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# An Unbroken Chain of Injustice: The Dawes Act, Native American Trusts, and *Cobell v. Salazar*

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*Concealed behind the benevolent façade of the American mission civilisatrice is the brutal reality of invasion, slavery, forced relocation, genocide, land theft, ethnocide, and forcible denial of the right to self-determination wholly incompatible with contemporary understandings of U.S.-Indian history and with the notions of justice informing the human rights regime. It is perhaps impossible to overstate the magnitude of the human injustice perpetrated against Indian people in denial of their right to exist, on their aboriginal landbase, as self-determining peoples: indeed, the severity and duration of the harms endured by the original inhabitants*

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*of the United States may well exceed those suffered by all other groups domestic and international.*

William Bradford<sup>1</sup>

*For those harboring hope that the stories of murder, dispossession, forced marches, assimilationist policy programs, and other incidents of cultural genocide against the Indians are merely the echoes of a horrible, bigoted government-past that has been sanitized by the good deeds of more recent history, this case serves as an appalling reminder of the evils that result when large numbers of the politically powerless are placed at the mercy of institutions engendered and controlled by a politically powerful few. It reminds us that even today our great democratic enterprise remains unfinished. And it reminds us, finally, that the terrible power of government, and the frailty of the restraints of the exercise of that power, are never fully revealed until government turns against the people.*

Judge Royce C. Lamberth<sup>2</sup>

## I. INTRODUCTION

Along with slavery, the brutal subjugation of Native Americans is one of the great stains on the history of human rights in the United States. In fact, the two cannot be separated, since slavery was one of the many abhorrent practices to which White settlers subjected Native Americans, under the sanction of law.<sup>3</sup> Ultimately, the American legal system would sanction not merely enslavement, but every form of hardship and infamy that can be visited upon a people, from death marches to systematic annihilations, confiscation of land to political, legal, and economic disenfranchisement. No lesser authority than John Marshall, Chief Justice of the Supreme Court, explained the dilemma that Europeans faced:

[T]he tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the

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1. William Bradford, *“With a Very Great Blame on our Hearts”*: *Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1, 19 (2003).

2. *Cobell v. Norton*, 229 F.R.D. 5, 7 (D.D.C. 2005), *vacated sub nom. Cobell v. Kempthorne*, 455 F.3d 217 (D.C. Cir. 2006).

3. *See, e.g., WHEN SORRY ISN’T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE* 242 (Roy L. Brooks, ed., 1999) (“Contrary to popular belief, Indian slavery was not unusual during the colonial era. . . . The Indian slave trade involved all the horrors long associated with the worst images of slavery, including beatings, killings, and tribal and family separation.”).

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forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce. . . . The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society . . . .<sup>4</sup>

In doing so, Marshall was merely rehearsing a characterization advanced a half-century earlier in the Declaration of Independence, namely, that Native Americans are “merciless Indian Savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes, and conditions.”<sup>5</sup> The demonization of Native Americans as “savages” and subhuman “others” was thus enshrined in the very foundational documents of the country.

Most Americans are at least vaguely aware of the unfathomable injustices that the federal government has committed against Native Americans. Nonetheless, an alarming number have come to see Native Americans not as a people still struggling for justice and equality, but as wealthy casino owners living high off of their tax-free riches. The fact is that very few tribes have managed to secure significant revenues from casinos, and casino income is taxed.<sup>6</sup> In fact, although one rarely reads about it or sees it in the popular media, Native Americans continue to suffer from gross inequality and shameful government misconduct.

Native Americans are, in truth, among the very poorest Americans. As the United States Civil Rights Commission explains, “Native Americans still suffer higher rates of poverty, poor educational achievement, substandard housing, and higher rates of disease and illness. Native Americans continue to rank at or near the bottom of nearly every social, health, and economic indicator.”<sup>7</sup> Fully 23.6% of Native Americans live below the poverty line,<sup>8</sup> and 34% of Native American children live in families with household incomes below the poverty

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4. *Johnson & Graham’s Lessee v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 590 (1823).

5. THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776).

6. U.S. COMM’N ON CIVIL RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 4 (2003) [hereinafter CIVIL RIGHTS COMM’N], available at <http://www.usccr.gov/pubs/na0703/na0204.pdf>.

7. *Id.* at ix.

8. Press Release, U.S. Census Bureau, American Indian and Alaska Native Heritage Month: November 2010 (Nov. 2, 2010) [hereinafter Facts for Features], available at [http://www.census.gov/newsroom/releases/archives/facts\\_for\\_features\\_special\\_editions/cb10ff22.html](http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb10ff22.html).

line.<sup>9</sup> Roughly 90,000 Native American families are homeless or underhoused, and nearly half of reservation households are crowded or severely crowded. One in five of those houses lacks adequate plumbing facilities.<sup>10</sup>

Native Americans have a lower life expectancy than any other ethnic group in the United States, and they suffer higher rates of illness for many diseases. “On average, men in Bangladesh can expect to live longer than Native American men in South Dakota.”<sup>11</sup> Elderly Native Americans are 48.7% more likely to suffer from heart failure, 173% more likely to suffer from diabetes, and 44.3% more likely to suffer from asthma than the general population.<sup>12</sup> Meanwhile, one in three Native Americans lacks health insurance coverage.<sup>13</sup>

In a comprehensive 2003 study, the Civil Rights Commission concluded that the federal government bears considerable blame for this appalling state of affairs. Despite its “special relationship” and fiduciary duties to Native Americans,<sup>14</sup> the government has consistently failed to fund the social and economic programs that are crucial to improving the lives and living conditions of Native Americans. For example, “[t]he federal government spends less per

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9. KRISTIN DENTON FLANAGAN & JEN PARK, U.S. DEP’T OF EDUC., NCES 2005-116, AMERICAN INDIAN AND ALASKA NATIVE CHILDREN: FINDINGS FROM THE BASE YEAR OF THE EARLY CHILDHOOD LONGITUDINAL STUDY, BIRTH COHORT 3 (2005), available at <http://www.tedna.org/articles/2005116.pdf>.

10. CIVIL RIGHTS COMM’N, *supra* note 6, at 50.

11. S.D. ADVISORY COMM., NATIVE AMERICANS IN SOUTH DAKOTA: AN EROSION OF CONFIDENCE IN THE JUSTICE SYSTEM (2000), available at <http://www.usccr.gov/pubs/sac/sd0300/ch1.htm>; see also *id.* (“A study by the Harvard School of Health in conjunction with health statisticians from the Centers for Disease Control found that Native American men living in six South Dakota counties had the shortest life expectancy in the Nation.”).

12. Christopher Thorne, *Elderly Indians in Poor Health*, BISMARCK TRIB., July 11, 2002, at 1B.

13. Facts for Features, *supra* note 8; see also CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR, & CHERYL HILL LEE, U.S. DEP’T OF COMMERCE, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2004, at 20 (2005), available at <http://www.census.gov/prod/2005pubs/p60-229.pdf>.

14. The Supreme Court has ruled that there is a distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. In carrying out its treaty obligations with the Indian tribes, the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) (citations & footnote omitted).

capita on Native American health care than on any other group for which it has this responsibility, including Medicaid recipients, prisoners, veterans, and military personnel.”<sup>15</sup> Adjusted for inflation, Native American programs experienced a yearly decline in government spending of \$6 million between 1975 and 2000. As a result, in 2000, “unmet needs in Indian Country owing to inadequate BIA funding were estimated at \$7.4 billion and have grown since then.”<sup>16</sup> In addition to the lack of appropriate funding, mismanagement of Native American trust accounts by the federal Bureau of Indian Affairs (“BIA”) “has denied Native Americans financial resources that could be applied toward basic needs that BIA programs fail to provide.”<sup>17</sup>

A federal class action lawsuit filed in 1996 on behalf of over 500,000 Native Americans revealed the extent of this mismanagement. *Cobell v. Salazar* sought to compel the federal government to account for and pay billions of dollars in royalties on leases covering millions of acres of Native American land.<sup>18</sup> The proceedings in *Cobell* exposed a woeful pattern of mismanagement, neglect, and malfeasance stretching from the 19<sup>th</sup> century to the present day. A brief history of the relevant facts, provided in Part II of this Article, helps to understand the scope of the injustice at issue in *Cobell*. Part III examines the major rulings and developments in the case. Part IV offers a brief conclusion.

## II. THE DAWES ACT: LATE NINETEENTH CENTURY ETHNIC CLEANSING

In the early nineteenth century, to satisfy the voracious appetite for Native American territories, the federal government pursued a policy of “removal.”<sup>19</sup>

15. CIVIL RIGHTS COMM’N, *supra* note 6, at x.

16. *Id.* at 24.

17. *Id.* at ix.

18. *Cobell v. Salazar*, 573 F.3d 808, 809 (D.C. Cir. 2009).

19. See Indian Removal Act of May 28, 1830, ch. 148, 4 Stat. 411; *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 7 (D.D.C. 1999), *aff’d sub nom. Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001) (“In the early 1800s, the United States pursued the policy of ‘removal’ – *i.e.*, the relocation of tribal communities from their homelands in the East and Midwest to remote locations in the newly acquired Louisiana Purchase territory.”); see, e.g., BROOKS, *supra* note 3, at 242-44; ANGIE DEBO, *A HISTORY OF THE INDIANS OF THE UNITED STATES* 101-11 (1970); Jose Monsivais, *A Glimmer of Hope: A Proposal to Keep the Indian Child Welfare Act of 1978 Intact*, 22 AM. INDIAN L. REV. 1, 2 (1997) (“When Andrew Jackson became President of the United States in 1829, the policy of removal began. The Indian Removal Act of 1830 was enacted to relocate most of the eastern tribes west of the Mississippi river. . . . Vast numbers of American Indians were marched westward onto lands considered unfit for human life. Although Indians were accused of allowing fertile farmland to lie fallow, in justification of the Indian Removal Act, the simple fact was that settlers wanted Indian land.”) (footnotes omitted).

The United States military forcibly removed Native Americans from their homelands and drove them in a “Trail of Tears” to the West, providing them with treaties ostensibly establishing their ownership of the new territories.<sup>20</sup> As settlers moved further west, however, the pressure to “open” the previously remote Native American territories to settlement grew. The federal government responded by violating existing treaties,<sup>21</sup> forcibly marching numerous Native American tribes to even more remote territories, and, by the 1850s, forcing them onto reservations.<sup>22</sup>

The hunger for Native American land was boundless, however, and soon the reservations became the objects of avarice,<sup>23</sup> particularly after the discovery of valuable minerals in several of these territories. But how to open the reservations for acquisition? In stark contrast to the Western concept of private property, the vast majority of Native American land was not owned by individuals, but held in common by the entire tribe. In the words of the noted Native American activist Russell Means:

One must understand that to an Indian, ownership of land is a foreign concept. The earth is our Grandmother, who provides us with everything we need to survive. How can you *own* your grandmother? How can you

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20. “By a combination of bribery, trickery, and intimidation,” in the 1830s, United States government agents induced five of the largest remaining tribes in the eastern United States to relinquish the remainder of their lands and migrate west of the Mississippi. ANGIE DEBO, *AND STILL THE WATERS RUN* 5 (1968). “All these removal treaties contained the most solemn guarantees that the Indians’ titles to these new lands should be perpetual and that no territorial or state government should ever be erected over them without their consent.” *Id.*

21. *Cobell v. Babbitt*, 91 F. Supp. 2d at 7 (“These treaties and agreements were frequently violated or amended to reduce Indian holdings and to open more land to non-Indian settlers.”).

22. See, e.g., Geoffrey C. Heisey, Comment, *Oliphant and Tribal Criminal Jurisdiction over Non-Indians: Asserting Congress's Plenary Power to Restore Territorial Jurisdiction*, 73 IND. L. J. 1051, 1061 (1998) (“In the mid-1850s, the United States established the reservation system. This policy again displaced Indians by relocating them onto much smaller parcels of land than those originally promised to them.”) (footnote omitted); RICHARD WHITE, “IT’S YOUR MISFORTUNE AND NONE OF MY OWN”: A NEW HISTORY OF THE AMERICAN WEST 91 (1991).

23. See, e.g., Deborah A. Geier, *Essay: Power and Presumptions; Rules and Rhetoric; Institutions and Indian Law*, 1994 BYU L. Rev. 451, 456 n.12 (1994) (“Even these reservations proved to be too tempting for land-hungry whites, however, leading to the allotment era.”); Chester A. Arthur, President of the U.S., First Annual Message to Congress (Dec. 6, 1881) [hereinafter *President Arthur*], available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29522> (“As the white settlements have crowded the borders of the reservations, the Indians, sometimes contentedly and sometimes against their will, have been transferred to other hunting grounds, from which they have again been dislodged whenever their new-found homes have been desired by the adventurous settlers.”).

*sell* her? How does a piece of paper that you probably can't read prove ownership of something that can't be owned?<sup>24</sup>

The Native Americans' refusal to break up territory into privately owned parcels made it difficult or impossible for outsiders to acquire the remaining Native American property. Concomitantly, the communal system allowed tribes to maintain their cultural and linguistic unity in the face of an assimilationist, ethnocidal mob lurking at the gates. Not surprisingly, this was a source of unending consternation for White Americans, who viewed the communal system as incompatible with human progress. Only by implementing a private regime could Native Americans reach the stage of "civilization" enjoyed by White Americans. Returning from a trip to Native American territory in 1885, Senator Henry Dawes of Massachusetts, a so-called "friend of the Indian,"<sup>25</sup> expressed the prevailing mentality:

The head chief told us that there was not a family in the whole nation that had not a home of its own. There is not a pauper in that nation, and the nation does not owe a dollar. It built its own capitol . . . and built its schools and hospitals. Yet the defect of the system was apparent. They have got as far as they can go, because they hold their land in common. It is [the socialist writer] Henry George's system, and under that there is no enterprise to make your home any better than that of your neighbors. There is no selfishness, which is at the bottom of civilization. Till these people will consent to give up their lands, and divide them among their citizens so that each can own the land he cultivates, they will not make much progress.<sup>26</sup>

The twin evils of greed and forced assimilation coalesced in the General Allotment Act of 1887,<sup>27</sup> commonly known as the Dawes Act, after Senator

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24. RUSSELL MEANS WITH MARVIN J. WOLF, *WHERE WHITE MEN FEAR TO TREAD* 10-11 (1995); accord Eric T. Freyfogle, *Land Use and the Study of Early American History*, 94 *YALE L.J.* 717, 723 (1985) (book review) ("Like other hunter-gatherer and horticultural groups, [Native Americans] believed that land was no more subject to ownership than was the air, water, sky, or the numerous spirits that inhabited the world.")

25. Dawes was one of many self-proclaimed "friends of the Indian" who routinely met in the 1870s to discuss Native American policy. See, e.g., KENT CARTER, *THE DAWES COMMISSION AND THE ALLOTMENT OF THE FIVE CIVILIZED TRIBES, 1893-1914*, at 13 (1999).

26. Henry Dawes, U.S. Senator from Mass., Address at the Third Lake Mohonk Indian Conference (1885), quoted in SCOTT L. MALCOMSON, *ONE DROP OF BLOOD: THE AMERICAN MISADVENTURE OF RACE* 15 (2000) (alteration in original).

27. General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified at 25 U.S.C. §§ 331-333 (1887)) (repealed 2000).

Dawes, its sponsor.<sup>28</sup> “Allotment” was a policy designed to force Native Americans to leave their communal lands and to assimilate into the rest of America while opening their remaining territory to non-Native ownership and use.<sup>29</sup> Native Americans were “allotted” an amount of property, usually a 40-, 80-, or 160-acre plot.<sup>30</sup> The allotted land was then held in trust by the United States government on behalf of the individuals.<sup>31</sup> Native Americans could not sell, lease, or otherwise encumber their land without the government’s permission.<sup>32</sup> Land that was not sold was leased by the government for animal grazing, farming, and mineral extraction, with all profits to be remitted to the beneficiaries. The “surplus” land left over after allotment was sold to railroads, mining companies, ranchers, or other non-Native Americans.<sup>33</sup>

Allotment proved an unmitigated disaster for Native Americans, an example of ethnic cleansing in the literal sense: the idea was to “cleanse” the Native Americans of their ethnic identity and to force them to become independent farmers, part of “mainstream” America.<sup>34</sup> President Chester A.

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28. Dawes believed that assimilation was the key to Native American “progress,” and he saw the allotment system as a way to secure the best deal for Native Americans before they lost all of their land to rapacious settlers. As historian Angie Debo comments, “only the student of [Native American] history knows how much was done by well-meaning people with preconceived notions which they never bothered to submit to the test of facts[,unconscious allies of the exploiters.” DEBO, *supra* note 19, at ix-x.

29. See CARTER, *supra* note 25, at ix (“Allotment was supposed to promote assimilation into the dominant culture, clear the way for converting Indian Territory into a state, and satisfy powerful groups seeking opportunities for economic development and profit.”).

30. JANET A. McDONNELL, *THE DISPOSSESSION OF THE AMERICAN INDIAN, 1887-1934*, at 2 (1991).

31. *Id.*

32. See, e.g., CARTER, *supra* note 25, at 155-56; McDONNELL, *supra* note 30.

33. See *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 8 (D.D.C. 1999), *aff’d sub nom.* *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001).

34. “The objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force assimilation of Indians into the society at large.” *Cnty. of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 254 (1992). Even at the time, there were many who recognized the Act for what it was. As the House Indian Affairs Committee Minority Report of 1880 attests:

The real aim of [the Dawes Act] is to get at the Indian lands and open them up to settlement. The provisions of the apparent benefit of the Indian are but the pretext to get at his lands and occupy them. With that accomplished, we have securely paved the way for the extermination of the Indian races upon this part of the continent. If this were done in the name of Greed, it would be bad enough; but to do it in the name of Humanity, and under the cloak of an ardent desire to promote the Indian’s welfare by making him like ourselves, whether he will or not, is infinitely worse.

House Indian Affairs Committee, Minority Report, H.R. Rep. 46-1576, at 7-10 (1880), *quoted in* NANCY GENTILE FORD, *ISSUES OF WAR AND PEACE* 145 (2002).



Arthur, speaking in favor of allotment, announced that it “would have a direct and powerful influence in dissolving the tribal bond, which is so prominent a feature of savage life, and which tends so strongly to perpetuate it.”<sup>35</sup>

A mere two days after the Allotment Act was passed, five thousand settlers rushed across the Sioux border in South Dakota to lay claim to the best pieces of land.<sup>36</sup> This was a typical scene: in reservation after reservation, the government set aside the choicest land as “surplus,” to be gobbled up by settlers, while allotting the poorest land to the Native Americans. On the Yakima reservation in Washington, Native Americans were allotted land in bug-infested, rocky areas wholly unsuitable for farming.<sup>37</sup> “On the Papago reservation, where land without water for irrigation was almost worthless except in large tracts, the Indian Office allotted each Indian only [ten] acres of irrigable land.”<sup>38</sup> When nine elderly men on the Yuma reservation refused to accept their allotments, the allotting agent jailed them and threatened others with the same fate.<sup>39</sup>

Native Americans were simply unprepared to protect and manage their allotments. Few had any concept of private property, and few could speak let alone read English.

Many Indians were told, literally overnight, to change their previous, centuries old lifestyle, and become farmers on their own parcel of land. The incidence of ownership over land was a completely foreign concept to the vast majority of reservation Indians. So too was the payment of taxes once a fee patent was issued. Consequently, tax foreclosures on parcels of individual land were rampant, shrinking Indian Country precipitously. The lands’ mineral and timber resources were sold off at criminally low prices, and more often than not, the proceeds were deposited in “Individual Indian Money” (IIM) accounts that went to the federal trustees

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35. President Arthur, *supra* note 23. In tandem with the allotment policy, the federal government formed boarding schools run by the BIA. The BIA removed Native American children from their families and placed them in these schools for compulsory education, literally, in how to be White Americans. Family visits were forbidden, a rule calculated to sever cultural and linguistic ties. *See id.* (“[T]he pupils are altogether separated from the surroundings of savage life and brought into constant contact with civilization.”). Children went years without seeing their families, and many never saw their parents again. In the words of Assistant Secretary of the Interior Kevin Gover: “They forbade them their native languages. They forbade them their religions. They cut their hair and they dressed them . . . like non-Indian kids would be dressed, and literally tried to turn them into white people.” *Cobell v. Babbitt*, 91 F. Supp. 2d at 8 (quoting the testimony of United States Assistant Secretary of the Interior Kevin Glover during the 1999 trial in *Cobell*).

36. FERGUS M. BORDEWICH, *KILLING THE WHITE MAN’S INDIAN* 121 (1996).

37. MCDONNELL, *supra* note 30, at 19.

38. *Id.*

39. *Id.* at 22.

and were never distributed to the beneficiaries. All the while, as each succeeding generation passed . . . the undistributed trust accounts continued to fractionate malignantly.<sup>40</sup>

Theodore Roosevelt declared allotment “a mighty pulverizing machine to break up the tribal mass.”<sup>41</sup> The statistics demonstrate just how powerful that machine was: between 1887 and 1934, Native Americans lost ninety million acres, or about sixty-five percent of their land.<sup>42</sup> As William Bradford explains:

[B]y encouraging Indian individuals to formally withdraw from the tribe in exchange for a per capita share of tribal land and by meeting the failure of unemployed Indian allottees to pay property taxes with foreclosure, reversion of title, and sale to white speculators at prices far below market value, Allotment abolished Indian reservations as autonomous and integral sociopolitical entities.<sup>43</sup>

This is the history behind the Native American trusts, the subject of *Cobell v. Salazar*.<sup>44</sup>

### III. COBELL V. SALAZAR: *INJUSTICE COMPOUNDED BY INJUSTICE*

In 1934, Congress passed legislation ending the allotment process, but extending the trust period for land already allotted.<sup>45</sup> To this day, the government still holds approximately eleven million acres of Native American land in trust.<sup>46</sup> By Congressional designation, the Secretary of the Department

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40. James T. Hamilton, *Progressing Back: A Tribal Solution for a Federal Morass*, 27 AM. INDIAN L. REV. 375, 378-79 (2003) (footnote omitted). “Fractionation occurs when Indian allotments are divided and divided again by inheritance through succeeding generations, diluting the ownership interests of allottees and causing enormous administrative difficulties for the BIA.” *Cobell v. Kempthorne*, 532 F. Supp. 2d 37, 41 (D.D.C. 2008), *vacated sub nom. Cobell v. Salazar* 573 F.3d 808 (D.C. Cir. 2009).

41. Theodore Roosevelt, President of the U.S., First Annual Message to Congress (Dec. 3, 1901), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29542> (“The General Allotment Act is a mighty pulverizing engine to break up the tribal mass. It acts directly upon the family and the individual. . . . The effort should be steadily to make the Indian work like any other man on his own ground.”).

42. *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 8 (D.D.C. 1999), *aff’d sub nom. Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001).

43. Bradford, *supra* note 1, at 38-39 (footnotes omitted).

44. *Cobell v. Salazar*, 572 F.3d 808 (D.D.C. 2009).

45. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-463 (2006)).

46. *Cobell v. Babbitt*, 91 F. Supp. 2d at 9.

of the Interior (“DOI”) and the Secretary of the Treasury serve as trustee-delegates for trust management functions. The BIA, under the authority of the DOI, is responsible for managing the trust lands, approving leases and transfers of land, and income collection. The Treasury holds and invests the individual Native American accounts, or “IIM accounts,” and is responsible for accounting and financial management of the funds.<sup>47</sup>

Compounding injustice with injustice, however, the government’s record in managing the trust funds has been nothing short of appalling. As the D.C. Circuit Court of Appeals has explained, in the decades leading up to the filing of *Cobell*, “report after report excoriated the government’s management of the IIM trust funds.”<sup>48</sup> For example, a 1992 Congressional report observed:

Scores of reports over the years by the Interior Department’s inspector general, the U.S. General Accounting Office, the Office of Management and Budget, and others have documented significant, habitual problems in [the] BIA’s ability to fully and accurately account for trust fund moneys, to properly discharge its fiduciary responsibilities, and to prudently manage the trust funds.<sup>49</sup>

Responding to this dismal state of affairs, in 1994, Congress enacted legislation (the “1994 Act”) reaffirming the government’s obligation to “account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested [under the 1938 Act].”<sup>50</sup> Congress also created the position of “Special Trustee,” a sub-cabinet position appointed by the President to oversee the trust administration process.<sup>51</sup>

Unfortunately, the 1994 Act did virtually nothing to end the mismanagement. Horror stories abounded of Native Americans unable to get a proper accounting of their money, receiving conflicting accounts, or seeing their balances disappear altogether.

When fire consumed her log cabin in this reservation town [in Browning, Montana], Bernice Skunk Cap knew she would have to tap into her income from a land-lease account managed by the federal government to

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47. See Christopher Barrett Bowman, *Indian Trust Fund: Resolution and Proposed Reformation to the Mismanagement Problems Associated with the Individual Indian Money Accounts in Light of Cobell v. Norton*, 53 CATH. U. L. REV. 543, 550-51 (2004).

48. *Cobell v. Norton*, 428 F.3d 1070, 1072 (D.C. Cir. 2005).

49. COMM. ON GOV’T OPERATIONS, MISPLACED TRUST: THE BUREAU OF INDIAN AFFAIRS’ MISMANAGEMENT OF THE INDIAN TRUST FUND, H.R. No. 102-449, at 2 (1992).

50. American Indian Trust Fund Management Act of 1994, Pub. L. No. 103-412 § 102, 108 Stat. 4239, 4240 (codified as amended at 25 U.S.C. § 4001 (2006)).

51. *Cobell v. Babbitt*, 30 F. Supp. 2d 24, 28 (D.D.C. 1998).

make a down payment on a new home. The 75-year-old Blackfoot Indian woman, who trembles from a nervous disorder and speaks little English, asked for the money. But Bureau of Indian Affairs officials said she wasn't "competent" to withdraw the entire \$2,400 in her account. She took out \$1,000. A few weeks later, she was told her balance was zero, with no further explanation.<sup>52</sup>

In June of 1996, Native American trust beneficiaries decided they could wait for relief no longer. Represented by the Native American Rights Fund of Boulder, Colorado ("NARF"), five plaintiffs filed a class action suit in D.C. federal court against the Secretary and Assistant Secretary of the Interior and the Secretary of the Treasury seeking an accounting for billions of dollars in Native American trust funds on behalf of over 300,000 beneficiaries (a number later revised to include over 500,000 beneficiaries). The plaintiffs alleged that the government had "grossly mismanaged" the trusts, and continued to do so, in numerous respects.<sup>53</sup> Among other things, the plaintiffs alleged that the government "failed to keep adequate records and to install an adequate accounting system"<sup>54</sup>; "destroyed records bearing upon the[] breaches of trust"<sup>55</sup>; "lost, dissipated, or converted to the United States' own use the money of the trust beneficiaries"<sup>56</sup>; failed "ever to reconcile or audit the accounts, so that defendants are unable to provide accurate account balances or to determine how much money that should have been collected and credited to IIM accounts was not collected or was diverted to improper ends"<sup>57</sup>; failed "to maintain accurate ownership records"<sup>58</sup>; and failed "to provide regular, accurate reports to beneficiaries to tell them the correct amounts and sources of their income."<sup>59</sup>

The plaintiffs highlighted numerous consequences of this egregious breach of trust, including the fact that "there were at least 15,599 duplicate accounts with the same number"; "[t]here were more than 54,000 accounts, containing over \$46,000,000, for individuals with no address or no correct address"; and "[t]here were more than 21,000 accounts with more than \$36,000,000 for persons who had died; at least 2,400 of these were for closed estates, yet more

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52. Louis Sahagun, *Indians Sue U.S. over Trusts Bureau Accused of Mismanaging Money of 300,000 Across County*, MILWAUKEE J. SENTINEL, Nov. 17, 1996, at 10.

53. Complaint to Compel Performance of Trust Obligations at ¶ 3, *Cobell v. Babbitt*, 30 F. Supp. 2d 24 (No. 96-1285) [hereinafter Complaint].

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* ¶ 21.

58. *Id.*

59. *Id.*

than \$600,000 due to heirs under such estates had still not been distributed.”<sup>60</sup> Plaintiffs reminded the court, finally, that the bulk of the funds in the IIM accounts stemmed from individual land allotments, dating “from the era, lasting until 1934, when it was the policy of the United States to break up Indian tribes and tribal lands.”<sup>61</sup>

The lead plaintiff in the case—finally coming to an end at the time of publication—is Elouise Pepion Cobell of Valier, Montana. A graduate of Great Falls Business College, Ms. Cobell is the great granddaughter of Mountain Chief, a noted Native American leader, and is an experienced banker and civic leader. She is currently the Executive Director of the Native American Community Development Corporation, a nonprofit affiliate of the Native American Bank.<sup>62</sup> Like all of the named plaintiffs, Ms. Cobell is the beneficiary of an IIM account.<sup>63</sup>

Other named plaintiffs included Mildred Cleghorn, who passed away in a car accident in April of 1997. Ms. Cleghorn was an enrolled member of the Fort Sill Apache Tribe of Oklahoma, serving as the tribal chairperson for 20 years. A recognized leader in Native American affairs, Ms. Cleghorn was a graduate of Oklahoma State University, a teacher, and the National Director of Education for the North American Indian Women’s Association.<sup>64</sup> She was also a living testament to the unbroken record of horrible mistreatment suffered by Native Americans at the hands of the U.S. government: in 1886, Ms. Cleghorn’s father was taken as a “prisoner of war” along with Geronimo by the United States army. She was born a “prisoner of war” in 1910 in Fort Sill, Oklahoma.<sup>65</sup>

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60. *Id.* ¶ 22.

61. *Id.* ¶ 17.

62. Biography of Eloise Cobell (on file with author).

63. Complaint, *supra* note 53, ¶ 7.

64. *Id.* ¶ 36; Diana Everett, *Mildred Imoch Cleghorn (1910-1997)*, ENCYCLOPEDIA OF OKLA. HIST. & CULTURE, <http://digital.library.okstate.edu/encyclopedia/entries/C/CL010.html> (last visited Jan. 21, 2011).

65. Complaint, *supra* note 53, ¶ 36. One-quarter of the standing army of the United States pursued Geronimo’s tiny band of Chiricahua Apaches who had dared to resist plunder and extermination. Upon their surrender in 1886, the U.S. government loaded 381 Chiricahuas into cattle cars with sealed windows in the September heat and shipped them to “camps” in Florida and later Alabama. There, they died in ghastly numbers in the unfamiliar damp heat, suffering from tuberculosis, meningitis, and other maladies. The vast majority had never taken up arms against the government – some even serving as scouts for the U.S. army – and those few who did had no concept that they were committing a crime. Later transferred to Fort Sill, Oklahoma, they were held as “prisoners of war” until their release in 1913, twenty-seven years after the surrender. See MICHAEL LIEDER & JAKE PAGE, *WILD JUSTICE* 26-29 (1997); DEE BROWN, *BURY MY HEART AT WOUNDED KNEE* 411-12 (1970); *Tribal History*, FORT STILL APACHE: CHIRICAHUA – WARM SPRINGS APACHE, <http://www.fortsillapache->

Cleghorn repeatedly went to the BIA office to ask for information about her trust account, whereupon officials failed or simply refused to provide her with any information. These were Cleghorn's "trustees," yet they could not or would not provide her with the most basic information regarding her trust: they would not provide her with copies of the leases the government had signed in her name; they would not tell her where her land was located; they would not even tell her how much her property was worth.<sup>66</sup> "If Ms. Cleghorn, a teacher, tribal leader, and extraordinarily savvy woman, couldn't get this information," says Keith Harper, NARF attorney and Cherokee Nation member, "how does an ordinary Navajo who speaks little or no English get the information?"<sup>67</sup>

Harper placed the BIA's treatment of Cleghorn and a half-million other beneficiaries in historical perspective. "The BIA agent has long enjoyed extraordinary power in Indian country. He has always been the boss. A trustee is a servant, not a boss. But the BIA agent has never assumed the mantle of the servant."<sup>68</sup> With their livestock destroyed, and traditional means of farming and hunting prohibited, Native Americans depended upon rations provided by the BIA to survive. This gave the BIA agents tremendous power, which they wielded arbitrarily and oppressively. "If you didn't go to church, for example, you didn't get your ration," Harper explains. "And without your ration, you would die."<sup>69</sup>

Perhaps the most emblematic episode of BIA paternalism occurred in 1912, when superstar athlete and Native American Jim Thorpe asked his BIA agent to release trust money—i.e. Thorpe's own money—to pay for his travel to the 1912 Olympics in Stockholm, Sweden. The BIA agent refused his request, lecturing: "instead of gallivanting around the country, he should be at work on his allotment."<sup>70</sup> Thankfully, Thorpe made his way to the Games, garnering two gold medals to the acclaim of the entire country.

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nsn.gov/index.php?option=com\_content&view=article&id=5&Itemid=6 (last visited Feb. 3, 2011). Lieder and Page describe life at Fort Sill:

They could not leave the base for more than a few hours without the permission of the commanding officer. Whenever he gave them a job to do, they had to comply, without any compensation for their labor. They did not own the land on which they lived and had no possibility of acquiring it. . . . The Chiricahuas were denied the freedom to travel without permission, to labor for money, to acquire a permanent home, and to form a family outside the group.

LIEDER & PAGE, *supra* at 43.

66. Telephone Interview with Keith Harper, Attorney, Native Am. Rights Fund (October 6, 2006) [hereinafter Harper Interview].

67. *Id.*

68. *Id.*

69. *Id.*

70. Joseph Bruchac, Jim Thorpe: The World's Greatest Athlete 46 (2006) (unpublished study guide), available at <http://www.jimthorpefilm.com/guide/guide06.pdf>.

Decades later, the federal government was still denying Native Americans access to their own accounts, or even the most basic information about those accounts. Indeed, when lead plaintiff Cobell was younger, she requested an accounting of her trust funds, only to be told by federal officials that she was not “capable” of understanding the accounting.<sup>71</sup> Cobell, an accountant and treasurer of the Blackfeet Nation for thirteen years, received a MacArthur Foundation “genius” grant in 1997.<sup>72</sup>

#### A. *Bleak House Revisited*

In light of the myriad reports demonstrating woeful neglect and mismanagement, and given the compelling need, plaintiffs hoped for a swift adjudication of their claims, including “a decree ordering an accounting and directing the defendants to make whole the IIM accounts of the class members.”<sup>73</sup> In fact, in the best of all worlds, the government would admit the wrongdoing, provide a fair accounting and restitution of funds, and immediately implement the changes necessary to fulfill its duty as trustee of the IIM accounts.

Instead, after 109 years of mismanagement and malfeasance, the government chose the path of greatest resistance, and greatest harm: it moved to dismiss the lawsuit, concomitantly seeking to abolish the rights of the plaintiffs ever again to seek redress in the courts. Among other things, the government asserted that the doctrine of sovereign immunity barred the lawsuit.<sup>74</sup> It is well established, however, that plaintiffs may sue the government for relief *other* than money damages, e.g. to compel government officials to perform their duties. In fact, the Administrative Procedure Act expressly provides:

An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal

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71. Julia Whitty, *Accounting Coup*, MOTHER JONES, Sept.-Oct. 2005, at 57, 59.

72. *Id.* at 59, 86.

73. Complaint, *supra* note 53, ¶ 4.

74. The doctrine of sovereign immunity bars plaintiffs from suing the federal government for money damages without the government’s consent. *See, e.g.*, *Minnesota v. United States*, 305 U.S. 382, 388 (1939).

authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States . . . .<sup>75</sup>

Contrary to the government's assertions, in *Cobell*, the plaintiffs were not seeking money damages, but an accounting and reconciliation of moneys already in the account.<sup>76</sup> As former presiding Judge Royce C. Lamberth<sup>77</sup> observed in his 1998 decision rejecting the government's motion, the plaintiffs alleged that "the money is in the account but the ledger cannot be properly kept, so the stated balance is incorrect. In the plaintiffs' view, they only seek to balance the checkbook, not add any money to the checking account."<sup>78</sup>

In addition, the government argued that the administration of its trust duties should be entirely unreviewable by the courts because those duties are "committed solely to agency discretion."<sup>79</sup> This would have meant that none of the 500,000 Native American plaintiffs could ever again sue over even the grossest mismanagement of their IIM accounts, since all judicial review would

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75. 5 U.S.C. § 702 (2006); *see, e.g.*, *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) ("The APA's waiver of sovereign immunity applies to any suit whether under the APA or not.").

76. *Cobell v. Babbitt*, 30 F. Supp. 2d 24, 39 (D.D.C. 1998).

77. After graduating from the University of Texas School of Law, Judge Lamberth served as a Captain in the Judge Advocate General's Corps of the United States Army from 1968 to 1974, including a stint in Vietnam. *See* Chief Judge Royce C. Lamberth, U.S. DIST. CT. FOR THE DIST. OF COLUMBIA, <http://www.dcd.uscourts.gov/dcd/lamberth> (last visited Feb. 3, 2011). He then became an Assistant United States Attorney for the District of Columbia, and later Chief of the Civil Division of the U.S. Attorney's Office – the very office that would defend the government in *Cobell*. *Id.* In November of 1987, President Reagan appointed Judge Lamberth to the United States District Court for the District of Columbia, where he now serves as Chief Judge. Until 2002, Judge Lamberth also served as Presiding Judge of the U.S. Foreign Intelligence Surveillance Court, after his appointment by Supreme Court Chief Justice Rehnquist in May 1995. *Id.* Judge Lamberth gained notoriety during the 1990s as a tenacious inquisitor of President Clinton and other members of his administration. *See, e.g.*, Stephanie Mencimer, *Lone-Star Justice: Conservatives Thought Clinton-bashing Judge Royce Lamberth Was on Their Team – Until He Went After the Bushies*, WASH. MONTHLY, Apr. 2002, at 23 ("[H]e is the very same judge who, for eight years, dogged the Clinton administration with a ferocity only seen in independent prosecutor Ken Starr."). The *Wall Street Journal's* editorial page hailed Judge Lamberth's efforts, and there were calls from conservative quarters for his appointment to the Supreme Court. *Id.* at 24. But Judge Lamberth evades simple stereotypes. *See, e.g.*, Carol D. Leonnig, *Straight Shooter to Some, Loose Cannon to Others*, WASH. POST, Sept. 15, 2005, at A31 ("Lamberth has many defenders, from conservative Supreme Court justices to left-wing civil liberties lawyers, and is reputedly ranked by lawyers as among the most skilled judges on the court.").

78. *Cobell v. Babbitt*, 30 F. Supp. 2d at 39.

79. *Id.* at 32.



be prohibited. The government failed, however, to show that Congress ever intended to foreclose judicial review of trust duties.<sup>80</sup> The case would continue.

Also in 1998, Judge Lamberth bifurcated *Cobell* into two stages. The first would examine the request to fix the government's trust management practices, known as the "fixing the system" portion; the second would examine the request for an accounting of funds held in the IIM accounts, known as the "correcting the accounts" portion.<sup>81</sup> Phase I was scheduled for trial in June of 1999. Before the Phase I trial could begin, however, in January 1999, Judge Lamberth was forced to conduct a two-week contempt trial as a result of the government's abject failure to comply with orders to produce trust documents.<sup>82</sup>

The government had simply ignored court orders dating back over two years, severely hampering the plaintiffs' case.<sup>83</sup> The government admitted, in fact, that they were not in compliance with the court's November 1996 and May 1998 orders for the production of documents.<sup>84</sup> Indeed, after the court scheduled the contempt trial, the defendants produced over 9,000 pages of documents that had been ordered two years earlier.<sup>85</sup> But there was more. Although the government had entered into an express agreement to preserve documents and materials relevant to the case, it ignored this obligation. Several months of microfiche went missing, and Treasury lost or destroyed 8,000 cubic feet of potentially relevant documents.<sup>86</sup> Shoddy record-keeping only accentuated the problems. Paul Homan, the former Special Trustee for American Indians appointed by President Clinton and confirmed by the Senate, testified at trial that "[t]he record-keeping system [for the IIM accounts] is the worst that I have seen in my entire life."<sup>87</sup>

Astonishingly, in a trust case concerning a class of 500,000 beneficiaries, the government could not even produce the trust documents for the five named plaintiffs in the case, including Cleghorn and Cobell. The government had agreed to produce these documents by March of 1997. But with their records in complete disarray, they failed to produce documents for any of the named plaintiffs by the deadline, and long thereafter.<sup>88</sup>

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80. *Id.*

81. *Cobell v. Norton*, 226 F. Supp. 2d 1, 15 (D.D.C. 2002), *vacated in part*, 334 F.3d 1128 (D.C. Cir. 2003).

82. *See Cobell v. Babbitt*, 37 F. Supp. 2d 6, 8-9 (D.D.C. 1999).

83. *Id.* at 21, 36.

84. *Id.* at 18.

85. *Id.* at 21.

86. *Id.* at 21, 28.

87. *Id.* at 13 (alteration in original) (internal quotations omitted).

88. *Id.* at 19-21.

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In the face of “clear and convincing evidence,” Judge Lamberth held DOI Secretary Babbitt, Treasury Secretary Robert Rubin, and Assistant DOI Secretary Gover in civil contempt. “The way in which the defendants have handled this litigation up to the commencement of the contempt trial is nothing short of a travesty,” Judge Lamberth opined.<sup>89</sup> He did not relish holding the defendants in contempt, the first time in modern history that a sitting Secretary had been held in contempt.<sup>90</sup> “But courts have a duty to hold government officials responsible for their conduct when they infringe on the legitimate rights of others.”<sup>91</sup>

Judge Lamberth found that the government not only failed to comply with court orders, but it attempted to cover up its noncompliance. He expressed both surprise and dismay that the government—and the Justice Department—could be guilty of such misconduct. With unusual candor, Judge Lamberth confessed that his pro-government biases had led him astray:

The court is deeply disappointed that any litigant would fail to obey orders for production of documents, and then conceal and cover-up that disobedience with outright false statements that the court then relied upon. But when that litigant is the federal government, the misconduct is even more troubling. The institutions of our federal government cannot continue to exist if they cannot be trusted. The court here conducted monthly status conferences where plaintiffs complained that the government was not producing the required documents. Because of the court’s great respect for the Justice Department, the court repeatedly accepted the government’s false statements as true, and brushed aside the plaintiffs’ complaints. This two-week contempt trial has certainly proved that the court’s trust in the Justice Department was misplaced. The federal government here did not just stub its toe. It abused the rights of the plaintiffs to obtain these trust documents, and it engaged in a shocking pattern of deception to the court. I have never seen more egregious misconduct by the federal government. In my own experience, government lawyers always strived to set the example by following the highest ethical standards that were then a model for the rest of the legal profession, and the Justice Department always took the position that its job was not to win an individual case at all costs, but to see that justice was done. Justice has not been done to these Indian beneficiaries.<sup>92</sup>

Even a cursory review of the historical treatment of Native Americans—to say nothing of the history of the IIM accounts at issue in *Cobell*—should have

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89. *Id.* at 13.

90. *Id.* at 14.

91. *Id.*

92. *Id.* at 38.

disabused the court of any blind trust in the federal government. It was certainly not a trust that the plaintiffs and their attorneys shared. As Harper has commented, "Calling this a trust fund is perhaps the most ironic use of the word trust in history. Time and time again Indians have trusted in the federal government and at each and every stage, they have been betrayed. This is just a modern-day manifestation of the betrayal."<sup>93</sup>

Nonetheless, Judge Lamberth had signaled his intention to see that justice was finally done. Upon agreement of the parties, Judge Lamberth appointed a special master to oversee compliance with the court's orders. "[J]ustice delayed is justice denied," Judge Lamberth observed.<sup>94</sup> "The court cannot tolerate more empty promises to these Indian plaintiffs."<sup>95</sup>

### B. *The Phase I Trial*

In June of 1999, precisely three years after the filing of the lawsuit, the Phase I trial began in the D.C. federal courthouse. In his opening statement for the plaintiffs, attorney Thaddeus Holt eloquently framed the issue before the court. "These plaintiffs represent half-a-million people, their fellow Indians. Some of them the poorest people in this country, and their little property, of which the United States is trustee."<sup>96</sup> The evidence, Mr. Holt explained, "will show that the government has failed miserably in the most basic requirements of a trustee. . . . Sadly, it's one more example of the government's breach of faith with the original inhabitants of this land. It's like one more broken treaty."<sup>97</sup> Mr. Holt reminded the court of the shameful history of the trusts, and the provenance of the funds in the IIM accounts:

This is the earnings of land that always belonged to them. It belonged to them before Captain John Smith set foot in Jamestown. It belonged to them before Sir Walter Raleigh, before Coronado and De Soto, before Columbus, before Leif Ericsson. It's their property, protected by all the principles of due process.<sup>98</sup>

A marathon, six-week bench trial followed. None of the plaintiff-beneficiaries testified, but numerous DOI officials did, including Interior

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93. *Two Cabinet Officers Cited for Contempt by Federal Judge*, NARF LEGAL REV., Winter/Spring 1999, at 1, available at <http://www.narf.org/pubs/nlr/nlr24-1.htm>.

94. *Cobell v. Babbitt*, 37 F. Supp. 2d at 38.

95. *Id.*

96. Transcript of Opening Statement of Thaddeus Holt, Attorney for the Plaintiffs at 15, *Cobell v. Babbitt*, 91 F. Supp. 2d 1 (D.D.C. 1999) (No. 96-1285).

97. *Id.* at 16.

98. *Id.*

Secretary Bruce Babbitt. On the eve of trial, these officials were forced to concede significant portions of the plaintiffs' case. For example, DOI admitted that it "does not adequately control the receipts and disbursements of all IIM account holders"; its "periodic reconciliations are insufficient to assure the accuracy of all accounts"; it "does not provide all account holders periodic statements of their account performance"; it "does not provide adequate staffing, supervision and training for all aspects of trust fund management and accounting"; and its record-keeping system was inadequate.<sup>99</sup> At trial, the concessions continued, highlighted by Secretary Babbitt's admission that "the entitlements of Individual Indians that are dictated by the trust responsibilities of the United States are not being fulfilled," and that "[t]he fiduciary obligation of the United States government is not being fulfilled."<sup>100</sup>

Undeterred by this dispositive evidence, government attorneys argued that the plaintiffs failed to prove their case, that the government had not violated the 1994 Act, and that reform was occurring at a reasonable pace, with no need for judicial intervention. "I think our proof has shown you, however, is that [*sic*] trust reform is springing up. Not overnight, Your Honor, but steadily and with growing momentum," the Department of Justice's ("DOJ's") lead attorney told the court.<sup>101</sup> "Now, the Congress was fully aware that with 150 years of history behind it, this wasn't going to be done overnight, and I think we've argued in our papers that that means that the United States is in compliance with the act . . . ."<sup>102</sup> Over 100 years after the Allotment Act was passed, a half-decade after passage of the 1994 Act, and three years after the plaintiffs filed *Cobell*, the government argued that "the Interior Department has proceeded in a reasonable fashion, in a reasonable speed. *Indeed, aggressive, as many have testified.*"<sup>103</sup>

The cruel irony of these words was not lost upon Judge Lamberth. Ruling for the plaintiffs in December of 1999, Judge Lamberth put the government's argument in perspective: "Defendants' cry of 'trust us' is offensive to the court and insulting to plaintiffs, who have heard that same message for over one hundred years."<sup>104</sup> "[D]efendants have been told by Congress and begged by

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99. *Cobell v. Babbitt*, 91 F. Supp. 2d at 33 (citations omitted).

100. *Id.* (citations omitted) (internal quotations omitted).

101. Transcript of Closing Statement of Tom C. Clark, Attorney for the Defendant at 5011, *Cobell v. Babbitt*, 91 F. Supp. 2d 1 (Civ. No. 96-1285).

102. *Id.* at 5049.

103. *Id.* at 5047-48 (emphasis added). Meanwhile, lawyers for the Treasury – the folks who lost 8,000 cubic feet of potentially relevant documents, *see Cobell v. Babbitt*, 37 F. Supp. 2d 6, 21 (D.D.C. 1999), argued that "[t]here is no systemic failure that can be attributed to Treasury." Closing Statement of Brian L. Ferrell at 4993, *Cobell v. Babbitt*, 91 F. Supp. 2d 1 (No. 96-1285).

104. *Cobell v. Babbitt*, 91 F. Supp. 2d at 53.

plaintiffs for decades to correct the errors stemming from defendants' century-long reign of mismanagement," Judge Lamberth explained.<sup>105</sup> Their argument "that the court should simply allow them to carry out their duties under the same supervision that has brought them to this point cannot prevail."<sup>106</sup>

Judge Lamberth explained exactly where the status quo had brought the government: to a point where it could not provide hundreds of thousands of plaintiffs, including "some of the poorest people in this nation,"<sup>107</sup> with an accounting of their money.

It would be difficult to find a more historically mismanaged federal program than the Individual Indian Money (IIM) trust. The United States, the trustee of the IIM trust, cannot say how much money is or should be in the trust. As the trustee admitted on the eve of trial, it cannot render an accurate accounting to the beneficiaries, contrary to a specific statutory mandate and the century-old obligation to do so. More specifically, as Secretary Babbitt testified, an accounting cannot be rendered for most of the 300,000-plus beneficiaries, who are now plaintiffs in this lawsuit. Generations of IIM trust beneficiaries have been born and raised with the assurance that their trustee, the United States, was acting properly with their money. Just as many generations have been denied any such proof, however.<sup>108</sup>

With a keen sense of history, Judge Lamberth observed that the government's breach of trust was all the more egregious considering the background of the trust:

The United States' mismanagement of the IIM trust is far more inexcusable than garden-variety trust mismanagement of a typical donative trust. For the beneficiaries of this trust did not voluntarily choose to have their lands taken from them; they did not willingly relinquish pervasive control of their money to the United States. The United States imposed this trust on the Indian people. As the government concedes, the purpose of the IIM trust was to deprive plaintiffs' ancestors of their native lands and rid the nation of their tribal identity. The United States reaped the "benefit" of this imposed program long ago—sixty-five percent of what were previously tribal land holdings quickly opened up to non-Indian settlement. But the United States has refused to act in accordance with the

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105. *Id.*

106. *Id.*

107. *Id.* at 6.

108. *Id.*

fiduciary obligations attendant to the imposition of the trust, which are not imposed by statute.<sup>109</sup>

Judge Lamberth ruled that the government had a fiduciary duty to render an accurate accounting of all money in the IIM trust, which the government breached.<sup>110</sup> The judge did not, however, tell the defendants how to do their job. Instead, he ordered them to establish policies and procedures to come promptly into compliance; to retain all trust documents necessary to render an accurate accounting; and to provide the court and opposing counsel with quarterly status reports explaining the steps taken to come into compliance.<sup>111</sup> It was now up to DOI to perform an historical accounting of the IIM accounts that would form the basis of the Phase II trial.

It is impossible to describe here all of the government's appeals and motions, acts and omissions, that delayed justice in this case for over fourteen years. What follows, then, is but summary of the salient events after the plaintiffs emerged victorious from the Phase I trial.

### *C. Intransigence and Delay*

Never yielding an inch to the *Cobell* plaintiffs, the government appealed Judge Lamberth's Phase I decision. Rehearsing its closing arguments from the lower court, the government argued on appeal that Congress included no deadlines in the 1994 Act, leaving it entirely to the government to decide upon the timing of the needed reform.<sup>112</sup> In other words, there was no breach, because the government was free under the 1994 Act to do whatever it wanted, and at its own pace. In addition, the government argued that the "IIM beneficiaries have no judicially enforceable right to an accounting at all."<sup>113</sup>

As it had done in its motion to dismiss and at trial, the government thus sought to foreclose for all time the right of 500,000 beneficiaries to a legal remedy for the government's wrong. This was the equivalent of a bank's attempting to abolish the right of clients to demand an accounting of their funds in the bank, despite unequivocal proof that the bank had woefully mismanaged the funds and was likely depriving customers of their money. This would be egregious enough in a normal case, but this was not a bank, and these were not just any customers. Because the federal government holds the Native

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109. *Id.*

110. *Id.* at 50.

111. *Id.* at 58-59.

112. *Cobell v. Norton*, 240 F.3d 1081, 1096 (D.C. Cir. 2001).

113. *Id.* at 1110; *see also id.* at 1104 ("Appellants also argue that, whatever right to an accounting plaintiffs may have, the district court erred insofar as it determined that such a right was judicially enforceable.").

American lands in trust for individual beneficiaries, “it assumes the fiduciary obligations of a trustee.”<sup>114</sup> And in the immortal words of Justice Cardozo, “[a] trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.”<sup>115</sup> It may fairly be argued that the government’s attempt to abolish plaintiffs’ legal right to any accounting or review was itself a breach of its fiduciary obligations to the plaintiffs, to say nothing of the government’s “overriding duty . . . to deal fairly with Indians.”<sup>116</sup>

In February of 2001, the United States Court of Appeals for the District of Columbia Circuit affirmed Judge Lamberth’s decision. “The federal government has substantial trust responsibilities toward Native Americans,” the court ruled.<sup>117</sup> And it was “equally clear” that the government “has failed time and again to discharge its fiduciary duties.”<sup>118</sup> “Not only does the Interior Department not know the proper number of accounts,” the appellate court noted, “it does not know the proper balances for each IIM account, nor does Interior have sufficient records to determine the value of the IIM accounts.”<sup>119</sup> None of this was excused by the absence of a deadline in the 1994 Act: “the lack of a timetable does not give government officials carte blanche to ignore their legal obligations,”<sup>120</sup> particularly since federal officials “were aware of their fiduciary obligations long before passage of the 1994 Act—let alone initiation of this action—and yet little progress has been made in discharging those duties.”<sup>121</sup>

On the same day that the D.C. Circuit issued this opinion, Dominic Nessi, Chief Information Officer for the BIA and a principal witness for the DOI at the Phase I trial, issued a memorandum stating “that trust reform is slowly, but surely imploding at this point in time.”<sup>122</sup> In April 2001, *Government*

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114. *Id.* at 1088; *accord* *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (“[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties . . .”) (internal quotations omitted).

115. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

116. *Morton v. Ruiz*, 415 U.S. 199, 236 (1974); *see* *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (“[The federal government] has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.”).

117. *Cobell v. Norton*, 240 F.3d at 1086.

118. *Id.*

119. *Id.* at 1089.

120. *Id.* at 1096.

121. *Id.* at 1097.

122. *Cobell v. Norton*, 226 F. Supp. 2d 1, 19 (D.D.C. 2002), *vacated in part*, 334 F.3d 1128 (D.C. Cir. 2003).

*Executive* magazine quoted Nessi as stating: “For all practical purposes, we have no security; we have no infrastructure. . . . Our entire network has no firewalls on it. I don’t like running a network that can be breached by a high school kid.”<sup>123</sup>

At the request of Judge Lamberth, Special Master Alan Balaran launched an immediate investigation.<sup>124</sup> In December 2001, Balaran issued a voluminous report finding that “Interior – in derogation of court order, common-law, and statutory and regulatory directives – has demonstrated a pattern of neglect that has threatened, and continues to threaten, the integrity of trust data upon which Indian beneficiaries depend.”<sup>125</sup> Balaran listed myriad studies and reports establishing that Interior was well aware of the problem, but had done nothing to resolve it.

Rather than take any remedial action, its senior management has resorted to the condescending refrain that has consistently insinuated itself into the federal government’s relationship with Native Americans, in general, and with IIM holders, in particular. And that is one that requests forbearance and trust on the grounds that reform continues to be the “highest priority.”<sup>126</sup>

Balaran noted that, but for Mr. Nessi’s public comments, the court may never have learned of these problems.<sup>127</sup>

#### D. Contempt Number Two

On the basis of this report and several other allegations of misconduct, in late 2001 and early 2002, Judge Lamberth conducted a twenty-nine-day trial to determine whether DOI Secretary Gale Norton (Norton replaced Bruce Babbitt as Secretary of the Interior in late January of 2001) and other DOI officials should be held in civil contempt.<sup>128</sup> Ruling in September 2002, Judge Lamberth found the government guilty of “fraud upon the court,” and thus in

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123. Katherine McIntire Peters, *Trail of Trouble*, GOV’T EXEC., Apr. 15, 2001, [http://www.govexec.com/fpp/fpp01/bureau\\_of\\_indian\\_affairs.htm](http://www.govexec.com/fpp/fpp01/bureau_of_indian_affairs.htm). “Turns out, not only could the hackers [hired by Judge Lambert to test the system] get into the system with techniques available to any second-rate high-school computer geek, they were able to set up a trust account and make adjustments to it undetected.” Mencimer, *supra* note 77.

124. *Cobell v. Norton*, No. 96-1285, 2001 U.S. Dist. LEXIS 20453, at \*8 (D.D.C. Dec. 6, 2001).

125. *Id.* at \*140

126. *Id.* at \*140-41.

127. *Id.* at \*139.

128. *Cobell v. Norton*, 226 F. Supp. 2d 1, 11 (D.D.C. 2002), *vacated in part*, 334 F. 3d 1128 (D.C. Cir. 2003).



contempt.<sup>129</sup> In its quarterly performance reports, Judge Lamberth ruled, the government deliberately withheld material information regarding the true state of reform at the DOI, and “made a conscious and deliberate decision not to correct the patently false statements that its officials had made during the Phase I trial.”<sup>130</sup>

“It is now abundantly clear,” Judge Lamberth ruled, “that the six week Phase I trial was nothing more than a dog and pony show put on by the Interior defendants.”<sup>131</sup> In particular, DOI representatives touted the virtues of their new trust management system “and then intentionally failed to inform the Court that the land management system, which was the centerpiece of their trust reform effort and defense during the Phase I trial, was experiencing enormous problems and would not be able to be implemented any time in the near future.”<sup>132</sup> These actions, taken “with the full knowledge” of government attorneys, “interfered with this Court’s ability to adjudicate fairly this case and with the plaintiffs’ ability to present their case.”<sup>133</sup>

Meanwhile, the government had taken no substantive measures following the Phase I trial to provide the plaintiffs with an accounting.<sup>134</sup> More than six years after the case was filed, and more than three years after the conclusion of the Phase I trial, the government was still in no position to estimate when it would complete the accounting required to begin the final Phase II trial. “The Court is both saddened and disgusted by the Department’s intransigence in the face of the Phase I trial ruling,” Judge Lamberth commented.<sup>135</sup> Indeed, rather than take such measures,

With the willful assistance of attorneys in the Solicitor’s Office, the Department of Interior falsely represented to this Court that it was publishing a notice in the Federal Register to determine which accounting method to use in performing a historical accounting of the IIM trust accounts. As the Court (and plaintiffs) now know, the Department never planned on using the comments to the notice as part of its decision-making

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129. *Id.* at 121; *see also id.* (“Now, of course, the fact remains that the defendants also in all likelihood committed a fraud upon the Court of Appeals as well. . . . Indeed, it is quite clear that the Interior Department is fully capable of simultaneously defrauding more than one court in this action.”).

130. *Id.* at 123.

131. *Id.*

132. *Id.*

133. *Id.*

134. *See, e.g., id.* at 160-61.

135. *Id.* at 113.

process. Rather, the agency published the notice in the Federal Register to support the appeal it had filed with the D.C. Circuit.<sup>136</sup>

With respect to the DOI computer system, Judge Lamberth found that “the defendants, by representing to the Court (and plaintiffs) for more than a year that they were in the process of making their computer systems more secure when in reality they were doing virtually nothing, committed a fraud on this Court.”<sup>137</sup> Judge Lamberth’s conclusion reflected his utter frustration with the government’s misconduct:

In February of 1999, at the end of the first contempt trial in this matter, I stated that “I have never seen more egregious misconduct by the federal government.” Now, at the conclusion of the second contempt trial in this action, I stand corrected. The Department of Interior has truly outdone itself this time. . . .

Over a two year period, the defendants successfully led this Court and the plaintiffs to believe that they were bringing themselves into compliance with the 1994 Act, and that they were taking steps that would one day provide the foundation for a historical accounting of the IIM trust accounts. In reality . . . the Interior Department was experiencing so many difficulties in so many different aspects of its trust reform effort that the agency is still only at best marginally closer to discharging its fiduciary obligations properly than it was three years ago when the Court held the Phase I trial. . . .

This Court need not sit supinely by waiting, hoping that the Department of Interior complies with the orders of this Court and the fiduciary obligations mandated by Congress in the 1994 Act. To do so would be futile. I may have life tenure, but at the rate the Department of Interior is progressing that is not a long enough appointment. Accordingly, the Court has ordered relief today that it views as being absolutely necessary to getting both this case and trust reform back on track. In the meantime, Secretary Norton and Assistant Secretary McCaleb can now rightfully take their place alongside former-Secretary Babbitt and former-Assistant Secretary Gover in the pantheon of unfit trustee-delegates.<sup>138</sup>

Judge Lamberth ordered a further trial, to be known as the Phase 1.5 trial, to determine any additional relief that might be warranted.<sup>139</sup> (Less than a year

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136. *Id.* at 120 (citation omitted).

137. *Id.* at 128.

138. *Id.* at 160-61 (citation omitted).

139. *Id.* at 162. In late 2002, the government made its first motion to remove Judge Lamberth, asking the judge to recuse himself and to disqualify the Special Master. Among

later, in July of 2003, Judge Lamberth would order all DOI systems to be immediately disconnected from the internet until the safety and integrity of the system could be established.<sup>140</sup>)

On appeal, the D.C. Circuit vacated Judge Lamberth's second contempt finding. Notably, the appellate court did not set aside Judge Lamberth's numerous findings of misconduct. Instead, the court ruled that Judge Lamberth had improperly imposed criminal rather than civil contempt upon Secretary Norton. "[T]he district court cites completed conduct of the defendants," the circuit court explained, "making the proceeding criminal in nature."<sup>141</sup> And with criminal contempt, "one person cannot be held criminally liable for the conduct of another."<sup>142</sup> The lion's share of the misconduct, the court found, occurred under the watch of Secretary Babbitt, not Secretary Norton, and there was no proof that Secretary Norton had any personal knowledge that the reports filed under her watch were false or misleading.<sup>143</sup> The court acknowledged that the earlier reports "were misleading about the progress being made in ways painstakingly identified by the district court."<sup>144</sup> But "Secretary Norton cannot be held criminally liable for contempt based upon the conduct of her predecessor in office."<sup>145</sup> The government was guilty of gross misconduct, but upon technical grounds—and given the departure of Secretary Babbitt and his fellow officials—none would be called to answer for that misconduct.

#### E. *The Phase 1.5 Trial*

In May and June of 2003, Judge Lamberth conducted a forty-four-day bench trial to determine the scope of the government's duty to provide an accounting, and to assess the government's plan for providing that accounting.<sup>146</sup> In his September 2003 decision following trial, Judge Lamberth

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other things, the government alleged that the Court and the Special Master had conducted impermissible *ex parte* communications. Rejecting this motion in January 2003, Judge Lamberth explained that "[i]t is not only appropriate but necessary for the Court, as principal, to consult with its agents regarding the manner in which they are carrying out their assigned duties." *Cobell v. Norton*, 237 F. Supp. 2d 71, 89 (D.D.C. 2003).

140. See *Cobell v. Norton*, 274 F. Supp. 2d 111 (D.D.C. 2003).

141. *Cobell v. Norton*, 334 F.3d 1128, 1146 (D.C. Cir. 2003); see also *id.* at 1140 ("[T]he district court's findings of contempt are functionally criminal rather than civil in nature.").

142. *Id.* at 1147.

143. *Id.* at 1147-48.

144. *Id.* at 1149.

145. *Id.* at 1148.

146. *Cobell v. Norton*, 283 F. Supp. 2d 66, 245 (D.D.C. 2003), *vacated in part*, 392 F.3d 461 (D.C. Cir. 2004).

ruled that, pursuant to the DOI's statutory and fiduciary duties predating the 1994 Act, Interior must perform an accounting of all assets as well as income in the IIM trust fund since the passage of the General Allotment Act in 1887.<sup>147</sup> And he rejected DOI's request to conduct merely a "statistical analysis," in which transactions are not verified by supporting documentation, but only through the use of statistical sampling methods. DOI had proffered no evidence that a statistical method had ever been employed in the performance of an accounting, as opposed to an audit, "much less that such methods are accepted by professional accountants as part of an accounting."<sup>148</sup> Indeed, DOI's sole expert on this issue "admitted that he had never heard of statistical sampling being used in an accounting."<sup>149</sup>

Judge Lamberth acknowledged that this would impose significant costs on the government. But the balance of hardships pointed in the plaintiffs' favor:

[T]he hardship to the IIM beneficiaries that would result from a further delay of the long-promised accounting of their trust fund is simply beyond the pale. Many of the beneficiaries live at a subsistence level, and depend on their IIM trust fund checks in order to purchase basic necessities such as food and drink. The delay of an adequate accounting of their funds therefore directly affects their basic ability to survive. Although neither the imposition of additional tasks upon an administrative agency nor the requirement that taxpayer funds be made available to fund such tasks represent insignificant hardships, both of these must be weighed against the personal interests in life and health of an estimated 300,000 to 500,000 American Indians.<sup>150</sup>

Judge Lamberth then entered an injunction establishing a timetable for the DOI to complete specific tasks, and requiring the DOI to report on its progress. In doing so, he decried DOI's "bunker mentality," seeking to "protect one's own bureau first; then Interior as a whole; [and to] protect the public interest last of all."<sup>151</sup>

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147. *Id.* at 288 ("The historical accounting of the Trust conducted by the Interior defendants shall account for all funds deposited or invested in the Trust since the passage of the General Allotment Act of 1887"); *id.* at 289 ("The historical accounting of the Trust conducted by the Interior defendants shall account for all assets held by the Trust since the passage of the General Allotment Act of 1887.").

148. *Id.* at 193.

149. *Id.*

150. *Id.* at 212.

151. *Id.* at 237-38.

F. *A Scandal on Navajo Land*

Events unfolding on Navajo land as the Phase 1.5 trial was proceeding would only further Judge Lamberth's dismay. Pursuant to its trust responsibilities, DOI appraises and then sells rights-of-way ("ROWs") across allotted land to private energy companies, remitting payment to the beneficiaries. In March 2003, Special Master Balaran made a site visit to government offices in New Mexico and Arizona to determine if information regarding the appraisal of ROWs running across Navajo country was being preserved in accordance with court orders.<sup>152</sup> In an August 2003 report, Balaran revealed his scandalous findings. In an interview with Balaran, the government's Chief Appraiser admitted that he had "erased" all of the appraisal information contained on his computer; that he could not find the memoranda he used to formulate his appraisal valuations; that he did not have documentation to support his ROW valuations; and that, based upon his valuations, Navajo allottees were receiving "payments for ROWs 'much less' than those payments received by neighboring tribes and private landowners."<sup>153</sup>

In particular, for pipeline ROWs across the San Juan Basin, Navajo allotted land was valued at \$25-30 per "rod" (a 16.6-foot unit), whereas neighboring tribal land was valued at \$140-\$575 per rod, and land belonging to private landowners at \$432-\$455 per rod.<sup>154</sup> Navajo allottees were being ripped off, in violation of not only the government's fiduciary obligations, but federal law mandating "just compensation" for such land use.<sup>155</sup> Balaran's report, published by the court, noted that "[t]his disparity must be viewed in the context of a 1998 report from the Division of Economic Development revealing that approximately 56 percent of the Navajo live below the poverty level," and "80 percent of those who live on the reservations lack plumbing, telephones, or electricity."<sup>156</sup>

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152. *Cobell v. Norton*, No. 96-1285, 2003 U.S. Dist. LEXIS 14303, at \*1 (D.D.C. Aug. 20, 2003).

153. *Id.* at \*3-4.

154. *Id.* at \*46.

155. See 25 U.S.C. § 325 (2006) ("No grant of a right-of-way [over Indian lands] shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just."); *Strate v. A-1 Contractors*, 520 U.S. 438, 454-55 (1997) ("A grant over land belonging to a tribe requires . . . the payment of just compensation.") (citations omitted); *id.* at 455 n.10 (same vis a vis individuals).

156. *Cobell v. Norton*, 2003 U.S. Dist. LEXIS 14303, at \*39 n.31. Mr. Balaran resigned in disgust in March 2004, shortly before the D.C. Circuit was scheduled to hear the government's motion to disqualify him. In his resignation letter, Mr. Balaran suggested that the government sought his dismissal because of his whistle-blowing activities: "I began to uncover evidence that Interior was putting the interests of private energy companies ahead of the interest of individual beneficiaries. . . . [Publicizing this information] could cost the very

“This is merely an exemplar,” plaintiffs’ attorney Harper explained, noting that the government has consistently undervalued Native American land throughout the country.<sup>157</sup> Shoshone land in Idaho, for example, which includes some of the best agricultural property you can find, has been valued at \$65 to \$75 per acre. Meanwhile, non-Native Americans living adjacent to this property are receiving over \$200 per acre for the same use.<sup>158</sup> The problem, Harper explained, is that government officials appraise Native American land without looking at “non-Indian comparables.”<sup>159</sup> By looking only at other Native American leases, the undervaluation of Native American lands, as compared with non-Native American lands, perpetuates itself.

### G. Congress’ Last-Minute Rider

In November 2003, shortly after Judge Lamberth ordered the government to provide a full accounting to beneficiaries, a rider was inserted into a Congressional appropriations bill “in the dead of night,” staying the effect of that order.<sup>160</sup> The rider, which Congress ultimately enacted into law,<sup>161</sup> prevented the expenditure of federal funds to comply with Judge Lamberth’s order until the earlier of the following: (a) a Congressional amendment to the 1994 Act delineating the specific historical accounting obligations of DOI with respect to the IIM accounts, or (b) December 31, 2004.<sup>162</sup> The rider was surreptitiously inserted into a bill calling for appropriations to fight wildfires; to oppose the bill was to risk major political fallout for obstructing the provision of emergency funds.<sup>163</sup> J.D. Hayworth, R-Ariz., co-chair of the bipartisan

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companies with which senior Interior officials maintain close ties millions of dollars.” DOI dismissed the charges as “preposterous” and “baseless.” These events are discussed in detail in two reports published by Smart Money. See Scott Patterson, *Fraud in New Mexico*, SMART MONEY, Dec. 3, 2004, <http://www.smartmoney.com/investing/stocks/fraud-in-new-mexico-16691/>; Scott Patterson, *An Ugly History*, SMART MONEY, Dec. 7, 2004, <http://www.smartmoney.com/investing/stocks/an-ugly-history-16704/>.

157. Harper Interview, *supra* note 66.

158. *Id.*

159. *Id.*

160. See 149 Cong. Rec. H10199-200 (daily ed. Oct. 30, 2003) (statement of Rep. Tom Cole) (“I am appalled that this language was included in the conference report . . . since it was not part of either the original House [or] Senate Interior appropriation bills. It was added in the dead of night in order to avoid legislative scrutiny and open debate.”).

161. Department of the Interior and Related Agencies Appropriates Act, 2004, Pub. L. No. 108-108, 117 Stat. 1241 (2003).

162. See *id.* at 1263.

163. Jerry Reynolds, *Bush Administration Likely Behind Cobell Appropriations Rider*, INDIAN COUNTRY TODAY, Nov. 1, 2003, [http://www.indiantrust.com/index.cfm?FuseAction=Articles.ViewDetail&Article\\_id=287&Month=11&Year=2003](http://www.indiantrust.com/index.cfm?FuseAction=Articles.ViewDetail&Article_id=287&Month=11&Year=2003).

House Native American Caucus, called it a “poison pill that was added to the legislation in blatant violation of House rules and protocol.”<sup>164</sup> Oklahoma Representative Tom Cole was similarly outraged:

It is clearly the first step in a process designed to impose rather than negotiate a settlement of Indian Trust account claims and to do so for as little money as possible regardless of the merits of individual cases and the historical culpability of the Federal Government in the mismanagement and theft of Native American assets held in trust.<sup>165</sup>

The D.C. Circuit refused to strike down the questionable rider, vacating Judge Lamberth’s injunction on the basis of the new law.<sup>166</sup> Congress did not take action to address DOI’s obligations, however, and when the December 31, 2004 deadline passed, Judge Lamberth simply reissued his injunction in February of 2005.<sup>167</sup> On appeal, the D.C. Circuit reversed the injunction on the grounds that Judge Lamberth “disregarded relevant information about the costs of [the] injunction.”<sup>168</sup> In particular, the government estimated that it would cost billions of dollars to perform the historical accounting mandated by Judge Lamberth, yet Congress had only appropriated \$58 million for historical accounting purposes in 2005.<sup>169</sup> At that rate of appropriation, “an accounting of the sort ordered by the district court would not be finished for about two hundred years, generations beyond the lifetimes of all now living beneficiaries.”<sup>170</sup>

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164. *Id.*

165. 149 Cong. Rec. H10199-200 (daily ed. Oct. 30, 2003) (statement of Rep. Tom Cole). As Judge Lamberth noted, this was not the first attempt to limit the plaintiffs’ claims in *Cobell*: In July of 2002, the House considered H.R. 5093, a bill limiting DOI’s obligation to perform an accounting to transactions occurring after the year 1985. *Cobell v. Norton*, 283 F. Supp. 2d 66, 198 n.71 (D.D.C. 2003), *vacated in part*, 392 F.3d 461 (D.C. Cir. 2004). The bill was defeated, 281 to 144. *Id.* The sponsors of that bill then:

[S]uccessfully inserted a provision into the omnibus appropriations for fiscal year 2002, authorizing the Secretary of the Interior to use discretionary funds to pay private attorneys to represent current and former Interior employees in connection with the present litigation. As of July 2003, this provision has resulted in the expenditure of taxpayer funds in the amount of \$4.5 million to pay private attorneys for government employees.

*Id.* (citations omitted).

166. *Cobell v. Norton*, 392 F.3d 461, 464-65 (D.C. Cir. 2004).

167. *Cobell v. Norton*, 357 F. Supp. 2d 298, 300 (D.D.C. 2005), *vacated*, 428 F.3d 1070 (D.C. Cir. 2005).

168. *Cobell v. Norton*, 428 F.3d at 1077.

169. *Id.* at 1073-75.

170. *Id.* at 1076.

Of course, the plaintiffs had long acknowledged that it was senseless to spend billions on an accounting instead of dedicating those funds to settling plaintiffs' claims. To that end, in December 2005, the plaintiffs offered to settle all claims with the government for \$27.5 billion, despite their belief that the government might owe them up to \$170 billion.<sup>171</sup> "[T]he \$27.5 billion is a bargain," lead plaintiff Cobell told the House Resources Committee at a special hearing.<sup>172</sup> "Don't waste money on what we regard as highly questioned accounting."<sup>173</sup> DOI refused the offer, and refused to make a counteroffer.<sup>174</sup> Congress—which all agree is best-suited to bring a swift end to the dispute—declined to act, ensuring that millions would continue to be spent, and more time would pass, before justice was finally done for the 500,000 *Cobell* plaintiffs. By the end of 2005, the government had already spent \$100 million in litigation and an equal amount in accounting and documentation efforts.<sup>175</sup>

H. "*Utter Depravity*," "*Moral Turpitude*," and "*Obstinate Litigiousness*"

In September 2004, Judge Lamberth ordered Interior to cease communications with *Cobell* class members regarding their trust land until a notice could be fashioned apprising them of their rights.<sup>176</sup> A month later, Judge Lamberth learned that Interior employees in several locations had begun withholding checks from trust beneficiaries, citing the court's September order as justification for doing so.<sup>177</sup> Addressing the issue in February 2005, Judge Lamberth fulminated at the inhumanity of withholding subsistence payments:

Many Indians depend on their IIM trust payments as an important part of their income—an income that, on average, is meager to begin with. . . . The idea that Interior would either instruct or allow BIA to withhold trust payments . . . is an obscenity that harkens back to the darkest days of United States-Indian relations. . . . [T]he perniciousness and irresponsibility demonstrated by blaming the Court pales in comparison to the utter depravity and moral turpitude displayed by these individuals'

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171. David Melmer, *Trust Fund Case Deadlocked: Interior Declines to Provide Historic Accounting to House Resources Committee*, INDIAN COUNTRY TODAY, Dec. 21, 2005, at A1.

172. *Id.* at A4.

173. *Id.*

174. Editorial, *Settle Indian Trust Fund Case*, DENVER POST, Mar. 16, 2006, at B6 ("The Department of Interior has refused to settle the case, saying its own studies found few discrepancies.").

175. *Id.*

176. *See Cobell v. Norton*, 355 F. Supp. 2d 531, 533 (D.D.C. 2005).

177. *Id.*



willingness to withhold needed finances from people struggling to survive and support families on subsistence incomes.<sup>178</sup>

These actions, Judge Lamberth explained, were “a testament to the startling inhumanity of government bureaucracy.”<sup>179</sup>

Five months later, in July of 2005, Judge Lamberth granted the plaintiffs’ request that all communications from the DOI to beneficiaries be accompanied by a notice informing them of the existence of the *Cobell* lawsuit.<sup>180</sup> Judge Lamberth noted that most beneficiaries were unaware of the lawsuit, and “to allow beneficiaries to continue to make decisions that substantially alter their trust interests without information about this litigation and Interior’s obligations is to effectively rob those beneficiaries of the cash value of their rights.”<sup>181</sup> He used the occasion to recount the sorry history of “mismanagement, falsification, spite, and obstinate litigiousness”<sup>182</sup> in the case:

The entire record in this case tells the dreary story of Interior’s degenerate tenure as Trustee-Delegate for the Indian trust – a story shot through with bureaucratic blunders, flubs, goofs and foul-ups, and peppered with scandals, deception, dirty tricks and outright villainy – the end of which is nowhere in sight. Despite the breadth and clarity of this record, Interior continues to litigate and relitigate, in excruciating fashion, every minor, technical legal issue.<sup>183</sup>

In another moment of unusual candor, Judge Lamberth denounced the government’s actions as culturally insensitive at best:

But regardless of the motivations of the originators of the trust, one would expect, or at least hope, that the modern Interior department and its modern administrators would manage it in a way that reflects our modern understandings of how the government should treat people. Alas, our “modern” Interior department has time and again demonstrated that it is a dinosaur—the morally and culturally oblivious hand-me-down of a disgracefully racist and imperialist government that should have been buried a century ago, the last pathetic outpost of the indifference and anglocentrism we thought we had left behind.<sup>184</sup>

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178. *Id.* at 541.

179. *Id.*

180. *See* *Cobell v. Norton*, 229 F.R.D. 5, 23-24 (D.D.C. 2005), *vacated sub nom.* *Cobell v. Kempthorne*, 455 F.3d 217 (D.C. Cir. 2006).

181. *Id.* at 15 (quoting *Cobell v. Norton*, 225 F.R.D. 41, 52 (D.D.C. 2004)).

182. *Id.* at 11.

183. *Id.*

184. *Id.* at 7.

After nine years of highly contentious litigation in *Cobell*—and 118 years of trust mismanagement—Judge Lambert had reached his wit’s end with the defendants, as his increasingly strident decisions made apparent.

I. *Who Will Rid Me of this Meddlesome Judge?*

In a 2004 editorial, the *New York Times* commented that, “[s]o far, Interior has worked as hard to discredit the judge in the case, Royce Lamberth, as it has to actually fix the problem.”<sup>185</sup> In August of 2005, the defendants took the ultimate step: in an extraordinary move, they asked the D.C. Circuit to remove Judge Lamberth from the case. Calling Judge Lamberth’s July 2005 decision, quoted above, “unlike any other judicial opinion that we have ever seen,”<sup>186</sup> the DOJ suggested that Judge Lamberth was no longer fit to hear the case “fairly” and “dispassionately.”<sup>187</sup>

Opposing this motion, attorneys for the plaintiffs pointed out that the removal of a judge in civil cases “is so rare in this Circuit as to be virtually unprecedented.”<sup>188</sup> Judge Lamberth’s decision was vitriolic to be sure, his tone exasperated and sharp. But, then, the government’s history of “mismanagement, falsification, spite, and obstinate litigiousness”<sup>189</sup> in the case were unlike anything ever seen before. “The district court’s rulings, while forcefully worded, are founded entirely on the evidence of record set forth in nine years of litigation and over 200 days of evidentiary hearings,” the plaintiffs observed.<sup>190</sup> “While the government says that they have never seen a judicial decision such as the July 12, 2005 opinion, counsel for plaintiff [*sic*] have never seen such reprehensible actions, recalcitrance and outright abuse by a fiduciary both before and during the litigation.”<sup>191</sup> In short, Judge Lamberth’s decision did not reflect an undue bias, but “the overwhelming evidence of century-long failures of trust management.”<sup>192</sup>

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185. Editorial, *A Continuing Shame*, N.Y. TIMES, Sept. 26, 2004, at 4.10.

186. Motion for Reassignment of This Case to a Different District Court Judge at 1, *Cobell v. Norton*, 428 F.3d 1070 (D.C. Cir. 2005), (No. 05-5068) (“On July 12, 2005, the district court issued a ruling that, in its extended vitriol, is unlike any other judicial opinion that we have ever seen.”).

187. *Id.* at 17.

188. Combined Opposition to Appellants’ Motion for Reassignment and Appellees’ Motion for Sanctions at 9, *Cobell v. Norton*, 428 F.3d 1070, (No. 05-5068) [hereinafter Combined Opposition].

189. *Cobell v. Norton*, 229 F.R.D. 5, 11 (D.D.C. 2005), *vacated*, 455 F.3d 317 (D.C. Cir. 2006).

190. Combined Opposition, *supra* note 188, at 1.

191. *Id.* at 21.

192. *Id.*

Nonetheless, in July 2006, the D.C. Circuit Court granted the government's motion, removing Judge Lamberth from the case.<sup>193</sup> It was only the second removal of a judge in a civil case in the history of the D.C. Circuit,<sup>194</sup> and the first time in history that a judge was removed based upon statements made in reaching his decisions.<sup>195</sup> The court cited the "string" of orders from Lamberth that it had reversed, but it noted that "repeated reversals, without more, are unlikely to justify reassignment."<sup>196</sup> Instead, the court relied chiefly upon Judge Lamberth's pronouncements, from which "an objective observer is left with the overall impression that the district court's professed hostility to Interior has become so extreme as to display clear inability to render fair judgment."<sup>197</sup> Among other things, the court cited Judge Lamberth's July 2005 opinion, which "extends beyond historical racism and all but accuses *current* Interior officials of racism."<sup>198</sup>

As the plaintiffs had pointed out, however, Judge Lamberth's excoriating language was fully justified in the record, a fact that the circuit court acknowledged:

Although the July 12 opinion contains harsh—even incendiary—language, much of that language represents nothing more than the view of an experienced judge who, having presided over this exceptionally contentious case for almost a decade, has become "exceedingly ill disposed towards [a] defendant that has flagrantly and repeatedly breached its fiduciary obligations."<sup>199</sup>

"To be sure," the court continued, "Interior's deplorable record deserves condemnation in the strongest terms. Words like 'ignominious' and 'incompeten[t]' (the district court's) and 'malfeasance' and 'recalcitrance'

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193. *Cobell v. Kempthorne*, 455 F.3d 317 (D.C. Cir. 2006).

194. See Plaintiffs-Appellee's Petition for Rehearing and Rehearing *En Banc* at 1, *Cobell v. Kempthorne*, 455 F.3d 317 (D.C. Cir. 2006), (No. 05-5269) [hereinafter Petition for Rehearing]. For the first such case, see *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995) (per curiam).

195. See *SEC v. Loving Spirit Found.*, 392 F.3d 486, 494 (D.C. Cir. 2004) ("[W]e have found no case where this or any other federal court recused a judge based only on his or her rulings."); Petition for Rehearing, *supra* note 194, at 1; see also Peter B. Rutledge, *A Judgment Call*, *LEGAL TIMES*, Aug 7, 2006, at 58, 59 ("Ordinarily, as the D.C. Circuit acknowledges, judges are removed on the basis of something they do, such as engaging in impermissible ex parte contacts. But here, Lamberth is being removed on the basis of what he said (or, more accurately, did not say) in a judicial opinion. This is remarkable.").

196. *Cobell v. Kempthorne*, 455 F.3d at 335.

197. *Id.* (citations omitted) (internal quotation marks omitted).

198. *Id.* at 333.

199. *Id.*

(ours) are fair and well-supported by the record.”<sup>200</sup> Yet, the court concluded that Judge Lamberth’s rulings could lead a reasonable observer to believe “that Interior stands no chance of prevailing whatever the merits of its position.”<sup>201</sup>

It is difficult to reconcile the circuit court’s finding (i) that DOI was “flagrantly and repeatedly” in violation of the law, “ignominious” and “deplorable,” with its ruling (ii) that Judge Lamberth’s strident decisions in response suggested that he was unfair and predisposed to ruling against DOI. As the Supreme Court has observed, judicial rulings “[a]lmost invariably . . . are proper grounds for appeal, not for recusal.”<sup>202</sup> Indeed, the D.C. Circuit itself had recognized “that it would be extraordinary to disqualify a judge for bias or appearance of partiality when his remarks arguably reflected what he learned, or what he thought he learned, during the proceedings.”<sup>203</sup>

And it was impossible for the plaintiffs not to see this as yet another remarkable act of injustice against them. “It is unprecedented for a federal judge to be reassigned for statements in his opinions that accurately restate record evidence and describe the deplorable conduct of the government as trustee,” said Cobell.<sup>204</sup> “It is the conduct of government officials that must be publicly condemned and severely sanctioned until it stops, not the esteemed Judge who has the intellectual integrity to describe such repugnant behavior.”<sup>205</sup> “It is another dark chapter in the history of this nation’s mistreatment of Indian people.”<sup>206</sup>

#### J. “No Thanks, We’ll Take the Accounting”

In March 2007, the Bush Administration offered a proposal to settle all trust claims against the government, past, present, and future (including not only *Cobell*, but over 250 additional trust cases); to pay for trust reform at the Department of the Interior; to improve information technology security relating to the trust accounts; and to fund a controversial initiative to shift trust

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200. *Id.*

201. *Id.* at 334.

202. *Liteky v. United States*, 510 U.S. 540, 555 (1994).

203. *United States v. Microsoft Corp.*, 253 F.3d 34, 115 (D.C. Cir. 2001) (per curiam); *accord SEC v. Loving Spirit Found.*, 392 F.3d 486, 494 (D.C. Cir. 2004) (“[J]udicial rulings . . . virtually never provide a basis for recusal.”).

204. Press Release, Indian Trust, *Cobell v. Kempthorne* - Indian Plaintiffs Ask Full Court of Appeals to Reconsider Decision of Three Judge Panel to Reassign Judge Lamberth (Aug. 28, 2006) (on file with author).

205. *Id.*

206. Press Release, Indian Trust, Indian Plaintiffs Appeal Court of Appeals Decision that Vacates Injunction (Aug. 24, 2006), *available at* <http://www.rlnn.com/ArtAug06/IndianPlaintiffsAppealDecisionVacatesInjunct.html>.

responsibility to tribes and individual account holders.<sup>207</sup> In a March 1, 2007 letter to Congress, United States Attorney General Alberto Gonzales and Interior Secretary Dirk Kempthorne stated that the Administration was “willing to invest up to \$7 billion dollars, over a ten year period,” to accomplish all of this.<sup>208</sup> An Interior official explained that roughly half of this amount, or \$3.5 billion, would be used to settle the trust cases.<sup>209</sup> The settlement would expunge “all existing and potential individual and tribal claims for trust accounting, cash and land mismanagement, and other related claims, along with the resolution of other related matters (e.g., trust reform, IT security, etc.) that . . . permit recurrence of such highly disruptive litigation.”<sup>210</sup>

To put this figure in perspective, in March 2005, Attorney General Gonzales himself acknowledged to Congress that the federal government’s liability for claims of trust mismanagement could exceed \$200 billion.<sup>211</sup> And the Department of the Interior’s own experts placed the figure for *Cobell* alone at between \$10 and \$40 billion.<sup>212</sup> “You cannot say that you have a potentially \$200 billion liability [for tribes] and try and settle that, plus Cobell, plus trust reform, plus IT security, for \$7 billion,” said Harper.<sup>213</sup> “That is patently bad faith.”<sup>214</sup>

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207. See Mary Clare Jelonick, *U.S. Government Offer of \$7 Billion to Settle Native Lawsuits Rejected*, VILLAGE EARTH (Mar. 10, 2007), [http://villageearth.org/pages/Projects/Pine\\_Ridge/pineridgeblog/2007/03/us-government-offer-of-7-billion-to.html](http://villageearth.org/pages/Projects/Pine_Ridge/pineridgeblog/2007/03/us-government-offer-of-7-billion-to.html); *Bush Offers Low Figure to Settle All Trust Fund Claims*, INDIANZ.COM (Mar. 7, 2007), <http://64.38.12.138/News/2007/001718.asp>.

208. Letter from Dirk Kempthorne, Sec’y of the Interior & Alberto R. Gonzales, Att’y Gen., to Byron Dorgan, Chairman, Senate Comm. on Indian Affairs (Mar. 1, 2007), available at <http://64.38.12.138/docs/cobell/bush030107.pdf> [hereinafter Kempthorne & Gonzales].

209. Jelonick, *supra* note 207.

210. Kempthorne & Gonzales, *supra* note 208.

211. Alberto R. Gonzales, U.S. Att’y Gen., Statement Before the House Committee on Appropriations, Subcommittee on Science (Mar. 1, 2005), available at <http://www.usdoj.gov/archive/ag/testimony/2005/022805fy06aghousetestimonyfinal.htm> (“The United States’ potential exposure in these cases is more than \$200 billion.”).

212. Press Release, Indian Trust, Interior Feigns Not to Understand What Indians Are Entitled To (June 21, 2005) (on file with author) (“A recent study by the Interior’s Department’s own consultant showed that the government’s liability in the Cobell case could be \$10 billion to \$40 billion.”).

213. *Bush Offers Low Figure to Settle All Trust Fund Claims*, *supra* note 207.

214. *Id.* “[I]f a bank, or a typical trustee, tried the same thing, it would be criminal.” an editorial in the *Seattle Post-Intelligencer* noted. Mark Trahan, *Do As We Say With Other People’s Money*, SEATTLE POST-INTELLIGENCER, Mar. 9, 2007, [http://www.seattlepi.com/opinion/306838\\_trahant11.html](http://www.seattlepi.com/opinion/306838_trahant11.html). “Consider the message here: We don’t know what we owe you for money we’ve collected on your behalf. We know it’s a lot. But our records are bad and so we may never know. Here take this . . .” *Id.*

Some took issue with the Cabinet members' use of the phrase "willing to invest." "Excuse us," an editorial on *Indianz.com* exclaimed, "but it's not your money to 'invest.' It's money that belongs to Indian people and is owed to them for the federal government's failure to do the job properly."<sup>215</sup> And others noted that, just as they had done in the lawsuit, government officials were endeavoring to foreclose the government's responsibility for mismanagement of the trust in the future, "no matter how woefully it might manage and fail to protect these assets."<sup>216</sup> In a press release entitled, "No Thanks, We'll Take the Accounting," plaintiff Cobell announced:

The Kempthorne-Gonzales letter is a license to steal from Indian people. And, while the Interior Department has a long and notorious history of cheating, swindling and robbing from Indian people, I in all my years have never heard of such a brazen attempt to rob us of our livelihood. In America, every other citizen can sue the government if it unlawfully takes their land or steals their money, but not Indian people if Kempthorne or Gonzales has their way. . . . The Cobell case was filed because this proposal is precisely how the government has managed this Trust—without accountability for the rampant fraud, corruption and theft that has defined Interior's reign as trustee.<sup>217</sup>

*K. Historical Accounting "Impossible," Judge Robertson Issues an Award*

In December 2006, Judge James Robertson<sup>218</sup> replaced Judge Lamberth in *Cobell*.<sup>219</sup> Signaling his intent to finally bring the litigation to a close, Judge Robertson soon ordered a trial regarding the scope of accounting required

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215. Editorial, *Bush Administration Proposes to Settle Nothing*, INDIANZ.COM (Mar. 11, 2007), <http://64.38.12.138/News/2007/001779.asp>.

216. Robert J. Miller, *Steal Their Land, Steal Their Money*, TOMPAINE.COM (Mar. 13, 2007), [http://www.tompaine.com/articles/2007/03/13/steal\\_their\\_land\\_steal\\_their\\_money.php](http://www.tompaine.com/articles/2007/03/13/steal_their_land_steal_their_money.php).

217. Press Release, Indian Trust, Cobell v. Kephthorne - *No Thanks, We'll Take the Accounting* (Mar. 8, 2007), available at [http://mailman1.u.washington.edu/pipermail/uwt\\_naso/2007-March/000034.html](http://mailman1.u.washington.edu/pipermail/uwt_naso/2007-March/000034.html).

218. President Clinton appointed Judge Robertson to the bench in 1994. After a stint in the U.S. Navy, Judge Robertson engaged in both private and public interest practice, serving as chief counsel for the Lawyers' Committee for Civil Rights Under Law and as a partner at Wilmer, Cutler & Pickering until his appointment to the bench. Biography of Judge James Robertson (on file with author). Like Judge Lamberth, Judge Robertson also served on Foreign Intelligence Surveillance Court after his appointment by Chief Justice Rehnquist, resigning the position in 2005. See Keith Garvin, *Judge Resigns from Surveillance Court*, ABC NEWS (Dec. 21, 2005), <http://abcnews.go.com/Politics/story?id=1429647>.

219. In March 2007, the Supreme Court denied plaintiffs' certiorari petition, letting stand the circuit court's order removing Judge Lamberth from the case. *Cobell v. Kempthorne*, 549 U.S. 1317 (2007).

under the 1994 Act, to take place in October 2007, eleven years after plaintiffs filed suit.<sup>220</sup> Following a ten-day trial, in January 2008 Judge Robertson issued a momentous—and prolix—decision, concluding that “the Department of the Interior has not—and cannot—remedy [*sic*] the breach of its fiduciary duty to account for the IIM trust.”<sup>221</sup>

Judge Robertson began by noting that “[n]o real accounting, historical or otherwise, has ever been done of the IIM trust.”<sup>222</sup> The 1994 Act, he added, contains “few clues” as to precisely what a historical accounting must entail, “but it is clear from the Special Trustee’s oversight duties that account holders are entitled to a ‘fair and accurate accounting of all trust accounts.’”<sup>223</sup> Nevertheless, he rejected the plaintiffs’ argument that this meant a full and proper, rather than a statistical, accounting. Judge Robertson acknowledged, as Judge Lamberth did before him, that “defendants have not identified a single instance apart from the present case where a trust accounting was performed by statistical sampling,” and that “the use of such a procedure in any conventional accounting would likely be frowned upon.”<sup>224</sup> This was “not a conventional accounting case, however,” and since the D.C. Circuit appeared to sanction the use of statistical sampling, he concluded that “the statistical sampling in Interior’s plan is not a *per se* violation of Interior’s accounting duty.”<sup>225</sup>

Similarly, he rejected plaintiffs’ argument that an accurate accounting was impossible because of numerous missing documents, including critical documents establishing opening balances and assets.<sup>226</sup> “Defendants have located and centralized 43 miles of Indian records potentially relevant to the accounting,”<sup>227</sup> he noted, and “Defendants have been surprised to discover that the records needed to perform the accounting are indeed available and accessible . . . .”<sup>228</sup> This was, however, an overstatement. As Judge Robertson

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220. *Judge Orders Cobell Accounting Trial for October 10*, INDIANZ.COM (Apr. 20, 2007), <http://64.38.12.138/News/2007/002515.asp>.

221. *Cobell v. Kempthorne*, 532 F. Supp. 2d 37, 103 (D.D.C. 2008), *vacated sub nom. Cobell v. Salazar* 573 F.3d 808 (D.C. Cir. 2009).

222. *Id.* at 43.

223. *Id.* at 98-99 (citing 25 U.S.C. § 4043(b)(2)(A) (1994)). Robertson was citing the 1994 Act, which provides, in relevant part: “The Special Trustee shall monitor the reconciliation of tribal and Individual Indian Money trust accounts to ensure that the Bureau provides the account holders, with a fair and accurate accounting of all trust accounts.” Pub. L. No. 103-412 § 303, 108 Stat. 4245 (1994) (codified as amended at 25 U.S.C. § 4043(b)(2)(A) (2006)).

224. *Cobell v. Kempthorne*, 532 F. Supp. 2d at 92.

225. *Id.*

226. *Id.* at 103 n.21.

227. *Id.* at 45.

228. *Id.* at 46.

acknowledged, “it is unclear from the evidence presented at trial what percentage of total IIM records that should have been maintained over the life of the trust have actually been recovered . . . .”<sup>229</sup> Of equal importance, he acknowledged “[t]he absence of a verified opening balance and an asset statement” as “the most serious defect in [Interior’s Accounting] Plan.”<sup>230</sup> Indeed, because “opening balances are not confirmed and the funds are not traced back through predecessor accounts,” Interior simply cannot “provide beneficiaries reasonable assurance that their account balances are accurate.”<sup>231</sup>

Ultimately, then, Judge Robertson’s finding that “Interior is unable to perform an adequate accounting of the IIM trust”<sup>232</sup> was guided by his concerns with the prohibitive costs that would be incurred, rather than on the ground that “fair and accurate”<sup>233</sup> accounting was impossible given the missing documents.

This case must be governed by Congress’s plain demand for an accounting of “all funds held in trust by the United States for the benefit of an . . . individual Indian.” In its refusal to appropriate enough money to pay for such an accounting, Congress has not amended that demand or the common law of accounting. What it has done, instead, is to render a real accounting impossible—or, perhaps, to *recognize* that such an accounting is impossible, unless it is “nuts” enough to pay more than \$3 billion to hunt down perhaps \$3 billion of unexplained variances in the government’s accounts.<sup>234</sup>

Having determined that an historical accounting was impossible, Judge Robertson asked the parties to submit evidence and to conduct a trial on the reasonable amount to which plaintiffs were entitled.

Plaintiffs sought \$58 billion,<sup>235</sup> a figure they later reduced to \$46.85 billion.<sup>236</sup> They argued that approximately \$14.3 billion had been collected by

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229. *Id.* at 55.

230. *Id.* at 100.

231. *Id.*

232. *Id.* at 103.

233. *See supra* note 223 and accompanying text.

234. *Id.* at 102; *see also id.* at 103 n.21 (“I do not reach the conclusion urged by plaintiffs: that an adequate accounting is impossible because of the problem of missing records. The record before me is inconclusive on that point. The record is not inconclusive, however, on the tension between the expense of an adequate accounting and congressional unwillingness to fund such an enterprise.”). The fact that Interior cannot “provide beneficiaries reasonable assurance that their account balances are accurate” would appear conclusively to demonstrate that an adequate accounting is impossible because of the missing records. *Id.* at 100.

235. Plaintiffs’ Memorandum in Support of Equitable Restitution and Disgorgement at 44, *Cobell v. Kempthorne*, 532 F. Supp. 2d 37 (No. 96-1285).



the government from the inception of the trusts, with reported disbursements totaling approximately \$10.7 billion, “resulting in \$3.6 billion in nominal dollars remaining in the trust.”<sup>237</sup> They further argued that by withholding these funds from beneficiaries, the government benefited greatly, reducing the national debt and avoiding debt service costs.<sup>238</sup> Plaintiffs then calculated the benefit to the government utilizing a ten-year Treasury note rate, compounded over the years to yield a total figure of \$46.85 billion as of December 31, 2007.<sup>239</sup>

Defendants scoffed at plaintiffs’ figures. They argued that the lion’s share of plaintiffs’ total arose out of an artful attempt to garner interest from the government, and under settled law, interest cannot be recovered against the government without an express waiver.<sup>240</sup> Based upon their own expert calculations, moreover, they determined that plaintiffs were entitled to “only \$158.7 million,” asserting “a 97.5% level of confidence” that this figure was “no greater than \$409.8 million.”<sup>241</sup> (On appeal in May 2009, the government insisted that plaintiffs were in fact due nothing: “THE COURT: The named Plaintiffs have, their accounts have been thoroughly audited, and they are due nothing. MS. KLEIN [Defendants’ attorney]: Exactly.”).<sup>242</sup>

In August 2008, Judge Robertson issued his decision, awarding plaintiffs \$455,600,000.<sup>243</sup> He found that plaintiffs failed to substantiate their argument

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236. Transcript of Evidentiary Hearing at 1520, *Cobell v. Kempthorne*, 532 F. Supp. 2d 37 (No. 96-1285), available at [http://www.justice.gov/civil/cases/cobell/docs/pdf/06242008\\_amtranscript.pdf](http://www.justice.gov/civil/cases/cobell/docs/pdf/06242008_amtranscript.pdf) (placing the figure, after “offsets,” at \$46.85 billion).

237. Plaintiffs’ Memorandum in Support of Equitable Restitution and Disgorgement, *supra* note 235, at 29.

238. *Id.* at 27.

239. *Id.* at 44. Again, the initial figure was \$58 billion, later reduced by plaintiffs. *See supra* note 236 and accompanying text.

240. *See* Defendants’ Proposed Findings of Fact and Conclusions of Law Following the June 2008 Trial on Plaintiffs’ Restitution and Disgorgement Claims at 118, *Cobell v. Kempthorne*, 532 F. Supp. 2d 37 (No. 96-1285) [hereinafter Defendants’ Proposed Findings], available at [http://www.usdoj.gov/civil/cases/cobell/docs/pdf/07112008\\_FoF&CoL.pdf](http://www.usdoj.gov/civil/cases/cobell/docs/pdf/07112008_FoF&CoL.pdf). *See generally* Library of Cong. v. Shaw, 478 U.S. 310, 311 (1986) (“[I]nterest cannot be recovered in a suit against the Government in the absence of an express waiver of sovereign immunity from an award of interest.”); *Amax Land Co. v. Quarterman*, 181 F.3d 1356, 1359-60 (D.C. Cir. 1999) (“[Where] Congress has not expressly provided by statute or contract for recovery of interest against the government, and in the absence of such a waiver of sovereign immunity, interest cannot be awarded against the United States.”).

241. Defendants’ Proposed Findings, *supra* note 240, at 116-17.

242. Transcript of Oral Argument at 34, *Cobell v. Salazar*, 573 F.3d 808 (D.C. Cir. 2009) (Nos. 08-5500 & 08-5506), available at [http://www.usdoj.gov/civil/cases/cobell/docs/pdf/20090511\\_transcript.pdf](http://www.usdoj.gov/civil/cases/cobell/docs/pdf/20090511_transcript.pdf).

243. *Cobell v. Kempthorne*, 569 F. Supp. 2d 223, 226 (D.D.C. 2008), *vacated sub nom. Cobell v. Salazar*, 573 F.3d 808 (D.C. Cir. 2009).

that the government withheld or diverted approximately 30% of the total receipts, yielding the figure of \$3.6 billion. “Yes, the United States Government spills billions of dollars a year . . . [but] there has never been any evidence of such prodigious pilfering of assets from within the trust system itself.”<sup>244</sup> And he held that plaintiffs failed to demonstrate that the Government actually benefited from the funds wrongfully withheld, an argument “entirely unproven as to any specific funds, and specifically refuted as to the modern borrowing practices at Treasury.”<sup>245</sup> Even if plaintiffs had actually proven a benefit to the government, moreover, their claim was barred by the doctrine of sovereign immunity.<sup>246</sup> The government had dispossessed the Native Americans of their land, and forced the trusts upon them, assuming the most solemn fiduciary obligations. Over the course of 121 years, the government had repeatedly violated those obligations, only to assert that the doctrine of sovereign immunity shielded them from the obligation to fully compensate the trust beneficiaries.

Rejecting plaintiffs’ calculations entirely, Judge Robertson accepted the government’s “statistical modeling approach,”<sup>247</sup> choosing “a number that is within the range of government’s own admitted ‘uncertainty’ about the amount necessary to restore the proper balance to the IIM trust.”<sup>248</sup> He concluded that the government’s model, while “imperfect . . . presents a plausible estimate of funds withheld . . . .”<sup>249</sup> Plaintiffs’ figures, by contrast, were “uncorroborated.”<sup>250</sup>

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244. *Id.* at 231.

245. *Id.* at 245.

246. *Id.* at 246-48. Judge Robertson noted that a bill requiring the payment of interest to the beneficiaries – and thus specifically waiving sovereign immunity – was introduced but not enacted. *Id.* at 247 n.17 (citing H.R. 1846, 103d Cong. § 102(2) (1993)).

247. *See id.* at 236.

248. *Id.* at 226.

249. *Id.* at 240. Oddly enough, Judge Robertson placed great weight on the fact that the defendants’ model acknowledged a shortfall, even while they urged a figure that was 1/295th the amount sought by the plaintiffs. *See id.* at 238-39. Indeed, Judge Robertson ruled that the government’s acknowledgement – albeit of a figure that represents a fraction even of what government officials had previously acknowledged, *see supra* note 213 and accompanying text, should be viewed as a form of admission, and thus somehow endowed with greater credibility. *See Cobell v. Kempthorne*, 569 F. Supp. 2d at 238 (“[T]he \$158.9 million gap . . . may be taken as a sort of admission”); *id.* (“That number is best understood as an admission . . . .”) (emphasis omitted); *id.* at 252 (“This statement has the character of an admission–by responsible civil servants . . . .”). Needless to say, a defendant’s acknowledgment of a shortfall can reasonably be viewed as an admission against party interest as to the existence of a shortfall, but it is hardly an admission against party interest as to the precise amount of that shortfall.

250. *Id.* at 231.

The problem, of course, is that, as Judge Robertson acknowledged, “there is no aggregate IIM receipt and disbursement data for considerable portions of the history of the Indian trust.”<sup>251</sup> Conveniently for the government, then, owing to government negligence or malfeasance, the corroborating evidence was lost to posterity. For this very reason, however, the government’s statistical model was plainly unworthy of Judge Robertson’s confidence.<sup>252</sup>

In July 2009, the D.C. Circuit vacated both of Judge Robertson’s decisions, ruling that “the court erred in freeing the Department of the Interior from its burden to make an accounting.”<sup>253</sup> “[W]ithout an accounting,” the appellate court explained, “it is impossible to know who is owed what. The best any trust beneficiary could hope for would be a government check in an arbitrary amount.”<sup>254</sup> The court recognized that some uncertainty was inevitable, but “[e]quity requires the courts to assure that Interior provides the best accounting it can.”<sup>255</sup> The circuit court thus remanded the case to Judge Robertson to “enforce the best accounting that Interior can provide,”<sup>256</sup> expressly directing that, given Interior’s “limited resources,” the lower court “should also consider low-cost statistical methods of estimating benefits across class sub-groups.”<sup>257</sup>

Although the circuit court had upheld plaintiffs’ right to an accounting—albeit a limited, statistical accounting—the decision would mean yet more delays in a case already more than thirteen years old. Lead plaintiff Cobell put the decision in perspective:

For hundreds of thousands of Indians, including children, the elderly, and the infirm who depend upon their trust funds for food, clothing, shelter, and health care, this ruling means that many more years will pass before they can hope to secure trust funds that the government has withheld

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251. *Id.* at 236.

252. Judge Robertson acknowledged that the government’s calculations “may not have adequately accounted for just how unreliable the underlying data was.” *Id.* at 239. And there were myriad additional problems with the government’s data, as Plaintiffs demonstrated. To take but one example, even the statements of account that were available for analysis were completely unreliable: “In 1988, 32% of beneficiaries who responded to an inquiry by Interior’s external accountant reported that they did not receive payments listed on their IIM statements. In 1989, 44.4% of beneficiaries who responded to a second inquiry said that they did not receive their trust disbursements posted by Interior.” Corrected Response and Reply Brief for Appellants/Cross-Appellees at 27, *Cobell v. Salazar*, 573 F.3d 808 (D.C. Cir. 2009) (Nos. 08-5500 & 08-5506) (citations omitted).

253. *Cobell v. Salazar*, 573 F.3d at 809.

254. *Id.* at 813.

255. *Id.*

256. *Id.* at 811.

257. *Id.* at 814.

unconscionably and in breach of trust duties that it has owed for generations.<sup>258</sup>

#### L. A Settlement at Last

As a Presidential candidate, Barack Obama pledged that he would resolve the *Cobell* lawsuit fairly.<sup>259</sup> Once in office, says Harper, Obama “put people in place and sent the right messages to them that he thought that this was an important agenda item . . . .”<sup>260</sup> The result was an historic agreement, announced on December 8, 2009, to settle *Cobell* after more than thirteen years of acrimonious litigation. Under the terms of the agreement, the government committed to pay \$3.4 billion to settle the class action.

The government agreed to establish a settlement account of \$1.4 billion to compensate class members for all claims of accounting and trust mismanagement, respectively.<sup>261</sup> Instead of an historical accounting, all class members with an accounting mismanagement claim<sup>262</sup> would receive \$1,000, together with a prorated payment arrived at by calculating the ten highest years of revenue in their IIM account. For example, those with average revenue of between .01¢ and \$5,000 would receive between \$500 and \$1,000; those with an average between \$15,000 and \$30,000 would receive between \$2,500 and \$5,000; and those with an average between \$75,000 and \$750,000 would receive between \$10,000 and \$100,000.<sup>263</sup>

All class members with a trust mismanagement claim, i.e. those who owned trust land as of September 20, 2009 or who had an IIM account at any

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258. Press Release, Indian Trust, *Cobell v. Salazar*: Lead Plaintiff Comments on Court Ruling (July 24, 2009) (on file with author).

259. Rob Capriccioso, *Obama Administration moves to settle Cobell*, INDIAN COUNTRY TODAY, Dec. 16, 2009, at 1, 3 (“As a candidate, I heard from many in Indian country that the *Cobell* suit remained a stain on the nation-to-nation relationship I value so much,” the president said in statement. “I pledged my commitment to resolving this issue . . . .”); Cobell Indian Trust Conference Call with Keith Harper, Att’y for Plaintiff, Elouise Cobell, Plaintiff, & Jamie Moss, NewsPros Representative, at 2 (Dec. 8, 2009) [hereinafter Trust Call], available at [http://www.cobellsettlement.com/press/cobell\\_call.pdf](http://www.cobellsettlement.com/press/cobell_call.pdf) (statement of Keith Harper: “He committed during the campaign to resolving these cases fairly”).

260. Trust Call, *supra* note 259, at 2.

261. Class Action Settlement Agreement at 6, *Cobell v. Salazar*, 573 F.3d 808 (D.C. Cir. 2009) (No. 96-1285) [hereinafter Settlement Agreement], available at [http://cobellsettlement.com/docs/sa\\_1\\_19\\_11.pdf](http://cobellsettlement.com/docs/sa_1_19_11.pdf).

262. These class members are defined as “individuals living on September 30, 2009 who had an IIM account open at any time between October 25, 1994 and September 30, 1999 and had money credited to it.” Letter from Elouise Cobell, Plaintiff, to Indian Country (Mar. 15, 2010), available at [http://www.cobellsettlement.com/class/3\\_14\\_10.php](http://www.cobellsettlement.com/class/3_14_10.php).

263. *Id.*

time between 1985 and September 30, 2009, would receive a separate payment of \$500.<sup>264</sup> Payments to accounting and trust claimants would not be mutually exclusive, and class members meeting the requisite criteria would be eligible for both payments.<sup>265</sup> Approximately \$15 million of the fund would be set aside to reimburse the named plaintiffs for “expenses and costs” borne throughout the litigation,<sup>266</sup> while the plaintiffs’ attorneys signed a separate agreement not to seek more than \$99.9 million in compensation for their work on behalf of the class.<sup>267</sup>

In addition, the government agreed to set aside \$2 billion for a “Trust Consolidation Fund.”<sup>268</sup> This fund would be used to tackle the problem of fractionation.<sup>269</sup> Under the agreement, the government would offer fair market value to the owners of fractionated lands,<sup>270</sup> up to \$2 billion, and then return the land to tribal control. “The purpose,” Harper explained, “is to make this more productive land by having it consolidated and then under tribal control and then at the same time compensating the individual Indians who own the land.”<sup>271</sup> As an additional incentive for individuals to participate in the program, the government agreed to set aside five percent of the proceeds of the land sales, up to \$60 million, in a scholarship fund for Native American students pursuing post-secondary education.<sup>272</sup>

Finally, on December 8, 2009, the day of the agreement, Interior Secretary Ken Salazar issued Secretarial Order 3292, establishing a national commission on Native American trust administration and reform.<sup>273</sup> The commission was charged with conducting “a thorough evaluation of the . . . management and administration of the trust administration system,” and of “the manner in which

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264. *Id.*

265. *Id.*

266. Settlement Agreement, *supra* note 261, at 49.

267. See Letter from Elouise Cobell, Plaintiff, to Indian Country (Feb. 16, 2010) [hereinafter Feb. 16 Letter], available at [http://www.cobellsettlement.com/class/2\\_16\\_10.php](http://www.cobellsettlement.com/class/2_16_10.php).

268. Settlement Agreement, *supra* note 261, at 35, 51.

269. See *supra* note 40 and accompanying text. The *New York Times* cited the example of a 40-acre parcel of land with 439 owners, “most of whom receive less than \$1 a year in income from it.” Charlie Savage, *U.S. Will Settle Indian Lawsuit for \$3.4 Billion*, N.Y. TIMES, Dec. 8, 2009, <http://www.nytimes.com/2009/12/09/us/09tribes.html>. “The parcel is valued at about \$20,000, but it costs the government more than \$40,000 a year to administer those trusts.” *Id.*

270. Settlement Agreement, *supra* note 261, at 35.

271. Trust Call, *supra* note 259, at 5 (statement of Keith Harper, Att’y for Plaintiff).

272. Settlement Agreement, *supra* note 261, at 38-42; Trust Call, *supra* note 259, at 5 (statement of Keith Harper, Att’y for Plaintiff).

273. See Sec’y of the Interior, Order No. 3292 (Dec. 8, 2010), available at <http://www.doi.gov/tribes/upload/secretarial-order.pdf>.

the Department audits the management of the trust administration system,” in order to reform and improve the system.<sup>274</sup>

President Obama lauded the settlement agreement as an “important step towards sincere reconciliation,”<sup>275</sup> while Cobell struck a more pragmatic tone:

The \$1.5 billion settlement fund for the accounting claims was the product of negotiations between the parties and is, in my estimation, a fair resolution for plaintiffs’ accounting, restitution and damages claims after considering the risk associated with further litigation, the refusal of the Court of Appeals to order the government to provide a full accounting of all funds, and the absence of any time limit for final judgment in this case.<sup>276</sup>

“[T]here is little doubt,” she added, that “this is significantly less than the full amount to which individual Indians are entitled.”<sup>277</sup> Indeed, just one year earlier, the plaintiffs had requested \$46.85 billion.<sup>278</sup> But the plaintiffs could not afford the luxury of battling the government indefinitely for justice that had repeatedly proven elusive in the courts:

[W]e are compelled to settle now by the sobering realization that our class grows smaller each year, each month, and every day, as our elders die, and are forever prevented from receiving their just compensation. We also face the uncomfortable, but unavoidable fact that a large number of individual money account holders currently subsist in the direst poverty, and this settlement can begin to address that extreme situation and provide some hope and a better quality of life for their remaining years.<sup>279</sup>

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274. *Id.*

275. Savage, *supra* note 269.

276. Letter from Elouise Cobell, Plaintiff, to Indian Country (Feb. 22, 2010), available at [http://www.indiantrust.com/elo/2\\_22\\_10](http://www.indiantrust.com/elo/2_22_10). Cobell noted, for example, that the district court had “limited the award following the 2008 trial to only \$455.6 million for plaintiffs’ accounting claims.” *Id.*

277. Elouise Cobell, Statement at the Department of Interior Press Conference Announcing the Settlement in *Cobell v. Salazar* (Dec. 8, 2009) (on file with author) [hereinafter Cobell Statement]; accord Press Release, Indian Trust, \$3.4 Billion Settlement Announced in Federal Mismanagement of Individual Indian Trust (Dec. 8, 2009) [hereinafter 2010 Press Release], available at <http://www.cobellsettlement.com/pressrelease.php> (“Indians did not receive the full financial Settlement they deserved, but we achieved the best Settlement we could.”).

278. See *supra* note 236 and accompanying text.

279. Cobell Statement, *supra* note 277. According to Harper, the “vast majority” of class members supported the agreement in meetings held throughout “Indian country.” Transcript of Status Conference at 7, *Cobell v. Salazar*, 573 F.3d 808 (D.C. Cir. 2009) (No. 96-1285) [hereinafter Transcript], available at <http://cobellsettlement.com/docs/Settlement>

Before that could happen, Congress would have to ratify the agreement,<sup>280</sup> then send it to the district court for approval under Rule 23 of the Federal Rules of Civil Procedure.<sup>281</sup> The agreement provided an initial deadline for congressional approval of December 31, 2009,<sup>282</sup> after which it would “automatically become null and void.”<sup>283</sup> Although there appeared to be “no serious substantive opposition to the deal,”<sup>284</sup> Congress failed to act, month after month, and the parties were forced to secure repeated postponements to keep the deal alive.<sup>285</sup>

With time of the essence, and doubtless more class members passing away without ever seeing a modicum of justice, bills to ratify the settlement were repeatedly defeated. In June 2010, the measure fell victim to a Republican filibuster of a \$110 billion bill to extend unemployment benefits, to which it was attached.<sup>286</sup> In late July 2010, the Senate voted to strip the *Cobell* settlement from a bill to fund the war in Afghanistan.<sup>287</sup> Finally, in September, the government decided that the *Cobell* settlement must be joined with a settlement of racial discrimination claims brought by African American farmers, known as *Pigford II*.<sup>288</sup> At this point, said Cobell, “passage appears to be impossible. . . . [W]e can’t carry *Pigford*, too.”<sup>289</sup>

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\_status\_hearing.pdf. The agreement was not, however, universally applauded, with some questioning the approximately \$15 million to be paid to the named plaintiffs, and the nearly \$100 million to be paid to plaintiffs’ attorneys. *See, e.g.*, William E. Martin, Editorial, *Congress Should Study Cobell Settlement Before Approving It*, INDIAN COUNTRY TODAY, Feb. 3, 2010, at 4. For a response to these criticisms see Dennis Gingold, Editorial, *Cobell Settlement Will Provide Legacy*, INDIAN COUNTRY TODAY, Feb. 3, 2010, at 4; Feb. 16 Letter, *supra* note 267.

280. Settlement Agreement, *supra* note 261, at 2, 15.

281. *Id.* at 1.

282. *Id.* at 12.

283. *Id.* at 2.

284. Editorial, *Congress Shortchanges the Indians*, N.Y. TIMES, Mar. 15, 2010, <http://www.nytimes.com/2010/03/16/opinion/16tue4.html>. By May of 2010, however, House and Senate Republicans had begun to raise concerns, particularly over the amount of projected attorneys’ fees. *See* Rob Capriccioso, *Republicans Question Cobell Settlement*, INDIAN COUNTRY TODAY, May 26, 2010, at 3.

285. *See, e.g.*, Transcript, *supra* note 279, at 4.

286. *See* Tristan Hallman, *GOP-led Filibuster Blocks Resolution of Indian Lawsuit*, ARGUSLEADER.COM (June 25, 2010), <http://www.argusleader.com/article/20100626/NEWS/6260309/GOP-led-filibuster-blocks-resolution-of-Indian-lawsuit> (“Republicans blocked the package as a whole because the bill and its \$110 billion price tag would add to the deficit without other spending cuts or tax increases.”).

287. Editorial, *The Senate Balks Again*, N.Y. TIMES, Aug. 5, 2010, at A26.

288. *See* Letter from Elouise Cobell, Plaintiff, to Indian Country (Sept. 30, 2010), available at [http://www.indiantrust.com/elo/9\\_30\\_10](http://www.indiantrust.com/elo/9_30_10).

289. *Id.*

Reflecting the concerns of Senate Indian Affairs Vice Chairman John Barrasso (R-WY), the settlement was amended to provide an additional \$100 million to the neediest members of the class.<sup>290</sup> Following this change, on November 19, 2010, the Senate unanimously passed the legislation.<sup>291</sup> On November 30, 2010, the House approved the settlement by a vote of 256 to 152.<sup>292</sup> And on December 9, 2010, President Obama signed the bill into law.<sup>293</sup>

Fourteen years after the filing of *Cobell*, the United States government had finally offered Native Americans some measure of compensation for 123 years of “bureaucratic blunders, flubs, goofs and foul-ups . . . scandals, deception, dirty tricks and outright villainy.”<sup>294</sup>

#### IV. CONCLUSION

Do rights violations persist in this country? What greater evidence of the persistence of injustice can there be than the case of Mildred Cleghorn, born and raised in a U.S. government concentration camp for Apaches and a plaintiff in the *Cobell* case? Ms. Cleghorn tragically died before seeing justice done in *Cobell*. But she lived long enough to see the United States government react to her demand for an accounting of her own trust money with a motion to dismiss the claim entirely, and thus to foreclose any further inquiry into, much less any reconciliation and payment of, those funds.

That was only the opening salvo in a case that would see the government employ scorched earth litigation tactics against the very people whose “trust” it had systematically abused for more than a hundred years. By 2005, Elouise Cobell noted, the government had assigned more than 100 lawyers to fight the plaintiffs in this case, through four trials, seven appeals, 2,500 different court filings, and six attempts at mediation.<sup>295</sup> Those figures all increased significantly in the half-decade that followed. How many more beneficiaries passed away during this time?

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290. *Id.* The \$100 million was transferred from the land consolidation fund. *See id.*

291. *See* Letter from Elouise Cobell, Plaintiff, to Indian Country (Nov. 22, 2010), available at [http://www.indiantrust.com/elo/11\\_22\\_10](http://www.indiantrust.com/elo/11_22_10).

292. Rob Capriccioso, *Cobell Settlement Clears House; on to President*, INDIAN COUNTRY TODAY, Dec. 8, 2010, at 1.

293. Michelle Tirado, *Obama Signs Cobell Settlement*, AM. INDIAN REP., Dec. 9, 2010, <http://www.americanindianreport.com/wordpress/2010/12/obama-signs-cobell-settlement/>.

294. *Cobell v. Norton*, 229 F.R.D. 5, 11 (D.D.C. 2005), *vacated sub nom. Cobell v. Kempthorne*, 455 F.3d 217 (D.C. Cir. 2006).

295. Press Release, Indian Trust, *Judge Awards Fees to Plaintiffs in Trust Case* (Dec. 19, 2005) (on file with author).



In fact, tens of thousands of beneficiaries died during the years of scorched earth litigation in *Cobell*.<sup>296</sup> Like their predecessors, dispossessed of their land by the United States government and forced into a “trust” relationship, they died without a single accounting of their trusts, and without restitution of the vast sums of money that the government misplaced or diverted. Not surprisingly, moreover, given the government’s forced dispossession and pauperizing of the Native Americans, many of them were among the poorest in the land, those who could least afford the deprivation of their trust funds: “Although they are citizens of the greatest and most prosperous nation in the world today, the beneficiaries of the IIM trust live under conditions that would not be alien to citizens of the poorest Third World nations. Many of them live in abject poverty.”<sup>297</sup>

Ultimately, it was this very fact that forced Cobell and others to accept the government’s inadequate settlement offer:

Time takes a toll, especially on elders living in abject poverty. Many of them died as we continued our struggle to settle this suit. Many more would not survive long to see a financial gain, if we had not settled now. This, more than any other factor, motivated me to work toward an agreement now.<sup>298</sup>

The D.C. Circuit had already denied the *Cobell* plaintiffs an historical accounting of their trusts, and in an unprecedented maneuver, had removed plaintiffs’ drum major for justice, Judge Lamberth.<sup>299</sup> Meanwhile, following trial in 2008, Judge Robertson had limited plaintiffs’ accounting claim to only \$455.6 million.<sup>300</sup> The *Cobell* settlement offered but a fraction of what the plaintiffs likely deserved. But in the end, it was an exercise in the “achievable,”<sup>301</sup> rather than the just.

Looking back, it is difficult to fathom the depths of injustice that *Cobell* and its history reveal. Judge Lamberth’s commentary perhaps sums it up best:

[W]hen one strips away the convoluted statutes, the technical legal complexities . . . what remains is the raw, shocking, humiliating truth at the bottom: After all these years, our government still treats Native

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296. *Id.*

297. *Cobell v. Norton*, 283 F. Supp. 2d 66, 230 (D.D.C. 2003), *vacated in part*, 392 F.3d 461 (D.C. Cir. 2004).

298. 2010 Press Release, *supra* note 277.

299. *See supra* notes 193-195 and accompanying text. As noted, this was the first time in history that a judge was removed based upon statements made in reaching his decisions.

300. *See supra* note 243 and accompanying text.

301. 2010 Press Release, *supra* note 277.

American Indians as if they were somehow less than deserving of the respect that should be afforded to everyone in a society where all people are supposed to be equal.<sup>302</sup>

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302. *Cobell v. Norton*, 229 F.R.D. 5, 7 (D.D.C. 2005), *vacated sub nom.* *Cobell v. Kempthorne*, 455 F.3d 217 (D.C. Cir. 2006). Senator John McCain, R. Az., a ranking member of the Indian Affairs Committee, told *60 Minutes*, “they cannot account for \$2.4 billion—B, billion. Look, if \$2.4 billion for any other group of Americans could not be accounted for, there would be an outcry, there’d be lawsuits, there’d be—there’d be a national scandal.” Interview by Mike Wallace, *60 Minutes*, CBS, with Sen. John McCain, U.S. Senate (Apr. 2, 2000) (transcript on file with author).