



INTERTRIBAL MONITORING ASSOCIATION on Indian Trust

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FY2010 ITMA FOURTH QUARTERLY REPORT JULY – SEPTEMBER, 2010

The fourth quarter of FY2010 was spent largely in concluding ITMA's major 2010 initiative for OST, namely, the report on Appraisals and Valuations of Indian Trust Property. In addition, much of the quarter was devoted to preparation for the 20th Annual Conference of ITMA which was scheduled for the third week of October.

A meeting originally scheduled for the first month of this quarter was eventually moved to late September in order for board members who had not previously visited the American Indian Records Repository (AIRR) facility in Lenexa, Kansas, to do so. July did provide an unexpected opportunity to confer with representatives of DOI's Office of Inspector General to review ITMA's December 2009 report on land fractionation and consolidation as part of their project to prepare the Department to implement the land purchase component of the *Cobell* settlement.

ITMA continued to respond to inquiries from tribes, account holders, the public, and the Congress regarding tribal views on pending litigation, proposed settlements, and authorizing legislation for the *Cobell* settlement. ITMA was required always to explain that the organization has taken no official position on the *Cobell* settlement. However, it should be noted that the views of the organization's member tribes appear to vary widely depending in part on whether those tribes' reservations have been allotted and the amount of money flowing regularly through the members' IIM accounts.

Meeting with OIG on Land Purchase Preparation

The Executive Director was asked to find time to confer with representatives of the OIG who have been tasked with making recommendations to the Department in preparation for implementing the \$2 billion land purchase program that has been contemplated as part of the *Cobell* settlement. The Executive Director and appropriate staff/consultants arranged to meet in Billings, Montana on July 20 to discuss ITMA's earlier work and recommendations, and to learn more about the OST project. OIG was represented by Brian Brizil and Katelyn DeMello who are the principal individuals involved. ITMA was represented by Mary Zuni, David Harrison, and Majel Russell.

Mr. Brizil and Ms. DeMello explained that their project is undertaken as part of a lesser-known function of OIG, namely, to prepare for success in advance of significant initiatives or new program activities of the Department's agencies. They explained that the Department has never before attempted a major Indian land acquisition program such as is contemplated as part of the Cobell settlement, and they want to assist in preparing for a successful launch, free of major start-up difficulties, false starts, and significant losses due to waste, fraud, or abuse in the program.

They stated that they have conducted significant research into previous programs and into all known sources of analytic and scholarly reviews of land consolidation activities within the Department. They were very complementary of ITMA's December 2009 report on the subject and said they had found it to be among the most useful reference works they have encountered in their review. They said they were particularly impressed by what they regarded as ITMA's sound recommendation that the single-heir rule of the American Indian Probate Reform Act should be tested judicially as soon as possible.

The IG representatives seemed to be very anxious that the Department not repeat any form of the experience that two recent Secretaries of Interior had when the Supreme Court invalidated significant portions of the Indian inheritance laws that both Secretary Hodel and Secretary Babbitt had attempted to defend only after scores of thousands of probates had been closed, only to be told all those conveyances were illegal.

Ms. Russell and Mr. Harrison discussed at length with the IG reps their experiences in working with transactions involving allotted Indian lands and Ms. Russell explained in depth the results of her ground-breaking work in conjunction with the Office of Hearings and Appeals to avoid further fractionation of trust land ownership at probate.

The IG representatives agreed to consider making a presentation at ITMA's 20th Annual Conference and offered confident predictions that their first in a series of reports on plans for implementing the *Cobell* settlement would be readily available when it was completed sometime before the Annual Conference.

As it turned out, they did make a presentation at the Annual Conference, but their first report is not available at the close of Fiscal Year 2010. On the other hand, the authorizing legislation for implementing the *Cobell* settlement has not been enacted, either, at the end of the Fiscal Year.

Field Visit to Crow Agency

Following the ITMA meeting with OIG representatives, ITMA's Executive Director reviewed with Majel Russell and the ITMA Chairman and Vice Chairman the activities of ITMA for the year to date and discussed plans for the Annual Conference agenda.

Ms. Zuni travelled to Crow Agency where she viewed at first-hand the relative vastness of a reservation with 1,000-acre+ allotments versus some of the reservations in the Great Lakes area where some allotments are smaller than 80 acres.

This issue of the relative size of allotments takes on incredibly huge proportions, Ms. Zuni was shown, when the various “trigger sizes” of individual interests are implicated. For interest, an interest of 5 per cent or less is treated very differently under the American Indian Probate Reform Act than is an interest of greater than 5 per cent. On an 80-acre allotment, a five per cent interest is equivalent to an undivided interest in the whole, or maybe a 100% interest in a four-acre tract after partition.

The exact, same percentage interest in a 1,020-acre tract, on the other hand, represents a 5% interest in 1,000+ acres, or maybe an undivided, 100% ownership of a tract of 51 acres. If the original allotment were only 40 acres, then just a 5% interest in a Crow allotment could represent a greater estate than 100% interest, or a larger landholding than the entire allotment, on another reservation.

Montana-Wyoming Tribal Leaders Council Meeting

ITMA's Chairman and Executive Director and Consultant David Harrison attended the meeting of the Montana Wyoming Tribal Leaders Council at Billings Montana. The primary objective of the meeting was to discuss the reorganization and revitalization of the Large Land Based Tribes, an organization established because it is felt the National Congress of American Indians does not adequately represent the interest of large tribes. It was pointed out that it is these tribes who have the most invested in trust matters.

ITMA invited the organization to conduct a presentation on their efforts at the upcoming ITMA Annual Conference. Provided funding is available, ITMA has committed to host a meeting with OST for the Great Plains and Rocky Mountain area tribes in the future.

Visit with Trust Reform Delegation of ATNI at Coeur d'Alene Reservation

On August 23rd and 24th, ITMA Chairman Michael Finley of Colville, Executive Director Mary Zuni and David Harrison met at the Coeur D'Alene Reservation with representatives of the Affiliated Tribes of Northwest Indians to discuss that organization's plans to bring the subject of Indian trust reform to the 112th Congress sometime after it convenes in January 2011.

Dick Trudell of the American Indian Resources Institute presented a historic overview of Indian trust issues since the 1970's, including his organization's recent hosting of a national meeting that included Senator Daniel Inouye and other Congressional leaders who have attempted to legislate reform of Indian trust administration in recent decades.

Ernest Stensgar provided a review of national tribal organizations' trust reform legislative initiatives in the early years of the Twenty-First Century and an update on efforts to cause OST programs and responsibilities to revert to the BIA.

David Harrison offered a review of actual improvements in trust administration over the past fifteen years and suggested that all the really significant reforms have been achieved in OST and not in the Bureau. He also suggested that greater consideration should be given to trust functions that have been stripped from BIA, but not given to OST. The single largest generator of money into trust funds, minerals production, has been stripped from the Bureau for several years, he said, with significant consequences but little or no comment from Indian country. Tribal water rights has been taken from the Bureau in recent years, he said, and is now staffed almost entirely at the direction of the Secretary's office where not even the Assistant Secretary has any influence over it. In short, he asked, are present efforts to restore OST functions to BIA really doomed to return them to a shell of a former agency unless the other major trust functions are addressed as well?

The meeting concluded with a commitment to revisit legislation introduced in previous Congress' in the 21st Century and seek a coordinated trust reform agenda among tribal organizations early in 2011. ITMA was asked to continue following and reporting on any efforts regarding the merging/reorganization of OST and/or BIA. Mary Zuni suggested ITMA organize a day-long meeting with the Northwest Tribes and Donna Erwin for a in depth discussion and dialogue on trust reform matters and OST's efforts in that regard.

Follow-up on Interest Earnings from Fort Peck Listening Conference

As reported in the Third Quarterly Report for FY2010, a Listening Conference on the Fort Peck Reservation in April of this year had revealed a vexing issue for members of the Assiniboine and Sioux Tribes of that reservation regarding interest on advance deposits and the taxation of interest collected for late payments on oil and gas production there. A member of the Fort Peck Tribes' Executive Board had commented there that one reservation had generated \$139 million in bonus payments for oil and gas leases in 2009 alone. At least 25% of that money, he said, had been paid in advance to secure the high bid for those leases, and those advance deposits had earned no interest while held by the government in special deposit accounts.

Further inquiry by ITMA had revealed that these advance deposits are often held for long periods of time, sometimes far longer than a year, depending on how long final clearances take and how long it takes to collect all the required signatures on a lease, even after the highest bidder is advised of his successful bid. ITMA had also learned that this issue has come up from time to time in previous periods of high volume leasing activity, and seems to come up regularly during oil boom periods. ITMA was told that in one such period back in the 1970's, the BIA had adopted a policy of earning interest on advance deposits and returning the accrued interest along with the deposit to

unsuccessful bidders, while crediting the Indian lessors with the interest accrued on successful bids when the entire bonus was transferred to the individuals' accounts.

During the course of this review, ITMA was also questioned again regarding the matter of OTFM's reporting statutory interest collected on previously underpaid oil and gas royalties to the Internal Revenue Service as taxable interest "earnings." ITMA takes the view that these payments are not "earnings" at all, but are merely assessments to provide the Indian lessor with the present value of what should have been collected previously. In other words, this interest is required by statute and is collected to put the Indian in the same position he would have been in if the government had collected the right amount on a timely basis.

The Acting Special Trustee, however, expressed the view that there is nothing that can or should be done to revisit this matter. She seemed to suggest that so long as any receipts are tagged as interest of any kind, OST will continue reporting the interest component of these delayed payments as taxable income. The key to this matter, she has explained, is the use of the word "interest" on the forms that accompany the payments. In effect, she says, "if it says interest, we say it's taxable."

ITMA has suggested that at the least, OST might ask MMS or other transferor agencies to use another word to describe these payment components. ITMA expects this issue to be raised again in 2011.

ITMA's Report on Appraisals and Evaluations of Indian Trust Property

On September 15, ITMA's Executive Director and Consulting Attorney Brian Gunn conferred with OST principals and staff to review ITMA's report on a review of the processes for conducting appraisals and other evaluations of Indian trust property. ITMA was working to complete the report in time for presentation to the 20th Annual Conference scheduled for October.

The ITMA report had concluded that there was very little statutory requirement, and very little guidance, for formal appraisals to support Indian trust land transactions. There were, however, numerous references throughout the statutes governing Indian land transactions to such concepts as fair market value, adequate consideration, and estimates of value.

Much of the current practice seemed to have simply "resulted," rather than having been thoughtfully constructed as a result of careful consideration. A long-standing BIA directive from a former Deputy Commissioner requires that all Indian land transactions be supported by an appraisal. A directive from the Secretary's office requires that all appraisals be conducted by state-licensed Certified General Appraisers. State-licensed Certified General Appraisers are required by the terms of their licenses to apply formalistic procedures prescribed by documents issued by the national associations of the appraisal profession.

Among the silly results is that even a gift of an interest in land must often await the conduct of an expensive appraisal that costs many times the value of the land being given away. Among the serious results is that very serious, very economically significant land transactions are often delayed, and sometimes lost, to the delays that are incurred in seeking and receiving appraisal reports before land transactions can be approved and recorded.

The informal review of the unfinished report with OST was very constructive, and the final report will be presented at the 20th Annual Conference in October 2010.

Visit to American Indian Records Repository

On September 29, a delegation including the Executive Director and ITMA board members who had not previously visited the Lenexa facility were provided with a tour through the American Indian Records Repository.

The visiting board members included ITMA Chairman Michael Finley of the Confederated Tribes of the Colville Reservation, George Thurman, Principal Chief of the Sac and Fox Nation of Oklahoma and McCoy Oatman of the Nez Perce Tribe. Tohono O'odham Nation representative Olivia Liston and Tlingit & Haida Vice President William Micklin were unable to make the trip due to last minute critical tribal matters. ITMA Consultant Brian Gunn accompanied the delegation.

The visit provided the visiting board members with the impressive visual and sensory experience of appreciating the huge quantity of records that have been transported, indexed, and stored in an environmentally controlled, searchable repository that is designed to and staffed to provide secure storage for as long as required ... both for the government's own records and for the tribal records of any tribe that wants to utilize the facility to store tribal records in an archival-quality facility.

Tribal representatives reported to the ITMA Board that the trip was extremely beneficial and they were impressed with the capability existing at AIRR.