[ORAL ARGUMENT SCHEDULED FOR FEBRUARY 16, 2012]

No. 11-5205

**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, *et al*.,
Defendants-Appellees,**

**Appeal from the United States District Court for the District of Columbia
No. 1:96-CV-1285, the Honorable Thomas F. Hogan, District Judge**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Objector-Appellant.

B. Rulings Under Review

All rulings under review appear in the Brief for Objector-Appellant.

C. Related Cases

All related cases appear in the Brief for Objector-Appellant.

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Craven App.	Objector-Appellant Kimberly Craven's separate appendix
Craven Br.	Objector-Appellant Kimberly Craven's opening brief
IIM	Individual Indian Money

INTRODUCTION

This landmark class settlement arises out of a painful period in American history. Over a century ago, the United States, in an effort to destroy tribal governments and forcibly assimilate Indians into American society, seized tribal land and divided it into allotments. The government then held those allotments in trust for the benefit of individual Indians. Income derived from the government's sale and lease of those lands was to be commingled, held in the Individual Indian Money Trust ("IIM Trust"), invested in common, and ultimately disbursed to individual Indian beneficiaries of the IIM Trust. Sadly, the government's management of the IIM Trust has been replete with loss, dissipation, theft, waste, and wrongful withholding of funds. Indeed, this Court has described the government's mishandling of the IIM Trust as "a serious injustice that has persisted for over a century and that cries out for redress." *Cobell v. Kempthorne* (*Cobell XIX*), 455 F.3d 317, 335 (D.C. Cir. 2006). To redress this injustice, Plaintiffs brought this class action in 1996 seeking declaratory and injunctive relief to compel the United States to conduct a full historical accounting of all IIM Trust funds, to correct and restate IIM account balances, to fix broken Trust management systems, and to undertake other Trust reform measures to ensure prudent Trust management.

The lawsuit and Plaintiffs' historic settlement with the government are unique. The case has lasted for more than fifteen years, involving over 3,900 docket entries, 250 days of hearings and trials, ten interlocutory appeals to this Court, and over 80 published opinions of the district court and this Court. In December 2009, the parties reached an unprecedented $3.4 billion settlement, including $1.9 billion in furtherance of Trust reform and $1.5 billion in direct payments to class members. All three branches of the government approved the settlement: Congress, exercising its plenary power in relation to Indian affairs, "authorized, ratified, and confirmed" it through bipartisan legislation; the President signed that legislation with an accompanying statement of support; and the district court found the settlement to be fair, reasonable, and adequate after a full hearing. Given the unique nature of the IIM Trust and the legislation approving this settlement, there is no other case like this one and there likely never will be.

Objector-Appellant Kimberly Craven, a single objector out of 500,000 Indian trust beneficiaries, asks this Court to ignore the findings of Congress, the President, and the district court; to override the decisions of the 99.98% of class members who neither objected to this settlement nor opted out; and to veto the considered judgment of the class representatives and class counsel who litigated this case for more than fifteen years. Craven's arguments are both without legal support and grounded solely on hypotheticals and speculation with no basis in the

extensive trial or appellate record. She even argues that Elouise Cobell could not be trusted to represent class members—although Ms. Cobell dedicated more than a quarter of her life to this litigation, and received countless national awards and plaudits, before her untimely death earlier this year.

When this Court last considered this case (for the tenth time), it emphasized that "[w]e must not allow the theoretically perfect to render impossible the achievable good." *Cobell v. Salazar* (*Cobell XXII*), 573 F.3d 808, 815 (D.C. Cir. 2009). But that is precisely what Craven asks this Court to do. With the express approval of Congress, the parties reached a settlement that, in the words of the district court, "does a great service to recognize the harm done to the American Indians in the past by the government who is supposed to be their protector." (Craven App. 782.) This Court should affirm the district court's approval of the settlement. Otherwise, this litigation will continue endlessly, trust reform will languish, and class members likely will receive nothing at all.

STATEMENT OF THE FACTS

I. HISTORY OF THE INDIVIDUAL INDIAN MONEY TRUST

This Court explained the history of the IIM Trust in *Cobell v. Norton* (*Cobell VI*), 240 F.3d 1081 (D.C. Cir. 2001). Below, Plaintiffs provide a brief summary of the relevant facts.

In the late nineteenth century, the federal government adopted a policy of assimilation for Indians. To further that policy, the government seized tribal reservation land and, in part, divided it into parcels allotted to individual Indians. *Id.* at 1087; General Allotment Act of 1887, ch. 119, 24 Stat. 388 (1887).

The United States retained legal title to the allotted lands and, as trustee for individual Indians, exercised complete control over those lands and their resources, including oil, natural gas, coal and timber. *Cobell VI*, 240 F.3d at 1087. Individual Indian beneficiaries could not sell or lease their land. *Id.* By exercising control as trustee of individual Indian property, the United States "charged itself with moral obligations of the highest responsibility and trust." *Seminole Nation v. United States,* 316 U.S. 286, 297 (1942); *see also Mitchell v. United States*, 463 U.S. 206, 226 (1983).

Despite the government's obligations, the history of the IIM Trust is replete with the loss, dissipation, theft, waste, and wrongful withholding of Trust funds. As early as 1914, Congress learned that "[t]he Government itself owes millions of dollars for Indian moneys which it has converted to its own use." Bureau of Municipal Research, 63rd Cong., *Report to the Joint Commission to Investigate Indian Affairs: Business and Accounting Methods Employed in the Administration of the Office of Indian Affairs* 2 (Comm. Print 1915) ("*1915 Report*"). Misappropriation and mismanagement continued into modern times. In *Cobell VI*,

this Court noted that "[t]he General Accounting Office, Interior Department Inspector General, and Office of Management and Budget, among others, have all condemned the mismanagement of the IIM trust accounts over the past twenty years." *Cobell VI*, 240 F.3d at 1089; *see generally* Comm. on Gov't Operations, *Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund*, H.R. Rep. No. 102-499 (1992) ("*Misplaced Trust*").

Further compounding these problems, the full scope of the government's mismanagement remained hidden from individual Indian beneficiaries because, as a matter of policy, they were not provided with statements of account and "[n]o real accounting, historical or otherwise, has ever been done of the IIM trust." *Cobell v. Kempthorne* (*Cobell XX*), 532 F. Supp. 2d 37, 43 (D.D.C. 2008).

II. THE TRUST REFORM ACT

A century of complaints by Indians, and "many years of congressional frustration over Interior's handling of the IIM trust," *id.* at 41, led to passage of the American Indian Trust Fund Management Reform Act ("Trust Reform Act"), Pub. L. No. 103-412, 108 Stat. 4239 (1994). It confirmed and codified the government's pre-existing fiduciary duty to provide a full accounting to IIM Trust beneficiaries. *Cobell VI*, 240 F.3d at 1090.

Plaintiffs brought this class action in 1996, after the government failed to begin the accounting mandated by the Trust Reform Act and required by the

government's pre-existing fiduciary duties. In 1999, the district court found the Interior and Treasury Departments in violation of the Trust Reform Act and held them in breach of their trust duties to Plaintiffs. *Cobell v. Babbitt* (*Cobell V*), 91 F. Supp. 2d 1, 58 (D.D.C. 1999). The district court granted declaratory relief, ordered the Interior and Treasury Secretaries as trustee-delegates "to provide plaintiffs an accurate accounting of all money in the IIM trust," and established a plan for compliance. *Id.* This Court affirmed the court's order. *Cobell VI*, 240 F.3d at 1110.

III. SCOPE OF THE TRUST ACCOUNTING

In addition to reform of the government's broken Trust management system, the central issue in this action has been the scope of the accounting applicable to the IIM Trust. In 2008, the district court held that it is "clear that . . . the required accounting is an impossible task" and that "the Department of the Interior has not—and cannot—remedy the breach of its fiduciary duty to account for the IIM trust." *Cobell XX*, 532 F. Supp. 2d at 39, 103. Based on that decision, the court conducted an evidentiary hearing to determine the nature and scope of restitutionary relief to remedy the government's breach of trust. Following that hearing, the court ordered the United States to pay class members $455.6 million in restitution for IIM Trust funds improperly withheld. *Cobell v. Kempthorne* (*Cobell XXI*), 569 F. Supp. 2d 223 (D.D.C. 2008).

On interlocutory appeal, this Court rejected the district court's finding of impossibility, holding that Interior must provide an accounting. *Cobell XXII*, 573 F.3d at 812-13. However, this Court denied Plaintiffs a full historical accounting, which traditional trust-law principles would mandate. Instead, the Court concluded that the government must undertake only "the best accounting possible, in a reasonable time, with the money that Congress is willing to appropriate." *Id.* at 813. The Court also instructed that, during such an accounting, Interior need only "concentrate on picking the low-hanging fruit." *Id*. at 815.

Although Plaintiffs still believe they are entitled to a full historical accounting, and to adverse inferences should the government be unable to document all Trust assets and transactions, *Cobell XXII* in many ways cut the heart out of Plaintiffs' request for full injunctive and declaratory relief. Under this Court's holding, class members are no longer guaranteed to receive an accounting—even if they prevail in this litigation—because Congress could decline to appropriate sufficient (or any) funds or the Interior Secretary could deprioritize the accounting.

At the same time, the government was under increasing pressure to find a solution to this protracted and costly litigation. Indeed, the case had taken on monumental proportions in the district court. In *Cobell XXII*, this Court

acknowledged that "our precedents do not clearly point to any exit from this complicated legal morass." 573 F.3d at 812.

IV. THE SETTLEMENT AGREEMENT

In July 2009, after seven unsuccessful efforts at mediation and negotiated settlement, the parties renewed settlement discussions. For five months, they engaged in intensive and contentious negotiations. On December 7, 2009, the parties executed a Settlement Agreement contingent upon authorizing legislation and the district court's approval. The amended complaint filed pursuant to the Settlement Agreement created two classes. The Historical Accounting Class consists (with certain modifications, App. 218-19) of the class originally certified by the district court (App. 1-3), which seeks injunctive and declaratory relief including an accounting and necessary Trust reform. (Craven App. 539.) The Trust Administration Class consists of class members with claims against the government for mismanagement of their IIM Trust assets. (Craven App. 543.)

The settlement allocates $1.9 billion for the Trust Land Consolidation Fund. (Craven App. 544.) Interior must use those funds to purchase highly fractionated Trust interests at market rates. *Id.* These undivided interests resulted when allotments were continuously divided among the original beneficiaries' descendants over many generations. The difficulty of accounting for these interests and revenue generated therefrom is a major factor in the government's

mismanagement of the IIM Trust. *Cobell XX*, 532 F. Supp. 2d at 41. Thus, consolidating these interests is necessary for meaningful Trust reform and prudent Trust management.

In addition, each member of the Historical Accounting Class receives a payment of $1,000, totaling approximately $337 million. This payment is in lieu of a completed historical accounting; it is not compensation for accounting errors. The Historical Accounting Class is certified under Rule 23(b)(1)(A) and 23(b)(2) of the Federal Rules of Civil Procedure. Historical Accounting Class members are not permitted to opt out. (Craven App. 548.)

The settlement also provides for payments to the Trust Administration Class. Class members receive a baseline payment of $800[1] plus an additional amount calculated from the ten highest-revenue years in each class member's IIM account. The Trust Administration Class payments total approximately $1.1 billion. The class is certified under the Claims Resolution Act of 2010, described below, and alternatively under Rule 23(b)(3) of the Federal Rules of Civil Procedure. Trust Administration Class members may opt out.[2] (Craven App. 548-49.)

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[1] The Settlement Agreement provided for a payment of $500 but the Claims Resolution Act increased that amount by approximately $300 and the parties amended the Agreement accordingly. (App. 201-02, 208, 258.)

[2] Payments to both classes are exempt from federal income taxation and are excluded from income for purposes of means-tested federal entitlement programs. CRA § 108(a)-(b).

Finally, the settlement created the Indian Education Scholarship Fund to help Indian students "defray the cost of attendance at both post-secondary vocational schools and institutions of higher education." (Craven App. 567.) The Scholarship Fund will receive up to $60 million from the Trust Land Consolidation Fund, to encourage class members to participate in the land consolidation program. It will also receive unclaimed funds after all payments are made to the Historical Accounting and Trust Administration Classes. (Craven App. 568-69.)

V. THE CLAIMS RESOLUTION ACT OF 2010

The settlement required congressional approval. On November 30, 2010, following a year of debate, Congress enacted the Claims Resolution Act of 2010 ("CRA"), Pub. L. No. 111-291, 124 Stat. 3064. On December 8, 2010, the President signed the Act into law. The CRA provided that "[t]he Settlement is authorized, ratified, and confirmed." CRA § 101(c)(1). Because under existing law certain Trust Administration Class claims must be brought in the Court of Federal Claims, *see* 28 U.S.C. § 1491(a)(1), Congress expressly conferred jurisdiction on the district court for all claims asserted in the Amended Complaint. CRA § 101(d)(1). In addition, because the Trust Administration Class had not previously been certified, Congress provided that "[n]ot withstanding the requirements of the Federal Rules of Civil Procedure, the court in the Litigation may certify the Trust Administration Class." *Id.* § 101(d)(2)(A).

VI. APPROVAL OF THE SETTLEMENT

Following enactment of the CRA, Plaintiffs undertook the most extensive class settlement notice process ever conducted. Plaintiffs sent direct mail notice to the known addresses of all class members; advertised the settlement extensively in local, regional, and national media including television, radio, newspapers, and magazines; and contacted businesses, non-profits, educational institutions, and others serving Indians to provide posters, flyers, DVDs, and other materials containing notice of the settlement, in English and in multiple Indian languages. (App. 230-36.) In addition, Ms. Cobell and class counsel for months traveled thousands of miles through Indian Country to explain the settlement to thousands of class members. The settlement garnered significant media coverage and public statements by high-ranking government officials, including the President. (App. 235.)

The settlement notice informed class members of their right to opt out of the Trust Administration Class and to submit objections to the settlement. Of the 500,000 class members in the two classes, the district court received only 92 objections, including one from Craven, and 1,824 opt outs, the overwhelming majority of which are from one tribe. (Craven App. 778, 789.)

The district court held a fairness hearing on June 20, 2011. Craven, through counsel, appeared and opposed the settlement. After hearing arguments from

objectors and the parties' counsel, the district court approved the settlement, finding it "fair, reasonable, and adequate." (Craven App. 771-83.) The court entered its approval order on July 27, 2011, and entered final judgment on August 4, 2011. (Craven App. 837, 843-55.) Craven appealed.

STATUTES AND REGULATIONS

All applicable statutes are contained in the addendum to the Brief for Objector-Appellant.

SUMMARY OF THE ARGUMENT

The judgment below, approving the settlement, should be affirmed.

1. Initially, the settlement must be viewed through the prism of Congress' plenary authority to legislate with respect to Indian affairs. Congress specifically "authorized, ratified, and confirmed" this settlement. Congress' authority over Indian affairs is particularly broad with respect to legislation—such as the CRA—dealing with Indian lands and other assets. Here, the settlement is a valid exercise of Congress' authority so long as it is "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." The CRA and settlement readily satisfy this standard.

2. Craven first argues that the "distribution scheme" is unfair. Initially, relying on *Cobell XIII* and *Cobell XXII*, she asserts that the law-of-the-case doctrine requires a finding of unfairness because those cases rejected an award of

money in lieu of an accounting. But Craven waived this argument by not asserting it below. In any event, the law-of-the-case doctrine applies only when the Court previously decided the same legal issue, and neither *Cobell XIII* nor *Cobell XXII* addressed the fairness of a class-action settlement awarding the relief at issue here.

Moreover, Craven claims that the settlement is unfair because there is a purported "intraclass conflict" arising from the alleged fact that the settlement overvalues some class members' claims and undervalues others. But there is no intraclass conflict, as Craven identifies no ascertainable groups of class members with conflicting interests. Moreover, Craven's argument is premised on the allegation that accounting errors have caused class members' accounts to differ by "orders of magnitude," leading to the intraclass conflict, but this contention is based wholly on speculation—not record evidence. She fails to demonstrate that any large accounting errors, putting class members in conflicting positions, have actually occurred. Finally, Craven also improperly focuses only on this single aspect of a multi-part settlement. The district court's fairness ruling, however, is based on the settlement as a whole.

3. Craven argues that the Historical Accounting Class is improperly certified under Rule 23(b)(2), in light of the Supreme Court's *Wal-Mart* decision, because the settlement provides monetary relief. But the class is certified alternatively—and properly—under Rule 23(b)(1)(A), and thus this Court need not

reach Craven's Rule 23(b)(2) argument. In any event, the settlement is appropriate under Rule 23(b)(2) because a properly certified (b)(2) class may be settled for money and because that relief in this case is a uniform payment to all class members and is incidental to the non-monetary, trust reform aspects of the settlement.

4. Craven argues that the Trust Administration Class does not satisfy due process or the commonality requirement of Rule 23(a)(2). Certification of this class is rationally related to Congress' plenary authority over Indian affairs and therefore is proper. Further, the class provides the "minimal procedural due process" requirements for class certification: notice, opt out, and adequate representation. Craven's argument that due process requires compliance with the commonality jurisprudence of Rule 23(a)(2) is without support. Finally, even if Rule 23(a)(2) governs, certification is proper under *Wal-Mart* because the class involves a "common answer" to the disputed question of the nature and scope of the government's fiduciary duty to prudently manage IIM Trust assets.

5. The $2.5 million incentive award to the named plaintiffs does not create a conflict of interest with absent class members. The district court found that the named plaintiffs had no conflict and always acted in the best interests of the class as a whole. Craven offers no contrary evidence and thus fails to show an abuse of discretion.

6. Craven argues that the district court improperly considered the low number of objectors in its fairness determination. Such consideration was proper. Moreover, the district court relied on many appropriate factors, so it did not abuse its discretion in approving the settlement.

7. Craven argues that the district court improperly struck her brief filed in response to the parties' motions for final settlement approval. This action was within its discretion to manage its docket. In any event, the district court permitted Craven to make the same arguments at the fairness hearing, so any error is harmless.

ARGUMENT

I. CRAVEN IGNORES CONGRESS' PLENARY POWER OVER INDIAN AFFAIRS.

This settlement stands apart from other class settlements in a key respect: it is the will of Congress. Through the CRA, Congress "authorized, ratified, and confirmed" the settlement. CRA § 101(c)(1).

Even in an ordinary case, this congressional mandate would greatly alter the legal standards otherwise applicable to the settlement. Here, however, the CRA is particularly potent because "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the Supreme Court] ha[s] consistently described as 'plenary and exclusive.'" *United States v. Lara*, 541 U.S. 193, 200 (2004). The "plenary power" doctrine permits Congress to legislate with

respect to Indian affairs in ways possibly impermissible in other settings. As the Supreme Court has explained, Congress may "enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive." *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 501 (1979). Here, however, the legislation is not constitutionally offensive and, most importantly, provides benefits to 500,000 Indians that are unprecedented in nature and scope.

To be sure, "[t]he power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84 (1977). Constitutional protections like due process still constrain the government. However, because of the broad discretion afforded to Congress, legislation involving Indian affairs that would otherwise receive heightened scrutiny instead is measured by rational-basis review: "the legislative judgment should not be disturbed '[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians.'" *Id*. at 85. For example, Congress is permitted to enact racial hiring preferences for Indians, although in other settings those racial preferences would violate equal protection principles. *Morton v. Mancari*, 417 U.S. 535, 555 (1974). Similarly, Congress may apply different criminal laws to members of Indian tribes without violating

due process or equal protection. *United States v. Antelope*, 430 U.S. 641, 644 (1977).

Moreover, Congress' plenary power is at its zenith where, as here, the legislation involves Indian lands and other assets. Congress' authority over Indian lands and other assets "has been termed 'one of the most fundamental expressions, if not the major expression, of the constitutional power of Congress over Indian affairs.'" *Weeks*, 430 U.S. at 86. In *Weeks*, for example, Congress distributed funds to certain Delaware Indians to redress breaches of an Indian treaty, but excluded Delaware Indians who resided in Kansas. The Supreme Court held that the legislation "does not offend the Due Process Clause" because it "rationally supports [Congress'] decision to avoid undue delay, administrative difficulty, and potentially unmeritorious claims." 430 U.S. at 89-90. As Justice Blackmun explained, "there necessarily is a large amount of arbitrariness in distributing an award for a century-old wrong" but "Congress must have a large measure of flexibility in allocating Indian awards." *Id.* at 91 (concurring).

Craven acknowledges the CRA but dismisses its import without referencing the plenary power doctrine (Craven Br. 26-28)—although Plaintiffs discussed it below. Instead, Craven contends that, because the United States is a party, "Congress's litigation decisions receive no deference." (*Id.* at 28.) This is wrong.

Even in cases not involving Indian affairs, Congress can compel a particular outcome in pending litigation by changing the law. *See Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 438 (1992). Moreover, the plenary power doctrine applies even if the United States is a party to litigation—indeed, in *Weeks*, the plaintiffs challenged "[a]n Act of Congress providing for the distribution of funds . . . pursuant to an award by the Indian Claims Commission." 430 U.S. at 75; *see also*, *e.g.*, *LeBeau v. United States*, 474 F.3d 1334 (Fed. Cir. 2007).

Finally, the CRA readily qualifies for deference under the plenary power doctrine. Because more than fifteen years of litigation pursuant to the Trust Reform Act had achieved neither complete Trust reform nor an adequate remedy to IIM beneficiaries, Congress "authorized, ratified, and confirmed" the settlement, concluding that it afforded fair and adequate relief to class members. That decision—related to the disposition of Trust lands and related assets—plainly is "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." Therefore, Congress' approval of the settlement must be given substantial deference.

II. THE DISTRICT COURT'S FAIRNESS DETERMINATION IS PROPER AND WITHIN THE COURT'S SOUND DISCRETION.

This Court reviews the district court's decision to approve a class settlement for abuse of discretion. *Thomas v. Albright*, 139 F.3d 227, 231 (D.C. Cir. 1998). It may not "substitute its views of fairness for those of the district court and the

parties to the agreement, but is only to determine whether the district court's reasons for approving the [settlement] evidence appreciation of the relevant facts and reasoned analysis of those facts in light of the purposes of Rule 23." *Pigford v. Glickman*, 206 F.3d 1212, 1217 (D.C. Cir. 2000) (citation omitted). As explained below, Craven failed to make the requisite "'clear showing' that an abuse of discretion has occurred." *Id.*

A. The Settlement is fair, reasonable, and adequate.

When determining whether to approve a class settlement, courts in this Circuit "examine[] the following factors: (a) whether the settlement is the result of arm's length negotiations; (b) the terms of the settlement in relation to the strength of plaintiffs' case; (c) the status of the litigation at the time of settlement; (d) the reaction of the class; and, (e) the opinion of experienced counsel." *In re Vitamins Antitrust Litig.*, 305 F. Supp. 2d 100, 103 (D.D.C. 2004). The court's "primary task is to evaluate the terms of the settlement in relation to the strength of the plaintiffs' case." *Thomas*, 139 F.3d at 231. "The court should not reject a settlement merely because individual class members complain that they would have received more had they prevailed after a trial." *Id.*

The court properly found the settlement to be "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The settlement is the product of arms-length negotiations. Moreover, it was not reached shortly after the case was filed; rather,

Plaintiffs and class counsel vigorously litigated the case and they are intimately familiar with the strengths and weaknesses of their evidence and legal positions. In particular, this Court's decision in *Cobell XXII*—departing, in Plaintiffs' view, from *Cobell VI*—rejected one of Plaintiffs' central claims in the litigation: that class members are entitled to a full historical accounting of all IIM Trust accounts and assets from the inception of the Trust. Thus, as the district court noted, Plaintiffs were acutely aware of "the status of the last reversal from the Circuit and the prospects . . . of years of litigation facing [the parties] on both sides, with rather dubious chances of ultimate success, frankly, if you read the law carefully as developed by our Circuit." (Craven App. 772-73.)

The settlement provides fair and adequate relief in light of these litigation realities. It obligates the government to spend $1.9 billion to purchase and consolidate fractionated, undivided IIM Trust interests. Trust reform has been a central goal in this litigation, and the government has long asserted that fractionation is a key obstacle to accurate accountings and prudent Trust management. *See infra*, at 41-42. In addition, each member of the Historical Accounting Class will receive $1,000, and each member of the Trust Administration Class will receive at least $800 plus additional amounts based on the ten highest revenue-generating years reflected in the IIM accounts. In total, class members receive over $3.4 billion in tax-free economic benefits from the

settlement—significantly greater than even the $455 million award reversed in *Cobell XXII.* In light of *Cobell XXII*, the settlement provides class members with more than reasonably could be expected had this case proceeded to trial.

The CRA provides further support for the district court's fairness determination. The Supreme Court has recognized that Congress can provide a legislative solution to complicated class actions where further litigation is unlikely to achieve a satisfactory outcome. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 622-26 (1997). Here, this Court warned in *Cobell XXII* that "our precedents do not clearly point to any exit from this complicated legal morass." 573 F.3d at 812. Congress heeded this Court's warning, exercising its plenary authority over Indian affairs to approve and fund the settlement.

Given Congress' approval pursuant to its plenary power, the adverse implications of *Cobell XXII* on Plaintiffs' claims, the extraordinary length and complexity of the litigation, the many years of further expensive litigation if the settlement is not approved, the few objections, and the substantial relief afforded by the settlement, the district court did not abuse its discretion by finding the settlement fair, reasonable, and adequate.

B. Craven waived her law-of-the-case argument and that argument is meritless.

Craven argues that the district court's fairness determination is erroneous because, citing *Cobell XXII* and *Cobell v. Norton* (*Cobell XIII*), 392 F.3d 461 (D.C.

Cir. 2004), "the law of the case precludes finding the settlement fair." (Craven Br. 20.) This argument fails for two independent reasons.

First, Craven waived her law-of-the-case argument because she did not raise it below. This Court "is not a forum in which a litigant can present legal theories that it neglected to raise in a timely manner in proceedings below." *Tomasello v. Rubin*, 167 F.3d 612, 618 n.6 (D.C. Cir. 1999). In an objector's appeal from a class settlement, "arguments that were properly preserved for appeal are limited to those which [the objector] presented with at least a minimum level of thoroughness to the District Court through its written objection." *In re Ins. Brokerage Anti-Trust Litig*., 579 F.3d 241, 262 (3d Cir. 2009); *accord In re Literary Works in Elec. Databases Copyright Litig*., 654 F.3d 242, 255 n.8 (2d Cir. 2011). Craven's objections did not assert that the law-of-the-case doctrine precluded this settlement—indeed, she never referenced the language in *Cobell XIII* or *Cobell XXII* on which she now relies. (Craven App. 656-83.) Accordingly, this argument is waived.

In any event, Craven is wrong. First, when applicable, the law of the case doctrine is a *discretionary* principle, *Safir v. Dole*, 718 F.2d 475, 481 n.3 (D.C. Cir. 1983), and "'not an inexorable command that rigidly binds a court to its former decisions.'" *Melong v. Micronesian Claims Comm'n*, 643 F.2d 10, 17 (D.C. Cir. 1980). More important, the doctrine applies only when "the *same* issue" arises in a

subsequent appeal. *LaShawn A. v. Barry*, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (*en banc*) (emphasis in original). Neither *Cobell XIII* nor *Cobell XXII* considered whether monetary payments in lieu of an accounting are appropriate as part of a *settlement*. *Cobell XIII* did not address monetary payments at all, and *Cobell XXII* considered only whether monetary payments are appropriate as part of a *litigated* final judgment relieving the government of its historical accounting obligations. Indeed, Craven takes language from *Cobell XXII* out of context, pointing to a portion of the opinion where this Court rejected the district court's conclusion that an accounting was "impossible." 573 F.3d at 813. This Court's review of the settlement entails an entirely different standard from the one applied in *Cobell XXII*.

Moreover, unlike in *Cobell XXII*, the district court's fairness determination is not based solely on an award of monetary relief; rather, the court properly "evaluate[d] the fairness of the settlement to the class as a whole." *Thomas*, 139 F.3d at 233. Specifically, the court considered a wide range of factors in determining that the settlement is fair, including "the prospect of many more years of costly litigation" and the lack of "any assurance to either party of a satisfactory result." (Craven App. 785.) In addition, many aspects of the settlement were *not* part of the monetary award reversed in *Cobell XXII* and were not considered by this Court in its analysis of a "fair" litigated judgment, including the $1.9 billion

Trust Land Consolidation Fund. Thus, *Cobell XIII* and *Cobell XXII* involved different factual predicates and different legal issues, so the law-of-the-case doctrine does not preclude approval of the settlement.

Finally, far from barring this settlement, *Cobell XIII* confirms the district court's decision. There, this Court indicated in *dicta* that, with respect to the historical accounting, Congress could provide a "simpler scheme than the district court's, while nonetheless assuring that each individual receives his due or more." *Cobell XIII*, 392 F.3d at 468. That *dicta* refutes Craven's argument by confirming that Congress, exercising its plenary power over Indian affairs, may adopt a fair solution other than a full historical accounting—as it did here with the CRA.

In short, Craven's law-of-the-case argument asserts not only that this Court can substitute its view of the settlement's fairness for that of the district court, but that it already did so without knowing the terms of a settlement that did not exist at the time *Cobell XIII* and *Cobell XXII* were decided. As explained above, this argument is both waived and wrong.

C. Craven's speculation about an alleged "intraclass conflict" does not establish that the district court abused its discretion in finding the settlement reasonable.

Craven next challenges the fairness of the settlement. She expressly disclaims an argument that it is unfair because the settlement consideration is of insufficient value. (Craven Br. 23.) Instead, she contends that the "distribution

scheme" is unfair on only one basis: purported intraclass conflicts. She argues—based entirely on speculation with no record evidence—that the settlement creates intraclass conflicts because it might undervalue some class members' claims and overvalue others. (*Id.* at 23-28.) Specifically, Craven contends that because payments to the Trust Administration Class are based on the ten highest revenue-generating years, class members whose accounts are understated will receive less than those whose accounts do not have accounting errors or for whom errors result in overstatements. Thus, Craven argues that "class members who have suffered the greatest alleged injury are the ones who receive the least money and *vice versa*." (*Id*. at 25.) Craven contends that that this "intraclass conflict" is impermissible. This argument fails for several reasons.

1. There is no "intraclass conflict."

First, Craven misunderstands the concept of "intraclass conflicts." Intraclass conflicts exist when the goals of one group of class members conflict with the goals of another, necessitating subclasses with separate class representatives and counsel. In *Amchem* and *Ortiz v. Fibreboard Corp*., 527 U.S. 815 (1999), on which Craven relies, the Supreme Court rejected class certification in part because the class included those with existing asbestos-related diseases and those who had been exposed to asbestos but had no health problems. The Court explained that "for the currently injured, the critical goal is generous immediate payments, but

that goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future." *Ortiz*, 527 U.S. at 856; *see also Amchem*, 521 U.S. at 626-27.

Here, by contrast, Craven does not identify any ascertainable group of class members with conflicting interests. Rather, she asserts that some unknown and (under *Cobell XXII*) probably unknowable class members might receive less in the settlement than they might receive in a hypothetical litigated judgment, while others—also unknown and unknowable—might receive more. That is not an "intraclass conflict." Indeed, because the identities of the class members in each category are unknown, it is *impossible* to appoint class representatives for each such putative subgroup. More fundamentally, subclasses are unnecessary; if class members are unaware of which subgroup they are in, the concern animating *Amchem* and *Ortiz*—"[t]he selling out of one category of claim for another," *Literary Works*, 654 F.3d at 252—cannot be present.

The Seventh Circuit addressed this very issue in *Uhl v. Thoroughbred Technology & Telecommunications, Inc.*, 309 F.3d 978 (7th Cir. 2002). There, a railroad sought to lay fiber-optic cable on one side of its tracks, and the adjoining landowners sued for trespass. At the time of the class settlement, landowners were unaware on which side of the tracks the fiber would be laid. The settlement provided greater payment to the landowners on the side where the fiber ultimately

was placed. *Id.* at 980-82. A class member objected, arguing that the differential treatment between class members constituted an impermissible intraclass conflict. *Id.* at 985. Rejecting this argument, the Seventh Circuit explained that "at the time of the settlement, [the class representative] was in the same position as all class members." *Id.* at 986. Specifically, the court held that there was no intraclass conflict because "the named representative had an equal incentive to represent both sides as long as he did not know where his property would end up." *Id*. As in *Uhl*, class members here do not know, and cannot know, whether they might recover more or less by litigating than the amount they will receive in the settlement. Thus, Craven's intraclass conflict argument fails.

2. Craven's intraclass conflict argument relies entirely on hypotheticals and speculation.

More fundamentally, Craven's argument relies entirely on her own hypotheticals and speculation about accounting errors that may cause class members' accounts to improperly "differ by orders of magnitude," thus creating a conflict between those class members whose accounts are materially understated and those whose accounts are not. (Craven Br. 26.) Craven does not cite *any record evidence* that these purported intraclass conflicts actually *exist*. Nor does she demonstrate (or even assert)—based on evidence known to her—that her interests conflict with those of other class members. Further, Craven concedes that without these massive accounting errors, there would be no intraclass conflicts

because "class members are not materially prejudiced relative to one another." (*Id.* at 25.) Thus, Craven's intraclass conflict argument depends on the existence not just of numerous accounting errors generally (as alleged in the Amended Complaint), but massive accounting errors that cause some (and only some) class members' IIM accounts to be understated by "orders of magnitude."

It is Craven's obligation to show that her alleged accounting errors *actually exist*, not merely that they *might* exist. *See*, *e.g.*, *Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010) ("a conflict will not defeat the adequacy requirement if it is 'merely speculative or hypothetical'"); *In re Warfarin Sodium Antitrust Litig*., 391 F.3d 516, 533 (3d Cir. 2004) (rejecting class objectors' arguments because they "have only asserted, rather than established, an inherent conflict among [class members]"). Craven, however, does not cite *any* evidence from the voluminous record demonstrating that these purportedly massive accounting errors exist.[3] Indeed, the only instance in which Craven purports to cite actual IIM account information (Craven Br. 24) is an unsworn statement by a *pro se* objector at the fairness hearing, who in turn did not cite record evidence. "Without some evidence of an actual conflict, the district court did not abuse its

[3] While some IIM Trust documents are under seal, Craven never sought to modify applicable protective orders to obtain access to them. Craven cannot complain that she lacked access to the record when she sat on her hands and did nothing.

discretion by granting class certification." *Cummings v. Connell*, 316 F.3d 886, 896 (9th Cir. 2003).

Craven also ignores a wealth of record evidence contradicting her assertions. For example, the government introduced a 2,000-page report from an Interior contractor who reviewed IIM account data. (App. 93-163.) That report asserts that the government had successfully tracked 48,985,831 of the 49,064,275 IIM transactions (over 99.84%) during a 22-year period. (*Id*. at 118, 121.) Indeed, the government vigorously disputes that there are any non-minor accounting errors,[4] much less massive errors causing some accounts to be understated by "orders of magnitude," as Craven speculates. Likewise, the district court observed after the 2008 trial that "one permissible conclusion from the record would be that the government has not withheld any funds from plaintiffs' accounts. . . . [D]espite a profusion of evidence and opinion about the unreliability of IIM records, there has been essentially no direct evidence" of funds missing from IIM accounts. *Cobell XXI*, 569 F. Supp. 2d at 238. Thus, Craven's intraclass conflict argument turns *entirely* on her own speculation, which was refuted by the government, rejected by the district court after an evidentiary hearing, and unsupported by record evidence.

[4] "During the October 2007 bench trial, Associate Deputy Secretary James Cason testified that Interior understood the results of [an accounting analysis] as indicating that, although there were errors in the accounts, the errors were relatively few, the errors tended to be small, and the errors were on both sides of the ledger." *Cobell XX*, 532 F. Supp. 2d at 50.

In sum, Craven cannot rely on speculation when she "cites nothing in the record to support that speculation." *In re Core Commc'ns, Inc.*, 455 F.3d 267, 282 (D.C. Cir. 2006). If Craven believed there was evidence to support her intraclass conflict theory, she was obligated to identify it in her opening brief. Neither the parties nor this Court is required "to comb through the voluminous record in this case to determine the merits of an argument for which [Craven] offers no support." *Catawba County v. EPA*, 571 F.3d 20, 42 (D.C. Cir. 2009).

Craven also argues that Elouise Cobell's Senate testimony about James Kennerly proves that Craven's arguments are "more than hypothetical." (Craven Br. 24-25.) But Ms. Cobell's testimony is not record evidence and, again, the record contradicts Craven's claims. A government report concluded that Mr. Kennerly's missing mineral royalties were accounted for: they were given to the Blackfeet Tribe, which also claimed an interest in them, as part of an agreement between the Tribe and Mr. Kennerly's family. (App. 123.) In any event, Mr. Kennerly did not opt out of the Trust Administration Class or object to the settlement, demonstrating that he did not view the settlement as unfair.

Further, Mr. Kennerly's situation demonstrates Craven's profound lack of understanding of the underlying facts in this case. Lawsuits by IIM Trust beneficiaries are quite rare, and successful lawsuits are even rarer; such cases are expensive to litigate, require evidence that is very difficult to obtain, and are

fraught with legal hurdles such as the statute of limitations. *See, e.g., Brown v. United States*, 195 F.3d 1334 (Fed. Cir. 1999); *Begay v. Public Serv. Co. of N.M.*, 710 F. Supp. 2d 1161, 1202-03 (D.N.M. 2010); *Simmons v. United States*, 71 Fed. Cl. 188 (2006). Accordingly, there is no sound reason to believe that Mr. Kennerly could have prevailed on such a claim. This settlement is the only opportunity for class members like Mr. Kennerly to receive a substantial measure of justice for the government's wrongdoing.

Finally, Craven filed a motion for judicial notice of the complaint and motion to dismiss in *Two Shields v. United States*, No. 11-531-L (Fed. Cl.), apparently contending that they support her intraclass conflict argument. She is wrong, for numerous reasons. First, "mere allegations of a complaint are not evidence." *Tibbs v. City of Chicago*, 469 F.3d 661, 663 n.2 (7th Cir. 2006). There is no reason to believe that these trust mismanagement allegations will succeed where virtually all others have failed. Second, even if taken as true, the complaint does not establish a conflict between class members, because it does not bear on whether the settlement disadvantaged the *Two Shields* plaintiffs (or more generally putative class members) vis-à-vis other *Cobell* class members. Thus, at most the *Two Shields* complaint may support an argument that the settlement value is too low—but, as noted, Craven expressly abandoned that argument. (Craven Br. 23.) Finally, in all events, the *Two Shields* plaintiffs could have opted out of the Trust

Administration Class to pursue their claims individually. *See Murray v GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 323 (3d Cir. 1998). Indeed, other class members have done precisely that—*e.g.*, certain members of the Quapaw Tribe. *See Cobell Summary for Quapaw Members, available at* http://www.quapawtribe.com/index.aspx?NID=230 (visited Dec. 15, 2011). But the *Two Shields* plaintiffs did not opt out, and Craven's implicit suggestion that "they would have received more had they prevailed after trial" is not grounds for rejecting the settlement. *Thomas*, 139 F.3d at 231.

3. Craven ignores other aspects of the settlement that contributed to the district court's fairness determination.

Craven's argument also improperly focuses on only one aspect of a complex settlement. An objector cannot satisfy her burden to show abuse of discretion by targeting "particular portions of the overall settlement" and claiming that some class members "are individually entitled to more." *Id.* at 233. Thus, even if, as Craven claims, there are inequities in the settlement's payment scheme, they must be balanced against the benefits of the settlement and the risks of further litigation. The settlement is far broader than the payments challenged by Craven. The district court duly considered all of those factors in determining that the settlement is fair. (Craven App. 784-96.)

Craven also improperly assumes that, absent the settlement, Plaintiffs necessarily would obtain *all* of the relief sought in the Amended Complaint—including a full historical accounting and tax-free payments for any mismanagement of Trust funds and assets. But the court acknowledged at the fairness hearing that Plaintiffs have "rather dubious chances of ultimate success, frankly, if you read the law carefully as developed by our Circuit." (Craven App. 772-73.) Indeed, with respect to Plaintiffs' request for a full historical accounting, there is no guarantee Plaintiffs would receive that relief *even if they prevail*. As explained above, in *Cobell XXII* this Court held that Interior need only conduct a limited accounting "with the money that Congress is willing to appropriate" and need only "concentrate on picking the low-hanging fruit." 573 F.3d at 813, 815. Thus, unless Congress appropriates the many billions of dollars necessary for a full historical accounting, *see Cobell v. Norton* (*Cobell XVI*), 428 F.3d 1070, 1077 (D.C. Cir. 2005), Plaintiffs could prevail and still obtain no relief.

Similarly, for trust mismanagement claims, many class members likely would receive no recovery absent this settlement. In addition to problematic evidentiary hurdles such as lack of witnesses and records, many damages claims are legally barred by defenses such as the statute of limitations. *See supra*, at 30-31.

In short, the settlement places class members in a better position than if the case were litigated to judgment. Certainly Craven provides no basis for second-guessing the district court's conclusions about the difficulties Plaintiffs would face in further litigation.[5]

III. SETTLEMENT OF THE HISTORICAL ACCOUNTING CLASS IN PART FOR MONETARY RELIEF IS CONSISTENT WITH *WAL-MART STORES, INC. V. DUKES*.

Craven next argues that settlement of the Historical Accounting Class claims is impermissible because it includes a monetary component. (Craven Br. 28-34.) Craven argues that under *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), a claim certified under Rule 23(b)(2) cannot seek monetary relief. Craven's argument fails for numerous reasons.

A. The Historical Accounting Class is certified under 23(b)(1)(A), which permits monetary relief.

Craven's argument is based entirely on Rule 23(b)(2), the provision at issue

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[5] Craven also states in a heading that the Trust Administration Class payment scheme "bears no relation to the underlying claims." (Craven Br. 23.) She provides no support for this assertion and it is therefore waived. *McKinley v. Bd. of Governors of Fed. Reserve Sys.*, 647 F.3d 331, 335 n.7 (D.C. Cir. 2011). Moreover, the payment scheme plainly bears a direct relation to the claims—payments are based on revenue generated from each class member's IIM assets. In addition, *amicus* Competitive Enterprise Institute ("CEI") largely parrots Craven's arguments, but also asserts that the district court did not conduct a sufficiently "rigorous" analysis of the settlement and that the CRA is an abuse of Congress' power. (CEI Br. 7-10.) Craven did not assert these arguments below or in her appellate brief, so they are not properly before this Court. *Elliott v. USDA*, 596 F.3d 842, 850 (D.C. Cir. 2010).

in *Wal-Mart*. This Court need not address Craven's *Wal-Mart* argument because the Historical Accounting Class is certified alternatively under both Rule 23(b)(1)(A) and 23(b)(2). Thus, if the settlement is proper under Rule 23(b)(1)(A), this Court may affirm without reaching (b)(2) issues. *DeBoer v. Mellon Mortg. Co*., 64 F.3d 1171, 1175 (8th Cir. 1995).

To begin with, Craven has waived any argument that the settlement is improper under Rule 23(b)(1)(A). Her brief provides no reasoned argument for why the settlement fails to satisfy that provision. It contains only a one-sentence footnote stating (without legal argument) that "[a]lthough the putative Historical Accounting Class was also certified as a (b)(1)(A) class, that does not change the calculus under *Wal-Mart*." (Craven Br. 30 n.5.) That is insufficient to preserve the argument. This Court repeatedly has held that it will not "consider cursory arguments made only in a footnote." *Doe v. Exxon Mobil Corp*., 654 F.3d 11, 49 n.37 (D.C. Cir. 2011). "It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work." *Id.* That is precisely what Craven has done.

Moreover, even if this Court excuses her waiver, the portion of *Wal-Mart* dealing with monetary relief does not apply to Rule 23(b)(1)(A) classes. That holding applies only to classes certified under Rule 23(b)(2), which expressly limits certification to claims seeking "*final injunctive relief or corresponding*

declaratory relief." In *Wal-Mart*, the plaintiffs sought backpay, a form of equitable relief, in an effort to fit within Rule 23(b)(2). *Wal-Mart* addressed whether Rule 23(b)(2) permits certification of those claims, because they were for equitable monetary relief. 131 S. Ct. at 2557.

Wal-Mart's holding turned on the specific language of Rule 23(b)(2), which is limited to declaratory or injunctive relief. Rule 23(b)(1)(A), by contrast, contains no similar limitation. In addition, *Wal-Mart* relied on the historical origins of Rule 23(b)(2) in desegregation cases and the advisory committee notes stating that Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." *Id*. at 2559. Based on those factors, the Court held that a claim involving monetary relief may not be certified under Rule 23(b)(2) if "the monetary relief is not incidental to the injunctive or declaratory relief." *Id*. at 2557.

This reasoning does not apply to Rule 23(b)(1)(A) classes. *Wal-Mart* distinguished (b)(1) from (b)(2) classes, noting that there are many (b)(1) classes, such as "limited fund" cases, in which the relief sought is *entirely* monetary. *Id*. at 2558 n.11. Indeed, there are countless Rule 23(b)(1) classes that seek monetary relief. For example, ERISA class actions seeking money damages are routinely certified under Rule 23(b)(1)(A) and/or 23(b)(1)(B) because they allege breaches of fiduciary duty and thus "could create inconsistent results for the fiduciaries."

Chesemore v. Alliance Holdings, Inc. ___ F. Supp. 2d ___, 2011 WL 4576008, at *11 (W.D. Wis. 2011); *see also Neil v. Zell*, 275 F.R.D. 256, 267 (N.D. Ill. 2011). Moreover, Rule 23's advisory committee notes expressly identify breach of trust claims, like those asserted by the Historical Accounting Class, as paradigmatic examples of a proper Rule 23(b)(1) claim for monetary relief. Thus, unlike a (b)(2) class, a (b)(1) class may obtain monetary relief.

In her cursory footnote, Craven cites a district court decision (*Daskalea v. Washington Humane Soc'y*, 275 F.R.D. 346 (D.D.C. 2011)) stating that *Wal-Mart* is not limited to Rule 23(b)(2). (Craven Br. 30 n.5.) But *Daskalea* addressed a different holding from *Wal-Mart*. In addition to holding that monetary relief must be "incidental" to injunctive or declaratory relief, *Wal-Mart* also held that "individualized monetary claims" should be certified under Rule 23(b)(3), not (b)(1) or (b)(2). 131 S. Ct. at 2558. In *Daskalea*, pet owners brought a class action alleging unlawful seizure of their pets. Those claims sought "individualized" monetary relief that differed for each owner, and thus could not be certified under either (b)(1) or (b)(2). *Daskalea*, 275 F.R.D. at 363. Here, by contrast, the monetary relief provided to the Historical Accounting Class is not individualized—each class member receives the same $1,000 payment. Thus, this holding from *Wal-Mart* does not apply.

In short, because the Historical Accounting Class is properly certified under Rule 23(b)(1)(A), the Court need not address Craven's *Wal-Mart* argument.

B. The Historical Accounting Class is properly certified under Rule 23(b)(2) and may be settled in part for uniform monetary relief.

Even if this Court holds that Rule 23(b)(1)(A) does not apply, the Historical Accounting Class is properly certified under Rule 23(b)(2). Craven's lengthy discussion of *Wal-Mart* ignores key factors that distinguish this classic breach of trust case from the employment discrimination claims in *Wal-Mart*.

1. ***Wal-Mart* does not bar a properly certified (b)(2) class from *settling* in part for monetary relief.**

Wal-Mart held that a Rule 23(b)(2) class may not be *certified* where the class seeks only non-incidental monetary relief. But *Wal-Mart* did not hold that a properly certified (b)(2) class seeking injunctive or declaratory relief may not be *settled* in part for money. This is a critical distinction. There is a "strong judicial policy in favor of settlements, particularly in the class action context." *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009); *see also* 4 Alba Conte, *et al.*, *Newberg on Class Actions* § 11:41, at 87 (4th ed. 2003). Class settlements avoid the "costs and risks of a lengthy and complex trial" and ensure that class members receive timely relief. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995).

These principles are particularly important in Rule 23(b)(2) classes, which often involve requests for injunctive relief that are, in effect, all-or-nothing claims. For example, in *DeBoer v. Mellon Mortgage Co*., 64 F.3d 1171 (8th Cir. 1995), a plaintiff class sought to enjoin a bank from requiring excessive escrow amounts. The district court certified the class under Rule 23(b)(2) because the class sought injunctive relief. However, as the Eighth Circuit noted, "plaintiffs did not have a very strong case—they may not have even had a legitimate federal cause of action." Plaintiffs ultimately agreed to a settlement without an injunction, but that required the bank to "refund excess escrow funds if they total more than $15" and to "pay a class rebate for past charges." *Id.* at 1173-77.

If, as Craven suggests, a Rule 23(b)(2) class settlement cannot include *any* monetary relief, class members like those in *DeBoer* are placed in an untenable situation. The *DeBoer* plaintiffs had little chance of obtaining an injunction. By settling, class members received relief far better than what they could achieve through litigation.

The posture of this case further underscores why a categorical rule prohibiting monetary relief as part of a Rule 23(b)(2) settlement could harm class members. As explained above, *Cobell XXII* dramatically limited the scope of the historical accounting to which class members are entitled. As a result, even if Plaintiffs were to prevail, they might receive nothing at all. And that assumes

Plaintiffs will prevail, an outcome that is by no means certain. Finally, the case already has lasted more than fifteen years and, if the settlement is disapproved, will continue for many more. Even if Plaintiffs ultimately prevail and Congress were to appropriate sufficient funds for the accounting, it would take many years for Interior and Treasury to complete it.

Simply put, after *Cobell XXII*, it is exceedingly difficult to envision recovery by class members of meaningful injunctive relief in their lifetimes. In light of this fact, it would be perverse to insist that the accounting claims cannot be settled for money and instead must limp toward an unsatisfactory and unknown result. Disapproval of a monetary settlement would mean that "Plaintiffs could initiate the action but could not settle it. This would turn this case into an unstoppable zombie, yielding only to the lethal force of dispositive Court action." *In re Merck & Co. Sec. Derivative & ERISA Litig.*, MDL No. 1658 (SRC), 2009 WL 331426, at *8 (D.N.J. Feb. 10, 2009).

Craven's only response to this argument is to compare this case to *Brown v. Board of Education*, 347 U.S. 483 (1954), and assert that a class settlement for money damages in lieu of desegregating public schools would be "unseemly." (Craven Br. 33.) This is a risible analogy. In *Brown*, there was an ongoing constitutional violation. Thus, a monetary settlement without injunctive relief would permit the government to continue to violate the Constitution with impunity.

Here, by contrast, the settlement resolves only *past* breaches of trust—after September 30, 2009, the government remains fully subject to its fiduciary duties, including its obligation to render accurate accountings and prudently manage the Trust. (Craven App. 542, 573.) Thus, Craven's *Brown* hypothetical is inapposite.

2. *Wal-Mart* does not prohibit uniform monetary relief that is "incidental" to overall relief awarded in the settlement.

The settlement also is consistent with *Wal-Mart* because the monetary award to the Historical Accounting Class is incidental to the settlement's broader trust reform relief. Craven's *Wal-Mart* argument (Craven Br. 28-34) focuses solely on the $1,000 payments to class members, which constitute only $337 million (less than 10%) of the total $3.4 billion settlement. (App. 220.) Craven ignores substantial trust reform elements of the settlement and the main purpose of this litigation.

A key goal of this case from the outset has been "'fixing the system' or reforming the management and accounting of the IIM trusts so as to meet the federal government's fiduciary responsibilities." *Cobell VI*, 240 F.3d at 1093. To that end, the largest portion of the settlement, valued at $1.9 billion, is the Trust Land Consolidation Fund. (Craven App. 564-67.) Interior must use that fund to purchase highly fractionated, undivided interests in land within the IIM Trust and consolidate them into tribal beneficial ownership. (*Id.*) The government has consistently maintained that continuously fractionating interests contribute

materially to its inability to maintain accurate IIM Trust records and prudently manage the commingled Trust. (App. 224-25.) The Supreme Court has recognized that "extreme fractionation of Indian lands is a serious public problem." *Hodel v. Irving*, 481 U.S. 704, 718 (1987). Indeed, the Court described Craven's own tribe, the Sisseton-Wahpeton Sioux, as "a quintessential victim of fractionation." *Id.* at 712. "Forty-acre tracts on the Sisseton-Wahpeton Lake Traverse Reservation, leasing for about $1,000 annually, are commonly subdivided into hundreds of undivided interests, many of which generate only pennies a year in rent. The average tract has 196 owners, and the average owner [has] undivided interests in 14 tracts." *Id.* The $1.9 billion fund to purchase fractionated interests and consolidate them is the centerpiece of the settlement and will dramatically improve the government's ability to manage the IIM Trust prudently.

The settlement also requires the government to establish the Indian Education Scholarship Fund to finance scholarships for Indian students. (Craven App. 567, 570.) Finally, over the course of this lawsuit, Plaintiffs have forced the government to spend approximately $5 billion on other Trust reform measures, such as improving trust management systems, records, and staff; oversight of Trust funds; and security of electronic trust records, funds, and other assets. *See, e.g.,* U.S. Dep't of Interior, Office of the Special Tr. for Am. Indians, *Budget Justification for Fiscal Year 2010*, at OST-20 (2010), *available at*

http://www.doi.gov/ost/congressional/budget/FY2010_BudgetJustification.pdf (visited Dec. 15, 2011). Moreover, as a result of this litigation, Interior established a Secretarial Commission on Indian Trust Administration and Reform that "will undertake a forward-looking, comprehensive evaluation of how the Interior Department manages and administers its trust responsibilities." U.S. Dep't of Interior, *Secretary Salazar and Associate Attorney General Perrelli Applaud Final Approval of Cobell Settlement* (June 20, 2011), *available at* http://www.doi.gov/news/pressreleases/Secretary-Salazar-and-Associate-Attorney-General-Perrelli-Applaud-Final-Approval-of-Cobell-Settlement.cfm (visited Dec. 15, 2011). Thus, the $1,000 payments are incidental to broader Trust reform obtained through this litigation and settlement.

Since *Wal-Mart*, courts have approved monetary relief as incidental to injunctive relief. *Delarosa v. Boiron Inc.*, 275 F.R.D. 582, 591-93 (C.D. Cal. 2011); *Cronas v. Willis Grp. Holdings, Ltd.*, No. 06 Civ. 15295(RMB), 2011 WL 5007976, at *4 (S.D.N.Y. Oct. 18, 2011). In *Delarosa*, for example, the court certified a Rule 23(b)(2) class seeking an injunction and actual damages against a manufacturer for false marketing. The court held that under California law actual damages were limited to "the amount [class members] spent purchasing packages of [the cold remedy]." *Delarosa*, 275 F.R.D. at 592. Because "no additional facts or individualized hearings would be necessary" to determine damages, the court

concluded that "actual damages . . . are 'incidental' to injunctive relief." *Id.* Similarly, $1,000 payments to the Historical Accounting Class are incidental to the extensive trust reform measures.

IV. <u>THE DISTRICT COURT PROPERLY CERTIFIED THE TRUST ADMINISTRATION CLASS</u>.

Craven argues that the district court erred by certifying the Trust Administration Class. The Trust Administration Class seeks monetary relief, including damages, for the government's mismanagement of Trust assets. Class members could opt out and pursue their mismanagement claims individually. (Craven App. 548-49.)

The CRA authorized the district court to certify the Trust Administration Class "[n]ot withstanding the requirements of the Federal Rules of Civil Procedure." CRA § 101(d)(2)(A). The court certified the Trust Administration Class under both the CRA and Rule 23(b)(3).

Craven argues that the class is improperly certified because it does not satisfy Rule 23(a)(2)'s commonality requirement and that certification violates due process. (Craven Br. 35-45.) These arguments are meritless. Because Craven concedes that Congress has the power to exempt class certification from Rule 23 (*id.* at 42-43), Plaintiffs first address Craven's constitutional arguments. If the Court finds that the class settlement is constitutional, it need not address Craven's Rule 23(a)(2) argument.

A. Certification of the Trust Administration Class is constitutional under the plenary power doctrine.

Craven's constitutional argument begins with the faulty premise that ordinary constitutional principles governing class actions apply here. They do not. As noted, Congress exercised its plenary power over Indian affairs to "authorize[], ratif[y], and confirm[]" this settlement. CRA § 101(c)(1). Because the CRA concerns the management of land and other assets held in trust for Indians, it falls squarely within the core of "the constitutional power of Congress over Indian affairs." *Weeks*, 430 U.S. at 86. Thus, the settlement need not satisfy constitutional standards governing other class settlements. Instead, the settlement is constitutional if it is "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Id.*

The settlement readily satisfies this standard. For nearly a century, Congress has acknowledged that the government "owes millions of dollars for Indian moneys which it has converted to its own use." *1915 Report* at 2. The decision to provide redress for that longstanding breach of trust in a single settlement is "rationally related to the government's legitimate interest in protecting thousands of Indian claimants from the need to litigate thousands of expensive, time-consuming individual actions to recover any compensation for their claims." *Littlewolf v. Hodel,* 681 F. Supp. 929, 939 (D.D.C. 1988), *aff'd*, 877 F.2d 1058 (D.C. Cir. 1989). In short, Congress's legislative solution may not be perfect, but

it is unquestionably rational and a valid exercise of "the constitutional power of Congress over Indian affairs." *Weeks*, 430 U.S. at 86. Accordingly, certification of the Trust Administration Class is constitutional.

B. Certification of the Trust Administration Class satisfies "minimal procedural due process" requirements established by the Supreme Court.

Even without the plenary power doctrine, Craven's constitutional argument fails. The CRA permitted the district court to certify the Trust Administration Class without regard to Rule 23. Craven argues that even if Rule 23 does not apply, certification of the Trust Administration Class is improper because it violates due process. This argument is meritless.

Craven asserts that "[w]ith the exception of *Hansberry v. Lee*, the Supreme Court has never had to explicitly delineate" the minimum due process requirements for class certification. (Craven Br. 43.) This is flatly wrong. The Supreme Court expressly explained those constitutional requirements in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). *Shutts* involved a state class action to which Rule 23 did not apply. The issue in *Shutts* was the "minimal procedural due process protection" necessary to certify a class action. *Id.* at 811-12. The Court identified the three constitutionally minimum requirements for class certification: (1) "notice plus an opportunity to be heard and participate in the litigation"; (2) "an opportunity to remove [oneself] from the class by executing and returning an 'opt

out' or 'request for exclusion' form to the court"; and (3) "that the named plaintiff at all times adequately represent the interests of the absent class members." *Id.* These requirements are the constitutional floor—if they are satisfied, certification is constitutional.

Craven does not directly address *Shutts*. Instead, she argues that the adequacy requirement in *Shutts* includes an implied typicality requirement (although no court has ever said so), and that this implied typicality requirement in turn contains an implied commonality requirement (although, again, no court has ever said so). Craven then asserts that this implied commonality requirement is somehow the same as the commonality requirement of Rule 23(a)(2). (Craven Br. 44-45.) Craven ends this multi-step *ipse dixit* by concluding that the Trust Administration Class cannot satisfy *Shutts*'s adequacy of representation requirement because the class does not satisfy Rule 23(a)(2)'s commonality requirement. (*Id.*)

This strained reasoning—which lacks supporting authority—is flawed. If the Supreme Court believed that the Constitution required compliance with Rule 23(a)(2) in *all* class actions, *Shutts* would have said so. Rule 23(a)(2)'s commonality mandate was well-established in 1985 when the Court decided *Shutts*. Instead, the Court held that there are only three "minimal" due process requirements for class certification: notice, opt out, and adequacy of representation.

Moreover, in *Hansberry v. Lee*, 311 U.S. 32, 42 (1940), the case cited in the adequacy discussion in *Shutts*, the Court held that due process does not "compel the adoption of the particular rules thought by this Court to be appropriate for the federal courts." *Id.* Rather, due process requires only that certification "fairly insures the protection of the interests of absent parties who are to be bound" by the judgment. *Id*. Accordingly, Craven's fanciful argument that due process requires compliance with Rule 23(a)(2) is wrong.

Although Craven does not argue that class certification fails under *Shutts*, those factors—notice, opt out, and adequacy of representation—are satisfied here. Plaintiffs undertook the most comprehensive class notice in history. *See supra*, at 11. In addition, the Trust Administration Class settlement provides an unfettered right to object to the settlement or to opt out that is explained to class members in the settlement notice. (App. 263-64.)

Finally, Elouise Cobell and the other named plaintiffs adequately represent the absent class members. Adequate representation is satisfied where certification "fairly insures the protection of the interests of absent parties who are to be bound." *Hansberry*, 311 U.S. at 42. Here, Craven identifies no evidence that the named plaintiffs did not protect the interests of class members. To the contrary, throughout this lengthy action, they and class counsel vigorously litigated the case, obtained extensive evidence supporting the trust mismanagement claims, and

obtained the knowledge necessary to litigate those claims. It is hard to imagine a group of plaintiffs or attorneys more capable of fully prosecuting trust mismanagement claims than those who have battled the government for more than fifteen years on related trust reform claims. Furthermore, the settlement itself is a testament to the adequacy—the $3.4 billion in tax-free direct monetary value to the class is unprecedented.

Likewise, Craven has not identified any "potentially conflicting interests" between the named plaintiffs and absent class members, *id.* at 44, except for her challenge to the incentive awards. As explained below, Craven's incentive awards argument is groundless. *See infra*, at 54-58.

Finally, where notice and opt out rights are sufficiently robust, courts have indicated that adequacy of representation requirements are minimal. *See* 7A Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 1765, at 319 (3d ed. 2005). Here, the notice program was the most extensive in class-action history. Class members were aware of the details of the lawsuit, the settlement, and their objection and opt-out rights. Because the due process concerns in *Shutts* stem from the fact that absent class members are bound by a judgment, *see* 472 U.S. at 811-12, class members' unfettered ability to opt out further demonstrates that the settlement satisfies due process.

C. The Trust Administration Class satisfies Rule 23(a)(2)'s commonality requirement.

Finally, the district court also alternatively certified the Trust Administration Class under Rule 23(b)(3). Craven contends that the class cannot satisfy Rule 23(a)(2)'s commonality requirement in light of *Wal-Mart*.[6] (Craven Br. 38-42.) Craven is wrong.

In *Wal-Mart*, the Supreme Court held that commonality is not satisfied merely by identifying a "common question." 131 S. Ct. at 2551. Rather, the class must share a common *disputed* question. *Id.* "That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* In other words, "[w]hat matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.*

The Trust Administration Class has numerous "common answers" that satisfy *Wal-Mart*. The central claim of the Trust Administration Class is the government's systemic mismanagement of IIM Trust assets. All class members

[6] Craven addresses only Rule 23(a)(2). Thus, she has waived any argument based on the other requirements of Rule 23(a) or Rule 23(b)(3). *United States v. Reeves*, 586 F.3d 20, 26 (D.C. Cir. 2009).

share a common disputed legal issue with respect to that claim: the nature and scope of the government's trust duties to IIM beneficiaries.

Plaintiffs contend that the government's obligation to manage IIM Trust assets is identical to that of a trustee at common law. The government disputes this assertion. (App. 398-99.) Indeed, the government argued in *Cobell VI* that "the district court improperly construed the nature and extent of the government's fiduciary duties to IIM trust beneficiaries," and that its trust obligations are substantially narrower than those of a common-law trustee. 240 F.3d at 1094. Simply put, the parties disagree about the fiduciary standards that govern the management of IIM Trust assets. The answer to that disputed question is not just common, but central, to all class members' mismanagement claims.[7]

This common answer distinguishes this case from *Wal-Mart*. There was no dispute in *Wal-Mart* about whether Title VII applied to class members. Thus, it was not enough for class members to allege "that they have all suffered a violation of the same provision of law." 131 S. Ct. at 2551. Here, by contrast, the central issue in dispute is the nature and scope of the government's trust duties to class members in the management of this unique commingled Trust. This common issue

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[7] Craven misunderstands class members' mismanagement claim, asserting that "the settling parties have conglomerated several dozen different types of causes of action into a single class." (Craven Br. 40.) The Trust Administration Class asserts a single claim for breach of the government's fiduciary duties. (Craven App. 485-87.) Although the government may have breached that unitary duty in different ways, class members all assert the same claim.

unites all class members in a way the garden-variety *Wal-Mart* discrimination claims did not.

In addition, "[t]he Treasury Department maintains only a single 'IIM account' for all IIM funds, rather than individuated accounts for each individual IIM beneficiary." *Cobell VI*, 240 F.3d at 1089. Within that account, all IIM Trust beneficiaries' funds are commingled, held, and invested in common. *Cobell V*, 91 F. Supp. 2d at 11-12. Thus, while class members have different account balances within the Trust, all class members share a common interest in enforcing the government's fiduciary duty to prudently manage the common Trust fund and all commingled assets, including undivided fractionated interests in allotted lands.

To be sure, as Craven argues, the government mismanaged Trust assets in different ways, from imprudent investments and accounting errors to outright theft. But the mismanagement is systemic and, as *Wal-Mart* makes clear, Rule 23(a)(2)'s commonality requirement does not require *every* issue, or even most issues, to be common—to the contrary, it requires only a single "common contention." 131 S. Ct. at 2551. The scope of the government's trust obligations to class members—the central issue for all class members' claims—satisfies that standard.[8]

Finally, this class action differs from *Wal-Mart* in another important respect. In *Wal-Mart*, the company gave individual store managers discretion regarding

[8] For this reason, the *Two Shields* litigation, *see supra*, at 31-32, is irrelevant to commonality.

hiring and promotion. The plaintiffs alleged that these store managers engaged in discrimination, but could not "identif[y] a common mode of exercising discretion that pervades the entire company." *Id*. at 2554-55. Here, the government's mismanagement has been systemic and pervasive. *1915 Report* at 2; *Misplaced Trust*, *supra*; *Cobell VI*, 240 F.3d at 1089. Thus, there is record evidence that the breaches of trust pervade the IIM Trust and all commingled Trust assets. *Cobell VI*, 240 F.3d at 1110; *Cobell XX*, 532 F. Supp. 2d at 46, 54, 71-72. Indeed, during his trial testimony, trustee-delegate Secretary Babbitt *conceded* that he personally failed to live up to his fiduciary obligations. (App. 38.) Moreover, unlike *Wal-Mart*, in this case the government did not grant individual employees discretion to enact policies regarding Trust management. Rather, the trustee-delegates and their employees and contractors were obligated to comply with the same trust standard, but the government failed to provide adequate policies, systems, records, staff, and oversight. *Cobell V*, 91 F. Supp. 2d at 48-51. In other words, the Trust management system itself has been broken, permitting more than a century of systemic mismanagement of the IIM Trust. Accordingly, the district court did not abuse its discretion in concluding that the Trust Administration Class satisfies Rule 23(a)(2).

V. **THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THE PROPOSED INCENTIVE AWARDS TO BE REASONABLE.**

Craven challenges the incentive awards to the named plaintiffs. This Court reviews incentive awards for abuse of discretion. *Montgomery v. Aetna Plywood, Inc.,* 231 F.3d 399, 408 (7th Cir. 2000). "Courts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation." *In re Lorazepam & Clorazepate Antitrust Litig*., 205 F.R.D. 369, 400 (D.D.C. 2002). "In deciding whether to grant incentive awards and the amounts of such awards, courts consider factors such as 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." *Wells v. Allstate Ins. Co.*, 557 F. Supp. 2d 1, 8-9 (D.D.C. 2008) (internal quotation marks omitted).

Craven repeatedly misrepresents the amount requested as incentive awards, contending that Plaintiffs requested "$13 million in incentive payments." (Craven Br. 46.) In fact, Plaintiffs sought $2.5 million in incentive awards, with the majority for lead plaintiff Elouise Cobell. (Craven App. 779-80.) Craven apparently arrived at $13 million by adding to the incentives request Plaintiffs' separate request for costs actually incurred and documented by the named plaintiffs

in prosecuting this litigation.[9] Those costs represent substantial amounts that Elouise Cobell actually incurred to litigate this case and which she must repay. (App. 283-87; Craven App. 779.) In any event, the court denied Plaintiffs' request for costs and that ruling is not at issue in this appeal. (Craven App. 792.)

The $2.5 million in incentive awards did not create an "untenable conflict" (Craven Br. 46) between named plaintiffs and class members. Elouise Cobell deserved every penny of the $2 million the district court awarded for her leadership in this litigation. Ms. Cobell did not sit on the sidelines while class counsel handled the case and negotiated a settlement. She dedicated her life to obtaining justice for her fellow Indians—she was involved in every strategic decision and made every political decision in the case; she spent nearly $390,000 of her own money on the lawsuit; and for years she traveled the country speaking with IIM beneficiaries and raising funds to cover litigation costs. (App. 277, 293, 296.) Her work on the case won her a prestigious "Genius Grant" from the MacArthur Foundation; honorary degrees from Dartmouth College, Montana State University, and Rollins College; and awards from groups as diverse as the International Women's Forum and AARP. (App. 293, 296.) Sadly, Ms. Cobell died after final approval of the settlement. As a testament to her remarkable achievements through

[9] Plaintiffs agreed to request no more than $15 million in combined incentive awards and reimbursement of costs on behalf of the named plaintiffs. (Craven App. 578.)

this historic lawsuit, numerous members of Congress extended their condolences, President Obama issued a formal statement celebrating her life and accomplishments, and the *New York Times* and *Washington Post* published editorials commemorating her unflinching commitment to reforming the IIM Trust. *See, e.g.*, *Elouise Cobell, A Native American Leader Who Took on Washington and Won*, Wash. Post, Oct. 17, 2011, at B6.

Craven ignores Ms. Cobell's accomplishments and dedication to this case. Instead, she insists that because of the size of the incentive award request (to which Craven wrongly adds the request for cost reimbursement), Ms. Cobell could "no longer be trusted to represent the class's interests." (Craven Br. 48.) The facts refute this repugnant assertion. As the district court explained:

> I was distressed to hear Ms. Cobell attacked today by one of the objectors' representatives [Craven's counsel]. I felt that was without foundation. There was no suggestion of any collusion by her part to get a fee, and then she would settle the case. There is nothing in the record to support that. All I have in the record for Ms. Cobell is starting this case maybe 20 years ago trying to get someone to take it, 15 years ago getting the suit filed, and forever thereafter being intimately involved and paying hundreds of thousands of dollars out of her own pocket to make sure that the case could continue when there was no money. How can it now be claimed that she would then, somehow, compromise easily, I don't understand that accusation. She has accomplished more for the individual, I think, Native Americans than any other person recently that I can think of in history. This is her case. She contributed hundreds of thousands of dollars. She helped fund raise. She spent hundreds and thousand of hours. She was part of every serious, strategic decision made. She dedicated up to 1,200 hours per year. She put her reputation on the line, her health, and has unprecedented efforts by a named plaintiff I have not seen

> before in a class action case. I believe she is fully entitled to the award that she has requested in this matter.

(Craven App. 779.)

Craven does not cite *any* evidence contradicting these findings or showing that Ms. Cobell's interests were compromised by the incentive request, a request that was made only after every benefit to class members had been agreed to. Moreover, courts in this Circuit have rejected similar arguments where, as here (Craven App. 579), awarding an incentive is solely "within the Court's discretion" and the named plaintiffs had "no assurance of receiving such awards during the pendency of [the] litigation." *Cohen v. Chilcott*, 522 F. Supp. 2d 105, 115 n.2 (D.D.C. 2007); *see also*, *e.g.*, *Radosti v. Envision EMI, LLC,* 717 F. Supp. 2d 37, 52-53 (D.D.C. 2010) (same).

Instead, Craven relies (Craven Br. 45-48) on out-of-circuit decisions that are distinguishable. In *Murray v GMAC Mortgage Corp.*, 434 F.3d 948, 952 (7th Cir. 2006), for example, the court found the $3,000 incentive award was disproportionate because class members received less than $1 and "given the tiny sum per person, who would bother to mail in a claim?" Thus, the court concluded that the named plaintiff negotiated a settlement that rewarded herself but "that leaves the class empty-handed." *Id.* That rationale is inapposite here. In Craven's other cases, courts found the incentive requests excessive or evidence of a conflict of interest. The district court here found precisely the opposite—that Ms. Cobell

deserved the reward and that she was concerned only with the best interests of class members. (Craven App. 779.)

Incentive awards to the other named plaintiffs, which were considerably smaller than Ms. Cobell's, similarly did not create a conflict of interest. Mr. LaRose, Mr. Maulson, and Ms. Cleghorn devoted time to the litigation, were deposed by the government, and assumed reputational and personal risks. (App. 302-11.) As the district court explained:

> [Mr. LaRose] was in the deposition. [He] coordinated the media efforts . . . engaged political leaders, and [was] as heavily involved in the case as the others. [He was] [a]n original plaintiff since the beginning. . . [Mr. Maulson was an] original plaintiff. He was deposed by the government; discussed key litigation issues; and helped with the continuation of the case; and again, put his reputation at risk. . . . [Ms. Cleghorn] took her mother's spot as a plaintiff when her mother died in 1997. [She was] [d]eposed by the government, attended court hearings; participated in the strategic decisions; and came forth to support the case at all times.

(Craven App. 779-80.)

In sum, Craven failed to present any *evidence* that the incentive awards affected the named plaintiffs' judgment or created a conflict of interest. Accordingly, the court did not abuse its discretion in approving those awards.[10]

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[10] *Amicus* CEI contends that Ms. Cobell had a conflict because in 2007 congressional testimony she rejected a purported $7 billion settlement offer. (CEI Br. 15-16.) That $7 billion offer never existed. (Craven App. 778; App. 367-72.) More important, Ms. Cobell's testimony came *before* this Court decided *Cobell XXII*, which limited the relief Plaintiffs could obtain.

VI. THE DISTRICT COURT PROPERLY CONSIDERED THE LOW NUMBER OF OBJECTORS.

Craven argues that the district court inappropriately considered the small number of objectors (92 out of 500,000 class members, less than 0.02%) as an indication that the vast majority of class members approved of the settlement. (Craven Br. 49.) However, courts routinely view silence as consent to a class settlement. In *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3d Cir. 1995), which according to Craven supports her assertion that silence does not equal consent, the court stated that "[c]ourts have generally assumed that 'silence constitutes tacit consent to the agreement.'" *Id.* at 812; *accord*, *e.g.*, *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1313 n.15 (3d Cir. 1993).

Further, the small number of objectors is only one of many factors the district court considered in approving the settlement. *See supra*, at 19-21, 32-34. Because the court's approval is based on numerous appropriate fairness factors, any error resulting from considering the number of objectors is harmless.

VII. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN STRIKING CRAVEN'S IMPROPER OPPOSITION BRIEF.

Finally, Craven argues that the district court erred when it struck a brief she filed. (Craven Br. 51; Craven App. 746.) Importantly, the court did not strike Craven's objections. But over a month after the deadline to file objections, Craven

filed a brief in opposition to the parties' motions for final approval. The district court struck that brief, holding that Craven had no right to file pleadings other than her timely objections. That decision is well within the court's sound discretion. *Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 150 (D.C. Cir. 1996).

Craven claims the district court's "retroactive requirement for intervention . . . undoes the Supreme Court's ruling in *Devlin* that objectors need not intervene to preserve their rights." (Craven Br. 52.) But *Devlin v. Scardelletti*, 536 U.S. 1 (2002), does not hold that objectors may participate in the district court as class representatives or that they may file pleadings without intervening. Rather, *Devlin* holds that objectors "have the power to bring an appeal without first intervening." *Id*. at 14. Nothing in *Devlin* permits objectors to file briefs as if they were named plaintiffs. In any event, the court's decision to limit Craven to timely objections is within its discretion to manage its docket. *Jackson*, 101 F.3d at 150.

Finally, Craven's counsel appeared at the fairness hearing after the district court struck her brief. At the hearing, the court permitted her counsel to argue the issues raised in that brief. (Craven App. 759-60.) Thus, even if striking the brief was error, it is harmless.

CONCLUSION

The Court should affirm the district court's judgment approving this historic settlement.

Respectfully submitted,

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DATED: December 16, 2011

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(iii) because it contains 13,979 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using MS Word 2003 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

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