



March 9, 2010

The Honorable Doc Hastings
Ranking Member
Committee on Natural Resources
U.S. House of Representatives
Washington, DC 20515

Dear Representative Hastings:

We are writing in response to your letter of February 24, 2010, regarding the historic Settlement Agreement in *Cobell v. Salazar*. As your letter notes, the Settlement has received wide, bipartisan support, and we urge the Congress to pass implementing legislation expeditiously.

For the last 13 years, the *Cobell* litigation has cast a shadow over the Federal Government's trust relationship with Indian tribes and individuals. The litigation has involved hundreds of motions, dozens of rulings and appeals, and several trials. Over the course of several months at the end of 2009, the Department of Justice, the Department of the Interior, and the Department of the Treasury engaged in extensive settlement negotiations with plaintiffs. At the end of these negotiations, the parties were finally able to reach an agreement, overcoming their differences and the difficult history of this highly contentious litigation. We view this Settlement as an integral element of ongoing improvements and trust reforms

We are happy to provide you with additional information about the terms of the Settlement and to respond to the questions that you posed in your letter.

(1) Why are resource mismanagement claims included in the proposed settlement and how were they valued as part of the \$1.4 billion amount of the settlement?

Answer: Throughout the litigation, plaintiffs have taken the position that the Federal Government's alleged trust accounting errors are only one facet of the Government's alleged mismanagement of trust assets. The potential for trust administration litigation continues. On behalf of the United States, we believe that any settlement of the *Cobell* litigation must constitute a full and complete settlement of all historical accounting and mismanagement claims, so that this longstanding and divisive litigation can be brought to a close. To bring clarity to this issue, the Settlement contains an amended complaint that unambiguously asserts mismanagement claims, thereby enabling the full and complete settlement of all such claims for alleged mismanagement of trust assets. By including these claims, the Settlement reached between the plaintiffs and the United States will bring a true end to the litigation.

The trust administration claims will be paid out of the \$1.412 billion Accounting /Trust Administration Fund. A portion of the \$1.4 billion will be distributed to cover the historical accounting claims at the per capita rate of \$1,000 per individual. This payment is a per-person and not a per-account payment. After distribution for the historical accounting claims and any disbursements for fees, costs, or expenses required by the Settlement or the Court, all of the funds remaining in the \$1.412 billion will be spent on settling the trust administration claims. Each individual in the Trust Administration Class will receive a baseline payment of \$500 and then, after certain deductions, will receive an additional pro rata share based on an assigned value formula that will be based on an average of revenue generated in an individual's IIM account.

(2) Who represented these claims-holders interests during the settlement negotiations?

Answer: As noted above, the parties agreed that the plaintiffs would file an Amended Complaint that would include one or more claims for breach of trust with respect to the mismanagement of trust funds and trust assets. The interests of the trust administration claim-holders were represented by putative class representatives Elouise Pepion Cobell, Penny Cleghorn, Thomas Maulson, and James Louis LaRose, all of whom allege in the proposed Amended Complaint, attached to the Settlement Agreement as Exhibit B, that they experienced losses from the mismanagement of their trust funds and assets. As part of the ordinary approval process, the U.S. District Court for the District of Columbia will apply existing law to determine whether those four individuals adequately represent the interests of these claims holders.

(3) How will the new class be identified and the process for determining payments be made?

Answer: Class members will be initially identified based on IIM account information that identifies those Indian landowners who have or have had IIM accounts. The parties will also reach out and identify additional class members, and through public outreach and the historic nature of this Settlement, we believe that potential class members will come forward to participate in the Settlement. A detailed notice will be mailed to all IIM account holders, and 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 website to learn more. Plans include the preparation of materials in Native American languages that describe the Settlement, including short videos on DVD, and live meetings in targeted locations around the country. The Settlement provides that class membership will be decided finally by the Court, with the assistance of a Special Master appointed by the Court and funded from settlement funds.

The process for determining settlement distributions will be based upon, among other things, the final number of individuals in the class, information about an individual's IIM account and ownership records, the amount of fees and expenses awarded to plaintiffs' counsel and class representatives, the cost of administering the Settlement Agreement, and the distribution formulas specified in Part E.4 of the Settlement. The parties have agreed to engage an

experienced firm that specializes in overseeing and administering class action settlements to guide the process.

- (4) Is it fair and reasonable to disallow opt-outs from the historical accounting settlement when an historical accounting may be necessary for an individual who opts out of the trust administration class to pursue a resource management claim?**

Answer: An individual who opts out of the trust administration class will be able to obtain the necessary accounting to enable the Court to render a judgment. Paragraph I.7 of the Settlement Agreement, on page 46, addresses the claims and rights preserved by those who opt out of the trust administration class, including the right to an accounting in aid of the jurisdiction of the Court to render a judgment. This was included precisely so that there would not be any prejudice to those who want to pursue individual trust administration claims.

- (5) What is the purpose of the incentive payments for the named plaintiffs, how much will each named plaintiff receive in incentive payments, and why do the payments come out of the settlement fund?**

Answer: Federal case law provides that, in certain circumstances, class representatives may receive incentive payments based upon the time, energy, and leadership they contributed to the lawsuit and the contributions they made to the class as a whole. These payments come from the settlement fund because they constitute awards to class members.

As stated in paragraph K.3 of the Settlement Agreement, the Government does “not consent to an award of costs, expenses or incentives, except to the extent supported by and consistent with controlling law.” However, paragraph K.1 does acknowledge that plaintiffs may file a petition for incentive payments, “which expenses and costs are expected to be in the range of \$15 million above those paid by Defendants to date.”

Paragraph K.2. requires that plaintiffs post any such petition for incentive awards on their website, <http://indiantrust.com/>. Once those named plaintiffs file their petition for class representative incentive awards with the Court and post it on their website, the Government will review and respond to the petition and insist that the Court authorize incentive payments only to the extent they are reasonable and fair to the other class members. Individual Indians also will have the opportunity to object to plaintiffs’ requests before the Court determines whether incentive payments should be made or what a fair amount is for each named plaintiff. The Court will be the arbiter of requests for incentive payments for the named plaintiffs. Paragraph K.1. of the Settlement Agreement further requires that the incentive payment amounts be included in the Notice to the class that will be sent at the time the Court makes an order granting Preliminary approval to the Settlement.

(6) How will the land consolidation payments result in a meaningful benefit for Tribes?

Answer: The land consolidation payments will be beneficial in a number of respects. First, the land consolidation portion of the Settlement addresses the serious and long standing problem of fractionation that 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 \$1. Fractionation also has deprived Indian landowners of productive use and enjoyment of their lands because when there are large numbers of landowners for a single tract, it is difficult or impossible to obtain sufficient agreement to negotiate arrangements to develop resources on the land or otherwise beneficially utilize the trust land.

The land consolidation fund created by the Settlement will address this problem by greatly reducing the number of individual interests, and pursuant to the Department of the Interior's existing land consolidation program, making those acquired interests in land available to tribes. Tribes can then unlock that land and put it to more productive uses for their communities. This will have the beneficial impact of significantly reducing the number of interests for which accounting needs to be undertaken, reducing the ongoing administration costs of the Federal Government, and will be of great benefit to tribes. The Department will consult with tribal governments to ascertain their land use planning objectives and identify opportunities to consolidate the land in a manner that is beneficial to tribal communities.

(7) Attorney fees are reportedly in the range of \$50 million to \$99 million. Does the proposed settlement agreement cap these fees, and does this fee range represent both past and future attorney fees?

Answer: 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 to be decided by the Court. Under the Settlement, the Government and 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. 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, the judge 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.

(8) How much, if any, of the attorney fees are attributable to the value of the asset mismanagement claims that are now included in the proposed settlement?

Answer: The Settlement does not specifically allocate any of the attorneys' fees to the asset mismanagement claims. It will be up to the Court to determine whether the class counsel is entitled to any fees based on the portion of the Accounting/Trust Administration Fund that will be dedicated to trust administration claims.

(9) Do you support a hearing on the settlement agreement in the House Natural Resources Committee prior to moving a settlement bill through the House?

Answer: The Departments of Justice and the Interior have accepted the Committee's invitation to testify at a hearing regarding the *Cobell* Settlement and look forward to answering your questions on an expedited basis.

(10) Prior to action on authorizing legislation for the settlement agreement, will you conduct regional consultation with Indian Country to explain the proposed settlement and answer questions?

Answer: The plaintiffs and the Government are engaged in 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.

If Congress enacts implementing legislation, the Settlement provides for more extensive outreach to inform individual Indians and tribal governments about the Settlement. During that outreach process, detailed notices will be mailed to all IIM account holders describing the Settlement. 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. As mentioned in the answer to question 3 above, plans include the preparation of materials in Native American languages that describe the Settlement, 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 to the Court and the parties.

In summary, during the time since this Settlement Agreement was reached in December 2009, the Departments of Justice and the Interior have continually engaged with tribes regarding the Settlement, and we will significantly expand this outreach following the enactment of the

necessary implementing legislation. Through an extensive outreach and consultation process, affected individuals will have an opportunity to learn about the Settlement and to raise concerns about the Settlement before the Court finally approves it.

Thank you for the opportunity to provide these responses for your consideration. Please let us know if we can be of further assistance. We appreciate your interest in this historic Settlement and we hope that you will help us to enact implementing legislation. It is time to put this history of divisive litigation behind us and to forge a path towards a future where tribes and the Native American community work in true partnership with the United States to address the many challenges facing Indian country.

Sincerely,



David J. Hayes
Deputy Secretary



Thomas J. Perrelli
Associate Attorney General

cc: The Honorable Nick J. Rahall
Chairman, Committee on Natural Resources