United States Department of the Interior

OFFICE OF THE SOLICITOR
1849 C STREET N.W.
WASHINGTON, DC 20240

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Memorandum

To: Secretary

From: Solicitor

Subject: Applicability of the Indian Land Consolidation Act's Lien Provisions to the Cobell Settlement

I. Introduction

This memorandum addresses the legal question of whether the lien provisions of the Indian Land Consolidation Act ("ILCA")[1] are applicable to the newly-created Trust Land Consolidation Fund that was established under the Cobell Settlement. As background, the Cobell Settlement was approved by Judge Thomas F. Hogan of the U.S. District Court for the District of Columbia on July 27, 2011.[2] Judge Hogan entered a final judgment for the Cobell Settlement on August 4, 2011.[3] The U.S. Court of Appeals for the District of Columbia affirmed these orders on May 22, 2012.[4] All time periods for appellate review have yet to expire; however, during this interim period Judge Hogan in May, 2011 allowed representatives of the Department of the Interior to communicate with Cobell class members regarding the land consolidation component of the Cobell Settlement. Under the Cobell Settlement and its implementing legislation, a $1.9 billion Trust Land Consolidation Fund is established for the principle purpose of purchasing fractional interests from willing sellers for tribes to use such land for the benefit of their members.

Under the existing ILCA program, a lien is placed on an acquired fractional interest received by a tribe and requires that revenue derived from that interest in the amount of the purchase price is to be paid to the Secretary and deposited in a revolving fund. The issue of the applicability of the lien provision to the Cobell Settlement has been raised a number of times during the Department of the Interior's regional government-to-government consultations with tribal leaders and other stakeholders that were conducted in the year 2011 regarding the land consolidation program under the Cobell Settlement.[5]

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[1] 25 U.S.C. §§ 2201-2221 (2012).
[2] Cobell v. Salazar, No. 1:96CV1285(TFH) (D.D.C. July 27, 2011).
[3] Cobell v. Salazar, No. 1:96CV1285(TFH) (D.D.C. Aug. 4, 2011).
[4] Cobell v. Salazar, No. 11-5205 (D.C. Cir. May 22, 2012); Cobell v. Salazar, No. 11-5270 (D.C. Cir. May 22, 2012) (consolidating Nos. 11-5271, 11-5272).
[5] Notice of Regional Tribal Consultation Meetings, 76 Fed. Reg. 41808 (July 15, 2011); *see also* Cobell Consultation Transcripts for Billings, MT (July 15, 2011); Minneapolis, MN (Aug. 18, 2011); Seattle, WA (Sept. 16, 2011); Phoenix, AZ (Sept. 29, 2011); Oklahoma City, OK (Oct. 6, 2011), *available at* http://www.doi.gov/cobell.

After those consultations, the Department of the Interior announced in February, 2012 the publication of a Cobell Land Consolidation Program Draft Plan which included a section on the lien provisions in ILCA.[6] In this section, the document states that "Tribal leaders and members expressed strong dissatisfaction with the idea that liens would be placed on lands purchased under the program. Many stated that making tribes pay back the costs of the land would undermine the goal of the settlement."[7] The Department's discussion regarding the liens in the draft document stated that the Cobell Settlement established a separate fund designed to be expended in ten years in contrast to the lien provisions in ILCA and that the intent of the Cobell Settlement was for tribes to use consolidated lands for the benefit of their members and communities.[8] The Department said that it "is currently analyzing this issue."[9] It is anticipated that a final proposed Cobell land consolidation plan will be issued in the near future.

More recently, Congressman Tom Cole sent a letter to Deputy Secretary David J. Hayes on August 1, 2012, that asked for the Department's clarification regarding the lien provision. In this letter, Congressman Cole states that the Claims Resolution Act, which authorized, ratified, and confirmed the Cobell Settlement, "anticipated that the $1.9 billion would fund the buy-back of fractionated interests and make those lands available to tribes - without any 'strings' (*I.e.*, liens) attached."[10] Congressman Cole further concluded that it "would not make sense for tribes to be required to reimburse the Federal Government for the benefit realized by the settlement."[11]

In light of these inquiries, the Department has evaluated this issue and has reached the conclusion that the lien provisions in ILCA do not apply to the land consolidation program in the Cobell Settlement. The provisions of ILCA only apply to the extent consistent with the terms of the Cobell Settlement and the Claims Resolution Act ("CRA") which "authorized, ratified, and confirmed" the Cobell Settlement.[12] The Cobell Settlement establishes a unique, one-time "Trust Land Consolidation Fund" in the amount of $1.9 billion that must be expended in ten years and sets forth precise purposes for the Fund. None of the express purposes of the Fund allow for the imposition of liens on tribes to repay the value of lands acquired pursuant to the Cobell Settlement and the CRA. Neither the Cobell Settlement nor the CRA specifically reference – much less apply – ILCA's lien provisions. Moreover, the terms of the Cobell Settlement reflect the intent of the parties to resolve litigation and not perpetuate long standing legal disputes or create new controversies. The imposition of a lien on tribes to replenish an existing fund would be contrary to the purposes of Cobell Settlement to aggressively eradicate fractionation in a focused, ten-year effort without imposing additional administrative and financial burdens. To not honor the intent of the parties would disrupt the balance of negotiated terms struck in the

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[6] Notice of Availability, 77 Fed. Reg. 5528, 5529 (Feb. 3, 2012); *see also* http://www.doi.gov/cobell/upload/FINAL-DRAFT-Cobell-Land-Consolidation-Program-Draft-Plan-31-Jan-2012-2.pdf.

[7] *See* Dep't of the Interior, Cobell Land Consolidation Draft Plan at 29, http://www.doi.gov/cobell/upload/FINAL-DRAFT-Cobell-Land-Consolidation-Program-Draft-Plan-31-Jan-2012-2.pdf. ("Cobell Land Consolidation Draft Plan").

[8] *Id.*

[9] *Id.*

[10] Letter from Congressman Thomas Cole, U.S. House of Representatives, to David J. Hayes, Deputy Secretary, U.S. Dep't of the Interior (Aug. 1, 2012).

[11] *Id.*

[12] Claims Resolution Act of 2010 (CRA), Pub. L. No. 111-291, § 101(c), 124 Stat. 3064, 3066 (2010).

Cobell Settlement. Lastly, the Department's interpretation of the Cobell Legislation is entitled to deference under the well-established *Chevron* analysis[13] and any ambiguity regarding the application of the lien provisions should not be interpreted to the detriment of Indians and is to be construed liberally in favor of the Indians under the Indian canon of construction.

II. Legal Background

There are three legal sources of information that provide the foundation for interpreting the legal question presented: The Cobell Settlement, the CRA, and the lien provisions in ILCA. We turn to each of them to provide a brief summary of the relevant provisions.

A. The Cobell Settlement

The Cobell Settlement states that "an integral part of trust reform includes accelerating correction of the fractional ownership of trust or restricted land, which makes administration of the individual Indian trust more difficult."[14] To that end, the Cobell Settlement establishes a new "Land Consolidation Program"[15] that is implemented through expenditures from a specially-created "Trust Land Consolidation Fund" that shall be "distribute[d] . . . in accordance with" ILCA, applicable legislation enacted pursuant to the Cobell Settlement, *i.e.*, the CRA, and applicable provisions of the Cobell Settlement.[16] The Cobell Settlement further states that "[t]he Trust Land Consolidation Fund shall be used solely for the following purposes: (1) acquiring fractional interests in trust or restricted lands; (2) implementing the Land Consolidation Program; and (3) paying the costs related to the work of the Secretarial Commission on Trust Reform, including costs of consultants to the Commission and audits recommended by the Commission. An amount up to a total of no more than fifteen percent (15%) of the "Trust Land Consolidation Fund" shall be used for purposes (2) and (3) above."[17]

The Cobell Settlement specifically requires that the Department offer fair market value in accordance with Section 2214 of ILCA to owners of fractionated interests.[18] In a departure from the statutory provisions of ILCA, the Cobell Settlement states that Interior "shall use reasonable efforts to prioritize the consolidation of the most highly fractionated tracts of land."[19] The Cobell Settlement further states in pertinent part, that "Interior Defendants shall have no more than ten (10) years from the date of Final Approval of this Agreement to expend the Trust Land Consolidation Fund, at which time any amounts remaining in the Trust Land Consolidation Fund shall be returned to the Treasury."[20] The Cobell Settlement also sets forth a unique whereabouts

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[13] Chevron v. Natural Res. Def. Council, 467 U.S. 837 (1984).
[14] Class Action Cobell Settlement, Background ¶ 11, Cobell v. Salazar, No. 1:96CV01285-JR (D.D.C. Dec. 7, 2009) [hereinafter Cobell Settlement].
[15] The Land Consolidation Program is defined as "[t]he fractional interest acquisition program authorized in 25 U.S.C. 2201 et. seq., including any applicable legislation enacted pursuant to this Agreement." Cobell Settlement, A(20).
[16] Cobell Settlement, F(1).
[17] *Id.* at F(2).
[18] *Id.* at F(3); 25 U.S.C. § 2214.
[19] Cobell Settlement, F(3). ILCA provides that the Secretary *may* give priority to the fractional interests representing 2% or less of a parcel of trust or restricted land. 25 U.S.C. § 2212(b)(2).
[20] Cobell Settlement, F(4).

unknown process and deemed consent provision.[21] Lastly, up to $60 million of the "Trust Land Consolidation Fund" shall be deposited in the "Indian Education Scholarship Holding Fund" which was created, in part, for the purpose of incentivizing individuals to participate in the Cobell Settlement's land consolidation effort.[22]

B. Lien Provisions of the Indian Land Consolidation Act

The ILCA fractional interest acquisition program was designed to be a self-sustaining, revolving fund that would enable the Secretary to continue to buy fractional interests in land on an ongoing, long-term basis.[23] Section 2213 of ILCA places a lien on an interest received by a tribe and requires that revenue derived from the interest to be paid to the Secretary, and deposited in the "Acquisition Fund."[24] Section 2215 of ILCA creates the "Acquisition Fund" in which appropriated funds as well as revenue from a tribe's leasing and permitting of an acquired fractional interest and related resources are to be placed for acquiring additional fractional interests.[25]

The lien provisions in Section 2213 of ILCA authorize the Secretary to waive the liens under certain circumstances. Subsection 2213(b)(1) states that "[t]he Secretary shall have a lien on any revenue accruing to an interest . . . until the Secretary provides for the removal of the lien under paragraph (3), (4), or (5)." Subsections 2213(b)(3) and (b)(4) authorize the waiver of the lien(s) in instances related to either complete payment of the lien(s), circumstances in which it is determined that the administrative costs of managing the lien(s) is equal to or higher than projected revenues, or the failure/inability to generate sufficient revenues to pay off the lien(s) in a reasonable time. Subsection 2213(b)(5) also provides that the Secretary has the discretion to waive a lien "periodically" after consulting with tribal governments and other entities.[26]

C. The Claims Resolution Act

The Cobell Settlement was "authorized, ratified, and confirmed" by the CRA.[27] Consistent with the Cobell Settlement, the CRA defines the "Land Consolidation Program" to be a "program conducted in accordance with the Settlement, the Indian Land Consolidation Act (25 U.S.C. 2201 et seq.), and subsection (e)(2) [of the CRA] under which the Secretary may purchase fractional interests in trust or restricted land."[28] To implement this Program, the CRA establishes in the Treasury of the United States a "Trust Land Consolidation Fund" in the amount of $1.9 billion.[29] The CRA provides that the "Trust Land Consolidation Fund" will be used to

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[21] *Id.* at F(6) and (7).
[22] *Id.* at F(5) and G(2)(c).
[23] *See* 25 U.S.C. §§ 2212-13 and 2215.
[24] *Id.* § 2213(b).
[25] *Id.* § 2215.
[26] *Id.* § 2213. This memorandum does not address the question of whether the Secretary has the authority to waive the lien provisions in the context of the Cobell Settlement.
[27] CRA § 101(c)(1).
[28] CRA § 101(a)(4). The referenced subsection (e)(2) provides that the Secretary must consult with Indian tribes "to identify fractional interests within the respective jurisdictions of the Indian tribes for purchase in a manner that is consistent with the priorities of the Secretary." *Id.* § 101(e)(2).
[29] *Id.* § 101(e)(1).

"conduct the Land Consolidation Program" and to cover "other costs specified in the Settlement," *i.e.*, administration costs, support for the Cobell Trust Reform Commission, and the $60 million for the Indian Education Scholarship Fund.[30] Accordingly, the CRA provides for the deposit of $60 million from the "Trust Land Consolidation Fund" into an 'Indian Education Scholarship Holding Fund".[31] The CRA is the only legislation enacted to effectuate the Cobell Settlement.

III. Legal Analysis

The central legal question is whether the Cobell Settlement's Land Consolidation Program must abide by the lien provisions in ILCA given the generic reference in both the Cobell Settlement and the CRA to ILCA. This question can be answered by applying well-established rules of statutory construction given Congress' enactment of the CRA, which "authorized, ratified, and confirmed" the Cobell Settlement,[32] as well as standard principles of contract interpretation.

A. Provisions of ILCA Should Only Apply to the Extent They Are Consistent with the Cobell Settlement and its Implementing Legislation

While both the Cobell Settlement and the CRA include a general reference to the provisions of ILCA in defining the new Land Consolidation Program, both are silent on precisely which provisions of the ILCA are applicable to the implementation of the Program. The only operative section of ILCA referenced in the Cobell Settlement is the fair market value provision, 25 U.S.C. § 2214.[33] Other provisions of ILCA will also apply, given the definition of the "Land Consolidation Program," but only to the extent those provisions do not conflict with the provisions of the CRA and the Cobell Settlement. This principle of statutory construction provides that "[a]s a general rule, prior and later statutes dealing with the same subject matter, although in apparent conflict, should as far as reasonably possible be construed in harmony with each other to allow both to stand and to give force and effect to each."[34] This principle further provides "if one construction is workable and fair and the other is unworkable and unjust, the court will assume the legislature intended that which is workable and fair."[35]

Thus, in order to give effect to each legal authority at issue – the Cobell Settlement, ILCA, and the CRA – any interpretation of these authorities must be harmonious and workable where the goals of each are achieved. An interpretation that the lien provisions do not apply to the Cobell Settlement is consistent with this principle. The ILCA lien provisions were created to ensure there was sufficient funding to address fractionation over the long term when there was no guaranteed source of funding year after year. With the advent of the significant sum of funding in the Cobell Settlement for land consolidation purposes, there is no need for an ongoing

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[30] *Id.* § 101(e)(1)(B); Cobell Settlement, F(2) and G(2).
[31] CRA § 101(e)(1)(D).
[32] *Id.* § 101(c)(1).
[33] Cobell Settlement, F(3). The Cobell Settlement also refers to ILCA's definition of "parcel of highly fractionated Indian Land." *Id.* at F(7).
[34] SUTHERLAND STATUTES & STATUTORY CONSTRUCTION, § 46.5 (Norman J. Singer & J.D. Shombie Singer eds., 7th ed. 2007).
[35] *Id.*

replenishment of funds. The most "workable" interpretation is to ensure the focused and unimpeded expenditure of the $1.9 billion to address the fractionation problem without any constraints such as liens. In the event that there remain unaddressed fractionation issues at the end of the ten year period – which of course one would hope would not be the case – the force and effect of the ILCA lien provisions will remain and be available to address any outstanding issues. In short, to allow for the imposition of the lien provisions now would put the ILCA and the Cobell Settlement at cross purposes rather than achieving a harmonious interpretation.

The lien provisions of ILCA at Section 2213 cannot be read harmoniously with the provisions of the Cobell Settlement and its implementing legislation. The ILCA lien provisions relate solely to the recoupment of funds appropriated by Congress to carry out the ILCA program over the long term. No provision of the CRA or of the Cobell Settlement mandates or even contemplates the future recoupment of funds. Language omitted by Congress is persuasive evidence of Congressional intent. Where Congress fails to use certain terms or language it typically uses for a certain purpose, then it is reasonable to infer that Congress has intentionally sought a different outcome by omitting those terms.[36] Likewise, the requirement that unexpended funds revert to the Treasury after ten years under the Cobell Settlement and the CRA further demonstrates that there was no intent to deposit any revenue generated from the $1.9 billion into a pre-existing revolving fund.[37]

Indeed, the Land Consolidation Program under the Cobell Settlement does not purchase fractional interests utilizing the Acquisition Fund created under Section 2215 of ILCA. As stated above, no Cobell Settlement funds or revenue derived therefrom will be deposited in the Acquisition Fund. Rather, the Cobell Settlement precisely outlines permitted uses of the $1.9 billion, stating that "[t]he Trust Land Consolidation Fund shall be used solely for the purposes of (1) acquiring fractional interests in trust or restricted lands; (2) implementing the Land Consolidation Program; and (3) paying the costs related to the work of the Secretarial Commission on Trust Reform, including costs of consultants to the Commission and audits recommended by the Commission."[38] In addition, the Cobell Settlement provides that fifteen (15) percent of the Trust Land Consolidation Fund will be used for purposes 2 and 3.[39] Part of the Trust Land Consolidation Fund will also be deposited in an Indian Scholarship Holding Fund.[40] None of these clearly-stated purposes on their face allow for the imposition of liens on tribes to repay the value of lands acquired under the Cobell Settlement. Presumably, had the Department intended to make the imposition of liens a condition of the Cobell Settlement it would have stated so expressly. As such, application of the lien provisions in ILCA are, on their face, contrary to the objective of the Cobell Settlement, as approved by Congress, that the Trust Land Consolidation Fund in the specific amount of $1.9 billion is to be expended in ten (10) years for specific purposes.

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[36] *See, e.g.*, Cen. Bank of Denver v. First Interstate Bank, 511 U.S. 164, 176-77 (1994) (finding that omission of "aiding and abetting" liability language showed that Congress did not intend to impose such liability).
[37] Cobell Settlement, F(4); CRA § 101(e)(1)(B).
[38] Cobell Settlement, F(2).
[39] *Id.*
[40] *Id.* at F(5).

There are other unique provisions in the Cobell Settlement that further demonstrate why wholesale imposition of the provisions of ILCA would result in an "unworkable" interpretation. The Cobell Settlement diverges from ILCA by setting forth a new standard of prioritization for the purchase of fractional interests, stating that the Department "shall use reasonable efforts to prioritize the consolidation of the most highly fractionated tracts of land."[41] And, unlike ILCA, the Cobell Settlement also contains unique provisions regarding how whereabouts unknown are to be located and a deemed consent provision.[42] To apply ILCA wholesale without taking into account these unique provisions of the Cobell Settlement would directly conflict with the CRA and the Cobell Settlement. Thus, the more reasonable and logical way to resolve these inconsistencies is to conclude that ILCA applies only to the extent it is consistent with and does not conflict with the CRA and the Cobell Settlement.

B. Application of the Lien Provisions to the Cobell Settlement Is Contrary to the Intent of the Parties

Our interpretation that the ILCA lien provisions do not apply to the Cobell Settlement's land consolidation program is consistent with the principle that "[f]ederal agreements with Indians draw their meaning from representations by Government agents to the Indians, as well as from the Indians' own understanding."[43] "Indian agreements are to be read as the Indians understood and would naturally understand them."[44] In this instance, the overwhelming response by tribal leadership during recent government-to-government consultations regarding the Cobell land consolidation program was that the lien provisions of ILCA should not apply to this unique, Cobell Settlement-spawned program.[45] Furthermore, the Plaintiffs' counsel represents that it was never the intent to impose liens on lands purchased under the Cobell Settlement. In recent correspondence, Plaintiffs' counsel stated "[a]s one of the attorneys directly involved in negotiating the settlement, I can unequivocally state that it was our intent that no liens would be asserted on the lands purchased as part of the settlement . . . we believe it is abundantly clear that the application of ILCA liens would be in direct conflict with both the spirit and letter of the *Cobell* settlement agreement and enabling legislation."[46] Congressman Cole's recent correspondence on this issue also reflects intent to not apply the lien provisions to this unique fund established by this specific settlement.[47] This interpretation is also consistent with the Department's understanding of the Cobell Settlement, as expressed by Deputy Secretary David J. Hayes at one of the government-to-government consultations on the Cobell Settlement's land consolidation program where he stated "There's an important difference in the Cobell land consolidation program from ILCA in this regard: We are not expecting the tribes to pay back the

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[41] *Id.* at F(3).
[42] *Id.* at F(6); CRA § 101(e)(5).
[43] United States v. Oneida Nation, 576 F.2d 870, 877 (Ct. Cl. 1978).
[44] Gila River Pima-Maricopa Indian Community v. United States, 199 Ct. Cl. 586, 593 (Ct. Cl. 1972) (citing Peoria Tribe of Indians v. United States, 390 U.S. 468, 472-73 (1968)).
[45] *See supra* notes 6 & 7.
[46] Letter from William E. Dorris, Esq. to Hilary Tompkins, Solicitor, U.S. Dep't of the Interior (August 10, 2012).
[47] *See supra* note 10.

cost of the property that will come into tribal control here."[48] The D.C. Circuit has held that courts should defer to an agency's reasonable construction of a settlement agreement.[49]

The Cobell Settlement's general references to ILCA are intended to allow for the application of existing legal authorities to acquire the fractional interests, such as the Secretary's authority to acquire those interests at Section 2212.[50] This general reference, however, does not reflect the intent of the parties to provide for a wholesale importation of all of ILCA's requirements. Rather, the Cobell Settlement established a new program that derives authorities as necessary from existing law as well as the newly-enacted CRA, subject to the confines of the Cobell Settlement itself. The terms of the Cobell Settlement reflect the intent of the parties to resolve litigation, cease long standing legal disputes, and not create new controversies. The imposition of liens would create a new lawyer of administrative burdens generally and financial obligations on Indian tribes that was not the goal of this Settlement which was to "accelerat[e] correction of the fractionated ownership of trust or restricted land, which makes administration of the individual Indian trust more difficult."[51]

Similarly, Congress enacted the CRA to ratify the Cobell Settlement generally and to "authorize specific aspects of the Agreement,"[52] including the authority to establish the $1.9 billion fund in the Department of the Treasury. No provision of the CRA reflects Congressional intent to impose wholesale all of the ILCA lien provisions. The purpose of the CRA was to ratify the Cobell Settlement and not to materially change it. Indeed, the parties to the Cobell Settlement expressed an intent to not change its terms by the enactment of legislation necessary for the Cobell Settlement by providing a poison pill provision that if legislation "is enacted with material changes, the Agreement shall automatically become null and void."[53] Had Congress materially changed the Cobell Settlement – which imposition of the lien provision would presumably have done – the Cobell Settlement would be void. Instead, Congress approved the Cobell Settlement and the U.S. District Court of the District of Columbia and the Court of Appeals gave final approval of the Cobell Settlement in its original form, subject to non-material modifications made by Congress in the CRA.[54] Thus, the intent of the parties to the Cobell Settlement remained intact after Congressional and judicial approval and that intent must be honored in its implementation.

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[48] Cobell Consultation Transcript at 116-117 (Billings, MT July 15, 2011), http://www.doi.gov/cobell/upload/-f-Cobell-Settlement-Consultation-7-15-11.PDF. In addition, Solicitor Hilary Tompkins was directly involved in the Cobell Settlement negotiations and is the author of this memorandum.

[49] Bolack Minerals Co. v. Norton, 370 F. Supp. 2d 161, 175 (D.D.C. 2005) (citing A/S Ivarans Rederi v. United States, 938 F.2d 1365, 1368 (D.C. Cir. 1991) and Nat'l Fuel Gas Supply Corp. v FERC, 811 F.2d 1563, 1568-73 (D.C. Cir. 1991)).

[50] Section 2212(a) of ILCA permits the Secretary of the Interior to "acquire, at the discretion of the Secretary and with the consent of the owner . . . and at fair market value, any fractional interest in trust or restricted lands." 25 U.S.C. § 2212(a).

[51] Cobell Settlement, Background ¶ 11.

[52] Cobell Settlement, B(1).

[53] *Id.*

[54] Cobell v. Salazar, No. 96-1285 (D.D.C. July 27, 2011) (order granting final approval); Cobell v. Salazar, No. 11-5205, 2012 U.S. App. LEXIS 10230 (D.C. Cir. May 22, 2012).

C. *The Department's Reasonable Interpretation Regarding the Applicability of the Lien Provisions is Entitled to Deference*

For argument's sake, even if one were to conclude that it is ambiguous as to whether the lien provisions apply, the agency's interpretation of the Cobell Settlement and the CRA is entitled to deference. When a term of a statute is ambiguous, the ambiguity is a delegation of authority to the agency to fill the statutory gap in a reasonable fashion.[55] "An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress."[56] Deference to the agency's reasonable interpretation is to be granted, not only in instances involving the agency's area of expertise, but also in instances where the issue is a simple construction of language.[57] This deference is due, in part, to the agency's "more comprehensive experience with the kinds of disputes and negotiations that generally produce such an agreement."[58]

Here, the Cobell Settlement states that the Trust Land Consolidation Fund shall be distributed "in accordance with the Land Consolidation Program authorized" under ILCA.[59] Similarly, the CRA defines the term "Land Consolidation Program" to mean "a program conducted in accordance with . . . the [ILCA] . . . ."[60] While an argument can be made that this language, taken alone, could be interpreted to mean that every provision of ILCA applies to the Cobell Settlement, such an argument would run counter to Congress' intent of rectifying the federal policy of allotment and the intractable problem of fractionation of Indian lands in a targeted, time-limited fashion and bring closure to long-standing controversies.[61] The Department of the Interior's reasonable interpretation promotes the purpose of both the CRA and the Cobell Settlement and it is consistent with Congressional intent. Accordingly, the Department's interpretation is entitled to deference. To that point, during floor debate, Representative Moran, explained that, among other reasons, he supported the CRA because:

> this settlement seeks to address the growing problem of 'fractionated' land interests . . . [it] allows individual Indians owning shares of fractionated land to voluntarily sell their land back to the federal government, in exchange for a cash payment. In turn tribal communities will have the opportunity to consolidate these fractionated interests

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[55] *See* Chevron, 467 U.S. at 865-866 (1984).
[56] *See, e.g.*, United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985).
[57] Chevron, 467 U.S. at 843-45.
[58] Bolack Minerals Co. v. Norton, 370 F. Supp. 2d at 175 (internal quotations and citations omitted).
[59] Cobell Settlement, F(1).
[60] CRA § 101(a)(4) (2012).
[61] *See* 156 CONG. REC. S8294 (Nov. 30, 2010) ("[i]n 1887 the Federal Government allotted tribal lands to individual Indians in parcels between 40 and 160 acres. The Department of Interior was supposed to hold these parcels in trust for a period of 25 years and then turn them over to the individual Indians. The Department of Interior has held these allotments in trust until the present day. During the 123 years since 1887, these lands have become highly fractionated as successive generations of Indian owners bequeathed the land to their children"); *see also id.* ("[i]t is a rare day in the Congress that we have an opportunity like this to end, once and for all, decades-old injustices . . . claims against the government so that we can move forward together").

> and use the land for homes, schools, and economic development.[62]

Along that same line, Chairman of the House Committee on Natural Resources, Representative Nick Rahall, stated that the CRA and the Agreement provide "$1.9 billion [that] will be used to fund a Trust Land Consolidation Fund so that highly fractionated lands may be repurchased and consolidated into single tribal ownership again," which he explained would "streamline administration of trust lands."[63] Application of the lien provisions would, however, not result in streamlining or provide tribes with immediate economic benefit from these lands. Rather, liens would increase administrative burdens and costs because the Department would be required to monitor every interest purchased and set up an accounting scheme that would track revenue derived from potentially hundreds of thousands of individual interests purchased to determine when the purchase price is repaid. Tribes could wait years before any economic benefit derived from these interests flowed to them. This result was not the intent of the parties nor does it fulfill the purposes for which Congress approved, confirmed, and ratified the Cobell Settlement.

Lastly, the canons of construction applicable in Indian law, which derive from the unique relationship between the United States and Indian tribes, also guide the Department's interpretation of a statute.[64] Under these canons, statutory silence or ambiguity is not to be interpreted to the detriment of Indians. Instead, statutes establishing Indian rights and privileges are to be construed liberally in favor of Indians, with any ambiguities to be resolved in their favor.[65] Thus, to the extent that the CRA is not clear on its face regarding the applicability of the lien provisions of ILCA to the purchasing of interests utilizing the Cobell Settlement's Trust Land Consolidation Fund, those ambiguities must be resolved in favor of Indians. During tribal consultations, there was an overwhelming opposition by tribes to the imposition of the lien provisions of ILCA.[66] Additionally, the Cobell Settlement and the CRA reflect the intent of the parties and Congress to create a discrete, one-time fund to be expended over a period of ten years to acquire fractional interests in a focused and accelerated fashion to minimize administrative burdens and potential legal conflicts in the future.[67] Applying the lien provisions would not fulfill this intent.

Accordingly, the Department's conclusion that the lien provisions of ILCA do not apply is reasonable and consistent with the CRA and the Cobell Settlement and is entitled to deference.

IV. Conclusion

The lien provisions of Section 2213 and the Acquisition Fund provision of Section 2215 of ILCA do not apply to interests purchased through the Cobell Settlement's Trust Land

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[62] 156 CONG REC. H7658, 7693 (Nov. 30, 2010).
[63] *Id.* at 7686.
[64] Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985).
[65] *Id. See also* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 200 (1999); County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 269 (1992).
[66] *See supra* note7.
[67] Because we conclude that the lien provisions in ILCA do not apply, we express no opinion as to whether the Secretary could waive the lien provisions.

Consolidation Fund. The Trust Land Consolidation Fund is not intended to be a self-sustaining, revolving fund. Imposing liens on acquired properties is inconsistent with the goal of a one-time complete expenditure of the Trust Land Consolidation Fund within ten years. It is also contrary to the intent and purpose of the Cobell Settlement, which is to vest Indians with payments for their individual interests and facilitate economic and self-governance programs through land consolidation for tribes in a focused and accelerated fashion.

Hilary C. Tompkins