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The Indian Trust Fund Litigation: An Overview of *Cobell v. Salazar*

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Summary

Reportedly, if Congress does not authorize the settlement recently reached in *Cobell v. Salazar* without any material changes by August 6, 2010, it will be rendered null and void. In this settlement, signed on December 7, 2009, the government agreed to pay $1.4 billion to members of the class who sought to have a historical accounting of their IIM accounts (an abbreviation for Individual Indian Monies). An additional $2 billion is to be provided by the government for the purpose of consolidating fractionated trust and restricted lands.

First filed in 1996, *Cobell v. Salazar* involves the Department of the Interior's (DOI's) management of several money accounts. These money accounts, or IIMs, as distinguished from tribal trust funds, are monies which the federal government holds for the benefit of individual Indians. The conflict in the case traces to the federal government's trust responsibility with respect to American Indians. In the capacity of trustee, the United States holds title to much of Indian tribal land and land allotted to individual Indians. Receipts from leases, timber sales, or mineral royalties are paid to the federal government for disbursement to the appropriate Indian property owners. Flowing from the federal trusteeship of Indian lands and mineral resources are fiduciary responsibilities on the part of the United States to manage Indian monies and assets which have been derived from these lands and are held in trust. However, several of the beneficiaries of these trust funds have alleged that DOI has mismanaged these funds and filed suit in order to obtain a proper accounting of these funds and to receive damages if warranted.

In January 2008, the United States District Court for the District of Columbia reached the conclusion that DOI would be unable to produce the required accounting. Instead, in a later hearing on August 7, 2008, the district court imposed a remedy of $455.6 million in restitution, which differed greatly from what the plaintiffs had sought—approximately $47 billion. In its ruling, the court rejected the plaintiffs' methodology of computing the amount owed to the trust beneficiaries and their additional claims for "benefit to the government" for funds not credited to the accounts of the beneficiaries. However, on July 24, 2009, the United States Court of Appeals for the District of Columbia reversed the district court, ordering that DOI, in light of the limited appropriations provided by Congress, conduct the best accounting possible with the monies available. Plaintiffs filed a petition for certiorari to the U.S. Supreme Court to review the court of appeals decision.

The purpose of this report is to provide a brief background of the history leading up to the litigation and a review of the issues that have proven so difficult for the judiciary to resolve. The report will be updated as warranted by judicial decisions or legislative action.

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Background

First filed in 1996, *Cobell v. Salazar* involves the Department of the Interior's (DOI's) management of several money accounts. These money accounts, known as IIMs (an abbreviation for Individual Indian Monies) are monies which the federal government holds for the benefit of individual Indians rather than property held for the benefit of an Indian tribe.[1] The conflict in the case emanates from the federal government's trust responsibility with respect to American Indians. The Supreme Court first formulated the concept of the federal government as trustee for Indian tribes in 1831, likening the relationship to that of "a ward to its guardian."[2] In the capacity of trustee, the United States holds title to much of Indian tribal land and land allotted to individual Indians. Receipts from leases, timber sales, or mineral royalties are paid to the federal government for disbursement to the appropriate Indian property owners. Flowing from the federal trusteeship of Indian property are fiduciary responsibilities on the part of the United States to manage Indian monies and assets which have been derived from these lands and are held in trust.[3]

The case is premised on statutory duties imposed upon the federal agencies handling Indian monies as well as on the existence of property rights in funds and assets held in trust for Indians. The courts have recognized broad powers of Congress with respect to Indian affairs legislation and Indian property, but have also recognized that Indian property may not be taken for a public purpose without just compensation.[4] This case is not a claim for just compensation; it is a claim for an accounting by the trustee (i.e., the United States) for receipts and disbursements representing the trust corpus held for the benefit of individual Indians.

The *Cobell* litigation sprang out of the federal government's trust responsibility with respect to three groups of money accounts held in trust for individual Indian beneficiaries. These accounts are commonly referred to as the Individual Indian Money (IIM) accounts. They include (1) Land-based Accounts—established to receive revenues derived from the approximately 11 million acres held in trust by the U.S. for individual Indians;[5] (2) Special Deposit Accounts (SDAs)—intended to be temporary accounts to hold funds that could not be immediately credited to the proper IIM account holder; and (3) Judgment and Per Capita Accounts—established to receive funds from tribal distributions of litigation settlements and tribal revenues.[6] Congress has delegated to the Secretary of the Interior and the Secretary of the Treasury its responsibilities as trustee with

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[1] Both the Department of Justice website, http://www.usdoj.gov/civil/cases/cobell/, and the *Cobell* plaintiffs' website, http://www.indiantrust.com/index.cfm, include documents and opinions filed in the case.

[2] *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

[3] *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (quoting *Navajo Tribe of Indians v. United States*, 624 F. 2d 981, 987 (Ct. Cl. 1980)).

[4] *See, e.g., United States v. Sioux Nation*, 448 U.S. 371 (1980).

[5] These accounts trace their beginnings to the federal government's allotment program of the late 19th and early 20th centuries. Under this program, the Secretary of the Department of the Interior (DOI) was authorized to allot portions of reservation land to individual Indians. Title would remain with the United States in trust for a number of years, after which it would pass to the individual allottees free from all encumbrances. The allotment policy resulted in large amounts of land passing into non-Indian ownership, and Congress abandoned the policy in 1934, extending indefinitely the trust periods of allotments that had not yet passed into fee ownership. Many of these properties remain in trust to this day. *See* Felix F. Cohen, *Handbook of Federal Indian Law* § 1.04 (2005 ed.).

[6] *Id.*, at § 5.03[3][a], n. 138.

regard to the IIM accounts.[7] The Bureau of Indian Affairs (BIA) has general responsibility for trust land management and income collection.[8]

Most transactions involving IIM accounts require BIA approval.[9] One of BIA's most important duties in this regard is managing IIM funds derived from income-producing activities on allotment land, including grazing leases, timber leases, timber sales, oil and gas production, mineral production, and rights-of-way. The Office of Trust Fund Management (OTFM) is responsible for BIA's fiduciary duty to keep accurate financial records of these activities. OTFM also shares the banking aspect of DOI's trust responsibility with the Treasury Department. OTFM and BIA officers collect payments and deposit them into a local bank where there is a Treasury General Account.[10] The Treasury Department maintains a single "IIM account" for all IIM funds, rather than individual accounts, while OTFM is responsible for maintaining accounting records for the individual funds.[11] Treasury also invests the funds at the direction of DOI.[12]

The federal government—as holder of these accounts in trust for the Indian beneficiaries—has fiduciary obligations to administer the trust lands and funds arising from them for the benefit of the beneficiaries. The federal government has stipulated, however, that it does not know the exact number of IIM trust accounts that it is supposed to administer; nor does DOI know the correct balances for each IIM account.[13] DOI has conceded that it is currently unable to provide an accurate accounting for a majority of IIM trust beneficiaries.[14] The Treasury Department also has problems with trust fund management procedures. First, the Treasury Department has permitted the destruction of documents over six years and seven months old, and made no effort to ensure that documents related to accounting for IIM accounts are preserved.[15] In addition, there can be a time lapse between the deposit of funds with the Treasury Department and the investment of those funds.[16] There can also be a time lapse between the issuance of a check and when the payee presents the check, resulting in lost interest.[17]

Congressional oversight committees became concerned with alleged IIM mismanagement in the late 1980s and began holding oversight hearings regarding the IIM accounts in 1988. Four years later, the House Committee on Government Operations produced a report highly critical of the Interior Department.[18] In 1994, Congress enacted the Indian Trust Fund Management Reform Act

[7] 25 U.S.C. § 161a(a).

[8] *See, e.g.*, the federal timber management statutes, at 25 U.S.C. §§ 406-407, 466.

[9] *See Cobell v. Babbitt*, 91 F.Supp.2d 1, 9 (D.D.C. 1999), *afff'd*, 240 F.3d 1081 (D.C. Cir. 2001).

[10] *Id.*, at 9-10.

[11] *Cobell v. Norton*, 240 F.3d 1081, 1089 (D.C. Cir. 2001). When OTFM issues a check to an IIM trust beneficiary, the amount is deducted from the individual fund, even though the money remains in the Treasury's general account. As a result, the beneficiary loses any interest that would accrue between issuance and cashing of the check, a time lapse that "may be short in the private sector, [but] can be much longer in the IIM trust context because OTFM often has incorrect addresses for the recipients." *Cobell v. Norton*, 91 F.Supp.2d 1, 12 (D.D.C. 1999).

[12] *Id.*, at 1088-1089.

[13] *Id.*, at 1089.

[14] *Id.*

[15] *See id.*, at 1092.

[16] *Id.*

[17] *Id.*

[18] *Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund*, H.Rept. 102-499 (1992).

(the Reform Act),[19] recognizing the federal government's pre-existing trust responsibilities and further identifying some of the Interior Secretary's trust fund responsibilities, such as providing adequate accounting for trust fund balances; providing adequate controls over receipts and disbursements; providing accurate and timely reconciliations; preparing and supplying periodic statements of account performance and balances to account holders; and establishing consistent, written policies and procedures for trust fund management.[20] Significantly, the original House bill (H.R. 1846) would have made the accounting duty prospective only. When another similar bill was introduced to replace H.R. 1846, that provision was left out. This new bill became the Reform Act, and the courts interpreting it in the *Cobell* litigation have determined that DOI owes a historical accounting duty going back to the act of June 24, 1938.[21] As the D.C. Circuit Court of Appeals stated, "the 1994 Act identified a portion of the government's specific obligations and created additional means to ensure that the obligations would be carried out."[22]

The Litigation

The *Cobell* litigation began in 1996, and its docket enumerates over 3,600 documents and over 20 district court and federal court of appeals opinions. The following attempts to distill the history of this litigation so that it focuses on the substantive issues regarding the IIM accounts.

In 1996, a group of IIM account holders filed a class action suit to compel performance of trust obligations, alleging that the Secretaries of the Interior and the Treasury—as delegatees of the federal government's trust responsibilities—had breached the fiduciary duties owed to plaintiffs by mismanaging the IIM accounts.[23] Two years later, the district court judge bifurcated the trial into two phases, with Phase 1 to focus on reforming the management and accounting of the IIM trust funds, and Phase 2 to address the historical accounting of those accounts.[24] In 1999, United States District Judge Royce C. Lamberth issued a ruling as to Phase 1, holding that the Treasury and Interior Secretaries had breached their fiduciary duties to the IIM account holders.[25] The transition to Phase 2 has proven difficult because the defendants have been unable to submit—in forms acceptable to the court—plans for reforming the account-management system and for providing a historical accounting.[26]

Two specific issues have made it particularly difficult for DOI to provide an accounting in the *Cobell* litigation. The first of these issues is the fractionation of interests in many of the allotment lands. These interests have been fractionated over the years as they have been divided among the heirs of the original allottees, increasing exponentially with each generation and leading to

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[19] P.L. 103-412 (25 U.S.C. §§ 4001 et seq.).

[20] 25 U.S.C. § 162a(d).

[21] *Cobell v. Norton*, 240 F.3d 1081, 1102 (D.C. Cir. 2001).

[22] *Id.*, at 1100.

[23] For a discussion of the history of the case, *see id.*, at 1092-1093 (D.C. Cir. 2001).

[24] *Id.*

[25] *Cobell v. Babbitt*, 91 F.Supp.2d 1 (D.D.C. 1999), *aff'd*, 240 F.3d 1081 (D.C. Cir. 2001).

[26] *Cobell v. Norton*, 226 F.Supp.2d 1, 162 (D.D.C. 2002). Finding a workable method to provide the historical accounting has proven extremely difficult. Adding to that difficulty is the fact that the litigation has become increasingly acrimonious. See *Can a Process Be Developed to Settle Matters Relating to the Indian Trust Fund Lawsuit?: Oversight Hearing Before the Committee on Resources, U.S. House of Representatives*, 108th Cong. 1st Sess. 50 (2003) (statement of John Berry, Chairman, Quapaw Tribe).

incredibly small interests that are difficult to track. DOI estimates that there are currently over 1.4 million fractional interests subdividing 58,000 tracts of land.[27] While DOI has stated that it can perform a transaction-by-transaction accounting of the judgment and per capita accounts and the SDAs, the problems presented by the land-based accounts have proven very difficult to resolve. DOI has argued that it should be able to use statistical sampling with respect to some of these accounts.[28]

The second difficult question is determining how far into the past a historical accounting should go. At various points in the litigation, the different parties have argued for an accounting of transactions as far back as 1887 (date of the Allotment Act), 1938 (date of the Indian Reorganization Act), and 1994 (date of the Reform Act). Resolving this problem would likely encompass a choice between what is fair and what is possible. One could have very different answers to these two questions, mainly because, as the litigation so far has shown, DOI and Treasury records relating to the IIM accounts are at best incomplete.

In January 2003, DOI provided a new historical accounting plan to Judge Lamberth that would cover all accounts open as of October 25, 1994, when the Reform Act was enacted. After reviewing DOI's plan, Judge Lamberth in September 2003 issued a controversial structural injunction giving the court broad oversight authority to ensure that (1) DOI carries out the accounting (the court adopted what is essentially a modified version of DOI's historical accounting plan, but did not allow DOI to use statistical sampling with respect to the land-based accounts); and (2) DOI reforms its system for managing the IIM accounts. Judge Lamberth also appointed a monitor to ensure compliance with the injunction order.[29]

One month later, Congress passed an appropriations rider stating that "nothing in [the Reform Act] or in any other statute, and no principle of common law, shall be construed or applied to require the Department of the Interior to commence or continue historical accounting activities with respect to the [IIM] Trust" until 2005 or when Congress more clearly delineates DOI's accounting obligations under the Reform Act.[30] Congress took this action in direct response to Judge Lamberth's structural injunction order, stating that compliance could cost upwards of $6 billion and that diverting that amount of resources could be "devastating to Indian country."[31] Two subsequent appropriations bills have limited the funds available to DOI for the historical accounting to $58 million for FY2005 and FY2006.[32]

On December 10, 2004, the D.C. Circuit issued an opinion striking down almost all of Judge Lamberth's injunction.[33] The court first held that, pursuant to Congress's directive contained in the aforementioned appropriations rider, DOI could not be compelled to perform any historical

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[27] See *Can a Process Be Developed to Settle Matters Relating to the Indian Trust Fund Lawsuit?: Oversight Hearing Before the Committee on Resources, U.S. House of Representatives*, 9 (statement of James Cason, Associate Deputy Secretary, U.S. Department of the Interior). For a description of the various accountings that DOI has attempted, including the historical accounting for the named plaintiffs in *Cobell*, *see* 12-13.

[28] *Id.*

[29] *Cobell v. Norton*, 283 F.Supp.2d 66, 225 (D.D.C. 2003).

[30] P.L. 108-108 (117 Stat. 1263). Congress has not attempted to more clearly delineate DOI's accounting obligations since enacting this statute.

[31] See H.Rept. 108-330, at 117 (October 28, 2003).

[32] P.L. 108-447 (118 Stat. 2809) and P.L. 109-54 (119 Stat. 499).

[33] *Cobell v. Norton*, 392 F.3d 461 (D.C. Cir. 2004).

accounting. The court noted, however, that the directive would sunset on December 31, 2004, and the judges pointed out that they could not "address the issues that would be relevant if the district court [after December 31, 2004] reissued those provisions [compelling a historical accounting]."[34] The court next largely overturned Judge Lamberth's injunction as to DOI's systemic reform. Looking to Supreme Court precedent, the D.C. Circuit held that judicial review under the Administrative Procedure Act (APA) is limited to *specific* agency actions, and that such review cannot be extended to "claims of broad programmatic failure."[35] The court held that Judge Lamberth, in issuing his injunction, had impermissibly wandered into this latter area, which is more properly reserved for executive or legislative action. While the D.C. Circuit upheld Judge Lamberth's requirement that DOI submit a plan laying out how it will come into compliance with its fiduciary obligations, the court found that the other elements of Lamberth's order (e.g., the appointment of a monitor, the listing of and compliance with tribal laws) were not tied to specific findings of wrongdoing and suggested greater, and inappropriate, judicial intrusion into agency discretion.

On February 23, 2005, Judge Lamberth—noting that the deadline contained in the appropriations rider had passed—issued another structural injunction with respect to the historical accounting.[36] Once again, he adopted a modified version of DOI's historical accounting plan, but prohibited the use of statistical sampling and required an accounting going back to the Allotment Act of 1887. He refused to stay the order pending appeal, citing the plaintiffs' nine-year wait and "a delay directed by Congress in a bizarre and futile attempt at legislating a settlement in this case."[37]

On November 15, 2005, the D.C. Circuit vacated Judge Lamberth's injunction and historical accounting order and directed that, on remand, the district court, in evaluating DOI's plan for a statistical sampling to accomplish the accounting, should not ignore the general language of the Reform Act and subsequent congressional limitations on funding, suggesting that the Reform Act should not be seen as mandating "the best available accounting without regard to cost."[38] The court of appeals would later remove Judge Lamberth from this case for abuse of discretion and bias.[39]

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[34] *Id.*, at 468.

[35] *Id.*, at 472.

[36] *Cobell v. Norton*, 337 F.Supp.2d 298 (D.D.C. 2005).

[37] *Id.*

[38] *Cobell v. Norton*, 428 F.3d 1070, 1075 (D.C. Cir. 2005).

[39] On July 11, 2006, the court of appeals found the district court to have abused its discretion in ordering DOI to disconnect from the Internet many of its computer systems, ordered the district court to vacate an order requiring DOI to include in any communication to class members a warning that information provided about trust matters might be unreliable, and removed Judge Lamberth from the case for bias in accusing DOI of racism. *See Cobell v. Norton*, 428 F.3d 1070, 1075 (D.C. Cir. 2005). While the appellate court recognized that Judge Lamberth's opinion did not reflect an animosity toward DOI, independent of the developments in the case, it concluded that the language Judge Lamberth used might give rise to an impression that justice could not be done in this case. *See Cobell v. Kempthorne*, 455 F.3d 317 (D.C. Cir. 2006). Bias was seen in Judge Lamberth's language in *Cobell v. Norton*, 229 F.R.D. 5 (D.D.C. 2005), such as the following quoted by the appellate court: "'Alas, our "modern" Interior department [sic.] has time and again demonstrated that it is a dinosaur—the morally and culturally oblivious hand-me-down of a disgracefully racist and imperialist government that should have been buried a century ago as the last pathetic outpost of the indifference and anglocentrism we thought we had left behind.'"

On January 30, 2008,[40] Judge James Robertson, assigned to the case in December 2006, rejected DOI's historical accounting plan not because of its use of statistical sampling methodology, but on the basis of finding its scope legally inadequate in terms of years and accounts or funds to be covered. He then held that DOI's accounting for the funds was impossible "as a conclusion of law" because DOI could not "achieve an accounting that passes muster as a trust accounting" due to the inadequacy of funding provided by Congress.[41] Judge Robertson ordered a hearing to develop a process for determining an appropriate remedy.

On August 7, 2008, Judge Robertson issued a decision on the remedy issue in which he awarded plaintiffs $455.6 million in restitution.[42] The figure represents the amount to be restored to plaintiffs as receipts not credited to their accounts. Claims for damages for funds which never were collected or for mismanagement of assets are not included in the figure and were not before the court in *Cobell*.[43] To determine the amount of restitution, the court had to examine the models the parties had set forth for determining the difference between what Treasury had posted as receipts to the IIM accounts and what had been disbursed to individual accounts or account holders. Information accumulated from the years of attempts at arriving at a satisfactory and reliable means of reconstructing the records at DOI and Treasury aided the court in evaluating the models offered by the parties.

The Court, in formulating its remedy, decided not to accord plaintiffs the full benefit of evidentiary presumptions in their favor.[44] This led the court to apply a modified burden of proof on the government's statistical model for calculating data that it could not produce.[45] DOI had shown that only 77% of the monies collected for the IIM system had been posted to IIM accounts. Accepting the government's calculation of receipts but using their own formula for calculating a disbursement rate for each year, the plaintiffs claimed a shortfall of $3.6 billion over 122 years. To this they proposed adding approximately $43.4 billion as "benefit to the government" based on a formula they had devised which assumed that whatever was not disbursed to the account holders was available for general governmental expenses, relieving the government of a need to issue and pay interest on Treasury bonds.

The government produced evidence explaining some of the shortfall between receipts and disbursements. A DOI expert testified that the discrepancy reflected the fact that not all the funds received into Treasury's IIM account are intended to be credited to individual Indian trust fund accounts. Some, such as tribal trust fund receipts or bid or lease deposits, are to be funneled on a pass-through basis to other recipients.[46]

[40] *Cobell v. Kempthorne*, 532 F.Supp.2d 37 (D.D.C. 2008) (*Cobell XX*).

[41] *Cobell XX*, 532 F.Supp.2d at 102 n. 19.

[42] *Cobell v. Kempthorne*, 569 F.Supp.2d 223 (D.D.C. August 7, 2008) (hereinafter *Cobell* restitution award decision or *Cobell XXI*).

[43] *Id.*, at 5, n. 1. It is possible such claims may be within the jurisdiction of the Court of Federal Claims.

[44] *Cobell XXI*, slip op., at 63-66.

[45] *Cobell XXI*, slip op., at 66.

[46] DOI's expert also testified to various means by which bookkeeping entries might not be captured as disbursements to individual accounts. The court found the testimony to be persuasive in "explaining the nature of the discrepancy between receipts and postings." *Id.*, slip op., at 28. The testimony, however, did not quantify percentages of "receipts ... for stakeholders, for tribal trusts, and for third parties," but acknowledged that to do so would be "not impossible, but ... time consuming ... and has not been done." *Id.*, slip op., at 28-29.

Having admitted that 23% of IIM receipts had not been posted to IIM accounts and faced with the plaintiffs' charge that approximately $4 billion had not been disbursed to account holders, the government was required to explain the shortfall and put a figure on it. The explanation was essentially that the individual Indian trust beneficiaries were not entitled to all of the funds that Treasury deposited in the IIM account. The government attempted to demonstrate this point by using a statistical model that employed a "multiple imputation" technique to account for the multiplicity of variables imputed to the large range of missing data with respect to the accounts.[47]

With both the plaintiffs' and defendant's statistical models before him, Judge Robertson not only found the model offered by the plaintiffs to be defective, he also criticized their failure to offer specific evidence to discredit the defendant's model. According to his opinion, the plaintiffs' model could not be considered, among other reasons, because it was inconsistent in accepting the government's estimate of receipts, but not of disbursements, which reflected "a super-strong interpretation of the presumption against the breaching trustee that cannot be equitably applied to the trusts at issue here."[48]

Accordingly, Judge Robertson accepted the government's model and provided a certain evidentiary advantage to the plaintiffs by selecting the "maximally conservative" estimate.[49] Therefore, using the maximally conservative estimate as established by the government model, the court concluded that $455.6 million was the amount missing in the IIM trust and that only that amount would be awarded in restitution.[50]

The Latest Decision: District Court Instructed to Enforce "The Best Accounting" DOI Can Provide with "Limited Government Resources"

The July 24, 2009,[51] decision issued by the U.S. Court of Appeals for the District of Columbia vacated the holding in Judge Robertson's January 2008 decision that DOI did not have to conduct an accounting due to impossibility and remanded the case to the district court for further proceedings.[52] The court of appeals concluded that the district court was correct to grant deference to DOI's methodology in conducting the accounting because "it 'a[rose] out of an administrative balancing of cost, time, and accuracy.'"[53] However, the court of appeals also found that the district court's conclusion that "the proper *scope* of the accounting obligation … is the result … of a *legal* interpretation of the 1994 Act and other statutes governing the IIM trust" was not completely correct.[54] Although the district court correctly concluded that the extent of the

[47] *Cobell XXI*, slip op., at 29-33.

[48] *Id.*, slip op., at 68.

[49] *Id.*, slip op., at 69-70. According to Judge Robertson, the 99% confidence level addresses the fact that there is more uncertainty in the data than the government's expert witness acknowledged, and such a figure "is a legally sound way of crediting obscurities and doubts to the plaintiffs." *Id.*, at 70.

[50] *Id.*, slip op., at 70.

[51] *Cobell v. Salazar*, 573 F.3d 808 (D.C. Cir. July 24, 2009) (*cert. dismissed* 2010 U.S. LEXIS 5260) (*Cobell XXII*).

[52] *Cobell XXII*, No. 08-5500 at 2.

[53] *Id.*, at 8 (quoting *Cobell XX*, 532 F.Supp.2d at 91).

[54] *Id.*, at 9 (quoting *Cobell XX*, 532 F.Supp 2d at 89) (emphasis in original).

scope of the accounting is derived from statutory law, the court of appeals concluded that "the unique nature of this trust requires the district court to exercise equitable powers in resolving the paradox between classical accounting and limited government resources."[55] Thus, the court of appeals concluded that the district court was incorrect in assuming it could not adjust the scope of the accounting in order provide the best accounting possible with the limited resources made available by Congress.[56] Rather, "the district court sitting in equity must do everything it can to ensure that Interior provides them an equitable accounting. The district court's holding of impossibility contradicts the requirement of an equitable accounting—one that makes most efficient use of limited government resources."[57]

After holding that DOI must conduct the best accounting possible with the money Congress appropriated for the task, the court of appeals then provided some guidance to the district court in order to help establish the proper scope of the accounting.[58] The court of appeals first noted that "the district court should exercise its equitable power to ensure that Interior allocates its limited resources in rough proportion to the estimated dollar value of payments due to class members."[59] The court of appeals also recommended that the district court "consider low-cost statistical methods of estimating benefits across class sub-groups."[60] Finally, the court of appeals concluded that the district court erred in ordering an accounting for accounts closed before the 1994 Act was passed because the act only contemplated an accounting of funds held in trust by the United States at the time of the act's passage.[61]

December 7, 2009, Settlement

On December 7, 2009, the Department of the Interior reached a settlement agreement with the plaintiffs' class. Currently, because of a mutual agreement between both the plaintiffs' class and the federal government, Congress must authorize the settlement through legislation without material changes or it will be considered "null and void."[62] The settlement agreement originally called for Congress to authorize it legislatively by December 31, 2009.[63] The deadline, however, has been extended six times to February 28, 2010, April 16, May 25, June 15, July 9, and currently to August 6.[64] Furthermore, the settlement agreement also stipulates that it will be rendered null and void if Congress makes any "material changes" to the authorization that deviate from what the parties have already agreed upon.[65] Although the parties have repeatedly agreed to extend the settlement approval deadline, the parties have made no statement concerning material

[55] *Id.*, at 10.

[56] *Id.*

[57] *Id.*

[58] *Id.*, at 11.

[59] *Id.*

[60] *Id.*

[61] *Id.*, at 12.

[62] *See* http://legaltimes.typepad.com/blt/2010/04/deadline-in-cobell-case-extended-for-third-time.html.

[63] Settlement Agreement at 12, 15. A copy of the settlement agreement can be found at http://www.cobellsettlement.com/docs/2009.12.07_Settlement_Agreement.pdf.

[64] *See* http://www.cobellsettlement.com/docs/2010.02.26_Settlement_Agreement_Extension%202.pdf; http://legaltimes.typepad.com/blt/2010/04/deadline-in-cobell-case-extended-for-third-time.html; http://legaltimes.typepad.com/blt/2010/07/yet-another-extension-in-cobell-indian-trust-case.html

[65] Settlement Agreement at 15.

changes; thus it appears that the stipulation that no material changes be made to the settlement still applies. Approval of the settlement has passed the House on two occasions and is currently pending before the Senate.[66]

The settlement agreement addresses the claims of two separate classes. One class, the "Historical Accounting Class," is defined as those Indian beneficiaries who had an open IIM account between October 25, 1994, and September 30, 2009, in which there was at least one cash transaction credited to it.[67] The "Trust Administration Class" is defined as those individual Indian beneficiaries alive as of September 30, 2009, who have or had IIM accounts between roughly 1985 to the present (the time period when IIM accounts were kept in electronic databases) and individual Indians who, as of September 30, 2009, had recorded or other demonstrable ownership interest in land held in trust or restricted status, regardless of the existence of an IIM account or proceeds generated from the land.[68]

The settlement agreement offers to release from the federal government the claims of both the Historical Accounting Class relating to their right to a historical accounting and the claims of the Trust Administration Class that were raised or claims that should have been raised in the class action because they were related to the mismanagement of the IIM accounts.[69] However, the settlement also specifically excludes from the release (1) claims related to the payment of the account balances of existing IIM accounts; (2) claims related to the payment of existing amounts in special deposits accounts, tribal accounts, or judgment fund accounts; (3) claims related to the breaching of trust or alleged wrongs after September 30, 2009; (4) claims for damages to the environment other than those claims expressly identified as Land Administration Claims; (5) claims for trespass; (6) claims against tribes, contractors, and other third parties; (7) equitable, injunctive, or non-monetary claims for boundary correction and appraisal errors; (8) money damages arising from boundary or appraisal errors that occur after September 30, 2009; (9) claims arising out of leases, easements, rights-of-way, and similar encumbrances existing as of September 30, 2009; (10) claims related to failure to assert water rights and quantification; and (11) health and mortality claims.[70] The settlement also states that no further monetary obligations shall attach to the federal government after the funds agreed upon in the settlement are dispensed.[71]

In return for this release of liability, the settlement calls for the establishment of two funds. The first fund is to receive $1.412 billion from the Judgment Fund and will be called the "Accounting/Trust Administration Fund." From this fund, each member of the Historical Accounting Class shall receive $1,000. After this payment is made, the next stage involves establishing the identities of the members of the Trust Administration class and paying each member a pro rata amount. This amount involves a $500 base payment. In addition, each member of the class will receive a pro rata amount of the remaining monies in the Accounting/Trust Administration Fund. Any money remaining in this fund will be used to finance a program called

[66] *See* H.R. 4213, 111th Cong. (2010); H.R. 4899, 111th Cong. (2010).

[67] Settlement Agreement at 10.

[68] Settlement Agreement at 14.

[69] Settlement Agreement at 43-44.

[70] Settlement Agreement at 44-45.

[71] Settlement Agreement at 51.

"Funds for Indian Education Scholarships," which provide for the cost of post-secondary educations for Indian students.[72]

The second fund, called the "Trust Land Consolidation Fund," is to receive $2 billion. This fund, which will terminate in 10 years, will be used to acquire fractional interests in trust or restricted land pursuant to 25 U.S.C. § 2201 et seq., which authorizes a program called the Land Consolidation program. This program is the principal vehicle by which the federal government consolidates fractionated trust and restricted lands. Monies from this account would also be made available for the "Funds for Indian Education Scholarships."[73]

The settlement calls for legislation that will exclude from federal taxation any monies a class member may receive from this settlement.[74] The settlement also leaves for the district court's future consideration the amount of attorney's fees and also the amount of the incentive award for the named plaintiffs of the class.[75] Associate Attorney General Thomas Perrelli has testified to the Senate Indian Affairs Committee that the two sides have agreed to attorneys fees ranging from $50 million to $100 million that will come out of the $1.4 billion settlement.[76]

Future Considerations

If, by August 6, Congress does not decide whether to approve or reject the settlement agreement, or again extend the settlement deadline, the agreement will be rendered by its terms, null and void. If Congress decides to reject the settlement, or if the settlement otherwise becomes null and void, the district court will then oversee DOI's attempt to provide the best accounting possible of the IIMs.[77] It appears that the court of appeals has contemplated that DOI may use "low-cost statistical methods" in order to carry out its accounting obligations, but has not directly ordered a particular methodology to be used.[78] Thus, it will be largely left to the district court to oversee the tailoring of the methodology and scope of the accounting. While the district court can and must use its equitable powers to determine an accounting methodology that can be paid for with the appropriations provided by Congress, Congress has the option to legislate the methodology and scope if it so chooses and to provide more appropriations for an accounting.

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[72] Settlement Agreement at 23-34.

[73] Settlement Agreement at 35-37. While the settlement agreement does not dictate where the $2 billion will come from, the attached "Proposed Legislation" has a clause stating the monies will come out of the Judgment Fund.

[74] Settlement Agreement at 42-43.

[75] Settlement Agreement at 48-50.

[76] *See* http://legaltimes.typepad.com/blt/2009/12/attorneys-fees-in-cobell-case-capped-at-100-million.html. Webcast of the hearing can be seen at http://www.senate.gov/fplayers/I2009/urlPlayer.cfm?fn=indian121709&st=60&dur=3476.

[77] *Id.*, at 14.

[78] *Id.*, at 11.

Alternatively, if the current settlement should fail, Congress could propose an alternative settlement offer through legislation.[79] The question is whether the plaintiffs' class would accept an alternative settlement, especially considering that a settlement has already been negotiated between them and DOI.

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[79] *See, e.g.*, the Indian Trust Reform Act of 2005, S. 1439, 109th Cong. (2005) for an example of a possible legislative settlement of the *Cobell* case.