

ITMA 2006 ANNUAL REPORT

Narrative description of the Purposes and Objectives of this Grant

The work plan under the current grant was negotiated through a series of meetings involving ITMA officers and staff and representatives from the highest levels of the Office of Special Trustee.

a. Assist OST by providing reports of beneficiary views re CTMP and FTM.

Early discussions focused significant attention on a proposed initiative then under consideration by OST to develop an investment vehicle for tribal trust funds that would permit some form of pooling tribal trust funds for investment purposes. Preliminary analysis by OST investment professionals had indicated that such a vehicle would permit higher earnings on tribal trust funds generally; would insulate from capital losses those tribes who from time to time required redemption of investment securities prior to maturity; and would permit the investment staff to approximate more nearly the performance of private sector portfolios in the same markets that are available to OST for investment of tribal trust funds.

ITMA officers and staff visited with OST officials and discussed the prospect of ITMA's active participation in promoting understanding and acceptance of such an investment vehicle among the tribes with trust funds in the OST portfolio. These discussions were candid and free-wheeling. They included professional descriptions from OST staff of the foreseen advantages; explanations of OST's capabilities to perform the subsidiary accounting that would be required to maintain current reports of earnings, gains, and any losses to each individual tribe; discussions of the possible and likely reactions from the account owners' and trust beneficiaries' perspectives; questions to be answered; and other questions for which proposed answers were still under deliberation, such as just how to structure such an investment pool, e.g., on a dollar-for-dollar par value basis, or on some other "unit" basis such as is commonplace in the private sector mutual fund industry.

ITMA met and conferred with OST regarding the implementation of the Fiduciary Trust Model. ITMA reviewed with OST many of the initiatives under way including the schedule for conversion to TAAMS for both title and encumbrance data; analyses of

data from IIM administration, including both transaction and dollar amount comparisons by area; and the development of metrics by OST for continuous analysis and resource allocation. ITMA also toured the call center and observed the interaction of call center employees with beneficiaries who called in from around the country with questions regarding their accounts, recent payments, and account statements.

Other, new aspects of trust reform intruded into both ITMA's and OST's work plans during the grant period. Prior to the beginning of the current grant period, the chairman of the Senate Committee on Indian Affairs had requested ITMA to assist in developing a consensus position from Indian country for recommending policy and programmatic developments for improving DOI's administration of the Indian trust estate. ITMA subsequently chaired or co-chaired a number of meetings throughout the country for this purpose and participated in presenting to Congress and to the public a set of "50 Principles" to guide deliberations for subsequent trust reform efforts.

The introduction of S. 1439 (109th Cong. 1st Sess.) during the grant period put the subject of legislative changes in Indian trust administration on the front burner for ITMA. Among other things, S. 1439 put the very existence of OST into question, as well as proposing significant changes in the trust administration regime as it was being developed and implemented by OST. ITMA conferred with OST regarding the apparent assumptions underlying the legislative proposal, including those for eliminating the Office of Special Trustee and those for directing the annual audit of OST activities.

ITMA was constrained to devote a significant part of its resources during the grant period to analysis, discussion, and explanation of S. 1439 and its implications for tribal trust administration. ITMA developed an analysis of S.1439 and disseminated it to tribal leaders and tribal organizations throughout the country. ITMA co-chaired a series of meetings throughout the country to discuss the proposed legislation, to develop recommended changes to the legislation, and to seek a consensus position among tribal account holders, as well as individual Indian beneficiaries, the *Cobell* plaintiffs, and the government. This effort consumed an enormous part of ITMA's energies and resources throughout the grant period.

ITMA conferred with OST regarding the comments received from these meetings, including the proposed legislative reorganization of DOI's Indian trust administration and the elimination of the Office of the Special Trustee.

The current "Regulatory Initiative" that the Department inaugurated late in the first quarter of the grant period provided impetus to another major activity that neither ITMA nor OST specifically contemplated in constructing the current grant. The appearance of some 400 pages of draft regulations on more than a dozen trust-related functions and programs required an enormous commitment of resources.

b. providing timely and accurate information.

ITMA board members from widely separated parts of the country who participated in the meetings with OST to observe the pace and scheduling of various parts of FTM

implementation were unfailingly impressed with the progress they witnessed. These first-hand observations provided the best evidence available to ITMA for responding to years-old questions and criticisms regarding the pace of reform and the schedule for systems conversion. The development of a “tickler system” for notifying lessees and other user of Indian trust resources of payments due, and then matching payments received with those notices was particularly impressive to the ITMA participants.

In addition, ITMA participated at the request of the Osage Tribe in a meeting at the Osage Cultural Center to discuss pending legislation, the draft of tribal litigation, the prospects for legislative intervention into the *Cobell* litigation, and the Department’s Indian trust administration.

At all meetings, ITMA shared with tribal and individual participants the insights gained from the conferences and consultations with OST regarding implementation of the FTM and the schedule for systems conversion to TAAMS. In particular, ITMA advised tribal participants of the views gained from conferring with OST regarding the accounting methods appropriate for reporting to account beneficiaries and the apparent misperceptions of the *Cobell* plaintiffs with respect to the absence of an “accounts receivable” system feature in the accounting and reporting methods employed by OST.

ITMA produced a newsletter describing the activities arising from the FTM implementation, the meetings to discuss pending legislation, the decisions arising from the various court cases involving tribal trust funds, and the continuing *Cobell* litigation.

ITMA also provided to account beneficiaries from Oklahoma to California information regarding FTM implementation and access to the beneficiary call center. Responses from those who took the initiative to make inquiry at the call center were uniformly pleasantly surprised by the level of service and courtesy they received.

ITMA also provided valuable information to other tribal organizations in the deliberations regarding S. 1439, based on consultations with OST and the counselor to the Solicitor. These consultations were particularly important in advising beneficiaries with the Department’s views on DOI reorganization, on the proposed expanded tribal trust management pilot program, and on the Department’s views regarding land fractionation and possible approaches to ameliorate the difficulties occasioned by the nearly exponential increase in land ownership interests.

ITMA’s explanations of the proposed schedule for TAAMS implementation were greeted with considerable surprise at some of the meetings because the analysis shared by OST regarding the location of the highest dollar amount of transactions as opposed to the location of the largest number of ownership interests seemed very counter-intuitive to many participants. ITMA also received valuable input in these discussions regarding land ownership issues that had not previously surfaced in such stark relief. These issues included the increasing reservation ownership by non-citizen Indians, and the increasing ownership of reservation lands by residents of other reservations and members of other tribes. The Nez Perce Tribe advised, for instance,

that Nez Perce ownership on the Umatilla Reservation was nearly as extensive as Umatillas' individual ownership interests on their own reservation.

ITMA provided an analysis of each of the December 2005 sets of draft regulations to its membership and made the analysis available to account holders throughout the country by posting on its web site. ITMA also participated in meetings hosted by the Department in order to facilitate a widespread understanding of the proposed regulatory changes and their underlying policy assumptions and objectives. ITMA hosted a special meeting in Denver for tribes and account holders throughout the country to describe in detail the proposed legislation and its relationship to the Indian Trust Funds Management Reform Act of 1994. Representatives of the National Business Center attended this meeting and were highly complimentary of ITMA's contributions to the dialogue surrounding these proposed regulatory changes.

ITMA continued throughout the grant period to review these regulations, and to confer with OST, OHA, and other arms of the Department to provide beneficiary perspective to the Department's Regulatory Initiative.

c. Annual report on FTM implementation, including stakeholder acceptance, consensus, systems adequacy, and organizational and cultural barriers.

ITMA will provide this report under separate cover in connection with close-out activities associated with this grant period.

d. Provide information to Committees of Congress, OST, and DOI

ITMA was invited three times to appear before Committees of Congress to discuss S. 1439 and its implications for the *Cobell* litigation, as well as the bill's proposed reorganization of DOI's regime for Indian trust administration. Copies of ITMA's prepared statements for these appearances have been provided to OST.

ITMA's remarks before these Committee contained the organization's best efforts to capture the consensus view that were developed throughout the meetings chaired by ITMA during the grant period.

e. Assist OST by hosting three Listening Conferences

ITMA conducted a listening conference in Anadarko, Oklahoma, where representatives of OST at the highest level participated and individual account holders from the region were permitted to interact with OST officials. This listening conference provided the Special Trustee and Principal Deputy Special Trustee, along with selected staff members, with a forum from which to address a large number of tribal officials and account holders with a first-person report on trust reform progress and FTM implementation. In addition, the listening conference provided OST at the highest level with an opportunity to hear first-hand the concerns, questions, and frustrations of account holders from a grass-roots level. The dialogue at this listening conference was

more animated and somewhat less constructive than in several of the earlier conferences. This conference did, however, provide the Special Trustee with an opportunity to deliver a first-hand report to dozens of account holders regarding the development of OST's FTM, including appraisals, TAAMS implementation, probate backlogs, land fractionation, improvements in the federal cadastral survey program for Indian lands, and modernization of OST's beneficiary-centered customer services program such as development of the call center, institution of a lockbox for collections, and other improvements such as routine notice of lease payment due dates. As at all previous conferences, Indian individuals and tribal leaders expressed serious concern over the decision of the government to stop providing will-writing services to individuals, citing many can not afford the service.

f. Tribal and account holder outreach, including newsletter

ITMA provided routine email distribution to tribes and individuals of all trust-related activities with which ITMA was involved. In addition, meeting announcements, analyses, and news reports are disseminated by email, facsimile machine, and first-class postage. Many account holders have advised ITMA that they do not have access to either email or facsimile transmissions, and ITMA accommodates those who have provided a mailing address by sending materials through the U.S. mail.

ITMA's analysis of S. 1439 and the Regulatory Initiative, as well as responses to observations and comments by account holders and other tribal organizations, were well received by the beneficiary community for the most part. Many of the issues implicated by the legislation and the draft regulations have proved to be highly contentious among different beneficiary constituencies, and ITMA has often found itself in a position of attempting to forge consensus from harshly competing views. ITMA has struggled to maintain a position of being an honest broker of views and purveyor of accurate information to the beneficiary community.

The proposed pilot program for tribal trust management, for instance, has raised significant differences between some of those tribes who already contract or compact such programs and some direct service tribes. Some of the contracting and compacting tribes want to see a marked expansion of their numbers, while many direct service tribes still view the operation of these programs as a direct federal responsibility that is diluted by tribal operation.

Another area where ITMA's account holder outreach has placed it in the midst of strongly contending but opposing views is probate reform. Some beneficiary constituencies see the backlog and somewhat glacial pace of probate administration as an evil to be remedied at almost any cost. Others see the proposals for streamlining probate through summary processes by officials who are not subject to the judicial canons that constrain administrative law judges as a sacrifice of due process to expediency. ITMA has tried to present each side's views to the other in an appropriate manner that is respectful of the legitimate concerns of each.

At every meeting conducted or hosted by ITMA during the grant period, ITMA has provided a forum for the tribal representatives of the FTM implementation team to make a report to the assembled beneficiary community. These reports have been valuable not only to the account holders present, but also to the FTM implementation team representatives as an opportunity to gauge stakeholder acceptance and to gain important feedback from the beneficiary community.

g. Semi-annual written reports

ITMA has provided lengthy reports to the tribal community regarding its activities of the grant and other information relevant to the accomplishment of the purposes of ITMA and the objectives of this grant.

The analyses of the Department's Regulatory Initiative, for instance, have run more than 50 single-spaced pages. These have been presented to the tribal community, to account holders in meetings, and delivered in reports through email, facsimile, and U.S. mail. These reports have solicited and then reported ITMA views on trust fund accounting, land acquisition, land consolidation, probate reform, fees for services, administrative appeals, and other issues implicated in the draft regulations circulated by the Department.

The development of the 50 Principles for trust reform involved the development and distribution of hundreds of pages of analysis and commentary before the distillation into a report presented to the ITMA board in October, to the National Congress of American Indians in November, and delivery to Committees of Congress at their request in July.

Analyses and reports on S. 1439 commanded a significant portion of ITMA's information dissemination activities from the moment the bill was introduced into the Congress. Meetings from Coeur d'Alene to Washington, D.C. produced a stream of documents and reports which were disseminated to the tribal community, comments back from that community, and syntheses of competing and complementary views on every aspect of the bill.

All these reporting and information sharing and continuing analysis activities continue to the current date, and are likely to accelerate in the closing days of the grant period.

h. Hiring a person to maintain routine and regular communication with OST

ITMA entered the grant period with a contractor who had extensive experience in representing the views of individual account holders to the Department. This individual attended meetings at which OST and ITMA conferred on the progress of FTM implementation and administration of this grant. She then prepared reports for ITMA which were made available on the ITMA web site, and she made oral presentations at every meeting ITMA hosted during the period she was engaged by ITMA for this purpose. OST's obvious progress in improving beneficiary service was particularly

striking during this period, and the contractor shared her enthusiasm for these developments in her reports.

When other professional commitments overcame the first contractor's ability to devote sufficient time to maintaining communication with OST, ITMA was without a person with this primary responsibility for a period of months. Subsequently, ITMA was able to secure the services of another contractor with significant experience in the field. This contractor was a former counsel to ITMA and a long-time representative of a tribal account holder with a substantial stake in OST's trust fund portfolio. She has visited OST and toured the facility to familiarize herself with current operations and developments. The current contractor has shown herself to be a willing participant in ITMA's continuing effort to share with the beneficiary community a tribal perspective on OST's continuing successes in reforming Indian trust administration.

The continuing development of FTM; the prospect of reconnecting the Department to the internet; the major changes contemplated by the Department's Regulatory Initiative; the prospects of a significant change in the Department's own organization for trust administration; the likelihood of a continuing need to be responsive to changes imposed by Congress; the increase in the number of tribes interested in presenting plans for tribal management of trust funds; the pressure for more and more tribes to contract or compact for trust management programs; the continuing work to develop a collective tribal investment vehicle; and many other changes either under way or under consideration all portend a continuing need for even closer collaboration and consultation between OST and ITMA.

The pace of change in DOI's Indian trust administration and the improvements resulting from FTM implementation will require continuous review and likely modification of the means employed by ITMA for effecting this continuing liaison and consultation with OST.

Narrative description of purposes, objectives and tasks not accomplished, with statement of reasons.

The first of the three scheduled conferences was conducted at the headquarters of the Comanche Tribe in Oklahoma. The second of the conferences was scheduled for Leech Lake in Minnesota and cancelled twice at the request of the host tribe due to tribal business and next due to the unavailability of the Special Trustee or the Principal Deputy Special Trustee to attend. The third conference, which was scheduled at Tohono O'odham in October was cancelled at the request of the Principal Deputy Special Trustee due to schedule conflicts. With the approval of the Tribe, this session is rescheduled for November, 2006.

ITMA and OST agreed to schedule a meeting at the American Indian Records Repository at the National Archives and Records Administration facility in Lenexa, Kansas. That meeting, too, was postponed by scheduling conflicts and is currently contemplated for November 14, 2006.

In addition to scheduling conflicts with the OST, the two Listening Conferences that were cancelled for Minnesota and Arizona were not rescheduled and conducted because of the pressing schedule to discuss and disseminate information regarding the Regulatory Initiative and S. 1439. The trend of questions and concerns reaching ITMA from the beneficiary community clearly indicate that shifting the focus during this grant period from the originally envisioned listening conferences to the more pressing issues of legislative and regulatory reform was an appropriate use of time and resources during this grant period. Neither of those two initiatives was amenable to control or scheduling by either ITMA or OST. Yet, both initiatives affect ITMA's and OST's missions directly and immediately. Therefore, the attention and resources devoted to them made scheduling and conducting the remaining two listening conferences inadvisable in the circumstances.

The suggested development of some form of investment "pool" for tribal trust funds was an OST initiative. It, too, however, was not achieved, largely because other required reviews and approvals from the Department have not been forthcoming during the grant period. ITMA did agree to assist OST in describing the proposal to the beneficiary community, and in collecting and reporting back to OST views and comments received from tribal account holders. As the matter actually developed, ITMA and OST reached an informal agreement to withhold public announcement or discussion of the proposed initiative pending further review by higher officials within the Department of the Interior and government attorneys in the Departments of both Interior and Justice. ITMA understands that the views of the Office of the Solicitor regarding this proposed improvement in tribal trust fund administration is expected, but may not be received before the expiration of the grant period.

The semi-annual reports to the tribal community regarding the activities and goals of ITMA and the objectives of the grant gave way to continuous updating of a number of reports and analyses as they developed during the grant period. These analyses and reports were developed either in response to or in anticipation of the constantly changing landscape of proposed legislative and regulatory changes.

Summary of Problems, delays, or adverse conditions

The *Cobell* litigation continued to overshadow both ITMA's and OST's activities throughout the grant period. In addition, the positions taken by the parties in more than twenty tribal trust fund lawsuits colored the ability of OST and ITMA to share information fully. In part, this was because one side or the other was party to confidentiality and protective orders in the various lawsuits. In part, it was because one side or the other was reluctant to share information that might in some manner jeopardize a litigating position, or subject one party or another to criticism or sanction for dealing with a party represented by counsel in the matter under discussion.

The positions taken by the government in litigation presented some difficulties in ITMA's efforts to disseminate information to beneficiaries regarding the settlement of

historic account balances. ITMA, for instance, offered a suggestion intended to facilitate tribal understanding and acceptance of OST's suggested pooling of tribal trust funds for investment. This recommendation of a longitudinal comparative analysis was dismissed out of hand by the government due to concerns that the results might somehow be used against the government in pending or future litigation. This continued one-eye-toward-possible-compromise approach to collaboration represents a significant barrier to the kind of collaborative approach to trust reform that this grant contemplates.

Many issues that comprised the subject of ITMA's meetings and activities during the grant period failed to achieve consensus views among the beneficiary community or tribal organizations representing their individual constituencies. The issue of probate backlogs typifies the inability of the beneficiary community to achieve a consensus view. Some elements of this community view the backlog to be an evil to be remedied at almost any cost. Other elements of this community view the proposals to streamline the probate process as an unacceptable sacrifice of due process to expediency.

Another issue that continues to divide the tribal community is the proposal to provide incentives to tribal management of trust programs. Some members of the contracting and compacting tribal community tend to see this approach as the only reasonable alternative available to a tribe determined to achieve self-determination and true trust reform. Some members of the direct service tribal community see the emphasis on contracting and compacting as both an infringement on their tribal sovereignty and as a threat to the very existence of the trust relationship between their tribes and the federal government.

The constant repetition from the *Cobell* plaintiffs in court, in Congress, in the press, and in the public of certain preferred outcomes continues to impede open inquiry and dialogue. The constant repetition, for instance, that failure to implement an "accounts receivable" system constitutes a fatal flaw in Indian trust administration has precluded any consideration of the assumptions underlying the demand. Whether an "accounts receivable" system belongs in a trust regime that does not operate on a credit basis is never discussed. Consequently, the feature of TFAS that currently notifies lessees and other payors of payment due dates before payment is actually due does not receive either attention or appreciation from the account holders who benefit from that feature and still echo the demands for an "accounts receivable" system.

Similarly, some members of the beneficiary community still object vigorously to the method utilized by OST of accounting for and reporting on Indian trust funds. Some continue to insist that the failure to account and report on an accrual basis is a fatal flaw in the administration of the Indian trust. Whether the Federal Accounting Standards Advisory Board ultimately approves the proposal to utilize some Other Comprehensive Basis of Accounting, such as a modified cash basis of accounting, remains an open question. Whatever the outcome of that issue, it seems to ITMA that even FASAB has agreed that accounting to the beneficiary level on an accrual basis will not be required. Accordingly, it seems to ITMA that the issue continuously asserted by this portion of the

beneficiary community is based on the faulty premise that beneficiaries should expect to receive individual account statements prepared on the accrual basis of accounting.

ITMA has not been successful in dispelling these and some other misunderstandings that lead to continued criticism of OST and DOI that may well be misplaced.

Previous experience with regulatory reforms in the areas of minerals management, timber stand administration, and other resource management regimes counsels caution in what appears to ITMA to be a troubling concession to land records data problems. The once-heralded commitment to clean up land records and title information before migrating it to a modern automated system has apparently been abandoned to the current determination to roll out TAAMS with current data. The concern is that once a modern automated system is up and running, the impetus for cleaning up the data in the system, and the resources with which to make it happen, will disappear.

Conclusion

The current grant period has been a time of great uncertainty on many fronts, even as OST has continued to make significant progress in implementing FTM. This period has required an unusually high level of energy to receive, analyze, and disseminate an enormous amount of information from the Congress and the Department, as well as from OST.

ITMA thinks the working relationship with OST has improved commensurately with the improvements OST has made and that ITMA has championed for more than a dozen years. The relationships among the stakeholders have been complicated by litigation, by uncertainty, by the continuing lack of consensus within the beneficiary community on important issues, and by what ITMA regards as unfortunate pronouncements by parties on both sides in litigation designed not to further trust reform but to protect litigating positions.

This complex atmosphere makes continuing collaboration and open dialogue between OST and ITMA more important, however, not less. ITMA is committed to continuing and improving an atmosphere of transparency and accountability in all aspects of trust administration.

To that end, ITMA looks forward to continuing to work with OST and the beneficiary community in all aspects of trust reform.