

COBELL V. SALAZAR Q & As

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COBELL SETTLEMENT OVERVIEW

Why has the federal government decided to settle with the Cobell plaintiffs at this time?

Resolving this historic trust accounting lawsuit has been a top priority of President Obama. This administration has worked in good faith with the plaintiffs to reach an honorable and responsible settlement. This litigation has included hundreds of motions, dozens of rulings and appeals, and several trials. It has been a contentious and acrimonious case that has negatively impacted the government's relations with Indian Country for more than a decade.

How did the parties arrive at the \$1.4 billion settlement figure?

The U.S. Government will pay \$1.4 billion to the plaintiffs to settle claims related to the Department's performance of an historical accounting, alleged accounting errors and other allegations of funds mismanagement claims, and claims regarding the alleged mismanagement of trust assets. By addressing mismanagement as well as accounting-related claims, the settlement fund will resolve all potential claims by individual class members and avoid all further "look-backs" regarding prior fund accounting and management.

What is the land consolidation program? How did the parties arrive at the \$2 billion land consolidation figure?

The land consolidation fund addresses an historic legacy of the General Allotment Act of 1887 (the "Dawes Act"), which divided tribal lands into parcels between 40 and 160 acres in size, allotted them to individual Indians and sold off all remaining unallotted Indian lands. As original allottees died, their intestate heirs received an equal, undivided interest in the allottees' lands. Today, it is common to have hundreds of Indian owners for one parcel.

As of September 30, 2009, there were 143,663 individual Indian allotments and more than four million fractionated interests. These four million interests could expand to 11 million interests by the year 2030 unless an aggressive approach to fractionation is taken. The \$2 billion land consolidation program will provide for the voluntary buy-back of fractionated land interests. By reducing the number of individual trust accounts that the U.S must maintain, the program will greatly reduce on-going administrative expenses and future accounting-related disputes. In order to provide owners with an additional incentive to sell their fractionated interests, the settlement authorizes the Interior Department to set aside up to 5 percent of the value of the interests into a college and vocational school scholarship fund for American Indian students.

Who will administer this land consolidation program? How will the value of a fractionated interest in a property be determined?

The Interior Department will administer the land consolidation program using existing programs already dedicated to land consolidation. Accepted valuation methods will be used to determine the value of a fractionated interest. Each person holding a fractionated interest will be eligible to sell their land on a voluntary basis.

How will the scholarship fund be handled?

As noted above, the scholarship fund is being established to provide an additional incentive for fractionated interest holders to sell their interests so that land consolidation can occur and a large number of trust accounts that currently must be maintained for fractionated interests can be closed. The scholarship fund will be administered by a non-profit entity selected by the parties that will be overseen by a special board of trustees with representatives selected by the Department of the Interior and plaintiffs. The 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 a strong institutional governance structure that ensures a prudent and fair administration, investment and distribution of the scholarship fund. The entity will be required to provide reports on its activities and open access to its records regarding its administration of the fund to the special board of trustees.

Why the Indian scholarship fund?

Fractionated interests can be modest in value. We anticipate that including the additional incentive provided by a set-aside to the scholarship fund will help encourage individual Indians to convey their interest to the United States. The scholarship fund set-aside to benefit Indian education will be used in lieu of an additional cash incentive to help maximize the land that will be purchased in the program.

How does this settlement affect Indian trust reform?

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. As part of the effort to evaluate the current trust management and to improve the long-term management of trust assets, the Secretary will establish a 5-member Secretarial Commission on Indian Trust Administration and Reform. The Commission, created for an initial 2-year term, will make recommendations including addressing issues regarding a performance audit of trust systems and controls.

Has Congress been involved in the settlement negotiations?

Congress has played a leadership role and been actively involved in Indian trust reform over recent decades. We anticipate that Congressional leaders will welcome resolution of this long-standing litigation on these terms, which are fair to plaintiffs and Indian country, and which advance the U.S. Government's interest in reducing the number of small trusts that it must administer and facilitating a land consolidation program.

SETTLEMENT MECHANICS

When will the settlement be final?

The settlement has been negotiated with the involvement of the U.S. District Court for the District of Columbia. It will not become final until it is formally endorsed by the court. Also, Congress must enact a short piece of legislation to authorize implementation of the settlement.

What happens if the settlement is approved by Congress and the Court?

If the legislation is passed by Congress and the settlement is approved by the U.S. District Court for the District of Columbia, the settlement will become effective and distribution of payments to the class will begin.

What is the notice process? Can a class member opt out of the settlement?

Several hundred thousand class members will receive an explanation of, among other things, a description of the settlement, procedures for distributing the settlement fund, the amount of attorneys' fees, the manner in which a person can opt out of the settlement, and contact information for inquiries. They will have time to review and understand the settlement, and will have 60 days to decide whether to opt out of the settlement. The District Court Judge will then determine if the notice and opt out process was fair. After that, the judge reviews the entire process. Upon his approval, the settlement becomes effective.

Who pays for the settlement?

Because it is a settlement of a litigation matter, the Judgment Fund, maintained by the Dept. of the Treasury to provide for judgments and settlements among other things, will fund the settlement.

How will attorneys' fees be handled? How much are the attorneys' fees?

The presiding judge will review and rule upon requests for the award of attorneys fees by plaintiffs' counsel. Any amount will come out of the settlement award of \$1.4 billion.

When will the money be distributed?

The settlement money will be distributed once the final settlement is approved. This will occur only after Congress authorizes implementation of the agreement, the class has been notified, and the court has given final approval to the settlement.

Will the money be distributed to the class members only?

The settlement money will only be distributed to members of the two classes – the Accounting Class and the Trust Administration Class. See below (“For Indians and Account Holders”) for a description of the classes. The land consolidation fund will be used to purchase interests from any person holding a fractionated interest and not just class members. The Department will focus on the most highly fractionated tracts.

How is the money going to be distributed to Individual Indian Money (IIM) account holders?

The settlement funds will be deposited with the trust department of a private bank selected by the plaintiffs based on criteria set forth in the Agreement. The Department of the Interior will not be responsible for distributing these funds to class members. The lawyers for the class, along with a hired Claims Administrator, will have that responsibility. The land consolidation fund is separate from the settlement funds and will be administered by the Department of Interior under the existing the land consolidation program.

How much will class members receive?

The settlement agreement sets forth a formula for how much each individual will receive. It is not possible to estimate those payments at this time, as it would depend, among other variables, on the various trust assets held by an individual. At a minimum, all members of the Accounting Class will receive \$1,000 and all members of the Trust Administration class will receive \$500.

What happens to pending lawsuits that some individual tribes have brought, alleging claims that are similar to the claims that were brought by the Cobell plaintiffs?

The suits brought by individual tribes will not be affected by this settlement. They will continue to proceed through the courts.

FRACTIONATION

How small are the interests?

As of September 30, 2009, there were 143,663 individual Indian allotments and over 4 million fractionated interests. Of those, over 37,000 tracts of land account for more than 2 million fractionated interests. There are now single pieces of property with ownership interests of less than 0.0000001, or 1/10 millionth of the whole interest, valued at less than a penny. As an example of continuing fractionation, consider a real tract identified in 1987 in *Hodel v. Irving*:

Tract 1305 is 40 acres and produces \$1,080 in income annually. It is valued at \$8,000. It has 439 owners, one-third of whom receive less than \$.05 in annual rent and two-thirds of whom receive less than \$1. The largest interest holder receives \$82.85 annually. The common denominator used to compute fractional interests in the property is 3,394,923,840,000. The smallest heir receives \$.01 every 177 years. If the tract were sold (assuming the 439 owners could agree) for its estimated \$8,000 value, he would be entitled to \$.000418. The administrative costs of handling this tract are estimated by the BIA at \$17,560 annually. Today, this tract produces \$2,000 in income annually and is valued at \$22,000. It now has 505 owners but the common denominator used to compute fractional interests has grown to 220,670,049,600,000. If the tract were sold (assuming the 505 owners could agree) for its estimated \$22,000 value, the smallest heir would now be entitled to \$.00001824. The administrative costs of handling this tract in 2003 are estimated by the BIA at \$42,800.

What is the effect that fractionation has had on the management of the Indian lands?

Generally, over 50% of owners must agree on the use of the land, such as leasing for resource development, grazing, timber harvesting, and other rights-of-way and lease activity. When land is highly fractionated and ownership interests are modest, it is difficult to obtain owner

participation in leasing or use of the land. As a result, highly fractionated tracts of Indian land often cannot be used for the benefit of either the many individual owners or for tribal communities. The land consolidation program will help unlock the unrealized benefits of these lands for the benefit of tribal communities.

What are the economic consequences of fractionation?

The economic consequences of fractionation are severe. Appraisal studies suggest that when the number of owners per tract of land grows to between ten and twenty, the fair market value associated with each interest declines -- often precipitously. Fractionated interests, however, still hold cultural and historical significance for many individual allottees.

Where are these lands primarily located? Can they be found within the boundaries of an existing reservation?

The majority of the highly fractionated parcels are located within the Great Plains and Rocky Mountain Regions and are found within existing reservation boundaries.

How long has the problem of fractionation existed?

Fractionation is not a new issue. In the 1920s the Brookings Institute conducted the first major investigation of the impacts of fractionation. This report, which became known as the Meriam Report, was issued in 1928 and formed the basis for land reform provisions that were included in what would become the Indian Reorganization Act of 1934.

What has been done to try to correct fractionation?

The American Indian Probate Reform Act of 1994 created a new Federal probate law that changed the way intestate trust estates are distributed to heirs after a beneficiary's death and provides for land consolidation options during probate. This increases the importance and benefits of estate planning so the beneficiary can determine who inherits his/her assets. The Indian Land Consolidation Act, as amended in 2004, offers opportunities for fractionated interest holders to sell their interests and consolidate ownership with the Tribal governments. At Interior, efforts have been coordinated primarily through the BIA Indian Land Consolidation Office, which has sought to help Tribes by operating several acquisition projects which purchase interests in fractionated tracts and transfers title to the Tribes. A total of 20 reservations located in seven BIA Regions have participated in ILCP.

INDIAN TRUST MANAGEMENT

How big is the Indian trust?

The Department of the Interior is responsible for managing over 100,000 leases on 56 million acres of land. For fiscal year 2009, funds from leases, use permits, land sales and income from financial assets, totaling approximately \$298 million (excluding \$57 million of transfers from the tribal trust funds), were collected for more than 384,000 open IIM accounts. About \$566 million was collected in fiscal year 2009 for about 2,700 tribal accounts for over 250 tribes. Most of the total revenue was produced by a very small percentage of accounts. \$3.5 billion in trust funds is also managed.

Since 1996, the Office of the Special Trustee for American Indians has receipted over \$10.4 billion from the individual and tribal trust assets and disbursed more than \$9.5 billion to individual account holders and tribal governments.

How does this compare to a commercial trust?

No single fiduciary institution has ever managed as many trust accounts as the Department of the Interior has managed over the last century. Unlike most commercial trusts, there was no trust document that created the Indian trust and articulated the fiduciary duties incumbent on the federal government in managing that trust. Unlike the commercial trust environment, where accounts and underlying trust assets must remain economically viable and productive or face liquidation under the common law of trusts, a large number of small balance accounts exist within the Indian trust. Similarly, the United States has not adopted many of the tools that States and local government entities have for ensuring that unclaimed or abandoned property is returned to productive use within the local community.

How many small balance accounts exist?

As of the end of fiscal year 2009, nearly 131,600 IIM accounts have balances of less than \$15 with no activity for 18 months. Over 73,000 of open IIM accounts receive less than \$10 per year. Interior maintains thousands of accounts that contain less than one dollar, and has a responsibility to provide an accounting to all account holders. In many cases the value of an Indian trust account is less than the cost of its administration.

Are account holders charged for trust services?

The Indian fiduciary trust does not charge for services to manage the natural resources of the trust or investment of trust funds. The Federal Government bears the entire cost of administration. Virtually 100 percent of the income is returned to tribes and individuals.

Where are the assets invested?

By law, the Indian trust is limited to investments in government or government-backed securities. This decreases risk but also limits the potential for growth.

FOR INDIANS AND ACCOUNT HOLDERS

Where can I learn more about the settlement?

Information is available at www.cobellsettlement.com.

Who can I contact to update my address?

A toll-free hotline, set up for the settlement, will take your contact information at 1-800-961-6109.

Will I be included in the settlement?

You must be a member of the class in the Cobell litigation. You are eligible to participate if you had an IIM account open at any time between October 25, 1994 and September 30, 2009 and

your account had at least one transaction credited to it (“Accounting Class”). You are not eligible if you had filed your own accounting case prior to June 10, 1996.

There also is a new, second class created under the settlement for individuals who had an IIM account during the “electronic ledger era” (1985 to present) and individuals who as of September 30, 2009 had an ownership interest in land held in trust or restricted status even if you did not have an IIM account “Trust Administration Class.” A person is not eligible if you had filed a separate case before this settlement for mismanagement claims against the Department of the Interior.

What legal document/documents will I have to sign in order to receive the settlement?

For land conveyance, you will need to sign an application and deed(s).

Is the settlement pay out going to be distributed confidentially?

In the settlement, the federal government and the plaintiffs agree to take all appropriate steps to maintain the confidentiality of each class member’s information. The parties will need to share information with contractors hired to implement the settlement and make payments to class members. They will also be bound by confidentiality requirements.

Does this affect my status as a land holder?

If you choose to sell your interests, you will be paid fair market value for the land. In addition, a contribution will be made to a scholarship fund benefiting Indian students for each interest that you sell; however, only people who sell their interest early on will have a portion go to the scholarship fund. There is a cap of \$60 million that can go to the scholarship fund.

Do I have to give up my land if it is a fractionated share? At what level of fractionation?

It is up to you if you want to sell your fractionated share. We will focus the land consolidation program first on the most highly fractionated areas but there is no limit on the fractionated interests that the Interior Department will offer to buy and transfer to tribal communities.

How can I sell my land?

The process is being handled by the existing Indian Land Consolidation Program. Should you possess fractionated interests, an inventory with the value of your interests will be sent to you. You can select which interests you wish to sell. Once your selections are received, a deed will be sent and payment will be made through your IIM account.

Will I have to pay taxes on the compensation of the settlement that I receive?

If Congress passes the proposed settlement legislation, then you will not have to pay taxes on the settlement funds.

Is there a possibility of my money being garnished from other debts that I owe?

The plaintiffs’ class counsel will be responsible for distributing the funds to you. You are obligated to comply with any court orders or requirements to pay outstanding debts. These funds would most likely be subject to any garnishment proceedings or other restrictions that are in effect against you so you should look into that. We cannot offer you legal advice on this matter.

If I am a BIA employee, are there any exemptions or penalties for receiving the settlement?
There are no exemptions or penalties for receiving the settlement.