

**STATEMENT OF DAVID J. HAYES  
DEPUTY SECRETARY  
OF THE INTERIOR  
ON  
THE PROPOSED SETTLEMENT OF  
COBELL V. SALAZAR  
BEFORE THE  
COMMITTEE ON NATURAL RESOURCES  
UNITED STATES HOUSE OF REPRESENTATIVES**

**March 10, 2010**

Good morning Mr. Chairman, Mr. Hastings, and members of the Committee. Thank you for the opportunity to provide the views of the Department of the Interior (Department) regarding the Settlement that has been reached between the United States and the plaintiffs in the *Cobell* class-action lawsuit and accompanying legislation, the “Individual Indian Money Account Litigation Settlement Act.” The *Cobell* case, which devolved into contentious and acrimonious litigation over the Department’s trust management and accounting of hundreds of thousands of individual Indian trust accounts, has hindered U.S. efforts to work effectively in Indian Country for more than a decade. During these years many members of this Committee have signaled a desire for the agencies involved in this litigation to find a way to bring the case to resolution. And in December 2009, we achieved an agreement. I am very pleased to say that the Settlement we have reached is a fair one, a forward-looking one, and one that I am certain will strengthen the relationship between the federal government and Native Americans. This Settlement will enable us to move ahead together and to focus on the many pressing issues facing Indian Country.

The agreement is the product of good faith, arms-length negotiations between the United States and plaintiffs. It not only resolves litigation over the U.S. government’s

management of hundreds of thousands of individual Indian trust accounts, but also addresses one of the root causes of the trust accounting controversy— namely, the fact that tens of thousands of individual accounts have proliferated through the years due to the continued “fractionation” of Indian ownership interests in land. This has led to large and growing expenses related to the tracking of small trust accounts, opportunities for trust accounting errors, and the unavailability of highly fractionated lands for productive uses.

This negotiated agreement lays out a path for the responsible management of Indian trust assets in the 21st century. The agreement strengthens the trust relationship between the United States and our Native American citizens, a relationship that has at times been fraught with challenges but a relationship which the members of this Committee have long sought to develop into one of mutual respect and understanding. In this statement, I will briefly describe the components of the proposed Settlement and related steps being taken by the Department to improve our management of Indian assets. I am accompanied today by Hilary Tompkins, the Solicitor for the Department and the first American Indian to hold that post. Ms. Tompkins participated actively in the negotiations, which I led on behalf of the Secretary of the Interior.

### **Accounting and Trust Administration Claims Settlement**

The first part of this settlement agreement resolves claims related to the class-action lawsuit brought by the plaintiffs in *Cobell v. Salazar*. The case centers around the U.S. government’s accounting of over three hundred thousand individual American Indian trust accounts. The Settlement would resolve not only the plaintiffs’ claims for an

historical accounting for funds that the government holds in individual American Indian trust accounts, but also all claims associated with the management of these trust funds and the underlying trust assets (consisting of land and resources that are held in trust for individual Indian members of the plaintiff class). The Settlement addresses all existing and potential trust-related claims that the plaintiffs may have against the United States to date, and thus brings final closure to this long and difficult issue.

Under the terms of the Settlement regarding trust management and accounting issues, approximately \$1.4 billion would be distributed to the class members, which consist of certain American Indians and Alaska Natives, as defined in the Settlement. Each class member with an historical accounting claim will receive \$1000 and class members may also receive additional funds related to trust management claims under a formula set forth in the settlement agreement. By addressing alleged mismanagement as well as accounting-related claims, this settlement fund will fully resolve all potential claims by individual class members and avoid all further “look-backs” regarding prior fund accounting and trust management issues.

Because the question has come up frequently in discussions about this Settlement, I want to briefly address the issue of attorneys’ fees. The Settlement provides a fair structure for determining the proper amount of attorneys’ fees. Under that structure, attorneys’ fees would be paid out of the \$1.4 billion settlement fund (and so would not require additional taxpayer funds), and would be in an amount which the court will decide. Under the Settlement, the plaintiffs have agreed that they will not ask the court to make an award

outside the range of \$50 million to \$99.9 million to compensate plaintiffs' attorneys for work they have performed since the case began more than 13 years ago. Individual Indians may object to any such requests, and the United States believes that as much of the fund as possible should go to the individual class members. If the judge awards a figure within that range, the parties to the Settlement have agreed that they will not appeal the court's determination. The Settlement provides that when the federal judge makes a decision regarding the appropriate level of attorneys' fees, he will have before him the plaintiffs' attorneys' actual records of the time they spent working on this case. The plaintiffs' attorneys also have the right under the Settlement to ask the court to approve payments for work performed after the date of the Settlement, based solely on attorney hours and actual billing rates and actual expenses and costs incurred, up to a capped amount of \$12 million. The government and individual Indians may object to any such requests, and the court may award less than the amount requested. Negotiating for payments of attorneys' fees is a typical part of the resolution of class action cases, and the approach taken in this Settlement is a fair and reasonable one.

### **Correcting Fractionation**

The second part of this Settlement contains provisions designed to address the "fractionation" issue that is one of the root causes for the allegations included in plaintiffs' claims, and which needs to be addressed in order to reduce potential liability for Cobell-type claims in the future. This problem consists of the continued proliferation of new trust accounts as land interests held in trust for individual American Indians continue to subdivide (or "fractionate") through inheritance processes. The Settlement and

legislation provide for a \$2 billion fund for the buy-back and consolidation of fractional land interests. The land consolidation fund addresses an historic legacy of the General Allotment Act of 1887 (the “Dawes Act”) and other related allotment statutes, which divided tribal lands into parcels of between 40 and 160 acres in size, allotted them to individual Indians, and sold off remaining unallotted Indian lands. As original allottees died, their intestate heirs received equal, undivided interests in the allottees’ lands. Today, it is not uncommon to have hundreds of Indian owners for one parcel.

The result of the continued proliferation of thousands of new trust accounts caused by the fractionation of land interests through succeeding generations is that millions of acres of land continue to be held in such reduced ownership interests that only a small percentage of the individual owners derive a meaningful financial benefit from their ownership. Indeed, as of September 30, 2009, there were approximately 140,000 tracts of land owned by individual Indian allottees and more than four million interests. It has been estimated that these four million interests will expand to eleven million interests by the year 2030 if the actions contemplated in this Settlement are not taken. This situation creates more harm than good for the individual owners, the tribes and the federal government. The proliferation of individual interests creates obligations for the Department to undertake a detailed accounting for tens of thousands of very small accounts, thereby triggering both expense and opportunity for errors such as those alleged in the *Cobell* litigation. In addition, because there are multiple owners of land, often with individuals having very small shares, it typically is impossible to obtain consent from the owners regarding steps to ensure the productive use of such lands. As a result, in too

many instances, tribes find economic development efforts stymied by their inability to utilize heavily allotted tracts of land for much needed energy, commercial, and agricultural development.

Under the provisions of the Settlement for land consolidation efforts, the Department would use a \$2 billion fund for the buy-back of fractional land interests. The Department would use existing programs and law to make these acquisitions, with additional authority that would be provided under the proposed settlement legislation for the conveyance of interests held by persons who cannot be located after engaging in extensive efforts to notify them and locate them for a five-year period.

Because the value of many highly-fractionated interests in land will be very small, and owners of those interests may not be inclined to cash out their small interests, the Settlement sets aside up to \$60 million for use in incentivizing the sale of fractionated interests. More specifically, contributions can be made on behalf of sellers of fractionated interests to an existing non-profit organization that provides scholarships and other support for educating American Indians and Alaska Natives.

### **Long-term Trust Reform**

To address the future of Indian trust management, on December 8, 2009, Secretary Salazar signed a Secretarial order to establish a five-member national commission to evaluate ongoing trust reform efforts. The commission will make recommendations on the future management of individual trust account assets and the need for comprehensive

auditing of these operations. While the Department has made significant progress in improving and strengthening the management of Indian trust assets, our work is not over. The Commission will make recommendations regarding how to improve trust management services on a going-forward basis, such as recommendations regarding the appropriate roles of various Interior agencies including the Office of Special Trustee and the Bureau of Indian Affairs.

## **Conclusion**

I hope you will help us to secure swift enactment of the necessary legislation. As the members of this Committee are aware, this Settlement is a starting point, not an ending point. It is time now to move beyond the litigation and to commit to working cooperatively with American Indian and Alaska Native communities to address education, law enforcement, and economic development challenges. Moving forward, Secretary Salazar and I are committed to conducting government-to-government consultation with tribes to make sure that this Settlement is fully understood by the people who will be most impacted by it and to seek vital tribal input on, and assistance with, implementation of the land consolidation component of the Settlement. With this Settlement we will turn the page on a dark chapter in Indian Country and begin to move forward, together, towards our common goals.

Thank you for the opportunity to appear before you today. I look forward to answering your questions.