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The Indian Trust Fund Litigation: An Overview of *Cobell v. Norton*

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Summary

The *Cobell v. Norton* litigation has been before the courts since 1996. The dispute in *Cobell* involves the federal government's alleged mismanagement of accounts held in trust for individual Indians. Central to this dispute is the Department of the Interior's duty to provide a historical accounting of the accounts. This duty has proven very difficult to fulfill, however, for a variety of reasons. The purpose of this report is to give a background of the history leading up to the litigation and summarize the issues that have proven so difficult for the judiciary to resolve. This report will be updated upon final disposition of the case or legislative intervention.

Background. The conflict in *Cobell v. Norton* traces to the federal government's trust responsibility with respect to American Indians. The Supreme Court first formulated this concept in 1831, likening tribal-federal government relationship to "a ward to its guardian."[1] Over the years, this relationship has evolved to include fiduciary responsibilities on the part of the United States to manage Indian monies and assets held in trust.[2] While Congress's power to shape the contours of this fiduciary obligation is great, it is not plenary, and Indians have property rights in funds and assets held in trust.[3] The *Cobell* litigation sprang out of the federal government's trust responsibility with respect to three groups of money accounts held in trust for individual Indian beneficiaries. These accounts are commonly referred to as the Individual Indian Money (IIM) accounts. They include (1) Land-based Accounts — established to receive revenues derived from the approximately 11 million acres held in trust by the U.S. for individual Indians;[4] (2)

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[1] *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

[2] *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (quoting *Navajo Tribe of Indians v. United States*, 624 F. 2d 981, 987 (Ct. Cl. 1980)).

[3] See, e.g., *United States v. Sioux Nation*, 448 U.S. 371 (1980).

[4] These accounts trace their beginnings to the federal government's allotment program of the late 19th and early 20th centuries. Under this program, the Secretary of the Department of the Interior (continued...)

Special Deposit Accounts (SDAs) — intended to be temporary accounts to hold funds that could not be immediately credited to the proper IIM account holder; (3) Judgment and Per Capita Accounts — established to receive funds form tribal distributions of litigation settlements and tribal revenues.[5]

Congress has delegated to the Secretary of the Interior and the Secretary of the Treasury its responsibilities as trustee with regard to the IIM accounts.[6] The Bureau of Indian Affairs (BIA) has general responsibility for trust land management and income collection.[7] Most transactions involving IIM accounts require BIA approval. One of BIA's most important duties in this regard is managing IIM funds derived from income-producing activities on allotment land, including grazing leases, timber leases, timber sales, oil and gas production, mineral production, and rights-of-way.[8] The Office of Trust Fund Management (OTFM) is responsible for BIA's fiduciary duties to keep accurate financial records of these activities.[9] OTFM also shares the banking aspect of DOI's trust responsibility with the Treasury Department. OTFM and BIA officers collect payments and deposit them into a local bank where there is a Treasury General Account.[10] The Treasury Department maintains a single "IIM account" for all IIM funds, rather than individual accounts, while OTFM is responsible for maintaining accounting records for the individual funds.[11] Treasury also invests the funds at the direction of the Department of the Interior (DOI).[12]

As mentioned above, the federal government — as holder of these accounts in trust for the Indian beneficiaries — has fiduciary obligations to administer the trust lands and funds arising from them for the benefit of the beneficiaries. The federal government has stipulated, however, that it does not know the exact number of IIM trust accounts that it

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[4] (...continued)
(DOI) was authorized to allot portions of reservation land to individual Indians. Title would remain with the United States in trust for a number of years, after which it would pass to the individual allottees free from all encumbrances. The allotment policy resulted in large amounts of land passing into non-Indian ownership, and Congress abandoned the policy in 1934, extending indefinitely the trust periods of allotments that had not yet passed into fee ownership, and many of these properties remain in trust to this day. See Felix F. Cohen, *Handbook of Federal Indian Law* 127-143 (1982 ed.).

[5] Ibid. at 149-150.

[6] 25 U.S.C. § 161a(a).

[7] See, e.g., the federal timber management statutes, at 25 U.S.C. §§ 406-407, 466.

[8] Ibid.

[9] See *Cobell v. Babbitt*, 91 F.Supp.2d 1, 10 (D.D.C. 1999).

[10] Ibid.

[11] *Cobell v. Norton*, 240 F.3d 1081, 1089 (D.C. Cir. 2001). When OTFM issues a check to an IIM trust beneficiary, the amount is deducted from the individual fund, even though the money remains in the Treasury's general account. As a result, the beneficiary loses any interest that would accrue between issuance and cashing of the check, a time lapse that "may be short in the private sector, [but] can be much longer in the IIM trust context because OTFM often has incorrect addresses for the recipients." *Cobell v. Norton*, 91 F. Supp.2d 1, 12 (D.D.C. 1999).

[12] Ibid., at 1088.

is supposed to administer, nor does DOI know the correct balances for each IIM account.[13] DOI concedes that it is currently unable to provide an accurate accounting for a majority of IIM trust beneficiaries.[14] The Treasury Department also has many problems with its trust fund management procedures. First, in conformity with federal law, the Treasury Department allows the destruction of documents over six years and seven months old, and makes no effort to ensure that documents related to accounting for IIM accounts are preserved.[15] In addition, there can be a time lapse between the deposit of funds with the Treasury Department and the investment of those funds.[16] There can also be a time lapse between the issuance of a check and when the payee presents the check, resulting in lost interest.[17]

Congressional oversight committees became concerned with IIM mismanagement in the late 1980's, and began holding oversight hearings regarding the IIM accounts in 1988, and fours years later produced a report highly critical of the Interior Department.[18] In 1994, Congress enacted the Indian Trust Fund Management Reform Act (the Reform Act),[19] recognizing the federal government's pre-existing trust responsibilities and further identifying some of the Interior Secretary's trust fund responsibilities, such as providing adequate accounting for trust fund balances; providing adequate controls over receipts and disbursements; providing accurate and timely reconciliations; preparing and supplying periodic statements of account performance and balances to account holders; and establishing consistent, written policies and procedures for trust fund management.[20] Significantly, the original House bill (H.R. 1846) would have made the accounting duty prospective only. When another similar bill was introduced to take H.R. 1846's place, however, that provision was left out. This new bill became the Reform Act, and the courts interpreting it in the *Cobell* litigation have determined that DOI owes a historical accounting duty going back to the act of June 24, 1938.[21] As the D.C. Circuit Court of Appeals put it, "The 1994 Act identified a portion of the government's specific obligations and created additional means to ensure that the obligations would be carried out."[22]

The Litigation. In 1996, a group of IIM account holders filed a class action suit to compel performance of trust obligations, alleging that the Secretaries of the Interior and

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[13] *Cobell v. Norton*, 240 F.3d 1081, 1089 (D.C. Cir. 2001).

[14] Ibid.

[15] See *Cobell v. Norton*, 240 F.3d 1081, 1092 (D.C. Cir. 2001).

[16] Ibid.

[17] Ibid.

[18] *Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund*, H.Rept. 102-499 (1992). Largely in response to this report, BIA contracted with Arthur Anderson & Co. to audit and reconcile a sampling of 17,000 IIM accounts, which the company was unable to accomplish due to inadequate records.

[19] P.L. 103-412 (25 U.S.C. 4001 et seq.).

[20] 25 U.S.C. § 162a(d)

[21] *Cobell v. Norton*, 240 F.3d 1081, 1102 (D.C. Cir. 2001).

[22] Ibid., at 1100.

the Treasury — as delegatees of the federal government's trust responsibilities — had breached the fiduciary duties owed to plaintiffs by mismanaging the IIM accounts.[23] Two years later, the district court judge bifurcated the trial into two phases, with Phase 1 to focus on reforming the management and accounting of the IIM trust funds, and Phase 2 to address the historical accounting of those accounts.[24] In 1999, United States District Judge Royce C. Lamberth issued a ruling as to Phase 1, holding that the Treasury and Interior Secretaries had breached their fiduciary duties to the IIM account holders.[25] The transition to Phase 2 has proven increasingly difficult, however as the defendants have been unable to submit — in forms acceptable to the court — plans for reforming the account-management system and providing a historical accounting.[26]

While providing the far-reaching accounting required in the *Cobell* litigation is a difficult task on a number of levels — the plaintiffs, in fact, argue that an accurate accounting is impossible, due to lack of records — two issues have proven particularly difficult for DOI in performing this task. The first of these issues is the fractionation of interests in many of the allotment lands. These interests have been fractionated over the years as they have been divided among the heirs of the original allottees, increasing exponentially with each generation and leading to incredibly small interests that are difficult to track. DOI estimates that there are currently over 1.4 million fractional interests of 2% or less involving 58,000 tracts of land.[27] No matter how small the revenue generated by the interest — and DOI cites some interests as being so small that they generate less than one cent per year — DOI is required to account for them.[28] While DOI has stated that it can perform a transaction-by-transaction accounting of the judgment and per capita accounts and the SDAs, the problems presented by the land-based accounts have proven very difficult to resolve, and DOI has argued that it should be able to use statistical sampling with respect to some of these accounts.

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[23] For a discussion of the history of the case, *see Cobell v. Norton*, 240 F.3d 1081, 1092-1093 (D.C. Cir. 2001).

[24] Ibid.

[25] *Cobell v. Babbitt*, 91 F.Supp.2d 1 (D.D.C. 1999), *aff'd*, 240 F.3d 1081 (D.C. Cir. 2001).

[26] *Cobell v. Norton*, 226 F.Supp.2d 1, 162 (D.D.C. 2002). While finding a workable method to provide the historical accounting has proven extremely difficult, adding to that difficulty is the fact that the litigation has become increasingly acrimonious. See *Can a Process Be Developed to Settle Matters Relating to the Indian Trust Fund Lawsuit?: Oversight Hearing Before the Committee on Resources, U.S. House of Representatives*, 108th Cong. 50 (2003) (statement of John Berry, Chairman, Quapaw Tribe). It is not just the parties who are at loggerheads, however. In addition, since the trial's inception, Judge Lamberth has issued contempt orders against, among others, former Treasury Secretary Robert Rubin, former DOI Secretary Bruce Babbitt, and current DOI Secretary Gale Norton (the D.C. Circuit later overturned the contempt order against Secretary Norton).

[27] See *Can a Process Be Developed to Settle Matters Relating to the Indian Trust Fund Lawsuit?: Oversight Hearing Before the Committee on Resources, U.S. House of Representatives*, 108th Cong. 9 (2003) (statement of James Cason, Associate Deputy Secretary, U.S. Department of the Interior). For a description of the various accountings that DOI has attempted, including the historical accounting for the name plaintiffs in *Cobell*, see Ibid., at 12-13.

[28] DOI is also required to provide trust services to the owners of such interests, including title records, lease management, and probate. *See Id.*

The second difficult question is how far back a historical accounting should reach. At various points in the litigation, the different parties have argued for an accounting of transactions as far back as 1887 (date of the Allotment Act), 1938 (date of the Indian Reorganization Act), and1994 (date of the Reform Act). Resolving this problem would likely encompass a choice between what is fair and what is possible. One could have very different answers to these two questions, mainly because, as the litigation so far has shown, DOI and Treasury records relating to the IIM accounts are at best incomplete.

In January 2003, DOI provided a new historical accounting plan to Judge Lamberth that would cover all accounts open as of October 25, 1994, when the Reform Act was enacted. After reviewing DOI's plan, Judge Lamberth in September 2003, issued a controversial structural injunction giving the court broad oversight authority to ensure that (1) DOI carries out the accounting (the court adopted what is essentially a modified version of DOI's historical accounting plan, but did not allow DOI to use statistical sampling with respect to the land-based accounts); and (2) DOI reforms its system for managing the IIM accounts. Judge Lamberth also appointed a monitor to ensure compliance with the injunction order.[29]

One month later Congress passed an appropriations rider stating that "nothing in [the Reform Act] or in any other statute, and no principle of common law, shall be construed or applied to require the Department of the Interior to commence or continue historical accounting activities with respect to the [IIM] Trust" until 2005 or Congress more clearly delineates DOI's accounting obligations under the Reform Act.[30] Congress took this action in direct response to Judge Lamberth's structural injunction order, stating that compliance could cost upwards of $6 billion and that diverting that amount of resources could be "devastating to Indian country."[31] Two subsequent appropriation bills have limited the funds available to DOI for the historical accounting to $58 million for FY2005 and FY2006.[32] On December 10, 2004, the D.C. Circuit issued an opinion striking down almost all of Judge Lamberth's injunction.[33] The court first held that, pursuant to Congress's directive contained in the aforementioned appropriations rider, DOI could not be compelled to perform any historical accounting. The court noted, however, that the directive would sunset on December 31, 2004, and the judges pointed out that they could not "address the issues that would be relevant if the district court [after December 31, 2004] reissued those provisions [compelling a historical accounting]."[34]

The court next largely overturned Judge Lamberth's injunction as to DOI's systemic reform. Looking to Supreme Court precedent, the D.C. Circuit held that judicial review under the Administrative Procedure Act (APA) is limited to *specific* agency actions, and

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[29] *Cobell v. Norton*, 283 F.Supp.2d 66, 225 (D.D.C. 2003).

[30] P.L. 108-108 (117 Stat. 1263).

[31] See H.Rept. 108-330, at 117 (Oct. 28, 2003).

[32] P.L 108-447 (118 Stat. 2809) and P.L. 109-54 (119 Stat., 499).

[33] *Cobell v. Norton*, 392 F.3d 461 (D.C. Cir. 2004).

[34] Ibid., at 468.

that such review cannot be extended to "claims of broad programmatic failure."[35] The court held that Judge Lamberth, in issuing his injunction, had impermissibly wandered into this latter area, which is more properly reserved for executive or legislative action. While the D.C. Circuit upheld Judge Lamberth's requirement that DOI submit a plan laying out how it will come into compliance with its fiduciary obligations, the court found that the other elements of Lamberth's order — e.g., the appointment of a monitor, the listing of and compliance with tribal laws — were not tied to specific findings of wrongdoing and suggested greater, and unlawful, judicial intrusion into agency discretion.

On February 23, 2005, Judge Lamberth — noting that the deadline contained in the appropriations rider had passed — issued another structural injunction only with respect to the historical accounting.[36] Lamberth once again adopted a modified version of DOI's historical accounting plan, but prohibited the use of statistical sampling and required an accounting going back to the Allotment Act of 1887. Judge Lamberth refused to stay the order pending appeal, citing the plaintiffs' nine-year wait and "a delay directed by Congress in a bizarre and futile attempt at legislating a settlement in this case."[37] On November 15, 2005,[38] the D.C. Circuit vacated Judge Lamberth's injunction and historical accounting order and directed that, on remand, the district court, in evaluating DOI's plan for a statistical sampling to accomplish the accounting, should not ignore the general language of the Reform Act and subsequent congressional limitations on funding, suggesting that the Reform Act should not be seen as mandating "the best available accounting without regard to cost."[39]

On July 11, 2006, the Court of Appeals found the district court to have abused its discretion in ordering DOI to disconnect from the Internet many of its computer systems,[40] ordered the district court to vacate an order requiring DOI to include in any communication to class members a warning that information provided about trust matters might be unreliable, and removed Judge Lamberth from the case for bias[41]in accusing DOI of present-day racism. While the appellate court recognized that Judge Lamberth's opinion did not reflect an animosity toward DOI, independent of the developments in the case, it concluded that the language of the opinion combined with the court's actions might give rise to a public impression that justice could not be done in the case.

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[35] Ibid., at 472.

[36] *Cobell v. Norton,* 337 F.Supp.2d 298 (D.D.C. 2005).

[37] Ibid.

[38] *Cobell v. Norton,* ___ F. 3d ___, 2005 WL 3041512 (D.C. Cir. 2005).

[39] Ibid., at 5.

[40] *Cobell v. Kempthorne,* ___ F.Supp.2d ___, 2006 WL 1889148 (D.C. Cir. 2006).

[41] *Cobell v. Kempthorne,* ___ F.Supp.2d ___, 2006 WL 1889150 (D.C. Cir. 2006). D.C. Cir. 2006). Bias was seen in Judge Lamberth's language in *Cobell v. Norton,* 229 F.R.D. 5 (D.D.C. 2005). such as the following quoted by the appellate court: "'Alas, our 'modern' Interior department [sic.] 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 as the last pathetic outpost of the indifference and anglocentrism we thought we had left behind.'"