# Subcommittee on Indian, Insular and Alaska Native Affairs
Doug LaMalfa, Chairman
Hearing Memorandum

May 19, 2017

To: All Subcommittee on Indian, Insular and Alaska Native Affairs Members

From: Majority Staff, Subcommittee on Indian, Insular and Alaska Native Affairs (x6-9725)

Hearing: Oversight Hearing on *"The Status and Future of the Cobell Land Consolidation Program."*

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On Tuesday, **May 23, 2017, 2:00pm in 1324 Longworth House Office Building**, the Indian, Insular and Alaska Native Affairs Subcommittee will hold an oversight hearing on *"The Status and Future of the Cobell Land Consolidation Program."*

## Summary

The hearing will examine the status and measure the success of a $1.9 billion program established by an act of Congress designed and run by the Obama Administration. The purpose of the program is to acquire tiny fractionated interests, from willing sellers, in individual Indian lands and consolidate them into tribal ownership. The Department of the Interior holds in trust about 10 million acres of land in tracts of 80 or 160 acres for the benefit of individual Indians. In many cases, Indians' interests in these lands fractionate as generations of the Indian owners die intestate. Many tracts are owned by dozens or hundreds of Indians each owning tiny, undivided interests often in multiple tracts, creating an administrative nightmare for the Department of the Interior, and bringing little economic development potential to the beneficial owners. Consolidating fractionated tracts into a tribal owner reduces administrative costs and increases the potential for developing the lands.

## Policy Overview

- Indian land fractionation is a major administrative problem for the Department of the Interior and it reduces the value of lands to their Indian owners.

- A land buy-back program developed in 2012 to use a $1.9 billion appropriation from Congress to consolidate highly fractionated Indian lands has around **$700 million** remaining.

- It is unclear that the program has greatly reduced Indian land fractionation after the expenditure of more than $1 billion.

## Witnesses

*Mr. James Cason*
Acting Deputy Secretary
U.S. Department of Interior
Washington, D.C.

**Background**

The $1.9 billion land buy-back fund is part of a $3.412 billion legislative settlement of *Cobell v. Salazar (Cobell)*. *Cobell* was a class action lawsuit filed in 1996 by a Blackfeet Indian named Elouise Cobell on behalf of more than 300,000 individual Indians for whom the United States holds in trust certain monies derived from the leasing of their trust lands, and from Indian claims and other special payments. In the lawsuit, plaintiffs sought a federal court to compel the Secretary of the Interior, who administers these individual Indian money (IIM) accounts, to perform a historical accounting required under a 1994 law[1] intended to rectify past decades of poor recordkeeping relating to these accounts.

Negotiated by the Obama Administration in 2009, the *Cobell* settlement essentially represented a political resolution to the lawsuit. While the Department of the Interior was prepared to perform the court-ordered accounting,[2] the Obama Administration entered into $3.412 billion settlement soon after a U.S. Appeals Court vacated monetary relief awarded by a district court. Terms of the settlement were controversial in Congress and Indian Country:

> "As a factual matter, after nearly thirteen years Plaintiffs finally got a judgment from the Trial Court for 455 million dollars and a ruling that an accounting could not be done. However, the Trial Court's decision was appealed, and the Court of Appeals vacated, set aside the 455 million dollar award and ruled that an accounting could be done. Ironically, Mr. Chairman, the ruling from the Court of Appeals could be considered a win, since an accounting is what the IIM account holders actually wanted – no money, but an accounting. ELOISE PEPION COBELL, et al., Plaintiffs, v. BRUCE BABBITT, Secretary of the Interior, et al., Defendants, 30 F. Supp. 2d 24, 39 (D.C. D.C.)("The plaintiffs have repeatedly and expressly stated that their Complaint does not seek an additional infusion of money or other damages for other losses, but rather requests only an accounting.") The problem with that, to some, was the Court of Appeals' decision didn't put any money in the hands of the attorneys. By the way, it certainly didn't put any money in the hands of Class Representatives, since the Department of the Interior has stated publicly that it had in fact conducted an accounting of the IIM accounts for Ms. Cobell and named Class Representatives and found a variance of less than one hundred dollars."[3]

[1] American Indian Trust Fund Management Reform Act of 1994 (P.L. 103-412, 108 Stat. 4239 (25 U.S.C. 4001 et seq.))
[2] In 2006, the Department informed the Committee it had performed an accounting of the IIM accounts for all of the named plaintiffs and 31 of their predecessors and found that, to date, "the accounting has not provided any evidence that billions of dollars collected for beneficiaries were not distributed to them as the plaintiffs claim." (Letter to House Resources Committee Chairman Pombo, from Associated Deputy Secretary Jim Cason and Special Trustee for American Indians Ross Swimmer, March 22, 2006.)
[3] Testimony of Richard Monette, Associate Professor of Law, Univ. of Wisconsin, former Tribal Chairman of the Turtle Mountain Band of Chippewa, and individual Indian Money account holder, Subcommittee on Indian and Alaska Native Affairs, Hearing on H.R. 887, April 5, 2011.

Under a side agreement signed by then-Associate Attorney General Thomas J. Perrelli, and plaintiffs' counsels Dennis Gingold and Keith Harper,[4] the federal government agreed to support a payment of $99 million in attorney fees to plaintiffs' counsel, including Mr. Harper. It was later revealed that Mr. Harper was a "bundler" for the Obama-Biden 2012 presidential campaign[5] after having served on the 2008 Transition Team overseeing Interior Department appointments for President Obama and as President Obama's "Native policy adviser" during the 2008 campaign.[6] It is unclear whether the Obama Administration took any steps to address the obvious potential for a conflict of interest involving Harper's participation in the settlement negotiations and the controversial side agreement on attorney fees.

Because the court vacated the prospect of any money awards, the legislative settlement had to be ratified and funded by Congress. The settlement was accordingly authorized and funded under Title I of the Claims Resolution Act of 2010 (P.L. 111-291).

The Congressional Budget Office scored the entire **$3.412 billion** appropriated for the *Cobell* settlement as direct spending,[7] requiring offsets in order to comply with congressional budget rules. Among offsets chosen by Democrats and the Obama Administration were $562 million in cuts to the Women, Infants, and Children program.[8]

*Fractionation of Tribal Lands*

Under the General Allotment Act of 1887 (also known as the Dawes Act), Congress transferred tribal lands within Indian reservations to individual members in 80 or 160-acre allotments. (Surplus lands were then opened to non-Indian settlement). The parcels were to be held in trust for a 25-year period, but this trust status was later made permanent. Over time, undivided interests in allotments fractionated exponentially as generations of landowners died without leaving a will. Fractionation of many allotments continues to this day.

By 2012, approximately 243,000 individuals owned $2.9 million interests in 93,000 tracts of trust land. A single 160-acre tract may have more than a thousand owners of tiny undivided interests. One individual may own interests in multiple allotments. Thousands of IIM accounts, in which revenues from the use or lease of these allotments are deposited, maintain a balance of less than one dollar. About 60 percent of the 243,000 individual owners realized $25 or less during fiscal year 2013 from their lands. All costs of administering the lands and the accounts are borne by the taxpayer through annual appropriations.

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[4] *Cobell v. Salazar* Agreement on Attorneys' Fees, Expenses, and Costs, December 7, 2009, filed in the U.S. District Court for the District of Columbia

[5] https://indiancountrymedianetwork.com/news/politics/keith-harper-cobell-lawyer-bundled-at-least-500000-for-obamas-re-election/

[6] http://missoulian.com/news/local/obama-appoints-native-officials-to-transition-team/article_4a4bdc93-eec1-5ee6-8e09-c346e698401f.html

[7] Letter from CBO to Ranking Member Doc Hastings, Natural Resources Committee, March 29, 2010.

[8] CBO, November 23, 2010. "Budgetary Effects of H.R. 4783, the Claims Resolution Act of 2010, as passed by the Senate on Nov. 19, 2010, as transmitted to CBO on November 18, 2010."

A highly fractionated allotment (typically a parcel in which no individual owns more than 5% interest) is nearly impossible to put to productive use. Under 25 U.S.C. §2218, the Secretary may approve a lease, right-of-way, or sale of a trust allotment with 20 or more owners only when a majority of them consent. When an allotment has several hundred owners dispersed in various locations, obtaining such consent may be prohibitive. According to Interior's 2016 Status Report, "Approximately 63 percent of the 97,970 fractionated tracts generated no income to IIM accounts during the last 12 months."

**Land Buy Back Program**

The "Land Buy Back Program for Tribal Nations" was formally established through Secretarial Order No. 3325 on December 17, 2012. Housed in the Office of the Secretary of the Interior, the program is supposed to resolve Indian land fractionation through the purchase of fractional interests in individual Indian allotments and the consolidation of these tracts of land in tribal ownership. Authority for consolidating interests in fractionated Indian is under the Indian Land Consolidation Act (25 U.S.C. §2201 et seq.).

The 2016 Status Report on the program includes a detailed overview of fractionation and how the program as developed by the Obama Administration has been run.

*Indian Land Consolidation Act (ILCA)*

The land buy-back program is operated under ILCA, which authorizes Interior to purchase interests in highly fractionated allotments and consolidate them in tribal ownership. In most cases, allotments are within the tribes' existing reservations. The Secretary has until November 24, 2022, to spend money from the Trust Land Consolidation Fund, upon which date unspent funds revert to the Treasury.

The premise of ILCA is that when underused fractionated lands are consolidated in a single owner – a tribe – leasing and other development to benefit the tribal community is much easier and less costly. ILCA has had mixed success because of the unwillingness of many individuals to part with lands which have been in the family for generations.

Features of the program include the following:

- Up to 15% ($285 million) may be used to pay (1) administrative costs for the land consolidation program, and (2) costs of Secretarial Commission on Trust Reform Secretary Salazar ordered to be created.
- Indian lands must be purchased at no less than fair market value from willing sellers, and then transferred in trust to tribes.
- When a purchase of a tract is made, a small contribution will be sent to capitalize a $60 million Indian Education Scholarship Fund created under the Settlement.

ILCA[9] provides that when a fractionated tract is sold to Interior, the Department immediately transfers title from the individuals to the tribe (in trust) in whose reservation the tract is located, and that a lien is placed on the tract. The lien is paid off as revenues from development of the land occurs, enabling the Department to utilize the moneys as a revolving fund for additional purchases. In 2014, Secretary Salazar, referencing a Solicitor's opinion, declared that the lien requirement of ILCA does not apply to the land buy-back program.

In July 2014, before the Senate Committee on Indian Affairs, then-Deputy Secretary of the Interior Michael Connor testified that the program had made more than 33,000 purchase offers with a total value of $300 million at four reservations. This placed approximately 203,000 acres of land into trust for three tribes.

The initial expenditures for the implementation of the buy-back activities were $13.8 million. This included $3.2 million for outreach activities regularly at national and regional tribal events and listening sessions that included staff booths to meet with landowners and distribute informational materials.

In administering the program, Interior communicated with approximately 80 tribes during the first two years of the program. The department also noted that all fractionated locations within the United States should have the opportunity to participate, not just locations with 90 percent of fractionated lands. The program pursued opportunities to include less fractionated locations in early implementation efforts.

In May 2017, the Department of the Interior released the Land Buy-Back Program for Tribal Nations Cumulative Sales table summarizing transactions to date.

**Issues with the Cobell Land Consolidation Program**

Some are concerned that the Cobell Land Consolidation program is not succeeding because of how it has been operated since its inception, and because ILCA lacks provisions creating an incentive to address fractionation through means other than taxpayer purchases. It is unclear that any progress has been made in reducing the net number of fractionated interests in Indian Lands, despite more than a billion dollars from the $1.9 billion fund having been spent on purchases.

Moreover, it is unclear how the Department prioritizes which tracts of lands to target for the extension of offers to purchase. In the last few years of the Obama Administration, the Department spent a large sum of the funds to acquire for relatively small amounts of land.

[9] ILCA also provides means for tribes to acquire fractional interests in allotments and (as amended by the American Indian Probate Reform Act) sets forth rules and procedures relating to partitioning, descent of estate, probate, life estate, and other aspects related to the administration of individual Indian allotments.

Another concern is that former Secretary Salazar's declaration that ILCA's lien requirement does not apply to purchases under the program is contrary to the plain text of the settlement and the Claims Resolution Act.[10] The former Secretary's questionable lawful waiver of the lien program effectively gutted Interior's ability to leverage program funds. Accordingly, in the last year of the Obama Administration, Interior Department officials stated the program would run out of money quickly and that Interior was likely to request billions of dollars from Congress in future years.

[10] "[T]he Interior Defendants ***shall distribute the Trust Land Consolidation Fund in accordance with the Land Consolidation Program authorized under 25 U.S.C. 2201 et seq.***, any other applicable legislation enacted pursuant to this Agreement, and applicable provisions of this Agreement." (Sec. F(1), Cobell Class Action Settlement Agreement, Dec. 7, 2009). (Emphasis added)
"The term ''Land Consolidation Program' means a program conducted in accordance with the Settlement, the Indian Land Consolidation Act (25 U.S.C. 2201 et seq.), and subsection (e)(2) under which the Secretary may purchase fractional interests in trust or restricted land." (Sec. 101(a)(4) of the Claims Resolution Act of 2010, P.L. 111-291).
"The Secretary shall have a lien on any revenue accruing to an interest described in subsection (a) until the Secretary provides for the removal of the lien under paragraph (3), (4), or (5)." (25 U.S.C. 2213(b)(1))