

**PROPOSED SETTLEMENT OF THE
COBELL V. SALAZAR LITIGATION**

OVERSIGHT HEARING

BEFORE THE

**COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES**

ONE HUNDRED ELEVENTH CONGRESS

SECOND SESSION

Wednesday, March 10, 2010

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CONTENTS

	Page
Hearing held on Wednesday, March 10, 2010	1
Statement of Members:	
Cassidy, Hon. Bill, a Representative in Congress from the State of Louisiana	28
Christensen, Hon. Donna M., a Delegate in Congress from the Virgin Islands	8
Faleomavaega, Hon. Eni F.H., a Delegate in Congress from American Samoa	6
Grijalva, Hon. Raúl M., a Representative in Congress from the State of Arizona	8
Hastings, Hon. Doc, a Representative in Congress from the State of Washington	3
Kildee, Hon. Dale, a Representative in Congress from the State of Michigan	5
Prepared statement of	5
Napolitano, Hon. Grace F., a Representative in Congress from the State of California	7
Rahall, Hon. Nick J., II, a Representative in Congress from the State of West Virginia	1
Prepared statement of	2
Statement of Witnesses:	
Cobell, Elouise C., Lead Plaintiff in <i>Cobell v. Salazar</i> , Browning, Montana	50
Prepared statement of	53
Class Action Settlement Agreement dated December 7, 2009	57
Agreement on Attorneys' Fees, Expenses, and Costs	57
Dorris, William E., Managing Partner, Kilpatrick Stockton LLP, Washington, D.C.	61
Finley, Hon. Michael O., Director, Inter-Tribal Monitoring Association on Indian Trust Funds, Albuquerque, New Mexico	9
Prepared statement of	10
Hayes, Hon. David, Deputy Secretary, U.S. Department of the Interior, Washington, D.C.	33
Prepared statement of	35
Monette, Richard, Professor of Law,, University of Wisconsin, Madison, Wisconsin	17
Prepared statement of	19
Nunez, Hon. Austin, Chairman, Indian Land Working Group, and Chairman, San Xavier District of the Tohono O'odham Nation, Tucson, Arizona	13
Prepared statement of	15
Response to questions submitted for the record	16
Perrelli, Hon. Thomas J., Associate Attorney General, U.S. Department of Justice, Washington, D.C.	37
Prepared statement of	39
Additional materials supplied:	
Rosebud Sioux Tribe, Statement submitted for the record	63
Squire, Percy, Percy Squire Co., LLC, Columbus, Ohio, Letter submitted for the record	66

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

**Wednesday, March 10, 2010
U.S. House of Representatives
Committee on Natural Resources
Washington, D.C.**

The Committee met, pursuant to call, at 10:12 a.m. in Room 1324 Longworth House Office Building, Hon. Nick J. Rahall, II, [Chairman of the Committee] presiding.

Present: Representatives Rahall, Kildee, Faleomavaega, Napolitano, Grijalva, Costa, Sablan, Heinrich, Christensen, Baca, Herseth Sandlin, Hastings, Smith, Lummis, and Cassidy.

**STATEMENT OF HON. NICK J. RAHALL II, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF WEST VIRGINIA**

The CHAIRMAN. The Committee meets today to hear testimony on the Proposed Settlement of the *Cobell v. Salazar* litigation. Under the proposed \$3.4 billion agreement, \$1.5 billion would be used to settle historical accounting claims, as well as mismanagement claims.

The remaining \$2 billion would be used to address the fractionated Indian lands problem. This settlement agreement will end almost 14 years of contentious litigation.

For the first time ever, the parties have come together and agreed upon a proposed settlement. I commend the parties for overlooking your differences, trying to resolve the issues, and put an end to the court battle.

While I support settlement of this case, some in Indian Country have raised questions and concerns. The parties have responded to many of these issues, and I praise Elouise Cobell for sending wide-reaching, lengthy e-mails answering questions that she has received.

I encourage the *Cobell* parties to view this hearing as another forum in which to educate not only Congress, but also Indian Country, on the agreement. Upon acceptance of this agreement, a Secretarial Commission on Trust Reform would be established by the Interior Department.

This is a welcome initiative and long overdue, but it will only be successful if the tribes are at the table from the beginning, and the Department truly listens to what they have to say, and the Department must remember one size does not fit all.

I would be remiss if I did not take a moment to reflect on what has brought us to this point. Over 100 years of mismanagement of Indian trust funds by the United States and decades of ignoring the problem.

I have been here long enough to remember our former colleague, Mike Synar from Oklahoma, back in the mid-1980s spending five years on a report detailing the breadth and scope of the problem.

That report started the Congressional focus on fixing the problem. Since that time, Congress has held numerous hearings, passed legislation, and appropriated millions of dollars to reform trusts on management, and give Indian trustees greater control over their funds.

Many times I have sat in this room and heard from the Interior Department that they had plans for a new, latest, greatest computer system that would fix all the problems.

Do not misunderstand me. I believe those plans were made with the best intentions, but the problem remained that moving data to any one system could not fix all the problems, and no computer system can recreate documents lost decades ago.

Many people have worked on the reform issue over the years, and they have moved on. The one constant through it all has been Elouise Cobell. I have nothing but the utmost respect and admiration for Elouise. She has not once faltered in her mission to mend the system and ensure that future Indian allottees benefit from a well managed trust fund process.

Elouise, we thank you for your tenacity, and all of your hard work. The trust fund mismanagement lawsuit has been very frustrating to all involved and, at times, tempers overheated. Thankfully, we have with us today only persons dedicated to bringing this chapter to a close, and willing to do the work needed to see that that happens. I look forward to their testimony. I recognize the Ranking Member.

[The prepared statement of Chairman Rahall follows:]

**Statement of The Honorable Nick J. Rahall, II, Chairman,
Committee on Natural Resources**

The Committee meets today to hear testimony on the proposed settlement of the *Cobell v. Salazar* litigation.

Under the proposed \$3.4 billion agreement, \$1.4 billion would be used to settle historical accounting claims as well as mismanagement claims. The remaining \$2 billion would be used to address the fractionated Indian lands problem.

This Settlement Agreement will end almost 14 years of contentious litigation. For the first time ever, the parties have come together and agreed upon a proposed settlement. I commend the parties for overlooking their differences, trying to resolve the issues and putting an end to the court battle.

While I support settlement of this case, some in Indian Country have raised questions and concerns. The parties have responded to many of these issues and I praise Elouise Cobell for sending wide reaching, lengthy e-mails answering questions she has received.

I encourage the Cobell parties to view this hearing as another forum in which to educate, not only Congress, but also Indian Country, on the agreement.

Upon acceptance of this agreement, a Secretarial Commission on Trust Reform would be established by the Interior Department. This is a welcome initiative and long overdue. But it will only be successful if the tribes are at the table from the beginning and the Department truly listens to what they have to say. And the Department must remember, one size does not fit all.

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legislation, and appropriated millions of dollars to reform trust fund management and give Indian trustees greater control over their funds.

Many is the time I have sat in this room and heard from the Interior Department that they had plans for a new, latest, greatest, computer system that would fix all the problems. Do not misunderstand me; I believe those plans were made with the best intentions. But the problem remained that moving data to any one system could not fix all of the problems and no computer system can recreate documents lost decades ago.

Many people have worked on the reform issue over the years, and many have moved on. The one constant, through it all, has been Elouise Cobell.

I have nothing but the utmost respect and admiration for Elouise. She has not once faltered in her mission to mend the system and ensure that future Indian allottees benefit from a well managed trust fund process.

Elouise, we thank you for your tenacity and all of your hard work.

The trust fund mismanagement and law suit has been very frustrating to all involved and at times tempers overheated. Thankfully we have with us today only persons dedicated to bringing this chapter to a close and willing to do the work needed to see that happens.

I look forward to the testimony. Thank you.

**STATEMENT OF HON. DOC HASTINGS, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF WASHINGTON**

Mr. HASTINGS. Thank you, Mr. Chairman, and thank you for scheduling this meeting on *Cobell v. Salazar*, the settlement agreement. Mr. Chairman, it was on December 7 of last year that this settlement was announced, and it was greeted with widespread hope across Indian Country that a resolution was at hand.

I, too, am very hopeful that a fair treatment for individual Indians is close at hand. This lawsuit, as the Chairman has mentioned, has gone on far too long, and it is my first priority that individual Indians are treated fairly in this matter.

However, I must admit a degree of concern that the \$3.4 billion settlement that was announced on December 7 had an initial expiration date of December 31, only 24 days later.

That deadline was subsequently extended to February 28, and now to April 16. So my concerns are twofold. First, the urgency for action by the parties to the settlement, at least thus far, has not been open to any transparent action by this Congress.

We are over three months after the initial settlement, and now we are holding our first public hearing, and I commend again the Chairman for doing that. But this hearing does come only after this Committee was contacted by individual Indians and several Indian organizations simply asking for more information on what this settlement means.

It is troubling that affected Indians have felt concern that there may be a rush to action before public hearings were held so that they may better understand the settlement. My second concern has been the astonishing fact that no actual bill to implement the settlement has yet been introduced in either house. For three months, there have been no legislative attempts before either the House or the Senate, and more importantly, there is no introduced bill available to be read by those who are directly affected by the settlement.

So deadlines are being imposed on Congress to act with uncharacteristic swiftness, and yet there is no introduced bill for Congress to even look at, or those interested parties to look at.

This raises the question of when and how this settlement agreement is going to be enacted. Will it be handled in an open, transparent manner that respects the rights of individual Indians to see and understand what is happening, or will it be done in a manner that instead puts the emphasis on speed and haste.

On the details of the settlement itself, there are several matters that I certainly would like the witnesses to address, issues that have been raised by Indians in their correspondence with this Committee.

First, I want to distinguish between the \$1.4 billion portion of the settlement agreement that resolves the Indian historical accounting class action lawsuit, and also extinguishes all potential damages claimed, and the \$2 billion portion that provides funding to existing authorized Department of the Interior programs to purchase fractionated lands. Those two issues.

The \$1.4 billion will provide a cash payment of \$1,000 to each Indian account holder. While the class action case was not a money claims case, there is clearly merit in settling it by paying cash awards and starting with a clean slate.

The bulk of the \$1.4 billion portion, however, will go to settling damage claims, which were not litigated in the *Cobell* case. It is my understanding that a key reason behind the need for Congressional action on the settlement agreement is this matter of damages claimed.

The District Court has no jurisdiction over them, and legislation is needed to create these claims, while simultaneously resolving them. I have to admit that this does raise a degree of concern that Congress would serve as the lawyer, judge, and jury, in unilaterally dispensing with the claims of thousands of individual Indians.

However, the parties to the settlement agreement have concluded this is a critical component, and they should weigh very heavily in our consideration. I certainly respect that, though it is important to ask for information on how this affects individual Indians, and whether they are being treated fairly in this process.

And, second, Mr. Chairman, there is the matter of the attorney fees. Reports have said that lawyers could be paid between \$50 million and \$100 million. Now that is a very high amount of money. I believe it is important to understand what specific justification exists for this large payment to the lawyers in this case, and whether they are collecting any fees from the settlement of damage claims that they did not represent.

Lawyers deserve to be paid fairly for the actual work that they perform, but there appears to be no accounting or records to back up this high level of fees. Congress should have that information, especially as it is my understanding that the fees paid to lawyers come from the same pot of money that compensates individual Indians.

When every dollar that goes into the pocket of a lawyer comes out of the pocket of an individual Indian, I think it is our responsibility as Members of Congress to look at this very closely.

Last, greater clarity would be helpful on the portion of the settlement agreement that provides \$2 billion for the consolidation of fractionated Indian lands. How is this related to the settling of claims?

Was it included at the request of the Plaintiffs or the Government? What oversight will be provided to ensure the best benefit to taxpayers, individual Indians, and Indian tribes as a result of this portion and this part of the settlement.

In conclusion, I do want to thank you again, Mr. Chairman, for holding this hearing. I believe it is an important step and opportunity to improve our understanding and the understanding of the affected Indians of this settlement agreement. So, with that, I thank you, and I yield back my time.

The CHAIRMAN. Do other Members wish recognition? The Chair of our Native American Caucus, Mr. Kildee.

STATEMENT OF HON. DALE E. KILDEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. KILDEE. Thank you, Mr. Chairman. First of all, I want to commend President Obama, Attorney General Holder, and Interior Secretary Salazar, for their attention to this matter, and their continued efforts to strengthen the relationship between the United States and the tribal nations.

And I want to commend Elouise Cobell. Tenacity is a great virtue, and she certainly has exercised that tenacity for justice. When you are going to be a seeker after justice, you have to pursue your justice and the justice of those with whom you are associated.

She has done a wonderful job in this, and I think sets an example for us in the Congress, which has an obligation to pursue justice. And let us take an example from her, who would not give up, and pursued this relentlessly with a great devotion.

And I think this is one where we have to give our devotion to this, and that this is a moral issue, more than just a legal issue. It is a moral issue, and we have to do what is morally and legally right, and make these things as right as humanly possible.

We know that records have been lost, and this figure has been agreed upon, but I hope that when I stand before my tribes that I can present as good a case of having done good as Elouise Cobell has done. I yield back the balance of my time.

The CHAIRMAN. The Gentleman from American Samoa, Mr. Faleomavaega.

[The prepared statement of Mr. Kildee follows:]

Statement of The Honorable Dale E. Kildee, a Representative in Congress from the State of Michigan

Good morning Mr. Chairman, I want to thank you for scheduling this hearing today. I first would like to pledge my support for ending the 14 years of litigation surrounding this case.

I commend President Obama, Attorney General Holder and Interior Secretary Salazar for their attention to this matter and their continued efforts to strengthen the relationship between the United States and tribal nations.

As you know, the Cobell case has been in litigation for over 13 years. Late last year, the parties reached an agreement to settle the case for \$3.4 billion. But the agreement will not take effect unless Congress passes legislation to authorize and fund the Settlement Agreement. Legislation is needed to ensure that the court has jurisdiction over the terms of the Settlement Agreement and to ensure the availability of Judgment Funds to settle the claims.

The courts in this case have repeatedly found the United States to be in violation of its trust responsibilities to Native Americans. The Settlement Agreement resolves the claims of those Native Americans and also fixes the problems that caused the mismanagement of over three hundred thousand trust accounts held by Native Americans.

This decision will help make amends for the past mismanagement of Indian trust funds by the U.S. Government, as well as bring much needed resources to address fractionated Indian lands.

While this is an important step, this is not the end of the fight for justice on behalf of Indian trust assets, and I will continue to fight to ensure that our tribes are treated in a fair and equitable manner.

I, along with several of my colleagues will be sending a letter to House leadership urging them to provide immediate assistance and support in passing legislation to approve and fund the Cobell v. Salazar Settlement Agreement.

As you are aware, the settlement agreement originally required Congressional approval by Dec 31, 2009, which was extended until February 28, 2010. Fortunately the parties have again agreed to extend this deadline until April 16, 2010.

I want to applaud Chairman Rahall with working the Senate Indian Affairs Committee to seek a timely conclusion to this pending litigation. I urge my colleagues to support a timely resolution to this litigation. I look forward to hearing from the witnesses today. Thank you.

**STATEMENT OF HON. ENI F.H. FALEOMAVAEGA, A DELEGATE
IN CONGRESS FROM AMERICAN SAMOA**

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman. As a Member of our American Indian Congressional Caucus, I do thank the Gentleman from Michigan, and also our colleague from Oklahoma, Mr. Cole, as Co-Chairmen of our Congressional Caucus for American Indians.

And I do want to thank you and Mr. Hastings for what I thought were pretty comprehensive statements in terms of the situation that we are now in. The only concern that I have, Mr. Chairman, is that 384,000 accounts involving some 250 Indian tribes, 100 years of mismanagement, that we can only come up with \$3.5 billion.

Something is missing here, Mr. Chairman, I submit, and I think that this is one reason why we had the courageous efforts by Ms. Elouise Cobell, because not only the Congress was not able to resolve the thing. It seemed like getting this \$3.5 billion is like pulling teeth.

Oh, but we can spend \$900 billion in fighting the war in Iraq, and the five million Native Americans, and all of the men and women who serve in the Armed Forces, and who bleed and die for our country, I just want to say that something is amiss here, Mr. Chairman.

And I really honestly believe that \$3.5 billion is a pittance, and I think that likely what Mr. Hastings was saying that paying our attorneys \$50 million to \$100 million, there is something wrong with that, too.

I do want to associate myself with the comments that Mr. Hastings has made. The concerns about how we are proceeding with this effort, this so-called settling of these hundred years of mismanagement.

The fact that there were even efforts of reorganizing the Bureau of Indian Affairs, nothing has come about in that, on that situation. But I do want to say that I do have some very serious questions about how we come up with a figure of \$3.5 billion. I felt at least it should have been \$9 billion to \$10 billion, and even that was very difficult to ascertain.

And supposedly we had given every opportunity to the Department of the Interior to come up with the numbers, come up with

the figures, and if they couldn't, then there has got to be a better way of calculating exactly what was lost, what was stolen, or in terms of the mismanagement on the part of our government to be the trustees of the resources that were rightfully owned by the Indian tribes.

Again, I do want to thank you, Mr. Chairman, for calling this hearing. I hope that it won't be the last, and there will be more in the coming weeks and months, and let us just look into it a little more and a little deeper.

And, I, too, want to say how much utmost respect I have for Elouise Cobell for her courage, for her commitment, not only on her own behalf, but certainly among all the Indian tribes that were affected by the bottom line mismanagement by the Bureau of Indian Affairs, and the accounts of our Native American people.

This is just a real sad commentary. I don't know if I should stand up and say hooray for \$3.5 billion, or I should say that something is wrong here. I think our Indian Americans deserve a lot more than this, and I thank you, Mr. Chairman.

The CHAIRMAN. Are there other Members who wish to make opening comments? The gentlelady from California.

STATEMENT OF HON. GRACE NAPOLITANO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mrs. NAPOLITANO. Thank you, Chairman Rahall, for the hearing. I have sat through these Committee hearings in this room for almost 12 years, a little over 12 years, and listening to many of the things through the years, it is very apparent that we have not paid—and as the comments by Mr. Faleomavaega, and my colleague, Mr. Kildee, there is a lot missing, and somehow we are not focused on being able to rectify the wrongs that have been done to the Native Americans for decades.

In my Subcommittee on Water and Power, we continue to honor the tribes water claims. I think there is a lot of work to be done, and I thank the Administration for trying to get moving.

I just feel that somehow we feel frustrated that we may not be moving fast enough, or wide enough, to be able to understand that if we help our Native American Tribes that they can take care of their own.

They will be able to succeed in the economy by educating their children, and being able to do all the things that we have not kept them from, but not helped them. We have taken from, but not helped them.

So not even to see that there has been a benefit settlement to reimburse families and communities is really a travesty upon our own people, because Native Americans are our first Americans.

We need to bring this to a closure and whatever we can do to help, Mr. Chairman, we are ready to do so, and thank you so very much for this hearing.

The CHAIRMAN. I thank the gentlelady. The gentleman from Arizona, Mr. Grijalva.

**STATEMENT OF HON. RAÚL M. GRIJALVA, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF ARIZONA**

Mr. GRIJALVA. I want to thank you, Mr. Chairman, and thank you for the hearing. Let me briefly just associate myself with the comments that Mr. Kildee made, and also take the privilege and the opportunity to welcome my good friend, Austin Nunez, from back home.

Welcome, and again, thank you for the hearing. It is important, and the sooner that we move, the sooner we can begin the resolution to this issue that has been around too long. Thank you, sir.

The CHAIRMAN. Any other comments? Opening statements? The gentlelady from the Virgin Islands, Dr. Christensen.

**STATEMENT OF HON. DONNA M. CHRISTENSEN, A DELEGATE
IN CONGRESS FROM THE VIRGIN ISLANDS**

Mrs. CHRISTENSEN. Just briefly, Mr. Chairman. I want to thank you for holding this hearing, and I have been here for 14 years. I remember my first joint hearing over at the Senate on this issue, and being left to chair what was a very, very difficult hearing.

But I am just glad that we are coming close to ending an injustice that has existed for far too long. There is still much work to be done, but I want to take this opportunity to also applaud Ms. Cobell, and those who supported her, and look forward to the testimony of our witnesses this morning.

The CHAIRMAN. OK. If there are no further opening statements, we will now recognize—well, before I recognize the witnesses, I would like to note that our longtime staff director in the Office of Indian Affairs, Marie Howard, is retiring at the end of this month.

This will be the last hearing that she will staff. There she is. And for almost 30 years now, Marie has worked on this Committee, fighting for Indian Country, and on behalf of all of us on the Committee, the Members on the Committee want to express our appreciation to Marie, both professionally and personally, for her dedication, and her professionalism, and the manner in which she has so well conducted herself over these 30 years.

So, Marie, congratulations to you, and we want to wish you the best as you continue to work for Indian Country.

[Applause.]

Mr. FALEOMAVAEGA. Will the Chairman yield?

The CHAIRMAN. Yes, gladly.

Mr. FALEOMAVAEGA. I might also add the fact that just about every major piece of legislation affecting our Native American community has Marie Howard's signature on it. I also want to commend her and thank her for a tremendous service that she has given on behalf of our Native American community throughout the country. Marie, you deserve every bit of it. Thank you.

The CHAIRMAN. OK. Our first panel is composed of the following individuals: The Honorable Michael Finley, the President of the Inter-Tribal Monitoring Association on Indian Trust Funds, from Albuquerque, New Mexico; The Honorable Justin Nunez, Chairman, Indian Land Working Group, Tucson Arizona; and Professor Richard Monette, the University of Wisconsin, Madison, Wisconsin.

Gentlemen, we welcome you to the Committee on Natural Resources today. We do have your prepared testimony. It will be made part of the record as if actually read, and you are encouraged to summarize within the five-minute time frame. And do you want to go in the order that I introduced you? Mr. Finley then.

STATEMENT OF HON. MICHAEL FINLEY, PRESIDENT, INTER-TRIBAL MONITORING ASSOCIATION ON INDIAN TRUST FUNDS, ALBUQUERQUE, NEW MEXICO

Mr. FINLEY. Good morning, Chairman Rahall, and Ranking Member Doc Hastings, and Members of the Committee, my name is Michael Finley, and I serve as Chairman to the Board of Directors of the Intertribal Monitoring Association on Indian Trust Funds.

However, I am also Chairman of my own tribe, the Confederated Tribes of the Colville Reservation, Northeast Washington State. I appreciate the opportunity to be here today to present ITMA's views regarding the proposed settlement of the *Cobell* litigation.

The Committee has my prepared statement, and I would like to take the opportunity to highlight a few of those areas. Since the onset, ITMA has long supported an honorable and just settlement of the *Cobell* litigation. However, as the Chairman has pointed out, we are talking about a hundred years of history here.

It is an emotional issue for many of the Indian beneficiaries, and they have many questions. I have heard various questions from people across Indian Country, as well as my own constituents.

They want to know what this settlement means to them. They want to know how it is going to impact them. However, I don't always have the answers to their questions. They want to know why is it only recently the mismanagement claims were included when all along they were told that they were not, and I believe that question was raised a little bit ago.

So being their tribal leader, they want me to have answers to these questions, and I always haven't had the answers to those questions. I know that ITMA, as an organization that deals with these issues, has been fielding many questions from Indian Country, as well as tribal leaders.

I have heard from various tribal leaders as well who have been hearing many of the same questions. Indian beneficiaries that are impacted by this just want transparency. They question why the haste, and I think that it is a legitimate question that needs to be answered, but more importantly, their questions need to be answered before this is considered.

So as a result of that, ITMA may organize the first national outreach meeting on a settlement in Las Vegas on February 24th. Elouise's attorneys were on-hand, and ITMA and the consultants were on-hand. Various tribal leaders and Indian beneficiaries across the Nation were on-hand.

Many questions were asked, and many were answered. However, a lot of the issues were not clarified, and questions remain. In attempts to address some of those questions and answers, ITMA has offered suggestions that is in the written testimony that is before you today.

And I feel though what I would like to highlight is that we are asking the Plaintiffs and the Government consider setting aside a portion of the settlement fund to provide an option for mismanagement claims to be resolved administratively.

We want to target those people who fall through the cracks, and I think if this is considered as we move forward, it would give an opportunity for many of those people to have a voice.

A lot of the Indian beneficiaries that I have talked to, they just want their story to be here. Because of the long history, many of these people were reared on the very same lands that are now included on this Class II action that is within the settlement terms.

So they have an emotional tie to the property. A lot of time this property is passed on from one generation to the next, and include important cultural areas to the Indian beneficiaries.

There is a long history of mismanagement, and in some cases outright capricious activities conducted by the Bureau, and many of these individuals just want their story to be heard, and they want to see a resolution to the wrongs that were done to them in the past, but they want that to happen in the right way.

We also would like the Department to consult with the tribal governments on how the \$2 billion land consolidation fund will be implemented and spent. All too often in the past, I think you would see that this was done with the input of the tribes.

The tribes deserve to have a voice in this process. They need to be consulted on this. I think the tribes should have a better understanding of what those priorities would be other than some other group that is based out of D.C.

We are on the ground working with the land, and we know the land, and we know what our priorities are. We want to be given that opportunity to decide what those priorities would be if this moves forward and the money is allocated in that program.

We also would like the parties to conduct in person outreach to the Indian beneficiaries throughout Indian Country, because as I stated, it is an emotional issue. People want to be heard. They want their questions answered.

So I would ask that the parties conduct that as we move forward. In conclusion, I would like to thank you for this opportunity to testify today. ITMA is grateful for the Administration's commitment to ending the *Cobell* litigation, in hopes that this commitment also extends to resolving the scores of pending tribal lawsuits and forward looking trust reform. At this time, I stand ready for any questions that the Committee may have.

[The prepared statement of Mr. Finley follows:]

Statement of The Honorable Michael O. Finley, Director, on Behalf of the Inter-Tribal Monitoring Association on Indian Trust Funds

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 administra-

tion 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, 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.

The CHAIRMAN. Thank you, Mr. Finley. Chairman Nunez.

**STATEMENT OF HON. AUSTIN NUNEZ, CHAIRMAN,
INDIAN LAND WORKING GROUP, TUCSON, ARIZONA**

Mr. NUNEZ. Good morning, Honorable Chairman Rahall, and Members of the Committee. Thank you for giving me this opportunity to address this longstanding, arduous, and divisive litigation.

I am speaking today on behalf of the Indian Land Working Group, a nationwide organization founded in 1991, and since that time has engaged in issues related to restoration, use, and management of the remaining native land base, including cost allotments. ILWG continually seeks improvements in the protection and management of all Indian trust lands.

With me today are two board members, Vice Chairwoman Helen Sanders, and Board Member Marcella Giles. I am a member of the Tohono O'dham Nation, and have served 23 years as the Chairman of the Nation's Santa Vera district.

The district is co-extensive with the Santa Vera Indian reservation founded by Executive order in 1874. The reservation covers 105 square miles, of which two-thirds, or approximately 42 thousand acres, were allotted to individuals under the General Allotment Act of 1887.

My family and I are owners of an allotted trust plan, and thus within the class of plaintiffs in the *Cobell* litigation. With this background, my remarks today are in my capacity as Chairman of ILWG.

After considerable discussion and deliberations the board of directors of ILWG has taken the position for support of the December 7, 2009 class action settlement agreement, and the implementing legislation which it proposes.

While the settlement agreement in several ways falls short of our initial expectations and hopes. Nevertheless, we believe that this settlement agreement is in the best interests of the parties, including class members and the government.

We have concluded that the benefits of the settlement outweigh the disappointments. Our reasoning follows that of the Plaintiff class counsel set out in paragraph 16 of the opening section of the settlement agreement, namely the risk and uncertainty of further litigations, the result, and the benefits of closure and payment to land owners, many more of whom would pass away before seeing any benefits should this dispute be further extended.

The settlement agreement does not provide for all of the damages sought by the Plaintiffs, nor does it acknowledge the mishandling of trust funds by the government, which has caused great hardship to our people over many years and generations.

Nevertheless, the good faith of the parties is obvious in light of the progress of the litigation over the past decade. We recognize and are encouraged that the amount of the settlement fund is more than twice the amount found by the trial court to be the losses resulting from fund mismanagement.

The uncertainty of further litigating that finding is significant. More importantly, this litigation has brought to the Department of the Interior and the Bureau of Indian Affairs a dramatic change in understanding of the government's fiduciary duty.

Regardless of the amount of damages to be distributed to this settlement, this settlement will bring closure to this chapter in the United States and Indian relationships. Finally, additional investments in land consolidation called for in the second aspect of the settlement agreement is long overdue and welcomed.

We have some difficulty in understanding the inclusion of the unlitigated issues of the land mismanagement claims into the settlement at this point, 14 years into the case. We understand the desire of the government to resolve as many claims as possible, and acknowledge land mismanagement claims that are related to the general allegations of trust mismanagement.

In view of the benefits of the settlement agreement, and risks, and uncertainty, and delay in further litigating those issues, ILWG

can accept this aspect of the settlement agreement, but DOI and the Department of Justice should extensively consult with IAM account holders, not just the tribes, plus the issues of backlog, probate should be addressed before the settlement goes forward.

Last, we do not agree with sunset provisions for fractionation. In conclusion, the board officers of the Indian Land Working Group acknowledge and thank those who worked hard to preserve, and their financial support and sacrifice to conclude and deliver the settlement agreement. Thank you for the opportunity to address you today.

[The prepared statement of Mr. Nunez follows:]

Statement of The Honorable Austin Nunez, Chair, Indian Land Working Group, and Chairman, San Xavier District of the Tohono O'odham Nation

Honorable Chairman and Members of the Committee, I appreciate the opportunity to address this committee today on the proposed settlement of this long running, arduous and divisive litigation.

I am speaking today on behalf of the Indian Land Working Group, a nation wide organization founded in 1991, and since that time actively engaged in issues related to restoration, use and management of the remaining native land base, including trust allotments. The ILWG continually seeks improvement in the protection and management of all Indian Trust Lands and the revenues derived from them.

I am a member of the Tohono O'odham Nation, and have served for 22 years as chairman of that Nation's San Xavier District. The District is coextensive with the San Xavier Indian Reservation founded by Executive Order in 1874. The reservation covers 105 square miles, of which two-thirds, or approximately 42,000 acres were allotted to individuals under the General Allotment Act of 1887. My family and I are owners of allotted trust land, and thus within the class of plaintiffs in the Cobell litigation. With this background, my remarks today are in my capacity as the chairman of ILWG.

After considerable discussion and deliberation, the Board of Directors of ILWG has taken a position of support for the December 7, 2009 Class Action Settlement Agreement and the implementing legislation which it proposes. While the Settlement Agreement in several ways falls short of our initial expectations and hopes, nevertheless, we believe that this Settlement Agreement is in the best interests of the parties, including class members, and the government. We have concluded that the benefits of this Settlement outweigh the disappointments. Our reasoning follows that of the Plaintiff Class Counsel set out in paragraph 16 of the opening section of the Settlement Agreement, namely, the risk and uncertainty of further litigation, certainty of result, the benefits of closure and the payment to landowners, many more of whom would pass away before seeing any benefit should this dispute be further extended.

The Settlement Agreement does not provide for all of the damages sought by the plaintiffs, nor does it acknowledge mishandling of trust funds by the government which has caused great hardship to our people over many years and generations. Nevertheless, the good faith of the parties is obvious in light of the progress of the litigation over the past decade. We recognize and are encouraged that the amount of the settlement fund is more than twice the amount found by the trial court to be the losses resulting from fund mismanagement. The uncertainty of further litigating that finding is significant. More importantly, this litigation has brought to the Department of Interior and the Bureau of Indian Affairs a dramatic change in understanding of the government's fiduciary duty. Regardless of the amount of damages to be distributed through this Settlement, this Settlement will bring closure to this chapter in United States and Indian relations. Finally, additional investment in land consolidation called for in the second aspect of the Settlement Agreement is long overdue, and welcome.

There have been rumblings in Indian country about the amount of attorneys' fees and incentive payments to the class representatives. It is appropriate for class representatives to be reimbursed for the monies they have expended in pursuing this litigation; however, it is difficult for most landowners, whose holdings provide little if any income, to comprehend litigation costs of the magnitude of \$15 million. We recognize, however, that it is appropriate to reimburse those native people who sacrificed and had the courage and stamina to support this endeavor for the past 14 years and without whose contributions there would be no settlement fund. It is also

hard for many to understand how attorneys' fees of up to \$100 million can be fair and reasonable. However, these amounts in relation to the amount recovered through the litigation and negotiation of the settlement may be appropriate. We also note that trust beneficiaries are somewhat protected through the process outlined in the Settlement Agreement for publication and court approval of the amounts to be paid out for attorneys' fees and class representative payments.

We have some difficulty in understanding the inclusion of the unlitigated issues of land mismanagement claims into the settlement at this point, 14 years into the case. We understand the desire of the government to resolve as many claims as possible, and acknowledge the land mismanagement claims are related to the general allegations of trust mismanagement. In view of the other benefits of the Settlement Agreement, and the risks and uncertainty and delay of further litigating these issues, ILWG can accept this aspect of the Settlement Agreement.

In conclusion, the Board and Officers of the Indian Land Working Group acknowledge and thank those whose hard work, perseverance, financial support and sacrifice were able to conclude and deliver the Settlement Agreement. I urge the Committee, the House and Senate to act quickly to approve the implementing legislation so that the Cobell litigation can be put to rest and the Native landowners whose moneys were mishandled can be compensated.

Thank you for the opportunity to address you today.

Response to questions submitted for the record by Hon. Austin Nunez, Chairman, San Xavier District Tohono O'odham Nation, and Indian Land Working Group

March 25, 2010

Hon. Nick J. Rahall, II
Chairman
Committee on Natural Resources
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Rahall,

Thank you again for giving the Indian Land Working Group the opportunity to comment on the proposed *Cobell* Settlement at the March 10, 2010 hearing. This is to provide our responses to your questions as posed to us in your letter of March 15, 2011. I have listed them in the same order as your letter.

- 1. In the *Cobell* hearing, during questioning from the Committee, Plaintiff's attorney William Dorris testified that in 2004, the Court invited the plaintiffs to file trust mismanagement claims. Accordingly, the issue of whether or not such claims were included in the *Cobell* lawsuit appears to be in some dispute. Can you comment on this matter?**

Response: The Indian Land Working Group (ILWG) understands that the corpus of the trust includes trust or restricted land and underlying natural resources. The Department of the Interior (DOI) mismanagement of these resources has been a topic of discussion at many of ILWG's conferences that included unlawful trespass, overgrazing or timber cut without permission or oil pumped from an allottee's land without permission. These were the ongoing issues that led to an incorrect payment deposited in each allottees Individual Indian Monies (IIM) account.

During several of ILWG's workshops, individual allottees met and asked for assistance to determine correct rental payments from their respective leases, to understand probate rulings under AIPRA, and to address fractionation complexities. The results from the workshops included the understanding that a correction of their IIM accounting depended on DOI administratively correcting the management of the resource.

From ILWG's perspective, then, asset mismanagement was always seen as a factor in IIM account shortages. We have not been privy, however, to the strategic decisions of the counsel for the Plaintiff Class in not making those issues explicit in the litigation.

- 2. As you testified on the first panel, would you care to comment on the testimony of any other witness at the hearing or to respond to issues raised by any of the witnesses?**

Response: Professor Monette raised an issue of collusion between the parties in his testimony. ILWG dismisses this notion and suggest this undermines the professor's credibility. ILWG expected the parties to negotiate a settlement. The ILWG ex-

pected a larger settlement number as did most members of the plaintiff class. Despite this disappointment, ILWG believes a good faith negotiation occurred and gives no logic to an argument that the *Cobell* parties colluded to bring spurious results to individual allottees. The negotiated settlement needs to move forward to be approved by Congress.

Mr. David Hayes stated in his testimony that there would be an effort to do more outreach to tribes. ILWG strongly recommends actual field meetings to talk to tribes including allottees as well as give notice to Bureau of Indian Affairs Regional Directors to hold informational discussions with tribes and allottees in each Region. Newspapers, TV, radio and speaking engagements should be employed. In sum, ILWG does not believe outreach has been adequate.

Mr. Michael Finley, Chairman of the Inter-tribal Monitoring Association (ITMA) and Chairman of the Colville Tribe, did not elaborate on how closely ITMA has worked with allottees who are members of the class of plaintiffs to this lawsuit. To address allottee issues, the ILWG has developed educational videos and manuals in the areas of Estate Planning and Probate; Land Exchange & Consolidation; Leasing of Indian Land; Land Acquisition and Financing; and Land Data. In response to changes in the Indian Land Consolidation Act and the American Indian Probate Reform Act, ILWG conducted numerous community based trainings over the past several years that included meetings with tribal councils/tribal employees and landowner associations. In addition the ILWG responds to requests from Tribes and individuals for information on a continual basis.

Representatives from the San Xavier Allottee Association (AZ), the Oklahoma Indian Land & Mineral Owners Of Associated Nations—OILMAN (OK), the Allottee Association of the Affiliated Tribes of the Quinault Reservation (WA), the Ft. Hall Landowners Alliance (ID), and the Lakota Landowners Association (SD) are some of the community based entities and locations where trainings have been conducted, or individual one-on-one assistance has been given. In addition, trainings were coordinated for Tribal Councils, educational institutions, legal entities, and additional tribal communities on a per request basis.

The ILWG is not aware of one Tribe or tribal organization, such as ITMA, that has worked with allottees in the same manner as ILWG for the past two decades. Our extensive two-decade work with allottees is the basis from which ILWG finds its support of this settlement.

Sincerely,

Austin Nunez, Chairman
San Xavier District Tohono O'odham Nation
and Indian Land Working Group

The CHAIRMAN. Professor Monette, welcome.

**STATEMENT OF PROFESSOR RICHARD MONETTE,
MADISON, WISCONSIN**

Mr. MONETTE. Good morning, Chairman Rahall, and Ranking Member Hastings, and Members of the Committee, thank you for the opportunity to present this morning on this historic moment for the tribes.

Mr. Chairman, the proposed *Cobell* settlement, if enacted as it is, would itself be a breach of trust, particularly as many of you have pointed out with the astounding lack of participation of tribes and tribal leaders and what has been developed, and the astounding lack of transparency so far, especially given the recent urgency and haste with which this has been put before you.

As it is, the proposed settlement runs afoul of the Class Action Fairness Act of 2005. It also runs afoul of the Federal Rules of Civil Procedure, laws that this Congress has put in place to protect class action plaintiffs.

Now, attorneys in the case have kind of justified all of this as though this were sort of any other settlement, and many of you have said, and I just want to emphasize, that this is not just any other settlement.

This is a matter of solemn trust between this body and this country, and it should be treated as such, and if anything, this settlement, if any, should comply with the Federal Rules of Civil Procedure, and the Class Action Fairness Act.

In short, Mr. Chairman, what you have heard is that the proposed settlement includes claims that were not made by Plaintiff. They do not pertain, and they are not germane, and they are not even relevant to the lawsuit at hand.

The big ticket items, as you know, are the settlement only provision that would establish a so-called trust administration class. Proposing to settle non-monetary asset claims for all those who do not proactively opt out, potential claims relating to oil, gas, coal, minerals, water, timber, thereby releasing the Department of the Interior of all liability in such matters.

And I want to emphasize water, because we have heard that a couple of times here as though perhaps people have missed that. That is in here, and to be settled out, individual water claims.

On that point by the way, I also wanted if I could, with all the haste, it was difficult to read this all carefully, and my reading lasted very late last night. I had to read something five or six times.

I had a call with the solicitor, who I think, if I might, and with all due respect to her, and I respect her very much, she knows, found it a little stumped as well. In Item 15, and I think it is A-15, it talks about the historical accounting claims, the ones that are to be settled entirely without an opt out.

This is the thousand dollar settlement, and we are told that this is just for the accounting, but the definition says historical accounting claims shall remain common law or statutory claims, including claims arising under the Trust Reform Act, for an historical accounting through the record date of any and all IAM accounts and any asset held in trust or restricted status, including, but not limited to, land and funds.

Now it takes care of the accounting part and the funds part, and so then this land and the assets is something different, and they are included in the definition of historical accounting claims, the claims that are intended to be finally closed.

So we get this idea that with the trust administration class that you can opt out, but on the other hand, we have some language that suggests that it doesn't matter if you opt out. Those claims are finalized anyway.

It may just be a matter of drafting ambiguity at best perhaps. It really needs to be looked at more closely because as it reads now, it doesn't seem corroborate what we are hearing in other fora.

So let me just talk about the point where the *Cobell* lawsuit. Basically, some people think taint basically, and the court ordered \$455 million, and at that juncture the temptation of collusion loomed large.

And I think it is fair to say that the *Cobell* lawsuit fell victim to some of that collusion. From that point forward the record reveals less lawyering for the Plaintiffs, especially the absent class members, and more lawyering of the deal they struck behind closed doors.

And frankly at that juncture the record suggests inappropriate participation in settlement negotiations by the presiding judge, who otherwise would be a trustee for absent class members pursuant to Rule 23[e] of the Federal Rules of Civil Procedure.

So as soon as the dollar amount on the negotiating table went that high, it was clear that there was more to give than to lose, and it seems like it fell victim to collusion. It looks that way to those of us who are on the outside.

And we hope that if the Rules of Federal Procedure and the Class Action Fairness Act were abided by, it would answer some of these questions. Thank you for the opportunity again. Thank you for the bit of transparency that this hearing is bringing to the issue. Hopefully, it will be an excellent beginning.

[The prepared statement of Mr. Monette follows:]

Statement of Richard Monette, Professor of Law, University of Wisconsin, and Former Tribal Chairman, and IIM Account Holder

Good Morning Mr. Chairman and Members of the Committee.

My name is Richard Monette. I am a Professor of Law at the University of Wisconsin in Madison. I am also a former twice-elected Chairman of the Turtle Mountain Band of Chippewa. Finally, I am also an IIM account holder.

Mr. Chairman, the proposed Cobell settlement, if enacted as is, will itself be a breach of trust.

As it is, this proposed settlement runs afoul of the Class Action Fairness Act of 2005 (CAFA), the law enacted by this body to protect the interests of all parties in a class action. It also runs afoul of the Federal Rules of Civil Procedure (FRCP) governing class action lawsuits. That is why the named parties have requested Congress to grant broad waivers from the strictures of those laws. Plaintiffs' attorneys have justified this settlement as though it were any other settlement; but it is not any other settlement and does not involve any other trust. This settlement involves the solemn Trust relationship and Trust Responsibilities between the United States and the Indian Tribes with which it has signed treaties and with whom it has a long and sometimes difficult and sometimes thoroughly enlightened history. This settlement, if any, should adhere to the FRCP and the CAFA.

The proposed settlement has two main components and, as usual, the devil is in the details. First, the proposed settlement would establish an "Historical Accounting Class", providing payments of one thousand dollars to each class member, without any option to opt in or out. Second, the proposed settlement would also establish a "Trust Administration Class" that would provide payments of five hundred dollars to IIM account holders, with a provision to opt out, that would be deemed a complete satisfaction of any trust asset claim and wholly release the Department from any further liability to those who accept such payments. Finally, the proposed settlement would provide for fifteen million dollars in "incentive payments" for the class representatives and exorbitant attorney fees.

In short, Mr. Chairman, the proposed settlement includes claims that were not made by Plaintiffs, including matters that do not pertain, that are not germane, or that are not relevant to the lawsuit. The three big ticket items in this regard are:

- 1) first, the "settlement-only" provision that would establish a so-called "Trust Administration Class", proposing to settle non-monetary asset claims for all those who do not proactively opt-out, potential claims relating to oil, gas, coal, minerals, water, and timber, thereby releasing the Department of the Interior of all liability in such matters;
- 2) second, the "settlement-only" provision proposing to establish and authorize a "Trust Land Consolidation Fund" within the Department of the Interior to the tune of some two billion dollars;
- 3) third, the "settlement-only" provisions establishing an Indian Education Scholarship Holding Fund that would divert some 60 million dollars from the land Consolidation Program to a Holding Fund whose monies are to be distributed by non-profit organizations nominated by Plaintiffs and confirmed by the Secretary.

Mr. Chairman, not one of these three provisions belongs in the settlement.

The Department of the Interior has stated that this lawsuit has cost it approximately one hundred million dollars every year of the fourteen years of this litigation. That is, perhaps not coincidentally, 1.4 billion dollars, the exact amount of the

settlement attributed to settling all claims. In other words, I guess the Tribes and individual Indians are supposed to be elated that the Department is willing to pay them money that was intended to benefit them in the first place.

This lawsuit was originally filed in District Court as an equitable action seeking injunctive relief only with no monetary damages. Plaintiffs simply asked the Department to reconcile IIM accounts and to produce documentation to corroborate the reconciliation.

Early in the litigation, in a bout of judicial sensationalism, the district court held certain Interior officials in contempt of court because they could not and would not produce records aiding an accounting. However, if an accounting could not be done, then the injunctive relief could not be ordered, and a new theory of the case based on monetary relief would become plausible. This is why the proposed settlement illustrates a huge leap from making equitable claims into settling monetary damages.

In August 2009, Plaintiff's lawsuit took a steep turn for the worse. In many people's eyes, to invoke the vernacular, the case had tanked. The Federal District Court ruled that an accounting was not possible and ordered Defendants to pay \$455 million dollars in restitution. Both sides appealed and the Federal Court of Appeals set aside the judgment on both points, remanding to the District Court to approve a plan that "efficiently uses limited government resources to achieve an accounting."

Therefore, at best, the settlement should be limited to the 455 million dollars that the district court ordered as restitution. At worst, the settlement should be void and the Department should set about the task of accounting as the Court of Appeals ordered. The Representative Plaintiffs' counsel should be paid their actual fees and costs up to the point where their case "tanked", where they convinced the court that an accounting could not be done and that injunctive relief was not possible.

When the district court found a \$455 million dollar cause for restitution, and the court of appeals ordered an accounting, million dollar damage figure, and the Defendant Interior Department looking at protracted accounting exercises, both sides found enough incentive to pursue a settlement.

At that juncture, the Cobell lawsuit fell victim to collusion at the expense of the American taxpayer. From that point forward, the record reveals less lawyering for the Plaintiffs, especially the absent class members, and more lawyering of the deal they'd struck behind closed doors. And frankly, at that juncture, the record suggests inappropriate participation in settlement negotiations by the presiding judge, who would otherwise be a trustee for absent class members. At that point, who was obliged to look after the best interests of the class, especially absent class members, as the federal rules and federal law requires?

As soon as the dollar amount on the negotiation table went above 455 million dollars, it meant the Plaintiff class was getting more than the District Court believed they had made their case for. But the government didn't give this away for free; inevitably, Plaintiffs would be giving up something more in return.

Likewise, as soon as the dollar amount went above 455 million dollars, Defendants revealed the astounding willingness to pay more than they were held liable for. But the government didn't give this away for free either; instead, Defendants would surely be getting something more in return.

In short, the proposed settlement would relieve Defendants of more liability than Plaintiffs had made claim to, and would provide Plaintiffs relief for claims that they did not make. Primarily, what Plaintiffs would relinquish, and what Defendants would gain, is a settlement of so-called "Trust Administration" claims that were never part of the lawsuit, claims that Plaintiffs had neither the right nor privilege to cede, and that Defendants as Trustees had neither the obligation, nor the right, to accept.

One has to wonder if the class representatives and their lawyers had brought this case not as a class action, but by themselves, foregoing up to 15 million dollars in "incentive awards" and 100 million dollars in attorneys' fees, and if after 14 years of litigation the Department of the Interior and the Bureau of Indian Affairs came to them and said, "Eloise, do we have a deal for you. We'll give you \$1000 for your accounting claim, and we'll offer to settle any other claim you might have for all the years of trust mismanagement,"—one has to wonder if they'd have taken the deal.

Mr. Chairman and members of the Committee thank you for the opportunity to testify this morning and the first bit of official transparency regarding this whole proposed settlement.

The CHAIRMAN. I thank the gentleman. Let me ask my first questions to Chairman Finley. Your testimony indicates that a separate

administrative process should be allowed for the trust administration class. Would you please explain why the ability to opt out of the class to pursue the claims individually is not sufficient?

Mr. FINLEY. Well, the real reason why is that we tried to get out to people who fell through the cracks. Our hope is that the parties would recognize the problem and rectify it, and making the money available for this third option that we proposed within our suggestions and in the written testimony that you have.

And so I guess it being an emotional issue, people want emotional closure. I think that would give them an opportunity to be heard, and to hopefully see some compensation for their losses that they incurred over the years.

The CHAIRMAN. Are you aware of the Equal Access Justice Act being used in other litigation settlements against the United States?

Mr. FINLEY. Yes. Offhand, I don't really know of any others other than the one that was previously done in this case. We have heard that individuals would prefer that the attorney fees come from some other means?

I think a lot of the concerns that we have heard throughout Indian Country, and it has been mentioned here today, that people have a problem with that large amount of money coming out of the settlement itself.

The CHAIRMAN. All right. Let me ask Chairman Nunez. Upon Congressional enactment of the proposed legislation the Department of the Interior will begin implementation of the Secretarial Commission on Trust Reform. Do you have any recommendations as to how the Commission should operate?

Mr. NUNEZ. Yes, sir. It certainly should include Indian trust landowners, if at all possible, and to make sure that there is certainly transparency, and that continual education and information be provided to the landowners.

The CHAIRMAN. Thank you for that. Professor Monette, you testified that the United States has spent approximately a hundred-million dollars per year on attorney costs to litigate this matter.

Yet, you question the Plaintiffs' attorneys' fees, in the range of 50 to a hundred million dollars, and that is what you question, for the same 14 years. Why do you think the United States spent 14 times more for attorneys' fees than the Plaintiffs?

Mr. MONETTE. I am sorry, I don't understand the question, Mr. Chairman.

The CHAIRMAN. Well, according to your testimony, you say that the United States has spent approximately a hundred-million dollars per year on attorney costs to litigate this matter.

And yet you are questioning the Plaintiffs' attorney fees in the range of 50 to a hundred-million dollars. Is that correct?

Mr. MONETTE. Well, it is not correct. I have not really questioned the attorneys' fees, although I share the concerns that the other panelists have raised. The hundred-million dollars that the Department has told us is that what they have spent for doing this special trustee work every year out of the money that they have otherwise gotten.

And so what I pointed out is that it is a hundred-million dollars for 14 years, which adds up to \$1.4 billion, which is the exact

amount of the settlement. So what I suggested is that the tribes—they apparently think the tribes and their members are supposed to be elated for getting \$1.4 billion of money that was otherwise appropriated for their benefit in the first place.

The CHAIRMAN. All right. I appreciate that clarification. Do you know what the average percentage award for attorney fees in other class action settlements is?

Mr. MONETTE. I don't know, and they are all over the board. It is not uncommon, as you know, in tribal matters for them to be 10 percent as we have a Federal statute that is on point. They have been as high as 40 percent.

But generally that has been a percentage of an amount that the Court has ordered, and here the Court ordered 455 million. Then we got two sides that basically colluded to add more money to that, and then for attorneys' fees to be added.

And it is a very clear sort of rule, Mr. Chairman, that deals with that issue. In fact, there are probably three or four of them. Generally, and this was part of my testimony written to you, Courts particularly look for signs that a class action settlement resulted from a reverse action.

Collusive agreements between the defendants and the class representatives often are in exchange for generous attorney fees. As the ABA article that I pointed out notes, by this—and this is a quote—that by this tactic, the defendant hopes to preclude all other claims, which is precisely what is happening here with the trust administration claims, which is why I wrote them after that paragraph.

The proposed settlement, at least on this issue, will be a poster child of such reverse action settlements. It also flies in the face of a very difficult development with settlements; that is, attempting to address the question you are asking about settlement only provisions.

As I wrote similarly the United States Supreme Court has directed courts to scrutinize settlement only class action lawsuits, where classes are certified and claims are made solely for the purpose of settlement, which is what we got here; without scrutiny and without sufficient information.

So we have for the first time a second class, a trust administration class, that none of us have seen before. Now it may be a good idea. It may be the only way to work out the kinks in this settlement, but nobody has seen it. I have not.

I have talked to many tribal leaders, and not a single one has even heard of the idea—except for, of course, the very small number of tribal leaders that the Plaintiffs are working with.

And so this is the classic settlement only provision. The proposed settlement provision establishing a new trust administration class at the eleventh hour of claims that were neither made nor litigated will become the poster child of the settlement only problem that the Supreme Court has frowned upon.

It also likely violates our reverter clauses, although quite frankly that provision is so ambiguous in the proposed settlement that I couldn't quite understand it. But the court disfavors reverter clauses which specify that unclaimed funds revert to the defendant.

First, there was all the incentive to provide more money than the claim asked, or more money than the court ordered, I am sorry. But then once the claims are made difficult to make, that money is reverting back to the defendant.

That is the kind of reverter clause that precisely this body, the Congress, suggested are unfair in class action lawsuits, and as I wrote here, this is especially relevant in this settlement, since normally plaintiffs would administer distribution of awards. They are going to help the plaintiffs.

The defendants are going to help the plaintiffs administer this award. In fact, they will play a key role. These reverter clauses allow counsel agree, and this is again out of the ABA article.

These reverter clauses allow counsel to agree to inflated settlement amount that serves as the basis for calculating attorney fees, while providing an incentive to discourage members of the class from making claims.

With attorney fees based on the overall amount, and the defendant administering claim awards, this settlement again will be the poster child of this frowned upon reverter clause in the rules.

So my written testimony will point out where I think several of the provisions run afoul of two or three laws that this body has adopted to protect class participants. This settlement is asking this body to play along, to make broad waivers of any other applicable law, so that it can reach a settlement that otherwise that they could not have reached.

And to grant jurisdiction to a court in ways that had not been granted before in this matter so that money could be on the table. and all we are asking is that if we can have the transparency and the time to look at these matters to make sure that tribes are at the table, and tribal leaders, and apparently that we have recognized here in the land consolidation fund.

Tribal leaders are largely absent from the discussion in this so-called education scholarship fund. The plaintiffs are going to propose nonprofit organizations to administer scholarship funds, all without the tribes, and I don't think that the tribes would agree with all of that. They may agree with some, but quite frankly, with the short timing, we really just don't know.

The CHAIRMAN. Mr. Hastings.

Mr. HASTINGS. Thank you, Mr. Chairman. My first question is to Chairman Finley. Before redistricting, I represented the Okanogan County part of the Colvilles. I don't now. I might sneak over a little bit there in Grand Coulee, but just a small part.

But at any rate, you are here representing ITMA, and if you said it in your testimony, I missed it, but what do you hear from your constituents in Washington State on this issue?

Mr. FINLEY. I think I pointed that out in my testimony, that many of them are questioning how this could be brought without their consent. I think that it has been stated earlier that this is the first of its kind in Indian Country, and it truly is.

My constituents turned to me for these answers. They expect their elected body to bring issues like this to the forefront. In this case, this has not happened. So when they turned to me and asked me for questions, and I don't have them, it creates a difficult situa-

tion for me as a tribal leader, because I should be doing those things for them.

Some of their issues are the emotional issues that you have heard. Some of them believe the terms as they understand them, if they do understand them, aren't fair to them. Some of them think that they are good, and they will benefit them in a number of areas.

It is across the spectrum, but I do want to underscore the fact that I continually have heard that they expect me as a tribal leader to have these answers for them, and I have tried to find those answers for them the best that I possibly can.

Mr. HASTINGS. You would anticipate that the chairman of their tribes would have similar concerns and similar questions from their constituents, too?

Mr. FINLEY. I have heard similar concerns from other tribal leaders.

Mr. HASTINGS. Which then raises a question that I wanted to ask all three of you. I think there is general agreement that this has to be put behind us. We are at a point where there is at least a settlement in front of us, and there are some questions about that.

The questions center on transparency and maybe a final decision at least, a comfort zone of all of you. So my question then to all of you, what would you advise us to do as we move forward on this process?

Now, keep in mind that this settlement was reached on December 7, and was supposed to be culminated on December 31. It has now been kicked ahead to April 16, and presumably it can be kicked ahead again.

But at what point and what should we be doing in order to satisfy the transparency that I sense all of you want to have more of and so forth? What advice can you give us? Let us start with you, Chairman Finley.

Mr. FINLEY. I think if the parties involved would do outreach across the nation, and throughout the various regions. That would go a long ways in addressing some of the concerns and questions that many of the Indian beneficiaries have, as well as tribal leaders.

Mr. HASTINGS. OK. Mr. Nunez.

Mr. NUNEZ. I certainly agree with the statement from Mr. Finley. The plaintiffs actually are scheduled to come out within the next two weeks to Arizona to meet with the tribes there, but I also think that the Department of Justice, and the Department of the Interior also need to do the field hearings in conjunction with Ms. Cobell's group.

But certainly all information that can be granted and provided to the individual allottees and tribes needs to get out there so that everybody can feel comfortable in moving this forward.

Mr. HASTINGS. Professor Monette.

Mr. MONETTE. I would ask the Committee to bear in mind that all of these individual Indian money accounts and the interest are derivative of these peoples' membership in tribes, largely derivative of their membership in tribes that entered into treaties with the United States.

And those tribes belong and deserve to be at the table. I would add that perhaps there could be a judicial referral of the money claims to the Federal Court, waiving the United States sovereign immunity, so that the Court could actually address these matters, and maybe the settlement then would make more sense. It would not appear to be as collusive.

I would ask this body to direct settlement negotiations to comply with the Class Action Fairness Act, and the Federal Rules of Civil Procedure. They can be waived at the end, because obviously that is what we are asking now.

But right now, we haven't had a settlement with them applying. It would be nice if their settlement negotiations were in compliance with those laws, maybe with the idea that there would be some necessary waivers at the end.

But right now those laws are requiring the things that I mentioned, and very stringent requirements regarding notice. I think that it is fair to say that that has not been followed, the clear, concise, and easily understood language, and the Supreme Court addressing that rule in a recent case requiring a desire to actually inform absent class members.

I am a member of this class, and I can say in no uncertain terms that I have never once, in no way, shape, or form, have I ever been contacted by a Plaintiffs' attorney or by the named Plaintiffs to ask what I thought, to ask what I felt about it.

This Committee and your staff know that I am pretty easy to find. So I think that should be complied with as well.

Mr. HASTINGS. Well, ultimately the decision rests with us, because we have to have legislation, which by the way has not been introduced. At what point, I guess in this whole process, should we feel a comfort level that you have all been satisfied that the transparency and the procedures are enough to satisfy all of Indian Country, or is that the 64-dollar question always? Any one of you.

Mr. MONETTE. I think when the tribal leaders are given a chance to look at it and to talk about it, and right now at first blush, we are going to find tribal leaders that absolutely oppose this at one end, and those who think, oh, it absolutely should go forward, and at the other end, we could cherry pick from either end.

If they all get a chance to talk this out, I think we will come up with a consensus, and if the tribal leaders, true to my talk here this morning, if they think that this should go forward, I am all for it.

Mr. HASTINGS. Well, that then lends this opportunity, because if we are going to have to ultimately make that decision, we are going to have to hear from tribal leaders and individuals.

We have already, and we welcome that. I think that on all sides that they welcome that, but if there is some real heartburn, so to speak, on this process, we really need to know what that heartburn is, and the depth of that heartburn throughout this whole process before we can make that decision.

So I would respectfully ask all of you with the contacts that you have throughout Indian Country to share that with us as soon as possible so that we can proceed forward. Thank you, Mr. Chairman.

The CHAIRMAN. The Gentleman from American Samoa, Mr. Faleomavaega.

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman. I was just going to follow up with my good friend from Washington's question, as well as his opinion, and I was going to ask all three of you gentlemen is it your understanding that in order to move this proposed settlement that is now being discussed, that there has to be some kind of a Federal legislation to actually implement the process, or can this just be done by Executive Authority of the Administration?

Mr. FINLEY. It is also my understanding that the decision rests with Congress to give the Court the authorization to move forward on the settlement terms that are before everybody today.

Mr. FALEOMAVAEGA. It is also my understanding that legislation is required. Mr. Monette.

Mr. MONETTE. Earlier on, we were told—we were told 14 years ago told really about the strategy and genius of the strategy of the case, that it was not asking for money. So it would not run any red flags up the poles.

It was simply asking for a correct accounting, a reconciliation, and that is why it was able to be brought in the Federal District Court as a declaratory and injunctive matter.

But as soon as the accounting—and we were told evidently that the appeals court does not agree, but we were told that an accounting can't be done, and the monetary damages became more plausible.

But in order to get monetary damages, as you know, that requires a waiver of sovereign immunity from the United States, likely a judicial referral on this. So the settlement as it is cannot be done solely by the Executive Branch, by the Administration. It requires this body's stamp of approval as it is.

Mr. FALEOMAVAEGA. Well, as you know, in the years that I have served as a member of this Committee, we have had this yo-yo relationship going back and forth between the Administration and the Congress in determining exactly how much money is involved here in this mismanagement.

And I believe that this is one of the critical factors as to why Ms. Cobell felt that we need to file a lawsuit because we are not getting anywhere. Now, 14 years later, we are now at this point, and as I said previously in my statements, I cannot believe that this is the amount of money that is being involved.

And I honestly believe it is a lot more than \$3.5 billion or whatever. I wanted to ask you when Ms. Cobell initiated the lawsuit, what was the reaction from the Indian Country?

Did any of these 250 tribes go and give their moral support, as well as financially, when she was struggling to put this through the Federal Court system? Professor Monette.

Mr. MONETTE. I think it is fair to say that my tribe did. My tribal leader, who I respect greatly, Twila Martin Kekahbah, at that point pulled me aside and talked with me about it.

I know that there were very warm feelings for the Native American Rights Fund at the time, and that we thought that the Native American Rights Fund was going to see this case through to the end, and win all those \$170 billion that Mr. Faleomavaega would

apply here, and I am all with you on that, and NARF would get their fair share of that.

Looking at the settlement today, the Native American Rights Fund is not even listed as class counsel, and I am sure that they want to be, but I am also sure that they recognize at this point that there are some very sort of dangerous conflicts of interest for them putting it in there today. But I can tell you at that time that that is the discussion that we had.

Mr. FALEOMAVAEGA. I sense also from reading your statement and your comments, Professor Monette, that in your honest opinion that the current process has evolved with the involvement of the Department of the Interior.

Is the process agreeable to you, both legally and policy wise, or do you have some serious questions on how we came up with where we are now, where Secretary Salazar has given agreement to this proposed \$3.7 billion that we are going to provide in the settlement.

Mr. MONETTE. One thing that we have not heard yet, and I assume that we will, but the Department certainly hasn't been with clean hands throughout this process. We have seen them basically taking five IAM accounts and massaging them into one over time.

We have seen them preparing for this settlement, where we have people who have trust interests in land out there, who had no IAM account, and they created an IAM account. All of this is to cast the broader net for buy-in, along with the land consolidation funds, and scholarships, and all of that.

There has been authority for land consolidation since 1934 frankly, since the Indian Reorganization Act. There have been authorization from this body for scholarships. They have always been under funded, and they should be funded.

What they have to do at this settlement other than dangling a carrot in front of people for buy-in is beyond me. There is a better process. We are better than this. This is of a historical moment for our people.

Fifty years from now, we will look back and look at that, frankly, indefensible law that this body passed a hundred plus years ago, the General Allotment Act, and we will look at this as an attempt to fix part of it forever.

And I hope it would as well, but if we are going to do that with that much historical moment, we might as well do it right.

Mr. FALEOMAVAEGA. Thank you, Mr. Chairman. I think my time is up. If I could just raise one short comment to Mr. Nunez, the Chairman and member of the Tohono Tribe in Arizona.

I visited your tribal nation there a couple of hears ago with my cousins, who played for the University of Arizona football team, and I just wanted to ask you if our high school football team is coming along OK.

I am going to ask my cousin, who is currently the defense coordinator for the University of Arizona, to pay you another visit to make sure that our high school there is coming along OK, and if it is OK with my friend, Raúl, here, we can do that. Thank you, Mr. Chairman.

The CHAIRMAN. The gentleman from Louisiana, Mr. Cassidy.

**STATEMENT OF HON. BILL CASSIDY, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF LOUISIANA**

Mr. CASSIDY. Mr. Monette, I heard an expression once that the enemy of the good is the better. Now, I think that has a lot of truth. I have been here about a year, and it seems like it is very hard to get anything done. If you are talking about 50 years from now, it almost seems like this could still be litigated 50 years from now.

Clearly, there are some problems with the legislation. On the other hand, it does seem to redress some things which need to be redressed, and it seems to bring conclusions to something that seems like it could go on forever.

What are your thoughts about that statement? And, Mr. Nunez, I appreciate both of you gentlemen's perspectives on that, too.

Mr. MONETTE. I am in agreement that the time is now or near to get this all behind us.

Mr. CASSIDY. But it doesn't seem like it is going to happen now in a year.

Mr. MONETTE. The problem with that is the broad brush that this has been done, and the devil is in the details, or the devil should be in the details here, and some of the details are missing.

My tribe, for example, the Turtle Mountain Band of Chippewa, the reservation was too small when the allotment came, when the Allotment Act came about. So, twenty-five hundred heads of households were granted allotments 500 miles away from the tribe, in South Dakota, in Minnesota, and in Montana.

Those allotments are so far from the tribe that the tribal government, as a tribe, as a collective body, has not been able to pay attention to those claims and those allotments over the years.

Many of them have been lost. We on occasion find telephone lines running through the middle, and we find that some of them have had oil pumped out of them without there ever being a lease.

This was all the subject of the Senate Committee on Investigations, a long investigation about 20 years ago, over three years. Now, none of that has been resolved yet. Some of those claims could be worth frankly thousands or millions.

But this legislation will dangle in front of my tribe and my tribal members, where there is 80 percent unemployment, dangle \$500 in front of them, and say will you take this in exchange for whatever has happened in the past, and I am afraid that they are going to say yes. And everybody has got their own will, but at least I want them to know that.

Mr. CASSIDY. Let me hear from the other two gentlemen.

Mr. NUNEZ. I would say that there are some issues that will be resolved through the settlement. However, as you mentioned, and others have mentioned, there are other issues that will not be addressed.

And it is very uncertain how they will be addressed in the future. However, I believe that more support from the Department of the Interior needs to be provided so that they can assist the tribes and the individual allottee landowners.

Without that support and qualified staff to be able to delve into the fractionation issues, and the boundary issues, it will still be there.

Mr. CASSIDY. So we are focusing on the money, but the corrective direction to the Interior would be one very good part of this settlement, and that going forward theoretically, this would not continue to be an issue. So you would focus on that as a good that would be a strong reason for supporting the settlement?

Mr. NUNEZ. Yes, sir.

Mr. CASSIDY. Independent of whether or not we can dispute about the money. Mr. Finley.

Mr. FINLEY. I agree now or near is the time to do it, but I think we need to be deliberate about it. The Indian beneficiaries need to be informed. They want transparency. The tribal leaders want transparency.

So if this is to move forward, we need to keep that in mind, that that is what we want at the very least, because we are talking about a hundred years of history here. Yet, we are being asked on the other hand by some to say, well, don't ask questions right now. It could prevent things from moving forward.

Your opportunity to ask questions will come later. That is a tough sell to people in Indian Country who have experienced all the injustices over the years. It is not the same Indian Country that once existed then. People are self-empowered, and are not afraid to ask questions, and they want their questions answered.

Mr. CASSIDY. So, Mr. Finley, and Mr. Nunez, what level of outreach have you seen or would you expect prior to this settlement? What do your members tell you that they are hearing about the benefits that will accrue to them from this settlement?

Mr. NUNEZ. Well, in our case, the Santa Vera Lodge Association has supported the settlement. I am not real sure about the allotment owners in Hill River and Salt River, in those areas.

But I believe as I mentioned earlier that just getting out there and talking to them, and making the presentations about the settlement will go a long ways to helping them understand.

And through those presentations, then if there are questions and concerns, then we will hear about them, and then we as the Indian Land Working Group, would also be willing to assist them with regard to their concerns.

Mr. CASSIDY. Mr. Finley, you were going to answer?

Mr. FINLEY. I would have to agree with that comment. It is my understanding that there are outreach efforts currently in the works right now with an organization in the northwest.

Certainly ITMA would be more than happy to help assist in that process to get the information out to the people, and I think that if the parties involved were to participate in that, which it is my understanding that they do plan to, then I think that will go a long ways in addressing some of the problems, concerns, and questions that I have heard within recent months.

Mr. CASSIDY. Thank you.

The CHAIRMAN. The gentleman from Arizona, Mr. Grijalva.

Mr. GRIJALVA. Thank you, Mr. Chairman. I have kind of a wandering question for all three, and thank you very much for you testimony. it was very edifying. The issue of class notification, I have heard it from all three of you that it is important that Indian Country be involved in knowing, and being notified of what the proposed settlement is.

The issue of collusion, I don't know how you resolve that other than to halt any legislative initiative until that is judicially investigated, which I think was a suggestion.

But at the same time, there is an urgency, and I want to deal with that urgency question. Can we accomplish putting together the legislation to carry out the settlement with urgency, and I think the issue of historical—the hundred years—is appropriate, and has to be part of the context.

The last 14 years has to be part of the context. So, there is for many people an urgency to move this settlement forward and to close this chapter, and move on to other chapters, which requires the Department of the Interior to continue their responsibility in a very serious way.

So is it doable to move forward with urgency, and with deliberate speed, or hold the process in abeyance until issues of class notification, and collusion, are settled. And I pose the question, and I don't mean to make it either/or, but it is, because I think—well, never mind. Go ahead.

Mr. FINLEY. I would support it moving forward. I would just hope that our recommendations that are in the written testimony are given due consideration as we move through this process.

I hope that as many questions that linger out there are answered, and I hope that opportunity will be given to those who fall through the cracks, and who really aren't included in the Class II portion be given an opportunity, instead of just or you can opt out.

I think that the history shows that these people deserve an opportunity. They don't always have the means, the financial means, or even the physical means, that it takes, the wherewithal if you will, to see that through.

Mr. GRIJALVA. Describe opportunity for me if you don't mind.

Mr. FINLEY. Well, in my written testimony, we had offered a third option.

Mr. GRIJALVA. OK.

Mr. NUNEZ. I would say that we could meet the outreach efforts within the time frame that we are allotted, and again, if we just explain all the aspects of it, and answer the concerns as best as possible.

I believe that we will get to the landowners and the tribal governments to be able to bring this to closure.

Mr. GRIJALVA. OK. Professor.

Mr. MONETTE. You know, there are probably five thousand studies out there that all conclude one sentence pretty much, and that is that people are OK to lose. They are OK to be adversely affected as long as they feel that the process was fair.

And so far, I don't think they feel that way. This is a start. I recognize that there is urgency, but deliberation and transparency will be important here for what Congress does.

I note that Congress has plenary power, and so Congress can do it at once. My old dad, who was successfully elected to our tribal council more times than anybody had ever been, he always called it—he always said to me, so Congress has plenty power. They do.

Mr. GRIJALVA. We don't use it well sometimes, but it is plenty. [Laughter.]

Mr. GRIJALVA. At the end of that deliberate outreach with some urgency attached to it is the goal unanimity of opinion or is the goal for people to be informed of the people affected?

Mr. NUNEZ. I would say both.

Mr. GRIJALVA. OK.

Mr. FINLEY. I would agree.

Mr. GRIJALVA. OK. Thank you. I yield back, sir.

The CHAIRMAN. The gentlelady from Wyoming, Ms. Lummis.

Mrs. LUMMIS. Thank you, Mr. Chairman. And I appreciate this hearing. I am just trying to help the tribes that reside in Indian Country within the State of Wyoming, but Northern Arapaho and Eastern Shoshone understand what is being proposed here.

Chairman Finley, I want to clarify a little bit about how somebody can opt out. For those within the trust administration, or damage claims classification, you raised some concerns about what the process would be for an individual.

Can you or either of our other two witnesses today share any additional insight with me as to what frame work the settlement agreement establishes for an individual who pursues the opt out provision?

Mr. NUNEZ. My understanding is that if one wishes to opt out, then they can seek their own legal counsel to pursue their concerns. Granted, however, there are a majority of our Indian people that may not have the means to do so. However, we are still giving them that option that is there.

Mrs. LUMMIS. And I also understand that individuals with damage claims, they will be given approximately \$500, plus a stipend based on a preset formula. Do you know how this payment compares to past successful damage claims of this nature, or is there a standard that we can look to, to see if this is reasonable?

Mr. NUNEZ. Personally, I am not aware.

Mr. FINLEY. I am not either, but I can say that this is new to Indian Country, the class action lawsuit, as it is being brought forward now.

Mrs. LUMMIS. Thanks, Mr. Finley. Another question for you. You mentioned in your testimony that you think the attorneys' fees should come out of the Equal Access to Justice Act, the EAJA Fund, instead of the judgment fund, which may be reasonable, except that I would alert you that each places no firm cap on the amount of attorneys' fees that can be recovered.

So how would Congress ensure the level of funding being directed toward attorneys in this case is appropriate?

Mr. FINLEY. I don't know. As you pointed out, the decision rests with you, but if you would like an answer from me, I will work on that and get it back to the Committee.

Mrs. LUMMIS. Well, thank you, and I will mention to you that I, along with two other members of this Committee, including Representative Herseth Sandlin, who is here today, have recently introduced legislation that would require the Federal Government to make transparent the attorneys' fees that are paid out under each.

For the last 15 years, there are no records of how much the hourly rate was, to whom they were paid, whether it was a settlement or a judgment amount that was paid out under EAJA, and to

whom, and so we are trying to shine some light on attorneys' fees paid out under EAJA.

And given the amount of attorneys' fees in this settlement, it may appear to be somewhat open-ended. It is a pretty broad range, 50 a hundred-million. What assurance is there that Indian Country will ever know how much attorneys ultimately receive as a result of this settlement?

Mr. FINLEY. I don't know that we will know. I would like to think that we would, considering everything that is at stake, and all the individual beneficiaries who will be compensated, or who choose to opt out, or whatever happens as we go through this process.

But as you heard today, people are interested in that topic. People are concerned about it, and they want to know the answers to that. So I would like to think at the end of the day that we will be able to see that number and know and look at it.

And you mentioned earlier that you were not aware of what the attorneys' fees were, et cetera. I thought our tribe was the only one that had that problem, but evidently I was wrong.

Mrs. LUMMIS. That is true throughout EAJA, and that is true regardless of the Federal Agency that has been sued under EAJA, and we hope to rectify that. Thank you very much for your testimony. Mr. Chairman, thank you.

The CHAIRMAN. The gentleman from New Mexico, Mr. Heinrich.

Mr. HEINRICH. I have just a comment for Chairman Finley. I appreciate you bringing up the issue of consultation with tribes on the implementation of the Tribal Land Consolidation Fund.

I think that if we are to approve this, that is a critical piece moving forward, and I would certainly welcome the opportunity to press for adequate consultation as we move forward on this.

Mr. FINLEY. I appreciate that.

The CHAIRMAN. The gentlelady from South Dakota, Ms. Herset Sandlin.

Ms. HERSETH SANDLIN. Thank you, Mr. Chairman. I don't have any questions for this panel, but I want to thank you for having this hearing. I thank the witnesses for their perspectives and what they have offered to the Committee.

Mr. Chairman, as you know, I represent nine sovereign tribes in South Dakota, and this agreement, if approved by Congress, would have a profound impact on the State. There are approximately 20 thousand of the accounts that are held by individuals within the State's borders, and this is the largest number of any State.

We do know that there are various—either regional or national—associations or individual tribes that are weighing how this should go forward, possibly looking at resolutions desiring more hearings, more consultation, more information.

In that regard, I do think it is important that as we assess the views of the various account holders that they do feel, and as the professor indicated, that there was a fair process. That they had a chance to fully understand the ramifications of this agreement, and in that respect, I do want to recognize Ms. Cobell.

She has taken the time to visit Indian Country in South Dakota most recently, in the Pine Ridge and Rosebud Reservations, to answer questions. And I think it is just important that we ensure fair process, and part of that is having this hearing today to get a bet-

ter and broader perspective of the ramifications of the agreement, and the perspectives of the Administration, different tribal leaders, as well as Ms. Cobell herself. So I thank you, Mr. Chairman, for the opportunity.

The CHAIRMAN. Any other Members of the Committee wish to be recognized? If not, gentlemen, we thank you for your testimony today. The Committee will now hear from The Honorable David Hayes, a Deputy Secretary, United States Department of the Interior, Washington, D.C., accompanied by The Honorable Hilary Tompkins, Solicitor, United States Department of the Interior, Washington, D.C.

And our second panelist will be The Honorable Thomas J. Perrelli, Associate Attorney General, United States Department of Justice, Washington, D.C. We welcome each of you. We do have your prepared testimony. It will be made a part of the record as if actually read. David, we will recognize you first. Welcome back to the Committee.

STATEMENT OF HON. DAVID HAYES, DEPUTY SECRETARY, U.S. DEPARTMENT OF THE INTERIOR, WASHINGTON, D.C.; ACCOMPANIED BY HON. HILARY TOMPKINS, SOLICITOR, U.S. DEPARTMENT OF THE INTERIOR, WASHINGTON, D.C.

Mr. HAYES. Thank you very much, Mr. Chairman, and Members of the Committee, it is a pleasure to be here today to respond to questions about this very important settlement.

I want to first at the outset let all of you know that this has been from day one an incredibly high priority for this Administration to see if we could resolve this long-running *Cobell* lawsuit.

It has taken 13 years, hundreds of millions of dollars in litigation on both sides, 20 appellate opinions, dozens literally of hearings and trials, scores in fact of hearings and trials, and it has been a corrosive case that has hurt the relationship between the United States and Indian Country.

From day one, Hilary Tompkins, to my left, the first ever American Indian Solicitor at the Department of the Interior, and I, on behalf of the Secretary, took this on personally to see if we could through our personal involvement at the highest levels, break through what had been 13 years of failure basically to try to reach closure on this.

We were joined at the hip by Attorney General Eric Holder, and his top associate, Deputy Attorney General Tom Perrelli. We were personally engaged in these discussions, and we worked with a team that represents the class affected by this settlement.

The 300 to 500 thousand individual Indians are represented through the class action by a team of lawyers, and the relentless and impressive Elouise Cobell, who you will hear about, and hear from in the next panel.

We feel that this settlement is a fair settlement, and an appropriate settlement, and I am going to defer to Tom to talk about some of the legal aspects that have been raised in this hearing.

Let me just mention a couple of issues of special importance to the Department of the Interior, and our trust responsibility to the individual Indians who have trust accounts and to tribes who have trust accounts.

It is our view that we need to resolve these historical issues and set the course, and turn the page, and look ahead, and repair our management of trust assets with the tribes, and look ahead and not behind.

Toward that end it was very important to the United States, and we think it is very important for this Congress that this chapter be closed, and that the backward looking of historical accounting be fully accounted for, and resolved, and that means not just the question of whether the accounting has been done, but also woven into the issue is the question of in addition to the accounting, the green eye shade work, has the assets themselves been mismanaged.

That was all an important element, and we thought if we just resolved the question of the accounting, and didn't deal with the question of mismanagement, we would be back here spending literally \$50 million a year as far as the eye could see.

So we went to the class, and the class will work with the Judge as Tom will explain, to work through that element of the settlement. We wanted to close the book and look ahead.

And toward that end, Mr. Chairman, and Members of the Committee, as explained in my written testimony, as soon as this settlement goes forward, we are impaneling a new commission to ensure that as we move forward with our trust management that we are taking the best of what we have learned over the last 13 years.

We will hire folks. We are going to have a five-member panel, well represented by Indian Country. We are going to look at what worked and at what didn't, and we are going to see how we reorganize the Department, in terms of the trust management issues.

We have an Office of Special Trustee. We have a Bureau of Indian Affairs, with different responsibilities, and some conflicts in terms of customer service at the least. We want to do it right.

This was a very important point by Elouise Cobell and her colleagues here, and we accept it. We want to move forward and do this right going forward. Let me finally—and one aspect of doing it right going forward that we were very insistent on—is that part of the problem that led to *Cobell* is the fractionation of Indian lands.

And the fact that over time we now have four million individual interests in highly fractionated tracks of land that do nobody any good, and the expense is enormous, and the opportunity for error and mismanagement is enormous.

So we worked with the Plaintiffs to have as part of this settlement a resolution of that root cause problem of fractionation. That is why the \$2 billion associated with getting money back into the pockets of these individual Indians, and at the same time freeing up those lands, and taking away the root cause of these errors of these individual accounts is so important, and why we are so excited about the settlement.

Let me say finally that in terms of how we implement that settlement, we are looking forward to vigorous government to government consultations with all of the tribes on how we implement.

And to your point, Congressman Heinrich, the land consolidation program, because this is going to be a benefit to the tribes, as well as to the individual Indians who are settling in this matter, and

we want their help, in terms of prioritizing lands that should be acquired through this program, and working with them every step of the way.

And as we can talk about in the Q and A, we are anxious to make sure that the word and understanding about this settlement gets out in Indian Country. We have done a number of outreach efforts already. We are ready to do more.

We frankly thought it presumptuous to go out and assume that this settlement would be approved by the Court and by the Congress without getting your approval first, and we look forward to getting that in the near future. Thank you, Mr. Chairman.

[The prepared statement of Mr. Hayes follows:]

**Statement of David J. Hayes, Deputy Secretary,
U.S. Department of the Interior**

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.

The CHAIRMAN. Thank you, David. Mr. Perrelli.

STATEMENT OF HON. THOMAS J. PERRELLI, ASSOCIATE ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. PERRELLI. Good morning, and thank you, Chairman Rahall, and Ranking Member Hastings, and other Members of the Committee. The litigation, known as now *Cobell v. Salazar*, has lasted 13 years, and has been an extraordinarily important issue for this Committee, and for the United States, and it has cast a shadow on the United States nation to nation relationship with tribal governments and their members.

We at the justice department view the December 7th settlement as historic, and we think that we are given a choice of now ending that litigation finally or returning to the courtroom, and we think the opportunity presented by the settlement is worth seizing, because we think it is fair to the Plaintiffs, and responsible for the United States, and provides a path as Mr. Hayes said for moving forward in the future.

We very much welcome the opportunity to answer questions and dispel some of the misconceptions about the settlement. As has already been discussed, the settlement contains many key elements

that Members of Congress and both parties have sought to address in prior efforts to resolve this matter.

It resolves historical accounting claims, thereby providing a \$1,000 check to be sent to each member of the class, and bringing the government and each holder of an individual Indian money account into agreement on the balance of each account.

And I would say that that piece of the settlement, and the language that was quoted on the prior panel, addresses just accounting claims, and not the trust mismanagement claims. So I don't think there is any uncertainty there.

Second, the settlement also addresses trust administration or mismanagement claims. Those are claims that allege over the years the government has mismanaged hundreds of thousands of acres of land and millions of dollars, including proceeds from them that it holds in trust for individual Native Americans.

Over the last 14 years, these claims have long been linked with this lawsuit. Much of the litigation over the last 14 years has been about what has been in the lawsuit, and what has been out of the lawsuit.

Many of the efforts in Congress, including the efforts that came out of the One Hundred and Ninth Congress, sought to finally resolve both the accounting claims and potential trust mismanagement claims altogether, because it was recognized, I think, by everyone, that bringing these matters to final resolution was a benefit to everyone, and that if we were left with the specter of years of litigation about mismanagement claims, we really would not have achieved very much.

Under the settlement, the complaint will be amended to make clear that the trust administration claims are part of the case, and each and every Plaintiff in the class will receive a payment based on a formula, reviewed and approved by the Court.

The payments, in addition to the thousand dollars for the historical accounting for that class, will start at \$500, but will range up in some cases to hundreds of thousands of dollars for individual Native Americans.

All told, between the accounting and the trust mismanagement claims, the Plaintiff class will be receiving approximately \$1.4 billion. In contrast to what was intimated in the last panel, there is no reversion of that \$1.4 billion to the government.

That \$1.4 billion will go to class members, to the extent that there may be unclaimed funds, there is a provision that allows that to go for scholarship funds.

Finally, as Mr. Hayes said, there is a framework for addressing the problem of fractionated lands and a path forward so that we are not in this position again in five years, in 10 years, and 15 years, and 50 years.

We very much appreciate the opportunity to answer questions about the settlement, and we have tried to be as transparent as possible from the outset of this process. As soon as the settlement was reached in December of 2009, the Secretary, and Deputy Secretary, and the Solicitor of the Department of the Interior, held or how a call with tribal leaders across the Nation to inform them about the settlement.

The Department of the Interior and I have participated in hearings before the Senate Indian Affairs Committee, and sat before tribal leaders at the National Congress of American Indians, and answered all questions that were raised, and Federal representatives appeared before other tribal organizations.

And I know that Ms. Cobell and her counsel have engaged in similar outreach. Going forward, when we talk about notice to class members, and the opportunity for even more outreach, what we have done to date is really only the beginning.

Once the legislation passes, and the settlement is filed, formally filed with the Court for preliminary approval, that will trigger the notification provisions of Rule 23, and will result in a robust notice, and we include that individual letter sent to class members that will provide an explanation of the settlement.

And then we envision significant outreach, including radio, television, and other means to ensure that there is a maximum amount of information to all class members so that they will have the opportunity to consider.

And then they will be able to go before the Judge and object to the Judge, and consider opting out, and object to particular parts of the settlement, but through the ordinary process that occurs with class actions.

So we think that there are going forward going to be enormous opportunities for class members to review and comment on the settlement. Thank you to the Committee for this hearing, and we look forward to answering your questions.

[The prepared statement of Mr. Perrelli follows:]

**Statement of Thomas J. Perrelli, Associate Attorney General,
U.S. Department of Justice**

Good morning and thank you to Chairman Rahall, Ranking Member Hastings, and the other members of the Committee. The litigation that is today known as *Cobell v. Salazar* has lasted thirteen years, and over those years it has been an important issue for this Committee, its members, and their constituents.

That interest is well-placed, as *Cobell v. Salazar* is one of the largest class actions ever brought against the U.S. government. What began in 1996 has seen 7 full trials constituting 192 trial days; has resulted in scores of judicial decisions; has been up to the Court of Appeals ten times; and has been the subject of intense, and sometimes difficult, litigation.

Thanks in large part to the direction and support that the members of this Committee have provided over the years, on December 7, Mrs. Cobell's attorneys and the United States signed a settlement that would turn the page on that history.

The settlement, which will require legislative and judicial approval to become effective, is fair to the plaintiffs, is responsible for the United States, and provides a path forward for the future. The settlement contains many of the key elements that Members of Congress have sought to address in prior efforts to resolve this matter. First, the settlement resolves the plaintiffs' claims for an historical accounting. The resolution on this issue, like other aspects of the settlement, is important both for the past and the future. It is important for the past, because it will result in a \$1,000 check being sent to each member of the class. And it is important for the future, because it brings the Government and each holder of an Individual Indian Money account into agreement on the balance of each account—something that has been contested since this litigation began.

Second, the settlement resolves what have been called the "trust administration" claims. Such claims allege that over the years, the Government has mismanaged the hundreds of thousands of acres of land and millions of dollars—including proceeds from those lands—that it holds in trust for individual Native Americans. Although to date few such claims have been brought, allegations of trust mismanagement have remained a possible threat to rebuilding the long-term relationship between the Department of the Interior and Native Americans. There has always been con-

cern that, even if the Cobell case settled, it would simply be followed by a slew of mismanagement cases that would continue the acrimony. Under the settlement, the plaintiffs will amend their complaint to add these claims, which will then be resolved. Each and every plaintiff in this class will receive a payment, in addition to the \$1,000 check for the accounting claims, based on a formula to be approved by the Court. And the Department of the Interior will know that it has put those trust administration claims, too, behind it.

Between the accounting claims and the trust administration claims, the plaintiff class will be receiving approximately \$1.4 billion.

Finally, the settlement provides a framework through which the Department of the Interior can address one of the principal factors that has led down this path. The trust system that the Government manages has become increasingly complex over the years, as lands that were jointly owned by a small handful of individuals many decades ago are now often owned by several times that number, as the individual owners have passed away and left those interests to be divided among their heirs. Much of this land, divided up among sometimes hundreds of owners, has severely limited economic potential.

To address this problem of fractionated lands, the settlement contributes additional funds to a land consolidation program that provides critical benefits to every party. For individuals who own a fractional amount of land and wish to sell it, it will put money directly into their hands. The tribes that will ultimately own these newly consolidated interests will have productive assets that they can finally put to beneficial economic use. And over time, the Department of the Interior will reduce the hundreds of thousands of small accounts that it has been managing at a highly disproportionate cost.

As I mentioned, this settlement is not final. It requires authorization from Congress and approval from the court. We hope that both will happen quickly.

The legislation that is required to implement this settlement accomplishes a number of things. Among other things, it ensures that the United States District Court for the District of Columbia, which has been handling the litigation, can continue to assert jurisdiction over it after the plaintiffs amend their complaint. The legislation also sets up two funds within the Treasury of the United States, permits the court to certify a single class of trust administration claims, and—much like earlier efforts to resolve Cobell—authorizes the Secretary to administer the land consolidation program that is critical to the settlement. We believe that Congress should move forward with this legislation as quickly as possible.

The settlement also requires approval from the court. Once legislation has passed, the parties will present their proposed settlement to the court, and will begin the process of explaining it to class members across the country. Those individuals and others will have an opportunity to review the settlement and express their views on it, and the court will ultimately decide whether it represents a fair resolution of the claims. We believe that this formal process of explaining the settlement to the class, which the court does not have authority to initiate until after legislation passes, will be an important opportunity to provide information and answer questions—and for the court to ensure that the settlement meets the legal requirements of fairness to the class.

In the meantime, the parties are already engaged in extensive active outreach to explain the Settlement, both to the individual Indians who are the members of the plaintiff class in the litigation and to Indian tribes. Once the Settlement was reached in December 2009, the Secretary, Deputy Secretary, and Solicitor of the Department of the Interior held a call with tribal leaders across the nation to inform them of the Settlement and to answer their questions, followed by a widely-publicized hearing before the Senate Indian Affairs Committee. Representatives of the government also recently appeared before the National Congress of American Indians to answer questions and provide information on the Settlement. Similarly, federal representatives have appeared before other tribal organizations to provide information regarding the Settlement. Mrs. Cobell and the plaintiffs' counsel are engaged in similar outreach.

Throughout our discussions with the plaintiffs, we have been guided by two principles. First, we wanted true peace for the parties. We wanted to turn the page on history. The resolution of the accounting and trust administration pieces of this litigation will do that. And second, we wanted to put Interior on a new path for the future, and give it tools to address some of the underlying conditions that have contributed to its challenges. The land consolidation program will do that.

This settlement is a successful resolution for Native Americans, and for all Americans, and I hope that it will receive swift approvals so we can bring the litigation fully to an end. We look forward to working with the Committee to move the necessary legislation forward, and I look forward to your questions.

The CHAIRMAN. Thank you both for your testimony. I would like to ask either one of you a question that I raised this morning in our Committee Chair meeting and discussing this hearing today, and the overall issue that we are addressing.

And there was consternation raised among the appropriators, needless to say, because CBO has scored this settlement, and my question to either or both of you really would be can you help Congress identify funds that we can help pay for this settlement?

Mr. HAYES. My understanding, Mr. Chairman, is that we are having discussions in the Administration on that point. This is an unusual case, in that the judgment fund is available for this purpose

The CBO scoring is in—and I am not a budgeteer, I am happy to report, and so I don't understand the vagueness of the scoring process. Normally when you have a judgment fund situation, you don't have this issue arise, but I can assure you, Mr. Chairman, that we are having intense discussions with the White House and with OMB, and we will be happy to get back to you on that very shortly.

The CHAIRMAN. That would be most helpful, David. Let me continue with you then, David, and ask you a question about the \$2 billion fund that expires at the end of 10 years, with any remaining funds, of course, returning to the General Treasury. Is that correct?

Mr. HAYES. Yes, Mr. Chairman.

The CHAIRMAN. What is the rationale for not depositing any remaining funds into the education fund, which is also established by the proposed settlement agreement?

Mr. HAYES. We anticipate, Mr. Chairman, that these funds will all be spent by buying back fractionated interests. It is our intent actually working close with once we get approval here, working closely with the tribes, and prioritizing the efforts to accelerate those buy backs.

We would like to have them—most of them occur in the early years. We don't see this program going out 10 years at all. The \$2 billion, we think, is roughly sized to potentially buy back most of the parcels that have 20 or more owners.

But when you get into a fractionated land tracts that have anywhere from 5 to 20, all of a sudden, you are getting into the likely costs of that buy back being well in excess of \$2 billion. So what we see is this is going to make a huge dent in the problem, but it is not going to resolve the problem.

The CHAIRMAN. Could you please explain why you think a formula with an opt out clause is more appropriate than an administration option with the resolution of the trust administration claims?

Mr. HAYES. Let me defer to the lawyer here on that one if you don't mind, Mr. Chairman.

The CHAIRMAN. Sure.

Mr. PERRELLI. There was discussion earlier about a streamline process for claimants, and I think we view the class action mechanism as the streamline process to give individual Native Americans funds recovery for potential trust administration claims.

The opt out would put them in the exact same place that they would be otherwise today with respect to those claims, claims that to date that very few have been brought. I knew that there was a question earlier about prior examples. There are very few examples of these kinds of claims being brought.

So we think that this mechanism through the settlement that we have created is that streamline means to offer some measure of compensation to individuals. Otherwise, they can choose to go to court as they can today.

The CHAIRMAN. Thank you. Mr. Hastings.

Mr. HASTINGS. Thank you, Mr. Chairman. You heard the testimony of the prior panel, and several Members, including me, at least raised the issue of attorneys' fees. My question to you is that we could not find it on the website, the settlement, or the documents of that, and you responded that there was an agreement.

We haven't seen it, and so would you provide that to us, the documents specifically regarding the settlement as to attorney fees, and how those were derived?

Mr. PERRELLI. Yes, we will, and just for the record, it indicates that the parties will litigate between \$50- and \$99.9 million for past attorneys' fees, and we are happy to provide the documents.

Mr. HASTINGS. OK. Good. How soon can we expect that?

Mr. PERRELLI. We can get it to you today.

Mr. HASTINGS. OK. That would be fine. The next question I have is that you heard again the prior panel, and the prior panel was suggesting that this is a big step forward.

But there just needs to be more transparency and understanding of what this settlement agreement means to everybody. Mr. Grjalva asked a question, I think, to Mr. Nunez, is the issue transparency or unanimity, and I think the response was both.

You are suggesting, OK, let us pass this, and then we will have outreach. How do you reconcile the differences of opinion on that?

Mr. HAYES. I think, Congressman, that is not quite the dichotomy. We are engaged in outreach, and we will engage in more outreach. I should say that at the Department of the Interior that we have received enormous positive feedback about this settlement from Indian Country.

No doubt there are some folks—and you had a couple here on the panel who are not happy with the settlement, or who question it. I firmly believe that you will not have unanimity on anything like this.

We believe that there is enormous interest in Indian Country in resolving this, and enormous credibility with the Plaintiff class representatives. Elouise Cobell and her representatives, and their attorneys, have enormous credibility in Indian Country, because they know how hard they have worked in this matter for the last 13 years.

I hope and think that we are fresh blood, in terms of the Department of the Interior. We have not been involved in the past, and we have come at this from a fresh look, and I think we have some credibility.

We will continue to work, and I think your hearing here has been very helpful, and thank you for holding it, in terms of con-

tinuing to provide an opportunity for us to explain some of this, and we will.

And we will be happy to do more outreach. I think the point that Tom just mentioned is important though. There is a judicial process here. The Judge has to approve—has a fairness hearing basically, that will resolve a number of these questions.

And then once if he says this is a fair and appropriate settlement from a judicial perspective, then the class action notice processes start, and we are very anxious to use every mechanism available to make sure that everyone in Indian Country who wants to understand this fully, fully understands their rights, their opportunities, to opt out, to opt in, whatever.

But we can't accelerate that until we continue through this process and then we have the Judge approve the settlement in the fairness hearing.

Mr. PERRELLI. And if I can just clarify. What we will happen is that once legislation is enacted, and the settlement goes before the Judge, he will preliminarily approve, which will then trigger all of the notice to individual class members, and all of the outreach that is contemplated by the agreement.

People will have the opportunity to file objections, raise concerns, and then we anticipate a significant fairness hearing some months down the road in front of him.

Mr. HASTINGS. Well, all of that is after the fact, and Congress has the responsibility first. Now, I think that is self-evident, although we have not seen any legislation. So we don't know exactly what—I am presuming that it is the settlement agreement.

But my point is simply is that this hearing was designed to bring out differing views, and different observations on this settlement agreement. I think everything that I have heard is that this is a very, very big step forward.

It needs to be addressed, but it needs to be understood, and I think the testimony was pretty clear that Indian Country in general wants to know more about it before this legislation is passed, and our responsibility as Members of Congress obviously is to listen to the different views of our constituents, because we represent you people.

I concede that you did a lot of work working on this. I am not arguing with that at all, but there is—and there certainly seems to be a little different approach, and that is why I was asking, but what I am unfortunately hearing is, well, let us pass this and we will take that next step.

And so I hope that I didn't quite hear it that way, but if your outreach is aggressive, I am certain that we will hear from Indian Country in general that this process has moved forward.

Mr. HAYES. And thank you, Congressman, for those comments, and I appreciate the chance to clarify once again. The day of the settlement, we were on a conference call with scores of tribal leaders around the country explaining the settlement.

We have tribes visiting our Department as you well know as they visit your offices on The Hill week in and week out. We have been doing extensive discussions with many, many tribes.

Just last week, both Hilary Tompkins and Tom Perrelli spent a couple of hours in front of a panel with the National Congress on

American Indians, responding to all comers, all questions, about this settlement.

There are important meetings next week that have already been alluded to. We will continue to do that. We appreciate the fact that it is very important now to answer these questions, and we thank you for this opportunity to hear the issues that we heard today, and to respond to them, and to have the opportunity for a dialogue with this important Committee on the subject.

Mr. HASTINGS. OK. I would just conclude that I appreciate that, and I encourage you to continue your outreach. I suspect since we have the responsibility here to pass this legislation, that we will hear back from Indian Country as to the success of that outreach, and I think that is probably a fair way to do it. Thank you.

Mr. FALEOMAVAEGA. [Presiding]. Thank you for your testimonies, Secretary Hayes, and also our Deputy Attorney General, and Ms. Tompkins. Welcome. It is a real pleasure and certainly I am sure that throughout Indian Country the tremendous pride that we finally appointed our first Solicitor General who is of Native American ancestry.

I believe that you are a member of the Navajo Nation?

Ms. TOMPKINS. Yes. A proud member of the Navajo Nation, yes.

Mr. FALEOMAVAEGA. 250 thousand strong. That is pretty good. Secretary Hayes, you mentioned in your testimony that you had a copy of a draft bill that the Administration is proposing? Did I read that correctly in your testimony?

Has the Administration developed a proposed bill relating to this issue of this settlement?

Mr. HAYES. Yes, the Administration has, and the President sent it up to the leadership a week or two ago.

Mr. FALEOMAVAEGA. So we have it here among the Members?

Mr. HAYES. As far as I know.

Mr. FALEOMAVAEGA. I think Mr. Hastings says that he has not received a copy. Certainly I have not received a copy.

Mr. HAYES. Well, we will resolve that, Congressman Hastings. We will get it to you.

Mr. FALEOMAVAEGA. Yes, I think that would be a tremendous help. How many were involved in these negotiations? And I can understand that you must have gone through some grueling days, and weeks, and months, in finally reaching a settlement in December.

But I am just curious. How many were involved in these negotiations? Was it just between Ms. Cobell and her attorneys, and the officials of the Department of the Interior?

Mr. PERRELLI. There were Ms. Cobell, and her attorneys, and there were attorneys, consultants, as well as maybe up to 10 or 11 folks from the Departments of the Interior and the Department of Justice. We filled a big conference table, or two, and more.

Mr. FALEOMAVAEGA. So primarily it was just Ms. Cobell and her attorneys, Plaintiffs attorneys, and officials from both the Department of Justice and the Department of the Interior; is that correct?

Mr. PERRELLI. That is correct.

Mr. FALEOMAVAEGA. OK.

Mr. HAYES. And, of course, their attorneys represent the class. They have been certified. The class has been certified. So that they

are the appropriate and official representative of the hundreds of thousands of individual Indians who hold accounts.

So we thought it appropriate since we have been negotiating with them since they brought the litigation as a class.

Mr. FALEOMAVAEGA. How did you arrive at the \$3.4 billion as the price settlement for this class action suit? I believe it is \$1.4 billion for the class members, and was it \$2-some-billion for another portion of this? How did you arrive at this figure?

Mr. PERRELLI. And I will let Mr. Hayes talk about the \$2 billion.

Mr. FALEOMAVAEGA. The reason why I raise this issue is that this is one of the most contentious issues. Over the years, as I can remember, not only was there tremendous disagreements among the members or in the Congress, both House, and even within the Administration.

In fact, we even I think appropriated over \$10 million through an auditing company or a firm to find out exactly what was involved in the accounting, and even they could not come out with it after spending over \$10 million to provide some kind of an accounting. But I am just curious. How did you arrive at this?

Mr. PERRELLI. With respect to the \$1.4 billion, it was in negotiations, and so certainly a negotiated amount. As we looked at it, we looked at quantifications of the case made over time.

The Court had previously suggested a number, approximately 450 million for the accounting portion of the case. The Plaintiffs at different times had argued for significantly more money.

We also looked and made our best estimate to look at the entire range of accounts and potential mismanagement claims. We had the benefit of looking at settlements in the tribal trust area, which gave us some information about the potential size of these claims, and we did our best to come up with a reasonable settlement amount, but it was certainly a negotiation.

Mr. FALEOMAVAEGA. Well, what happened through all these years with the—well, in terms of—well, you are supposed to have some kind of a computer type accounting system. That was not done properly, I suppose.

But I am just curious. In terms of the numbers, this is what was agreed upon? Because it seems to be a lot higher than in my humble opinion over the years on the numbers that were being thrown around. But \$3.5 billion is somewhat a little low in my opinion. Secretary Hayes.

Mr. HAYES. Yes, if I can just make a couple of observations.

Mr. FALEOMAVAEGA. Please.

Mr. HAYES. I think that through the years of this litigation that this Congress has supported extensive work in terms of accounting work at the Department of the Interior through the Office of the Special Trustee, and the Office of Historical Accounting, that has provided enormous information, and provided the basis for good discussion about the status of these accounts.

So it is not as though these years of litigation have been for naught. There has been much more information developed over the years. I think that has been very helpful.

I will say that this was a very tough negotiation. The same Plaintiffs' lawyers who have been appropriately aggressive from day one, were appropriately aggressive in our negotiations.

And I am somewhat offended by the suggestion that there was some collusion here between the United States and the Plaintiffs, particularly when to your point the settlement amount is significantly less frankly than this Congress has had before it, and that prior Administrations have looked at for settlements.

I view that as a sign of good, hard and appropriate negotiating on both sides, and I think the settlement is fair and the Plaintiffs do as well, but I encourage you to ask the same question of the Plaintiffs' counsel.

Mr. FALEOMAVAEGA. I just have one more question to Ms. Tompkins. As you have heard previously from Professor Monette, in terms of the legal process, and whatever the legal justifications, does this mean that once this settlement is done with, with Congressional legislation to put the seal on it, that there could be no more class action suits concerning this matter.

Ms. TOMPKINS. If this settlement is approved by Congress, and ultimately by the Court, it will resolve the claims that are released in this settlement agreement. So it will resolve past claims for historical accounting, past claims for mismanagement of funds and assets.

So those will be resolved, but moving forward, potential new claims could arise in the future, and that will always be the case. So, those types of future claims would not be affected by this settlement agreement.

Mr. FALEOMAVAEGA. My time is up. The gentlelady from Wyoming.

Mrs. LUMMIS. Thank you, Mr. Chairman, and I would just comment that I had a law school professor named Joel Selig, who was Department of Justice, Jimmy Carter era, trained, and was an expert in class action lawsuits.

No University of Wyoming Law School graduate should have as much class action lawsuit experience as we did, but it was all because of Joel Selig. So I highly recommend his particular expertise in implementing Rule 23 litigation, and I want to ask a couple of questions.

Deputy Secretary Hayes, could you describe a little bit more what arm's-length interaction your Department had with those folks whose claims will be extinguished?

Mr. HAYES. Well, our negotiations were with the class representatives, and with their lawyers. They started last summer, early in the summer, and we had intense discussions throughout the summer and into the fall, leading to this settlement.

Now, I welcome you to ask the next panel, and Elouise Cobell, in terms of how they communicated with the class. As you well know from your training at the University of Wyoming Law School, one of the advantages of a class action is that a court has sanctioned a class, and class representatives, and counsel for the class, to speak on behalf of the class and, of course, they have done that eloquently for the last 13 years, and those are the folks that we dealt with.

Mrs. LUMMIS. I would like to follow up. You stated that the settlement addresses all existing and potential trust related claims that the Plaintiffs may have against the United States to date.

What kinds of yet to be litigated claims are being settled, and will it be clearer to Plaintiffs in accepting the settlement that they are extinguishing yet to be litigated claims?

Mr. HAYES. Well, I appreciate you raising that. That may be a misstatement in my testimony. I mean, we are not resolving claims for future—that start tomorrow, or the day after the settlement.

Mrs. LUMMIS. OK.

Mr. HAYES. In fact, that is why the Secretary has entered an order that would become effective at the time of settlement at the request of the Plaintiffs. So that we make sure that going forward that we learn the lessons that we have learned over the last 13 years, and take a fresh look, and make sure that we don't make these mistakes again.

And that is also why we are excited about the land consolidation program, because it will minimize both the expense of these individual actions, but also the opportunities for mistake, and at the same time, it puts money in the pocket of individual Indians.

Mrs. LUMMIS. OK. Good to know. Thank you very much. In visiting with the tribes in Wyoming, they gave me two primary messages. One was that there is an absolute need to settle this matter, and I am so pleased that this hearing is being held, because some settlement proposal has come to fruition.

And also that many individuals throughout Indian Country have questions about the terms and the precedence setting impacts of this. What kinds of steps does the Department plan to take to educate tribal members on the full scope of the settlement?

Mr. HAYES. Congresswoman, we described a little bit before what we have done to date, in terms of our initial outreach to the tribes as a group with the Secretary, and with the outreach through the National Congress on American Indians, and through our individual tribal outreach.

We had a Senate hearing before the turn of the year, and we have this hearing. But I take seriously the points of Congressman Hastings, and others here. We will redouble our efforts right now to make sure that there is good information out there about this settlement.

This hearing has demonstrated that there is confusion in some quarters, and some misinformation, and that does no one any good. We are confident that this is an excellent settlement, and we will make ourselves available, and aggressively put ourselves out there to communicate that as forcefully and as frequently as we can.

Mrs. LUMMIS. Thank you, and would the Chairman indulge one more question, Mr. Chairman?

Mr. FALCOMA. Sure. Go ahead.

Mrs. LUMMIS. Thank you. Mr. Perrelli, one specific question that was asked by a tribal leader in my State was whether or not individual payments under the settlement would be taxable.

And also whether it would affect formulas for other Federal payments, such as TANF? Can you respond to that?

Mr. PERRELLI. And I think the settlement itself doesn't change the rules that would otherwise apply to those payments. So I think that there are—and I will get myself out of my depth quickly if I get too far into tax issues, and this may be the kind of thing that

a written follow-up to you may be helpful in talking about the general rules that would apply.

Mrs. LUMMIS. That would be great, and the tribes in Wyoming would really appreciate it, and I will be sure to pass it on. Thank you, Mr. Chairman.

Mr. FALEOMAVAEGA. The gentleman from New Mexico.

Mr. HEINRICH. Thank you, Mr. Chairman. First, welcome to all of you. I had an opportunity to work with Solicitor Tompkins when we were both working for the State of New Mexico, and have nothing but high regard for her legal mind.

And I want to sort of direct my first question to both Mr. Hayes and Mr. Perrelli. From the point of view of your two agencies—and I don't want to sidetrack us too much, but I want to ask about the tribal trust lawsuits that are also currently pending in the Federal Courts.

And they are based on many of the same problems that are inherent in the *Cobell* case. These are with tribes as plaintiffs rather than individuals, and I just want to ask from both of you what are you and your agencies doing to make sure that those cases are also receiving the same sort of high level of attention and potential for resolve that this case has seen?

Mr. HAYES. I thank you for your question, Congressman, and this is a very important point. There are nearly a hundred lawsuits that individual tribes have brought in terms of management of their tribal trust assets.

A few have settled. We have been in discussions with the Justice Department about how—pivoting off of this settlement with a class of individual Indian account holders—we can get many, many more of those tribal cases into a settlement mode.

That will be our sole attention once we resolve this matter. We are looking at budgeting adequate amounts of budget, and working with the Congress to ensure that we have the support needed to do the fact finding, et cetera, that will enable these tribal cases to be settled.

And we have had some preliminary discussions with the Justice Department about some process thoughts to help facilitate a fast tracking of the settlement process, and I defer to Mr. Perrelli for supplementing that.

Mr. PERRELLI. I have two things. I will first clarify what I just said, because the settlement does not deal with the tax issues. The legislation that we proposed does deal with the tax and benefit issues.

I am sorry that the Congressman had to leave before I could clarify that, but when we send up a copy of the legislation, there is a specific provision on the tax and benefits implication that I think will be helpful to tribal leaders to understand that.

With respect to the tribal trust cases, they are really the next step in this path in trying to bring resolution to all of these claims. The Solicitor and I recently sent a letter to some of the leaders of the groups that are representing significant numbers of the tribes, and inviting them to a settlement negotiation in which we would participate personally.

And we envision having that schedule in short order, and hopefully beginning a process that will allow us to move forward in those cases as we have here.

Mr. HEINRICH. I appreciate both of your responses on that. I know that there are at least five cases in New Mexico, with the Arapaho Nation, the Hickory, and Mescalero and Apache Tribes, and the Pueblos of Zia and Laguna that are all involved in related litigation.

The last thing that I would just do is for Ms. Tompkins. I wanted to give you the opportunity if you wanted to address the matter that Professor Monette brought up at the beginning, where he seemed to characterize your view on an issue, and I wanted to give you an opportunity to characterize your own view on that.

Ms. TOMPKINS. Thank you, Congressman Heinrich. Sure. I guess my only comment on that was the question that we discussed last night was really—it just reminded me of law school and one of those convoluted, arcane questions that you would get when a professor was throwing you with easing the Socratic method.

But I did look at the issue, and it is not an issue that raises any concern in the settlement agreement. It is about some very technical language in the definition part of the settlement.

But it is not a problem. It basically includes the words lands and assets in the accounting definition, because that is an outgrowth of the litigation. There was a time in the litigation when the parties were debating whether or not asset statements, descriptions of the land, the underlying land, should be in the accounting statements. And so that is just to ensure that we are addressing that issue in that definition. Thank you.

Mr. HEINRICH. Thank you, and Mr. Chairman, I yield back the rest of my time.

Mr. FALEOMAVAEGA. Thank you. I would like to turn the time over to our Ranking Member for further questions.

Mr. HASTINGS. Thank you very much, Mr. Chairman. I don't have any other questions, but it is more of a request, because you said, and properly so, that this hearing has been very good.

Generally, hearings engender more questions in the future. Surprise. Surprise. You were very kind to me in responding to the questions in a two week time period on the letter that I sent you.

What I would ask you is that questions that are given to you after this meeting, if you would respond in a like time, a two week period, because there was a very tight time period on that, and as quickly that we can get these questions—our answers back for these questions, that would be helpful.

So if you could set a goal of responding to whatever followup questions, that that response would be within a two week period.

Mr. HAYES. Absolutely, Congressman.

Mr. HASTINGS. Great. Great. Thank you very much. Thank you, Mr. Chairman.

Mr. FALEOMAVAEGA. Well, I have just one followup question to the question from the gentleman from New Mexico. I just wanted to get it straight and for the record that there are tribes who have already filed lawsuits in the same case matter that we are talking about.

Are you suggesting that we are going to do something to disallow them from pursuing their efforts in filing a lawsuit in that same case matter?

Mr. PERRELLI. No, not at all. Not at all, Congressman, and I apologize for any confusion in that regard. There are approximately 99 current lawsuits filed by tribes that are not affected by this settlement, and this settlement doesn't preclude tribes and tribal governments from filing any action.

Mr. FALEOMAVAEGA. All right. Well, thank you very much. I believe we have one more panel here, our third one, and this is Ms. Elouise Cobell, and I believe she probably has a couple of attorneys that will be attending here. We would welcome her to testify now, and for the record, please introduce the attorney that is here with you.

STATEMENT OF ELOUISE C. COBELL, LEAD PLAINTIFF IN COBELL V. SALAZAR, BROWNING, MONTANA; ACCOMPANIED BY MR. WILLIAM E. DORRIS, MANAGING PARTNER, KILPATRICK STOCKTON LLP, WASHINGTON, D.C.

Ms. COBELL. Yes, I will, and with me today is Bill Dorris, one of the Plaintiffs' attorneys, and he will be joining me for any comments or questions, and I think it is very important to tell this Committee that I didn't bring this case on behalf of tribes.

I brought this case on behalf of over 500 thousand individual Indians, and many who I know, and many who have suffered from the mismanagement of the Indian trust funds, and it is the largest class action lawsuit.

I was a little taken back by the word transparency. This has been going on for 14 years, and we have posted constantly, and newspapers have covered it, and over, and over about what has happened in this court case.

And I think that there is much more consensus, as Secretary Hayes has stated, in individual Indians knowing about this case. I flew in late last night from South Dakota, where I have been visiting and swiping my own personal credit card, but visiting tribes and individual Indians at tribal locations.

And I was overjoyed because sometimes you feel that there are a lot of Monday night quarterbacks, and you are right down to the bottom, and getting ready to make a touchdown, and then everybody starts yelling and screaming that you did this wrong, and you did that wrong.

Well, it was overwhelming to me to get out to Indian Country and to individual Indians, and not that I haven't been out to Indian Country before, because I have traveled extensive in Indian Country updating individual Indians on this case.

But I was extremely rewarded by just looking at the people that we represented, and the thank you's, and the appreciation that was extended by elderly people, young people.

And I think where the real confusion really existed was with the tribes. The tribal council members would get up and talk about, oh, you are going to extinguish your rights in the Black Hills, and it was constantly correcting misinformation that existed out there.

That was one of the reasons that I actually started going out to Indian Country immediately before Congress approved this settle-

ment because of the misinformation, and it was important for individual Indians to hear the facts, and as they learned the facts, you cannot believe the amount of like personal notes that were written.

And, yes, we want to move forward. We feel that this is a stepping stone. We understand that this is not the end all to all the problems that exist in Indian Country. This is something that has been accomplished, and we feel good about this victory. We feel very good about this victory.

I was very impressed by a young man in Pine Ridge, who got up and who had been reading since a young man at the beginning of this case, and informed all his family members constantly about what this case meant, and what it meant for all individual Indians.

Very bright, and it just overwhelmingly gave me the satisfaction of the young people that have been affected by this case, and that, yes, they do have rights, and they do have a voice.

And that a lot of times what I heard over the last couple of days is that tribal councils do not represent them, and they wanted me to make sure that I understood that, because sometimes they felt that they couldn't trust tribal councils.

So they wanted me to understand that, and they told me over and over, and as we continued to travel South Dakota, and were visiting every single reservation in South Dakota, it has been overwhelming.

There is almost no opposition to this settlement as far as individual Indians. I think where we really ran into problems is just the total misinformation, and that is why we were out there.

I just would like to say that I was deeply hurt by the collusion that the Professor alleged, and I want to tell you that these negotiations were tough. They were hard, and I think that I did the best job that I could, along with my class counsel, to negotiate a settlement.

I felt that we were owed much more money, but this could go on for hundreds of years, and people are dying. Individual Indians that are owed this money are dying every single day, and we had to reach a time that we put the past before us, and get some money out to individual Indians that are owed.

And so the driving force—and I really would like to thank Attorney General Tom Perrelli, and Deputy Secretary Hayes, and Solicitor Hilary Tompkins, because at times I wanted to walk out of the meetings. I said, no, that we are not accepting this.

And once of the issues that I thought was very, very important is for the future. What about the future of our young people, and worked very hard for a scholarship fund, and that it be dedicated to educating our young people so that we never have to go through this again.

We should never have to go through this abuse that the U.S. Government has done to individual Indians, and I just don't want that to happen, and I want every individual young person to be educated so we don't have to.

You don't know when I was walking over, and you don't know how many times I have testified before the Senate Committee, this Committee. It has been numerous. I started with Mike Synar, who the Chairman recognized, and he was totally incredible.

He was a person that started it, but probably 20 some times—and sometimes it just gets so tiring, because you come back again, and it is the same thing, and tribes say more consultation, and more of this, and more of that.

Well, for 14 years, I sat in that courtroom and there was not too many tribal people that sat there. But we always had great input. My tribe was always behind this. They sent letters that said that we are behind this 100 percent.

So I really wanted to address the situation on the outreach, because this outreach has been going on. You know, should we have gotten more than \$3.4 billion? I would have liked to have gotten more than \$3.4 billion.

Like the Chairman, I wanted \$280 billion at one point in time, but what is reasonable. What is reasonable during this time before so many people pass away and die, and die of poverty.

I just came from Pine Ridge. I just came from Rose Bud, and things are tough. Things are tough in those situations. You can't believe the roads that I traveled. They don't even have paved roads.

So I just want to continue to address that. The other thing that I did on my own just trying to get information out because of the misinformation. You know, oh, the treaties are being violated. Oh, this is going to happen. Oh, there are going to be no future claims.

So I just began issuing Ask Elouise letters. Why don't you ask us. We know. Don't go to your tribal chairmen that have already said they don't know anything about it. Ask us.

So I started submitting, and this is the fourth Ask Elouise letter, and what we do is we collect questions from all the IAM account holders, and they give us questions, and we address them, constantly address them.

And so it is a good way of getting out and really working with people. I guess I want to talk a little bit about the fifteen-hundred dollars, and the accounting portion you all know sitting up here, and everybody has talked about it.

You have allocated hundreds of millions of dollars for an accounting, and there just can't be an accounting. There are too many missing documents. The documents are gone. So you can't do an accounting. So we had to settle on that.

And we were asking for \$48 billion. The Court came back and said, no, I think I will give you \$455 million, and then the Appellate Court said, well, go back to District Court, and said, oh, the government can do any type of an accounting that they want.

They can do an accounting for the low hanging fruit and for accounts that have a hundred-thousand or more in them. So it wasn't a legal accounting, and you can take as long as you want. So we could have been looking at another hundred years for an accounting.

And so those are the reasons that we settled, and those are the reasons that we fought on the table with the Department of Justice and the Department of the Interior to making sure that we got the best settlement.

It was very important to us to have people understand that this would not be taxable. Many of the people that are going to be receiving this money are poor. They are poor. Entitlement programs

are very important to them, and the majority of people are on SSI, on TANF, on food stamps, and we wanted to ensure that those were not disrupted.

And so in this settlement agreement, we will not be held victims to having those go away. I guess maybe the other areas that I wanted to talk about is the trust mismanagement claims.

The government wanted that. The government wanted it, and we sat and talked about them. We actually did a study of how many claims had been filed on land mismanagement by individual Indians. There wasn't that many.

And the reason there isn't that many is because people don't have the money to sue, and that is why I sued the government on behalf of the 500 thousand individual Indians, and not one tribe gave one penny for this litigation. Let me ensure that item to you.

I went out and raised money so that we could have justice, and so I know how difficult it is, and so I know that individuals that want to resolve these trust mismanagement claims that they have the option to. They can opt out.

And I think that has been discussed several times over and over that there is going to be a fairness hearing. Everybody that doesn't like what is happening, then go to the fairness hearing. Be heard, and the Judge will determine.

The Judge played an active role in this. When he called the parties together, he said that you can litigate forever. I don't see any judicial solution, because he knew that we had been in court for 14 years, and we could be in court for another 20 years.

And we don't want to go to the Supreme Court. I mean, that option is open for us, and many of you asked why is there a sense of urgency. There is a sense of urgency because we have timelines, and I know Bill Dorris will discuss that with you, where we lose out on our option to go to the Supreme Court, but that is our next option, is to go to the Supreme Court.

You can do the right thing here. You can act and act quickly, and get this approved so that we can get money to individual Indians that have been abused for so many years. Let us move on. Let us get this behind us, and let us move on, and I urge this Congress to take me seriously.

It has been difficult. It has been a difficult 14 years, and I thought that the hard part was over when we had a legal settlement between the Plaintiffs and the Defendants.

I thought that all we had to do was come up and talk to Congress, because they had so many hearings that they knew about this, and it is almost like Congress sometimes acts oblivious to all the issues that we have talked about, and I am not criticizing, because I need your support to approve this.

[Laughter.]

Ms. COBELL. But I would like to stop there, and just take any questions.

[The prepared statement of Ms. Cobell follows:]

Statement of Elouise P. Cobell, Lead Plaintiff in *Cobell V. Salazar*

I. INTRODUCTION

Good afternoon, and thank you Chairman Rahall, Ranking Member Hastings, and members of the Committee. I am here today representing a class of over 500,000 individual Indians as the lead plaintiff in the case initially entitled Cobell v. Babbitt

and now referred to as *Cobell v. Salazar*, pending in the United States District Court for the District of Columbia and presently presided over by Judge James Robertson. Since virtually its inception more than 13 years ago, Congress has taken keen interest in this litigation and its key objectives—reforming the Individual Indian Trust (“Trust”), ensuring that the government accounts for all Trust assets including all trust funds, land and natural resources, and correcting and restating each individual’s account balance.

By any measure, this litigation has proven exceptional and extraordinary. Not only is it one of the largest class actions ever brought against the United States as it addresses over 120 years of mismanagement of Indian trust assets and involves over 500,000 individual Indians, but the litigation has been intense and contentious. Moreover, there have been more than 3600 docket entries in the district court and over 80 published decisions, including ten appeals—the most recent appellate opinion is referred to as Cobell XXII.

On each occasion I have appeared before Congress, I have emphasized my willingness to explore settlement of this case. But of course, resolution takes two parties willing to come to the table to negotiate in good faith and attempt to reach an equitable settlement that would set the foundation for improved trust management and accountability in the future. Until very recently, however, we did not have such a willing partner on the other side. President Obama showed great leadership during the campaign when he committed to seek a fair resolution to this case and, when elected, he followed through and charged Secretary Salazar and Attorney General Holder with carrying out this commitment.

Having been through seven failed settlement efforts before, I was not optimistic at the outset of these negotiations that we would be able to reach agreement. Beginning in the late summer of 2009, though, we sat down in good faith and so did the Administration. Associate Attorney General Tom Perrelli, Interior Deputy Secretary David Hayes, and Interior Solicitor Hillary Tompkins were involved in the day-to-day negotiations. The issues to discuss and resolve were gravely challenging, and I repeatedly felt we had reached impasse. But both my team and the government soldiered on, knowing that resolution was the best thing for the affected individual Indian trust beneficiaries and for a healthier foundation of the trust relationship for the future.

Reaching agreement was certainly not easy, and the settlement from my perspective is not perfect. I would want more for beneficiaries as I think that is what they deserve. But a settlement requires compromise—by definition, you do not get everything you want. This is the bottom line: After months of discussion, I am here to testify that I strongly support this agreement. It is time to look forward, not backward. And though we must never forget the past, this settlement can move us forward together as it represents the best resolution we can hope for under the circumstances.

Although we have reached an historical settlement totaling more than \$3.4 billion, there is little doubt this is far less than the full amount to which individual Indians are entitled. Yes, we could prolong our struggle, fight longer, and, perhaps one day, reach a judgment in the courts that results in a greater benefit to individual Indians. But we are nevertheless compelled to settle now by the sobering reality that members of our class die each year, each month, and every day, forever prevented from receiving that which is theirs. We also face the uncomfortable, but unavoidable fact that a large number of individual Indian trust beneficiaries are among the most vulnerable people in this country, existing in the direst of poverty. This settlement can begin to provide hope and a much needed measure of justice.

In addition, now that the Cobell case has brought heightened attention to this matter, I am optimistic that this settlement will lay the foundation for genuine and meaningful reform of the Trust. There remains considerable room for improvement, as Secretary Salazar and Deputy Secretary Hayes have recognized. I am hopeful that the Commission that Secretary Salazar has contemporaneously announced with this settlement will ensure that additional critical reforms are made and that we set the underpinning for safe and sound management of our assets in the future.

The terms of the settlement have been well publicized. We have reached out to Indian Country to insure that beneficiaries are well informed of its terms. I just returned from meeting with beneficiaries in South Dakota, and our class counsel, as we speak, is traveling to meet with beneficiaries in other states. We have met with allottee associations, tribal organizations and landowners and will continue our efforts. Next week, our class counsel will visit Arizona and New Mexico, the following week Montana, Wyoming and North Dakota and the weeks after that Oklahoma, Washington, California and Oregon. Further meetings with beneficiaries will continue throughout Indian Country in March and April to make sure that they are able to receive complete and accurate information about the settlement.

Despite this outreach, there remains misinformation regarding the settlement conveyed by a very small number of individuals, many of whom are not beneficiaries and do not speak for individual Indian beneficiaries. I want to dispel those misunderstandings:

First, there are those who have stated that under this agreement beneficiaries will receive very little. This is not accurate. In fact, most beneficiaries who participate in this settlement will receive at least—and I emphasize at least—\$1,500.00. Many will receive substantially more based on the transactional activity in their IIM account. To those in Indian Country, receipt of this money is critical, both as a recognition of the government's past wrongdoing and as a first step in fulfilling the commitment to reforming the trust system. Many individual Indians are dependent on this money for the basic necessities of life. Its payment should not be further delayed.

Two other points are important with respect to these distributions. First, receipt of these funds shall not be construed as income and thus will not be taxable for beneficiaries. This is only fair because proceeds from trust lands are generally not taxable. Second, and critically important to the poorest among the class, the Cobell settlement funds shall not be considered when determining eligibility for programs such as TANF, SSI and food stamps. The last thing the parties want is to further victimize poorer class members by preventing them from receiving benefits from programs for which they would otherwise be eligible.

Second, there are suggestions that the settlement should not have encompassed claims for trust administration since it is contended the Cobell case did not involve mismanagement of trust assets. This is not correct. The Cobell case has always insisted that the government account for all trust assets—not just money but the land and natural resources that are at the heart of the individual Indian trust. And, the district court invited plaintiffs to amend our complaint to include these claims in the litigation well before these settlement negotiations. In other words, their inclusion should be no surprise. Indeed, while true that there are certain trust damages claims that are now expressly included that were not before, understand that virtually all settlement discussions—including those led by this Committee and the Senate Indian Affairs Committee—have contemplated the inclusion of all such individual claims. The largest and oldest tribal organization, the National Congress of American Indians passed unanimously a resolution in 2006 endorsing inclusion of all trust management claims if, where as here, there is an opt out.

I and others were also counseled on this point by the following sober reality: Very few trust mismanagement cases have ever been filed and those that have are very expensive, extremely time consuming and fraught with risk. There is an obvious reason for this. For most beneficiaries, the claims are relatively modest when compared with the cost of litigating against the government and the legal obstacles in doing so. Legal hindrances abound, such as statute of limitations and jurisdictional restrictions, and together with the cost prohibitive nature of litigation, help explain why so few have been brought. For the great majority of beneficiaries, this settlement represents the only opportunity for them to receive any compensation for the government's mismanagement of their trust assets. For those who wish to pursue those claims independently, they have the opportunity to do so by opting out of the trust administration portion of the settlement. The agreement preserves all legal mechanisms to enable them to do so.

Third, there are those who criticize the amount that the class attorneys may receive by reason of this settlement. That criticism is misplaced. This is not a case where attorneys are attempting to get a fee based on a quick settlement. The attorneys in this case undertook substantial risk in filing and prosecuting this case on behalf of the 500,000 individual Indian beneficiaries in 1996. Many of the attorneys gave up their practices to work solely on it. It has often consumed 18 hour days, seven days a week. They have engaged in 7 major trials, handled countless appeals by the government and reviewed tens of millions of pages of documents. They responded when no one else—not even Congress—was able to correct the wrongdoing that individual Indians endured. As a result of their efforts, for the first time in over 100 years, the government has been held accountable for its mismanagement of the IIM Trust. Moreover, solely as a result of their efforts, reform of the Trust is a real possibility. The benefit to class members from their efforts is considerable. They have agreed to limit their petition for fees to under \$100 million. This is less than 3% of the total settlement—very modest when compared with fees typically awarded in class actions. Class members will have the opportunity to object to the fees and those objections will be considered by the Court before any fee award. The attempt by some such as ITMA to limit the fees further to those available under the Equal Access to Justice Act (EAJA) suffers from two infirmities. First, the government has made clear that it is not open to paying fees through EAJA. Second, if in the end,

lawyer fees are so dramatically curtailed, then how will individual Indians ever obtain the kind of highly competent and dedicated counsel necessary to bring a difficult case like this next time? It is already tragically difficult to attract such lawyers and ITMA would like to make it all the more challenging. This makes no sense.

Fourth, there are those that have even suggested that the named plaintiffs in this case, including me, will profit from this settlement. This again is erroneous. The incentive fee contemplated is an award to named plaintiffs by the Court for their work in assisting in this case and to cover expenses. As you might expect, the work required has been considerable. However, most of the money requested will be for reimbursement of expenses incurred during the 14 years of this litigation. Millions of dollars have been spent in prosecuting this case, including payment of experts, and covering charges for transcripts and other court costs. I have contributed substantial funds to aid in the prosecution of this case. The Blackfeet Reservation Development Fund, a non profit, has used millions of its own funds as well. Furthermore, many of the grants we received are in the form of loans and are repayable. Importantly, any class members not comfortable with the incentive award will have a opportunity to have their views heard by the Court before any payment is made. However, those who have advanced the money to prosecute this case deserve to be reimbursed.

Finally, some who don't understand the reality of the historical data and the lack of reliable information, have criticized the distribution scheme contemplated in this settlement. They say it doesn't track with precision the losses for each beneficiary. The reality is that there is no data to establish actual losses. This is indeed rough justice. But it is the best possible way to achieve three important objectives: (1) being fair so that all receive a meaningful payment of at least \$1,500, while rewarding high dollar accounts that likely suffered the most losses; (2) permitting for a prompt distribution where most beneficiaries will be completely paid within a few months; and (3) will not waste significant money on lawyers, accountants and Special Masters trying to figure out what is owed to each individual. In addition, the Court will hear any objections to the distribution scheme and make a determination on its fairness.

Some have asked to establish an extensive and expensive process where beneficiaries can have essentially mini-trials before a Special Master. This is absolutely and unequivocally foolish. It would waste significant funds on figuring out who gets what and will take years before beneficiaries receive their distributions. Moreover, it will not be advantageous to those beneficiaries who can prove their case since such beneficiaries have the ability to opt out anyway and pursue their claims independently. In short, such a proposal would take years, cost hundreds of millions and be no fairer than the current model. This is precisely why the parties rejected such an approach.

In summary, this settlement will do a lot of good. It will get more than \$3 billion in the hands of beneficiaries. It will provide monies for land consolidation. It will create a \$60 million scholarship fund. Moreover, there will be a Secretarial Commission to recommend additional trust reforms that are desperately needed. And there is an agreement to perform an audit of the Trust. No audit has ever been done. To heal the division between individual Indian trust beneficiaries and the government that is reflected historically and in the nearly 14 years of our litigation and to begin to establish confidence that the IIM Trust is managed in accordance with trust law, transparency is essential. Too many records have been destroyed. Too much deception has occurred. Importantly, this settlement will allow individual Indians to look forward and work collaboratively with their trustee to ensure a better tomorrow.

We know this settlement does not solve many of the serious underlying problems plaguing this Trust. We know that reform must continue and cannot stop here. We will continue our efforts to ensure accountability. We have had to spend too much time looking backwards, trying to address the terrible wrongs of the past. Now, my hope is that we look forward to correct those wrongs so that individual Indian trust beneficiaries finally receive that which rightfully is theirs.

When I embarked on this settlement process, I was skeptical that this result could be achieved. But we were able to reach a resolution. There has been too much discussion about what we would like to achieve for individual Indian beneficiaries. It is now important that we implement this historical settlement. I now ask Congress to swiftly enact the necessary implementing legislation so we can begin to distribute our trust funds without further delay. Hundreds of thousands of individual Indians have waited patiently for far too long.

NOTE: The 57-page “Class Action Settlement Agreement” dated December 7, 2009, has been retained in the Committee’s official files. It can be found at the following website:

www.doi.gov/documents/ClassActionSettlementCobellvSalazar.pdf

[The “Agreement on Attorneys’ Fees, Expenses, and Costs” submitted for the record follows:]

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

ELOUISE PEPION COBELL, et al. Plaintiffs,

vs.

KEN SALAZAR, Secretary of the Interior, et al, Defendants.

Case No. 1:96CV01285-JR

Agreement on Attorneys’ Fees, Expenses, and Costs

December 7, 2009

WHEREAS the Parties entered the Class Action Settlement Agreement, dated December 7, 2009 (“Main Cobell Agreement”); and

WHEREAS the Parties desire that the Class should compensate Class Counsel for reasonable attorney fees and related expenses and costs;

THEREFORE, the Parties hereby enter this Agreement on Attorneys’ Fees, Expenses, and Costs (“Fee Agreement”).

1. Unless otherwise defined herein, this Fee Agreement incorporates all defined terms in the Main Cobell Agreement and shall be interpreted in a manner consistent with the Main Cobell Agreement.

2. The amount of attorneys’ fees, expenses and costs shall be decided by the Court in accordance with controlling law and awarded from the Accounting/Trust Administration Fund.

3. The Parties agree that litigation over attorneys’ fees, expenses, and costs should be conducted with a civility consistent with the Parties’ mutual desire to reach an amicable resolution on all open issues. The Parties agree therefore that all documents filed in connection with the litigation over attorneys’ fees, expenses, and costs shall consist of a short, plain statement of the facts and the law with the goal of informing the Court of relevant information for its consideration.

Attorneys’ Fees, Expenses, and Costs Incurred through December 7, 2009.

- a. Plaintiffs may submit a motion for Class Counsel’s attorney fees, expenses, and costs incurred through December 7, 2009. Such motion shall not assert that Class Counsel be paid more than \$99,900,000.00 above amounts previously paid by Defendants. Unless otherwise ordered by the Court, Plaintiffs’ memorandum of points and authorities in support of such claim shall not exceed 25 pages and shall be filed no later than thirty (30) days following Preliminary Approval, and Class Counsel’s reply in support of such claim shall not exceed 15 pages.
- b. Defendants may submit a memorandum in opposition to Plaintiffs’ motion. Such memorandum shall not assert that Class Counsel be paid less than \$50,000,000.00 above the amounts previously paid by Defendants. Unless otherwise ordered by the Court, Defendant’s memorandum shall not exceed 25 pages and shall be filed within 30 days after Plaintiffs’ motion.
- c. Concurrently with any motion for fees, expenses, and costs of attorneys through December 7, 2009, Plaintiffs shall file statements regarding Class Counsel’s billing rates, as well as contemporaneous, where available, and complete daily time, expense, and cost records supporting this motion. Defendants may also submit an annotated version or summary of the time, expense and cost records in support of their opposition.
- d. Plaintiffs disclosure and filing of the records referenced in the preceding paragraph shall not constitute a waiver of any attorney client privilege or attorney work product protections. Plaintiffs may request the entry of an appropriate protective order regarding such confidential records.

- e. In the event that the Court awards attorneys' fees, expenses, and costs covered by this Paragraph in an amount equal to or greater than \$50,000,000.00 and equal to or less than \$99,900,000.00, Plaintiffs, Class Counsel and Defendants agree not to file a notice of appeal concerning such award.

5. *Attorneys' Fees, Expenses, and Costs Incurred after December 7, 2009.* Plaintiffs may submit a motion for Class Counsel's attorneys' fees, expenses, and costs incurred after December 7, 2009, up to \$10,000,000.00. Such motion shall be based solely on attorney hours and actual billing rates and actual expenses and costs incurred, and may not be justified by any other means (such as a percentage of the class recovery). Such motion shall be resolved in such manner as directed by the Court. Concurrently with any motion for post Agreement attorneys' fees, expenses, and costs, Plaintiffs shall file statements regarding Class Counsel's billing rates, as well as complete and contemporaneous daily time, expense, and cost records supporting this motion.

6. Should (a) either party terminate the Main Cobell Agreement pursuant to the terms thereof, (b) the Main Cobell Agreement become null and void because a condition subsequent does not occur, or (c) the Main Cobell Agreement not finally be approved by the Court, this Fee Agreement shall be null and void, and the parties and Class Counsel shall take such steps as are necessary to restore the status quo ante.

7. Nothing in this Fee Agreement shall affect the right of any non-party to this Fee Agreement.

Wherefore, intending to be legally bound in accordance with the terms of this Fee Agreement, the Parties hereby execute this Fee Agreement:

SIGNATURES

Wherefore, intending to be legally bound in accordance with the terms of this Agreement, the Parties hereby execute this Agreement:

FOR PLAINTIFFS:

Dennis M. Gingold, Class Counsel

Keith M. Harper, Class Counsel

FOR DEFENDANTS:

Thomas J. Perrelli, Associate Attorney General

Mr. FALEOMAVEGA. Chairman Rahall.

The CHAIRMAN. Thank you. Elouise, you heard my opening statement, and I certainly want to reiterate my commendation for you, and praise for you. You certainly have demonstrated a dogged determination, a persistence and patience, and your fight for justice for Indian Country will be long remembered after all of us in this room have departed.

I wanted to also compare the misperceptions that I guess that are out there, and salute you as I said in my opening statement for your Dear Elouise column, or hotline, that you have opened to answer a lot of those misperceptions.

And fears, and unjustifiable fears, but yet because of all of the injustices that have been done, you can understand from where it comes. It reminds me very much of our health care debate, and the misperceptions that are out there, and those for their own reasons that may be stirring up opposition unjustifiably on those who stir up the opposition.

But again the fear you can understand, and the anger and frustration, because it has been so long as we all know, 13 or 14 years. You heard this figure mentioned earlier that there is an agreement

that establishes a range of 50 to a hundred-million dollars for attorney fees. Can you help us on how this range was developed?

Ms. COBELL. Well, this range is 3 percent, and I firmly believe that the attorneys have to be paid a hundred million dollars. You know, the danger that we run into is when you start pulling back attorneys' fees.

I am going to go back a little bit in time before I filed this lawsuit. I went shopping for attorneys. I went to those big attorney firms here in Washington that represented tribes. I asked them to take this case.

They told me no, we are not taking the case. It is going to take too long, and we just are not going to take the case. I could not get people to represent me, and these were attorneys that made 20 and 30 percent off the Court of Claims representing Indian tribes, and they just would not do it.

And then I finally found the attorneys that would represent, and I thought that the amount that they have filed for is very reasonable, very reasonable. I have no problem. I have done research, and I know that it is 25 percent, 20 percent, 25 percent for attorneys' fees for large cases.

And I believe that if we have good attorneys and we won—and let me tell you that we won. In the 14 years, we won huge victories, and it is almost like a surgeon. When my husband and I went through a transplant, I gave him a kidney, we had the top surgeon. It cost us a lot of money.

But we got the top surgeon because we wanted to live. I got the top attorneys because I wanted over 500 thousand individual Indians to live, and I wanted to make sure that they had proper representation. So I think that three percent is a bargain basement amount to pay the attorneys.

The CHAIRMAN. Could you tell us how this settlement may affect future trust management by the Department of the Interior?

Ms. COBELL. Well, I have to believe that if anything that this court case has done has shown the breach of trust, that the Department of the Interior is unlawful, or that they are not doing.

And so I believe that there is only one way to go, and that is to change, and I heard Secretary Hayes talk about the Secretarial order that Secretary Salazar is doing, where he is going to have a commission and to address trust reform, and continue, and I have to believe.

I met with Secretary Salazar specifically one on one on this, because I was very worried about the fact that trust reform would not be performed, and I think his leadership—but it will take all of us to continue to make sure that trust reform is implemented properly for individual Indians.

And I guess I just have to believe that when I have the Secretary of the Interior and the Attorney General telling me that they have committed, if I can't believe them, then I don't know who I can believe.

The CHAIRMAN. You have touched upon this, but would you like to elaborate anymore on what this settlement agreement means for future generations?

Ms. COBELL. Well, I believe that this will, like the panel before has stated, this is for the past, compensation for the past. I think

that the fact that this is the first victory for many individual Indians is so empowering for so many individual Indians that they do have a voice, and that they can be heard.

And I feel that the young people are learning from this case. They are learning from this case. They are understanding that they have to pay attention. That you have to become very active in the management of your assets. You cannot be passive.

And you can't say, oh, the government is going to take care of it for us, because they are not. So you constantly have to be very active, and I think that this case has done that.

You know you cannot believe the number of calls that class counsel gets, and the number of letters, and the number of calls, and I would like to invite each and every one of you to my little teeny office at Blackfeet, where I have boxes and boxes of letters from people that say thank you. Thank you for standing up. Thank you for drawing a line in the sand and saying no more.

And we want to make a change. This change has to happen, and I do think that by sitting with the government and coming together for a settlement that we can change together. That the relationship between the Department of the Interior, and the Department of Justice, and individual Indian account holders, will improve, and we have to be able to work together to move forward.

The CHAIRMAN. Thank you, Elouise. Thank you again.

Ms. COBELL. Thank you for your nice comments.

The CHAIRMAN. Thank you.

Mr. FALCOMA. Our Senior Ranking Member, the Gentleman from Washington, Mr. Hastings.

Mr. HASTINGS. Thank you, Mr. Chairman, and thank you for being here, and certainly I think it needs to be acknowledged the long time period by which you have been involved in this.

I have said in this Committee on other occasions where there are settlements, and not necessarily Indian settlements, but other settlements, that generally speaking those are very tough decisions.

But the good part about it generally speaking is that they are decided by the people that are involved, and I applaud that process. I think that generally is good. You heard today, however, that there are some questions regarding the transparency and the understanding of what this settlement means. It is very legitimate, I think.

And I think that process needs to be followed. Maybe one thing that you could do to help that is to share all of your—I think you called them Letters to Elouise, with all of the people that have questions about that.

I mean, if there is transparency, then for goodness sakes, share all of that information, and you can get to a point of an understanding. I think that is what we all want, but there are some legitimate questions out there.

Let me focus a bit though, at least from my understanding here of the attorneys' fees, because there was questions that were raised on all of that. Now, as I understand it, your initial lawsuit was because of the accounting, and you said that was impossible, and so therefore you came to a settlement on that.

Now, my understanding of the total amount of dollars of that part of it, the accounting, is roughly \$300 million. The non-liti-

gated claims that is part of that is about \$1.1 billion, nearly three times as much.

Yet, the attorney fees come out of that portion as I read the settlement. So that means that part of the damage claims—and correct me if I am wrong, but you said that you weren't necessarily happy that was part of the settlement agreement, but all the attorney fees come out of that portion of the money. I am just asking you if that is correct or not.

Ms. COBELL. I am going to take a run at the first question, and then I have Bill Dorris, our attorney, talk about that. But it was not just recently that the trust mismanagement was included in our case.

It was a while back, and Bill Dorris will talk about it, where the District Court had said that you are now to include the accounting of trust assets other than just the funds. So that became a part of this case early on, and I can't remember the exact date, and I will turn this over to Bill.

**STATEMENT OF WILLIAM E. DORRIS, MANAGING PARTNER,
KILPATRICK STOCKTON LLP, WASHINGTON, D.C.**

Mr. DORRIS. Yes. The court did invite the Plaintiffs to amend their complaint to add those claims at some point during the course of the case, and that was in approximately 2004.

But one of the things that I think is important to understand is that from the very outset when we asked for an accounting, one of the natural outgrowths of an accounting once you determine how well the trust has been managed or mismanaged, you then have a restatement of accounts.

So in one sense money was always part of this case, in that one of the outgrowths from the accounting itself would be a restatement of the accounts. Now, one of the great benefits that we got for most of the Plaintiff class, and what will be the trust administration class, is that they have the opportunity now, without further litigation, to collect money tax free to settle those claims.

However, we were very careful in the settlement agreement to make sure that if they did not want to take advantage of that, they could opt out and have all of their rights still preserved, and that is very clear in the settlement agreement.

Now, one of the issues that the District Court will have to determine in deciding what the right amount of attorneys' fees is, because that is not decided. That will ultimately be for the discretion of the court, is that normally in this district ranges are from 20 to 30 percent recovery for attorneys' fees.

As Ms. Cobell was indicating, if you look at the full \$3.4 billion amount, an award of a hundred million dollars would be only 3 percent. But one of the issues that the District Court will have to determine after it hears from all of the class members, is what percentage is to apply and to what funds.

Should it only apply to the historical accounting portion of the \$1.4 billion, or should something be given to the attorneys for perhaps not litigating fully the trust administration claims, but still getting those benefits for the class.

So that will be an issue for the court to decide, but let me also tell you that these claims have been investigated very thoroughly

before we settled them. As part of our accounting claim, we had extensive research and analysis done by experts, in terms of how much oil, gas, and other minerals, timbers, grazing rights, ranching, all of the various assets from the Plaintiff class, what should the government have collected on that.

And we had extensive expert analysis done so that we felt like we were in a very good position when we settled these claims, though they are subject to an opt out, to get a fair settlement for the Plaintiffs.

Mr. HASTINGS. Let me respond by simply saying that I am not an attorney, and I appreciate your response and legalese. I am going to have to go back and digest that in my way with the information that I have, and what you are saying.

If you take the total 3.4, over half of that is something in future claims, but yet you are saying that should be part of the—or at least as I understand it, that should be part of the pot by which attorney compensation comes from. I just have a question, and so let me end here, but ask this of both of you. As I mentioned earlier to the Department of Justice and the Department of the Interior, hearings like this, it is good to have these hearings, because it brings out issues that need to be resolved.

There are going to be some questions, obviously, as our staff kind of digests what you said, and we would obviously send you some questions so that we could further explore so we can understand exactly what was said here.

If we could get your quick response—and I asked Justice and Interior because they turned around my questions in a two-week time period, and if you could follow that, that would be very helpful, because, Ms. Cobell, you said that timing is of the essence.

Obviously, timing is of the essence to us, because we are part of this whole formula. I mean, again, if it was settled without any monetary damages, we would not be part of it.

But there are monetary damages, and that means it brings us into this, and we have to understand what we are going in a proper way to make the right decision. We can only do that if we have information that satisfies our issues, too.

And let me just simply conclude as I opened this that settlement agreements from my point of view are generally a very, very good way to go, simply because the people that are involved are the ones that are making the decision.

But there are always questions that come of that, and we certainly heard that today. I think that those things need to be resolved so we can feel comfortable in going forward with this settlement agreement. So, thank you, Mr. Chairman.

Mr. FALEOMAVEGA. Thank you. When Ms. Cobell filed a lawsuit, and this was in 1996, I had this crazy idea and said why can't we just get some of that money from the Interior Department since it is owing to Indian Country, and establish some kind of a scholarship fund, and hopefully maybe Indian Country will give approval to something so that we could utilize.

And this is 14 years ago, and I am just so happy to hear that one of the factors that was given into your negotiations is that there will be a scholarship fund. Can you elaborate on that a little more, Ms. Cobell? How much is going to be allocated?

Ms. COBELL. The scholarship fund is \$60 million and, of course, I wanted a hundred million, but I had to give in to \$60 million for a scholarship fund, but it is for all individual Indians that would like to pursue their education. And no matter if it be at tribally controlled colleges, universities, or vocational schools, and I think this is a very good move. We have already had different private foundations that want to match the scholarship fund.

So it is a great opportunity for individual Indians to get educated, and I just hope that every single one of them take on land issues, and get educated in that area to continue to understand the management of their land.

And one of these days there, I think that Mr. Nunez talked about his association, and I that it is really important to have young people start having associations, and having places for individual Indians to go, and to learn the expertise that has to be known in order to manage your own assets, and to improve your own quality of life.

Mr. FALEOMAVAEGA. I for one would certainly absolutely support your suggestion that it should be a hundred-million dollar pot specifically for scholarship funds, because I honestly believe that is only for the betterment, and not only the future of Indian Country, but for the young generations coming up in the United States.

I just wanted to share with you a little bit of how much I enjoyed reading—I believe he was a Lakota—Dr. Vine Deloria, and how much I deeply enjoyed reading some 20 books that he had written. One of them was “Custer Died For Your Sins,” and I think the other book was “God is Red.”

I hope my colleagues will have a chance to read those two books, because I think it tells a lot about the—and I just say that Mr. Deloria is one of my admirers, but I will once again say, Ms. Cobell, thank you for our patience.

I realize that there are a lot of questions raised by what is going to happen now and hopefully there will be a better understanding in Indian Country about what you have tried to do, and what you have achieved, and with the help of the attorneys that have been willing to do all of this on behalf of Indian Country for some 14 years now. I do want to thank you.

Ms. COBELL. Mr. Chairman, can I use this special time to officially say goodbye to Marie Howard. Marie Howard has been one of the bright spots that makes you want to continue to come back and testify before these committees, and she has just been committed, and I don't know what we will do without her. Goodbye, Marie.

Mr. FALEOMAVAEGA. Thank you very much. Without any further statements, the hearing is adjourned.

[Whereupon, at 12:43 p.m., the Committee was adjourne

[Additional material submitted for the record follows:]

[A statement submitted for the record by the Rosebud Sioux Tribe follows:]

Statement submitted for the record by the Rosebud Sioux Tribe

For decades, the Rosebud Sioux Tribe (“Tribe”) has called for Congressional commitment of substantial federal funding to solve the fractionated interest problem

created by the federal government and left to tribes to solve. This testimony only concerns the portion of the Cobell Class Action Settlement Agreement (“Settlement Agreement”) concerning fractionated interests; specifically, the \$2 billion Trust Land Consolidation Fund (“Fund”).

As described further herein, our Tribe has been on the cutting edge in developing creative, effective and sustainable program for consolidation of fractionated interest. The only thing missing has been a comparable commitment of federal financial and administrative assistance. The federal government has been paltry at best, and at times go as far as to undermine the Tribe’s efforts. In order to facilitate consolidation of fractionated interests, language in the Cobell litigation settlement bill must be revised to make the Trust Land Consolidation Fund to be used broadly for Indian land consolidation purposes. For example, funds should be available to eliminate liens already acquired by the Indian Land Consolidation Program (“ILCP”) for tribes. Funds must also be available to be used to immediately eliminate any and all tribal loan obligation (especially to the United States) associated with land consolidation efforts and programs. This would benefit those Indian tribes, like Rosebud, that have already begun consolidation of their own fractionated interests. Furthermore, it will ensure that more of the \$2 billion is applied toward Indian land consolidation before the ten (10) year “sunset date” established in the Settlement Proposal. (The Tribe sees no reason for such a time limit in any case.)

Brief History of the Fractionation of the Rosebud Sioux Tribe Reservation. The Rosebud Sioux Tribe Reservation (“Reservation”) occupies only a small portion of the former Great Sioux Reservation. Specifically our Reservation consists of what remains after 90 million acres were taken from the Tribe and tribal members during Allotment and Homesteading. Subsequent cessions to the United States further diminished our land base. As with many other tribes, the Tribe is still trying to recover land lost through the checkerboarding of our Reservation. Consistent with the checkerboarding of Reservations, our current Reservation is comprised of tribal land, individual allotments and fee land owned by tribal members and others. Additionally, some allotments and tribal land fall outside the currently acknowledged boundaries of the Reservation. Due to the devastating diminishment of our land base, the Tribe has spent decades reacquiring and consolidating the scattered holdings, both within and outside the Reservation boundaries.

Federal Government Fractionated Interest Consolidation Efforts. To assist tribes with the consolidation of fractionated interests within reservation boundaries, the federal government developed the ILCP. The ILCP purchases fractionated interests in the name of an Indian tribe. However, subsequent to purchase, interests are immediately slapped with a lien. These liens make it impossible for the land to be transferred to tribes. Lease income generated from ILCP purchased interest is used by the ILCP to purchase more fractionated interests. This actually results in the generation of debt in the name of tribe for which the interest was acquired. As is evident, the practice of placing liens on ILCP purchased interests undermines the overall goal of land consolidation. Tracts are not placed in trust for tribes, and tribes are put in debt for land acquisitions they cannot access.

The federal government also created a lending program through the U.S. Department of Agriculture (“USDA”), under the Farm Service Agency, that allows tribes to borrow money to resolve the fractionation problem internally with the use of Indian Land Acquisition Loans. However, interest rates on these loans become so outstanding that tribes are required to pay interest in amounts in excess of several times the principal.

Rosebud Sioux Tribe Fractionated Interest Consolidation Efforts. Since 1943, the Tribe has operated a fractionated interest program called Tribal Land Enterprise (“TLE”). TLE has been a cutting edge program, and the model upon which other tribes have followed. Like the ILCP, TLE is working to resolve the fractionated interest problem within the Reservation. However, TLE uses new and innovative ways to acquire fractionated interest, which have been commended by the Department of the Interior. Through TLE, the Tribe has borrowed \$8.5 million in Indian Land Acquisition Loans from the USDA. To date, the Tribe has repaid the principal amount on its Indian Land Acquisition Loans. However, as previously mentioned, the Tribe has fallen victim to interest payments that now total several times more than original loan amounts.

Rosebud Sioux Tribe Proposal for a Mutually Beneficial Solution. In the true spirit of consolidation of fractionated Indian land interests, the Tribe has time and time again submitted proposals to the Bureau of Indian Affairs (“BIA”) for the return of land purchased in the name of the Tribe through the ILCP to the Tribe. We continue to demand that liens on the ILCP tracts be forgiven, and the ILCP tract lease income be transferred to the TLE program.

Our proposals are just and reasonable. Especially in light of the fact that programs like TLE save the federal government money by reducing the cost of administering fractionated interests for the federal government. Also, since the infrastructure of TLE is already in place, and TLE's administrative needs are already met, funds funneled through TLE can be used solely to acquire fractionated interests. Our proposals are the most economic and efficient way for the federal government to execute Indian land consolidation!

Trust Land Consolidation Fund Created from the Cobell Settlement Agreement. The Class Action Settlement Agreement ("Settlement Agreement") for *Elouise Pepion Cobell v. Ken Salazar, Secretary of Interior, et al.*, No. Civ. 96-1285 (JR) ("*Cobell*") was entered into on December 7, 2009. The Settlement Agreement provides for the establishment of a Trust Land Consolidation Fund ("Fund"). As defined in the Settlement Agreement, the Fund shall have \$2 billion "allocated to Interior Defendants and held in a separate account in Treasury for the purpose of acquiring fractional interests in trust or restricted land..."

Interior Defendants are to distribute the Fund in accordance with the Indian Land Consolidation Program authorized under 25 U.S.C. §§2201 et seq. The Fund shall be used for the purposes of (1) acquiring fractional interests in trust or restricted lands; (2) implementing the ILCP; and (3) paying the costs related to the work of the Secretarial Commission on Trust Reform, including costs of consultants to the Commission and audits recommended by the Commission.

Interior Defendants have no more than ten (10) years from the date of the final approval of the Settlement Agreement to expend the Fund. If the Fund is not expended at that time, any amount remaining in the Fund will be returned to the Treasury.

Realization of Fractionated Interest Consolidation on the Rosebud Sioux Tribe Reservation. As earlier stated, the Tribe has repeatedly requested that lands purchased through the ILCP be returned to the Tribe lien free. This is authorized under ILCA, as amended by the American Indian Probate Reform Act ("AIPRA"), per 25 U.S.C. § 2213(b)(3), "Removal of Liens After Findings."

According to ILCA, the Secretary of the Interior ("Secretary") can forgive the repayment of a lien if: (1) the costs of administering the interest will equal or exceed the projected revenues; (2) it will take an unreasonable period of time for the parcel to generate revenue that equals the purchase price; or (3) a subsequent decrease in the value of land or commodities associated with the parcel of land make it likely that the interest will be unable to generate revenue that equals the purchase price paid for the interest in a reasonable time. To date, the Secretary has not forgiven the repayment of liens on the Tribe's ILCP tracts, nor indicated that our proposal is even being considered.

Additionally, the Tribe has requested that all interest on the Tribe's Indian Land Acquisition Loans be forgiven. Again, to date, the interest on the loans are still outstanding, and no discussion are in place to settle the outstanding interest issue.

How the Trust Land Consolidation Fund Could Assist the Rosebud Sioux Tribe, TLE, and other Tribes with Programs like the TLE. If the Secretary is unwilling to forgive the lien as outlined above, the Tribe proposes that funds from the Trust Land Consolidation Fund be used to satisfy the liens on the Tribe's ILCP tracts. Additionally, the Tribe proposes that funds from the Trust Land Consolidation Fund also be used to satisfy the Tribe's outstanding interest on the Tribe's Indian Land Acquisition Loan.

Language in the *Cobell* litigation settlement bill must permit the Trust Land Consolidation Fund to be used for the satisfaction of liens on tracts already acquired by the ILCP for tribes, and towards loans (both the principal and interest) tribes have taken out for land consolidation purposes. Not only would this allowance provide the best benefit to tribes who have already begun consolidation their own fractionated interests, it would better ensure that the entire Fund is actually applied toward Indian land consolidation before the sunset date in the settlement. Additionally, allowance of the aforementioned use of the Fund will save the federal government money on administrative overhead of ILCP tracts and federal loans.

Conclusion. The fractionation problem has been and continues to be very costly to the federal government, which continues to incur administrative costs on all ILCP tracts upon which there is a lien, and federal loans issued for land consolidation. If liens and loans could be satisfied from the Trust Land Consolidation Fund created through the *Cobell* Settlement Agreement, the federal government will be alleviated of all administrative costs of the ILCP tracts and federal loans. Both the federal government and tribes benefits from this arrangement, and the goal of land consolidation is ultimately honored. It is time that the federal government heed decades worth of urging from tribes to assist in solving a federally created problem—fractionation of Indian land. The *Cobell* Settlement Agreement outlines vehicle with

which the federal government can make amends for decades of trust mismanagement. The Trust Land Consolidation Funds provides a vehicle that can help begin healing century long wounds.

The Tribe thanks you for the opportunity to submit a statement for the record.

[A letter submitted for the record by Percy Squire, Percy Squire Co., LLC, Columbus, Ohio, follows:]

March 10, 2010

The Honorable Nick J. Rahall, II
Chairman
Committee on Natural Resources
1324 Longworth House Office Building
Washington, D.C. 20515

Re: Full Committee Oversight Hearing on the "Proposed Settlement of the *Cobell v. Salazar* Litigation; Proposed Amendment

Dear Mr. Chairman:

This correspondence is being sent to you on behalf of the Plaintiffs in United States Supreme Court Case No. 09-585. *The Harvest Institute Freedman Federation, et al. v. United States*, now pending. The Harvest action was commenced on December 28, 2006, in the United States Court of Federal Claims by persons aggrieved by the breach of fiduciary duties owed by the United States to Freedman as defined under the terms of various treaties entered into between the United States and the so-called Five Civilized Indian tribes following the Civil War, in 1866.¹ The *Cobell* settlement as currently proposed has profound implications for the Harvest Institute action and countenances the perpetuation of historic racial discrimination, unless amended, for the following reasons:

1. The *Cobell* settlements reaffirms the existence of a trust relationship between the United States and Native Americans dating back to at least 1887, the time of enactment of the General Allotment Act of 1887, known as the "Dawes Act" (the bulk of trust assets alleged within the *Cobell* action to have been mismanaged by the United States are proceeds of various transactions in land allotted to individual Indians under the Dawes Act), See, *Cobell v. Salazar*. July 24, 2009, Opinion of the United States Court of Appeals for the District of Columbia, Circuit No. 08-5500, p. 2.
2. Under 1866 treaties between the United States and the Five Civilized Tribes, Freedmen were accorded equal civic status in relation to the United States as members of the Five Civilized Tribes, whether the Freedman were adopted into the tribes or not;
3. Since *Cobell* establishes that trust obligations are owed and have been owed by the United States to Indians since the close of the Civil War, Freedman having equal civic status under the 1866 treaties to members of the Five Civilized tribes are also owed fiduciary duties by the United States;
4. The *Cobell* settlement is evidence that the United States has never repudiated its fiduciary duty as trustee to Native American beneficiaries, i.e. the *Cobell* Plaintiffs; thus
5. Contrary to the rulings of the United States Court of Federal Claims in *Harvest Institute Freedman Federation, et al. v. United States*, Case No. 06-907L and its affirmation by the United States Court of Appeals for the Federal Circuit, the six year statute of limitations applicable to claims against the United States under the Tucker Act 28 U.S.C. § 2501, does not, under the repudiation rule², begin to run in relation to claims by the Harvest Institute Plaintiffs,

¹See, Exhibits 1, 2 and 3 for definitions of Freedmen from various Administrations.

²There is a general "repudiation rule" with regards to equitable trusts that says the statute of limitations will not begin to run on claims to enforce a trust against a trustee until repudiation of the trust relationship. The underlying rationale is that the trustee's possession of the trust assets is presumed to be possession for the beneficiary (i.e., the cestui que trust), and the time should begin to run on claims against the trustee only when the trustee has taken some acts or communicated in a way that is inconsistent with that presumption, so as to provide notice that the trustee has disavowed the trust relationship or is no longer acting in the interests of the beneficiary. The repudiation rule is applicable in the Harvest action for the reason the Freedmen are seeking recovery of trust property itself, and the Government as evidenced by *Cobell* has not already repudiated its trust relationship with the Freedmen.

et al. until the United States as trustee repudiates its trust responsibility to the Five Civilized Tribes, an event which *Cobell* establishes has never occurred.

In light of the above it is inequitable and will result in the perpetuation of racial discrimination against the Freedman Plaintiffs in the Harvest Institute action (hereinafter "Harvest Plaintiffs") to settle claims accruing to the benefit of members of the Five Civilized Tribes, descendants of slaveholders and persons who were disloyal to the United States while failing to resolve claims against the United States by the Harvest Institute Freedmen's Federation's putative class. Accordingly, the *Cobell* settlement authorization legislation should be amended to also include resolution of the claims in Supreme Court docket no. 09-585, by adding a subclass to the putative *Cobell* class consisting of the Plaintiffs in the Harvest Institute action and by increasing the settlement amount by \$600,000,000.00 to account for claims by the 120,000 individual descendants of Freedman entitled to a recovery by reason of the breach of fiduciary duties owed to the Freedmen by the United States. A full discussion of the grounds for this relief is below.

A. BACKGROUND³

During the Civil War, the Five Civilized Tribes entered into treaties with the Confederacy, severing their relations with the United States. As a result of these acts of disloyalty the Five Civilized Tribes forfeited all tribal lands and their status as government wards. In 1866, the United States made treaties with each of the Five Civilized Tribes, setting the terms on which the tribes would continue to exist within the United States, regain their land and trust beneficiary status. All of the treaties with the Five Civilized Tribes eradicated slavery³ within the tribes and provided that the emancipated "Freedmen" would have certain rights within the tribes. Although these Treaties had a common purpose, the provisions of the various Treaties were not identical. However, under the treaties the Freedmen were emancipated and given civic status equal to Indians whether the Freedmen were adopted into the Tribes or not. The following is a summary of the provisions of the treaties pertinent to this appeal.

The Seminole Treaty: The United States entered into its first antebellum treaty with the Seminole in 1866. 14 Stat. 755. The treaty provided that the Freedmen members would have rights equal to those of Seminoles by blood:

And inasmuch as there are among the Seminoles many persons of African descent and blood, who have no interest or property in the soil, and no recognized civil rights, it is stipulated that hereafter these persons and their descendants, and such other of the same race as shall be permitted by said nation to settle there, shall have and enjoy all the rights of native citizens, and the laws of said nation shall be equally binding upon all persons of whatever race or color who may be adopted as citizens or members of said tribe.

14 Stat. 755, 756. In 1898, the Seminole entered into an agreement with the United States to allot its land held in common to individual members. 30 Stat. 567. The agreement made no distinction between the Freedmen members and the members by blood. All Freedmen members, those represented by Harvest here, did not receive allotments under this agreement.

The Creek Treaty: The United States' treaty with the Creek is similar to its treaty with the Seminole. It provided that the Creek Freedmen would have all the rights of members by blood, including the right to share equally in land and funds:

[A]nd inasmuch as there are among the Creeks many persons of African descent, who have no interest in the soil, it is stipulated that hereafter those persons lawfully residing in said Creek country under their laws and usages...shall have and enjoy all the rights and privileges of native citizens, including an equal interest in the soil and national funds, and the laws of said nation shall be equally binding upon and give equal protection to all such persons, and all others, of whatever race or color, who may be adopted as citizens or members of said tribe.

14 Stat. 785, 786. In 1897, the United States and the Creek Nation agreed to terms on which the Creek Nation's common lands would be allotted. 30 Stat. 496.

³The repudiation rule has appeared in cases involving Native American trust claims. For example, in *Tunica-Biloxi Tribe v. United States*, 1991 U.S. App. LEXIS 10716 (Fed. Cir. May 17, 1991).

Under the law of trust, a cause of action for breach of a fiduciary obligation owed by a trustee does not accrue until the trust is repudiated or terminated. *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238, 1249 (N.D. Cal. 1973) (citing *United States v. Taylor*, 104 U.S. 216 (1881)).

³See, Exhibit 4 for actual treaty terms.

514. The agreement made no distinction between Creeks by blood and the Freedmen. In 1901, the Creek entered a second agreement with the United States. 31 Stat. 861. Like the first, this agreement made no distinction between Creek Indian and Freedmen members. The Creek Freedmen represented by Harvest here did not receive their allotments on the same terms as the Creek members by blood.

The Cherokee Agreement: The United States entered into a treaty with the Cherokee in 1866. The treaty of 1866, inter alia is a basis for Appellants' claims here. A treaty with the Cherokee Tribe and the United States was concluded on July 19, 1866. Article IV of that Treaty provided that "... [a]ll of the Cherokee freed Negroes who were formerly slaves to any Cherokee, and all free Negroes not having been slaves, who resided in the Cherokee nation prior to June 1, 1861...shall have the right to settle in and occupy the Canadian district...and will include a quantity of land equal to 160 acres for each person who may so elect to reside in the territory..." Thus, as in the case of the Choctaw and Chickasaw Freedmen, the Cherokee Freedmen were "adopted into the tribe [and! [consequently, they and their descendants were entitled to participate in the allotment of lands equally with members of the tribe by blood." *Ross v. Ickes*. 130 F.2d 415 (D.C.C. 1942). It is in the failure of the Cherokee to allot land to the Freedmen represented by Harvest in this action that gave rise to the Harvest Complaint.

The Choctaw and Chickasaw Treaty: The United States entered into a treaty with the Choctaw and Chickasaw Tribes on April 28, 1866. 14 Stat. 769. This treaty provided that the tribes had a choice about how to deal with their Freedmen. If the tribes made their Freedmen members within two years, the tribes would receive a portion of a trust fund, and the Freedmen would receive 40-acre allotments once the Choctaw, Chickasaw and Kansas Indians had made their selections. If the tribes did not adopt their Freedmen and the Freedmen voluntarily removed themselves to other land within Indian Territory, the tribes would get nothing and the [Freedmen would receive a portion of the trust fund. Id] The Choctaw and Chickasaw resisted adopting the Freedmen, so the Freedmen were not entitled to the 40-acre allotments. In 1883, the Choctaw adopted the Freedmen into the tribe and declared each was entitled to 40 acres. The tribe made no allotments at that time either. *Choctaw Nation of Indians v. United States*. 318 U.S. 423, 425 (1943). The Chickasaw never did adopt their Freedmen into the tribe.

In 1897, the United States entered into an agreement with the Choctaw and Chickasaw whereby their lands held in common would be allotted. 30 Stat. 496, 505-506. This agreement provided that the Choctaw Freedmen would receive 40-acre allotments. 30 Stat. 506. Before any allotments were made, the United States entered into another agreement with the tribes. This second agreement also provided that Choctaw and Chickasaw Freedmen would receive 40 acres. 32 Stat. 641.

While the Choctaw and Chickasaw treaty provided conditional property rights, none of the other treaties entitled the Freedmen to individual property rights. The Freedmen represented by Harvest here did not receive allotments under their tribes' allotment agreements with the United States at the turn of the 20th century.

The allotment process under the Dawes Act of 1887 was not initially applicable to the Five Tribes. The allotment process was extended to include the Five Tribes by the Curtis Act of 1898. Under the Curtis Act, Five Tribes land was allotted. Proceeds from transactions involving Five Tribes land, resulted in assets whose mismanagement is the subject of the *Cobell* action. just as with assets emanating from the General Allotment Act of 1887.

The claim of the Harvest Plaintiffs alleges land guaranteed under the 1866 treaties to Freedmen by the United States was not delivered to the Freedmen, allotments were not received under the Curtis Act of 1898 which resulted in the resulting failure to establish "Individual Indian Money" accounts for the ancestors of the Harvest Plaintiffs. Approving the *Cobell* settlement authorization without some amendment to address this historic breach of trust will perpetuate past historic racial discrimination and have the ironic twist of resolving claims of persons disloyal to the United States and slaveholders, while failing to address the claims of persons who were not disloyal and guaranteed equal civic and political status, separate and apart from tribal membership - the Harvest Plaintiffs.

The United States has clearly accepted and acknowledged its trust responsibilities to the *Cobell* Plaintiffs. In point of fact, the trial court in *Cobell* stated:

- It is clear now that this Court has broad equitable authority to deal with a century or more of trustee nonfeasance and to fashion appropriate remedies, see, *Cobell v. Norton*, 240 F.3d 1081, 1108-10 (D.C, Cir. 2001) (*Cobell VI*). but it is also clear that the authority is constrained by traditional doctrinal limits on federal courts that apply in suites against the government, including sovereign immunity and separation of powers.

- Accordingly, methods that might be unacceptable in a typical trust case, such as statistical sampling, are available here, where I am instructed to strike a more forgiving “balance between exactitude and cost.”
- In these uncharted waters, where the trust is of enormous scope, the trustee of unusual character, and the data affected with such great uncertainty, the law of trusts is a sort of magnetic compass; it cannot be expected to point to due north, or to “map directly” onto this context. *Id.* at 1078.
- One useful is not very precise pointer provided by case law is that a trustee may not hide behind obscurity that he himself has created. See, e.g., *Rainbolt v. Johnson*, 669 F.2d 767, 769 (D.C. Cir. 1981)
- “As to a trustee who fails to keep proper records of his trust it is usually stated that, ‘all presumptions are against him’ on his accounting, or that ‘all doubts on the accounting are resolved against him.’”
- The rules that identify and govern a breach of the accounting duty for a simple, 25-year trust with a single beneficiary cannot be applied, unaltered, to a 121-year old perpetual trust, managed by civil servants, with rapidly multiplying beneficiaries and a variety of ever-changing assets. Equity seeks “to do justice to all”—parties, *Bollinger & Boyd Barge Serv., Inc. v. The Motor Vessel. Captain Claude Bass*, 576 F.2d 595, 598 (5th Cir. 1978) (Emphasis added.)
- —“its orders are adapted to the exigencies of the case,” *Taylor v. Sterrett*. 499 F.2d 367, 368 (5th Cir. 1974), and it seeks to make accurate evaluations of difficult evidence, not to provide “windfalls” for victims or punishment for wrongdoers. See, *Bollinger v. Boyd*, 576 F.2d at 598.
- The trustee’s irremediable breach of its accounting duty has unquestionably harmed individual plaintiffs (if not necessarily the plaintiff class): their putative damages claims have been prejudiced by the impossibility of assembling accurate data about the disposition of their assets.

These are but a few of the affirmative statements made by the *Cobell* Court concerning its duty to the *Cobell* Plaintiffs, including those *Cobell* Plaintiffs descended from persons disloyal to the United States who forfeited all of their land.

B. SOLUTION

The *Cobell* settlement authorization definition of litigation should be expanded to include Supreme Court docket no. 09-585, *Harvest Institute Freedmen Federation, et al v. United States*. The settlement amount should be increased by \$600,000,000.00 to account for the 120,000 Harvest putative class members. A Harvest subclass should be certified in the *Cobell* action however participation in the subclass should not be based exclusively on the “Final Rolls of Citizens and Freedmen the Five Civilized Tribes” the “Dawes Rolls. Persons who can prove a connection to any of the Congressionally mandated Freedmen census should be eligible to apply for Harvest subclass participation, including: The Kern-Clifton Roll of Cherokee Freedmen of 1897 and the Wallace Roll of Admitted Freedmen 1890-1893. The exclusive authority of the Dawes Roll must be abandoned in favor of the addition of the Kern-Clifton Roll and Wallace Roll and also the “Ancient documents” exception to the hearsay rule codified into the Federal Rules of Evidence which allows into evidence probative statements in a document in existence twenty years or more the authenticity of which is established.” Fed. R. Evid. 803(16).

C. CONCLUSION

It is respectfully requested that the *Cobell* authorization legislation be amended as set forth above in order to avoid the perpetuation of historic inequity and blatant racial discrimination.

Sincerely,

Percy Squire

Enclosure

cc: Joshua Pitre; Joshua.pitre@mail.house.gov
 Clay T. Lightfoot; Clay-Lightfoot@cobuni.senate.gov
 Rollie Wilson; rollie.wilson@indian.senate.gov
 James S. Hall; Jim.Hall@indian.senate.gov

[NOTE: Attachments have been retained in the Committee’s official files.]

