUSION

The United States' skillful and profitable stewardship of the Western Shoshone Judgment Funds was not a breach of trust, and Plaintiffs failed to prove that the United States abused its discretion or acted imprudently. For the reasons stated above, the Court should enter judgment in favor of the United States.

Respectfully Submitted,

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[19] The Court will recall that Dr. Alexander and Mr. McLean also presented a series of damages analyses based on Dr. Starks's stated opinion that during some of the period at issue somewhat longer-term investments would have been within the range of prudence for the 326-K Fund. *See* Tr. 878:1-5 (McLean); Tr. 878:13 – 880:25; McLean Demonstrative Exhibits 23-24; JX-422 (Alexander Report) at WSIG-TRIAL 6729-30. These analyses further confirm the extreme nature of Plaintiffs' damage claim. More fundamentally still, they confirm that BIA's actual investment on WSIG's money was well within the range of prudence.

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