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Ruling on Indian money tries to put price on broken trust

by Kate Burke

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On Aug. 7, 2008, the 12-year Cobell lawsuit against the U.S. came to a screeching pause. Elouise Cobell, the primary named plaintiff in the class action, brought the suit on behalf of an estimated 250,000 to 500,000 Indian people who are beneficiaries of the federal Individual Indian Money system.

A painful, and sadly familiar, irony is demonstrated in the course of this case. Although the courts have been willing to condemn the actions of the Department of the Interior and the Bureau of Indian Affairs, there is virtually no way to redress those wrongs adequately.

The lawsuit alleges that the United States, primarily through the Department of the Interior and its Bureau of Indian Affairs, has grievously mismanaged the IIM trust, which holds revenues belonging to individual Indian people. After 12 years, several trips to the appellate courts and a change of judges, the latest step in Cobell was last month's ruling by Judge James Robertson ordering the United States to repay $455.6 million into the IIM trust.

For perspective, the plaintiffs had argued most recently that more than 100 times that sum, as much as $58 billion, was unaccounted for in the system. Judge Robertson's order is not necessarily the end of Cobell; Ms. Cobell has stated her intention to appeal the ruling.

The IIM system is a relic of late 19th- and early 20th-century federal Indian policy, born during what is called the "allotment" era in Indian affairs. Starting in the 1880s, the U.S. government adopted an official policy of carving up commonly held tribal interests in reservation lands and "allotting" interests in relatively small tracts to individual Indians. The goal was to promote the assimilation of the Indians by ending their communal way of life and urging them to become farmers.

It was also handy that, after each eligible tribal member had been allotted his or her parcel, the remainder of the reservation was considered "surplus" to the needs of the tribe and was opened up for non-Indian settlement. In this way, the reservation system shrank from 138 million acres in 1887 to 48 million acres by 1934, when the policy of allotment was officially abandoned.

Allotted lands, along with other Indian property, are owned by individual Indians, but are subject to severe restrictions and administration by the United States, as trustee for the individual allotees. The Bureau of Indian Affairs commonly supervises the leasing of allotments to non-Indians for surface uses such as timber harvesting, or for gas, oil or mineral mining. The revenues from those leases belong to the allotees. The IIM system was developed to collect, manage and disburse those revenues. As trustee, the federal government is under the highest level of fiduciary duty to manage the trust property and revenues correctly.

The Cobell suit revealed massive, systemic and historical mismanagement of the IIM system by the Department of the Interior and the Bureau of Indian Affairs. In 2005, the original judge on the case, Judge Royce Lamberth, displayed his growing exasperation in a fateful order that referenced a history of "murder, dispossession, forced marches, assimilationist policy programs, and other incidents of cultural genocide against the Indians" and called the Department of the Interior "a dinosaur - the morally and culturally oblivious hand-me-down of a disgracefully racist and imperialist government."
Such comments, issuing from the judge who lived and breathed the Cobell case for nine years, can fairly be interpreted either as logical, if strenuous, conclusions from the evidence or as improper judicial bias. The court of appeals believed the latter and removed Judge Lamberth from the case, replacing him with Judge Robertson.

A painful, and sadly familiar, irony is demonstrated in the course of this case. Although the courts have been willing to condemn the actions of the Department of the Interior and the Bureau of Indian Affairs, there is virtually no way to redress those wrongs adequately. Judge Lamberth acknowledged the plaintiffs' invitation to "declare that Interior has repudiated the Indian trust, appoint a receiver to liquidate the trust assets, and finally relieve the Indians of the heavy yoke of government stewardship," but felt that to do so would be to announce that "negligence and incompetence in government are beyond judicial remedy ... and that people are simply at the mercy of governmental whim with no chance for salvation."
Instead, Judge Lamberth opted to hold out the "slim and quickly receding hope that future progress may vitiate the need for such a grim declaration." One wonders if Judge Lamberth's receding hope slowed its retreat or slipped from his view altogether when Judge Robertson attached the $455.6 million value to over a century of U.S. failings.

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