IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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

PLAINTIFF'S POST-TRIAL BRIEF

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

Attorney of Record for Plaintiffs

OF COUNSEL:

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

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

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The Court has found that the Government imprudently invested the Docket 326 judgment funds awarded to Plaintiff Western Shoshone Identifiable Group (WSIG) in too short-term a manner most of the time from 1980 – 2012. Accordingly, WSIG is "entitled to a reasonable estimate of the damages it is due." *W. Shoshone Identifiable Grp. v. United States*, 143 Fed. Cl. 545, 627 (2019) (*W. Shoshone*). The parties have presented divergent expert opinions about the amount of damages WSIG is due. For the reasons discussed below, the Court should credit the damages calculations proffered by WSIG's expert, Rocky Hill Advisors (RHA), rather than the calculations proffered by the Government's expert, Dr. Laura Starks.[1]

I. PRELIMINARY ISSUES

At the conclusion of the damages trial, the Court identified a number of issues to be addressed in the post-trial briefs. Two of those issues are appropriately addressed at the outset, before proceeding to a more detailed discussion of the applicable law and the facts of this case.

A. The Experts' Opinions Set The Bounds For Damages

First, the Court queried whether the opinions of the parties' experts establish the bounds on the amount of damages in this case. The answer is yes. There is no basis in the evidence for awarding WSIG less than the amount of damages that Dr. Starks opines is due, or more than the amount of damages that RHA opines is due.

B. Interest Is Not An Issue In This Case

Second, the Court queried whether interest is an issue in this case and, if so, how it should be computed. Interest is not an issue. The United States is immune from an award of prejudgment interest in the absence of express congressional consent to such an award. *Library of Congress v.*

[1] The Government's other expert, Dr. Francis Longstaff, did not offer an opinion on the amount of damages. (Trial Tr. vol. 3, 677:12-18, July 23, 2020.)

Shaw, 478 U.S. 310, 314 (1986). There is no applicable waiver of immunity that would permit an award of prejudgment interest in this case, and that is not what WSIG seeks. Instead, WSIG seeks damages equal to the additional investment income that would have been earned had the Docket 326 Funds been prudently invested.

Dr. Starks' contends that any monetary award to WSIG for the period from October 2013 to the time of trial should be calculated as prejudgment interest rather than damages. But there is no legal basis for an award of prejudgment interest. Rather, the issue is one of damages – calculating the amount of income that would have been earned if the additional funds that should have been in the Docket 326 accounts as of September 30, 2013, were invested prudently up to the time of trial. This issue will be addressed in more detail below.

There was a potential issue about how to calculate the growth of accrued damages during the non-breach periods. But this did not involve prejudgment interest either. Rather, it relates to the damages computation. The experts agreed that the growth rate for the non-breach periods should be based on the Government's actual investment performance. Initially, they used different methods to measure this growth rate but RHA accepted Dr. Starks' approach, which simply divides the ending balance by the starting balance to calculate the growth rate. Thus, all of the damages calculations presented at trial use the same growth rate for the non-breach periods. The divergence between the damages figures presented by RHA and Dr. Starks are attributable to the different ways in which they calculate damages during the breach periods.

II. THE FRAMEWORK FOR THE COURT'S DECISION

The Court must decide between the divergent estimates of damages offered by RHA and Dr. Starks. In making this decision, the governing law provides substantial guidance.

A. The Experts' Divergent Damages Opinions

RHA offered two alternative calculations of damages, depending on whether the legal presumption in *Confederated Tribes of Warm Springs Reservation of Or. v. United States*, 248 F.3d 1365, 1371 (Fed. Cir. 2001) (*Warm Springs*) is applied to select the maturity structure of the "but for" damages model.[2] RHA calculated damages of **$133,125,302** if the *Warm Springs* presumption is used, and **$113,830,811** if it is not used. (JX-442, WSIG-TRIAL-08862.) These figures include damages through June 30, 2020.

Dr. Starks originally calculated damages of **$74,769,612** through September 30, 2013. (JX-435 at WSIG-TRIAL-08291, ¶ 80, WSIG-TRIAL-08295-96, ¶ 90.) She subsequently increased her calculation of damages for the 326-A Funds by $34,823. (JX-438, WSIG-TRIAL-08460, n.55.) This revision increased the total damages to **$74,804,435**. On instructions from Government counsel, Dr. Starks did not calculate any damages after September 2013. (JX-438, WSIG-TRIAL-08455, ¶¶ 33-34; Trial Tr. vol. 2, 440:15-25, July 22, 2020.) On the eve of trial Dr. Starks filed a surrebuttal declaration in which – based on new instructions from counsel – she opined that WSIG should receive prejudgment interest for the period after September 2013 based on risk-free spot interest rates using 3-month or 6-month Treasury bills. The addition of this prejudgment interest yields a total of $79,189,854 if 3-month rates are used or $79,684,062 if 6-month rates are used. (DX-2120, WSIG-TRIAL-010667, ¶ 9, WSIG-TRIAL-010669.) WSIG has filed a motion to strike Dr. Starks' untimely new opinion on this issue. (ECF 190.)

[2] "Where several alternative investment strategies would have been equally plausible, the court should presume that the funds would have been used in the most profitable of these." *Warm Springs*, 248 F.3d at 1371 (quoting *Donovan v. Bierwirth*, 754 F.2d 1049, 1056 (2d Cir. 1985)).

B. Choosing Between The Experts' Opinions

Both RHA and Dr. Starks followed the same two basic steps to calculate damages. First, each established a maturity structure for the 326-K Fund (or 326-A Funds) during each of the breach periods. Second, each established a rate of return for that maturity structure. Then each of them used a mathematical model to compute the resulting investment returns that the Government should have earned and the amount of damages.

If the experts' damages models are equally plausible, the Court is required to adopt RHA's model. *See Jicarilla Apache Nation v. United States*, 112 Fed. Cl. 274, 310 (2013) (*Jicarilla Apache III*). This is because "the 'risk of uncertainty as to the amount of loss' falls on the government." *W. Shoshone*, 143 Fed. Cl. at 627 (quoting *Warm Springs*, 248 F.3d at 1371).

Here RHA's calculation of damages is actually far more plausible than Dr. Starks' calculation. RHA bases its maturity structures on the Court's liability findings. For the damages periods where a maturity structure in the range between 5-10 years would be prudent, RHA offers two alternatives: a 10-year structure based on the legal presumption in *Warm Springs*, and a 7.86-year structure based on the average maturity of the 326-K Fund during the period (1992-1997) the Court found that it was prudently invested. RHA then uses the market-average rate of return (derived from Barclays U.S. Treasury indexes) for each of these maturity structures to calculate damages. Neither of the two essential elements of RHA's calculations – the maturity structure and the rate of return – is based on its own opinion. Instead, they are based on objective factors.

In contrast, Dr. Starks relies on her own new opinion (which differs from her previous opinions) to select a maturity structure at the lowest bound of the 5-10 year range the Court found to be prudent. Then, to establish a rate of return for that maturity structure, she selects one particular investment strategy – Treasury bond ladders – out of the countless options available.

Thus, both essential elements of her damages calculations are based entirely on her own opinions rather than objective factors. Furthermore, her damages model is not plausible because it utilizes an investment strategy (bond ladders) that the Government never actually used in investing the Docket 326 Funds, and that produces a below-average return.

III. APPLICABLE LEGAL STANDARDS AND BURDENS OF PROOF

A. The Burdens Of Proof As To Damages

1. WSIG's burden of proof

WSIG has the burden to prove that the Government committed a breach of trust and that a loss resulted. *See Restatement (Third) of Trusts, Liability of Trustee for Breach of Trust* § 100 cmt. f (2012). Both of those burdens have been met here. The Court has already ruled that the Government committed a breach of trust by imprudently investing the Docket 326 Funds in too short-term a manner during the liability periods. And it is undisputed that a loss resulted from that breach of trust; the parties simply dispute the amount of that loss.

2. The Government's burden of proof

"'[O]nce the beneficiary has shown a breach of the trustee's duty,' the 'risk of uncertainty as to the amount of loss' falls on the government." *W. Shoshone*, 143 Fed. Cl. at 627 (quoting *Warm Springs*, 248 F.3d at 1371). Thus, "[w]here several alternative investment strategies would have been equally plausible, the court should presume that the funds would have been used in the most profitable of these. The burden of proving that the funds would have earned less than that amount is on the fiduciaries found to be in breach of their duty. Any doubt or ambiguity should be resolved against them." *Warm Springs*, 248 F.3d at 1371 (quoting *Donovan*, 754 F.2d at 1056); *see also Jicarilla Apache III*, 112 Fed. Cl. at 310; *Osage Tribe of Indians of Okla. v. United States*, 96 Fed. Cl. 390, 407-09 (2010) (*Osage IV*).

B. The Damages To Which WSIG Is Entitled

WSIG is "entitled to a reasonable estimate of the damages it is due." *W. Shoshone*, 143 Fed. Cl. at 627 (quoting *Osage Tribe of Indians of Okla. v. United States*, 97 Fed. Cl. 542, 544 (2011)). "'The ascertainment of damages is not an exact science,' the Federal Circuit has warned, and 'where responsibility for damages is clear, it is not essential that the amount thereof be ascertainable with absolute exactness or mathematical precision.'" *Id.* (quoting *Jicarilla Apache III*, 112 Fed. Cl. at 304-05). "'[C]are must be taken lest the calculation of damages become a quixotic quest for delusive precision or worse, an insurmountable barrier to any recovery.'" *Id.* (quoting *Franconia Assocs. v. United States*, 61 Fed. Cl. 718, 746 (2004)).

"Under the Federal Circuit's standard, the [plaintiff] is required to select and prove neither the 'best' nor the 'most appropriate' benchmark." *Jicarilla Apache III*, 112 Fed. Cl. at 310. If the plaintiff's damages model reflects an investment strategy that was at least as plausible as the alternatives offered by defendant, the court is required to presume that the funds would have been invested in this fashion. *See id.*

The principle that the beneficiary should receive the benefit of any uncertainty as to the amount of damages is reinforced by the Government's fiduciary duty to invest Indian trust funds so as "to maximize the trust income by prudent investment." *Cheyenne-Arapaho Tribes v. United States*, 512 F.2d 1390, 1394 (Ct. Cl. 1975); *Jicarilla Apache III*, 112 Fed. Cl. at 289. Congress reaffirmed this duty to maximize the return on tribal trust funds in the American Indian Trust Fund Management Reform Act. 25 U.S.C. § 4043(b)(2)(B).

C. The Measure Of Damages For Imprudent Investment

The measure of damages for breach of trust is the profit which would have accrued to the trust if there had been no breach. "In determining the amount of damages for a breach of the

trustee's fiduciary duty with regard to investments of the trust property, courts attempt to place the beneficiary in the position in which it would have been absent a breach." *Warm Springs*, 248 F.3d at 1371. "[T]he recovery from a trustee for imprudent or otherwise improper investments … would be the difference between (1) the value of those investments and their income and other product at the time of surcharge and (2) the amount of funds expended in making the improper investments, increased (or decreased) by a projected amount of total return (or negative total return) that would have accrued to the trust and its beneficiaries if the funds had been properly invested." *Restatement (Third) of Trusts, Liability of Trustee for Breach of Trust* § 100 cmt. (b)(1) (2012).

"Losses to a [trust fund] from breaches of the duty of prudence may be ascertained, with the help of expert analysis, by comparing the performance of the imprudent investments with the performance of a prudently invested portfolio." *Evans v. Akers*, 534 F.3d 65, 74 (1st Cir. 2008). "Where … the breach arises from a pattern of investment rather than from investment in a particular stock, courts will rarely be able to determine, with any degree of certainty, which stock the investment manager would have sold or declined to buy had he complied with investment guidelines." *Dardaganis v. Grace Capital Inc.*, 889 F.2d 1237, 1244 (2d Cir. 1989). In such cases, "the projected returns on indefinite hypothetical investments during the surcharge period may appropriately be based, inter alia, on … market indexes." *Restatement (Third) of Trusts, Liability of Trustee for Breach of Trust* § 100 cmt. (b)(1) (2012); *see Cal. Ironworkers Field Pension Trust v. Loomis Sayles & Co.*, 259 F.3d 1036, 1046-47 (9th Cir. 2001) (upholding trial court's decision to rely on a "benchmark yield as an approximation of what the improperly invested funds would have earned if properly invested").

The Court of Federal Claims has previously approved the use of a market index as a benchmark for determining the performance of a properly invested portfolio in order to calculate

damages. *See Jicarilla Apache III*, 112 Fed. Cl. at 307-10. A number of other courts have likewise approved the use of market indexes for this purpose. *See*, *e.g.*, *Maiz v. Virani*, 253 F.3d 641, 664 (11th Cir. 2001); *Alco Indus., Inc. v. Wachovia Corp.*, 527 F. Supp. 2d 399, 410 (E.D. Pa. 2007); *Williams v. Sec. Nat'l Bank of Sioux City*, 358 F. Supp. 2d 782, 804 (N.D. Iowa 2005).

D. Damages Accrue Up To The Time Of Trial And Are Not Prejudgment Interest

"[A] recovery for past damages ordinarily includes not only those damages that the plaintiff incurred before filing the complaint, but also any damages that the plaintiff incurs up to the time of trial." *McAllister v. Sec'y of Health and Human Servs.*, 70 F.3d 1240, 1243 (Fed. Cir. 1995). In this case, damages include lost investment income on the additional amounts (i.e., the accrued damages) that should have been in the Docket 326 accounts as of September 30, 2013. "In fact, what plaintiff seeks as additional damages is investment income it claims was lost during the period between [September 30, 2013] and [June 30, 2020]—income that, it claims, would have been received if the amount of principal produced by proper investment practices as of [September 30, 2013], were further invested properly up to the time of trial. This interest, accordingly, does not represent interest on the damages owed, but rather is an actual component of those damages." *Jicarilla Apache III*, 112 Fed. Cl. at 311.[3]

Likewise, in *Osage Tribe of Indians of Okla. v. United States*, the court agreed with plaintiff that "initial damages must be treated as though such funds had been in trust all along, and additional damages must be assessed for the trustee's consequent failure to invest such funds." 75 Fed. Cl. 462, 480 (2007) (*Osage III*). "Defendant cannot escape liability for its breach in failing properly to manage the trust by arguing that it was required to disburse the funds, an act it was

[3] The *Jicarilla* court added that "there is little doubt that the proper measure of damages for defendant's misfeasance in investing the trust funds will include some degree of investment income lost from October 1, 1992, to the present." *Id*. (citations omitted).

incapable of accomplishing due to its initial breach. Defendant's argument would, in effect, 'reward the [g]overnment for inaction that violates the [g]overnment's fiduciary duties to collect funds and accrue interest.'" *Id.* at 481 (quoting *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1352 n.7 (Fed. Cir. 2004)).

IV. RHA'S CALCULATION OF DAMAGES

A. RHA Established Maturity Structures For The Breach Periods Based On The Court's Findings And The Applicable Law

RHA originally calculated damages in this case based on its own opinions about what maturity structure was prudent for the Docket 326 Funds during the various periods at issue. After the Court issued its liability decision, RHA recalculated damages to use maturity structures based on the Court's findings for the breach periods, and used the actual rate of return achieved by the Government for the periods when the Court found no breach of trust. (JX-434, WSIG-TRIAL-07586.)[4]

1. 326-K Fund: 1980-1992

RHA determined the appropriate maturity structure of the 326-K Fund for the initial breach period (August 1980 – November 1992) by using the same maturity structure that the Court found to be appropriate during the following non-breach period (December 1992 – March 1997). The Court found that the Government had invested the Fund prudently during the later period because it had "lengthened the maturity structure of the 326-K Fund into longer-term securities, with an

[4] Dr. Starks criticized the way RHA originally calculated the growth of the Docket 326 Funds during the non-breach periods. She argued that it was more appropriate to determine the growth rate during those periods by simply dividing the ending balance by the starting balance. After review, RHA agreed that their approach had inadvertently "result[ed] in a larger growth rate in the non-breach period than was realized by the Government." (Trial Tr. vol. 1, 152:5-7, July 21, 2020.) Accordingly, RHA adopted the approach advocated by Dr. Starks. (Trial Tr. vol. 1, 121:17-25, July 21, 2020.) Thus, all of the damages calculations presented at trial use the same methodology for the non-breach periods.

average weighted maturity years to call ranging from approximately five to ten years." *W. Shoshone*, 143 Fed. Cl. at 658-59. The Court explained that, "[a]lthough the government could have possibly invested the 326-K Fund in more longer-term securities following the approximate ten-year peak of the average weighted maturity years to call in September 1993, the government's decision to decrease the 326-K Fund to an approximate average weighted maturity years to call of a little less than five years by March 1997, is arguably within the range of prudence." *Id.* at 640. "[T]he government's decision to maintain … an average weighted maturity years to call ranging between approximately five to ten years does not appear to violate the range of prudence so as to be too short-term." *Id.*

Based on the Court's findings, RHA concluded that a maturity structure in this 5-10 year "range of prudence" would also have been appropriate for the earlier breach period. RHA reasoned that "[t]he investment horizon of the 326-K Fund during the 12-year period from August 5, 1980 through November 1992 was at least as long as the horizon during the subsequent 4.3 years. Thus, prudent investment during the earlier period required a maturity structure at least as long as during the later period, or somewhere in the range between five to ten years." (JX-434, WSIG-TRIAL-07588; *see also* Trial Tr. vol. 1, 88:2-6, July 21, 2020.)

The question then becomes what particular maturity structure between 5-10 years should be selected to compute damages. This choice makes a substantial difference in the amount of damages. RHA first examined the record for any evidence showing that the Government would have favored a particular maturity structure between 5-10 years. RHA found no such evidence. As Mr. Nunes explained, during 1992-1997, "the Government lengthened the portfolio to about 11 years, and then it immediately began to shorten somewhat substantially through roughly four years of this nonbreach period, shedding about 6 1/2 or so years of weighted average maturity in

a roughly four-year period, as well -- so no clear pattern there whatsoever except that the Government was reverting back to its old ways." (Trial Tr. vol. 1, 87:2-9, July 21, 2020.) RHA "took a look also at purchase activity to see if there was any kind of a pattern there, and it was absolutely nothing. It roams all over the map." (Trial Tr. vol. 1, 87:14-17, July 21, 2020.) "[T]here was no consistent pattern in the data that we could tease out that would reflect that the Government had any plan whatsoever …." (Trial Tr. vol. 1, 97:1-3, July 21, 2020.)

RHA also reviewed the Government's investment of the 326-K Fund over the entire course of its existence. Mr. Nunes explained that, "once [the BIA Certificate of Deposit] program was wound down and sort of conventional investing of the portfolio was happening, we could not discern any pattern, any strategy throughout the entire life of these funds." (Trial Tr. vol. 1, 117:11-15, July 21, 2020.) RHA found that "the Government's investment methodology was essentially ad hoc, with no apparent consistency, both during the 1992-1997 period when the court found it prudently invested the 326-K Fund and during the periods when it imprudently invested the 326-K and 326-A Funds." (JX-437, WSIG-TRIAL-08435.) Thus, the evidence does not demonstrate that any particular maturity structure between 5-10 years is a more plausible choice than others if the Government had invested the Fund prudently during the 1980-1992 period.

Accordingly, RHA turned to the legal presumption established in *Warm Springs* to resolve the choice of a maturity structure. This presumption is that, "[w]here several alternative investment strategies would have been equally plausible, the court should presume that the funds would have been used in the most profitable of these." Here, the most profitable maturity structure is the longest one – 10 years – and so RHA selected that structure as the basis for calculating damages. (JX-434, WSIG-TRIAL-07589.) This choice was based on the legal presumption established by the Federal Circuit, not on RHA's own opinion about what the maturity structure

should have been.

RHA also prepared an alternative calculation if the Court finds that the *Warm Springs* presumption is not applicable. Again, RHA did not impose its own judgment in selecting a maturity structure from the 5-10 year range the Court found to be prudent. Instead, it used the average maturity of the Fund during 1992-1997 as the maturity structure for the breach period. This turned out to be 7.86 years. (JX-434, WSIG-TRIAL-07589; Trial Tr. vol. 1, 89:6-16, July 21, 2020.)

2. 326-K Fund: 1997-2004

For the next two breach periods, from April 1997 – June 2004, RHA took a similar approach, keyed to the Court's finding that a maturity structure in the range between 5-10 years was prudent during 1992-1997. RHA reasoned that this same range remained prudent during the following periods. Although enactment of distribution legislation was becoming more likely, "there was no development prior to July 2004 that required any shortening of the maturity structure of the 326-K portfolio to mitigate the interest rate risk." (JX-434, WSIG-TRIAL-07590-91.) Several reasons support this conclusion. First, a prudently invested portfolio would have been highly diversified among maturities. Second, as a result of "seasoning" over time, the portfolio would have included bonds with similar maturities but different interest rates.[5] This increases the likelihood that, if securities had to be sold prior to maturity, losses on some of them would be

[5] "Seasoning" is "a form of diversification that develops over time as securities are sold or mature and are replaced, or as new securities are purchased with cash flows generated by the portfolio. Because market interest rates fluctuated (as they always do) during the entirety of the period, the 326-K portfolio would have included securities of comparable maturity that carried different interest rates because they were purchased at different times during varied interest rate cycles." (JX-434, WSIG-TRIAL-07591.)

counterbalanced by gains on others.[6] (JX-434, WSIG-TRIAL-07591; Trial Tr. vol. 1, 94:20 – 95:6, July 21, 2020.) Third, as the Court found, it was foreseeable that it would take at least two-and-a-half years after the passage of distribution legislation to identify eligible recipients and commence any distribution. *W. Shoshone*, 143 Fed. Cl. at 659. This "buffer" period provided ample opportunity to adjust the maturity structure of the 326-K Fund after the distribution legislation was actually enacted. (JX-434, WSIG-TRIAL-07591-92.)[7]

Since the 5-10 year maturity range remained prudent during these breach periods, RHA again prepared two alternative damages calculations – one using a maturity structure of 10 years based on the *Warm Springs* presumption and the other using a maturity structure of 7.86 years based on the weighted average of the 326-K portfolio during the 1992-1997 non-breach period. (JX-434, WSIG-TRIAL-07592.)

3. 326-K Fund: 2004-2006

For the final breach period, from July 2004 to September 2006, a shorter maturity structure was needed because the Distribution Act had now been enacted. To establish this new maturity structure, RHA relied on the Court's finding that the Government had invested the 326-K Fund prudently during the following period, October 2006 – December 2010, when the average maturity was 2.97 years. Once again, RHA reasoned that the investment horizon of the Fund was at least as long during the earlier breach period as during the non-breach period that followed. Therefore,

[6] Dr. Longstaff disputed that "seasoning" mitigates risk, asserting that all securities always remain subject to interest rate risk. (Trial Tr. vol. 3, 603:22 – 604:11, July 23, 2020.) This misses the point. Seasoning does not mitigate risk as to any individual security; rather, it is a form of diversification that mitigates the risk to the portfolio as a whole.

[7] Notably, Dr. Starks took the same approach in her damages model. She used the same maturity structure (in her case, five years) for all of the breach periods before the enactment of the Distribution Act in 2004. (JX-435, WSIG-TRIAL-08283, ¶ 58; Trial Tr. vol. 2, 408:13-17, July 22, 2020.)

it used 2.97 years as the maturity structure for the breach period. (JX-434, WSIG-TRIAL-07592-93; Trial Tr. vol. 1, 98:9 – 99:4, July 21, 2020.)

4. 326-A Funds: 1992 – November 1998

The first breach period for the 326-A Funds was from March 1992 – November 1998. To determine the appropriate maturity structure, RHA started from the Court's finding that the 326-A Funds had the same investment horizon as the 326-K Fund during this period. *W. Shoshone*, 143 Fed. Cl. at 655. This means that a maturity structure that was prudent for one fund would also have been prudent for the other. The Court found that the Government had prudently invested the 326-K Fund during most of this period in a portfolio whose maturity ranged between 5-10 years. Thus, RHA reasoned that a maturity structure in that same range would also have been prudent for the 326-A Funds during this period. (JX-434, WSIG-TRIAL-07594.)

As already discussed, the evidence does not show that the Government would have chosen any particular maturity structure within the range of 5-10 years had it invested the 326-A Funds prudently. RHA did not assume that the Government would have invested the 326-A Funds identically to 326-K Fund during this period because, in fact, the Government had not done so. Accordingly, RHA again used the same two alternative maturity structures to calculate damages: a 10-year structure based on *Warm Springs* and a 7.86-year structure. (JX-434, WSIG-TRIAL-07594; Trial Tr. vol. 1, 99:15 – 100:9, July 21, 2020.)

5. 326-A Funds: December 1998 – June 2004

The second breach period with respect to the 326-A Funds is from December 1998 – June 2004. The Court found that, in December 1998, "it became quite probable that the 326-A Funds would be held in perpetual trust as education grant money." *W. Shoshone*, 143 Fed. Cl. at 655. Therefore, the Court said, "the government should have begun to transition the 326-A Funds into

longer-term securities because the principal of the funds was not intended to be distributed." *Id.* at 660. Based on these findings, RHA transitioned the 326-A Funds over the first six months of 1999 to a long-term portfolio, reflecting the unlimited investment horizon for these funds. (JX-434, WSIG-TRIAL-07595.)[8]

6. 326-A Funds: July 2004 – January 2012

The final breach period with respect to the 326-A Funds is from July 2004 – January 2012. The Court found that, upon the passage of the Distribution Act, "the government had certainty that the principal of the 326-A Funds was not to be invaded." *W. Shoshone*, 143 Fed. Cl. at 660. Thus, RHA continued to use the same long-term maturity structure for these funds. (JX-434, WSIG-TRIAL-07595.)

B. RHA Established Market-Average Rates Of Return For The Selected Maturity Structures

Once RHA determined the appropriate maturity structure of the Docket 326 Funds during the breach periods, the next step was to determine the rate of return for a portfolio with that maturity structure. "A return projection for 'properly invested' funds should reflect the standards of prudent investment . . . and should not rely on hindsight . . . in selecting a benchmark . . . for hypothetical performance." *Restatement (Third) of Trusts, Liability of Trustee for Breach of Trust* § 100 cmt. (b)(1) (2012).

However, there are countless different strategies for prudently investing funds with a particular investment horizon. The only commonality among them is that the maturity structure of the portfolio will match the investment horizon. When asked how many possible strategies

[8] Dr. Starks, in her revised calculation of damages for the 326-A Funds, also shifted them to a long-term portfolio at this point although she did not use any transition period. (JX-438, WSIG-TRIAL-08460, n.55.)

could have been used to invest the Docket 326 Funds, Mr. Nunes replied "I hesitate to say infinite, but certainly there could be hundreds of different portfolios . . . and there could have been hundreds of different variations, all -- all still properly aligned, you know, with the investment horizon of the funds." (Trial Tr. vol. 2, 281:16-21, July 22, 2020.)

Unless the evidence shows that the trustee would have used a particular investment methodology if the funds had been invested prudently, RHA "see[s] no justification for an expert to select [a methodology] on the basis of his or her opinion. To the contrary, the damages model should be as neutral and objective as possible." (JX-437, WSIG-TRIAL-08436.) This is because "[t]he selection of a particular investment methodology can significantly affect the amount of damages." (*Id.*)

The *Restatement of Trusts* takes a similar view. It provides that "the projected returns on indefinite hypothetical investments during the [liability] period may appropriately be based, inter alia, on: [1] the return experience (positive or negative) for other investments, or suitable portions of other investments, of the trust in question; [2] average return rates of portfolios, or suitable parts of portfolios, of a representative selection of other trusts having comparable objectives and circumstances; or [3] return rates of one or more suitable common trust funds, or suitable index mutual funds or market indexes (with such adjustments as may be appropriate)." *Restatement (Third) of Trusts, Liability of Trustee for Breach of Trust* § 100 cmt. (b)(1) (2012) (emphases added). This list of potential damages measures does not include an opinion by an expert about how the trust funds at issue would/should have been invested. Instead, the *Restatement* sets forth various objective measures, including market indexes.

1. The evidence does not support the use of any particular investment strategy to calculate damages

Here, the evidence does not indicate that the Government would have used a particular investment methodology or strategy had it invested the Docket 326 Funds prudently. The Government's investment policies do not mandate any particular investment methodology. As the Court noted in its liability decision, "the Department of the Interior issued various policies regarding the investment of tribal trust funds over the investment period in question, but the policies did not give much direction on which investment practices and investments might be considered prudent or imprudent." *W. Shoshone*, 143 Fed. Cl. at 622. Those policies "give very limited guidance and set almost no rules regarding what would or would not be a prudent investment of tribal trust funds." *Id.* at 624.

Nor did the Government follow any consistent investment methodology in practice. The Court commented on the absence of any evident method in the Government's investment decisions with respect to both the 326-K Fund and the 326-A Funds. Regarding the investment of the 326-K Fund, the Court noted that, by 1998, the Government "appears to have drifted back to its old investment pattern from the 1980s and early 1990s." *W. Shoshone*, 143 Fed. Cl. at 643 (emphasis added). Similarly, the Court noted, "the likely explanation for the government's inconsistent pattern of investment of the 326-A Funds between December 1998 and June 2004 is that 'there's really no plan here, that this is just sort of happening for whatever reason that we can't really identify.'" *Id.* at 657.

RHA concluded that "the Government's investment methodology was essentially ad hoc, with no apparent consistency, both during the 1992-1997 period when the court found it prudently invested the 326-K Fund and during the periods when it imprudently invested the 326-K and 326-A Funds. The Government's ad hoc, inconsistent methodology is highlighted by the disparity

between its investment of the 326-K Fund and its investment of the 326-A Funds [which had the same investment horizon] in the period before December 1998." (JX-437, WSIG-TRIAL-08435.) Thus, the evidence does not support the use of any particular investment strategy to calculate damages because the Government never consistently followed a particular strategy when it did prudently invest the Docket 326 Funds.

2. Benchmarks provide a neutral and objective measure of market-average returns

Since the Government's actual investment practices do not provide a template for measuring damages, it is necessary to turn elsewhere. Instead of making a subjective decision about exactly how the Docket 326 Funds should have been invested by the Government, RHA used benchmarks which reflect the market-average rate of return for a diversified portfolio with the appropriate maturity structure. This approach is neutral and objective. As Mr. Nunes explained, "[w]e are strategy- and portfolio-agnostic, and we want to be strategy- and portfolio-agnostic because we recognize that to achieve a certain term structure of a portfolio, it could be done any number of ways, and so the indexes are plain vanilla in that regard, and they provide us, again, with a sort of baseline. It's the market average performance based on the rules of the index, without any subjectivity whatsoever." (Trial Tr. vol. 1, 107:19 – 108:1, July 21, 2020.) RHA's approach assumes that prudent investment in a correct maturity structure would have achieved results that match the market-average performance. No more and no less. (JX-437, WSIG-TRIAL-08436-37.) Furthermore, this approach comports with the Government's investment policy, which specified that "portfolios should be structured to achieve at least a market-average rate of return throughout economic cycles . . . ." (JX-280, WSIG-TRIAL-03025, ¶ C.)

RHA's benchmark approach to calculating damages does not specify how the funds should have been invested during the period at issue. It does not specify an active or a passive investment

strategy. It does not specify what securities should have been purchased or how long they should have been held. Instead, its benchmarks reflect the market-average investment return for a diversified portfolio with the appropriate maturity structure. RHA's benchmark approach assumes that prudent investment in a correct maturity structure would have achieved results that match the market-average performance. The benchmarks are "passive and unbiased measures of the returns that could be achieved through prudent investment, regardless of the particular investment methodology that was employed." (JX-437, WSIG-TRIAL-08437 (emphases in original).)

RHA's benchmarks are "based neither upon the notion that there would be active management of the tribal trust funds nor upon any assumption that the funds would have been invested so as to generate an extraordinary performance that beat the market." *Jicarilla Apache III*, 112 Fed. Cl. at 308. As Mr. Nunes testified, "[s]o I guess if this was a term paper, we're looking for a C or a C-plus here, because that's sort of the standard grade . . . ." (Trial Tr. vol. 1, 102:20-22, July 21, 2020.) He summarized RHA's approach succinctly during cross-examination: "To determine what the earnings rate should be if the Government had properly aligned the term structure of the portfolio with the investor horizon, we simply use market average returns for a plain vanilla, nonsubjective, nonhuman intervention index that says here's what the market did." (Trial Tr. vol. 2, 232:8-13, July 22, 2020.)

3. Barclays indexes provide appropriate benchmarks

To develop these market-average benchmarks, RHA used the Barclays U.S. Treasury indexes. These indexes "provide an objective, neutral measure of market average performance." (Trial Tr. vol. 1, 102:17-19, July 21, 2020.) They are "an absolute passive measure of the market" that "involves no portfolio manager managing the money." (Liability Trial Tr. vol. 2, 292:2-5, Oct. 11, 2017.) Mr. Nunes explained how RHA selected these indexes. It examined various

indexes that were restricted to Treasury and federal agency bonds and concluded that only the Barclays Treasury indexes are fully compliant with the statutory restrictions on the investment of Indian trust funds. (Liability Trial Tr. vol. 2, 290:18 – 291:5, Oct. 11, 2017; Damages Trial Tr. vol. 2, 279:25 – 280:22, July 22, 2020.)

Further, these indexes are an inherently conservative benchmark of investment performance because the yield on Treasury bonds is typically less than the yield on agency bonds, which were also permissible investments. (Liability Trial Tr. vol. 2, 291:5-20, Oct. 11, 2017; JX-437, WSIG-TRIAL-08436, n.7.) "[T]he index is simply providing the market average return of a – you know, what turns out to be a very conservative portfolio because it's comprised of treasuries." (Trial Tr. vol. 2, 282:15-18, July 22, 2020.)

RHA used three Barclays indexes to develop the benchmarks for its revised damages calculations:

- The Barclays U.S. Treasury (UST) index includes all Treasury bonds with maturities between 1-30 years.
- The Barclays Long-Term U.S. Treasury (LT) index includes all Treasury bonds with maturities between 10-30 years.
- The Barclays 1-5 year U.S. Treasury (1-5 UST) index includes all Treasury bonds with maturities between 1-5 years.

(JX-434, WSIG-TRIAL-07586.)

Because each index includes the entire market that it tracks, its composition reflects market forces rather than any judgment by RHA. As Judge Allegra noted, "[u]nder [the U.S. Treasury] index, the allocation as between short-, medium-, and long-term bonds at any point reflects market forces (i.e., all relevant obligations outstanding) rather than any judgment by plaintiff's experts or

others regarding what that mix should have been." *Jicarilla Apache III*, 112 Fed. Cl. at 307. Similarly, the particular mix of maturities in the Barclays LT index and 1-5 UST index reflects market forces in the portion of the market that they measure rather than any judgment by RHA or another expert.

4. Benchmarks for particular maturity structures are derived from the Barclays indexes

Each Barclays index has its own weighted average maturity. This average maturity fluctuates somewhat over time because it depends on the current mix of Treasury bonds outstanding in the market. For example, as Mr. Nunes explained in the first trial, the Barclays UST index "has an average maturity -- that fluctuates, because it's based on investor sentiments in the market -- but on average, it's typically in, say, a range of maturity from -- anywhere from about 6 ½ years, maybe up to about eight-ish years." (Liability Trial Tr. vol. 2, 293:14-21, Oct. 11, 2017.)

The different maturity structures of the various Barclays indexes enable RHA to use them to create benchmarks of market-average performance for a portfolio that should have a particular maturity structure. (Trial Tr. vol. 1, 105:23 – 106:7, July 21, 2020.) For example, in the *Jicarilla* case, RHA concluded that the tribal trust funds at issue should have a maturity structure that was similar to the Barclays UST index and so it used that index (without any adjustment) as the benchmark for prudent investment performance. (Liability Trial Tr. vol. 2, 293:11-13, Oct. 11, 2017.) Likewise, in its original damages model in this case, RHA used the Barclays UST as the performance benchmark for the 326-K Fund during the period between enactment of the Distribution Act in 2004 and January 2011. (JX-420, WSIG-TRIAL-06051.)

When the prudent maturity structure of the funds at issue does not match a particular Barclays index, RHA develops a market-average benchmark for that maturity structure by

combining two Barclays indexes in the correct proportions. Thus, in its original damages model in this case, RHA used a 50/50 mix of the Barclays UST index and the Barclays LT index to generate a benchmark with a weighted average maturity of approximately 15 years to calculate the performance of the 326-K Fund during the time period from 1980-2004. (JX-420, WSIG-TRIAL-06050.)

For its revised damages calculations, RHA needed benchmark rates of return for maturity structures of 10 years and 7.86 years for the 326-K Fund for the breach periods from 1980-1992 and 1997-2004, and for the 326-A Funds from their inceptions through November 1998. It needed a benchmark rate of return for a maturity structure of 2.97 years for the 326-K Fund for the period from 2004-2006. (For the 326-A Funds, RHA continued to use the Barclays LT index as the benchmark from December 1998 onward, as it had in its original model). Given that these target maturity structures fall between the weighted average maturities of the Barclays indexes, RHA combined two different indexes to develop each of these benchmarks.

When RHA combines two Barclays indexes to develop a benchmark, it starts with the Barclays UST, which is the broadest-based and most diversified because it includes all maturities from 1-30 years. (Trial Tr. vol. 2, 272:25 – 273:14, July 22, 2020.) Then RHA adds in as much of the longer or shorter index as necessary to achieve the desired weighted average maturity. (Trial Tr. vol. 1, 106:8 – 107:10, July 21, 2020; Trial Tr. vol. 2, 273:25 – 274:16, July 22, 2020.) In this case, the various benchmarks are composed as follows:

Benchmark	Period	Composition
10-year	1980-1992	86.05% Barclays UST; 13.95% Barclays LT[9]

[9] JX-434, WSIG-TRIAL-07589.

7.86-year	1980-1992	97.90% Barclays UST; 2.10% Barclays 1-5 UST[10]
10-year	Apr. – Dec. 1997	88.35% Barclays UST; 11.65% Barclays LT[11]
7.86-year	Apr. – Dec. 1997	90.20% Barclays UST; 9.80% Barclays 1-5 UST[12]
10-year	1998-2004	91.60% Barclays UST; 8.40% Barclays LT[13]
7.86-year	1998-2004	81.25% Barclays UST; 18.75% Barclays 1-5 UST[14]
2.97-year	2004-2006	6.75% Barclays UST; 93.25% Barclays 1-5 UST[15]

RHA used these benchmarks to establish the market-average rate of return for the Docket 326 Funds if they had been prudently invested during the various breach periods. Its investment model multiplies the amount of funds in the 326-K Account (or 326-A Account) during a breach period by the benchmark rate of return to calculate the market-average return that should have been achieved. The model then subtracts the return that the Government actually achieved during the breach period, yielding the amount of damages.

These performance benchmarks are not an investment strategy or methodology. To the contrary, RHA uses these benchmarks to avoid selecting a particular investment strategy. RHA is "absolutely willfully agnostic as to the manner in which the funds would be invested or could have been invested." (Trial Tr. vol. 1, 111:9-11, July 21, 2020.) As Mr. Nunes testified during the first trial, "We're using the benchmark only as a means to represent achievable returns in the market. . . . We're not dictating what the portfolio actually should have looked like." (Liability Trial Tr. vol. 2, 291:25 – 292:2, 292:22-23, Oct. 11, 2017.) He reiterated at the damages trial that RHA is

[10] *Id.*
[11] JX-434, WSIG-TRIAL-07590.
[12] *Id.*
[13] JX-434, WSIG-TRIAL-07592.
[14] *Id.*
[15] JX-434, WSIG-TRIAL-07593.

"absolutely not" saying that the Docket 326 Funds should have been invested in a manner that mimics the Barclays indexes. (Trial Tr. vol. 1, 111:2-5, July 21, 2020.)

5. Transition periods are used to effect significant changes in maturity structure

RHA used transition periods in its investment model when significant changes were made to the maturity structure of the Docket 326 Funds. It used a transition period of one-year in 1980-1981 to shift the 326-K Fund from cash equivalents into a diversified portfolio with a weighted average maturity of either 10 years or 7.86 years.[16] It used a transition period of six months in 1999 to shift the 326-A Funds into a long-term portfolio.[17] And it used a transition period of six months in 2004 to shorten the maturity structure of the 326-K Fund (from either 10 years or 7.86 years) to a weighted average maturity of 2.97 years.[18]

RHA used these same transition periods in its original investment model, except for the transition period in 2004, which it had inadvertently omitted. Mr. Nunes testified at the first trial that, "[i]n hindsight, I wish we had [used a transition period], because I think it would be more consistent." (Liability Trial Tr. vol. 2, 298:7-8, Oct. 11, 2017.) RHA corrected that oversight in its revised model. In its original model, RHA had also used a six-month transition period in 2011 to shift the 326-K Fund into cash prior to its distribution. But no such transition period was needed in the revised model because the last breach period ended in September 2006 and the 2.97 year average weighted maturity that RHA used from July 2004 – September 2006 matched the weighted average maturity of the following period.

[16] JX-434, WSIG-TRIAL-07589.
[17] JX-434, WSIG-TRIAL-07595.
[18] JX-434, WSIG-TRIAL-07593.

Mr. Nunes explained the rationale for these transition periods during the first trial. "Building a portfolio is something that you do over time. You don't buy all your securities on one day." (Liability Trial Tr. vol. 2, 275:3-5, Oct. 11, 2017.) "To suggest that you would immediately dump the 26.1 million in cash, in a sense overnight, into whatever portfolio -- long term, short term, intermediate term -- it's just not the way it's done. . . . It's an -- it would be the epitome of imprudent management." (Liability Trial Tr. vol. 5, 1155:24 – 1156:9, Oct. 16, 2017.) He reiterated this point during the damages trial: "So you have to -- to be prudent, you need to have -- when you're doing something significant, like building a portfolio of this size out of cash or cash equivalents, you must do it over some length of time and not just like flipping a light switch and all of a sudden the portfolio is built." (Trial Tr. vol.1, 90:18-23, July 21, 2020.)

Mr. Nunes illustrated this point with his own prior experience as the Chief Financial Officer of a bank that repositioned a $16 million portfolio that was in cash equivalents. This process took somewhere between 18-22 months. (Trial Tr. vol. 1, 91:2-24, July 21, 2020.) He added that "[o]ne could argue should the transition period [in this case] have been 18 months or 12 or 24 months, okay, we can have that debate, but it has to be something, and we believed, when we were creating and developing this model, that certainly one year was a reasonable length of time for a transition period to build the initial portfolio." (Trial Tr. vol. 1, 133:13-19, July 21, 2020.)[19]

Mr. Nunes also has explained why the subsequent transition periods were shorter than the initial one in 1980-1981. "When you're coming out of a structure, to reposition into a different

[19] RHA did not use a transition period to invest the 326-A Funds when they first came into existence. But the 326-A Funds were a small fraction of the amount of the 326-K Fund: $823,752.64 for Docket 326-A-1 and $29,396.60 for Docket 326-A-3. Moreover, at that time, they were effectively a part of the same overall portfolio as the 326-K Fund since the plan then was to distribute all of the Funds. In 1998, when the 326-A Funds were earmarked as a separate portfolio to create an education trust (and the amount of those Funds had grown), RHA did use a transition period to shift them into a long-term maturity structure.

structure, you have a lot more flexibility, and so it can be done prudently at a little bit of a faster pace." (Liability Trial Tr. vol. 2, 275:5-8, Oct. 11, 2017.)

C. RHA Brought Damages Forward From 2013 To Date

RHA's original damages calculations were through September 30, 2013. The final step that it took in revising those calculations was to bring them forward to the date of trial, i.e., through June 30, 2020. RHA did so based on instructions from counsel that WSIG is entitled to recover all of the damages it incurred up to the time of the damages trial. (JX-434, WSIG-TRIAL-07597.) Mr. Nunes noted that these were not calculations of prejudgment interest. "We are simply bringing damages forward." (Trial Tr. vol. 1, 134:3-4, July 21, 2020.)

To calculate the lost investment income, RHA generated appropriate performance benchmarks for this final 7-year period. For the 326-A Funds, whose principal would never be distributed, RHA used the same benchmark – the Barclays LT – that it had used for previous breach periods after these Funds were earmarked as a perpetual trust. (JX-434, WSIG-TRIAL-07597.)

For the 326-K Fund, in contrast, a new benchmark was needed. Since September 2013, the investment horizon of the monies that should have been in this Fund has depended on when this lawsuit concludes, which will result in the distribution of those monies. Litigation of this type does not proceed quickly, but it might be foreshortened by a settlement. RHA concluded that these considerations made it appropriate to select a maturity structure in the short- to intermediate-term range. Conservatively, it chose the Barclays 1-5 UST as the damages benchmark for this period. (JX-434, WSIG-TRIAL-07597-98.) This index has a weighted average maturity that is comparable to the maturity structure that the Government used from 2006-2010, during the period before the initial distributions of the 326-K Fund began. (Trial Tr. vol. 1, 114:2-14, July 21, 2020.)

D. RHA's Damages Calculations By Period

RHA's damages calculations, on a cumulative, period-by-period basis, are summarized on a chart attached to this brief as Appendix A.

V. DR. STARKS' CALCULATION OF DAMAGES

Dr. Starks opines that, to calculate damages, "it is necessary to construct plausible counterfactual (or 'but-for') portfolios comprising prudent investments in the relevant time periods." (JX-435, WSIG-TRIAL-08278, ¶ 45.) She asserts that constructing these portfolios requires selecting (1) an appropriate investment horizon, and (2) an appropriate "investment methodology" that, "in combination, reflect prudent management of the funds." (*Id.*) "[Y]ou need both an appropriate investment methodology and an appropriate investment horizon." (Trial Tr. vol. 3, 464:18-20, July 23, 2020.) But the investment horizons that Dr. Starks uses are inappropriate because they are based on her new opinions rather than the Court's findings and because her new opinions lack credibility. Further, her contention that constructing a damages model also requires selecting an appropriate investment methodology (strategy) is incorrect. And the particular methodology she selects is not plausible.

A. Dr. Starks' Investment Horizons Are *Ipse Dixits* That Lack Credibility

1. 326-K Fund

Dr. Starks opines that "the appropriate pre-Distribution Act investment horizon for the 326-K Fund was five years." (JX-435, WSIG-TRIAL-08283, ¶ 58.) She uses this investment horizon for the periods from August 1980 until November 1992, and from April 1997 until June 2004. (JX-435, WSIG-TRIAL-08267, ¶ 18, WSIG-TRIAL-08289-90, ¶ 76.) Dr. Starks does not offer an opinion on the appropriate investment horizon after the Distribution Act became law. But her model starts transitioning to a shorter maturity structure after June 2004 by reinvesting the

proceeds from maturing securities and coupon payments into one-year Treasuries rather than ten-year securities. (JX-435, WSIG-TRIAL-08289-90, ¶ 76; Trial Tr. vol. 2, 407:6-10, July 22, 2020.)

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

Dr. Starks explained her new opinion in conclusory terms: "I believe that five years – given, again, the Court's opinion, given the Government's policies, practices, and investment objectives, given the conditions at the time, and given the financial and economic theory -- that five years was the most plausible portfolio -- maturity." (Trial Tr. vol. 3, 470:4-9, July 23, 2020.) She acknowledged that, during the first trial, "I may have said I wasn't clear on [whether] the five years [was prudent]." (Trial Tr. vol. 3, 470:16-17, July 23, 2020.) Asked about when she became clear, she responded: "Well, in order to -- I haven't changed my opinion, but in order to meet with the decision that the Court has made, I had to -- I had to consider a wider range of prudence. But I hadn't said that five years wasn't prudent, only that -- the only thing I said was that 15 years wasn't prudent over that time period." (Trial Tr. vol. 3, 470:20 – 471:2, July 23, 2020) (emphasis added).) She admitted that "I took the Court's decision into account" in rendering her new opinion. (Trial Tr. vol. 3, 471:10, July 23, 2020.)

When asked whether a maturity structure longer than five years would have been prudent during the 1980s, Dr. Starks said, "Ah, it could have been. I think it would have been less plausible,

but it could have been." (Trial Tr. vol. 3, 473:17-18, July 23, 2020.) Dr. Starks could not say whether a maturity structure of seven years during the 1980s would have been prudent even if less plausible than five years. She claimed, "I would have to look at that. As I said, I looked at everything together to come up with the five years." (Trial Tr. vol. 3, 475:15-17, July 23, 2020.) Dr. Starks asserted that "I considered a number of factors in deciding on what -- what was the most plausible model that met the conditions, the Court's opinion, the -- the Government's practices and policies, finance theory, so I took all of these into account and came up with what I thought was the most plausible. So I -- I didn't go and say, okay, well, let me -- let me consider if I use six years, seven years, eight years. Perhaps those are also plausible. I considered what I chose to be the most plausible, and that's what I worked on." (Trial Tr. vol. 3, 474:14-24, July 23, 2020.) When asked if she had considered whether a maturity structure longer than five years would have been prudent during the period from 1980 to 1992, Dr. Starks responded, "And it could have been. I did not focus on the longer structures." (Trial Tr. vol. 3, 477:4-5, July 23, 2020.)

Dr. Starks also opined that the investment horizon of the 326-K Fund was shorter and more uncertain in the 1980s than during 1992-1997. (Trial Tr. vol. 3, 472:23 – 474:5, July 23, 2020.)

2. 326-A Funds

With respect to the 326-A Funds, Dr. Starks originally opined that "an average investment horizon of five years would have been prudent … until June 2004, at which point an average investment horizon of approximately 14 years would have been appropriate." (JX-435, WSIG-TRIAL-08284, ¶ 62.) She later revised this opinion in her rebuttal report to state that the shift to

a longer investment horizon could occur in December 1998. (JX-438, WSIG-TRIAL-08460, n.55.)[20] She uses these investment horizons to calculate damages for the 326-A Funds.

Dr. Starks did not address whether an investment horizon/maturity structure longer than five years would have been prudent for the 326-A Funds from their inceptions (in 1992 and 1995) until December 1998. This omission is notable because (1) the 326-A Funds had the same investment horizon as the 326-K Fund until December 1998 (*W. Shoshone*, 143 Fed. Cl. at 655); and (2) Dr. Starks previously opined – and the Court found – that the Government prudently invested the 326-K Fund in a maturity structure ranging between 5-10 years from 1992 to 1997. When asked whether the investment horizon of the 326-K Fund and the 326-A Funds was the same during the period from 1992 through December 1998, Dr. Starks equivocated: "And actually I'm not sure. I understand your question. I think there's a lot of uncertainty about the investment horizon of each of those funds." (Trial Tr. vol. 3, 490:9-11, July 23, 2020.)

3. Dr. Starks' opinions lack credibility

Although the Court found that a maturity structure between 5-10 years was prudent during 1992-1997, Dr. Starks opines that the lowest bound of that range was the prudent and most plausible maturity during the preceding period from 1980-1992. Dr. Starks asserts that the investment horizon was shorter during this earlier period than during 1992-1997 although the Court has made no such finding and the evidence is to the contrary. And, based on her conclusion that five years is the most plausible maturity, she did not consider whether any longer maturities might also be prudent. Thus, she selects the shortest, least profitable maturity structure as the basis for damages and she excludes any application of the *Warm Springs* presumption.

[20] Dr. Starks stated at trial that she could see using either 1998 or 2004 as the dividing point, and so her revision was an alternative calculation of damages in the event the Court chooses 1998. (Trial Tr. vol. 3, 484:23 – 485:7, July 23, 2020.)

What was Dr. Starks' reasoning that led to this conclusion, especially given she was "unclear" at the first trial about whether five years was a prudent maturity structure during 1980-1992? We don't really know because she refused to explain her opinions in anything other than conclusory terms. She repeatedly asserted, without elaboration, that she had considered "the Court's opinion," "the Government's policies, practices, and investment objectives," "the conditions at the time," and "financial and economic theory." Like the proverbial "black box," she listed her "inputs" and articulated her "output" (her opinion) without revealing how one led to the other. She disclosed nothing of substance that can be independently evaluated. In sum, she asks the Court to believe her because she said so. But "'[a]n expert opinion is no better than the soundness of the reasons supporting it' [and a court] does not need to credit 'expert opinion testimony that is connected to the existing data or methodology only by the *ipse dixit* of the expert.'" *K.L. v. Sec'y of Dep't of Health and Human Servs*., 134 Fed. Cl. 579, 601 (2017) (citations omitted).

Dr. Starks opined in the same conclusory manner on the maturity structures for the other breach periods. Again, she resisted any efforts to probe her reasoning. For example, Dr. Starks advocated a five-year maturity structure for the 326-A Funds from 1992-1998 although she previously blessed the 5-10 year maturity structure of the 326-K Fund during this same period. This inconsistency demands an explanation because the 326-A Funds then had the same investment horizon as the 326-K Fund. But Dr. Starks refused to provide one. Instead, she rebuffed the premise that the investment horizons for these Funds were the same. Rather than answer a legitimate question, she dodged it. This is not the hallmark of a credible opinion.

B. There is no basis to impose an "investment methodology" in calculating damages

Dr. Starks contends that constructing a damages model requires selecting an appropriate "investment methodology" in addition to an appropriate investment horizon/maturity structure. She chooses a methodology that specifies exactly how the funds should have been invested and which provides a rate of return for calculating damages. (Trial Tr. vol. 3, 464:21-24, July 23, 2020.)

Dr. Starks asserts that "an appropriate investment strategy for the BIA's management of the tribal funds would likely be one of several possible 'buy-and-hold' strategies[.]" (JX-435, WSIG-TRIAL-08279, ¶ 46.) She discusses a "bullet" strategy, a "barbell" strategy, and a "ladder" strategy as examples. She asserts that "a prudent portfolio could be managed under a 'buy-and-hold' strategy" and that "a prudent buy-and-hold portfolio could be operationalized under a ladder structure." (JX-435, WSIG-TRIAL-08284-85, ¶ 63 (emphases added).) On this basis, Dr. Starks proceeds to utilize laddered portfolios of Treasury bonds to calculate damages. For the 326-K Fund, she uses a 10-year ladder, comprised of securities ranging from one to 10 years of remaining maturity, with an average maturity of approximately five years. For the 326-A Funds, she uses the same 10-year laddered portfolio until December 1998, and then shifts to a longer ladder, ranging from one to 28 years of remaining maturity.

There are multiple reasons why Dr. Starks' laddered portfolios are not an appropriate damages measure in this case.

1. Prudent investment does not require any particular "investment methodology"

First, prudent investment does not mandate any particular "investment methodology." Dr. Starks conceded this point. (Trial Tr. vol. 3, 492:20-22, July 23, 2020.) To the contrary, there are

any number of different investment methodologies that can be prudent so long as the maturity structure of the portfolio is properly aligned with the investment horizon. Although Dr. Starks now implies that choosing an "investment methodology" is essential to prudent management, she nowhere discussed the need for a particular methodology in her previous reports analyzing whether the 326-K Fund had been prudently invested. She mentioned an "investment strategy" only in terms of aligning the investment horizon and maturity structure. For example, she asserted that "a generally accepted investment strategy for fixed income portfolios consists of matching the maturity of the investment to the investor's investment horizon." (JX-423, WSIG-TRIAL-06958-59, ¶ 84.)

Dr. Starks cannot and does not contend that the facts of this case require the use of her laddered portfolios, or any particular investment methodology. She merely asserts that "a prudent portfolio could be managed under a 'buy-and-hold' strategy" and that "a prudent buy-and-hold portfolio could be operationalized under a ladder structure." (JX-435, WSIG-TRIAL-08284-85, ¶ 63 (emphases added).) But just because one methodology could be prudent does not establish that it constitutes an appropriate measure of damages. "[T]here are endless variations in reasonable strategies for investing and for the prudent management of risk, with a variety of legitimate theories of investment to support and incorporate into these strategies." *Restatement (Third) of Trusts* § 90 cmt. h (2007). Dr. Starks does not explain why her ladder methodology should be used to measure damages instead of the innumerable alternative methodologies that might be used.[21]

[21] The Government's previous damages experts, Dr. Gordon Alexander and Justin McLean, proffered a series of 12 alternative portfolios for the investment of the 326-K Fund, none of which involved use of a "ladder" investment methodology. Dr. Starks does not explain why she adopts a ladder methodology in preference to the various alternatives that the other Government experts put forward.

2. The evidence does not support the use of Dr. Starks' ladder methodology

Dr. Starks acknowledges that an investment portfolio used to model damages must be plausible. (JX-435, WSIG-TRIAL-08278, ¶ 45, WSIG-TRIAL-08285, ¶ 64.) But her buy-and-hold, laddered portfolios are not a plausible damages model based on the evidence in this case. Given the Government's investment policies and actual investment practices, it is not plausible that the Government would have invested the 326-K and 326-A Funds in the rigid bond ladders that Dr. Starks proposes.

The Government's investment policies do not mandate any particular investment methodology. As the Court noted, "the Department of the Interior issued various policies regarding the investment of tribal trust funds over the investment period in question, but the policies did not give much direction on which investment practices and investments might be considered prudent or imprudent." *W. Shoshone*, 143 Fed. Cl. at 622. Those policies "give very limited guidance and set almost no rules regarding what would or would not be a prudent investment of tribal trust funds." *Id.* at 624.

Dr. Starks argues that her bond ladders comport with the Government's buy-and-hold investment policy. But no such policy existed until 1997, when the Government adopted a policy stating that it "will purchase securities with the intent to hold each security until maturity, while realizing that sales can and may occur prior to maturity" for reasons including an opportunity to improve yield or quality. (JX-280, WSIG-TRIAL-03029.) This was not a strict buy-and-hold policy and the Government did not treat it as such. Thereafter, the Government repeatedly sold securities in the 326-K portfolio in advance of maturity. From 1997 to August 2011, there were 60 instances in which securities were sold before maturity: 12 of these transactions produced capital losses of approximately $744,000; 34 transactions produced capital gains totaling about

$4.45 million; the remaining transactions resulted in neither a capital gain nor a capital loss. (JX-437, WSIG-TRIAL-08434.)

Furthermore, the Government's policy never mentioned the type of bond ladders that Dr. Starks proposes. It did state that tribal portfolios should be structured "in a 'laddered' fashion consisting of a variety of security types and maturity dates." (JX-375, WSIG-TRIAL-05067.) The policy explained that this is achieved by using a mix of short-term, intermediate-term, and long-term securities. (*Id.* at WSIG-TRIAL-05068.) In other words, the Government used "laddered" as a synonym for "diversified." Although the Government's investment policy permitted the use of the bond ladders that Dr. Starks proposes, it did not discuss or recommend such ladders.

More importantly, the Government's actual investment practices were completely at odds with Dr. Starks' bond ladders. As discussed above, the Government never followed any consistent methodology in investing the Docket 326 Funds. The Court commented on the absence of any evident method in the Government's investment decisions. It observed that, by 1998, the Government's investment of the 326-K Fund "appears to have drifted back to its old investment pattern from the 1980s and early 1990s." *W. Shoshone*, 143 Fed. Cl. at 643 (emphasis added). Similarly, it noted, "the likely explanation for the government's inconsistent pattern of investment of the 326-A Funds between December 1998 and June 2004 is that 'there's really no plan here, that this is just sort of happening for whatever reason that we can't really identify.'" *Id.* at 657. In fact, aside from the imprudent BIA Certificate of Deposit program, "the Government's investment methodology was essentially ad hoc, with no apparent consistency" throughout this case. (JX-437, WSIG-TRIAL-08434-35.)[22] The Government's erratic investment practices were the

[22] Even Dr. Starks acknowledged that the Government "used different methodologies over the time period." (Trial Tr. vol. 3, 494:9-10, July 23, 2020.) "They changed their methodology over time." (Trial Tr. vol. 3, 495:1-2, July 23, 2020.)

antithesis of the rigid, mechanical use of bond ladders that Dr. Starks proposes as the appropriate "but for" model to measure damages.

Most telling of all, the Government never actually invested the 326-K or 326-A Funds in a laddered portfolio throughout their existence. Indeed, RHA has never seen an instance where the Government, on its own volition, employed a ladder in investing tribal trust funds. (JX-437, WSIG-TRIAL-08434; Trial Tr. vol. 1, 116:19-24, July 21, 2020.)[23] Thus Dr. Starks proposes to measure damages by using an investment strategy that the Government never actually used for the Docket 326 Funds. This, by itself, makes her damages model completely implausible.

C. Dr. Starks' Damages Model Is Not Plausible

Dr. Starks does not demonstrate that using her laddered portfolios to calculate damages is either more plausible or more accurate than RHA's use of a benchmark reflecting the market average rate of return. She does not explain why her investment methodology, which would have produced a return far below the average performance of the market, furnishes a better measure of damages.

At every step, Dr. Starks' damages model is based on her own judgments that drive down the amount of damages. Thus, she chose the shortest, lowest-yielding maturity structure from the 5-10 year range that the Court found prudent and insisted that it was the most plausible one. Likewise, Dr. Starks took the same "because I say so" approach to selecting an investment

[23] The Government showed Mr. Nunes a 1999 presentation made to the Te-Moak Western Shoshone Council which discusses building a "laddered" portfolio of fixed income securities. DX-2121, WSIG-TRIAL-10685. But, as discussed above, the Government's investment policy used the phrase "laddered" as a synonym for diversified across maturities. The Government did not establish that the Government ever actually invested Te-Moak funds in a bond ladder. (See Trial Tr. vol. 2, 264:14-17, July 22, 2020.) The single document the Government produced which shows the actual use of a ladder involved an investment of the Jicarilla Apache water rights fund made at tribal direction. (DX-2122, WSIG-TRIAL-10699) ("Per tribal instruction these funds are invested in a six month ladder with monthly rungs.").

methodology. Here the arbitrary nature of her choice is even more glaring. First, there was no need for her to select a particular methodology – she could instead have used a neutral benchmark as RHA did. Moreover, although Dr. Starks claimed that she considered the Government's actual investment practices in structuring her portfolio, (Trial Tr. vol. 3, 506:22 – 507:1, July 23, 2020), the evidence conflicts with her choice. The investment methodology Dr. Starks selected is one that the Government never used in investing the Docket 326 Funds and that is completely at odds with the ad hoc, inconsistent manner in which the Government actually invested those Funds.

Dr. Starks' choice of Treasury bonds, rather than agency securities, as the investments for her damages model is also revealing. She acknowledged that, most of the time, agency securities offer a higher coupon than U.S. Treasuries of the same maturity. (Trial Tr. vol. 3, 508:9-11, July 23, 2020.) Because of their higher return, the Government invested the Docket 326 Funds primarily in agency securities rather than in Treasury bonds. (DX-2121, WSIG-TRIAL-10689.) However, Dr. Starks became evasive when asked whether she had considered using agency securities in her damages model:

> ***Q. Dr. Starks, in constructing your model but-for portfolio, did you consider using agency securities in addition to U.S. Treasuries?***
>
> *A. Ah, yes. The problem was, as Mr. Nunes has explained -- and he also only uses U.S. Treasuries -- is the difficulty with being sure that the agency bonds met the requirements of the -- of the Government.*
>
> ***Q. Well, Mr. Nunes' problem was that he couldn't find an index of agency securities where the entire index matched the investment limitations of Section 162. Do you recall his testimony on that score?***
>
> *A. Yes, I do.*
>
> ***Q. All right. But you didn't have the same constraint, did you?***
>
> *A. Well, I had a constraint in that I would be happy to make decisions on individual agency securities across time and to have a -- in some sense a pure, practical portfolio that would meet the Government's requirements throughout this long time*

> *period. I used Treasury securities, which is the same base that Rocky Hill uses over the time period.*
>
> ***Q. Well, couldn't you have constructed a ladder with agency securities?***
>
> *A. You can certainly structure a ladder with agency securities. Again, I don't know that that was plausible over this entire time period. You would have had to have been careful about -- about the agency securities, which would have required human intervention on my part and making judgment calls. So I decided to be pure and just use the Treasury securities, and I, again, point out that Rocky Hill did the same thing in terms of only using Treasury securities.*

(Trial Tr. vol. 3, 509:18 – 510:24, July 23, 2020.)

Dr. Starks' professed reluctance to "intervene" and make "judgment calls" to select particular agency securities with the requisite maturities for her laddered portfolio rings hollow. She was more than willing to intervene and make judgment calls about the correct maturity structure and about the appropriate investment methodology in ways that drove down damages. She is only reluctant to "intervene" where doing so would increase the amount of damages. Likewise, her attempt to justify her selection of lower-yielding Treasury bonds on the grounds that RHA had also used them is completely incredible. She attacked RHA's approach to calculating damages left, right, and sideways. No other part of her damages model was built on emulating RHA.

For all of these reasons, Dr. Starks' damages model is not a plausible measure of damages. Her choice of maturity structure is not credible because it is based solely on her own opinions, which she has been unwilling to candidly elucidate. Her investment methodology is not plausible because the Government never invested the Docket 326 Funds in the manner she advocates.

VI. DR. STARKS' CRITICISMS OF RHA'S INVESTMENT MODEL

Dr. Starks also makes a series of criticisms of RHA's investment model. She professes to find various conceptual flaws in RHA's methodology, and contends that RHA made a series of errors in calculating damages. However, none of her criticisms survives scrutiny.

A. There Are No Conceptual Flaws In RHA's Investment Model

1. RHA's model does not conflict with Government policies and practices

Dr. Starks contends that RHA's investment model conflicts with the Government's policies and practices in various ways. But the manner in which RHA's model is constructed precludes any such conflict. There are two major components in the model – a maturity structure and a rate of return. RHA selected its two alternative maturity structures from within a range that the Court has ruled was prudent. How can a prudent maturity structure violate the Government's investment policies or practices? And RHA selected a market-average rate of return that does not require use of any particular investment methodology. How can a market average rate of return conflict with the Government's policies and practices?

a. The presumptive limit on maximum maturities

Dr. Starks contends that both of RHA's alternative maturity structures (the 10-year structure and the 7.86-year structure) ignore a Government policy that limited the maximum maturity of investments to 10 years absent permission. (JX-438, WSIG-TRIAL-08458-59.) But this 10-year limit did not even come into existence until 1997 and it lasted only two years, at which point the limit was raised to 15 years. (JX-280, WSIG-TRIAL-03027; JX-320, WSIG-TRIAL-03604.) Further, the Government did not, in practice, limit the maturities that it purchased for the Docket 326-K Fund. To the contrary, as Dr. Starks previously noted, from November 1992 "until just prior to the first distributions, the Government kept the WSIG funds invested in a mix of

investments with maturities ranging from 1 day to 30 years." (JX-423, WSIG-TRIAL-06983, ¶ 148.) So these limits would not have precluded either of RHA's maturity structures.

Moreover, both of RHA's maturity structures are in a range that the Court has ruled was prudent. The Government's investment policies, including the 10- and 15-year limits, cannot preclude or limit the choice of a prudent maturity structure for a particular trust account. If prudent investment of the Docket 326 Funds called for the purchase of securities with maturities longer than the presumptive limit set by the Government's policy, the limit must give way. Indeed, Dr. Starks assumes that when her investment model for the 326-A Funds required bonds with maturities up to 28 years, permission would have been granted to purchase them. (JX-435, WSIG-TRIAL-08285, n.92.) She did so because that is what prudent investment of the funds required. (Trial Tr. vol. 3, 502:21 – 503:13, July 23, 2020.) The presumptive maturity limit in the Government's investment policy poses no greater obstacle to RHA's investment model than it does to Dr. Starks' own model.

b. The buy-and-hold policy or practice

In order to argue that RHA's benchmarks conflict with the Government's policies and practices, Dr. Starks mischaracterizes them as being an investment strategy and incorrectly criticizes them on that basis. She alleges that "RHA's index approach requires that the BIA continuously trade securities, regularly selling them before they mature," which conflicts with the Government's general buy-and-hold policy. (JX-438, WSIG-TRIAL-08457, ¶ 38.) She adds that such a strategy would have been infeasible because "there were no bond index funds in operation until after the start of the investment period here." (JX-435, WSIG-TRIAL-08279, n.72.) This is an attack on a "straw man" that does not exist because RHA's benchmarks are not an investment strategy. To the contrary, RHA is "willfully agnostic as to the manner in which the funds would

be invested or could have been invested." (Trial Tr. vol. 1, 111:9-11, July 21, 2020.) RHA is "absolutely not" saying that the Docket 326 Funds should have been invested in a manner that mimics the Barclays indexes. (Trial Tr. vol. 1, 111:2-5, July 21, 2020.) RHA's benchmarks simply provide a market-average rate of return for a portfolio with a particular maturity structure. Thus, as Mr. Nunes noted, the Government's buy-and-hold policy is irrelevant to RHA's model because "we steadfastly refrain from dictating any strategy for managing the funds whatsoever." (Trial Tr. vol. 2, 279:3-5, July 22, 2020.)

Dr. Starks contended that RHA selected an investment strategy by using the Barclays indexes. (Trial Tr. vol. 3, 518:9-17, July 23, 2020.) This is nonsense. An index is simply a measure of the performance of a particular market. For instance, the S&P 500 Index measures the stock performance of 500 large companies. It is true that an investor can adopt a strategy of emulating a particular index, and that index mutual funds – whose holdings match or track a particular market index – have become popular. But that is not what RHA proposes here. It uses the Barclays indexes for their original purpose as a measure of the market-average performance of Treasury bonds. Its benchmarks are "passive and unbiased measures of the returns that could be achieved through prudent investment, regardless of the particular investment methodology that was employed." (JX-437, WSIG-TRIAL-08437 (emphases in original).)

2. RHA's benchmarks are appropriate measures of performance

Dr. Starks also contended that, even if the Barclays indexes are not investment strategies, they are not fair or reasonable measures of the performance that the Government could be expected to achieve with its buy-and-hold approach to investing. (Trial Tr. vol. 3, 578:9-25, July 23, 2020.) When asked if a buy-and-hold strategy is capable of achieving a market-average return as measured by the Barclays indexes, she engaged in circumlocution: "Well, the Barclays Index over

this period is selling bonds, every single bond before maturity. Interest rates were going from an all-time high, so it turns out that over this period, for the -- that a huge proportion of those returns came from running a strategy that's counter to the Government's buy-and-hold strategy or their holding-versus-trading strategy." (Trial Tr. vol. 3, 527:5-11, July 23, 2020.) Dr. Starks implied (without actually asserting) that a buy-and-hold approach cannot achieve a market-average return as calculated by the Barclays indexes. This contention is unpersuasive for two reasons.

First, as Dr. Goldstein explained, "the core benefit of investing in longer-term bonds over time [is] the ability to lock-in higher rates. . . . As long as an investor follows a buy and hold strategy, they can benefit from locking in rates while realizing no capital gains or losses." (JX-425, WSIG-TRIAL-07142, ¶ 173.) Thus, if an investor purchases a 10-year bond with an 8% return and rates drop to 7%, the investor can either sell and realize an immediate capital gain or else hold the bond and continue receiving the above-market returns until the bond matures. It simply is not true that a buy-and-hold strategy cannot achieve the same returns as an active strategy based on selling bonds prior to maturity. Were that the case, then no one would follow buy-and-hold strategies. Accordingly, the Barclays indexes, which track the average performance of the entire market, are a fair measure of performance regardless of the particular investment strategy being employed.

Second, the evidence showed that the Government, itself, repeatedly used Barclays indexes as benchmarks for its performance in investing tribal funds. (PX-1002, WSIG-TRIAL-10824; JX-375, WSIG-TRIAL-05115, ¶ 12 and WSIG-TRIAL-05120, ¶ 60; JX-412, WSIG-TRIAL-05951 and WSIG-TRIAL-05955.) Certainly, the Government would not have done so if it believed that the Barclays indexes were inappropriate measures of its performance. Thus, neither the

Government nor Dr. Starks can now credibly complain that RHA has created unfair measures of market-average investment performance by basing its benchmarks on the Barclays indexes.

3. RHA does not use hindsight impermissibly

a. Warm Springs calls for use of hindsight

Dr. Starks argues that RHA impermissibly uses hindsight in calculating damages. First, she contends that, "[s]etting aside RHA's reliance on … *Warm Springs*, . . . RHA provides no basis for its claim that an investment strategy based on a 10-year average maturity was expected—at the start of the period at issue—to be the most profitable." (JX-438, WSIG-TRIAL-08460-61, ¶ 45 (emphases added).) Once again, she is attacking a straw man; RHA makes no such claim. It selected the 10-year maturity structure based on *Warm Springs*, which explicitly calls for use of hindsight.[24] (*See* Trial Tr. vol. 1, 147:7-18, July 21, 2020.) Alternatively, RHA selected the 7.86-year maturity structure based on the average maturity structure during the non-breach period. RHA was completely transparent about its bases for choosing these two maturity structures. In contrast to Dr. Starks, RHA did not hide behind its own Delphic "opinion" in selecting an appropriate maturity structure from the 5-10 year range that the Court ruled was prudent.

b. RHA's benchmarks are simply measures of market-average performance

Next, Dr. Starks contends that RHA impermissibly relied on hindsight in combining the Barclays indexes to construct its benchmarks. She argues that, "[w]ithout hindsight regarding the U.S. Treasury market's evolution over the 1980-1992 period, . . . it would not have been possible to select pairs of portfolio weights in August 1980 that, if applied at all times from August 1980

[24] "Where several alternative investment strategies would have been equally plausible, the court should presume that the funds would have been used in the most profitable of these." 248 F.3d at 1371 (quoting *Donovan*, 754 F.2d at 1056).

to November 1992, would result in an average maturity of 10.0 or 7.86 years over the entire period." (JX-438, WSIG-TRIAL-08466, ¶ 54; *see also* Trial Tr. vol. 2, 362:1-9, July 22, 2020.) Therefore, she claims, "the RHA approach is infeasible with the information available to a bond manager in the investment decision-making process." (JX-438, WSIG-TRIAL-08466, ¶ 54.) This is a reprise of her discredited argument that the RHA benchmarks are an investment strategy specifying how the Government should have invested the Docket 326 Funds during the breach periods. They are not. Instead, they are after-the-fact measures of the market-average performance during the breach periods. As such, RHA properly utilized the historical Barclays data in constructing them.

c. RHA did not use hindsight in combining Barclays indexes

Finally, Dr. Starks contends that RHA used hindsight in constructing its benchmarks by choosing combinations of the Barclays indexes "that yield[] among the highest damages possible." (JX-438, WSIG-TRIAL-08467, ¶ 56.) She asserts that, in constructing 10-year and 7.86-year benchmarks, "there are countless different possible combinations of the Barclays indices RHA used [and] [n]early all of these alternative combinations of the Barclays indices would result in lower damages." (*Id.*) As the foundation for this argument, Dr. Starks generated 87 alternative combinations of the Barclays indexes that have a weighted average maturity of 10 years for the period 1980-1992. (JX-438, WSIG-TRIAL-08790-91.) She generated 98 alternative combinations of the Barclays indexes that have a weighted average maturity of 7.86 years for that period. (JX-438, WSIG-TRIAL-08792-93.) The Government emphasized this argument at trial:

Dr. Starks testified at length about her analysis (Trial Tr. vol. 2, 329-41, July 22, 2020) and used four demonstrative slides (DX-2124, WSIG-TRIAL-10719-22) to illustrate her testimony.[25]

Even taken at face value, however, Dr. Starks' analysis does not establish that RHA's benchmarks are flawed. It shows a variation of up to 4.57% in the amount of damages calculated by the 87 alternatives with a weighted average maturity of 10 years, and a variation of up to 5.67% in the amount of damages calculated by the 98 alternatives with a weighted average maturity of 7.86 years. These variations are minor. As this Court has observed, "'[t]he ascertainment of damages is not an exact science.'" *W. Shoshone*, 143 Fed. Cl. at 627 (citation omitted). "[W]hen damages are hard to estimate, the burden of imprecision does not fall on the innocent party." *LaSalle Talman Bank v. United States*, 317 F.3d 1363, 1374 (Fed. Cir. 2003). The calculation of damages need be "only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931).

But Dr. Starks' analysis should not be taken at face value. A closer examination reveals that it is she, not RHA, who is manipulating the data here. Recall how RHA constructs a benchmark: when a target maturity structure falls in between the weighted average maturities of two Barclays indexes, RHA combines those two indexes to develop the benchmark. RHA starts with the Barclays UST and then adds in as much of the longer or shorter index as necessary to achieve the desired maturity structure. (Trial Tr. vol. 1, 106:8 – 107:10, July 21, 2020; Trial Tr. vol. 2, 273:25 – 274:16, July 22, 2020.) In this case, the 10-year maturity structure was in between

[25] The figures in these demonstratives are inaccurate because they are based on RHA's original damages calculations before it revised its approach to the non-breach periods.

the weighted average maturities of the Barclays UST and the Barclays LT. RHA's benchmark is composed of 86.05% Barclays UST and 13.95% Barclays LT for the period 1980-1992. (JX-434, WSIG-TRIAL-07589.) The 7.86-year maturity structure, on the other hand, was in between the weighted average maturities of the Barclays UST and the Barclays 1-5 UST. RHA's benchmark is composed of 97.90% Barclays UST and 2.10% Barclays 1-5 UST for the period 1980-1992. (*Id.*)

However, none of Dr. Starks' alternatives are constructed in the same manner as RHA's benchmarks. None of her alternatives are based on combining the two Barclays indexes closest to the target maturity structure. Instead, with two exceptions, all of her alternatives combine all three Barclays indexes, including the one that is farthest away from the target maturity structure. Similarly, the two alternatives which combine only two indexes (10-year alternative #1 [JX-438, WSIG-TRIAL-08790]; 7.86-year alternative #1 [JX-438, WSIG-TRIAL-08792]) exclude the Barclays UST and instead use another index whose average maturity is farther away from the target.

Furthermore, RHA strives to make its damages model "as neutral and objective as possible." (JX-437, WSIG-TRIAL-08436.) One virtue of using indexes as benchmarks is that their composition reflects market forces rather than any judgment by RHA. "Under [the UST] index, the allocation as between short-, medium-, and long-term bonds at any point reflects market forces (i.e., all relevant obligations outstanding) rather than any judgment by plaintiff's experts or others regarding what that mix should have been." *Jicarilla Apache III*, 112 Fed. Cl. at 307. Similarly, the particular mix of maturities in the Barclays LT index and 1-5 UST index reflects market forces in the portion of the market that they measure rather than any judgment by RHA or another expert. RHA's method of combining two indexes to create a benchmark likewise uses a

neutral and objective rule – maximize the use of the Barclays UST, which is the most diversified index, and use only so much of a longer- or shorter-term index as necessary. And Mr. Nunes specifically denied that RHA had tested out various alternatives before selecting this approach. (Trial Tr. vol. 2, 273:15-21, July 22, 2020.)

In contrast, Dr. Starks' alternative benchmarks are not based on any neutral, objective rule. Rather, they involve a computer generating as many different combinations as possible from three different indexes. There is no rule for how to select among them nor any rationale for making this choice. The fact that some of these random combinations yield slightly lower damages does not establish that RHA's benchmarks are unreasonable, much less that they are concocted based on hindsight. In sum, Dr. Starks' accusation that RHA manipulated its benchmarks is unpersuasive.

B. There Are No Errors In RHA's Damages Calculations

Dr. Starks further asserts that RHA made a series of errors in calculating damages that require deductions from its total damages figure. Once again, her contentions do not withstand scrutiny.

1. RHA did not incorrectly convert quarterly index returns to daily earnings

Dr. Starks contends that RHA "miscalculate[d] returns *throughout the period at issue* by incorrectly converting [Barclays] quarterly index returns to daily earnings rates." (JX-438, WSIG-TRIAL-08449, ¶ 14 (emphasis in original).) She claims that this miscalculation added $15.5 million to RHA's calculation of damages for the 326-K Fund under the 10-year maturity model, and $12 million under the 7.86-year maturity model, plus another half-million dollars to the calculation of damages for the 326-A Funds. (DX-2120, WSIG-TRIAL-10683.) But her contention is baseless.

Dr. Starks asserts that, "[u]nder RHA's stated approach, any proceeds received during a given quarter . . . should be held until the end of the quarter before it is reinvested." (JX-438, WSIG-TRIAL-08449, ¶ 16.) Her premise is correct; RHA uses quarterly Barclays data and, to avoid double counting, proceeds received during one quarter should not be reinvested until the next quarter. But Dr. Starks goes astray in contending that "the RHA model reinvests all proceeds monthly, allowing for the accumulation of compounded returns on these proceeds *within that quarter*." (JX-438, WSIG-TRIAL-08449-50, ¶ 16 (emphasis in original).) This is simply not so.

Nonetheless, Dr. Starks persisted in this accusation at trial: "I'm not critiquing what Barclays does. Barclays is very good at transforming a monthly interest rate to a quarterly interest rate to an annual interest rate. My critique is that Rocky Hill said that they were reinvesting quarterly when, in fact, in their model, they are reinvesting monthly." (Trial Tr. vol. 2, 387:23 – 388:3, July 22, 2020.) She was emphatic that RHA's model "actually reinvests monthly." (Trial Tr. vol. 2, 388:21, July 22, 2020.) When asked how she knew that, she replied, "Because I asked the people at Analysis Group to look at the model and see what they -- what they did." (Trial Tr. vol. 2, 388:23-24, July 22, 2020.)

Mr. Nunes refuted Dr. Starks' contention in his rebuttal testimony by walking the Court through the RHA damages model for the first calendar quarter of 1983. (JX-434, WSIG-TRIAL-07614-15.) He explained that RHA's model calculates a daily earnings amount in order to address situations where the account at issue has inflows or outflows during the course of a quarter.[26] But there is no compounding during the quarter. The same Barclays quarterly earnings rate is applied

[26] The Docket 326 Funds did not have inflows or outflows during the period at issue except during 2011-2013 when the 326-K Fund was being distributed on an ongoing basis. But such inflows and outflows are a regular occurrence in other cases where RHA uses the same investment model. (Trial Tr. vol. 4, 715:4 – 716:9, July 24, 2020.)

each day of the quarter and it is always applied to the beginning balance at the start of the quarter. Thus, the daily earnings amount remains the same throughout the quarter. There is no increase in the daily earnings from one month to the next because there is no compounding within the quarter. Only at the start of the next quarter are the accumulated daily earnings throughout the first quarter reinvested. As a double check, Mr. Nunes demonstrated that the results at the end of the quarter are exactly the same if the calculations are done on a quarterly basis rather than a daily basis. (Trial Tr. vol. 4, 707:1 – 708:22; 709:24 – 714:20; 716:10-21, July 24, 2020.)

Thus, Dr. Starks' accusation is false. The figures in black and white on the pages of RHA's investment model show that there is no compounding of earnings within a quarter. The RHA model does not reinvest proceeds monthly as Dr. Starks claims; rather it reinvests them quarterly in accordance with the Barclays data it is using. It is Dr. Starks who has made the multi-million dollar error here, not RHA.

2. RHA properly uses years to maturity rather than years to call in its alternative damages model

Dr. Starks contends that RHA should have used the "weighted average years to call" rather than the "weighted average years to maturity" in its alternative damages calculation. (JX-438, WSIG-TRIAL-08452.) She asserts that use of weighted average years to call rather than weighted average years to maturity would have reduced RHA's "Alternative B" damages figures by $13.9 million for the 326-K Fund and $167,111 for the 326-A Funds. (DX-2120, WSIG-TRIAL-10683.)

Dr. Starks claims that RHA's use of the "years to call" measure is inconsistent with the Court's liability opinion. (Trial Tr. vol. 2, 384:1-9, July 22, 2020.) The Court used "years to call" rather than "years to maturity" when analyzing the maturity of the 326-K Fund because both parties agreed that it more closely approximates the actual maturity structure of the Fund. *W. Shoshone*, 143 Fed. Cl. at 569. This was because, over the lifetime of the Fund, about 85% of the callable

securities in which the Fund was invested were called back in advance of their maturity dates. *Id.* at 568.

That does not mean, however, that "years to call" provides the appropriate measure of damages. In fact, the "years to call" measure understates the actual maturity structure of the 326-K Fund because not all callable securities in the portfolio were called back in advance of their maturity dates. The actual maturity structure of the Fund during the non-breach period from 1992-1997 was somewhere between "years to call" and "years to maturity," but exactly where is unknown. As Mr. Nunes explained, because "years to call" would understate the actual maturity structure of the Fund, it would understate the amount of damages. (Trial Tr. vol. 1, 130:3-8, July 21, 2020.) "Th[is] situation falls within the doctrine which has been law since the days of the 'Chimney Sweeper's Jewel Case,' that when damages are at some unascertainable amount below an upper limit and when the uncertainty arises from the defendant's wrong, the upper limit will be taken as the proper amount." *Gratz v. Claughton*, 187 F.2d 46, 51-52 (2d Cir. 1951) (L. Hand, J.).[27] Thus, RHA properly used the weighted average years to maturity rather than the weighted average years to call in order to calculate the amount of damages.

Furthermore, any marginal overstating of the maturity structure caused by use of weighted average years to maturity is counterbalanced by RHA's choice of "a very conservative portfolio . . . comprised of treasuries" to measure investment performance and damages. (Trial Tr. vol. 2, 282:17-18, July 22, 2020.) In actuality, the Government invested tribal trust funds primarily in agency securities because they generally have higher yields than Treasury bonds. (DX-2121, WSIG-TRIAL-10689.) But RHA calculates damages based on the market-average return for

[27] This rule accords with the principle that "[T]he risk of uncertainty as to the amount of the loss falls on the trustee" and "[a]ny doubt or ambiguity should be resolved against [the trustee]." *Warm Springs*, 248 F.3d at 1371.

(lower yielding) Treasury bonds with a 7.86-year maturity structure. Accordingly, there is no reason to conclude that RHA's calculation is not "a reasonable estimate of the damages [WSIG] is due." *W. Shoshone*, 143 Fed. Cl. at 627.

3. RHA properly uses transition periods

Dr. Starks contends that RHA improperly used transition periods in its damages model to inflate the amount of damages. She asserts that elimination of all transition periods would reduce the damages by $33 million in RHA's 10-year maturity model and by $27 million in its 7.86-year model. (DX-2120, WSIG-TRIAL-10683.) She focuses primarily on the one-year period that RHA used to transition the 326-K Fund in 1980-1981 to a portfolio with a maturity structure of either 10 years or 7.86 years. Because interest rates rose during this period, had the 326-K Fund been shifted all at once in August 1980, it would have suffered a significant loss during the next year that would have substantially reduced the growth of the Fund over the entirety of its existence. (Trial Tr. vol. 2, 378:10-18; 379:25 – 380:8, July 22, 2020.) A transition period reduces the risk of incurring a substantial loss resulting from investing an entire lump sum just before an adverse change in the market.

Dr. Starks argues that "the use of the transition periods does not comport with the Court's Opinion as to the timing of the damages periods" because "[t]he Court found … that the 326-K Fund was imprudently managed starting in August 1980, not one year later, when RHA's transition period for the 326-K Fund concludes." (JX-438, WSIG-TRIAL-08453, ¶ 27; *see also* Trial Tr. vol. 3, 570:6-11, July 23, 2020.) But assuredly the Court did not intend to preclude the use of transition periods in calculating damages.[28] To the contrary, the Court stated that, once the 326-

[28] Mr. Nunes testified that RHA "did not interpret the Court's decision to mandate an imprudent act [i.e., no transition period] at the beginning of the period for the purposes of calculating damages." (Trial Tr. vol. 1, 187:15-17, July 21, 2020.)

A Funds were earmarked for an education trust, "the government should have begun to transition the 326-A Funds into longer-term securities because the principal of the funds was not intended to be distributed." *W. Shoshone*, 143 Fed. Cl. at 660 (emphasis added). Likewise, the Court found that the Government's investment of the 326-A Funds between February 2012 and September 2013 was prudent because it "began to transition both A Funds into longer-term securities during this time." *Id.* at 658 (emphasis added).

Further, Dr. Starks' contention that transition periods are unwarranted is belied by her own damages model. When the Distribution Act was enacted in 2004, Dr. Starks does not immediately change the maturity structure of her damages model as she claims RHA should do. Instead, she gradually shortens her existing ladder of bonds, with maturities ranging from 1-10 years, by each year reinvesting in new 1-year bonds rather than 10-year bonds. (JX-435, WSIG-TRIAL-08290, ¶ 76.) Thus, her own transition period is more prolonged than the 6-month period that RHA uses. "As a result, from January 2005 through September 2006, the maturity structure of [RHA's] damages model is actually shorter than the maturity structure of Dr. Starks' model." (JX-437, WSIG-TRIAL-08429.)

More fundamentally, in criticizing RHA's use of transition periods, Dr. Starks ignores the critical point that she, herself, made in extolling the virtues of her bond ladder. She explained that "the ladder approach mitigates reinvestment risk, as only a small portion of the overall portfolio is reinvested at market rates annually. In contrast, under bullet or barbell approaches, a large portion or all of the portfolio matures at the same point in time, exposing all of the investor's funds to potentially adverse changes in interest rates . . . ." (JX-435, WSIG-TRIAL-08287, n.99.) At trial she had to acknowledge this point:

> ***Q. All right. And the way the ladder mitigates the reinvestment risk is it spreads out the period over which you are redeploying your funds, right?***

A. Well, yes.

(Trial Tr. vol. 3, 533:13-16, July 23, 2020.) In other words, whenever investors invest (or reinvest) their funds, there is always a risk that it will later prove to have been bad timing as the market changes. To mitigate this risk, prudent investors spread the investment (or reinvestment) of an entire portfolio over time. This is exactly why RHA uses transition periods.

Furthermore, the evidence showed that when the Government, itself, increased the maturity structure of the 326-K Fund from less than two years to almost 10 years in 1992-1993, it took almost six months to accomplish this shift. (DX-2124, WSIG-TRIAL-10713; Trial Tr. vol. 3, 545:12-19, July 23, 2020.) Dr. Starks would not concede that this was a transition period. "Whether it was a transition or whether it was a strategy that was changing, I -- I cannot tell you that, but it is -- it does have human intervention. It is an investment strategy decision." (Trial Tr. vol. 3, 545:16-19, July 23, 2020.) Her response avoids the point. The change in the maturity structure of the 326-K Fund was not so gradual that it might plausibly reflect a series of separate strategy decisions to lengthen the Fund's maturity structure a bit at a time. Rather, it reflects a decision to make a major change in the Fund's maturity structure that was executed over a number of months rather than all at once. In other words, the Government chose to effectuate the change over time (as RHA proposes) rather than all at once (as Dr. Starks proposes).

4. RHA properly brought damages forward from 2013 to date

Dr. Starks' final allegation is that RHA's calculation of damages for the period from September 2013 to date constitutes improper "prejudgment interest" which must be excluded. She asserts that RHA's damages calculation for its 10-year maturity model should therefore be reduced by almost $18 million, and that damages for the 7.86-year maturity model should be reduced by $15 million. (DX-2120, WSIG-TRIAL-10683.) This contention is not based on Dr. Starks' own

analysis and opinion. Rather, she is simply repeating the position of Government counsel: "I have been informed by Counsel for the Government that pre-judgement interest is not to be included in computing damages sustained by the WSIG . . . [and] I have been instructed to . . . remov[e] the accrual of pre-judgement interest." (JX-438, WSIG-TRIAL-08455, ¶¶ 33-34; *see also* Trial Tr. vol. 2, 440:15-25, July 22, 2020.)

On the eve of trial, Government counsel repented their strategic choice to have Dr. Starks ignore this issue, and asked her to opine about how prejudgment interest should be calculated. Dr. Starks then produced a critique in which she contended that any award for the post-September 2013 period should be calculated as prejudgment interest rather than damages. "[A]s requested by DOJ, I show below and in the attached exhibits how RHA's proposed rates of return during the 'roll-forward' (i.e., post-liability) period . . . compare to various interest-only or 'spot' risk-free rates of return that are often used to bring forward damages from the date of liability to the date of the judgment." (DX-2120, WSIG-TRIAL-10666, ¶ 6.) WSIG has moved to strike Dr. Starks' untimely new opinion pursuant to RCFC 37(c)(1). (ECF 190.)

In any event, Dr. Starks' new opinion about how to calculate prejudgment interest is irrelevant as a matter of law. The United States is immune from an award of prejudgment interest in the absence of express congressional consent to such an award. "This requirement . . . reflects the historical view that interest is an element of damages separate from damages on the substantive claim." *Library of Congress*, 478 U.S. at 314. There is no applicable waiver of immunity that would permit an award of prejudgment interest in this case. Nor does WSIG seek such an award. Instead, WSIG seeks the investment income that would have been earned from October 2013 through June 2020 if the additional funds that should have been in the Docket 326 accounts as of September 30, 2013, were invested prudently up to the time of trial. The "initial damages must be

treated as though such funds had been in trust all along, and additional damages must be assessed for the trustee's consequent failure to invest such funds." *Osage III*, 75 Fed. Cl. at 480. The lost investment income sought by WSIG "does not represent interest on the damages owed, but rather is an actual component of those damages." *Jicarilla Apache III*, 112 Fed. Cl. at 311. Therefore, Dr. Starks' calculations of "prejudgment interest" for this period are beside the point.

VII. DR. LONGSTAFF'S CRITICISMS OF RHA'S INVESTMENT MODEL

Dr. Longstaff did not offer an opinion on the amount of damages in this case. His role was simply to criticize RHA's damages computations. (Trial Tr. vol. 3, 677:12-18, July 23, 2020.)

Dr. Longstaff used financial theory to criticize RHA's conclusion that no particular maturity structure in the range of 5-10 years was more plausible than another. He asserted that RHA's "assumption" that any maturity structure in that range was equally plausible is "contradictory to kind of basic principles that we have had for 60 years in financial economics about portfolio construction." (Trial Tr. vol. 3, 595:17-23, July 23, 2020.) But he misconstrues the issue here, which is factual not theoretical. RHA examined how the Government actually had invested the 326-K Fund during the non-breach period from 1992-1997, and found no evidence that it was more likely to choose one particular maturity structure than another. Dr. Longstaff cannot contest this factual conclusion because, by his own admission, he is not familiar with how the Government invested the 326-K Fund during that period. (Trial Tr. vol. 3, 680:5-12, July 23, 2020.)

Dr. Longstaff either misapprehends or ignores what RHA actually did. He criticizes RHA's approach based on theoretical analyses about how a maturity structure should be chosen on an *ex ante* basis. First, he conducted a simulation exercise to demonstrate "that the assumption that you necessarily or predictably will do better by investing in a long-term bond vis-à-vis a short-

term bond just isn't correct." (Trial Tr. vol. 3, 621:21-23, July 23, 2020.) Then he conducted another analysis to challenge RHA's conclusion that no particular maturity structure in the range of 5-10 years was more plausible than another. Dr. Longstaff claimed that he "wanted to avoid this possibility of hindsight bias. We don't know ahead of time what's going to happen. And so we wanted to use an approach . . . that is basing portfolio construction on the information that is known at the time." (Trial Tr. vol. 3, 630:13-18, July 23, 2020.) His critiques are utterly irrelevant because RHA did not purport to select its 10-year and 7.86-year maturity structures on an *ex ante* basis; to the contrary, it explicitly relied on hindsight.

Dr. Longstaff constructs a hypothetical model to select on an *ex ante* basis what he calls the "optimal" maturity structure within the range of 5-10 years for each of the breach periods. (Trial Tr. vol. 3, 680:19-23, July 23, 2020.) Under his model, each month the Government would choose between three representative Treasury bonds – a five-year, a seven-year, and a ten-year bond – based on which had the highest Sharpe ratio, which is a simple measure of expected return relative to risk (i.e., the expected return for the next month versus the price volatility over the past three months). (Trial Tr. vol. 3, 682:1 – 684:20, July 23, 2020.) Then the entire portfolio would be invested in the selected issue of bonds for the next month, at which point the process would be repeated. Thus, the portfolio would never have any diversification among bond types or maturities, and the maturity structure of the portfolio would change from month to month, jumping back and forth between five years, seven years, and ten years. (Trial Tr. vol. 3, 686:15 – 687:1; 687:19 – 688:3, July 23, 2020.)

Of course, it would have been completely infeasible for the Government to have invested the Docket 326 Funds in this manner, performing these calculations and reinvesting the entire portfolio every month. Furthermore, there is no evidence that the Government ever based its

investment decisions on Sharpe ratios. In addition to being infeasible, it would have been patently imprudent for the Government to have invested the Docket 326 Funds in this completely undiversified manner. Indeed, when pressed about these features of his model, Dr. Longstaff backpedaled: "I'm not providing an opinion about whether this would be a prudent approach, a practical approach, a desirable approach. I'm just simply using this to see if we can find counter-examples to [RHA's] assumption." (Trial Tr. vol. 3, 688:9-13, July 23, 2020.) Thus, Dr. Longstaff criticizes RHA's choices of maturity structure based on academic exercises that have no relation to RHA's evidence-based determination. Moreover, Dr. Longstaff bases his criticism on an alternative investment model that is unrealistic and imprudent. Accordingly, his testimony is irrelevant to the issues before the Court.

VIII. CONCLUSION

WSIG has satisfied its burdens to prove that the Government committed a breach of trust and that a loss resulted. Accordingly, it is "entitled to a reasonable estimate of the damages it is due." *W. Shoshone*, 143 Fed. Cl. at 627. RHA's investment model "provides a reasonable and appropriate basis for calculating the damages owed here." *Jicarilla Apache III*, 112 Fed. Cl. at 310. RHA's model is transparent and objective. Any assumptions in it that are favorable to WSIG, such as the 10-year maturity structure, are explicitly based on the law. Otherwise, RHA's approach to calculating damages is neutral and objective, i.e., it uses the average maturity structure of the 326-K Fund during the non-breach period to create an alternative maturity structure, and it uses market-average rates of return as investment benchmarks.

The Government has not satisfied its burden of proving that the Docket 326 Funds, if prudently invested, would have earned less than RHA has calculated. *See Warm Springs*, 248 F.3d at 1371. Even if Dr. Starks' damages model were as plausible as RHA's model, *Warm Springs*

would require adoption of RHA's model as the measure of damages. *See Jicarilla Apache III*, 112 Fed. Cl. at 310. But Dr. Starks' damages model is not credible because its maturity structure is based solely on her own *ipse dixit* opinions, and it produces a return far below the market-average returns calculated by RHA. It is not plausible because the Government never used her proposed investment methodology (bond ladders) to invest the Docket 326 Funds.

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

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Respectfully submitted,

/s/ Kelli J. Keegan

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

Attorney of Record for Plaintiffs

OF COUNSEL:

RANDOLPH BARNHOUSE
MICHELLE MIANO
Barnhouse Keegan Solimon & West LLP
7424 4th St. NW
Los Ranchos de Albuquerque, NM 87107
Tel: (505) 842-6123
Fax: (505) 842-6124
dbarnhouse@indiancountrylaw.com
mmiano@indiancountrylaw.com

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

Fax: (202) 955-5564
steven.gordon@hklaw.com

CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2020, I filed the foregoing electronically through the CM/ECF system, which caused the following counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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

Attorneys for Defendant

/s/ Kelli J. Keegan
Kelli J. Keegan