

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
ELOISE COBELL, ET AL . DOCKET NUMBER: CA 96-125

.
Plaintiffs, .

.
vs. . Washington, D. C.

. June 20, 2011

KENNETH SALAZAR, ET AL . 10:00 A.M.

.
Defendants. .

.
TRANSCRIPT OF FAIRNESS HEARING
BEFORE THE HONORABLE THOMAS F. HOGAN
A UNITED STATES DISTRICT JUDGE

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1 P R O C E E D I N G S
 2 THE COURTROOM DEPUTY: All rise. This Honorable
 3 Court is now in session. The Honorable Judge Thomas F.
 4 Hogan presiding. Please be seated and come to order.
 5 Civil action 96-1285. Eloise Cobell, et al,
 6 versus Kenneth Salazar, et al.
 7 Counsel, please approach the lectern, state your
 8 names and who you represent for the record, beginning with
 9 plaintiffs' counsel.
 10 MR. GINGOLD: Your Honor, Dennis Gingold for
 11 plaintiffs.
 12 Would you like me to identify the --
 13 THE COURT: Yes. For the record, everyone who is
 14 here should identify themselves.
 15 MR. GINGOLD: Mr. Harper, Mr. Levitas, Mr.
 16 Charnes, Mr. Bertschi, Mr. Smith, Mr. Dorris and Mr. Holt.
 17 THE COURT: Thank you.
 18 MR. KIRSCHMAN: Good morning, Your Honor. For
 19 defendants in this case Robert Kirschman from the Department
 20 of Justice, and with me at counsel table, also from the
 21 Department of Justice, I have Michael Quinn, John
 22 Stemplewicz and Chris Kohn.
 23 Also at counsel table with us for the Department
 24 of Treasury is Paul Wolfteich.
 25 I believe joining us will be -- from the

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1 Department of Interior -- Hillary Tompkins, the Solicitor,
 2 also.
 3 THE COURT: All right, thank you.
 4 We are gathered here this morning, and I
 5 appreciate --
 6 ARENT FOX: (Unintelligible) from Arent Fox on
 7 behalf of Mark Brown.
 8 THE COURT: You filed a motion overnight to
 9 intervene. I am going to hold that for right now. Thank
 10 you.
 11 ARENT FOX: Thank you, Your Honor.
 12 THE COURT: We are here to consider the petitions
 13 for the approval of the settlement in this case that were
 14 preliminarily approved last year before we proceeded to have
 15 the circulation of the settlement, the opportunity for
 16 people to object and to appear, and for explanations to be
 17 given to those affected.
 18 This is an historic case that has a long history,
 19 some tragic and now more recently successful, and I have
 20 allowed, in my order, the organization for the fairness
 21 hearing today to allow those who wish to appear to be heard
 22 to be allowed to speak.
 23 But first what I'm going to do is have the opening
 24 statements by the plaintiffs and the defendants made. Then
 25 I will turn to the objectors, each of which were given a

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1 reasonable time to hear their objections, and when we
 2 conclude that we will have the response to the objections by
 3 the plaintiffs and defense counsel, and finally closing
 4 remarks and my rulings.
 5 I expect this will take some time. I would
 6 appreciate quiet as possible in the courtroom, but you are
 7 welcome to leave if you need to leave at some point. At an
 8 appropriate point we will probably take a recess for the
 9 parties here to have a short break as well.
 10 So with that in mind, we will follow that course,
 11 and the first proceedings then for the court will be to
 12 recognize the parties' counsel in this case, to basically
 13 give an opening statement, a summary of where we are, the
 14 factors that I need to consider as to whether or not this is
 15 an appropriate settlement, and sort of a preview of where
 16 they are going as we go forward before we hear the objectors
 17 in this case.
 18 I have arranged to have all of the objections
 19 filed. Some were handwritten, many to me. Every one that
 20 has been received in this court has been forwarded to
 21 counsel if counsel had not gotten them directly, and filed
 22 as a part of the court record.
 23 I received one by e-mail this morning that is
 24 late, but I have looked at it, plus I received an e-mail
 25 from Loren Zeipher, Z-e-i-p-h-e-r, saying that she is unable

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1 to make the hearing. She appreciates and thanks the court
 2 for its opportunity given to speak, but will not be
 3 appearing today.
 4 With that background then, I will hear from
 5 plaintiffs' counsel first.
 6 MR. DORRIS: Good morning, Your Honor. If it
 7 please the court, I am Bill Dorris, and on behalf of the
 8 plaintiffs and class counsel, we would like to thank you for
 9 taking on this very difficult, challenging and time-
 10 consuming matter, and we appreciate your expeditious
 11 handling of it.
 12 Plaintiffs respectfully ask this court to bring
 13 this epic struggle to a close by the court granting final
 14 approval of the settlement agreement which has been
 15 ratified, authorized and confirmed by Congress, and signed
 16 into law by the President, and to also enter final judgment
 17 giving effect the terms of the settlement.
 18 Your Honor, it is my privilege today to introduce
 19 the class representatives to the court. We have present in
 20 the courtroom with us three of the class representatives,
 21 and I would like to introduce them to you, and I would ask,
 22 please, that they stand so that you will know who they are
 23 as I do.
 24 First we have Tom Maulson, who is the tribal
 25 chairman of the Lac du Flambeau tribe in Wisconsin. We have

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1 Louisa Rose, the former tribal chairman of the Winnebago
 2 tribe in Nebraska, and we have Penny Cleghorn who lives in
 3 Apache, Oklahoma. Penny replaced her mother, Mildred, who
 4 was one of the original class representatives upon her
 5 mother's unfortunate death.
 6 Her mother was born in a POW camp with Geronimo,
 7 her father having been one of the key lieutenants to
 8 Geronimo. Penny, upon her mother's death, was substituted
 9 in and approved by the court as a class representative,
 10 but we are sorry that her mother could not be here, as so
 11 many of the class members have passed away during this long
 12 case.
 13 Thank you.
 14 Your Honor, we have joining us today by telephone
 15 from the Blackfeet Reservation in Browning, Montana, the
 16 lead plaintiff, Eloise Cobell. She has made countless trips
 17 for meetings, and mediation, and trials and hearings here in
 18 this court, and in Congress and throughout the country over
 19 the past 15 years. But due to health reasons today cannot
 20 be present.
 21 We would request permission for her to make a
 22 brief statement. We have consulted with the defendants, who
 23 have no objection to that, and she is on the line, and I
 24 would that she be permitted to do so.
 25 THE COURT: All right. Rather than have her wait

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1 until the later part of the proceeding with her health
 2 situation, the court will grant that request.
 3 Ms. Cobell, can you hear us?
 4 MS. COBELL: Yes, I can.
 5 THE COURT: All right, Ms. Cobell, you are welcome
 6 to make a statement concerning this as the lead plaintiff in
 7 the case.
 8 MS. COBELL: Thank you, Your Honor.
 9 My name is Eloise Cobell, and I am an enrolled
 10 member of the Blackfeet Tribe, and I was born and raised and
 11 presently reside on the Blackfeet Indian Reservation. I am
 12 also the lead plaintiff in this litigation. My great
 13 grandfather was Mountain Chief, the last war chief of the
 14 Blackfeet Nation.
 15 I wish I could be there present in today's
 16 fairness hearing so I could introduce myself personally and
 17 explain to you how important this settlement is to 500,000
 18 individual Indian trust beneficiaries. However, physically
 19 I am unable to do so. Therefore I sincerely thank you for
 20 the opportunity to participate by phone.
 21 I want to explain that few, if any, legal cases in
 22 modern times have embodied the pain of so many people in
 23 Indian Country, and also embodied the hopes of those
 24 people. The possibility of settling this century-old
 25 injustice has provided hope for the future and a light for

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1 the horizon.
 2 For over 100 years individual Indians have been
 3 victimized by the government's gross mismanagement of the
 4 individual Indian Trust and trust assets, including the
 5 income earned on our trust land, and for the last 15 years
 6 this court, alone, has held our hope for the individual
 7 Indians.
 8 Successive administrations stubbornly resisted and
 9 bitterly fought our effort with everything it had. Congress
 10 was unable to bring resolution despite great effort to do
 11 so.
 12 Finally, in 2009, through the extraordinary
 13 efforts of this court, and class counsel, and class
 14 representatives, for the first time since this case was
 15 filed on June 10, 1996, the Executive Branch sat down in
 16 good faith and negotiated a fair settlement of this case.
 17 Then in December of 2010, after a year of meeting
 18 with members of Congress and their staff, we were able to
 19 obtain Congressional approval of this settlement. In this
 20 tight budget environment, this was extremely difficult to
 21 do, particularly since 100 percent of the Senate needed to
 22 pass the ratification of the settlement.
 23 What has been accomplished here is historical. A
 24 3.4 billion settlement with 1.5 billion distributed directly
 25 to individual Indians, and 1.9 billion to address

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1 fractionation, a necessary investment for improving future
 2 management, and this is tax free.
 3 In addition, 5 billion has been spent by the
 4 government on trust reform brought about by the pressure of
 5 this case, and it has been brought to bear. Nothing like
 6 this has ever been done for individual Indians.
 7 I am confident that this court understands our
 8 history of abuse. Its opinions and decisions speak
 9 eloquently and sincerely of the challenges we have had to
 10 face.
 11 The record is plain to anyone who has spent the
 12 time to read and understand it. It is permanent testimony
 13 to the importance of this case and why it has been one of
 14 the most difficult challenges I have ever faced. In terms
 15 of settlement, it brings a measure of justice to some of the
 16 most vulnerable people in this country.
 17 This settlement is not perfect. I do not think it
 18 compensates for all of the losses sustained, but I do think
 19 it is fair, and it is reasonable. That is what matters. A
 20 fair resolution has been achieved.
 21 I am convinced that it is the best settlement
 22 possible. I am convinced, also, that if the settlement
 23 failed there would be -- there would be many more years of
 24 litigation with little possibility of a more favorable
 25 resolution.

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1 While you will hear from objectors today, the
 2 overwhelming majority of class members, over 99.98 percent
 3 agreed that the settlement is fair and want this matter
 4 resolved now.
 5 This support is not surprising to me. When I have
 6 visited innumerable Indian communities over the last year to
 7 speak about the settlement, I had heard first-hand the wide
 8 support of this settlement.
 9 I don't want to get into details of our
 10 settlement. Those issues have been fully briefed and have
 11 been debated. But I know that they will be discussed
 12 further in this hearing.
 13 However, I want to address an issue that has been
 14 addressed by the defendants and a couple of the members of
 15 Congress. That issue is reasonableness of legal fees for
 16 our class counsel.
 17 Often I have said that if we our attorneys are not
 18 treated fairly and in accordance with controlling law, we
 19 will never be able to obtain competent lawyers who will be
 20 willing to battle the government until justice is served,
 21 for however long that it takes.
 22 I strongly believe that that is true. An
 23 overwhelming majority of individual Indian class members
 24 agree. So please let the message be that lawyers who
 25 represent native people will be treated no worse or

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1 compensated no less than those who represent people who are
 2 not Indians.
 3 Until class counsel accepted our case, we had no
 4 hope and no remedy for the abuse that we have been forced
 5 to endure for decade after decade, generation after
 6 generation.
 7 Our attorneys have labored tirelessly and at a
 8 great sacrifice for many years. They have never wavered in
 9 their commitment to us, and they helped us accomplish
 10 something that most people thought would be impossible to
 11 achieve.
 12 We would not have had the success without our
 13 class counsel. I urge you to treat them fairly in
 14 accordance with the law.
 15 In closing, 124 years of abuse of our trust is
 16 enough. 15 years of intense, difficult litigation is more
 17 than enough. Too many of us have died without justice. Any
 18 more delays will mean that still more will die without
 19 justice. Enough is enough.
 20 On behalf of the named Native people, I appreciate
 21 beyond words what Judge Lamberth, Judge Robertson and you
 22 have done, and how each of you have stepped up and
 23 courageously resolved some of the thorniest issues that
 24 any judge in this country has ever had to address and
 25 resolve. I am deeply grateful that this court has not

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1 failed us.
 2 I thank this court again for the opportunity to
 3 provide my views, and pray and hope that I can see the
 4 distribution of our settlement funds later this year. That
 5 is very important to me, my fellow class members and
 6 justice.
 7 Thank you, Your Honor.
 8 THE COURT: Thank you, Ms. Cobell, for that
 9 statement. We wish you well and hope that you will do
 10 better.
 11 All right, sir.
 12 MR. DORRIS: Earlier this month this lawsuit
 13 entered its sixteenth year. It has been one of the most
 14 complicated and extensively litigated cases ever in this
 15 court, or any other court in this land.
 16 This proposed settlement begins to provide real
 17 justice for the plaintiff classes, in addition to providing
 18 for continued trust reform. It ends a David and Goliath
 19 feat of immense proportions, pitting the all-powerful
 20 federal government against many of its poorest and most
 21 marginalized citizens.
 22 The \$1,512,000,000 in tax-free dollars for the two
 23 classes will be distributed in a carefully balanced way.
 24 Each member of the historical accounting class will be paid
 25 \$1,000 for giving up exactly the same thing, the receipt of

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1 an equitable accounting which the government has not and
 2 cannot provide.
 3 The additional payments to the trust
 4 administration class will reflect that all have been damaged
 5 by poor mismanagement, but that there are individualized
 6 differences.
 7 The payments to the members of the trust
 8 administration class will range from \$800 to well over
 9 \$100,000, and in a number of instances over \$1 million,
 10 based on the value of their assets in terms of earnings over
 11 time as reflected in the best data available.
 12 The \$1.9 billion land consolidation fund provides
 13 funding and a vehicle for addressing one of the most
 14 difficult problems facing the administrators of the trust,
 15 the presence of highly fractionated ownership interest
 16 shares.
 17 These funds provide the ability for the government
 18 to pay fair market value for the shares, and to be sold on a
 19 voluntary basis where it would be difficult to sell those
 20 interests if the people chose to do so.
 21 In addition, the trust administration -- the land
 22 consolidation fund provides for the creation of a \$60
 23 million scholarship fund for Native Americans.
 24 In addition to being tax-free, significantly, none
 25 of these payments will diminish the right of any of the

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1 class members to receive any other federal benefits or
 2 welfare.
 3 This agreement cannot solve all of the problems
 4 with the trust. Much more work, much more effort will be
 5 required. But the plaintiffs in the settlement agreement
 6 insisted on expressly and specifically saying that trust
 7 reform was not complete.
 8 As a result of this case, as a result of our
 9 discussions, and as a result of us now reaching a
 10 settlement agreement, Secretary Salazar has issued a
 11 Secretarial order calling for the creation of a commission
 12 to address further trust reform upon the final approval of
 13 this settlement.
 14 Following Your Honor granting preliminary approval
 15 in December of 2010, the notice program has been
 16 successfully completed, and notice in the words of Ms.
 17 Kinsella, one of the most experienced notice contractors,
 18 was that the notice in this case was extraordinary.
 19 The court-approved claims administrator has logged
 20 approximately 1,800 exclusions from the trust administration
 21 class. Thus, this shows that the right to opt out was a
 22 meaningful right exercised by a number of people. It also
 23 shows that the vast, vast majority of the trust
 24 administration class wants to participate in and accept the
 25 benefits of this settlement.

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1 In terms of objections, out of the approximately
 2 500,000 members of the classes, we have logged 92
 3 objections, some of whom will be here to speak today, with
 4 the majority of those objections only going to some
 5 particular aspect of the settlement and not the overall
 6 settlement itself.
 7 However, no comment or objection received during
 8 the notice period identifies any reason that this historic
 9 settlement agreement should not be provided -- should not be
 10 approved.
 11 We have responded in writing in detail to the
 12 objections, and we will address them later today.
 13 A few have said we should have held out for more.
 14 We say that in light of the Court of Appeals' decision in
 15 Cobell 22, the settlement is fair and reasonable and brings
 16 to a close intractable litigation.
 17 Even the Court of Appeals in Cobell 22, Your
 18 Honor, called the resolution of this case a Gordian knot,
 19 and indicated that its prior decisions -- almost apologized
 20 that its prior decisions pointed to no clear exit from this
 21 legal morass.
 22 At least one of the objectors incorrectly contends
 23 that there was a \$7 billion offer on the table that the
 24 plaintiffs rejected in 2005. That is simply not true. No
 25 such offer was ever made.

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1 A few others, all of whom have stood on the
 2 sidelines and out of the fray for these 15 years now say
 3 that the class representatives and class counsel should not
 4 be paid what is otherwise provided for by precedence and
 5 controlling law.
 6 We say that until the class representatives and
 7 class counsel stood together to hold the government
 8 accountable for over 120 years of abuse, a task that almost
 9 everyone thought was impossible -- the abuse had continued
 10 for over a century with no end in sight.
 11 By making it clear that the trustee can be and
 12 will be held accountable, the equation between the trustee
 13 and the beneficiaries has been rewritten, the lines redrawn,
 14 and the relationship between the trustee and the
 15 beneficiaries fundamentally changed for all times.
 16 In addition to the \$3.4 billion in real justice
 17 flowing from this settlement, and the \$5 billion in trust
 18 reforms to date as a result of this case, this case stands
 19 as permanent testimony for future generations, historians
 20 and scholars as to what our clients have endured and what
 21 they have now overcome, and it also stands as a beacon of
 22 hope and a wellspring of inspiration for all other oppressed
 23 people.
 24 In closing, we ask for approval of the proposed
 25 settlement so that it can begin to bring real justice to the

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1 plaintiff classes, can foster the continued trust reform
 2 started by the pressure from this case, and can lead to the
 3 better relations between the government and Native Americans
 4 for the years ahead.
 5 Thank you, Your Honor.
 6 THE COURT: Thank you.
 7 Let me break in for a minute here. We have more
 8 of a crowd than we expected.
 9 (Whereupon, the court conferred with his courtroom
 10 deputy.)
 11 THE COURT: I am going to invite those who have to
 12 stand -- we are going to be here three or four hours -- it
 13 will be difficult -- to come up and sit in the jury box. I
 14 think I have about 12 seats there available. So those who
 15 want to come up and sit down in the jury box -- it will be
 16 too long to stand all day.
 17 We can also sit a couple over at the extra counsel
 18 table over there.
 19 (Whereupon, people from the audience took the suggested
 20 seats.)
 21 THE COURT: At this point the court recognizes the
 22 government counsel to address the court on their opening
 23 statement at this time.
 24 Mr. Kirschman.
 25 MR. KIRSCHMAN: Thank you, Your Honor.

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1 May it please the court, defendants join with
 2 plaintiffs in asking that the court approve this historic
 3 settlement. The settlement is one of the largest ever
 4 entered into by the United States. It is fair, reasonable
 5 and adequate for both classes.
 6 As the court noted in the In re: Vitamins case,
 7 the following factors determine whether this settlement
 8 should be approved:
 9 One, whether the settlement is a result of arms
 10 length negotiations.
 11 Two, the terms of the settlement in relation to
 12 the strength of the plaintiffs' case.
 13 Three, the status of litigation at the time of
 14 settlement.
 15 Four, the reaction to the class.
 16 Five, finally, the opinion of experienced counsel.
 17 Here, Your Honor, in this case these factors
 18 justify your approval of this settlement. Defendants'
 19 primary concern is that this settlement should be the final
 20 resolution of all claims of class members covered by the
 21 settlement. Defendants, like Congress, truly seek to turn a
 22 new page through this settlement.
 23 Historically, the court subsequently considering
 24 whether a settlement was binding has looked to the trial
 25 court's articulated reasons for approving it. For that

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1 reason, Your Honor, we respectfully request that this
 2 court, pursuant to Rule 23(e), provide written findings
 3 that this settlement is, indeed, fair, reasonable and
 4 adequate.
 5 Congress has, of course, authorized, ratified and
 6 confirmed this settlement through the Claims Resolution Act
 7 of 2010, and the President demonstrated his support for it
 8 by promptly signing the legislation into law.
 9 The involvement in Congress and the President in
 10 the settlement process supports a determination that the
 11 settlement comports with the Constitution and is fair and
 12 reasonable.
 13 THE COURT: Excuse me one second.
 14 If anyone has a cell phone on or a Blackberry on,
 15 please turn them off. We are getting a buzzing in the
 16 communications here, and it makes it hard to hear. Any cell
 17 phones, Blackberries, any electronic equipment, you have to
 18 turn them off, not just silence them.
 19 MR. KIRSCHMAN: I was keeping time. I will turn
 20 off my Blackberry, Your Honor.
 21 THE COURT: It interferes with our electronics
 22 here trying to hear. Thank you.
 23 MR. KIRSCHMAN: The involvement of Congress, as I
 24 said, and the President, Your Honor, supports the
 25 determination that the settlement comports with the

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1 Constitution and is fair and reasonable.
 2 Congress subjected this settlement to an enhanced
 3 and independent scrutiny on behalf of the class members for
 4 a year, which is a strong additional indication that the
 5 classes were adequately represented in this process.
 6 Congress also did not serve as a mere rubberstamp.
 7 As you are aware, it held hearings, and vetted the terms of
 8 this settlement, and even caused the original terms of the
 9 settlement to be modified to ensure that class members were
 10 being treated fairly and reasonably.
 11 For example, Your Honor, the 2010 Act required the
 12 parties to modify the settlement agreement by reallocating
 13 \$100 million that had initially been intended for the Land
 14 Consolidation Program to augment the minimum settlement
 15 payments that would be paid to the trust administration
 16 class.
 17 Another example, Your Honor, is the fact that
 18 Congress has asked this court to consider the special status
 19 of class members as beneficiaries when it considers an
 20 appropriate amount to award in attorneys' fees and incentive
 21 awards.
 22 Congress's role in the settlement thus requires
 23 this court to conduct an analysis different than in some
 24 traditional settlement cases. As the court is aware,
 25 Congress is a settler of Indian trust, and has the plenary

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1 authority to determine how the United States should carry
 2 out its trust obligations. That is the law of this case,
 3 and these principles were recently confirmed in the Supreme
 4 Court's case in Hickory Apache.
 5 Even outside of the context of Indian litigation,
 6 Your Honor, Congress has the authority to change the
 7 statutory rights of litigants, and our brief in support of
 8 this settlement cites numerous cases that establish that
 9 authority.
 10 Here Congress has acted well within its authority
 11 to resolve a past statutory trust duty, namely, Interior's
 12 implied duty to conduct an historical accounting. The 2010
 13 Act is Congress's rational recognition, Your Honor, that
 14 this case presents unique challenges to the parties, to this
 15 court, and even to Congress, and that the best resolution of
 16 the dispute is a comprehensive one that could not be
 17 achieved in any other forum.
 18 It is also very important, Your Honor, as Mr.
 19 Dorris noted, that as part of the 2010 Act, Congress funded
 20 \$1.9 billion for the Department of the Interior to conduct
 21 its Land Consolidation Project, to address the critical
 22 issue of fractionation.
 23 Turning to the first factors set out in In re:
 24 Vitamins, the settlement should be approved as a product of
 25 arms-length negotiations. Contrary to what some have said,

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1 there is simply no collusion here. The settlement is the
 2 result of nearly 15 years of intense litigation, and it
 3 comes after several attempts at settlement over the course
 4 of the litigation, and months of good-faith, intense
 5 negotiations between the parties.
 6 The settlement is also fair and reasonable when
 7 viewed in light of the strength of plaintiffs' cases,
 8 another factor in In re: Vitamins. This is certainly true
 9 in regard to the historical accounting class.
 10 In fact -- and again Mr. Dorris noted this, after
 11 several trials and more than 14 years of litigation, the
 12 scope of the historical accounting still remains unresolved
 13 today. It is, however, now firmly established that
 14 Interior's performance of the historical accounting is
 15 subject to the willingness of Congress to fund it.
 16 In addition, Your Honor, Interior must provide
 17 only the best historical accounting possible in light of
 18 whatever amount might be funded by Congress. That is the
 19 law of the case.
 20 And in 2008, Your Honor, when this court heard
 21 evidence regarding restitution claims and afforded every
 22 presumption to the plaintiffs, it awarded only \$455.6
 23 million as restitution for the inability, as the court found
 24 at the time, to perform the historical accounting.
 25 Of course, the D. C. Circuit in 2009 later vacated

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1 that money award, now making any monetary payment to this
 2 class as a result of any litigation extremely unlikely.
 3 The approximately \$360 million that will be paid
 4 to settle the historical accounting claims is a substitute
 5 for the receipt of the information that would have been in
 6 the historical statements of account, and it is clearly fair
 7 and reasonable.
 8 The trust administration class terms are also
 9 fair and reasonable, Your Honor, in light of the litigation
 10 risks involved in proving such individual claims. This
 11 settlement dedicates a historic amount of approximately \$1
 12 billion to pay for potential trust administration claims,
 13 the merits of which have hardly been tested let alone
 14 established.
 15 No history of successful litigation of individual
 16 Indian trust administration claims exists to undermine the
 17 reasonableness of this settlement amount. Certainly no
 18 objectors have pointed to any.
 19 There are problems of proof, Your Honor, related
 20 to these cases. The statute of limitations would often be
 21 up applicable, and the cost of litigation also poses a very
 22 real risk that little, if any, recovery is available under
 23 the trust administration claims for most individuals.
 24 The facts that have been developed throughout this
 25 litigation do not demonstrate a basis for a larger amount,

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1 and in fact the facts that have been established demonstrate
 2 just the opposite. Those facts led this court to a reject
 3 plaintiffs' \$47 billion claim when they were seeking
 4 restitution.
 5 In addition, Your Honor, the billion dollars is to
 6 be paid to the trust administration class, and it is a
 7 significant percentage of the almost \$6 billion of receipts
 8 that have flowed through the IIM system into the IIM
 9 accounts during the period that is covered by this
 10 settlement.
 11 This settlement thus strikes a fair and reasonable
 12 balance between the government's need for the resolution of
 13 its liability on those claims and reasonable compensation
 14 that is likely beyond the practical reach of most individual
 15 beneficiaries.
 16 Despite objections that the trust administration
 17 class is improper because it cannot meet the Rule 23
 18 requirements -- Rule 23 elements of commonality, Congress
 19 properly authorized class certification here without
 20 applying those elements.
 21 Congress's power to do this was established in
 22 Shady Grove Orthopedics Association, and in other cases we
 23 have cited in our brief. As a result, the class
 24 certification tests from Rule 23(b)(3) are not relevant
 25 here.

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1 Instead, the only relevant consideration, Your
 2 Honor, is whether the settlement, because it is otherwise
 3 fair and reasonable, also affords due process to the absent
 4 class members.
 5 In reviewing the constitutionality of the
 6 settlement in that regard, Your Honor, the court should be
 7 directed by the protections set out in the Phillips
 8 Petroleum v. Shutts Supreme Court case.
 9 Those are, Your Honor:
 10 One, sufficient notice to the class.
 11 Two, a meaningful opportunity for dissatisfied
 12 class members to object and be heard.
 13 Three, a meaningful chance to opt out of the
 14 class.
 15 And four, adequate representation of the class by
 16 their representatives.
 17 As detailed in the parties' briefs and in the
 18 declarations from Kinsella Media and the Garden City Group,
 19 the notice provided to class members were unprecedented and
 20 extraordinarily thorough.
 21 The 90-day notice period clearly satisfied due
 22 process. As the court is aware, courts routinely allow only
 23 30 to 60 days.
 24 It is also very important, Your Honor, that the
 25 notice was carried out in a unique way to account for the

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1 numerous locations of many of the class members, the rural
 2 areas in which member many of the class members live, and
 3 the several languages that are spoken by many of the class
 4 members.
 5 After the notice, Your Honor, class members were
 6 also given a fair opportunity to be heard, both in writing
 7 and today through this fairness hearing. The class members
 8 were also given a meaningful opportunity to opt out as
 9 addressed by Mr. Dorris.
 10 Although some have objected that they could not
 11 make an informed decision because there was no historical
 12 accounting, that misperceives the purpose of the historical
 13 accounting.
 14 That would have led to the provision of
 15 transaction histories and account balances, but it did not
 16 require, and was never contemplated to require the
 17 production of trust records.
 18 Class members were also informed of what rights
 19 they would forgo and what rights they would retain should
 20 they choose to opt out.
 21 Finally, Your Honor, looking at the elements under
 22 Shutts, the class representatives here are adequate for
 23 settlement purposes.
 24 In this District case law establishes that there
 25 are two criteria for determining the adequacy of the

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1 representation and those are:
 2 One, that the named representatives must not have
 3 antagonistic or conflicting interests with the unnamed
 4 plaintiffs.
 5 And two, that the representative must be able to
 6 vigorously prosecute the interest of the class.
 7 No evidence has been presented to show that
 8 criteria have not been met here. The court should give
 9 great weight, Your Honor, to the numerous objections to
 10 class counsel's request for attorneys' fees and the named
 11 plaintiffs request for incentive awards.
 12 The objections -- the issue of attorneys' fees
 13 elicited the most objections of any other issue raised by
 14 the objectors. As some objectors noted, Your Honor, you
 15 should not be swayed by class counsel's request for \$224
 16 million in fees and expenses into believing that somehow
 17 that makes an award of \$99.9 million more palatable, because
 18 it does not.
 19 As we established in our brief that we filed
 20 earlier, a \$50 million fee is more than reasonable, and that
 21 should include all expenses, Your Honor.
 22 It is also in accord with the stated position of
 23 Congress, as I mentioned earlier, that this court consider
 24 the fact that these fees will be coming from class members
 25 who are beneficiaries of a Federal trust.

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1 However, Your Honor, having said that, the mere
 2 request for a large amount of fees and incentive awards does
 3 not render the representation of the class inadequate. It
 4 is very important that here, Your Honor, that it is up to
 5 you to determine what a reasonable attorneys' fee and
 6 incentive award is. Your Honor, you have the authority to
 7 scrutinize these requests and determine an appropriate
 8 amount.
 9 The key then he is here, in the context of this
 10 litigation, do the incentives of the class representatives
 11 align with the absent class members? And we believe, Your
 12 Honor, that they certainly do.
 13 In light of the above, Your Honor, and looking at
 14 the status of the litigation, which is another factor under
 15 In re: Vitamin, approval of the settlement is clearly
 16 justified. After the D. C. Circuit remanded this case back
 17 to this court in 2009, it was clear that there could be more
 18 years of litigation as Mr. Dorris noted.
 19 Also, Your Honor, the D. C. Circuit in Little Wolf
 20 versus Lujan found that the legislation that it was
 21 considering met the rational basis standard where it was,
 22 quote:
 23 "Rationally related to the
 24 government's legitimate interest
 25 in protecting thousands of

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1 Indian claimants from the need
 2 to litigate thousands of
 3 expensive, time-consuming,
 4 individual actions to recover
 5 any compensation for their
 6 claims."
 7 Congress acted in the same manner here as enacting
 8 the 2010 Act, Your Honor, and has made it possible after
 9 decades of disputes to have individuals receive compensation
 10 without having to pursue costly, time-consuming litigation.
 11 And finally, Your Honor, as plaintiffs have noted,
 12 it is important to understand that 90 -- only 90 of about
 13 450 class members have objected to this settlement. It is
 14 92.
 15 THE COURT: 90 out of 450,000?
 16 MR. KIRSCHMAN: Hum?
 17 THE COURT: 90 out of 450,000?
 18 MR. KIRSCHMAN: Approximate 450,000. We don't
 19 have final numbers on class members, but it is approximately
 20 450,000.
 21 That comes out to approximately point zero two
 22 percent, Your Honor; and as Mr. Dorris noted, only 1,800
 23 individuals opted out of the trust administration class, and
 24 of those, 1,100 were Quapaw Tribe members, who are intending
 25 to participate in a separate suit in the Court of Federal

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1 Claims.
 2 Now we do not represent that these numbers mean
 3 that everyone in the class favors this settlement. But what
 4 it surely shows, Your Honor, is that there is an overall
 5 favorable reaction from class members to this settlement and
 6 its terms.
 7 In conclusion, Your Honor, there is in this
 8 District a long-standing judicial attitude favoring class
 9 action settlements in appropriate cases, and this is clearly
 10 such a case. We appreciate Your Honor's careful review of
 11 the issues, and respectfully request that pursuant to Rule
 12 23(e) that the Court finally approve this settlement as
 13 fair, reasonable and adequate.
 14 Thank you.
 15 THE COURT: Thank you, Mr. Kirschman. I
 16 appreciate it.
 17 We are at the point of having the opening remarks
 18 of counsel as to the background and history of this
 19 litigation and their request by both parties for the court
 20 to approve it as fair, reasonable and adequate.
 21 Now to go to the objections at this time, the
 22 objectors' statements. I have given them five or 10 minutes
 23 each, that they will stay with the objections that they
 24 filed and not go into other non-relevant areas.
 25 The simplest way to do it is we tried to outline

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1 them in alphabetically order, no matter what their objection
 2 was. So at this time the court is going to proceed with
 3 that order.
 4 I said alphabetical. Looking at it it doesn't
 5 look alphabetical on the list to me. I thought it was
 6 alphabetical. I don't think -- oh, it is first name
 7 alphabetical. Thank you.
 8 We have copies here of what the objections were.
 9 I am going to call on all of on Aldine Farrier first,
 10 please, F-a-r-r-i-e-r for the record.
 11 All right, we are ready to go.
 12 MS. FARRIER: Thank you, Your Honor.
 13 I'm here today to object to the Indian Trust
 14 settlement of the \$3.4 billion, resulting from the Cobell
 15 versus Salazar law suit, and challenge its settlement.
 16 First of all, the legal fees are excessive, and
 17 they rob the Indian account holders of compensation due to
 18 them.
 19 This is not a fair settlement for the class. How
 20 many of us 250,000, 300,000 IIM account holders are
 21 represented in this lawsuit? Will we actually benefit from
 22 this settlement? How many IIM account holders will receive
 23 sufficient amounts, and how many will benefit beyond their
 24 rights and will receive monies who have not incurred
 25 injuries?

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1 If this settlement is allowed to continue, how in
 2 the future will we settle claims that have never been
 3 litigated? This is a dangerous precedent as it allows
 4 Congress to create causes of action where none exist.
 5 With this settlement the U.S. government can now
 6 say that it is closing out 122 years of financial
 7 mismanagement. This accounting only covers the time period
 8 between October 25, 1994, and September 30, 2009. Only
 9 those IIM account holders with open accounts during this 15
 10 year span will benefit.
 11 The government claims to not be able to provide
 12 accountings to -- for the accounts to Indian people. In the
 13 meantime, where are all of the persons responsible for this
 14 mismanagement of the funds and land-use? They should be
 15 held responsible, be expelled from their jobs, tried in a
 16 court of law and sent to prison.
 17 The federal government has been charged to protect
 18 our lands, and now this settlement is yet another vehicle to
 19 take more land away from us.
 20 Further, the fractionated ownership interests are
 21 not defined in the action. This settlement encourages IIM
 22 account holders who are living in poverty -- living in
 23 extremely poverty stricken areas to sell their lands for
 24 pennies on the dollar.
 25 Who will determine fair market value for those

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1 lands? Will it be taken into account that the value of
 2 other minerals, and water, et cetera, which lie beneath the
 3 topsoil will be calculated in for future revenues? Mining,
 4 grazing, timber, riverbed rights, et cetera, will those be
 5 included in this settlement?
 6 I object to this court's acceptance of Congress's
 7 waving of the Federal Rules of Civil Procedure in order to
 8 enable the trust administration class. This appears to be
 9 another instance where Indian people are treated differently
 10 in the federal system than any other class.
 11 Excuse me. Native American people have served
 12 this country -- excuse me -- in times of war and peace.
 13 They are upstanding citizens. Shame on this administration
 14 for signing this legislation approving this settlement, and
 15 shame on the court.
 16 Thank you.
 17 THE COURT: Thank you, Ms. Farrier.
 18 The court recognizes Ben Carnes, C-a-r-n-e-s, who
 19 has filed a written objection with the court and asked to
 20 speak. Mr. Carnes.
 21 MR. CARNES: Let me know if this is too close. I
 22 speak really low.
 23 THE COURT: Yes, please. Thank you.
 24 MR. CARNES: I will try to stick to my points, but
 25 I need to lead up to it.

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1 My name is Ben Carnes. I am a full blood of the
 2 Choctaw Nation. I have never called myself an American
 3 Indian, a Native American or an American citizen. I am a
 4 citizen of a sovereign Indian Nation.
 5 When the Europeans came to our country, we had a
 6 sacred spiritual connection to our lands. We had a
 7 spiritual connection to the way that we live, the waters
 8 that we drink, the resources of this land that we used.
 9 We were met with a way of life from Europe that
 10 construed land as property to be owned. You cannot walk
 11 on this land. You cannot drink water off of this land.
 12 But these people came, and they were hungry. They
 13 were afraid of the way of life that they had in Europe, and
 14 so we welcomed them here. We showed them how to grow food
 15 We showed them how to hunt. We showed them to find
 16 medicines.
 17 Then they asked for a little bit of land. So,
 18 okay, we will reserve this part for ourselves, and you can
 19 have this, and it continued on. Eventually somehow we ended
 20 up in the custody of the War Department, and through the War
 21 Department we now have the Department of Interior and Bureau
 22 of Indian affairs.
 23 My people were asked to join the alliance against
 24 Jackson. We said no, we will fight. If it was not for my
 25 people there would be no America here today. About four or

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1 five years later, my people were one of the first ones that
 2 were sent to what they call Indian Territory on the Trail of
 3 Tears.
 4 Then Senator Dahl came and looked at the people
 5 and said, you know what, there is a problem here. They are
 6 not selfish. They are not like us, so we have got to break
 7 these lands up into allotments.
 8 I'm pretty angry about everything that I have
 9 read and learned. I can understand that the attorneys are
 10 tired. I can understand Ms. Cobell is tired. But I'm
 11 tired, too.
 12 I mean the Marshall Trilogy, which you understand,
 13 Worcester versus Georgia, the Macintosh case -- you know, we
 14 were considered wards of the federal government. How long
 15 do we remain wards of the federal government? Because in
 16 this settlement, I don't feel it is fair.
 17 I feel that this settlement is nothing more than a
 18 cover-up. You know, pitch a few crumbs -- a few dollars out
 19 here, and get them quiet, and now you can never bring up
 20 these issues again. This case is closed.
 21 No, it is not closed. Where did this money go?
 22 You know, through their efforts these attorneys, after we
 23 found out that the Department of Interior destroyed
 24 evidence, they destroyed records, who were they trying to
 25 protect?

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1 I feel like this case needs to go on. We need to
 2 investigate who stole the money? When did they steal it?
 3 Are they still alive? Are they still in public office? Can
 4 they be prosecuted?
 5 You know, this relationship that we have with the
 6 federal government needs to be end -- come to an end. We
 7 can manage our own trust. We are adults.
 8 You know, I challenge the federal government to
 9 show us that we are incompetent to manage our own affairs,
 10 because if we could become free of the federal government,
 11 then maybe we would not have to comply with the Indian
 12 Reorganization Act in which the court government tells us
 13 how to create tribal councils, how to have chiefs, because
 14 this becomes a system of political patronage and a lot of
 15 corruption.
 16 You know, I just recalled, too, that one of the
 17 attorneys in their response to the fairness hearing said,
 18 where were we when all of this was going on? Well, I
 19 inherited this from my mother. She died in 1996, right as
 20 this case started. And two or three years ago someone said,
 21 hey, you can get a lot of money. Go check it out.
 22 And so I looked, and I found out that I am a
 23 member of this class. So I tried to research and study it.
 24 It is a lot. I can understand the effort that has gone into
 25 this.

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1 I also understand, too, that when the other judge
 2 was removed from this case, Judge Lamberth, I felt that the
 3 people's heart had dropped to the floor, because Judge
 4 Lamberth was not being biased. He was angry. He was more
 5 angry than I am right now.
 6 I'm doing my best to control my emotions, but he
 7 let it out, because the Department of Interior disobeyed,
 8 disobeyed, disobeyed, and disobeyed. So he lashed out at
 9 them.
 10 And what frightens me about this change of judges
 11 is the same thing that happened to one of our Indian people.
 12 His name is Leonard Peltier. They changed judges on him,
 13 and we see what happened to him.
 14 So when these attorneys want to know where I was?
 15 Well, I was probably out there on a highway hitch-hiking
 16 somewhere, advocating for Leonard Peltier.
 17 I was probably in front of a Senate Select
 18 Committee testifying on religious rights of Native
 19 prisoners.
 20 I was probably in Hawaii, testifying for a Senate
 21 Select Committee who stood up and walked out on me because
 22 they did not like what I had to say.
 23 Or I was probably sitting in front of the White
 24 House after Leonard Peltier was denied parole fasting, a
 25 spiritual fast. I was there because I thought these

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1 attorneys would carry this case through. I thought we were
 2 going to see justice.
 3 But you know, I think one of the estimates was
 4 \$166 billion, and now it is 3.4. I know the numbers have
 5 changed, but I did my math. That is barely 2 percent. So
 6 the Department of Interior takes a knife, they stick it in
 7 our back to the hilt, and I have to pull out two percent and
 8 it is a victory? I don't think so. I cannot agree with
 9 that.
 10 I cannot agree what I heard Ms. Cobell said
 11 earlier, that the majority of the class members support
 12 this. What I feel from my conversation with the Indian
 13 people is, we cannot win. It is the federal government.
 14 They are going to do what they are going to do, so I might
 15 as well cut the few dollars. That is a voice out of
 16 resignation. So, you know, I had to come and address these
 17 points and these issues.
 18 And I'm also concerned, too, about the attorney
 19 fees. As I understand it, a lot of cases, especially under
 20 Section 1983 of the Civil Rights Complaint, the losing party
 21 usually carries the attorney fees.
 22 You know, if the attorneys want to ask for 224
 23 million, or asked for a billion, let the federal government
 24 pay for it. They are the ones that created this mess. We
 25 should not have to -- it shouldn't have to come out of our

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1 settlement to take that.
 2 When it comes to land consolidation, that is
 3 another mess that Department of Interior, Senator Dahl,
 4 created.
 5 Do not dare -- do not take any land from our
 6 people, no matter how badly fractionated you think it is,
 7 because I mentioned Senator Dahl said, we are not selfish.
 8 That is because we lived our ways of life in communal
 9 living. We didn't have no idea about we owned this much.
 10 You know, I have talked to friends on the
 11 Roosevelt Reservation. They cannot use their land, even if
 12 it is fractionated, because tribal council is getting to
 13 well, you can't do this. This is not yours. This is alien
 14 to our way of thinking.
 15 Maybe there are 500 areas in 100 acres. There is
 16 not enough land to build a house on. Well, you know what,
 17 that is enough land to grow food on. They can grow food
 18 year, after year, after year, and feed a large community of
 19 people. That could go a lot further than \$1,500.
 20 You know, if they want to buy the land at fair
 21 market value -- that is something I did not hear in the
 22 settlement. We have an inherent right of sovereignty to
 23 this land -- our connection to this land.
 24 What are they going to pay for sovereignty? I
 25 have five acres with 13 family members, and you cannot buy

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1 my piece for a trillion. You don't have enough money to buy
 2 my piece of sovereignty. That belongs to me.
 3 You know, if anything else, because of the
 4 mismanagement by the Department of Interior and the BIA,
 5 they need to start buying surrounding land and bring it in
 6 so people could have a place to live, because on the Turner
 7 Mountain Reservation, it is not large enough to accommodate
 8 housing for all of their people.
 9 There are people on the wait list to have an
 10 Indian home built on the Reservation. It is not large
 11 enough. So do not take from us. We have lost way too much
 12 already.
 13 You know, if I had had the time I would have
 14 brought a map to show the 1700s, 1500s -- all of what they
 15 call the United States is all black. But now you look at
 16 what is left of the Indian land, we don't have anymore to
 17 give.
 18 I don't usually read from speeches. You know, I
 19 am not an attorney, and I'm not a politician. I speak from
 20 right here in my heart. This is not fair. This is not
 21 just.
 22 I was under the impression that this case was
 23 going to go until the end. You know, I can say that because
 24 the lawsuit against Long Hair and the Oklahoma State Prison
 25 System, I stayed in prison voluntarily for two more years to

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1 see the case through.
 2 So when these attorneys say, where was I? I was
 3 doing what I needed to do. And I thought they were here,
 4 too. But, you know, we are not ready to settle, and I want
 5 to make one more point on behalf of myself, and possibly
 6 others, but it is up to them.
 7 I did not opt out of this case, because I had
 8 hoped to come to this court and present my arguments that
 9 the attorneys -- the case would go on. Let's look at
 10 eliminating the Bureau of Indian Affairs. Let's look at
 11 restoring all of our assets and resources back into our
 12 management.
 13 Then I want to stay in this case, but if you rule
 14 in support of this settlement, then I will see what I can do
 15 about appealing, and once I have no more recourse for
 16 appealing, then I would wish to opt out.
 17 And I would also ask that you allow everyone else
 18 who remained a part of this case until it comes to that last
 19 step, because all of those people who opted out were afraid
 20 of being parsed up, and they didn't want to be a part of.
 21 That was too premature.
 22 We should wait until the last minute, because
 23 maybe something might happen today. Maybe somebody's voice
 24 in here may touch your heart. Maybe there are some issues
 25 that they bring up it will just become so apparent that you

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1 may rule that way.
 2 So I want to thank you for giving me the time,
 3 because I do believe I went over by ten minutes, but I
 4 appreciate it.
 5 THE COURT: Thank you, Mr. Carnes. I appreciate
 6 it.
 7 The next objector who wished to address the court
 8 was Carol Good Bear and also Darwin Good Bear
 9 MS. GOOD BEAR: Good morning, Your Honor.
 10 THE COURT: Good morning. Thank you.
 11 MS. GOOD BEAR: I am Carol Good Bear of the Mandan
 12 Hidatsa and Arikara Tribes of the Fort Berthold Reservation
 13 of North Dakota. I am a member of the Mandan and Hidatsa
 14 Tribe in particular.
 15 I am objecting to the proposed settlement of the
 16 historical accounting class, and I challenge the
 17 plaintiffs' suitability as a representative of all account
 18 holders.
 19 The named plaintiffs told us the suit was about an
 20 accounting. They each received their accounting and
 21 actively prevented the rest of us -- the rest of the class
 22 from receiving the account statements that were prepared for
 23 us at great expense.
 24 The government told the Court of Appeals in oral
 25 argument on May 11, 2009 and that the plaintiffs each

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1 received transaction-by-transaction reports going back to
 2 their predecessors. These reports, the government said,
 3 revealed a single error of \$60.94 for one plaintiff, and
 4 collectively they had been overpaid 3,000.
 5 Now they say their claims are common and typical
 6 enough to justify their representation of all account
 7 holders. I think fairness demands that their account
 8 statements be put on the records so that a determination can
 9 be made.
 10 I think I'm entitled to a ruling by the judge who
 11 will rule on this settlement if these named plaintiffs
 12 really do have -- still have claims that are common and
 13 typical of those of us who have had a good deal of money go
 14 through our accounts. In the alternative I think this judge
 15 has a duty to examine the account statements prepared for
 16 the named plaintiffs and rule on their suitability to
 17 represent me.
 18 The \$1,000 payments some class members will
 19 receive is many thousands of times the amount they have
 20 received in their accounts. My \$1,000 payment will be less
 21 than one percent of the amount that has gone through my
 22 account.
 23 My account alone has had more money go through it
 24 over a 30-year period -- has had more money -- is over
 25 100,000 of the class members put together. It simply is not

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1 fair or reasonable that we should all receive the same
 2 payment.
 3 I do not think the that Constitution's guarantee
 4 of due process permits this court to require me to settle
 5 the balance in my account by putting into the same amount --
 6 by putting into the same amount that it has put into
 7 accounts that were opened just days before the settlement
 8 period closed.
 9 I do not think that this settlement is fair, Your
 10 Honor. My account predates the settlement period. The
 11 class membership is flawed. Class representatives do not
 12 represent me. My account is not only older than many other
 13 IIM accounts, but my account is even older than a lot of the
 14 account holders.
 15 My account predates the settlement period, and
 16 some of the class members have accounts that have been
 17 opened just since the settlement was announced. It is not
 18 fair or reasonable to treat equally an account that was
 19 opened for pennies the day before the settlement period
 20 ended with an account like mine that has been open for
 21 decades and had more than \$100,000 go through it in a period
 22 of 30 years.
 23 This settlement would pay out more than 107
 24 million to over a hundred thousand individuals who do not
 25 even have 15,000 if you put all of their accounts together.

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1 My account alone had more than 100,000 go through it during
 2 the settlement period, and I don't think I should be
 3 required, Your Honor, to accept the same settlement as will
 4 be provided to the thousands of account holders who have
 5 never even had one dollar in their accounts.
 6 I think those of us who are not similarly situated
 7 should be required to accept the same settlement. I do not
 8 think due process permits these results.
 9 I think that we should be permitted to opt out of
 10 the historical accounting. Not one of the plaintiffs is
 11 from my reservation, Your Honor. Not one of them has an oil
 12 lease from the same land, from the same geological
 13 formation, from the same reservoir, even the same geological
 14 province.
 15 There is no plaintiff from the most active and
 16 largest oilfield in the nation. The money in the Fort
 17 Berthold accounts, or that should be in the Fort Berthold
 18 accounts, has very little in common with what should be in a
 19 very small account, for example, in Nebraska and Montana,
 20 Oklahoma or Wisconsin.
 21 This litigation has revealed that thefts and
 22 embezzlements have occurred, and even those accounts will
 23 not be made whole. Instead, every account holder will be
 24 treated equally in spite of the known difference, and each
 25 will receive \$1,000, regardless of the amount actually

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1 stolen or embezzled.
 2 In any fair settlement there should be some
 3 relationship between a settlement payment and the amount of
 4 damages, or the risk of loss, or the value of the claim
 5 being settled.
 6 In this proposed settlement there is no such
 7 relationship. The proposed settlement for the historical
 8 accounting class is simply not fair or reasonable. In fact
 9 it perpetuates the very kind of wrongful treatment of IIM
 10 account holders the plaintiffs complained of throughout this
 11 law suit.
 12 The government presumably will no longer have any
 13 obligation to audit leases of my land, to determine what
 14 should have been paid into my account. At least it is not
 15 clear to me just exactly what is being settled for the
 16 historical accounting class.
 17 Will this settlement be used as a defense against
 18 my claims for an audit of my leases because my account
 19 balance has been settled for this period?
 20 In their response to objections the plaintiffs are
 21 all over the map on this topic as to just what the
 22 settlement is. They state that a common trustee makes all
 23 of the claims suitable for treatment as a class for
 24 settlement purposes.
 25 They state that all trust assets are managed in

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1 common. They state that their so-called experts' reports of
 2 several years ago justify the amount and the methods of
 3 paying the settlement. They claim the IIM trust assets are
 4 all managed in common.
 5 They state that the government's trust management
 6 and accounting systems are common to the class as a whole.
 7 In fact, the systems for accounting for my oil and gas
 8 income are emphatically not the same as those in accounting
 9 for my grazing income. They are not even in the same
 10 agency, and they do not even interface electronically.
 11 The plaintiffs state many things in their response
 12 that are simply and plainly wrong.
 13 That points out to a bigger problem in this
 14 settlement. There are no longer any adversaries or
 15 adversarial positions in this lawsuit. In this lawsuit both
 16 the parties owe me a fiduciary duty, and both parties are
 17 telling this court that my objections are irrelevant,
 18 unsupported and misplaced.
 19 This court should consider -- should reconsider
 20 whether this lawsuit is even properly before the court. The
 21 plaintiffs say that Congress has, quote, unquote, ratified
 22 this settlement.
 23 That is another way of saying that this court's
 24 only remaining duty is to rubberstamp the settlement, and
 25 the Constitution does not permit such a demeaning role for

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1 the federal courts.
 2 The prospect for more, quote, unquote, very
 3 expensive litigation that you wanted to avoid, Judge Hogan,
 4 when you urged Congress to pass this authorizing legislation
 5 cannot be permitted to cloak the wholesale violation of
 6 class members' rights to the protection of the federal
 7 rules, federal law and the Constitution of the United
 8 States.
 9 Your Honor, I would urge this court to reject the
 10 settlement of claims that have never been presented in this
 11 litigation and that are not supported by any evidence or
 12 testimony.
 13 And, Your Honor, I would ask that you excuse my
 14 brother, Darwin. He could not make it here because of
 15 financial reasons, and I'm thankful to be here to present
 16 today.
 17 And also being near Father's Day weekend I want to
 18 thank my late father, Lawrence Kingsey Good Bear, who served
 19 six years in the Navy, who was present at the bombing of
 20 Pearl Harbor, and he fought for my right to get to present
 21 here today and to be heard.
 22 Thank you, Your Honor.
 23 THE COURT: Thank you, Ms. Good Bear. I
 24 appreciate you coming in, and will recognize your brother's
 25 objections, which are somewhat similar to yours in his

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1 written submission that I have reviewed.
 2 MS. GOOD BEAR: Yes, Your Honor. Thank you.
 3 THE COURT: All right, then we will move down to
 4 Celestia Fast Horse Two Eagles.
 5 Is Celestia Fast Horse Two Eagles here from
 6 Plymouth, Minnesota?
 7 (No response.)
 8 THE COURT: We have not had a call that she could
 9 not come in today. She had filed a request to be heard and
 10 had written an objection.
 11 A PERSON FROM THE AUDIENCE: Your Honor, my name
 12 is Karen (unintelligible). I am from the Blackfeet
 13 Reservation in Montana. I wrote to ask to speak at this
 14 hearing, and I would like to if somebody -- I don't think I
 15 made it on the agenda. I never did hear from --
 16 THE COURT: I am sorry, what was your full name
 17 again?
 18 A PERSON FROM The AUDIENCE: Karen, K-a-r-e-n.
 19 THE COURT: I don't have anything here that you
 20 had written in to ask for a hearing
 21 A PERSON FROM THE AUDIENCE: Yeah. I wrote to
 22 both places that it said that little pamphlet that I got,
 23 and I would like --
 24 THE COURT: In a little but I will let you talk to
 25 counsel when we take a break, and see if we can find out who

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1 that is. I have made a list of everything that came in
 2 here.
 3 A PERSON FROM The AUDIENCE: I would like to speak
 4 if I may.
 5 THE COURT: We will talk with counsel.
 6 Ms. Celestia Fast Horse Two Eagles is not here
 7 apparently. I would then go down to Charles Colombe, C-o-l-
 8 o-m-b-e.
 9 He is also not here -- from Mission, South Dakota,
 10 MR. CARNES: (Unintelligible.)
 11 THE COURT: We cannot hear you. I am sorry, why
 12 don't you come to the mic so we can get a record of what you
 13 are saying please, sir.
 14 Thank you, Mr. Carnes.
 15 MR. CARNES: I am not speaking officially for
 16 Charles Colombe, but I talked with one of his friends that
 17 works for him, and he said that he is not able to come due
 18 to doctor's orders. He is receiving treatment in Oklahoma
 19 City.
 20 And also, Your Honor, I wanted to add, too, that a
 21 close friend of mine I spoke with, Jason Nathaniel Corwin,
 22 is not going to be here today either. He had a prior
 23 commitment, and there was just no way that he could come,
 24 and he didn't have time to write a statement and send a
 25 power of attorney.

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1 THE COURT: I don't have anything from him. All
 2 right, thank you, sir. We will pass Mr. Colombe. I have
 3 his written objections here from the Rosebud Sioux Tribe
 4 expressing his concerns.
 5 Below him is Darlene Pipeboy. Ms. Darlene Pipeboy
 6 is here? She is from the Lake Traverse Reservation.
 7 MS. PIPEBOY: Good morning. My name is Darlene
 8 Renville Pipeboy.
 9 (Whereupon, Ms. Pipeboy spoke in a foreign language
 10 that the court reporter was unable to report.)
 11 MS. PIPEBOY: The uniqueness of Native American
 12 people -- an elderly gentleman, not Indian, said, if the
 13 Native people die, we will die, too. And that is very true.
 14 We look at the context. Lake Traverse
 15 Reservation, 1867. 9 million acres. It included two
 16 reservations. One in North Dakota and one in South Dakota.
 17 Our current -- let me check here.
 18 Our current acreage is 107,000 acres as compared
 19 to 9 million. I think the extent of government intervention
 20 into the livelihood and (foreign word) -- we say, I am
 21 Renville/Pipeboy. All of these allotted lands are held by
 22 (foreign word) families.
 23 I am a Renville. My grandfather -- if you'll
 24 excuse me for a minute -- my grandfather was the head man of
 25 the 1867 Allotment Act. He did not sign, but they allowed

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1 the Allotment Act to pass.
 2 His probate was quite extensive. When we look at
 3 traditional ways -- excuse me. Okay. He was born in 1824.
 4 He died in 1892, two years after the Allotment Act.
 5 In our traditional ways, Gabriel Renville, he had
 6 three wives. One of the wives was my grandmother. Those
 7 are accepted traditional ways at that time, whether or not
 8 people objected to them.
 9 Sitting Bull, he once said -- the agent came to
 10 tell him, you have to get rid of one of your two wives.
 11 Sitting Bull said, you tell them which one has to leave.
 12 Okay, the same situation.
 13 My grandmothers -- I call them all my
 14 grandmothers. I love them all. The first wife,
 15 Tukanmanikiye Win. She is my grandmother. Her name is
 16 Mary G. Renville. She was an allottee. They had 10
 17 children. Six of them died because of, shall we say,
 18 economic reasons.
 19 The second wife, Tunkantiomani Win. She was Anna
 20 T. Renville. She also had 10 children. Seven of them died.
 21 Three survived.
 22 The third wife, Witeca Win, Sophia Renville. She
 23 had six children. One of them died.
 24 This is the extent of Gabriel Renville's probate.
 25 Paper upon paper. You know, It is unconscionable to me that

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1 we are looked at in terms of -- however the Bureau of Indian
 2 Affairs choose to keep records.
 3 They fractionated the land areas on paper. My
 4 grandfather holds 320 acres of land. If you fractionate
 5 his land, I guess we all own a teaspoon of dirt. But when
 6 you go out to Lake Traverse Reservation, his 300 acres are
 7 still there. They still need to be utilized by family
 8 members.
 9 The extent of fractionation, I'm sure you all
 10 aware of Michael Larsen. He did a research paper on the
 11 extent of fractionation on reservations. He came to Lake
 12 Traverse. I was one of the individuals who gave comment.
 13 He said Gabriel Renville and Winona Crawford, their probates
 14 were the worst because they had so many errors.
 15 So when we look at the Allotment Act and the
 16 fairness of it and you come to Cobell, Cobell says, money
 17 will be given to buy out all of the fractionated lands.
 18 If this happens you will decimate Lake Traverse
 19 Reservation. When people live in poverty and you offer them
 20 money, they're going to accept money. Why? Because they
 21 have to eat.
 22 You know, this issue of poverty is one of the
 23 issues. How dare Cobell use people to find a way to define
 24 a determination of what to do with fractionated lands?
 25 Those lands are not fractionated. They are fractionated on

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1 paper. If we do the research we will find this out, and
 2 part of it is here.
 3 We take deference. We are not intellectuals. You
 4 will have to excuse us if we do not talk English -- speak
 5 English well.
 6 It says if the settlement becomes final you will
 7 give up your right to sue the federal government for claims.
 8 Lake Traverse is very unique if all of this land is
 9 allotted, for all reservations have tribal trust land.
 10 And when we look at the allotted lands, it is not
 11 part of the court issues. If you lived on allotted lands,
 12 you are tax-free. We do not have to pay taxes. And we
 13 enjoy that right. So we see the Cobell case as another way
 14 for the United States government, and whomever else, to take
 15 our land, and we will not allow that to happen.
 16 When we look at case law, the United States
 17 government created the policy. We did not. There is the
 18 Wheeler-Howard Act, the IRA, Indian Reorganization Act,
 19 okay. All of the tribes in the thirties were to come to the
 20 agency and vote whether or not they wanted to accept. Lake
 21 Travers voted against the IRA. We are non-IRA.
 22 We do not follow -- excuse me, fall under the
 23 policies and the statutes of the United States government.
 24 Why? Because we are a traditional government, and we chose
 25 to do so. So the acts and policies do not apply to us.

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<p>1 The vote count, which is also a matter of 2 historical reference, I believe it was 335 to 200. 3 THE COURT: You have about two more minutes, 4 please, Ms. Pipeboy. Thank you 5 MS. PIPEBOY: 335 to 266. 6 These are, again, all of the lands that have 7 already escheated on our reservation. We have lost. So we 8 disagree. We disagree with Cobell. The lack of informed 9 consent. We as historical as an account class cannot opt 10 out. We have the right to exclude ourselves. 11 We say we maintain inalienable rights to our land. 12 I think I read that in the Constitution somewhere. 13 We also object to the Indian education 14 scholarship. We realize education is a good thing, but 15 funds for education should come from treaty entitlement, and 16 should not be part of the class action case. So we object. 17 We object to the Cobell case, and we will continue to do so, 18 whether it is in this court or whether it is at the 19 International Court. 20 Thank you. 21 THE COURT: Thank you, Ms. Pipeboy. 22 I have next on my list, and I was asking my clerk 23 to find the written objection -- I don't seem to have it -- 24 of Dorothea Wilson. 25 MR. HARPER: Your Honor?</p>	<p>1 settlement agreement and the settling parties motions filed 2 on May 16, 2011. 3 Counsel requested individual -- 4 THE COURT: You will have to slow down. 5 MR. JACOBS: My statement is quite lengthy, and 6 that is the reason I was going at such a fast rate. 7 THE COURT: I don't think you will be able to read 8 all twenty some pages of written -- 9 MR. JACOBS: I only have 14 pages. 10 THE COURT: Go ahead and read your statement, but 11 you do have to read slowly so the court reporter can get it 12 down so we have it for the record and everybody can read in 13 the future. 14 MR. JACOBS: Okay. 15 THE COURT: Thank you. 16 MR. JACOBS: I am thankful that the court allows 17 up to 10 minutes, which is still a short time to object, to 18 a voice over 124 years of grievance. My individual 19 grievance covers the 99 year period beginning in 1912. 20 I am a supposed member of the historical class, 21 and confine my objections to the historical class issues. I 22 request that this court decide whether or not I'm properly 23 designated as a member of the historical class and offer the 24 following in support of my response and opposition to forced 25 membership in the historical class for the following</p>
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<p>1 THE COURT: Yes. 2 MR. HARPER: Keith Harper for the record. 3 THE COURT: Yes. 4 MR. HARPER: Your Honor, Ms. Wilson and Mr. 5 Solomon Quinn are the next two in order. They filed 6 identical objections to Ms. Pipeboy. In fact it was just a 7 photocopy of the same objection. 8 THE COURT: I see. 9 MR. HARPER: And we would just ask the court that 10 if they are heard that they be limited to speaking on issues 11 that have not already been touched upon. 12 THE COURT: I understand. They both filed 13 identical objections to Ms. Pipeboy? 14 MR. HARPER: That is correct. 15 THE COURT: I just didn't have a Xeroxed copy of 16 it. I just had the original. 17 Is Ms. Wilson here? Or is Mr. Quinn here? 18 (No response.) 19 THE COURT: All right, thank you. We will go to 20 Mr. Eddie Jacobs. Mr. Jacobs has filed objections to the 21 settlement. Good morning, Mr. Jacobs. 22 MR. JACOBS: Thank you, Your Honor. My name is 23 Eddie Jacobs. I am a Muscogee Creek Nation citizen, and I 24 am an account holder, and respectfully request the court's 25 permission to enter my oral response and opposition to the</p>	<p>1 reasons. 2 One, Eddie Jacobs' administrative claim satisfies 3 the definition of an exception to the class because it is 4 action filed on their own behalf prior to the June 10, 1996. 5 The Cobell original complaint and amended 6 complaint define the exception to the Cobell class as 7 historical class consisting of those individual Indians -- 8 Indian beneficiaries -- exclusion of those who prior to the 9 filing of the complaint on June 10, 1996, had filed action 10 on their own behalf stating a claim for historical 11 accounting. 12 B, trust administration class consists of those 13 individual Indians exclusive of persons who filed action on 14 their own behalf. 15 I originally asked for a reconciliation of my 16 father's, Johnny Jacobs, IIM account in 1987. Since then I 17 have continuously asked Department of Interior officials to 18 examine my IIM documentation for an accounting and 19 reconciliation. 20 My hopes for success were elevated in 1993 when 21 Mr. Jim Paris, Director of the Office of Trust Fund 22 Management stated in his January 29, 1993 letter to me. 23 This is recognized as a valid task. 24 I believe the Department of Interior officials 25 were considering reconciling my records when Cobell filed</p>

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1 this class action in 1996.
 2 After filing, the Department of Interior
 3 officials would not or could not discuss my claim, because
 4 they arbitrarily decided that I was a class member, even
 5 though there appears to be some doubt by the Department of
 6 Justice.
 7 In 1998 a letter from the DOG counsel, Louis S.
 8 Weiner, the plaintiffs' counsel, Mr. Weinter stated:
 9 "Should our understanding of
 10 the scope of the class
 11 certification be incorrect,
 12 or should you elect to allow
 13 us to communicate directly
 14 with Mr. Jacobs, please let
 15 us know."
 16 In 2060 DOG counsel Robert E. Kirschman, Junior's
 17 letter requested plaintiffs' counsel contact me regarding my
 18 status and stated:
 19 "If you have a different
 20 understanding, please let us
 21 know."
 22 Plaintiffs' counsel never contacted me. The fact
 23 is I did not learn the Justice Department wrote Plaintiffs'
 24 counsel about my claim until I read this letter attached to
 25 defendants' response to plaintiffs' opposition for motion to

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1 compel attorneys to sign statements of nonparties or release
 2 Eddie Jacobs, as attachment A and C filed September 21st,
 3 2006.
 4 Your Honor, for your convenience may I present a
 5 copy of defendants' response to the court? Settling parties
 6 have access to the documents on DOG's own website.
 7 Defendants' reference letters and other -- and my
 8 other documents offered prior to my action brought in 1987
 9 and reaffirmed in 1994 satisfies the requirement of the
 10 exception to the Cobell class.
 11 My claim is further supported by my father and my
 12 documents dating back to 1912, first brought to the BIA
 13 officials and the U.S. Solicitor's Office, and then later to
 14 the Office of Special Trustee.
 15 Harold Bloom, Assistant Inspector General, stated
 16 in his August 15, 1988 letter to me in response to my
 17 request for reconsideration of an audit that:
 18 "It is our decision not to
 19 audit your individual Indian
 20 money account."
 21 Mr. Bloom's letter confirms that I started my
 22 action prior to 1996 and shows that the DOG had my records
 23 in their possession.
 24 Additionally, he stated:
 25 "It is also important to note

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1 that these errors were made
 2 prior to the automation of
 3 the system."
 4 Many errors were made prior to the computer system
 5 -- computer era. Yet the settlement leaves all of these
 6 errors unaccounted for.
 7 The U.S. Solicitor Edward Kohn, October 16, 1998
 8 letter -- reference letter provides defendants turn my
 9 documents over to plaintiffs' counsel. Additionally, Kohn's
 10 letter shows both settling parties had my records, and
 11 neither offered them to the court.
 12 Both parties previously stated there was no record
 13 with full knowledge I had records until -- I mean dating
 14 back to World War I era.
 15 How is the denial of my claim for an adequate
 16 representation fair? The fact that defendants and
 17 plaintiffs decided there was a historical accounting of
 18 class members without obtaining a ruling from this court is
 19 not fair.
 20 More recently and equally unfair, the Garden City
 21 group third-party administrators decided that I'm a member
 22 of both Cobell classes without even knowing the relevant
 23 facts.
 24 In all fairness I ask this court to decide whether
 25 or not I am an exception to the historical class. I

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1 respectfully request the court make this decision so I may
 2 proceed with my action I began in 1987 and reaffirmed
 3 pursuant to the 1994 Trust Reform Act, Section 4012.
 4 I fulfilled the requirements of the 1994 statute
 5 before this class action was filed, yet both settling
 6 parties refuse to recognize my claim and supporting
 7 documents, even though the Office of Special Trustee
 8 recognized by documents and offered to perform a
 9 reconciliation accounting if plaintiffs' counsel would
 10 release me from the class. Plaintiffs would not.
 11 Without an accounting and reconciliation, there
 12 has been no chance to finish what I started in 1987 and
 13 reaffirmed in 1994. I repeatedly asked plaintiffs' counsel
 14 to protect my interests and those of Oklahoma Five Civilized
 15 Tribes and individual Indians, but they refused to answer
 16 any of my letters.
 17 Your Honor, may I present copies of these letters
 18 to the court for the record?
 19 THE COURT: Sure.
 20 MR. JACOBS: The settling parties already have
 21 them in their files, but I would like you to examine them as
 22 further proof of my statements here today.
 23 Plaintiffs stated in their May 16, 2000 motion
 24 that class settlement is the only realistic means to provide
 25 compensation and restitution relief to IIM Trust

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1 beneficiaries for the government's breach of trust and other
 2 wrongful conduct associated with its mismanagement of the
 3 IIM Trust.
 4 I disagree. If defendants provide an
 5 administrative hearing where an unbiased accounting and
 6 reconciliation can be accomplished based on supporting
 7 documentation, there should be no need of filing a case in a
 8 court of law. Besides, I understand the administrative
 9 claims must be exhausted before an action may be brought in
 10 a higher court.
 11 I respectfully ask this court to examine the
 12 reasons why plaintiffs' counsel failed to respond to Eddie
 13 Jacobs questions or recognize my request for help with the
 14 Oklahoma Five Civilized Indian issues not brought in this
 15 case.
 16 I understand why the defendants did not want my
 17 documents brought, since they would provide evidence of the
 18 wrongdoings and the mistakes which they are unwilling to
 19 admit.
 20 Eddie Jacobs' claim is sufficiently distinct from
 21 the class. All other class members, plaintiffs' counsel,
 22 have knowledge of reasons cited and all of Eddie's reference
 23 letters to plaintiffs' counsel.
 24 The plaintiffs and the defendants should already
 25 have my letters in the records, because I mailed them to

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1 the parties, to Judge Robertson, and select members of
 2 Congress.
 3 The reason my claim is sufficiently different are
 4 -- there are 16 reasons. I could read those --
 5 THE COURT: You have about two minutes left.
 6 MR. JACOBS: Well, in closing then -- I felt like
 7 the time period wasn't adequate to address all of my issues,
 8 and I can provide the court with a copy of my documents and
 9 the letters which I have.
 10 THE COURT: Do you have them with you, those
 11 letters?
 12 MR. JACOBS: I have them right here.
 13 THE COURT: You can give them to my clerk of
 14 court, and we will have them filed.
 15 MR. JACOBS: Thank you, Your Honor.
 16 THE COURT: All right, thank you, sir.
 17 We are going to take a break. The court reporter
 18 has been going without a break for over an hour and a half,
 19 and it is only reasonable to take a short break. We will
 20 take about a 10 minute recess. We will be back and take up
 21 Mr. Yamamoto on behalf of several -- an attorney
 22 representing several objectors when we return.
 23 All right, a 10 minute recess.
 24 (Recess.)
 25 THE COURT: We are going to resume with the

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1 objector speaking. I missed one objector. I was told that
 2 Solomon Quinn, whose name I mentioned earlier, was actually
 3 here sitting in the jury box, and I missed him. I apologize
 4 for that. So Mr. Quinn, if you want to come up at this time
 5 and address the court you may do so.
 6 Your objection was the same as Ms. Pipeboy, so I
 7 hope you won't repeat what she said. It has to be in some
 8 area we didn't cover.
 9 MR. QUINN: Thank you, Your Honor.
 10 Why I am here? I inherited my ancestors' land. I
 11 inherited land from my ancestors, and why I opted out,
 12 because I believe that in the Cobell case what was awarded -
 13 - maybe we should have gotten some lands back so that we
 14 could be more self-sufficient.
 15 I did not make the statement that everything is
 16 coming from my heart. I apologize for that. But I hope
 17 what all is said from my relatives that are here that it can
 18 be honored, and I appreciate that you have us here.
 19 And that is all I have to say right now.
 20 THE COURT: Thank you, Mr. Quinn. I appreciate
 21 your coming up.
 22 MR. QUINN: Thank you very much.
 23 THE COURT: We will turn back to Alan H. Yamamoto
 24 representing various objectors.
 25 Is he here today?

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1 (No response.)
 2 THE COURT: He filed an appearance and a brief on
 3 behalf of the following individuals. He is from Alexandria,
 4 Virginia, an attorney. It was be on behalf of Feron Thunder
 5 Hawk, Laura Begay, Louise and Joe Marie Murphy.
 6 Are any of those individuals here who would like
 7 to speak since their attorney is not apparently?
 8 (No response.)
 9 THE COURT: Then his brief on behalf of their
 10 interests has been filed, and I have reviewed it, concerning
 11 the issues that he raised regarding both the amounts of the
 12 award and the settlement terms on the land purchase, about
 13 extending it, as well as the objectives to the attorney
 14 fees, expenses and incentive awards.
 15 We will pass on then to Jason Nathaniel Corwin
 16 from Spencer, New York.
 17 Is he here today?
 18 (No response.)
 19 THE COURT: Mr. Corwin had filed an objection
 20 objecting to it because of a lack of a full accounting. We
 21 will pass on Jason Nathaniel Corwin.
 22 Ms. Judith A. Heart Warrior Chosa, C-h-o-s-a. Is
 23 Ms. Chosa here?
 24 (No response.)
 25 THE COURT: Ms. Chosa had filed a notice with an

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<p>1 interest -- intent to appear, bust did not file any 2 objections, per se, just said that she wanted to appear and 3 testify before the court. 4 (No response.) 5 THE COURT: We will waive Ms. Chosa. 6 The next I have is a counsel, Theodore Frank, on 7 behalf of Kimberly Craven, objection to attorneys' fees, 8 incentive payments and awards, and as to the structure of 9 the settlement class action. 10 We received a lengthy brief from Mr. Frank. He 11 has also been heard on motions before the court previously. 12 All right, Mr. Frank. 13 MR. FRANK: May it please the court, Theodore 14 Frank, pro bono, for class member Kimberly Craven. Ms. 15 Craven could not be here today because of the cost of 16 travel, but she supports this objection, obviously. 17 THE COURT: Right. 18 MR. FRANK: And we would like to join Carol Good 19 Bear's objection, and I hope I can be half as eloquent as 20 she was. 21 A District Court judge evaluating a class action 22 settlement has a fiduciary duty to the unrepresented members 23 of the class to vigilantly protect those absent class 24 members' rights. 25 The settling parties asked to have Your Honor</p>	<p>1 changing the underlying substantive law. Nor can Congress 2 pass a statute overriding the individual Constitutional 3 protections of due process currently enshrined in many parts 4 of Rule 23(a) and (b) of the Federal Rules of Civil 5 Procedure. 6 Section 101(c) of the 2010 Act merely authorizes 7 the government to settle the case, a prerequisite to 8 settlement taking place because of the need for 9 Congressional authorization of the billions of dollars to be 10 spent. 11 The ratification is permission for the Executive 12 Branch to go forward rather than an order to the Judicial 13 Branch to disregard the requirements of Rule 23(e). 14 THE COURT: Slowed down. 15 MR. FRANK: In advance I gave the court reporter a 16 copy of my remarks to help her. 17 Nor could Congress give such an order. The 18 federal government is adverse in litigation to the absent 19 class members and would be nonsensical to say that it is 20 owed deference in the decision of whether or not a 21 settlement is fair, adequate and reasonable. Congress's 22 litigation decisions deserve no deference. 23 In fact Congress contemplated that this court 24 might have valid reasons not to certify the class. Reading 25 section 101(d)(2)(A) of the Act it says:</p>
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<p>1 abdicate that duty and defer to some Congressional plenary 2 power. This position in their briefs reflects a 3 fundamental misunderstanding of both the Claims Resolution 4 Act -- 5 THE COURT: Slow down a little bit for the 6 reporter, please. Thank you. 7 MR. FRANK: And of the role of Congress and the 8 courts in government's litigation. 9 Our briefing presents several independent grounds 10 for rejecting the settlement, but I would like to focus on 11 two issues in response to the parties' briefing today. 12 THE COURT: All right. 13 MR. FRANK: First, Congress did not and cannot, 14 for Constitutional reasons, divest this court of its Rule 23 15 review of this class-action proceeding. 16 Second, as a matter of the Rule 23 review, this 17 settlement and class, in general, falls far short of the 18 minimal constitutional Rule 23(e) thresholds. 19 First, the Claims Resolution Act did not make the 20 settlement into law. Rather, it merely endorsed and funded 21 an Executive Branch decision to settle litigation and left 22 the ultimate resolution to this court. 23 Congress could not constitutionally have done what 24 the settling parties claim they did. Congress may not 25 dictate the rules of decision in an individual case without</p>	<p>1 "Notwithstanding the requirements 2 of the FRCP, the court in 3 litigation may certify the trust 4 administration class." 5 May certify, Your Honor, rather than shall certify 6 the trust administration class. And the facial 7 constitutionality of the statute is preserved only by the 8 fact that Congress did not mandate the certification of the 9 class. 10 Those valid reasons for withholding certification 11 is contemplated by Congress surely include certifications 12 that would violate the due process rights of the absent 13 class members. 14 Apart from the due process ramifications, the 15 second reason for Congress's deference to the judicial 16 determination of class certification and settlement is 17 obvious. Congress cannot constitutionally dictate the rule 18 of decision in a pending case without changing the 19 perspective substantive law. 20 That is a simple separation of powers principle 21 from the United States versus Klein, which neither party 22 cites, reaffirms in several opinions in this court, and in 23 fact more recently in this very case in the D. C. Circuit in 24 2004 which held that there was no Klein violation because a 25 particular law repealed the substantive underlying law.</p>

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<p>1 But that did not happen here. There was no 2 underlying repeal of Rule 23, and as such, the 3 interpretation of the Act that the settling parties urge 4 upon this court would violate Klein. 5 The 11th Circuit addressed exactly this issue in 6 the Terry Schiavo case where the concurrence addresses these 7 issues. 8 Now the government argues in the context of a 9 lawsuit settlement that Congress has sort of carte blanche 10 to extinguish rights, that they can pass a statute and 11 settle the lawsuit that way. For that they rely upon dicta 12 in Sheridan Square and some related cases. 13 I think that that is an incorrect reading of 14 Sheridan Square. That was a fact intensive decision. But 15 even if the government's reading is correct, Sheridan Square 16 was superseded by the Supreme Court in United States versus 17 Winstar, which they also failed to bring to the court's 18 attention. 19 In Winstar, of course, the court held that 20 Congress cannot resolve contractual disputes by pulling the 21 rug out from under the private contracting party. 22 Now what is true in the contractual context is 23 even more so in the fiduciary trust context. The plenary 24 power of Congress, with respect to Indian law, does not 25 change that. We've seen courts apply Winstar to the Indian</p>	<p>1 and the class that constitutionally requires 2 decertification. 3 The incentives no longer align, and that is the 4 government's own test. The class can no longer trust that 5 the representatives' interests are their own interests, 6 because with \$13 million at stake, the class representatives 7 have as much incentive to sign off on an unfair settlement 8 as a fair settlement, and as much of an incentive to 9 approve an unfair -- sign off on an unfair \$223 million 10 windfall for the attorneys as they do for a fair attorney's 11 fee. 12 Now we don't know why Ms. Cobell changed her mind, 13 but we do know that she did change her mind after the 14 possibility of millions of dollars for settlement approval 15 became available to her. 16 Before the Senate Committee on Indian Affairs 17 Oversight on March 29, 2007, Ms. Cobell testified that the 18 trust administration claims were worth billions of dollars, 19 and that's why a \$7 billion legislative solution that would 20 not have needed court approval was rejected by the 21 plaintiffs. And that is the same one that the plaintiffs 22 said did not exist, but somehow she testified about it. 23 There has been no admission that she was mistaken 24 or incorrect in her previous testimony. This was not 25 addressed in Cobell 22, which obviously had nothing to do</p>
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<p>1 law context on a couple of occasions. 2 Cherokee Nation versus Levitt, 543 U.S. at 646, 3 and I also refer you especially to Judge Gajarsa's 4 concurrence in the Federal Circuit in 1999 in Babbitt versus 5 Oglala Sioux, 194 F. 3rd, 1374. An ex post extinguishment 6 of fiduciary rights is impermissible. 7 Now this is all just to show that the court cannot 8 defer to Congress and must undertake its own Rule 23 9 evaluation. When this court reaches the merits of the Rule 10 23 questions, you will find that the class certification is 11 woefully deficient under Rule 23 and constitutional 12 standards, and that the settlement does not meet the 13 requirements of interclass equity that Rule 23(e) requires. 14 Now our objection details at length several 15 independent reasons to reject the settlement under 23(a)(b) 16 and (e). But I would like to bring the court's attention 17 to the problem of the adequacy of the representation in 18 particular, and Ms. Good Bear touched upon this. 19 The settling parties do not dispute that this is a 20 constitutionally compelled inquiry under Shutts, recently 21 reaffirmed in Concepcion. 22 The lawyers have agreed to ask for -- excuse me, 23 the plaintiffs have asked for an unprecedented \$13 million 24 windfall for the class representatives. In doing so, they 25 create a conflict of interest between the representatives</p>	<p>1 with the trust administration claims, which were only bought 2 for the first time with respect to the preliminary approval. 3 And now the class is getting a fraction of what was 4 available to them in 2007. 5 We see Ms. Cobell's brief supporting settlement 6 contradicting what she told Congress in that 2007 testimony. 7 My client, Ms. Craven, argued that settlement was unfair 8 because it failed to take into account the individualized 9 circumstances of class members with widely disparate claims 10 under the trust administration class. 11 MR. HARPER: Your Honor, I would like to object at 12 this time. These issues are a field from what was presented 13 by Mr. Frank in his brief. 14 THE COURT: Sir, are you going into a new area 15 that you did no raise previously? 16 MR. FRANK: No, Your Honor. We are defending an 17 argument that we made in our brief in response to an 18 argument that they made for the first time after we filed 19 our brief. 20 MR. HARPER: Your Honor, he is discussing issues 21 that were raised in what is now a stricken brief, Your 22 Honor. 23 THE COURT: Right. 24 MR. HARPER: And that is impermissible, of course. 25 THE COURT: I think that is a problem.</p>

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1 MR. FRANK: Well, they argued that the brief
 2 should be stricken because I would have an opportunity to
 3 raise it at the fairness hearing, and now they are saying
 4 that I can't raise them at the fairness hearing because the
 5 brief was stricken.
 6 THE COURT: I will give you a couple of minutes to
 7 finish that up.
 8 MR. FRANK: Thank you, Your Honor.
 9 Ms. Cobell's brief, and this is what I'm
 10 responding to, she claimed that no such people existed, that
 11 there was nobody out there who had their sizable claim
 12 transfer to another class member.
 13 But Ms. Cobell herself testified in 2007 about
 14 James Kennerly, an example that demonstrates exactly what we
 15 are talking about in our April 20th objection. She told
 16 that Congress that his trust land was pilfered by oil
 17 companies over decades without any compensation because of
 18 misadministration of her trust claims.
 19 She told Congress that he was entitled to
 20 millions, and now she would have his claim for misallocated
 21 oil royalties be resolved for \$500 without an accounting,
 22 because all that are available in his trust account are the
 23 pennies that he didn't -- because he never received the oil
 24 royalties in the first place, and all of those claims are
 25 waived in the trust administration class, which groups

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1 together dozens of widely disparate claims. I have never
 2 seen a class certified that sprawling. And the parties do
 3 not point to any class that spawned that has ever been
 4 certified.
 5 That \$500 is the same as a hypothetical Indian,
 6 and it is not hypothetical, because we have just heard
 7 about a hundred thousand Indians with an average of \$.15
 8 each, who are getting the same \$500. But these two entirely
 9 unrated claims are in the same impermissibly sprawling
 10 class.
 11 So why is Ms. Cobell now arguing that Mr.
 12 Kennerly's claims don't exist? Is the possibility of an
 13 outsized multimillion payday why? We don't know. Mr.
 14 Kennerly did not opt out. We don't know why Ms. Cobell did
 15 not tell what she told Congress was her close personal
 16 friend that she settled his multimillion dollar claim for
 17 \$500.
 18 Maybe she was wrong in what she told Congress.
 19 We don't know, but we do not have any explanation for why
 20 that story has changed. We have no admission that they
 21 were incorrect or mistaken in that earlier testimony. And
 22 given incentives that \$13 million creates, to change the
 23 story and forget about Mr. Kennerly, no explanation would be
 24 adequate.
 25 The cases the parties cite to the contrary are

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1 inapposite. A \$2,500 incentive payment to a \$7,500
 2 incentive payment, these are not the sort of incentive
 3 payments that distort incentives or create conflicts the way
 4 \$13 million does. And as Judge Easterbrook said in Murray
 5 versus GMAC:
 6 "It is inherently impermissible
 7 for parties seeking to litigate
 8 on behalf of a class to take a
 9 widely disproportionate share
 10 of the settlement proceeds of
 11 litigation."
 12 And if Ms. Good Bear is correct, they are taking \$13 million
 13 for a claim that was worth under 60.
 14 Now the Kennerly case and the other issues that we
 15 discussed in our April 20 objection demonstrates the
 16 constitutional problem of cohesiveness. It is not enough
 17 for there to be a single common issue. The underlying class
 18 has to be sufficiently and predominantly cohesive to be
 19 treated identically, and that simply is not possible in the
 20 sprawling trust administration class.
 21 The parties fail to identify a single example of a
 22 class this individualized with this many disparate claims
 23 being certified as a single class.
 24 When courts refer to rough justice, the standard
 25 that the parties ask this court to take, the rough justice

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1 that the courts are talking about, you know, they are
 2 leveling off small claims.
 3 You have the consumer fraud case, and somebody
 4 with four boxes of cereal gets treated the same way as
 5 somebody who bought two boxes of cereal, and given a de
 6 minimis claims, it is okay to sort of even that out for the
 7 ease of administration.
 8 You cannot do that in a case where there are
 9 millions of dollars at stake. And see, for example, the
 10 Reynolds versus Beneficial National Bank case -- I believe
 11 we cited that -- where it was only the smallness of the
 12 claim that permitted that sort of leveling.
 13 It does not refer to a scything of the entire
 14 class, where those who are entitled to nothing get the same
 15 as those who Ms. Cobell earlier claims are entitled to
 16 millions.
 17 I would like to bring to the court's attention
 18 something that contradicts Ms. Cobell's statement that the
 19 Indian community supports the attorneys' fee award here.
 20 Last week the General Assembly, at the 2011 mid-
 21 year session of the National Congress of American Indians in
 22 Milwaukee, Wisconsin, they adopted a resolution endorsing
 23 the government's request that attorneys' fees and expenses
 24 and costs in this case be capped at \$50 million.
 25 They also supported the fee application of NARF.

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1 We do not take a position on that.
 2 THE COURT: Did they object to the settlement
 3 overall?
 4 MR. FRANK: They did not object to the settlement
 5 to my knowledge.
 6 You know, the majority of Indians should not
 7 object to this settlement. This settlement is a windfall
 8 for the majority of Indians. The problem is the inter-class
 9 equity problems, that there are substantial minorities that
 10 the settlement does not treat fairly and cannot treat
 11 fairly.
 12 We raised several other issues in our objection.
 13 I am short on time. I am happy to answer any questions you
 14 might have.
 15 THE COURT: Thank you, Mr. Frank.
 16 MR. FRANK: Thank you, Your Honor.
 17 THE COURT: The next was Ms. Loren Zephier. She
 18 notified the court this morning by e-mail that she is unable
 19 to attend. She thanks the court for the opportunity but
 20 will not be able to be here.
 21 We will than to go to Margie Eder, E-d-e-r. Ms.
 22 Eder has filed objections to the court continuing this case
 23 as well as to the settlement.
 24 MS. EDER: Good morning, Your Honor.
 25 THE COURT: Good morning.

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1 MS. EDER: Your Honorable Judge Hogan, I would
 2 like to thank you for allowing me to come here and speak
 3 concerning this opposition hearing. I did want to wish
 4 Eloise good health, and I'm praying for her, and I would ask
 5 that you would relay that message to her.
 6 However, you attorneys, and I am referring to you
 7 at this table, the Lord God rebukes you, because you want to
 8 line your pockets by robbing a people of that which is not
 9 yours to take.
 10 You consider within yourself that you are entitled
 11 to more, and you should not be of a greedy heart. \$233
 12 million is not right. Nor should it even be considered by
 13 this court.
 14 You entered into this lawsuit knowing full well
 15 that you could receive nothing or very little. Now that
 16 the settlement is coming to a close, you think within
 17 yourselves that you are to receive hundreds of millions of
 18 dollars.
 19 You claim to be representing us for the good of
 20 the Native American people, yet the fees that you are
 21 attempting to negotiate, those fees will take more from a
 22 poor people, and that is a shame on you.
 23 In God's mercy you were given grace to continue on
 24 in this lawsuit, but your greed has overcome you, and you
 25 have lost your vision for the righteous sake that you once

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1 held.
 2 You wrote in the beginning of this lawsuit, all
 3 plaintiffs printing this action on their own behalf and on
 4 behalf of all persons similarly situated. All. And I don't
 5 mean to be yelling, but it sounds like I am.
 6 Judge Hogan, I request of the court to set the
 7 attorney fees at \$50 million and no more. The attorneys
 8 were full knowledge to the risks that are involved in this
 9 type of lawsuit.
 10 My family has held the IIM accounts since the
 11 creation of the IIM and has suffered greater damage, more
 12 than most in this court, and certainly more than these
 13 attorneys that sit before us and ask for more money, and are
 14 willing to take away what little most will receive in this
 15 settlement.
 16 Every member of my family before me is dead. My
 17 parents, to my grandparents, to make great parents -- great-
 18 grandparents, and so on. Do you understand this? None of
 19 them will receive any compensation for the horrific
 20 mismanagement of their lands, their minerals, their oil,
 21 their gas leases, all of which was their money and could
 22 have helped them to escape the vastness of the poverty in
 23 which they lived.
 24 Yet I am forced to listen to those that claim that
 25 they are representing me and my family for my better

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1 interests.
 2 By the attorneys own tongues, their desire is for
 3 more, while I am to settle for less -- \$1,500, while they
 4 are attempting to walk away with millions upon millions.
 5 Yet I am the one who has held my account since 1965. 46
 6 years.
 7 I do not know of others personally that own in
 8 combination 720 acres of their own land. I own land in
 9 Montana, in North Dakota, in South Dakota. My land has
 10 cattle, oil, gas, minerals, pasture, water and even highways
 11 on it.
 12 I have seen others that are not native raise
 13 their family on my land and make a living enough to care for
 14 their families very, very well, all the while that I
 15 received less than \$165 a year from it. And it is my land.
 16 My land.
 17 Why should I live as an impoverished woman when I
 18 own all of this land? And if I do not agree to lease my
 19 land, then the laws will lease it anyway to another.
 20 I hold leases in my possession, and they are right
 21 here. And I would submit this as documentation if you want
 22 it, that I am offered and paid one penny -- that is right
 23 here.
 24 Second one, the undersigned hereby accepts the
 25 offer of zero zero. Nothing.

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1 Here is another one. Attached is a notice to
 2 lease two point five acres. This lease is for 50 years. I
 3 think on this one I have to be 104 years old. I don't think
 4 I'm going to live that long, and I think the cost of -- what
 5 do they call it? The cost of inflation or whatever that
 6 goes right along with it -- anyway.
 7 I watch my land that I share with my sisters
 8 diminish. The same plot of land -- now I have much, much
 9 land, was 11 acres. This is just one area. It was 11
 10 acres. It is now down to five. I didn't die. It did not
 11 go to my children. I am -- I think I am still alive. I am
 12 still here.
 13 I will remain silent no longer. Nor will any
 14 steal from my children, and the blessings of God will seal
 15 that, and I know this. Enough is enough. The attorneys
 16 have insulted my family with their proposed settlement and
 17 the greedy request that they have.
 18 They want millions of dollars, and they readily
 19 expect my family to accept peanuts -- I mean none of you
 20 would accept it yourself if you had to live it.
 21 This whole lawsuit should just go away, or it
 22 should be reconfigured fairly to all Native people, not just
 23 so the attorneys become multimillionaires at the expense of
 24 me, and my family, and the Native American people.
 25 I ask that you would remember the names of my

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1 family that cannot speak from the grave concerning this
 2 settlement when you decide which direction to go with it.
 3 They were warriors, moms and dads, sons and daughters, and
 4 even veterans of war to help this country retain its
 5 freedom. And all of them are deceased.
 6 Their names were Main Horn, Fixes Up, Bunch of
 7 Beads, Fighter, Long Nine, Light on Land, Barrel, and Jack
 8 Eater was a Purple Heart recipient more than once, who was
 9 my father. They are all dead, too. Minnie Two Shoes. She
 10 is my oldest sister, and she was one of the founders of the
 11 Native American Journalist Association, and she just passed
 12 on last April.
 13 My family records date back before the beginning
 14 of my reservation, and it is documented on my reservation,
 15 which is in Poplar Montana, the Fort Peck Indian
 16 Reservation. And our family was to the government in trust.
 17 \$1,500 for 46 years in it? And 233 million to you
 18 guys, and you have already received money?
 19 THE COURT: Ms. Eder, you are repeating yourself.
 20 MS. EDER: I know. I've got go stop that.
 21 THE COURT: Let's finish up.
 22 MS. EDER: I'm repeating myself.
 23 Well, that is my opposition, and I do have one
 24 other thing. One of the attorneys said something about that
 25 it was fair, but it is not really fair, because what is

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1 happening here is that it is very obvious -- I have
 2 documentation of land abuse, mismanagement, and they are
 3 going to base this off -- like I get 162 -- maybe \$162 every
 4 year.
 5 But that \$162 is being based off of downright
 6 thievery, and yet I have had my land since 1965, sir. And
 7 then there are other people that are going to come in and
 8 they may have one transaction, and they're going to walk
 9 away with thousands upon thousands of dollars, but based on
 10 just -- because I don't have a whole lot of money in my
 11 account, and I wonder why?
 12 Well, it shows in my documentation. It is getting
 13 stolen, and my land is being removed from me. I am going to
 14 get like \$1,500. And it is wrong, because it is being based
 15 on untruth of what really is.
 16 It is like you have got a whole piece of pie, and
 17 they are only going to base it on the one piece of pie I
 18 have left. What happened to the rest of the pie? Because I
 19 owned that whole pie, and I don't know how else to explain
 20 that.
 21 I bought my records here. They are dated back
 22 from 1965. I was told by a Senator -- when I talked to him
 23 he said, why doesn't anybody else have documentation? And
 24 then I was also told that whoever held all of these papers
 25 destroyed them.

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1 Well, I did not destroy mine. I kept mine. And,
 2 sir, if you would like to review them, I would put them in
 3 trust for you if I could get a copy -- I don't want them to
 4 disappear.
 5 THE COURT: I think you had better keep them for
 6 right now.
 7 MS. EDER: Anyway, I'm done.
 8 THE COURT: I don't want you to lose them.
 9 MS. EDER: No. Thank you.
 10 THE COURT: Thank you, Ms. Eder. I appreciate it.
 11 The court recognizes Ms. Mary Aurelia Johns from
 12 Nebraska.
 13 Good afternoon, Ms. Johns.
 14 MS. JOHNS: Good afternoon.
 15 My name is Mary Aurelia Johns, also known as Mary
 16 Lee Johns. I am an enrolled member of the Cheyenne River
 17 Sioux tribe, and I am an IIM account holder. In fact, I
 18 have had my account for 49 years, since 1962 when my mother
 19 died. My lands -- my trust lands are on the Cheyenne River
 20 Sioux Reservation in South Dakota.
 21 I am objecting to the proposed a settlement in the
 22 Cobell versus Caesar -- Salazar case because of -- however,
 23 before I begin my discussion of why I am objecting, I would
 24 like to take this opportunity tell you why I did not opt
 25 out.

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1 It took a great deal of struggle to make this
 2 decision. I chose not to opt out because if everyone opted
 3 out there would be no one to tell you what was wrong with
 4 this agreement, and I knew that it would be important for
 5 you to know why a person like myself objects to this
 6 agreement.
 7 My objections are as follows: I challenge the
 8 suitability of the named plaintiffs to maintain this action
 9 on behalf of myself.
 10 One, according to the federal government, the
 11 plaintiffs have received a personal accounting, yet those of
 12 us who they purport to represent have not. Furthermore, the
 13 plaintiffs have asked this court to prohibit the government
 14 from sending an accounting statement to me.
 15 Two, the plaintiffs by asking for an incentive
 16 award, no longer have commonality with the other IIM account
 17 holders and now represent only themselves. Trying to
 18 collect these awards and asking this court to rule that the
 19 agreement is fair and reasonable, and to give a final
 20 approval to the settlement, this is an obvious conflict of
 21 interest.
 22 I also challenge the plaintiffs' assertion that
 23 their claims are similar to mine, which has resulted in
 24 their being allowed to negotiate this agreement with the
 25 federal government that resulted in the trust administration

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1 class being created.
 2 This claim that commonality is based on the fact
 3 that IIM account assets are all held in trust by the federal
 4 government. This is not true, and I object to the assertion
 5 for the following.
 6 One. Each lease agreement that is approved by the
 7 federal government under its responsibility as a trustee has
 8 separate regulations and laws that govern the terms,
 9 obligations and management of these leases.
 10 Two. The laws that govern these leases, for
 11 example, are the American Indian Agricultural Management
 12 Reform Act, which governs my lands, are totally different
 13 than the Mineral Leasing Act or American Indian Forest and
 14 Woodlands Act.
 15 Mismanagement claims that individuals have under
 16 all of these types of leases do not share a common basis in
 17 law, and the facts that would be required to support these
 18 claims will be entirely different from the plaintiffs.
 19 There is no commonality for this class to be certified.
 20 In regard to the certification of the trust
 21 administration class, I have questions that need to be
 22 answered.
 23 One, my questions to this court are this: Would
 24 these claims have enough in common to take the
 25 administration class to trial? If you cannot certify the

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1 class for trial, how can the court then reasonably certify
 2 the trust administration class for settlement?
 3 Two. These administration claims under the trust
 4 administration class are the most egregious claims, and yet
 5 this class, according to the negotiated agreement is the
 6 last to be paid after the attorneys, the plaintiffs and the
 7 historical accounting class.
 8 This is neither fair nor reasonable. These
 9 payments will bear no relationship to any estimate or actual
 10 damages to an individual's assets, but purely on what is
 11 left over and how much has gone through the IIM account of
 12 those who are in the class.
 13 However, my strongest objection is to the
 14 following fact:
 15 The very idea that individuals, who I never agreed
 16 to represent me, should then take it upon themselves to
 17 negotiate, on my behalf, with the federal government that
 18 has over many, many, many years, mismanaged the lands that I
 19 inherited from my great great grandmother, Cleans as She
 20 Comes, my great grandfather, Poor Buffalo, my great
 21 grandmother, Grows in a Day, my grandmother Sara Poor
 22 Buffalo, my grandmother Mabel Dupree, and my mother, Marie
 23 Justice.
 24 The allotment of Lakota lands began under the law
 25 of 1889 that broke up the great Sioux reservation and

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1 provided for the allotment of the five smaller reservations
 2 that were created under this act.
 3 The Lakota were then forced to move to these
 4 allotments when the federal government began stopping the
 5 distribution of rations. They were then told that they had
 6 to grow their own food or starve, thus forcing the Lakota to
 7 accept the allotment of the lands.
 8 These lands that I inherited were specifically
 9 chosen by my great grandfather, who knew which lands he
 10 wanted, because they were in the same area that his family
 11 had spent many, many winters. They are truly our
 12 traditional lands.
 13 He knew that the lands were rich grasslands that
 14 would provide for his family. These lands did provide for
 15 several generations of our family by allowing us to have
 16 cattle and horses, but now these lands, because of
 17 mismanagement by the federal government, have been
 18 overgrazed to the point where very few cattle can be
 19 nourished for the entire summer.
 20 Moreover, the large cottonwood stands are no
 21 longer there to protect the river that flows through my
 22 family's lands.
 23 Not once has the federal government ever
 24 determined just how much damage has been caused to these
 25 lands by the overgrazing that allowed prairie dogs, evasive

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1 species of weeds, and other ecological damages to the once
 2 productive lands on my reservation.
 3 By allowing the certification of the trust
 4 administration class, I'm being denied the right to know
 5 exactly how much damage has been done and to be represented
 6 fairly and adequately as required by due process under the
 7 United States Constitution.
 8 Because this action purports to settle the trust
 9 administration claim, thi8s settlement may forever preclude
 10 my claims against the Bureau of Indian Affairs from
 11 mismanagement related to the land itself.
 12 I ask, can I sue for restoration of these damages
 13 after the settlement?
 14 As you can see, sir, these lands are precious.
 15 They hold the bones of my people. There are many graves on
 16 this land that are directly related to me.
 17 For the 14 years of this litigation of this case,
 18 I was continually assured that it was only about an
 19 accounting and never about our lands. Then in the last
 20 minute the land was brought in, and those of us who are tied
 21 to this land now face this new interjection into a case that
 22 was not about land.
 23 With this in mind, I also would like to say
 24 something about what this gentleman on the side and what
 25 this gentleman on the side talked about in regards to

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1 notification. They stated that this notification regarding
 2 these class actions -- this class-action suit was the best
 3 that has ever been done.
 4 A 16-page document was sent down to the
 5 reservations to people who, I guess, were on some kind of a
 6 list, and were told, you know -- but you have to understand,
 7 culturally our people do not react to documents sent by the
 8 federal government. They throw it on the side, just like
 9 probably more people in United States than you can imagine
 10 getting a letter from the federal government would probably
 11 do. Throw it on the side.
 12 Historically, every time Indians have won an
 13 award, from the Alaska Native Lands Claim Settlement Act, to
 14 the War Eagle Act, of which my children were both entitled
 15 to, you had to participate by filling out a form and saying
 16 you wanted to participate.
 17 This process went against historical and
 18 traditional manners of which Indian people have come to
 19 realize that if they wanted to participate they had to fill
 20 out a form.
 21 My sister, who is one of the most intelligent
 22 individuals that I know of, was shocked when I told her --
 23 she said, well, I opted out. And I said, well, did you send
 24 in the information? And she said, no. I did not fill out
 25 the forms, so therefore I'm not participating.

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1 And that is one of the things, if you truly want
 2 to know about these two gentleman speaking supposedly on our
 3 behalf, actually are stating the truth about only two
 4 percent or whatever they said, 99 point something percent of
 5 people who did not -- who chose to participate, then you
 6 must have to go back and research exactly what took place.
 7 That was a very, very legalistic form that they
 8 sent out. A 16-page form that was sent out to individuals
 9 who may not even have a sixth-grade education. And I am not
 10 trying to put down my people, but there were very educated,
 11 very knowledgeable individuals who were chairmen of certain
 12 tribes who, in fact, were against this whole process in the
 13 beginning, and did not read that document.
 14 I read it, and I was saying, do you realize that
 15 you have to do this? And they said, no. Let me see that.
 16 So I was passing my document around at a National Congress
 17 of American Indians meeting so that people, who should have
 18 known better, should have read it, and they didn't.
 19 And that is why I want you to question these two
 20 individuals who stood up and said, this was the best
 21 notification service ever done for Indian people.
 22 THE COURT: There was a TV and radio, was also not
 23 followed at all?
 24 MS. JOHNS: Well, people don't -- traditionally --
 25 traditionally, people don't participate by ignoring

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1 something. That is the way it is traditionally. You have
 2 to look back into the history of our people.
 3 They did not go to the -- they didn't go to the
 4 meetings where they were discussing IRA because they did not
 5 agree with the IRA. They stayed home. As a result of them
 6 staying home, it appeared that they supported it. But this
 7 is -- if you look historically, culturally you can ask any
 8 individual who knows something about Native people, then you
 9 will find that out.
 10 I just also want to say something, and I'm going
 11 to say it with the understanding, sir, that I do know that
 12 you have an important position, okay. But I also would like
 13 for you to remove yourself, sir, from these rulings of
 14 fairness of this proposed settlement.
 15 And I ask you, because I have read press reports
 16 by reputable journalists where you publicly stated on
 17 Friday, 15 October, 2010, that you urged Congress to quickly
 18 approve the settlement of the individual Indian trust case
 19 known as Cobell versus Salazar, quote, on its own merit,
 20 unquote.
 21 By stating that the settlement was a fair one
 22 and that the, quote, the merits are very clear, unquote,
 23 you urged Congress, quote, in the strongest terms, unquote,
 24 to approve the settlement, quote, as soon as possible,
 25 unquote.

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1 By these very statements you have gone on record
 2 in support of this agreement without waiting to hear from
 3 the very people that this settlement impacted the most. As
 4 a result, I fear that my statements, and the statements of
 5 others here today, have been given without -- what is the
 6 term, just to speak, I guess. Just to talk -- and will not
 7 receive the objective, fair and impartial consideration that
 8 I have the right to expect from a federal judge.
 9 We have a right to the appearance of fairness and
 10 impartiality. We do believe that your public statements
 11 have placed a cloud of doubt over your ability to rule
 12 fairly on a matter that your public statements suggest you
 13 may have already prejudged.
 14 So sir, I ask for justice for myself, my children,
 15 my grandchildren, but most of all my great grandchildren.
 16 My great granddaughter and my great grandson.
 17 You have heard several times several people
 18 talking about individuals who have passed away. My family,
 19 there are very few of the older ones left. That is true.
 20 But my family has always considered the grandchildren way
 21 more important than themselves. In fact my grandmother
 22 would go without food so that she could feed my sister when
 23 we were in very poor circumstances.
 24 So I ask for justice great-granddaughter and my
 25 great-grandson, who are the eighth generation of my family

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1 who would inherit the Cleans As She Comes lands. The
 2 question is, what condition will these lands be when they
 3 inherit?
 4 And that is what this whole concept of this trust
 5 administration class is about. It is about the land. And
 6 we have a statement in Lakota Country, the land and the
 7 people are one. Without our land, without the health of
 8 our land, then we are never going to be able to sustain a
 9 life.
 10 The majority of tribes in my part of the country,
 11 which is North Dakota, South Dakota and Nebraska, especially
 12 North Dakota, South Dakota and Montana, the majority of
 13 Indian people's economics are based on agriculture. And if
 14 our lands are no longer productive, that means that we no
 15 longer can support our families on our lands, and this is
 16 what has happened over the years.
 17 These lands have continually been degraded because
 18 of unscrupulous people who, for example -- there are several
 19 people that work for the Bureau of Indian Affairs on my
 20 reservation who also had -- who were supposed to be the
 21 individuals who were supposed to oversee the land.
 22 They had -- they also had permits on leases. So
 23 they were overgrazing the lands that they had leased. So
 24 how could they then question the overgrazing of lands -- the
 25 lands that my family owns?

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1 So these are the kinds of things that you have not
 2 heard. You have not heard this from either the federal
 3 government's side or the plaintiffs' side. These are the
 4 individuals -- they're going to tell you that everything is
 5 so wonderful out in Indian Country, and that \$1,500 is the
 6 best deal that they could have gotten us. This is not true
 7 at all.
 8 I would forgo the \$1,500 if the federal government
 9 agreed to come in, place certain kinds of programs and redo
 10 the lands and bring them back to where they once were before
 11 they got a hold of them.
 12 So I just -- you know, again, I think that it is
 13 really important for you to see the statements that you have
 14 made. I think that for those of us who come before you
 15 asking for justice that it is going to be very important for
 16 you to think about the fact that this may not be a very good
 17 settlement for those of us who own land.
 18 I thank you again for allowing me to speak. Thank
 19 you.
 20 THE COURT: Thank you for coming down. I
 21 appreciate it.
 22 Is Mr. Richard Monette here?
 23 MR. HARPER: Your Honor, could I be heard for a
 24 moment?
 25 THE COURT: About Mr. Monette? He is just going

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1 to speak for himself.
 2 MR. HARPER: Pardon me?
 3 THE COURT: He is just going to speak for himself.
 4 MR. HARPER: Yes. He is speaking for himself, and
 5 Your Honor, he has made an objection regarding speaking for
 6 -- with respect to the trust administration class. He is
 7 opted out of that class.
 8 THE COURT: All right. Mr. Monette, good
 9 afternoon. You are going to speak for yourself. You're not
 10 eligible to speak for the others.
 11 They said you opted out of the trust class?
 12 MR. MONETTE: Yes.
 13 THE COURT: All right. I will hear you about what
 14 you would like to discuss on the historical class.
 15 MR. MONETTE: I appreciate your holding this
 16 hearing and giving everyone the opportunity to present their
 17 objections. I really only have one main objection, and
 18 maybe a couple that will go along with it.
 19 The main objection I would like to weave into a
 20 story, as I have no choice, since my elders asked me to come
 21 here and say what I'm about to say, and not necessarily to
 22 speak as a lawyer. So I know you've heard some personal
 23 stories here, but if you could humor one more witness, it
 24 would be nice.
 25 When I was green behind the ears just out of law

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1 school, the Native American Rights Fund came to my
 2 reservation, and I had just been offered a job with my
 3 tribe, and they were talking about bringing this law suit.
 4 To cut to the chase, I can say from my
 5 understanding at that point that it was my understanding,
 6 and I think the chairwoman of my tribe, that all we really
 7 wanted was an accounting, and some of us wanted to know what
 8 happened to our land.
 9 I know you have heard some of the stories, so
 10 story is representative of a lot of other people. I hope I
 11 don't bore you and I will hurry.
 12 My tribe entered into a treaty of 1863. My great
 13 great great grandfather known as Little Shell walked out of
 14 the treaty negotiations because he thought it was unfair.
 15 That treaty was being negotiated on the Minnesota/North
 16 Dakota border, and he went west, further into North Dakota
 17 where one of our homelands was.
 18 In 1882 the President unilaterally reduced that
 19 reservation, or what we had left from that treaty. It was
 20 about 10 million acres, and they reduced it to 20 townships
 21 and gave the tribe \$1 million. It is known in the official
 22 annals as the ten cent treaty.
 23 Despite that, two years later the President again
 24 unilaterally, without Congressional authorization, reduced
 25 that reservation to two townships. Next to nothing compared

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1 to what we had. Some said it was in retaliation for Little
 2 Shell's refusal to negotiate.
 3 Then along came the Allotment Act which was -- is
 4 the font of a lot of what we have in front of us, and our
 5 reservation was too small. There was not enough land for
 6 allotments for everybody. Our people ended up with
 7 allotments in Minnesota, South Dakota, Western North Dakota.
 8 2,600 allotments in Montana. Anywhere from 250 to 600 miles
 9 away.
 10 My grandmother was assigned her allotment in
 11 Western North Dakota, 200 miles away. It was quickly
 12 discovered that her allotment would hold coal. So she was
 13 unilaterally removed from that allotment and put on another
 14 one, this time further away in Montana.
 15 My grandfather and my grandmother both got
 16 allotments, but my grandmother's was closer to the
 17 reservation, so they stayed there.
 18 Over half of that tribe died of starvation over
 19 the next three years, and there is an official monument on
 20 our reservation indicating that fact. They almost died of
 21 starvation.
 22 My mother was born, and they move back to the
 23 reservation, away from an allotment that had no roads going
 24 through it. No access to water. They were supposed to make
 25 a living there. So they left, and they went back to the

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1 reservation.
 2 When my mother was six she was taken from home and
 3 sent to an Indian boarding school for six years. She was
 4 not allowed to come home for six years -- summers or
 5 anything. She left being able to -- being fluent in Cree
 6 and Chippewa languages, and she came back afraid to speak
 7 either after having been told not to.
 8 She met my father later, much later, and they were
 9 removed under the relocation program. So I'm also going
 10 through some of the United States' policies for us, the
 11 treaty terms, the assimilation of policies, and now the
 12 relocation policy where they took a lot of the young Indian
 13 men out to do work, hard labor, for America.
 14 My dad was with the group that went out to the
 15 West Coast where he was a dynamiter for building dams,
 16 hanging 300 feet off the ground, laying dynamite into the
 17 walls of the mountains so the dam would come down when they
 18 blew it up.
 19 I was born there in Seattle. My mother contracted
 20 cancer, and we move back to the reservation shortly
 21 afterwards, and I grew up on the reservation with my family.
 22 Her cancer came back, and she pulled us all
 23 together, her children, and she told us about the land in
 24 Montana, and what it meant to her, and what it should mean
 25 to us, that it was in coal and oil country, and it was

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1 strategically located by a lake. She also told us about our
 2 grandfather's allotment as well.
 3 The next year she died. I was eight years old.
 4 My dad, he worked hard and he played hard, and within a year
 5 I was often spending days alone on my own. Nicely we had --
 6 the Housing and Urban Development had built a housing
 7 project on the reservation, and it had sort of a split
 8 level, and I found a place to sleep under their often so I
 9 wouldn't be too afraid at night, because they built our
 10 house between the Tomahawk Bar, the Arrowhead Bar, the
 11 Legion Bar, the VFW, and the rest of the housing project.
 12 So people often pounded out the doors, or broke windows, or
 13 just walked in. So I slept under the stairwell often.
 14 It was an interesting, scary -- I would like to
 15 think character building sort of experience.
 16 After she died I got sent to the Catholic Mission
 17 School where I was sexually assaulted by a priest. So then
 18 they threatened to send me to boarding school, and the two
 19 weeks before I was supposed to go I ran away, and they could
 20 not find me. I stayed with my mother -- my mother's mother,
 21 my grandmother, for weeks on end.
 22 So by the time I was 11 I staying alone for weeks
 23 on end, and by the time I was 14 I lived alone in a house
 24 for about a year -- until one of my brothers move back and
 25 moved in for a short while.

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1 That was the life I lived, but always thinking
 2 about my heritage, and where I came from, and what my
 3 parents left.
 4 Thankfully I could play football well. So when I
 5 quit school the coaches would come and get me and make me
 6 come back. I played basketball, the starting five. I ran
 7 track, and was very fast. I played baseball when we could
 8 have it -- when we could afford a baseball. The whole
 9 tribe.
 10 I made it through school in those conditions.
 11 They were very difficult. So it bothers me to no end to see
 12 what seems to me to be nothing but yet another policy of the
 13 federal government being foisted upon my people, a policy
 14 that on the one hand almost looks like a reparation, and
 15 this should not be deemed a reparation.
 16 One of my colleagues on the law school faculty,
 17 right after it first started hitting the news that this was
 18 settling, said finally you Natives are getting paid for what
 19 you have lost, and they view it as a repartition.
 20 That scares me, because the last time that the
 21 American public viewed an action of the courts and Congress
 22 as a repartition it was in 1946 to 1951 when they formed the
 23 Indian Claims Commissions and brought all of these cases to
 24 finally get rid of this.
 25 Well, they thought they'd finally gotten rid of it

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1 by 1951, and in 1953 Congress passed the termination act.
 2 So the very thought that Americans get in their mind that
 3 you finally -- you Indians are getting what you are owed and
 4 what you deserve, is a step before them thinking, now let's
 5 move on without this, and that would destroy our people back
 6 home.
 7 So it bothers me to no end that we have young
 8 people, Native Americans included, maybe not Native
 9 Americans with my experience, but Native Americans at least
 10 by skin color, who would help to settle this kind of an
 11 action, separating a man now from his heritage much the way
 12 U.S. policy separated a boy from his mother, and that is an
 13 unfairness.
 14 I want to say on the one hand, of course they're
 15 going to leverage that equity, and they're going to get rich
 16 off of it some of these young lawyers -- and some of the old
 17 lawyers. This is America after all.
 18 THE COURT: Thank you, Mr. Monette.
 19 As to any others who have not yet been called who
 20 have been listed, did I miss anyone who is listed to
 21 testify? A lady stood up originally. Who is --
 22 A PERSON FROM THE AUDIENCE: I would like to.
 23 THE COURT: Who is on the list that I didn't call.
 24 MR. HARPER: Counsel is here for Verlita Sugar.
 25 She is the last on the list.

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1 THE COURT: Yes. I am going to call upon her. I
 2 have a note here.
 3 And then is there anyone else who is actually on
 4 the list that was registered to testified that I have said
 5 could therefore that I have not talked with?
 6 I have got a power of attorney for Doris Lewis
 7 Warner and that's -- Donald Lewis Warner, and that I had --
 8 Gerald Warner had filed an objection, and if I missed you on
 9 the paper, I didn't see it on the paper, but that is all
 10 right, because you did file an objection.
 11 Mr. Warner, do you have him on your list to
 12 testify -- as objecting today?
 13 MR. KIRSCHMAN: Your Honor, Mr. Warner had been
 14 listed as one of the objectors. Plaintiffs opposed him
 15 representing his father I believe.
 16 Defendants do not oppose him testifying here
 17 today.
 18 THE COURT: I just got in a power of attorney.
 19 MR. HARPER: Yes, Your Honor. We did initially
 20 object, but in light of the power of attorney we would
 21 withdraw that objection.
 22 THE COURT: Mr. Warner, why don't you come up,
 23 please. I did just receive the power of attorney, and I
 24 will make it part of the record. I am referring to your
 25 elderly father you are now going to represent in this

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1 matter. Thank you, sir.
 2 MR. WARNER: Thank you, Your Honor. I want to
 3 thank you and this court for allowing me to speak on behalf
 4 of my father, Donald Lewis George Walking Shield Warner, as
 5 he is recovering from a recent surgery, and he would like to
 6 be here to speak for himself.
 7 My father and I are enrolled members Fond du Lac
 8 band of the Minnesota Chippewa tribe. My name is Gerald
 9 Legarde Warner. I am the great great great grandson of one
 10 of this country's greatest leaders that has ever set flesh
 11 upon this earth.
 12 My grandfather, Abraham Gall was the leader of
 13 the Hunkpapa Dakota Sioux of the great Sioux Nation. This
 14 Sioux Nation is the same one this very government has
 15 written into their laws making it illegal to up-rise the
 16 Sioux Indian.
 17 The Sioux tribe was a proud, 1 million strong, and
 18 by the time of the Battle of the Little Big Horn and
 19 Custer's last stand, there were only 4,000 remaining.
 20 My grandfather was one who signed the treaty
 21 alongside this government that brought peace to all warriors
 22 with the great Sioux Nation. This treaty was for all Native
 23 Americans in this country to live peacefully on these
 24 reservations.
 25 The trade off was the white man get all of the

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1 lands in question east of the Mississippi, and for the lands
 2 west of the Mississippi to the Pacific Ocean was Native
 3 American reservations.
 4 My grandfather also included in the same agreement
 5 that he wanted five things: Food, clothing, housing,
 6 schooling and medical for seven generations, and the
 7 government agreed. For those of you who might not know,
 8 seven generations to Native people means forever.
 9 It was just a short time later this very same
 10 government needed more lands, for they, too, did not realize
 11 just how many people were still coming to this great land,
 12 which has not stopped today.
 13 This is where the allotments, blood quantum, and
 14 this trust in question comes into the picture and why we are
 15 here addressing it today. This very same government took it
 16 upon themselves to decide how much land these people should
 17 get, and disguising it as being proud land owners, and to
 18 these trusting people, unknowingly, what was about to happen
 19 to them again.
 20 This government also took upon themselves the
 21 duties of the trustee, because this government decided that
 22 these people were not smart enough to handle their own
 23 affairs.
 24 My great grandfather was a medicine man and a
 25 tribal judge for his people, who was looked upon and known

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1 as a fair and honorable person. My father is the oldest
 2 living descendent of this great leader today. My father is
 3 also a fair and honorable person, and this is a vision and
 4 goal for myself.
 5 On my great grandfather's headstone there is an
 6 inscription saying: An honest man should never -- should
 7 always be remembered.
 8 By the rights as allowed by the laws of this
 9 country, and the treaties and our U.S. Constitution, we are
 10 natural born American citizens and have all of the rights
 11 given by these laws. The proposed settlement is in clear
 12 violation of the U.S. Constitution, Amendment One:
 13 "Whereas Congress shall make no
 14 law abridging the freedom of
 15 speech or the right to petition
 16 the government for redress of
 17 grievances."
 18 And amendment 14, citizenship rights, and all of paragraph
 19 1.
 20 Using the excuse of time gone by for destruction
 21 of lives is wrong. The 'cannot opt out' portion of the
 22 proposed historical class settlement is unconstitutional,
 23 starting but not limited to the U.S. Constitution, Amendment
 24 One.
 25 Who is protecting the interests of the ones of my

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1 family that have left this earth, and they have never been
 2 probated for 70 years, and they continue today having active
 3 IIM accounts?
 4 What about my great aunt that this same government
 5 cannot find since 1940? She was placed on the OSD Website
 6 and after my calling she was removed to the BIA Office. I
 7 then asked for a probate, and the two-year investigation and
 8 court appearance with probate. That was thrown out by the
 9 judge for not enough research through the Social Security
 10 Administration.
 11 A year later I called the probate officer, and I
 12 was told the Social Security Administration reported this
 13 person has a social number and is currently active, and this
 14 government still cannot find her.
 15 It seems to me that these government offices are
 16 not communicating and further proof that the new accounting
 17 system is not working.
 18 How is my great aunt being protected by this
 19 proposed fair settlement if this government cannot find her?
 20 What about all of the others on the government's own OSD
 21 Website?
 22 The monetary part of this proposed settlement, the
 23 historical accounting class and trust administration class
 24 is far short from what all of the courts that have had this
 25 case brought before them, and all have found this government

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1 guilty of wrongdoing.
 2 The trust administration class part of this
 3 settlement was never part of the original lawsuit, but it is
 4 attempting to take the majority of the so-called fair class
 5 settlement monies from these 300,000 IIM account holders
 6 that also make up the historical class, and this should
 7 never have been allowed in the settlement.
 8 This case was filed in 1996 for 300,000
 9 individuals, and these are the ones that have been patient
 10 over 120 years, even though many have gone and many are
 11 aging, but in the end these individuals -- in the end are
 12 the individuals that this case is about, and any final
 13 judgment should be the same.
 14 Then let the probate laws do their job by
 15 distributing what these laws already provide for. Any
 16 settlement should follow historically established probate
 17 laws, with the heirs standing in the shoes of the
 18 descendants, sharing the descendant's shares, and heirs
 19 should not share equally with descendant's siblings. Then
 20 let the probate laws do their job of distributing the
 21 original landowner's share of property, including these IIM
 22 accounts.
 23 The trustee and government officer since 1966 to
 24 2011, today, have allowed the undivided interest in my
 25 father's and co-owners lands, giving my father a payment of

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1 \$.76 an acre. These lands have been growing the wheat for
 2 the bread that many of us eat today. Hasn't there been a
 3 slight increase in cost of a loaf of bread since 1966?
 4 In 1974, when of my father's frustrating attempts
 5 to investigate concerns about his lands, he discovered in
 6 the records that he was allowed to see -- he found an equal
 7 shareholder and co-owner was not receiving the \$.76 an acre,
 8 but in fact was getting \$35 an acre for the same interest in
 9 the land. This is 46 times higher than what my father
 10 received.
 11 As of today and since 1949 the maximum yearly
 12 total my father has ever received is about \$700 a year.
 13 This also means in 1974 that same co-owner was getting a
 14 minimum of \$32,200 a year.
 15 Using the proposed trust settlement fund chart, my
 16 father would be getting a maximum of \$2,500, and his equal
 17 partner and co-owner getting \$125,000.
 18 My father discovered this and confronted the
 19 person that was responsible for the lease agreements, and
 20 also for getting the government trustee approval. This
 21 person looked directly at my father and told him that he
 22 knew too much, and if he did not leave he would not. The
 23 same person worked his way through the government BIA
 24 offices and retired.
 25 All leases for land in this country have used the

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1 railroad lease agreements for the basis of rents. They have
 2 always used one quarter of the crop for a fair price per
 3 acre. Today's average is still one quarter of the crop and
 4 \$60 an acre.
 5 This is 79 times what my father receives today.
 6 This clearly shows that this government has not fixed the
 7 problem, and this clearly shows a future legal action.
 8 We have asked every year since 1949, at the tribe,
 9 the BIA office, for copies of all leases. The tribe totally
 10 refuses, and the BIA's exact words were, we have them.
 11 After returning several times after time searching, they
 12 admitted having no leases on file.
 13 A letter I can supply you today shows the last
 14 response, April 20, 2006, from the OSD fiduciary trust
 15 officer David Shaw. We have had no response after this
 16 letter.
 17 THE COURT: They're concerned what the settlement
 18 is because the government will still be involved with
 19 setting the value on these leases, et cetera, that it is
 20 unfair?
 21 I'm trying to focus your objections to the
 22 settlement. I recognize your problem with the Bureau of
 23 Indian affairs on the individual leases your father had, and
 24 that he has not been equitably paid, but how does that apply
 25 to the settlement that we are talking about here?

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1 MR. WARNTER: Well, in the settlement they are
 2 offering what was in his account at that time and what
 3 could have been in his account if it was today worth 79
 4 times what he got, and then his would be different on this
 5 chart.
 6 THE COURT: I see.
 7 MR. WARNER: So anyway, today there are no
 8 leases, even today, and I have got another letter signed by
 9 my father. He has never received the leases he has asked
 10 for.
 11 My father was told in 1949 by the Tribal Realty
 12 Office that his land and mineral rights were worthless.
 13 Hearing this was very disconcerting, so he asked the farmers
 14 who were farming his land, and they offered him \$250 an acre
 15 back in 1973. Today's offer from the government is \$100 an
 16 acre in 2011.
 17 He also asked the South Dakota Assessor's Office,
 18 and the same type of land in the same area is \$800 an acre.
 19 THE COURT: Why don't you finish up your
 20 objections then, please?
 21 MR. WARNER: And finally in closing, I just want
 22 to put a face to this historical class. This is my father.
 23 This case is about a real person that I have been given
 24 authority -- and for me, personally, a great honor to speak
 25 for.

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1 My father is an 83-year-old man sitting at home
 2 recovering from surgery. My dad is a proud member of the
 3 Fond du Lac Band of the Minnesota Chippewa tribe, and like
 4 his father, and mother, and sisters before him, he has
 5 struggled all of his life to survive and make a living for
 6 his family.
 7 In spite of his daily struggle he has managed to
 8 hold on to his Indian trust land, just like his ancestors
 9 before him.
 10 He has made it known to all of his 11 children and
 11 29 plus grand and great grandchildren that in this country
 12 and the world that without land you are nothing. Without
 13 your traditional land you lose your connectedness with your
 14 ancestors, community and culture. We can clearly see this
 15 happening in this country and as this nation is helping
 16 militarily all over the world.
 17 My father is proud to be a United States citizen,
 18 and proudly to serve his country in the military for the
 19 freedoms we all have, and taught his children to respect
 20 this country and their Indian heritage.
 21 Like his parents, and grandparents, and all of his
 22 family who came before him, he trusted in the United States
 23 government to perform their fiduciary duty to keep his land
 24 safe, productive, and to ensure that it would be there for
 25 his children, and their children, and all of their children

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<p>1 to come.</p> <p>2 Instead, he now faces losing his land as the</p> <p>3 government blames fractionization as the reason they failed</p> <p>4 to perform their self-proclaimed legally responsible</p> <p>5 fiduciary duty for the Indian Trust land held in trust for</p> <p>6 himself and his family.</p> <p>7 Now he is being asked to take fractions of pennies</p> <p>8 on the dollar for money due him for which the federal</p> <p>9 government failed to negotiate leases, properly account for,</p> <p>10 and then deposit into his account.</p> <p>11 I would ask the court, do not approve this unfair</p> <p>12 settlement, and to make sure that land owners are given an</p> <p>13 adequate relief due them for the negligence of the federal</p> <p>14 government, and that the landowners are not stripped of</p> <p>15 their Indian Trust land and the rights afforded them under</p> <p>16 the U.S. Constitution of this country.</p> <p>17 Thank you, Your Honor.</p> <p>18 THE COURT: Thank you, Mr. Warner. I appreciate</p> <p>19 your coming in. Thank you.</p> <p>20 Is there anybody that is on the list? One lady</p> <p>21 came up earlier and said -- I don't know if she had filed a</p> <p>22 written objection or not.</p> <p>23 Do you just want to come up and tell me your</p> <p>24 situation, ma'am -- in the pink there.</p> <p>25 You're not on the list, and I am not going to have</p>	<p>1 just wanted more money, because I have great concerns.</p> <p>2 I have this philanthropy program called EL,</p> <p>3 Elongation of Life, and I had money coming from here for the</p> <p>4 future generations that was supposed to build the mind and</p> <p>5 body of the people who have suffered and everything.</p> <p>6 Myself, I am a fourth-generation. My daughter's a</p> <p>7 fifth generation, and now we have her daughter, who is a</p> <p>8 sixth generation, and she has -- I have seventh generation</p> <p>9 children who were given funds, and it was quite obviously</p> <p>10 lost or stolen in the mail, and that has gone on for a long,</p> <p>11 long time.</p> <p>12 I would just like some investigation into a few of</p> <p>13 the things that have happened on our reservation.</p> <p>14 Another one is this, that I heard that we were</p> <p>15 finally getting some money. I was pleased. I felt good and</p> <p>16 great. It says here in the Great Falls paper of last year:</p> <p>17 "The trust fund amounts. The</p> <p>18 Interior Department owes a total</p> <p>19 of 63 point some million to more</p> <p>20 than 54,000 people, but federal</p> <p>21 officials cannot find them."</p> <p>22 All right I am one. I have walked up to several</p> <p>23 people and said --</p> <p>24 THE COURT: Ma'am, this does not really pertain to</p> <p>25 the immediate objections we are talking about, and you had</p>
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<p>1 people just start testifying just out of the audience,</p> <p>2 because we can't have that.</p> <p>3 Would you give your name for the record and where</p> <p>4 you are from, please?</p> <p>5 MS. KIPP: Karen Kipp.</p> <p>6 THE COURT: State your name into the microphone</p> <p>7 here.</p> <p>8 MS. KIPP: Thank you, Honorable Judge.</p> <p>9 My name is Karen K. Kipp. I'm from the Blackfeet</p> <p>10 Reservation in Browning, Montana.</p> <p>11 THE COURT: Had you written in an objection?</p> <p>12 MS. KIPP: Well, I do own a lot of land and</p> <p>13 mineral resources, surface rights, mineral rights, and I</p> <p>14 have never really received a decent check with royalties for</p> <p>15 lease, oil rights, anything. It has always had to go</p> <p>16 through --</p> <p>17 THE COURTROOM DEPUTY: You don't have to hold the</p> <p>18 mic so close.</p> <p>19 MS. KIPP: Oh, okay. It has always gone</p> <p>20 transcript charity, you know, and other things needed on the</p> <p>21 reservation. I have had to buy all of the food, all of the</p> <p>22 clothes --</p> <p>23 THE COURT: Did you write an objection to us about</p> <p>24 this settlement?</p> <p>25 MS. KIPP: No -- yeah. I just asked to speak. I</p>	<p>1 not filed, apparently, a timely and proper objection. So we</p> <p>2 are not going to continue. If you have concerns you can</p> <p>3 talk to counsel, or talk to the people from the Interior</p> <p>4 Department about your foundation or whatever it is.</p> <p>5 MS. KIPP: All right. I would also like to bring</p> <p>6 to your attention the importance of building the foundations</p> <p>7 at these wind farms. I think they are a little out of</p> <p>8 control. I think the --</p> <p>9 THE COURT: People have asked me for a lot of</p> <p>10 things today. This is the first time anyone has talked</p> <p>11 about wind farms. But that is all right.</p> <p>12 MS. KIPP: Well, we have wind farms on our</p> <p>13 reservation.</p> <p>14 THE COURT: Thank you, ma'am.</p> <p>15 What the court is going to do is take a luncheon</p> <p>16 recess. We will return -- it is 1:15. We are going to</p> <p>17 return at 2:00 o'clock. At 2:00 -- go ahead.</p> <p>18 MR. HARPER: Your Honor, according to our records,</p> <p>19 we had one more objector4 that was on your list.</p> <p>20 THE COURT: We will take care of that then. I am</p> <p>21 sorry, I thought I covered everybody.</p> <p>22 Who did I miss, Ms. Sugar?</p> <p>23 MR. HARPER: Ms. Sugar, represented by counsel.</p> <p>24 THE COURT: I have a note on that. Didn't we get</p> <p>25 a note on Sugar? I am sorry, I thought I had gotten a note</p>

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1 that she had somehow withdrawn, but come in. That is all
 2 right. I misunderstood. I had written myself a note about
 3 Ms. Sugar, and I thought that something had come in that had
 4 changed her mind, but I'm happy to hear from you for
 5 representing Ms. Sugar.
 6 Would you identify yourself for the record?
 7 MS. WORK: May it please the court, my name is
 8 Susan Work. I'm there with local counsel, Joe Membrino, and
 9 I am representing Verlita Sugar.
 10 THE COURT: Let me get her objection back up
 11 again. All right, I've got it here. I do recall this about
 12 the five tribes. Thank you.
 13 MS. WORK: Ms. Sugar is a full blooded Cherokee
 14 citizen who owns a small, undivided restricted mineral
 15 interest in eastern Oklahoma within the boundaries of the
 16 Cherokee Nation.
 17 The Cherokee Nation is one of the so-called five
 18 civilized tribes, which also includes the Muscogee Creek
 19 Nation, the Chickasaw Nation, the Choctaw Nation, and the
 20 Seminole Nation.
 21 These tribes were removed from southeastern United
 22 States to Indian territory in the 1930s, and at that time
 23 they acquired fee title to their lands, which actually
 24 resulted in a unique situation for the tribes when allotment
 25 occurred, and it has an impact with respect to the

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1 identification of trust management class in the Cobell
 2 case.
 3 At the time of allotment in the early 1900s, the
 4 five tribes' allotments, including the Cherokee Nation's
 5 allotments, were all in restricted status. But shortly
 6 after that, Congress began to pass a series of special
 7 federal laws that apply to only the five tribes, and began
 8 to remove the restricted status of those lands based on --
 9 primarily based on the blood quantum of the individual
 10 owners.
 11 This resulted in the practically immediate loss to
 12 the restricted land owners of their lands, those that were
 13 less than half blood, in the early 1900s.
 14 The laws that got passed not only imposed these
 15 limitations with regard to blood quantum, but they also gave
 16 the state courts authority to act as federal
 17 instrumentalities in the probate of the estates of the
 18 restricted allotments, and in the approval of sales of the
 19 restricted allotments, and in the lease of mineral interests
 20 of the restricted allotments.
 21 As a result, the records maintenance for these
 22 restricted allotments are primarily found in the state court
 23 system in the various state county offices. In the
 24 Cherokee Nation alone there are 14 counties. So that
 25 requires -- in order to identify the restricted landowners,

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1 it is necessary to research the titles for all of these
 2 tracks and all of the fractionation that is involved in each
 3 county.
 4 The most recent of these federal law is the act of
 5 August 4, 1947, and that act continues the same limitations
 6 with regard to blood quantum, the same state jurisdiction
 7 issues.
 8 The federal government still maintained a trust
 9 responsibility to the five tribes and to the individual
 10 allottees. The federal government managed realty offices
 11 for each of the tribes and maintained some form of land
 12 title records, but not to the extent that you see elsewhere
 13 in the United States.
 14 There was also a special office set up in Tulsa.
 15 It is a field office of the United States Department of
 16 Interior Solicitor's Office, and there are several attorneys
 17 in that office that appear in state court proceedings to try
 18 to assist in protecting the interests of the individual
 19 restrictive landowners.
 20 So there is still significant federal fiduciary
 21 responsibility with regard to these lands, but there are
 22 many problems with land titles involving the lands because
 23 of the complicated nature of the federal laws.
 24 This leads to the problem with identification of
 25 the trust administration class, because it is easy to prove

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1 persons that have IIM accounts. They are atomically in the
 2 trust administration class. But there are not that many
 3 restricted landowners, or Cherokee landowners at least, that
 4 also have IIM accounts.
 5 The reason for that is because under the special
 6 federal laws the -- well, I would same most of the -- a
 7 great deal of the income from restricted lands comes from
 8 oil and gas, and the special federal laws concerning oil and
 9 gas leases allowed -- or at least were interpreted by the
 10 Department of Interior to allow direct pay to individual
 11 owners.
 12 So of course they are not covered in this
 13 particular class as far as any mismanagement of their
 14 incomes, but that's part of the problem, because there is
 15 now -- there are very are few IIM accounts.
 16 It is estimated that there are about 1,800
 17 Cherokee IIM accounts. That places a burden on the
 18 individual Cherokee restricted landowners to establish that
 19 they have a demonstrable interest -- ownership interest in
 20 restricted property.
 21 That is difficult to do because of the disarray of
 22 all of the records related to the land titles. The Cherokee
 23 Nation has only recently -- well, they were notified in June
 24 -- well actually they were notified -- the tribe was
 25 notified about a week ago, June 8, that it would receive 2.6

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1 million from the Department of Interior to fund a project to
 2 get individual restricted members' information researched
 3 and entered into the TAAMS system.
 4 Of course the TAAMS system -- what we understand
 5 based on meetings that have been held is that the Department
 6 of Interior, which is going to be responsible for providing
 7 information to the trust administrator with respect to
 8 demonstrable interests in restricted properties, applies to
 9 -- probably will be very beneficial to most tribes, but not
 10 to the five tribes, because there is no TAAMS system for the
 11 restricted five tribes land owners.
 12 It is estimated that it will take two to three
 13 years, using these funds, to be able to identify the tracks
 14 that are subject to restricted status and who the individual
 15 restricted landowners are.
 16 That does not even take into account the multitude
 17 of unprobated estates involving restricted property, and
 18 that is a related issue, because -- well, it is not
 19 necessarily related to identification of the trust
 20 administration class, but it is related to the
 21 participation, because if you have a deceased restricted
 22 land owner and there has been an IIM account set up for
 23 their estate, but there has been no probate filed, the way
 24 the settlement agreement reads, the heirs will not receive
 25 even -- like if there are six heirs, they will not even

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1 receive a one sixth share of the estimated \$800 that would
 2 be given to the trust administration class.
 3 The reason that they have not filed probates is
 4 because they have to go out and hire an attorney to file a
 5 probate. In the rest of the country, federal administrative
 6 law judges are used to probate estates involving trust
 7 property.
 8 Another issue that is important here, I think
 9 also, relates to the notice issue. If the federal
 10 government does not even know who the restricted landowners
 11 are, then how can notice be given to the restricted
 12 landowners?
 13 I've heard about -- people have talked today about
 14 individuals receiving lengthy explanations of the proposed
 15 settlement. I have not checked. I am not aware of whether
 16 there has been an attempt to send notices like that out to
 17 restricted landowners of the Cherokee Nation or the other
 18 four tribes.
 19 Also, I would just like to mention that three of
 20 the counties in northeastern Oklahoma within the boundaries
 21 of the Cherokee Nation are in the most poor, high poverty
 22 level counties in Oklahoma. Those counties also have a
 23 significant Indian population and significant restricted
 24 lands.
 25 Many of these landowners live out in the hills,

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1 basically, and they do not have Internet access. Many do
 2 not even necessarily have television access, and if they
 3 have not received written notice, then there is also an
 4 issue of whether there has been fair notice given to these
 5 people.
 6 Thank you.
 7 THE COURT: Thank you very much. I appreciate
 8 that approach.
 9 We will take our lunch recess. I will extend it
 10 now because of that thing for one hour so I can go through
 11 these notes about what I have been listening to. Be back at
 12 2:25. At that point the attorneys for the plaintiffs and
 13 the government will have an opportunity to respond to these
 14 objections.
 15 We have given a lot of time for that. I will see
 16 how much time they will need, and then we will move forward
 17 after that with the rest of the hearing.
 18 All right, 2:25.
 19 (Luncheon recess.)

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1 A-F-T-E-R-N-O-O-N P-R-O-C-E-E-D-I-N-G-S
 2 THE COURTROOM DEPUTY: This Honorable Court is
 3 again in session. Please be seated and come to order.
 4 Recalling Civil Action 96-1285, Eloise Cobell, et
 5 al, versus Kenneth Salazar, et al.
 6 THE COURT: All right, in the recess two matters.
 7 One is there was an original objector, Judith A. Chosa, C-h-
 8 o-s-a, who could not be here today, but I was informed that
 9 she had asked the court to note that her objection be lodged
 10 and be made a record of the court. Let me pull it out just
 11 refer to it for a minute.
 12 She asked if this could be shared with the parties
 13 here. She gives a history of the Indian peoples, and what
 14 she calls people destroying their way of life, and that
 15 there is no amount of money to rectify that, and that
 16 payment should be, rather, to a monthly income so the land
 17 could be made, and homes could be built, and there would be
 18 income to live on.
 19 She also complained about the parents being from
 20 two different tribes, only the one of blood one parent is
 21 counted, and that is not fair.
 22 That was Ms. Chosa, who had asked to make sure
 23 that that was recognized in the record, and her full written
 24 objections are in the record.
 25 I was informed over lunch that there was an

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1 individual, Ms. Short Bill. Ms. Short Bill had sent a
 2 notice in that came in a day late but IO think had been
 3 mailed now it looks like in a timely basis, and counsel have
 4 no objection to her making a statement, so if Ms. Short Bill
 5 would like to come up.
 6 Is Ms. Short Bill here, please?
 7 MS. SHORT BILL: Thank you, Your Honor, for
 8 letting me speak today.
 9 My name is Vanie Short Bill, and I am a member of
 10 the Rosebud Sioux Tribe. I am also a member of both the
 11 historical account class and the trust administration
 12 class.
 13 According to an article from Indian Country today
 14 entitled, Warrior Woman, Eloise Cobell said that she decided
 15 to settle with the federal government because so many IIM
 16 account holders were dying off.
 17 My Uncle Red, who lived most of his life homeless
 18 and without a job, was one of those members who did not live
 19 to see a payment. He died in 2007.
 20 I do agree that this case needs to be settled
 21 before more members of the class die off, but let's do so in
 22 a manner that is prudent so as to prevent any future or
 23 existing gross mismanagement of trust funds.
 24 I object to two portions of the settlement
 25 agreement. Both pertain to section F that involves the

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1 trust land consolidation fund.
 2 My first objection is that no settlement funds be
 3 expended on the purchase of fractionated interests until
 4 prudent measures are put in place to appropriately account
 5 for and manage the trust funds that are used in satisfying
 6 the liens.
 7 With each interest that is purchased a lien on all
 8 revenue is placed against it until the purchase price paid
 9 for has been recouped. According to the Indian Land
 10 Consolidation Act and the American Indian Probate Reform
 11 Act, once the purchase price is recouped, then the lien is
 12 to be removed, and the tribe should hold beneficial title
 13 free and clear of any lien.
 14 I have reason to believe that there currently is
 15 no trust system in place within the Great Plains region of
 16 the Bureau of Indian Affairs that currently tracks the
 17 amount of revenue -- that accurately tracks the amount of
 18 revenue produced by each interest, nor is the purchase price
 19 for the interest tracked in any of the trust systems.
 20 Without storing or tracking the purchase price
 21 paid for the interests, or the revenue it is generated, how
 22 would the Secretary ever know when to satisfy the lien so
 23 that the respective tribe can decide how the revenue will
 24 then be applied?
 25 Part four, and I'm quoting, removal -- from

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1 Section 2212 to 12:
 2 "Removal of liens upon payment
 3 into the acquisition fund states
 4 that the Secretary shall --"
 5 Not may, but shall.
 6 "-- remove the lien once the
 7 purchase price has been paid
 8 to the acquisition fund, except
 9 in those cases where the tribe
 10 has jurisdiction over the land
 11 authorizes the Secretary to
 12 continue the lien so that more
 13 acquisition funds can be
 14 generated."
 15 Without a system in place to notify when the
 16 purchase price is paid, the Secretary will never be in a
 17 position to advise the tribe that the lien can be satisfied,
 18 nor get the needed authorization to continue holding the
 19 lien.
 20 I blatantly disagree with the statement made at
 21 page 49 of the response to objections that states -- in
 22 quotation marks --
 23 "In no way does the land
 24 consolidation fund undermine
 25 sovereign rights."

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1 This current practice undermines the tribe's
 2 sovereignty, because the Secretary is not notifying them
 3 when the purchase price is recouped and allowing them to
 4 decide for themselves whether the lien should continue or
 5 not. The law clearly states in -- states that this is their
 6 decision to make, not the Secretary's.
 7 The manner in which the revenue is being managed
 8 is also an infringement on tribal sovereignty. It is to be
 9 -- in quotation marks, again, from the Indian Land
 10 Consolidation Amendments:
 11 "To be used to acquire undivided
 12 interests on the reservation
 13 from which the income was derived."
 14 Each month all revenue goes into one acquisition
 15 fund. This is the revenue from those interests that were
 16 purchased through the Indian Land Consolidation Program. It
 17 is always used to purchase interests nationally that are
 18 located only on those reservations were a tribe has
 19 participated in the program.
 20 But if there are not current willing sellers of
 21 the particular reservation, then the revenue brought in from
 22 that reservation can be used for making purchases on another
 23 reservation for another tribe -- a blatant violation of the
 24 law.
 25 There needs to be a mechanism in place that

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1 earmarks those funds of each tribe participating in the
 2 program so that, for example, Rosebud funds are not -- the
 3 Rosebud Sioux Tribe's funds are not spent on any other
 4 tribe.
 5 I am petitioning the court to place an injunction
 6 on any purchases of fractionated interests in accordance
 7 with 25 U.S.C. 2201 until proper mechanisms are in place
 8 that accurately keep track of the purchase price paid for
 9 each interest and track all revenue that interest produces
 10 so that it can be applied to satisfy the lien.
 11 There also needs to be a separate acquisition
 12 fund for each tribe so that the revenue paid back into it is
 13 only used to purchase interests for that particular
 14 reservation.
 15 The second objection that I have pertains to
 16 section 7 entitled, consent or conveniences. I do not think
 17 that it is right to automatically deem consent for a
 18 convenience for people who have been deemed, whereabouts
 19 unknown.
 20 Based on first-hand experience, and I worked for
 21 the Bureau of Indian Affairs for 30 years. I also own my
 22 individual Indian money account since 1976. Many people's
 23 IIM accounts are coded 'whereabouts unknown' simply because
 24 they moved and forgot to change their address.
 25 I, for one -- my revenue is two cents a year. So

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1 when I move do you think I'm going to be worried about my
 2 two cents a year? No, and I don't change my address.
 3 The government has paid me hundreds if not
 4 thousands of dollars finding people. I know how critical it
 5 is for me to contact the government where I'm at, yet I
 6 forget, knowing what I know. And a lot of other people do
 7 this because they just simply forget to change their
 8 address.
 9 Some of these people are in the military and are
 10 in foreign countries fighting for our freedom. Why would we
 11 want to undermine their Constitutional rights to convey
 12 their real property as they so choose and not the
 13 Secretary?
 14 I am petitioning the court to require the parties
 15 to seek a legislative remedy that provides for an amendment
 16 to the United States Postal Change of Address Form so that
 17 it asks if the addressee is Native American and owns an
 18 individual Indian money account.
 19 It could provide a check box that if checked
 20 authorizes the Post Office to notify the Secretary of their
 21 change of address.
 22 I did a study -- I'm a student at A.S.U.. and I
 23 did a study on the ramifications of the Indian probate
 24 process, and after interviewing several homeless people that
 25 I found in Arizona and South Dakota, A.S.U. professors, and

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1 a lot of other Native American people, the number one
 2 underlying problem with the whereabouts unknown issue is
 3 that they simply forget to change their address or notify
 4 the government of where they are at when they move.
 5 The objections I have can easily be remedied
 6 through the authority of this court and with the funds being
 7 set aside for trust reform. According to the United States
 8 Census, the average income of Indians living on the
 9 reservations is 4,478.
 10 As stated in an article from National Relief
 11 Charities from Inner-C Programs.org, the standard of life on
 12 some Indian reservations is equal to that of Third World
 13 countries.
 14 Just think what \$1,800 would mean to a person
 15 living in poverty in Libya? I wonder what it would have
 16 meant to my Uncle Red?
 17 I pray that the settlement agreement is approved
 18 before more members of the class die, including my 86-year-
 19 old mother, but I pray that it is does so in a manner that
 20 does not cause further harm and further infringements on the
 21 rights of Native American individuals such as my
 22 grandchildren, and all of the tribes throughout our
 23 country.
 24 I thank you for this opportunity to be heard, and
 25 I also have left a package that further describes my

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1 concerns regarding the current mismanagement of funds that
 2 is going on with the Indian Land Consolidation Program.
 3 Thank you.
 4 THE COURT: Thank you.
 5 Yes. I have gotten and I saw the package and have
 6 supplied that to counsel. Thank you.
 7 I just wanted to advise counsel, and over lunch
 8 you may have seen this, but the Supreme Court came down with
 9 the Wal-Mart class-action decision this morning, and I was
 10 worried whether or not that had any effect on our case.
 11 That is Wal-Mart Stores versus Duke, et al,
 12 decided today, reversing the 9th Circuit's certification of
 13 class, commonality issues.
 14 One of the other cases that has also recently
 15 come down, April 27, is AT&T Mobility versus Vincent
 16 Conceptions -- Concepcion, I guess, out of the 9th Circuit
 17 as well. Another one by Justice Scalia, who also wrote the
 18 Wal-Mart case. That came out of the Federal Arbitration Act
 19 matter, but they talked about basically what the
 20 constitutional requirements may be under notice and opt out
 21 rights.
 22 If you haven't looked at that you may want to look
 23 at that.
 24 With that, I will turn back to the response both
 25 by the plaintiffs' counsel and by defense counsel to the

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1 objections, and they can break them down either individually
 2 or in groups as they wish as to the fundamental objections
 3 made that I have heard.
 4 We have heard some very telling stories and
 5 concerns, I think, raised in good faith by people who
 6 traveled a very long way here, I'm sure sometimes with great
 7 difficulty and expense, to present their issues to the
 8 court.
 9 The one objection had been made asking the court
 10 whether it could be fair or not, basically because I had had
 11 status calls with this case as it proceeded on to my
 12 calendar after it had been removed Judge Lamberth by the
 13 Court of Appeals for the bias, and then Judge Robertson
 14 took it over and tried part of the claims. This case was
 15 then reversed by the Circuit, the 450 million or so that
 16 he awarded for restitution for the failure to do an
 17 accounting.
 18 It was reversed by the Circuit and eventually came
 19 to me as a senior judge, and I did encourage the parties to
 20 settle if at all possible. That is absolutely accurate.
 21 Abraham Lincoln said that the worst thing that could happen
 22 to you is a person to be involved in a lawsuit.
 23 The potential after what we call Cobell 22 -- you
 24 can see how many cases have been up there in the Court of
 25 Appeals -- was very dim for the plaintiffs at that point, I

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1 think in reality, in certain areas of getting a substantial
 2 recovery, at least in the historical accounting class, and
 3 because the damages have been reversed and there were only
 4 400 and some million awarded by Judge Robertson, not what is
 5 considered here to be potentially -- and obviously at that
 6 point 14 years or so of litigation, now 15, it is incumbent
 7 upon the court to see whether or not a matter could be
 8 settled.
 9 That does not change my obligation to be fair and
 10 consider this case -- we call it de novo, considered new, as
 11 to the objections and whether or not this is a fair and
 12 adequate and reasonable settlement or not.
 13 The fact that I encouraged that there should be a
 14 settlement and it would have to go to Congress, because
 15 there was so much money involved, and it could not come out
 16 of the normal funds available to the government. So I am
 17 not going to recuse myself on that basis.
 18 So I will go forward now with first the
 19 plaintiffs, and then defense counsel can respond to the
 20 objections that have been raised, both legal objections as
 21 to the notice of provisions and opt-out provisions as well
 22 as the objections that would seem in some way practical
 23 objection as to not being able to evaluate the leases
 24 properly.
 25 They've never been evaluated properly. They have

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1 never been paid fairly. That it does not reflect the true
 2 amounts in the IIM accounts because of either not being
 3 fairly paid or because there has not been a lot of money put
 4 in lately when there should have been, or whatever the
 5 various objections that went to those areas was.
 6 Then the bottom line was the objection to the
 7 historical accounting should not be settled because there
 8 has been no accounting for the individuals, and there will
 9 be no accounting, and that is unfair.
 10 These are trustees who had the obligation, just
 11 like your bank does with your bank account, hopefully, to
 12 keep track of the money, and pay it to you when it is due,
 13 and they have not done that.
 14 It has been established since 1999 by this court
 15 that there was mismanagement and not proper accounting of
 16 the monies due to the American Indians. The issue here
 17 really is, is this the fair and equitable way to resolve the
 18 matter under our laws of the United States as they currently
 19 exist?
 20 It will never be perfect. Nothing could resurrect
 21 120 years of either intentional or negligent management --
 22 mismanagement and harm done, I'm sure.
 23 Historically I am not sure that any settlement
 24 could cure the mistakes that have been made and harm caused
 25 or wrongs done. The object really today is, is this

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1 particular settlement to this set of facts before this
 2 court, which doesn't settle every claim that every Native
 3 American may have against the government, is it the
 4 appropriate way to go about it, and is it fair, reasonable
 5 and adequate based upon the factors that the court has to
 6 consider under the law.
 7 So I will hear from plaintiffs first, and then I
 8 will hear from defendants after that.
 9 MR. HARPER: Thank you, Your Honor, good
 10 afternoon.
 11 THE COURT: Good afternoon.
 12 MR. HARPER: May it please the court. Your
 13 Honor, we have heard today from 13 objectors, and there have
 14 been a total of 92 objectors who have filed papers in the
 15 appropriate timeframe.
 16 First of all, I would like to thank those -- on
 17 behalf of the legal team I would like to thank those folks
 18 who have come forward today and provided their views. It is
 19 a critically important part of the process.
 20 We do not agree with them, but this is about every
 21 class member having the opportunity to be heard. This is
 22 about their day in court.
 23 At the same time, Your Honor, we are mindful that
 24 by definition when we hear from objectors we hear from the
 25 displaced, however few. But we cannot forget at the same

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1 time that they are the few. We cannot forget that for every
 2 one of the individuals presenting today, there are literally
 3 tens of thousands of beneficiaries out in Indian Country who
 4 want this settlement, who have chosen to participate in this
 5 settlement, and they are waiting a final resolution to get
 6 their due.
 7 THE COURT: What about the argument that notice
 8 was not sufficient because of the Indian culture of not
 9 reading the mail from the federal government, or not having
 10 access to TV or Internet?
 11 MR. HARPER: Your Honor, I too am from Indian
 12 Country. I am a member of the Cherokee Nation. I can tell
 13 you that I heard that objection as well. There is some kind
 14 of notion that there may be some deficiencies in members of
 15 the class, and they're not able to understand, or they don't
 16 act like others act.
 17 I will tell you that that has not been my
 18 experience, and I just don't share those kind of
 19 paternalistic older notions of what Indian people, and the
 20 talents that they bring to the table, and what they
 21 understand about the law.
 22 We have been out to Indian Country. We have made
 23 visits to 50 different reservations. I myself have been to
 24 about 25 over the past couple of months during the notice
 25 process, and what we have found is that there are many

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1 individuals, thousands of people that we have met with that
 2 understand what is going on with this litigation, and they
 3 have decided to participate in it.
 4 So I don't think that there is any evidence to
 5 establish that. Certainly, Your Honor, Ms. Kinsella, in her
 6 affidavit, has set forth in great detail exactly the robust
 7 nature of this notice process.
 8 There were TV ads. There were radio ads. There
 9 were DVDs that were created in nine different languages.
 10 There were 8,000 of those DVDs that were sent out to members
 11 of the class who requested them, and to Indian
 12 organizations, and tribal organizations.
 13 So there was an outreach effort here -- of course
 14 in Ms. Kinsella's terms she is the best of the best as you
 15 know with respect to these kinds of matters -- that it was
 16 far beyond what is required by law.
 17 Again, I just do not see that there is any
 18 evidence to the notion that the notice was not sufficient
 19 and that the people were not informed of their rights. And
 20 those individuals that were informed of those rights, 99.98
 21 percent of them decided to remain in the class. A handful
 22 objected. 92. Only a few people have presented themselves
 23 here today.
 24 So what we are dealing with here is that we have a
 25 super majority out Indian Country that are looking to

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1 resolve these claims.
 2 During our visits I can tell you that every one of
 3 us who went out there -- from Ms. Eloise Cobell, to members
 4 of the litigation team, we saw what was near unanimous
 5 support for this resolution.
 6 People understood, similar to what the court has
 7 just articulated, that this does not right every wrong that
 8 has occurred over the centuries of mismanagement involved in
 9 this case. But what they do also understand is that this is
 10 a groundbreaking, record-breaking settlement, \$3.4 billion,
 11 that is ultimately fair and which they want to participate
 12 in.
 13 Your Honor, for those individuals who have been
 14 displeased or unhappy with it, they have had the opportunity
 15 for the trust administration class to opt out. Those who
 16 have wanted to, and there have been some who have selected
 17 to opt out, but that is far different than the idea that the
 18 settlement should not be approved, which would deprive the
 19 remainder of the class from enjoying the benefits of the
 20 settlement that they have chosen to enjoy.
 21 Your Honor, at the end of the day, actions speak
 22 louder than words. The actions that class members have
 23 taken is to participate.
 24 Your Honor, many if the issues that were raised
 25 today are similar and the same issues raised in written

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1 briefs. We have extensively briefed these issues. We are
 2 not going to outline all of the issues that we have set
 3 forth in our papers. We largely will rest on those
 4 responses.
 5 Of course if the court has any specific questions,
 6 we will address those. Otherwise, we will just emphasize
 7 some of those salient imports.
 8 We have divided this on our legal team into two
 9 individuals. Mr. Adam Charnes will step forward initially
 10 and address some of the Constitutional issues, including
 11 addressing the Supreme Court's decision in Wal-Mart, and
 12 then I will address some of the other objections, Your
 13 Honor, after that.
 14 THE COURT: Thank you.
 15 MR. CHARNES: May it please the court. Your
 16 Honor, I'm going to address three separate constitutional
 17 issues and talk about the Wal-Mart case at the end.
 18 THE COURT: All right.
 19 MR. CHARNES: The first constitutional issue is
 20 the argument that we heard this morning that there is a
 21 separation of powers problems with respect to the Claims
 22 Resolution Act.
 23 To be clear, the plaintiffs' position is that
 24 Congress, in the statute, does not handcuff this court in
 25 anyway. This court retains discretion to approve or

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1 disapprove the settlement fully. Therefore, there is no
 2 constitutional or separation of powers violation as has been
 3 suggested this morning.
 4 To be sure, we think that the court should
 5 exercise that discretion in light of the Claims Resolution
 6 Act. In particular, Congress's unprecedented approval of
 7 the settlement in this case, and in light of the plenary
 8 power doctrine which governs the United States' relationship
 9 and Congress's relation with respect to Indians in general,
 10 but the court retains discretion to approve or disapprove
 11 the settlement as it sees fit, and therefore there is no
 12 constitutional issue presented by the statute.
 13 Second, with respect to the trust administration
 14 class, some objectors have suggested that the class is
 15 insufficiently cohesive, or there is insufficient common
 16 interest in order for it to be certified and approved -- or
 17 for the settlement to be approved.
 18 I think it is important to start with first
 19 principles. As the court knows, Congress in the statute
 20 said that the trust administration class could be certified,
 21 notwithstanding Rule 23. So the specific requirements of
 22 Rule 23, as they have been laid out by the courts --
 23 expounded by the courts over many, many years, are not
 24 relevant. What is relevant is what the due process clause
 25 requires.

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1 The due process requirement is set forth in a case
 2 that has been mentioned this morning several times, Phillips
 3 petroleum versus Shutts. And Shutts states, as the
 4 government explained, four requirements:
 5 Notice to class members.
 6 Class members have an opportunity to be heard.
 7 There would be a right to opt out, at least when
 8 monetary relief is involved.
 9 And that the named plaintiffs at all times
 10 adequately represent the interests of the absent class
 11 members.
 12 As we explained in our briefing, and as the
 13 government has as well, we believe that all four criteria
 14 are satisfied here.
 15 Mr. Harper has already talked about the notice
 16 aspect and why that is sufficient. Clearly, all class
 17 members have had the opportunity to be heard, either in
 18 written objections or here this morning if they so choose.
 19 There is a fulsome opportunity to opt out with respect to
 20 the trust administration class.
 21 So the only remaining issue, therefore, is
 22 adequacy of representation, and the argument that has been
 23 made, really the main argument that has been made is that
 24 the class is insufficiently cohesive.
 25 As one objectors said, in her view there is a

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1 constitutional requirement that the class be predominantly
 2 cohesive, and our basic point, Your Honor, with respect to
 3 that is that that standard appears nowhere in the law.
 4 The Supreme Court in Shutts and in the Hansberry
 5 versus Lee case on which Shutts relied, does not have a
 6 standard of predominant cohesiveness. In fact, what the
 7 courts have held, and this is confirmed by the Wal-Mart
 8 case to a certain extent, is that there needs to be one and
 9 only one common issue, and that is what due process
 10 requires.
 11 And one way we know that is by looking at general
 12 class action Rule 23 law. The fact of the matter is that
 13 the law has been, for a long time, in (b)(1) and (b)(2)
 14 classes, there need be only one common issue.
 15 If this objector were correct that the class must
 16 be predominantly cohesive, then all of those class actions
 17 under (b)(1) and (b)(2) where courts found one common issue,
 18 all of those class actions would have been unconstitutional
 19 -- or the application of the rule to them would have been
 20 unconstitutional.
 21 So we believe that all that the due process clause
 22 requires is that there be a common interest, a single common
 23 interest that applies in every -- to every class member and
 24 the claims that that class member is asserting, and that is
 25 certainly satisfied here.

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1 As our paper show, the class members are all
 2 trust beneficiaries of the IIM Trust. The trust corpus is
 3 held in common. Income from the trust is commingled and
 4 held in common, and the breaches of trust found by this
 5 court and affirmed by the D. C. Circuit are systemically
 6 breaches that apply across the board to all beneficiaries of
 7 the trust.
 8 And that is all that the due process clause
 9 requires is that one common issue. There are many other
 10 common issues as well, but that is enough for the due
 11 process clause.
 12 The third issue -- the third constitutional issue
 13 I would like to address is the argument that several
 14 objectors have made, including this morning, with respect to
 15 an allegation that the settlement violates the equal
 16 protection clause, or equal protection principles and the
 17 Fifth Amendment's due process clauses I should say because
 18 Congress made an exception to the Federal Rules of Civil
 19 Procedure in street Claim's resolution act.
 20 We believe that that objection is also not well
 21 taken. To begin with, the Supreme Court held many years ago
 22 that in order for there to be an equal protection violation,
 23 the plaintiff must prove racial discriminatory intent or
 24 purpose. That racially discriminatory effect is not
 25 sufficient. Intent and purpose must be proved.

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1 That is clearly lacking here. None of the
 2 objectors have pointed to any racial animus. In fact I
 3 think the only fair reading of the events of the settlement
 4 and congressional approval of it are that they are meant to
 5 benefit American Indians, not to penalize them.
 6 Moreover, the settlement does not treat Indians
 7 differently based on race. What it does is it addresses the
 8 beneficiaries of the IIM Trust. The Supreme Court in Morton
 9 versus Mancanri case, the principles established there apply
 10 here.
 11 In that case, as Your Honor may recall, the
 12 Bureau of Indian Affairs had a hiring preference for members
 13 of a tribe living on reservations, and that was challenged
 14 by a non-tribal member saying that that hiring practice
 15 violated the equal protection principles, and the Supreme
 16 Court rejected it.
 17 In the course of doing so it said that the hiring
 18 preference was not even based on race. It was based on
 19 politics. It was meant to benefit Indian members of the
 20 tribes living on reservations, and since that was the
 21 categorization, it was not a racial classification.
 22 Finally, Your Honor, the plenary power doctrine,
 23 which I have alluded to, also applies here. The fact of the
 24 matter is that the congressional legislation addressing
 25 Indians and Indian tribes is not subject to strict scrutiny

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1 or any heightened level of review.
 2 The Supreme Court has held over and over again, as
 3 recently as this term, that Congress has plenary authority
 4 to regulate and legislate with respect to Indians and
 5 tribes, and that congressional legislation will only be
 6 overturned if it lacks a rational basis.
 7 And whatever criticisms you could make of the
 8 settlement, I think that it is fair to say that there is no
 9 rational -- that Congress had a rational basis for approving
 10 it.
 11 Finally, just a word about Wal-Mart, which we
 12 studied over lunch. We don't believe Wal-Mart presents any
 13 difficulties whatsoever with respect to your approval of the
 14 settlement.
 15 With respect to the historical accounting class,
 16 that class was certified under Rule 23(b)(1) as well as
 17 23(b)(2). I don't think there is a problem with Wal-Mart
 18 applying even to the 23(b)(2) aspect, but even if there
 19 were, the 23(b)(1) certification is sufficient. Nothing in
 20 Wal-Mart addresses Rule 23(b)(1) at all.
 21 I will note that I don't think Wal-Mart undermines
 22 the 23(b)(2) aspect of the settlement, either, for a couple
 23 of reasons.
 24 First of all, the Wal-Mart case did not involve a
 25 settlement. What the court said is that a class-action

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1 cannot be certified under (b)(2) if it seeks monetary relief
 2 at least to the extent that the money being sought is not
 3 incidental.
 4 It says nothing about whether a properly
 5 instituted (b)(2) class could sometime down the road be
 6 settled, and that is, of course, because the Wal-Mart case
 7 has not been settled. It is hotly contested litigation.
 8 (b)(2) cases -- even (b)(2) two cases seeking only
 9 injunctive relief are frequently settled. It would be an
 10 odd legal regime to say that if a plaintiff class sues for
 11 an injunction and the defendant offers a sufficient amount
 12 of money to buy itself out of the injunctive belief that is
 13 sought that settlement is somehow inappropriate or improper.
 14 Wal-Mart has nothing to do with the settlement.
 15 And the other aspect is, as we were reading the
 16 opinion, at least over the lunch hour, what the Supreme
 17 Court said was -- and the reason it disapproved the class
 18 in Wal-Mart case in particular, it says under (b)(2) class
 19 that you cannot have individualized awards of monetary
 20 damages.
 21 And that was really the Supreme Court's concern,
 22 and that is not the case with respect to the historical
 23 accounting class. Every member of the historical accounting
 24 class is getting the same amount of money. They are being
 25 treated exactly the same. There will be no individualized

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1 determinations. So the concerns that animated the Supreme
 2 Court's decision in Wal-Mart we do not believe are present
 3 here.
 4 With respect to the 23(a) aspect of Wal-Mart,
 5 again, all that required was one common issue. The Supreme
 6 Court confirmed -- Justice Scalia, that only one common
 7 issue is required, and that is satisfied here for the
 8 reasons that I explained.
 9 THE COURT: How about the other class? Instead of
 10 the historical class where the damages will be different,
 11 the awards would be different?
 12 MR. CHARNES: That is right.
 13 Well, congress in that -- in the statute said that
 14 the class did not have to satisfy Rule 23, and Wal-Mart is a
 15 Rule 23 case. So we think that disposes of it, even to the
 16 extent that Rule 23(a) applies, all the Supreme Court
 17 required was one common issue, which as we talked about a
 18 minute ago was all that the due process clause requires. So
 19 I think that the analysis is the same.
 20 THE COURT: All right.
 21 MR. CHARNES: And then with respect to the
 22 Concepcion case, AT&T versus Concepcion, I am a little
 23 puzzled as to what that decision has to do with this. All
 24 it did was reaffirm that adequacy must exist throughout a
 25 class action, and we certainly have no dispute about that

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1 fact.

2 THE COURT: Thank you very much.

3 MR. CHARNES: Thank you, Your Honor.

4 MR. HARPER: Your Honor, I'm going to turn to some

5 of the objections that we heard from a number of different

6 people first, and then there were some narrower specific

7 ones that I will address at the conclusion.

8 First, with respect to the settlement amount,

9 there seems to be a number of objectors who have claimed

10 that, in essence, the settlement amount is not enough. Of

11 course we have a \$3.4 billion amount. It is, as far as our

12 research indicates, the largest class action settlement

13 against the United States.

14 Another way to look at it is this, Your Honor. If

15 you look at all of the cases that have been litigated by

16 tribes or individual Indians against the United States, and

17 you added all of them together, their judgments and

18 settlements, you know, for the taking of land under the

19 Indian Claims Commission Act, for trust breaches, all of

20 those claims in the aggregate, this single settlement is

21 larger than all of the others. So that gives you another

22 sense of how significant a resolution this is.

23 Your Honor, class counsel always wishes -- always

24 wishes that they would get more for their class. But that

25 is not the test here. The test here is whether the proposed

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1 settlement is fair, reasonable and adequate under the

2 circumstances, and whether the interest of the class as a

3 whole are better served in this litigation or resolved by

4 the settlement.

5 The comparative, Your Honor, is between what the

6 claims are worth if fully litigated as compared to what the

7 settlement provides to the class. It is not the theoretical

8 injury that class members may have suffered. It is about

9 what is cognizable in the lawsuit, and what is before the

10 court here is that the settlement clearly is one that is

11 fair under that standard.

12 There is one aspect of this that I would like to

13 spend a moment upon, Your Honor, because there has been an

14 objection made that somehow the asset mismanagement claims

15 were kind of thrown in at the last minute and included

16 without any evaluation.

17 Your Honor, that is simply --

18 THE COURT: Yes, you should add that, because the

19 original lawsuit did not have that claim. It only asked for

20 an accounting, not damages.

21 MR. HARPER: That is accurate, Your Honor.

22 There have been many fund aspects mismanagement --

23 mismanagement claims regarding funds have been included, and

24 we made requests for disgorgement, requests for equitable

25 restitution that included some of the fund management

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1 claims. But there are aspects of what has been termed asset

2 or land management that were not a part of the initial

3 lawsuit to a certain degree.

4 Of course, Your Honor, this case was as much about

5 the breaches of trust involved as well as trust reform, and

6 trust reform always included these other aspects of the

7 management of the trust, the asset management as well.

8 Your Honor, one other point on that. We've had

9 eight separate settlement negotiations, and from the very

10 first one in 1998, the government made absolutely crystal

11 clear that they would not resolve this case without what

12 they termed, quote, unquote, total peace.

13 What that meant is that all individual claims

14 needed to be resolved for a settlement. And so from the

15 very inception of the negotiations back more than a decade,

16 we had assessed time and time again the value of those asset

17 mismanagement claims, because we knew that if we were to

18 settle those claims that they would be included.

19 In fact when Senator McCain introduced his bill --

20 Senate Bill 1439 in 2004, 2005 before Congress, he included

21 both asset mismanagement claims and fund mismanagement

22 claims.

23 All of that was included, because again, it was

24 well understood that the administration would not support

25 anything that did not include both kind of claims, and that

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1 had always been the case.

2 Now in that instance there was no opt out, and

3 that was one of the objections that the people raised at

4 that time. But the notion that the asset mismanagement

5 claims have not been fully investigated and assessed when it

6 was certain that they would need to be included if we were

7 ever to get to a resolution is just not true.

8 And so for many years class counsel have

9 investigated those claims. We have researched those in

10 detail, and so has the federal government, and we have a

11 sense, a good sense of what they are worth.

12 A similar objection, Your Honor, is with respect

13 to the distribution and whether or not it is fair. Your

14 Honor, first we will take the historical accounting class.

15 We think that issue is essentially disposed of with your

16 recent decision regarding the Quapaw tribe, docket 3828.

17 Quote in that decision:

18 "The monies awarded the

19 historical accounting class are

20 not damages. Rather defendants

21 award an identical amount to each

22 historical accounting class

23 member essentially in consideration

24 for being released from the

25 obligation to perform an historical

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1 accounting."

2 That is exactly how we see it, and that is why a

3 single per capita payment of \$1,000, no matter what the

4 value of your trust assets, is the fairest way to make that

5 distribution, because the individuals -- the government owes

6 each individual a duty to account. They are not providing

7 that, and in lieu thereof they are providing the \$1,000

8 payment. That is the fairest way to do so.

9 THE COURT: To make clear, there may have been

10 some confusion. The objections, or at least I understood

11 one objection, maybe, that the historical accounting class

12 is \$1,000 per person qualified to receive the monies in that

13 class.

14 The second class, the second matter there will be

15 differences of what is awarded on the payments stemming --

16 one said \$500 and one said \$800, up to -- and they have

17 determined that one of them may be a million dollars,

18 although some people claim that they are going to get a lot

19 less than they should.

20 But the \$1,000 per person does not change

21 regardless of the amount of money that you had in your IIM

22 account, et cetera. That is a set fee. I thought there was

23 some confusion with some of the objectors as to that.

24 MR. HARPER: Yes, Your Honor.

25 And turning then to the trust administration class

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1 as Your Honor just mentioned, there is an \$800 minimum

2 payment, and then payments will go up from there depending

3 on what was produced in your property from 1985 to 2009.

4 In essence, Your Honor, this is a balanced

5 approach. On the one hand it recognizes that class members

6 have all suffered some damages and that the government has

7 unlawfully obtained some benefit from its failure to

8 distribute these trust funds.

9 At the same time for those beneficiaries who have

10 more valuable assets, the likelihood of damages is greater.

11 Therefore, their payments are greater.

12 Your Honor, this is fair to the class as a whole.

13 There is no better way to do a distribution of this nature.

14 What we wanted to avoid -- what the parties wanted to avoid

15 was to spend literally tens or hundreds of millions of

16 dollars trying to figure out who gets what rather than

17 getting that money to the beneficiary class.

18 There was no possible way to do that in light of

19 the documents that are extant better than this -- this way

20 of distributing would do so.

21 In addition, Your Honor, for any individuals of

22 the trust administration class that believed they were owed

23 more, they always have the option of opting out, not

24 participating in the settlement, and proceeding in their own

25 subsequent action.

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1 There have been a couple, Your Honor, objections

2 regarding the land consolidation program. A couple deal

3 with alleged concerns regarding tribal sovereignty and

4 whether or not these undermine individual rights, and just a

5 quick moment on that.

6 There is nothing in this settlement, nothing in

7 that that would in any way negatively affect tribal

8 sovereignty. If anything, tribes are indirect

9 beneficiaries, because they will ultimately get the lands

10 back that are purchased through the consolidation program.

11 With respect to individually Indians, again, all

12 of the sales are voluntary, and so they will then be able to

13 decide.

14 There has also been the notion that there may not

15 be fair market value paid. Well, Your Honor, the settlement

16 itself expressly states that payments will be made for fair

17 market value.

18 In addition, this program will be -- this part of

19 the settlement will be operated under the Indian Land

20 Consolidation Act. There is a provision in the Indian Land

21 Consolidation Act requiring fair market value, requiring an

22 appraisal, and requiring that that appraisal be presented to

23 the beneficiary who is being made an offer under the Indian

24 Land Consolidation Act.

25 So we think that there is the legal coverage that

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1 some of the class members are seeking, Your Honor.

2 THE COURT: There was some technical objections

3 just raised as to the land consolidation concerning probate

4 and estate records, land records, et cetera.

5 MR. HARPER: Sure. And, Your Honor, we are not in

6 any way saying that there are not continuing issues with the

7 management of the trust. Our understanding is that the

8 Department of Interior is going to have extensive

9 consultations with tribes and individual landowners to

10 figure out and identify some of these problems and seek to

11 address them.

12 But Your Honor, that does not in any way say that

13 the setting forth of the \$1.9 billion fund in order to

14 consolidate land is in any way deficient, or not fair, or

15 not adequate.

16 There have been a couple of mentions of the

17 scholarship fund. Quickly on that. I think that there is

18 some misunderstanding there.

19 With respect to the scholarship funds, the

20 payments are going to be made to individuals that are at

21 fair market value. In addition to that, above and beyond

22 that, there will be money set aside for the scholarship

23 fund.

24 The reason that is is because we have heard from

25 many beneficiaries out in Indian Country -- if there is one

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1 theme that we hear time and time again is the importance of
 2 the next generation.
 3 We think that it will be a great incentive for
 4 folks to participate in the consolidation program if they
 5 know about that ad on that will ultimately create a
 6 scholarship fund. That was the intent behind it, and it has
 7 the additional benefit of creating this scholarship fund.
 8 In no way does that set aside any of the existing treaty
 9 rights or funds available under the Bureau of Indian
 10 Education.
 11 The one notion that has been voiced about how the
 12 funds will revert back to the federal government after ten
 13 years. Of course our position on that is that that is
 14 nowhere close to what is called the reverter clause, because
 15 reverter clause, the claims are extinguished and then the
 16 defendant still keeps the money.
 17 Here, if the land is not purchased the individual
 18 keeps its land, and those funds do not get paid to him, but
 19 then he does not lose his land either. So it is
 20 fundamentally different than the traditional reverter
 21 clause.
 22 A couple of issues related to incentive fee
 23 awards. First, Your Honor, of course this court has broad
 24 authority to make an incentive fee award that it deems fair
 25 and just under the circumstances.

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1 We have sought incentive fee awards from \$150 to
 2 \$200,000 for three of the named plaintiffs, and \$2 million
 3 for Ms. Eloise Cobell.
 4 All of these named plaintiffs have made important
 5 contributions to the success of this case. A handful of
 6 individuals have objected to the incentive fee awards, and
 7 most have targeted Ms. Cobell's -- the request made for Ms.
 8 Cobell.
 9 Let's be clear, Your Honor. The request for Ms.
 10 Cobell is extraordinary. It is not unprecedented, but it is
 11 extraordinary. The Alkatal case awarded, as Your Honor is
 12 aware, \$1.6 million to each of eight named plaintiffs. So
 13 this is not unprecedented.
 14 THE COURT: The one in Florida?
 15 MR. HARPER: This is the one in Florida, Your
 16 Honor.
 17 What I would submit to you today, Your Honor, is
 18 Ms. Cobell's contributions in this matter have been far
 19 greater than the ones made in other matters. She has
 20 devoted her life to righting this wrong. She has had day-
 21 to-day contact with counsel. She's been involved in every
 22 important decision.
 23 When this case needed a spokesperson, she was
 24 there. When this person -- this case needed somebody to
 25 raise funds, she was there. When we needed somebody to

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1 testify in Congress, she stood up. She took the brunt of
 2 the criticism for doing so. When this case needed
 3 additional funds, she took \$390,000 of her own money that
 4 she had won in a McArthur Genius Foundation Award, and she
 5 utilized it for experts in this case.
 6 Those are extraordinary contributions. Ms. Cobell
 7 has answered the call. This case, this settlement is a
 8 testament to her strength, courage and perseverance. We
 9 think that the request is extraordinary, but we also think
 10 that it is well worth it for her contribution.
 11 THE COURT: There was some challenge to her by Mr.
 12 Frank as to the \$7 billion offer that she testified to, et
 13 cetera.
 14 MR. HARPER: Yes. With respect to the \$7 billion
 15 offer, again, we presented this in detail in our papers.
 16 There has never been a \$7 billion offer for settlement of
 17 this case. The \$7 billion number came from the Bush
 18 administration, Your Honor.
 19 It included the settlement of all tribal trust
 20 cases, the reform of the entirety of the trust, the dealing
 21 with IT security issues, with fractionation, with not only
 22 individual claims from the past but in the future, and the
 23 termination of the trust.
 24 That is what the settlement offer was for \$7
 25 billion. It was considered widely a poison pill. It is not

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1 being resolved here.
 2 You take alone the tribal trust cases, which at
 3 one point the Attorney General, Alberto Gonzales, testified
 4 in Congress that those were worth potentially up to \$200
 5 million. I am not attesting one way or the other to it.
 6 That was his testimony.
 7 And you say -- and that is included in the \$7
 8 billion offer. Obviously, that is not the resolution of
 9 what was we are resolving here. That includes so much more,
 10 and when you are talking about including future claims, then
 11 there is a grave concern.
 12 There is another aspect of that which is that Mr.
 13 Frank has posed that this somehow makes Ms. Cobell have some
 14 kind of a conflict of interest.
 15 Well, Your Honor, the answer to that -- and a
 16 similar objection is made regarding attorney fees -- is that
 17 you get to decide, Your Honor, exercising discretion,
 18 whether or not to make an award for an incentive award, and
 19 because of that there is no conflict of interest. Otherwise
 20 there would always be a conflict of interest whenever an
 21 incentive fee -- an incentive award was asked for and
 22 determined by a court.
 23 Your Honor, with respect to attorneys' fees. We
 24 heard today a number of people -- a couple of objectors talk
 25 about attorneys' fees awards. I want to say this, Your

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1 Honor, with respect to that.
 2 I am very proud to be a member of this litigation
 3 team, because I know the work that this litigation team has
 4 put into this case for over 15 years, and what I can tell
 5 you is that when we do go out to Indian Country, when we
 6 have gone to those 50 reservations, we are not hearing
 7 extensive complaints about attorneys' fees.
 8 What we are hearing is people lining up after our
 9 remarks, after we brief them on the settlement, to thank us
 10 for the work that we have done. And it is humbling that
 11 folks do that, and we are very grateful to them for stating
 12 their appreciation. That is the reality that we see when we
 13 go out to Indian Country.
 14 We understand that there are a couple of people
 15 who do not see it that way, but the vast majority of the
 16 class we feel are comfortable with the request that has been
 17 made.
 18 And Your Honor, I do want to emphasize the point
 19 that Ms. Cobell made earlier today, and that is with respect
 20 to attorneys' fees. The question is that if the attorneys'
 21 fees are not fair, what is that going mean the next time an
 22 individual Indian seeks representation for a case of this
 23 nature, or other kind of case?
 24 A couple of other points that were raised by
 25 individuals with respect to the five tribes and the concerns

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1 there.
 2 First, my understanding is that the Interior
 3 Department is undertaking an effort to identify the members
 4 of the class -- the trust administration class that have
 5 what is called restricted fee lands that are recorded in
 6 state rather than the federal government systems.
 7 That effort I understand it is ongoing. I would
 8 also say that these individuals are allowed under the
 9 settlement agreement to self identify if they believe that
 10 they are included in the trust administration class.
 11 We have also had, as part of our overall effort
 12 regarding notice, we have made -- paid a substantial amount
 13 of attention to Oklahoma, in part, because of these issues.
 14 We made five bases throughout Oklahoma from
 15 Anandarko, to Lawton, to Durant, Muscogee and Tulsa. We
 16 met with thousands of individuals during those visits, many
 17 from the five tribes. We have had robust efforts in
 18 newspapers, on radio and television, and through that many
 19 individuals have self-identified themselves through phone
 20 calls.
 21 There have been 23,000 flyers that have been sent
 22 over to Oklahoma by the notice contractor, and 600 DVDs in
 23 languages such as my tribe's language, Cherokee, and others
 24 relevant to the beneficiaries in that area.
 25 There has been this robust effort. People know

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1 about the settlement. They know they can self identify, and
 2 we have had a reasonable -- it is well past reasonable the
 3 efforts that have been made to ensure that these individuals
 4 can have the opportunity to include themselves, and those
 5 efforts will continue to identify those individuals as I
 6 understand it.
 7 Your Honor, none of the objections that we have
 8 heard today should change the basic fact that this
 9 settlement is fair, reasonable and adequate. Unless the
 10 court has any further questions, I would ask that you
 11 overrule the objections and that you finally approve the
 12 settlement.
 13 THE COURT: Let me go through some of the
 14 questions with you, and then you will have a further
 15 chance, I think, after the government responds to the
 16 objections and to give a summary. I intended the final
 17 chance to talk a little more about attorneys' fees, because
 18 I think that that is somewhat separate from the underlying
 19 claims.
 20 The relief now under the settlement differs
 21 somewhat from the original initiation of the case where you
 22 asked for an accounting. Implied with that, I take it, was
 23 an accounting plus equitable relief, whatever could be
 24 granted beyond that.
 25 MR. HARPER: That is correct.

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1 THE COURT: It wasn't a money damages claim.
 2 And then as you said you had trust reform, and
 3 then at some point you came into this trust administration
 4 class suggestion.
 5 Was that created as greatest part of the
 6 settlement discussions, this actual class? Is that how that
 7 came about? How did that come about to be created?
 8 MR. HARPER: Yes. In essence, Your Honor, the
 9 trust administration class, as now articulated in its full
 10 form, was part of the resolution of the claims. It had
 11 been, though, part of the discussions for many years, and
 12 because of that had been widely investigated.
 13 THE COURT: And this was the vehicle to settle
 14 these claims, that is how you came up with this trust
 15 administration class?
 16 MR. HARPER: Yes, Your Honor. They included
 17 certain land management claims that were not originally
 18 included as damages claims in this action.
 19 THE COURT: In the trust administration claim, if
 20 there is an opt out, they preserve their claim for an
 21 historical accounting?
 22 MR. HARPER: Well, what they preserve is called an
 23 accounting in aid of judgment, Your Honor. Now the
 24 historical accounting that we brought here to District Court
 25 is different from what is called an accounting in aid of

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1 judgment.

2 What they do importantly preserve if they opt out

3 of the trust administration class is all of the evidentiary

4 and discovery abilities that you would normally have in an

5 action.

6 And because the accounting is used in aid of

7 judgment, we felt it necessary to confirm specifically in

8 writing and the settlement agreement that that was -- that

9 kind of an accounting was still available for those seeking

10 damages actions in a subsequent law suit under the Tucker

11 Act, and for that reason --

12 THE COURT: Would it go to the Court of Claims?

13 MR. HARPER: Those are generally performed in

14 Court of Claims.

15 Importantly, Your Honor, those are what is called

16 a post liability accounting. A liability must be

17 established, and to the extent that there is a breach of

18 trust of a money mandating statute, then the United States

19 will perform an accounting in aid of judgment in aid of

20 determination of the damages that should be awarded.

21 THE COURT: In the information that is going to be

22 relied upon, and maybe Interior wants to answer this

23 question, but the operation of the trust administration

24 class awards you make up a formula, and that information

25 there were some objections raised that that information may

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1 not be complete or misleading, et cetera.

2 Do you know how that -- where information is

3 coming from, and what is relied upon in order to get this

4 relief formula? Apparently, some people have already been

5 offered some money they are saying.

6 MR. HARPER: Your Honor, it is not clear to me. I

7 heard those objections as well. It was not clear to me

8 exactly what they meant by that. I think that the formula

9 is intended to include all funds that were actually

10 deposited and held in trust at the department within an IIM

11 account, which was the focus of the resolution here

12 involved.

13 I think that there are allegations that there may

14 be something incorrect there, but we just have not seen the

15 establishment of those allegations, and certainly the

16 government can respond in more detail.

17 What I will say is that there is an ability for

18 individuals who believe that they should be included but for

19 one reason or another are not on the available systems, to

20 make a claim to be included, and we have received thousands

21 of claims forms from our administrator -- from individuals

22 who want to be included that believe they have not -- have

23 been improperly excluded from the class.

24 So again, that ties into the robust notice

25 process. But there has been an effort to identify those

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1 individuals.

2 THE COURT: Let me -- just a couple of other

3 matters. As I said, I will wait on attorneys' fees for

4 miniature to question you later.

5 The scholarship fund. As I understand it that

6 has, I think, three sources to it, the scholarship fund?

7 MR. HARPER: Yes.

8 THE COURT: And has it been determined yet -- I

9 think someone has a cell phone on -- has it been determined

10 yet who is eligible to receive the monies from the

11 scholarship fund and regulations set up on it?

12 MR. HARPER: There hasn't been, Your Honor. Under

13 the settlement agreement, of course, the plaintiffs by -- I

14 think that it was two months after initial approval that

15 this court granted in December provided to the Department of

16 Interior -- nominated two entities that would be the manager

17 -- the administrators of that.

18 We did take that action, and the government may

19 have a better understanding of where they are in the process

20 of selecting the right organization.

21 There will be a five-member Board of Trustees,

22 uncompensated board, that will then decide the policies with

23 respect to the scholarship. So the short answer to your

24 question, Your Honor, is that that has not been specifically

25 determined yet.

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1 THE COURT: One of the reasons I asked was I did

2 receive a very interesting letter from a Native American

3 asking whether or not this would cover pre-existing

4 educational debt? Got out of college with a big debt. That

5 will be up to, I take it, the managers of the fund and the

6 trustees of the fund.

7 If there is a future -- in the event that some

8 members of the class believe there are future IIM trust

9 mismanagement, have they waived that right if there are

10 future mismanagement issues?

11 MR. HARPER: No, Your Honor. The settlement

12 agreement clarifies that any breaches of trust that occur

13 after the record date are breaches that can be brought in a

14 subsequent lawsuit. So this does not affect in any way

15 future claims.

16 Any potential mismanagement that occurs after that

17 record date in 2009 would be a matter that you could --

18 irrespective of whether or not you opted out of the class or

19 didn't opt out, you could bring that action.

20 THE COURT: And some of the argument that goes to

21 legal fees, and as I said, I am going to reserve that for a

22 minute, but one of the issues I thought about was what is

23 the future of reform in the IIM trust? You mentioned that

24 one of the purposes of this lawsuit was trust reform.

25 MR. HARPER: Yes.

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1 THE COURT: What have you agreed to in this
 2 settlement? What is enforceable, in other words, to have
 3 reform accomplished?
 4 MR. HARPER: Sure, Your Honor. A couple of things
 5 on that point.
 6 First, Your Honor, by the government's own
 7 admission, they have spent nearly \$5 billion on trust reform
 8 during the course of this litigation.
 9 THE COURT: 5 billion?
 10 MR. HARPER: 5 billion, and we would submit a lot
 11 due to the efforts of the team here involved. So that is
 12 point number one.
 13 Point number two is that we did want to have
 14 provisions in the settlement of agreement that addressed
 15 trust reform. One of those provisions is the \$1.9 billion
 16 for fractionation. The government has long submitted that
 17 fractionation is one of the principal reasons why they have
 18 not had sound management of the individual Indian money
 19 trusts.
 20 In this settlement, \$1.9 billion is set aside in
 21 order to consolidate land and deal with fractionation in an
 22 effective way. That, too, is about future management.
 23 That, too, is about trust reform.
 24 Third, Your Honor, the same day that this
 25 settlement was announced, Secretary of Interior Ken Salazar

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1 entered into a secretarial order that establishes a
 2 commission that will further study trust reform and what
 3 efforts are necessary to sustain additional trust reform.
 4 We agree that there are additional problems that
 5 need to be resolved, and that that is another aspect of the
 6 future looking aspects of this resolution.
 7 THE COURT: And you mentioned the \$7 billion
 8 figure, that the tribes have their own separate suits, and
 9 there are some 20 to 30 as I recall, maybe more than that.
 10 MR. HARPER: About 100.
 11 THE COURT: Following on after this one. I know I
 12 had a few behind me to do -- that have not resolved as a
 13 result of this case?
 14 MR. HARPER: That is right.
 15 And the point there was that the \$7 billion
 16 figure, the government made clear that that \$7 billion had
 17 to pay for the resolution of all of those tribal trust law
 18 suits, all of the individual lawsuits, all future claims,
 19 trust reforms and other matters. So it just was not an
 20 offer for settling this case, and it was not an offer for
 21 settling individual Indian claims.
 22 THE COURT: Let me just -- final-round up question
 23 on the overall settlement, then I'll get to the government,
 24 and then I'll get back to you on the individual attorneys
 25 fees a little more.

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1 What is the rough numbers of the American Indians
 2 in each class, and how many do you think, in total, will
 3 receive monetary benefits from the settlement in both
 4 classes?
 5 MR. HARPER: Your Honor, if I could have just a
 6 moment?
 7 THE COURT: And the reason I ask is I have seen
 8 about 300,000 banded about in a couple of instances for
 9 each class, and then I have seen a total of 450,000, perhaps
 10 500,000 total. It just wasn't clear to me.
 11 MR. HARPER: Sure.
 12 Your Honor, our understanding is that there are
 13 about 360,000 who are members of the historical accounting
 14 class. 360,000, and there are an additional 400 -- or I
 15 shouldn't say additional. Some of those are crossover --
 16 most of those are crossover.
 17 But there are 450,000 who are members of the trust
 18 administration class. In part that is because that class
 19 includes individuals who may have an allotment interest or
 20 an interest in restricted fee land but do not have an IIM
 21 account, and they will all -- members of both of those
 22 classes will receive a minimum benefit depending on whether
 23 they are members of the class.
 24 THE COURT: And I just recall. There was one
 25 objection that I forgot to ask you about. There seems to me

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1 a person who was knowledgeable -- a person who spoke towards
 2 the last concerning the 'whereabouts unknown' and locating
 3 people, and that there is a provision, I believe, that
 4 parts of land could be sold by default if the parties -- if
 5 the 'whereabouts unknown' category remained after five
 6 years?
 7 MR. HARPER: Yes.
 8 Your Honor, it has been referred to as the deemed
 9 consent provision. Specifically, what that entails is when
 10 an individual has not been located for an extensive period
 11 of time, and there are provisions for Interior -- the
 12 Interior Department having to make efforts to find that
 13 person, if in the event that they are unable to, then there
 14 is a deemed consent provision for the land consolidation.
 15 My understanding is that funds are then deposited
 16 in an IIM account, and they will still have the funds
 17 available.
 18 THE COURT: Thank you for the work.
 19 MR. HARPER: Thank you, Your Honor.
 20 THE COURT: I will hear from the government at
 21 this point on the response to the objections, and at the
 22 same time the government finishes its response to objections
 23 discussion, I will have some questions on the attorneys'
 24 fees, and then we will finish with response from the
 25 plaintiffs in that area.

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<p>1 MR. QUINN: Good afternoon, Your Honor. Michael 2 Quinn for the defendants. 3 We also spent part of our lunch looking over the 4 Wal-Mart decision. It was a good accompaniment to a salad. 5 Having looked at it and read through it, we also had an 6 opportunity to kind of search the terminology there to see 7 if it refers to anything in the way of due process or 8 constitutional issues, because our case here, the settlement 9 here as specified by Congress in the Claims Resolution Act 10 of 2010 is that this is not a case to be determined for a 11 class based on Rule 23, at least as to the certification of 12 the trust administration class. 13 Having looked briefly at the Wal-Mart decision as 14 issued as this morning, there are only two references to the 15 due process clause that we could find in the decision, and 16 no references to the constitution at all. 17 It appears to be specifically geared to addressing 18 in the first part of the decision Rule 23(a) and commonality 19 as it particularly applies in the case of a class to be 20 certified under 23 (b)(2) as a mandatory class. That is not 21 the trust administration class here. This trust 22 administration class is to be -- was certified as a 23(b)(3) 23 class for purposes of the settlement. 24 But I think it is informative that the court 25 discusses it in two places slip opinion. Due process is</p>	<p>1 to voluntarily waive trial and come to settlement in a 2 voluntary agreement with those parties, we believe that 3 those due process concerns are no longer an issue for the 4 court. 5 In that respect, even to the extent that those due 6 process considerations amount to beyond a rule issue to a 7 constitutional dimension, they don't really apply in the 8 context of the settlement here where the defendant has 9 protected itself by bargaining at the table to come to a 10 settlement. 11 The other aspect of Wal-Mart addresses the Rule 12 23(b)(2) certification in that case. It focuses primarily 13 on the issue of seeking money damages in a mandatory class 14 action. 15 We agree with the view of plaintiffs as Mr. 16 Charnes articulated then that the Wal-Mart decision is 17 distinguishable from this case and does not apply here as to 18 the 23(b)(2) historical accounting class, but I think for a 19 slightly different reason. 20 It has always been the government's position 21 throughout this litigation that the court's jurisdiction 22 being founded on the Administrative Procedure Act for the 23 failure and the delay of the defendants to provide the 24 implied accounting duty under the 1994 Reform Act was the 25 only thing at issue.</p>
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<p>1 mentioned at page 23. In noting that the court has always 2 required -- and citing Phillips Petroleum versus Shutts that 3 notice and opt out opportunity always be afforded in the 4 instance where money damages are to be awarded. 5 That is nothing new with respect to the structure 6 of the case here. 7 Due process also turns up again at page 26 of the 8 slip opinion, Your Honor. And there I think it brings to 9 the fore a key distinction between this case and the 10 settlement here before the court today and the litigation 11 going on in the Wal-Mart case, and that is the court says: 12 "Contrary to the 9th Circuit's view --" 13 And I'm quoting the decision, that slip opinion 26: 14 "-- Wal-Mart is entitled to 15 Individualized determination 16 of each employee's eligibility 17 for back pay." 18 That is the -- and other courts have recognized 19 this as well. The commonality test is not all about 20 protecting the absent class members. It is often primarily 21 about affording a defendant the right to due process at 22 trial. That is to face their accuser and to try each claim 23 before a jury at least to the extent it significantly 24 differs. 25 Here in settlement where a defendant comes forward</p>	<p>1 That is what the plaintiffs could obtain by matter 2 of relief was an accounting statement, not money damages. 3 To that extent, under even the Wal-Mart decision announced 4 today, that holds true. 5 As the court recognized in the order that it 6 issued last week, the thousand dollar settlement payment is 7 not damages. It does not attempt to resolve, or address, or 8 release anyone's claim that they had funds mismanaged, or 9 that they lost funds in the system. It is merely a payment 10 in recognition of the stipulation in the settlement that 11 the class is willing to forgo the claim's statutory 12 accounting statement for a stipulated agreement as to what 13 their balance was as of the record date being September 30, 14 2009. 15 So in that respect this case, from the 16 government's perspective, has never been about money 17 damages. It was to result in a statement issued to the 18 class members, and then those class members would 19 individually determine whether it indicated they were 20 missing money. And in that case they could bring a Tucker 21 Act claim either in the Court of Federal claims or within 22 the jurisdictional limits of the District Court -- in their 23 local District Court. 24 THE COURT: So the restitution, or payment, or 25 whatever you call it, was incidental to the equitable</p>

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1 relief?

2 MR. QUINN: Absolutely, Your Honor.

3 THE COURT: All right.

4 MR. QUINN: And it was part of the claim. The

5 claim plaintiffs initially included -- if you go back to the

6 original early stages of this case, going back all the way

7 back to 1998, Judge Lamberth struck allegations that even

8 hinted of damages to perfect a pure Administrative

9 Procedures Act claim.

10 So in that respect the 23(b)(2) certification here

11 continues to be proper even under the Wal-Mart decision,

12 having just had a few hours to digest it.

13 With respect to that, I think it is important to

14 keep in mind that since Congress has exempted the trust

15 administration class from the rigors of Rule 23(a) and

16 23(b)(3) in terms of certification, the court must look back

17 to other authority to determine how to protect absent class

18 members' rights and interests in determining whether the

19 settlement is fair, reasonable and adequate.

20 We have suggested in our briefs, and plaintiffs

21 have as well, that the best benchmark for that is the

22 Philip's Petroleum versus Shutts decision. That is

23 referenced again in -- it is still good law, and it is

24 referenced again in today's Wal-Mart decision and in another

25 context.

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1 But that case identifies -- and a subsequent

2 opinion in the Supreme Court and a concurring opinion by

3 Judge Ginsburg in the Matsushita Electric Industries case

4 versus Epstein, 516 U.S. 367 at page 396 decided a few years

5 after Shutts, mentions and describes the Shutts decision as

6 saying that this court, quote:

7 "Listed minimal procedural

8 due process requirements a

9 class action money damage --

10 a class action money

11 judgment must meet."

12 It is to bind absentees, and those requirements

13 include notice, an opportunity to be heard, a right to opt

14 out, and adequate representation. Those are the

15 requirements.

16 Commonality is not stated among them. The only

17 place where it comes into play in this context, in this

18 unusual circumstance where Rule 23 does not apply, is to the

19 adequacy of the representation.

20 We have submitted that if you look at the case

21 law on adequacy of representation, the standard requires an

22 actual conflict going to the heart of the representation.

23 In the Hansberry versus Lee, which I believe Ms. Cravens

24 counsel cited, 311 U.S. 32, in 1940, the conflict there

25 among the class was that the earlier lawsuit had a class of

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1 plaintiffs fighting against members of their own class.

2 Where it was clear that the parties on both sides

3 were members of the same class, you obviously have a

4 conflict among class members.

5 Subsequent decisional authority following

6 Hansberry has been to the effect that it cannot be just mere

7 speculation or conjecture about a conflict. There has to be

8 some proof of an actual conflict.

9 And nothing that has been presented either in

10 writing, Your Honor, I would submit, or today orally before

11 the court in the objections presents any direct evidence of

12 an actual conflict that prevents the court from finding

13 adequacy of representation.

14 The objectors, at least one this morning,

15 suggested that the plaintiffs cannot be adequate

16 representatives because the named class representatives got

17 an individual accounting.

18 Your Honor, might be wondering how that came

19 about. There was not an accounting in the sense that the

20 individual named plaintiffs receiving the formal statements

21 that everyone else would do. It is part of the original

22 work on discovery in the case.

23 Several accounting firms investigated, per an

24 agreement of the parties, the named plaintiffs and their

25 ancestors' records to try to determine if, in fact, an

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1 accounting could even be done.

2 So there was a thorough accounting work done, but

3 nothing that anyone had ever agreed was tantamount to the

4 receipt of the historical statement of account, which was

5 the ultimate aim of the historical accounting class

6 litigation.

7 And even if by chance -- and we don't agree that

8 it does -- but if such an accounting work for a named

9 plaintiff had, in effect, mooted their claim, which we don't

10 believe that it did, there is -- it is well-established that

11 a class representative, once in a certified class, can

12 continue to represent that class even if their claim winds

13 up being mooted.

14 There is extensive Supreme Court authority in that regard.

15 With respect to the claims that are compromised,

16 Your Honor, there are a couple of things that have come

17 through in the favor of the objections today. Those that

18 argued that their claims are being undervalued, or that they

19 will be under compensated as a result of the settlement,

20 that is one of the reasons why you have the safeguard for an

21 opt out.

22 Someone giving notice -- receiving notice of the

23 action who disagrees or is concerned for any reason that

24 they might not get their money's worth out of the

25 settlement, was free to submit an opt out. And several -- a

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1 couple of thousand -- close to a couple of thousand people
 2 did that. That is the safeguard.
 3 This case has also been in settlement mode for
 4 well over a year, even before the actual notice period
 5 began. The settlement was in front of Congress, and the
 6 information about the settlement agreement was available on
 7 the Internet, and anyone could look at the principle
 8 agreement and see what those terms were.
 9 The trust administration class, by definition,
 10 excludes anyone who filed a claim prior to the complaint in
 11 the trust administration class. So anyone who was
 12 concerned that they might be swallowed up in the trust
 13 administration class and did not want to deal with it also
 14 had the option of, in a sense, jumping ahead in line and
 15 filing suit so that they would be outside the definition of
 16 class.
 17 I think one of the objectors, and I think it was
 18 Mr. Carnes this morning, spoke of all of the other issues
 19 that lie before people in Indian Country. He talked about
 20 health care, educational concerns and economic development.
 21 And that is one of the main reasons why the government and
 22 the Secretary of Interior, in particular, had pushed to try
 23 to resolve all of these claims so that the government could
 24 turn the page and establishing a new relationship between
 25 the government and the American Indians.

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1 That does not mean that trust reform was done. It
 2 does not mean that claims that people have today -- and
 3 there were some objectors here arguing about -- mentioning
 4 problems that they have today.
 5 This lawsuit settlement, and even the approval by
 6 the court of the settlement, does not take away those
 7 individuals' rights to redress a current grievance. The
 8 settlement only releases claims going as far current as
 9 September 30, 2009.
 10 So if a person knows something is being stolen
 11 from their account, or knows something -- is certain that
 12 someone is doing something improper, those could still be
 13 addressed by a lawsuit going forward.
 14 The Department of the Interior and the Secretary's
 15 announced a Secretarial Commission on Trust Reform will have
 16 an evaluation of the Interior's administration with input by
 17 trust beneficiaries, and they hope to hold reasonable
 18 listening sessions, and examine the trust duties and what
 19 further reforms are necessary.
 20 One of the benefits out of the approval of this
 21 settlement is that the agreement provides -- and the statute
 22 provides that the Land Consolidation Fund allows a certain
 23 modest amount of money to go to support -- to fund that
 24 commission on an ongoing basis as it continues to identify
 25 areas of improvement in trust reform on a going forward

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1 basis.
 2 THE COURT: I had allowed the government some
 3 opportunity to communicate with the class members regarding
 4 the settlement, particularly the funds.
 5 Do you have any feedback on that? That was over
 6 objection of the plaintiff at the time I did it.
 7 MR. QUINN: I don't know that I have any specifics
 8 to relate to Your Honor this morning. I know that one of
 9 the reasons why we requested that relief is that the
 10 consultation -- the main for asking for the ability to
 11 communicate on a broader basis was because the statute --
 12 Congress asked the Department of Interior to consult with
 13 Indian tribes on the land consolidation aspects of the
 14 settlement going forward, and that means setting up formal
 15 conferences with those tribes.
 16 I understand that the first ones are scheduled
 17 for July 14. These take time to set up. But they will be
 18 going on, and there will be further conferences and
 19 consultations with tribes and other dates and other
 20 locations as the schedule can be arranged. But it has been
 21 a more formalized process, and that takes some time to get
 22 underway.
 23 The other thing about land consolidation,
 24 addressing some of the objections that you heard this
 25 morning, is that it is voluntary. No one needs to sell land

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1 that they do not want to sell.
 2 The land consolidation process is intended to be
 3 put forward to identify smaller fractions of land where it
 4 is very difficult to administer and may be meaningless to
 5 some owners. If a particular track is meaningful to
 6 someone, it is not going to be taken from them. They might
 7 be offered some money for it, but they do not have to take
 8 it.
 9 The other thing with respect to the 'whereabouts
 10 unknown' is -- as I read the settlement agreement, the
 11 consent on land consolidation will only apply to those class
 12 members who are bound by the settlement agreement. And in
 13 fact by being in the settlement agreement by contract you
 14 are agreeing to those terms going forward.
 15 But the money will not just disappear. If after
 16 trying for five years to locate the person, identify a tract
 17 for sale under that program, the money would then go into a
 18 'whereabouts unknown' account and be held for that
 19 individual.
 20 THE COURT: Tell me now if you are ready to move
 21 forward, or is someone else going to address the attorneys'
 22 fees issue.
 23 MR. QUINN: Let me see, Your Honor, if -- oh, if I
 24 could just for a moment address Ms. Works comments about the
 25 land issue and the notice issue.

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1 I think it is important to go back to the very
 2 comprehensive notice effort that was undertaken here. In
 3 addition to direct notice that was sent out you had posters
 4 like this where people were asked to post them in
 5 convenience stores, and clinics, government offices, tribal
 6 offices, telling people that if you want to get payment you
 7 did not have to do anything if you're a current account
 8 holder.
 9 Your rights -- you could call for further
 10 information. This was distributed all over reservations in
 11 Indian Country where class members were likely to reside.
 12 You had radio advertisements.
 13 If you go back and look at Ms. Kinsella's
 14 declaration, her declaration at exhibit 6 lists several
 15 Cherokee publications where full-page ads were taken out.
 16 She has got a Cherokee One Feather Weekly, February 3, full-
 17 page ad. Cherokee Feather Weekly, February 17, March 10.
 18 Another monthly publication, the Cherokee Phoenix Monthly,
 19 two different half page ads in two different issues.
 20 So there is outreach, and it doesn't stop there.
 21 The settlement agreement provides after approval by this
 22 Court of the settlement for further notice efforts to
 23 identify people who are in the class who stand to receive
 24 payments.
 25 I would refer Your Honor to section E of the

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1 settlement agreement. Section E-1 calls for the
 2 identification of a special master who would aid in those
 3 tasks. Section E-4 provides in part A that there be no
 4 payment -- no payout to the trust administration class until
 5 class members are substantially identified.
 6 4-E -- section E, 4 little E one, speaks to a
 7 supplementary notice program to potential class members
 8 encouraging them to register.
 9 4-E-2 requires the Garden City group to develop a
 10 procedure for verifying class members.
 11 4-E-3 sets a self-identification period that Mr.
 12 Harper spoke to where people can submit information, say,
 13 I'm a member of the class. I may not have an IIM account,
 14 but I have restricted land.
 15 And that is just a fact of the historical record
 16 here. There are certain tribes where the records are not
 17 with the federal government, and we will probably have to
 18 rely to a large extent on self identification from people
 19 who can submit information indicating that they are a member
 20 of the class.
 21 So I would suggest, Your Honor, in closing that
 22 the settlement has been thoughtfully approached to be as
 23 comprehensive and inclusive as possible and give every class
 24 member every opportunity to receive the payments and
 25 distributions that they are due under the settlement.

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1 THE COURT: Thank you.
 2 Mr. Kirschman, are you going to address the legal
 3 fee issue at this time?
 4 MR. KIRSCHMAN: I am sorry?
 5 THE COURT: Are you going to address the legal
 6 fees at this time?
 7 MR. KIRSCHMAN: Yes, Your Honor, and I will be
 8 brief.
 9 We have fully addressed the issue of legal fees
 10 in our brief, and we stand by that filing. We think that it
 11 is important that the court consider what it has heard
 12 today, and what it has seen it written objections that have
 13 been presented by people who have not appeared today.
 14 The government believes that a \$50 million award
 15 for all attorney fees, including the inclusion of expenses,
 16 is a reasonable amount based on the percentage of funds, a
 17 method used in this circuit.
 18 There has been no reason why the court should feel
 19 compelled to find awards, as I mentioned before, of \$99.9
 20 million somehow appropriate just because plaintiffs, in
 21 their filing, or class counsel in their filing, have sought
 22 a total of \$224 million. We just caution against any
 23 weighing in that manner.
 24 The settlement agreement leaves it to the court's
 25 sound discretion, and we ask that the court exercise that

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1 discretion in determining an appropriate amount. That
 2 discretion should, of course, as I mentioned earlier, be
 3 guided by the fact that Congress has asked that you consider
 4 that the plaintiff classes here are beneficiaries of a
 5 federal trust, and that the purpose of this settlement is to
 6 provide funds for these beneficiaries. So that is an added
 7 consideration.
 8 It makes it somewhat unique for the court, but it
 9 is an important one, and so we again bring that to your
 10 attention and ask that you find a total attorneys' fees of
 11 \$50 million is appropriate here.
 12 THE COURT: I appreciate that. And I have looked
 13 through the materials that have been supplied on attorneys'
 14 fees for both sides. Thank you.
 15 Counsel for the plaintiffs want to respond to the
 16 attorneys' fees issue at all?
 17 MR. HARPER: Your Honor, Mr. Gingold is going to
 18 address the attorneys' fees as part of his closing, if he
 19 could do that at this point.
 20 THE COURT: Do you want to summarize anything else
 21 first?
 22 MR. HARPER: Unless Your Honor has any further
 23 questions of me on any of the other objections, we did not
 24 have any specific other objections to address.
 25 THE COURT: I went through my questions that I had

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1 on this, and I went through all of the objections and most
 2 of the generic issues. I did not ask specific questions on
 3 some of the specific objections because they are covered
 4 otherwise in the concerns that we have discussed.
 5 Thank you.
 6 MR. HARPER: Thank you, Your Honor.
 7 THE COURT: Mr. Gingold, you are going to address
 8 attorneys' fees?
 9 MR. GINGOLD: Yes, Your Honor.
 10 THE COURT: All right.
 11 MR. GINGOLD: With respect to the attorneys' fees,
 12 plaintiffs asserted in their petition for class counsel fees
 13 50 to 99.9 million dollars, expressly in accordance with the
 14 terms of settlement.
 15 During the year that it took to negotiate with
 16 Congress to pass the Claims Resolution Act of 2010, the
 17 Senate required additional language be added to what had
 18 been the originally proposed legislation in support of the
 19 settlement, and that That legislation provided that 50 to
 20 99.9 million dollars in accordance with controlling law.
 21 Congress and the Senate unanimously passed this
 22 and expressly stated that it is this court's determination
 23 as to what is appropriate and what isn't in accordance with
 24 controlling law. The 50 to 99.9 million dollar number does
 25 not establish a ceiling and does not establish a floor.

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1 THE COURT: How do you get around the agreement as
 2 part of the class-action settlement agreement -- your fee
 3 agreement? You call that a clear sailing provision, but it
 4 seems to me that attorneys may submit a motion for class
 5 actions counsel's attorneys' fees, expenses and cost
 6 incurred through December 7, 2009. Such motion shall not
 7 assert class counsel be paid more than \$99.9 million above
 8 the previous amounts paid, and then you filed a motion that
 9 included more than that.
 10 MR. GINGOLD: No, Your Honor. I think we
 11 explicitly stated -- or plaintiffs explicitly stated that
 12 they asserted a fee request of \$99.9 million for class
 13 counsel subject to controlling law.
 14 As I tried to explain, subsequent to the agreement
 15 the Senate required an amendment of the proposed
 16 legislation, and that amendment was accepted by both the
 17 defendants and the plaintiff, adding the additional
 18 provision, subject to controlling law, or words to that
 19 effect.
 20 That was not in the original December 7, 2009
 21 agreement. It was added in the implementing legislation,
 22 the Claims Resolution Act, because it was explained to us
 23 that they wanted to be sure that whatever this court does is
 24 in accordance with controlling law.
 25 And Your Honor --

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1 THE COURT: If that is not a binding contract --
 2 assume for a second that that is not a binding contract that
 3 binds the court and I can set a reasonable fee under the
 4 law, is there some evidence of what counsel considers to be
 5 a reasonable fee in any event?
 6 MR. GINGOLD: Your Honor, there is some evidence
 7 of what counsel believed they would be -- this is important.
 8 The terms of settlement were negotiated with regard to the
 9 plaintiffs prior to any discussion of legal fees during the
 10 settlement process, which is required in accordance with the
 11 rules of the D.C. Bar, ethical rules, and I think with
 12 regard to most judicial decisions.
 13 The government indicated that it would not appeal
 14 an amount that this court would award if it was \$99.9
 15 million or less.
 16 By that acknowledgment, which is explicit in the
 17 December 7, 2009 settlement agreement, the government itself
 18 acknowledged that this court had the authority to award an
 19 amount more than that and, Your Honor, less than \$50 million
 20 as well.
 21 And Your Honor, unlike the black farmers'
 22 settlement, and the Indian farmers' settlement, those were
 23 capped fees, and there were floors.
 24 In the Indian farmers' settlement, which is a
 25 taxable settlement, and I believe the actual net

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1 distribution is something in the nature of \$600 million or
 2 less, what was approved by the court was \$60.8 million.
 3 In the black farmers' settlement the ceiling is, I
 4 think, something like \$92 million. There was no litigation
 5 surrounding the black farmers' settlement. The black
 6 farmers' settlement was solely a negotiated agreement
 7 between the United States and representatives of the black
 8 farmers.
 9 There had been litigation 10 years before that had
 10 been settled which was not perfect, but the settlement that
 11 was negotiated with a ceiling of about \$92 million, Your
 12 Honor, was just solely as a result of the negotiations,
 13 whether they were a few months or longer.
 14 Your Honor, it was always our understanding when
 15 neither we nor the government agreed to a ceiling or a floor
 16 that this court had the authority the award what it decided
 17 was appropriate and in accordance with the law of this
 18 circuit.
 19 The only concession made by the government in that
 20 regard was that if the ward was in excess of \$99.9 million
 21 it retained the right to appeal. If it was below \$99.9
 22 million or below, it waived its right to appeal. That is a
 23 difference, Your Honor.
 24 THE COURT: The way you all approach the fee
 25 request in your pleadings, it is a common funds approach.

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1 What is a common fund? The government has some \$300
 2 million. You claim all 3.4 billion, and what the trust
 3 reform will cost, or has cost in the past, as fair
 4 consideration.
 5 Can we consider the land consolidation fund as
 6 part of the common fund for the purpose of attorneys' fees?
 7 I mean that is a fund that is going to revert back to the
 8 government if it is not expended.
 9 MR. GINGOLD: Your Honor, our understanding of the
 10 law as we provided in our briefs is that this court
 11 ordinarily considers the direct monetary benefits received
 12 in a settlement or judgment and the tangible benefits that
 13 are in addition to that that the court can assess in
 14 deciding what is appropriate.
 15 Your Honor, what we pointed out in that regard is
 16 direct monetary benefits are in the nature of about \$1.5
 17 billion. There are indirect benefits, but there are
 18 tangible benefits to the class of \$5 billion in trust
 19 reform.
 20 When you are reviewing the case law in this
 21 regard, it is appropriate in this circuit and elsewhere to
 22 consider tangible benefits that are not direct monetary
 23 benefits to the class members.
 24 So we believe they don't necessarily -- or are
 25 determined on the basis of 15 percent, or 20 percent, or 25

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1 percent, which is often determined in class-action cases,
 2 but some value is associated with those benefits.
 3 Your Honor, the \$1.9 billion -- it is possible
 4 that no money out of the \$1.9 billion will be paid to an
 5 individual Indian, because individual Indians may refuse to
 6 sell. That is possible. We don't believe it is likely, but
 7 it is possible, Your Honor, and therefore all of that money
 8 would revert.
 9 In addition, Your Honor, of that \$1.9 billion, 15
 10 percent of that is available for the government to pay its
 11 fees and expenses. That's 15 percent of just the
 12 distribution of \$1.9 billion, which it apparently believed
 13 was reasonable to pay for its contractors, and at the time
 14 associated just with the purchase of fractionated interest
 15 from individuals who would receive the benefit of the funds
 16 once the purchase is consummated.
 17 Your Honor, we have been in this litigation for 15
 18 years -- well, more than 15 years now. The litigation has
 19 been some of the most difficult and intense litigation in
 20 the history of this circuit.
 21 We have done whatever needed to be done whether or
 22 not we would be paid, and Your Honor, some of us have not
 23 been paid since 1998, and we have done it. And this is
 24 important.
 25 I would say, Your Honor, that if it was not for

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1 Eloise Cobell, we would not have done this, and we did it
 2 because she approached us and said -- and, Your Honor, Mr.
 3 Harper and Mr. Pearl are Indians. Mr. Harper as he said is
 4 a Cherokee. Mr. Pearl as a Chickasaw.
 5 They are important members of the litigation
 6 team. Everybody on the litigation team is important, Your
 7 Honor, but they are very important. They bring a
 8 perspective that those of us who are not Indian would never
 9 have understood.
 10 But she asked them to do it because she said,
 11 nobody will do it. We have an abuse that has gone on for
 12 generations. She saw her parents and grandparents suffer.
 13 She saw children and others suffer. And she said, if you
 14 don't do it, who is going to do it?
 15 And she made one request of us when we do this.
 16 She said, I don't know if we are going to have any money to
 17 pay you, but you have to promise me that if we start this
 18 you are going to finish it, because we cannot afford to have
 19 you walk out of our litigation. We have to win because it
 20 is so important, symbolically and otherwise, to individual
 21 Indians.
 22 Those of us who are on the team -- and these are
 23 some of the most extraordinary people, Your Honor. I have
 24 been practicing law for 37 years. I was a partner in major
 25 law firms. These are some of the most extraordinary people

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1 I have worked with.
 2 It does not make any difference if anyone was
 3 being paid. It would not stop someone from working all
 4 night. It would not stop whatever was necessary to be
 5 done. But, Your Honor, what Judge Lamberth said, and what
 6 this court has said, Your Honor, has said himself, in other
 7 class action cases, first of all it is the results that
 8 counts.
 9 Secondly, you look at the effort.
 10 Thirdly you look at the difficulty.
 11 Fourthly you look at the risk.
 12 Fifthly, you look at the sacrifice.
 13 And then you look, Your Honor, generally at how
 14 the case was litigated and what the obstacles were. Your
 15 Honor, I think it is fair to say there is no case in the
 16 history of this circuit that has been more intensely
 17 litigated against a more formidable opponent.
 18 We do not have to go through what was done, why
 19 things were done over the 15 years, but I think it's fair to
 20 say that the government vigorously litigated and defended
 21 the positions of the United States.
 22 Whether we agreed with them on how they did it,
 23 they did it vigorously, and Your Honor, at one point in time
 24 our litigation team faced the Civil Division of the
 25 Department of Justice, the Environment and Natural Resources

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1 Division of the Department of Justice, the U.S. Attorney's
 2 Office in Washington, the Solicitors Office of the Interior,
 3 Treasury General counsel, White House counsel, and 54 law
 4 firms.
 5 This is what we have done, and we did this
 6 knowing fully well we may never get paid. We did this
 7 knowing fully well that some of us were not being paid. But
 8 we did it.
 9 What we want is something that this court
 10 determines is fair. We will accept this court's decision.
 11 But Ms. Cobell -- everything that Ms. Cobell says is
 12 meaningful. This is not lip service. This is not a
 13 political speech.
 14 It is important to her -- and it is so important
 15 to her that whatever she is dealing with right now she is
 16 paying attention to this case. She is convinced, and at
 17 from those of us who have gone to Indian Country, and I have
 18 traveled thousands of miles in Indian Country and met with
 19 thousands of individual Indians, including one particular
 20 session where more than 1,000 Navajo at one meeting attended
 21 the session on this settlement.
 22 Your Honor, contrary to what you may have heard
 23 today, individual Indians understand how important these
 24 issues are to them. They do not throw away what they
 25 receive in the mail with regard to Cobell, and they pay

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1 attention. They listen. They discuss with us what the
 2 issues are.
 3 These issues -- and Your Honor, we are talking
 4 about millions of dollars. It may seem high in Washington,
 5 but it's extraordinary in Indian Country. Whether you go
 6 to the Dakotas where people need \$20 to fill a propane tank
 7 in order to have heat in the winter, or if you go to the
 8 Navajo, where most of the people we met with did not speak
 9 English and we needed a Navajo translator with us all the
 10 time, they understand what millions of dollars mean in legal
 11 fees.
 12 But I will tell you what they told me, and I will
 13 tell you what they told my colleagues. For years people
 14 have come from Washington and told them that they were
 15 going to do things, and told them don't worry about it, and
 16 this is the first time anyone has ever done anything for
 17 them.
 18 Whatever the fee was, because they could not get
 19 lawyers, Your Honor. It is not -- one of the things we
 20 pointed out, let's say that it is an \$1,800 payment to
 21 someone in South Dakota because that person may have an
 22 account, but the land doesn't generate income other than a
 23 few dollars a year, whether it's 76 or 25. So they would be
 24 getting \$1,800, which is the expected minimum, not 15, and
 25 it is tax-free.

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1 Based on those percentages of the 99.9 million,
 2 they would have paid us \$27 a year. If it was more -- or
 3 no, I think it was less than that. It was about \$14 a year,
 4 and then I think 123 which was the number on 14.75 percent
 5 not 15, it was like \$27 year.
 6 Your Honor, I can tell you that that covers a
 7 couple of car washes a year in the Dakotas. It covers one
 8 here in Washington. And Your Honor, there are not a lot of
 9 lawyers who would do it for the price of a car wash, but
 10 that's what we're talking about here.
 11 And let me say one other thing. There is nothing
 12 I think you can identify that can properly quantify the
 13 importance of the settlement. This is the first time in
 14 history where an individual Indian was able to stand up on
 15 the same podium as a person of equal stature with the
 16 President of the United States, the Attorney General and the
 17 Secretary of Interior.
 18 Eloise Cabell and other class representatives were
 19 not CEOs of major companies. They were not chairman of
 20 major tribes. This was important. Individual Indians did
 21 this for themselves, and the lawyers who represented the
 22 individual Indians did it for them. Not for tribes, not for
 23 personal -- any personal benefit, because Your Honor, I will
 24 assure you there were no personal benefits that have come
 25 out of this representation.

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1 So Your Honor, we will abide by whatever this
 2 court believes is fair, and we understand why the government
 3 is arguing for the minimum, because this government made the
 4 same argument, by the way, in Indian farmers, and Judge
 5 Sullivan awarded the maximum in Indian farmers. I
 6 guarantee you this case has been more intensely litigated
 7 than Indian farmers.
 8 And Your Honor, I cannot imagine a more difficult
 9 assignment than what we have had. People have been away
 10 from families. We not only have seen members of our class
 11 die and become ill, we have seen our own families going
 12 through the same process.
 13 But at no time did anybody on the litigation team
 14 waiver and say, I cannot do it anymore. The people who are
 15 class counsel have done something I don't believe this court
 16 will ever see done again. I hope it will be, and I hope
 17 people are encouraged to do it again. But it's going to be
 18 very difficult.
 19 I think if the fees are unreasonable and do not
 20 represent what has been achieved and the effort has been
 21 made, everything that Eloise was trying to do will be lost,
 22 because this is the first step in ensuring the relationship
 23 between the United States and individuals goes forward on a
 24 footing where people are equal, where people are not
 25 patronize, where people are viewed as human beings who have

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1 the same rights as everyone else.
 2 And Your Honor, as Mr. Harper says, that is
 3 important. He believes that people are entitled to it. Our
 4 clients are entitled to it, and Your Honor, that is why we
 5 have been in this case.
 6 If this court believes that based on whatever has
 7 been done in accordance with controlling law, we haven't met
 8 it, we can accept that. If this court believes that
 9 whatever it awards the fee to be is fair, Your Honor, I
 10 guarantee we will accept that.
 11 Your Honor, I trust that was responsive.
 12 THE COURT: Fully.
 13 MR. GINGOLD: Thank you.
 14 THE COURT: Mr. Kirschman, do you want to say
 15 something? I am going to take a short recess.
 16 MR. KIRSCHMAN: Yes, Your Honor.
 17 A few points on the attorneys' fees issue. Class
 18 counsel seems -- first, I believe Mr. Gingold indicated that
 19 in their initial petition for fees that they did not request
 20 \$224 million. They in fact only requested 99.9. All you
 21 have to do is look at the proposed order that accompanied
 22 their filing, Your Honor, and you will see that it clearly
 23 requested \$224 million, as did the last page of their
 24 petition. So there should be no question what was going on
 25 here.

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1 Second, class counsel treat the 2010 Act as some
 2 kind of intervening event that changed the status of the
 3 attorney fee issue subsequent to our good faith
 4 negotiations.
 5 Your Honor, that just is not true, and I want to
 6 point your attention, if I may, to section 101(g)(3) of the
 7 2010 Act. Section (g) addresses the incentive awards and
 8 the award of attorneys' fees, expenses and costs under the
 9 settlement agreement, but (g)(3), subsection (g)(3) state
 10 specifically under a heading, affect on agreement, it states
 11 specifically:
 12 "Nothing in this subsection limits
 13 or otherwise affects the
 14 enforceability of the agreement
 15 on attorneys' fees, expenses and
 16 costs."
 17 The 2010 Act did not change or modify anything
 18 related to the attorney fee agreement the parties have
 19 reached, and that subsection makes it clear.
 20 Counsel also mention the \$5 billion in trust
 21 reform action. That action was paid for and taken by the
 22 United States. There should be no benefit to class counsel
 23 for actions taken as part of the Department of Interior's
 24 trust responsibilities and policy actions.
 25 Under Swedish Hospital, which is precedent in this

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1 case, Your Honor, the fee should be limited to that amount
 2 that counsel contributed to, that counsel worked towards
 3 achieving for the plaintiff.
 4 And here, Your Honor, that amount is approximately
 5 \$360 million. As you heard today and as we discussed in our
 6 briefs, there are approximately 360,000 class -- historical
 7 accounting class members, each who will receive \$1,000. The
 8 trust administration claim, as you know, was never
 9 litigated, and therefore that should not be a part of the
 10 award.
 11 Finally, again, Mr. Gingold speaks passionately
 12 about the benefits of the settlement for the class, and we
 13 certainly join in the request that the settlement be
 14 approved as fair, reasonable and adequate.
 15 But -- but, there is \$50 million or more riding on
 16 the issue of attorneys' fees, and that \$50 billion would
 17 directly affect the amount that these class members receive.
 18 So we think that is an important issue tied to this whole
 19 discussion today.
 20 Again, we only ask that you make note of those
 21 objections as you received them.
 22 THE COURT: Thank you very much.
 23 Robert O'Brian, Esquire, had filed a motion to
 24 intervene on behalf of Mark Brown, one of the attorneys who
 25 is claiming monies. The plaintiff had opposed the other

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1 applicant, who had also applied for attorneys' fees to
 2 intervene. I allowed that person. I will allow Mr. Brown
 3 to intervene with Mr. O'Brian to represent him in this
 4 matter.
 5 I'm going to do as follows. I am going to take a
 6 short recess for about 10 minutes, and then because of the
 7 individual plaintiffs, class representatives, the individual
 8 objectors who have come from all over the country, who I'm
 9 sure it's very difficult to travel for them and an expense,
 10 I'm going to make an oral ruling on the matters pending
 11 before me that will then be followed by a written ruling on
 12 the record.
 13 But it is important I think today to have some of
 14 these matters resolved for the parties, particularly for all
 15 of those who have traveled so far to be here and to hear the
 16 ruling of the court and understand what I'm saying and why
 17 at this time.
 18 So I will take about a ten minute recess and be
 19 back to finish the case.
 20 (Recess.)
 21 THE COURT: The parties today have appeared before
 22 me, together with the objectors and interested parties. The
 23 record should note that there has been standing room only in
 24 the courtroom throughout these proceedings.
 25 On this fairness hearing as to whether or not to

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1 approve the plaintiffs' and defendants' joint motion for
 2 final approval of the settlement and enter of final
 3 judgment.
 4 I am going to make some remarks, a bench opinion -
 5 - that means an oral opinion. I will do it at this time.
 6 As I mentioned earlier, it will be followed by a written
 7 opinion for the record.
 8 We've heard somewhat about the background of this
 9 case and the history which really resulted and lie, I think,
 10 in 19th century American politics, and the western movement
 11 that resulted in the seizing of the Indian lands, and as the
 12 wealth in those lands became apparent, the continued
 13 expansion of the government into the Indian lands.
 14 The policies are well known which resulted where
 15 we are today. They are very complex, and it would not help
 16 to review all of those at this time, but there is no
 17 question as to the legitimate concerns that were raised by
 18 the American Indians in this litigation.
 19 It really stems from the General Allocation Act of
 20 1887, or the Dawes Act. These allotments which were given
 21 to Indians to be held in trust by the government.
 22 Modification over years as we have heard from some of the
 23 people who appeared before me today resulted in less lands,
 24 and eventually the government holds millions of acres of
 25 Indian lands in trust.

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1 The government had promised it would fulfill its
 2 obligations as trustee when it took these lands, and what
 3 happened was the government mismanaged these resources on a
 4 staggering scale.
 5 That was established through this litigation
 6 perhaps more openly than in the past. It is not new, these
 7 claims of trust mismanagement. They have been around for
 8 100 years.
 9 Our Congress has done a study. There have been
 10 hearings starting in the early 1900s until rather recently
 11 decrying the state of the Indian Trust affairs, but
 12 nothing substantively really happened until this litigation
 13 began.
 14 Finally, just over 15 years ago on June 10 of
 15 1996, the class of Native American beneficiaries of the
 16 individual Indian money trust accounts filed this class
 17 action here in the federal court in Washington D. C. to
 18 address the claims of alleged breaches of fiduciary duties
 19 relating to those accounts by the government, really asking
 20 for an equitable accounting. Attached to that was basically
 21 claims of trust mismanagement.
 22 Judge Lamberth certified the class back in 1997,
 23 and in 1999 the court found that they were in breach -- that
 24 the government was in breach of its statutory trust duties,
 25 and ordered the defendants to provide plaintiffs an accurate

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1 accounting of all monies held in the IIM Trust.
 2 The Court of Appeals affirmed as to the liability
 3 issue. That was in 1999. Here we are in 2011. What
 4 followed was major litigation warfare. There were some 10
 5 appeals, seven trials, 250 days of court hearings to reach
 6 this stage. And as was pointed out by one of the counsel
 7 today, the Court of Appeals stated in their last opinion,
 8 which we call Cobell 22 from the Circuit Court, quote:
 9 "Our precedence do not clearly
 10 point to any exit from this
 11 complicated legal morass."
 12 So it looked upon the last remand from Judge
 13 Robertson who had the case and found restitution due for the
 14 failure to do an accounting of about \$455 million. That was
 15 reversed, and we were back here a couple of years ago to
 16 start over in the litigation in some ways.
 17 The comment about the judge that handled this
 18 case, Judge Lamberth took this on and handled it
 19 extraordinarily, dedicated to his work, handled the bulk of
 20 this litigation for many many years. And I indicated it was
 21 a legal warfare. That is a fair description of it.
 22 It engaged attorneys legally fighting with each
 23 other constantly. It engaged multiple law firms and lawyers
 24 at the Justice Department and outside of the Justice
 25 Department. It engaged various subsidiary proceedings

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1 involving violation of court orders and discovery issues
 2 that subsumed the main litigation for a time.
 3 Judge Lamberth's patience over many years of hard
 4 work night and day on this case eventually resulted in some
 5 very strong opinions decrying the government's actions, and
 6 the Circuit Court suggested that he should step aside, that
 7 he had lost his objectivity.
 8 And so despite his heroic efforts, the case was
 9 reassigned. I was Chief Judge at the time when this was
 10 made, and I was assigned the task of finding a judge who
 11 had the time and talent to handle this on our court, and
 12 Judge Robertson appeared on the scene, and he took the case
 13 over.
 14 He handled it until his retirement. He was
 15 distressed that he had to retire before he could finish the
 16 case. He also was very interested in seeing this through
 17 and seeing that justice be done eventually.
 18 Any good deed that you do comes back to haunt you.
 19 After I finished being Chief Judge and took senior status I
 20 got the case. So I assumed control of the case.
 21 The parties were trying to find out where to go
 22 next. Because of the status of the last reversal from the
 23 circuit and the prospects, I think, of years of litigation
 24 facing them on both sides, with rather dubious chances of
 25 ultimate success, frankly, if you read the law carefully as

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1 developed by our Circuit. Rightfully or wrongfully, that is
 2 the final word basically.
 3 So they entered into negotiations, and the
 4 administrations changed, and the parties found a way out of
 5 the morass that the Court of Appeals said they saw no easy
 6 exit from, and after 15 years of bitter litigation, and that
 7 is the only way to say it, the parties entered into a
 8 settlement agreement to resolve the issues in this case, and
 9 just the issues in this case, not to resolve every single
 10 claim that the Native Americans may have against the
 11 government.
 12 And as a result of that settlement there were some
 13 amended orders defining the historical accounting class and
 14 creating the trust administration class to facilitate the
 15 appropriate remedies for the IIM account holders so they
 16 could be resolved as well.
 17 Remarkably, I think, Congress, which seems not to
 18 be able to get along and do anything these days, remarkably
 19 Congress approved and passed a law approving this settlement
 20 and approving the trust administration class creation in a
 21 way.
 22 Under what we call the Claims Resolution Act of
 23 2010, it requires the entire Senate's agreement. They
 24 ratified this settlement, and appropriating the funds, which
 25 is the most important part of that, to resolve these claims.

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1 Now a few months later it is hard to realize that that has
 2 been accomplished, and that was through the efforts of both
 3 sides.
 4 I don't think today's world, with the deficit we
 5 are facing, and the issues they are debating in Congress,
 6 that this would ever pass. It was very fortuitous, and hard
 7 work by the parties, to get this through when they did.
 8 I think that the Executive Branch acted extremely
 9 well in doing this. Both the Attorney General and the
 10 Associate Attorney General, the Department of Interior,
 11 Secretary Salazar, David Hayes, the Deputy Secretary was
 12 ultimately involved.
 13 All contributed to get this settlement through,
 14 and it could not have been accomplished without the
 15 approval of the President, who could have denied it at any
 16 time he wished, particularly on the grounds of the deficit
 17 today. But he executed the agreement and signed the
 18 legislation into order. Just a remarkable accomplishment by
 19 all sides.
 20 The Justice Department, who had hard fought this
 21 for 15 years, and the legal issues involved -- legitimately
 22 fought it legally, and it was not improper that they did so.
 23 They represent their client, the United States, and felt
 24 that they had defenses to these claims, was willing to
 25 resolve the claims, put aside very bitter, unfortunate

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1 litigation, personal litigation on some levels between the
 2 parties, and resolve this matter, and the plaintiffs managed
 3 to do the same after having been, they felt, badly treated
 4 for 15 years by the government, not only their clients but
 5 the lawyers themselves as well.
 6 It is, I think, a testament to the better
 7 functioning, and I'm glad to see the legal system that these
 8 parties could do that -- these counsel could do that.
 9 Now what has come about as a result of this
 10 settlement is the historical agreement to resolve some of
 11 the past mistakes and wrongs that have occurred. Obviously
 12 not all. It is not meant to solve all problems.
 13 We heard today telling, sometimes tragic stories,
 14 and deep concerns evidenced by some who are affected by the
 15 settlement, have been affected by the mismanagement over the
 16 years.
 17 One of the concerns the court obviously had was
 18 this -- in a way that this litigation could have terminated
 19 successfully. Well, many of the documents simply do not
 20 exist in the government records any longer. They were
 21 either destroyed as old and unneeded when they should have
 22 been kept perhaps, or allowed to be destroyed because of bad
 23 storage practice, or lost over hundreds of years, or simply
 24 not created when they should have been.
 25 On the plaintiffs' side, many of their

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1 documentations are lacking as well. It makes it very
 2 difficult for them, and they have expressed some of their
 3 concerns here. So it made it difficult as to determine, I
 4 think, for any court that there could ever be an accurate
 5 accounting done.
 6 Despite Judge Lamberth's many orders, the circuit
 7 really, I think, determined that there could never be an
 8 accurate historical accounting done. There might have been
 9 some type of generic accounting, but where we would that get
 10 you?
 11 This settlement at least now provides some measure
 12 of certainty for most class members. The vast majority of
 13 class members are entitled to automatic recovery under the
 14 historical accounting, and then those under the trust
 15 accounting would provide other monies that they can show
 16 they are due.
 17 It may not be that the results are as fortuitous
 18 as some wished and don't provide redress for their wrongs,
 19 and I'm sympathetic to the reasons the various class members
 20 would have wanted class counsel to have struck a better
 21 balance or struck it differently in negotiations, or made
 22 sure whether items could be covered, but I'm certainly not
 23 persuaded that striking a different balance would have been
 24 either achievable in the negotiating process or more
 25 favorable to more members of the class.

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1 I'm certainly not convinced that a better result
 2 would have been achieved by taking this case to trial. Some
 3 people said, let's take it all the way. Let's go all the
 4 way this case. That is easy to say, but to deal with the
 5 substantial issues legal issues after 10 appeals, and nine
 6 basically outright reversals of those appeals with lower
 7 court victories.
 8 It is hard to see how there would be a better
 9 result if there had been eventually an accounting ordered
 10 that could ever be done and was ever accomplished in the
 11 years that that may have taken to do some type of an
 12 accounting, then each individual plaintiff would have to
 13 sue in the Court of Claims to try to claim the amount that
 14 they were due under the accounting if they disagreed with
 15 it.
 16 We have lost too many members of the class already
 17 in waiting the 15 years that this has been going on. Ms.
 18 Cobell probably started this 20 years ago trying to get this
 19 going, and to prolong this through litigation simply to say
 20 we could have won something at the end, whatever it may be,
 21 seems to me shortsighted.
 22 Obviously, each member of the class wants a
 23 settlement to provide the greatest possible compensation to
 24 each individual in the class and to them personally. I
 25 cannot conclude in the final balance that what has been

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1 agreed to by counsel on behalf of the class, after notice to
 2 the class, and explanations given, and reviewing the
 3 objections is anything but fair.
 4 Not having perhaps some draconian enough
 5 punishment for this mismanagement and this neglect to fit
 6 what they feel the crime is, and based upon them I can
 7 understand their are outrage and sense umbrage they have
 8 felt over the years.
 9 It does not take a person who is familiar with the
 10 history of the American Indian to understand their concerns.
 11 You can read Chief Joseph's statement and get a pretty good
 12 feeling for their concern.
 13 But that is not possible to resolve in this case.
 14 This case is trying to resolve the accounting issue, and by
 15 doing that you will receive a payment of thousand dollars in
 16 lieu of having an individual accounting, and secondly to
 17 resolve the trust claims.
 18 If you wish to stay a member of the class you can
 19 do so and resolve it that way, or you can withdraw from that
 20 and try to do the accounting and then try to collect what
 21 you think you are due for the mismanagement, and perhaps do
 22 better.
 23 But the process has gone on long enough. The
 24 court has the litigation resolved with the Claims Resolution
 25 Act and the settlement agreement, and I have to consider

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1 whether or not I should approve the final certification of
 2 the classes and enter judgment in accordance with the
 3 agreement, approve it as fair, reasonable, adequate and
 4 binding on the class members who have not timely opted out,
 5 and approve what I would award as reasonable, fees, expenses
 6 and costs, as well as incentive awards, and to pay the valid
 7 claims once we finalize the judgment.
 8 What is the settlement about? What are the
 9 amounts? We discussed at length here today. This historic
 10 -- I think it is truly the historic largest settlement in
 11 the history of the United States in any case that has ever
 12 been brought against the United States.
 13 One counsel indicated that if you add up all of
 14 the Indian claims cases in history and the amounts that have
 15 been paid, this eclipses them.
 16 So it will operate by having a historic accounting
 17 class where each member is paid thousand dollars, and
 18 release the government's obligation to perform the
 19 historical accounting for that -- to their IIM account.
 20 If the member opts out of the trust administration
 21 class, they are entitled to an accounting, and entitled to
 22 the appropriate methods of proof to do that.
 23 The other class created was a trust administration
 24 class. Once you identify the members and their pro rata
 25 share, by their calculations they each receive a base amount

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1 that has been estimated at an \$800 base amount according to
 2 a formula that is outlined in the agreement, and then some
 3 Indians who are qualified under that account generate large
 4 amounts of revenue and could have funds generated in excess
 5 of \$1 million. Again, they will be released as to that.
 6 And then there is created very cleverly an Indian
 7 education scholarship fund. I think that was added late in
 8 initiate negotiations. It went through Congress. That's an
 9 important factor for the resolution of these claims.
 10 Again, as indicated in my questioning of counsel,
 11 that will result in a fund that will be created for the
 12 education -- for higher education of the Indian populations,
 13 and that will be done under independent trustees apart from
 14 the Department of Interior, to issue appropriate rules and
 15 regulations to awarding of scholarships to the qualified
 16 Indian children, which will not affect any other rights they
 17 have to other educational funds.
 18 Additionally, the settlement and the law that
 19 passed, the Claims Resolution Act, formed a \$1.9 billion
 20 land consolidation program that we discussed at length. It
 21 goes on for 10 years.
 22 Moneys not spent in that program to purchase
 23 fractionalized shares -- trust land from willing sellers --
 24 the land would go back to tribal supervision. It does not
 25 go back to be controlled by the government directly, and

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1 that will go for 10 years, and then the funds will be
 2 reverted back to the Treasury. That, again, is a program
 3 that would help in this trust reform effort. The government
 4 has indicated they have already spent \$5 billion on
 5 attempting to straighten out the situation, separate from
 6 this case.
 7 Now the Indian educational scholarship fund, as I
 8 understand it, is funded by three sources. The balance of
 9 the accounting trust administration fund, once that is
 10 completed; certain payments made to class members whose
 11 whereabouts are unknown and do not claim payments after five
 12 years; and contributions of the land consolidation fund for
 13 the purchases made there under as indicated by counsel.
 14 That is a sweetener to help sell the land back to
 15 consolidate the fractionated shares so it can be a better
 16 program run in the future.
 17 Now consideration of the factors that the court
 18 has been asked to consider have been listed by counsel
 19 several times under the Phillips Petroleum case, whether or
 20 not I would approve the accuracy and fairness of this
 21 settlement.
 22 I hope you're not holding your breath. I will
 23 find my cite here in a minute.
 24 Looking under the Rule 23 that you have heard
 25 discussions about here today, this seems fair, and adequate,

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1 and appropriate as to the approval of this settlement, and
 2 that is essentially what the basis of the request that is
 3 before me today by both counsel with the joint motion that
 4 they have filed as I indicated previously.
 5 The court is going to order approval of the
 6 settlement. I am going to find that it is fair, reasonable,
 7 adequate, and it is appropriately binding on the class
 8 members who have not timely opted out of the trust
 9 administration class, and I do so for not only the reasons I
 10 have articulated, but there is just no question in looking
 11 at whether the objectives of the law and the Constitution
 12 have been satisfied in these areas.
 13 Sufficient notice and an opportunity to appear,
 14 and object, and be heard, and to opt out if you wish.
 15 Adequate representation has been made, and those factors
 16 apply to both classes, the historical accounting class as
 17 well as the trust administration class.
 18 So I'm going to address the generic provisions
 19 first. I just mentioned under the case law, I don't know
 20 whether it is considered essential, before I get to the Rule
 21 23 issues as to notice.
 22 There has been one claim that the Indian culture
 23 that they would not respond and getting a piece of mail from
 24 the federal government, but there've been multiple
 25 alternative notices sent out.

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1 I have never seen, and I handled the largest
 2 price-fixing case in the history of the United States, the
 3 In re: Vitamins case, notice to the extent sent out in this
 4 case, and some have reflected monies and costs, which are
 5 millions of dollars, which I was kind of taken aback when
 6 counsel approached me to spend that much money.
 7 But I became convinced to try to alert the Indian
 8 Nation to this settlement that they should know what the
 9 terms are and what it is about, and I allowed them to
 10 provide notice in every possible way, including personally
 11 going out and visiting all of the affected tribal areas.
 12 It is just not a letter from Washington. It is a
 13 tremendous effort that was undergone, both by the plaintiffs
 14 principally and some by the government, to not only give
 15 notice but to explain what happened.
 16 And not only are we using modern technology to do
 17 that, but such things as posting notice at the local 7-11,
 18 putting the town meetings together, and personally going out
 19 there to be seen and talked to. Word-of-mouth. There is
 20 just no question that this was covered in all of the local
 21 papers constantly. It was covered in all of the local
 22 advertising outlets. It was hard to miss.
 23 As a side note, I go to Montana two or three times
 24 a year, and you could not miss the advertisements if you are
 25 out there about this. So I'm satisfied that there was

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1 adequate notice, sufficient notice given, despite some
 2 cultural concerns about how the notice would be perceived, I
 3 don't know of any other way it could have been done better
 4 in this case.
 5 There have been opportunities to object and
 6 appear. That was clearly, I hope, communicated -- it seems
 7 to me it was from the notices I reviewed, and we did have
 8 people who traveled long distances, and I'm sure under some
 9 great difficulties.
 10 There are some people here today who came before
 11 the court and spoke in the finest tradition of our court,
 12 to be able to have the court hear them personally and
 13 directly. It is much more meaningful than just reading it
 14 on the cold paper, to see these people, look them in the
 15 eye, and hear their concerns, and try to understand their
 16 concerns, and to make a judgment that is appropriate in this
 17 case.
 18 I was greatly helpful to the court. I took all of
 19 the comments and kept them in mind as I reviewed this and
 20 consider the approval or not.
 21 There is an opt-out provision for the class, the
 22 trust administration class, under the rule, and that was
 23 allowed to be done. People did exercise themselves of that
 24 right and can continue their litigation in that regard if
 25 they wish to do so.

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1 As to the historical accounting class, and I will
 2 discuss that in a minute, that was certified under 23 that
 3 allowed us to continue the provision with the opting out
 4 and not directly allowed unless there is some historical
 5 reason brought to my attention as to why it had to be done.
 6 The adequate representation -- after 250 days in
 7 court, and literally thousands of court docket entries,
 8 after seven trials and 10 appeals, I don't know how anyone
 9 can say that there was not adequate representation.
 10 This was litigated fully without large
 11 compensation. There was one interim smaller fee award for
 12 various issues that had arisen in case and they had to
 13 defend, but without any true compensation given to counsel
 14 over these years, and they still stayed with it, even though
 15 at times it looked bleak as to whether there would ever be
 16 any recovery and they would ever have any monies.
 17 Their representation was consistent and with no
 18 hesitations, doing whatever they felt they had to do to try
 19 to push this litigation forward against heavy odds. No
 20 question about that.
 21 Now as to the particular classes and approving
 22 those or not as being appropriate. In the historical
 23 accounting class it clearly has been -- it was certified by
 24 the court back in 1907 by Judge Lamberth, and it satisfies
 25 the requirements under what we call the Federal Rules of

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1 Civil Procedure, 23. That is the class-action rule.
 2 You heard me ask the lawyers right after lunch
 3 about the Wal-Mart case. That was the largest class-action
 4 case ever brought by individuals, and it went to the Supreme
 5 Court, one and a half million women suing for back pay,
 6 among other issues, suing Wal-Mart, former employees, and
 7 the Supreme Court unanimously reversed the certification of
 8 the class in that case as not being appropriate under Rule
 9 23.
 10 So the court has to be satisfied that the rule is
 11 met to approve this settlement and historical accounting
 12 class as properly put before the court.
 13 First there has to be numerosity they call it.
 14 The numbers have to be worthwhile. Here there were over
 15 300,000 members of the historical accounting class. The
 16 estimate given to me is at least that or more today.
 17 Commonality, the common issue. Actually the only
 18 issue before that class was whether there could be an
 19 historical accounting done, and now in lieu of that there
 20 would be a restitution type payment. Not a damage claim,
 21 but restitution to make up for not getting the accountant.
 22 Typicality. That is the same actions in this type
 23 of claim. It is identical legal arguments in all cases.
 24 It's an identical situation of a pattern of fraud, or abuse,
 25 or mismanagement in the trust account.

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1 And then again the actual representation referred
 2 about.
 3 First of all, there is no antagonism between the
 4 plaintiffs and the class members, that is the named
 5 plaintiffs. They all wanted an accounting. That is what
 6 they suited for. One member doesn't succeed and all of the
 7 others lose, or some of the others lose because one
 8 succeeds. There is no clash between the representation of
 9 the named plaintiffs and the whole class.
 10 It was obviously vigorously litigated by them, the
 11 named plaintiffs and their counsel, and qualified counsel,
 12 obviously, were handling this very complex, difficult
 13 litigation.
 14 It seems to the court that the named plaintiffs
 15 displayed a real commitment to stick with the case for 15
 16 years in light of many defeats. They had a knowledge of
 17 the case. They worked on the case, and they had great
 18 interest in the litigation. They are not simply names put
 19 up there. They were intimately involved in the case and
 20 worked hard.
 21 If you look at the filings on their behalf and
 22 their fees and request for awards, you can realize the work
 23 that they were engaged in.
 24 There's really no individual damages here that
 25 would cause any difficulties in this award under the rules

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1 or inconsistent judgments.
 2 Here it is clear that the original relief, the
 3 predominant relief, was an equitable claim, but the case was
 4 then settled, and something that is akin to restitution, and
 5 as I discussed with counsel, it seems to be appropriate, and
 6 if you can't -- you have to be able to settle a (b)(2) case,
 7 and the only way to settle is through money if you don't get
 8 the injunction.
 9 So here that is appropriate and does not
 10 disqualify the case from being properly certified under
 11 23(b)(1)(A) and (b)(2), and I'm going to find that the
 12 historical accounting class was probably certified as
 13 properly engaged as a class and can be salient for the terms
 14 suggested in the settlement agreement.
 15 The trust administration class is a little more
 16 complicated. The court in this past December requested the
 17 parties certify under 23(b)(3) that their questions of law
 18 are, in fact, common to the class members, and they
 19 predominate over other questions affecting individual
 20 members, and the class action is superior to any other
 21 available method to fairly and efficiently adjudicating the
 22 controversy.
 23 That is taken in conjunction with the Claims
 24 Resolution Act which held that notwithstanding the
 25 requirements to the Federal Rules of Civil Procedure, the

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1 court in this litigation may certify the trust
 2 administration class, and if that is certified under
 3 subsection (a), which I just referred to and did, the trust
 4 administration class will be treated as a class certified
 5 under 23(b)(3) for the purpose of settlement.
 6 So technically I'm freed from the strictures of 23
 7 -- Rule 23, and therefore it has to have -- the
 8 constitutional standards still have to be made under
 9 Phillips Petroleum that had been referred to by counsel.
 10 Under Phillips Petroleum, again, I have already
 11 reviewed the features. The best practical notice. I have
 12 already found that there is extensive and extraordinary
 13 notice here. We even had a notice expert retained in how to
 14 do it properly.
 15 There was an opportunity to opt out under this
 16 class -- I am sorry, there is no opt out under this class
 17 certified under 23(b)(1), and there is nothing to indicate
 18 to the court that any member could make an argument that
 19 they should have a discretionary opt out of the historical
 20 class.
 21 I have issued a ruling just recently in that
 22 regard. As part of the ruling it is necessary to discuss
 23 the right to opt out, and that is in the order of June 17,
 24 Cobell versus Salazar.
 25 That order was as to the Quapaw Tribe of Oklahoma

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1 attempting to file materials here, and I indicated that the
 2 tribe contends that the awards should be individualized, and
 3 they cannot do that, and that the members wish to opt out to
 4 seek and complete an accurate damage arising in the
 5 government's breach of trust claims related to the IIM
 6 account, along with other corresponding monetary relief,
 7 because they think that the relief, under the historical
 8 accounting class, improperly estimates the amounts, and that
 9 it attempts to allocate damages on individual injuries.
 10 I indicated that that was not the proper
 11 description of the historical accounting class, that they
 12 are not damages, but they are considerations for being
 13 released from further accounting obligations at this time;
 14 that to avoid hundreds of thousands of individual actions --
 15 that is what would happen if there was an historical
 16 accounting class.
 17 Each potentially establishing standards providing
 18 an historical accounting, each would come out
 19 differently for the government, where the government acted -
 20 - it could be a concern that the assets that are invested in
 21 common, and that the claim is that they were improperly
 22 handled.
 23 It really flows -- the equitable relief of \$1,000
 24 from the -- the relief of \$1,000 from the equitable relief
 25 originally requested. I said it was like restitution, and I

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1 thought that was appropriate -- that the tribe had conflated
 2 the historical accounting class with the trust
 3 administration class, and their objections were not well
 4 taken.
 5 There is just no compelling reason shown to the
 6 court why granting the motion is necessary to have fair and
 7 efficient results in this case. So I denied their request.
 8 It simply cannot provide the tribe asking the court to
 9 exercise discretion to allow members opt out of the
 10 historical accounting class as certified.
 11 There is no right, but I could allow in my
 12 discretion, I assume, to amend that and try to say, okay,
 13 you can opt out if there is some justified rationale that
 14 you could show, or if there is some unique and distinct
 15 claim, but whether or not permitting the opt out is
 16 necessary to have a fair and efficient conduct of the
 17 action, it would be impossible to do this action if we had
 18 that. So I did not consider that as appropriate --
 19 opportunity.
 20 The opt outs were provided for in the trust
 21 administration class, and the notice detailed that right.
 22 The representation by the named plaintiffs, I have
 23 already discussed.
 24 Even if you look at the trust administration
 25 class, which did have the opt outs, so it qualifies in

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1 contrast to the historical accounting class under the
 2 Phillips formula, even if I assume for a minute that 23(a)
 3 applied to the trust administration class, arguably it seems
 4 to me that it could fit there.
 5 You have got numerosity. Some 400,000 plus
 6 members.
 7 Commonality. The same question. The same overall
 8 trust mismanagement.
 9 Typicality. The same reasons that I discussed
 10 before, the same basic course of events, the same legal
 11 theories.
 12 There are questions of law that are common to the
 13 class members over other questions affecting on the
 14 individual members. and certainly this is a class action
 15 superior to other available methods to adjudicate the
 16 controversy, and to have 400,000 individual claims brought
 17 and litigated through the court would not take 15 years, it
 18 would take a millennium.
 19 So the trust administration class I find is
 20 properly certified under the Claims Resolution Act and under
 21 Rule 23(B)(3).
 22 Now about the settlement. I went through the
 23 factors you considered whether or not -- the bottom line
 24 though is, is it fair? Is it really fair to the parties
 25 involved, to all of the Indians, almost half a million

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1 Indians?
 2 Is it reasonable and adequate? I have to evaluate
 3 that in relation to the strength of the plaintiffs' case. I
 4 have to evaluate that in light of some of the individual
 5 class members' complaints. They would receive more. I have
 6 to evaluate that -- whether it is an arms length
 7 negotiation, or it's a sweet deal between the parties.
 8 The relationship, as I said, to the plaintiffs'
 9 case, status of the litigation when it is settled, and the
 10 reaction of the class, which we heard today from some
 11 members and not others, and the opinion of experienced
 12 counsel.
 13 Arms length negotiation. I reviewed -- on purpose
 14 I gave you the beginning history of this case of 15 years of
 15 hostile litigation. Hostile, not friendly litigation. A
 16 legion of contested motions and issues fought again and
 17 again in this court.
 18 Numerous trials. Numerous appeals, most of which
 19 the plaintiffs lost, not won, in the Court of Appeals.
 20 Congressional examination and hearings on a
 21 settlement, which is very unusual, and a review by Congress,
 22 and approval by Congress. The Senate and the United States
 23 unanimously approved the settlement after making suggested
 24 changes.
 25 Approval by the Executive Branch, obviously who

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1 are represented here by the Department of Justice, and at
 2 the highest level by the President signing the legislation.
 3 He could have vetoed it if he did not think it was
 4 appropriate.
 5 Settlement in relation to the strength of the
 6 plaintiffs' case. It affords substantial benefits. We have
 7 a total settlement of \$3.4 billion -- more than ever before
 8 awarded in an Indian case. If you put every Indian case in
 9 the past together it is more than that.
 10 For its substantial benefits -- two sets of
 11 monetary awards, land consolidation to make the trust run
 12 better, hopefully. A scholarship fund to be created for the
 13 Indians.
 14 I guarantee you that most lawyers who looked at
 15 this case five years ago, eight years ago, 10 years ago, 15
 16 years ago -- would consider such relief highly improbable
 17 and highly doubtful.
 18 There has been talk about a \$7 billion offer.
 19 That was an offer to forgive the government not only on
 20 everything in the past that has ever happened, but
 21 everything that will happen to the Indians in the future by
 22 the federal government.
 23 That is not a true offer. No one settles a case
 24 for their client saying, you can do anything you want to my
 25 client in the next 50 years and I won't sue you. So there

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1 was no such offer outstanding.
 2 The success in obtaining Congressional approval.
 3 As I indicated, I'm amazed that it got approved, and that is
 4 to the benefit of the parties that that was done through
 5 terribly hard work by plaintiffs' counsel, and the strong
 6 support of the administration, and an excellent
 7 Congressional work as well, both by Senators and Congressmen
 8 involved in this.
 9 Potential interminable litigation. As I said,
 10 this case would have been another 15 years easily if this
 11 settlement fails. Accurate historic accountings are almost
 12 impossible, if not frankly impossible, and I don't know
 13 where the case would have gone.
 14 There is a famous case in literature by Dickens
 15 called the future called Jarndyce versus Jarndyce in the
 16 Bleak House. If you read that where he took on the legal
 17 establishment a couple hundred years ago. We still see the
 18 same today unfortunately, where the lawyers fought over an
 19 estate for a family for 20 years, and when they finally
 20 finished it, not only was there no money left for the
 21 heirs, because the lawyers got it all, but all the heirs had
 22 died.
 23 So we don't want that here. Here we have lost
 24 enough people who are entitled to monies. This will make an
 25 end to the litigation so they can get the monies.

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1 The enormous challenges for those individuals who
 2 wanted to go forward and continue the litigation. I've
 3 already gone through that. To try to prove individualized
 4 damages, bringing the complex claim against the government
 5 and try to recover -- I hope some of you who opted out can
 6 do that, but it is going to be difficult.
 7 The status of the litigation. The litigation had
 8 gone on, obviously, for 15 years. The strengths and
 9 weaknesses were not. Discovery had been done. The case had
 10 been tried multiple times, multiple appeals. It is not the
 11 type of litigation you see in class actions where there is
 12 no litigation.
 13 They come in with the consent decree, and the
 14 lawyers are going to get \$10 million, and everybody gets a
 15 coupon for \$5 to buy cereal, or whatever it is about. This
 16 is not like that. This is a true arm's-length hard-fought
 17 battle, hard-fought victory.
 18 Even if a significant portion of the class
 19 objected, and even if some of the named plaintiffs didn't
 20 want to settle I could still approve it if it's appropriate
 21 under the law, but we did not have that. We have 92
 22 objectors out of hundreds and hundreds of thousands of
 23 members.
 24 Even assuming some culturally did not read the
 25 papers, we still have hundreds of thousands, I am fairly

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1 convinced, who knew about this settlement and understood
 2 what they were getting into and approved it. Certainly a
 3 vast majority, well over 99 percent approved this
 4 settlement, not opted out or objected.
 5 Both sides have highly skilled and experienced
 6 attorneys who have agreed to the settlement as proper, and I
 7 guarantee you when they entered into this originally years
 8 ago, they got into a fight with each other over they years,
 9 and they were not agreeing to anything, including the time
 10 of day. But they agreed that this settlement was fair and
 11 proper, and they both are experienced, both sides, as to
 12 these cases and what they have worked out.
 13 So that is the rationale for approving the
 14 settlement as fair, adequate and appropriate.
 15 I have been asked to give incentive awards. That
 16 is part of the equitable powers of the court. They are
 17 routinely provided to compensate named plaintiffs for
 18 services they provide and the risks they incurred during the
 19 course of class-action litigation.
 20 That is a quote from a prior class-action case
 21 that I had. I am quoting myself. But there is no collusion
 22 here between the plaintiffs and the defendants. You know,
 23 in some of these class-action cases you get very suspicious.
 24 Everybody is selling out for money very quickly and not
 25 litigating the case. That is not true here.

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1 Here we have serious plaintiffs who have worked
 2 hard on the case when you review the files and material
 3 submitted. Plaintiffs admittedly asked for an
 4 extraordinary -- not extraordinary, rather a large sum for
 5 Eloise Cobell.
 6 I was distressed to hear Ms. Cobell attacked today
 7 by one of the objectors' representatives. I felt that was
 8 without foundation. There was no suggestion of any
 9 collusion by her part to get a fee, and then she would
 10 settle the case. There is nothing in the record to support
 11 that.
 12 All I have in the record for Ms. Cobell is
 13 starting this case maybe 20 years ago trying to get someone
 14 to take it, 15 years ago getting the suit filed, and
 15 forever thereafter being intimately involved and paying
 16 hundreds of thousands of dollars out of her own pocket to
 17 make sure that the case could continue when there was no
 18 money.
 19 How can it now be claimed that she would then,
 20 somehow, compromise easily, I don't understand that
 21 accusation. She has accomplished more for the individual, I
 22 think, Native Americans than any other person recently that
 23 I can think of in history.
 24 This is her case. She contributed hundreds of
 25 thousands of dollars. She helped fund raise. She spent

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1 hundreds and thousands of hours. She was part of every
 2 serious, strategic decision made. She dedicated up to 1,200
 3 hours per year. She put her reputation on the line, her
 4 health, and has unprecedented efforts by a named plaintiff I
 5 have not seen before in a class action case.
 6 I believe she is fully entitled to the award that
 7 she has requested in this matter. The best analogy is the
 8 Allapattah Services -- that is A-l-l-a-p-a-t-t-a-h -- versus
 9 Exxon, a Florida case in 2006, where nine plaintiffs each
 10 received \$1.76 million out of the fund, which is similar to
 11 this case and the length of litigation. Only two trials
 12 though, although they did get to the Supreme Court.
 13 But again, those plaintiffs showed unusual courage
 14 and commitment, participated in the decision-making,
 15 communicated with the class, gathered information,
 16 discovery, accepted liability of litigation costs, the
 17 theory of liability was untested, and there was no certain
 18 result with only themselves to receive modes personal
 19 damages. They did not get an extra big damage award, and
 20 they incurred retaliation risks from others connected with
 21 the case potentially.
 22 Those are the factors that the court in that case
 23 considered giving those very large rewards.
 24 In this case said I have considered those factors.
 25 I considered the plaintiffs were not figureheads. They

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1 brought it to the lawyers' attention. They were intimately
 2 involved in it.
 3 An unprecedented case, untested theory of
 4 liability, high uncertainty of success, substantial benefits
 5 conferred on the class members \$3.4 billion ultimately,
 6 achieved Congressional recognition and approval,
 7 reputational risks were undertaken in their home
 8 territories, and as I said, Ms. Cobell, expended substantial
 9 personal sums of her money when she would really not be able
 10 to recover that much if she won the case.
 11 So I think Ms. Cobell should be congratulated for
 12 the work that she has been done on the case and not
 13 condemned. She communicated openly with all class members
 14 discussed the cases -- all the class named plaintiffs did,
 15 and I know nothing else can be asked for them to do to earn
 16 these awards.
 17 Therefore, the court will consider as a fair and
 18 reasonable award the award of \$2 million to Ms. Cobell and
 19 approve that. However, the expenses she has requested will
 20 be deducted from that awarded. She will not get additional
 21 monies for her expenses. That will incorporate her expenses
 22 as well.
 23 Louise Larose will receive \$200,000. She was in
 24 the deposition. She coordinated the media efforts. She
 25 engaged political leaders, and as heavily involved in the

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1 case as the others. An original plaintiff since the
 2 beginning.
 3 Thomas Maulson will receive \$150,000. An original
 4 plaintiff. He was deposed by the government; discussed key
 5 litigation issues; and helped with the continuation of the
 6 case; and again, put his reputation at risk.
 7 And Peggy Cleghorn, a \$150,000 award. She took
 8 her mother's spot as a plaintiff when her mother died in
 9 1997. Deposed by the government; attended court hearings;
 10 participated in the strategic decisions; and came forth to
 11 support the case at all times.
 12 The sum represents roughly .02 percent of the
 13 common fund of \$1.4 billion, and I believe is appropriate
 14 under the qualifications as I have reviewed them awarding
 15 those.
 16 There was a request for Mr. Earl Old Person for an
 17 award. Unfortunately, Mr. Earl Old Person, an original
 18 plaintiff, was removed in 2003, and the court found at that
 19 time he was unable to conclude that Mr. Old Person is
 20 satisfying his duties at class representative to adequately
 21 protect the interests of the class members; refused to
 22 respond regarding his obligations in connection with the
 23 case, including his deposition, refused to be taken; and he
 24 refused to comply with court discovery orders. Therefore, I
 25 cannot give him an award based on equity to a class

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1 representative who did not execute his fiduciary duties
 2 towards the class as the other named people did, so his
 3 motion for an incentive award is denied.
 4 Plaintiff asked for 10,500,000 plus, and expenses
 5 incurred by third persons connected with this litigation.
 6 There is no class representative that occurred those out-of-
 7 pocket expenses that I can see that they referred to
 8 separate from Ms. Cobell's, so I am not going to -- I don't
 9 believe there is authority to award those expenses separate,
 10 so the motion for those incentive awards -- that 10,500,000
 11 is denied.
 12 Ms. Cobell's personal expenses, out-of-pocket
 13 ones, was not included in that expense request as I
 14 understand it, so those moneys will come out of her sizable
 15 incentive award that I have already approved.
 16 Now finally what remains to be done is discuss
 17 the attorneys' fees, which I will do briefly at this time,
 18 and we can address it more in our written opinion. But I
 19 wanted to finish with the parties that are here so they
 20 understand what their rights are at this time and the
 21 expenses.
 22 I am going to decide the aggregate attorneys' fees
 23 at this time and expenses for the pre-settlement activities.
 24 A portion of the fund that is in dispute between the
 25 attorneys I'm going to withhold, pending distribution, until

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1 I rule upon those disputes which I have before me now. But
 2 I'm not ready to rule upon those.
 3 The issue for the court is the calculation I
 4 should use. The Circuit follows a percentage of funds
 5 method. There has been some argument and a lot of written
 6 material is already submitted to me, and the real issue came
 7 down to me, what is the common fund here?
 8 We have of common fund doctrine, and a percentage
 9 from the common fund is fair. That is based upon those
 10 benefiting from prosecution or unjustly enriched so they
 11 don't share in the costs in proportion to the benefit each
 12 one receives. So what is the common fund here?
 13 The plaintiffs' counsel, understandably, say it is
 14 \$3.4 billion of the class-action settlement. It could be
 15 also consider the \$5 billion the government says they are
 16 going to spend on the trust reform.
 17 I think that is reaching too far frankly. I think
 18 it is clear that the accounting trust administration fund,
 19 which will be paid by the defendants now upon final approval
 20 of this settlement as defined in this settlement agreement
 21 is 1.412 billion dollars, and the plaintiffs have created
 22 that fund -- the plaintiffs' counsel, through the
 23 litigation. It did not exist before.
 24 They have achieved that result for their clients.
 25 That is a fixed monetary amount. Nothing is subject to

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1 reversion as some of the other funds are. It will be
 2 distributed to the individual Indians upon their approving
 3 the claim against the government. So it is a true common
 4 fund.
 5 Any leftovers go to the scholarship fund, because
 6 that is appropriate, and it doesn't get deducted for that
 7 reason from that. The scholarship fund is also benefiting
 8 their clients.
 9 But the land consolidation fund, I am not going to
 10 consider them as part of the common fund for the purpose of
 11 attorneys' fees, and I'm making this clear so the plaintiffs
 12 understand, and they have the right to appeal, the
 13 plaintiffs' counsel if they wish, but that is the basis.
 14 There is no guarantee that those funds are really
 15 going to be used to purchase a fractionated interest if the
 16 Indians refuse to do so. And any remaining funds revert
 17 back to the Treasury, not back to the Indians in any
 18 capacity.
 19 So even though it may be incidental, the
 20 plaintiffs' counsel claim, it should be counted -- it is
 21 highly uncertain to me what actual amount I could consider
 22 as a part of that. So the scholarship monies really come
 23 off from the other funds, so I cannot count them separately
 24 and additionally.
 25 The monies traceable to the litigation and the

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1 common fund is really the trust administration fund and not
 2 the other funds.
 3 So really what the government says -- with that
 4 then they only got 330 million, because they think that is
 5 the only fair amount that they have got.
 6 I disagree with that. There is no evidence that
 7 the government made any of these other concessions in
 8 settlement but for this litigation.
 9 The plaintiffs are not piggybacking upon the
 10 success of earlier cases where someone else has already
 11 litigated these issues and they come in secondly to get a
 12 fund. We don't have that here. It appears to me that
 13 plaintiffs are entitled to have counsel -- their fees
 14 based upon the one point four plus billion dollars
 15 recovered.
 16 What percentage should that be then? One of the
 17 factors I look at is, is it must be reasonable in light of
 18 the results obtained? I have to act like a fiduciary for
 19 the beneficiaries who are paying the fee, because now the
 20 Indians will pay this fee, and there has been somewhat of an
 21 adversary process about the fees, but still I have to take a
 22 close look at it.
 23 I have to consider what is reasonable in the
 24 circumstances? I do that by going over the various
 25 factors -- I think we've spent too much time reviewing, but

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1 again amount involved, the results obtained -- it's an
 2 exceptional result, I have already indicated that,
 3 substantial trust reform will also come about as a result of
 4 this.
 5 The awards are tax-free. The number of persons
 6 benefiting, almost half a million perhaps -- at least
 7 450,000 roughly. Future generations are going to benefit
 8 from the trust reform that is coming.
 9 Class member objections. I have reviewed the
 10 objections about attorney fees, but the majority have lodged
 11 no objection -- 99 percent -- and I have considered the
 12 objections as what could be fair in taking into account what
 13 I will award.
 14 Obviously I have counted upon the skill and
 15 efficiency of the attorneys involved in this hostile,
 16 complex litigation with multiple appeals, the complexity and
 17 the duration thereof.
 18 The risk of nonpayment? Mr. Gingold indicated
 19 they took a big risk, and they did. They could go home
 20 empty-handed.
 21 The amount of time involved? Enormous. The time
 22 records are impressive. Even though there are some
 23 objections to some of the time records, I think overall the
 24 records reflect even a cursory glance a phenomenal number of
 25 hours fairly put in.

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1 The parties' agreements? I have not gone off and
 2 held that the plaintiffs are bound by their agreements. I
 3 am somewhat concerned. They came in asking for more than
 4 there would seem to me an agreement, but I agree that it's
 5 up to the court to set a reasonable fee. They did have an
 6 agreement, and it concerns me that they seem to have backed
 7 off from that, but they certainly agreed to be bound within
 8 that range without an appeal.
 9 That is a minimum I think. I think actually they
 10 had an agreement, but beyond that it is up to the court to
 11 determine what the size of the attorneys fees should award.
 12 I could have felt they did should not get any of that, and
 13 that they should get \$5 million. I don't think the
 14 agreement bound the court either way.
 15 However, it is somewhat persuasive that what they
 16 considered to be reasonable when they were attempting to
 17 settle this case and sell it to Congress and to their
 18 clients.
 19 Additionally, it seems to me more reasonable than
 20 any contingency fee arrangements they may have had, because
 21 this fee agreement postdates any contingency fee agreements.
 22 In other words, they seem to have gone off and said, we will
 23 accept these fees regardless of whatever we said we would do
 24 originally.
 25 And similar cases? There has been a mention of

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1 looking at large cases, large awards. This case qualifies
 2 as what we call a mega fund case. That is a gigantic
 3 award. Not just an average couple million dollars
 4 settlement case.
 5 So how do you do a mega fund? Because they do not
 6 normally get 30 percent of a mega fund case. That is not
 7 awarded by the courts. That puts too high a premium on the
 8 legal fees.
 9 I did a survey here with my staff, nine cases,
 10 what we call mega fund cases, all in the neighborhood -- all
 11 more than 1 billion up to \$6 billion in class action funds,
 12 and I looked at the legal fees attributed thereto from what
 13 was considered then the common fund that was appropriate,
 14 and the fees ranged from 4.8 percent to a high of 15
 15 percent, depending upon various factors. Hours went to
 16 200,000 or more. Phenomenal amounts of time spent on some
 17 of these cases.
 18 And there is a collection of those cases set forth
 19 in a report of the 3rd Circuit task force on court awarded
 20 attorney fees at 108 Fed. -- the decision is 237, and
 21 another case 962 Fed. Supp. at 572 in In re: Prudential
 22 Insurance Company case reviewing all of these mega fund
 23 settlements, reviewing a percentage range there from 4
 24 percent to 17 plus percent.
 25 It seems to the court to award the attorneys' fees

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1 -- in looking at an amount that is sufficient to encourage
 2 lawyers to take on similar cases in the future -- that is
 3 one of issues that concerns the court.
 4 You cannot have cases like the original case that
 5 Ms. Cobell wanted to bring where lawyers said, I won't do
 6 it. I can never make money. It is a loser, and they would
 7 never litigate, and a good case -- a good client cannot be
 8 put forth before the court.
 9 We have to make attorney fees commensurate so that
 10 attorneys are encouraged to these cases and to help out the
 11 less privileged who need the help, not just Indians, but
 12 anyone in this country with similar type of situations where
 13 they were deprived of their rights. You have to make that
 14 worthwhile for lawyers to gamble to take these kinds of
 15 cases.
 16 They sorely need competent representation, and the
 17 Indians desperately needed these monies to be adequately
 18 handled, and now they will receive them from this
 19 settlement, and many of them, I know, live in extreme
 20 poverty; and they are special beneficiaries of a trust
 21 created by the government, and they owe them these monies.
 22 I have to look at the agreement between the
 23 parties, and they did have an attorneys' fees agreement,
 24 informative to the court, not binding upon the court.
 25 So the court -- considering those factors that I

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1 have just reviewed, I'm going to make the following
 2 attorneys' fees awards in this matter. I'm going to make an
 3 award of \$99 million as reasonable and appropriate for the
 4 aggregate attorneys' fees, expense and costs for pre-
 5 settlement amounts.
 6 That represents 7.1 percent, approximately, of the
 7 common fund, the way I found it existed. That is a common
 8 fund of \$1.4 billion -- consistent with the parties'
 9 agreement, more than the government requested and other
 10 people have requested, but at the same time it is within the
 11 range of mega settlement attorneys fees. Maybe a percentage
 12 or two below some of the others, but within that same range,
 13 as reasonable and adequate for the attorneys for the work
 14 they have done on this.
 15 It does not denigrate their performance whatsoever
 16 that I did not give them \$212 million. I have to make a
 17 judgment based upon my review of the case, my consideration
 18 of the factors that I have reviewed as to what is fair and
 19 reasonable in accordance with the common fund that I found
 20 existed that they created in this case.
 21 From that will be withheld at this time a maximum
 22 amount of \$13,616,250.48. That is if the allocation is not
 23 resolved before the final approval of the settlement -- as
 24 defined in the settlement agreement. That amount is going
 25 to be withheld from the payment pending determination of

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1 those claims which I hope to make in the near future.
 2 So let me just sum up where we are at this point.
 3 One, the historical accounting and class administration
 4 class are properly certified as I ruled.
 5 Two, I am going to order a judgment on behalf of
 6 the plaintiffs in accordance with the terms of the
 7 settlement agreement and the joint motion for final approval
 8 of the settlement, and the entry of final judgment will be
 9 granted.
 10 Settlement agreement I have found is fair,
 11 reasonable and adequate. IT is binding on the class members
 12 who did not timely opt out.
 13 Four, I am approving final payment of reasonable
 14 attorneys' fees, expenses and costs for the class counsel in
 15 the amount of \$99 million, subject to the terms of the
 16 settlement agreement, and to the claims against those fees
 17 by the two petitioners. That will be drawn from the common
 18 fund established by this settlement.
 19 For the incentive amounts approved and the awards
 20 requested in the amounts requested as I've already ruled --
 21 the claims administrator will now possess and pay all valid
 22 claims from the settlement account once the time frames have
 23 run that are appropriate.
 24 Defendants will be released from the class members
 25 claims outlined in the settlement agreement under section 1,

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1 and the defendants will make their final payments in the
 2 accounting trust administration found as is called for in
 3 the agreement.
 4 So that will be the order of court.
 5 I want to congratulate counsel for both sides for
 6 getting this result. It is an incredible result. I think
 7 it does a great service to recognize the harm done to the
 8 American Indians in the past by the government who is
 9 supposed to be their protector and failed to do so in the
 10 categories, at least before this court, as to the trust
 11 funds and the land management, and the hope that this does
 12 set a new tone for the government and a new course for
 13 Interior to deal with the American Indians on a fair and
 14 equitable basis as they indicated they will do so from now
 15 on.
 16 I want to congratulate counsel for the plaintiffs
 17 for their work in this case, representing the highest
 18 quality of work in the finest traditions of the Bar to
 19 undertake a case like this and litigate it for 15 years with
 20 no certain result, and getting what may be a disappointing
 21 result in the attorneys' fees. But you all deserve the
 22 highest praise for the work that you have done on these
 23 cases.
 24 With that the court will stand in recess, and if
 25 the parties haven't submitted orders in accordance with my

1 rulings, you should do so as soon as possible.

2 (Whereupon, the proceedings were adjourned.)

3 -----

4 CERTIFICATE OF COURT REPORTER

5 I certify that the foregoing is a correct transcript of
6 the proceedings in the above-captioned case.

7

8 SUSAN PAGE TYNER, CVR-CM

8

9

OFFICIAL COURT REPORTER

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