March 30, 2010

The Honorable Nick J. Rahall II
Chairman
Committee on Natural Resources
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Enclosed please find responses to questions for the record, which were posed to Associate Attorney General Thomas J. Perrelli and Deputy Secretary of the Interior Department David Hayes following their appearance before the House Natural Resources Committee at a hearing on March 10, 2010 entitled "Proposed Settlement of the *Cobell v. Salazar Litigation.*"

The Office of Management and Budget has advised us that from the perspective of the Administration's program, they have no objection to submission of this letter.

We hope this information is helpful. Please do not hesitate to contact these offices if we may be of further assistance on this matter.

Sincerely,

Christopher Mansour
Director
Office of Congressional
& Legislative Affairs
Department of the Interior

Ronald Weich
Assistant Attorney General
Office of Legislative Affairs
Department of Justice

Enclosure

cc: The Honorable Doc Hastings
Ranking Member, Committee on Natural Resources

Questions for the Departments of Interior and Justice

Questions of Rep. Doc Hastings

1. **How many individuals are members of the Historical Accounting class and of the Trust Administration Class, and how much overlap in membership is there between the classes?**

   As of January 2010, the Historical Accounting Class was estimated to have approximately 338,000 individual members and the Trust Administration Class was estimated to have approximately 496,000 individual members. There is substantial overlap between these classes because by definition, anyone who is a member of the Historical Accounting Class is also a member of the Trust Administration Class.

2. **To date, how much has the government paid the Plaintiffs for fees and expenses?**

   Over the course of the litigation, the court at various times ordered the Government to pay the plaintiffs' attorney fees and expenses in connection with certain discrete issues resolved earlier in the litigation. The court also made an interim award of attorneys' fees for work undertaken by plaintiffs' counsel through the first appeal in the case. These awards totaled $8,891,278. The court may take these previous awards of attorneys' fees into account when awarding plaintiffs' counsel any fees for past work.

3. **Is the Administration open to paying attorneys' fees under the *Cobell* Settlement through the Equal Access to Justice Act? If not, why was this approach rejected?**

   The parties anticipate that the Settlement will be implemented as they agreed, and without material changes that would render it null and void. Under this agreement, the court will decide the amount of attorneys' fees that will be paid out of the $1.4 billion settlement fund. The parties negotiated the settlement figures with the understanding the attorneys' fees would come from that overall figure. This type of arrangement is common in class action settlement agreements. The fund established in this type of settlement is referred to as a "common benefit fund," meaning a fund that is established to be divided among the many class members and from which the plaintiffs' attorneys' fees can be paid. The concept is that the plaintiffs who benefit from the class action settlement should be the ones to share in the costs of payment to the attorneys who represented them in the class action lawsuit. Under the Equal Access to Justice Act, the costs of payment to the plaintiffs' attorneys are paid by taxpayers. This "common benefit" approach is consistent with the Equal Access to Justice Act, under which a prevailing plaintiff could seek fees from the Government in addition to the settlement amount. The plaintiffs in this case have agreed not to seek those additional fees.

   In determining the amount of the common benefit fund under this Settlement Agreement, the parties agreed that they would 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. As part of this process, plaintiffs' counsel will petition the court for a fee payment, and will provide contemporaneous, where available, and complete daily time, expense, and cost records

supporting their petition. The Government and members of the class may submit responses to that petition, and the Government will make appropriate arguments in support of its position that as much of the Settlement funds as possible should go to the class members.

4. **What is the Departments' basis for supporting the request for Plaintiffs attorneys' fees in the range of $50 million to $99.9 million for work performed through December 7, 2009, and up to $12 million for work performed after December 7, 2009? Please submit to the Committee all relevant documents concerning the Departments' analysis of the amount of fees the government supports.**

   To be clear, the Government has not agreed to support the request for plaintiffs' attorneys to receive $99.9 million for past work and up to $12 million for work performed since December 7, 2009. It was critical to the Government that attorneys' fees be capped and that there be an opportunity to challenge the attorneys' fee request before the court. As such, the parties will litigate the issue of attorneys' fees before the judge, who will have before him the attorneys' daily time, expense, and cost records. The only limitation on the Government is that it may not argue that the fees should be less than $50 million dollars and it may not appeal an award under $99.9 million dollars. The Government will advance appropriate arguments in support of its position that as much of the Settlement funds as possible should go to the class members. Using the $1.4 billion fund as the baseline, the fee would range from 3.5 to 7 percent of the plaintiffs' award.

5. **The *Cobell* lawsuit was filed seeking a historical accounting of IIM Accounts. Please describe for the Committee what kind of historical accounting has been performed to date, and what was found.**

   The Department of the Interior has conducted significant historical accounting work. That work primarily involved two types of accounts: (1) "land-based accounts," which receive income mainly from leasing of Indian land, and (2) "judgment and per capita accounts," with income typically consisting of one-time payments.

   The Department first focused on judgment and per capita accounts. As of today, Interior has completed accounting work, which included reconciling – or verifying – each transaction with source documents, for 86 percent of the identified accounts. The few errors found were for minimal amounts, typically underpayments of interest totaling one or two dollars per account. Errors occurred in less than 1 percent of all transactions and totaled less than 0.03 percent of the total amount of transactions.

   With respect to the land-based accounts, Interior has completed accounting work for over 220,000 accounts in the "electronic ledger era," dating back to approximately 1985. For these accounts, Interior has performed a series of tests. Of the over 120 million transactions in the Department's database, Interior has verified the accuracy of thousands of transactions by reconciling them with source documents. Error rates and amounts are very low for these land-based accounts.

Interior has also been building a pre-1985 "paper ledger era" database and, from 2001 to 2003, analyzed 12,500 recorded transactions from older eras. That analysis showed a variance of less than one percent.

6. **With respect to individuals who opt out of the Trust Administration Class, what does an "accounting in aid of the jurisdiction of a court to render judgment" obligate the government to do?**

   The Settlement Agreement ensures that any individual who opts out of the Trust Administration Class and brings his or her own claim will still be able to obtain the necessary accounting to enable a court to render a judgment. The accounting in aid of judgment is a procedure in the Court of Federal Claims that enables the court to determine the amount of damages that a plaintiff is entitled to receive on a successful claim. The precise nature of an accounting in aid of judgment can vary from case to case, depending on the nature of the claim asserted and the liability found by the court. It typically could require the Government to produce documentation related to the specific claim. For example, if an individual's claim related to a provision in a lease, the court might require the Government to provide documents related to that particular lease provision.

7. **What role does the Administration have in selecting a qualified bank where the $1.4 billion Accounting/Trust Administration Fund is to be held? What plans are there to ensure it is a stable, well capitalized bank that is capable of properly managing this Fund?**

   Under the Settlement Agreement, the Government required that the plaintiffs select a bank that meets several fundamental requirements of federal law. Specifically, the Settlement Agreement, through the definition of a Qualifying Bank on page 13, requires that the plaintiffs select a "federally insured depository institution that is 'well capitalized,' as that term is defined in 12 CFR § 325.103, and that is subject to regulation and supervision by the Board of Governors of the Federal Reserve System or the U.S. Comptroller of the Currency under 12 CFR § 9.18."

8. **What would the bank be permitted to charge in fees, which might reduce an individual's $1,000 per capita payment for Historical Accounting Claims, the baseline $500 payment or the pro rata payment for Trust Administration Claims?**

   Under the Settlement Agreement, the court must approve any settlement administration expenses, and the plaintiffs will be highly motivated to ensure that the bank they select will maximize any payments to the class. In any event, if fees are charged, they will not affect the $1,000 per capita payment or the $500 baseline payment, which are estimated to be approximately $600 million. All additional costs, including fees to banks, will be paid from the remaining funds.

9. **Under the Settlement, the Plaintiffs select the qualified bank, subject to Court approval. Will the bank be independent of the Named Plaintiffs and their attorneys?**

As discussed above, the plaintiffs must select a bank that is a federally insured depository institution, is well capitalized under federal law, and is subject to regulation and supervision by the Federal Reserve or the Comptroller of the Currency. The bank will be serving, in essence, as a fiduciary for the classes, and will be monitored and overseen by the claims administration contractor and class counsel who have reporting obligations to the court.

10. **In E.2.b. of the Settlement Agreement, the Parties agree to move the Court to order the Defendants to pay $20 million to the Accounting/Trust Administration Fund to be used by the Plaintiffs to retain the Claims Administrator and Notice Contractor for necessary work required before Final Approval. The next paragraph, c., permits the Parties to move the Court to order additional payments for this purpose. What do you estimate the overall costs for Claims Administrator and Notice Contractor will be? Are these amounts paid out of the $1.412 million Accounting /Trust Administration Fund, or are they in addition to the $1.412 million? What kind of oversight and public reporting will be exercised to ensure such funding is effectively and efficiently spent?**

The Government believes that while it is critical that the parties provide extensive, thorough outreach to the individuals affected by this Settlement Agreement, it is also critical that as much of the settlement funds as possible go to the class members rather than for administrative costs. In order to ensure that the notice and administration work is conducted efficiently, the parties interviewed multiple, experienced firms regarding the outreach needed to implement the settlement fairly and fully. The parties agreed that the entire cost of this work could reach $20 million, which would come from the settlement funds upon order of the court and would not require additional appropriations.

In the event that the notice and administration costs are higher than estimated, the Settlement Agreement allows the parties to seek court approval to spend additional funds if necessary. As is common in class action litigation, all payments to contractors from settlement funds will require court approval, and the court will serve as a monitor on the use of class funds throughout the settlement process.

11. **It is understood that the $3.412 billion cost of the Settlement would be derived from the Judgment Fund maintained by the Department of the Treasury. When the Settlement amounts are paid, would the Judgment Fund have to be replenished through the Appropriations process?**

No, the Judgment Fund would not have to be replenished through the Appropriations process. The Judgment Fund is a permanent and indefinite appropriation, and therefore it does not require supplemental appropriations to cover large dollar payments.

12. **Did the government or the Plaintiffs propose to include the $2 billion land consolidation fund in the Settlement?**

The land consolidation fund is of critical importance to this Settlement Agreement and was the product of negotiations. Both sides recognized that one of the root causes of the Department's trust management deficiencies was the continuing proliferation of

individual Indian interests on trust lands through the process of fractionation. Fractionation has caused the proliferation of trust accounting responsibilities for literally hundreds of thousands of individual account holders, creating enormous expense and opportunity for error. Recent estimates show that there are approximately 120,000 IIM accounts that have a balance of $15 or less and no financial activity in the last 18 months, and thousands of accounts that contain less than one dollar.

Fractionation has deprived Indian landowners of productive use and enjoyment of their lands. Generally, owners holding over 50 percent of interests must agree on the use of the land, such as leasing for resource development, grazing, timber harvesting, rights-of-way, and other leasing activity. When land is highly fractionated with multiple ownership interests, it is difficult to obtain owner participation authorizing the use of the land. As a result, individual Indians and tribal communities cannot beneficially use highly fractionated tracts of Indian land. The land consolidation program will help unlock the unrealized benefits of these lands for the benefit of tribal communities.

For all these reasons, the land consolidation program is a vital component of the Settlement Agreement. It looks ahead and identifies a response to the problem of fractionation that will help to improve land management in Indian country for generations to come.

13. What do you estimate the costs of administering the land consolidation program under the Settlement will be?

The Settlement Agreement provides for an amount up to a total of no more than fifteen percent of the Trust Land Consolidation Fund to be used to implement the Land Consolidation Program and to pay 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.

14. As it stands, the Commission established under Secretarial Order 3292 is largely under the control of the Secretary even though trust reform matters and Indian affairs in general are under the plenary authority of Congress. Would the Departments object to the inclusion of language in a Settlement authorization bill to revise the manner in which members of the Commission are appointed, or to provide further guidance for the Commission's agenda than what is specified in the Secretarial Order establishing the Commission?

The proper management and administration of the Individual Indian Money accounts and trust assets are among the Department of the Interior's most significant fiduciary duties. Reform of the Indian trust management and accounting system began before this litigation was initiated in 1996, is ongoing today, and will continue in the future. A great deal of thought was put into designing the Commission in a way that would provide the greatest benefit to trust administration. The Department of the Interior would be open to discussing proposals from members of Congress on ways to continue to improve these efforts, but be assured that the Commission's duties and responsibilities are commensurate with the Department's existing legal authorities, particularly under the

American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. § 4001 et seq. As part of the effort to evaluate the current trust management and to improve the long-term management of trust assets, under Secretarial Order 3292, a Commission Chair and four members will be appointed following the solicitation of nominations and in consultation with trust beneficiaries, including the plaintiffs. These five members must collectively, have experience and/or expertise in trust management, financial management, asset management, natural resource management, Federal agency operations and budgets, as well as experience as account holders and in Indian country.

The Commission will hire a management consultant to provide a comprehensive assessment of the Department's operation of the trust administration system, including evaluating the strengths and weaknesses of the asset management activities of each entity involved and identifying options for transferring, consolidating, or otherwise managing the trust fund and assets in an optimal manner to enhance accountability, responsiveness, efficiency and customer service. The Commission will provide recommendations to the Secretary as to how to improve Interior's performance.

The Commission will be established only upon enactment of the legislation and final approval of the Settlement Agreement, and in accordance with the requirements of the Federal Advisory Committee Act, 5 U.S.C. App. 2.

15. What do you estimate the total costs of the Commission will be, and what assurances can you provide it will complete its work in a cost-effective and timely manner with the participation of tribes, individual Indians, and the congressional committees of jurisdiction?

The Commission, which will include tribal representatives, will conduct regional tours throughout Indian Country to obtain input from tribal leadership.

The Commission is charged with conducting a comprehensive assessment of the Department's trust administration system, including reviewing the consultant's report and providing recommendations to the Secretary. As part of its duties, the Commission shall receive input from the public, interested parties, tribes, and trust beneficiaries, including input received during a number of regional listening sessions conducted by the Commission. Anticipated costs associated with the Commission will be to hire the consultant, to cover travel expenses, and to pay the costs and expenses of Commission members. The Commission will also rely upon the Department's existing resources and expertise to assist in implementing its mission. The Deputy Secretary is charged with leading the effort and the Assistant Secretaries for Indian Affairs, Land and Minerals Management, and Policy, Management and Budget, along with the Special Trustee, are required to provide necessary support. The Commission will exist for an initial term of two-years, and thus, it will be crucial that the Commission work in a cost-effective and timely manner.

16. Regarding the education scholarship fund created in the Settlement Agreement, is the Department of the Interior open to potential language in a Settlement bill to respond to tribal concerns about the formation and operation of such a program?

The Indian Education Scholarship Fund is an important component of the Settlement Agreement. Its formation reflects the shared view that there be equal representation and input in the selection and oversight of the entity that would administer the fund. It was also important to the parties that the entity have experience in supporting Native American students in their educational pursuits and was non-profit in nature. As a result, the Settlement Agreement represents a mutually-acceptable approach for establishing and administering this important fund. Specifically, the Settlement Agreement provides that a non-profit entity selected by the parties administer the fund. The Agreement also establishes a special board of trustees consisting of equal representation of the parties with one additional member representing the non-profit organization. This board of trustees possesses the authority to remove the fund from the non-profit for any reason, including mismanagement of the funds. The non-profit entity must demonstrate a track record and current ability to create and expand educational and vocational educational opportunities for Native Americans, must have a history of financial solvency and health, and must have a strong institutional governance structure that ensures a prudent and fair administration, investment and distribution of the scholarship fund. The entity must provide reports on its activities and open access to its records regarding its administration of the fund. These provisions as a whole provide the mechanisms and assurances that the selected entity will be capable of administering the Indian Education Scholarship Fund in a sound and effective manner. It would be difficult at this stage to amend the settlement legislation regarding the formation or operation of the scholarship program, given that any material change to the legislation renders the Settlement Agreement null and void.

17. How is the education scholarship fund related to the claims being resolved in the *Cobell* Settlement?

The scholarship fund is important to the *Cobell* Settlement for two reasons.

First, fractionated interests can be modest in value. It is quite possible that without the incentive of contributions to the scholarship fund, some owners of small interests may not consider it worth the time to respond to the offer of the Government to purchase the interests that they hold. The scholarship fund provides an additional incentive for fractionated interest holders to sell their interests so that land consolidation can occur. The greater level of land consolidation that is able to occur is directly related to the claims being resolved in this litigation: without a mechanism to reduce the massive numbers of miniscule interests in land, the Department of the Interior will have resolved one set of claims but missed an opportunity to prevent future claims from arising again.

Second, it is common in class action settlements that even after reasonable efforts to distribute all funds, some settlement funds remain unclaimed. When that happens, the parties often ask the court to approve an alternate use of the unclaimed funds for the broader benefit of the class or the larger community. The parties agreed that use of unclaimed funds for Indian educational scholarships was a wise and beneficial use that would have a positive impact in Indian Country.

Question of Rep. Stephanie Herseth Sandlin

18. I know that there are requirements in the agreement for the federal government to notify account holders of certain deadlines to participate in the settlement once agreed to. Has the Department established or begun to establish an outreach and education plan that includes South Dakota?

Once the Settlement Agreement 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 Agreement and to answer their questions. Senior leadership from the Department of the Interior and the Department of Justice – including Secretary Salazar and Associate Attorney General Tom Perrelli – has participated in hearings before both the Senate and the House. In addition, senior leadership has participated in question and answer sessions with the National Congress of American Indians and the Tribal Budget Advisory Committee, a panel comprised of twenty-four tribal leaders representing twelve geographic regions, among other events.

On March 20, Deputy Secretary David Hayes participated, along with plaintiffs' counsel Keith Harper, in the Great Plains Tribal Chairman's Association meeting in Rapid City, South Dakota. In addition, Secretary Salazar sent a letter to 564 Tribal leaders outlining the settlement notice process, informing them of the hotline and web site set up to answer questions, and announcing the formal government-to-government consultation on the land consolidation program.

As you mentioned, the Settlement Agreement provides for more extensive outreach to inform individual Indians and tribal governments about the Settlement Agreement. During that outreach process, detailed notices describing the Settlement Agreement will be mailed to all IIM account holders. The plaintiffs and the government have planned a broad awareness campaign – including television, radio, and print advertising across Indian country – encouraging people to call the toll-free information line or to visit the supported web site to learn more. Plans include the preparation of materials in Native American languages that describe the Settlement Agreement, including short videos on DVD. Plaintiffs are also contemplating live meeting events in targeted locations around the country. During this process, interested parties will have an opportunity to present any concerns regarding the Settlement Agreement to the court and the parties.