

**H.R. 887, TO DIRECT THE SEC-
RETARY OF THE INTERIOR TO
SUBMIT A REPORT ON INDIAN
LAND FRACTIONATION**

LEGISLATIVE HEARING

BEFORE THE

SUBCOMMITTEE ON INDIAN AND
ALASKA NATIVE AFFAIRS

OF THE

COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

FIRST SESSION

Tuesday, April 5, 2011

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**LEGISLATIVE HEARING ON H.R. 887, TO
DIRECT THE SECRETARY OF THE INTERIOR
TO SUBMIT A REPORT ON INDIAN LAND
FRACTIONATION, & FOR OTHER PURPOSES.**

Tuesday, April 5, 2011

**U.S. House of Representatives
Subcommittee on Indian and Alaska Native Affairs
Committee on Natural Resources
Washington, D.C.**

The Subcommittee met, pursuant to call, at 11:00 a.m. in Room 1334, Longworth House Office Building, Hon. Don Young [Chairman of the Subcommittee] presiding.

Present: Representatives Young, Gosar, Labrador, Noem, Hastings [ex officio], Boren, Kildee, Luján, Hanabusa.

**STATEMENT OF HON. DON YOUNG, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF ALASKA**

Mr. YOUNG. The Subcommittee will come to order. The Chairman notes the presence of a quorum. The Subcommittee on Indian and Alaska Native Affairs is meeting today to hear testimony on H.R. 887, to direct the Secretary of the Interior to submit a report on Indian land fractionation, and for other purposes.

Under Committee Rule 4[f], opening statements are limited to the Chairman and Ranking Member of the Subcommittee, so that way we can hear from our witnesses more quickly.

However, I ask for unanimous consent to include any other Members' opening statements in the hearing record if submitted to the Clerk by the close of business today. Hearing no objection, so ordered.

The purpose of today's hearing is to hear testimony on H.R. 887, a bill that I introduced with the Chairman of the Full Committee, Doc Hastings, and the gentleman from Arizona, Mr. Gosar.

H.R. 887 establishes a cap of \$50 million on fees and expenses that may be awarded to Plaintiffs' attorneys pursuant to the Cobell Settlement agreement. It also requires the Department of the Interior to submit to Congress a report regarding its plans to consolidate highly fractionated Indian lands using the \$1.9 billion in direct spending provided in the Cobell Settlement for this purpose.

Under the Claims Resolution of 2010, Congress authorized the United States District Court to approve the Cobell Settlement agreement. Congress did so with assurances from the Government and the Plaintiffs that attorneys' fees would be limited to an amount between \$50 million, and \$100 million pursuant to a side agreement that they signed in December of 2009.

Before this Committee, the Named Plaintiff testified that her attorneys, quote, "had agreed to limit their petition for fees to under \$100 million." Even this amount is excessive in my mind.

As the administration points out, only \$360 million of the settlement funds are based on claims that counsel actually litigated. The remaining funds are the result, not of tens of millions of dollars' worth of work performed by class counsel, but rather the government's desire to resolve the claims of the IIM account holders themselves.

Paying lawyers \$50 million to \$100 million for claims valued at 360 million sparked a controversy that delayed passage of a settlement for an entire year. Not only did the attorneys fail to justify these fees to the Committee, but the government and Plaintiffs lawyers structured the settlement so that all legal fees must be paid by the individual Indians and not the government.

Little did anyone know that the Named Plaintiff who made her statement before this Committee, the Plaintiffs were apparently concealing the existence of a contingency fee agreement providing the attorneys with a recovery of \$223 million.

It was publicly revealed for the first time two days after the President signed the Claims Resolution Act into law. Is this a bait-and-switch, a game of Three Card Monte, or a ploy to convince the court that \$100 million should be kind of a consolation prize?

I don't know how to answer this, but I do know that this Committee had a right to know about this contingency fee agreement when the Named Plaintiff and her attorneys testified about the legal fees of that case to the Committee.

Today, the Plaintiffs are stonewalling the efforts of this Committee to get to the bottom of the fee controversy, and are refusing to testify, or to respond to numerous written inquiries over the last year seeking information about their fees.

I voted for the Claims Resolution Act, but I now worry that the integrity of the Act has been compromised by the Plaintiffs' lawyers. Their actions are frustrating the efforts of the Members to protect the interests of 500,000 Indians, whose payments are now threatened by grossly excessive legal fees.

I don't want to let the government off the hook. The Department of the Interior and Justice have refused to testify on the grounds that the matter in which the Subcommittee seeks testimony is an active litigation. This is not an excuse the Committee has historically recognized.

It is also unprecedented. During the previous administration officials with the Department of the Interior voluntarily testified on numerous occasions to the House and Senate Committees while Cobell was in active litigation.

They also engaged in confidential mitigation with the Plaintiffs under the direct and personal supervision of the staff of the House and Senate Committees of jurisdiction, and the current administration testified on settlement last year.

In any case, the Department of the Interior and Justice have advised the Committee that the position of the government is entirely reflective of the brief that has been submitted to the court.

It is the view of the government on the attorneys' fees that it is important for Members to review, but I do not wish to take the

Committee's time quoting them. As part of my written statement provided for the record, I have provided key excerpts from the government's position on attorneys' fees.

May I say that if they continue to stonewall me, I will subpoena those people, litigation or no litigation, and then see how we go forward from there. At this time, I recognize the Ranking Member, the gentleman from Oklahoma, Mr. Boren, for any statement that he would like to make.

[The prepared statement of Chairman Young follows:]

**Statement of The Honorable Don Young, Chairman,
Subcommittee on Indian and Alaska Native Affairs**

The purpose of today's hearing is to hear testimony on H.R. 887, a bill I introduced with the Chairman of the full Committee, Doc Hastings, and the Gentleman from Arizona, Mr. Gosar.

H.R. 887 establishes a cap of \$50 million on fees and expenses that may be awarded to plaintiffs' attorneys pursuant to the Cobell Settlement Agreement. It also requires the Department of the Interior to submit to Congress a report regarding its plans to consolidate highly fractionated Indian lands using the \$1.9 billion in direct spending provided in the Cobell Settlement for this purpose.

Under the Claims Resolution Act of 2010, Congress authorized the U.S. District Court to approve the Cobell Settlement Agreement. Congress did so with assurances from the Government and the plaintiffs that attorneys' fees would be limited to an amount between \$50 million and \$100 million pursuant to a side agreement they signed in December 2009.

Before this Committee, the Named Plaintiff testified that her attorneys [quote] "have agreed to limit their petition for fees to under \$100 million."

Even this amount is excessive. As the Administration points out ". . . only \$360 million of the settlement funds are based on claims that counsel actually litigated. The remaining funds are the result, not of tens of millions of dollars' worth of work performed by class counsel, but rather the government's desire to resolve the claims of the IIM account holders themselves."

Paying lawyers between \$50 million and \$100 million for claims valued at \$360 million sparked a controversy that delayed passage of the Settlement for an entire year. Not only did the attorneys fail to justify these fees to this Committee, but the Government and plaintiff lawyers structured the Settlement so that all legal fees must be paid by the individual Indians, not the Government.

Little did anyone know that when the Named Plaintiff made her statement before the Committee, the plaintiffs were apparently concealing the existence of a contingency fee agreement providing the attorneys with a recovery of \$223 million. It was publicly revealed for the first time two days after the President signed the Claims Resolution Act into law.

Is this a bait-and-switch, a game of Three Card Monte, or a ploy to convince the Court that \$100 million should be a kind of consolation prize?

I don't know the answer to this, but I do know this Committee had a right to know about this contingency fee agreement when the Named Plaintiff and her attorney testified about the legal fees of this case in this Committee.

Today, the Plaintiffs are stonewalling the efforts of this Committee to get to the bottom of the fee controversy in their refusal to testify or to respond to numerous written inquiries over the last year seeking information about their fees.

I voted for the Claims Resolution Act, but I now worry that the integrity of the Act has been compromised by the Plaintiffs' lawyers. Their actions are frustrating the efforts of Members to protect the interest of the 500,000 Indians whose payments are now threatened by grossly excessive legal fees.

I don't want to let the Government off the hook. The Departments of Interior and Justice have refused to testify on the grounds that "the matter on which the Subcommittee seeks testimony is in active litigation."

This is not an excuse the Committee has historically recognized. It is also unprecedented. During the previous Administration, officials with the Department of the Interior voluntarily testified on numerous occasions in House and Senate committees while Cobell was in active litigation. They also engaged in confidential mediation with the Plaintiffs under the direct, personal supervision of staff of the House and Senate committees of jurisdiction. And the current Administration testified on the Settlement last year.

In any case, the Departments of Interior and Justice have advised the Committee that the position of the Government “is entirely reflected in the briefs that it submitted to the court. . . .”

The views of the Government on the attorney fees are important for Members to review but I do not wish to take up the Committee’s time quoting them now. As part of my written statement submitted for the record, I am providing key excerpts of the Government’s position on attorney fees.

**STATEMENT OF HON. DAN BOREN, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF OKLAHOMA**

Mr. BOREN. Thank you, Mr. Chairman. After nearly 14 years of contentious litigation, Congress, by an overwhelming majority, authorized \$3.4 billion to settle the *Cobell v. Salazar* class action lawsuit.

This authorization approved the proposed settlement agreement between the United States and over 500,000 individual Indian beneficiaries. Last December, we closed the chapter on more than 100 years of Federal mismanagement of Indian trust funds and land claims.

After decades of ignoring the problem, Congress passed the settlement and President Obama signed it into law. It was an historic day for Indian Country, and set in motion the next steps for the Judicial Branch to issue its final approval of the settlement.

Indeed, the Cobell Settlement process is a lesson in civics. By enacting it in the last Congress, the Legislative Branch authorized the funding to effect the settlement. By signing the bill, the Executive Branch enacted that authority into law. Now the Judicial Branch, in fulfillment of its appropriate government function, must decide whether the settlement is fair and reasonable before Indian beneficiaries may begin to receive payment for overdue justice.

This decision must include a careful look at attorneys’ fees. H.R. 887 trends very closely to disrupting the fine balance struck by the separation of powers principles that guide our government.

It improperly attempts to interfere with ongoing litigation by limiting the amount of attorneys’ fees that a Federal judge may award. This creates an appearance of undue political and Congressional influence over litigation decisions.

In short, this bill is well meaning, but the fact of the matter is that it invites constitutional inquiry and improperly interferes with the judicial process. Indian Country has waited far too long for justice to be achieved in this case.

We must now let the Judicial Branch do its work to provide finality and close the book on a century of broken promises. I will say to the Chairman that I do agree with him. I have a concern about these excessive fees, and maybe \$50 million is the right mark.

So I look forward to working with you, and I believe that the court should sort of do this right now, but I understand your frustration, especially with—you know, we want the money going to Indian Country, and not a lot of attorneys. So I yield back. Thank you.

Mr. YOUNG. I thank the gentleman, and the one thing that bothers me the most was the contingency fee was not announced until two days after the bill was signed. And I don’t think that any of

the Plaintiffs would have agreed to that if they had not been a contingency fee with one person or a small group.

Because we were told in this Committee that it was less, and between \$50 million to \$100 million, and we thought \$100 million was too much with the bills introduced by the Chairman was \$50 million.

The settlement was about \$350 million in legal work and then they get \$100 million, and that is pretty high itself. But now it was announced after the fact, and after it was signed into law—and I agree with you that justice has been long overdue.

I have been in this program for about 17 years, and when we get to a settlement, we originally thought that there was \$17 billion of misconduct by the Federal Government on Native lands by very frankly doing some very strange things, and they conveniently lost the records.

And so when they settled this, OK, I said fine, and I voted for it. But what bothered me was then we find out there is \$223 million in legal fees. And I have been through this legal aspect for a while, and I don't particularly have a great fondness for that process.

So with that, I now recognize the Chairman of the Full Committee, Doc Hastings.

STATEMENT OF HON. DOC HASTINGS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

Mr. HASTINGS. Thank you, Mr. Chairman, and thank you for introducing H.R. 887, and I am pleased to be a cosponsor of that bill. Let us be clear. Every dollar paid to the attorneys comes directly out of the pockets of individual Indians.

This bill is focused on ensuring those individual Indians for whom this settlement was reached are the ones who benefit, and that what is owed to individual Indians under the law is not fleeced away by a handful of lawyers demanding over \$200 million based on a secret deal known only to themselves.

During the second session of the 111th Congress, when the Cobell Settlement was pending, Members of the Committee were advised that the lawyers were seeking \$50 million to \$100 million in legal fees, and costs, pursuant to an agreement on attorneys' fees that was signed by both parties to the lawsuit, the government and the Plaintiffs.

In testimony made in front of this Committee in March of 2010, the Named Plaintiff said that her attorneys would not seek more than \$100 million. The government witnesses also described the \$50 million to the \$100 million fee range as being agreed upon.

And it was on those assurances that the Members of this Congress made their decision. At the time, the \$50 million to \$100 million fee range was considered by many to be extraordinary, including me.

A number of prominent tribal organizations and known experts on the Cobell litigation recommended that Congress amend the settlement to impose a cap at \$50 million. These questions about excessive fees led me twice to file amendments to impose such a cap.

Both times the Rules Committee, under the control of the Democrats, blocked me from even offering these ceiling limitation

amendments. So imagine everyone's surprise when shortly after the President signed the Claims Resolution Act that the Plaintiffs revealed that they had been hiding a contingency fee in which they claim they were owed \$223 million.

The chief Senate advocate of the Cobell Settlement, Senate Indian Affairs Committee Chairman Byron Dorgan, called this development shameful, and he went on to say, and I quote, "it is not a level that is acceptable, and is not a level that was contemplated by the agreement."

Mr. Chairman, I would hope that Members of the Committee concur in the statement made by the former Chairman, and that we take a real hard look to protect the interests of those 500,000 Indians that are affected.

And, last, it is very disappointing that the Department of Justice and Interior refused to testify at this hearing. To claim that this case is in active litigation as an excuse for not testifying just defies all history.

Time after time, after time, the government had testified on this case when it was in litigation. Their position in court was to limit fees to \$50 million, which of course is what H.R. 887 would do. They even reiterated that position in refusing to testify today in front of the Committee. But even more frustrating and outrageous is the refusal of the Plaintiffs' attorneys themselves to testify.

They have been asked to provide this Committee with a copy of their secret contingency agreement and other information used to justify their fee claim. They refused that request last year, and when asked again this year, they again refused.

So what do they do instead? They hired attorneys to represent them—lawyers hiding secret agreements to enrich themselves at the expense of individual Indians—lawyers hiring lawyers, instead of being open and transparent.

Mr. Chairman, that is why H.R. 887 was introduced and why this hearing is necessary, and why further action by this Committee should be expected. Again, I want to commend the Chairman for convening this hearing and introducing this bill, and I look forward to hearing the testimony of our witnesses.

[The prepared statement of Mr. Hastings follows:]

**Statement of The Honorable Doc Hastings, Chairman,
Committee on Natural Resources**

I want to thank the Chairman of the Subcommittee for introducing H.R. 887 and holding an expedited hearing on it. I am an original cosponsor of this bill.

Let's be clear: every dollar paid to the attorneys comes directly out of the pocket of individual Indians. This bill is focused on ensuring those individual Indians for whom this settlement was reached are the ones who benefit, and what is owed to individual Indians under the law isn't fleeced away by a handful of lawyers demanding over \$200 million dollars based on a secret deal known only to themselves.

During the second session of the 111th Congress when the Cobell Settlement was pending approval, Members of the Committee were advised that the lawyers were seeking \$50 million to \$100 million in legal fees and costs pursuant to an Agreement on Attorney fees that was signed by both Parties to the lawsuit, the government and the plaintiffs.

In testimony made in this Committee in March 2010, the Named Plaintiff said her attorneys would not seek more than \$100 million. The Government witnesses also described the \$50 million to \$100 million fee range as being agreed upon. And it was on these assurances that Members made their decision.

At the time, the \$50 million to \$100 million fee range was considered by many to be extraordinary. A number of prominent tribal organizations and noted experts

on the Cobell litigation recommended that Congress amend the Settlement to impose a fee cap of \$50 million.

These questions about excessive fees led me twice to file amendments to impose such a cap. Both times, the Rules Committee under the control of House Democrats blocked me from offering my fee limitation amendments.

So imagine everyone's surprise when shortly after the President signed the Claims Resolution Act into law, the plaintiffs revealed they had been hiding a contingency fee agreement under which they claim to be owed \$223 million.

The chief Senate advocate of the Cobell Settlement, Senate Indian Affairs Committee Chairman Byron Dorgan, called this development "shameful."

Senator Dorgan added that \$223 million "is not a level that is acceptable and it's not a level that was contemplated by the agreement."

Mr. Chairman, I would hope that Members of the Committee concur in the statement made by the former Chairman of the Senate Indian Affairs Committee, and take steps to protect the interests of 500,000 individual Indians by supporting H.R. 887.

Lastly, it is very disappointing that the Departments of Justice and Interior refused to testify at this hearing. To claim that the case is in active litigation as an excuse just defies all history. Time after time after time, the government had testified on this case it was in litigation. Their position in court is to limit fees to \$50 million, which is what H.R. 887 would do. They even reiterated that this is their position in refusing to testify before the Committee.

Even more frustrating and outrageous is the refusal of the plaintiff attorneys themselves to testify. They've been asked to provide this Committee with a copy of their secret contingency agreement and other information used to justify their fee claim. They refused this request last year. And when asked again this year they again refused. So what did they do? They hired attorneys to represent them.

Lawyers signing secret agreements to enrich themselves at the expense of individual Indians.

Lawyers hiring lawyers instead of being open and transparent.

This is why H.R. 887 was introduced, its why this hearing is necessary and its why further action by the Committee should be expected.

Again, I thank and commend Chairman Young for convening this hearing. I look forward to hearing the views of today's witnesses on this issue.

Mr. YOUNG. I thank the Chairman. We only have two witnesses today. They are Patricia Douville, and I believe she represents the Rosebud Sioux Tribe; and Professor Richard Monette, of the University of Wisconsin-Madison School of Law, an IIM Account Holder and a former Tribal Chairman. Welcome.

Like all our witnesses, your written testimony will appear in full in the hearing record. I also ask you to keep your oral statements to five minutes as outlined in your invitation letter from the Committee, and under Rule 4[a].

Our microphones are not automatic, and so please press the button when you are ready to begin. I would like to explain the timing lights. When you begin to speak, our clerk will start the timer, and a green light will appear. After four minutes, a yellow light will appear, and at that time you will begin to conclude your statement.

And at five minutes the red light will come on, and you may complete your sentence, but at that time I must ask you to please stop. So, with that, I will call on Patricia first. Please, Madam, you are on.

STATEMENT OF PATRICIA DOUVILLE, COUNCIL REPRESENTATIVE, ROSEBUD SIOUX TRIBE, ON BEHALF OF RODNEY M. BORDEAUX. PRESIDENT, ROSEBUD SIOUX TRIBE, SOUTH DAKOTA

Ms. DOUVILLE. Good morning, Mr. Chairman, and Committee Members. On behalf of the Rosebud Sioux Tribe, the Sicangu Lakota Oyate, I would like to thank you and the Committee for

convening this hearing to direct the Secretary of the Interior to submit a report on Indian land fractionation, and for other purposes.

My name is Patricia Douville, and I am a member of the Tribal Council of the Rosebud Sioux Tribe, and am testifying today in that capacity.

Although now considered a single Indian tribe, the Rosebud Sioux Indian Reservation is historically a confederation of seven Bands and Sub-Bands from all over the Midwest, and central, and southern Canada. The present-day Rosebud Reservation is located in south-central South Dakota, and was established by the authority of the 1868 Great Fort Laramie Treaty.

The Indian Reorganization Act of June 18, 1934, also known as the Wheeler-Howard Act, or informally, the Indian New Deal, was a United States Federal legislation which secured certain rights to Native Americans, including Alaska Natives.

These include activities that contributed to the reversal of the Dawes Act's privatization of common holdings of American Indians and a return to local self-government on a Tribal basis.

The Act also restored to Native Americans the management of their assets, being mainly land, and included provisions intended to create a sound economic foundation for the inhabitants of Indian reservations.

Section 18 of the IRA conditions application, or membership, of the IRA on a majority vote of the affected Indian Nation or Tribe within one year of the effective date of the Act, 25 United States Code 478. The IRA was the initiative of John Collier, Senior, Commissioner of the Bureau of Indian Affairs from 1933 to 1945.

The Rosebud Sioux Indian Reservation ratified the IRA on June 18, 1935, and now called itself the Rosebud Sioux Tribe. Subsequently, on April 7, 1943, the Rosebud Sioux Tribe formed Tribal Land Enterprise, TLE, under the authority of the Act to actively pursue and purchase tribal-allotted lands that would have traditionally been lost by the Patent-Fee process.

TLE historically becomes one of the first tribally owned and operated land consolidation programs in the United States. Since 1943, TLE now has in its control over 800,000-plus acres. These acres are used by the Tribe for agricultural, economic development, and of course, Tribal member residential use.

The Rosebud Sioux Tribe has proven to the Department of the Interior and the Bureau of Indian Affairs that Tribes have the capability, the knowledge, and the foresight to control the destiny of its tribal lands. After all, isn't it true that we Native Americans and Alaskan Natives should know what is in our best interests?

The Cobell Settlement brings forth many questions to me, my Tribe, and those Tribes who were affected by the failure of the Bureau of Indian Affairs to properly provide trust management of our individual allotted Tribal members.

Mr. Chairman, what is paramount in Indian Country today with this settlement is the following. Cap the lawyer fees to \$50 million. Second, ensure that the Tribes who were wronged by the Department of the Interior and the Bureau of Indian Affairs are properly and justly provided with the settlement funds for repurchasing of fractionated or restricted lands.

What worries me, Mr. Chairman, is the problem of the BIA administering these repurchasing funds with a time limit that is stipulated within the settlement agreement to a period of 10 years.

Mr. Chairman, is it peculiar that those who violated the trust responsibility that put this Federal Government in a lawsuit, which it lost, is again in control of these dollars?

Mr. Chairman, if this Committee has the authority to act and make recommendations, then please consider that Tribes also lost lands to the Homestead Act, which some would argue violated our great treaties.

The allowance for tribes to purchase fee lands within their original boundaries with these settlement dollars would help correct historic injustices. Thank you.

[The prepared statement of Mr. Bordeaux follows:]

Statement submitted for the record by Mr. Rodney M. Bordeaux, President, Rosebud Sioux Tribe (As given by Ms. Patricia Douville, Council Member of the Rosebud Sioux Tribe)

Good morning Chairman Doc Hastings and Committee members. On behalf of the Rosebud Sioux Tribe, the Sicangu Lakota Oyate, I would like to thank you and the committee for convening this hearing to direct the Secretary of the Interior to submit a report on Indian land fractionation, and for other purposes. My name is Patricia Douville and I am a member of the Tribal Council of the Rosebud Sioux Tribe and am testifying today in that capacity.

Although now considered a single Indian tribe, the Rosebud Sioux Indian Reservation, is historically a confederation of 7 bands and sub-bands from all over the mid-west and central and southern Canada. The present-day Rosebud Reservation is located in South-Central South Dakota and was established by the authority of the 1868 Great Fort Laramie Treaty.

The Indian Reorganization Act of June 18, 1934, also known as the Wheeler-Howard Act or informally, the Indian New Deal, was a U.S. federal legislation which secured certain rights to Native Americans, including Alaska Natives. These include activities that contributed to the reversal of the Dawes Act's privatization of common holdings of American Indians and a return to local self-government on a tribal basis. The Act also restored to Native Americans the management of their assets, being mainly land, and included provisions intended to create a sound economic foundation for the inhabitants of Indian reservations. Section 18 of the IRA conditions application, or membership, of the IRA on a majority vote of the affected Indian nation or tribe within one year of the effective date of the act (25 U.S.C. 478). The IRA was the initiative of John Collier Sr., Commissioner of the Bureau of Indian Affairs from 1933 to 1945.

The Rosebud Sioux Indian Reservation ratified the IRA on June 18, 1935 and now called itself the Rosebud Sioux Tribe. Sub sequentially, on April 07, 1943, the Rosebud Sioux Tribe forms Tribal Land Enterprise (TLE) under the authority of the act to actively pursue and purchase tribal allotted lands that would have traditionally been lost by the Patent-Fee process.

TLE historically becomes one of the first tribally owned and operated land consolidation programs in the United States. Since 1943 TLE now has in its control over 800,000 plus acres. These acres are used by the tribe for agricultural, economic development, and of course, tribal member residential use.

The Rosebud Sioux Tribe has proven to the Department of Interior and the Bureau of Indian Affairs that tribes have the capability, the knowledge and the foresight to control the destiny of its tribal lands. After all, isn't it true that we Native Americans and Alaskan Natives should know what is in our best interest?

The Cobell Settlement brings forth many questions to me, my tribe, and those tribes who were affected by the failure of the Bureau of Indian Affairs to properly provide "trust management" of our individual allotted tribal members.

Chairman Hasting what is paramount in "Indian Country" today, with this settlement, is the following; cap the lawyer fees to 50 million dollars, secondly, ensure that the tribes whom were wronged by the Department of Interior and the Bureau of Indian Affairs are properly and justly provided with the settle funds for repurchasing of fractionated or restricted lands.

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ment to a period of ten years. Mr. Chairman is it peculiar that those who violated the trust responsibility that put this federal government in a lawsuit, which it lost, is again in control of these dollars?

Mr. Chairman if this committee has the authority to act and make recommendations then please consider that tribes also lost lands due to the Homestead Acts which some would argue violated our great treaties. The allowance for tribes to purchase fee lands, within their original boundaries, with these settlement dollars would help correct historic injustices. Thank you.

Mr. YOUNG. Thank you, Lady, for your fine testimony. Richard, you are up.

STATEMENT BY PROFESSOR RICHARD MONETTE, UNIVERSITY OF WISCONSIN-MADISON SCHOOL OF LAW, FORMER TRIBAL CHAIRMAN AND CURRENT IIM ACCOUNT HOLDER

Mr. MONETTE. Good morning, Chairman Hastings, Chairman Young, Ranking Member Boren, and Members of the Committee, I am also honored to be on the panel with the Rosebud Sioux Tribal Leader.

Mr. Chairman, Ms. Cobell and the attorneys told us all that they would keep the class informed through a website. In fact, the court once noted—and I will quote: “The Plaintiffs generally have utilized their website as the primary means to communicate with class members.”

Well, more specifically, Mr. Chairman, on November 5, 1998, the judge struck from the complaint all of the claims that had to do with money, and we talked about this being potentially a \$17 billion case.

One of the reasons that it went from \$17 billion down to a much lower amount is because in 1998, in November, the judge struck from the complaint all of the claims that had to do with money, and he made it clear that the only claims that would survive were those that were about accounting.

And then he ordered, quote, “that the Plaintiffs within five days of this order shall post on the front page of Plaintiffs’ website, in a conspicuous manner, a notice to the class.”

However, in that very month, and months to follow, the website simply stated, and I brought a copy here if you would like to see it from November of 1998, there are no records to display for this month.

The single biggest event in the history of this litigation, and they didn’t tell the class. That was a common practice. In fact, it is fair to say that we were outright lied to all along.

I will say that the *Christian Science Monitor* wrote in an article in 2002, and they were quoting Ms. Cobell, and she said that “one of the persistent rumors I always hear is that I am somehow going to make millions of dollars in reward money for taking on the lawsuit,” she said, shaking her head. And then she said, quote, “I stand to gain no more than any other trust fund recipient.” Well, today, we know that Ms. Cobell stands to gain well over \$2 million from the settlement, while the vast majority of class members will receive less than \$2,000. She lied.

The Federal Court once wrote that it has been observed that by moving for class certification, the class representative and, in this

case Ms. Cobell, has voluntarily taken on a court-imposed fiduciary responsibility.

Evidently, Ms. Cobell does not feel that that obligation applies to her. It is safe to say that we all felt duped. Former Senator Dorgan has said that he is incensed at the amount of the request. He has intimated that Congress would not have passed it if he had known.

In a separate petition for attorneys' fees filed recently by the Native American Rights Fund (NARF), here is what they wrote. This is the Native American Rights Fund, who started this lawsuit. "Unlike the other attorneys who have petitioned the court for fees in this case, NARF is not seeking a premium, a bonus, or a fee multiplier." So I guess now we know even what NARF thinks about the attorney request.

If Members of Congress who moved the settlement, and NARF, which brought the suit, feel deceived, imagine why we, the IIM account holders, feel deceived about this lawsuit. There is a growing sentiment out there, in fact, that the request for \$223 million in legal fees is designed to make a \$99 million settlement look reasonable. Even \$50 million is not reasonable.

Lawyers take contingency fee cases all the time. They jump at the chance to win big. They run the risk of winning nothing. That is what happened in this case. They won nothing.

The trial court ordered \$455 million, and that an accounting could not be done. The appeals court said that an accounting could be done, and they vacated the \$455 million. That is where we stand with this case, zero dollars on the table.

They filed an intent to appeal with the United States Supreme Court, and then thinking that they were going to lose in front of a Republican-controlled court as they said, they withdrew their appeal.

And so we stand now with an appeals court opinion that says that they won nothing but an accounting. Ironically, maybe that was a win for some of us IIM account holders, because that is what we wanted, an accounting.

But when all they could receive was an accounting, there was no money in that for lawyers. So, very clearly, they went then and began to talk to this body, to the Department, and conjured up a lawsuit and a settlement so they could get paid a lot of money, and the rest of us very, very little. Thank you.

[The prepared statement of Mr. Monette follows:]

**Statement of Richard Monette, Associate Professor of Law,
University of Wisconsin, Madison, Wisconsin**

Good morning Chairman Hastings and Chairman Young, and members of the Committee. My name is Richard Monette and I am an Associate Professor of Law at the University of Wisconsin in Madison. I am an enrolled member and former Tribal Chairman of the Turtle Mountain Band of Chippewa, and an IIM account holder. I was invited to present my views on the attorney's fees portion of H.R. 887, specifically on the adequacy of the Plaintiff attorney's relationship with the unnamed members of the Plaintiff class, so I will limit my comments to those matters.

A sentiment is growing that Plaintiff attorneys' request for 223 million dollars in legal fees is designed to make a 99 million dollar request appear reasonable. Mr. Chairman, even 50 million dollars in attorney fees in this case is not reasonable.

Lawyers take cases on contingency fee bases all the time. They jump at the chance to win big. They run the risk of winning nothing. The latter is what occurred in the Cobell case.

As a factual matter, after nearly thirteen years Plaintiffs finally got a judgment from the Trial Court for 455 million dollars and a ruling that an accounting could not be done. However, the Trial Court's decision was appealed, and the Court of Appeals vacated, set aside the 455 million dollar award and ruled that an accounting could be done. Ironically, Mr. Chairman, the ruling from the Court of Appeals could be considered a win, since an accounting is what the IIM account holders actually wanted—no money, but an accounting. *ELOISE PEPION COBELL, et al., Plaintiffs, v. BRUCE BABBITT, Secretary of the Interior, et al., Defendants*, 30 F. Supp. 2d 24, 39 (D.C. D.C.) (“The plaintiffs have repeatedly and expressly stated that their Complaint does not seek an additional infusion of money or other damages for other losses, but rather requests only an accounting.”) The problem with that, to some, was the Court of Appeals' decision didn't put any money in the hands of the attorneys. By the way, it certainly didn't put any money in the hands of Class Representatives, since the Department of the Interior has stated publicly that it had in fact conducted an accounting of the IIM accounts for Ms. Cobell and named Class Representatives and found a variance of less than one hundred dollars.

At that juncture, Plaintiffs filed an intent to appeal with the US Supreme Court. However, apparently thinking they would lose, they never did complete the appeal. Rather they withdrew their intent to appeal and decided to take the route of colluding with the Department of the Interior, deceiving this Congress into creating a new Class of Plaintiffs and new claims that were never litigated, and then awarding millions to the lawyers who had thus far lost the case. To add insult to injury, a deal was offered for over seven billion dollars, but Plaintiff attorneys summarily turned it down, doing more to protect their own interests than those of the Individual Indian Account holders they represented. Frankly, they should get nothing.

Mr. Chairman, it's safe to say we all were duped. Former Senator Dorgan has said he is incensed at the amount of the request. In a separate petition for attorney fees, the Native American Rights Fund writes: “Unlike the other attorneys who have petitioned the Court for fees in this case, NARF is not seeking a premium, bonus, or fee multiplier.” Is it still a surprise that the thousands of unnamed Plaintiffs also now feel duped as well?

In a Legal Times blog on December 18, 2010 Plaintiff Attorney Keith Harper tells the reporter that the attorneys have in fact agreed to limit their fee claim. The sophisticated minds at the Blog understood them to be saying exactly that. If a legal publication understood the attorneys' to have agreed to limit their fees, then surely the average IIM beneficiary could not be faulted for getting the same understanding. And if the Blog (and other news media got it so wrong, wasn't it incumbent upon the Cobell attorneys to correct this mis-impression for the benefit of their clients? Class counsel have a high duty to the Class Members. These duties include loyalty, the avoidance of self-dealing, and truthfulness in representations to the Class. Having just litigated a case relating to the fiduciary duties of a Trustee, the attorneys were well acquainted with the fiduciary duties owed the Class. How can Class Counsel reconcile their actions relating to attorney fees with their duties to the Class? Should the inference of that bad intent be made?

Class Counsel assert in their fee petition that they had a written agreement with Class Representatives that they would recover a contingency fee of 14 percent of all funds provided under the settlement. If they had such an agreement and intended to use it to justify a fee greater than \$100 million, didn't they have a duty to reveal this to the Class? Didn't they have a duty to reveal this to Congress? The inference of improper behavior is further supported by statements made by Dennis Gingold after a Senator raised the possibility of limiting the amount authorized for attorney fees. Mr. Gingold told the press, and hence the Class, that “any change” to the settlement would render it null and void.” If the settlement is really good for the beneficiaries, how can an attorney who has a fiduciary duty to the Class, threaten to scuttle the entire deal if his fees are limited to a mere \$50 million? And how is it that the huge changes he is now requesting do not render it null and void?

Thus, Mr. Gingold and Mr. Harper were not telling the truth to the press, to Congress, and to the Class to which he owed a fiduciary duty when they said they would request fees between 50 million dollars and 100 million dollars, and they evidently flat out lied to us all when they said that changing the deal would render it null and void. We can never know how the truth might have changed the course of events. Would Congress have approved the deal knowing the attorneys would seek \$223 million? Would beneficiaries have been more vocal with Congress if they did not fear that the attorneys would scuttle the case if fees were limited? What we do know is this: there is no reason the deal cannot be modified if the parties want it modified. What we do know is that Congress has a special duty to Indians and that it can protect them from the rapacious greed of counsel who have failed to be straight with their clients.

The average members of the Class have been lied to all along. In the Christian Science Monitor Ms. Cobell was quoted as saying, "One of the persistent rumors I always hear is that I'm going to somehow collect millions of dollars in reward money for taking on the lawsuit," she says, shaking her head. "I stand to gain no more than any other trust fund recipient. . . ." Christian Science Monitor, "A Blackfeet's Crusade to settle accounts with US" March 20, 2002 (by Todd Wilkinson) Today she stands to gain well over two million dollars, while the vast majority of class members will receive less than two thousand dollars. "It has been observed that by moving for class certification..., the class representative has voluntarily taken on a court imposed, fiduciary responsibility." v. Pennsylvania Department of Corrections, 876 F. Supp. 3. 1437, 1457 (E.D. Pa. 1995). Evidently, that obligation does not apply to Elouise Cobell.

Ms. Cobell and her attorneys stated they would keep the Class informed through its website. However, in the period following the judge's order striking all money claims from the lawsuit and making simply an accounting lawsuit, the website simply stated: "Nothing to report". We now know why.

Mr. YOUNG. I was going to let you keep going. That sounded kind of interesting to me.

Mr. MONETTE. I have lots to go on.

Mr. YOUNG. And you can digress again as you go through this process. Thanks to both witnesses for the testimony that you have had. I am really interested in this, because as I said, I started this 17 years ago with that group that you talked about.

And we really believed that it was more than \$17 billion, and that the judge messed that up a little bit, but to have a settlement, and then have that money taken away, and have the Plaintiff have \$2 million as you said, that is very interesting to me. So we will continue on that.

Do you have a statement, young lady? You said it has been a tough day already, and we are not even up to eleven o'clock, or 11:30.

Mrs. NOEM. Well, I have just been behind schedule today. I was over on the Senate side.

Mr. YOUNG. Oh, that is a dark place. Don't ever go to the dark place.

Mrs. NOEM. I know, but I would appreciate the honor of introducing Patricia, who is from South Dakota, and if you would allow me that leeway, Mr. Chairman, that would be great.

So, thank you, and it is my great honor to introduce Patricia Douville, Council Representative of the Rosebud Sioux Tribe of South Dakota, my home. Patricia was born and raised on the Rosebud Indian Reservation, and represents the Ring Thunder Community.

I had the pleasure of meeting with Patty over the last few months, and it has been wonderful to hear from her first-hand some of the successes, as well as the concerns, of the Rosebud Sioux.

So thank you for coming to testify today, Patty, I appreciate that. It is wonderful to see you again, and I know that you have already given us your statement, and I thank you for that, and I look forward to working with you again in the future. Thank you, Mr. Chairman.

Mr. YOUNG. Thank you, Lady, and Mr. Boren, you have some questions?

Mr. BOREN. I have a few questions, Mr. Chairman. There is always a South Dakota connection, and as I mentioned to Mrs.

Noem, my wife is from Aberdeen, South Dakota, and so there is always somehow where we are connected to South Dakota.

Let me start out by saying that the court has issued a stay, and so the reason why the witness list here is a little bit thin is because there are a lot of people who may want to talk, and who may want to share their opinions, but they are bound by the court decision that they can't share their thoughts with us.

And I want to go to Mr. Monette here just quickly. You know, you are a law professor. How do you feel about Congress ejecting itself in active litigation? Does this implicate separation of powers and due process principles? Do you have any pause there when Congress tries to interject itself in the middle?

Mr. MONETTE. I think it is fair to say that I normally would have pause, but Congress has set the threshold for this settlement, and I think the fact that Congress maintains its jurisdiction in doing so.

Mr. BOREN. So in any other case, because this is the Cobell case, you would say that the Congress should not interject itself? I mean, this is special because it affects you, or because—what is the—

Mr. MONETTE. I will be in court making the argument that Congress has already injected itself. Congress waived the rules of civil procedure, the Federal rules, yet said that they would waive them so that the court could certify the second class, the Trust Administration Class, which had never been presented to the court.

The class had not been certified, and it could not be certified because there is no commonality or typicality among the members. And Congress invoked its Article I powers to create that jurisdiction under the Court's Article III powers. We have some pretty clear arguments in our court that that is inappropriate.

In fact, there is a recent quote from Justice Scalia, and in fact quoting another case from before, talking about, and I will quote, "the astounding principle that Congress can invoke its Article I powers to expand or contract the Court's Article III powers."

That is what the Congress did in this settlement in the first place. It expanded the Court's Article III powers in a way that the Court could not have done on its own. It did not and could not have had that case or controversy in front of it.

That is why on November 5, 1998, that is why the case went from \$17 billion down to a much lower amount, because the Court had to extract all those monetary claims because it knew that it did not have the jurisdiction.

And it was not just because Congress had not waived its immunity. It is because the Court had not certified a class, and I said that earlier. If the Court thinks that it can certify this class, and if Congress thinks that it can, then make the court do it.

Then come back and settle that if you want, but let us first see if the court can exercise its Article III jurisdiction and certify that class, and it could not.

Mr. BOREN. OK. So as a legal scholar would you agree that the Court does have discretion to award a greater or lesser amount to class counsel in suits such as these? Do they have that authority?

Mr. MONETTE. Generally the judge has discretion. Now, we have a long history in Indian Country of limiting attorneys' fees in land claims to 10 percent of the claim, and there have been a lot of law-

yers that got very wealthy off of that in the last 70 or 80 years, and that should be followed here.

Based on what DOJ said they actually won—I mean, we can hear about 14 years of litigation, but the fact of the matter is that they lost that. Then we had six months of negotiation. \$223 million is a pretty good deal for six months of negotiating behind closed doors.

What they should get is what they won, 10 percent of \$360 million, tops, and nothing beyond that.

Mr. BOREN. OK. I may have some further questions, but I am going to yield back right now. I am going to yield back.

Mr. YOUNG. I thank the gentleman. Mr. Labrador.

Mr. LABRADOR. Mr. Chairman, I just have a statement from a citizen of the Nez Perce Tribe, and I just want to ask for unanimous consent to insert it into the record.

Mr. YOUNG. Without objection, so ordered.

Mr. LABRADOR. And I yield back to the Chairman.

[A letter from Gary Dorr, Citizen of the Nez Perce Tribe, submitted for the record by Congressman Raúl R. Labrador (R.-ID), follows:]

Gary Dorr
Citizen of the Nez Perce Tribe
Enrollment No. 2528
P.O. Box 202
Worley, ID 93976

The Honorable Don Young
United States House of Representatives
Chairman, Subcommittee on Indian and Alaska Native Affairs
Washington, D.C. 20515

Dear Mr. Chairman:

I strongly support H.R. 887, Section 2. I am a Citizen of the Nez Perce Tribe, IIM Account holder, and an owner of farm land held in trust on the Nez Perce Indian Reservation. Many of the Indians in the Pacific Northwest who are in possession of trust land being leased by Commodity farmers have not been adequately represented by the Cobell Legal team inasmuch as the settlement will not fairly compensate all Indian land owners equally. The Cobell Legal team did not take into consideration the most basic of all land leasing concepts used with regularity by the Pacific Northwest Indian Land Owners. As stipulated in 25 CFR 162.227, Indians have always been allowed to negotiate direct pay from their lessors. Pacific Northwest Indian lessees utilize this form of payment for grain or other commodity crops. This process means that the farmers pay the Indian Land Owners Directly in lieu of directing payment through the Bureau of Indian Affairs or Office of Special Trustee by way of the Individual Indian Money Accounts (IIM Accounts).

As it stands now, the Cobell Settlement will pay for an Historical Accounting Class and for Trust Administration Class. As I understand it, any Indian who has had an IIM Account is part of the Historical class. Any Indian who had money passing through the IIM Account will receive five hundred dollars or more depending on how much money passed through the IIM Account as part of the Trust Administration Class. If my sister who lives in California elected to receive her crop payments from our Nez Perce Reservation land through her IIM Account, which would have been legal, and I elected to receive Direct Payment from the farmer on our land on the same lease, then under the Cobell Trust Administration payment schedule my sister will stand to gain more than I would for the same piece of land, for the same mismanagement, for the same historical background on the land handed down to us from our ancestors. This payment schedule as stipulated under the Trust Administration Class portends to create even more mismanagement of funds rightfully gained by Indian Land Owners a situation which should have been more than evident when this esteemed group of legal professionals undertook representing all Indian Land Owners without their consent.

Secondly, the Historical Accounting Class will also unfairly award some Indian IIM Account holders. That an Indian held an IIM Account is not merely an accept-

able reason to receive a payment for the Cobell Settlement. The reason is rather simple. Not all Indians receive money through their IIM Accounts for leasing or land use. We have multiple thousands of Indian children who receive Tribal per capita payments which are held in their IIM Accounts and are released when they turn 18 years of age. Many of these children are in receipt of their Tribe's Casino per capita payments. There is no other reason some Indian Children have or had an IIM Account between October 25, 1994 and September 30, 2009 other than they are or were receiving Tribal per capita payments. There was no mismanagement of trust assets in many of these incidents because not every Indian is a land owner. Many of these accounts can be reviewed by the Tribe and the Individual Indians to see that, given the relatively short time frame and miniscule number of per capita payments, this particular group of Indians has been paid exactly what was deposited and owed to them. Yet, as part of this Cobell Settlement, they will be receiving one thousand dollars for a mistaken belief that they have had trust assets mismanaged. Again, the apparent lack of understanding on the part of the Cobell legal team has led to what will once again result in further mismanagement and depletion of funds due to Indian Land Owners.

I feel that based on these two strikingly obvious mistakes and a litany of additional mistakes as articulated by Richard Monette and others, that the Cobell Legal Team has not represented the best interest of all Land Owners. In light of the fact that now we will not be able to come back and resolve this after this settlement unless we opt out of our respective classes, I strongly support this Subcommittee's actions to take effective and resolute action to limit the payment given to the Cobell Legal Team to 50 million dollars. We Individual Indians have been put between a rock and a hard place and there is no recourse of going back as a result of the manner in which the Cobell Legal Team has ramrodded this shoddy settlement through the courts supposedly on behalf of all Indians.

The Cobell Legal Team now claims to have represented us without our consent and sought to represent all of us without consulting with the most learned of all Indians, the Individual Land Owners. This group of Individual Land Owners is now beset with a terrible struggle to gain effective legal representation on our own if we opt out because many of our lawyers will be representing Tribes, which is a different class altogether.

This situation of further mismanagement of Individual Indian Assets created by the Cobell Legal Team is regrettable, unacceptable, and must not be rewarded with funds which will be withdrawn from the very class of people being represented. I strongly support the limitation of payment to the Cobell Legal Team to 50 million dollars. I know of other Indians who also support limiting payment to the Cobell Legal Team and oppose the entire Cobell Settlement, but have neither the means nor the support of their elected leaders who are representative of a different class to gain any significant momentum to oppose the entire Cobell Settlement.

I thank you and the other members of Congress for your time to consider the plight of an Individual Indian Land Owner in this grave situation, and I hope for adequate relief from further mismanagement of Individual Trust Assets, which would be further amplified if the Cobell Legal Team received more than 50 million dollars.

Sincerely,

Gary Dorr,
Citizen of the Nez Perce Tribe
Enrollment Number 2528

Mr. YOUNG. Mr. Kildee.

Mr. KILDEE. Thank you, Mr. Chairman, and thank you for having this hearing. I am not an attorney, which is sometimes an advantage and sometimes a disadvantage. But I think all of us at this table have purity of intention, and we want to do what is just and what is right.

I have some concerns about opening the case up in some way and maybe putting something in jeopardy, and so I am going to be very cautious on that. But I do recognize that everyone up here has a record and a background that shows the purity of intention. But sometimes I look at unforeseen consequences and I want to be very

careful with that, and with that, I will yield back the balance of my time, Mr. Chairman.

Mr. YOUNG. Ms. Noem.

Mrs. NOEM. Thank you, Mr. Chairman. I have a question for Ms. Douville. Thank you for your testimony. It highlighted an important issue that the Cobell Settlement brings to light, which is that the Bureau of Indian Affairs has not measured up to its trust management responsibilities.

So what suggestions do you have for BIA to further and to better fulfill their responsibilities?

Ms. DOUVILLE. What I believe is that the Department needs to get the Tribes, the Native Americans, involved in all the decision making for a true government-to-government consultation, so we can be equal partners sitting at the table, and making decisions. As I have stated before, we are capable and knowledgeable of doing for ourselves.

Mrs. NOEM. OK. A follow-up question. Could you tell me a little bit about the Tribal Land Enterprise, or the TLE, and how those lands are used? Specifically, how they benefit the Tribes.

Ms. DOUVILLE. OK. Well, it is obvious that we know how to best manage our lands, and the government should not be getting in our way of allowing the lands to be used by the Tribes as we see fit is the best for us, but in accordance with our treaties. We know how to develop and we know what we need, but the government has to remember that they do have trust responsibilities to us.

Mrs. NOEM. Is there anything that is preventing the Tribe from using land consolidation funding to buy fee lands within the boundaries of the reservation?

Ms. DOUVILLE. Well, with this settlement, yes, there is. It states in the settlement that only fractionated or restricted lands could be purchased with this. But what we would like to see is that fee lands would be able to be purchased with those monies also.

Mrs. NOEM. OK. Thank you for that clarification. I appreciate it. I yield back the balance of my time, Mr. Chairman. Thank you.

Mr. YOUNG. You guys are short today. Mr. Luján.

Mr. LUJÁN. Mr. Chairman, thank you very much, and I would very much agree with the sentiments that were shared by Mr. Kildee as well, and making sure that in the end, I think that we all share the same goals.

As far as making sure that we are able to provide some resolution to the many years that many of our Tribal brothers and sisters very clearly were discriminated against, and as we talk about how this funding should have gone to many people, and it didn't.

And in the end, I hope that is what we are able to concentrate on, and I would ask Ms. Douville and Mr. Monette if you would agree with that?

Mr. MONETTE. Very much.

Ms. DOUVILLE. Yes.

Mr. LUJÁN. With that being said, Mr. Chairman, learning from the last hearing, I will make sure that I submit some of my comments into the record as well. But a question that I have for Mr. Monette is that in your written testimony, you state that there is no reason that the settlement cannot be modified if the parties want it modified.

Being that there is a settlement that was put forth for approval before Congress, doesn't that indicate that the parties to this settlement have already agreed to the stipulations of the settlement?

And if they don't want it modified, how would that impact it?

Mr. MONETTE. Well, I guess some of it is to put all of that in context. I think that it is fair to say that what I said earlier is that this settlement can be modified by this body for sure.

And as I made my point, I hope earlier would not be a violation of any separation of powers at all. But we had witnesses from the Cobell camp testifying here, as well as in the newspapers, saying that when in the first instance the Chairman of this Committee, and including the Member on the dark side, on the other side of the Hill, also proposed to limit the attorneys' fees, the attorneys for Cobell said that any modification would render the settlement null and void, and that there could be no changes.

And when he said that, what was on the table at the most was an agreement that they told all of the class members, and told all of you, that they would limit their fees between \$50 million and \$99 million.

So to me, I mean, if he is asking for \$223 million. It sounds like he wants to render the settlement null and void. So in the court can it be modified?

Mr. LUJÁN. But, Mr. Monette, the position that that individual may have taken, does that fundamentally change the language associated with the agreement? I guess I am not following. I don't know that.

Mr. MONETTE. Well, we unnamed class members, and I appreciate the opportunity to testify for a lot of them that don't have the money to pay for million-dollar lawyers, we unnamed class members are owed huge obligations when a class settlement is made.

But when a class action is certified, and in fact as I read earlier, the sort of trust fiduciary responsibility that is imposed on the class member, the attorneys become the trustee for the unnamed class members, because they are not at the table, and they don't know the negotiations that are going on.

The judge becomes a trustee, and the model professional rules put a very high standard on the judge, as do the Federal Rules of Civil Procedure, on the judges. Of course, we have a trustee down the street, and we know where we have been with that one.

It is unfortunate that where we have been with that one that we feel like that we have been in the same place with the rest now.

Mr. LUJÁN. Mr. Chairman, if I could get back to the question, which is fundamentally what I think I have heard from some of the questions is that if you change the settlement agreement, and if there were amendments that were made, wouldn't it render the settlement null and void under the terms of the settlement agreement?

And wouldn't that potentially force parties back to resuming litigation?

Mr. MONETTE. If this body does it, I don't think it would. If you are asking me do I think it would be a good idea to take them back to the table and make them certify that second class, and actually litigate the claims, I would prefer that that occur. Absolutely.

Mr. LUJÁN. And, Mr. Chairman, the question is that if changes were made to the settlement, wouldn't that render the settlement void under the settlement agreement?

Mr. MONETTE. If we have an understanding that the contingency fee arrangement that we have not heard about, this 14 percent, was well hidden and is not part of the settlement, then I can agree.

Mr. LUJÁN. Let me ask it this way, Mr. Chairman, could it jeopardize the settlement agreement if it is amended?

Mr. MONETTE. Yes, and it should.

Mr. LUJÁN. Thank you, Mr. Chairman. I yield back my time.

Mr. YOUNG. Just for the gentleman's information, what concerns me the most is that I served on this Committee, and I have watched this as I said for 17 years. It was my understanding that the agreement was between \$50 million and \$100 million.

And I thought that \$100 million was extraordinary. Now, the Cobell attorneys took a cheap shot at me, and I will not forgive them for that. They thought that I was the originator of the bridge to nowhere, and if you really want to get me pissed off, you just mention that a few times, and that we had no right to do it.

And we were not aware of this on the Senate side, nor the House side, and then to disclose that after the fact is I think—that it does not have anything to do with the agreement.

I really believe that the agreement, if we wish to have it stand, should stand, and with the understanding of what fees would be paid. Ten percent is a standard fee, and I have said that \$99 million was awful high, and then to come back with \$223 million, and then have the Plaintiff say this will jeopardize the settlement, that was not part of the settlement.

It was not on the table, and that is where the frustration comes from the Chairman and myself. That was uncalled for because I don't believe that there would have been a settlement reached even with the Justice Department, if they were aware of that.

Now, that is what we want to find out, were they aware of it, and was the Department of the Interior aware of it, and if they were, we were not aware of it, and we were the ones that had to pass the law.

And we did that with the understanding that we wanted a settlement done, and that there would be a payment to the lawyers of a certain amount, between \$50 million and \$100 million.

And now we come out and here it is \$223 million. That is where I think that if we were to change the legal fees, how could it destroy the agreement. I don't understand that. The good lady from Hawaii. I love being the Chairman. I can talk all day long, but go ahead.

Ms. HANABUSA. Thank you, Mr. Chairman. Mr. Chairman, and thank you for the witnesses here, I was not here, and so please bear with me. I do happen to be an attorney, and Professor Monette, I am also very familiar with class actions.

One of the things that I am curious about is that in a class actions case, the fee is usually determined by the court after a hearing. Has that fee amount been determined yet? My understanding is that it has not.

Mr. MONETTE. The fee amount has not been determined yet.

Ms. HANABUSA. And it is also clear from what has been presented that there was some agreement that it would be between \$50 million and \$100 million, and it seems like the Class Plaintiffs' attorneys, have requested \$223 million. Am I understanding that correctly?

Mr. MONETTE. They said that is what they deserve in the case, and to the court.

Ms. HANABUSA. But have they requested \$223 million from the court, or is it—

Mr. MONETTE. They did not request anything beyond that statement, and so it sounds like their request.

Ms. HANABUSA. So we really don't know at this point in time whether they are going to breach the \$50 million to \$100 million by going in for \$223 million. Would that be a correct statement?

Mr. MONETTE. We don't know that they are going to get any more than the hundred-million. Well, right now we don't. That is still to be determined.

Ms. HANABUSA. So it would seem to me that it would be proper for Congress to take the position that what Congress' understanding was as to the fee structure, but it seems like there may have been an understanding of somewhere between 50 and a hundred, but not the \$223 million, which they may request, which they have not done at this point in time. Do you agree with me?

Mr. MONETTE. I would agree that Congress seems to have authorized between 50 and a hundred-million.

Ms. HANABUSA. But not anything more than that?

Mr. MONETTE. But not anything more.

Ms. HANABUSA. And that would be something that I would assume that the Court, in making an understanding and determination as to what the fee structure should be, that they would take into consideration what Congress' understanding was. So wouldn't you agree with me on that?

Mr. MONETTE. One would hope. Yes, I would agree with you on that.

Ms. HANABUSA. Thank you. Now, Ms. Douville, one of the things that I am interested in here in reading what has happened is this concept of fractionation, and how it would come to that.

The BIA actually is authorized to do that within 10 years, and your concerns are very valid, but what I am also concerned about is that as these lands are purchased—and I think in your testimony, you said in fee. Were they intended to be purchased in fee, and become part of Indian Country at that point?

Ms. DOUVILLE. Yes. Right now the fee lands that we have on our reservations, we purchased that on our own, and we would like to see this money be used also to be able to purchase those, because in the settlement, it does say that only fractionated or restricted lands can be purchased with this.

Ms. HANABUSA. So that is the \$1.9 million portion of the settlement?

Ms. DOUVILLE. No, \$1.9 billion, yes.

Ms. HANABUSA. Yes, \$1.9 billion. The thing that I am curious about is that my understanding is that Indian Country is held basically in trust.

Ms. DOUVILLE. Yes.

Ms. HANABUSA. So the concept of purchasing it in fee, and then it would then become part of Indian Country. So it would then be held in trust for—would it be a Tribal entity?

Ms. DOUVILLE. For the reservation.

Ms. HANABUSA. For the reservation itself?

Ms. DOUVILLE. Yes.

Ms. HANABUSA. And that would of course then protect any of that purchase from being taxed by any other governmental entity?

Ms. DOUVILLE. Yes, it would be non-taxable.

Ms. HANABUSA. Yes, and that was my concern. When I saw the purchase and fee, I wanted to be clear that the purchase and fee would result with no tax.

Ms. DOUVILLE. Yes.

Ms. HANABUSA. Thank you. And you, of course, also object to any of the monies—and I assume that is because you view it as taking away from the purchasing of the land if the attorneys walked off with this unconscionable amount of money?

Ms. DOUVILLE. That is just an outrageous amount of money to be taking for what little they have done basically.

Ms. HANABUSA. And you are a class member?

Ms. DOUVILLE. I am an IIM account holder, yes.

Ms. HANABUSA. And you would, of course, object at any proceeding that the court may hold on the issue of attorneys' fees?

Ms. HANABUSA. I object to the attorneys' fees even being at \$50 million right now.

Ms. HANABUSA. I understand that, but it seems like Congress may have approved somewhere between \$50 million and \$100 million.

Ms. DOUVILLE. Yes.

Ms. HANABUSA. Thank you very much. Thank you, Mr. Chairman.

Mr. YOUNG. Mr. Labrador

Mr. LABRADOR. Thank you, Mr. Chairman. I just have a few questions. I am trying to understand the issue a little bit better. I am new to the Congress, and I was not here when the settlement was approved.

And it seems like it is one of the few issues where maybe there is some bipartisan support, and some bipartisan questions also. So I just want to understand, kind of following up the good gentle woman from Hawaii's questions. If the attorneys signed a document that said that we are not going to ask for anything more than \$99 million would you agree to that?

Mr. MONETTE. I would never agree to that

Mr. LABRADOR. You would never agree to that?

Mr. MONETTE. No. Before this body was duped into enabling that settlement last year, I came here and argued that the monetary claims had been taken off the table, and if this body had not put those claims back on the table, we would simply be talking for an accounting, and the attorneys would be way, way less than that. Let us talk \$1 million or \$2 million.

And that is actually what they won. They did not win anything beyond that. They came here and convinced the Department and this body that they had done all this work, and had won things be-

yond that, and this body authorized a settlement that had an agreement between \$50 million and \$100 million.

It never should have done that. I will never agree with that. Now, if you are asking me a legal question did this body authorize it?

Mr. LABRADOR. Yes.

Mr. MONETTE. It did, and this body should undo that

Mr. LABRADOR. So that is a different question. So I just want to understand where you are coming from. Your statement then is that even if they told you right now that they went to the court and they said \$99 million is the most that we are going to ask for, you are not in agreement with that, correct?

Mr. MONETTE. I am not in agreement with that

Mr. LABRADOR. Patricia, how about you?

Ms. DOUVILLE. I don't agree with that at all. For one thing, if they did the due diligence that they should have, then the people in my region, in our area, the large land-based tribes that are going to be affected mostly from this settlement, did not get any information, and was not even properly informed as to what this settlement entailed, who was a class member, or even if there was going to be a monetary value placed on to it.

I, myself, as an IIM account holder, just got mail, something in the mail saying do you want to be a class member or do you not. There was nothing really available to us.

So a lot of the class members, first class members, don't really understand the settlement, and don't know what it is really going to do for us.

Mr. LABRADOR. So, in essence, you are more here to try to have us invalidate the agreement, and not necessarily argue about attorneys' fees?

Mr. MONETTE. I am here asking that the attorneys' fees be based on what they in fact won. If the agreement stays in place, fine. Well, I am not fine with that either, but—

Mr. LABRADOR. Well, that is not what I am asking. So you want the attorneys' fees to be \$1 million or \$2 million?

Mr. MONETTE. I want the attorneys' fees to be based at most on what all the parties agree that they might have won on the accounting part of this case, which is the only class that was certified, and the only claims that were litigated, the only litigation that was ruled upon by a judge.

Mr. LABRADOR. Thank you. I have no further questions.

Mr. YOUNG. Mr. Boren.

Mr. BOREN. Thank you, Mr. Chairman. I just have—I want to make some clarifications here. We have a lot of numbers that are being thrown out. You just mentioned \$2 million, and you just mentioned 10 percent, which is roughly \$30 million.

We have a number between \$50 million and \$99 million. I think the attorneys actually asked for \$99 million, but then in some of their submissions, they said that it could go up to \$223 million.

And I think that all of these numbers that are floating around goes back to why we need the judiciary to make this determination. We have as a Congress said between \$50 million and \$99 million.

The thing that I am most worried about is let us say whatever the number is that they come up with, and I am of the opinion that

it should be lower. But let us say they come up with a number that not all of us can agree on.

We open this back up again and we are sitting here 20 years later, and Mr. Kildee, and Mr. Young, and other people who have been here a long time, have worked on this issue for Indian Country.

The last thing that I want to see are these account holders not getting their money, and the people not being served, and a real accounting not being done. So I think that we have a hearing in June that is coming up, and some further hearings on where we might go, and they may come back, and the judge may come back because it is at his discretion, and be at a lower number.

So I think that we may be a little bit premature in doing anything. I think that this hearing is very important, and I thank the Chairman for having it, but we may be back, let us say, in July having to revisit this issue, because we may, as Mr. Kildee said, I think we all have purity of heart. We want to do what is best for Indian Country and for Tribes.

I am not an attorney, just like Mr. Kildee is not an attorney, and so I may be wrong in some of my statements, but I think this is an ongoing fluid process that we will hear more about in the coming days, and I thank the Chairman for having this hearing.

Mr. YOUNG. Mr. Gosar.

Dr. GOSAR. Professor, you seem to take a strong position that the Plaintiffs' class action attorneys had a conflict of interest, and even sold out the class for less money than what was offered in the settlement, simply to ensure a payment for the lawyers.

Are there any professional rules of ethics in the legal profession that prohibit these kinds of dealings? And what exactly should the class counsel have done under the circumstances; and last, has a bar complaint been filed, or should one be filed?

Mr. MONETTE. I do believe that there are conflicts. The Federal Rules of Civil Procedure has several provisions that address the kinds of conflicts that we have here. I think that it is fair to say that several people are contemplating bar complaints.

I have been contacted by different people in that regard. I think to put the matter squarely on the table, if they have cover in what they have done, it is because of what this body did.

I mean, it is high time to defer to the judiciary now. Last year, this body gave the judiciary jurisdiction over a lawsuit that it didn't have. The Constitution requires a case or controversy, and with the Trust Administration Class, there was none.

There was no case or controversy, and they could not bring it. That is why they had to come here to have this body do it. So what we get is this body teasing up a settlement to get some buy-in from Tribal leaders and others, and we get these other things put on the table, such as scholarships and consolidation money.

Now, with the Member who is familiar with class action lawsuits, would then be familiar with reverter clauses in settlements, in themselves are not a dirty word. Sometimes they are defensible.

But when a reverter clause is used simply to inflate the settlement as a means to inflate the attorneys' fees, those reverter clauses are frowned upon by everybody that I have read. We have a reverter clause in the settlement.

Now, your DOJ people last year testified that it was not, and it says that if all the money is not spent in the consolidation program, it shall return to the Treasury. Now, the only way that it could be more of a reverter clause is if it used the word revert instead of return. But it is a reverter clause in every sense of the word.

And so we get this \$2 billion added on to make this look like a big settlement to justify the inflated attorneys' fees. That is the classic kind of reverter clause that is frowned upon by every court in the land.

And so, yes, it is fair to say that there is a conflict. It is fair to say that perhaps the class members should have known what was going on all along, and you all had a discussion about whether you knew, and whether the Department. How about the client? That might have been nice if we had known what was going on.

We didn't, and so absolutely I think there is a conflict, and I think that people will raise those conflicts, and I wouldn't be surprised to see a bar complaint as well.

Dr. GOSAR. And how formally would you put that in place?

Mr. MONETTE. How formally would I?

Dr. GOSAR. How would you formulate that to go into fruition if that was the case?

Mr. MONETTE. Well, I appreciate the question, and with all due respect, if I am the one who is going to do that, I don't think that this is the appropriate body to say that.

Dr. GOSAR. Thank you. Ms. Douville, you take issue with the BIA's management of Indian Affairs. Many of the Tribes in my district have told me of the great difficulties with the BIA's incompetence in delaying an action.

These Tribes ask us for block grant funding so that they can decide how and when to conduct their operations on their own lands without a bureaucrat intervening. Do you share these sentiments?

Ms. DOUVILLE. Yes.

Dr. GOSAR. Do you have problems with BIA mismanagement?

Ms. DOUVILLE. Yes, I do.

Dr. GOSAR. Can you specify?

Ms. DOUVILLE. What I have a problem with is how we are not consulted. We are never at the table. We are never invited to the table, and we as Tribal leaders and Indian people, and Tribes, we know like I have said, we know what is going on with us, and we know what is in our best interests.

Dr. GOSAR. Do you think the tribes will be more self-reliant if we used block grants?

Ms. DOUVILLE. Yes.

Dr. GOSAR. So that would take us down the road instead of waiting for a bureaucrat to make a decision?

Ms. DOUVILLE. Yes, that would help us, but like I have said before, there are constitutional mandates with our treaties that the government needs to keep in mind, and that it is the law of the land. That is part of our constitution, and the BIA does have trust responsibilities to us.

Dr. GOSAR. I understand. Thank you very much.

Mr. YOUNG. Would anybody else from this side like to ask any more questions? Everybody is quiet? And you are a lawyer? I would watch you. Anybody on this side?

Ms. HANABUSA. Mr. Monette, I understand, and I hear loud and clear your frustration. Are you an actual certified—did you opt in as a class member?

Mr. MONETTE. I still have my letter sitting on my kitchen table, but you will recall that in the one class, you passed a settlement that doesn't allow me to opt in or opt out. I am stuck.

Ms. HANABUSA. I was not here. I am sorry.

Mr. MONETTE. OK. So they passed this class that said that we can't opt out, which may in fact raise some other Constitutional issues as you may know.

The second class that this body created in order to inflate the fees, we can opt out.

Ms. HANABUSA. But the first class, if I understand what you said, is an accounting, right?

Mr. MONETTE. Right.

Ms. HANABUSA. And you have no objections to that decision, and that is the proper class as far as you are concerned as I hear you?

Mr. MONETTE. I hold three separate IIM accounts, and I thought after 14 years that I was going to get an accounting. That is what I wanted.

Ms. HANABUSA. And that is really all that you said that you wanted in terms of a remedy, was the accounting?

Mr. MONETTE. That is what all of us thought we were getting from the people that I have spoken with, and that is what they wanted. Now, if you want to write a \$100,000 check, I will take that, too, but we wanted an accounting.

Ms. HANABUSA. But then you need the second class for that?

Mr. MONETTE. No, you don't need a second class. You need Congress to authorize it, just like they are doing it for lawyers.

Ms. HANABUSA. But the second class, or the second part that we are discussing now, which is the issue of where the attorneys' fees is falling into, that you are saying is what Congress authorized?

Mr. MONETTE. Yes.

Ms. HANABUSA. Because as I understand from what little I have read on this, is that there was no class certification on any other issue other than the accounting portion. Is that correct?

Mr. MONETTE. Right. That is right.

Ms. HANABUSA. No, I have not read the Cobell Settlement, but I intend to do it now. My understanding is that there has never been any adjudication of anything as to the merits. It is just that the settlement was reached and that settlement has become a public document, correct?

Mr. MONETTE. Correct.

Ms. HANABUSA. So how does that public document, or in terms of the settlement, which is usually as a result of the class action that is filed, how does that then interface with what you are saying Congress did?

Do you understand what I mean? You have a legal document, a class action, and a complaint which requests certification, which according to you on the issues that the Congress then addressed, was not certified, and was not before the court.

So somehow what you are saying Congress did, and what was not before the Court, has somehow got to be melded together to become the Cobell Settlement?

Mr. MONETTE. It is a fascinating, and one of the most convoluted stories that I have ever come across. Congresswoman, the judge, on November 5, 1998, of his own accord, not being asked by the Plaintiffs or the Defendants, struck wording from the complaint.

And all of the wording had to do with whether we were asking for money, because he said I don't have the jurisdiction over that. So I will strike that all out so that we are going forward simply on an APA type of ex parte, waiver of sovereign immunity claim. And so that is why it proceeded on that.

Fourteen years later, when they come to Congress with the first class that was certified and the court had jurisdiction over, they added in a second class that was not certified, and that the court did not have jurisdiction over, and would not unless Congress did what it did.

And that is not to say that what Congress did is constitutional, simply because of what I am saying, is that if the court thought it had a case or controversy in front of it, it would have certified that class before it sent it to Congress, but it didn't, and it couldn't.

So it asked you all to do it, and so this body then created a case or a controversy, the legislation, in invoking Article I powers for an Article III court. That likely is unconstitutional as well.

Ms. HANABUSA. Then I think that if you feel that way, you would challenge it.

Mr. MONETTE. I intend to.

Ms. HANABUSA. And that is what I thought you were going to say. Now, given that scenario, there still is this document called the Cobell Settlement that has been entered into court, and that was arrived at how, if you can tell me?

Mr. MONETTE. That was arrived at when they lost at the trial court, and it went to the appeals court, and they vacated the money, and said an accounting can be done. Now they are going, crap, now the highest court that we have gone to says that we have to do an accounting.

And they are learning that perhaps the accounting is not as bad as they thought. In fact, the Department of the Interior came out publicly at that time and said we have done a complete accounting of the five named class representatives, and there is a variance and a total of less than \$100. Those are the Named Plaintiffs.

So at that point, they filed in the Supreme Court, and thinking that we are going to lose. We are going to lose on a variety of grounds here, particularly because if the Court orders any money, we are in violation of the Tucker Act precedent.

So that is where the story takes over, and so they come to this body and do what they did. Well, maybe more specifically on your question, they then went behind closed doors at the Department of the Interior, and the Department of the Interior said, well, perhaps we will help you get this settlement through, and what is in it for us.

And the Plaintiffs' lawyers said, well, how about if instead of just settling all these accounting claims, how about if we let you guys

off the hook on all these oil, and gas, coal, and water claims that these Indians have as well.

We will let you off the hook and put that on the table. A few people said you don't have the right to put that on the table. Either side. It is not part of the lawsuit. They put it on the table and brought it here, and got this body's stamp of approval on that.

Ms. HANABUSA. Thank you. Thank you, Mr. Chairman.

Mr. YOUNG. Mr. Gosar.

Dr. GOSAR. Just two quick questions, Professor. How is it that class action counsel can seek over \$220 million for legal fees, but the average class member gets about \$2,000?

How is it that that type of disparity is fair and reasonable to the injured party? Are class action lawsuits simply a way for attorneys to get rich by using claimants like the Cobell Plaintiffs as straw men?

Mr. MONETTE. Right. It is becoming known as the settlement class action, and not settlement of a class action, but a settlement class action, put forth simply for the purpose of settling.

And in fact it has evolved so that we save more time, and money, and efficiency, and you will get a Merck, or a Pfizer, or somebody who will get these kinds of settlement class actions, and simply say, look, let us go in the back room and settle it, OK?

And they have never even gone through the exercise of establishing or certifying a class, establishing jurisdiction, and the courts and the law professorate are increasingly frowning on that, because it is starting to put some real twists and glitches in the law.

Dr. GOSAR. So restrictive reform should be enacted or should be looked at in regards to that?

Mr. MONETTE. Absolutely.

Dr. GOSAR. Thank you very much.

Mr. YOUNG. If there are no more questions, I am going to ask a couple of questions. If anybody wants to leave, fine, just whatever you want to do.

Richard, has the Plaintiffs lawyers received any previous compensation in this case?

Mr. MONETTE. They have.

Mr. YOUNG. What amount was it, and what was it for?

Mr. MONETTE. If you can figure that out with me, because that is like pulling teeth. Talk about digging for the needle in the haystack. They have—and in fact when they have won on those rare occasions in these 14 years, they made petitions under the Equal Access to Justice Act, and got paid.

And I am told that it is in the millions. They got paid when they actually won a motion. They want money now over and above that, but I can't figure out how much. I did not file a FOIA because you all thought that you were going to get that information last time, and evidently you have not, and I haven't either.

Mr. YOUNG. Now, as a lawyer, and I have some lawyers, and I have a nice one sitting at the front dais up here, I want to know why we don't know who—well, who paid it? Was it the taxpayer?

Mr. MONETTE. The taxpayer did, and because of that, of course, we should have a right to find out. I will say that I just did not pursue it as much as I should have, because this body thought that

it was going to, and I guess I was going to wait until you did, and told us all.

Mr. YOUNG. But if it is the taxpayers, then we have a right to know how much.

Mr. MONETTE. Absolutely.

Mr. YOUNG. So I would suggest that I will use that subpoena, and we will get that information, because I think that is very important as to how much money they received from the taxpayers already in this case. So thanks for answering that question.

You already stated this, I think, and you said that the Plaintiffs took a route of colluding with the Department of the Interior to create a new class of claims, and that is what I thought you were referring to a while ago behind doors; is that correct?

Mr. MONETTE. Exactly.

Mr. YOUNG. And you said in a statement that the Plaintiffs summarily rejected a \$7 billion offer to settle. Where was that from, the \$7 billion?

Mr. MONETTE. Well, I think that is more than urban legend, but we did have on the Senate side them floating the numbers, and Senator McCain in fact was the person who floated it most clearly.

I think it was \$7.8 billion, I think, and what we have heard—and remember now that some of this was going on with some people who were informed, and when tribal leaders are having a meeting, and I find a way to squeeze myself in the door sometimes.

So there was communications from the Department that they had communicated with *The Hill*, and that there would be agreement on that figure, and that it was Mr. Gingold, the Cobell attorney, who flat out rejected that amount.

Mr. YOUNG. Did the Plaintiffs know that as far as the other class action?

Mr. MONETTE. The unnamed Plaintiffs, the class itself, didn't know.

Mr. YOUNG. So Patricia didn't know that?

Ms. DOUVILLE. No.

Mr. MONETTE. No.

Mr. YOUNG. And would you have been happy with the \$7 billion?

Ms. DOUVILLE. I would be happy with just a completed accounting.

Mr. YOUNG. The reason that I ask that question is that what we wanted was an accounting, and that is what I wanted when I started this a long, long time ago. You may not be aware of that.

Patricia, you are right. The oil lease, and the coal leases, and the things that went on with this government, we estimated it at over \$17 billion of mismanaged, misdirected utilization of Native lands for the benefit of whom, I don't know, other than a few individual people.

And we were looking for that to establish the amount that was owed, and for the Committee to just keep in mind, this was an agreement reached, and why I don't know, other than the fact like you said that they went down, and we won't have any more auditing, and we won't have any more looking for those records that were conveniently lost, and that way you will be off the hook.

And I think that was the urging of people to settle this so that the Federal Government would not be on the hook. But that de-

prived the Alaskan—well, Alaskans lost \$700 million by the way, and that is over just a short period of time, and with the same type of action under the BIA.

And by the way, Patricia, we are going to write a bill that gives you the ability to do these things without having to go through the BIA. We are going to do that, because I think you have that responsibility.

Richard, you said that it was money that was always part of this case, and that one of the outgrowths of the accounting itself would be a restatement of the accounts. Now, what does that mean? Well, that is what she said.

Mr. MONETTE. I am not sure what he meant, but if there were variances—

Mr. YOUNG. And that was testimony that was provided to us by the way.

Mr. MONETTE. Oh, OK. The idea was that if there are variances in the account, that if the account had too much, maybe they would take some out. Of course, the idea being that the account had too little, and that number would simply be corrected.

And if that were the case that it would still fit within the equitable remedy, and not asking for an infusion of cash, but simply adding a zero, or a one, if that is what was needed on the account, and thereby fitting within the Federal District Court's jurisdiction.

And that is why those arguments were consistently made, but it sounds like he said a little more there, and I am not sure that I can explain that.

Mr. YOUNG. I will get that to you. Do you think that H.R. 887 creates any separation of powers problem? I believe you already addressed that. In other words, in passing this bill to limit attorneys' fees improper legislative meddling for the Judicial Branch?

Mr. MONETTE. Absolutely not, not on the settlement that this body enabled and authorized.

Mr. YOUNG. Because we did it. We passed a law, and we can change what we want.

Mr. MONETTE. It could not even be on the court's table if this body had not taken this action. Certainly this body can follow up and change a provision.

Mr. YOUNG. Should Congress allow the District Court to have complete discretion over the award of attorneys' fees?

Mr. MONETTE. No.

Mr. YOUNG. No? I knew you were going to say that. And in the lawsuit of Cobell versus Salazar, is it customary for the members of the class to pay attorneys' fees, or the government to pay them?

Mr. MONETTE. Well, it is customary for the Defendant to pay them when it is a suit against the government. So the government would pay, and there is some disagreement on that by the way.

Mr. YOUNG. Before the Cobell Settlement was publicly announced did class counsel ever say that their efforts would result in individual Indians bearing all costs associated with the litigation?

Mr. MONETTE. Not that I know of. I mean, there is a classic contingency fee, and they are saying fourteen-and-a-half percent, then we would assume that that fourteen-and-a-half percent would come off the top.

But our understanding, and it did not take a lawyer to have this understanding, that if this is simply an accounting case, then there is not going to be any cash being exchanged, and simply changing numbers on the accounting ledger.

At that point the lawyers would make their arguments to the court under the Equal Access to Justice Act for payment, and they would present their actual hours to the court, and if they thought that they could do that, and if they thought they could get \$223 million, then you should let them have at it, but my bottom-dollar bet is that they can't.

Mr. YOUNG. OK. Now, the government refused to testify today, but nevertheless the government is on record as saying, quote, "after Plaintiffs' 2011 victory on appeal, they suffered nine straight defeats at the appellate level." What is in evidence of those defeats?

Mr. MONETTE. Well, right now where we stand is that they lost. There is no money on the table. The Appeals Court took the \$455 million off the table and said an accounting can be done, and so go do it, and that is where we stand.

Now, to me—I mean, this is the irony perhaps in this, and I am sure that this will get used against me by the Cobell lawyers, but to me I won, because the Appeals Court said that an accounting can be done, and so go do it. That is what I wanted.

So the lawyers, they lost, because if it is just an accounting that is going to be done, there is no way that they can justify millions of dollars.

Mr. YOUNG. OK. Now, you said that the lady is going to win \$2 million, and Patricia is going to get maybe \$2,000?

Mr. MONETTE. That is what they put out to the public.

Mr. YOUNG. Well, where does she get the \$2 million?

Mr. MONETTE. That is actually in the statement that they sent to the class members, that Ms. Cobell stands to recover \$2 million. The other Named Plaintiffs, \$150,000 each, and then the rest of the class will be between \$1,000 or \$1,500.

If they accept the second class, and have no more activity, or perhaps a lot more than that. I should point out by the way that there is a small number of class members who will get a significant amount.

And it is because that second class has as a formula the activity in the account. So if you had a lot of activity in your account, then they are going to use a formula to get you money.

And let me tell you something here that I think you will find interesting. We have unnamed class members out there who have no activity in their account during that period but one. They sold their land.

Let us say they sold their land near Agua Caliente near Palm Springs in California for \$10 million, let us say, OK? One event in that account period, and based on that \$10 million sale, that formula is going to get them another one to \$2 million.

Nobody argues that there was any mismanagement of that account. Nobody argues that they didn't get fair market value for their land, but they had activity in their account over that 20 year period. They sold land, and now they are going to get a windfall bonus from that.

Now, how is that fair to her? Can I say what I said last year? That is about the worst thing that this Congress has ever done to Indian tribes, and right up there with termination and allotment. This will be one of the worst things in the history of the Federal-Tribal relations.

Mr. YOUNG. Now, realistically, I am not going to disagree with you, because it was sold to me as a booger. I am just raising the legal fees, but I never agreed with this to begin with basically.

Everybody said, well, let us get it out of the way. Let us put it away and we will get it done, but that was—and pardon the expression, but it smells. And I don't know whether we can undo it, but one thing that we can do if I am not mistaken in that \$223 million that they are asking for, it comes out of every individual Native, and in fact deprives the right to consolidate the lands.

Is that really the problem? Well, how much money is supposed to go to consolidation?

Mr. MONETTE. \$1.9 billion.

Mr. YOUNG. \$1.9 billion out of?

Mr. MONETTE. \$3.4 billion.

Mr. YOUNG. \$3.4 billion, and the rest of it goes to the Plaintiffs deal, and how much consolidation will occur with that \$1.9 billion? Not very much will it?

Mr. MONETTE. Well, it will depend on the reservation. Some of the valuations that are done by the Bureau of Indian Affairs are high, and so of course it will be less. Some of them are very, very low, depending on where you are in the country, and it can go a long ways.

But what we get is that we get these bureaucrats down there doing these plans for consolidation. The consolidation should be geared toward making the community work, especially for business, commerce, economic development. If you go out to some of these reservations, these allotments are scattered all over the place.

Mr. YOUNG. I just came out of Arizona, and I saw it.

Mr. MONETTE. And the Bureau of Indian Affairs, in their wisdom of doing these allotments 60 or 70 years ago, didn't think of, for example, a small tidbit like a downtown.

So you drive on these reservations, and you have a tire shop here, and a markers and monument shop there, and a hair design shop there, all an eighth-of-a-mile apart on all of these allotments, and there is no efficiency, no place to park, a waste of gas, a waste of time for people.

And the Tribes would like to look at these consolidation plans and make them work, including to join the real world with economic development, getting some trade and commerce, and some business activity.

And right now the way it is done, and I am pretty certain the way that the Bureau will do it in the future, will not facilitate any of that, and that will be a dirty shame as well.

Mr. YOUNG. Well, I am just going to ask both of you as I have asked the other witnesses before us, what ideas you have on how we can improve this situation, and I agree with the bureaucrats and the stagnation of the Department of the Interior and the BIA.

It has been badly serving the American Indians all this time, and we want that information so that we can be helpful. Ms. Noem, you have a question?

Mrs. NOEM. Thank you, Mr. Chairman. I just had a follow-up for Ms. Douville. The question is what is your feeling in your Tribe specifically? Do they prefer this type of monetary settlement, or is their goal just to have a complete accounting?

Ms. DOUVILLE. Thank you. Well, we are talking about the most impoverished people that America has, and at this time the amount of money that is going to be given to them is a huge amount of money, and it is needed.

It is much needed in Indian Country, and so with that, it is accepted, the first class to be accepted, and you get that \$1,000 no matter what, even if you want to be a Plaintiff or not. You get that.

So the acceptance of that is good, but they don't understand what strings are attached to the second class of money that is going to be given out, and I don't think it is fair for this settlement to basically dangle a carrot in front of a starving rabbit, and that is what this is doing.

So, I, myself personally don't believe that this is good for us, but on the Tribe's side, I can say that it will help, but also in this settlement agreement, it also states that it is for individuals.

They don't have any stipulations for the Tribes themselves. It was for the individuals, and so the Tribe does not take a stand as to what their position would be, because it is an individual's case.

Mrs. NOEM. A follow-up question. So if attorneys receive \$223 million, and maybe Mr. Monette can answer this, as opposed to the \$50 million or \$99 million cap that this bill proposes, where do they take that money from? Where is the money literally coming from if that cap is not there?

Mr. MONETTE. It will come from the amount of money that is uncertain that is set aside to address this formula. So everybody gets their thousand, and then they get \$500-plus according to the formula.

So that plus according to the formula has an uncertain amount of money in it. It will come from that. At least that is the best reading of it right now.

Mrs. NOEM. So the more money the Plaintiffs made, the less money that will go to individuals eventually?

Mr. MONETTE. A direct dollar for dollar.

Mrs. NOEM. OK. I appreciate that. Thank you, Mr. Chairman.

Mr. YOUNG. Mr. Boren.

Mr. BOREN. OK. This is my last statement. I have been a proponent of tort reforms since I have come to Congress. I am actually the Co-Chair of the Civil Justice Caucus, and so I am not a big fan of these large fees.

But I also believe that a lot of these attorneys will not enter into representation unless they have an incentive to make these cases. In most contingency fee based cases, it is about 33 percent of the take.

In our offices, we deal every day in Social Security Disability Cases, and of course, I always say don't hire an attorney. We will do it for you. But a lot of them take 33 percent.

So we have to have some incentive for these attorneys to make this case. The money though that comes to pay these claims, it is from Title 31 of the United States Code, Judgment Fund, and not from other Indian monies.

And so that is one thing that I wanted to clarify, and then another thing that I wanted to clarify, Mr. Monette, you made some statements about, well, it could have been \$.8 billion. Well, I heard that from John McCain.

I mean, that to me is what we call at home a wag. It is something that you kind of pull out of the air, and a lot of this stuff, you may not have been privy to. So that is something else that I want to point out.

But again I think that this hearing is very important, and I am glad that the Chairman has had it. I think we may be coming back and revisiting these same issues in a few months.

And, yes, Congress can pass any bill that it wants to, and it can do anything that it wants to, but all this work that has gone into this settlement, and even if it is not perfect, no settlement is perfect. There are some flaws.

But the last thing that we needed to do was unwind decades of work, tons of work, on behalf of individuals, and do I think that \$2,000 is enough? Probably not.

But we need to be careful that Indian Country gets \$2,000 instead of zero. So as we move forward, I just want to be very deliberative, and I am glad that the Chairman had this hearing, and I won't say anything else. Thank you.

Mr. YOUNG. One thing. Richard, did you say that you were going to file a brief on this matter?

Mr. MONETTE. I intend to, yes.

Mr. YOUNG. And are you going to do that pro bono, or are you going to be hired to do so?

Mr. MONETTE. I am going to do that pro bono, and I am going to find a Plaintiff, and I have, an IIM account holder who has enough money, so she won't accept money in exchange. We are going to have a lawsuit.

Mr. YOUNG. Remember, that is on the record. If you win, there will be no money in exchange.

Mr. MONETTE. That is on the record, yes.

Mr. YOUNG. I want to thank both of you. I think that this has been very informative, and rewarding, in the sense that we will be looking at this again. I would like to do something prior to the decision of what attorneys they are going to get, and maybe I can give a little direction to the Justice Department, and maybe it won't. I don't know.

But there is no way I think that we should be paying \$223 million for an \$86 million settlement. That is about what it was. A thank you to the both of you, and with that, this meeting is adjourned.

[Whereupon, at 12:23 p.m., the Subcommittee was adjourned.]

[Additional material submitted for the record follows:]

[The prepared statement of Mr. Gosar follows:]

**Statement of The Honorable Paul A. Gosar, a Representative
in Congress from the State of Arizona**

Mr. Chairman, thank you for giving me this opportunity to address the subcommittee. And I want to thank our witnesses here today as well for taking the time to present their views and information to Congress.

My district in Arizona has the largest Indian Reservation in the country. It is home to the Navajo Nation. My district has many tribes of Apache, the Yavapai and the State of Arizona as 22 federally recognized tribes.

I have stated publically my support for H.R. 887, and in addition, I declared before the House my serious concerns about the \$227 million lawyer fee request.

In the *Cobell*, case, we found the mismanagement of the Native trust monies abhorrent and the need for an accounting great. That was certainly an injury to the Native peoples. But I oppose a second injury to the Native peoples. It shocks the conscience to see such a large request. Every dollar paid out in legal fees is a dollar the injured Native Americans will not have.

I recognize that the work done by Plaintiffs' counsel on behalf of the claimants was important. But to see lawyers' fees in the hundreds of millions, compared to the average award to the injured American Indians of \$2,000 tells me we have a serious problem. For that reason I have proposed, in H.R. 1150, class action reform in the area of health insurance, and I will continue to focus on legal reform. We cannot tolerate a legal system where the injured parties get a trifle after years of litigation, and the lawyers walk away with hundreds of millions. If there is a better case for legal reform than *Cobell*, I am not aware of it. I therefore support this legislation, H.R. 887, that limits the fee award to \$50 million. But H.R. 887 is simply a remedy for one case. What *Cobell* tells us is that the system is broken and we need to reform it.

Let me say a word about why H.R. 887 is fundamental to us on this Committee, and to all of Congress. Congress has the ultimate power over Indian affairs. It also has the duty to protect Native American rights. The Indian Commerce Clause conveys the express power to Congress over Native American affairs. As a result of these powers, it is well established that Congress has plenary power over Indian affairs. It is up to us, members of Congress, to make sure we exercise these supervisory obligations. This hearing, and H.R. 887, are part of these constitutional duties. We would be remiss if we let such an onerous and overreaching fee request proceed forward and allow the American Indians to be victimized yet again.

The federal government has a "trust relationship" between it and the Native American tribes. This trust relationship obligates Congress and the federal government to protect the well-being of Native Americans, peoples who tendered their lands in return for this trust. We, the guardians in Congress, must now intervene to protect those under our care, especially where a fee dispute now creates a conflict of interest between the class members and their legal counsel.

In rectifying the breach of fiduciary duty documented in *Cobell*, we cannot allow another breach to proceed under our noses. Just as the government has a fiduciary duty to the Native Americans in the first instance in ensuring trust monies are not misappropriated, so too Congress has plenary power to ensure that the Native American class members are not gouged in a fee award.

Thank you again for coming to this hearing today and giving me the opportunity to speak and listen.

[The prepared statement of Mr. Markey follows:]

**Statement of The Honorable Edward J. Markey, Ranking Member,
Committee on Natural Resources**

Mr. Chairman, H.R. 887 is unjust, unwise and likely unconstitutional. As a result, it should remain un-enacted.

This legislation is unjust because it represents an unwarranted intrusion into pending litigation. Congress has provided statutory authority, and the courts have established case law, setting out a process and standards for determining attorney's fees. In the *Cobell* case specifically, both the pending settlement agreement and the legislation enacted last Congress funding that agreement, recognize that the amount of attorney's fees is properly determined by the Court, not the Congress.

The Court will review the entire, 15-year history of this landmark litigation, including detailed filings documenting expenses, hours worked, billing rates, benefits provided to the plaintiffs and relevant precedent. All parties will have an opportunity to present arguments and then the Court will apply the relevant law and

award the appropriate fees. And each step of this process will be public and transparent.

In contrast, H.R. 887 would simply impose an arbitrary number selected by Chairman Young and Chairman Hastings. Period. It is clear which of these two approaches would reach a more equitable conclusion.

It should be noted that this Committee has a checkered history when it comes to intervening in ongoing litigation. Under previous Republican Chairmen, this Committee injected itself into court proceedings regarding bonding requirements, the Antiquities Act, federal whistle-blowers, and even a failed Texas Savings and Loan. The end result of these intrusions was, at best, to create the appearance of political gamesmanship in the judicial process and at worst to actually tip the scales of justice.

This legislation is also unwise because it jeopardizes the entire settlement. The agreement ending this massive case is not final and resolution of the attorney's fees is an open question before the court. Should Congress, without process or justification, impose an arbitrary cap on those fees, the settlement could collapse and the litigation could resume.

While the amount to be paid by the government pursuant to the settlement is significant, the amount awarded to the plaintiffs by a jury could be more—potentially much more. Given that the assets mismanaged by the federal government are worth billions of dollars, that the mismanagement went on for more than a century, and that there are half a million plaintiffs—rash, political moves which could destroy this settlement would cost the taxpayers dearly.

And lastly, H.R. 887 is almost certainly unconstitutional because it violates the Separation of Powers Doctrine. Just as the Congress could not pass a law reversing the class action status granted in this case, or granting summary judgment to the defendant, we cannot pass a law setting specific attorney's fees. The Federal District Court for the District of Columbia has the requisite information, pleadings, process and authority to resolve this issue; Congress should allow the Court to do its work.

The truth is, if we were truly committed to reducing attorney's fees in this case, we had ample time to intervene. Congress could have lowered these attorney's fees—or avoided them altogether—by stepping in to right the wrong done to the Cobell plaintiffs at any point during the 100 years it went on. To circle back now, just as this century of injustice is on the verge of being remedied, to complain about the terms, is plainly wrong.

I would like to thank the witnesses for their time and effort to be here today. I yield back.

[“Excerpts of the Government Position on the effort by Cobell lawyers to get \$223 million” submitted for the record by Chairman Don Young follows:]

**Excerpts of the Government Position on the effort by
Cobell lawyers to get \$223 million**

**Submitted for the Record by Chairman Don Young
Subcommittee on Indian and Alaska Native Affairs
Hearing on H.R. 887, April 5, 2011**

(All excerpts are from the Defendants' Response and Objections to Plaintiffs' Petition for Class Counsel Fees, Expenses and Costs Through Settlement, filed in U.S. District Court for the District of Columbia, 02/24/11)

Class counsel cannot escape a simple fact: although they enjoyed some early success in this case, they have already been compensated for that success through prior fee petitions. But since their 2001 success in the Court of Appeals, class counsel have lost virtually everything they have tried, being rebuffed in nine consecutive Court of Appeals' decisions. Throughout that period, rather than advancing this case to conclusion, class counsel embroiled the Court, class members, and the government in a series of wasteful diversions characterized by ad hominem attacks on government officials and a lack of any discernible benefit to the class. The broader resolution of Individual Indian Money (IIM) management issues and the determination of Congress to bring these issues to a close address claims not pursued by plaintiffs and unconnected to the detours they actually pursued. (pp. 1–2)

Even a fee of \$99.9 million—all class counsel are permitted to seek—is grossly excessive. (p. 2)

Class counsel contend that they “have litigated novel issues and navigated a series of ten interlocutory appellate decisions,” Pet. at 18, but after a partial victory in Cobell VI (for which they have already been paid), the work for which they now seek fees resulted in nine straight defeats before the D.C. Circuit. (p. 10)

By 2007, class counsel had been paid approximately \$8.9 million in fees, costs, and expenses. (p. 14)

[T]heir total includes billable hours for which counsel have already been paid—or worse, that counsel have claimed and the Court has already rejected. (p. 16)

Assuming that there are, in fact, contingent fee agreements totaling 14.75%, applying that percentage to the proper \$360 million common fund results only in a payment of \$53.1 million. But no basis exists for using that claimed 14.75% percentage at all. (p. 15)

When seeking to certify the original class in 1996, plaintiffs stated that class counsel “are working on an hourly basis; none has been retained on a contingent fee (though some have agreed to withhold a portion of their hourly charge until a favorable termination of the case).” (p. 15)

Much of class counsel’s efforts over the past decade have been devoted to sideshows having little to do with achieving the historical accounting that plaintiffs sought. Class counsel’s skirmishing ran up costs for both sides. (p. 10)

The incivility for which the Cobell litigation has become known presents no better argument for payment and should not be rewarded. (p. 11)

Class counsel sought to have the Secretary of the Interior held in contempt and expanded this vendetta to virtually every lawyer and official at the Departments of Justice, Interior, and Treasury who had any role in the case, leading to the pendency of contempt or sanctions charges against 70 individual government employees, of whom 31 were targeted multiple times. The ploy needlessly interfered with the duties and personal lives of scores of public servants and cost the government more to defend the case because of the collateral attacks, but it garnered nothing for plaintiffs’ case and provided no benefit to the class. (p. 11)

Even worse than the diversions from issues in the case is that costs were driven up by tactics that affirmatively frustrated the historical accounting that plaintiffs sought. (p. 12)

The class members should not be taxed tens of millions of dollars to compensate attorneys for efforts that frustrated the very remedy that they purported to seek. (p. 13)

Despite those representations, counsel now argue that their service to those clients merits a payment of more than twice that amount—further depleting the funds available for payments to class members by more than \$120 million. Pet. at 25. Plaintiffs’ proposed order directs that the class’s custodian of funds “promptly shall pay to Class Counsel \$223,000,000.00 [in] fees and \$1,276,598 in expenses and costs.” [Dkt. 3678–15]. (p. 3)

They then petitioned under EAJA and obtained an award of over \$7 million in fees and expenses for their work, which the government promptly paid. They also received over \$750,000 in additional fees and expenses relating to discovery disputes. (p. 4)

After that initial phase, class counsel had little success. The case degenerated into a series of contempt and sanctions motions against 70 people and protracted efforts to shut down the Department of the Interior’s computer systems. The trial court conferred a few temporary victories—a contempt citation against the Secretary of the Interior and an order to disconnect most of Interior’s computer systems—but those were short-lived. After Plaintiffs’ 2001 victory on appeal, they suffered nine straight defeats at the appellate level. (p. 4)

The Court of Appeals expressly rebuffed class counsel’s effort to dispute their losing streak: “Plaintiff-beneficiaries’ . . . only example of a break in the constant stream of reversals. . . .” (p. 4)

Class counsel’s petition asks class members to foot the bill for their years of fruitless digressions from the core issue in the case. Settlement was precipitated not by class counsel’s litigation efforts (which, in the years since they were paid for previous work, failed), but by the government’s decision to end the litigation on terms that required congressional approval and set a better course for Interior and its relationship with Native Americans. (p. 5)

Class counsel justify their excessive fee petition by inflating both the amount of the fund for which they are responsible and the percentage to which they are entitled. (p. 7)

The \$1.9 billion appropriated for land consolidation is likewise not the product of class counsel’s efforts, was not sought in the original or amended complaint, and is simply irrelevant to the calculation of any common fund. (pp. 9–10)