Focus On: Cobell v. Salazar

By Justin Guilder

PHOTO: THREE RIVERS PETROGLYPH SITE, NEW MEXICO. BY LAWRENCE R. BACA.

By any measure, the Cobell v. Salazar litigation is one of the most extraordinary lawsuits in the history of the United States. A review of some of the eye-popping numbers associated with the case make its exceptional status clear: the certified class includes more than 500,000 individual Indian beneficiaries; the case has had over 3,500 court filings and more than 80 published opinions, 10 of which are from the court of appeals; the dispute involves 120-plus years of the government's trust management of 11 million acres of land from which more than $15 billion of trust funds has been collected. Moreover, the plaintiff class in *Cobell* stands as the single largest class ever certified against the federal government.

The unique nature of the litigation is further confirmed by the fact that, during the pendency of the litigation, several high-level officials from the U.S. Department of the Interior, including Secretaries Babbitt and Norton, were held in contempt of court for failing to comply with court orders and for misleading the court. Even more astonishing, the court of appeals removed the presiding judge, Hon. Royce Lamberth, citing an appearance of bias based on a string of reversals and certain incendiary language condemning the Interior Department. But removal of Judge Lamberth led to reassignment of the case to Hon. James Robertson, who ultimately assisted the parties during the tense settlement negotiations that resulted in the $3.4 billion settlement, which is the largest settlement the U.S. government has ever entered into.

However, the amazing story is that the *Cobell* litigation pales in comparison to the horrifying truth of the government's abuse of Indians—both generally in American history and specifically as it forms the underpinnings of this case. The events that led to this litigation were put into motion more than 120 years ago, when the U.S. Congress attempted to destroy Indians' tribal way of life by creating yeoman farmers cast in Congress members' own image. To accomplish those ethnocentric and paternalistic goals and to fulfill America's Manifest Destiny, Congress enacted the Dawes Act, which was designed to force the assimilation of Native Americans. That congressional act broke up tribal reservations generally into three categories of land: a diminished tribal reservation; land designated for settlement by whites; and land set aside to be individually allotted, which is the trust land at the heart of the *Cobell* case.

The United States immediately seized legal title to the allotted lands for the benefit of the individual Indians and, as trustee, exercised complete control over those lands and their resources—including oil, natural

gas, coal, timber, and other valuable natural resources. The U.S. government originally intended to terminate the trust status of the individually owned allotments after 25 years of oversight. The government's policy toward Indians shifted, however, and Congress extended the trust relationship in perpetuity, while at the same time ending the process of allotment.

The intervening 100 years of government trust oversight were marked by mismanagement at best and misappropriation or theft at worst. Either way, 40 million acres of land disappeared from the individual Indian Trust, and hundreds of thousands of Indians lived in poverty while government officials leased their lands for everything from grazing to oil drilling to mineral extraction. The records necessary for an accounting—records that detail the United States' fiduciary administration—vanished as quickly as did the hope that individual Indians would be permitted to manage their *own* affairs. Indeed, the history of the individual Indian Trust is littered with stories of loss, dissipation, theft, waste, and wrongful withholding of trust funds. Congress knew as early as 1914 that "[t]he Government itself owes millions of dollars for Indian moneys which it has converted to its own use."[1]

The government's abuse of Indians took many forms; after decades of being foreclosed from managing their own fiscal matters, in an effort simply to keep their land in trust status and avoid state taxation, some Indians had to attach themselves to the psychological yoke of the term "noncompetent" and bear the burden of having done so. Further compounding the problems suffered by the individual Indians, the breadth of the government's mismanagement remained hidden from the individual Indian beneficiaries because, as a matter of policy, beneficiaries were not provided any trust account statements, and no real accounting—historical or otherwise—has ever been done of the Indian Trust.

A century of complaints by Native Americans and Congress members' repeated concerns about pervasive mismanagement of the trust led to passage of the Trust Reform Act in 1994, which confirmed and codified the government's pre-existing duty to provide a full accounting to the beneficiaries of the trust. That act was the culmination of years of congressional frustration over the way the Department of the Interior was handling the individual Indian Trust. But after the government failed to begin the accounting required both by the Trust Reform Act and the government's fiduciary duty as trustee, five Indians filed a complaint in the U.S. District Court for the District of Columbia on behalf of themselves and all other individual Indian Trust beneficiaries. Thus began a 14-year litigation war.

The suit alleged that the federal government had breached its fiduciary obligations, claiming that the government destroyed critical records, failed to account to trust beneficiaries, and either lost trust assets or converted them to government use. Over the next three years, the district court certified the case as a class action, issued many opinions and, after conducting a lengthy trial, concluded that the federal government had failed to discharge its fiduciary duties and was in breach of trust. In 2001, the Court of Appeals for the District of Columbia Circuit generally affirmed and recognized that the individual Indian Trust that Congress had created more than 100 years ago had been mismanaged for nearly as long.

On Aug. 7, 2008, after many collateral battles, Judge Robertson issued a decision that awarded the plaintiff class $455.6 million of undisbursed trust funds as restitution from the defendants. That award followed on the heels of a decision handed down on Jan. 30, 2008, in which the court concluded that the historical accounting of all individual Indian Trust funds was impossible. The court grounded its impossibility ruling not on the absence of records capable of performing such an accounting but on the lack of congressional funding sufficient to conduct the historical accounting. On appeal, the court of appeals rejected the district court's finding of legal impossibility. The appellate court, in its tenth opinion, confirmed that the United States was still responsible to the individual beneficiaries for the best accounting possible and, once again, remanded the case for further proceedings.

After the district court's ping-pong game with the appellate court entered the eleventh round, the parties were forced to reassess their respective positions. And with the election of President Barack Obama, who made a campaign promise to settle the *Cobell* lawsuit, the possibility of settlement reappeared. However, because the parties had unsuccessfully attempted to reach settlement on seven different occasions, the plaintiffs approached settlement discussions with a jaundiced eye.

But the new Obama administration sat down at the negotiating table in good faith, and, for the first time in 14 years, light could be seen flickering at the end of the proverbial tunnel. Following three months of tense negotiations, the parties were able to reach a $3.4 billion settlement. Both monetary relief for breaches of trust and nonmonetary trust reform measures are included in the settlement, which, when final, will form the foundation upon which a new trust relationship will be built.

The total monetary portion includes $1.4 billion for resolution of the accounting, trust administration, and mismanagement claims. Those funds will be distributed to the individual beneficiaries of the individual Indian Trust who had an account open on the government's systems as of Oct. 25, 1994—the date the Trust Reform Act was passed. Those account holders will receive $1,000 as a payment in lieu of the government's providing a historical accounting. The remainder of this settlement fund, less the cost of settlement implementation, will be distributed pro rata, calculated on the transactional activity in a beneficiary's trust account over a designated period of time, with a baseline minimum payment of $500. Accordingly, the vast majority of beneficiaries will receive at least $1,500 from the settlement, and many will receive considerably more than that.

In addition, the parties focused their settlement efforts on resolving an issue that has plagued the individual Indian Trust for decades and has exponentially increased the difficulty the government faces in its fiduciary role—fractionation. The agreement therefore attempts to reduce the increasing fractionation of individual Indian lands. The Interior Department has repeatedly acknowledged that managing these highly fractionated interests—many of which have low monetary value—is one of the core problems that have

caused the trust to be mismanaged. An amount of $2 billion will be set aside to purchase those fractional interests from sellers who consent to the sale. That key aspect of the settlement will place additional funds in the hands of individual Indians and will help establish a more stable foundation for management in the future.

To provide incentives for fractional landowners to sell their land, an incentive program was negotiated. The parties agreed to create a $60 million scholarship fund for post-secondary academic and vocational scholarships for Indian youth to be funded as landowners sell their fractionated land. Elouise Cobell, the lead plaintiff in the lawsuit, succinctly explained the critical importance of the scholarship fund: "The scholarship fund will establish a great legacy for Indian children and grandchildren, providing them the education necessary to break the cycle of poverty that has held too many Indians in its grip for generations."[2]

In addition, the settlement includes a commitment by the federal government to appoint a commission that will oversee and monitor specific improvements to the way the Interior Department accounts for and manages the assets of individual Indian trusts going forward. The day the settlement agreement was publicly announced, Secretary Salazar followed through on that commitment by issuing a Secretarial Order that creates a Secretarial Commission. There is also an agreement to perform an audit of the trust, which is critical to ensuring that the beneficiaries and the public can scrutinize the effectiveness of the commission. (Detailed information about the settlement is available at www.Indian trust.com.)

There is no doubt that settling *Cobell* is an important step toward a genuine resolution of the long-standing conflict between the beneficiaries of the individual Indian Trust and the federal government. The settlement is perhaps the only way to lay the foundation for a more successful administration of individual Indian Trust assets in the future. Nevertheless, it is important to note that the settlement has not been finalized. Congress must enact legislation to authorize implementation of the settlement, and the district court must provide preliminary approval. Following the preliminary approval, notice will be sent to all class members, who will then have the ability to provide their comments on the settlement and, if they choose, opt out of it. After that notice and comment period, the settlement will be further scrutinized for its fairness, reasonableness, and adequacy, and the district court will have to provide final approval. The most critical step is clearly the first, because without congressional approval, this historic settlement will not materialize. **TFL**

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Endnotes

[1]Bureau of Municipal Research, 63rd Cong., Report to the Joint Commission to Investigate Indian Affairs: Business and Accounting Methods Employed in the Administration of the Office of Indian Affairs 2 (Comm. Print 1915).

[2]Testimony Before S. Comm. on Indian Affairs, 110th Cong. (2009) (statement of Elouise Cobell, lead plaintiff, *Co-*

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who participated on a panel entitled "Trade and Intercourse Act Suits: Legislation as an Alternative to Litigation."

In its first 35 years, the FBA Indian Law Conference has had more than 40 different chairs. The conference chairs represent an illustrious group of federal, state, and tribal attorneys as well as law professors. Table 2 presents a partial historical list of the conference chairs.

Why?

The FBA Indian Law Conference has played a role not only in our profession but also in the lives of our clients, law students, and association members. As Indian law has expanded, diversified, and fluctuated in many ways, this conference has adjusted and maintained accordingly. Notwithstanding the many other Indian law conferences now hosted by law schools, national and regional organizations, state Indian bar associations and sections, and even state Supreme Courts, the FBA conference still holds its own and is a standout. *Wado* ("Thanks," in Cherokee) to attendees, chairs, speakers, and the FBA. **TFL**

Melody L. McCoy is an enrolled member of the Cherokee Nation of Oklahoma. She has been a staff attorney at the Native American Rights Fund since 1986. She co-chaired the FBA Indian Law Conference in 1991 and 1992. All views and errors and omissions in this article are hers.

Endnotes

[1]Lawrence R. Baca, *Ignore the Man Behind the Curtain: A Brief History of Thirty Years of the Indian Law Conference*, 52 Fed. Law. 4 (2005).

[2]Answers: (1) In 1980, Hon. Peter McDonald, chairman of the Navajo Nation, was a luncheon speaker. (2) In 1980, Hon. Louis F. Claiborne, U.S. deputy solicitor general, was a banquet speaker. (3) Bruce M. Bothelo, attorney general of the state of Alaska, was a speaker in 1998, 2000, and 2001 (*Bonus*: Bothelo also appeared in 2006 in his present capacity as mayor of Juneau). (4) In 1983, the conference included a panel entitled "Gambling on Indian Reservations: Legal Context and Relationship to Economic Development." (5) The most recent year that litigation and legislative were topics was in 1998.