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In Memoriam

TRIBUTE TO ELOUISE COBELL

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Cobell v. Salazar, the landmark class-action case, and its settlement arise out of a painful period in American history. For more than a century, the government's abuse of individual Indian trust beneficiaries has been documented in various government reports and has been debated in Congress,<sup>1</sup> but nothing that Congress did or said stopped egregious breaches of trust committed by the executive branch.<sup>2</sup> The United States Court of Appeals for the D.C. Circuit noted that “[t]he General Accounting Office, Interior Department Inspector General, and Office of Management and Budget, among others, have all condemned the mismanagement of the [Individual Indian Money] trust accounts over the past twenty years.”<sup>3</sup> Indeed, the government exploited the Individual Indian Trust as if those funds were its own, wholly disregarding both its statutory and common law trust obligations and the needs and interests of hundreds of thousands of impoverished Indians.

No one did anything to stop that abuse until Elouise Cobell stood up and told the government, “no more.”

**\*190** Over a century ago, the United States, in an effort to destroy tribal governments and forcibly assimilate Indians into American society, seized tribal lands west of the Mississippi River and divided them into allotments. By the close of the first two decades of the twentieth century, the government held upwards of 54 million acres of allotted land in trust solely for the benefit of individual Indians. Income derived from the government's sale and lease of those lands and their natural resources, including oil, natural gas, timber, and coal, was commingled, deposited in the Treasury General Account, held in the Individual Indian Money Trust (“IIM Trust”) and elsewhere in Treasury and its agent banks, invested in common, and ultimately disbursed to the beneficiaries of the IIM Trust.

Unfortunately, the government egregiously breached the trust duties that it owes to individual Indians. Among other things, collected IIM Trust funds were not paid to individual Indians. Instead, they were used by the government to reduce the national debt. It is beyond dispute that the government's management of the IIM Trust has been replete with loss, dissipation, theft, waste, and wrongful withholding of funds. Indeed, the D.C. Circuit described the government's mishandling of the IIM Trust as “a serious injustice that has persisted for over a century and that cries out for redress.” *Cobell v. Kempthorne (Cobell XIX)*, 455 F.3d 317, 335 (D.C. Cir. 2006). Moreover, the government systematically destroyed most of the IIM Trust records, including the most important disbursement records from 1887 through 1990.

In 1996, on behalf of all individual Indian trust beneficiaries, Ms. Cobell, and three other named plaintiffs, brought an action in equity in the U.S. District Court for the District of Columbia to compel the United States to conduct a full historical accounting of all IIM Trust funds, to correct and restate IIM account balances, to fix broken Trust management systems, and to undertake other critical trust reform measures to ensure prudent Trust management. Notably, since the start of the litigation, the government has spent more than \$5 billion to fix and secure broken trust management systems that previously allowed unauthorized access to

IIM Trust data and assets. The government's effort began in earnest after U.S. District Judge Royce C. Lamberth held Treasury Secretary Rubin, Interior Secretary Babbitt, and Assistant Secretary Gover in contempt of court in the Cobell litigation.

**\*191** The historic lawsuit and settlement with the government are unique. The case has lasted more than sixteen years. It involves over 3,900 district court docket entries; 250 days of hearings and trials; fourteen appeals, including ten interlocutory appeals to the D.C. Circuit; and over 80 published opinions of the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the D.C. Circuit. In December 2009 the parties reached an unprecedented \$3.4 billion settlement, including \$1.9 billion in furtherance of trust reform and \$1.5 billion in direct payments to class members. All three branches of the government approved the settlement: Congress, exercising its plenary power in relation to Indian affairs, “authorized, ratified, and confirmed” the settlement through bipartisan legislation; the President signed that legislation with an accompanying statement of support; and the district court found the settlement to be fair, reasonable, and adequate after a fairness hearing. Given the unique nature of the IIM Trust and the legislation approving this settlement, there is no other case like this one and there likely never will be.

Of 500,000 class members (i.e., individual Indians living on September 30, 2009 (the record date) or those who died prior to that date, but whose estate had not been probated as of the record date), 99.98 percent support the settlement.<sup>4</sup> That is a powerful statement of support for the work done by Ms. Cobell, who dedicated more than a quarter of her life to the litigation and its settlement. Elouise commanded the best in those of us who had the privilege to work with her and represent her and individual Indian class members. She demanded commitment, clear thought, and fire in the gut. She insisted that all legal and strategic decisions be made for the right **\*192** reasons - whether or not they were politically correct - and, most importantly, she insisted that each decision be made solely in the best interests of individual Indian trust beneficiaries.

Much has been written about Elouise's accomplishments, not the least of which is the December 7, 2009 Cobell Settlement. The \$3.4 billion tax-free settlement is the largest settlement with the U.S. government in American history. This tribute provides the first opportunity for us to speak about her achievements. When, in 1995, she asked us to help her obtain justice for 500,000 individual Indian trust beneficiaries who had been abused by the government for more than a century, she forthrightly acknowledged the enormous difficulty of that task, but quietly and firmly implored us to accept the challenge. Elouise explained why it was important for us to accept the representation and hold the United States government accountable for more than a century of abuse. She said that there are very few things in life that are worth fighting for - even if they are considered by many to be nearly hopeless or impossible. This struggle was one. Candidly, she confessed that no one else would help her because the fight would be too expensive, too difficult, and too unpredictable. Many warned her that it would be impossible to hold the United States accountable to individual Indians; that federal courts ultimately would protect the Treasury and find whatever reason they could to excuse or rationalize the sordid behavior of every trustee-delegate of the United States.

Elouise explained that together we were the last best hope to obtain a measure of justice because no one else would or could take the fight to the government to end generations of abuse. She set one condition: if we start the fight, we must finish it. We accepted her challenge - with trepidation. On December 20, 1995, Elouise instructed us to prepare what would be a unique complaint in equity against the United States, which we filed on June 10, 1996 in the United States District Court for the District of Columbia.

In most ways, Elouise's concerns and fears proved true. The fight has been too difficult. It has been nearly impossible. It has been too expensive. And, it has taken far too long. Yet, on December 7, 2009, she - along with the over 500,000 individual Indians included in the class action settlement - prevailed against all odds and, of course, conventional wisdom. But, sadly, Elouise and thousands of elderly and infirm class members have already passed **\*193** and will not receive any measure of justice. Many Indian children continue to struggle without adequate food, shelter, medicine, clothing and education. These circumstances were not lost on Elouise. While she did not intend to solve all problems in Indian Country, she was acutely aware

of the adverse effects caused by government delays and obfuscations. She was frustrated and angered by the government's ever-present excuses. Even more, delay caused by other Indians angered her the most.

Elouise recognized and understood that the settlement is not perfect; that it could not remedy all the problems individual Indians face in their daily lives. She did not view the case or its settlement as a panacea. Instead, wisely, she viewed the settlement as an important first step. She hoped and believed that she would pass the torch to a new generation who would continue the difficult mission for justice and prudent trust management. Too many Indian people are depending on it. This first step is embodied within the structure of the settlement, itself, by the establishing what should be a \$60 million scholarship fund to defray the cost of higher academic and vocational education for individual Indians.

The government conditioned settlement on Congressional approval, a requirement that most people believed would be impossible in the current political and economic environment. Elouise led that effort too. Indeed, she was a force in Congress just as she was on the Blackfeet Reservation and in the courtroom. Repeatedly, she returned to Washington to meet with Members of Congress, Senators, and their staffs to convince them to enact authorization and appropriations legislation. Often, Elouise was sick and tired, but she persisted. On one visit, she collapsed on a sidewalk in Washington, D.C. and broke an orbital bone around one of her eyes. Nonetheless, she insisted on going back to the Hill the very next morning, in pain and wearing dark sunglasses to hide the scope of her injury, to urge passage of legislation because too many elders were depending on her.

Finally, On November 30, 2010, following a year of debate and extraordinary efforts of Montana Senators Max Baucus and Jon Tester, the majority leader of the House, Maryland Congressman Steny Hoyer, and Congressman Tom Cole, Congress enacted the **\*194** Claims Resolution Act of 2010 (“CRA”).<sup>5</sup> On December 8, 2010, the President signed the Act into law. The CRA provided that “[t]he Settlement is authorized, ratified, and confirmed.”<sup>6</sup> Because under existing law certain Trust Administration Class claims, arguably, were within the jurisdiction of the U.S. Court of Federal Claims,<sup>7</sup> Congress expressly conferred jurisdiction on the district court for all claims asserted in the Amended Complaint.<sup>8</sup> In addition, because the Trust Administration Class previously had not been certified, Congress provided that “[n]otwithstanding the requirements of the Federal Rules of Civil Procedure, the court in the Litigation may certify the Trust Administration Class.”<sup>9</sup>

Following enactment of the CRA, Elouise led the most extensive class-settlement notice process ever conducted in this country. Plaintiffs sent direct mail notice to the known addresses of all class members; advertised the settlement extensively in local, regional, and national media including television, radio, newspapers, and magazines; and contacted businesses, non-profits, educational institutions, and others serving Indians to provide posters, flyers, DVDs, and other materials containing notice of the settlement, in English and in multiple Indian languages. In addition, Elouise and class counsel for months traveled thousands of miles through Indian Country to explain the settlement personally to thousands of class members. That, too, was difficult. Worse, it was painful for Elouise. She was sick during most of the notice process.

The district court held a fairness hearing on June 20, 2011. After hearing from the twelve objectors (out of 500,000 class members) and their counsel, the district court approved the settlement, finding it “fair, reasonable, and adequate.”<sup>10</sup> The court entered its approval order on July 27, 2011, and entered final judgment on August 4, 2011. Four objectors appealed, three of which were consolidated by the court of appeals into one appeal.

**\*195** At no time, not even when she was bed ridden, did Elouise sit on the sidelines while class counsel handled the case and negotiated a settlement. Even when she was moved to a hospice in Great Falls, Montana we traveled to meet with her on settlement issues that she cared so much about. She dedicated her life to obtaining justice for her fellow Indians--she was involved in every strategic decision and made every political decision in the case; she spent nearly \$390,000 of her own money on the lawsuit; and for years she traveled the country speaking with IIM beneficiaries and raising funds to cover litigation costs.

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Her work on the case helped win her a prestigious “Genius Grant” from the McArthur Foundation; honorary degrees from Dartmouth College, Rollins College, and Montana State University; and awards from groups as diverse as the International Women's Forum and AARP.

Sadly, Ms. Cobell died after final approval of the settlement. As a testament to her remarkable achievements, numerous Members of Congress extended their condolences, President Obama issued a formal statement celebrating her life and accomplishments, and the New York Times and Washington Post published editorials commemorating her unflinching commitment to reform and rehabilitation of the IIM Trust.<sup>11</sup> Perhaps the most poignant gesture is that the Department of Interior lowered the United States flag to half staff in honor of Elouise's life and work.

Few can state more eloquently the importance of Elouise to Indians, the litigation, and its settlement than Judge Hogan did at the fairness hearing on June 20, 2012:

She has accomplished more for the individual . . . Native Americans than any other person recently that I can think of in history. This is her case. She contributed hundreds of thousand[s] of dollars. She helped fund raise. She spent hundreds and thousand of hours. She was part of every serious, strategic decision made. She dedicated up to 1,200 hours per year. She put her reputation on the line, her health, \*196 and [her] unprecedented efforts by a named plaintiff I have not seen before in a class action case.<sup>12</sup>

Plainly, Elouise deserved more time. Plainly, she deserved to cross the finish line. Both the United States and Indian Country lost a hero and a champion of the unheard, the unseen, and the forgotten. No one needed to tell Elouise that life is unfair. She lived it; she saw it every day in Indian Country. She understood that all of us live with the law, but must always strive for justice. As a child, she would hear her parents, grandparents, and tribal elders talk about missing trust funds and missing trust land. She observed disrespect and disdain from BIA officials. She felt the anger, frustration, and helplessness of her family and community. These experiences impacted Elouise. As a young adult, she served as Treasurer of the Blackfeet Tribe. Frequently, she would be questioned by tribal members about irregularities in their IIM accounts and she would listen to their fears and concerns. People asked her for help and guidance because no one else would help them. Often, the elderly and infirm would give up hope, resigned to abject treatment from the government.

Over time, Elouise came to understand fully the nature and scope of the government's unconscionable mismanagement of the IIM Trust and, ultimately, the district court and court of appeals agreed with her view. She demanded honest answers from the Bureau of Indian Affairs, other Interior bureaucrats, and Justice Department lawyers. Typically, she received deceptive, paternalistic, and dismissive responses. However, when the settlement was announced, she stood at a podium alongside the Secretary of Interior and the Attorney General of the United States. Her hard work throughout this case earned her and hundreds of thousands of unseen and previously voiceless individual Indians stature and genuine respect from a government steeped in traditions of ignorance and abuse towards Indians.

In the end, it is time that gives meaning to life and helps each of us make sense of it. Our lives include our accomplishments, failures, frustrations, and disappointments. For Elouise, her accomplishments are heroic. She accepted and met head on \*197 extraordinary challenges and responsibilities, suffered disappointments, and sacrificed precious time on her Montana ranch with her family because she was supported by their love and understanding of the good that she could accomplish. We will never see the likes of her again. We miss her.

Footnotes

- a1 Lead Counsel, *Cobell v. Salazar*.
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- 1 As early as 1914, Congress learned that “[t]he Government itself owes millions of dollars for Indian moneys which it has converted to its own use.” Bureau of Municipal Research, 63rd Cong., Report to the Joint Commission to Investigate Indian Affairs: Business and Accounting Methods Employed in the Administration of the Office of Indian Affairs 2 (Comm. Print 1915) (“1915 Report”).
- 2 The U.S. Court of Appeals for the D.C. Circuit explained the history of the IIM Trust in *Cobell v. Norton (Cobell VI)*, 240 F.3d 1081 (D.C. Cir. 2001).
- 3 *Cobell VI*, 240 F.3d at 1089; see generally Comm. on Govt. Operations, Misplaced Trust: The Bureau of Indian Affairs’ Mismanagement of the Indian Trust Fund, H.R. Rep. No. 102-499 (1992) (“Misplaced Trust”).
- 4 Four appeals challenged the district court’s final approval of the settlement. One appeal was voluntarily dismissed. *Cobell v. Salazar, Not Reported in F.3d*, 2011 WL 5515577 (D.C. Cir. 2011). One appeal, which had been filed by descendants of slaves who were owned by certain tribes at the close of the Civil War, demanded a share of the recovery. It was dismissed by the Court of Appeals and is final. *Cobell v. Salazar, Not Reported in F.3d*, 2011 WL 6941684 (D.C. Cir. 2011). Two appeals filed by four individual Indians who want the settlement set aside, were held by the Court of Appeals to be without merit. *Cobell v. Salazar*, 679 F.3d 909 (D.C. Cir. 2012); *Cobell v. Salazar, Not Reported in F.3d*, 2012 WL 1884702 (D.C. Cir. 2012). The appellants have until August 20, 2012 to seek review by the Supreme Court.
- 5 Pub. L. No. 111-291, 124 Stat. 3064
- 6 CRA § 101(c)(1).
- 7 see 28 U.S.C. §1491(a)(1),
- 8 CRA §101(d)(1).
- 9 Id. § 101(d)(2)(A).
- 10 Or. Granting Final Approval To Settlement, *Cobell v. Salazar*, 1:96-CD-01285-TFH, 4 (D.C. Cir. June 27, 2011)
- 11 See, e.g., Elouise Cobell, A Native American Leader Who Took on Washington and Won, Wash. Post, Oct. 17, 2011, at B6.
- 12 June 20, 2011 Tr. at 239.