

Separating Fact from Fiction

The Department of the Interior and the Cobell Litigation

By Ross O. Swimmer

So much about the long-running and highly emotional *Cobell v. Norton* Indian trust litigation, 428 F.3d 1070 (D.D.C. 2005), and the U.S. Department of the Interior's responsibility to Indian trust beneficiaries is misunderstood. The plaintiffs say that the federal government has failed, and continues to fail, to properly distribute massive amounts of Indian trust funds and that the vast majority of Indian trust records have been illegally destroyed. These statements have been repeated so often, they are simply taken as truth. But these claims are false.

When the *Cobell* litigation was filed, it brought focus to problems that needed attention, including many that fell outside the scope of the lawsuit. Over the last few years, many Bureau of Indian Affairs (BIA) employees at the Interior—more than 80 percent of whom are American Indians—have worked to improve the management of the Indian trust system for the benefit of all trust beneficiaries and to gather Indian trust records and reconcile historic accounts. We now have a much better understanding of both the history and current state of the Indian trust.

To set the record straight, following are ten questions and answers that go to the heart of the matter.

1. What is the *Cobell* lawsuit about? The American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. § 4001 *et seq.*, directed the Interior to account for certain trust funds. Two years later, Elouise Cobell and four other plaintiffs filed a class action lawsuit against the secretary of the interior, on behalf of all



Kevin Gover, assistant secretary for Indian affairs, testifies about the fractionated ownership of Indian lands before the Senate and House Joint Committee on Resources on Capitol Hill in 1999.

individual Indian trust beneficiaries, to compel the department to fulfill the accounting obligation. The plaintiffs' complaint also alleged that there had been mismanagement of trust assets. The court dismissed this claim as outside its jurisdiction.

2. What are individual Indian money (IIM) trust accounts? Individual Indian trusts originated mainly in the late 1800s, when the federal government tried to assimilate Indians into the economy by allotting them parcels of land to "work." This was also a way to break up the reservations. In time, when it appeared Indians were not taking up farming and ranching to the extent the federal government intended, the government began to work with individual Indian land owners to lease the land and pass

the revenues to them through IIM accounts. Today, some of the descendants of the original owners still receive payments through these accounts for the use of the trust land. Both tribal and individual Indian trust account holders may withdraw their assets and funds from trust status. Many Indian owners choose to keep their assets in trust because of tax or other benefits.

3. How much money is in IIM accounts today? Today, Interior manages approximately ten million acres of individual Indian trust land and collects and distributes approximately \$302 million per year in revenue through more than 277,000 open IIM accounts. These funds are generated from leasing, use permits, land sale revenues, and investment income. As well, Interior manages and invests about \$400 million for individuals.

4. Why are there so many accounts with very small balances?

A major problem in managing individual Indian trusts is land "fractionation." Because of probate codes and laws, individual allotments commonly are divided among many heirs as they are passed down. These parcels can now be owned by hundreds or even thousands of heirs as tenants in common. A lease payment of \$1,000 a month divided between 300 heirs yields each beneficiary \$3.33. Thousands of very small payments are credited to beneficiaries each month, leaving people understandably confused. Beneficiaries may feel that they are being cheated, but this is not the case.

Because of fractionation, Interior manages more than 15,000 accounts that have less than \$1 in them. This can cost taxpayers more than \$35 per account per year. Even when the owner of a \$1 account dies, Interior must probate the account, at an average cost of about \$3,000 per probate.

5. How has the management of the trust been improved?

Today, beneficiaries have direct access to a toll-free information call center and highly trained fiduciary trust officers to answer their questions and concerns. Millions of dollars have been spent to improve trust technology and the funds collection and distribution processes. Interior reconciles cash receipts on a daily basis and financial assets on a monthly basis. Account statements have been sent to beneficiaries quarterly since 1995; these statements are now being expanded to include comprehensive information about individuals' assets. We have a lot of work left to do, but things are very different today than they were ten years ago.

6. Do the records exist to do the historic accounting? In the early years of the *Cobell* lawsuit, it was unclear whether Interior had enough records to perform an adequate historical accounting of individual Indian trust funds. For years, different BIA offices around the country had been managing the trust with their own accounting systems, and records were

stored in a number of different locations. Nevertheless, a substantial volume of relevant documents still existed.

In 2004, we opened the American Indian Records Repository (AIRR) in Lenexa, Kansas, and began transferring inactive Indian records to the new facility. Today, AIRR is one of the best archival records centers in the world. Contrary to allegations that no records exist, more than 300 million pages of Indian records are preserved at AIRR, and more boxes arrive each week as

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offices clear out their backlogs of inactive records. This work affirms that the people who worked in the BIA did, in good faith, retain records allowing us today to perform a historical accounting of trust funds.

7. Why is the accounting process so controversial? For many years, Interior and the plaintiffs have gone back and forth in the courts on the scope and methodology of the historical accounting. The plaintiffs wanted every single transaction into or out of the trust since the 1880s to be reconciled. But it can cost taxpayers an average of \$3,500 to reconcile *each transaction* in an account, and, because of land fractionation, nearly 25 million of approximately 35 million transactions between 1985 and 2000 are for less than \$1. Because of the staggering costs, and the time it would take, Interior has been performing transaction-

by-transaction reconciliations for some accounts and a statistical sampling of other accounts—a method affirmed by the nation's largest accounting firms.

8. What accounting work has been done? To test the accuracy of transactions in land-based accounts, contractors from some of the nation's largest accounting firms have reconciled more than 99 percent of all high-dollar transactions—those over \$100,000—between 1985 and 2000, as well as a statistically selected random sample of 4,500 smaller transactions. Contractors have also reconciled more than 70 percent of all individual per capita and judgment accounts. They continue to reconcile more accounts and gather more information about how trust funds were distributed.

9. What conclusions can be drawn so far? Results, studied by a national research organization at the University of Chicago, are showing that most mistakes—and these include both overpayments and underpayments—appear to be historical miscalculations of interest on invested trust funds. Mistakes found to date total in the millions of dollars, not the billions the plaintiffs allege. In addition, we have found no evidence of tampering with the electronic systems nor evidence of system-wide error or fraud.

10. Can the *Cobell* litigation be settled? Today, it is unanimous—in Congress, in Indian Country, and at Interior—that it is time to find an appropriate settlement for this protracted litigation. This litigation is among the most contentious I have seen in Indian Country. As the former principal chief of the Cherokee Nation, I understand why frustrations with the federal government are so high. Poverty, disease, crime, and inadequate education are huge problems in Indian Country. All of these issues need more attention from tribal, state, and the federal government.

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and Congress but Indian Country itself. The department is spending upward of \$65 million per year for accounting work, litigation, and discovery costs that could be redirected into other Indian programs. The BIA is operating

in an environment where the requirements of the district court—such as the lack of Internet access and hampered communications with beneficiaries—cause undue, expensive delays and deficiencies in providing trust services. The BIA needs to return to its core mission of serving Indian communities instead of dedicating limited resources to responding to litigation demands. Interior has a fiduciary re-

sponsibility to American Indian trust beneficiaries and should be able to focus on the business of carrying it out.

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