

DANIEL K. INOUE, HAWAII
KENT CONRAD, NORTH DAKOTA
DANIEL K. AKAKA, HAWAII
TIM JOHNSON, SOUTH DAKOTA
MARIA CANTWELL, WASHINGTON
JON TESTER, MONTANA
TOM UDALL, NEW MEXICO
AL FRANKEN, MINNESOTA

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LISA MURKOWSKI, ALASKA
TOM COBURN, M.D., OKLAHOMA
MIKE CRAPO, IDAHO
MIKE JOHANNIS, NEBRASKA

United States Senate

COMMITTEE ON INDIAN AFFAIRS
WASHINGTON, DC 20510-6450

ALLISON BINNEY, MAJORITY STAFF DIRECTOR
DAVID A. MULLON JR., MINORITY STAFF DIRECTOR

May 24, 2010

Chairman Max Baucus
Senate Committee on Finance
Dirksen 219
Washington, DC 20510

Ranking Member Chuck Grassley
Senate Committee on Finance
Dirksen 219
Washington, DC 20510

Chairman Sander Levin
House of Representatives
Committee on Ways and Means
1102 Longworth
Washington, DC 20515

Ranking Member Dave Camp
House of Representatives
Committee on Ways and Means
1102 Longworth
Washington, DC 20515

Dear Chairmen and Ranking Members:

Now that the proposed settlement of the class action lawsuit *Cobell v. Salazar* will be included in H.R. 4213, I feel compelled to bring to your attention several concerns that have been raised about certain aspects of the settlement.

Since its announcement on December 8 of last year, this settlement has spawned a growing controversy in Indian Country. Questions about the settlement were raised almost immediately after U.S. Attorney General Eric H. Holder, Jr., and U.S. Secretary of Interior Kenneth L. Salazar publicly announced that agreement had been reached.

On December 17, 2009, the Senate Committee on Indian Affairs held an oversight hearing on the settlement. During my preparation for and based on what was discussed at the hearing, it became apparent to me that Congress should not rubber stamp the settlement. At the very least, Congress needed to consider modifications within the framework of the settlement to improve the outcome for individual class members.

The testimony of witnesses at the March 10, 2010, hearing on the settlement before the House Committee on Natural Resources illustrated some of the strong differences of views over the merits and fairness of certain aspects of the settlement. On April 27, 2010, I circulated a "Dear Tribal Leader" letter suggesting some potential approaches to dealing with five areas of significant concern that many stakeholders had raised regarding the settlement. The five areas in question are as follows:

- The amount of attorneys' fees that will be taken from the settlement funds.
- The amount that will be requested from the settlement funds by the named plaintiffs as monetary "incentive awards."

- The criteria for selecting the bank where \$1.412 billion of the settlement funds will be held pending distribution to the class members.
- The lack of any requirement of tribal consultation or participation in the \$2 billion land consolidation program authorized by the settlement.
- Problems with the pro rata formula that the settlement uses for allocating a large portion of the \$1.412 billion settlement fund.

The feedback on my letter reflected a wide spectrum of views on the settlement, but most commentators supported the idea that the settlement should be modified to address some or all of these five areas of concern. Most recently, on May 19th, 2009, the Affiliated Tribes of Northwest Indians, an organization of Indian tribes in the States of Washington, Oregon, Montana, Idaho, Nevada, California and Alaska, passed a resolution (enclosed) supporting the suggested solutions set forth in my letter.

Rather than repeat here the discussion of all five points set out in my April 27 letter (also enclosed), I will stress a few of the most important points it makes about the amount of attorneys fees, the qualifications of the bank where \$1.412 billion in settlement funds will be deposited, and problems with pro rata funding formula.

Attorneys fees and costs.

There is widespread dissatisfaction with how the parties have handled the matter of pre-settlement attorneys' fees and costs, all of which will be taken "off the top" of the settlement funds to be distributed to class members. The settlement agreement itself says plainly that these fees and costs will be determined by the Court in accordance with applicable law. But what the agreement fails to say is that, along with the settlement, attorneys for the parties quietly entered into a separate "side agreement" on pre-settlement attorneys fees.

Under this side agreement—which to this day has not been widely disseminated by the parties, if they have disseminated it at all¹—the Department of Justice will not to ask the Court to award attorneys' fees and costs in an amount less than \$50,000,000; the plaintiffs will not ask for attorneys' fees and costs in excess of \$99,900,000; and all parties will refrain from appealing any award that falls within the \$50,000,000 – \$99,900,000 range.

Although the settlement information website, www.cobellsettlement.com, includes descriptions of and links to most of the relevant settlement terms and documents, *it has no link to this generous "side agreement" on attorneys' fees and no description of its details other than a statement that "the attorneys have signed a separate agreement with the government agreeing to not ask for more than \$99.9 million."*² Given its other material provisions not mentioned on the website, this agreement could very well lead to an award of almost \$100 million in attorneys'

¹ Although the settlement was announced with considerable fanfare on December 8th, the side agreement was not disclosed until just before the Committee on Indian Affairs' hearing on December 17th.

² This description of only the upper limit of the side agreement on attorneys' fees, while accurate, falls a considerable distance short of full disclosure. It fails to mention the Government's agreement not to argue for an award of less than \$50,000,000 or the agreement of both parties not to appeal any award in between the two numbers.

fees and costs, which will be paid with money that would otherwise be distributed to class members. As one might expect, this lack of candor has not served the parties well in their efforts to convince Indian Country that the settlement is fair.

Depository bank.

Once the settlement receives “final approval” from the Court, the Secretary of the Treasury is required to deposit \$1.412 billion of Federal funds into a bank that the plaintiffs have the exclusive right to select, subject only to approval of the Court. The only criteria that the bank must meet are set out in the settlement’s single-sentence definition of “qualified bank”—a federally insured bank subject to regulation and supervision by the Board of Governors of the Federal Reserve or the Comptroller of the Currency that meets the definition of “well capitalized” under applicable Treasury Regulations. The settlement has no requirement of past experience or expertise of its management in administering and collateralizing large settlement funds; no requirement of having a clean history of compliance with banking laws and regulations; and no requirement that the bank must offer competitive interest rates on the deposit or that it must charge competitive the fees for services.

Contrast the settlement’s meager requirements for holding \$1.412 billion in settlement funds with its requirements for the non-profit recipients of funding from the \$60 million dollar “Indian Education Scholarship Fund.” To receive one dollar of these education funds, the non-profit must “have a demonstrated track record and current ability” to create educational opportunities, “a history of financial solvency and health, and a strong institutional governance structure that ensures a prudent and fair administration, investment, and distribution of the funds for Indian Education Scholarships,” and must make still other significant commitments to assure appropriate use of the funds and accountability. *Should not these same kinds of requirements, at a bare minimum, apply to the bank where \$1.412 billion of Federal funds will be deposited to carry out a congressionally approved settlement?*

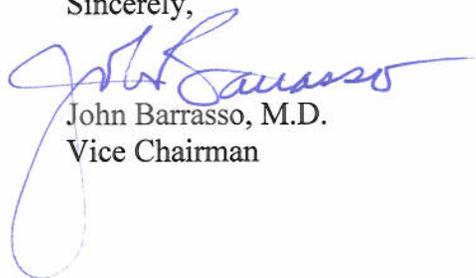
It is difficult to fathom why Congress would authorize the use of such a large sum of Federal funds without requiring significantly greater safeguards to be in place to protect the interests of the individual Indian class members whom this settlement is supposed to benefit.

The pro rata formula.

I will close with a few words on the pro rata formula that will be used to settle the claims of the settlement’s new “Trust Administration Class.” As explained in my April 27 letter, this formula, while simple and convenient to use, will lead to unfair results in many (and possibly most) cases. To deal with these cases the Court should be given authority to make discretionary adjustments on a case-by-case basis. No doubt this will add some complexity to the task of compensating the Trust Administration Class—but above all, this settlement should be about fairness to the class members, not just simplicity in distributing the money.

All of these issues can and should be addressed before Congress approves the settlement. I stand ready to work with you and the parties to the settlement to do just that.

Sincerely,

A handwritten signature in blue ink, appearing to read "John Barrasso". The signature is fluid and cursive, with a large loop at the end of the last name.

John Barrasso, M.D.
Vice Chairman

Enclosures