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United States Senate

COMMITTEE ON INDIAN AFFAIRS

WASHINGTON, DC 20510-6450

ALLISON BINNEY, MAJORITY STAFF DIRECTOR
DAVID A. MULLON JR., MINORITY STAFF DIRECTOR

April 27, 2010

Dear Tribal Leader:

On December 7, 2009, the Departments of Justice and the Interior entered into a proposed “Class Action Settlement Agreement” with the plaintiffs in the case of *Cobell v. Salazar*. This case has been pending in the Federal court system, with multiple hearings, trials and appeals, for almost 14 years. The proposed settlement agreement would resolve the current historical accounting claims as well as some entirely new claims. The settlement is subject to (1) approval of Congress, and then (2) preliminary and final approval of the Federal district court judge presiding over the case.

Since its announcement in December, the proposed settlement has given rise to considerable discussion and debate in Indian Country and elsewhere. Some commentators have supported the settlement, while others have been quite critical of either certain aspects of the agreement or, in some cases, all of it. In addition to the unresolved question of how to pay for the cost of the estimated \$3.412 billion proposed settlement, there are concerns that deserve to be carefully considered before Congress acts.

Why should these concerns be “carefully considered” before Congress acts? The answer to that is simple: Even though a congressionally approved settlement of the Cobell case would still require subsequent approval by the court, few if any substantive changes to the settlement could be made after Congress has acted. Class beneficiaries would have to accept any flaws in the settlement, and if those flaws turned out to be serious, the Court would have to decide whether to scuttle the settlement altogether. If the proposal is to settle the case once and for all, and to do so fairly to the parties as well as to the American taxpayer, we should get it right *before* Congress acts.

Attached to this letter is a list with descriptions of five suggested amendments designed to improve the settlement—either as amendments to the settlement agreement itself or to the draft legislation that the parties to the case have proposed to approve the settlement. These suggestions represent an attempt to address concerns that have been brought to my attention. Briefly, the amendments would accomplish the following:

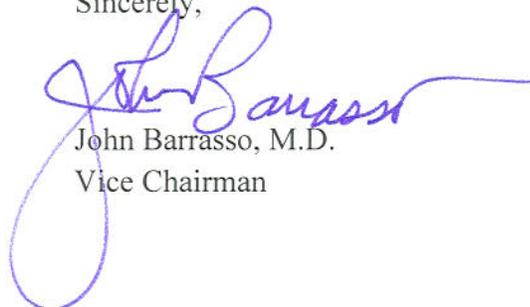
- Cap attorneys’ fees, expenses and costs incurred through December 7, 2009, at \$50 million.

- Limit any “incentive awards” to named plaintiffs to actual, unreimbursed out-of-pocket expenses incurred by that plaintiff.
- Have the Special Master, after receiving recommendations from the parties and subject to approval of the court, select the “Qualifying Bank(s).” The selection would be based not only on the minimal criteria in the settlement, but also on experience, institutional capacity to administer large deposits of this nature, competitive rates of interest, and other relevant factors as determined by the Court or the Special Master.
- Require the Department to consult with Indian tribes in planning, designing, and setting the priorities for the fractional interest acquisition program under the settlement, and to allow Indian tribes to participate or assist in implementing the program either through the Indian Self-Determination and Education Assistance Act or other appropriate means.
- Set aside up to \$50 million from the \$1.412 billion settlement monies as a reserve fund. Authorize the Special Master to use the fund to make discretionary, non-appealable supplements to the settlement payments of the members of the new “Trust Administration Class” that would be created pursuant to the settlement. These supplements would be provided only to members of that class who demonstrate that the per capita and formula payment under the settlement was not fair based on his or her individual circumstances.

Again, these suggested amendments are explained in more detail in the attached document. I would appreciate any input or suggestions you may have on these ideas or any other aspects of the settlement. Because time is short, I would like to hear from you as soon as possible. Please send any comments you may have to my staff director, David A. Mullon Jr., at david_mullon@indian.senate.gov or in writing at 838 Hart Senate Office Building, Washington, DC 20510.

Thank you for your time and help. I look forward to hearing from you.

Sincerely,



John Barrasso, M.D.
Vice Chairman

SUMMARY OF PROPOSED AMENDMENTS TO COBELL SETTLEMENT LEGISLATION

- Cap any award of attorneys' fees, expenses and costs incurred through December 7, 2009, at \$50 million. The attorneys involved in the Cobell litigation have entered into a "side agreement" stipulating that, although the question of attorneys fees, expenses and costs incurred prior to the settlement date will be determined by the court, they will contest the award within a range of \$50 million to \$99.9 million and that they will not appeal an award that falls anywhere within that range. A \$50 million cap on these fees, expenses and costs, while at the lower end of the range, represents an amount that attorneys for the plaintiffs and defendants have agreed would not be appealed.
- Limit any "incentive awards" to named plaintiffs to actual, unreimbursed out-of-pocket expenses incurred by that plaintiff. The provisions of the settlement agreement relating to incentive awards to named plaintiffs appear to address costs and expenses that have been incurred by these parties but that were not paid for by their attorneys. The agreement states that these costs and expenses are in the "range of \$15 million above those paid by Defendants to date." However, these provisions suggest that "incentive awards" are not limited to "expenses and costs." The proposed amendment would limit the awards, whatever they are called, to out-of-pocket expenses incurred by the party that have not already been paid for by the Government or the attorneys.
- Have the Special Master, after receiving recommendations from the parties and subject to approval of the court, select the "Qualifying Bank(s)," and base the selection not only on the minimal criteria in the settlement, but also on experience, institutional capacity to administer large deposits of this nature, competitive rates of interest, and other relevant factors as determined by the Court or the Special Master. The provisions in the settlement agreement about what bank or banks will be holding the \$1.412 billion settlement funds are minimal at best: Basically, the "qualifications" for the bank(s) are captured in only a one-sentence definition of the term "Qualifying Bank" on page 13 of the agreement.
- Require the Department to consult with Indian tribes in planning, designing, and setting the priorities for the fractional interest acquisition program under the settlement, and to allow Indian tribes to participate or assist in implementing the program either through the Indian Self-Determination and Education Assistance Act or other appropriate means. The \$2 billion set aside for this program should be expended in manner that deals with the significant problem of fractionation of individual Indian lands in the most cost effective and efficient manner possible.

The tribes whose reservations have significant numbers of highly fractionated tracts have been living with the problem for decades. They should be consulted and they should play a meaningful role in implementing the program.

- Set aside \$50 million from the \$1.412 billion settlement monies as a reserve fund and authorize the Special Master to use the fund to make discretionary, non-appealable, equitable increases in or supplements to the settlement payments to the members of the new “Trust Administration Class” that would be created pursuant to the settlement. These increases would be made to any member of that class who could demonstrate that the per capita and formula payment under the settlement was not fair based on his or her individual circumstances. In many instances, the proposed pro rata formula would be a rational basis for distributing the settlement monies, but in many other cases the formula might lead to significant inequities. For example, many if not most of the kinds of claims that would be resolved under this aspect of the settlement would arise from acts of mismanagement or neglect which would have led to reduced income to an IIM account. *Therefore, paradoxically, in some cases landowners whose trust assets were effectively managed—leading to higher income in their IIM accounts during the relevant time period—would fare better under the settlement than landowners whose trust assets were poorly managed in ways that led to reduced IIM account income during the relevant period.* While it might not be possible to make a class member whole, the suggested amendment would at least allow the Special Master to achieve some level of equity with a supplemental payment to any member of the Trust Administration Class who demonstrates that the pro rata payment should be supplemented based on his or her individual circumstances. If any amounts are remaining in this reserve fund after supplemental payments are approved by the Court and distributed to class members, the balance would be paid to all Trust Administration Class members under the pro rata formula of the settlement.