[ORAL ARGUMENT SCHEDULED FOR FEBRUARY 16, 2012]

No. 11-5205

In the United States Court of Appeals for the District of Columbia Circuit

ELOUISE PEPION COBELL, *et al.*,
Plaintiffs-Appellees,

KIMBERLY CRAVEN,
Objector-Appellant,

v.

KENNETH LEE SALAZAR, *et al.*,

Defendants-Appellees,

Appeal from the United States District Court for the District of Columbia No. 1:96-CV-1285, the Honorable Thomas F. Hogan, District Judge

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AMICUS CURIAE BRIEF BY THE INDIAN LAND TENURE FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLEES AND DEFENDANTS-APPELLEES

Dated: December 22, 2011

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure *Amicus* states that it is not a publicly-held corporation, does not issue stock and does not have a parent corporation. *Amicus* Indian Land Tenure Foundation is a non-profit 501(C)(3) organization created in 2001 whose mission is to help obtain Indian ownership and management of land within the original boundaries of every reservation and other areas of tribal significance through education, cultural awareness, economic opportunity and legal reform.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Objector- Appellant except for the Amici Indian Land Tenure Foundation who submits this brief.

B. Rulings Under Review

All rulings under review appear in the Brief for Objector-Appellant

C. Related cases

All related Cases appear in the Brief for Objector-Appellant.

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GLOSSARY

AIPRA	American Indian Probate Reform Act
BIA	Department of Interior, Bureau of Indian Affairs
CTLCP	Cobell Trust Land Consolidation Program
ILCA	Indian Land Consolidation Act
ILCP	BIA Indian Land Consolidation Program
ILTF	Indian Land Tenure Foundation
IRA	Indian Reorganization Act

INTEREST OF *AMICUS CURIAE*[1]

The Indian Land Tenure Foundation ("ILTF") was founded in 2001 by tribal representatives, individual Indian landowners and Indian land professionals for the express purpose of recovering Indian ownership, control and effective management of all reservation lands alienated from Indian ownership and lands located outside reservations boundaries with cultural, religious or ceremonial value to Indian people. ILTF is a 501(c)(3) non-profit organization, incorporated in the State of Minnesota. The ILTF is directed by an eleven-person board each with significant Indian land tenure experience and each bringing broad viewpoints concerning the ownership and management of Indian land. The ILTF is managed by senior staff with considerable experience in Indian land issues[2].

Since its inception the ILTF has collaborated with, provided direct services or provided funding to over 250 tribes across the nation. Additionally, the ILTF has provided educational materials, technical assistance and/or direct services to at least 50,000 individual Indian landowners from over 400 different Indian tribes. ILTF has also provided testimony to Congressional Committees as well as provided written input to several federal agencies on proposed rules and

[1] Pursuant to Rule 29(c)(1) no party or entity other than *Amicus Curiae* and its counsel authored this brief in whole or in part or made any monetary contribution intended to fund this brief's preparation or submission.

[2] A listing of the ILTF Board of Directors and senior staff is found in *Amicus* ILTF Appendix p. 1.

regulations related to Indian lands and management issues. ILTF President, Cris Stainbrook, participated on the Senate Committee on Indian Affairs' task force to re-write Senate Bill 550[3], later known as the American Indian Probate Reform Act of 2004[4], ("AIPRA") which superseded the probate provisions of the Indian Land Consolidation Act ("ILCA") of 1983 Pub. L. No. 97-459, 96 Stat. 2517 (1983) codified at 25 U.S.C. § 2201 *et seq.* ILTF was the consultant and service provider for the AIPRA Estate Planning and Will Writing Pilot Project for the Department of Interior. ILTF has provided its own resources in excess of $2,000,000 to multiple Indian Wills programs to provide free legal services to nearly 3,000 Indian people for the preparation and execution of wills and other estate planning instruments. ILTF's primary interest in estate planning was to assist Indian landowners in reducing the level of fractionation in their land title and/or prevent further fractionation of the land title upon the client's passing. ILTF, through its experience and expertise, firmly believes that dealing with fractionation issues involves estate planning on an individual Indian level and land consolidation on a tribal level.

ILTF has provided financial support to the Blackfeet Reservation Development Fund to support community meetings for informing class members

[3] S. 550 108 Cong., 1st Sess. (2003).
[4] American Indian Probate Reform Act, Pub. L. No. 108-374, 118 Stat. 1773 (2004).

about the provisions of the Settlement Agreement[5] in this matter. Additionally, ILTF has participated directly in the consultation sessions held by the United States Department of Interior regarding the potential Cobell Trust Land Consolidation Program ("CTLCP") to be set up as part of the Settlement Agreement's $ 1.9 billion Trust Land Consolidation Fund. ILTF's primary interest in undertaking these activities has been to inform tribes and Indian landowners to ensure that they have complete information for their future decisions.

Similarly, ILTF's interest in being *Amicus* in this appeal is to provide this Court with facts and information about individual Indian landownership, fractionated land title and related issues that may assist the Court in understanding the potential impact of its decisions and the grave risk of exponential fractionation in the next few decades if fractionation is left unchecked.

ARGUMENT

I. INTRODUCTION

[5] The provisions of the Settlement Agreement and the history are laid out in detail in Plaintiffs-Appellees Brief pp. 8 - 12. The settlement creates two classes – the Historical Accounting Class and the Trust Administration Class. "The settlement allocates $1.9 billion for the Trust Land Consolidation Fund. The Interior must use those funds to purchase highly fractionated Trust interests at market rates. The undivided interests resulted when allotments were continuously divided among the original beneficiaries' descendants over many generations. The difficulty of accounting for these interest and revenue generated therefrom is a major factor in the government's mismanagement of the IIM Trust. *Cobell XX*, 532 Supp. 2d at 41. Thus consolidating these interests is necessary for meaningful Trust reform and prudent Trust management." Brief of Plaintiffs-Appellees at p. 8 (citations omitted).

The Indian Land Tenure Foundation submits this *Amicus* brief to provide information to the Court concerning the urgency and importance of stemming the continued fractionation of Indian land title and the proliferation of undivided ownership interests in trust lands and to make specific recommendations regarding implementation of the Cobell Trust Land Consolidation Program ("CTLCP") that may result from the Settlement agreement in this matter.

The United States federal government began the policy of allotting American Indian land as early as 1798 through treaties made in direct negotiation with Indian tribes. In 1871, however, Congress declared that no further treaties would be made and all future dealings with Indian nations would be conducted through legislation. See, 25 U.S.C § 71. The eventual push for a national federal policy to break up Indian land and assimilate Indian people led to the passage of the General Allotment Act of 1887[6]. While individual allotment of tribal land began with the treaty making process in the late 1700's, the General Allotment Act was the mechanism Congress used to take millions of acres from the tribal nation ownership and convert the land into individual Indian ownership. The General Allotment Act legislation authorized the president to allot tribal lands to individual Indians in designated amounts on virtually every Indian reservation created by

[6] Ch. 119, 24 Stat. 388 (1887), codified as amended by 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354 and 381, more commonly known as the "Dawes Act."

treaty, act of Congress, or executive order. 25 U.S.C. §331.The General Allotment Act at 25 U.S.C. § 348 states:

> That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located…

The result is land assets of Indian nations were removed from Indian nation ownership to individual ownership, legal title to which was taken by the United States government and beneficial ownership was held "in trust for the sole use and benefit of the Indian…" *Id.* Thus began the "trust relationship" between the federal government and individual Indian people as landowners. Subsequent amendments to the General Allotment Act[7], allowed for the Secretary of the Interior to lease Indian lands as well as allow for the issuance of fee patents to "competent Indians." The impact of the General Allotment Act and the amendments provided for the inheritance of Indian lands through the division of the beneficial use in title only and not division of the physical land asset among heirs resulting in what is termed "undivided" interests in trust land. Each succeeding heir takes the allotted land as tenants in common, holding undivided

[7] See, The Act of 1891. 26 Stat. 794, (codified in scattered sections of 25 USC § 371 *et seq*.); and The Burke Act of 1906, 34 Stat. 182, 25 USC § 349.

interests in the allotment, such interests getting smaller with each intestate generation. Because interests are held in common, common ownership issues predominate and no individual owner may make exclusive use of any part of the land without consent of the others, nor generally can it be leased, logged, grazed, or mined without federal approval and consent of at least a majority of ownership. See, generally 25 U.S.C. § 2218.

The problems of federal trust management over these "undivided" fractionated Indian allotments as well as issues of inheritance are common to class members and become immediately apparent. In *The Problem of Indian Administration* a report to Congress in 1928 by the Institute for Government Research, also known as the Merriam Report, [8] a lengthy section entitled: *The Government as Guardian and Trustee of Indian Property* detailed numerous issues and circumstances of the failed policies and federal interventions.

The Merriam Report in fact caused Congress to re-examine the federal government's treatment of Indian nations and people. As a result the Indian Reorganization Act ("IRA") of 1934[9] was passed. The IRA ended further allotment of Indian land and directed the re-establishment of the tribally held land See, 25 U.S.C. §§ 461 – 463. The IRA did not, however, alter the inheritance provisions of

[8] *The Problem of Indian Administration* (Baltimore, John Hopkins Press February 28, 1928).
[9] 48 Stat. 984, 25 U.S.C. § 461 *et seq*.

Indian lands. Virtually nothing was passed by Congress[10] to address the ever increasing issues of fractionated land title and the proliferation of undivided interests until 1983 with the passage of the Indian Land Consolidation Act ("ILCA") of 1983 as amended.[11] The most significant amendments to the ILCA occurred when Congress passed the AIPRA of 2004, Pub. L. No. 108-374, 118 Stat. 1773 (codified in scattered sections of 25 U.S.C. § 2201).

Two significant issues stemming from this 124-year history of Indian land policy and management seem to be most germane to the Settlement in this matter, specifically as the issues relate to the CTLCP as proposed in this Settlement. First, the fractionation of Indian land title in trust allotments went virtually unimpeded for the first 96 years and was only modestly affected by the combined Congressional and Tribal efforts over the past 38 years. This has resulted in allotments with thousands of owners who own very small undivided interests in marginally productive allotments with an associated Federal Governmental (BIA) bureaucratic burden to manage the same allotments. All of which culminated in the present lawsuit. Second, is the untenable situation created by the United States

[10] One minor exception is the Act of November 24, 1942 (56 Stat. 1021) which provided the Indian holder of a trust or restricted allotment of lands or an interest therein has died intestate without heirs, the lands or interest so owned, together with all accumulated rents, issues, and profits therefrom held in trust for the decedent, shall escheat to the tribe.

[11] Indian Land Consolidation Act of 1983, Public Law 97-459, 96 Stat. 2517, 25 U.S.C. § 2201 et seq. and its amendments in 1983, 99 Stat. 3171, in 1991, 105 Stat. 1908, and in 2000, 114 Stat. 1992.

government through congressional action taking Indian nation land assets and re-distributing those assets to individuals without compensation to the Indian nations, and now as part of the solution to the problem requiring the Indian nations to pay to recover the land through liens imposed by the BIA management of the same land.

II. CURRENT SITUATION

The long and problematic history of allotment issues in Indian Country has been well documented by many parties and indeed, much of that history has been documented in the Court's record of this lawsuit. Rather than reiterate those issues further, *Amicus* will now discuss the current urgency of the situation and the value of moving this Settlement toward conclusion and implementing purchase of fractional interests.

At its inception, the ILTF requested and received an unpublished report summarizing land records information on trust allotments and undivided ownership interests in those trust allotments from the Aberdeen Region Office of the Bureau of Indian Affairs (BIA). The report entitled Graphics of Trust Allotments – July 11, 2001 is found attached in the *Amicus* ILTF Appendix at p. 5. The Graphics of Trust Allotments report summarizes the trust allotments held by the Federal Government for the benefit of individual Indians within the various regions of the BIA located throughout the United States. Trust allotments and tribal tracts total

180,400 as of July 11, 2001 as shown in the BIA's database. The total number of undivided interests in these same trust allotments totaled 3,146,504; an average of 17.4 owners per allotment. See *Amicus* ILTF Appendix at p. 6 entitled Land Records Information System Land Owner Interests. While this average number of owners may not seem outrageously high, there are documented tracts with thousands of owners. A BIA-generated graphic depiction of the ownership history and projected future of one such allotment on the Lac Courte Oreilles Reservation entitled Gitchikwe Allotment 159 shows the exponentially increasing speed with which fractionation can occur if unchecked. See, *Amicus* ILTF Appendix p. 8 for the Gitchikwe Allotment 159 graph. This one allotment created in 1854 is expected to have 537,313 undivided ownership interests by the year 2060. Unchecked, fractionated interests in Indian country will explode in the near future. Unchecked, the fractionation problem experienced in this litigation will seem trivial in the next 20 to 30 years.

The current information published by the BIA in the materials provided to tribal leaders and the public prior to the consultation sessions on the CTLCP shows that many allotments are now on the rapid upslope of exponential growth in the number of undivided ownership interests.[12] Comparing the 2001 data referenced above to the current number of ownership interests as reported by the BIA at

[12] Pre-Consultation Land Consolidation Fact Sheet found at http://www.doi.gov/cobell/upload/Land-Consolidation-Fact-Sheet-w-Table.pdf.

3,976,744, there has been a 26 % increase in the number of ownership interests over the past 10 years. At the same time the number of trust tracts has dropped to an estimated 130,000; the average number of owners per allotment has increased to 30.6 owners per track, a 76% increase. And while this is impressive, the increase is actually much larger. [13]

Beginning in 1999 the BIA has purchased small undivided interests from willing sellers through the Indian Land Consolidation Program ("ILCP"), 25 U.S.C. § 2212. Details of the ILCP can be found on the BIA website at http://www.bia.gov/WhoWeAre/BIA/ILCA/index.htm. The ILCP has operated on a limited budget but has been able to purchase 427,317 fractional interests. ILCP estimates that these purchases have avoided 826,524 new interests being created through inheritance. If even one-half of the avoided interests had become reality, the increase in ownership interests for the past decade would have been 40 % rather than the 26 %; the average number of ownership interests per tract would have risen to 33.8 owners per track, a 94% increase instead of a 76% increase. This would suggest that unchecked fractionation could easily result in a doubling of undivided interests in the next decade. Even the current rate of increase in

[13] National Congress of American Indians, Draft Talking Points on 1.9 Billion for Land consolidation of Fractionated Indian Lands, July 13, 2011. http://www.ncai.org/fileadmin/policy/2011/Draft_Talking_Points_on_Land_Consolidation_Program.pdf

undivided ownership interests is taxing an overburdened record keeping system within the BIA.

As noted in earlier Court records by a Special Trustee report[14] the BIA Realty staff was perpetually behind in updating land ownership records at one point estimating that it would take up to 104 staff years to eliminate the backlog primarily due to lack of resources to add more staff positions. Going forward the situation could dramatically deteriorate. ILTF estimated in 2005 that the annual administrative cost to the federal government was $120 per undivided interest. A subsequent estimate by the BIA staff put the number slightly higher at $125 per interest per year.[15] Even with computerized systems and a higher percentage of Individual Indian Money account holders not having sufficient funds for a check to be issued by the Department of Treasury[16], the Department of Interior does not have a budget sufficient to effectively manage the current number of undivided trust land ownership interests, irrespective of a continually higher number going forward.

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[14] *Addendum One: Condition of the U.S. Government's Trust Management Systems - Special Trustee's Assessment*, June 25, 1998 Office of Special Trustee website www.ost.doi/stragplan.add1.tab8.html and captured on http://web.archive.org.

[15] Information published on the BIA's website taken from Majel Russell, Principal Deputy Assistant to Department of Interior, testimony in front of the Senate Committee on Indian Affairs.

[16] The administrative cost for calculating, authorizing, releasing and processing a federal check is estimated by the Midwest Area Office of the BIA to be $45. Information given to the ILTF by Larry Morin, Acting Director of the Minneapolis Area, Bureau of Indian Affairs in 2005.

The BIA's inability to adapt policy changes to meet the rapidly changing environment has in the past and will continue to hinder the economic wellbeing of Indian landowners. As trust allotment ownership has become more fractionated, fewer Indian people are willing to engage their co-owners, usually their relatives, in discussions about using the land for their own businesses, farms and ranches. It is simply easier for them to go through the BIA leasing process and lease the property to non-Indian entities. For many reservations this has resulted in a huge loss of potential income and local economic activity as well as the lack of home sites. For instance, on the Crow Reservation (2.3 million acres total) virtually all of the 1.1 million acres of individual trust allotments are leased to non-Indians.

The BIA has attempted to adapt leasing rules and regulations but the growth of undivided ownership interests simply outpaces the BIA's efforts. The proposed rules for leasing for home sites, economic development and solar and wind energy projects were recently released for comment.[17] The intention is to streamline the process and allow for leasing within a more reasonable timeframe. However, consent to lease the allotment if there are 20 or more owners, requires the agreement of 50 percent of the ownership. *Id.* ILTF estimates that this will apply to more than 40 percent of all individually held trust allotments. The process of

[17] Residential, Business and Wind and Solar Resource Leases on Indian Land, 76 Federal Register 73784 (November 29, 2011)(to be codified at 25 C.F.R. Part 162).

obtaining agreement from the required 50 percent ownership on these allotments may negate any time savings to be had within the new BIA lease processing, if agreement is obtained at all.

Despite the Department of Interior's efforts to curtail the ballooning numbers of undivided interests in trust allotments, it has failed to mobilize the most important resource—Indian landowners and tribes. With the exception of ILCP, 25 U.S.C. § 2212, which purchases small fractional interests from willing sellers, the emphasis of the federal government has been on curtailing further fractionation through changes in probate regulations on Indian estates such as the escheat provision of ILCA, 25 U.S.C. § 2201, and several provisions in AIPRA, Pub. L. No. 108-374, 118 Stat. 1773 (2004) (whose general purpose is to limit fractionation and consolidate land). Neither the ILCA nor AIPRA is adequate in itself to remedy the imminent fractionation issues. While the former, ILCA escheat provision were declared an unconstitutional taking[18] the latter, AIPRA, may serve to reduce further fractionation but only over a long period of time. It is evident that the immediate needs of Indian Country must be served through acquisition programs. ILTF urges the quick implementation of the CTCLP of the Settlement Agreement.

[18] *Hodel v Irving,* 481 U.S. 704, 716-718 (1987) (holding the escheat provisions to be an unconstitutional taking of property without just compensation) and *Babbitt v Youpee*, 519 U.S. 234, 237 (1997) (holding the amendment to ILCA and unconstitutional taking of property without just compensation).

There are numerous examples found throughout Indian Country where Indian nations are working to reduce fractionation on individually held trust allotments. Most notably the Rosebud Sioux Tribe through its Tribal Land Enterprise has consolidated interests on more than 500,000 acres through the use of purchase and tribal assignments for approved land uses. The Confederated Tribes of the Umatilla Reservation utilized a tribally adopted probate code, will writing services and an active purchase program to restrict the growth in the average number of interests per allotment over the past 25 years from 8.3 in 1985 to 10.4 in 2011. Other tribes have used a variety of methods to limit the continual fractionation of allotment title.

Similarly, Indian people have long recognized that fractionation of allotment title means increased complexity in the use of the land. While a limited number have been able to purchase the interests held by co-owners, a few have used estate planning and writing wills to keep the inheritance of interests within the immediate family. ILTF estimates that fewer than 10 percent of all Indian trust land owners have a valid will despite the passage of AIPRA which contains an increased incentive for individual Indian owners to execute a valid will. As the contractor to the Department of Interior for the AIPRA Will Writing Pilot Project, ILTF was able to complete 1,473 estate planning documents for 1,113 Indian clients. Eighty-

five percent (85%) of the 829 wills that were drafted in nine months of service either reduced or prevented further fractionation of trust title.

III. GOING FORWARD

There is no question given the history of Indian trust land ownership and the rapid escalation of undivided ownership interests that the CTLCP represents an important opportunity to stem the tide of fractionation. However, in order for the Program to be most successful it must begin soon and go to scale quickly. Literally, with each passing day the problem grows and soon the growth will be exponential.

As *Amicus* we appreciate the district court's willingness to allow the Department of Interior to move forward with the consultation process surrounding the CTLCP before the Settlement is finalized. It is clear from the record from each consultation meeting that many Indian nations are interested in having a direct role in operating the CTLCP on their reservation. These Indian nations have created its programs to best fit its local circumstances and goals and could easily adapt the program within each nation's goals. It appears that there is clear authority in 25 U.S.C. § 2212(b)(3)(C) for the Secretary to enter into the necessary agreements with tribal nations to fully carry out land consolidation program functions.

While it is important to recognize the past successes of the BIA's existing ILCP found at 25 U.S.C. § 2212 it is equally important to recognize that the ability

to achieve a larger scale solution with the CTLCP under the Settlement Agreement can only be accomplished through the direct involvement of the tribal programs. Bringing the additional resources of 40 or 50 or even 60 tribal staffs to bear on the purchasing of undivided interests could bring the program to scale within a short time. The BIA ILCP will still need to grow substantially to administer the CTLCP for tribal nations that opt not to operate the program. The BIA will also need to streamline the functions of titling and expand the Realty staff to provide for the increased workload demand.

Additionally, the land CTLCP under the Settlement Agreement is to be established "in accordance with the Land Consolidation Program authorized under 25 U.S.C. § 2201 *et seq.*" (Objector-Appellant Kimberly Craven's separate appendix p. 564 - paragraph F.1. of the Settlement Agreement). In considering this provision it would suggest the possibility that liens may be placed by the BIA on the undivided land interests that are purchased under the CTLCP of the Settlement Agreement. In essence this creates a loan that the tribal nations must retire through foregone revenues from the land or associated natural resources.

After considerable effort, the *Amicus* cannot find any evidence that Indian nations were compensated for the taking of land into title held by the federal government in trust for the beneficial use by individual Indians. The nations were

compensated under Section 5 of the General Allotment Act, 24 Stat. 388 ch. 119, for lands

> …of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians,…

but not for the allotted lands. To suggest now, particularly under the terms of this Settlement Agreement, that the tribal nations should simply purchase the allotted land is unjust. The allotment process and the subsequent problems including ongoing fractionation of land title are the result of unilaterally applied actions by the federal government.

The Indian Land Consolidation Act, 25 U.S.C. § 2213(b)(5), gives the Secretary of Interior ample authority to waive liens on not only the interests acquired under this new acquisition program but also on the existing ILCP acquisitions. The ILTF urges the Court to take this and the above points into consideration in deciding the fairness and adequacy of the Settlement and the importance to meaningful trust reform and prudent trust management.

CONCLUSION

While the *Amicus* appreciates that those who have appealed the Settlement have done so in all sincerity and deserve all due consideration, issues related to fractionated land title grow with every passing day for both individual Indian landowners and the federal government. Many trust land allotments are beginning

to experience exponential growth in the number of undivided interests in the ownership. The Indian Land Tenure Foundation recommends that the Court acts as expeditiously as possible to resolve all of the appeals under the Settlement Agreement and allow for the CTLCP to move forward quickly.

The fact that many Indian nations have been operating their own undivided interest purchase programs for years suggests that those nations are uniquely positioned to quickly utilize the financial resources provided through this Settlement Agreement to implement the consolidation program at the necessary scale. Therefore, ILTF respectfully suggests that the Court direct the Department of Interior to provide to each Indian nation that chooses to operate a land consolidation program or expand an existing program, an allocation of funds for purchasing any undivided interests in trust allotments and a proportional allocation of funds for the administration of the program.

The fractionation of Indian trust land title and its accompanying problems were a result of congressional actions and the resolution of the problems should not be a burden placed on the tribal nations or Indian people. Therefore, ILTF would also respectfully suggest that the Court also direct the Secretary to waive all liens on undivided interests purchased under the Cobell Trust Land Consolidation Program.

Dated: December 22, 2011

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the Type-volume limitation of Fed. R. App. P. 32(a)(&(B) because it contains 4,436 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) it has been prepared in a proportionally spaced typeface using Microsoft Word 2007, Time New Roman 14-point font.

Dated: December 22, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2011, I filed a copy of the foregoing *Amicus Curiae* Brief with the clerk of court using the CM/ECF system which will serve notice upon the following ECF registrants, and served a copy by first class mail on the following:

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