



**INTERTRIBAL MONITORING ASSOCIATION** on Indian Trust Funds  
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## **ITMA FY 2008 SEMI-ANNUAL REPORT TO TRIBES (April 1, 2008 – Sept 30 2008)**

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The second half of the fiscal year was largely consumed by the agreement that grew out of discussions with OST about the Advisory Board recommendations in January that the Special Trustee devise a “solution” to the problem of fractionated land ownership. In continuing discussions that began in the first half of the year, Special Trustee Ross O. Swimmer advised that the Office of Management and Budget had eliminated funding for the BIA’s Indian Land Consolidation Office in a passback, and at some point he had elected not to force an appeal of the issue. In his discussions with OMB, however, he had been tasked with providing a report to OMB with comprehensive recommendations. That assignment to OST led to a very compressed and accelerated pace for ITMA to conduct an outreach, research, analysis, and recommendation project on land fractionation.

ITMA continued to confer with the National Congress of American Indians, the Council of Energy Resource Tribes, the Intertribal Bison Cooperative, the Affiliated Tribes of Northwest Indians, the Large-Land-Based Tribes consortium, and other Indian and tribal organizations involved in various components of the trust reform agenda. ITMA participated in ATNI meetings, and appeared at NCAI meetings to address committees or to serve on panels of that organization’s mid-year and other meetings.

ITMA continued to provide liaison/monitoring functions with OST, continued to monitor tribal and other trust litigation, and continued to confer with the Department on possible opportunities to implement the methodology previously developed in the Tribal Trust Funds Settlement Project.

### Tribal Trust Fund Settlement Project

The Methodology produced in a cooperative effort between ITMA and the Department’s Office of Historical Trust Accounting has been completed. The Methodology has been approved by tribal council resolution of the seven tribes who participated in its development, by the board of directors of ITMA, and by the

Department's Office of Historical Trust Accounting. Envisioned as a means for non-litigating tribes to achieve some form of binding settlement with the government on their various tribal trust fund balances, this methodology was developed over a period of several years and intense negotiations between the ITMA group and the Department. Although the Department of Justice did not participate openly in the discussions or negotiations, it was clear throughout the project that DOJ was looking over the shoulder of the Interior Department and participating in the background.

Because of the length of time taken in this project, some of the ITMA participating tribes who were non-litigating tribes when the project began had become litigating tribes during the course of the project. This was out of a concern that the government would use the elapsed time as an opportunity to bar any right to a judicial remedy by invoking a statute of limitations. That caused some delay as the government huddled to sort out the issues that might be involved and appropriate disclosures and waivers were put into place to protect the parties to the negotiations on the TTFSP methodology. In the meantime, the government also initiated a separate track with one of the participating tribes who had also filed claims in court to develop a settlement process for that tribe within the context of pending litigation.

Apparently the government does see value in the TTFSP methodology because several litigating tribes have contacted ITMA to make inquiries about the Methodology. They explain that Department of Justice lawyers have suggested that they consider utilizing the methodology in the context of their ongoing litigation. These tribes have expressed appreciation to ITMA for the effort that obviously went into development of the methodology, and for the prerogatives that are expressly reserved for individual tribes in its utilization.

One of the ITMA participating tribes that is not a litigating tribe did make an explicit request directly to OHTA in an open meeting for an opportunity to apply the methodology in a non-litigation settlement utilizing its own trust funds as a pilot test of the methodology. At the close of the fiscal year, that tribe had received no response from the Department. ITMA will continue to push for attention to this request, as well as pursue the possibility of working toward a larger Phase II project as was envisioned by the initial ITMA-governmental workgroup.

ITMA has also prepared a notice to tribes to accompany the methodology, urging tribes who do elect to use it to make sure they have appropriate professional expertise in its employment. The TTFSP methodology is not a self-executing process. Appropriate utilization will require a firm tribal commitment to get the most of it, and it will also require professional expertise that many tribes do not possess in-house in analyzing account statements, and conducting investment analysis of the tribe's returns.

## Fractionation

ITMA did enter into an agreement with OST mid-way through the fiscal year to conduct outreach and consultation on the land fractionation issue, and to prepare a report by the end of the fiscal year. Subsequently, ITMA began work with the BIA as well. Throughout the remainder of the fiscal year, ITMA conducted meetings on the land fractionation issue in the Pacific Northwest, in Oklahoma, in Montana, at national and regional tribal meetings including meetings of ATNI and NCAI.

ITMA found receptive audiences at each presentation or outreach session and by the end of the fiscal year had received a great many innovative and promising suggestions to formulate recommendations in the final report, now due in December.

At every meeting, there was unanimous agreement that the Bureau erred greatly and set back the cause of land consolidation considerably when it ceased providing will drafting assistance to Indian landowners. At every meeting, individual and tribal representatives urged ITMA to transmit this message back to the BIA, that estate planning and will drafting assistance are among the greatest needs in Indian country if land fractionation is to be even slowed.

Also, it became clear at each of these meetings that individual and tribal representatives are confident that many more Indian landowners would make much greater use of the land consolidation tools presently available under the American Indian Probate Reform Act and the Indian Land Consolidation Act, if only they were aware of the options available to them. At each meeting, attendees urged ITMA to recommend a vigorous outreach and educational program to bring knowledge and technical assistance to the actual reservation level where Indian landowners can both learn and immediately make use of knowledge gained. The legislative tools are worthless if they are unknown, and knowledge of them is not useful if the ability to use them is not provided also.

At the close of the fiscal year, ITMA still proposes to meet with additional tribes and groups of landowners in the Rocky Mountain, Great Plains, and Northwest Regions of the BIA. The information gained from this project should prove to be of great value not only to the Special Trustee, but to the Bureau, to OMB, and to Congressional Committees that will address this issue in one form or another in 2009 and succeeding years.

ITMA has candidly addressed the issue of involuntary conveyances of individually owned Indian trust land as a means of forcing land consolidation in certain circumstances. The idea has not been rejected out of hand at any meeting by any attendee so far. Of course, that does not suggest anything

remotely approaching any agreement, much less consensus, on what those “certain circumstances” ought to be. That will be the subject of many future conversations on the subject.

### Trust Litigation

The judge in *Cobell* scheduled a further trial that took ten days over the course of some three weeks in June to determine what remedy he should provide the plaintiffs since he had already determined that the accounting to which they were entitled was impossible to perform. In August the judge handed down a decision awarding the plaintiffs \$455,600,000 that he characterized as an equitable remedy since that number is within the range that the government cannot say with 95% certainty was actually posted to individual accounts although received in trust.

Both the government and the plaintiffs immediately announced great disappointment in the result and both plan to appeal. In a status conference following his decision, the judge made it clear he did not award any “damages” in the case. In fact, he would have been limited to \$10,000 in any damages award. He also made it clear that if the plaintiffs had had to prove any losses in the case, they would have gone home empty-handed since they did not prove any loss. The government continues to make the point that the award is based on a statistical possibility of a loss, not any demonstrated loss or not even any *probability* of a loss. And they plan to appeal the award on the grounds that the judge did not have the authority to make any award, and that there is no basis in the record of the case for the amount of \$455,600,000.

### Trust Monitoring

In addition to the monitoring and coordination of the efforts conducted during this session as detailed in this report, ITMA continued regular monthly meetings with the key staff at the Office of the Special Trustee to monitor reform efforts. Discussions are detailed in reports available on the ITMA web site as well as within the ITMA Newsletters.

During this period of time ITMA conducted two Listening Conferences, one at the Osage Tribe in Oklahoma and Yakama Nation in Washington State. Detailed reports are available on the ITMA web site.

