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Indian Trust Fund Litigation: Legislation to Resolve Accounting Claims in *Cobell v. Norton*

M. Maureen Murphy
Legislative Attorney
American Law Division

Summary

The *Cobell v. Norton* litigation has been before the courts since 1996. *Cobell* is a class action lawsuit alleging federal government mismanagement of accounts held in trust for individual Indians. To date the litigation has not been able to secure from the Department of the Interior sufficient data in the form of an historical accounting to determine the accuracy of the payments to individual account holders. Although a full historical accounting is unlikely to be judicially required, the prospect that pursuit of an accounting through litigation will be costly, protracted, and elusive has resulted in the introduction of S. 1439/H.R. 4322 and a concerted effort by Indian representatives to develop principles for a legislative settlement. The purpose of this report is to provide an overview of the development of a legislative solution. Updates will occur as warranted by legislative activity. Background information on the history, major developments and issues in the *Cobell* litigation is provided in CRS Report RS21738, *The Indian Trust Fund Litigation: An Overview of Cobell v. Norton*, by Nathan Brooks and M. Maureen Murphy.

S. 1439/H.R. 4322: Background. On July 20, 2005, Senator McCain, Chairman of the Senate Indian Affairs Committee, introduced S. 1439, the Indian Trust Reform Act of 2005, for himself and for Senator Dorgan, the Committee's Ranking Member. On November 15, 2005, Representative Pombo, Chairman of the House Committee on Resources introduced an identical measure, H.R. 4322, for himself, and for the Committee's Ranking Member, Representative Rahall. The legislation addresses settlement of the *Cobell v. Norton*¹ litigation and covers claims by individual Indian

¹ *Cobell v. Norton, et al.* Case No. 1:96CV01285 (D.D.C.). Documents are available on the Department of Justice website [<http://www.usdoj.gov/civil/cases/cobell/index.htm>] and the Cobell plaintiff's website [<http://www.indiantrust.com/>] (last visited December 2, 2005). A recent appellate decision in the case, *Cobell v. Norton*, ___ F. 3d ___, 2005 WL 3041512 (D.C. Cir. 2005), suggests that a complete historical accounting will not be judicially mandated.

beneficiaries that funds held in Individual Indian Moneys (IIM) accounts in their names by the Department of the Interior (DOI) have not been properly handled.² Funds in the IIM accounts represent receipts from the leasing of trust land held in the name of individual Indians, or leasing of mineral rights, timber management contracts, grants of rights of way, or other income-producing activities relative to such land. There are also IIM accounts that represent per capita shares of tribal distributions.

In introducing the legislation, Senator McCain stated that S. 1439 would resolve the *Cobell* litigation by creating a “settlement fund and direct[ing] the Secretary of the Treasury to develop a formula for distributing the fund to the beneficial owners of IIM accounts, in full settlement for losses, errors, and unpaid interest in their IIM Accounts,” as well as reform the Indian trust management system, restructure the Bureau of Indian Affairs under an Under Secretary for Indian Affairs, and phase out the Office of Special Trustee.³

Summary of S. 1439/H.R. 4322. The legislation is premised on findings that although Congress has appropriated tens of millions of dollars to provide an historical accounting of funds held by the federal government in IIM accounts, some data indicates that a complete historical accounting of the receipts and disbursements may be impossible, cost hundreds of millions of dollars, and be incomplete at the death of many of the elderly account beneficiaries.⁴ There are also findings respecting the need for a complete historical accounting to determine losses in the IIM accounts resulting from errors or mismanagement and the possibility that the cost of an accounting may exceed the current balance of, total sums passing through, or the enforceable liability of the United States for losses from the IIM accounts.⁵ There is also a finding that because many of the beneficiaries would prefer a monetary settlement rather than protracted litigation, Congress should “provide benefits that are reasonably calculated to be fair and appropriate ... in order to transmute claims by the beneficiaries of IIM accounts for undetermined or unquantified accounting losses and interest to a fixed amount,” taking into consideration the risks of delay and litigation to the claimants.⁶

Title I, entitled, Resolution of Historical Accounting Claims in *Cobell v. Norton*, would provide a lump sum, the amount of which is to be determined during the course of legislative consideration, for an Individual Indian Accounting Claim Settlement Fund, to be administered by the Secretary of the Treasury, who is to appoint a Special Master. Of the Fund, 80% is to be used to make payments to claimants with one portion distributed to all claimants on a per capita basis and another to pay more to beneficiaries based on volume passing through accounts. “Claimant” is defined to mean IIM beneficiaries living on the date of enactment of the American Indian Trust Fund Management Reform Act of

² The headright or mineral estates of the members of the Osage Nation are excluded as being the subject of separate legislation. S. 1439/H.R. 4322 (as introduced), §§ 101(10) and (11).

³ 151 *Cong. Rec.* S8565 (July 20, 2005).

⁴ S. 1439/H.R. 4322 (as introduced), § 101 (1) - (4).

⁵ *Ibid.*, § 101(5).

⁶ *Ibid.*, §§ 101(7) and (8).

1994⁷ and their heirs. Attorneys' fees, administrative costs, and payments to beneficiaries who successfully challenge to their distributions in court are also to be covered by the fund. The legislation specifies the time limits and judicial venue for challenges and appeals. To receive a distribution, claimants must submit a proper waiver. The legislation specifies that the benefits provided are substituted for any other claims arising before the date of enactment for losses resulting from accounting errors, mismanagement, or interest owed in connection with IIM accounts. Excluded from waiver are claims relating to trust resources management. Under the legislation, payments to claimants are not to be subject to federal or state income tax; to be taken into account for eligibility or for the amount of benefits under any other federal program; or to preclude courts from entertaining tribal trust account claims.

Title II would establish a twelve-member Indian Trust Asset Management Commission to review all DOI trust resource management laws and regulations and practices and report on these to the Senate Committee on Indian Affairs, the House Committee on Resources, and DOI.

Title III would establish an eight-year Indian Trust Resource Management Demonstration Project open to all Indian tribes participating in the FY2005 demonstration project⁸ and up to 30 other tribes submitting a proposed trust asset management plan and application to DOI. If approved, a demonstration project is to be in effect for eight years from the date of enactment, with tribes able to modify or terminate the plan annually. Tribes would also be able to negotiate how to prioritize the trust asset management budget for their reservations; compacting and contracting tribes participating in the demonstration project would be able to vary their trust asset management systems, practices, and procedures from those of DOI provided they meet the standards established in the legislation. Among the standards provided in the legislation are: determination by the Secretary of the Interior (SOI) that the plan meets the trust obligations of the United States; consistency with applicable federal and tribal law; and SOI determination that the plan will meet certain standards. These standards must include protecting trust assets from loss, waste, and unlawful alienation; promoting the interests of the beneficial owner of the trust assets; conforming to the beneficial owner's preferred use unless inconsistent with law; protecting applicable treaty-based rights to the use or enjoyment of the asset; and requiring good faith and loyalty to the beneficial owner in carrying out any activity under the plan. The legislation specifies that nothing in the legislation or an approved trust asset management plan shall affect the liability of the United States or a participating Indian tribe for any loss resulting from management of an Indian trust asset under an Indian trust asset management plan.

Title IV would set up a Fractional Interest Purchase and Consolidation Program and amend the Indian Land Consolidation Act's⁹ pilot program for acquiring individuals' fractional interest in land to be held in trust for tribes, under 25 U.S.C. § 2212, which currently limits the amount that may be offered for fractional interests to fair market

⁷ 25 U.S.C. §§ 4001, *et seq.*

⁸ This project is authorized under Section 131 of Title III, Division E of the Consolidated Appropriations Act, 2005, P.L. 108-447, 118 Stat. 2809, 3067.

⁹ 25 U.S.C. §§ 2201, *et seq.*

value. It would permit DOI to offer from \$100 up to \$350 over fair market value for interests in tract of land having 20 or more fractional interests. Another provision would permit the SOI to pay up to \$2,000 to any individual owner of trust or restricted interests who agrees to sell all such interests owned by that individual to the SOI, who would thereby avoid the cost to the United States of probate. Another provision allows SOI to make payments to individual owners of trust or restricted land to settle claims not covered in Title I, against the United States. There is also a special provision applicable to tracts owned by 200 or more individuals. It sets up a procedure permitting SOI to offer not less than four times fair market value to every owner of such tracts. Such offers will be deemed to have been accepted should the owner not respond to the offer by returning a notice of rejection included in the certified mail packet making the offer. To fund this program, the legislation authorizes SOI to borrow from the Treasury amounts to be approved in annual appropriations to be backed by SOI-issued obligations in amounts and carrying interest rates to be determined by the Secretary of the Treasury, subject to an aggregate limitation yet to be specified in the legislation, with repayment of principal and interest by SOI to flow from the revenues derived from land restored to tribes under this program. The legislation would require the Secretary of the Treasury to determine that the revenue stream from the purchased lands is sufficient to meet the repayment of the obligations; there is also authorization of appropriations in every year following a shortfall to meet the amount of the shortfall between what SOI repays to the Treasury and what was required.

Title V establishes in DOI an Under Secretary for Indian Affairs and an Office of Trust Reform Implementation and Oversight. Functions of the Assistant Secretary for Indian Affairs would be transferred to the new position, which would also have oversight over the new office and broad responsibility over DOI activities, including those relating to Indian affairs carried out in various DOI offices. The Office of Special Trustee for American Indians would be terminated and all functions transferred to the Under Secretary as of December 31, 2008.

Title VI requires SOI to prepare financial statements for individual Indian, Indian tribal, and other Indian trust accounts each fiscal year in accordance with generally accepted accounting principles of the federal government. Concurrently, the SOI is to prepare an annual internal control report establishing responsibility for maintaining internal control and procedures for reporting under this legislation and assessing the effectiveness of such procedures for the preceding fiscal year. The Comptroller General of the United States is to contract with an independent external auditor to prepare an audit report, funding for which is to be transferred to Government Accountability Office from DOI at the request of the Comptroller General.

“Principles for Legislation” of the Trust Fund Reform and Cobell Settlement Workgroup. The Trust Reform and *Cobell* Settlement Workgroup (Workgroup) was organized by National Congress of American Indians (NCAI) President Tex Hall and Inter-Tribal Monitoring Association Monitoring Association (ITMA) Chairman Jim Gray. It includes the *Cobell* plaintiffs, tribes, individual Indian allottees, and Indian organizations. It was formed in response to a request “to provide a set of principles that would guide the lawmakers’ drafting of legislation to provide a prompt and fair resolution of the trust issue,” from the Chairmen and Ranking Members of the Senate Indian Affairs Committee and the House Resources Committee, the Senators McCain and Dorgan and Representatives Pombo and Rahall; and it released “Principles for

Legislation” on June 20, 2005.¹⁰ There are 50 Principles, each of which is accompanied by a “Rationale.” These Principles are divided into four groups. The first is “Historical Accounting and Individual Indian Trust Accounts.” It calls for a lump sum settlement amount of \$27.487 billion, which is seen as justified, among other things, in terms of the level of mismanagement of the IIM accounts and the potential cost of an accounting. It requires that the sum be agreed to by class representatives and distributed by the district court. Also included in this section is a requirement for separate legislation to address the Osage Tribe headright issue.

Another group of Principles, “Reforming the Individual and Tribal Trust Systems,” includes standards for administering trust funds and lists 16 specific duties which should be made applicable.¹¹ It calls for an independent Executive Branch entity, headed by a Presidential appointee with a five-year term, to oversee DOI’s trust administration and to ensure proper audits of trust accounts.¹² It recommends a Deputy Secretary of Interior for Trust Management, sunseting the Office of Special Trustee, and expansion of tribal resource management rights within self-determination contracts.

The “Indian Land Consolidation” Principles advocate further legislation to promote consolidation of fractionated interests in land and specify various practices, including those designed to assure that adequate notice is provided to land owners, assistance is given to promote practices that will lead to land consolidation, and tribal government purchase of fractionated lands is fostered.

Principles under the heading, “Individual Indian Resource Management Claims,” propose that Congress “provide a fair offer to individual Indians for decades of federal mismanagement of their trust resources.”¹³

Reaction. In introducing S. 1439, Senator McCain presented it as a preliminary step rather than an unalterable legislative package. He thanked plaintiff’s representatives and various Indian organizations, but cautioned them and other “stakeholders” that:

... they may have issues with certain aspects of the bill as it is now written.... I do not think that there is any provision in the bill that is immutable, closed to debate or negotiation. Hopefully the stakeholders will remain engaged and continue to provide me with information and suggestions to make it a better bill, a bill that brings

¹⁰ “Settlement Principles. Elouise Cobell and Indian Leaders Join to Announce Settlement Principles for the Individual Indian Trust Litigation.” [http://www.indiantrust.com/index.cfm?FuseAction=PDFTypes.Home&PDFType_id=15&IsRecent=1] (last visited December 2, 2005).

¹¹ These include the duty of loyalty and candor; duty to keep and render accounts; duty to exercise reasonable care and skill; duty to administer the trust; duty not to delegate; duty to furnish information; duty to take & keep control; duty to preserve the trust property; duty to enforce claims and defend actions; duty to keep trust property separate; duty with respect to bank deposits; duty to make trust property productive; duty to pay income to beneficiaries; duty to deal impartially with beneficiaries; duty with respect to co-trustees; and duty with respect to persons holding control. *Ibid.*, p. 4.

¹² *Ibid.*, p. 5.

¹³ *Ibid.*, p. 9.

substantial improvements to the administration and management of Indian trust assets.¹⁴

Testifying at a Senate Indian Affairs Committee Hearing on July 26, 2005, were representatives of various Indian interest groups; Elouise C. Cobell, the named plaintiff in *Cobell*; and DOI officials. All praised the fact that the process of looking to a legislative resolution had begun. DOI took the position that any legislative solution should: (1) eliminate any requirement for historical accounting; (2) address all claims related to funds mismanagement; (3) include methods of ameliorating fractionated interests; and (4) address the issue of resource mismanagement claims.¹⁵ Elouise C. Cobell voiced a mixed response to the legislation, comparing it unfavorably with the “Principles,” but resolving to continue working with the Committee and expressing hope for the ultimate resolution of the issue. She endorsed the bill’s provisions requiring the use of the Judgment Fund instead of DOI program funds and indicating that the settlement amount could be expected to be in the billions of dollars. On the other hand, she criticized the bill for: (1) placing the administration of the settlement fund within the Executive Branch and eliminating judicial oversight over the distribution process; (2) not setting an actual amount for the settlement fund; and (3) failing to provide a thoroughgoing reform for the trusts held for individual Indians through clear definition of: trust duties, enforcement by the courts, remedies for breach, and independent oversight. She also questioned: (1) the definition of “claimant,” as too narrow; (2) limiting the high-volume distribution segment of the settlement fund to transactions in the accounts since 1980 as opposed to 1887; (3) not defining the records upon which distribution decisions are to be made; and (4) the inadequacy of the “Findings” section of the legislation.

Like the named plaintiff in *Cobell*, Tex G. Hall, NCAI President, and Jim Gray, ITMA President, had some criticism of S. 1439 and praise for the effort. They provided general endorsement of certain provisions of the bill. For instance, NCAI President Hall had praise for the trust asset management demonstration project provisions and the fractional interest purchase and consolidation program. They found the provisions restructuring BIA and the Office of Special Trustee to comport with the “Principles.”¹⁶

¹⁴ 151 *Congressional Record* S28565 (July 20, 2005).

¹⁵ Statement of James Cason, Associate Deputy “Secretary, and Ross Swimmer, Special Trustee for American Indians on the Cobell Lawsuit,” before the Senate Committee on Indian Affairs, at 4-5 (July 26, 2005), at [<http://indian.senate.gov/2005hrgs/072605hrg/cason.pdf>] (last visited December 2, 2005).

¹⁶ Testimony of Tex G. Hall, President, National Congress of American Indians and Chairman, Mandan, Hidatsa & Arikara Nation, before the United States Senate Committee on Indian Affairs Oversight Hearing on S. 1439, the Indian Trust Reform Act of 2005, at 4 (July 26, 2005). [http://indian.senate.gov/2005hrgs/072605hrg/072605wit_list.htm] (last visited December 2, 2005).