



INTERTRIBAL MONITORING ASSOCIATION on Indian Trust Funds
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FY 09 FIRST QUARTERLY REPORT (OCTOBER, NOVEMBER, DECEMBER 2008)

ITMA 18TH Annual Conference - OST Related Issues

On October 1-3, 2008 ITMA conducted its 18th Annual Conference at the South Point Hotel Casino in Las Vegas, NV. Approximately 80 individuals were in attendance who represented 23 tribal governments.

Significant was the election for the FY2008 ITMA Board of Directors and Officers of the Board. Board members include the tribal nations of Three Affiliated Tribes, Tlingit & Haida, Oneida Nation, Salish & Kootenai, Warm Springs, Blackfeet, Nez Perce, Crow, Chippewa Cree, Colville, Osage and Sac and Fox.

ITMA OST Liaison Brian Gunn provided an overview of monthly monitoring reports conducted over the past several months with key staff. He pointed out that in many cases the activities overlap between BIA and OST, for instance, on behalf of tribes inquiries have been made to regional and central office staff regarding the appraisal tracking system. Monthly monitoring meetings or telephone conference calls between top level OST staff and the ITMA Executive Director and OST Liaison have occurred and issues of discussion have included the OST vacancies and the Indian preference court case, issues involving crop share leases, the unveiling of the TAAMS system. ITMA has continued to monitor the Interior budget issues, specifically, the de-funding of the Indian Land Consolidation Office. Reports of sessions are available on ITMA's web site.

Tribal Chairman Ralph Sampson of the Yakama Nation and Osage Representative David Conrad provided reports on the highlights and priority issues presented at the Listening Conferences held at their respective reservations. Highlighted issues were:

Yakama - August 20-21 Listening Conference

- a request for funding for tribes to address fractionation suggesting tribes be allowed to consolidate interests and have whole sites available for families
- continued delays with fee-to-trust applications
- problems with contracted resources appraisal services because of backlog

- poor communication between contracted Yakama Land Enterprise and its relationship to BIA Realty
- excellent opportunity for Indian individuals to speak directly to Special Trustee

Osage – September 9 Listening Conference

- offered independent facilitation of internal governmental tribal issues
- fee to trust issues (mentioned specific matters)
- nonpayment of taxes on restricted land to county
- BIA provides little assistance in negotiating (grazing) leases
- BIA failure to consult with tribal members prior to making key discussions
- outreach to Indian individuals required

Nez Perce Chairman Sam Penney offered that the session conducted in Nez Perce in May 2008 was very beneficial and the Tribe was provided an excellent report listing issues. However, he suggested there be a process in place for determining a means of ensuring that issues were being handled by OST. He reported certain issues presented at the session are still pending.

ITMA Fractionated Indian Trust Lands Project

ITMA continues to conduct sessions on ITMA's Fractionated Indian Trust Lands initiative which offers the opportunity to generate active tribal participation in developing approaches to address the issue of fractionated land ownership throughout Indian Country. At the invitation of the Special Trustee for American Indians to conduct tribal outreach, in May 2008 ITMA began meeting with tribes, landowners, national and regional organizations, and officials of the Department of the Interior to discuss the issues of land fractionation. ITMA reported on the dialogue sessions which centered on the following discussions.

- legislative options to further address fractionated land ownership
- adequate funding for consolidation efforts
- tribal management authority over land consolidation
- options to address lands held by 'Where About Unknown' persons
- options to address unclaimed property
- options to address appraisal concerns
- creation of incentives to induce willing sellers

At the ITMA Annual Conference, a full day session was devoted to the fractionation topic and agenda presenters and participants shared their knowledge and insights generated from years of dealing with resources and land-based issues.

OST & Reform Act of 2004

Special Trustee Ross Swimmer provided an overview of OST projects, accomplishments, and future in regards of the new Administration.

Mr. Swimmer reported that over the past ten years there has been a total restructure of the financial side of the trust and operate a state of the art accounting system and are able to balance to the U.S. Treasury and when monies are paid to individuals, OST balances down to the penny. Individuals today receive quarterly comprehensive financial statements showing beginning balances, all transactions, subparts showing property owned, whether it's a right of way, and where the funds come from. This information allowed individuals to question status of leases and earnings. Mr. Swimmer referenced the Comprehensive Trust Management Plan that is in place and the fiduciary trust model showing areas of responsibility for agencies of trust (BLM, BIA, etc.). He discussed the 50 trust officers placed across Indian Country where the greatest number of transactions occurs, to assist with locating whereabouts unknown, assist with transactions, support BIA staff and help with the general administration's trust. He stated OST has trained over two thousand individuals within the Interior branches in trust fundamentals and what it means to administer the trust.

OST has a need to continue upgrading the information technology of OST and within BIA. He referenced the new TAAMS title system working in concern with TFAS the accounting system. All processes must be automated to deal with the tens of millions of transactions and billions of dollars each year.

OST continues to work with the historical accounting. The Office of Historical Trust Account with a budget of \$54 million is now under OST.

Regarding the Cobell lawsuit, Judge Robinson has ruled the maximum amount of loss is approximately \$40-\$55 million. Both parties are filing briefs asking the appellate court to accept the appeal. Regarding tribal lawsuits, eighty-four tribes have sued. He encouraged tribes to look at the work ITMA is doing along with tribes and the government on a settlement Methodology.

Referencing 'where do we go in the future?', Mr. Swimmer stated OST should look at focusing its efforts primarily on the financial side of the trust. OST has recommended to the department that OST should continue as an independent office to fulfill the oversight functions and the financial accounting functions given to them by Congress for the next several years. During that time the Special Trustee could begin planning, in consultation with tribes and with ITMA as a lead organization, to restructure trust operations, further suggesting a restructuring either as an independent office or as an office within the assistant secretary of Indian affairs.

Mr. Swimmer stated the work performed in records clean-up by OST for BIA should be taken over by BIA. He stated there is a serious problem with the numbering system between BIA and MMS that must be dealt with.

A question from the audience, "what is the plan to address fractionation an old probates" was responded to with Mr. Swimmer stating that OST had committed \$10 million to BIA to deal with the probates problem. In regards to fractionation, OST has contacted ITMA about assisting. ITMA agreed to go out into Indian Country and

dialogue with tribes to get input and suggestions regarding alternatives. ITMA will provide a final report with its findings and recommendations.

Investments

Mr. Chuck Evans, OST's Director of Investments, provided a recap of the current economy, stating the national economy has a problem, OST does not. Referencing OST trust funds, he stated he did not believe there was a risk because OST has invested in Fannie Mae and Freddie Mac.

Bureau of Indian Affairs

Michael Smith, BIA's Deputy Director reported that BIA is currently working with EPA on contaminate surveys and a previous requirements directive. Mr. Smith referenced the importance of continuing the ITMA Listening Conferences so that issues from the local communities can be brought to the attention of appropriate agencies for follow up and dialogue. He referenced the Secretary's healthy lands initiative, range management and agriculture.

Mr. Smith reported the Modernization Initiative presented several topics and was on going with discussions focusing on staffing, however, due to budget limitations and changing of work force it is not moving quickly. He stated tribal leadership should continue to guide the process. The National Indian Program Training Center located in Albuquerque, NM is available to all employees and tribes at no cost. In addition, there is no cost for attending the training courses. New projects were announced; the Honor Student Program, takes college students and puts them into the workforce at entry level., the Pathways to Leadership aimed at high potential employees (GS12-13), and the All Leadership and Mentoring Course aimed at GS 14-15. This year there are five applicants approved for the Senior Executive Service (SES) program.

A review of several top level and regional position changes within BIA was provided. Mr. Smith, referencing the FY2009 budget, announced we would be under a continuing resolution beginning today through March 6.

Office of Trust Responsibility

Land into trust has been placed under this office reported Vicky Fisher, Deputy Bureau Director for Trust. The newly revised Trust Handbook, which standardizes a process for placing land into trust is not ready for distribution, but is at final review stages. A tribal leaders meeting will be held to discuss the handbook processes. Ms. Fisher announced of all cases decided, about 60,000 have been approved for trust status.

In 2005, there were 18,000 probate cases older than 2000. Standardizing processes and procedures have been put in place. The protract system is being utilized to record cases. As of September 2008 there are 17,000 active cases in protract. Once a probate gets decided, LTRO makes the changes in the title system. Ms. Fisher acknowledged there are still issues to work out with individuals and that there is still guidance required for a consistent way of handling matters. She indicated there might be probate regulations sent out during this Administration. BIA's goal is to have all "eligible" back logs (that do not have a hold of some kind) completed by the end of FY2008, BIA is at 98%.

The issue of BIA no longer assisting individuals with will-writing was questioned and Ms. Fisher responded the Department is not promoting active will drafting efforts, and wondered if the department would be willing to consider other kinds of estate planning that would actually be focused on reducing fractionation. It was mentioned the new AIPRA law provided for some alternatives. She acknowledged there had to be an effort by the department to assist individuals and tribes to utilize the tools available.

A very lengthy and in-depth agenda continued on other aspects of trust reform and resources which received great interaction and feedback from Indian country.

NCAI Annual Conference & ITMA Board of Directors

The ITMA Executive Director and Chairman of the Board Mervin Packineau participated in the agenda of the NCAI Annual Conference Natural Resources Committee 'Trust Reform' panel discussion. The session was held on October 21, 2009 at Phoenix, Arizona.

ITMA reported on its current activities as well as provided an overview of its recent ITMA Annual Conference. Discussion presented by tribal leaders in regards to OST centered on the 'sun-setting' of the office and it was acknowledged much relied upon the outcome of the upcoming national elections.

ITMA report that at the direction of its membership, we would be looking into the issue of fractionated lands.

ITMA conducted a Board of Directors meeting with the members attending the session. The Board directed staff to meet with OST and BIA regarding possible efforts in regards to the fractionated lands issue. The Board also discussed the next locations for the Listening Conferences. It was determined a session would be held at the Salish & Kootenai Tribe as it offered unique issues being a tribe who is self-governance and administers its trust program. The second location will be at Rapid City.

Coeur D'Alene Fractionation Meeting

At the invitation of the Coeur D'Alene Tribe ITMA conducted a meeting focusing on fractionation issues at the reservation on November 20. Area tribes were invited and participated to the meeting.

ITMA provided an agenda that focused on the history of the fractionated lands problem. Professor Richard Monette provided a detailed power point describing the history of the problem and offered suggestions at working toward resolving the issues. He acknowledged many individuals do not want to see their tribe involved in their property, however, he endorsed that he would rather have his tribe governing his lands than the state or federal government because he could have a direct voice in the local political system. He urged tribal leaders to govern in their own communities or someone else will and he urged tribal members to allow their tribes to govern.

OST's Special Trustee participated on the agenda by providing an overview of the trust reform activities completed land on-going. He discussed areas requiring assistance of tribes, specifically, tribal input in dealing with the fractionation problem. ITMA was solicited to assist in coordinating tribal dialogue and preparing recommendations to submit based on tribal input.

ITMA legal counsel Majel Russell provided a power point review on the General Allotment Act of 1887 allotting lands to individuals, and the 1928 Meriam Report stating the General Allotment Act had failed. The 1934 Indian Reorganization Act prohibited further allotment of Indian lands and authorized the trust status of remaining allotment. There was a great deal of informative discussions between presenters and meeting participants regarding this subject and including forced fee patents and the loss of Indian lands due to tax issues. AIPRA was discussed and ITMA's ideas regarding consolidation agreements at probate was presented. The American Indian Probate Reform Act regulations were discussed.

Rapid City Fractionation Meeting

ITMA conducted a Fractionated Lands session was held at Rapid City, SD in conjunction with a Great Plains Tribal Chairmen's Association meeting. ITMA provided a review of the history and current situation regarding fractionated Indian lands.

The enormous economic and fiscal waste not only of the land that goes unused, but also of the federal expenditures of scarce federal funds that are badly needed for other Indian programs. The Indian Land Consolidation Office should be maintained and funded in 2009 however, ILCO's failure to coordinate its activities sufficiently with tribal objectives and with tribal land consolidation plans was an issue. Tribes should be in control and make decisions regarding parcels to be purchased so that acquired lands would more likely be immediately beneficial to the tribe. It was felt the federal

government's trust responsibility is tied so closely to administering the trust and providing services to individuals that eliminating individual ownership will weaken the federal commitment to carrying out its trust responsibilities to treaty tribes.

Individual landowners would sell their ownership interests willingly to the tribes if there were funds available to pay a reasonable purchase price. It was stated loan programs for land consolidation purchases should be available to individuals as well as to tribes at reasonable terms. Tribes should be offered a right of first refusal to purchase any lands that become available for sale on the reservation, whether the lands are in trust status or fee.

Appraisals were discussed and it was the overall conclusion that it takes too long to complete the process and sometimes result in missed opportunities to purchase from willing sellers. Estate planning was mentioned and there was agreement that the BIA made a serious mistake in ending the practice of assisting individuals in drafting wills. Tribes felt BIA should make an effort to provide assistance in this and other areas by providing 'templates' or other forms of 'guidance' on language to be used in wills to prevent further fractionation of interests in trust land and be willing to admit mistakes and reconsider prior decisions that are having unintended or untoward consequences.

The AIPRA and probate regulations were discussed and it was unanimous that training about the laws is required at local levels. Individuals are simply unaware of the intricacies and complexities of probate and intestate succession. Without assistance in estate planning and will drafting, participants stated, the tools of AIPRA will go largely unused by the vast majority of Indian landowners.

Other topics discussed were Indian Land Consolidation and the Whereabouts Unknown. Unpopular topics such as force involuntary sales or condemnation and adverse possession were discussed.

Large Land Based Tribes Meeting

At the invitation of the Large Land Based Tribes, ITMA participated on the agenda and provided an update of activities, most specifically, our efforts in conjunction with the Office of the Special Trustee's office regarding fractionated lands. The Executive Director reported on recent regional sessions conducted in Indian Country and several invitations were made to ITMA to meet with local communities. Individuals offered comments regarding tribal-specific experiences.

Participants questioned the plans of OST in regards to the sun-setting clause of the 1994 Reform Act.

It was urged that ITMA be involved in any discussions regarding trust reform during the transition of the new Administration. Concerns were voiced regarding the participation of *Cobell* attorneys in the DOI transition, citing conflicts of interest when discussing trust reform issues.

Trust Reform Monitoring

ITMA Executive Director and OST Monitoring Liaison Brian Gunn continue to meet with the OST top level staff regarding reform issues. Most recent issues include;

Extension of contaminant survey deadline: While not an OST issue per se, OST is helpful in discussing some ideas. ITMA tribes have discussed an EPA regulatory requirement (at 40 CFR 312 Subpart C) that contaminant surveys required for fee to trust acquisitions must be completed or updated within 180 days, a timeframe that in practice is apparently not workable when awaiting completion of cadastral surveys and appraisals. ITMA is attempting to assist in reviewing this matter and is also discussing this issue with BIA.

Reopening of Closed Estate Accounts — A question has arisen regarding situations where a closed estate account is reopened by OST. Apparently this happens when funds are not located or otherwise included in the account by the initial probate deadline. OST is looking into the matter.

Recording of appraisal backlogs: The most recent OST report in the *Cobell* case states that as of June 30, 2008, there are 3,628 appraisals pending throughout all of the Regional offices. The report states that this number reflects those requests for which all information has been received and that are at least 90 days, but it also says that counting methodologies vary from Region to Region. ITMA is attempting to determine if these numbers are reported by the Regions and the Regions use different counting methodologies, is the 3,628 number an accurate number?

Office of Native American Programs at USDA. The provisions in the 2008 Farm Bill relating to loans for consolidation of fractionated lands (Section 5501 of the Farm Bill as enacted into law has not yet been implemented. ITMA is monitoring the process and will follow the development of the regulations and encourage it occur through negotiated rulemaking.

Sun-setting of OST. With the new Administration in place, there is significant dialogue among Tribes and organizations about pushing the sun-setting of OST. ITMA will make an effort to work with Tribal representatives and the Office of the Special Trustee to arrange for formal dialogue regarding any suggested or proposed transition.