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PREPARED STATEMENT OF THE HONORABLE MICHAEL O. FINLEY ON BEHALF OF THE INTERTRIBAL MONITORING ASSOCIATION ON INDIAN TRUST FUNDS

OVERSIGHT HEARING ON THE PROPOSED SETTLEMENT OF THE *COBELL V. SALAZAR* LITIGATION

March 10, 2010

Good morning Chairman Rahall, Ranking Member Hastings, and members of the Committee. My name is Michael Finley and I am the Chairman of the Board of Directors of the Inter-Tribal Monitoring Association on Indian Trust Funds (ITMA), and will be testifying today in that capacity. I am also the Chairman of my own tribe, the Confederated Tribes of the Colville Reservation. I appreciate the opportunity to be here today to discuss ITMA's views regarding the proposed settlement of the *Cobell v. Salazar* litigation.

ITMA is an organization presently comprised of 65 federally recognized tribes from all Regions of the country, including Alaska. For twenty years, we have been actively involved in monitoring the activities of the government in the administration of Indian trust funds and in the larger trust reform efforts that have grown out of the American Indian Trust Fund Management Reform Act of 1994. In 1993, ITMA provided the first draft of that Act to Congress and was at the forefront of securing the passage of that Act into law. This law is the statutory basis for the *Cobell* lawsuit.

While ITMA has not endorsed every measure taken by the government in the name of trust reform during this period, significant progress has been made in the administration of trust funds and trust assets. The daily deposit of receipts through a nation-wide lockbox arrangement with a commercial bank, the immediate access to Individual Indian Money (IIM) accounts through a debit card issued by a major bank, and the latest annual audit that reveals no material weaknesses in the accounting systems are all major improvements that virtually no one would have believed possible when the 1994 Act was being considered by Congress.

On the other hand, significant issues do remain unresolved, and the organization continues to work with and to monitor the government's progress on other significant trust reform initiatives. Serious problems continue to remain in the overall administration and management of the Indian trust. Examples include the process by which the Department provides appraisals for Indian property, issues related to estate planning and will writing assistance to Indian beneficiaries, and the unreliability of land records. ITMA continues to work with the government and Indian beneficiaries to improve upon these and other problem areas.

ITMA has long supported an honorable and just settlement of the *Cobell* litigation and has provided input and assistance to the Committees of jurisdiction in previous settlement efforts. The *Cobell* litigation has consumed enormous resources and attention from both our trustee

agencies of government and from tribal leaders over the last fourteen years. It is fair to say that this lawsuit has deeply affected the nature and tone of the tribes' relationship with the government. We were particularly pleased when we heard during the last Presidential campaign that then-Senator Obama would make settlement of this case a priority if became our President. In addition, more than 100 tribes have lawsuits pending against the government relating to trust administration. ITMA hopes that the proposed *Cobell* settlement reflects a new attitude within the government to actively seek an honorable resolution of those cases as well.

After the proposed settlement was unveiled and individuals had a chance to begin reviewing it, ITMA began to field questions from both tribal leaders and individual Indians about the settlement and what it means for them. In many cases, after being provided with a general explanation of the settlement, the tribal leaders and individuals making the inquiries raised additional questions and, in many cases, concerns about the settlement and its potential effects should it be ratified by Congress and approved by the Court in its current form.

Most questions that ITMA has received revolve around the inclusion of Indian trust mismanagement claims in the settlement agreement. Unlike an accounting, these claims involve the actions, or inaction, of the government in managing Indian trust land, such as ensuring fair market value in approving leases or ensuring that timber is not overharvested so as to damage the landscape. The inclusion of this new and broad category of claims has been a source of confusion and concern because land owners have been told for more than ten years those claims are not involved in the litigation. In fact, if the court had jurisdiction over these claims, the parties would not be asking Congress to grant jurisdiction to the court to enter judgment on this proposed settlement. Many people are questioning why this case must be greatly expanded in order to settle it. Generally speaking, Indian landowners will have these claims extinguished in exchange for a base payment of $500, with the possibility that that amount might increase based on a formula. The settlement agreement allows the individuals within this class to opt out.

Other questions posed to ITMA involve the implementation of the $2 billion Trust Land Consolidation Fund and the extent, if any, of tribal input in how those dollars will be spent. We have also received many questions relating to attorney's fees and incentive payments to the class representatives. The underlying concern of all of these questions is the overriding issue of the impact of the proposed settlement on the United States' trust responsibility.

The original deadline for Congress to act to approve the settlement's implementing legislation was December 31, 2009, at 11:59 pm, just more than three weeks from the time the settlement was disclosed. No one understood the reason for the very short timeframe and it made people very wary of what was actually being proposed.

In response to these and other questions, ITMA organized a national meeting on February 24, 2010 in Las Vegas, Nevada, to provide a forum for tribal leaders and Indian landowners to hear a detailed walk-through of the settlement agreement and have an opportunity to ask questions. Significantly, this was the first outreach meeting of any kind that we are aware of regarding the settlement. ITMA is very grateful for the participation of all of those who attended, including counsel for the plaintiffs, and is hopeful that this meeting will be the catalyst for future and extended outreach.

I cannot emphasize enough how emotional of an issue land and the government's trust responsibility are to Indian people and the heightened emotion that comes when those are

affected in some way, as they would be in the proposed settlement. Although the *Cobell* case has been a class action, it goes without saying that to Indian people the case is much different than a standard class action involving a household appliance. There is a strong cultural connection to Indian land and for many, to the trust revenue they may receive as trust landowners, even if only a few pennies per year. For active landowners living in their respective tribal communities, wrongs for which the government is responsible from decades past that resulted in damage to their land or their families' land weigh heavily on their minds.

Many know that their rights will be affected by the settlement but very few have fully read and understand the settlement documents. Many have no electricity in their homes and limited access in their communities, so for them to be told to refer to www.cobellsettlement.com for answers is clearly not possible. Up until the announcement of the settlement, they had been told or understood that any issues arising from their trust lands and resources were not any part of the *Cobell* case. Now that they learn that these claims will be presumptively extinguished unless they are prepared to make a decision, it creates unease and concern. If they do not make the correct decision, something might be forever lost. For some, it means that they will have to hire a lawyer that they may not be able to afford.

With respect to tribal government involvement, there are parts that directly affect tribes and they have not been consulted or even advised by the parties that their interests are being brought into this law suit. For example, the land consolidation program will be overlain in many cases on similar tribal programs. In the past, the Bureau of Indian Affairs (BIA) program has sometimes competed directly with tribal land consolidation programs. If a competing program is funded with $2 billion dollars, tribal land consolidation and land restoration efforts may be severely hampered rather than enhanced. In addition, ITMA is advised that Alaska tribes are prohibited entirely from participating in the BIA Indian Land Consolidation program. These are just two examples where ITMA thinks this proposal could benefit from more deliberation.

ITMA appreciates the complexities associated with creating a rough justice settlement formula and understands that no settlement is perfect for everyone. Many people have raised questions, however, regarding the relationship between the proposed payment and the underlying claims that will be extinguished. For example, the formula for payments to Indian beneficiaries in the trust administration class beyond the $500 base amount for asset mismanagement claims appears to have little relation to what actual claims they might possess or to damage to their land. They will be paid under a formula that is based on the dollar amounts that went through their accounts, not on what losses they might have suffered. In other words, those who lost the most may actually receive the least and those who received the most may be paid even more. The most highly paid of all would very likely be those who have sold their trust lands altogether.

With respect to attorney's fees and costs, ITMA strongly believes that these payments should come from the Equal Access to Justice Act (EAJA) fund so that such fees and costs do not come out of the Settlement Fund set aside for the Plaintiffs. Ordinarily, the EAJA fund is available to cover attorney fees and expenses when they prevail in litigation against the Federal government and the government's position was not substantially justified. In this case, the government attorneys have publicly announced that the government's view is that the plaintiffs' attorneys should be fairly compensated for their work in this case. Thus, it is only right for the United States to absorb these fees and costs at its expense not the Plaintiffs.

With respect to the class representatives incentive awards, ITMA has heard some confusion as to whether these awards are limited to payment of unreimbursed expenses. ITMA is hopeful

that the parties can put this confusion to rest and provide an estimate with as much specificity as possible of what each class representative intends to seek as an incentive award, together with an estimate of what each class representative intends to seek as unreimbursed expenses.

These are some of the considerations that we hope this Committee will be cognizant of, and ITMA is willing to assist to the extent we are able to continue to facilitate the dialogue so that Indian beneficiaries can be as fully informed as possible in making the decisions that may be required of them.

In the interest of ensuring that individuals receive equitable treatment, ITMA recommends that the parties consider, or reconsider, as the case may be, setting aside a portion of the settlement fund to provide an option for members of the Trust Administration Class to have their claims resolved administratively, perhaps by a special master. The August 4, 2006, staff redraft of S.1439, which was introduced in the 109th Congress, included such a mechanism. Should the parties determine that the inclusion of such an option in the Settlement Agreement is feasible, this option would capture those individuals who might otherwise fall through the cracks. More importantly, however, it would also provide members of the Trust Administration Class the opportunity to have their mismanagement claims resolved in a manner that provides acknowledgement and closure from the government for the damages that they and their families may have suffered—without the expense and pitfalls of filing a separate lawsuit.

Second, ITMA believes that the Department should commit to consult with Indian tribes on the implementation of the $2 billion Trust Land Consolidation Fund and involve tribal governments in decisions on how the money will be spent. Under the Settlement Agreement, the $2 billion would fund the pre-existing Indian Land Consolidation Office (ILCO), which has never had more than $35 million to spend in any given year. Under the current practice, the ILCO will often purchase the least desirable and unproductive ownership interests, and the government has to administer these purchased interests until the government liens are satisfied. That seems very wasteful and unproductive, especially when a more sensible approach is readily available. Indian tribes themselves should be able to contract the functions of the ILCO so tribes can determine which lands they wish to purchase, and these purchases should be made free of any government liens and taken into trust immediately. In addition, because this program is not presently available to Alaska tribes, ITMA has adopted a resolution urging Congress to extend the benefits of the Land Consolidation Program to Alaska tribes.

To spend such a large amount of money quickly, the Department must eliminate the red tape and must take a hard look at the requirement that an appraisal be prepared for nearly all trust land transactions. Although the Trust Land Consolidation Fund is not related to the settlement of claims involved in the *Cobell* lawsuit, the $2 billion has the potential to be beneficial to both Indian landowners and the economies of tribal communities alike. ITMA hopes that the Department is considering these and other questions and looks forward to providing recommendations in this regard.

Finally, we urge the parties to engage in direct, in-person outreach with Indian beneficiaries to explain and answer questions about the proposed settlement. Providing a forum for Indian beneficiaries to assemble, compare notes amongst themselves, and tell their stories is invaluable. Again, the emotional aspect of these issues to Indian beneficiaries cannot be overstated and beneficiaries deserve to be able to talk to a real person given the gravity of the proposed settlement. A website or pre-recorded telephone message is simply no substitute for in-person contact. Again, this is not the average class action lawsuit.

ITMA is very grateful for the Administration's commitment to ending the *Cobell* litigation and hopes that this commitment also extends to resolving the scores of pending tribal trust lawsuits and to forward-looking trust reform. Thank you for this opportunity to testify. At this time, I would be happy to answer any questions that the Committee may have.

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