WRITTEN TESTIMONY
OF
PROFESSOR, FORMER TRIBAL CHAIRMAN, AND IIM ACCOUNT HOLDER
RICHARD MONETTE
BEFORE THE HOUSE COMMITTEE ON NATURAL RESOURCES
March 10, 2010

Good Morning Mr. Chairman and Members of the Committee.

My name is Richard Monette. I am a Professor of Law at the University of Wisconsin in Madison. I am also a former twice-elected Chairman of the Turtle Mountain Band of Chippewa. Finally, I am also an IIM account holder.

Mr. Chairman, the proposed Cobell settlement, if enacted as is, will itself be a breach of trust.

As it is, this proposed settlement runs afoul of the Class Action Fairness Act of 2005, the law enacted by this body to protect the interests of all parties. It also runs afoul of the Federal Rules of Civil Procedure governing class action lawsuits. That is why the proposed settlement and the proposed legislation would grant broad waivers from the strictures of those laws. Plaintiffs' counsel have justified this settlement as though it were any other settlement; but it is not any other settlement and does not involve any other trust. This settlement involves the solemn Trust relationship and Trust Responsibilities between the United States and the Indian Tribes with which it has signed treaties and with whom it has a long and sometimes difficult and sometimes thoroughly enlightened history.

The proposed settlement has two main components and, as usual, the devil is in the details. First. the proposed settlement would establish an "Historical Accounting Class", providing payments of one thousand dollars to each class member, without any option to opt in or out. Second, the proposed settlement would also establish a "Trust Administration Class" that would provide payments of five hundred dollars to IIM account holders, with a provision to opt out, that would be deemed a complete satisfaction of any trust asset claim and wholly release the Department from any further liability to those who accept such payments. Finally, the proposed settlement would provide for fifteen million dollars in "incentive payments" for the class representatives and exorbitant attorney fees.

In short, Mr. Chairman, the proposed settlement includes claims that were not made by Plaintiffs, including matters that do not pertain, that are not germane, or that are not relevant to the lawsuit. The three big ticket items in this regard are:

1) first, the "settlement-only" provision that would establish a so-called "Trust Administration Class", proposing to settle non-monetary asset claims for all those who do

not proactively opt-out, potential claims relating to oil, gas, coal, minerals, water, and timber, thereby releasing the Department of the Interior of all liability in such matters;

2) second, the "settlement-only" provision proposing to establish and authorize a "Trust Land Consolidation Fund" within the Department of the Interior to the tune of some two billion dollars;

3) the "settlement-only" provisions establishing an Indian Education Scholarship Holding Fund that would divert some 60 million dollars from the land Consolidation Program to a Holding Fund whose monies are to be distributed by non-profit organizations nominated by Plaintiffs and confirmed by the Secretary.

Mr. Chairman, not one of these three provisions belongs in the settlement.

The Department of the Interior has stated that this lawsuit has cost it approximately one hundred million dollars every year of the fourteen years of this litigation. That is, perhaps not coincidentally, 1.4 billion dollars, the exact amount of the settlement attributed to settling all claims. In other words, I guess the Tribes and individual Indians are supposed to be elated that the Department is willing to pay them money that was intended to benefit them in the first place.

This lawsuit was originally filed in District Court as an equitable action seeking injunctive relief only with no monetary damages. Plaintiffs simply asked the Department to reconcile IIM accounts and to produce documentation to corroborate the reconciliation. Early in the litigation, in a bout of judicial sensationalism, the district court held certain Interior officials in contempt of court because they could not and would not produce records aiding an accounting. However, if an accounting could not be done, then the injunctive relief could not be ordered, and a new theory of the case based on monetary relief would become plausible. This is why the proposed settlement illustrates a huge leap from making equitable claims into settling monetary damages.

In August 2009, Plaintiff's lawsuit took a steep turn for the worse. In many people's eyes, to invoke the vernacular, the case had tanked. The Federal District Court ruled that an accounting was not possible and ordered Defendants to pay $455 million dollars in restitution. Both sides appealed and the Federal Court of Appeals set aside the judgment on both points, remanding to the District Court to approve a plan that "efficiently uses limited government resources to achieve an accounting."

Therefore, at best, the settlement should be limited to the 455 million dollars that the district court ordered as restitution. At worst, the settlement should be void and the Department should set about the task of accounting as the Court of Appeals ordered. The Representative Plaintiffs' counsel should be paid their actual fees and costs up to the point where their case "tanked", where they convinced the court that an accounting could not be done and that injunctive relief was not possible.

When the district court found a $455 million dollar cause for restitution, and the court of appeals ordered an accounting, million dollar damage figure, and the Defendant Interior Department looking at protracted accounting exercises, both sides found enough incentive to pursue a settlement.

At that juncture, the Cobell lawsuit fell victim to collusion at the expense of the American taxpayer. Perhaps nothing bears greater testimony to this fact than the candid admission stated in the introductory BACKGROUND section of the proposed settlement, paragraph number 10: "Recognizing that individual Indian trust beneficiaries have potential additional claims arising from Defendants' management of trust funds and trust assets, Defendants have an interest in a broad resolution of past differences in order to establish a productive relationship in the future." (p.4)

From that point forward, the record reveals less lawyering for the Plaintiffs, especially the absent class members, and more lawyering of the deal they'd struck behind closed doors. And frankly, at that juncture, the record suggests inappropriate participation in settlement negotiations by the presiding judge, who would otherwise be a trustee for absent class members. At that point, who was obliged to look after the best interests of the class, especially absent class members, as the federal rules and federal law requires?

As soon as the dollar amount on the negotiation table went above 455 million dollars, it meant the Plaintiff class was getting more than the District Court believed they had made their case for. But the government didn't give this away for free; inevitably, Plaintiffs would be giving up something more in return.

Likewise, as soon as the dollar amount went above 455 million dollars, Defendants revealed the astounding willingness to pay more than they were held liable for. But the government didn't give this away for free either; instead, Defendants would surely be getting something more in return.

In short, the proposed settlement would relieve Defendants of more liability than Plaintiffs had made claim to, and would provide Plaintiffs relief for claims that they did not make. Primarily, what Plaintiffs would relinquish, and what Defendants would gain, is a settlement of so-called "Trust Administration" claims that were never part of the lawsuit, claims that Plaintiffs had neither the right nor privilege to cede, and that Defendants as Trustees had neither the obligation, nor the right, to accept.

One has to wonder if the class representatives and their lawyers had brought this case not as a class action, but by themselves, foregoing up to 15 million dollars in "incentive awards" and 100 million dollars in attorneys fees, and if after 14 years of litigation the Department of the Interior and the Bureau of Indian Affairs came to them and said, "Eloise, do we have a deal for you. We'll give you $1000 for your accounting claim, and well offer to settle any other claim you might have for all the years of trust mismanagement," – one has to wonder if they'd have taken the deal.

An article appearing on the American Bar Association's website, written by attorneys John Isbister, *et al*, raises several points pertinent to the matter at hand. *See* http://www.abanet.org/litigation/committees/classactions/settlement-class-action.html.

Rule 23(e) of the FRCP is intended to protect the interests of absent class members, to ensure that the court is well informed about the class settlement, and to ensure that the court expressly scrutinizes its terms. As a result, District courts themselves have been charged to act as a "fiduciary of the class" when considering a proposed class action settlement and are subject to "the high duty of care that the law requires of fiduciaries."

One aspect of the fiduciary duty is to ensure an arms length process to avoid collusion between class representatives, defendants and their attorneys. Just because the proposed settlement at "M. 6." states: "The Parties have negotiated all terms and conditions of this agreement at arms length" doesn't make it so. Indeed, if anything this bold declaration appears to be nothing but an acknowledgement that the opposite is true, and that Congress' stamp of approval in necessary to make it so.

Generally, Courts particularly look for signs that a class action settlement resulted from a "reverse auction" – a defendant's collusive agreement between Defendants and class representatives often in exchange for generous attorney fees. As the ABA article notes, "By this tactic, the defendant hopes to preclude all other claims." The proposed settlement at issue will be the poster-child of such a reverse auction

Similarly, the U.S. Supreme Court has directed courts to scrutinize "settlement only" class actions lawsuits, e.g., where classes are certified and claims are made solely for the purpose of settlement, without scrutiny and without sufficient information. The proposed settlement's provision establishing a new Trust Administration Class with claims that were neither made nor litigated will become the poster-child of the "settlement only" problem that the Supreme Court has frowned upon.

Courts also disfavor "reverter" clauses, which specify that unclaimed funds revert to the Defendant. This is especially relevant in this settlement since normally Plaintiffs would administer distribution of awards, whereas here Defendants will play a key role. Such reverter clauses allow counsel to agree to an inflated settlement amount that serves as the basis for calculating attorney fees, while providing an incentive to discourage members of the class from making claims. With Plaintiffs' attorney fees based on the overall amount, and the Defendant administering claim awards, this settlement will be the poster child of frowned-upon reverter clauses.

The parties must satisfy Rule 23's notice requirements. In 2003, Rule 23(c)(2)(B) was amended to require notice in clear, concise, and easily understood language. The Advisory Committee's Notes explain that the change was a "reminder of the need to work unremittingly at the difficult task of communicating with class members." The Supreme Court required parties to give notice in a manner reflecting a "desire to actually inform" absent class members. There could hardly be a class action settlement in the history of this country that so blatantly violates these basics of due process. I am a

member of the class, and I have never, in any way, shape, or form, been contacted by Plaintiffs' counsel. This settlement will become the poster child for violations of basic notice requirements and due process.

Frankly, Mr. Chairman and members of the Committee, it is almost as though the experienced lawyers in this lawsuit knew exactly what they were not supposed to do, and then, assuming no tribe or Indians would understand their designs, did it. Now, they would ask tribes and their members to cover their eyes, ears, and mouths while the settlement obtains, and they would ask Congress to play along.

Finally, the proposed settlement and legislation provide a few carrots to Tribal leaders and individual Indians to build support. Section "F" of the proposed settlement establishes a "Trust Land Consolidation Fund", as well as a "Secretarial Commission of Trust Reform", without explaining the powers, composition, or selection of the Commission. In informal discussion the parties have explained that the Commission will merely be "Advisory", but the proposal does not say that. Nor does the proposal state whether the Commission is governed by the Federal Advisory Committee Act, or exempted from the Act. The language gives the Department broad powers while limiting the participation by Tribes.

The terms governing the establishment and administration of the Indian Education Scholarship Holding Fund raise serious questions about their constitutionality. The proposal would authorize non-profits to administer funds for scholarships, raising the specter of delegating federal powers and authorities, not to mention obligations, to entities that are neither appointed by, nor removable by, the president. Perhaps the current President is amenable to that development, but the next one may not be.

I would very much like to extend my gratitude to the Chairman and this Committee as an American for the transparency that this hearing begins to bring to this matter. It will be a good start.

I am one of the "absent class members" intended to be subjected to the subterfuge. I receive about 7 cents per year in my IIM acct. So the wisdom is, presumably, that I will

delightfully accept the $1000 since I likely won't live long enough to accumulate it 7 pennies at a time.

The proposed settlement would have me "buy in" at the expense of having to decide whether to accept an additional $500 in exchange for waiving any natural asset related claim, or to "opt out".

Fails the smell test, and the Court of History will bear witness.

For both Plaintiffs and Defendants, the justification has been that individual Indian can "opt-out". That conveniently ignores the propriety of the underlying problem: whether it belongs in their in the first place.

Section F of the proposed settlement would establish a "Trust Land Consolidation Fund".

Education:

"Non-delegation of federal matters"
Delegating federal responsibilities to person not appointable nor removable by the President.
Mr. Chairman and members of the Committee thank you for the opportunity to testify this morning and the first bit of official transparency regarding this whole proposed settlement.