

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, *et al.*, :
 :
 Plaintiffs, :
 :
 v. : Civil Action No. 96-1285 (JR)
 :
 DIRK KEMPTHORNE, Secretary of :
 the Interior, *et al.*, :
 :
 Defendants. :

MEMORANDUM

The government may well be correct in its submission that a partial final judgment under Rule 54(b), requiring the payment of \$455.6 million to the plaintiff class but without determining the proper allocation of the funds, or establishing a distribution plan, or ruling on attorney fees, might be found not to be appealable. It is indisputable, however, that my decision to award a \$455.6 million judgment "involves controlling question[s] of law as to which there is substantial ground for difference of opinion" and that "an immediate appeal . . . may materially advance the ultimate termination of the litigation." Of particular importance to the plaintiffs are the two principal rulings that drive the dollar amount of the award: that I had no jurisdiction in equity to order disgorgement of the "benefit to the government" that plaintiffs think was derived from the withholding of trust funds, see dkt. # 3573 at 51-58; and that the facts of this case did not support application of the "super-

strong presumption" that plaintiffs invoked, see id. at 58-67. A third driver of the dollar amount of the award, which may or may not be accessible to the Court of Appeals on an interlocutory review, was the parties' differing treatment of Osage headright funds, see id. at 20-21. And, of course, the government may wish to appeal, or cross-appeal, on the threshold question of whether I had jurisdiction to award monetary relief against the government at all, see id. at 42-51. The order that accompanies this memorandum certifies my decision to award \$455.6 million to the plaintiff class for interlocutory appeal under 28 U.S.C. § 1292(b). Proceedings relating to the issues presented by the government [dkt. #3577 at 4 n.3, 14-15] need not be stayed unless the Court of Appeals or a judge thereof shall so order.

JAMES ROBERTSON
United States District Judge

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ORDER

Pursuant to the findings of fact and conclusions of law set forth in memorandum opinions of this Court dated January 30, 2008 [dkt. # 3505] and August 7, 2008 [dkt. # 3573], it is **ORDERED** and **DECREED** that the plaintiff class recover from the defendants Four Hundred Fifty Five Million Six Hundred Thousand Dollars (\$455,600,000). Because this order involves controlling questions of law as to which there is substantial ground for difference of opinion, and because an immediate appeal may materially advance the ultimate termination of this litigation, it is **CERTIFIED** for immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

JAMES ROBERTSON
United States District Judge