

Cobell Buy-Back Must Advance Indian Country Interests

By **Keith Harper**

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On Dec. 14, 2010, President Barack Obama signed the Claims Resolution Act of 2010, which, among other things, settled Cobell v. Salazar for a total of \$3.4 billion after 14 years of intense litigation. Of that amount, \$1.5 billion was to be distributed to the plaintiff class based on a formula agreed to by the parties and \$1.9 billion was set aside as a massive infusion to the Land Consolidation Fund (LCF) in an attempt to meaningfully consolidate Indian land holdings and thereby make such lands more economically viable.



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The premises of the LCF part of the settlement were three-fold and rather simple: (1) the fractionation of Indian land holdings undermined effective economic development; (2) there were many willing sellers of smaller fractional interests throughout Indian Country if they could be fairly compensated; and (3) a mass infusion of funds into the LCF would facilitate purchases of these interests and dramatically enhance the ability of tribal communities to effectively utilize their land base for economic development or other constructive purposes.

The benefit to the plaintiff-class of individual Indians was manifest. Many wanted to sell at least some of their small fractional interests and now there were funds to realize the purchases. Moreover, to the extent the lands were consolidated under tribal ownership and the tribal nation was able to thereby make more productive such lands, it would inure to the benefit of the entire tribal community including Cobell Class members. Finally, as an added incentive, a small percentage of each purchase would be added on top of fair market value for a Cobell scholarship fund up to \$60 million.

Of course, the consolidation of Indian lands also benefits the federal government because with each purchase Interior Department's administrative burden lessens commensurately. But it is important to bear in mind that this distinct and additional benefit is not, nor can it be, the central purpose of the \$1.9 billion of fund infusion into the LCF. After all, this settlement — like all settlements — is an exchange of legal claims for specific compensation to the plaintiffs. The settlement agreement itself makes this plain stating that the \$3.4 billion reflects the government's "complete financial obligation under this Settlement" to the plaintiff class for the class' trust mismanagement and accounting claims. Alleviating some of the administrative burden on Interior aids defendants, not plaintiffs and it would be incongruous indeed to consider this alleviation the animating aim of such a settlement.

Over the next six years, the Obama administration implemented the program in a manner that effectively consolidated over two million acres of land under tribal ownership. The purchases of fractional interests were made with extensive and continuous consultation with tribal governments to ensure that targeted interests were tailored to achieve a central purpose of consolidation — improving economic development and enhancing tribal self-governance. And by this measure, the Cobell buy-back program was plainly a success.

Nevertheless, the Trump administration has decided to depart from this approach. On July 28, 2017, without meaningful consultation with tribal nations, the new administration issued an edict radically changing the Cobell buy-back program. For one thing, participation in the program is now limited to just 20 tribes to spend the remaining \$540 million. This means that about 80 other tribal communities — previously part of the program — will now be locked out.

Moreover, it's clear that the program will now be focused on maximizing the number of fractional interests purchased with the remaining available funds, rather than purchasing parcels more likely to promote economic development. This will have the unfortunate effect of benefiting Indian Country far less.

To illustrate, let's compare two hypothetical situations. Let's suppose there is an 80-acre parcel of land in a remote area of a reservation, which we will refer to here as "Blackacre." Further let's stipulate that Blackacre is highly fractionated, say between 100 owners. The sole economic use of Blackacre is a grazing lease for \$2,000 a year. Completely consolidating that parcel by purchasing all 100 interests for fair market value will not cost very much. And thus targeting Blackacre, and similar parcels — as the Trump administration now intends to do — allows for more consolidation.

Now, let's look at a very different plot of land, "Greenacre." Greenacre is 40 acres and also highly fractionated with 50 owners. But it is located right off of an interstate connecting two major metropolitan areas. Greenacre can be used for a variety of businesses or commercial leases from highway signs to service stations and stores. But because of fractionation, it has been very difficult to get the majority of owners all on the same page. Thus, Greenacre has not realized its full economic potential. It will cost multiple times more money to consolidate Greenacre than it would to consolidate Blackacre.

If your objective is to simply buy as many fractionated interests as possible, then clearly you would target low-cost Blackacre and properties like it. If, however, your goal was to make tribal communities more economically viable, then undoubtedly you would include parcels such as Greenacre. Blackacre has no ability to substantially benefit the tribal community; it cannot be the basis of transformational development. Greenacre, on the other hand, does have the possibility to be a commercial game changer. What is needed in Indian Country is the development of properties such as Greenacre; however, too often today, regrettably, such development is dramatically hampered by fractionation.

What the Trump administration has now decided is that it will only target properties like Blackacre. This will have the effect of limiting the administrative burden on the Interior Department — fewer interests means less paperwork. I understand why from a federal government perspective this is attractive. And if the funds were ordinary appropriated funds, not the result of litigation and a settlement, perhaps considering administrative burdens of the Interior Department would be among the valid considerations. But, of course, that is not what we have. Where, as here, the funds are indeed compensation for claims in litigation, then the sole objective of the Cobell buy-back program must be tangible benefit to the plaintiff class. More successful economic development of tribal enterprises on

lands like Greenacre self-evidently provide such tangible benefit.

In short, the interests of tribal communities is far better served by targeting not only Blackacre but also parcels such as Greenacre. These kinds of parcels can be the engine of economic development and bring desperately needed jobs. And this is precisely the approach the Obama administration took — working with tribes to select parcels which will maximize developmental impact.

There is also the matter of what is the fair and in furtherance of the nation-to-nation relationship. Let us recall, that the United States imposed the policy of allotment on tribal nations without their consent. From 1887, when it began, to 1934 when allotment was ended, 90 million acres of land fell out of tribal ownership. To add further injury, the allotment process created a debilitating land tenure system with land fractionation growing exponentially from one generation to the next. This, in turn, has hindered tribal economic development for nearly a century. Some important progress has been made over the last eight years to restore tribal homelands and consolidate parcels to ensure greater economic viability, but far more needs to be done. And one sure way to continue to progress is for the Interior Department to collaborate with tribes to identify lands that fit within broader economic planning.

At the same time, I have heard from this administration that they want to have a broader conversation about what a more effective land tenure system would look like long term. I think there is a way to have a constructive dialogue in this regard. Tribal leaders are well aware of the vagaries of the present land tenure system and many may be open to a process that sought to improve it through agreed modifications. This conversation can only be successful though if based on a reservoir of goodwill and with meaningful and extensive consultation.

Of course, any changes to the land tenure system would have to ensure against negative impacts on tribal sovereign authority and if any change seems neo-terminationist they will be properly rejected out of hand. There is no appetite for a corporate model — floated by the administration — either. Even with these understandable strictures, engagement on how we make effective changes to improve the use of tribal lands is worth having if the administration is willing to hold them in good faith and collaboratively with Indian Country. That is the way to discover new and better ways to address the Interior Department's concern of their perceived trust administration burdens.

We cannot forget that the Cobell buy-back program is the result of a settlement. Its implementation should be focused on how best to serve the plaintiff class and the communities from which they come. Because the Trump administration's July 28 announcement is a dramatic departure from this approach and inconsistent with the Cobell settlement, it should be reconsidered.

DISCLOSURE: Keith Harper represented the plaintiff class of 500,000 individual Native Americans and served as class counsel in the matter Cobell v. Salazar referenced in this article.

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