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Congress of the United States
House of Representatives

May 13, 2010

Dennis M. Gingold
607 14th Street, N.W.
Suite 900
Washington, D.C. 20005-2018

Dear Mr. Gingold:

This letter seeks confirmation or clarification on your recent statement to the news media regarding the proposed *Cobell v. Salazar* settlement agreement. In a March 5, 2010, article by the Associated Press, you state the proposed settlement will be terminated if Congress does not approve the agreement by May 28 or attempts to change any part of it, including placing a cap on attorneys' fees.

Pursuant to your statement to the news media, is it true that you and plaintiff lawyers would kill the proposed settlement if your attorneys' fees are capped at $50 million?

A straightforward response is requested.

As you are certainly aware, considerable concern has been raised by individual Indians across the country, in both letters to Congress and during public forums, about the amount of proposed settlement funds that would be paid to lawyers. In addition, the fact that lawyers' fees could equal or exceed $100 million under the proposed settlement prompted a bipartisan reaction at the House Natural Resources Committee hearing in March.

The bipartisan concern with the high level of attorney fees should not be surprising as every dollar that is paid to attorneys is a dollar that comes out of the pocket of individual Indians covered by the proposed settlement.

In proposing a settlement agreement that requires an Act of Congress to implement, the named plaintiffs, their attorneys and Executive Branch officials certainly must have been aware that elected Representatives and Senators would perform their duty to review it to ensure that those they represent, including individual Indians affected by the proposed settlement, are treated fairly. I can be counted among those Members who have heard directly from tribal leaders, individual Indians and respected Indian associations that have concerns with aspects of the

proposed settlement. This is why I so strongly expressed at the Committee's hearing the need for more public information on the proposed settlement, and for prompt answers to the many questions that were being asked in Indian Country. It is regrettable that responses have not been received to written questions submitted to the named plaintiff and plaintiff attorneys after the March 10, 2010 hearing. Similar questions posed to the Interior and Justice Departments were answered on March 30, 2010. Among the questions posed to the plaintiffs were ones specifically seeking more information on the amount of work performed by plaintiff attorneys and justification for fees.

It is hardly reasonable to seek the approval of Congress to pay $100 million to a handful of lawyers when that means less compensation is being provided to the individual Indian constituents that Congress represents – especially when efforts to determine what amount of lawyers' fees is merited through documentation of actual work performed are frustrated by the absence of responses to Committee questions.

To date, the justification for the fees made by the Plaintiffs and Class Counsel is insufficient. In testimony before the House Natural Resources Committee, Elouise Cobell described the attorney fees as "very modest" and "less than 3% of the total settlement." Some might take issue with that statement; put in a fair perspective, $100 million could be said to represent nearly one-third of the value of awards for the claims that were actually litigated (based upon the number of individual Indian account holders multiplied by the $1000 each would receive.) Regarding the asserted figure of 3%, it is unclear how the Class Counsel can claim credit for resolving Trust Administration Claims and crafting the $2 billion Land Consolidation Program as these matters were not part of the litigation and Counsel did not represent these claimants before either the Court or in settlement negotiations. It is hardly reasonable for Counsel to expect to be paid for work that they did not perform or on behalf of persons they did not represent.

It would be surprising and concerning if you and fellow plaintiff attorneys would jettison this entire proposed settlement and the payments it would provide to individual Indians in the accounting class solely because Congress would limit your fees to no more than $50 million, rather than $100 million, so that more funds can go to those Indians on whose behalf this litigation was launched 14 years ago.

One final but important point about the proposed settlement needs to be publicly clarified. The District Court has no jurisdiction to implement this Settlement Agreement unless Congress grants it. The media have reported several public statements made by the plaintiffs, the Administration, and the District Court, who say that Congress is on a "deadline" to authorize the settlement. In fact, there is no "deadline" in the settlement. There is an expiration date that is self-imposed by the Administration and the Plaintiffs on themselves – Congress was not a party

to the settlement negotiations and is bound by no date. I am concerned that repeated talk of a "deadline" has turned into a pretext to pass settlement legislation without the thorough scrutiny that individuals Indians have been seeking from their elected Representatives and Senators. Furthermore, I will note that it has been nearly five months since the proposed settlement agreement was announced, and yet no legislation or bill has been introduced in either the House or Senate. It certainly is more difficult for Congress to properly review, consider and act upon this settlement when no actual bill even exists or has been introduced.

As the elected representative of individual Indian claimants, and as Ranking Member of the Committee of jurisdiction, it is my duty to provide scrutiny of this Settlement. To this end, I would appreciate complete responses to the follow-up questions submitted pursuant to the March 10, 2010, hearing. For your convenience, a copy of the questions is enclosed with this letter. A direct response is also requested to the question posed at the outset of this letter: Pursuant to your statement to the news media, is it true that you and plaintiff lawyers would kill the proposed settlement if your attorneys' fees are capped at $50 million?

Thank you for your attention and I look forward to your prompt written responses.

Sincerely,

Doc Hastings
Ranking Member
Committee on Natural Resources

Encl.

Cc:
Ms. Elouise Cobell
Mr. Keith Harper, Partner, Kilpatrick Stockton, LLP
The Honorable Ken Salazar, Secretary, U.S. Department of the Interior
The Honorable Eric Holder, Attorney General, U.S. Department of Justice

Questions for Elouise Cobell

1. Has the *Cobell v. Salazar* lawsuit included claims relating to asset (including land) mismanagement or damages? At what point, if any, were claims related solely to the government's mismanagement of Indian lands or non-monetary resources included in the litigation?

2. Your statement describes the $100 million in attorneys' fees as a "very modest" three percent of the total Settlement. Is it fair to say that the attorneys' fees of up to $100 million represent up to one-third of the value of the Historical Accounting Claims in the Settlement (about $300 million) which were the only such claims litigated in Court?

3. To date, how much of the Plaintiffs' costs and expenses been reimbursed by the government?

4. Given the size of the attorneys' fees being requested from Congress, it is requested that the Committee be provided documentation of the attorneys' unreimbursed costs and expenses.

5. Does the Settlement Agreement cap the amount of incentive payments the Named Plaintiffs may receive? How much in total do the Named Plaintiffs intend to request in incentive payments?

6. Your written testimony states that many of the grants you received are in the form of loans and are repayable, and that some entities gave you advances that need to be reimbursed. Please describe these grants, loan agreements, and advances. For example, who made them, what were the terms and conditions, when were they made, and what were their amounts? Are there any contingency fee arrangements with the grantors or creditors?

7. On pages 18 and 19 of the Plaintiffs' amended complaint, there is an allegation concerning the failure of the Administration to appoint a new Special Trustee for American Indians:

   (a) Since this administration took office, the Interior Defendants in breach of trust duties owed by the United States have obstructed or discouraged the appointment of candidates who meet the qualifications set forth in 1994 Act in order to conceal the nature and scope of continuing breaches of trust and serious problems in trust reform, notwithstanding that $5 billion has been spent on trust reform as a result of this litigation.

   Question: As you know, the Special Trustee for American Indians is an important position for collection and proper management of trust funds. What is the factual basis for this allegation of continuing breaches of trust, and how does this Settlement Agreement stop such breaches from continuing?

8. Have you identified a qualified bank where the $1.4 billion settlement will be deposited? What criteria have you used, or will you use, in selecting a qualified bank? Will it be independent of the Plaintiffs and Plaintiffs' attorneys?