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## Cobell Settlement Finalized After Years of Litigation: Victory at Last?

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## NOTE

### COBELL SETTLEMENT FINALIZED AFTER YEARS OF LITIGATION: VICTORY AT LAST?

*Brooke Campbell\**

#### *I. Introduction*

In late November 2012, the Cobell settlement was finalized after more than seventeen years of litigation.<sup>1</sup> Finally, after countless decades of the federal government mismanaging Native American trust accounts, the United States would pay more than \$3.4 billion to thousands of Native Americans holding trust accounts.<sup>2</sup> In reference to the settlement, President Obama stated, “I welcome the final approval of the Cobell settlement agreement, clearing the way for reconciliation between the trust beneficiaries and the federal government.”<sup>3</sup> But is the Cobell settlement really a victory for trust beneficiaries? Or is the settlement an unfair “quick fix” that once again demonstrates the failure of the United States to fulfill its fiduciary duty<sup>4</sup> as a trustee?

The United States has held land in trust for Native Americans since the Dawes Act of 1887.<sup>5</sup> As a trustee, the government owes a fiduciary duty to

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1. Maryann Batle, *Historic \$3.4 Billion Cobell Settlement Final, Clearing Way for Tribal Payments*, CRONKITE NEWS (Nov. 27, 2012), <http://cronkitenewsonline.com/2012/11/historic-3-4-billion-cobell-settlement-final-clearing-way-for-tribal-payments/>.

2. *Id.*

3. Press Release, White House Office of the Press Secretary, Statement of the President on the Final Approval of the Cobell Settlement (Nov. 26, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/11/26/statement-president-final-approval-cobell-settlement>.

4. For analysis on the fiduciary relationship established under two important tribal trust cases, see Daniel W. Hart, Note, *United States v. Jicarilla Apache Nation: Why the Supreme Court's Refusal to Apply the Fiduciary Exception to Attorney-Client Privilege Stands to Diminish the Federal-Tribal Trust Relationship*, 36 AM. INDIAN L. REV. 527, 531-34 (2011-2012).

5. Jered T. Davidson, Comment, *This Land Is Your Land, This Land Is My Land? Why the Cobell Settlement Will Not Resolve Indian Land Fractionation*, 35 AM. INDIAN L. REV. 575, 580 (2010-2011).

properly maintain all trust accounts.<sup>6</sup> However, the United States has struggled to properly maintain tribal trust accounts because of the vast amount of land held in trust, numerous transfers of ownership, and the development of fractional<sup>7</sup> interests over time.<sup>8</sup> As an attempt to fix the fractionalization and trust mismanagement problems, Congress enacted the American Indian Trust Management Act of 1994 (“the 1994 Act”), which required the Secretary of State to make a full accounting to each trust account holder annually.<sup>9</sup> Eloise Cobell, among other named plaintiffs, filed a class action lawsuit against the Secretary for failure to provide a full accounting to each account holder on an annual basis as required by the 1994 Act.<sup>10</sup> After years of litigation, the parties entered into a settlement agreement, which Congress later approved.<sup>11</sup> The settlement agreement resulted in a total award of \$3.412 billion.<sup>12</sup>

Proponents of the settlement agreement claimed it as a “victory” for individual trust holders.<sup>13</sup> In stark contrast, opponents of the settlement saw it as another failed attempt to properly compensate Native American trust account holders.<sup>14</sup> For instance, despite the 1994 Act requiring a full accounting to each individual account holder, the Secretary of State refused to do so because of the expense.<sup>15</sup> Instead of fulfilling its fiduciary duty and doing a full accounting to arrive at the correct amount owed to tribes, the government decided that \$3.4 billion was sufficient.<sup>16</sup> According to at least one estimate, however, the true amount owed to trust account holders is “between ten and forty billion dollars.”<sup>17</sup> Critics also pointed out the

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6. *Id.* at 579; *Cobell v. Norton*, 240 F.3d 1081, 1099 (D.C. Cir. 2001) (describing “the fiduciary relationship owed Indian tribes as the highest of moral obligations”).

7. For a discussion on fractionation, see Kristina L. McCulley, Comment, *The American Indian Probate Reform Act of 2004: The Death of Fractionation or Individual Native American Property Interests and Tribal Customs?*, 30 AM. INDIAN L. REV. 401, 407-13 (2005-2006).

8. See generally Davidson, *supra* note 5.

9. 25 U.S.C. § 4021 (2012).

10. *Cobell v. Salazar*, 679 F.3d 909, 913 (D.C. Cir. 2012).

11. *Id.* at 913-15.

12. *Id.* at 916.

13. See Battle, *supra* note 1.

14. S.E. Ruckman, ‘*Cobell Warming*’, NATIVE AM. TIMES (Sept. 16, 2011), <http://www.nativetimes.com/life/commentary/6035-se-ruckman-cobell-warming>.

15. *Cobell v. Salazar*, 679 F.3d at 914.

16. *Id.* at 916.

17. Christopher Barrett Bowman, Comment, *Indian Trust Fund: Resolution and Proposed Reformation to the Mismanagement Problems Associated with the Individual Indian Money Accounts in Light of Cobell v. Norton*, 53 CATH. U. L. REV. 543, 543 (2004).

large attorney fees and incentive payments for the class representatives.<sup>18</sup> Ninety-nine million of this award went to the attorneys' fees and \$2.5 million went to the four class representatives.<sup>19</sup>

Kimberly Craven was one of the many critics that objected to the terms of the agreement. Craven endured heavy criticism for her decision to appeal; attorneys for some of the Cobell plaintiffs went as far as posting an ethically questionable letter criticizing those who objected along with their contact information.<sup>20</sup> But Craven was fighting for the same outcome as the original plaintiff, Cobell: a fair and just settlement. This note will analyze the issues Craven raised in her appeal. One issue in this case is whether Federal Rule of Civil Procedure 23 ("Rule 23") allows class certification, despite possible interclass conflict. The second issue is whether incentive payments to class representatives are proper, and at what point does the payment amount create a conflict between the class representative and unnamed class members.

Part II of this note will discuss a brief history of the 1994 Act and the history preceding Craven's appeal. Part III will discuss Craven's two main arguments against the settlement. Part IV describes why the appeals court misapplied Rule 23. Additionally, this note suggests that the district court or the United States Supreme Court should have adopted a proportionality method to determine whether incentive payments to class representatives create an interclass conflict. Since the Supreme Court has not directly addressed whether incentive payments should be allowed in class actions, this note suggests that the Supreme Court should allow incentive payments, but have lower courts consider the fairness of such awards based on proportionality principles.

## *II. Law Before the Case*

### *A. American Indian Trust Fund Management Reform Act of 1994*

Congress enacted the American Indian Trust Fund Management Reform Act in 1994 ("the 1994 Act").<sup>21</sup> The 1994 Act was touted as the solution to

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18. Petition for Writ of Certiorari at 6-7, *Craven v. Cobell*, 133 S. Ct. 543 (2012) (No. 12-234), 2012 WL 3613470 at \*6-\*7.

19. *Id.*

20. Rob Capriccioso, *A Public Letter from the Cobell Lawyers Prompts Ethics and Harassment Concerns*, NATIVE STRENGTH (Jan. 30, 2012, 4:25 PM), <http://nativestrength.com/2012/01/30/a-public-letter-from-the-cobell-lawyers-prompts-ethics-and-harassment-concerns/>.

21. *Cobell v. Salazar*, 679 F.3d 909, 913 (D.C. Cir. 2012).

a century of failed attempts to properly manage trust accounts.<sup>22</sup> The purpose of the 1994 Act was to reaffirm the fiduciary duty owed to trust account holders and allow both tribes and individual trust holders to make more decisions involving their accounts.<sup>23</sup> Section 4011 of the 1994 Act recognized the need to properly manage accounts held in trust and required the Secretary of Interior to account for the daily and annual balances of each account.<sup>24</sup> Each account holder was to receive annual statements of the current and past balances of the account, information concerning any changes from gains or losses, and all receipts.<sup>25</sup> Additionally, the Secretary had to provide quarterly statements for accounts that were active within the past eighteen months and had balances greater than one dollar.<sup>26</sup> Section 4012 granted individual account holders the right to demand interest payments relating back to the date when the Secretary first started investing money from individual Indian accounts.<sup>27</sup> In order to be entitled to these payments, the individual holders had to be identified in the account or the individual would have to provide sufficient documentation proving their right to recover.<sup>28</sup>

The 1994 Act also established the Office of the Special Trustee for American Indians.<sup>29</sup> The Special Trustee had the task of formulating plans to better manage trust accounts.<sup>30</sup> The Special Trustee developed a plan, but lacked adequate funding for implementation.<sup>31</sup> No one sought funding for the new plan and a few years later, the Cobell class action began.<sup>32</sup>

#### B. Cobell v. Salazar

As a result of the government's non-compliance with the 1994 Act, Eloise Cobell and four additional plaintiffs filed a lawsuit in 1996 against the Secretary of Interior for mismanagement of their trust accounts.<sup>33</sup> The plaintiffs sought a historical accounting of the trust accounts pursuant to the

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22. See Bowman, *supra* note 17, at 553.

23. *Id.*

24. 25 U.S.C. § 4011 (2012).

25. *Id.*

26. *Id.*

27. *Id.* § 4012.

28. *Id.*

29. *Id.* § 4041.

30. *Id.* § 4043(a)(1).

31. Bowman, *supra* note 17, at 556.

32. *Id.* at 556-57.

33. Cobell v. Salazar, 679 F.3d 909, 913 (D.C. Cir. 2012).

1994 Act.<sup>34</sup> However, the 1994 Act did not specify how to manage the historical accounting.<sup>35</sup> While the Secretary gave Congress an estimated cost of \$2.4 billion for the accounting, Congress was only willing to pay \$127.1 million.<sup>36</sup> Consequently, the Secretary created a new plan in 2007 based on statistical sampling that would cost significantly less, \$271 million.<sup>37</sup> This plan eliminated the individual accounting requirement of the Act.<sup>38</sup>

In 2009, the parties entered into a settlement agreement.<sup>39</sup> There were two separate classes, the Historical Accounting Class (“HAC”) and the Trust Administration Class (“TAC”).<sup>40</sup> The HAC was composed of class members that held Individual Indian Money (“IIM”)<sup>41</sup> accounts during the period of October 25, 1994 to September 30, 2009.<sup>42</sup> The TAC trust holders with IMM accounts from 1985 and individuals with proof that they had some right to land held in trust.<sup>43</sup>

The members of the HAC would receive \$1000 each and were certified under Rule 23(b)(1)(A), which gives members no option to opt out.<sup>44</sup> The court certified the HAC under 23(b)(1)(A), which states that a class action may be appropriate when separate actions risk “inconsistent or varying adjunctions with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class.”<sup>45</sup> Given the size of the class, separate proceedings would be difficult and the amount of litigation costs would be massive. However, before any class can be certified, the court must check to see if all the prerequisites of Rule 23(a) are met:

One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is

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34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 913-14.

38. *Id.* at 914.

39. *Id.*

40. *Id.*

41. For a discussion on the mismanagement and fractionation of IIM accounts, see James T. Hamilton, *Progressing Back: A Tribal Solution for a Federal Morass*, 27 AM. INDIAN L. REV. 375, 378-80 (2002-2003).

42. *Id.*

43. *Id.*

44. *Id.*

45. FED. R. CIV. P. 23(b)(1)(A).

impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.<sup>46</sup>

The class was alternatively certified under 23(b)(2), which provides that “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunction relief or corresponding declaratory relief is appropriate respecting the class as a whole.”<sup>47</sup>

The members of the TAC would each receive at least \$500 and a “*pro rata* share of the remaining settlement funds in accordance with an agreed-upon compensation formula.”<sup>48</sup> Additionally, “reasonable attorney fees” and “incentive payments for the class representatives” were included in the settlement agreement.<sup>49</sup> The TAC was given the right to opt out; however, many class members did not realize that they had waived their right to opt out when they signed the settlement agreement.<sup>50</sup> Congress approved the settlement in 2010 and increased the amount of money for the TAC to \$800.<sup>51</sup> Congress did this “without regard to the requirements of the Federal Rules of Civil Procedure, and provided that such a certification would be treated as a certification pursuant to Rule 23(b)(3).”<sup>52</sup> On December 21, 2010, the district court approved the settlement and certified both classes.<sup>53</sup>

### III. Statement of the Case

Kimberly Craven, along with ninety-one other class members, objected to the settlement, and a hearing was held on June 20, 2011.<sup>54</sup> Craven argued first, that the settlement went against the “law of the case.”<sup>55</sup> Second, Craven argued the settlement agreement lacked an opt-out provision for the HAC.<sup>56</sup> Third, Craven argued that a possible intra-class

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46. *Id.* Rule 23(a).

47. *Id.* Rule 23(b)(2).

48. *Cobell v. Salazar*, 679 F.3d 909, 914 (D.C. Cir. 2012).

49. *Id.* at 915.

50. *Id.* at 914.

51. *Id.* at 915.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 916.

56. *Id.* at 917.

conflict among the class representatives and other members existed because of the size of the incentive payments in comparison to the awards of other class members.<sup>57</sup> The district court rejected all of these arguments and Craven appealed.<sup>58</sup>

The D.C. Circuit Court of Appeals rejected Craven's first argument by stating that "[u]nder the law-of-the-case doctrine, 'the *same* issue presented a second time in the *same* case in the *same* court should lead to the *same* result,'" and did not apply in this situation.<sup>59</sup> Although it was the same case in the same court, the circumstances had changed.<sup>60</sup> When the court first addressed the issue, the Secretary was still considering a full accounting to each account holder.<sup>61</sup> But now, it was not possible to complete a full accounting because Congress failed to provide the funds necessary.<sup>62</sup> Additionally, the groups were not subdivided into two separate classes in the earlier decision.<sup>63</sup>

Craven's second argument against class certification was that the \$1000 settlement payment to each class member in the HAC was individualized monetary relief.<sup>64</sup> As a result, it went against the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*.<sup>65</sup> In that case, the Supreme Court denied class certification of female employees that claimed the managers discriminated against them based on their gender.<sup>66</sup> The lower court certified the class under 23(b)(2).<sup>67</sup> The Supreme Court hinted that this rule could be read as applying only to injunctive or declaratory relief, and did not authorize class certification of monetary claims.<sup>68</sup> However, this case was answered on the narrower issue — that claims for "individualized [monetary] relief" violated the rule.<sup>69</sup> Since back pay to each individual employee was individualized, the Court refused to certify the class.<sup>70</sup> The Court held that class certification under 23(b)(2) could not be granted

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57. *Id.* at 918.

58. *Id.* at 915.

59. *Id.* at 916-17.

60. *Id.* at 917.

61. *Id.* at 913.

62. *Id.*

63. *Id.* at 917.

64. *Id.*

65. *Id.* (citing *Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2557-58 (2011)).

66. *Wal-Mart v. Dukes*, 131 S. Ct. at 2561.

67. *Id.* at 2548-49.

68. *Id.* at 2557 (citing *Ticor Tittle Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994)).

69. *Id.*

70. *Id.* at 2561.

“where the monetary relief is not incidental to the requested injunctive or declaratory relief.”<sup>71</sup>

In the current case, the court of appeals denied that the settlement was individualized because the Secretary’s refusal to conduct historical accounting made it impossible to determine what each individual’s actual claim would be worth.<sup>72</sup> The court stated, even if it was assumed “that the \$1,000 *per capita* settlement payment monetized the requested injunctive relief, certification of the HAC as a Rule 23(b)(2) class was nonetheless appropriate because of the unusual circumstances surrounding the litigation.”<sup>73</sup> The court further reasoned that even if the payments monetized the injunctive relief, the unique circumstances and complications made it appropriate.<sup>74</sup> The court emphasized the years spent in litigation and the importance of congressional approval of the settlement.<sup>75</sup>

As to Craven’s third objection, the court of appeals denied there was an intra-class conflict.<sup>76</sup> Craven claimed that two separate classes were insufficient to protect absent members because some claims are worth more than others. The appellate court acknowledged that congressional hearings did contain testimony that some claims may be worth more if they held royalties for oil and gas held in trust by the United States.<sup>77</sup> However, the court of appeals stated that most royalty owners exchanged their interest for a lump sum payment in 1919.<sup>78</sup> The court further stated that even if class members still held interest in oil and gas royalties, they were part of the TAC and had a right to opt out.<sup>79</sup>

Craven had also argued “that, prior to the settlement agreement, the class representatives received historical accounting that showed their trust claims to be of little value; the[ir] interests therefore were in conflict with those of the rest of the classes that did not know how they would fare under the distribution scheme.”<sup>80</sup> The court found that the named class representatives did not receive a full accounting of their claim.<sup>81</sup> As a

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71. *Id.*

72. *Cobell v. Salazar*, 679 F.3d 909, 921 (D.C. Cir. 2012).

73. *Id.* at 918.

74. *Id.*

75. *Id.*

76. *Id.* at 920.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 921.

result, there was no proof of over-compensation.<sup>82</sup> The court further stated that even if the class representatives were over-compensated, Craven could not prove that other members of the class were under compensated.<sup>83</sup> The court of appeals rejected all of Craven's claims and affirmed the settlement.<sup>84</sup>

#### IV. Analysis

##### A. The D.C. Circuit Court Improperly Placed the Burden on Craven to Show an Interclass Conflict

Craven petitioned the United States Supreme Court on August 2, 2012; however, the Supreme Court denied certiorari on October 29, 2012.<sup>85</sup> By denying certiorari, the Court has left unresolved two important issues raised by Craven in her appeal:<sup>86</sup> (1) whether the court of appeals improperly put the burden on her to show proof of an impermissible structural conflict in order for the Court to deny class certification;<sup>87</sup> and (2) whether the large incentive payments to the class representatives adversely affected their ability to fairly represent other class members.<sup>88</sup>

As to the first issue, Craven argued that the prerequisites of Rule 23 made it the class representatives' burden to show that certification was proper.<sup>89</sup> She argued that it was impossible for her to meet this burden because the Secretary of Interior was the only one who had access to the information, some of which was destroyed.<sup>90</sup> Craven claimed the court of appeals improperly put the burden on her to prove that other class members were inadequately represented when Rule 23 clearly states it is the plaintiff's burden to show adequate representation.<sup>91</sup>

The United States Supreme Court stated in *Wal-Mart Stores, Inc. v. Dukes* that Rule 23 is more than a "mere pleading standard," and those attempting to certify the class "must affirmatively demonstrate his compliance with the Rule — that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact,

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82. *Id.*

83. *Id.*

84. *Id.* at 924.

85. *Craven v. Cobell*, 133 S. Ct. 543 (2012) (No. 12-234).

86. Petition for Writ of Certiorari, *supra* note 18, at i-ii.

87. *Id.* at 17.

88. *Id.* at 22.

89. *Id.* at 17.

90. *Id.* at 19.

91. *Id.* at 17.

etc.”<sup>92</sup> Craven claimed that the court of appeals went against the Supreme Court’s instruction by not making it the plaintiff’s burden to show these requirements.<sup>93</sup>

Craven additionally argued in her petition to the Supreme Court that the District of Columbia created a circuit split as to what must be shown to establish an intra-class conflict.<sup>94</sup> Craven claimed the circuit courts are split on the issue of whether potential conflicts are enough to deny class certification.<sup>95</sup> Craven admitted that most courts require more than speculative proof; but several courts disagree on how proof should be defined.<sup>96</sup> The Second, Third, Sixth, and Seventh Circuits have described potential conflicts resulting from “structural flaw[s] or ‘potential’ issue[s] [as] enough to raise serious questions’ warranting denial of certification.”<sup>97</sup> In contrast, the Fourth, Ninth, and now, the District of Columbia Circuits require more than “speculative proof for a conflict to exist.”<sup>98</sup> These courts require “hard evidence” of an actual conflict.<sup>99</sup> However, the Fourth Circuit only requires a potential intra-class conflict for mandatory classes.<sup>100</sup> Circuit splits cause results to vary from court to court, which leads to unpredictability and may adversely affect claimants’ rights. This circuit split is especially significant because in cases such as this one, an objecting class member will never be able to show an actual intra-class conflict when they have no way to access the records.

The attorneys for the class action claimed there was no conflict between the circuits because the different outcomes in these cases were based on factual differences, and not applying different standards.<sup>101</sup> They argued that the lower courts in all the cases cited by Craven were properly using the standards established by the Supreme Court in *Amchem Products Inc. v.*

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92. *Walmart v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

93. Petition for Writ of Certiorari, *supra* note 18, at 18.

94. *Id.* at 15.

95. *Id.* at 15-16.

96. *Id.* at 16.

97. *Id.* (citing *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.2d 242 (2d Cir. 2011)); see also *Retired Chicago Police Ass’n v. City of Chicago*, 7 F.3d 584, 598 (7th Cir. 1993).

98. *Id.* (citing *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170 (3d Cir. 2012)).

99. *Id.* (citing *Ward v. Dixie Nat’l Life Ins. Co.*, 595 F.3d 164, 180 (4th Cir. 2010)).

100. *Id.* (citing *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 338 (4th Cir. 1998)).

101. Brief in Opposition of Plaintiffs-Respondents at 13, *Craven v. Cobell*, 133 S. Ct. 543 (2012) (No. 12-234), 2012 WL 4426427, at \*13.

*Windsor and Ortiz v. Fibreboard Corp.*<sup>102</sup> Craven also cited these two cases in support of her argument.<sup>103</sup>

Both *Amchem* and *Ortiz* involved class actions for asbestos exposure.<sup>104</sup> *Amchem* contained members that were suffering health related issues from asbestos exposure and members that were exposed but had not yet experienced health problems.<sup>105</sup> Nine class representatives were named for the entire class.<sup>106</sup> The Court stated that those already suffering health problems had the incentive to reach a large, quick settlement.<sup>107</sup> In contrast, members that were only exposed, but not yet ill, did not know what claims they may have in the future.<sup>108</sup> Thus, the Court denied class certification because the class lacked structural safeguards to protect separate interests, such as subgroups with class representatives for each.<sup>109</sup>

*Amchem* provides support for both Craven and the plaintiffs' attorneys. The case supports those opposing Craven because the Court in *Amchem* emphasized the need for Congress to authorize a large settlement, which did occur in the Cobell case.<sup>110</sup> Also, the class members were divided into two separate subclasses, the TAC and the HAC.<sup>111</sup> On the other hand, *Amchem* also supports Craven's argument because some evidence did exist that the TAC contained both low value claims and high value.<sup>112</sup> According to the government's own evidence, most claims were of low value.<sup>113</sup> As evidence of high value claims, Craven cites to a lawsuit pending in federal court, *Two Shields v. United States*.<sup>114</sup> However, the plaintiffs claim that *Two Shields* involves a different claim, mismanagement of land by leasing to oil companies for under market value.<sup>115</sup>

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102. *Id.*

103. Petition for Writ of Certiorari, *supra* note 18, at 15.

104. *See generally* *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

105. *Amchem*, 521 U.S. at 603.

106. *Id.* at 602-03.

107. *Id.* at 626.

108. *Id.* at 628.

109. *Id.* at 626.

110. *See* Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064.

111. *See* *Cobell v. Salazar*, 679 F.3d 909, 914 (D.C. Cir 2012).

112. Petition for Writ of Certiorari, *supra* note 18, at 12.

113. *Id.*

114. *Id.*

115. Brief in Opposition of Plaintiffs-Respondents, *supra* note 101, at 20.

*Ortiz* was also an asbestos class action concerning a different issue of class certification.<sup>116</sup> In this case, the class action included members that had not filed lawsuits over asbestos exposure, but excluded individuals that had settled with the company and retained the right to sue later if they subsequently suffered from health related problems.<sup>117</sup> The Court found the settlement unfair because a large number of claimants could be excluded.<sup>118</sup> Further, the Court found that the payments to the class representatives were unfair because they would receive double the average amount immediately, as well as a portion of the leftover funds.<sup>119</sup>

*B. Incentive Payments to Class Representatives Were Vastly Disproportionate to Others' Awards*

The second issue Craven appealed to the Supreme Court concerned the class representatives' large incentive payments.<sup>120</sup> The size of incentive awards class representatives receive must be carefully scrutinized to ensure they comply with the prerequisites of Rule 23(a)(4).<sup>121</sup> This rule requires the class representative to "fairly and adequately protect the interests of the class."<sup>122</sup> The Supreme Court has not set guidelines for determining the appropriate size of incentive awards.<sup>123</sup> Instead, courts may use their discretion or follow the jurisdiction's procedures for incentive awards.<sup>124</sup> This practice creates unpredictability for claimants and may encourage forum shopping.<sup>125</sup> By denying certiorari in this case, the Supreme Court missed an invaluable opportunity to set guidelines for incentive payments in class actions.

The class representatives received incentive payments drastically higher than the average payments to the unnamed class members. The first named plaintiff, Cobell, received \$2 million, a second representative received \$200,000, and the last two class representatives were each awarded

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116. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

117. *Id.* at 854.

118. *Id.*

119. *Id.*

120. *Cobell v. Salazar*, 679 F.3d 909, 920 (D.C. Cir. 2012).

121. Ann K. Wooster, *Propriety of Incentive Awards or Incentive Agreements in Class Actions*, 60 A.L.R. 6th 295, § 25 (2010).

122. FED. R. CIV. P. 23(a)(4).

123. Petition for Writ of Certiorari, *supra* note 18, at 7 (citing *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1254 (11th Cir. 2003)).

124. *Id.*

125. For a discussion on forum shopping, see generally Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677 (1990).

\$150,000.<sup>126</sup> In stark contrast, the HAC members only received \$1000 each, and the TAC members only received approximately \$800 each.<sup>127</sup> The incentive payments were immensely higher than those normally allowed in class actions, where the median amount for a class representative is approximately \$4000.<sup>128</sup> However, since the Supreme Court has not set any guidelines for courts to follow, the Cobell court was free to use its discretion and approved the incentive awards.

Incentive awards can be beneficial and should not be prohibited; but objective guidelines are needed to promote uniformity and fairness in class actions. For example, incentive awards are beneficial in class actions where the recovery for each individual class member may be nominal; otherwise, it would be difficult to find a class representative to bring the class action.<sup>129</sup> Also, incentive awards may be appropriate in situations where the class representative has financially contributed or spent a substantial amount of time or effort for the benefit of the class action.<sup>130</sup>

On the other hand, a disproportionate incentive award to class representatives creates conflicts of interest with other class members.<sup>131</sup> A class representative owes a fiduciary duty to other class members.<sup>132</sup> If the incentive award is too large, the class representative may be tempted to act in their own best interest instead of acting in the best interest of all class members.<sup>133</sup> As a result, these two competing interests must be balanced. There are a number of methods to balance these interests; but creating a clear set of guidelines for all courts to follow is crucial.

Comparing the Cobell settlement to another similar class action illustrates the need to have uniform, objective guidelines. The most significant difference between the Cobell court and the court in *Van Vranken v. Atlantic Richfield Company* is the use of the following factors, which determine whether the incentive payment to the class representative was appropriate:

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126. *Id.* at 26.

127. *Cobell v. Salazar*, 679 F.3d 909, 914-15 (D.C. Cir. 2012).

128. Petition for Writ of Certiorari, *supra* note 18, at 30 (citing Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. REV. 1303, 1308 (2006)).

129. *Wooster*, *supra* note 121, § 6.

130. *Id.* § 8.

131. *Id.* § 9.

132. *Id.*

133. *Id.* § 10.

1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.<sup>134</sup>

In *Van Vranken*, the named representative was to receive \$100,000 as an incentive payment out of a nearly \$70 million settlement.<sup>135</sup> The court found that the representative had spent substantial time on the case over several years of litigation, beginning in 1979 and ending in 1995.<sup>136</sup> Additionally, the class representative was a key witness in the case, and contributed financially on several occasions.<sup>137</sup> However, the court found that his claim was not substantially worth more than other class members and lowered the incentive award to \$50,000.<sup>138</sup>

Similar to the *Van Vranken* case, the attorneys for the Cobell class action claimed that the incentive awards for the named class representatives were justified because of the length of the litigation and the amount of participation.<sup>139</sup> For example, the named class representative, Cobell, spent approximately \$390,000 over a twenty-year period, and traveled across the United States to further support the class action.<sup>140</sup> Cobell died shortly after the approval of the settlement and was recognized by a number of groups for her efforts.<sup>141</sup> Attorneys for the Cobell class action also claimed the other named class representatives were more involved than those in a typical class action.<sup>142</sup>

Unlike the court in *Van Vranken*, the court in the Cobell settlement did not apply a set of factors to determine whether the incentive awards were appropriate.<sup>143</sup> Instead, the court made general findings such as the one cited above by the Cobell attorneys to justify the awards.<sup>144</sup> If the court of appeals had applied the *Van Vranken* factors, the incentive payments most

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134. *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995).

135. *Id.*

136. *Id.*

137. *Id.* at 295-96.

138. *Id.* at 300.

139. Brief in Opposition of Plaintiffs-Respondents, *supra* note 101, at 25-26.

140. *Id.* at 24-25.

141. *Id.*

142. *Id.* at 26.

143. *See Cobell v. Salazar*, 679 F.3d 909 (D.C. Cir. 2012).

144. *Id.* at 924.

likely would not have been approved. The Cobell litigation did last for several years, but not many more than the *Van Vranken* case.<sup>145</sup> Additionally, at least one named representative contributed a substantial amount of money and time for the benefit of the Cobell class action.<sup>146</sup>

But the other Cobell class representatives did not contribute as substantially and still were given very generous payments.<sup>147</sup> Arguably, three of the four class representatives in the Cobell settlement contributed the same amount as the class representative in *Van Vranken*, if not considerably less.<sup>148</sup> In *Van Vranken*, the class representative presented key testimony to weaken the other party's defense.<sup>149</sup> Like the *Van Vranken* case, class representatives in the Cobell settlement did not have substantial claims.<sup>150</sup> According to some of the evidence in the case, a partial accounting of the class representatives' claims proved they were not substantially large or different than most of the other claims.<sup>151</sup> For these reasons, the *Van Vranken* court would probably have lowered all of the incentive awards in the Cobell class action as it did for the class representative in the *Van Vranken* case. Comparing the Cobell settlement with the *Van Vranken* settlement demonstrates the disparities that occur when the Supreme Court fails to establish uniform guidelines to direct the lower courts.

#### *V. Proposed Guidelines for Determining Appropriate Incentive Payments*

The Supreme Court should adopt the *Van Vranken* factors as an objective guideline for courts to determine the appropriate amount for incentive payments.<sup>152</sup> Prior to approving an incentive award in a settlement agreement, a court should apply the *Van Vranken* factors.<sup>153</sup> Once an amount is determined, the court should compare the amount each class representative would receive to the net settlement amount and to the award each class member would receive. If either percentage appears excessive when compared to other class action incentive payments, the court should require proof to justify the disparity. Without proper justification, the court

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145. *Cf. id.*; *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995).

146. Brief in Opposition of Plaintiffs-Respondents, *supra* note 101, at 25.

147. *Id.*

148. *Id.*

149. *Van Vranken*, 901 F. Supp. at 299.

150. Petition for Writ of Certiorari, *supra* note 18, at 12.

151. *Id.*

152. *See Van Vranken*, 901 F. Supp. at 299.

153. *See id.*

should lower the incentive payment to a more appropriate amount. These guidelines would encourage the class representatives to be part of the litigation process, and would motivate them to get the best deal for all class members.

Although the Supreme Court has not taken a position on incentive awards, lower courts have considered the proportionality of the representatives' awards compared to the overall settlement.<sup>154</sup> For example, a California district court held in *Alberto v. GMRI, Inc.* that the court must conduct a proportionality review in order to determine whether the incentive payments were too high.<sup>155</sup> To make this determination, the court balanced "the number of named plaintiffs receiving incentive payments, the proportion of the payments relative to the settlement amount, and the size of each payment."<sup>156</sup>

In *Alberto*, the named representative was to receive \$5000 as an incentive award and the unnamed class members would receive approximately \$25 each.<sup>157</sup> The total settlement amount was \$700,000<sup>158</sup>, making the incentive payments 0.71% of the total settlement amount.<sup>159</sup> The court considered this payment too high compared to other class action incentive payments that ranged from 0.17-0.56%.<sup>160</sup> Thus, the court refused to approve the proposed incentive payment at the fairness hearing unless it could be justified by the representative's effort or time spent on the case.<sup>161</sup>

Comparing the incentive award to the overall settlement award creates an objective method to determine whether an incentive award is excessive. However, it does not incentivize the class representative to reach the best deal for each individual member. In order to create this incentive, the awards should not exceed a certain percentage compared to the individual awards of each class member. Courts should look at both standards to determine whether incentive payments are excessive. Depending on the type of class action, one standard may be more appropriate than the other.

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154. See Wooster, *supra* note 121, § 25.

155. *Id.* (citing *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 669 (E.D. Cal. 2008)).

156. *GMRI, Inc.*, 252 F.R.D. at 669 (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003)).

157. *Id.*

158. *Id.* at 665.

159. *Id.* at 669.

160. *Id.*

161. *Id.*

The Cobell settlement is a prime example of how a large overall settlement, over \$3.412 billion, may make the incentive payments of \$2.5 million not excessive, compared to the *Alberto* case (cited previously).<sup>162</sup> The class representative receiving \$2 million would only take 0.00059% of the net settlement, and the remaining representatives (totaling half a million) would receive an even smaller percentage. However, when compared to the amount each individual member would receive, either \$800 or \$1000, the incentive payments are excessive.

In *Murray v. GMAC Mortgage Corp.*, the court compared the class representative incentive award to the maximum recovery a non-representative would receive. In *Murray*, the court implied that a “sufficient disparity — where the representative recovered 300% of the maximum allowable recovery — might render a settlement ‘untenable.’”<sup>163</sup> In that case, the class representative had an incentive payment of \$3000, and the maximum amount unnamed members could recover was \$1.<sup>164</sup> The Supreme Court should adopt a similar standard to determine whether an award is excessive (in addition to comparing the class representative’s award to the net settlement amount).

In the Cobell settlement, the class representative receiving \$2 million will earn 250,000% more than the TAC (approximately \$800 each). Compared to the HAC, that same representative would receive 200,000% more than the average payment of \$1000. At some point, incentive awards become excessive and tempt the class representative to look out solely for their own interest.<sup>165</sup>

By adopting the proposed standard, courts can ensure incentive awards do not create conflicts of interest. Given the varying types of class actions, courts should compare incentive payments to both the total net settlement and the amount other members would receive. If the incentive payments are excessive compared to other class action incentive payments, the representatives should be required to show evidence to justify the disparity.<sup>166</sup>

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162. Petition for Writ of Certiorari, *supra* note 18, at 24.

163. *Id.* (quoting *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006)).

164. *Murray*, 434 F.3d at 952.

165. *See* Wooster, *supra* note 121, § 6.

166. *See, e.g.,* Van Vranken v. Atl. Richfield Co., 901 F. Supp. 294, 299 (N.D. Cal. 1995).

### VI. Conclusion

The Cobell case is unique due to the large number of class members, the years of litigation, and the inability to get a full accounting from the federal government to determine the true value of all claims.<sup>167</sup> Given its complexities, as well as the involvement of Congress, the Supreme Court may have been hesitant to disturb the settlement agreement. However, Craven raised two important issues that require action by the Supreme Court to lessen confusion in future cases.<sup>168</sup>

As to the first issue, the court of appeals placed an impossible burden on Craven and other objectors to show an actual intra-class conflict.<sup>169</sup> This is especially inappropriate considering it was the government's fault records were destroyed and a full historical accounting was not conducted.<sup>170</sup> Since the government has a fiduciary relationship with Indian trust account holders, there should be a full historical accounting even if the cost exceeds most claims.<sup>171</sup> Arguably, this would be the cheaper choice since the government has stated that most of the accounts checked did not contain errors.<sup>172</sup> Further, the government argues that most claims are of low value, so even if some account holders are owed money, the amount should be relatively low.<sup>173</sup>

The second issue, concerning the appropriateness of large incentive payments to the class representatives, presented the United States Supreme Court with an opportunity to address whether these types of awards are appropriate as well as the proper amount.<sup>174</sup> Like many class actions, the lawyers and class representatives seem to be the ones truly benefitting from the settlement. The attorneys will receive \$99 million and the class representatives will receive \$2.5 million.<sup>175</sup> In stark contrast, all other members will each receive either \$800 or \$1000.<sup>176</sup>

Incentive payments may be appropriate to a certain extent, but at some point it would seem to create a conflict of interest between the class

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167. See *Cobell v. Salazar*, 679 F.3d 909, 918 (D.C. Cir. 2012).

168. See *Petition for Writ of Certiorari*, *supra* note 18, at 6-7.

169. *Id.* at 17.

170. *Id.* at 19.

171. *Cobell v. Norton*, 240 F.3d 1081, 1102 (D.C. Cir. 2001).

172. *Cobell v. Salazar*, 679 F.3d at 918.

173. *Id.*

174. *Petition for Writ of Certiorari*, *supra* note 18, at 22.

175. *Id.* at 6-7.

176. *Id.* at 6.

representatives and the other class members.<sup>177</sup> The incentive payments in this case were vastly larger than most class actions.<sup>178</sup> Because the Supreme Court has not set guidelines, each court must decide on its own what is appropriate. This may lead to forum shopping and more importantly, create incentives for class representatives to settle rather than try to get the best deal for the non-named class members. Implementing the proposed standard would create uniformity for all courts, and ensure incentive awards do not create conflicts of interest. However, since the Supreme Court denied certiorari in this case, both issues raised by Craven remain unresolved.<sup>179</sup>

Both of these issues are particularly troubling because of the unique relationship between the parties in this case. Unlike most class actions, a fiduciary duty exists between the federal government and Native Americans. An earlier decision in this case by the D.C. Circuit Court of Appeals clearly stated:

The federal government has substantial trust responsibilities toward Native Americans. This is undeniable . . . It is equally clear that the federal government has failed time and again to discharge its fiduciary duties. Here, there is no dispute that appellants, as trustee-delegates of the federal government, have failed to discharge fully their fiduciary obligations.<sup>180</sup>

Eleven years later, the same court emphasized what a major “accomplishment” it was to get the settlement approved.<sup>181</sup> Instead of requiring a full historical accounting, the court further states that most accounts were likely not mismanaged.<sup>182</sup> In other words, the class members are lucky to receive such a generous settlement. Since the settlement has been finalized, it has become one more example of how the government has failed to fulfill its trust obligations to Native Americans.

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177. See Wooster, *supra* note 121, § 10.

178. Petition for Writ of Certiorari, *supra* note 18, at 26 (citing Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. REV. 1303, 1308 (2006)).

179. See Batlle, *supra* note 1.

180. *Cobell v. Norton*, 240 F.3d 1081, 1086 (D.C. Cir. 2001).

181. *Cobell v. Salazar*, 679 F.3d 909, 916 (D.C. Cir. 2012).

182. *Id.* at 918.