'Settlement concepts' offer remains viable in Cobell case

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by: **Jerry Reynolds** / Indian Country Today

Part one

WASHINGTON - Among the thorny issues left over from one Congress to the next is the Cobell v. Kempthorne litigation, now in its 10th year, over the Individual Indian Money trust. But as part of an effort to settle the case legislatively and resolve some of the problems that fuel it, the presidential administration has put forward a handful of suggestions that not only aroused substantial criticism from Indian country, but also struck some tribal leaders and observers as reasonable.

The ''settlement concepts,'' as the administration termed its views, would ordain a federal withdrawal from management of the IIM trust in two phases over a 10-year period. The priority of the first phase would be consolidation of fractionated lands by voluntary and involuntary mechanisms. Among other details, tribes and individuals would retain land title; the land would remain inalienable, in trust, not subject to taxation.

Interior Department Secretary Dirk Kempthorne, in brief remarks on the settlement concepts made on Nov. 16, 2006, said the administration hopes to help Indian trust account beneficiaries move from litigation to economic development and prosperity. He emphasized the administration's willingness to ''invest billions'' in a ''material adjustment'' to trust management that will ultimately increase the value of the trust estate.

James Cason, associate deputy secretary for Indian Affairs at Interior and a regular participant in consultations on Cobell-related legislation, expanded on the settlement concepts in an interview shortly after they became public knowledge. In response to a line of questioning, he took Kempthorne's remarks as his starting point.

''There are several key elements in the [settlement concepts] offer. One of the elements, in particular when you're talking about making an investment for return of improved capital values within Indian country, is in the area of how we manage land fractionation.''

With 130,000 land allotments to account for - some of them not fractionated at all, but most others fractionated among dozens, hundreds or even thousands of ownership interests - Interior has focused on the cost of fractionation to the total value of land parcels owned by individuals and tribes. ''And what happens with the fractionation,'' Cason said, ''is to each degree that a parcel is fractionated, it has a corresponding degree of reduced value for that parcel. Because you [individual Indians and tribes] can't use the entire bundle of rights associated with the parcel when you have multiple owners who may or not agree upon the use of the property, and none of them effectively get to have the benefit of using the parcel, part of the administration's proposal was to put money into consolidating the interest in parcels.''

Using uniform appraisal standards recognized throughout the United States, Interior calculates that when between 10 and 20 percent of a parcel is fractionated among multiple ownership interests, Cason explained, the market value of that parcel becomes zero, compared with an approximately $25,000 market value for a property of undivided possessory interest.

''So part of what we were offering was, let's make a commitment on the part of the government to get to these parcels and consolidate the interest in the parcels so that whoever ends up owning these parcels at the end can actually have meaningful, beneficial use and enjoyment of their property right, which they're denied right now, and that we actually restore the market value of the parcel so that they have something they can leverage [into greater value].''

One proposal that is being discussed as a legislative possibility, Cason said, is leaving the possessory interests of the top nine or 10 interest owners intact, so as to focus on consolidating the many much smaller interests with a minimum of disruption to the larger interest holders. The smaller interests might even be offered, collectively, to the top nine or 10 interest holders, he added.

''We found that with pretty rare exceptions, that if you took the top nine or 10 owners, that in most cases they owned a significant majority of the property interest. And so we felt like that approach ... would enable a lot of the continuity in Indian country but take away all the disruption from fractionation.''

The approach might well require a mechanism for involuntary land transfers, Cason said, though no final consensus has been reached. "But I think that it's envisioned as part of the discussions that at some point you would need to do that. And there are tools, through [land] condemnation, or other tools that you could use. Those tend to be pretty expensive, so we would probably look into legislation for some easier mechanism that's more cost-efficient to do than that."

(Continued in part two)

'Settlement concepts' offer remains viable in Cobell case

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Part two

WASHINGTON - In an effort to rationalize the federal trust relationship with tribes and settle the litigation known as Cobell v. Kempthorne over federal accounting of the Individual Indian Money trust, the Bush administration has put forward a preliminary framework of "settlement concepts" that would ordain a federal withdrawal from management of the IIM trust in two phases over a 10-year period.

The priority of the first phase would be the consolidation of fractionated lands by voluntary and involuntary mechanisms. According to James Cason, associate deputy secretary for Indian affairs at the Interior Department (the federal government's lead delegate agency on Indian affairs and the defendant in Cobell), consolidation of fractionated interests in land is considered essential to realizing the economic value of IIM allotted lands. Interior's preference would be to purchase the fractionated interests of possibly all but the top nine or 10 interest owners of an allotment from voluntary sellers, he said.

Interior, as the only "market" offering cash payments for fractionated interests, has already purchased tens of thousands of interests, Cason added. "So we have a lot of volunteers who are willing to do it."

Ross Swimmer, Interior's special trustee for Indian trust issues, added that "for the most part, we haven't found people unwilling to divest themselves of their interest for some sum of money. In fact, many of the people that we have purchased their interest from didn't even know they owned it. It's been passed down more by family history. People say, 'Well, you know, my great-grandfather used to own a piece of land up in South Dakota. Wonder whatever happened to it?'"

"Well they don't know that they own one-tenth of it today, because after several generations have gone through they just moved away, live east of the Mississippi, and they just didn't keep track of it. We [Interior] have to go dig these people out. So there are a lot of people out there like that, that you would almost have to have some form of involuntary transfer. We have forty-some thousand, even who are receiving money, that we can't locate. You can imagine people who have never received any income off this land, have moved away and fourth, fifth generation down from the allotment - they don't know they own it. And for us to try to go out and get a warranty deed from everybody that owns a tiny fraction is almost impossible," Swimmer said.

"But for the most part, those that we have contacted, been able to find, as long as they received something for their interest, they've generally been willing to sell. I don't know what the ratio is. I don't think we've had many turn-downs at all. But again we're only purchasing those interests that are generally less than 2 percent of the property."

Cason and Swimmer concur, then, along with some other participants from Congress and the tribes in the discussions that produced the "settlement concepts," that some form of involuntary transfer of interests in land will be required for the full consolidation of fractionated allotment interests. They also acknowledge that an involuntary transfer mechanism of any kind is bound to conjure up distrust, based on history if nothing else. That is one reason the settlement concepts insist the consolidated lands must remain in trust,

inalienable from the tribe without its consent and, as property of the tribal and federal governments, untaxed.

''We, too, recognize that there's been a long history,'' Cason said. ''And some of the history's a little bit checkered, and it causes some feelings of angst in Indian country. And so one of the elements of the [settlement concepts] proposal that we were discussing with [Capitol Hill] was a clear statement that we would continue to hold all of this property in trust, and prevent involuntary alienation of this property. So it was a blanket statement from the front - the land would be in trust, we're not looking to take the land out of trust, we would prevent involuntary alienation of the trust - to address that very point.

''This is not termination. We're not trying to get rid of the land. What we're trying to do is change the character of how the land gets managed, and who's making the decisions about managing the land.

''So we tried to address that point up front, and there's a little bit of a - I'll say a complicator, in that there's not a way for us to make an absolute statement that no land will go out of trust. And the reason that is is because both Indian tribes and individuals have the right to say, 'I want to take my land out of trust.' So they do have the right to do that, so we have to basically preserve that option. But what we're saying is we will prevent, as part of our trust relationship, the involuntary alienation of the land. And based on our history here, we expect that in most cases tribal members and Indian tribes will want to keep their land in trust.''

(Continued in part three)

Settlement concepts' offer remains viable in Cobell case

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Part three

WASHINGTON - Discussions will continue in the new Congress on ''settlement concepts'' to resolve the *Cobell v. Kempthorne* litigation, along with some of the problems that brought it about.

The class action lawsuit, brought by Individual Indian Money account holders against the Interior Department, seeks an accounting of IIM funds, as well as a financial settlement based on the mismanagement alleged against Interior by congressional reports and agency audits. A congressional initiative to end the litigation faltered last year. At the tail end of that process, the Bush administration brought forward a handful of suggestions under the rubric of ''settlement concepts.''

''There's been a lot of consultation so far, and it looks like we need some more,'' said James Cason, associate deputy secretary for Indian affairs at Interior and a regular participant in consultations on Cobell-related legislation.

He added that Interior, the federal government's lead delegate in dealing with Indian trust issues, often doesn't get credit for consultation with tribes because it has to put a lot of thought into its suggestions before they can be offered up for consultation. Without the prior thoughtfulness and effort, he added, there would be no point to consultation because the ideas would not be substantive enough to discuss.

The latter certainly can't be said of the settlement concepts, which would ordain a federal withdrawal from management of the IIM trust in two phases over a 10-year period. The priority of the first phase would be consolidation of fractionated lands by voluntary and involuntary mechanisms. Fractionated lands, universally recognized as the leading problem in managing the IIM trust, would be consolidated; but land title would remain with Indian individuals or tribes. The priority of the second phase would be transition to a ''beneficiary-managed'' trust with limits on federal liability.

The proposals have met with substantial hostility from Indian country, but also with some measure of

support.

Ross Swimmer, Interior's special trustee, said that consolidating land so that owners can make economic decisions in their own interest, rather than simply holding land in trust without real benefit to the owners, is the genuine path toward self-determination. ''So that we're not maintaining a trust that has 1/1,000th of an interest that brought in two cents last year, but there's a tract of land where we're maintaining it in trust, but someone is using it for their benefit. That's what we'd like to see.''

Cason, too, emphasized solutions, and not necessarily Interior's solutions. ''You know, if someone in Indian country has a better way to create a solution than the way we put it on the table, great. Tell us what it is. Because in the end, what Ross and I are trying to do is spend our time effectively, trying to help a particular, well-defined constituency get better results out of the investments we're making.

''Right now, we spend about $3 billion a year into Indian country, and we'd like to get a better product, a better solution for Indian country, than where we are now. ... But in the end, let's stop and think about what the options are and what the problems are, and let's think together about how we can solve them.''

Swimmer and Cason both believe a financial settlement of the magnitude contemplated by plaintiffs and the Senate Committee on Indian Affairs - $8 billion at last report - is not an option, according at least to the accounting process Interior has engaged in. Cason said any settlement figure should have ''some semblance of a relationship to the facts.''

''The administration supports settling Cobell,'' he said. ''And the Hill [Capitol Hill] supports settling Cobell. And the real issue is ... how much does it cost us and what are we buying?''

''I think one of the problems,'' Swimmer added, ''even in S. 1439 [last year's failed congressional attempt to settle Cobell legislatively], is that there's so much to fix that it's very difficult to figure out what you're paying for. Congress has - all of us have to know what we're paying for.''