

Opening Statement
Ranking Member Edward J. Markey
Legislative Hearing: H.R. 887: Cobell Attorney's Fees
Subcommittee on Indian and Alaska Native Affairs
April 5, 2011

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 Chairman, 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, and 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.