ELOUISE P. COBELL
LEAD PLAINTIFF IN *COBELL V. SALAZAR*

TESTIMONY
BEFORE THE COMMITTEE ON NATURAL RESOURCES
HOUSE OF REPRESENTATIVES

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I. INTRODUCTION

Good afternoon, and thank you Chairman Rahall, Ranking Member Hastings, and members of the Committee. I am here today representing a class of over 500,000 individual Indians as the lead plaintiff in the case initially entitled *Cobell v. Babbitt* and now referred to as *Cobell v. Salazar*, pending in the United States District Court for the District of Columbia and presently presided over by Judge James Robertson. Since virtually its inception more than 13 years ago, Congress has taken keen interest in this litigation and its key objectives—reforming the Individual Indian Trust ("Trust"), ensuring that the government accounts for all Trust assets including all trust funds, land and natural resources, and correcting and restating each individual's account balance.

By any measure, this litigation has proven exceptional and extraordinary. Not only is it one of the largest class actions ever brought against the United States as it addresses over 120 years of mismanagement of Indian trust assets and involves over 500,000 individual Indians, but the litigation has been intense and contentious. Moreover, there have been more than 3600 docket entries in the district court and over 80 published decisions, including ten appeals—the most recent appellate opinion is referred to as *Cobell XXII.*

On each occasion I have appeared before Congress, I have emphasized my willingness to explore settlement of this case. But of course, resolution takes two parties willing to come to the

table to negotiate in good faith and attempt to reach an equitable settlement that would set the foundation for improved trust management and accountability in the future. Until very recently, however, we did not have such a willing partner on the other side. President Obama showed great leadership during the campaign when he committed to seek a fair resolution to this case and, when elected, he followed through and charged Secretary Salazar and Attorney General Holder with carrying out this commitment.

Having been through seven failed settlement efforts before, I was not optimistic at the outset of these negotiations that we would be able to reach agreement. Beginning in the late summer of 2009, though, we sat down in good faith and so did the Administration. Associate Attorney General Tom Perrelli, Interior Deputy Secretary David Hayes, and Interior Solicitor Hillary Tompkins were involved in the day-to-day negotiations. The issues to discuss and resolve were gravely challenging, and I repeatedly felt we had reached impasse. But both my team and the government soldiered on, knowing that resolution was the best thing for the affected individual Indian trust beneficiaries and for a healthier foundation of the trust relationship for the future.

Reaching agreement was certainly not easy, and the settlement from my perspective is not perfect. I would want more for beneficiaries as I think that is what they deserve. But a settlement requires compromise – by definition, you do not get everything you want. This is the bottom line: After months of discussion, I am here to testify that I strongly support this agreement. It is time to look forward, not backward. And though we must never forget the past, this settlement can move us forward together as it represents the best resolution we can hope for under the circumstances.

Although we have reached an historical settlement totaling more than $3.4 billion dollars,

there is little doubt this is far less than the full amount to which individual Indians are entitled. Yes, we could prolong our struggle, fight longer, and, perhaps one day, reach a judgment in the courts that results in a greater benefit to individual Indians. But we are nevertheless compelled to settle now by the sobering reality that members of our class die each year, each month, and every day, forever prevented from receiving that which is theirs. We also face the uncomfortable, but unavoidable fact that a large number of individual Indian trust beneficiaries are among the most vulnerable people in this country, existing in the direst of poverty. This settlement can begin to provide hope and a much needed measure of justice.

In addition, now that the *Cobell* case has brought heightened attention to this matter, I am optimistic that this settlement will lay the foundation for genuine and meaningful reform of the Trust. There remains considerable room for improvement, as Secretary Salazar and Deputy Secretary Hayes have recognized. I am hopeful that the Commission that Secretary Salazar has contemporaneously announced with this settlement will ensure that additional critical reforms are made and that we set the underpinning for safe and sound management of our assets in the future.

The terms of the settlement have been well publicized. We have reached out to Indian Country to insure that beneficiaries are well informed of its terms. I just returned from meeting with beneficiaries in South Dakota, and our class counsel, as we speak, is traveling to meet with beneficiaries in other states. We have met with allottee associations, tribal organizations and landowners and will continue our efforts. Next week, our class counsel will visit Arizona and New Mexico, the following week Montana, Wyoming and North Dakota and the weeks after that Oklahoma, Washington, California and Oregon. Further meetings with beneficiaries will continue throughout Indian Country in March and April to make sure that they are able to receive complete and accurate information about the settlement.

Despite this outreach, there remains misinformation regarding the settlement conveyed by a very small number of individuals, many of whom are not beneficiaries and do not speak for individual Indian beneficiaries. I want to dispel those misunderstandings:

First, there are those who have stated that under this agreement beneficiaries will receive very little. This is not accurate. In fact, most beneficiaries who participate in this settlement will receive at least – and I emphasize <u>at least</u> - $1,500.00. Many will receive substantially more based on the transactional activity in their IIM account. To those in Indian Country, receipt of this money is critical, both as a recognition of the government's past wrongdoing and as a first step in fulfilling the commitment to reforming the trust system. Many individual Indians are dependent on this money for the basic necessities of life. Its payment should not be further delayed.

Two other points are important with respect to these distributions. First, receipt of these funds shall not be construed as income and thus will not be taxable for beneficiaries. This is only fair because proceeds from trust lands are generally not taxable. Second, and critically important to the poorest among the class, the *Cobell* settlement funds shall not be considered when determining eligibility for programs such as TANF, SSI and food stamps. The last thing the parties want is to further victimize poorer class members by preventing them from receiving benefits from programs for which they would otherwise be eligible.

Second, there are suggestions that the settlement should not have encompassed claims for trust administration since it is contended the Cobell case did not involve mismanagement of trust assets. This is not correct. The Cobell case has always insisted that the government account for all trust assets – not just money but the land and natural resources that are at the heart of the individual Indian trust. And, the district court invited plaintiffs to amend our complaint to include

these claims in the litigation well before these settlement negotiations. In other words, their inclusion should be no surprise. Indeed, while true that there are certain trust damages claims that are now expressly included that were not before, understand that virtually all settlement discussions – including those led by this Committee and the Senate Indian Affairs Committee - have contemplated the inclusion of all such individual claims. The largest and oldest tribal organization, the National Congress of American Indians passed unanimously a resolution in 2006 endorsing inclusion of all trust management claims if, where as here, there is an opt out.

I and others were also counseled on this point by the following sober reality: Very few trust mismanagement cases have ever been filed and those that have are very expensive, extremely time consuming and fraught with risk. There is an obvious reason for this. For most beneficiaries, the claims are relatively modest when compared with the cost of litigating against the government and the legal obstacles in doing so. Legal hindrances abound, such as statute of limitations and jurisdictional restrictions, and together with the cost prohibitive nature of litigation, help explain why so few have been brought. For the great majority of beneficiaries, this settlement represents the only opportunity for them to receive any compensation for the government's mismanagement of their trust assets. For those who wish to pursue those claims independently, they have the opportunity to do so by opting out of the trust administration portion of the settlement. The agreement preserves all legal mechanisms to enable them to do so.

Third, there are those who criticize the amount that the class attorneys may receive by reason of this settlement. That criticism is misplaced. This is not a case where attorneys are attempting to get a fee based on a quick settlement. The attorneys in this case undertook substantial risk in filing and prosecuting this case on behalf of the 500,000 individual Indian beneficiaries in 1996. Many of the attorneys gave up their practices to work solely on it. It has

often consumed 18 hour days, seven days a week. They have engaged in 7 major trials, handled countless appeals by the government and reviewed tens of millions of pages of documents. They responded when no on else – not even Congress – was able to correct the wrongdoing that individual Indians endured. As a result of their efforts, for the first time in over 100 years, the government has been held accountable for its mismanagement of the IIM Trust. Moreover, solely as a result of their efforts, reform of the Trust is a real possibility. The benefit to class members from their efforts is considerable. They have agreed to limit their petition for fees to under $100 million. This is less than 3% of the total settlement – very modest when compared with fees typically awarded in class actions. Class members will have the opportunity to object to the fees and those objections will be considered by the Court before any fee award. The attempt by some such as ITMA to limit the fees further to those available under the Equal Access to Justice Act (EAJA) suffers from two infirmities. First, the government has made clear that it is not open to paying fees through EAJA. Second, if in the end, lawyer fees are so dramatically curtailed, then how will individual Indians ever obtain the kind of highly competent and dedicated counsel necessary to bring a difficult case like this next time? It is already tragically difficult to attract such lawyers and ITMA would like to make it all the more challenging. This makes no sense.

Fourth, there are those that have even suggested that the named plaintiffs in this case, including me, will profit from this settlement. This again is erroneous. The incentive fee contemplated is an award to named plaintiffs by the Court for their work in assisting in this case and to cover expenses. As you might expect, the work required has been considerable. However, most of the money requested will be for reimbursement of expenses incurred during the 14 years of this litigation. Millions of dollars have been spent in prosecuting this case, including payment of experts, and covering charges for transcripts and other court costs. I have contributed

substantial funds to aid in the prosecution of this case. The Blackfeet Reservation Development Fund, a non profit, has used millions of its own funds as well. Furthermore, many of the grants we received are in the form of loans and are repayable. Importantly, any class members not comfortable with the incentive award will have a opportunity to have their views heard by the Court before any payment is made. However, those who have advanced the money to prosecute this case deserve to be reimbursed.

Finally, some who don't understand the reality of the historical data and the lack of reliable information, have criticized the distribution scheme contemplated in this settlement. They say it doesn't track with precision the losses for each beneficiary. The reality is that there is no data to establish actual losses. This is indeed rough justice. But it is the best possible way to achieve three important objectives: (1) being fair so that all receive a meaningful payment of at least $1,500, while rewarding high dollar accounts that likely suffered the most losses; (2) permitting for a prompt distribution where most beneficiaries will be completely paid within a few months; and (3) will not waste significant money on lawyers, accountants and Special Masters trying to figure out what is owed to each individual. In addition, the Court will hear any objections to the distribution scheme and make a determination on its fairness.

Some have asked to establish an extensive and expensive process where beneficiaries can have essentially mini-trials before a Special Master. This is absolutely and unequivocally foolish. It would waste significant funds on figuring out who gets what and will take years before beneficiaries receive their distributions. Moreover, it will not be advantageous to those beneficiaries who can prove their case since such beneficiaries have the ability to opt out anyway and pursue their claims independently. In short, such a proposal would take years, cost hundreds of millions and be no fairer than the current model. This is precisely why the parties rejected such

an approach.

In summary, this settlement will do a lot of good. It will get more than $3 billion in the hands of beneficiaries. It will provide monies for land consolidation. It will create a $60 million scholarship fund. Moreover, there will be a Secretarial Commission to recommend additional trust reforms that are desperately needed. And there is an agreement to perform an audit of the Trust. No audit has ever been done. To heal the division between individual Indian trust beneficiaries and the government that is reflected historically and in the nearly 14 years of our litigation and to begin to establish confidence that the IIM Trust is managed in accordance with trust law, transparency is essential. Too many records have been destroyed. Too much deception has occurred. Importantly, this settlement will allow individual Indians to look forward and work collaboratively with their trustee to ensure a better tomorrow.

We know this settlement does not solve many of the serious underlying problems plaguing this Trust. We know that reform must continue and cannot stop here. We will continue our efforts to ensure accountability. We have had to spend too much time looking backwards, trying to address the terrible wrongs of the past. Now, my hope is that we look forward to correct those wrongs so that individual Indian trust beneficiaries finally receive that which rightfully is theirs.

When I embarked on this settlement process, I was skeptical that this result could be achieved. But we were able to reach a resolution. There has been too much discussion about what we would like to achieve for individual Indian beneficiaries. It is now important that we implement this historical settlement. I now ask Congress to swiftly enact the necessary implementing legislation so we can begin to distribute our trust funds without further delay. Hundreds of thousands of individual Indians have waited patiently for far too long.