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REPORT ITMA LISTENING CONFERENCES (2004-2009)

EXECUTIVE SUMMARY

For more than five years, ITMA has conducted Listening Conferences throughout Indian country. These meetings have allowed ITMA to hear first-hand from Indian trust beneficiaries the trust matters that most concern them. These conferences have provided top-level OST officials with an opportunity to interact face-to-face with trust beneficiaries in their home communities.

More importantly, these Listening Conferences have provided tribal leaders and individual trust beneficiaries with opportunities to present their concerns directly to those OST and BIA officials who are charged with discharging to them the nation's fiduciary responsibilities to the federal Indian trust. Over this period virtually everything about these Listening Conferences has changed dramatically, the tone, tenor, content, beneficiary expectations, and even the attendance level. These changes have mirrored changes that have taken place during this period in the administration of the trust, as well as changes in the law governing important aspects of the trust.

Developments in the *Cobell* litigation represent another striking change in trust beneficiary expectations during this period. In addition, actual implementation of long-awaited reforms in trust administration have addressed some of the concerns that dominated comments delivered by trust beneficiaries in the early Listening Conferences, such as timely posting of receipts and early access to trust funds. Finally, significant changes in the law and implementing regulations have placed new issues at the forefront of trust consideration.

The delivery of some trust services has improved significantly; Indian trust beneficiary expectations have changed; and the legal landscape has changed dramatically in both the courts and the Congress. Consequently, the requirements of effective trust monitoring have changed substantially since the Listening Conferences were initiated in 2004. ITMA has moved from simply collecting and forwarding the concerns expressed by tribes and individual trust fund account holders. Today, ITMA is

actively engaged in actually attempting to meet some of the needs identified as most compelling in these Listening Conferences.

ISSUES AND PROBLEMS WERE COMMON AND WIDESPREAD

ITMA conducted Listening Conferences on reservations from the border of Mexico to the border of Canada, throughout the Plains States and the Intermountain West. Issues raised in the early Listening Conferences included many concerns of an anecdotal nature, including concerns that have been harbored within many Indian families for generations. Then ITMA chairman Chief Jim Gray of the Osage Nation described the first Listening Conference in Oklahoma: “Individuals came up one after another, telling stories that go back generations, why is the delay so long, why are their leases not being managed properly.”

That first conference proved prototypical of seventeen others to follow. In meeting after meeting throughout Indian country, the concerns and frustrations expressed by trust beneficiaries and tribal leaders were remarkably similar. Leases were not being enforced. Rights-of-way were not renewed and corridor properties were operated in trespass year after year. Individuals saw oil field equipment operating on their lands, yet received no income from those operations. Probate of the estates of deceased Indian family members was not completed for many years. Efforts to leave money in IIM accounts in order to accumulate funds for trust-to-trust land purchases were frustrated by automatic disbursements. Opportunities for favorable transactions were missed because the Bureau demanded an appraisal, but could not provide one in a timely manner. Land records were hopelessly outdated and inaccurate. Original surveys and boundaries were erroneously set during allotment and have not been corrected in one hundred years.

At each reservation, some issues peculiar to that location demonstrated the importance of local officials' familiarity with the history and organic documents of each tribe and each reservation in order to be responsive to local concerns. At Osage, for instance, many comments related to the distribution of mineral revenues under the Osage Allotment Act and the inheritance of “headright” interests in the mineral estate. The BIA decision not to continue making property tax payments on trust lands out of trust funds caused considerable consternation, even for the mother of the Acting Director of the Bureau of Indian Affairs. Tribal members from Wind River complained of deteriorating irrigation facilities, notwithstanding the continued assessment of operation and maintenance charges.

On the Crow Reservation, tribal members described difficulties in securing timely real estate services on a reservation containing some ten percent of all allotted lands in the county. The President of the Northern Cheyenne Tribe reported that an elderly tribal member had never been advised of \$70,000 in a special deposit account for him. In the Pacific Northwest, tribal members and legal services attorneys described problems that resulted when minors' trust funds were depleted by non-custodial parents

and other adult family members. A tribal member on Nez Perce explained difficulties in securing approval of gift deeds intended to avoid further fractionation of trust lands at probate. On Coeur d'Alene, tribal officials described financial losses associated with the Bureau's insistence on the untimely marketing of crop shares from trust lands.

The Chairman of the Nez Perce Tribe expressed concern at delays in probate and questioned why the Department would not approve a tribal probate code that had been expressly authorized by federal law. A tribal member from the Blackfeet Tribe complained that individual trust funds were impressed with liens from a tribal credit program with no supporting documents. Another tribal member expressed frustration that lease offers were far too low and the Bureau would not advertise competitive lease opportunities. Others complained that the government would not press claims for Indian ownership of abandoned railroad rights-of-way. On several reservations, tribal members advised that even written complaints of these and other violations to the BIA simply went unanswered for years at a time.

Landowners on the Blackfeet Reservation advised they were trying to take advantage of the tools offered by the American Indian Probate Reform Act and other provisions of the Indian Land Consolidation Act. These efforts were thwarted, however, because if they did not involve an immediate cash transaction, they were "back-burnered" in favor of leasing and other transactions that generated cash into trust funds. A tribal member at the Salish & Kootenai Listening Conference advised that land consolidation among living trust landowners was frustrated by the lack of a credit program for that purpose. Landowners on the Tohono O'odham Reservation complained of automatic renewals of mining leases with no notice to the trust landowners. Landowners from Crow Creek Sioux and other reservations throughout the Dakotas complained no one locally could advise on estate planning or provide assistance with writing wills in order to prevent further fractionation of trust lands.

Confusion over Roles of BIA and OST.

Participants at these meetings also revealed a common lack of understanding of the respective roles of BIA and OST. Most of the issues raised actually involved matters that fall within the purview of the BIA or even the Office of Hearings and Appeals, rather than with OST, such as land lease practices and operation of realty and irrigation programs. At several locations, participants also raised questions about the budget of OST as contrasted with perceptions of significantly inadequate budget resources for the operation of trust programs within the BIA. Participants also raised questions regarding the future of OST, whether it is now contemplated as a permanent agency within the Department of Interior or whether plans are being laid to "sunset" OST and return all its functions and budgetary authority to the BIA.

OST and BIA Participation

All of the Listening Conferences were attended by representatives of the Office of Special Trustee, and local and regional BIA officials were also invited to participate. These meetings provided senior OST officials with opportunities to describe the respective roles of BIA and OST. Special Trustee Ross O. Swimmer often took the lead in these discussions, beginning with an explanation of the origins of OST in the Indian Trust Funds Management Reform Act of 1994. Over time, he explained, as OST recognized that particular problem areas required focused and sustained efforts to meet the requirements of the new law, OST took them over for the purpose of reforming them.

The first of these reforms was the establishment of a new accounting system to replace the many different systems that were then in place throughout the Bureau of Indian Affairs. The Special Trustee repeated in several meetings that the previous “legacy” systems made overall reporting to trust beneficiaries impossible and none of them sufficiently recorded or reported money received with the source of the funds collected or disbursed. The accounting systems adopted by OST would permit the Department for the first time to meet the requirements of the law with respect to recording daily balances and providing periodic statements of account to all beneficiaries. The accounting system presently in place at OST is a modified commercial trust accounting system that is used in the trust departments of scores of financial institutions, and is widely regarded as a state-of-the-art trust accounting system.

Principal Deputy Special Trustee Donna M. Erwin addressed virtually all the Listening Conferences through 2008 and explained that the role of OST was to serve the beneficiaries and to meet the requirements of the law. Addressing many of the questions that participants repeatedly asked, she explained that OST’s focus was to improve beneficiary services. She explained that many of the OST initiatives grew out a detailed review of the trust business practices within the Department (commonly referred to as the “As-Is-To-Be” exercise). She would explain, for instance, that a beneficiary question might often involve matters within the authority or files of a realty office, an IIM clerk, and the Office of Hearings and Appeals. No one individual had either the authority or the responsibility to provide information within another branch or agency of the Department. In short, no one had either the authority or the responsibility to provide that beneficiary with an answer to his or her question.

Trust Officers.

One of the OST initiatives that grew out of the review of previous business practices was the creation of 52 “fiduciary trust officer” positions to be located within BIA facilities throughout the country with the sole responsibility to be responsive to trust beneficiaries, regardless where the information might be located. Over the course of the five years during which ITMA conducted Listening Conferences throughout the country, virtually all these positions were filled.

Whereabouts Unknown.

In addition, these trust officers were assigned another duty that had simply been no one's job for many years, namely, the location of individual Indian account holders whose whereabouts were unknown – and to unite them with their trust funds. Over the course of this same period, several thousand individuals have either reunited with their money, or provided information regarding their accounts which now contain new and accurate addresses. As of ITMA's last Listening Conferences in the fall of 2009, there were 83,914 accounts whose owners' whereabouts remained unknown. The combined balance of these accounts, which continue to earn the same interest as all other IIM accounts, was some \$72 million. Of these, 25 accounts whose owners' whereabouts remain unknown contain more than \$100,000 each. On the other hand, more than 34,000 of these accounts contain less than \$1 each. Largely during the same period as covered by ITMA's Listening Conferences, more than 12,000 account holders have been reunited with more than \$8 million of their trust funds.

Special Deposit Accounts.

Another OST initiative that had been no one's designated responsibility previously has been identifying the owners of more than \$65 million held in Special Deposit Accounts. As of the date of ITMA's most recent Listening Conferences in the fall of 2009, more than \$52 million previously in Special Deposit Accounts have been distributed to owners. Of this amount, some \$17 million have been distributed to tribal accounts; another \$17 million to individual account holders; and yet another \$17 million to non-Indians or other third parties. Some \$15.6 million plus accumulated interest remain in Special Deposit Accounts with the ownership yet to be resolved.

Indian Trust Training.

Another OST initiative has involved formal classroom training for BIA, OST, and tribal employees actually involved in delivering trust services to Indian beneficiaries. Prior to the establishment of OST, training in trust duties and principles had been spotty at best, and nonexistent for the most part. OST has established an ongoing relationship with the Canon Financial Institute to provide courses in Trust Accounting to more than 150 employees in Accounting Technician positions. OST and BIA have provided in-house training in Trust Fundamentals to more than 120 employees in various Department agencies and to tribal employees.

Appraisal Services

One of the most prevalent issues raised at virtually every Listening Conference relates to the practice of appraisals to support trust land transactions. A 1990's-era policy directive from the Deputy Commissioner of Indian Affairs, requiring that each land transaction be supported by an appraisal, has not been withdrawn. The result has been a great backlog of appraisal requests throughout the Bureau of Indian Affairs.

Several factors exacerbate this issue. The Indian Land Consolidation Act amendments of recent years authorize the Secretary of Interior to "determine fair market value" in a number of circumstances without reference to a formal appraisal process.

The Secretary has not to date, however, made use of this authority outside the formal appraisal process. Government appraisers are required to conform their work to the Uniform Standards of Professional Appraisal Practice (USPAP), and these requirements are generally regarded as unnecessary for such transactions as voluntary exchanges and gift deeds.

The Office of Appraisal Services is testing an automated program to facilitate the development of valuation reports to support land transactions involving fractionated lands (U/FAS or Undivided/Fractionated Land Appraisal System), but has experienced some difficulty in its actual testing, which is now scheduled for implementation sometime in the third quarter of FY 2010. In addition, the Department has developed an automated system for tracking appraisal requests and backlogs (AARTS or Appraisal Request and Review Tracking System). More than 8,000 appraisal valuation reports were provided to support Indian land transactions in FY 2009. At the end of FY 2009, more than 1700 appraisal efforts were currently underway.

In addition, many contracting and compacting tribes have undertaken this responsibility, and OST has conducted six tribal consultations for the purpose of determining budget allocations of tribal shares to support this program. As of November 2009, the Office of Appraisal Services is reviewing the results and analyzing options for allocating these funds.

ITMA has proposed that the Department undertake a serious initiative to determine circumstances in which a formal valuation report should not be deemed necessary to support a land transaction. These circumstances might well involve voluntary transactions such as gift deeds among family members, and voluntary exchanges to achieve consolidation of fractionated interests in land.

ITMA has also recommended that the Department provide clear guidance to the BIA regarding the appropriate use of appraisals, including even those prepared in full compliance with USPAP. The competence of appraisers in the land use contemplated (right-of-way, commercial use, minerals, etc.), should not be casually assumed. The timeliness of appraisal reports is another critical factor to be considered when reviewing renewals or volatile marked situations.

Land Consolidation and Fractionated Ownership Interests

The problems associated with the fractionated ownership of Indian lands were identified repeatedly as the source of many problems affecting trust administration, including budgetary problems in all trust programs. The Department has reported that nearly one-half of the entire BIA budget is devoted in one way or another to dealing with the issues that arise directly from the fractionated ownership of much Indian land.

During the period covered by ITMA's Listening Conferences throughout Indian country, more and more time was devoted to discussion of alternatives of addressing

the underlying problems of fractionated ownership, as opposed to addressing individual beneficiaries' discrete problems with their own land or trust accounts. Both OST and ITMA developed presentations that were designed both to illuminate and demonstrate the issue, as well as to elicit constructive suggestions for dealing with the issue on a widespread and programmatic basis.

During this period, OST invited ITMA to undertake a separate project to collect insights and recommendations from Indian country and to prepare a report with recommendations. The BIA subsequently provided support to this project, and the report was delivered in December 2008. Also during this period, the Department of Interior decided to cease funding for the BIA's Office of Land Consolidation, and ITMA strongly resisted this decision. The Office of Land Consolidation remains open, but funds for actually consolidating land ownership interests have been greatly curtailed at present.

Also during the period covered by ITMA's Listening Conferences, the latest Congressional amendments to the Indian Land Consolidation Act of 1983, including the American Indian Probate Reform Act, became effective with implementing regulations issued by the Department of the Interior. These dramatic changes in the law occupied much of the discussion at Listening Conferences in the later years of the period. At every meeting, participants advised that neither the requirements nor the opportunities of the law were sufficiently understood by rank and file Indian landowners on reservations throughout the country. And, as with other trust issues discussed above, it was no one's job to address that level of understanding or to advise Indian landowners of the alternatives available to them under AIPRA to avoid the historical delays and uncertainties of probate.

Probate, Estate Planning, and Will Writing

Eventually, issues regarding land consolidation came to dominate Listening Conferences as more and more tribal officials and individual landowners expressed interest in new options available to them, and frustration at the lack of information provided to them. ITMA developed detailed presentations regarding not only the history of fractionation, but of Congressional and government efforts to address its results.

Ironically, during this period when Congressionally authorized estate planning tools were being provided to landowners to address fractionation, and increased authorities were being provided to tribes to consolidate tribal landholdings, the Department announced a new policy of withholding further assistance to individual Indians in preparing wills to take advantage of these opportunities. ITMA repeatedly urged reconsideration of this new policy, and its author agreed to reconsider it when he was elevated to the position of Assistant Secretary of Indian Affairs. He shortly thereafter left federal service, however, and the policy remains that the Department does not provide direct services in estate planning or will writing.

The critical lack of information available to living landowners became such a recurring theme that ITMA approached the Department with a proposal to undertake yet another project to provide this information in a useful way to individual trust landowners on a pilot basis throughout the Rocky Mountain Region of the BIA. After considerable consultation and conferring repeatedly with the various agencies throughout the Department, ITMA has now entered into an agreement with the Bureau of Indian Affairs to provide estate planning and will drafting services to Indian landowners in the Rocky Mountain Region.

Actual experience with this new initiative has actually resulted in providing at least as much assistance to the prospective heirs of deceased individuals as to the estate planning of living landowners. Information regarding the tools available to consolidate landholdings at probate have been received just as eagerly as ITMA expected estate planning services to be welcomed by living Indians seeking to avoid further fractionation of their landholdings upon their demise. ITMA has now provided actual land consolidation services to dozens of families at probate who otherwise might well never have known of the alternatives available to them.

ITMA hopes to continue and expand this initiative, which to date is the only known project designed to provide trust beneficiaries with the information and the tools available to Indian landowners to make their landholdings productive and prevent further fractionation.

Future of Listening Conferences

As of the close of Fiscal Year 2009, ITMA plans to continue to hold Listening Conferences on a much more limited basis, and to concentrate its efforts in FY 2010 on actually providing those services that five years of previous Listening Conferences have shown to be desperately needed in Indian country. In providing these services, ITMA believes it is serving not only the personal needs of individual trust beneficiaries and prospective heirs, but is also contributing significantly to the twin national policies of preventing further fractionation and reversing the effects of the allotment policy of previous centuries.

ITMA will continue to entertain requests from individual tribes to conduct Listening Conferences to address issues and concerns that are of concern to particular locations or treaty areas. The primary focus for now, however, is to continue to make productive use of the valuable insights gained and lessons learned from five years of Listening to Indian Country at the local level.