

**[ORAL ARGUMENT SCHEDULED ON FEBRUARY 16, 2012]**  
No. 11-5205

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Elouise Pepion Cobell, *et al.*,  
Plaintiffs-Appellees,

Kimberly Craven,  
Objector-Appellant,

v.

Kenneth Lee Salazar, Secretary of the Interior, *et al.*,  
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

**BRIEF FOR THE DEFENDANTS-APPELLEES**

TONY WEST  
Assistant Attorney General

RONALD C. MACHEN, JR.  
United States Attorney

THOMAS M. BONDY  
ADAM C. JED  
BRIAN P. GOLDMAN  
(202) 514-4825  
*Attorneys, Appellate Staff*  
*Civil Division, Room 7535*  
*U.S. Department of Justice*  
*950 Pennsylvania Avenue, N.W.*  
*Washington, D.C. 20530*

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## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

### **A. Parties and Amici.**

The named plaintiffs-appellees are Elouise Pepion Cobell, Thomas Maulson, James Louis Larose, and Penny Cleghorn. Ms. Cobell passed away on October 16, 2011. They represent two certified classes. The Historical Accounting Class consists of “those individual Indian beneficiaries (exclusive of those who prior to the filing of the Complaint on June 10, 1996 had filed actions on their own behalf stating a claim for an historical accounting) alive on the Record Date [September 30, 2009] and who had an IIM Account open during any period between October 25, 1994 and the Record Date, which IIM Account had at least one cash transaction credited to it at any time as long as such credits were not later reversed.” A539 (Settlement Agreement (“SA”) ¶ A.16). The Trust Administration Class consists of “those individual Indian beneficiaries (exclusive of persons who filed actions on their own behalf, or a group of individuals who were certified as a class in a class action, stating a [claim concerning the administration of trust funds or lands] prior to the filing of the Amended Complaint [on December 21, 2010]) alive as of the Record Date and who have or had IIM Accounts in the ‘Electronic Ledger Era’ (currently available electronic data in systems of the Department of the Interior dating from approximately 1985 to the present), as well as individual Indians who, as of the

Record Date, 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.” A543 (SA ¶ A.35).

The appellant is Kimberly Craven, who was not a party to the proceedings below, but is a member of the two classes and filed an objection to the class settlement agreement approved by the district court.

The defendants-appellees are Ken Salazar, as Secretary of the Interior; Larry Echohawk, as Assistant Secretary of Interior–Indian Affairs; and Timothy Geithner, as Secretary of Treasury, all named in their official capacities.

The Competitive Enterprise Institute, a nonprofit organization, has filed a brief as *amicus curiae* in this appeal.

## **B. Rulings Under Review.**

Ms. Craven has taken this appeal from the July 27, 2011 order entered by Judge Thomas F. Hogan in D.D.C. No. 96-1285, granting final approval to the class settlement agreement, and the final judgment entered on August 4, 2011. The district court’s order and judgment are reproduced in the Appellant’s Appendix at A784-96 and A837, respectively. The district court’s underlying oral ruling is reproduced in the Government Appendix (“GA”) at GA75-139.

### C. Related Cases.

1. This case has been before this Court on ten previous occasions: *Cobell v. Salazar*, 573 F.3d 808 (D.C. Cir. 2009) (Nos. 08-5500 & 08-5506); *Cobell v. Kempthorne*, 455 F.3d 317 (D.C. Cir. 2006) (No. 05-5269); *Cobell v. Kempthorne*, 455 F.3d 301 (D.C. Cir. 2006) (No. 05-5388); *In re Kempthorne*, 449 F.3d 1265 (D.C. Cir. 2006) (No. 03-5288); *Cobell v. Norton*, 428 F.3d 1070 (D.C. Cir. 2005) (No. 05-5068); *Cobell v. Norton*, 392 F.3d 461 (D.C. Cir. 2004) (No. 03-5314); *Cobell v. Norton*, 391 F.3d 251 (D.C. Cir. 2004) (Nos. 03-5262 & 04-5084); *In re Brooks*, 383 F.3d 1036 (D.C. Cir. 2004) (Nos. 03-5047, 03-5048, 03-5049, 03-5050 & 03-5057); *Cobell v. Norton*, 334 F.3d 1128 (D.C. Cir. 2003) (No. 02-5374); *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001) (Nos. 00-5081 & 00-5084).

2. The *Cobell* settlement is at issue in four other appeals currently pending in this Court. In three consolidated cases, Nos. 11-5270, 11-5271 & 11-5272, three objectors (Carol Eve Good Bear, Charles Colombe, and Mary Aurelia Johns, respectively) seek reversal of the district court order approving the settlement. Good Bear's motion to sever her appeal (No. 11-5270) from the other two appeals with which it has been consolidated, is currently pending in this Court. In No. 11-5158, the Harvest Institute Freedmen Foundation and two individuals appeal the denial of their motion to intervene in the district court. Plaintiffs and the government have

moved to dismiss that appeal for lack of jurisdiction or, alternatively, for summary affirmance.

/s/ Thomas M. Bondy  
Thomas M. Bondy

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\*Authorities upon which we chiefly rely are marked with asterisks.



## **GLOSSARY**

1994 Act	American Indian Trust Fund Management Reform Act of 1994
A	Appellant Kimberly Craven's Appendix
Br.	Objector-Appellant's Brief
CRA	Claims Resolution Act of 2010
GA	Government Appendix
HAC	Historical Accounting Class
IIM Accounts	Individual Indian Money Accounts
SA	Settlement Agreement
TAC	Trust Administration Class
Tr.	Transcript of Fairness Hearing and Oral Ruling

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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**STATEMENT OF JURISDICTION**

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1346, and § 101(d) of the Claims Resolution Act of 2010 (“CRA”), Pub. L. No. 111-291, 124 Stat. 3064, 3066. The district court entered final judgment on August 4, 2011. A837. A timely notice of appeal was filed on August 6, 2011. A856; see Fed. R. App. P. 4(a). This Court has jurisdiction under 28 U.S.C. § 1291.

**STATEMENT OF THE ISSUE**

Whether the district court abused its discretion in approving the Congressionally-authorized settlement of the *Cobell* Indian trust litigation.

## STATUTORY PROVISIONS

Pertinent statutory provisions and rules are attached as an addendum to this brief. Included are the Claims Resolution Act of 2010, the American Indian Trust Fund Management Reform Act of 1994, and Federal Rule of Civil Procedure 23.

## STATEMENT OF FACTS

At issue in this appeal is the district court's approval of the parties' settlement, authorized and ratified by an Act of Congress, of the long-running *Cobell* Indian trust litigation. The appeal marks the latest chapter in a 15-year litigation that this Court has called a "legal morass" and a "Gordian knot." *Cobell v. Salazar*, 573 F.3d 808, 812 (D.C. Cir. 2009). The underlying proceedings have encompassed approximately 250 days of hearings and trials, 10 interlocutory appeals, at least one petition for rehearing en banc, and two petitions for certiorari. To date, this Court has issued ten published opinions in the matter. We summarize here only the most salient aspects of the case.

### **I. Background**

#### **A. Individual Indian Money Accounts**

The General Allotment Act of 1887, also known as the Dawes Act., 24 Stat. 388, ch. 119 (formerly codified at 25 U.S.C. § 331 *et seq.*), allotted tribal land to individual Indians, and related legislation provided that the Department of the Interior

(“Interior”) would manage those lands and place certain revenues into individual accounts, known as Individual Indian Money accounts (“IIM accounts”). *Cobell v. Norton*, 334 F.3d 1128, 1133 (D.C. Cir. 2003). Billions of dollars have flowed through the IIM accounts since 1887, leaving an overall balance of \$416.2 million as of December 31, 2000. *Cobell v. Norton*, 428 F.3d 1070, 1072 (D.C. Cir. 2005); see *Cobell v. Kempthorne*, 532 F. Supp. 2d 37, 83 (D.D.C. 2008).

Over the past century, as land allotments passed to multiple heirs, ownership of the allotments has become increasingly “fractionated.” *Babbitt v. Youpee*, 519 U.S. 234, 237 (1997). Multiple generations of inheritances yielded exponential growth in the number of individual interests in each allotment. Beneficial ownership of the underlying lands is now shared among some four million interests, and Interior records individual ownership interests to the 42nd decimal point. H.R. Rep. No. 102-499, at 28 & n.94 (1992). Interior must divide each revenue receipt among what is often “dozens to more than 1,000 individual owners of a single allotment.” *Cobell v. Norton*, 283 F. Supp. 2d 66, 182 (D.D.C. 2003). The result is that many account holders own interests in multiple fractionated allotments, and thousands of accounts have “little or no activity” and “balances less than \$50.” H.R. Rep. No. 102-299, at 28. This has significantly complicated Interior’s trust administration responsibilities.

## **B. The 1994 Act**

On October 25, 1994, the American Indian Trust Fund Management Reform Act of 1994 (“the 1994 Act”), Pub. L. No. 103-412, 108 Stat. 4239 (codified at 25 U.S.C. §§ 162a(d) & 4001 *et seq.*), took effect. The 1994 Act set out various Interior functions, including creating a “comprehensive strategic plan” to ensure “proper and efficient discharge of the Secretary’s trust responsibilities”; “[p]roviding adequate systems for accounting for and reporting trust fund balances”; “[p]roviding periodic, timely reconciliations to assure the accuracy of accounts”; and “account[ing] for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian \* \* \* .” 25 U.S.C. §§ 162a(d), 4011, 4043(a)(1) & (2).

The Act did not by its terms require an historical accounting to ensure that a century of transactions had been properly recorded. Congress had previously noted that it might cost “as much as \$281 million to \$390 million to audit the IIM accounts,” and that, “[o]bviously, it makes little sense to spend so much when there was only \$440 million deposited in the IIM trust fund for account holders as of September 30, 1991.” H.R. Rep. No. 102-499, at 26 (1992) (footnote omitted).

## **II. The *Cobell* Litigation**

### **A. Plaintiffs' Complaint**

Plaintiffs commenced this class action in 1996 on behalf of present and former IIM account holders. Plaintiffs alleged that the government had breached its fiduciary duties and sought “wholesale improvement of [the Indian trust] program,” *Cobell v. Norton*, 240 F.3d 1081, 1095 (D.C. Cir. 2001), including (1) a declaration that the government owed them specific trust obligations and was in breach of those obligations; (2) an injunction compelling Interior and Department of Treasury officials to perform those obligations; and (3) an order requiring Interior to conduct an accounting of individual Indian trust accounts. See *Cobell v. Babbitt*, 52 F. Supp. 2d 11, 19 (D.D.C. 1999). The complaint also asked that plaintiffs be “made whole” by an order directing the government “to restore trust funds wrongfully lost, dissipated, or converted,” but, to avoid dismissal of their complaint on jurisdictional grounds, plaintiffs later disavowed any claim for “cash infusions into the IIM accounts.” *Cobell v. Babbitt*, 30 F. Supp. 2d 24, 40 & n.16 (D.D.C. 1998).

### **B. Litigation of the Accounting Claim**

#### **1. The Unreasonable Delay Ruling**

In 1997, the district court certified a class, under Federal Rules of Civil Procedure 23(b)(1)(A) and (b)(2), of all present and former IIM account beneficiaries.

*Cobell*, 30 F. Supp. 2d at 28. After a six-week trial, the court declared that the government had not fulfilled its duties. It held, *inter alia*, that the 1994 Act required an historical accounting of all money in the IIM trust accounts, and that the accounting had been unreasonably delayed. *Cobell*, 91 F. Supp. 2d 1, 29, 58 (D.D.C. 1999). The court “retained continuing jurisdiction over the case for the next five years” to monitor the accounting and other progress. *Cobell*, 240 F.3d at 1094; see *Cobell*, 91 F. Supp. 2d at 58.

This Court largely affirmed the district court’s decision in 2001. This Court observed that “[t]here is no question” that the government had “made significant steps toward the discharge of [its] fiduciary obligations.” *Cobell*, 240 F.3d at 1107. However, it held that the government was obliged to provide an historical accounting, which had been “unreasonably delayed” within the meaning of the Administrative Procedure Act. *Id.* at 1108. This Court upheld the district court’s continuing oversight of the matter, reasoning that the district court has “broad equitable powers” — “the power \* \* \* to do equity and to mold each decree to the necessities of the particular case.” *Id.* (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944)).

## **2. First Structural Injunction**

In 2003, the district court held a second trial to consider proposed accounting plans. *Cobell*, 283 F. Supp. 2d at 85. Interior submitted a plan that would have cost an estimated \$335 million. The court heard forty-four days of testimony and received

over 500 exhibits before issuing a 214-page opinion. *Ibid.* It noted the extraordinary difficulty in completing an historical accounting given the effect of “fractionation.” The court also observed that there are “approximately 195,000 boxes or containers of Indian trust records” in five different locations. *Id.* at 152-53. The court nevertheless issued a “structural injunction,” with an estimated cost of \$6-12 billion, requiring Interior to undertake a comprehensive effort to retrieve records and verify virtually every IIM account transaction since 1887. *Cobell v. Norton*, 392 F.3d 461, 466 (D.C. Cir. 2004).

Congress responded that this expensive accounting “would not provide a single dollar to the plaintiffs,” H.R. Conf. Rep. No. 108-330, at 117 (2003); it would “displace funds available for education, health care and other services,” *ibid.*, and “do almost nothing to benefit the Indian people,” 149 Cong. Rec. S13,751, S13,785 (2003) (statement of Sen. Burns). Rather, “Indian country would be better served by a settlement of this litigation.” H.R. Conf. Rep. No. 108-330, at 117. Congress enacted Pub. L. No. 108-108 (2003), which imposed a spending moratorium and provided that the 1994 Act should not “be construed or applied to require the Department of the Interior to commence or continue historical accounting activities with respect to the Individual Indian Money Trust” until December 31, 2004, or until Congress amended the 1994 Act “to delineate the specific historical accounting obligations of the Department of the Interior with respect to the Individual Indian



Money Trust.” 117 Stat. 1241, 1263 (2003). Congress thus rejected the notion that, in passing the 1994 Act, it “had any intention of ordering an accounting” on the scale ordered by the district court; “individual legislators said in effect that the disparity between the costs of the judicially ordered accounting, and the value of the funds to be accounted for, rendered the ordered accounting, as one senator put it, ‘nuts.’” *Cobell*, 392 F.3d at 466.

In light of Pub. L. No. 108-108, this Court vacated the structural injunction. *Id.* at 468. This Court noted that any delay in an accounting would not amount to an unconstitutional taking, because “the accounting is a purely instrumental right,” and is not itself a form of “property.” *Ibid.*

### **3. Second Structural Injunction**

After Pub. L. No. 108-108 lapsed on January 1, 2005, the district court reissued its structural injunction. *Cobell v. Norton*, 357 F. Supp. 2d 298 (D.D.C. 2005). This Court again vacated the order, explaining that the language of the 1994 Act “doesn’t support the inherently implausible inference that [Congress] intended to order the best imaginable accounting without regard to cost.” *Cobell*, 428 F.3d at 1075. This Court elaborated that “neither congressional language nor common law trust principles (once translated to this context) establish a definitive balance between exactitude and cost.” *Id.* at 1076. Although this Court declined to specify the precise parameters of the government’s accounting obligation, it held that Interior could, at least for certain

smaller transactions, use statistical sampling and match only a “sample of transactions to their supporting documentation.” *Id.* at 1077-78.

#### **4. Ancillary Proceedings and Assignment of a New District Judge**

The litigation from 2003 through 2006 included a number of ancillary disputes. This Court twice reversed district court orders requiring disconnection of Interior’s computer systems from the Internet, ostensibly to preserve Indian trust data. *Cobell v. Norton*, 391 F.3d 251, 253-54 (D.C. Cir. 2004); *Cobell v. Kempthorne*, 455 F.3d 301, 302 (D.C. Cir. 2006). This Court likewise twice removed subsidiary judicial officers appointed by the district court to supervise the accounting process, for playing “an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system.” *Cobell*, 334 F.3d at 1142; see *In re Kempthorne*, 449 F.3d 1265 (D.C. Cir. 2006); *In re Brooks*, 383 F.3d 1036 (D.C. Cir. 2004). This Court ultimately ordered the case assigned to a new district court judge. *Cobell*, 455 F.3d at 331-35. In doing so, this Court “close[d] with a warning to the parties,” noting that five years after the first decision by this Court, “no remedy [was] in sight,” and the parties should “work with the new judge to resolve this case expeditiously and fairly.” *Id.* at 335-36.

## **C. The Impossibility and Restitution Rulings**

### **1. The Impossibility Ruling**

In October 2007, the district court held a ten-day trial to assess Interior's progress. The district court found that there were "substantial improvements in the administration of the trust." *Cobell*, 532 F. Supp. 2d at 86.

Discovery and ongoing auditing also revealed that at least some claimed problems with the trust had been exaggerated. For example, a 2004 project conducted by various accounting firms showed that assumptions that "records would be missing, erroneous, and in disarray" were "overblown," and that there were "far fewer errors and missing records than [they] had expected to discover." *Id.* at 60. Indeed, Interior reconciled post-1985 transactions of \$100,000 or more, representing about \$483 million in throughput, and found a net overpayment of disbursements of \$11,876 and a net underpayment of credits of \$11,208. GA9. Likewise, Interior reconciled a sample of 4,500 smaller value transactions, and found a net overpayment of \$512. *Ibid.* These studies also confirmed, however, that reconciling individual account transactions would be even more costly than previously anticipated. See *Cobell*, 532 F. Supp. 2d at 50, 58, 60. They "revealed that reconciling a single transaction costs between \$3,000–\$3,500," even for small transactions. *Id.* at 58.

Looking ahead, the district court noted that “nineteen published opinions in this case have yielded no definitive, undisturbed ruling on the core question that looms over this dispute, which is: *What is the scope or nature of the accounting that is required by the 1994 Act?*” *Id.* at 42. The court noted the continuing challenges in establishing a feasible means of conducting an historical accounting, observing that the “[o]riginal cost and time estimates were off by several multiples,” and that Congress had not appropriated the funds needed. *Id.* at 58.

The district court concluded on this basis that the accounting was “impossible.” *Id.* at 103. This was not “because of missing records.” *Id.* at 103 n.21. Rather, the court explained, “the tension between the expense of an adequate accounting” and Congress’s willingness to provide funds was determinative. *Ibid.*

## **2. The Restitution Ruling**

In June 2008, the district court conducted another ten-day trial to explore other options. *Cobell v. Kempthorne*, 569 F. Supp. 2d 223, 225 (D.D.C. 2008). The court noted the tension between its “broad equitable authority \* \* \* to fashion appropriate remedies” (citing *Cobell*, 240 F.3d at 1108-10), and “limits on federal courts \* \* \* in suits against the government, including sovereign immunity and separation of powers.” *Id.* at 225 (citing *Cobell*, 392 F.3d at 473). It highlighted many of the “benefits” achieved by the litigation, including improvements to the Indian trust

system and development of a repository of trust records. *Id.* at 253. Ultimately, the court awarded \$455.6 million in “restitution” to the class, based on a statistically possible but unproven difference between aggregate receipts and disbursements since the IIM accounts were first created in 1887. *Id.* at 225-27, 236-39, 252. The court stressed that there was “essentially no direct evidence of funds in the government’s coffers that belonged in plaintiffs’ accounts,” and that “an accounting claim raised 121 years into the trust would ordinarily be prejudicially late.” *Id.* at 238, 250.

This Court again vacated the district court’s order. *Cobell*, 573 F.3d at 809. This Court held that the district court could not award what were essentially monetary damages to compensate for asserted accounting shortfalls. This Court held that the scope and method of the accounting remained a question for the district court, and clarified that the nature of the task must be molded to the case and “adjusted in equity.” *Id.* at 813. “[T]he ideal concept of a complete historical accounting” may be “impossible,” this Court explained, *id.* at 814, but Interior should conduct whatever accounting was possible given “the resources it receives, or expects to receive, from Congress.” *Id.* at 811. Thus, statistical sampling could be used for verifying transactions of all sizes, *id.* at 814, and, in crafting any further orders, the district court was to consider “whether the cost to account will exceed the amount recovered by class beneficiaries.” *Ibid.*

### III. The Parties' Settlement

In July 2009, following this Court's tenth published decision in the matter, with no end to the litigation in sight and mindful of this Court's admonition that they work together "to resolve this case expeditiously and fairly," *Cobell*, 455 F.3d at 336, the parties renewed settlement discussions. After five months, the parties announced a tentative settlement. The settlement was expressly contingent on Congressional legislation authorizing the parties' agreement. A544 (SA ¶ B.1).

The settlement requires government funding in excess of \$3.4 billion. Pursuant to the settlement, the government committed \$1.9 billion to purchase and consolidate fractionated land interests. A564-67 (SA ¶ F); CRA § 101(e). In addition, the further sum of \$1.512 billion is to be paid into an "Accounting/Trust Administration Fund," and is to be used to settle two kinds of claims, corresponding to two overlapping plaintiff classes. A535 (SA ¶ A.1) (providing \$1.412 billion); CRA § 101(a)(9), (j) (adding \$100 million). The settlement provides for the filing of an amended complaint setting out both of those classes. A544-45 (SA ¶ B.3), A589-616 (SA Exhibit B).

The "Historical Accounting Class" (HAC) consists of those "who had an IIM Account open during any period between October 25, 1994 and the Record Date [September 30, 2009], which IIM Account had at least one cash transaction credited

to it.” A539 (SA ¶ A.16). In lieu of receiving an historical accounting, each of the estimated 360,000 members of the class receives instead a \$1,000 payment. A556 (SA ¶ E.3.a). As a class certified under Federal Rule of Civil Procedure 23(b)(1)(A) and (b)(2), no opt-out is available. A548 (SA ¶ C.2.a).

The “Trust Administration Class” (TAC) consists of individuals who held IIM Accounts at any time between 1985 and the present, as well as individual Indians who, as of the Record Date, had an ownership interest in restricted or trust land. A543 (SA ¶ A.35); see also A537-39 (SA ¶ A.14), A540-41 (SA ¶ A.21). All members of the HAC also meet the definition of TAC class membership. Unlike the Historical Accounting Class, the Trust Administration Class is an opt-out class; members of the TAC could opt out within 90 days of the class notice. A548 (SA ¶ C.2.b), A626 (Modification of SA, ¶ 8). Those who did not opt out receive a base payment of at least \$500, plus a *pro rata* share of the class funds based upon “the average of the ten \* \* \* highest revenue generating years in each individual Indian’s IIM Account.” A557-59 (SA ¶ E.4.b). Congress created a separate fund of \$100 million to increase the minimum payments made to around \$850. CRA § 101(j).

The settlement provides for a broad but limited release of claims. Claims for payment of account balances in existing accounts, claims for breaches committed after the record date, and claims for future trust reform are not released. A573-74 (SA ¶ I.3). Under the settlement, historical accounting claims are released. A572-73

(SA ¶ I.1). Thus, class members who do not opt out of the TAC to pursue individual damages actions accept the balance in the last 2009 account statement. A575-76 (SA ¶ I.8). Persons opting out of the TAC remain free to pursue individual damages claims for alleged lands or funds mismanagement. A575 (SA ¶ I.7). In pursuing such actions, claimants remain “entitled to all methods of proof, applicable evidentiary presumptions and inferences (if any), and means of discovery available in any court of competent jurisdiction.” *Ibid.* This includes, “without limitation,” the right to an “accounting in aid of the jurisdiction of a court to render judgment.” *Ibid.*

#### **IV. Congressional Authorization of the Settlement**

In December 2009, the President announced the parties’ settlement agreement. Months of debate in the House and Senate followed. In December 2010, the President signed into law the Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064.

The Act provides that the agreed-upon settlement of this case “is authorized, ratified, and confirmed,” CRA § 101(c)(1). The Act also appropriates funds necessary to implement the settlement, *id.* § 101(e), (j); amends the district court’s jurisdiction to permit the matter to proceed, *id.* § 101(d); provides that “[n]otwithstanding the requirements of the Federal Rules of Civil Procedure,” the court “may certify the Trust Administration Class” and the TAC shall thereafter “be



treated as a class certified under Rule 23(b)(3),” *id.* § 101(d)(2)(A); and makes settlement payments tax-free, *id.* § 101(f).

## **V. The District Court’s Approval of the Settlement and Entry of Final Judgment**

On December 21, 2010, the district court granted preliminary approval of the parties’ settlement. A647. Pursuant to the terms of the agreement, the court ordered an expansive program of class notice and invited objections to the settlement, allowing objections through April 20, 2011. A649.

### **A. Class Notice**

The parties retained a preeminent notice expert with experience managing 600 large class action settlements. Along with a claims administrator, the parties designed a program that provided notice through multiple channels to reach the hundreds of thousands of potential class members. Notice included:

- A direct mailing describing the settlement to all 337,000 potential class members with a known address, GA53 (Keough Decl. ¶ 9);
- An extensive web presence at [www.indiantrust.com](http://www.indiantrust.com), which was launched immediately after the settlement was announced in 2009 and received a total of 302,436 visits (from 206,517 unique visitors) through May 11, 2011, GA54-55 (Keough Decl. ¶¶ 11-13);
- A toll-free number established at the same time, which provided recorded information, allowed people to register for the settlement, and later hosted a live call center during the notice period that fielded 182,878 calls, GA55-56 (Keough Decl. ¶ 14-16);

- A video summarizing the settlement, which was translated into nine languages, and was distributed online and through 8,000 DVD copies, GA47 (Kinsella Decl. ¶ 73), GA50-51 (Keough Decl. ¶ 4);
- Advertisements of the toll-free number, website, and an address to request packets in English, Spanish, or Navajo, which yielded 51,748 requests, GA52-53 (Keough Decl. ¶ 7, 10); and
- Additional paid media advertisements, including in Native American publications and broadcasts on Native American stations, often in Native American languages, GA26-30, 31-38, 47-48 (Kinsella Decl. ¶¶ 14-24, 27-47, 74).

Additionally, the parties worked to distribute information with partners, including Bureau of Indian Affairs agencies, schools, nursing homes, non-profits, religious organizations, tribal colleges, tribal courts, and Indian Health Service facilities. GA56-58 (Keough Decl. ¶ 18-22). Media coverage of the settlement, including remarks by the President, the Secretary of the Interior, Members of Congress, the lead plaintiffs, and class counsel further publicized the agreement.

## **B. Objections**

Out of more than 500,000 class members, there were 92 objections from individuals and groups. GA134 (Transcript of Fairness Hearing and Oral Ruling (“Tr.”) 237). The appellant here, Kimberly Craven, is an IIM account holder who did not opt out of the TAC but filed a timely objection.

### **C. Fairness Hearing and Final Approval**

On June 20, 2011, the district court held a fairness hearing. The court heard arguments from the parties, GA110-27 (Tr. 141-209), and also allowed any objector who wished to be heard to present arguments against the settlement. GA83-109 (Tr. 33-137).

The court then rendered an oral ruling so that “those who have traveled so far” could “hear the ruling of the court and understand” what the court had decided “and why.” GA127 (Tr. 209). The court described the history of the “major litigation warfare \* \* \* to reach this stage.” GA128 (Tr. 212). Following the tenth decision by this Court, the district court explained, “[t]he parties were trying to find out where to go next.” GA128 (Tr. 213). They faced additional “years of litigation,” and under “the law \* \* \* developed by our Circuit,” the plaintiffs had “rather dubious chances of ultimate success.” GA128-29 (Tr. 213-14).

In considering whether the settlement was fair, adequate, and reasonable, the court focused on what relief the plaintiffs could have expected had they continued with the litigation. Considering “the strength of the plaintiffs’ case,” GA134 (Tr. 235), the court concluded that “a better result” was not likely. GA130, 134 (Tr. 218, 235). Moreover, the court explained, even if “there had been eventually an accounting ordered” at all, it likely would have been “some type of generic

accounting,” which would have been of limited utility. GA 129-30 (Tr. 217-18). The court found that the settlement, by contrast, provides ample and immediate benefits, and if the case continued, there could be “interminable litigation” easily stretching “another 15 years.” GA134 (Tr. 236). And even once some form of accounting were complete, to obtain any monetary relief, “each individual plaintiff would have to sue in the Court of [Federal] Claims,” where, the court stressed, success would be “difficult.” GA130, 134 (Tr. 218, 237). The court also observed that unlike a typical class settlement, this was the product of “a true arm’s-length hard-fought battle” and followed years of litigation and extensive discovery. GA134 (Tr. 237). The court stated that it “cannot conclude in the final balance” that the settlement “is anything but fair.” GA130 (Tr. 218-19).

The district court specifically explained that any due process requirements were satisfied. The court stated that it had “never seen \* \* \* notice to the extent sent out in this case.” GA131 (Tr. 224). Likewise, the court observed, “I don’t know how anyone can say there was not adequate representation.” GA132 (Tr. 226).

Next, the court explained that the Historical Accounting Class was properly certified and that the \$1,000 per-member payment was a permissible settlement. The court reasoned that each class member had the same legal claim to an historical accounting. GA132 (Tr. 227). The court held that settling the accounting claim was thus proper for a class certified under Rule 23(b)(1)(A) or (b)(2). If there had been

“thousands of individual actions,” the court explained, each such matter could have established separate standards for an historical accounting, which would have been unworkable. GA133 (Tr. 231). “[Y]ou have to be able to settle” the case, “and the only way to settle is through money if you don’t get [an] injunction.” GA132 (Tr. 229). In response to objections that “awards should be individualized,” the court explained that this argument incorrectly “conflate[s] the historical accounting class with the trust administration class.” GA133 (Tr. 231-32). The \$1,000 payment to members of the historical accounting class is “not damages” but is simply “consideration[.]” paid by the government “for being released” from its unspecified accounting obligation. GA133 (Tr. 231).

Turning to the Trust Administration Class, the court explained that under the Claims Resolution Act, the certification of this class is not governed by Rule 23. Rather, Due Process is the only limit on the court’s power to certify the class. GA132-33 (Tr. 229-30). The court found Due Process satisfied, emphasizing the “extensive and extraordinary notice” and class members’ robust opt-out rights. GA133 (Tr. 230, 233).

On July 27, 2011, the district court issued a written order approving the settlement, echoing its oral ruling. A784-96. On August 4, 2011, the court entered final judgment. A837.

## **SUMMARY OF ARGUMENT**

The parties to this long-running and contentious litigation asked the district court to approve a Congressionally-ratified settlement agreement, which brings this controversy to a close and provides nearly \$3.5 billion for Indian trust beneficiaries. After conducting a hearing and entertaining objections, the district court approved the agreement, finding that it was fair, adequate, and reasonable. The district court's judgment reflects no abuse of discretion, and should be upheld.

The settlement resolves a long and hard-fought dispute, and was entered into at arm's length. The settlement provides for a payment of \$1,000 to each of the estimated 360,000 members of the Historical Accounting Class, for a total disbursement of approximately \$360 million. The settlement also dedicates an unprecedented sum — approximately \$1 billion — to pay for potential trust administration claims. And the settlement further commits another \$1.9 billion for the acquisition and consolidation of fractionated land interests, a step that all agree is essential to rational trust reform. The settlement is generous in relation to the strength of plaintiffs' case, allowed members of the Trust Administration Class to opt out if they so chose, and is overwhelmingly in the public interest.

Nor is this a run-of-the-mill settlement. The settlement agreement here was extraordinary in that it was expressly contingent on Congressional legislation.

Congress enacted the requisite statutory provisions, and, in so doing, appropriated billions of dollars to fund the settlement and amended the district court's jurisdiction to enable the court to proceed. Under the circumstances, the district court properly exercised its discretion in approving a settlement that Congress explicitly "authorized, ratified and confirmed." CRA §101(c). This conclusion holds all the more true in light of Congress' preeminent role in Indian trust matters, and its specific role as settlor of the IIM trusts underlying this case.

Craven's arguments to the contrary are meritless. Craven seeks to preempt the fairness inquiry, urging that it is "the law of the case" that this settlement is unfair. She relies on this Court's 2009 decision vacating the district court's holding that an historical accounting is impossible and its order that the government pay "restitution." But the question here is whether the parties' agreed-upon settlement, authorized and ratified by Congress, is fair. That question could not have been and was not before this Court in its 2009 ruling, which was issued prior to the existence of any settlement.

In focusing on the settlement's payment of \$1,000 to each member of the Historical Accounting Class, Craven's position misapprehends what the \$1,000 payments represent. The settlement's per capita payment of \$1,000 to each member of the Historical Accounting Class is a substitute for an historical accounting, pursuant to a Congressionally-authorized settlement that extinguishes altogether any

obligation to furnish such an accounting. The payment is not intended as compensatory damages for any individual harm. Craven is wrong to argue that, as a matter of law, plaintiffs cannot release claimed rights to an historical accounting — *i.e.*, asserted rights to information regarding IIM transactions — in exchange for a uniform monetary payment. The essence of settlement is compromise, and a per capita payment of \$1,000 to each member of the Historical Accounting Class embodies a reasonable and permissible means of solving what had become, after years of litigation, an essentially intractable problem.

Craven is also mistaken in maintaining that the distribution scheme with respect to the Trust Administration Class is unreasonable. Under the settlement, every Trust Administration Class member who did not opt out of the class will receive a baseline amount of approximately \$850, and this amount will then be adjusted upwards, based on the highest ten years of receipts in a class member's IIM account(s), from 1985 to 2009. The settlement thus offers fair payments on potential trust administration claims to hundreds of thousands of individual Indians, without requiring any of them to incur the considerable risks and expense of prosecuting those claims. And the opt-out provision serves as a safety valve that allowed any class member to reserve the ability to pursue whatever trust mismanagement claims the person may have had, outside of the parties' Congressionally-authorized settlement.



Craven inaptly seeks to question the certification of the Trust Administration Class. In the Claims Resolution Act, Congress expressly exempted the Trust Administration Class from the certification requirements of Rule 23. The only limitation on the district court's discretion to certify the class — Due Process — was fully satisfied. Class members received exceptional notice of the matter through multiple channels. They were afforded ample opportunity to object and be heard. They had robust opt-out rights. And they were more than adequately represented by the lead plaintiffs, who negotiated a large monetary award for unproven claims. The court's decision to certify the class amply passes constitutional muster.

Craven's remaining contentions are baseless. It did not undermine the lead plaintiffs' adequacy of representation for them to request an incentive award; such awards are commonly made at the end of long class action litigation, and Congress expressly provided that the district court would have the discretion to grant such awards here. Nor did the district court abuse its discretion in striking what was, in essence, an untimely and improper sur-reply in support of Craven's already-lodged objections to the parties' settlement agreement. The judgment of the district court was proper in all respects, and should be affirmed.

## STANDARD OF REVIEW

“This court reviews the district court’s decision” to approve a class action settlement “for abuse of discretion, which allows for reversal only if the district court applied the wrong legal standard or relied on clearly erroneous findings of fact.” *In re Vitamins Antitrust Class Actions*, 327 F.3d 1207, 1209 (D.C. Cir. 2003). An objector “bears the burden” of “making a ‘clear showing’ that an abuse of discretion has occurred.” *Pigford v. Glickman*, 206 F.3d 1212, 1217 (D.C. Cir. 2000).

## ARGUMENT

### **I. The District Court Was Well Within Its Discretion to Approve the Settlement Agreement.**

#### **A. The Settlement Is Fair, Adequate, and Reasonable.**

Although this Court has eschewed any particular formula for evaluating class settlements, it has emphasized that district courts must consider whether the settlement was “the product of collusion between the parties” and must “evaluate the terms of the settlement in relation to the strength of the plaintiffs’ case.” *Thomas v. Albright*, 139 F.3d 227, 231 (D.C. Cir. 1998). A settlement is not unreasonable simply because class members receive less than they would have received had they “prevailed after a trial.” *Ibid.* Nor is a settlement unfair because the interests of class members may vary or some class members may benefit more from the settlement than

others. See *id.* at 231-33. Rather, the court must consider “the interests of the class as a whole.” *Id.* at 232.

The district court here found no hint of collusion. GA135 (Tr. 239). The settlement was the result of “a true arm’s-length hard-fought battle” between the parties. GA134 (Tr. 237); see also GA134 (Tr. 234). In addition, Congress, after independently assessing the settlement, expressly authorized and ratified it (as discussed in more detail below). Where, as here, a settlement is “reached in arm’s-length negotiations between experienced, capable counsel after meaningful discovery,” the courts apply “a presumption of fairness, reasonableness, and adequacy.” *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 32-33 (1st Cir. 2009).

The district court carefully considered the terms of the settlement in relation to the strength of plaintiffs’ case. By the time of the parties’ agreement, it was clear that, even if plaintiffs were to prevail in the underlying litigation, they would be entitled, at most, to what the district court described as “some type of generic accounting.” GA129 (Tr. 217). As this Court has stressed, however, the asserted right to an accounting is not itself property. *Cobell*, 392 F.3d at 468. Rather, it is “a purely instrumental right” — a piece of information consisting, in this case, of an historical statement of account. *Ibid.* And especially given the costs and uncertainties involved, Congress could have simply repealed any historical

accounting obligation altogether. See *ibid.*; see also *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2329 n.9 (2011). Further, even as it stood, any accounting was likely to be of limited utility. The precise nature and scope of any historical accounting obligation remains largely unresolved to this day, even after years of litigation. See *Cobell*, 573 F.3d at 813. And, as this Court has held, any eventual accounting would be controlled by Congress's willingness to fund the project, would employ substantial statistical sampling, and would as a practical matter be constrained by other parameters as well. *Id.* at 811, 814.

It is likewise entirely unproven, after years of litigation, that whatever historical statements of account may ultimately have been required, would have revealed any significant errors in the overall handling of IIM accounts, much less any errors at all with respect to any particular account. To the contrary, the record indicates that variances, if any, were small. See, *e.g.*, *Cobell*, 532 F. Supp. 2d at 60; GA9.

And, significantly, the district court would have had no authority in the ongoing litigation to award any monetary relief. As the district court found, were any class members to seek monetary relief, they would have had to bring new litigation, which would likely take years to resolve, with highly uncertain prospects of recovery, even assuming applicable statutes of limitations and other obstacles could be overcome. GA130, 134 (Tr. 218, 237).

Against this backdrop, the settlement is generous. It releases any obligation to furnish historical statements of account, but also provides each Historical Accounting Class member with \$1,000 (tax-free and without prejudice to public assistance programs). This compromise is especially fair and reasonable, given that: the aggregate costs of undertaking and completing any requisite historical accounting task may have proved exorbitant; provision of historical statements of account would not necessarily have revealed any significant discrepancies; and continuing district court litigation could not and would not have resulted in any monetary recovery at all. There are an estimated 360,000 members in the Historical Accounting Class, so the \$1,000 payments amount in the aggregate to \$360 million.

Moreover, by definition, every person in the Historical Accounting Class is also a member of the Trust Administration Class. Under the settlement, TAC members are entitled to additional, individually determined payments, tied in part to factors such as the size and degree of transaction activity in a person's IIM accounts. See A557-59 (SA ¶ E.4.b). The latter payments alone are expected to come to a total of approximately \$1 billion.

The Trust Administration Class also features a full and robust opt-out right. Thus, any class member dissatisfied with the proposed settlement terms could pursue an independent monetary claim for funds or lands mismanagement by opting out of the TAC, thereby preserving whatever trust mismanagement claims he or she may

have possessed under existing law. Those individuals who opted out of the TAC remain “entitled to all methods of proof, applicable evidentiary presumptions and inferences (if any), and means of discovery available in any court of competent jurisdiction.” A575 (SA ¶ I.7). This includes, “without limitation,” the right to an “accounting in aid of the jurisdiction of a court to render judgment.”<sup>1</sup> *Ibid.* Thus, in no way does the settlement “preclude absent class members from bringing their own individual lawsuits for monetary damages.” *In re Veneman*, 309 F.3d 789, 795 (D.C. Cir. 2002).

And, of special note, although Historical Accounting Class members waive whatever rights they may have had with respect to the receipt of historical statements of account, the settlement waives no prospective accounting rights at all. See A573-74 (SA ¶ I.3). With respect to any substantive claims for funds or lands mismanagement, the settlement likewise imposes no mandatory waiver of any rights of any kind, whether prospective or retrospective in nature. See *ibid.*

In approving the settlement, the district court properly considered not only its cumulative terms and benefits to the class, but also the stage of litigation, the reaction

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<sup>1</sup> See *Klamath & Modoc Tribes v. United States*, 174 Ct. Cl. 483, 491 (1966); see, e.g., *Yankton Sioux Tribe v. United States*, 84 Fed. Cl. 225, 235 (2008); *Doe v. United States*, 61 Fed. Cl. 453, 457-58 (2004); see also *E. Shawnee Tribe of Okla. v. United States*, 582 F.3d 1306, 1308 (Fed. Cir. 2009), vacated on other grounds, 131 S. Ct. 2872 (2011).

of the class, and the public interest underlying the settlement. See Adv. Comm. Notes on Fed. R. Civ. P. 23, 28 U.S.C. App. at 160; *McReynolds v. Richards-Cantave*, 588 F.3d 790, 804 (2d Cir. 2009); *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 349 (6th Cir. 2009); *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 350 (3d Cir. 2010).

After 15 years of discovery and fact finding, the parties and the district court had an unusually well-developed understanding of the case. They also had the benefit of several opinions by this Court. Thus, the settlement was crafted, and approved, with full awareness of the record and the risks and uncertainties of further litigation.

The reaction of the class was decidedly favorable. Following the parties' extensive notice effort, the court received only 92 objections out of a cumulative pool of approximately 500,000 persons. To put this in perspective, a settlement can be fair even if "a significant portion of the class" objects. *Thomas*, 139 F.3d at 232 (15%); see, e.g., *Cotton v. Hinton*, 559 F.2d 1326, 1332-33 (5th Cir. 1977) (50%); *Bryan v. PPG Indus., Inc.*, 494 F.2d 799, 803 (3d Cir. 1974) (20%); *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir.1987) (36%). Here, the objection rate was 0.18%. The fact that "only a small number of objections are received" is not dispositive, but it may be "indicative of the adequacy of the settlement." 4 Newberg on Class Actions § 11.41 (4th ed. 2002).<sup>2</sup>

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<sup>2</sup> Contrary to Craven's contention (Br. 49), it was not "legal error" for the district (continued...)

The settlement is also overwhelmingly supported by the public interest. The government agreed to establish a fund of \$1.9 billion to acquire and consolidate fractionated land interests, thus substantially facilitating substantive trust reform and further aiding trust beneficiaries. See A564-67 (SA ¶ F); CRA § 101(e).<sup>3</sup> Further, the settlement also provides tens of millions of dollars in funding for scholarships for Native Americans, to help enhance educational opportunities in under-served communities. See A567-71 (SA ¶ G). Finally, the settlement relieves the government, the courts and the taxpayers of the burden of continuing with what Judge Lamberth described as “one of the most complicated and difficult cases ever to be litigated in” the District of Columbia. GA17; see *Mayfield v. Barr*, 985 F.2d 1090, 1092 (D.C. Cir. 1993) (noting the strong policy of “encouraging settlements, particularly in class actions, which are often complex, drawn out proceedings demanding a large share of finite judicial resources”). Especially considering the

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<sup>2</sup>(...continued)

court to consider this fact, among many other factors, in evaluating the settlement. As the above-cited cases demonstrate, it is not uncommon for a court to take into account the reaction of the class in determining whether to approve a class action settlement. See GA134-35 (Tr. 237-38) (district court listing class reaction as one of the factors underlying the fairness determination).

<sup>3</sup> A tract identified in *Hodel v. Irving*, 481 U.S. 704 (1987), illustrates the complexities and costs of administering fractionated lands: Tract 1305 consists of 40 acres, has 439 owners, and produces \$1,080 annually. The Bureau of Indian Affairs estimated annual administrative costs of handling this tract at \$17,560. *Id.* at 713.



matter in its full context, the district court plainly committed no abuse of discretion in upholding the historic settlement of this long-running case, a settlement expressly authorized and ratified by Congress.

**B. Congress Expressly Authorized, Ratified and Confirmed the Settlement.**

“The benefits” that a class may gain from “the establishment of a grand-scale compensation scheme” is “a matter fit for legislative consideration.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 529, 622 (1997). Working within the framework of the pending litigation, the Claims Resolution of 2010 Act expressly provides that the agreed-upon settlement of this case “is authorized, ratified, and confirmed.” CRA § 101(c)(1). Among other detailed provisions pertaining to this matter, the Act also appropriates funds necessary to implement the settlement, *id.* § 101(e), (j); amends the district court’s jurisdiction to allow the matter to proceed, *id.* § 101(d)(1); and provides that “[n]otwithstanding the requirements of the Federal Rules of Civil Procedure,” the court “may certify the Trust Administration Class,” *id.* § 101(d)(2)(A).

Congress’ explicit authorization and ratification of the settlement weighs decisively in favor of the district court’s determination to approve the settlement. Congress rendered a judgment “deliberately expressed in legislation,” which properly informed the district court’s discretion. *Virginian Ry. Co. v. Ry. Employees*, 300 U.S.

515, 551 (1937).<sup>4</sup> Indeed, legislative ratification makes clear that the settlement is consistent with any applicable statutory and common law. See Black's Law Dictionary 1376 (9th ed. 2009) (“[a]doption or enactment” or “acceptance of a previous act, thereby making the act valid.”); see, e.g., *Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297, 301-02 (1937) (Congress’s ratification has “the force of law”); *Silas Mason Co. v. Tax Comm’n of Wash.*, 302 U.S. 186, 196-97, 208 (1937) (statute that “validated and ratified” Department of the Interior contracts “give[s] the force of law” to those agreements).<sup>5</sup>

Congress’ action is especially significant in light of its exclusive authority over waivers of sovereign immunity. Any eventual historical accounting would ultimately be subject to Congressional control, see *Cobell*, 392 F.3d at 466; *Cobell*, 240 F.3d at 1094; see also *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1099-1101 (D.C. Cir. 2003), and any future damages claims here would

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<sup>4</sup> Equitable discretion must be guided by “recognized, defined public policy.” *Meredith v. Winter Haven*, 320 U. S. 228, 235 (1943); see also *Hecht Co.*, 321 U. S. at 331 (courts’ discretion under a federal statute “must be exercised in light of the large objectives of the Act”).

<sup>5</sup> Craven contends (Br. 27) that the CRA’s provision declaring the settlement “authorized, ratified, and confirmed,” § 101(c)(1), was merely “permission for the executive branch to go forward by appropriating money (and creating jurisdiction).” But Congress expressly appropriated funds and authorized jurisdiction elsewhere in the CRA. See § 101(d), (e), (j). Craven thus reads parts of the Act, including two of the three words in § 101(c) — “authorized,” “ratified,” and “confirmed” — as surplusage. See *Bailey v. United States*, 516 U.S. 137, 146 (1995).

be “available by grace and not by right,” *United States v. Tohono O’Odham Nation*, 131 S. Ct. 1723, 1731 (2009).

Congress also plays a distinctive role with respect to Indian trust matters. Here, in particular, Congress is “the settlor of the IIM trust, which ultimately establishes the contours of the United States’ (and its delegates’) fiduciary duties.” *Cobell*, 91 F. Supp. 2d at 50; see *Cobell*, 283 F. Supp. 2d at 268 (“Congress, the settlor of the IIM trust, \* \* \* expressly delegat[ed] the United States’s administration of the IIM trust to the Interior and Treasury Departments”); see also *Jicarilla Apache Nation*, 131 S. Ct. at 2329 n.9 (“Indian trusts resemble revocable trusts at common law because Congress has acted as the settlor in establishing the trust and retains the right to alter the terms of the trust by statute, even in derogation of tribal property interests.”).

Indeed, Congress’s legislative judgments in this area are due the highest respect. As the Supreme Court has explained, “[i]n the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands. \* \* \* Of necessity, the United States assumed the duty of furnishing th[em] protection, and with it the authority to do all that was required to perform that obligation \* \* \* .” *Bd. of County Comm’rs v. Seber*, 318 U.S. 705, 715 (1943). Thus, “the organization and management of the [Indian] trust[s] is a sovereign function

subject to the plenary authority of Congress,” and “the power has always been deemed a political one.” *Jicarilla Apache Nation*, 131 S. Ct. at 2323-24.

In *Littlewolf v. Lujan*, 877 F.2d 1058 (D.C. Cir. 1989), for example, this Court confronted a statute settling disputed land claims with Indians in exchange for compensation fixed by the statute or, if the claimant elected, a judicially determined amount of compensation. *Id.* at 1059. Although the Court independently evaluated whether the statute was constitutional, it deferred to “Congress’ plenary power over Indian affairs” and its reasoned, legislative judgment that had “balanced the competing interests” at stake, “in light of complex historical, legal, economic, and social factors.” *Id.* at 1063.

Similar considerations are present in this case, and they underscore that the district court properly approved the settlement. The settlement agreement here was extraordinary in that it was expressly contingent on Congressional action. Congress undertook the requisite legislation, and, in so doing, appropriated billions of dollars to fund the settlement and amended the district court’s jurisdiction to enable the court to proceed. Under the circumstances, the district court abused no discretion in approving the settlement that Congress had “authorized, ratified, and confirmed.” CRA §101(c).

**C. Craven's Objections to the Fairness of the Settlement Are Without Merit.**

Craven's arguments fall far short "of making a 'clear showing' that an abuse of discretion has occurred." *Pigford*, 206 F.3d at 1217.

1. Craven seeks to pretermite the fairness inquiry, urging that it is "the law of the case" that this settlement is unfair. Br. 20-22. She relies on this Court's 2009 decision vacating the district court's holding that an historical accounting is "impossible." See *Cobell*, 573 F.3d at 812. In explaining why the district court had erred in awarding \$455 million to the class as "restitution" with respect to its historical accounting claims, this Court stated, among other things, that such a restitutionary award would be "unfair" as a satisfaction of the historical accounting obligation. See *id.* at 813.

The fairness question here is different. For present purposes, the question is whether the parties' agreed-upon *settlement*, authorized and ratified by Congress, is fair. That question could not have been and was not before this Court in its 2009 ruling, which was issued prior to the existence of any settlement of the case.

2. In focusing on the settlement's payment of \$1,000 to each member of the Historical Accounting Class, Craven's position misapprehends the nature and function of those payments. The settlement's per capita payment of \$1,000 to each member of the Historical Accounting Class is consideration for the release of

historical accounting claims, pursuant to a Congressionally-authorized settlement. It is not compensation for any individualized harm. Nor does it resolve any claims of alleged trust mismanagement. It is not a monetary award that plaintiffs could otherwise seek. Rather, the \$1,000 settlement payment is in lieu of preparation and distribution to each HAC class member of an historical statement of account by the Department of the Interior.

Craven mistakenly maintains that, because plaintiffs may eventually have obtained some kind of accounting if the litigation had continued, it is unfair to settle that claim for a monetary payment. “The essence of settlement is compromise.” *EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985); see *Berardinelli v. Gen. Am. Life Ins. Co.*, 357 F.3d 800, 805 (8th Cir. 2004). Even with respect to common law trusts, beneficiaries may release trustees from a duty to account. See 4 Pomeroy’s *Equity Jurisprudence* § 1063 (5th ed. 1941). As a matter of fairness, there is nothing wrong with exchanging the claimed right to an historical accounting for a uniform payment plus the option of receiving compensatory damages as part of the Trust Administration Class — especially after 15 years of litigation revealed the equitable and jurisdictional limits on the capacity of the courts to direct an accounting. That conclusion holds particularly true where, as here, the claim is an equitable one, because “[e]quity eschews mechanical rules \* \* \* [and] depends on flexibility.” *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946).

*Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), relied upon by Craven, is irrelevant to this analysis. The Supreme Court held in *Wal-Mart* that claims for monetary relief may not be certified under Rule 23(b)(2), at least where monetary relief is not incidental to injunctive or declaratory relief. *Id.* at 2557. The Court explained that Rule 23(b)(2) “does not authorize class certification when each class member would be entitled to an individualized award of money damages.” *Ibid.*; see also *Eubanks v. Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997).

The historical accounting claims in this case were not claims for money damages, much less claims for individualized money damages. To the extent Craven suggests that the Historical Accounting Class, as a mandatory class, cannot be *settled* for uniform cash payments, see Br. 29, she provides no support for that proposition and we are aware of none. With respect to the HAC, plaintiffs obtained — in a settlement — entirely *non*-individual payments based on allegations of a unitary failure to act.

Indeed, Craven would exclude *any* form of money from a “non-opt out class” settlement under Rule 23(b)(1)(A) or (b)(2). Br. 31. But class actions involving monetary relief do not necessarily require opt-outs.<sup>6</sup> See, *e.g.*, *Thomas*, 139 F.3d at

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<sup>6</sup> Thus, the Historical Accounting Class is properly certified under Rule 23(b)(1)(A) because, with respect to an accounting, Interior “must treat all alike as a matter of practical necessity.” *Amchem*, 521 U.S. at 614; see Adv. Comm. Notes on Fed. R.

(continued...)

234-36; *Eubanks*, 110 F.3d at 96-98. Indeed, even class actions *seeking* money may proceed under those provisions in appropriate circumstances. See, e.g., *Thomas*, 139 F.3d at 234-36; *Eubanks*, 110 F.3d at 96-98; see also *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998), cited in *Wal-Mart*, 131 S. Ct. at 2560. Notably, Craven all but ignores Rule 23(b)(1)(A), merely asserting in a footnote that the rule from *Wal-Mart* against *individualized* damages is dispositive. Br. 30 n.5. See *Wal-Mart*, 131 S. Ct. at 2557 (“claims for *individualized* relief” cannot be certified under Rule 23(b)(2)) (emphasis in original); *Eubanks*, 110 F.3d at 95 (“underlying premise of (b)(2) certification — that the class members suffer from a common injury that can be addressed by class-wide relief — begins to break down when the class seeks \* \* \* monetary damages to be allocated based on individual

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<sup>6</sup>(...continued)

Civ. P. 23, 28 U.S.C. App. at 155 (Rule 23 (b)(1)(A) may properly be invoked “to obviate the actual or virtual dilemma” of varying adjudications). The same is true with respect to uniform monetary payments to release the duty to account; either Interior had to adopt uniform accounting standards and reconcile decades of inter-related transactions, or it had to pay all potential claimants for a release. Likewise, the HAC is properly certified under Rule 23(b)(2), because the declaration of an accounting duty and an order that Interior conduct an accounting would apply to the class as a whole. Uniform payments to discharge that obligation in a compromise would be incidental to the requested declaratory and injunctive relief and thus permissible under Rule 23(b)(2) as well. The presumption of cohesion and unity that follows from a unitary failure to act would apply equally to a unitary settlement payment in lieu of that act. Because “the assumption of cohesiveness underlying certification of a (b)(2) class” applies to uniform payments, no opt-out would be necessary. See *Thomas*, 139 F.3d at 234-36.



injuries”). But even assuming that this principle applies to (b)(1)(A) actions, the per capita \$1,000 payment to each Historical Accounting Class member here is not an “individualized award of monetary damages,” *Wal-Mart*, 131 S. Ct. at 2557, nor does it address “*individual* injuries,” but only a common issue properly resolved by a class-wide settlement.

Craven tries to analogize this settlement to a hypothetical in which the plaintiffs in *Brown v. Board of Education* were forced to waive their constitutional rights in exchange for a cash payment. Br. 33. But the settlement here waives no prospective accounting rights, nor does the underlying litigation involve any constitutional claims. And, as noted, with respect to any damages claims for trust mismanagement, the settlement imposes no mandatory waiver of any kind, whether prospective or retrospective in nature. This is plainly not “a settlement that authorizes the continuation of clearly illegal conduct.” *Robertson v. Nat’l Basketball Ass’n*, 556 F.2d 682, 686 (2d Cir. 1977).

3. Craven’s fairness objections fare no better with respect to the Trust Administration Class. See Br. 23-25.

Under the settlement, every TAC member who has not elected to opt out of the class will receive a baseline amount of approximately \$850. See GA73 (Herman Decl. ¶ 38). This amount will then be adjusted upwards, *pro rata*, based on the

highest ten years of receipts in a class member's IIM account(s), from 1985 to 2009. As a witness explained to the court, the TAC compensation formula is sensible. It recognizes timing differences and smooths variances, by counting each class member's highest ten years of account revenues. See GA70-73 (Herman Decl. ¶¶ 29-39). Moreover, as the district court previously recognized after taking substantial evidence, IIM "throughput" is a suitable proxy for estimating possible error. *Cobell*, 569 F. Supp. 2d at 252. IIM data for the relevant period have been extensively examined and tested for reliability, GA62-70 (Herman Decl. ¶¶ 7-28), and have been subjected to cross-examination by plaintiffs and consideration by the district court. See *Cobell*, 569 F. Supp. 2d at 231-32, 234-36; *Cobell*, 532 F. Supp. 2d at 61-69.

Craven challenges the distribution scheme, speculating that it is unfair to individuals with large holdings. But a settlement is not unreasonable simply because some class members might benefit more than others, see *Thomas*, 139 F.3d at 231-33, and "no party can reasonably expect to receive in a settlement precisely what it would receive if it prevailed on the merits." *Eubanks*, 110 F.3d at 98. Ultimately, the fairness inquiry reflects "an amalgam of delicate balancing, gross approximations and rough justice." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009).

Here, on an individual basis, it may not be possible to obtain damages in a later suit. Beyond the question whether any significant shortfalls exist, see *Cobell*, 532 F.

Supp. 2d at 60; GA9, the statute of limitations and the practical concerns of litigation costs pose a substantial risk that little, if any, likelihood of recovery would exist for many mismanagement claims. The settlement thus offers fair payments on potential trust administration claims to hundreds of thousands of individual Indians, without requiring any of them to incur the considerable risks and expense of prosecuting those claims.

And crucially, as we have stressed, the Trust Administration Class is an opt-out class. Thus, those who desired to reserve their rights and pursue trust mismanagement claims on their own had an ample and meaningful opportunity to exclude themselves from the settlement. The opt-out provision with respect to the TAC served as a safety net that allowed any class member to reserve the ability to pursue whatever trust mismanagement claims the person may have had, outside of the parties' Congressionally-authorized settlement.

In the end, the settlement in this case dedicates an unprecedented sum — over \$1 billion — to pay for potential trust administration claims alone, the prospects of which are, at best, uncertain. Congress has provided the necessary funding, the district court after due deliberation has approved the parties' agreement, and only a tiny minority of the class members have elected to opt out. As this Court stated in

another context, “[w]e must not allow the theoretically perfect to render impossible the achievable good.” *Cobell*, 573 F.3d at 815.<sup>7</sup>

## II. The Trust Administration Class Was Properly Certified.

Craven argues that the Trust Administration Class was not and could not properly be certified. Br. 35. But the Claims Resolution Act provides that, “[n]otwithstanding the requirements of the Federal Rules of Civil Procedure,” the district court “may certify the Trust Administration Class.” CRA § 101(d)(2)(A). Congress wields “ultimate authority over the Federal Rules of Civil Procedure; it can create exceptions to an individual rule as it sees fit – either by directly amending the rule or by enacting a separate statute overriding it in certain instances.” *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1438 (2010). Thus, as

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<sup>7</sup> As we understand it, Craven does not assert that the settlement harms her, but rather speculates how it may harm others. “Standing, of course, is issue-specific,” *In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 29 (D.C. Cir. 2000), and a litigant ordinarily cannot assert that someone else has been harmed, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804-05 (1985). Moreover, class members who have not intervened are treated as parties, and thus permitted to appeal, only so that they may “preserve their *own* interests.” *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002) (emphasis added). Nowhere in Craven’s objection before the district court or brief here does she allege that asserted inequities makes *her* worse off. Indeed, she refers mostly to a different class member, James Kennerly, whom she posits has “the right to millions of dollars of oil royalties” and urges has been disadvantaged. Br. 25; *id.* at 3-4, 9, 15. Craven does not hint that she stands in a similar position. Because her argument pertains to how the total settlement amount — which she concedes is fair (see Br. 23) — was distributed, she appears to be before this Court complaining that she is being benefitted at the expense of others.

Craven concedes (Br. 42-43), the only limitations on certification are those imposed by due process.

Due process is a “flexible concept.” *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 320 (1985). It “is not a technical conception with a fixed content unrelated to time, place and circumstances,” but rather “calls for such procedural protections as the particular situation demands.” *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (internal quotation marks omitted).

In the context of a class action for individualized damages, due process generally requires that class members receive notice, an opportunity to be heard, a right to opt out, and adequate representation. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985); *In re Veneman*, 309 F.3d at 795 (discussing *Shutts*). These elements are malleable and, to some extent, overlapping. See, e.g., *Williams v. Burlington N., Inc.*, 832 F.2d 100, 104 (7th Cir. 1987); *Stewart v. Rubin*, 948 F. Supp. 1077, 1091 (D.D.C. 1996), *aff’d* without opinion, 124 F.3d 1309 (D.C. Cir. 1997).

“The most important element of due process is adequate notice.” *Berardinelli*, 357 F.3d at 804. Notice was particularly potent here in terms of its due process implications; because of the potential settlement, class members were notified of the proposed outcome of the litigation, and not merely its pendency. As the district court

observed, notice in this case was “extensive and extraordinary.” GA133 (Tr. 230). Plaintiffs and the government, with the aid of a retained expert and numerous other entities, undertook an elaborate and comprehensive effort to ensure that class members received notice of the action and of the parties’ agreement and its terms. See *supra* at 16-17. Additionally, for nearly a year leading up to the formal notice period, the settlement received considerable public attention as the legislation moved through Congress. Adequacy of notice in this case is not seriously open to challenge.

Likewise, class members had ample opportunity to participate in the district court proceedings. The court provided for a generous period in which to submit objections to the agreement in general and to its treatment of trust administration claims in particular. And the court allowed anyone who wished to be heard to attend the fairness hearing and voice his or her concerns. See GA83-109 (Tr. 33-137).

Class members were also fully entitled to opt out of the Trust Administration Class, within specified time limits. The right to opt out was not merely a general right to opt out of the litigation, but was the right to opt out of the concrete, proposed settlement. Class members were thus aware of the recovery they would forgo. Individuals electing to opt out were not bound by any release of trust administration claims, and remain free to pursue such claims as they see fit, subject to applicable law. See A575 (SA ¶ I.7).

The final factor in the due process calculus is adequacy of representation. “[I]t has been suggested that adequate representation may not be constitutionally required if sufficient notice is provided,” 7A Wright et al., Federal Practice & Procedure (“Wright & Miller”) § 1765 (3d ed. 2005), or that, in any event, when there is notice and opportunity to opt out, adequacy of representation plays a lesser role, see, e.g., *Pelt v. Utah*, 539 F.3d 1271, 1285-86 (10th Cir. 2008). Regardless, due process requires, at most, that class representatives “fairly represent” the class. *Hansberry v. Lee*, 311 U.S. 32, 41-43 (1940).

The primary indication of adequate representation is “whether the representative, through qualified counsel, vigorously and tenaciously protected the interests of the class. A court must view the representative’s conduct of the entire litigation with this criterion as its guidepost.” *Gonzales v. Cassidy*, 474 F.2d 67, 75 (5th Cir. 1973); see, e.g., *Pelt*, 539 F.3d at 1286. This litigation has at all times since its inception been vigorously pursued. The class representatives were aligned with the rest of the class in seeking compensation for alleged trust mismanagement and in attempting to overcome various bars to suit and difficulties in establishing injury. And the representatives obtained for the class substantial and guaranteed recovery, while preserving an unfettered right to opt out. As the district court noted, “I don’t

know how anyone can say that there was not adequate representation.” GA132 (Tr. 226).

Craven points to variations in the interests of different class members, and she speculates that because the settlement agreement spells out different types of potential errors in administration, the class representatives and counsel could not have represented the class adequately. See Br. 35-37. But due process captures the concern “that absent persons cannot be represented by parties who have *fundamentally divergent* interests in the subject of the representation.” 18A Wright & Miller § 4455. Thus, the only instance in which the Supreme Court has found class representation to be constitutionally inadequate was in *Hansberry*, where the supposed class action proceeded on the basis of a false stipulation entered into by parties with interests directly opposed to many in the class. 311 U.S. at 38, 44-46.

To the extent Craven suggests that the various prerequisites to class certification under Rule 23 must invariably be met to satisfy the constitutional adequacy of representation inquiry, her argument is meritless. See *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 33 (1981) (a legislature may require as a matter of “wise public policy” more process than what is “minimally tolerable under the Constitution”); *Hansberry*, 311 U.S. at 42 (due process “does not compel \* \* \* any particular rule for establishing the conclusiveness of judgments in class suits, nor



does it compel the adoption of the particular rules thought \* \* \* to be appropriate for the federal courts”) (citations omitted). The Supreme Court’s decisions regarding Rule 23’s adequacy standards are carefully limited to address only Rule 23.<sup>8</sup> Significantly, in *Ortiz v. Fibreboard Corp.*, three of the seven members of the majority wrote separately to state that they agreed with the majority’s holding based on the “Federal Rules” as they presently existed, but that they would “agree entirely with th[e] dissent” if those rules were “revised.” 527 U.S. at 865 (Rehnquist, C.J., joined by Scalia and Kennedy, JJ., concurring).<sup>9</sup> And, in any event, Rule 23 in significant respects protects defendants, not plaintiffs. This Court should decline Craven’s invitation to constitutionalize Rule 23.

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<sup>8</sup> In *Amchem*, the Court thus emphasized that its opinion “focus[es] on the requirements of Rule 23” and described its adequacy-of-representation conclusion as being that the class does not “satisfy Rule 23(a)(4)’s requirement,” specifically the “existing Rule 23.” 521 U.S. at 619-20, 622 & n.17, 625. And in a later case, the Court likewise confined its adequacy holding to “the requirements of structural protection applicable to all class actions under Rule 23(a)(4)” and the “subdivisions of Rule 23(b).” *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856-57 & n.31 (1999); see also *id.* at 865 (Rehnquist, C.J., concurring) (confirming that the Court’s opinion was rooted in “the Federal Rules of Civil Procedure”).

<sup>9</sup> Indeed, in both *Amchem* and *Ortiz*, the Court called for Congress to create a “national asbestos dispute-resolution scheme” that would benefit both present and future claimants. 521 U.S. at 598, 622; 527 U.S. at 821 & n.1. Congress’s flexibility in doing so would be hamstrung if the issue there was of constitutional dimension.

Even under Rule 23, “[w]hat constitutes adequate representation” is “a question of fact that depends on the circumstances of each case.” 7A Wright & Miller § 1765. Adequacy is evaluated by a variety of factors, including the quality of class counsel, the degree to which the interests of class representatives differ from those of other class members, and the overall context of the litigation. *Twelve John Does v. Dist. of Columbia*, 117 F.3d 571, 575 (D.C. Cir. 1997). This analysis encompasses whether class representatives have “antagonistic or conflicting interests with the unnamed members of the class.” *Ibid.*

To defeat the adequacy of representation requirement by positing a conflict of interest, an objector must offer more than speculation. The conflict must be real and “fundamental.” *E.g.*, *Ward v. Dixie Nat’l Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010); *Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003). Thus, “[c]ourts generally reject the argument that an intra-class conflict exists when divergent theories of liability would benefit different groups within the class,” for example when “different class members desir[e] different methods of calculating damages.” 1 Newberg on Class Actions § 3:62 (5th ed. 2011).

No such conflicting interests exist here. Craven urges that the Trust Administration Class is large and that its members may have had a variety of potential claims. But it does not follow that class representation was in any respect inadequate,

much less constitutionally inadequate. Unlike, for example, in *Amchem*, Craven here never identified to the district court any distinct groups within the class that had directly opposing interests, and with respect to which one will lose out to the other. See *Amchem*, 521 U.S. at 623-26; see also *Ortiz*, 527 U.S. at 856. Nor does Craven demonstrate how her own interests are in any fundamental conflict with those of the class representatives.

At bottom, due process presents a case-specific inquiry. Here, if the district court had disapproved the Trust Administration Class, the underlying litigation may well have continued for years, and it is entirely possible that plaintiffs would ultimately have been awarded little or no relief. In other words, many class members may have gone “without any effective redress.” *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 339 (1980). Due process does not inflexibly compel that result. See, e.g., *Ortiz*, 527 U.S. at 865 (Rehnquist, C.J., joined by Scalia and Kennedy, JJ., concurring) (emphasizing that if not bound by Rule 23, they would have affirmed the “near heroic effort[]” to “make the best of a bad situation,” particularly because it would secure money for class members that they would not otherwise receive); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313-14 (1950) (citing need to achieve a “final settlement,” and stressing that due process cannot be construed to “place impossible or impractical obstacles in the way”).

In the context of this case, of course, an Act of Congress expressly states that, “[n]otwithstanding the requirements of the Federal Rules of Civil Procedure,” the district court “may certify the Trust Administration Class.” CRA § 101(d)(2)(A). Although Congress did not, strictly speaking, require that the class be certified, it gave the matter explicit consideration, and authorized and ratified the underlying class action settlement. In and of itself, due regard for Congress’ action militates in favor of the district court’s class certification. See *Amchem*, 521 U.S. at 622; *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982) (in some instances, a “legislative determination provides all the process that is due”); *Littlewolf*, 877 F.2d at 1063 (presumption of constitutionality where Congress “balanced the competing interests” of Indian tribe, government bodies, and non-Indian communities).

### **III. Appellant’s Remaining Contentions Are Meritless.**

Craven advances two final challenges to the judgment below. Both are without basis.

**A.** Craven erroneously urges that, by seeking \$13 million in “incentive payments,” the class representatives here “create[d] an ‘untenable’ conflict” which “[r]equire[s] [d]ecertification.” Br. 45-46. The class representatives sought \$2.5 million in incentive payments and \$10.5 million in expenses; the district court granted

only the incentive award and denied the additional expenses. GA135-36 (Tr. 238-43).

In any event, courts regularly approve incentive awards to reflect “the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation.” *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998). Although the government opposed the request for incentive awards here as excessive, the request was not disqualifying. The lead plaintiffs in this case indisputably invested years of effort in the litigation. Even if, as the government believes, these individuals overvalued that effort in their incentive payment request, the fact that they sought the award demonstrates no fundamental conflict requiring that the settlement be undone.

Significantly, the terms of the settlement here did not grant any incentive award. At the time they entered into the agreement, the named plaintiffs did not know what incentive award — if any — they might receive. The settlement agreement provided only that the district court would have the discretion, pursuant to applicable law, to make such an award after considering the parties’ and any objectors’ views. A579 (SA ¶ K.5). The Claims Resolution Act likewise expressly recognized that the district court was empowered to issue incentive awards “in

accordance with controlling law,” but that it was not required to do so. CRA § 101(g). No indication exists that the named plaintiffs entered into this settlement for nothing more than the hope of a large personal payout.<sup>10</sup>

**B.** In the district court proceedings, Craven filed a brief expressing her objections to the settlement. After plaintiffs and the government filed motions for approval of the settlement, Craven sought to file a second brief, responding to those motions. The district court struck the latter pleading as untimely, and Craven complains in this Court that the district court erred in so doing. Br. 51-52.

Rule 23(e) requires only that, after parties propose a settlement, notice be given, and class members be granted an opportunity to object. See Fed. R. Civ. P. 23(e)(5). The rule does not require that objectors be allowed to respond *seriatim* to every filing with which they potentially disagree.

More generally, the district court has the “prerogative to manage its docket,” and possesses broad “discretion to determine how best to accomplish this goal.” *Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 151 (D.C. Cir. 1996). The court here “thoroughly read[] and underst[ood]” Craven’s

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<sup>10</sup> The cases that Craven cites are plainly inapposite. *E.g.*, *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 952 (7th Cir. 2006) (named plaintiff entered into settlement agreement guaranteeing him a substantially larger payout than the rest of the class).

opposition pleading, and noted that, “in substance,” it was no more than an untimely supplement to the objections she had already filed. A746 (district court order). That determination was not an “abuse of discretion.” *Jackson*, 101 F.3d at 150.

Any possible error was in any event harmless. See *Burkhart v. Wash. Metro. Area Transp. Auth.*, 112 F.3d 1207, 1214 (D.C. Cir. 1997). At the fairness hearing, the court allowed Craven’s counsel to make the arguments contained in the brief at issue. See GA93-96 (Tr. 70-82). The court was thus aware of those arguments when it stated that it “cannot conclude in the final balance” that the settlement “is anything but fair.” GA130 (Tr. 218-19).

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

TONY WEST  
Assistant Attorney General

RONALD C. MACHEN, JR.  
United States Attorney

THOMAS M. BONDY  
ADAM C. JED  
BRIAN P. GOLDMAN  
(202) 514-4825  
*Attorneys, Appellate Staff  
Civil Division, Room 7535  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530*

DECEMBER 2011



**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief is in compliance with Rule 32(a)(7) of the Federal Rules of Appellate Procedure. The brief contains 12,542 words, and was prepared in 14-point Times New Roman font using Corel WordPerfect 12.0.

/s/ Thomas M. Bondy  
Thomas M. Bondy

**CERTIFICATE OF SERVICE**

I hereby certify that on December 16, 2011, I filed and served the foregoing Brief For The Defendants-Appellees with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. Participants are registered CM/ECF users and will be served via the CM/ECF system.

/s/ Thomas M. Bondy  
Thomas M. Bondy

**ADDENDUM**

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Public Law 111-291  
111th Congress

An Act

Dec. 8, 2010  
[H.R. 4783]

This Act may be cited as “The Claims Resettlement Act of 2010.”.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

Claims  
Resolution Act  
of 2010.

42 USC 1305  
note.

**SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

(a) SHORT TITLE.—This Act may be cited as the “Claims Resolution Act of 2010”.

(b) TABLE OF CONTENTS.—The table of contents of this Act is as follows:

Sec. 1. Short title; table of contents.

**TITLE I—INDIVIDUAL INDIAN MONEY ACCOUNT LITIGATION SETTLEMENT**

Sec. 101. Individual Indian Money Account Litigation Settlement.

**TITLE II—FINAL SETTLEMENT OF CLAIMS FROM IN RE BLACK FARMERS DISCRIMINATION LITIGATION**

Sec. 201. Appropriation of funds for final settlement of claims from In re Black Farmers Discrimination Litigation.

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Sec. 310. White Mountain Apache Tribe Water Rights Settlement Subaccount.

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- Sec. 613. Acquisition of Pueblo water supply for Regional Water System.
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- Sec. 701. Mandatory appropriation.

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Subtitle B—TANF

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- Sec. 812. Modifications to TANF data reporting.

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- Sec. 822. Limitation on distributions relating to repeal of continued dumping and subsidy offset.

Subtitle D—Emergency Fund for Indian Safety and Health

- Sec. 831. Emergency Fund for Indian Safety and Health.

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- Sec. 841. Rescission of funds from WIC program.

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- Sec. 851. Budgetary effects.

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## TITLE I—INDIVIDUAL INDIAN MONEY ACCOUNT LITIGATION SETTLEMENT

### SEC. 101. INDIVIDUAL INDIAN MONEY ACCOUNT LITIGATION SETTLEMENT.

(a) DEFINITIONS.—In this section:

(1) AGREEMENT ON ATTORNEYS' FEES, EXPENSES, AND COSTS.—The term “Agreement on Attorneys’ Fees, Expenses, and Costs” means the agreement dated December 7, 2009, between Class Counsel (as defined in the Settlement) and the Defendants (as defined in the Settlement) relating to attorneys’ fees, expenses, and costs incurred by Class Counsel in connection with the Litigation and implementation of the Settlement, as modified by the parties to the Litigation.

(2) AMENDED COMPLAINT.—The term “Amended Complaint” means the Amended Complaint attached to the Settlement.

(3) FINAL APPROVAL.—The term “final approval” has the meaning given the term in the Settlement.

(4) LAND CONSOLIDATION PROGRAM.—The term “Land Consolidation Program” means a program conducted in accordance with the Settlement, the Indian Land Consolidation Act (25 U.S.C. 2201 et seq.), and subsection (e)(2) under which the Secretary may purchase fractional interests in trust or restricted land.

(5) LITIGATION.—The term “Litigation” means the case entitled *Elouise Cobell et al. v. Ken Salazar et al.*, United States District Court, District of Columbia, Civil Action No. 96-1285 (TFH).

(6) PLAINTIFF.—The term “Plaintiff” means a member of any class certified in the Litigation.

(7) SECRETARY.—The term “Secretary” means the Secretary of the Interior.

(8) SETTLEMENT.—The term “Settlement” means the Class Action Settlement Agreement dated December 7, 2009, in the Litigation, as modified by the parties to the Litigation.

(9) TRUST ADMINISTRATION ADJUSTMENT FUND.—The term “Trust Administration Adjustment Fund” means the \$100,000,000 deposited in the Settlement Account (as defined in the Settlement) pursuant to subsection (j)(1) for use in making the adjustments authorized by that subsection.

(10) TRUST ADMINISTRATION CLASS.—The term “Trust Administration Class” means the Trust Administration Class as defined in the Settlement.

(b) PURPOSE.—The purpose of this section is to authorize the Settlement.

(c) AUTHORIZATION.—

(1) IN GENERAL.—The Settlement is authorized, ratified, and confirmed.

(2) AMENDMENTS.—Any amendment to the Settlement is authorized, ratified, and confirmed, to the extent that such amendment is executed to make the Settlement consistent with this section.

(d) JURISDICTIONAL PROVISIONS.—

(1) IN GENERAL.—Notwithstanding the limitation on the jurisdiction of the district courts of the United States in section 1346(a)(2) of title 28, United States Code, the United States

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District Court for the District of Columbia shall have jurisdiction of the claims asserted in the Amended Complaint for purposes of the Settlement.

## (2) CERTIFICATION OF TRUST ADMINISTRATION CLASS.—

(A) IN GENERAL.—Notwithstanding the requirements of the Federal Rules of Civil Procedure, the court in the Litigation may certify the Trust Administration Class.

(B) TREATMENT.—On certification under subparagraph

(A), the Trust Administration Class shall be treated as a class certified under rule 23(b)(3) of the Federal Rules of Civil Procedure for purposes of the Settlement.

## (e) TRUST LAND CONSOLIDATION.—

## (1) TRUST LAND CONSOLIDATION FUND.—

(A) ESTABLISHMENT.—On final approval of the Settlement, there shall be established in the Treasury of the United States a fund, to be known as the “Trust Land Consolidation Fund”.

(B) AVAILABILITY OF AMOUNTS.—Amounts in the Trust Land Consolidation Fund shall be made available to the Secretary during the 10-year period beginning on the date of final approval of the Settlement—

(i) to conduct the Land Consolidation Program; and

(ii) for other costs specified in the Settlement.

## (C) DEPOSITS.—

(i) IN GENERAL.—On final approval of the Settlement, the Secretary of the Treasury shall deposit in the Trust Land Consolidation Fund \$1,900,000,000 out of the amounts appropriated to pay final judgments, awards, and compromise settlements under section 1304 of title 31, United States Code.

(ii) CONDITIONS MET.—The conditions described in section 1304 of title 31, United States Code, shall be deemed to be met for purposes of clause (i).

(D) TRANSFERS.—In a manner designed to encourage participation in the Land Consolidation Program, the Secretary may transfer, at the discretion of the Secretary, not more than \$60,000,000 of amounts in the Trust Land Consolidation Fund to the Indian Education Scholarship Holding Fund established under paragraph (3).

(2) OPERATION.—The Secretary shall consult with Indian tribes to identify fractional interests within the respective jurisdictions of the Indian tribes for purchase in a manner that is consistent with the priorities of the Secretary.

Consultation.

## (3) INDIAN EDUCATION SCHOLARSHIP HOLDING FUND.—

(A) ESTABLISHMENT.—On final approval of the Settlement, there shall be established in the Treasury of the United States a fund, to be known as the “Indian Education Scholarship Holding Fund”.

(B) AVAILABILITY.—Notwithstanding any other provision of law governing competition, public notification, or Federal procurement or assistance, amounts in the Indian Education Scholarship Holding Fund shall be made available, without further appropriation, to the Secretary to contribute to an Indian Education Scholarship Fund, as described in the Settlement, to provide scholarships for Native Americans.



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(4) ACQUISITION OF TRUST OR RESTRICTED LAND.—The Secretary may acquire, at the discretion of the Secretary and in accordance with the Land Consolidation Program, any fractional interest in trust or restricted land.

(5) TREATMENT OF UNLOCATABLE PLAINTIFFS.—A Plaintiff, the whereabouts of whom are unknown and who, after reasonable efforts by the Secretary, cannot be located during the 5-year period beginning on the date of final approval of the Settlement, shall be considered to have accepted an offer made pursuant to the Land Consolidation Program.

(f) TAXATION AND OTHER BENEFITS.—

(1) INTERNAL REVENUE CODE.—For purposes of the Internal Revenue Code of 1986, amounts received by an individual Indian as a lump sum or a periodic payment pursuant to the Settlement shall not be—

(A) included in gross income; or

(B) taken into consideration for purposes of applying any provision of the Internal Revenue Code that takes into account excludable income in computing adjusted gross income or modified adjusted gross income, including section 86 of that Code (relating to Social Security and tier 1 railroad retirement benefits).

(2) OTHER BENEFITS.—Notwithstanding any other provision of law, for purposes of determining initial eligibility, ongoing eligibility, or level of benefits under any Federal or federally assisted program, amounts received by an individual Indian as a lump sum or a periodic payment pursuant to the Settlement shall not be treated for any household member, during the 1-year period beginning on the date of receipt—

(A) as income for the month during which the amounts were received; or

(B) as a resource.

(g) INCENTIVE AWARDS AND AWARD OF ATTORNEYS' FEES, EXPENSES, AND COSTS UNDER SETTLEMENT AGREEMENT.—

Determination.

(1) IN GENERAL.—Subject to paragraph (3), the court in the Litigation shall determine the amount to which the Plaintiffs in the Litigation may be entitled for incentive awards and for attorneys' fees, expenses, and costs—

(A) in accordance with controlling law, including, with respect to attorneys' fees, expenses, and costs, any applicable rule of law requiring counsel to produce contemporaneous time, expense, and cost records in support of a motion for such fees, expenses, and costs; and

(B) giving due consideration to the special status of Class Members (as defined in the Settlement) as beneficiaries of a federally created and administered trust.

(2) NOTICE OF AGREEMENT ON ATTORNEYS' FEES, EXPENSES, AND COSTS.—The description of the request of Class Counsel for an amount of attorneys' fees, expenses, and costs required under paragraph C.1.d. of the Settlement shall include a description of all material provisions of the Agreement on Attorneys' Fees, Expenses, and Costs.

(3) EFFECT ON AGREEMENT.—Nothing in this subsection limits or otherwise affects the enforceability of the Agreement on Attorneys' Fees, Expenses, and Costs.

(h) SELECTION OF QUALIFYING BANK.—The United States District Court for the District of Columbia, in exercising the discretion

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of the Court to approve the selection of any proposed Qualifying Bank (as defined in the Settlement) under paragraph A.1. of the Settlement, may consider any factors or circumstances regarding the proposed Qualifying Bank that the Court determines to be appropriate to protect the rights and interests of Class Members (as defined in the Settlement) in the amounts to be deposited in the Settlement Account (as defined in the Settlement).

(i) APPOINTEES TO SPECIAL BOARD OF TRUSTEES.—The 2 members of the special board of trustees to be selected by the Secretary under paragraph G.3. of the Settlement shall be selected only after consultation with, and after considering the names of possible candidates timely offered by, federally recognized Indian tribes.

(j) TRUST ADMINISTRATION CLASS ADJUSTMENTS.—

(1) FUNDS.—

(A) IN GENERAL.—In addition to the amounts deposited pursuant to paragraph E.2. of the Settlement, on final approval, the Secretary of the Treasury shall deposit in the Trust Administration Adjustment Fund of the Settlement Account (as defined in the Settlement) \$100,000,000 out of the amounts appropriated to pay final judgments, awards, and compromise settlements under section 1304 of title 31, United States Code, to be allocated and paid by the Claims Administrator (as defined in the Settlement and pursuant to paragraph E.1.e of the Settlement) in accordance with this subsection.

(B) CONDITIONS MET.—The conditions described in section 1304 of title 31, United States Code, shall be deemed to be met for purposes of subparagraph (A).

(2) ADJUSTMENT.—

(A) IN GENERAL.—After the calculation of the pro rata share in Section E.4.b of the Settlement, the Trust Administration Adjustment Fund shall be used to increase the minimum payment to each Trust Administration Class Member whose pro rata share is—

(i) zero; or

(ii) greater than zero, but who would, after adjustment under this subparagraph, otherwise receive a smaller Stage 2 payment than those Trust Administration Class Members described in clause (i).

(B) RESULT.—The amounts in the Trust Administration Adjustment Fund shall be applied in such a manner as to ensure, to the extent practicable (as determined by the court in the Litigation), that each Trust Administration Class Member receiving amounts from the Trust Administration Adjustment Fund receives the same total payment under Stage 2 of the Settlement after making the adjustments required by this subsection.

(3) TIMING OF PAYMENTS.—The payments authorized by this subsection shall be included with the Stage 2 payments under paragraph E.4. of the Settlement.

(k) EFFECT OF ADJUSTMENT PROVISIONS.—Notwithstanding any provision of this section, in the event that a court determines that the application of subsection (j) is unfair to the Trust Administration Class—

(1) subsection (j) shall not go into effect; and

(2) on final approval of the Settlement, in addition to the amounts deposited into the Trust Land Consolidation Fund

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pursuant to subsection (e), the Secretary of the Treasury shall deposit in that Fund \$100,000,000 out of amounts appropriated to pay final judgments, awards, and compromise settlements under section 1304 of title 31, United States Code (the conditions of which section shall be deemed to be met for purposes of this paragraph) to be used by the Secretary in accordance with subsection (e).

## TITLE II—FINAL SETTLEMENT OF CLAIMS FROM IN RE BLACK FARMERS DISCRIMINATION LITIGATION

### SEC. 201. APPROPRIATION OF FUNDS FOR FINAL SETTLEMENT OF CLAIMS FROM IN RE BLACK FARMERS DISCRIMINATION LITIGATION.

(a) DEFINITIONS.—In this section:

(1) SETTLEMENT AGREEMENT.—The term “Settlement Agreement” means the settlement agreement dated February 18, 2010 (including any modifications agreed to by the parties and approved by the court under that agreement) between certain plaintiffs, by and through their counsel, and the Secretary of Agriculture to resolve, fully and forever, the claims raised or that could have been raised in the cases consolidated in *In re Black Farmers Discrimination Litigation*, Misc. No. 08-mc-0511 (PLF), including Pigford claims asserted under section 14012 of the Food, Conservation, and Energy Act of 2008 (Public Law 110-246; 122 Stat. 2209).

(2) PIGFORD CLAIM.—The term “Pigford claim” has the meaning given that term in section 14012(a)(3) of the Food, Conservation, and Energy Act of 2008 (Public Law 110-246; 122 Stat. 2210).

(b) APPROPRIATION OF FUNDS.—There is appropriated to the Secretary of Agriculture \$1,150,000,000, to remain available until expended, to carry out the terms of the Settlement Agreement if the Settlement Agreement is approved by a court order that is or becomes final and nonappealable, and the court finds that the Settlement Agreement is modified to incorporate the additional terms contained in subsection (g). The funds appropriated by this subsection are in addition to the \$100,000,000 of funds of the Commodity Credit Corporation made available by section 14012(i) of the Food, Conservation, and Energy Act of 2008 (Public Law 110-246; 122 Stat. 2212) and shall be available for obligation only after those Commodity Credit Corporation funds are fully obligated. If the Settlement Agreement is not approved as provided in this subsection, the \$100,000,000 of funds of the Commodity Credit Corporation made available by section 14012(i) of the Food, Conservation, and Energy Act of 2008 shall be the sole funding available for Pigford claims.

(c) USE OF FUNDS.—The use of the funds appropriated by subsection (b) shall be subject to the express terms of the Settlement Agreement.

(d) TREATMENT OF REMAINING FUNDS.—If any of the funds appropriated by subsection (b) are not obligated and expended to carry out the Settlement Agreement, the Secretary of Agriculture shall return the unused funds to the Treasury and may not make

UNITED STATES PUBLIC LAWS  
103rd Congress - Second Session  
Convening January 25, 1994

PL 103-412 (HR 4833)  
October 25, 1994

**AMERICAN INDIAN TRUST FUND MANAGEMENT REFORM ACT  
OF 1994**

An Act to reform the management of Indian Trust Funds, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

\* \* \*

<< 25 USCA § 4001 >>

SEC. 2. DEFINITIONS.

For the purposes of this Act:

- (1) The term "Special Trustee" means the Special Trustee for American Indians appointed under section 302.
- (2) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims \*4240 Settlement Act (85 Stat. 688), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.
- (3) The term "Secretary" means the Secretary of the Interior.
- (4) The term "Office" means the Office of Special Trustee for American Indians established by section 302.
- (5) The term "Bureau" means the Bureau of Indian Affairs within the Department of the Interior.
- (6) The term "Department" means the Department of the Interior.

<< 25 USCA § 162a >>

## TITLE I--RECOGNITION OF TRUST RESPONSIBILITY

### SEC. 101. AFFIRMATIVE ACTION REQUIRED.

The first section of the Act of June 24, 1938 (25 U.S.C. 162a), is amended by adding at the end the following new subsection:

"(d) The Secretary's proper discharge of the trust responsibilities of the United States shall include (but are not limited to) the following:

"(1) Providing adequate systems for accounting for and reporting trust fund balances.

"(2) Providing adequate controls over receipts and disbursements.

"(3) Providing periodic, timely reconciliations to assure the accuracy of accounts.

"(4) Determining accurate cash balances.

"(5) Preparing and supplying account holders with periodic statements of their account performance and with balances of their account which shall be available on a daily basis.

"(6) Establishing consistent, written policies and procedures for trust fund management and accounting.

"(7) Providing adequate staffing, supervision, and training for trust fund management and accounting.

"(8) Appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands."

<< 25 USCA § 4011 >>

### SEC. 102. RESPONSIBILITY OF SECRETARY TO ACCOUNT FOR THE DAILY AND ANNUAL BALANCES OF INDIAN TRUST FUNDS.

(a) REQUIREMENT TO ACCOUNT.--The Secretary shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a).

(b) PERIODIC STATEMENT OF PERFORMANCE.--Not later than 20 business days after the close of a calendar quarter, the Secretary shall provide a statement of performance to each Indian tribe and individual with respect to whom funds are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a). The statement, for the period concerned, shall identify--

- (1) the source, type, and status of the funds;
- (2) the beginning balance;
- (3) the gains and losses;
- (4) receipts and disbursements; and
- (5) the ending balance.

\*4241 (c) ANNUAL AUDIT.--The Secretary shall cause to be conducted an annual audit on a fiscal year basis of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a), and shall include a letter relating to the audit in the first statement of performance provided under subsection (b) after the completion of the audit.

\* \* \*

Approved October 25, 1994.

**Federal Rule of Civil Procedure 23. Class Actions.**

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

- (1) prosecuting separate actions by or against individual class members would create a risk of:
  - (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
  - (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
- (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
- (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to

these findings include:

- (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
- (D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) Time to Issue. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) Defining the Class; Appointing Class Counsel. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) Altering or Amending the Order. An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:



- (i) the nature of the action;
- (ii) the definition of the class certified;
- (iii) the class claims, issues, or defenses;
- (iv) that a class member may enter an appearance through an attorney if the member so desires;
- (v) that the court will exclude from the class any member who requests exclusion;
- (vi) the time and manner for requesting exclusion; and
- (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) Judgment. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

\* \* \*

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed

settlement, voluntary dismissal, or compromise:

- (1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.
- (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
- (3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
- (4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
- (5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

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(h) Attorney's Fees and Nontaxable Costs. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

- (1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.
- (2) A class member, or a party from whom payment is sought, may object to the motion.
- (3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).
- (4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).