Richard Monette
TESTIMONY BEFORE THE SUBCOMMITTEE
ON INDIAN AND ALASKA NATIVE AFFAIRS ON H.R. 887,
to direct the Secretary of the Interior to submit a report
on Indian Land Fractionation, and other matters
April 5, 2011

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.

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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.

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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.