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## SUMMARY

### Proposed Cobell Class Action Settlement Agreement of December 7, 2009

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This Settlement Agreement (hereinafter “the Settlement,”) would resolve a case that originally sought declaratory and injunctive relief to require defendants to provide plaintiffs with an accounting of IIM funds. In addition to the class most closely related to the original claim, defined as the “Historical Accounting Class,‒ the Settlement defines a new class, the “Trust Administration Class.‒ By inserting this second class of claims, the parties significantly expand the scope of claims being extinguished to include those based on land and resource mismanagement as well as fund mismanagement.

The Settlement is accompanied by authorizing legislation. Note that if Congress makes material changes to the legislation, the Settlement is rendered null and void. Settlement, p. 15.

#### Who is included in the Settlement Classes?

The Historical Accounting Class consists of individuals who owned land or funds in accounts. Claims for this class arise under the Trust Reform Act of 1994 and include “the historical accounting through [September 30, 2009] of all funds collected and held in trust by Defendants and their financial and fiscal agents in open or closed accounts, as well as interest earned on such funds, whether such funds are deposited in IIM accounts, or in tribal, special deposit, or government administrative or operating accounts.” Settlement, p. 10.

The Trust Administration class is composed of members who have or had IIM accounts and all those individual Indians who owned land, who “had a recorded or other demonstrable ownership interest in land held in trust or restricted status, regardless of the existence of an IIM account and regardless of the proceeds, if any generated from the land.” Settlement, p. 14. [Underline added.] The Settlement would extinguish all claims of the Trust Administration Class for mismanagement of their trust assets. These claims include “Funds Administration Claims” and “Land Administration Claims.” “Funds Administration Claims” are funds mismanagement claims. They include, for example, failure to collect rent on a lease.

“Land Administration Claims” include claims for “mismanagement of land, oil, natural gas, mineral, timber, grazing, water and other resources and rights.” Settlement, p. 11. Specific breaches in this area include, for example, failure to maximize total production for oil, natural gas, or mineral resources, failure to correct boundary errors, misappropriation, failure to enforce conservation requirements, failure to enforce the law against trespassers or those who commit land fraud, and failure to prudently negotiate leases, easements, rights of way or sales of individual Indian land. Settlement, p. 11-12. Clearly this is a very broad and diverse, and potentially valuable, class of claims.

The Historical Accounting Class includes individual Indians who were alive as of September 30, 2009 and who had an IIM account open between October 25, 1994 and September 30, 2009. The Historical Accounting Class also includes deceased beneficiaries if their IIM account was open as of September 30, 2009 and estates of Class Members are included if they died after September 30, 2009 but before distribution. The Trust Administration Class does not include individuals who were deceased as of September 30, 2009, but does include the estates of deceased beneficiaries if the probate was open as of September 30, 2009. Like the Historical Accounting Class, the Trust Administration Class includes beneficiaries deceased after September 30, 2009 but before distribution.

#### Does the new “Trust Administration” Class Need to be Certified by the Court?

In class action lawsuits, the “class” must be certified in order for the litigation to move forward. The Federal Rules of Civil Procedure require that the plaintiffs represent the class members adequately and that all class members are similarly situated – that there are questions of law or fact common to all class members.

In this case a new class certification is required because the Class Certification Order of February 4, 1997 did not include nonmonetary mismanagement claims. The initial complaint filed June 10, 1996 defined the class as “all present and former beneficiaries of IIM accounts” and asked the court “for a decree ordering an accounting and directing the defendants to make whole the IIM accounts of the class members.” In order to include the “Trust Administration Class,” therefore, the parties have amended the complaint to add a claim for “one or more claims for breach of trust with respect to Defendants’ mismanagement of trust funds and trust assets requesting damages, restitution, and other monetary relief.” Settlement, p. 16.

The amended complaint also contains an argument to justify the certification of the Trust Administration Class. Amended Complaint, p. 19-24. However, individual Indians who own trust assets could make a credible and reasonable argument that common questions of law and fact are not present due to the broad variety of asset mismanagement claims and the differing legal issues applicable to each claim. It may in fact be difficult for the parties to justify certification of the Trust Administration Class.

It appears that the parties anticipate that class certification may present a challenge. The legislation that accompanies the Settlement contains the following provision: “Notwithstanding the requirements of the Federal Rules of Civil Procedure, the court overseeing the Litigation may certify the Trust Administration Class, which shall then be treated as a class under Federal Rule of Civil Procedure 23(b)(3) for purposes of the Settlement.” Section 105(b), Legislation, p. 2. This appears to authorize the court to deviate from the usual class certification requirements. Class members may want to consider whether the underlying policy and fairness reasons for requiring that class members be similarly situated apply in this situation.

### Can individual Indian Beneficiaries Opt Out?

The Settlement provides that no “Opt Out” is available for the Historical Accounting Class. This aspect of the Settlement may be vulnerable to legal challenge. The Settlement gives members of the Trust Administration Class sixty days from the first day notice is sent to all class members to opt out. Trust Administration Class members can opt out by submitting a written request for exclusion to the Claims Administrator. Settlement, p. 19-20. In the event that more than 15% of Trust Administration Class members opt out, “the Defendants, at their sole option, may elect to withdraw from and fully terminate this Agreement in which case the Parties will be restored to their prior positions as though the Agreement had never been executed...” Settlement, p. 20-21.

Note that plaintiffs have alleged throughout the litigation, and continue to do so in the Settlement, that the Department of the Interior has faulty and inaccurate contact data for a broad spectrum of class members. Given that state of affairs, and the remote and isolated areas where many tribal members live, it is surprising that Trust Administration Class members have only sixty days to opt out.

### How is the Settlement Funded and How are Funds Allocated?

The Settlement requires the United States to pay \$1.42 billion which would be deposited in a “Qualified Bank.” The first \$20 million, at minimum, is allocated to Claims Administrator and the Notice Contractor. The settlement would next pay every Historical Accounting class member \$1000 regardless of how many IIM accounts each class member held, the “Stage 1” payments. Trust Administration class members would receive a baseline amount of \$500. They would also receive a prorated amount of the remaining settlement funds, the “Stage 2” payments. However, the pro-rated amount would only be available after payment of:

1. \$1000 to each Historical Accounting Class Member; and
2. The \$20 million, possibly more, for the Claims Administrator and Notice Contractor; and
3. Amounts taken out of settlement because of members who opt out; and
4. A reserve fund for class members who did not receive notice; and

5. An amount reserved for the \$500 Trust Administration baseline payment; and
6. All payments made, or to be made to Class Counsel, which \$50-100 million for past work, plus future work, amount uncertain and to be determined; and
7. All payments made to, or to be made to, the four Class Representatives, which will be at least \$15 million but could be significantly more; and
8. Current, remaining, and future costs of administering the fund to be paid to the Notice Contractor, the Claims Administrator, and the Qualified Bank. Note that this provision would enable the bank in which the fund was deposited to assess a significant amount of costs in order to administer the fund.

These set asides are likely to amount to at least \$500 million, which leaves approximately \$900 million for Stage 2 payments.

The pro-rata payments to the Trust Administration class would be paid based on an "Assigned Value." To determine this Assigned Value, the Department of the Interior would calculate the average of the ten highest revenue generating years in each individual beneficiary's IIM account. That amount would then be divided by the sum of all Assigned Values for all Trust Administration Class Members. Settlement, p. 30. Using this methodology each member would be paid his or her percentage share of the amount that is available for Stage 2 payments after the rest of the Settlement is funded.

Interestingly, under this methodology, the amount paid to Trust Administration Class members is not based on actual loss of funds or other assets. Instead it is based on the amount in IIM accounts. *This means that, for example, that if an individual Indian was owed \$50,000 in lease rental funds and it was never paid into his IIM account, which had \$0 in it, that individual Indian would recover no damages under this settlement but the claim would be extinguished. In cases in which damage was done to an individual Indian's land – e.g. the wrong pesticide was used by the BIA and it caused significant damage to the land's agricultural lease potential – no recovery would result under this settlement, although the claim would be extinguished, because the damages would not in any way relate to what was in the individual Indian's IIM account. This makes the settlement formula for "Trust Administration" claims vulnerable to legal challenge. Note also that the Department of the Interior could potentially evade very significant liability under this formula because many claims, including natural resource damage claims, have no relationship to how much money passes through an IIM account.*

#### Funding of Land Consolidation

The Settlement sets aside an additional \$2 billion for the Bureau of Indian Affairs Land Consolidation Program, to be used for acquiring fractional interests in trust or

restricted lands. Up to 15% percent of the \$2 billion can also be used for administration of the Land Consolidation Program and for “paying the costs related to the work of the Secretarial Commission on Trust Reform.” Settlement, p. 35. However, this “Secretarial Commission on Trust Reform” is not defined anywhere in the Settlement or in the legislation. Considering the extremely need for funding for land consolidation in Indian country, it is surprising that funds are being taken out for a purpose that is not openly defined. As set out in the Settlement, it appears that the Department of the Interior would have total discretion in establishing and administering this Commission.

#### What are the plaintiff incentive payments?

The Settlement provides that the four named plaintiffs, Eloise Pepion Cobell, Penny Cleghorn, Thomas Maulson, and James Louis Larose shall file a notice to the court for incentive awards, “including costs and expenses that were not paid for by attorneys.” These expenses and costs are “expected to be in the range of \$15 million above those paid by Defendants to date.” Settlement, p. 49. Note that this amount is not capped at \$15 million.

Class members may object to the amount requested by the named plaintiffs. Some questions that class members might reasonably ask include the following:

- a. How do the incentive payments relate to the amount the named plaintiffs are owed in the historical accounting?
- b. What documentation of costs and expenses supports the costs that these payments represent?
- c. How much of their costs and expenses, not paid for by attorneys, were funded by foundation and other charitable grants?

Unlike many other federal statutes that are designed to reward whistle-blowing by citizens who initiate lawsuits, the Trust Reform Act of 1994 does not authorize these kinds of incentive payments. The extent of the Court’s authority to approve these payments may therefore be questioned.

#### What is the basis for attorneys’ fees?

The Settlement authorizes payment of attorneys’ past and future attorney fees. This is estimated at \$50-100 million up through the date of the agreement and \$30-50 million for future work, including settlement implementation. Again, class members may legitimately ask class counsel for an accounting of these fees, including information about how much of the work was funded by foundation grants.

#### Conclusion

This Settlement significantly expands the scope of claims being settled and therefore extinguished by adding the "Trust Administration Class" as a class to be certified. Although it is clear that all Historical Accounting Class Members will receive \$1000 in the Stage 1 payments, it is unclear what Trust Administration Class Members will receive beyond the \$500 baseline payment in Stage 2 payments. This is of concern because the Trust Administration Class payments will only be made after many other very costly items are funded.

Class members may also question the fundamental fairness of the Assigned Value formula because it is unrelated to actual loss but is instead based on what was in the accounts. This would mean that a class member whose account was never missing any funds would stand to benefit greatly by a Stage 2 payment. It would also mean that a class member whose account funds were misappropriated because of an act of gross negligence might have a much lower Assigned Value because of funds missing from their account, meaning that they would certainly not be made whole by the Stage 2 payment.

Last, there are several significant areas where the Settlement is vulnerable to challenge or failure. First, if Congress makes material changes in enacting authorizing legislation, the settlement is rendered null and void. If 15% or more of Trust Administration Class Members opt out, the entire Settlement fails. Class members may also successfully challenge certification of the Trust Administration Class, which would result in failure of the entire settlement.