12-355
No. _____

In The
Supreme Court of the United States

CAROL EVE GOOD BEAR, CHARLES COLOMBE, and MARY AURELIA JOHNS,

Petitioners,

v.

ELOUISE PEPION COBELL, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a settlement class action can be approved over timely objections interposed by class members when the single point of requisite commonality found by the D.C. Circuit is by definition not a common issue of law or fact applicable to all members of the class.

II. Whether a mandatory settlement class action can be approved over timely objections by a class member that she should be permitted to opt out of the settlement that provides for only a monetary payment?

PARTIES TO THE PROCEEDING

Parties to this case include the named plaintiffs-appellees below, Elouise Pepion Cobell, Penny Cleghorn, Thomas Maulson, and James Louis Larose, all individual Indians and representative plaintiffs of the plaintiff classes certified by the district court in this case. Ms. Cobell died on October 16, 2011 and has not been replaced, nor has a personal representative been named. Penny Cleghorn appears as a replacement for her deceased mother Mildred Cleghorn who was an original plaintiff and certified class representative. Earl Old Person, another original plaintiff and certified class representative, was removed as a class representative early in the litigation. The remaining four individuals have been approved as representatives of two plaintiff classes certified below. The Historical Accounting Class consists of all individual Indians who were beneficial owners of Individual Indian Money Accounts administered by the Secretary of Interior during the record period in this case. The Trust Administration Class consists of all members of the Historical Accounting Class and also includes individual Indians who during the record period owned an interest in land held in trust by the United States or subject to restrictions imposed by the United States.

Also parties to the proceeding are defendants in the district court and defendants-appellees in the appellate court below, Kenneth Lee Salazar, Secretary of the U.S. Department of the Interior; Timothy Geithner, Secretary of the U.S. Department of the Treasury; and Interior Assistant Secretary-

Indian Affairs Larry Echohawk, all in their official capacities. Mr. Echohawk has departed government service and has not been replaced.

Petitioners here are Carol Eve Good Bear, Mary Aurelia Johns, and Charles C. Colombe, individual Indians and members of the plaintiff classes certified in this case. Ms. Good Bear and Mr. Colombe have opted out of the Trust Administration Class. Kimberly Craven, another individual Indian and member of both plaintiff classes, also appealed the approval of the settlement in this case. The same-day decision of her appeal by a separate panel of the Court of Appeals for the District of Columbia governed the disposition of two issues presented by Petitioners here.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Carol Eve Good Bear, Mary Aurelia Johns, and Charles C. Colombe respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia in this case.

OPINIONS BELOW

The judgment of the court of appeals (App., *infra*, 1a-3a) is not reported. The same-day judgment (No. 11-5205) of the court of appeals, disposing of two issues petitioned for review here, is reported at 679 F.3d 909 (D.C. Cir. 2012). The district court's December 21, 2010 order certifying the Trust Administration Class (App., *infra*, 59a) is not reported. The district court's order of July 27, 2011 granting final approval of the settlement agreement (App., *infra*, 33a) is not reported.

JURISDICTION

The court of appeals entered its judgment on May 22, 2012. App., *infra*, 1a. Petition for rehearing was not sought. On August 13, 2012, the Chief Justice recused, Mr. Justice Scalia extended the time for filing a petition for writ of certiorari to and including September 19, 2012. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT FEDERAL RULES AND STATUTES

The relevant provision of the federal rules, Federal Rule of Civil Procedure 23, is reproduced in full in the Appendix to the Petition (App., *infra*, 59a-65a). The relevant jurisdictional statute, Title I of the Claims Resolution Act of 2010, Pub. L. 111-291, 124 Stat. 364, *et seq.*, is reproduced in full in the Appendix (App., *infra*, 66a-74a).

STATEMENT OF THE CASE

This case is perhaps the longest-pending among the progeny of *Bowen v. Massachusetts*, 487 U.S. 879 (1988) in which this Court permitted a claim to proceed against the United State for monetary recovery under a theory of declaratory and equitable relief where a suit against the government for money damages would have been barred in the district courts. Plaintiffs in this case attempted to dance on the head of that pin for more than fourteen years until they sought from Congress putative jurisdiction to recover billions of dollars in a settlement that would resolve not only their original claims, but also much larger claims indisputably for money damages that both they and the district court had long expressly disclaimed as any part of this case.

In 1996 Elouise Cobell, a member of the Blackfeet Tribe, and four other individual Indians filed this suit seeking certification of a plaintiff class of all past and present Indian beneficiaries of Indian trust property administered by the United States.

Filed in the United States District Court for the District of Columbia, the suit demanded an accounting of all funds and assets held in trust for all past and present Indian beneficiaries, along with recovery of all funds determined to be due by these accountings.

In determining the court's jurisdiction under the waiver of sovereign immunity contained in the Administrative Procedure Act, 5 U.S.C. § 702, Judge Lamberth posed the question as one in which "... the crucial issue becomes whether the plaintffs' requested retrospective remedy of an accounting is ... simply a money damages claim in disguise." *Cobell v. Babbitt*, 30 F. Supp. 2d 24, 39 (D.D.C. 1998) (*Cobell* I). Following a searching analysis, which included, "... importantly, certain representations of the plaintiffs' counsel ...," the court concluded that "... the retrospective allegations of the Complaint seek solely an accounting. Thus, the plaintiffs do not seek money damages." *Id.*

Judge Lamberth then turned to "... the second issue – and the true point of impasse – ... whether plaintiffs seek anything beyond an accounting." Addressing the government's concern that the plaintiffs were not really interested in an accounting, but in "a cash infusion," the district judge pointed out that "*The plaintiffs have repeatedly and expressly stated that their Complaint does not seek an additional infusion of money or other damages for other losses, but requests only an accounting.*" *Id.* at 39-40 (*emphasis added*). Noting that the government's concerns with the language of

the complaint were reasonable, Judge Lamberth modified the complaint before him substantially.

***

5. The following language is hereby stricken from the Complaint as irrelevant to the plaintiffs' claim for relief:

(1) "The true totals would be far greater than those amounts, but for the breaches of trust herein complained of." Plaintiffs' Complaint P 2;

(2) "[Defendants] have lost, dissipated, or converted to the United States' own use the money of the trust beneficiaries." Id. P 3(d);

(3) "and to direct [the defendants] to restore trust funds wrongfully lost, dissipated, or converted." Id P 4;

(4) "Failure to exercise prudence and observe the requirements of law with respect to investments and deposit of IIM funds, and to maximize the return on investments within the constraints of law and prudence." Id 21(g).

The elimination of these references conforms the Complaint to the plaintiffs' theory of their case and eliminates the basis for the

> government's concerns that the plaintiffs are asking this Court to order a cash infusion into the accounts."

Cobell v. Babbitt, 30 F. Supp. 2d 24, 40 n. 18, (D.D.C. 1998). The complaint in this case, as modified by Judge Lamberth in November 1998, remained the operative claim for relief in this case for more than twelve years, until the present Amended Complaint was filed on December 21, 2010.

The Court of Appeals for the D.C. Circuit eventually affirmed Judge Lamberth's subsequent ruling, *Cobell v. Babbitt*, 91 F. Supp. 2d 1 (1999) (D.D.C.), that the government was, indeed, in breach of its fiduciary obligations to provide an accounting to Indian trust beneficiaries. *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001). For several years, the case moved between the district court and the appeals court as the parties litigated the scope of the accounting required as well as a number of collateral issues. Eventually, Judge Robertson, who had succeeded Judge Lamberth in the case announced that, "Indeed, it is now clear that completion of the required accounting is an impossible task." *Cobell v. Kempthorne*, 532 F. Supp. 2d 37, 39 (D.D.C. 2008).

Following the determination that the required accounting was simply impossible, Judge Robertson conducted a searching trial to determine whether and to what extent plaintiffs might be entitled to a monetary recovery on the basis of their theory of restitution. Upon conclusion of that proceeding, the judge said of the plaintiffs' case,

> My overall conclusion about plaintiffs' model is that it cannot be used as a representation or even an estimate of the amount of trust funds that the government has failed to disburse or post to IIM accounts. Instead of providing unbiased opinions, plaintiffs' expert witnesses essentially provided plaintiffs with a way to put a dollar value on their argument that all data that favors the plaintiffs may be treated as admitted, and all data that disfavors them must be proven by the government with discrete, transactional evidence.

Cobell v. Kempthorne, 569 F. Supp. 2d 223, 234 (D.D.C. 2008). The judge reviewd the more than 120-year history of Indian trust fund administration during which some $13 billion had passed through those accounts and found the government's accounting model and methodology credible. Nevertheless, because "the government can say only that, with 99 percent confidence, it believes that no more than $ 455,600,000 is missing from the stated balance of the IIM trust[,]" the judge awarded that amount to plaintiffs *Id.* at 252.

In his earlier ruling regarding impossibility of the required accounting, the district judge pointed out that even the accounting required by law would not account for all trust funds because many revenues from trust land simply do not pass through the system of Individual Indian Money accounts administered by the Secretary of Interior. The terms

of some Indian leases provide for lessees to make payment directly to landowners, and those monies never pass through Individual Indian Money (IIM) accounts. Those "direct pay" funds would not be accounted for, and are simply not "taken into trust" by Interior, though generated by use of Indian trust lands. *Cobell v. Kempthornem*, 532 F. Supp. 2d 37, 77 (D.D.C. 2008).

In his ruling in which he granted an award of $455,600,000 Judge Robertson was careful to announce explicitly that his award did not include any amount for "damages," which would have included payment for funds lost or stolen, monies owed but not collected, failure to achieve market value in leases or sales of trust assets, or for mismanagement of trust assets. *Cobell v. Kempthorne*, 569 F. Supp. 223, 226 (D.D.C. 2008).

On interlocutory appeal, the D.C.Circuit vacated the district court's earlier ruling that the required accounting is impossible and remanded with guidance that very significantly restricted the scope and level of accounting sought by plaintiffs. *Cobell v. Salazar*, 573 F.3d 808, 814-15 (D.C. Cir. 2009). The appeals court also noted the award of $455,600,000 was "unproven," and vacated that order as well. *Id.* at 810.

There the case stood when the present settlement was announced on December 7, 2009. The settlement provided that an amended complaint would be filed setting forth two plaintiff classes. Generally, a Historical Accounting Class, would consist of individuals who had an IIM account with

at least one cash transaction between October 25, 1994 and September 30, 2009. A Trust Administration Class would consist of all members of the Historical Accounting Class, plus all individuals who owned an interest in trust or restricted Indian land between 1985 and September 30, 2009 regardless of the existence of an IIM account and regardless whether any trust funds were generated from the land. A settlement fund of $1.412 billion would be created from which each member of the Historical Accounting Class would be paid $1,000. The remainder of the fund, after expenses and attorney fees, would be paid to members of the Trust Administration Class according to a formula based on the amount of money that had passed through their accounts during the settlement period. *Cobell v. Salazar*, 679 F. 3d 909, 914 (D.C. Cir. 2012).

Because the Trust Administration Class settlement would resolve all claims for damages arising from the administration of trust assets (App. 10a), a special jurisdictional statute would be required to confer jurisdiction on the district court to entertain the amended Complaint. On December 8, 2010 Congress enacted the Individual Indian Money Account Litigation Settlement Act as Title I of the Claims Resolution Act of 2010. App. 66a-74a, purportedly conferring jurisdiction on the district court *"for purposes of the settlement" (emphasis added). Id.* at 68a.

Petitioners filed timely objections to the settlement and appealed the district court's grant of final approval of the settlement. Petitioners

claimed, *inter alia*, that the representative plaintiffs for the Trust Requirement Class did not meet the requirement of commonality required to maintain the action. Ms. Good Bear in particular argued that she should have been afforded an opportunity to opt out of the mandatory Historical Accounting Class which, presented with the settlement agreement, sought no declaratory or injunctive relief at all, but merely a monetary payment. The appeals were consolidated and the court of appeals affirmed the district court's approval of the settlement.

REASONS FOR GRANTING THE WRIT

The D.C. Circuit's holding that the representative plaintiffs meet the requirement for commonality required to represent absent class members in the Trust Administration Class is palpably wrong and clearly erroneous. As the appeals court itself noted, the Trust Administration Class consisted not only of individuals who had IIM accounts during the settlement period, but also individuals who owned interests in trust or restricted land, "... *regardless of the existence of an IIM account.*" App. 9a *(emphasis added).* In justifying its conclusion that the representative plaintiffs meet the requirement of commonality, the court of appeals offered the singular proposition that "... all of the class members' trust claims revolve around resolution of a single issue — the extent of the Secretary's fiduciary obligation as trustee of the IIM accounts." App. 27a. That simply cannot be the case since by definition this class consists of all IIM account holders, *as well as others regardless of the existence of an IIM account.*

Ms. Good Bear in particular claims she should be allowed to opt out of the Historical Accounting Class because this class is presented not for trial or determination of the rights of class members, but for surrender of those rights in return for a cash payment. The appeals court acknowledges that where money damages are sought, due process requires notice, an opportunity to be heard, adequate representation, and "the right of class members to opt out[.]" App. 26a. The panel in these appeals found itself bound by the decision in Ms. Craven's appeal, App. 2a. The Craven panel on the same day explicitly held that the payment to the Historical Accounting Class was "... *in exchange for* the release of the Secretary of Interior's 'obligation to perform a historical accounting ..." (App. 10a) (*emphasis added*). Even the *Bowen* Court would have found this to be a classic form of money damages ("Damages are given to the plaintiff *to substitute* for a suffered loss[.]" *Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988) (*emphasis added*). The courts below should not be permitted to continue to dance on the head of the *Bowen* pin at the expense of the due process rights of absent class members, especially in an action that is presented not for adjudication of rights, but solely for settlement.

I. THE D.C. CIRCUIT'S DECISION ON COMMONALITY REGARDING THE TRUST ADMINSITRATION CLASS DEFIES RECENT CLASS ACTION JURISPRUDENCE IN THIIS COURT

The Trust Administration Class certified here is composed of IIM account holders who have no interest in trust or restricted lands, but who have either inherited funds or have been recipients of tribal distributions. It will also contain Indian landowners who do not have IIM accounts at all, as Judge Robertson carefully noted. *Cobell v. Kempthorne*, 532 F. Supp. 2d 37, 77 (D.D.C. 2008). Among those landowners, it will be composed of Indians who have not been paid at all for trust resources removed from their lands. It will include owners of valuable mineral property. *See, e.g., Shirley Delgado v. Actng Anadarko Area Director*, 27 IBIA 65 (1994) (individual Oklahoma Kickapoo Indian had been underpaid more than $1 million for oil produced from his land). It will include owners of valuable rain forest timber on the Olympic Peninsula. *See, e.g., Mitchell v. United States*, 463 U.S. 206 (1983). Throughout the length and breadth of the Western United States and Alaska, individual Indians own a "vast and sprawling" range of land-based assets held in trust by the United States.

This Court's jurisprudence regarding the requirement that a plaintiff must have shared of suffered the same injury as those he would represent was referred to as the "general rule," almost a

century ago. *See, McCabe v. Atchison, T. & S.F.R, Co.*, 235 U.S. 151, 164 (1914). Recent class action decisions of this Court have maintained inviolate the requirement that representative plaintiffs "must be part of the class and possess the same interest and "suffer the same injury shared by all members of the class he represents." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974).

There is no record that either court below conducted the slightest inquiry into the commonality required for maintenance of a class action. This is clearly not a plaintiff class that presents issues clearly enough in the pleadings to determine whether absent parties are fairly encompassed by claims common to the representative plaintiffs, nor is there any evidence that the courts below "... probed behind the pleadings before coming to rest on the certification question." *General Tel Co. v. Falcon*, 457 U.S. 147, 160 (1982).

Most recently, on the very day that the trial judge announced from the bench his approval of this settlement agreement, this Court handed down its decision in *Wal-Mart Stores, Inc., v. Dukes*, 131 S. Ct. 2541 (June 20, 2011). To paraphrase Chief Judge Kozinski of the 9th Circuit writing in dissent, but quoted approvingly by this Court in *Wal-Mart*, the members of the Trust Administration Class "... have little in common but their [race] and this lawsuit." *Id.* at 2557.

The justification offered by the appeals court for approving the certification of the Trust Administration Class is clearly erroneous on its face.

And because it is palpably clear, after more than sixteen years of litigation, that maintenance of this *Bowen* dance has not advanced "the efficiency and economy of litigation which is a principal purpose of the [class action] procedure." *General Tel. v. Facon*, *supra*, at 159, *quoting American Pipe & Construction v. Utah*, 414 U.S. 538, 553 (1974), this Court should reverse the court of appeals summarily and direct the Amended Complaint to be dismissed. At some point, some Court must say, as this Court did recently, "This case is at an end." *United States v. Navajo Nation*, 556 U.S. 287, 302 (2009).

II. THE DECISION OF THE COURT OF APPEALS NOT TO PERMIT ABSENT CLASS MEMBER WHO TIMELY OBJECTED TO OPT OUT OF THE HISTORICAL ACCOUNTING CLASS SHOULD BE REVERSED

The panel below found itself bound by a same-day decision of another panel's ruling that no opt out procedure was required for the mandatory Historical Accounting Class in this settlement. That panel had clearly acknowledged that due process requires a class action settlement for money damages to permit absent class members, *iner alia*, an opportunity to opt out of the settlement. App. 26a. Through a verbal legerdemain that borders on sophistry, the parties below had presented a mandatory settlement class that sought nothing more than a monetary payment as a substitute for a legal duty owed the class members. The Historical Accounting Class in the Amended Complaint,

presented solely for purposes of a cash payment to class members, cannot in any meaningful sense by said to present a claim for declaratory or injunctive relief, as required for certification under Rule 23(b)(2).

The appeals court found that count I of the Amended Complaint presented a claim for injunctive and declaratory relief, and certification under the mandatory provisions of Rule 23(b)(2) was appropriate. App. 16a. This Court has recently emphasized, however, that "Rule 23 does not set forth a mere pleading standard." *Wal-Mart*, *supra*, at 2551. "A party seeking class certification must be prepared to prove *in fact*..." that requirements of the Rule are met. *Id.* This Court there cited its holding in *General Tel. v. Falcon*, *supra*, that " ... it may sometimes be necessary to probe behind the pleadings before coming to rest on the certification question." *Id.* Any inquiry into behind the pleadings in this Amended Complaint would reveal that the district court was granted jurisdiction only for purposes of the settlement, and the settlement provided only for monetary payment in exchange for the right plaintiffs proposed to surrender on behalf of absent parties. Even the dissent in *Wal-Mart* agreed in that case that certification under Rule 23(b)(2) was inappropriate because the plaintiffs there sought monetary relief that "... is not incidental to any injunctive or declaratory relief that might be available." *Id.* at 2561 (Ginsburg, J., *concurring in part and dissenting in part*).

Petitioners respectfully suggest that this Court should reverse that ruling since this Amended

Complaint was filed under a jurisdictional statue that purported to confer jurisdiction for only purposes of this settlement, and the settlement agreement expressly provides for only a monetary payment that emphatically is not incidental to any injunctive or declaratory relief. Indeed, no injunctive or declaratory relief at all is available under terms of the settlement. Rather, this is a case in which, in its role of continuing jurisdiction and supervision, the court should have adjusted the class certification to fit the realities of the case. Because no injunctive or declaratory relief was sought at all, *in fact*, in the settlement action presented by the Amended Complaint here, continued certification under Rule 23(b)(2) was not proper, at least when timely challenged by absent class member Good Bear who sought to opt out of the class to preserve her own rights.

Refusing to permit her to opt out of the Historical Accounting Class was a clear denial of her due process rights under the pellucid rulings in recent class action decisions by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the case set for plenary review. Alternatively, the decisions of the Court of Appeals for the District of Columbia that governed the disposition of these appeals below should be summarily reversed or vacated and remanded for further consideration in light of the crystalline holdings of this Court designed to protect the jurisprudential value of class action litigation in

a manner consistent with the due process rights of absent class members. Since it is clear that the parties below have discovered use of the settlement class device, *see, e.g.*, *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F. 3d 768, 790-93 (3d. Cir. 1995), and remain masters of their own agreement, they should be able to fashion one that respects the rights of absent class members.

Respectfully submitted,

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Pub. L. No. 111-291, 124 Stat. 3064,
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[Entered: May 22, 2012]

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-5270 **September Term, 2011**
FILED ON: MAY 22, 2012

ELOUISE PEPION COBELL, ET AL.,
APPELLEES

CAROL EVE GOOD BEAR, ET AL.,
APPELLANTS

v.

KENNETH LEE SALAZAR, SECRETARY OF THE INTERIOR, ET AL.,
APPELLEES

Consolidated with 11-5271, 11-5272

Appeals from the United States District Court
for the District of Columbia
(No. 1:96-cv-01285)

Before: BROWN and GRIFFITH, *Circuit Judges*, and GINSBURG, *Senior Circuit Judge*.

JUDGMENT

This appeal was considered on the record from the district court and on the briefs and the oral

arguments of the parties. Although the issues presented occasion no need for a published opinion, they have been accorded full consideration by the Court. See Fed. R. App. P. 36; D.C. Cir. Rule 36(d). For the reasons stated below, it is

ORDERED and **ADJUDGED** that the orders of the District Court be affirmed.

The appellants raise four objections to the multi-billion dollar settlement of this class action. Two of these arguments are foreclosed by another decision of this court, *Cobell v. Salazar*, No. 11-5205 (D.C. Cir. May 22, 2012),* in which the court concluded that the settlement at issue in this case is fair and comports with the requirements of due process and of Federal Rule of Civil Procedure 23, *see id.*, slip op. at 12–13, 16–22.

The appellants' other two arguments, that the district court lacked jurisdiction and that the district judge should have recused himself, are utterly without merit. As to the first, the appellants' claim that the adverseness required for an Article III case or controversy ends when the parties to a dispute reach a settlement subject to court approval is contrary to all precedent and to common sense. As to the second, it is based upon the blatant mischaracterization that certain statements made by the district judge at a status conference were made "out of court."

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* The relevant facts are as stated in that opinion.

The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

[Entered: May 22, 2012]

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 16, 2012 Decided May 22, 2012

No. 11-5205

ELOUISE PEPION COBELL, ET AL.,
APPELLEES

KIMBERLY CRAVEN,
APPELLANT

v.

KENNETH LEE SALAZAR,
SECRETARY OF THE INTERIOR, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:96-cv-01285)

Theodore H. Frank argued the cause and filed the briefs for appellant.

Anand V. Ramana was on the brief for *amicus curiae* Competitive Enterprise Institute in support of appellant.

Thomas M. Bondy, Attorney, U.S. Department of Justice, argued the cause for federal appellees.

With him on the briefs were *Tony West*, Assistant Attorney General, *Ronald C. Machen, Jr.*, U.S. Attorney, and *Adam C. Jed* and *Brian P. Goldman*, Attorneys. *R. Craig Lawrence*, Assistant U.S. Attorney, entered an appearance.

Adam H. Charnes argued the cause for appellees Elouise Pepion Cobell, et al. With him on the briefs were *David C. Smith*, *Richard D. Dietz*, *Michael Alexander Pearl*, *Keith M. Harper*, *Dennis M. Gingold*, *William E. Dorris*, and *Elliott Levitas*.

Heidi A. Drobnick was on the brief for *amicus curiae* Indian Land Tenure Foundation in support of appellees.

Before: ROGERS, TATEL and BROWN, *Circuit Judges*.

Opinion for the Court by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: This is an appeal from the approval of a class action settlement agreement related to the Secretary of the Interior's breach of duty to account for funds held in trust for individual Native Americans. Class member Kimberly Craven challenges the fairness of the settlement, contending principally that an impermissible intra-class conflict permeates the scheme to compensate class members for surrendering their established right to injunctive relief and that this conflict undermines the commonality, cohesiveness, and fairness required by Federal Rule of Civil Procedure 23 and due process. The record, however, fails to confirm either the existence of the purported intra-class conflict or a

violation of due process. Rather, the record confirms that the two plaintiff classes possess the necessary commonality and adequate representation to warrant certification, and that the district court, therefore, did not abuse its discretion in certifying the two plaintiff classes in the settlement or in approving the terms of the settlement as fair, reasonable, and adequate pursuant to Rule 23(e). Accordingly, we affirm the judgment approving the class settlement agreement.

I.

In 1996, Eloise Cobell and four other Native Americans filed a class action alleging a breach of fiduciary duties by the Secretary in managing the class members' "Individual Indian Money" ("IIM") trust accounts. "The bulk of the trust assets 'are the proceeds of various transactions in land allotted to individual Indians under the General Allotment Act of 1887, known as the Dawes Act.'" *Cobell v. Salazar* ("*Cobell XXII*"), 573 F.3d 808, 809 (D.C. Cir. 2009) (citation omitted). The class, certified pursuant to Federal Rule of Civil Procedure 23(b)(1)(A) and (b)(2), sought injunctive and declaratory relief in the form of an historical accounting. *Id.*[1] Their right to an historical accounting arose under the American Indian Trust Fund Management Reform Act of 1994 ("the 1994 Act"), 25 U.S.C. § 162a *et seq.* (2006); *id.* §§ 4001–4061. *Cobell XXII*, 573 F.3d at 810. The Act did not specify, however, the proper scope of such an

[1] The background and the course of the litigation prior to the proposed settlement agreement entered into on December 7, 2009, can be found in *Cobell v. Norton*, 240 F.3d 1081, 1086–94 (D.C. Cir. 2001), and *Cobell v. Kempthorne* ("*Cobell XX*"), 532 F. Supp. 2d 37, 39–42 (D.D.C. 2008).

accounting or the methodology by which it could be accomplished. *Id.* at 813; *Cobell XX*, 532 F. Supp. 2d at 42. During the initial stages of the litigation, the Secretary proposed several plans for accomplishing an accounting. *See Cobell XX*, 532 F. Supp. 2d at 47–56. For example, in a 2002 report to Congress, the Secretary described plans "to conduct a transaction-by-transaction reconciliation of all funds in the IIM accounts through December 31, 2000," and to provide historical statements of account for each account. *Id.* at 48. The estimated cost was $2.425 billion. *Id.* Congress "request[ed] that the Secretary 'promptly consider ways to reduce the costs and the length of time necessary for an accounting . . . [including] alternative accounting methods.'" *Id.* The Secretary then developed a plan in 2003, which was to rely on statistical sampling and use only limited transaction-by-transaction reconciliation, at an estimated cost of $335 million. *Id.* at 48–49. "Between 2003–2007, however, not only did Interior receive only $127.1 million in appropriations for its IIM historical accounting work, but it also discovered that the accounting process it had envisioned would be both more costly and more time-consuming than it had anticipated." *Id.* at 56. Consequently, as the litigation entered its eleventh year, the issue of the proper scope and methodology of an historical accounting had yet to be resolved. In October 2007, the district court held a trial to address these and other questions.

At trial, the Secretary offered evidence regarding the latest plan ("the 2007 Plan") for accomplishing an historical accounting in compliance with the 1994 Act. The 2007 Plan relied on statistical sampling for account and transaction

reconciliation to an even greater extent than the 2003 Plan. In addition, the total number of transactions to be reconciled was significantly reduced, and the provision of asset statements to account beneficiaries was eliminated. *See id.* at 56–58. The Secretary's explanation for these changes to the scope and methodology of the proposed accounting echoed those offered in 2003 for tailoring the 2002 proposal: "Original cost and time estimates were off by several multiples, and Congress failed to appropriate the funds Interior had requested and expected." *Id.* at 58. The 2003 Plan was now estimated to cost $1.675 billion to complete, with an average cost of $3,000 to $3,500 for reconciliation of a *single* transaction. *Id.* In contrast, the Secretary estimated completion of the 2007 Plan would cost $271 million. *Id.* at 81. Despite the reduced ambitions of the 2007 Plan, the average cost of the accounting for a single transaction still would likely exceed the average value of that transaction, *id.* at 92, and, more significantly, the 2007 Plan would "not provide beneficiaries with information about the assets from which IIM funds ha[d] been derived," *id.* at 98.

Given this state of affairs and the likelihood of many more years of litigation, the parties entered into settlement negotiations in the summer of 2009. On December 7, 2009, the parties entered into a class settlement agreement. *See* Class Action Settlement Agreement, Ex. 2 to Joint Mot. For Prelim. Approval of Settlement, *Cobell v. Salazar* (No. 1:96- cv-01285) (Dec. 10, 2010). We describe its basic parts:

First, an amended complaint would be filed setting forth two classes:

(1) the Historical Accounting Class, consisting of individual beneficiaries who had an IIM account (with at least one cash transaction) between October 25, 1994 (the date on which the 1994 Act became law) and September 30, 2009 (the "record date" of the parties' agreement),[2] *id.* § A ¶ 16, and

(2) the Trust Administration Class, consisting of the beneficiaries[3] who had IIM accounts between 1985 and the date of the proposed amended complaint as well as individuals who, as of September 30, 2009, "had a recorded or other demonstrable ownership interest in land held in trust or restricted status, regardless of the existence of an IIM [a]ccount and regardless of the proceeds, if any, generated from the [l]and," *id.* § A ¶ 35.

The settlement envisioned that the Historical Accounting Class would be certified pursuant to Rule 23(b)(1)(A) and 23(b)(2), in the alternative, with no individual right to opt out of the class; the Trust Administration Class would be certified pursuant to Rule 23(b)(3) with an opt-out right. *Id.* § B ¶ 4.b.

Second, the Secretaries of Interior and Treasury would deposit $1.412 billion into a

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[2] The Historical Accounting Class excluded individuals who, prior to the filing of the original class action, filed actions on their own behalf for accountings.

[3] The Trust Administration Class excluded individuals who, prior to the filing of the amended complaint on December 21, 2010, filed actions on their own behalf for claims that would have otherwise fallen under the claim release entered into by the Trust Administration Class.

settlement fund. *Id.* § E ¶ 2.a. From this fund, each member of the Historical Accounting Class would receive $1,000, *id.* § E ¶ 3.a, in exchange for the release of the Secretary of Interior's "obligation to perform a historical accounting of [the class member's] IIM Account or any individual Indian trust asset," *id.* § I ¶ 1. The Trust Administration Class members would receive a baseline payment of $500 plus an additional *pro rata* share of the remaining settlement funds in accordance with an agreed upon compensation formula. *Id.* § E ¶ 4.b. The Trust Administration Class payment would release the Secretary from liability arising out of any past mismanagement of IIM accounts and trust properties. The scope of that release would not be unlimited: for example, claims for payment of existing account balances, breach-of-trust claims arising after September 30, 2009, and water-rights claims would fall outside of its scope. *Id.* § I ¶¶ 2–3.

Third, in addition to the class and compensation structure, the proposed settlement provided for:

(1) establishment of a $1.9 billion Trust Land Consolidation Fund for the Secretary to acquire fractional interests in trust lands, *id.* § A ¶ 36, § F ¶ 2, § G ¶ 2.c;

(2) establishment of an Indian Education Scholarship Fund, *id.* § G ¶ 1;

(3) potential tax-exempt status, at the election of Congress, for funds received by the class members, *see id.* § H;

(4) reasonable attorneys' fees, expenses, and costs for class counsel, to be awarded at the discretion of the district court, *id.* § J; and,

(5) incentive payments for the class representatives, to be awarded at the discretion of the district court, *id.* § K.

The proposal also stated that the class settlement agreement was contingent upon the enactment of legislation by Congress to authorize certain aspects of the settlement. *Id.* § B ¶ 1.

In 2010, Congress enacted the Claims Resolution Act of 2010 ("the CRA"), Pub. L. No. 111-291, 124 Stat. 3064 (Dec. 8, 2010), which "authorized, ratified, and confirmed" the proposed settlement, *id.* § 101(c)(1). It also authorized the district court to certify the Trust Administration Class without regard to the requirements of the Federal Rules of Civil Procedure, and provided that such a certification would be treated as a certification pursuant to Rule 23(b)(3). *Id.* § 101(d)(2). The CRA appropriated funds including funds for the settlement and land-consolidation funds. *Id.* § 101(e)(1)(C)(I), (j)(1)(A). Settlement funds received by class members would be tax-exempt under the Internal Revenue Code. *Id.* § 101(f). Congress also increased the total amount of the settlement fund by $100 million, from $1.412 billion to $1.512 billion, *id.* § 101(j)(1)(A), resulting in approximately a $300 increase in the baseline payment (from $500 to $800) due members of the Trust Administration Class.[4]

On December 10, 2010, the parties filed a joint motion for preliminary approval of the class

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[4] *See* Decl. of Michelle D. Herman at ¶¶ 38, 39, *Cobell v. Salazar* (No. 1:96-cv-01285) (May 16, 2011).

settlement agreement, which the district court granted on December 21, 2010. The district court also certified the Historical Accounting Class pursuant to, in the alternative, Rule 23(b)(1)(A) and (b)(2), and the Trust Administration Class pursuant to, in the alternative, CRA § 101(d)(2) and Rule 23(b)(3). Appellant Kimberly Craven and ninety-one other class members filed timely objections. At a fairness hearing on June 20, 2011, the district court heard testimony from objecting class members, including Craven's intra-class conflicts objections, along with arguments in support of the settlement agreement by counsel for the plaintiff class and the Secretary. At the close of the hearing the district court explained why it concluded the settlement was fair, reasonable, and adequate. We summarize relevant parts.

To begin, the district court acknowledged the objectors' concerns and that the settlement "may not be . . . as fortuitous as some wished and do[es not] provide redress for their wrongs." Fairness Hr'g Tr. at 217. Nonetheless, the district court explained that it was "not persuaded that striking a different balance would have been either achievable in the negotiating process or more favorable to more members of the class," *id.*, nor "that a better result would have been achieved by taking this case to trial," *id.* at 218. First, the parties were facing "years of litigation . . . with rather dubious chances of ultimate success." *Id.* at 213. They had "found a way out of the morass that the Court of Appeals said [it] saw no easy exit from," and "after 15 years of bitter litigation [the parties had] . . . entered into a settlement agreement to resolve the issues in this case, . . . not to resolve every single claim that the

Native Americans may have against the government." *Id.* at 214. Second, "[t]his settlement at least now provides some measure of certainty for most class members," whereby "[t]he vast majority of class members are entitled to automatic recovery under the historical accounting, and . . . those under the trust accounting would [be] provide[d] other monies that they can show they are due." *Id.* at 217. The settlement does so, moreover, in the absence of evidence of an intra-class conflict among the Historical Accounting Class by providing a nondamages payment of $1,000 to each class member. As for the Trust Administration Class, it has the commonality, numerosity, and typicality required by Rule 23. *See id.* at 233. Third, the settlement is reasonable and adequate because it "affords substantial benefits," with "a total settlement of $3.4 billion." *Id.* at 235. Obtaining Congressional approval and avoiding Presidential disapproval of the settlement was, the district court observed, "a remarkable accomplishment by all sides." *Id.* at 215.

By order of July 27, 2011, the district court granted final approval to the class settlement agreement that the lawsuit be settled and that the United States pay $3.412 billion — $1.512 billion to the settlement fund and $1.9 billion to the land consolidation fund — in accordance with the terms of the settlement agreement and the CRA. Among other actions, the order set forth the scope of the two plaintiff classes and their respective claim releases, listed the individuals who had chosen to opt out of the Trust Administration Class, and awarded attorneys' fees and incentive payments to the remaining class representatives, while denying most

requested additional expenses.[5] A final judgment was signed and entered August 4, 2011. Craven appeals the judgment and related orders.

II.

A.

As an initial matter, Craven contends that the law of the case bars approval of the settlement agreement. She points to *Cobell XXII*, where this court vacated the judgment in favor of the plaintiff class and the order of a restitution award, holding that such an award would be arbitrary, inaccurate, and unfair to some class members in the absence of an historical accounting, 573 F.3d at 813. A lump-sum award, whose magnitude was of uncertain origin, the court stated, was an improper equitable judgment for the class's claim; "without an accounting, it is impossible to know who is owed what," and so "[t]he best any trust beneficiary could hope for would be a government check in an arbitrary amount." *Id.* Although *Cobell XXII* did address the issue of a remedy for the historical-accounting claim, the law-of-the-case doctrine has no application here.

Under the law-of-the-case doctrine, "the *same* issue presented a second time in the *same* case in the *same court* should lead to the *same result*." *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc) (emphasis in original). *Cobell XXII* involved the same case, the same court, and the same parties

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[5] Plaintiffs' attorneys were awarded $99 million in fees. Eloise Cobell, James Louis LaRose, Penny Cleghorn, and Thomas Maulson — the class representatives — were awarded incentive payments respectively of $2 million (inclusive of her expenses), $200,000, $150,000, and $150,000.

as the current appeal, but the court's holding arose in a different context at an earlier stage of the litigation and the statements with regard to its holding spoke to a different issue — one that did not involve the terms of the class settlement agreement now under review. The court did not address, nor could it given the stage of the proceedings, the propriety or fairness of a two-class *settlement* involving *pro rata* as well as *per capita* payments. The distribution method for the lump-sum award had not yet been determined and so could not have been at issue in *Cobell XXII*, *see Cobell v. Kempthorne* ("*Cobell XXI*"), 569 F. Supp. 2d 223, 253 (D.D.C. 2008). Furthermore, the factors that guided the exercise of the district court's equitable power in addressing the claims for injunctive and declaratory relief under review in *Cobell XXII*, are distinct from those that govern the district court's approval of a settlement. *Compare Cobell XXII*, 573 F.3d at 813 (discussing the interplay of the 1994 Act and equitable principles in determining scope of an historical accounting) *with* FED. R. CIV. P. 23(e) (setting the procedure for approving a class settlement).

The class settlement agreement was the result of discussions post-dating *Cobell XXII* in which the parties, facing nigh insurmountable obstacles to achieving their original goal, decided to pursue another approach to resolving their protracted differences. Given the distinction between *Cobell XXII* and the current appeal, the law of the case does not foreclose approval of the class settlement agreement. To the extent Craven suggests that the lawsuit could be settled only for some type of historical accounting but not for monetary relief, her

contention fails, *see infra* Part II.B; to the extent she contests the fairness of the distribution scheme, her contentions also fail, *see infra* Part II.C.

B.

Craven contends with respect to the Historical Accounting Class that "a mandatory [Rule] 23(b)(2) class settlement without [an] opt-out right is inappropriate where relief is predominantly monetary, especially when individual class members are required to waive rights to injunctive relief already won in litigation." Appellant's Br. at 28 (capitalization removed). This argument mischaracterizes the Historical Accounting Class.

Rule 23(b)(2) provides for class certification where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief . . . is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2). Just such a circumstance presents itself here: the Secretary refused to provide an historical accounting to IIM account holders; their claim for injunctive and declaratory relief in Count I of the amended complaint applied to the Historical Accounting Class as a whole.

Craven disagrees. The $1,000 *per capita* settlement payment, she maintains, monetizes the historical-accounting claims so that what was a uniform, indivisible remedy becomes divisible and individualized, and therefore certification of the Historical Accounting Class pursuant to Rule 23(b)(2) is precluded by *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557–58, 2560 (2011). This is so, Craven says, because the historical accounting

has greater value to class members with significant trust-mismanagement claims, who may use the information from the accounting to obtain substantial monetary relief, than to those with negligible trust mismanagement claims for whom the accounting may provide little or no benefit. In other words, because some plaintiffs stand to gain more from claims based on the information an historical accounting would produce, the injunctive relief sought is worth more to them than it is to other class members.

Assuming that the $1,000 *per capita* settlement payment monetized the requested injunctive relief, certification of the Historical Accounting Class as a Rule 23(b)(2) class was nonetheless appropriate because of the unusual circumstances surrounding this litigation. Craven's argument ignores that the record developed through extensive and hard-fought litigation indicates that the different interests she alleges likely do not exist and that even if they do exist, they would not be revealed by the type of sampling-heavy accounting that would almost certainly occur if the plaintiff class prevailed in the litigation. *See* Fairness Hr'g Tr. at 213, 218; *Cobell XX*, 532 F. Supp. 2d at 56, 103. Interior had performed a fairly extensive accounting in the course of the litigation but found only minor discrepancies. At trial, the district court observed that "one permissible conclusion from the record would be that the [Secretary] has not withheld any funds from plaintiffs' accounts." *Cobell XXI*, 569 F. Supp. 2d at 238. This court's decision in *Cobell XXII* placed significant limits on the Secretary's accounting duty, clarifying that Interior need only provide "the best accounting possible . . .

with the money that Congress is willing to appropriate." 573 F.3d at 813. Given that any additional accounting funded by Congress would likely rely heavily on statistical sampling, even if latent intraclass conflicts did exist, they would be unlikely ever to be discovered. All of this suggests that the information produced from an historical accounting is not likely to be worth significantly more to some class members than to others, and thus the $1,000 settlement payment is properly viewed as nonindividualized and does not run afoul of *Wal-Mart*.[6]

Moreover, this case is extraordinary in that Congress not only expressly authorized, ratified, and confirmed the settlement, but also appropriated $3.4 billion to fund it. Although Congress made no express findings about the propriety of (b)(2) certification of the Historical Accounting Class, given the lengthy litigation and the limited funds available for further accounting, Congress's judgment that uniform payments would adequately compensate class members for an accounting right that it created carries significant weight and sets this case apart from others.

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[6] *See McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 490–92 (7th Cir. 2012) (citing FED. R. CIV. P. 23(b)(2), (c)(4); *Allen v. Int'l Truck & Engine Corp.*, 358 F.3d 469, 472 (7th Cir. 2004) (citing *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 898–99 (7th Cir. 1999))); *Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 433 (6th Cir. 2012); *see also* 2 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 4:14, at 105, § 4:20, at 145 (4th ed. 2002 & Supp. 2011).

C.

Craven also contends that the Trust Administration Class's distribution scheme is unfair under Federal Rule of Civil Procedure 23(e) "because it bears no relation to the underlying claims and perversely undervalues the claims of the most injured class members while providing windfalls to class members who have suffered little or no injury." Appellant's Br. at 23 (capitalization removed). Her challenge rests again on an alleged intra-class conflict that arises from the distribution scheme's under- and over-compensation of class members. Although disclaiming any suggestion that Rule 23(e) fairness requires a perfect allocation of payments among individual class members, *see* Appellant's Br. at 25, Craven nevertheless maintains that under the existing distribution formula, some members of the Trust Administration Class likely possess more valuable claims than do others and therefore the *per capita* baseline payment undercompensates the former while over-compensating the latter, an inequity that the *pro rata* payment does not remedy. As the district court found, however, the distribution scheme is fair, Fairness Hr'g Tr. at 219, and "[i]t is hard to see how there [c]ould be a better result," *id.* at 218, because Craven offers no persuasive evidence to support her claim of unfair compensation. Absent such evidence, Craven's intra-class conflict contention cannot undermine the overall fairness of the distribution scheme and she thus fails to demonstrate an abuse of discretion by the district court. *See Richards v. Delta Air Lines, Inc.*, 453 F.3d 525, 530 (D.C. Cir. 2006); *Pigford v. Glickman*, 206 F.3d 1212, 1216 (D.C. Cir. 2000).

1. The Secretary initially questioned Craven's standing to present this challenge because he understood her to claim only injuries to third parties and not to herself. *See* Appellees' Br. at 43 n.7. Craven's declaration disposes of that conjecture; it identifies how she is personally injured as a result of the district court's certification of both classes.[7] Craven Decl. ¶¶ 6–7, 11; *see also* 28 U.S.C. § 1653; *Am. Library Ass'n v. FCC*, 401 F.3d 489, 494 (D.C. Cir. 2005). Moreover, the Secretary's suggestion overlooks the fact that the two major components of the settlement — the Historical Accounting Class and the Trust Administration Class — are inextricably intertwined. The historical accounting

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[7] By sworn declaration, submitted in response to the court's call for supplemental briefing on standing, Craven states that she is "prejudiced by the settlement in multiple respects." Craven Decl. ¶ 2. Craven holds an interest in real property held in trust by the Secretary. *Id.* at ¶¶ 3, 5. Under the class settlement agreement, she is, according to the settlement administrator, entitled to a *per capita* payment of approximately $1,800 and a *pro rata* payment of approximately $600. *Id.* at ¶ 5. "Every dollar that the distribution formula provides to overcompensate *per capita* recipients thus disadvantages the subclass of class members like [Craven] who are entitled to *pro rata* distributions." *Id.* at ¶ 6. Craven further declares that her *pro rata* distribution will be reduced as a result of incentive payments to the class representatives. *Id.* Additionally, Craven states, and specifically explains a basis for, her belief that she has "a meritorious claim for trust mismanagement worth more than the approximately $2400 [she] will receive in the settlement." *Id.* at ¶ 7. In a similar fashion, she supports her belief that she "may have other claims for trust mismanagement" in connection with her real property that she is "unaware of because [she has] not yet been able to exercise [her] rights to a[n] historical accounting," rights which were extinguished by the settlement, *id.* at ¶ 11. *See id.* at ¶¶ 8–11.

that the plaintiff class sought — but which is taken away by the settlement — would have provided evidence of the value of each class member's IIM account and thereby shown, among other things, whether there was an intra-class conflict. The settlement agreement makes the challenges unseverable. *See* Class Action Settlement Agreement, § M ¶ 6. Craven thus has established a non-speculative basis for asserting an "injury in fact," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), that gives her standing to challenge not only the certification of the Historical Accounting and Trust Administration Classes but also the fairness of the Trust Administration Class's distribution scheme. Any other conclusion would prove a bitter irony for those who have lost their earned right to an historical accounting under the 1994 Act. *See Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 2012 WL 375249, at *2 (5th Cir. Feb 7, 2012) (citing *Devlin v. Scardelletti*, 536 U.S. 1, 6–7 (2002)); *cf. In re Vitamins Antitrust Class Actions*, 215 F. 3d 26, 28–29 (D.C. Cir. 2000).

2. Although Craven has standing to challenge the fairness of the distribution scheme on the basis of the alleged intraclass conflict, her contention fails on the merits. As an initial matter, Craven's discussion of a hypothetical conflict is an inadequate basis for vacating the class settlement agreement. *See Eubanks v. Billington*, 110 F.3d 87, 98 (D.C. Cir. 1997). And her concrete examples fare no better. Craven references congressional testimony (attached to a supplemental brief that the district court struck as untimely, *see infra* Part II.E) regarding the value of potential claims held by a particular class member. Other evidence indicates that the class

member's ancestor likely released his claim to oil and gas royalties in exchange for a lump-sum payment from his tribe when the tribal council, pursuant to a 1919 congressional Indian Appropriations Act, asserted tribal mineral rights.[8] *See also Cobell XX*, 532 F. Supp. 2d at 95–97. Even assuming those claims survived, that class member, like any other class member who is allegedly under-compensated by the distribution formula, could have opted out of the Trust Administration Class; the record indicates the class member at issue declined to do so.

Indeed, the existence of the opt-out alternative effectively negates any inference that those who did not exercise that option considered the settlement unfair. The district court, although acknowledging the possibility that some class members may not have read or fully understood the settlement-notice documents, was satisfied that the opt-out provision fulfilled its purpose of protecting objecting class members, Fairness Hr'g Tr. at 225, finding that the "extensive and extraordinary notice" procedures, *id.* at 230, ensured "hundreds of thousands" of class members "knew about th[e] settlement and understood what they were getting into and approved it," *id.* at 238. Craven does not suggest these findings are clearly erroneous. *See* FED. R. CIV. P. 52; *In re Vitamins Antitrust Class Actions*, 327 F.3d 1207, 1209 (D.C. Cir. 2003).

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[8] *See* HISTORICAL RESEARCH ASSOCS., MINERAL LEASING ON ALLOTTED INDIAN LANDS: U.S. GEOLOGICAL SURVEY INVOLVEMENT & HISTORICAL RECORDS ASSESSMENT 24–29 (2000) (labeled "Privileged and Confidential," but appearing in Pls.-Appellees' public appendix at 118–23).

Other portions of the record also contradict the inequity Craven alleges. The historical-accounting records examined thus far have revealed only minor errors in trust accounting. In 2007, Interior reported that it successfully traced 94.7% of over 47 million IIM transactions occurring between 1985 and 2007,[9] "reflect[ing] the reality that, in the absence of some kind of equitable evidentiary presumption in favor of the plaintiffs, one permissible conclusion from the record would be that the government has not withheld any funds from plaintiffs' accounts," *Cobell XXI*, 569 F. Supp. 2d at 238.

Craven's attempt to support her intra-class conflict attack by turning, in her reply brief, to the accounting received by the class representatives is not well taken. She maintains that, prior to the settlement agreement, the class representatives received historical accountings that showed their trust claims to be of little value; their interests therefore were in conflict with those of the rest of the class members who did not know how they would fare under the distribution scheme. First, as discussed, few if any class members are likely to have trust claims of substantial value. Second, even assuming Craven is properly responding to Plaintiffs-Appellees' argument that there is no conflict among unnamed class members, *see Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1001 (D.C. Cir. 2008), and that Craven could show that the distribution scheme did *over*-compensate the class

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[9] *See* DEPT'T OF THE INTERIOR, OFFICE OF HISTORICAL TRUST ACCOUNTING, DATA COMPLETENESS VALIDATION: INTERIM OVERALL REPORT 28 (2007) (Pls.-Appellees' App'x 194).

representatives, she has still failed to present persuasive evidence of class members who are *under*-compensated by the distribution scheme and thus failed to demonstrate the alleged conflict. Craven's evidence also does not establish that the distribution scheme over-compensates the class representatives. Only a partial accounting of the class representatives' IIM accounts was performed in 2001, which revealed "small variances" in the analyzed transactions. *Cobell XX*, 532 F. Supp. 2d at 50. The class representatives thus stand in the same position as all other class members — lacking the historical accounting to which they are entitled under the 1994 Act and therefore lacking accurate information from the Secretary of the value of their claims.

Furthermore, as mentioned, the record indicates that any feasible accounting would be unlikely to provide evidence of the alleged intra-class conflict. Craven's position leaves this problem unaddressed, neglecting to account for the changed circumstances during the fifteen years between the commencement of this litigation and its settlement in 2011. By the time the parties entered settlement negotiations following *Cobell XXII*, it had become clear that the Secretary would be unable to perform an accounting of the IIM trust under the 1994 Act with the degree of accuracy desired by the plaintiff class. *See Cobell XXII*, 573 F.3d at 813–15; *Cobell XX*, 532 F. Supp. 2d at 103. Trust records had been lost or destroyed, *Cobell XX*, 532 F. Supp. 2d at 45–46, fractional ownership rendered accounting difficult, *see Cobell XXI*, 569 F. Supp. 2d at 249, and changes to Interior's trust-accounting system had complicated accounting efforts, *see Cobell XX*, 532 F.

Supp. 2d at 43–44; HISTORICAL RESEARCH ASSOCS., *supra* note 8, at 25 (Pls.-Appellees' App'x 119). Preliminary work had revealed that even a partially complete accounting would be prohibitive in cost, *see Cobell XX*, 532 F. Supp. 2d at 81–82; the record was clear "on the tension between the expense of an adequate accounting and congressional unwillingness to fund such an enterprise," *id.* at 103 n.21. In view of these realities, this court in July 2009 instructed "the district court to use its equitable power to enforce the best accounting that Interior can provide, with the resources it receives, or expects to receive, from Congress." *Cobell XXII*, 573 F.3d at 811. This instruction underscored the reality that the original goal of the litigation — a complete historical accounting for each class member — would not be realized. Instead, any historical accounting that would result from continued litigation would likely be severely limited in scope, heavily restrained by cost, and thus unlikely to reveal the existence of — much less remedy — the intra-class conflict Craven alleges.

Viewed, then, not in the hypothetical light cast by Craven's challenge, but in the actual light illuminating the parties' negotiations, the district court reasonably concluded that the class settlement agreement offered a fair resolution of the plaintiff classes' claims free of impermissible intra-class conflict.

D.

Additionally, Craven challenges the certification of the Trust Administration Class as inconsistent with constitutional due process. She maintains that the commonality and cohesiveness

requirements of Rule 23 are of constitutional magnitude inasmuch as they inform adequacy of representation, which is a clear constitutional prerequisite to class certification. She relies on *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985), involving claims for money damages, as well as *Hansberry v. Lee*, 311 U.S. 32, 37 (1940), involving injunctive relief, and points to this court's acknowledgment of the due-process implications of adequate representation in *National Association for Mental Health, Inc. v. Califano*, 717 F.2d 1451, 1457 (D.C. Cir. 1983), and *Phillips v. Klassen*, 502 F.2d 362, 366 (D.C. Cir. 1974). Craven fails, however, to show that certification of the Trust Administration Class violated due process.

Where money damages are sought, due process requires: (1) adequate notice to the class; (2) an opportunity for class members to be heard and participate; (3) the right of class members to opt out; and (4) adequate representation by the lead plaintiff(s). *Phillips Petroleum*, 472 U.S. at 811–12. Given the district court's findings regarding the extensive notice of the proposed settlement that was provided to class members, the opportunity for class members to present their objections and participate in the fairness hearing, and the right to opt out, Craven's due-process objection boils down to a challenge to the adequacy of class representation. As Craven suggests, the adequate-representation element of due process overlaps with Rule 23(a)'s requirement that "there are questions of law or fact common to the class," FED. R. CIV. P. 23(a)(2). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 n.20 (1997). Under Rule 23(a), commonality requires that plaintiffs advance a "common contention" that

"must be of such a nature that it is capable of classwide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 131 S. Ct. at 2551. The Trust Administration Class satisfies this requirement. Although Craven characterizes the Class as "sprawling" and encompassing "dozens of wildly different theories of liability," Appellant's Br. at 42, all of the class members' trust claims revolve around resolution of a single issue — the extent of the Secretary's fiduciary obligation as trustee of the IIM accounts. To the extent Craven's commonality objection rests on the purported intra-class conflict between over- and undercompensated class members, her contention fails for lack of persuasive evidentiary support, *see supra* Part II.C.2.

Nor, as Craven maintains, did the district court's award of incentive payments to class representatives create an impermissible conflict requiring decertification of either class. To the extent Craven's argument that the incentive awards create an intra-class conflict hinges on the size of the incentive awards, her brief focuses on the class representatives' request, not on the terms of the class settlement agreement, the district court's findings, or the district court's actual award. Although the district court acknowledged in ordering the incentive payments that such awards "are routinely provided to compensate named plaintiffs for the services they provide and the risks they incur[] during the course of class-action litigation," Fairness Hr'g Tr. at 238, the class settlement agreement provided no guarantee that the class representatives would receive incentive payments; it

left that decision and the amount of any such payments to the discretion of the district court. The Secretary's opposition to the magnitude of the class representatives' proposed incentive payments highlighted the uncertain status of such payments at the time of the settlement. In describing Ms. Cobell's singular, selfless, and tireless investment of time, energy, and personal funds to ensure survival of the litigation as meriting an incentive award, the district court found such contributions undermined any attempt to imply that Ms. Cobell had improperly colluded with the Secretary to settle prematurely in order to collect a fee. *See id.* at 239. It also denied altogether the class representatives' request for expenses incurred prior to December 7, 2009 (the date of the settlement agreement), finding that, with the exception of Ms. Cobell, they had failed to show directly-incurred expenses; with regard to Ms. Cobell, her expenses were incorporated into her incentive payment.

Craven thus fails to show either an error of law or clear factual error in the district court's due-process analysis.

E.

Craven's other challenges also fail. First, the district court's reference to the small number of objectors was one of many observations, not a dispositive finding in its fairness analysis amounting to legal error. Nothing in the district court's observation was inconsistent with the caution that should be exercised in "inferring support from a small number of objectors to a sophisticated settlement," *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 812 (3d

Cir. 1995). *See also In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1137 (7th Cir. 1979).

Second, Craven fails to show that any prejudice resulted from the district court's striking of her supplemental brief as untimely, so the error, if any, was harmless. *See Burkhart v Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1214 (D.C. Cir. 1997). The district court allowed Craven's counsel to present those arguments at the fairness hearing. *See* Fairness Hr'g Tr. at 77–78. Even now Craven fails to identify any argument in her supplemental brief that was not presented to the district court.

Finally, Craven's general objection to the fairness of the class settlement agreement focuses on the information-deficit concern discussed previously: without an historical accounting, it is impossible to tell whether some members are being over-compensated while others are being undercompensated, and yet class members are being forced to surrender their right to an historical accounting and are thereby left without the information needed to establish the value of their claims. The protracted and contentious nature of this litigation underscores the reasonableness of the district court's evaluation of the fairness and adequacy of the class settlement agreement under Rule 23(e). Congress had shown no inclination to fund the historical accounting to which the plaintiff class was entitled under the 1994 Act. The question was could the class nonetheless benefit appropriately without it. Class counsel acknowledged that, despite significant work with existing data, efforts had failed to show significant accounting errors in the IIM

accounts, *see Cobell XXI*, 569 F. Supp. 2d at 238. The class settlement agreement was the result of an arms-length negotiation. What interests it protected and what benefits it provided were weighed by the district court, and considered in view of the class-member objections. The settlement acknowledged the plaintiff class' entitlement to an historical accounting and that the United States would pay for the surrender of that right and for trust claims in accordance with an agreed-upon formula. The settlement further provided that the Secretary would attempt to purchase fractional ownership shares to enable accurate accounting in the future in fulfilment of the Secretary's trust responsibilities. Congress has approved the settlement and appropriated the necessary funds. For Craven to characterize the settlement as "tak[ing] shortcuts to solve the problem at the expense of individual rights," Appellant's Br. at 13, and "tak[ing] a series of impermissible shortcuts that abuse the class action process to settle this case," *id.* at 15, is to ignore the history of this hard-fought litigation and the obstacles to producing an historical accounting.

Accordingly, we hold that in approving the class settlement agreement pursuant to Rule 23(e) the district court did not abuse its discretion in focusing on the significant benefits for each class member in view of the realities facing them after fifteen years of litigation, including multiple appeals, and we affirm the judgment certifying the two classes, approving the terms of the settlement, and encompassing the provisions of the July 27, 2011 order.

[Entered: August 4, 2011]

AO 450 (Rev. 01/09; DC-03/10)
Judgment in a Civil Action

UNITED STATES DISTRICT COURT
for the
District of Columbia

ELOUISE PEPION COBELL, ET AL
Plaintiff

v. Civil Action No. 96-cv-1285 (TFH)

KEN SALAZAR, ET AL
Defendant

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one):*

☐ the plaintiff *(name)* _____ recover from the defendant *(name)*_____ the amount of _____ dollars ($ _____), which includes prejudgment interest at the rate of _____%, plus postjudgment interest at the rate of _____%, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ recover costs from the plaintiff *(name)* _____.

☑ other: The Court has granted final approval of the parties' agreement that this action shall be settled and compromised and

that the defendant shall pay three billion four hundred and twelve million dollars ($3,412,000,000) in accordance with the terms set forth in the Class Action Settlement Agreement and Order Granting Final Approval to Settlement.

This action was *(check one):*

☐ tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

☐ tried by Judge _____ without a jury and the above decision was reached.

☑ decided by Judge Thomas F. Hogan on a motion for (Joint Motion) Final Approval of Settlement and Entry of Final Judgment

Date: 08/04/2011

ANGELA D. CAESAR,
CLERK OF COURT

/s/_____
Signature of Clerk or Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,

Plaintiffs,

v.

KEN SALAZAR, Secretary of the Interior, et al.,

Defendants.

No. l:96CV01285(TFH)

FILED
JUL 27 2011
Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

ORDER GRANTING FINAL APPROVAL TO SETTLEMENT

Background

On June 10, 1996, plaintiffs brought this class action seeking to enforce trust duties owed by the United States to individual Indian trust beneficiaries and redress breaches of trust by the United States and its trustee-delegates, the Secretary of the Interior, the Assistant Secretary of Interior-Indian Affairs, and the Secretary of the Treasury, regarding their management of Individual

Indian Money (IIM) accounts. The complaint sought, among other things, declaratory and injunctive relief construing the trust obligations of the defendants to members of the plaintiff class, and declaring that the defendants had breached, and were in continuing breach of, their trust duties to the plaintiff class members, an order compelling defendants to perform those legally mandated obligations, an accounting, and the correction and restatement of their IIM accounts. On February 4, 1997, this Court certified the then plaintiff class pursuant to F.R.C.P. 23(b)(1)(A) and (b)(2).

On December 21, 1999, this Court held, among other things, that defendants were in breach of certain of their respective trust duties and ordered defendants to provide plaintiffs with an accounting of their IIM accounts. *Cobell v. Babbitt ("Cobell V")*, 91 F. Supp. 2d 1 (D.D.C. 1999). The United States Court of Appeals for the District of Columbia Circuit affirmed in part and reversed in part, upholding the Court's determination that defendants were in breach of their trust duties and affirmed the government's duty to provide a historical accounting. *Cobell v. Norton ("Cobell VI")*, 240 F.3d 1081 (D.C. Cir. 2001).

The Court retained jurisdiction to ensure that the defendants discharged their trust duties and many more years of litigation ensued, including numerous trials and appeals. On July 24, 2009, the Court of Appeals reversed this Court's award of $455.6 million in restitution to plaintiffs and remanded the case to this Court while acknowledging that its "precedents do not clearly point to any exit from this complicated legal morass."

Cobell v. Salazar ("Cobell XXII"), 573 F.3d 808, 812 (D.C. Cir. 2009).

With the prospect of many more years of costly litigation and without any assurance to either party of a satisfactory result, the parties negotiated at arms length over the course of several months a comprehensive Class Action Settlement Agreement dated December 7, 2009 ("Settlement Agreement"). The parties also executed an Agreement on Attorneys' Fees, Expenses and Costs dated December 7, 2009 ("Agreement on Attorneys' Fees"). The parties have subsequently executed eight modifications to the Settlement Agreement and one modification to the Agreement on Attorneys' Fees. References to those agreements in this Order shall be deemed to the agreements, as modified in writing by the parties.

The Settlement Agreement required enactment of legislation. Over the course of the ensuing year Congress held hearings, vetted the terms of the settlement, and caused the parties to agree to certain additional modifications. Congress then "authorized, ratified and confirmed" the Settlement, as modified by agreement of the parties, pursuant to the Claims Resolution Act of 2010, Public Law 111-291 (Dec. 8, 2010; 124 Stat. 3064) ("Claims Resolution Act"), which the President signed into law on December 8, 2010.

Upon joint motion by the parties, this Court entered an order preliminarily approving the Settlement Agreement on December 21, 2010, providing for, among other things, notice to the plaintiff classes in addition to procedures for

objections to the Settlement Agreement and for members of the Trust Administration Class to exclude themselves from that class. At the same time, the Court (a) permitted plaintiffs to amend the complaint to add the Trust Administration Claims, which amendment was filed on December 21, 2010, (b) modified the certification of the Historical Accounting Class, (c) certified the Trust Administration Class, (d) approved the Class Representatives for the Trust Administration Class and (e) appointed Class Counsel for the Trust Administration Class.

On June 20, 2011, this Court held a Fairness Hearing during which the Court heard argument from counsel for the parties and objections from members of the plaintiff classes or their counsel. The Court has heard and considered all submissions in connection with the proposed settlement and the files and record of these proceedings, including the objections submitted, responses to them, the Joint Motion for Final Approval of Settlement (Dkt. No. 3761], Plaintiffs' Motion for Approval of Class Representatives' Incentive Awards and Expenses [Dkt. No. 3679], Defendants' Objections to Class Representatives Petition for Incentive Awards and Expenses (Feb. 24, 2011) [Dkt. No. 3697], and Plaintiffs' Motion for an Award of Attorneys' Fees and Expenses of Class Counsel [Dkt. No. 3678], Defendants' Response and Objections to Plaintiffs' Petition for Class Counsel Fees, Expenses and Costs Through Settlement (Feb. 24, 2011) [Dkt. No. 3694] as well as all supporting and opposing memoranda and the arguments of counsel for the parties, counsel for party-intervenors, counsel for any objector, and all individual objectors. All findings and decisions

issued by the Court during the June 20, 2011, Fairness Hearing are incorporated herein by reference.

It is hereby **ORDERED, ADJUDGED, AND DECREED** as follows:

1. All capitalized terms, which are not defined in this Order, shall have the meaning set forth in the Settlement Agreement.

2. The Court, having conducted the hearing required by F.R.C.P. 23(e)(2), hereby concludes that the requirements for settlement under Rule 23(e) are satisfied, and that the terms of the settlement are "fair, reasonable and adequate" from the perspective of absent class members. The Court further concludes that the process carried out in connection with the consideration of the proposed settlement satisfied due process by affording adequate notice to class members, a meaningful opportunity for class members to participate and be heard, a reasonable opportunity for members of the Trust Administration Class to exclude themselves from the settlement, and adequate representation of the classes by the class representatives and class counsel.

3. The Court finds that both the Historical Accounting Class and the Trust Administration Class satisfy the requirements of F.R.C.P. 23(a). Numerosity, commonality, typicality, and adequacy of the representatives have been established for both classes. In any event, the Claims Resolution Act suspends these requirements as to the Trust Administration Class.

4. Regarding the Historical Accounting Class, the Court concludes that the requirements of both F.R.C.P. 23(b)(1)(A) and 23(b)(2) are satisfied and pursuant to F.R.C.P. 23(c)(3), it hereby grants final certification of the Historical Accounting Class as follows:

> Those individual Indian beneficiaries (exclusive of those who prior to the filing of the Complaint on June 10, 1996 had filed actions on their own behalf stating a claim for a historical accounting) alive on the Record Date (defined as September 30, 2009) and who had an IIM Account open during any period between October 25, 1994 and the Record Date, which IIM Account had at least one cash transaction credited to it at any time as long as such credits were not later reversed. Beneficiaries deceased as of the Record Date, are included in the Historical Accounting Class only if they had an IIM Account that was open as of the Record Date. The estate of any Historical Accounting Class Member who dies after the Record Date but before distribution is in the Historical Accounting Class.

5. On December 21, 2010, this Court certified the Trust Administration Class pursuant to F.R.C.P 23(b)(3) and § 101(d)(2) and the Claims Resolution Act. Having fully considered the parties' arguments and all objections, the Court hereby confirms that the Trust Administration Class is

properly certified pursuant to the Claims Resolution Act, and in the alternative, pursuant to F.R.C.P. 23(b)(3). This class shall be treated as a class certified under F.R.C.P. 23(b)(3) for all purposes, and pursuant to F.R.C.P. 23(c)(3) the Court hereby grants final certification of the Trust Administration Class as follows:

> Those individual Indian beneficiaries (exclusive of persons who filed actions on their own behalf, or a group of individuals who were certified as a class in a class action, stating a Funds Administration Claim or a Land Administration Claim, as defined by the Settlement Agreement of December 7, 2009, prior to the filing of the Amended Complaint on December 21, 2011) alive as of the Record Date (defined as September 30, 2009) and who have or had IIM Accounts in the "Electronic Ledger Era" (currently available electronic data in systems of the Department of the Interior dating from approximately 1985 to the present), as well as individual Indians who, as of the Record Date, had a recorded or other demonstrable ownership interest in land held in trust or restricted status, regardless of the existence of an IIM Account and regardless of the proceeds, if any, generated from the Land. The Trust Administration Class does not include beneficiaries deceased as of the Record Date, but does include

> the estate of any deceased beneficiary whose IIM Account or other trust assets had been open in probate as of the Record Date. The estate of any Trust Administration Class Member who dies after the Record Date but before distribution is included in the Trust Administration Class.[1]

6. The Court hereby concludes that adequate notice of the Settlement has been provided to members of the Historical Accounting Class and to members of the Trust Administration Class, pursuant to F.R.C.P. 23(e)(1). Notice met and in many cases exceeded the requirements of F.R.C.P. 23(c)(2) for classes certified under F.R.C.P. 23(b)(1), (b)(2) and (b)(3). The best notice practicable has been provided class members, including individual notice where members could be identified through reasonable effort. The contents of that notice are stated in plain, easily understood language and satisfy all requirements of F.R.C.P. 23(c)(2)(B).

7. The Notice properly provided members of the Trust Administration Class an opportunity for exclusion from the Trust Administration Class. As reflected on Exhibits A (timely exclusions who have been confirmed to be in Interior's records as Trust Administration Class Members) and B (timely

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[1] As noted in a Notice of Errata dated June 2, 2011 [Dkt. No. 3787], the earlier definition of the Trust Administration Class inadvertently referred to Land Mismanagement Claims and Funds Mismanagement Claims, in lieu of Land Administration Claims and Funds Administration Claims, respectively. This has been corrected in the definition set forth above.

exclusions who have not been confirmed to be Trust Administration Class Members) attached to this Order, 1,824 individuals timely requested exclusion from the Trust Administration Class and each such person listed on those exhibits is (a) excluded from the Trust Administration Class, (b) deemed to preserve and not release or waive by either the Settlement Agreement or this Order any Funds Administration Claims or Land Administration Claims they may have had as of the Record Date, (c) not deemed to have agreed to the stated balance of their IIM Account(s) as of the Record Date, and (d) excluded from terms of this Order relating to the Trust Administration Class.

8. All Class Members who raised timely objections to the Settlement Agreement have been given an opportunity to be heard at the Fairness Hearing. The Court has considered all written and oral objections, and finds that the Settlement Agreement is fair, reasonable, and adequate. Accordingly, the Joint Motion for Final Approval of the Settlement Agreement [Dkt. No. 3768] is hereby **GRANTED** and Judgment is hereby entered in accordance with the terms of the Settlement Agreement. The Settlement Agreement shall be consummated and implemented in accordance with its terms and conditions.

9. The Settlement Agreement and this Judgment are binding on all members of the Historical Accounting Class. All members of the Historical Accounting Class and their heirs, administrators, successors or assigns shall be deemed to have released, waived and forever discharged the United States, defendants, any

department, agency, or establishment of the defendants, and any officers, employees, or successors of defendants, as well as any contractor, including any tribal contractor (collectively, the "Releasees") as set forth in Section I of the Settlement Agreement, except for those provisions of Section I relating solely to the Trust Administration Class.

10. The Settlement Agreement and this Order and Judgment are binding on all members of the Trust Administration Class who are not identified among the excluded class members in Exhibits A or B hereto. Such members of the Trust Administration Class and their heirs, administrators, successors or assigns shall be deemed to have released, waived and forever discharged the Releasees as set forth in Section I of the Settlement Agreement (except for those provisions of Section I relating solely to the Historical Accounting Class) and to have agreed to the stated balances in their IIM Accounts as provided for in Paragraph I.8 of the Settlement Agreement.

11. Pursuant to the Settlement Agreement, defendants are to pay a total of $1,512,000,000.00 into the Accounting/Trust Administration Fund upon Final Approval as defined by section A. 13 of the Settlement Agreement, less a deduction for payments that will not be made to members of the Trust Administration Class identified in Paragraph 5 above who have been excluded from the class. Defendants are ordered to file a statement reflecting the calculation of the opt-out fund adjustment within 45 days of this Order. By prior Order of this Court,

defendants have previously paid $20,000,000.00 of that total into the Accounting/Trust Administration Fund. Defendants are hereby ordered to pay the remaining $1,492,000,000.00, less the deduction for excluded class members described above, into the Accounting/Trust Administration Fund upon Final Approval.

12. The Claims Administrator is hereby ordered to pay all valid Claims from the Accounting/Trust Administration Fund in accordance with the terms of the Settlement Agreement.

13. Having considered controlling law and giving due consideration to the special status of plaintiffs as beneficiaries of a federally created and administered trust, the Court hereby finds that incentive awards to the Class Representatives in the following amounts are fair and reasonable:

Elouise Cobell:	$2,000,000.00
James Louis LaRose:	$ 200,000.00
Penny Cleghorn:	$ 150,000.00
Thomas Maulson:	$ 150,000.00

These amounts shall be paid out of the Settlement Account holding plaintiffs' funds immediately upon deposit of the funds in the Accounting/Trust Administration Fund pursuant to, ¶ 11 of this Order. Plaintiffs' request for expenses of Class Representatives in the amount of approximately $10.5 million is hereby denied because plaintiffs have not shown that theses are expenses or liabilities of the Class Representatives. Class Representatives' expenses and costs incurred

subsequent to December 7, 2009 shall be the subject of further motions as provided in Paragraph K.4 of the Settlement Agreement.[2]

14. The request of Earl Old Person for an incentive award [Dkt. No. 3734] is hereby **DENIED.**

15. Based on controlling law, the Claims Resolution Act, the Settlement Agreement, the Agreement on Attorneys' Fees, the submissions of the parties, and the record in this case, the Court, giving due consideration to the special status of plaintiffs as beneficiaries of a federally created and administered trust, hereby awards to plaintiffs' attorneys $99,000,000.00 as fair and reasonable fees, expenses and costs for work through December 7, 2009 (the date of the Settlement Agreement). Of that amount, a total of $13,616,250.84 will be withheld in the Settlement Account until the resolution by further Order of this Court of claims for attorneys' fees and expenses by the Native American Rights Fund and Mark Kester Brown. The remaining amount of $85,383,749.16 shall be paid jointly to Dennis Gingold, Thaddeus Holt, and Kilpatrick Townsend & Stockton LLP out of the Settlement Account holding plaintiffs' funds immediately upon deposit of the funds in the Accounting/Trust Administration Fund pursuant to ¶ 11 of this Order. Class Counsel's fees, expenses and costs after December 7, 2009 shall be the subject of subsequent requests by plaintiffs as provided in the Settlement Agreement and the Agreement on Attorneys' Fees.

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[2] This Order does not dispose of Plaintiffs' Motion for Reconsideration of Class Representatives' Expense Application [Dkt. No. 3839] and it will be the subject of a further order.

16. Plaintiffs shall direct the Notice Contractor to undertake a supplementary notice campaign as soon as practicable following distribution of funds to the Historical Accounting Class. The purpose of this notice is to target potential claimants and provide information related to the Trust Administration Class distribution.

17. Membership in the Trust Administration Class will be determined solely according to the process set forth in the Settlement Agreement. All individuals who believe they are entitled to participate in the settlement as a member of the Trust Administration Class and who are required under the terms of the Settlement Agreement to submit a Claim Form must do so by mailing a properly completed and signed form to the Claims Administrator[3] postmarked no later than **September 16, 2011**. The Claims Administrator shall make an initial determination of eligibility for members of the Trust Administration Class no later than **November 4, 2011**.

18. All individuals who request reconsideration of the Claims Administrator's determination of eligibility must do so in writing by a signed letter mailed to the Claims Administrator and postmarked no later than **December 5, 2011**. Based on requests for reconsideration, the Claims Administrator must make a second determination of eligibility for members of the Trust Administration Class no later than **January 6, 2012**.

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[3] The address for mailing Claim Forms to the Administrator is: Indian Trust Settlement, P.O. Box 9577, Dublin, OH 43017-4877.

19. Any appeals made from the second determination of eligibility by the Claims Administrator must be made in writing by a signed letter delivered to the Claims Administrator and postmarked no later than **February 6, 2012.**

20. Upon Final Approval as defined by Section A.13 of the Settlement Agreement, defendants are hereby ordered to pay $1,900,000,000.00 to the Trust Land Consolidation Fund, which is to be held in a separate account in the Treasury Department and distributed in accordance with the Settlement Agreement and Claims Resolution Act.

21. Upon Final Approval, defendants shall establish the Indian Scholarship Holding Fund in accordance with the Settlement Agreement and the Claims Resolution Act, and shall thereafter make payments from it to the Indian Education Scholarship Fund as provided in the Settlement Agreement. The parties shall take all other steps required by the Settlement Agreement and the Claims Resolution Act in connection with the establishment and operation of the Indian Scholarship Education Fund.

22. It is further ordered that defendants are released from their obligations to file reports required by the Order of December 21, 1999 [Dkt. No. 412] (Interior and Treasury quarterly status reports) and the Order of September 9, 2004 [Dkt. No. 2681] (Interior Office of Trust Records monthly report of activities).

23. It is further ordered that such other duties of plaintiffs to disburse settlement funds to class members shall be performed in accordance with the terms of the Settlement Agreement and any order of this Court. Plaintiffs shall report to the Court before any payments for administration and expenses are made and shall obtain advance approval from the Court therefor.

24. Pursuant to § 101(f)(1) of the Claims Resolution Act of 2011, for purposes of the Internal Revenue Code of 1986, amounts received by an individual Indian pursuant to this Settlement shall not be included in gross income and shall not be taken into consideration for purposes of applying any provision of the Internal Revenue Code that takes into account excludable income in computing adjusted gross income or modified adjusted gross income, including section 86 of that Code (relating to Social Security and tier 1 railroad retirement benefits).

25. Pursuant to § 101(f)(2) of the Claims Resolution Act of 2011, for purposes of determining initial eligibility, ongoing eligibility, or level of benefits under any Federal or federally assisted program, amounts received by an individual Indian pursuant to this Settlement shall not be treated for any household member, during the 1-year period beginning on the date of receipt as income for the month during which the amounts were received, and shall not treated as a resource.

26. This Court shall retain jurisdiction for the purpose of accomplishing the terms of the

Settlement Agreement and its administration, and resolving any disputes in connection therewith.

27. The Clerk shall enter Final Judgment in accordance with this Order.

SO ORDERED this the 27th of July 2011.

/s/
Thomas F. Hogan
United States District Judge

[Entered: September 13, 2011]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,

Plaintiffs,

v. **Civil. Action No. 96-01285 (TFH)**

KEN SALAZAR, Secretary of the Interior, et al.,

Defendants.

MEMORANDUM OPINION

Pending before the Court is Intervenor-Applicant Quapaw Tribe of Oklahoma's (O-GAH-PAH) Motion to Intervene as a Plaintiff [Docket No. 3834], which was filed on June 17, 2011 and seeks intervention as of right or permissively "to ensure that the rights of the 1,080 Quapaw Tribal Members who seek to opt out of the Settlement are protected." Quapaw Tribe's Mot. to Intervene 1. For the reasons set forth below, the Court will deny the motion.

DISCUSSION

Upon review of the Quapaw Tribe's motion, it is apparent the Tribe seeks to intervene on behalf of

its members solely to object to the fact that there is no opportunity to opt out of the Historical Accounting Class, which was certified by the Court pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P."). *See* Order Granting Final Approval to Settlement (July 27, 2011) [Docket No. 3850]. Although the Quapaw Tribe does not challenge the certification of the Historical Accounting Class,[1] this is the fourth attempt by the Tribe to voice an objection to the lack of an opt out. *See* Objections of the Quapaw Tribe of Oklahoma (O-GAH-PAH) Concerning Proposed Settlement and Notice of Intent to Appear at Fairness Hearing [Docket No. 3737]; The Members of the Quapaw Tribe of Oklahoma's (O-GAH-PAH) Request to Supplement Their Objections to the Proposed Settlement and Notice of Intent to Appear at the Fairness Hearing [Docket No. 3788]; Motion for Leave to File Corrected Objections Concerning Proposed Settlement on Behalf of the Quapaw Tribe of Oklahoma (O-GAH-PAH) and Tribal Members [Docket No. 3808]. The Court denied all three of the Quapaw Tribe's prior motions on the grounds that, as an organization, the Quapaw Tribe was not a party to the case and therefore lacked standing to file objections to the Settlement Agreement or appear at the fairness hearing,[2] and the Quapaw Tribe's subsequent attempt two months later to convert its prior motions to one filed on behalf of its

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1 Quapaw Tribe's Mot. to Intervene 7 (stating "the Tribe does not seek to challenge the class certification by this motion").

2 Order (June 9, 2011) [Docket No. 3798].

members was untimely, the objections were untimely, and the objections to the lack of an opt out for the Historical Accounting Class misconstrued the nature of the agreed relief afforded to the Class in the Settlement Agreement, Order (June 17, 2011) [Docket No. 3828].

The Court's June 17, 2011 Order denying the Quataw Tribe's third motion clearly stated that the Court "divines no circumstances under which it would be appropriate for any [Historical Accounting Class] members to opt out of the class." *Id.* at 5. The preclusion of an opt out for the Historical Accounting Class pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure is consistent with the precedent in this Circuit. Although the D.C. Circuit has held that "the language of Rule 23 is sufficiently flexible to afford district courts discretion to grant opt-out rights in [Fed. R. Civ. P. 23](b)(2) class actions," *Eubanks,* 110 F.3d at 94, the exercise of that discretion is limited to situations in which permitting opt outs is necessary to facilitate the fair and efficient conduct of the action because the assumption of cohesiveness underlying certification of a (b)(2) class is inapplicable to the individual class member's claims for monetary damages or if the court determines that particular plaintiff's claims are unique or sufficiently distinct from the claims of the class as a whole, *id.* at 96-97. Otherwise, "as a general matter, courts should not permit opt-outs when doing so would undermine the policies behind ... (b)(2) certification." *Id.* at 94-95.

It is well established that "the underlying premise of [Fed. R. Civ. P. 23] (b)(2) certification" is "that the class members suffer from a common injury

that can be addressed by classwide relief ...." *Eubanks v. Billington,* 110 F.3d 87, 95 (D.C. Cir. 1994). On December 8, 2010, Congress enacted the Claims Resettlement Act of 2010, which is a statute authorizing, ratifying and confirming the Class Action Settlement Agreement dated December 7, 2009. The Claims Resettlement Act of 2010, Pub. L. 111-291, 124 Stat. 3064 (Dec. 8, 2010). Contingent on enactment of the statute, and pursuant to the terms of the Class Action Settlement Agreement, the plaintiffs filed an Amended Complaint that asserted that the defendants breached their trust responsibilities by failing to provide an accounting of Individual Indian Money ("IIM") accounts and defined the Historical Accounting Class as:

> [T]hose individual Indian beneficiaries (exclusive of those who prior to the filing of the Complaint on June 10, 1996 had filed actions on their own behalf stating a claim for historical accounting) alive on September 30, 2009 and who had an IIM account open during any period between October 25, 1994 and September 30, 2009, which IIM account had at least [one] cash transaction credited to it at any time as long as such credits were not later reversed. Beneficiaries deceased as of September 30, 2009 are included in the Historical Accounting Class only if they had an IIM account that was open as of September 30, 2009. The estate of any beneficiary in the Historical Accounting Class who dies after September 30, 2009, but

> before distribution is included in the Historical Accounting Class.

Amended Complaint to Compel the United States to Discharge Trust Duties and to Recover Restitution, Damages, and Other Monetary Relief for Defendants' Breaches of Trust § XI(36)(a). The Amended Complaint sought "a claim for breach of trust seeking equitable restitution to restate the IIM Accounts in accordance with the historical accounting requested ...." Class Action Settlement Agreement § B(3)(b). The alleged breaches of trust and failure to provide an historical accounting of the IIM accounts apply uniformly to all members of the Historical Accounting Class and the class-wide relief sought and afforded to the class members pursuant to the Class Action Settlement Agreement is equitable restitution in the form of "a per capita amount of $1,000.00" that "will be a per-person, not a per-account, payment." *Id.* § E(3)(a). This is not a case in which the class is seeking to recover other forms of monetary damages to be allocated based on individual injuries or for different amounts of damages requiring subjective considerations of each class member's claims. *See Thomas v. Albright*, 139 F.3d 227, 235 (D.C. Cir. 1998) (noting that "that whenever individual plaintiffs in a subsection (b)(2) class have claims for different amounts of damages, their interests may begin to diverge").

More to the point, the D.C. Circuit emphasized that the fact that a party "received less under the settlement agreement than they might have expected to receive had they prevailed in individual lawsuits cannot alone justify an opt-out, as no party can reasonably expect to receive in a

settlement precisely what it would receive if it prevailed on the merits." *Eubanks*, 110 F.3d at 98. The Quapaw Tribe makes clear that the sole basis for its motion to intervene is to protect the "monetary interests" of its Tribe members "because the proposed Settlement amount for the historical payments is significantly less than is likely owed to the Quapaw Members due to the Tribe's unique history."[3] Quapaw Tribe's Mot. to Intervene 5. This is not one of the "limited circumstances," *Thomas*, 139 F.3d at 235, that affords a valid basis for this Court to exercise discretion to permit selective opt outs, *Eubanks*, 110 F.3d at 98.

Given that this Circuit's precedent precludes granting an opt out right to members of the Quapaw Tribe solely on the basis that they will receive less under the Class Action Settlement Agreement than they might expect to receive if they prevail in individual lawsuits, the Historical Accounting Class is seeking primarily equitable relief for a common injury and therefore "is assumed to be a cohesive group with few conflicting interests, giving rise to a presumption that adequate representation alone provides sufficient procedural protection," *In re*

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[3] The Quapaw Tribe further states that if they are not allowed to opt out of the Historical Accounting Class "they will be precluded by *res judicata* principles from pursuing these claims in their chosen forum – the U.S. Court of Federal Claims – *where they hope to receive far larger awards because their individual losses are so much greater than the proposed Settlement in this case*," Quapaw Tribe's Mot. to Intervene 15 (emphasis added) and "the named class representatives have entered into a proposed Settlement with the Government that provides *inadequate compensation* to the Quapaw Members," *id.* at 16 (emphasis added).

Veneman, 309 F.3d 789, 792 (D.C. Cir. 2002), and there is no other legal basis for granting opt outs for the Historical Accounting Class, the class members in this case were correctly notified that, by law, they could not opt out of the Historical Accounting Class. They could, however, opt out of the Trust Administration Class, which was certified pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure and seeks "claims for breach of trust with respect to Defendants' mismanagement of trust funds and trust assets requesting damages, restitution and other monetary relief." Class Action Settlement Agreement § (B)(3)(b). Because there is no legal basis to grant the individual members of the Quapaw Tribe the right to opt out of the Historical Accounting Class, however, the Quapaw Tribe as an organization is unable to establish that it has a right to intervene pursuant to Fed. R. Civ. P. 24(a)(2) because it has no legally-protected interest in the action. *See S.E.C v. Prudential Sec. Inc.,* 136 F.3d 153, 156-160 (D.C. Cir. 1998) (holding that investors had no legally-protected interest in a securities lawsuit when applicable precedent precluded the investors from enforcing a consent decree by asserting that they should have received greater damages awards).

Furthermore, intervention of right does not apply because the existing parties adequately represent any interest in securing equitable restitution for the restatement of the IIM accounts in light of the government's failure to provide an historical accounting. Fed. R. Civ. P. 24(a)(2) (proscribing intervention of right when existing parties adequately represent the would-be intervenor's interest); *Karsner v. Lothian,* 532 F.3d

876, 885 (D.C. Cir. 2008) (noting that a prerequisite to intervention as of right is that "no party to the action can be an adequate representative of the applicant's interests" (internal quotation marks and cite omitted)); *Illinois v. Bristol-Myers Co.*, 470 F.2d 1276, 1278 (D.C. Cir. 1972) (finding that intervention as a matter of right did not apply because the would-be intervenor's interests were adequately represented by the existing parties). With respect to the quality of class counsel, as the Court stated during the Fairness Hearing on June 20, 2011, "after 250 days in court, and literally thousands of court docket entries, after seven trials and 10 appeals, I don't know how anyone can say that there was not adequate representation .... [Class counsels'] representation was consistent and with no hesitations, doing whatever they felt they had to do to try to push this litigation forward against heavy odds." Fairness Hr'g Tr. 226:6-19, June 20, 2011. Likewise, the Quapaw Tribe has presented no viable claim that the named class representatives have antagonistic or conflicting interests and, as indicated, the many years of intense litigation in this case stand as irrefutable evidence that the class representatives were able to "vigorously prosecute the interests of the class through qualified counsel." *Twelve John Does v. District of Columbia,* 117 F.3d 571, 575 (D.C. Cir. 1997). As a result, the Quapaw Tribe's claims with respect to the historical accounting are the same as the claims asserted by the Historical Accounting Class with the only difference being that the Quapaw Tribe contends that its members are entitled to more compensation than the equitable restitution under the Class Action Settlement

Agreement provides. Quapaw Tribe's Mot. to Intervene 5 (stating that the Quapaw Tribe members "were entirely satisfied with the relief sought by the class certified by this Court in 1997, which was a complete accounting of their IIM accounts" and it was "[o]nly when they learned that a settlement was being considered that would not provide this accounting and would severely restrict their recovery" that the members took issue with the class representation).

The fact that the Quapaw Tribe's chief issue with the certified Historical Accounting Class is that its individual members will reap less compensation than they otherwise might also precludes intervention as a matter of right because it defeats associational standing. Given that the nature of the Quapaw Tribe's claims appear to be for monetary damages requiring individualized proof, its members would have to be parties to the lawsuit, in which case associational standing is not appropriate. *See Warth v. Seldin*, 422 U.S. 490, 516 (1975) (Powell, J.) (rejecting associational standing when the nature of the relief requires individualized proof and, as a corollary, that the members be parties to the suit).

The Court also declines to exercise its discretion to grant permissive intervention under Fed. R. Civ. P. 24(b)(1)(B). Even if the Quapaw Tribe was granted permission to intervene on the ground that it shares with the main action a common question of law or fact, intervention would have no effect because, as the foregoing discussion makes clear, there is no valid legal basis to allow Tribe members to opt out of the Historical Accounting Class, which is the sole claim the Tribe seeks to

advance by intervening. *See Prudential Sec. Inc.*, 136 F.3d at 156 n.7 (finding no abuse of discretion when a district court denied permissive intervention on the ground that intervention "would have no effect" because the would-be intervenors lacked a legal basis to support the purpose for which intervention was sought).

CONCLUSION

For the foregoing reasons, the Court will deny Intervenor-Applicant Quapaw Tribe of Oklahoma's (O-GAH-PAH) Motion to Intervene as a Plaintiff [Docket No. 3834]. An appropriate order consistent with this Memorandum Opinion will follow.

September 12th, 2011 /s/
Thomas F. Hogan
United States District Judge

[Entered: December 21, 2010]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL et al., on their own behalf and on behalf of all persons similarly situated,	)
Plaintiffs,	)
v.	)
KEN SALAZAR, Secretary of the Interior, et al.,	)
Defendants.	)

Civil Action
No. 96-1285 (TFH)

ORDER CERTIFYING TRUST ADMINISTRATION CLASS, APPOINTING CLASS COUNSEL, AND APPROVING CLASS REPRESENTATIVES FOR THE TRUST ADMINISTRATION CLASS, AND MODIFYING THE FEBRUARY 4, 1997 CLASS CERTIFICATION ORDER

The matter comes before this Court on Plaintiffs' Unopposed Motion to Certify the Trust Administration Class, Appoint Class Counsel, Approve Class Representatives, and Modify the February 4, 1997 Class Certification Order ("Unopposed Motion"). Upon consideration of the proposed Settlement Agreement as modified on

November 17, 2010; 28 U.S.C. § 1331; the Claims Resolution Act of 2010, Public Law 111-291 (Dec. 8, 2010; 124 Stat. 3064); Rule 23 of the Federal Rules of Civil Procedure, and the record of these proceedings, it is hereby

ORDERED that the Unopposed Motion is GRANTED. It is further

ORDERED that the February 4, 1997 Class Certification Order is modified and the Historical Accounting Class accordingly certified as follows:

> [T]hose individual Indian beneficiaries (exclusive of those who prior to the filing of the Complaint on June 10, 1996 had filed actions on their own behalf stating a claim for a historical accounting) alive on the Record Date [September 30, 2009] and who had an IIM Account open during any period between October 25, 1994 and the Record Date, which IIM Account had at least one cash transaction credited to it at any time as long as such credits were not later reversed. Beneficiaries, deceased as of the Record Date, are included in the Historical Accounting Class only if they had an IIM Account that was open as of the Record Date. The estate of any Historical Accounting Class Member who dies after the Record Date but before distribution is in the Historical Accounting Class.

It is further

ORDERED, pursuant to Rule 23(b)(3) and § 101(d)(2) and the Claims Resolution Act of 2010, Public Law 111-291 (Dec. 8, 2010; 124 Stat. 3064), that the Trust Administration Class is accordingly certified as follows:

> Those individual Indian beneficiaries (exclusive of persons who filed actions on their own behalf, or a group of individuals who were certified as a class in a class action, stating a Funds Mismanagement Claim or a Land Mismanagement Claim, as defined by the Settlement Agreement of December 7, 2009, prior to the filing of the Amended Complaint) alive as of the Record Date and who have or had IIM Accounts in the "Electronic Ledger Era" (currently available electronic data in systems of the Department of the Interior dating from approximately 1985 to the present), as well as individual Indians who, as of the Record Date, had a recorded or other demonstrable ownership interest in land held in trust or restricted status, regardless of the existence of an IIM Account and regardless of the proceeds, if any, generated from the Land. The Trust Administration Class does not include beneficiaries, deceased as of the Record Date, but does include the estate of any deceased beneficiary whose IIM Accounts or other trust

assets had been open in probate as of the Record Date. The estate of any Trust Administration Class Member who dies after the Record Date but before distribution is included in the Trust Administration Class.

It is further

ORDERED that the following attorneys are appointed Class Counsel for the Trust Administration Class: Dennis M. Gingold, Thaddeus Holt, and attorneys from Kilpatrick Stockton, LLP - Elliott H. Levitas, Keith Harper, William Dorris, David C. Smith, Adam Charnes, and Justin Guilder. It is further

ORDERED that the following individual Indians are approved as Class Representatives for the Trust Administration Class: Elouise Pepion Cobell, James Louis LaRose, Thomas Maulson, and Penny Cleghorn.

IT IS SO ORDERED.

This 21st day of December 2010.

/s/
THOMAS F. HOGAN
UNITED STATES DISTRICT JUDGE

(B) the plaintiff denies liability in whole or in part to any or all of the claimants.

(2) *By a Defendant.* A defendant exposed to similar liability may seek interpleader through a crossclaim or counterclaim.

(b) RELATION TO OTHER RULES AND STATUTES. This rule supplements—and does not limit—the joinder of parties allowed by Rule 20. The remedy this rule provides is in addition to—and does not supersede or limit—the remedy provided by 28 U.S.C. §§ 1335, 1397, and 2361. An action under those statutes must be conducted under these rules.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007.)

Rule 23. Class Actions

(a) PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) CERTIFICATION ORDER; NOTICE TO CLASS MEMBERS; JUDGMENT; ISSUES CLASSES; SUBCLASSES.

(1) *Certification Order.*

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) *Notice.*

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment.* Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issues.* When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) *Subclasses.* When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) CONDUCTING THE ACTION.

(1) *In General.* In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) *Combining and Amending Orders.* An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPROMISE. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The

following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) APPEALS. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) CLASS COUNSEL.

(1) *Appointing Class Counsel.* Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

TITLE I – INDIVIDUAL INDIAN MONEY ACCOUNT LITIGATION SETTLEMENT

SEC. 101. INDIVIDUAL INDIAN MONEY ACCOUNT LITIGATION SETTLEMENT.

(a) DEFINITIONS. – In this section:

(1) AGREEMENT ON ATTORNEYS' FEES, EXPENSES, AND COSTS. – The term "Agreement on Attorneys' Fees, Expenses, and Costs" means the agreement dated December 7, 2009, between Class Counsel (as defined in the Settlement) and the Defendants (as defined in the Settlement) relating to attorneys' fees, expenses, and costs incurred by Class Counsel in connection with the Litigation and implementation of the Settlement, as modified by the parties to the Litigation.

(2) AMENDED COMPLAINT. – The term "Amended Complaint" means the Amended Complaint attached to the Settlement.

(3) FINAL APPROVAL. – The term "final approval" has the meaning given the term in the Settlement.

(4) LAND CONSOLIDATION PROGRAM. – The term "Land Consolidation Program" means a program conducted in accordance with the Settlement, the Indian Land Consolidation Act (25 U.S.C. 2201 et seq.), and subsection (e)(2) under which the Secretary may purchase fractional interests in trust or restricted land.

(5) LITIGATION. – The term "Litigation" means the case entitled Elouise Cobell et al. v.

Ken Salazar et al., United States District Court, District of Columbia, Civil Action No. 96-1285 (TFH).

(6) PLAINTIFF. – The term "Plaintiff" means a member of any class certified in the Litigation.

(7) SECRETARY. – The term "Secretary" means the Secretary of the Interior.

(8) SETTLEMENT. – The term "Settlement" means the Class Action Settlement Agreement dated December 7, 2009, in the Litigation, as modified by the parties to the Litigation.

(9) TRUST ADMINISTRATION ADJUSTMENT FUND. – The term "Trust Administration Adjustment Fund" means the $100,000,000 deposited in the Settlement Account (as defined in the Settlement) pursuant to subsection (j)(1) for use in making the adjustments authorized by that subsection.

(10) TRUST ADMINISTRATION CLASS. – The term "Trust Administration Class" means the Trust Administration Class as defined in the Settlement.

(b) PURPOSE. – The purpose of this section is to authorize the Settlement.

(c) AUTHORIZATION. –

(1) IN GENERAL. – The Settlement is authorized, ratified, and confirmed.

(2) AMENDMENTS. – Any amendment to the Settlement is authorized, ratified, and confirmed, to the extent that such amendment is executed to make the Settlement consistent with this section.

(d) JURISDICTIONAL PROVISIONS. –

(1) IN GENERAL. – Notwithstanding the limitation on the jurisdiction of the district courts of the United States in section 1346(a)(2) of title 28, United States Code, the United States District Court for the District of Columbia shall have jurisdiction of the claims asserted in the Amended Complaint for purposes of the Settlement.

(2) CERTIFICATION OF TRUST ADMINISTRATION CLASS. –

(A) IN GENERAL.– Notwithstanding the requirements of the Federal Rules of Civil Procedure, the court in the Litigation may certify the Trust Administration Class.

(B) TREATMENT. – On certification under subparagraph

(A), the Trust Administration Class shall be treated as a class certified under rule 23(b)(3) of the Federal Rules of Civil Procedure for purposes of the Settlement.

(e) TRUST LAND CONSOLIDATION. –

(1) TRUST LAND CONSOLIDATION FUND. –

(A) ESTABLISHMENT. – On final approval of the Settlement, there shall be established in the Treasury of the United States a fund, to be known as the "Trust Land Consolidation Fund".

(B) AVAILABILITY OF AMOUNTS. – Amounts in the Trust Land Consolidation Fund shall be made available to the Secretary during the 10-year period beginning on the date of final approval of the Settlement –

(i) to conduct the Land Consolidation Program; and

(ii) for other costs specified in the Settlement.

(C) DEPOSITS. –

(i) IN GENERAL. – On final approval of the Settlement, the Secretary of the Treasury shall deposit in the Trust Land Consolidation Fund $1,900,000,000 out of the amounts appropriated to pay final judgments, awards, and compromise settlements under section 1304 of title 31, United States Code.

(ii) CONDITIONS MET. – The conditions described in section 1304 of title 31, United States Code, shall be deemed to be met for purposes of clause (i).

(D) TRANSFERS. – In a manner designed to encourage participation in the Land Consolidation Program, the Secretary may transfer, at the discretion of the Secretary, not more than $60,000,000 of amounts in the Trust Land Consolidation Fund to the Indian Education Scholarship Holding Fund established under paragraph (3).

(2) OPERATION. – The Secretary shall consult with Indian tribes to identify fractional interests within the respective jurisdictions of the Indian tribes for purchase

in a manner that is consistent with the priorities of the Secretary.

(3) INDIAN EDUCATION SCHOLARSHIP HOLDING FUND. –

(A) ESTABLISHMENT. – On final approval of the Settlement, there shall be established in the Treasury of the United States a fund, to be known as the "Indian Education Scholarship Holding Fund".

(B) AVAILABILITY. – Notwithstanding any other provision of law governing competition, public notification, or Federal procurement or assistance, amounts in the Indian Education Scholarship Holding Fund shall be made available, without further appropriation, to the Secretary to contribute to an Indian Education Scholarship Fund, as described in the Settlement, to provide scholarships for Native Americans.

(4) ACQUISITION OF TRUST OR RESTRICTED LAND. – The Secretary may acquire, at the discretion of the Secretary and in accordance with the Land Consolidation Program, any fractional interest in trust or restricted land.

(5) TREATMENT OF UNLOCATABLE PLAINTIFFS. – A Plaintiff, the whereabouts of whom are unknown and who, after reasonable efforts by the Secretary, cannot be located during the 5-year period beginning on the date of final approval of the Settlement, shall be

considered to have accepted an offer made pursuant to the Land Consolidation Program.

(f) TAXATION AND OTHER BENEFITS. –

(1) INTERNAL REVENUE CODE. – For purposes of the Internal Revenue Code of 1986, amounts received by an individual Indian as a lump sum or a periodic payment pursuant to the Settlement shall not be –

(A) included in gross income; or

(B) taken into consideration for purposes of applying any provision of the Internal Revenue Code that takes into account excludable income in computing adjusted gross income or modified adjusted gross income, including section 86 of that Code (relating to Social Security and tier 1 railroad retirement benefits).

(2) OTHER BENEFITS. – Notwithstanding any other provision of law, for purposes of determining initial eligibility, ongoing eligibility, or level of benefits under any Federal or federally assisted program, amounts received by an individual Indian as a lump sum or a periodic payment pursuant to the Settlement shall not be treated for any household member, during the 1-year period beginning on the date of receipt –

(A) as income for the month during which the amounts were received; or

(B) as a resource.

(g) INCENTIVE AWARDS AND AWARD OF ATTORNEYS' FEES, EXPENSES, AND COSTS UNDER SETTLEMENT AGREEMENT. –

(1) IN GENERAL. – Subject to paragraph (3), the court in the Litigation shall determine the amount to which the Plaintiffs in the Litigation may be entitled for incentive awards and for attorneys' fees, expenses, and costs –

(A) in accordance with controlling law, including, with respect to attorneys' fees, expenses, and costs, any applicable rule of law requiring counsel to produce contemporaneous time, expense, and cost records in support of a motion for such fees, expenses, and costs; and

(B) giving due consideration to the special status of Class Members (as defined in the Settlement) as beneficiaries of a federally created and administered trust.

(2) NOTICE OF AGREEMENT ON ATTORNEYS' FEES, EXPENSES, AND COSTS. – The description of the request of Class Counsel for an amount of attorneys' fees, expenses, and costs required under paragraph C.1.d. of the Settlement shall include a description of all material provisions of the Agreement on Attorneys' Fees, Expenses, and Costs.

(3) EFFECT ON AGREEMENT. – Nothing in this subsection limits or otherwise affects the enforceability of the Agreement on Attorneys' Fees, Expenses, and Costs.

(h) SELECTION OF QUALIFYING BANK. – The United States District Court for the District of Columbia, in exercising the discretion of the Court to approve the selection of any proposed Qualifying Bank (as defined in the Settlement) under paragraph A.1. of the Settlement, may consider any factors or circumstances regarding the proposed Qualifying Bank that the Court determines to be appropriate to protect the rights and interests of Class Members (as defined in the Settlement) in the amounts to be deposited in the Settlement Account (as defined in the Settlement).

(i) APPOINTEES TO SPECIAL BOARD OF TRUSTEES. – The 2 members of the special board of trustees to be selected by the Secretary under paragraph G.3. of the Settlement shall be selected only after consultation with, and after considering the names of possible candidates timely offered by, federally recognized Indian tribes..

(j) TRUST ADMINISTRATION CLASS ADJUSTMENTS. –

(1) Funds. –

(A) IN GENERAL. – In addition to the amounts deposited pursuant to paragraph E.2. of the Settlement, on final approval, the Secretary of the Treasury shall deposit in the Trust Administration Adjustment Fund of the Settlement Account (as defined in the Settlement) $100,000,000 out of the amounts appropriated to pay final judgments, awards, and compromise settlements under section 1304 of title 31, United States Code, to be allocated and paid by the Claims Administrator

(as defined in the Settlement and pursuant to paragraph E.1.e of the Settlement) in accordance with this subsection.

(B) CONDITIONS MET. – The conditions described in section 1304 of title 31, United States Code, shall be deemed to be met for purposes of subparagraph (A).

(2) ADJUSTMENT. –

(A) IN GENERAL. – After the calculation of the pro rata share in Section E.4.b of the Settlement, the Trust Administration Adjustment Fund shall be used to increase the minimum payment to each Trust Administration Class Member whose pro rata share is –

(i) zero; or

(ii) greater than zero, but who would, after adjustment under this subparagraph, otherwise receive a smaller Stage 2 payment than those Trust Administration Class Members described in clause (i).

(B) RESULT. – The amounts in the Trust Administration Adjustment Fund shall be applied in such a manner as to ensure, to the extent practicable (as determined by the court in the Litigation), that each Trust Administration Class Member receiving amounts from the Trust Administration Adjustment Fund receives the same total payment under Stage 2 of the

Settlement after making the adjustments required by this subsection.

(3) TIMING OF PAYMENTS. – The payments authorized by this subsection shall be included with the Stage 2 payments under paragraph E.4. of the Settlement.

(k) EFFECT OF ADJUSTMENT PROVISIONS. – Notwithstanding any provision of this section, in the event that a court determines that the application of subsection (j) is unfair to the Trust Administration Class –

(1) subsection (j) shall not go into effect; and

(2) on final approval of the Settlement, in addition to the amounts deposited into the Trust Land Consolidation Fund pursuant to subsection (e), the Secretary of the Treasury shall deposit in that Fund $100,000,000 out of amounts appropriated to pay final judgments, awards, and compromise settlements under section 1304 of title 31, United States Code (the conditions of which section shall be deemed to be met for purposes of this paragraph) to be used by the Secretary in accordance with subsection (e).