



NATIONAL CONGRESS OF AMERICAN INDIANS

June 11, 2010

The Honorable Byron Dorgan
Chair
Committee on Indian Affairs
United States Senate
Washington, DC 20510

The Honorable John Barrasso
Vice Chair
Committee on Indian Affairs
United States Senate
Washington, DC 20510

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Re: Cobell Settlement and Senator Barrasso's Amendment 4313 to the American Jobs and Closing Tax Loopholes Act of 2010

Dear Chairman Dorgan and Vice Chairman Barrasso:

As you know, a very important vote may soon occur in the Senate. Currently the Senate is considering H.R. 4213, the American Jobs and Closing Tax Loopholes Act of 2010. For Indian people across the country the most important provision in the legislation is Section 607, which would authorize the settlement of the *Cobell v. Salazar* litigation over federal mismanagement of Indian trust funds. Senator Barrasso has proposed an amendment that would address some concerns about the settlement that have been raised by tribal leaders and Indian people. These are legitimate concerns that have come from the grassroots in Indian country, and it is our hope that the parties and the Senate try to find common ground on these concerns.

The National Congress of American Indians has long supported a settlement of this litigation because it is time to bring justice to Indian people and because the contentious litigation has distracted from efforts to address the many other issues that Indian country faces. When the settlement was first announced in December of 2009, there was a general feeling of elation and relief throughout Indian country. We are extremely grateful to the Administration and to Eloise Cobell and her team for working so hard on this settlement and bringing it to the brink of resolution.

However, we also believe that Ms. Cobell described it well when she said that this is a "bittersweet victory" for Indian country. There is no doubt that the injuries to Indian people have been much greater than the compensation they will receive. In addition, over the past several months, Indian tribes and Indian people have had an opportunity to more closely examine the details of the settlement. Hearings have been held in Congress, and meetings have taken place on reservations across the country. As might be expected with a class action settlement of this size and complexity, the details have generated considerable discussion and some disagreements.

Senator Barrasso has solicited the views of tribal leaders on the details of the settlement and has filed a proposed amendment. The Affiliated Tribes of Northwest Indians and the Great Plains Tribal Chairman's Association, two large and well respected regional tribal organizations, have both passed resolutions favoring Senator Barrasso's amendment. A similar resolution has been submitted to NCAI for consideration during our Midyear Session during the week of June 20. However, NCAI's consideration of the resolution may happen after Congress has voted.

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As you know, both the Administration and the Cobell plaintiffs have raised concerns that any amendments to the Cobell settlement legislation would render the settlement null and void. We understand the need for the parties to a difficult settlement to adopt this posture. However, we have little doubt that if Congress were to make modest and reasonable adjustments, the parties will readily amend the settlement agreement to conform to the implementing legislation.

NCAI's interest is that Congress passes a settlement that is responsive to legitimate concerns raised by tribal leaders and members of the class, and that a contested floor vote on these issues may not be conducive to our shared goal of settling the litigation. I will briefly address the elements of Senator Barrasso's amendment. Amendment 4313 would:

1) Cap attorneys' fees at \$50 million and incentive awards at expenses up to \$15 million

The settlement was accompanied by a side agreement that the federal government would not contest an award of attorney's fees in a range between \$50 to \$100 million. These attorneys' fees have generated considerable discussion. Most account holders will receive an award in the range of \$1500, which is less than what was expected. Over the years, the Cobell plaintiffs have frequently estimated the size of the damages in the hundreds of billions, so disappointment at the size of the award has combined with views about the size of the attorneys' fees. This is a difficult issue because we also recognize that the Cobell attorneys have worked very hard on the litigation for the last 14 years, and class action attorneys in Indian law cases should be fairly compensated on a par with similar class actions. We suggest that the numbers are not far apart, and an accommodation could be reached.

2) Require that a special master select the bank that will handle the \$1.4 billion award

The settlement agreement indicates that the award will be deposited in a bank selected by the plaintiffs and approved by the court. Senator Barrasso's amendment would require that court should consider certain criteria for experience in the handling of large deposits, compliance with banking laws, and competitiveness of fees. This appears to be a reasonable provision to ensure competent and efficient management of the funds.

3) Allow tribes to participate in the land consolidation program that will occur on their reservations

NCAI strongly supports Senator Barrasso's proposal to permit tribes to participate in the land consolidation program that will be funded by the settlement. Land consolidation is critical for addressing trust management problems created by fractionation and preventing future mismanagement. However, Indian tribes have had concerns about the ability of the Bureau of Indian Affairs to administer the land consolidation program on the scale and in the timeframe required by the settlement. Since 1975, Indian tribes have been able to contract with the BIA to manage BIA programs on their reservations. The Indian Land Consolidation Program is one of the few programs that does not allow tribal participation in this way. We believe that allowing tribal governments to participate in land consolidation will greatly benefit the program because tribes have the greatest interest in its success, and because tribes know the local conditions on their reservations much better than a centrally-located BIA.

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4) Set aside a \$50 million fund for class members who may not be fairly compensated by the formula distribution.

The inclusion of natural resource mismanagement claims within the settlement has been controversial within Indian country because it was not a part of the original Cobell claim, and because the formula would be unfair to some landowners. Although the resource mismanagement settlement allows an opt-out, it would be extraordinarily difficult for Indian landowners to pursue mismanagement claims on their own. Senator Barrasso's amendment would set-aside \$50 million out of the settlement to make equitable adjustments for certain landowners who would not be adequately compensated by the formula. So long as it does not substantially slow down the operation of the formula distribution, we believe it is reasonable to set aside a small portion of the settlement to smooth out some of the inequities of the formula system.

Thank you very much for considering our views on this important issue. We greatly appreciate the enormous efforts that all of you have put into resolving the Indian trust funds litigation.

Sincerely,

A handwritten signature in black ink that reads "Jefferson Keel". The signature is written in a cursive, flowing style with a large initial "J".

Jefferson Keel, NCAI President