



January 7, 2009

SUMMARY OF REPORT
TO OST SPECIAL TRUSTEE FOR AMERICAN INDIANS
ON DISCUSSIONS WITH INDIAN TRIBES AND INDIVIDUALS ON THE
CONSOLIDATION OF FRACTIONATED OWNERSHIP INTERESTS IN
ALLOTTED INDIAN LANDS
&
RECOMMENDATIONS FOR ADDRESSING FRACTIONATION

Introduction

In May of 2008, the Board of Directors authorized ITMA to undertake a project throughout Indian country to solicit comments and recommendations from Indian tribes and Indian landowners regarding the problems associated with the fractionated ownership of Indian lands. ITMA entered into a grant agreement with the Office of the Special Trustee for this purpose, with the further agreement that ITMA would present a report to the Special Trustee containing recommendations for addressing the problems of fractionation and also containing recommendations for addressing these problems.

ITMA has circulated a draft of that report to ITMA's board and consultants, and has delivered that report to the Special Trustee as required by the terms of the grant agreement. The purpose of this Summary is to provide the Board of Directors of ITMA with a brief overview of the contents of that report and the recommendations it contains.

Attention is particularly directed to Category 3 of the Recommendations below, specifically to the recommendation that Congress enact a "lapse statute" that would automatically return individual interests in Indian lands to tribal ownership if the individual owner fails to meet certain requirements that would be spelled out in the law to retain his ownership interest. Such a requirement is common in federal and state laws, but has not been applied to interests in allotted Indian trust lands. Under such a statute, an Indian landowner could see his interest in land transferred back to the tribe from whose reservation the allotment was carved simply by doing nothing for a period specified by statute.

Background and History Segment

Because of the long history of the problem and the complexity of recent laws and court decisions on the fractionation issue, the ITMA report presents a somewhat lengthy

and detailed history of the issues. This detailed history documents that the purposes of allotment were not simply to turn Indians into individual farmers, as is commonly suggested. One Congressional Committee described the allotment policy as merely a cover “to get at the Indian lands and open them up for settlement.” President Teddy Roosevelt even described it as “a mighty pulverizing engine” to break up tribal communities. This section of the report further provides documented evidence that Congress has since repudiated the allotment policy and declared that it is now the policy of the United States “to reverse the effects of the allotment policy on Indian tribes.”

The report recites the magnitude of the problem of fractionated ownership of Indian lands in the early Twenty-First Century. The government spends some \$432 million a year simply to administer more than 4 million undivided interests in approximately 11 million acres of land. These lands are often unproductive for their owners and the complicated ownership patterns cause significant jurisdictional problems for tribal governments.

The report describes the largely unsuccessful federal efforts to address the problem of fractionated ownership of Indian lands, including the court decisions that have ruled the escheat provisions of the Indian Land Consolidation Act unconstitutional. The report then describes in some detail the more recent efforts to remedy the legal problems with ILCA through the ILCA Amendments of 2000 and the American Indian Probate Reform Act of 2004. The report discusses the improvements in these recent statutes, and discusses the comments received in meetings regarding ways to improve them and to make them more effective than they have been to date, as well as results of ITMA research. Finally, the report points out that one provision of AIPRA, the Single Heir Rule, might not survive challenge in the federal courts.

Recommendations

With this background, the ITMA report offers fifteen recommendations for a new Congress and a new Administration to consider in addressing the fractionation issues. For purposes of presentation, but not to reflect any sense of priority, the report presents the recommendations in five categories, as follows:

1. Include Indian Land Consolidation in National Economic Recovery Plan

The report points out that the Rosebud Sioux Tribe and the Yakama Nation have demonstrated that tribal land consolidation programs can put highly fractionated lands to self-sustaining productive use if properly supported and administered under tribal control. These two tribes have consolidated fractionated reservation lands under tribal ownership or control and put the acquired lands to grazing, farming, orchard, commercial, industrial, and even home site uses. Considering the enormous waste of potentially productive land and the enormous expense associated with administering passive ownership interests, ITMA recommends that Indian land consolidation presents a great opportunity to solve a long-standing problem while carrying out another national priority of economic recovery.

2. Education and Technical Assistance in Utilizing Tools of ILCA and AIPRA

The report points out that both ILCA and AIPRA include potentially very valuable tools that tribes and landowners can utilize in preventing further fractionation of land ownership and consolidating current landholdings into fewer ownership interests. Recommendations under this category include providing tribes and landowners with information and education on the availability of these tools; providing assistance with estate planning and will drafting; maintaining the BIA's Indian Land Consolidation Office with expanded functions and greater coordination with tribal programs and land use plans; and providing greater dissemination of information on the various voluntary transactions that are authorized by AIPRA to consolidate individual ownership interests as well as tribal prerogatives.

3. Involuntary Conveyances

This category contains three separate recommendations. The first would authorize tribes to condemn individual land ownership interests and take the property into tribal ownership so long as the basic requirements of eminent domain are observed, namely, notice, due process, and payment of just compensation for the interest condemned. The second of these recommendations proposes that Congress enact a "lapse statute," under which entirely passive or absentee landowners would see their ownership interests simply "lapse" or expire if they did not meet certain requirements under the law for retaining their ownership. The states and the federal government have utilized such statutes for many years to prevent the economic waste and law enforcement problems that result from sustained periods of passive ownership or inattention to requirements of the law that amount to "abandonment." The third of these recommendations involving involuntary conveyances is a recommendation to authorize tribal proceedings against the land itself when personal notice is impossible or when the land is used for certain illegal purposes such as growing illegal crops, housing "meth labs," illegal aliens, or human trafficking, for instance. Federal and state laws routinely permit the "seizure" and "forfeiture" of real property in such cases, so long as the processes are not otherwise unconstitutional in terms of illegal searches and seizures, and the basic notice required by due process requirements.

The recommendations regarding involuntary conveyances presume that new authorities for returning land to tribal ownership would be triggered by certain "threshold" circumstances to be determined by legislation or regulation. Meeting participants seemed to agree, for instance, that law or regulation could prescribe a maximum number of owners for a single tract, perhaps no more than ten ... or depending on the size of the parcel no more than 50, for example. Similarly, landowners and tribal representatives seemed to agree that a minimum ownership stake might trigger an involuntary conveyance, such as less than 5%, or less than 1%, to be determined by federal or tribal law. Another "threshold" consideration suggested involves landowners whose "whereabouts unknown" status leaves trust land virtually abandoned for some specified period of time. Virtually all meeting participants seemed to agree with the basic concept underlying involuntary conveyances that the conveyance would be to the party who owned the land previously, namely, the tribe from whose reservation or treaty area the allotments were originally carved. Some participants suggested that tribes could equally offer term estates to individuals who

conveyed their interests voluntarily, such as life estates for living landowners who make inter vivos transfers of their ownership interests to their tribes.

4. Redesigned Purchase Program

This category recommends that the government adopt a method of determining fair market value that does not require a formal appraisal under the Uniform Standards of Professional Appraisal Practice (USPAP). The report points out the comments received at each meeting regarding the time and expense associated with appraisal requirements, especially when the interest under consideration is not worth the time it takes to secure an appraisal, sometimes not worth the paper it takes to print the appraisal report. Also in this category is a recommendation that federal land acquisition efforts be coordinated with tribal land consolidation and land use plans. Federal and tribal efforts have actually been in competition in some instances where this coordination has not been achieved. Coordinating federal and tribal plans will result in acquired lands being put to productive use sooner and will tend to avoid the acquisition of isolated interests that simply result in additional recordkeeping for the government's interests, but no benefit to any party. This category contains a recommendation that all federal credit, loan guarantee, and interest subsidy programs be made available for Indian land consolidation purposes, and finally that all current and future liens against acquired lands be eliminated.

5. New Concepts for Indian Land Consolidation

The fifth category includes three recommendations that would involve new mechanisms to improve the government's current efforts to implement the policy of reversing the effects of fractionation. The "lapse statute" fits equally under this category, but for purposes of presentation was listed among the other "involuntary conveyance" recommendations. One of the recommendations that is included here would be to amend or to seek a court test of the Single Heir Rule under AIPRA. The government's previous policy of escheating small undivided interests to tribes was declared unconstitutional and required re-opening and re-probating more than 60,000 probate cases. ITMA recommends that the current Single Heir Rule not be permitted to operate for years before determining its validity. A second recommendation in this category is to authorize a program of electronic storage and retrieval of wills for the BIA. Electronic signatures have been accepted as legally valid in other contexts, and Congress has authorized electronic storage of records required by the Immigration and Nationality Act. If records required for national security purposes can be stored and retrieved electronically, there seems to be no reason that wills governing the disposition of Indian lands could not also be stored and retrieved when needed in a similar fashion. This should greatly simplify the process for probating Indian estates when probate has not been avoided by greater use of the other tools available under AIPRA. Finally, this category recommends amending the Indian Tribal Governmental Tax Status Act to provide a tax deduction or a transferable tax credit for the person who puts up the purchase money to acquire and consolidate fractionated Indian land. ITMA suggests this would open up a source of financing for acquiring fractionated interests in land in a way that would not put the cost on tribes, and would not require up-front federal outlays. Individuals or private sector taxpayers could provide money for Indian land

consolidation, and take that same amount as a deduction or credit against taxes otherwise due.

Next Steps

ITMA has received initial positive comments from the Special Trustee in regards to the report, and hopes to work cooperatively with the Department to pursue implementation of these recommendations.

The ITMA staff welcomes any comments or further recommendations from the ITMA board on this important subject.