



November 30, 2010

FY2010
ITMA ANNUAL REPORT

The Intertribal Monitoring Association (ITMA) opened FY2010 with its Nineteenth Annual Conference held in Las Vegas, Nevada on November 11-13, 2009. Approximately 75 individuals representing 22 tribes were in attendance. Michael Finley, Chairman of the Colville Confederated Tribes was elected to head ITMA as its Chairman for the coming year.

NINETEENTH ANNUAL CONFERENCE

Vicki Forrest, BIA Director of Trust Services provided a report on Secretary Salazar's interests and initiatives, including establishment of a task force on climate change and renewable energy. She indicated that the BIA and BLM will be coordinating efforts to enable the Department's Geographic Information System to provide resource information and boundary descriptions down to the allotment level. She reported that 99 per cent of the backlog estates in probate had been closed, and that the BIA-ITMA Rocky Mountain Pilot Project on land consolidation was very successful. She further suggested there might be a substantial reconfiguration of the Bureau's 8 Land Title Records Offices due to a lack of funding and resources for the present configuration.

Representatives from other national tribal resource organizations reported to ITMA's 19th Annual Conference, including the Intertribal Fish and Wildlife Association and the Council of Energy Resource Tribes. The intertribal wildlife association has grown to 220 member tribes and had recently begun to work with non-Indian environmental organizations to fashion long-range cooperative change strategies during what is perceived to be an environmentally Obama Presidential Administration. The Council of Energy Resource Tribes reported that tribes were eagerly embracing the renewable-friendly policies of the Obama Administration and hoping to develop soon a model for bringing renewable energy to the market from Indian lands.

Majel Russell reported on the ITMA-BIA Land Consolidation and Estate Planning Pilot Project, reporting that as of November 2009, 992 undivided interests had been avoided through consolidation at probate. Of 24 families referred for mediation, 19 had accepted mediation, and of those all nineteen has successfully reached land consolidation agreements among family members.

A panel discussion on the future of OST and BIA produced a variety of competing views. President George Howell of the Pawnee Nation commented that he thinks partnering BIA with OST, rather than criticizing OST for taking Bureau functions, would be far more productive in the future. Chief Jim Gray of the Osage Nation commented that future discussions on the future of BIA and OST should focus on maintaining and improving levels of service and not on the organizational structure of the agencies providing those services. Donna Erwin, Principal Deputy Special Trustee, advised she had been led to believe that the new Administration would be looking at how most appropriately to organize OST and BIA to uphold the Fiduciary Trust Model that has been developed and adopted within the Department so that all trust functions are adequately funded and competently staffed. Ms. Erwin thinks OST has been very successful on the money management side of trust administration.

The member tribes present at the 19th Annual Conference of ITMA closed the session by adopting an ITMA Position Paper for presentation to the incoming Obama Presidential Administration. Suggestions for inclusion in the paper included reviewing the provisions of S. 1439 from a previous Congress as a blueprint for trust reform legislation; addressing issues arising in Ch. 11 bankruptcy when a bankrupt is excused from making payments but is allowed to continue operation and production of Indian trust assets; urging the new Administration to review the still-recent transfers of political appointees to career positions in the federal service and urging implementation of Phase II of ITMA's Tribal Trust Fund Settlement Project; and urging continued and increased funding for the BIA's Indian Land Consolidation Office.

Open and Continuing Matters Monitored by ITMA

Conversion of Oil and Gas Payments to TAAMS. OST first advised ITMA that oil and gas revenues were going to be moved from the MMS by the end of last year. As of the end of FY 2010 this conversion had not occurred, although ITMA is still advised by OST that the transfer is expected to be completed. Since mineral revenues are the single largest source of income to Indian trust funds, ITMA will likely make additional inquiries during FY2011 regarding this planned transfer.

Appraisal Processes. As part of its FY2010 agreement with OST, ITMA undertook a significant review of and report on the appraisal process relating to Indian trust land transactions. This report has been shared with OST, and ITMA will continue to monitor and report on developments relating to the appraisal function in connection with Indian trust land. ITMA has already noted that there seems to be no general federal statute that requires formal appraisals in connection with Indian trust land transactions, although the various laws related to land transfers, sales, leases, and rights-of-way use a variety of terms to suggest a federal duty to make some form of valuation to support the terms of the transaction.

ITMA notes that OST has previously advised that testing of the Appraisal Request and Review Tracking System would be complete by the end of calendar year

2010. ITMA will follow up in 2011 on results of this testing, and on OST/DOI responses to suggestions made in ITMA's published report on Appraisals and Evaluations of Indian Trust Property.

Reallocation of Tribal Shares. ITMA monitored the consultation sessions conducted by OST throughout Indian country between June and August of FY2010 to seek input from tribes on a sensible and equitable method of allocating the available program dollars among the approximately 40 tribes who contracted or compacted for the appraisal program under the Indian self-determination laws. ITMA notes that OST first advised that the new proposal for allocating these program funds would be published in the *Federal Register* by the end of calendar year 2010. ITMA looks forward to conferring with tribes and commenting on OST's new proposal when this publication appears.

Treatment of various forms "Interest" Collected or Earned. ITMA continues to believe that statutory "interest" collected on mineral royalties should not be treated as "interest earnings" for income tax purposes. In FY 2010 ITMA made recommendations to OST for working with MMS or its successor agency to change the nomenclature for designating the statutory interest that is transferred to OST as part of collections for previous under payments.

ITMA has also recommended that OST work with the Administration to eliminate the current requirement of IRS rulings that mandate federal income liability for interest earned on deposits of individual Indian trust funds. There is no statutory requirement for this tax treatment, and ITMA continues to believe that the costs to the government for computing and reporting these earnings on hundreds of thousands of accounts must greatly exceed the tax revenues collected. This seems especially true of the more than 100,000 accounts that have less than \$15 in them. In addition, the tax liability that this treatment imposes on individuals who have been significantly underpaid for mineral royalties visits a liability upon them that greatly exceeds the liability that would be incurred had the correct amounts been paid on a timely basis and then invested as part of the IIM pool.

Finally, ITMA has suggested that OST consider a strategy of investing advance deposits received on bids for mineral leases. ITMA suggests that the earned interest could be returned with the deposits returned to unsuccessful bidders, and interest earned on the successful bid should be credited to the landowners' accounts when the leases are eventually approved.

Pay.Gov. ITMA reported in its first quarterly report for FY2010 OST's plans to make available to payors on contracts and leases for use of Indian lands the online payment system established by the U.S. Treasury Department that is generally used for making payments to federal agencies. OST had reported that this method of payment would be available through the website www.Pay.gov.com or through kiosks that would be made available at BIA agency offices. OST would be responsible for administering the application of this electronic payment system that collects payments into Indian trust funds. This system was expected to be implemented during FY 2010, but had yet to be

made operational as FY2010 ended. ITMA looks forward to this significant improvement and hopes to see it installed early in FY2011.

Follow-up to Other Issues Raised in Listening Conferences. ITMA continued throughout FY 2010 to monitor issues raised by individual landowners in Listening Conferences. Indian landowners in Oklahoma have reported that some individuals have accepted unsolicited offers to purchase the individual Indians' mineral interests in simple sign-and-return forms that are received in the mail. ITMA has not yet determined how many of these offers have been accepted, whether they are honored by the BIA/OST, and whether such transactions are authorized by law.

ITMA also continued throughout FY2010 to follow up on issues of the uninterrupted use of expired rights-of-way across Indian lands in situations that were first brought to attention in Listening Conferences. In at least one case, the BIA had advised the landowners that the easements had been approved over the landowners' objections in order to avoid condemnation proceedings in federal court. ITMA suggests that since one of the purposes of a condemnation proceeding, even where authorized by law, is to determine the value of the rights taken, it appears that the BIA has chosen simply to accept an offer rather than to permit a judicial determination of the value of the rights taken.

Tribal Probate Codes. ITMA has continued to monitor the Department's progress and activities relating to the approval of tribal probate codes as authorized by the American Indian Probate Reform Act. Although not an OST function, this matter will directly affect OST especially as it relates to whatever appraisal or other valuation requirements will be required in tribal probate codes for exchanges, consolidation agreements, or purchases at probate. ITMA had reported earlier that a Nez Perce probate code had been approved, but later learned that was not accurate. Early in FY2010 ITMA reported that the Umatilla Tribe's probate code had been approved. Later in FY2010, ITMA was advised that the Department was not approving probate codes until some formal guidance or regulatory framework was approved, and this had not happened as FY2010 closed. ITMA will continue to monitor this issue.

Monitoring Trust Litigation and Cobell Settlement

The plaintiffs and the government announced in the first quarter of FY2010 a settlement of the long-running *Cobell v. Salazar* lawsuit involving the rights of individual trust fund account holders. In response to an avalanche of requests, ITMA prepared briefing papers to describe the proposed settlement and convened a national meeting on February 24 to share information about the proposed settlement. The plaintiffs were represented at that public meeting by Keith Harper, a partner in the law firm of Kilpatrick-Stockton and one of the plaintiffs' lawyers who negotiated the settlement agreement. Richard Monette, a former chairman of the Turtle Mountain Band of Chippewa Indians and currently a professor of law at the University of Wisconsin addressed the settlement from the perspective of Indian claims jurisprudence. Majel

Russell, a principal in the Elk River Law Firm of Billings, Montana provided a detailed power point presentation as part of her detailed description of the proposed settlement. A detailed report of that meeting is contained in ITMA's report for the 2d quarter of FY2010.

As FY2010 closed, Congress had not acted on the necessary legislation to authorize the court to take jurisdiction over the settlement, to rule on its fairness, and to administer it. At a meeting between ITMA staff and the OST Principal Deputy Special Trustee, ITMA shared specific concerns presented to ITMA by Tribes. These include concerns with the fairness of the formula for distributing payments to the asset management class according to a formula that will pay the most to those who have actually divested themselves of their trust lands altogether. Account holders have questioned ITMA about the letters that some landowners received advising them of the dollar amount they might receive under the settlement, and whether they should expect a similar letter. Many tribal representatives have questioned why the proposed \$2 billion land acquisition fund cannot be made subject to self-determination contract or compact, and why unspent funds should revert to the U.S. Treasury if not spent in ten years. ITMA will continue to monitor progress of the proposed settlement in order to be responsive to requests for information.

FY2010 had opened with more than ninety-nine Indian trust-related cases involving more than 100 tribes still pending in the various federal courts around the country. Forty-three tribes represented by the Native American Rights Fund in the case of *Nez Perce v. Kempthorne* had been joined by some two dozen more as intervenors in the case. Fifty-seven tribes were maintaining their own actions in the U.S. Court of Federal Claims. Little visible progress had been made toward negotiated resolution of these cases as the fiscal year ended, although important appellate decisions had been rendered in some.

Supreme Court Activity in FY2010. In the first quarter of FY2010, the plaintiffs in *Cobell* filed a petition for review in the Supreme Court of the United States of a decision which vacated altogether the monetary award ordered by the trial judge in that case ... then without explanation of any kind withdrew the petition some six months later in the third quarter of FY2010, leaving the lower court's judgment intact. The Supreme Court had agreed to review a decision of the Federal Circuit that upheld the Tohono O'odham Tribe's right to maintain simultaneously two trust-related cases against the United States. And in the third quarter of FY2010, the United States requested Supreme Court review of a lower court decision favorable to the Jicarilla Apache Nation. The lower court applied a "fiduciary exception" to the normal attorney-client privilege and ruled the Jicarilla Apache Nation should be allowed to see and utilize legal advice received from government attorneys in the administration of the tribe's trust estate. The United States has argued that this decision will have a "chilling effect" on legal advice within the government and that the government acts not only as a trustee but as a sovereign and should be accorded the full protections of the traditional attorney-client privilege in administering the Indian trust. As FY2010 closed, the Osage Nation was contemplating an appeal to the Supreme Court to overturn lower court decisions holding

that the Osage Reservation no longer exists. The Supreme Court had handed down no decision in these cases at the close of FY2010, except to grant the *Cobell* petition to withdraw their case altogether.

Estate Planning Project

During the 2d quarter of FY2010, ITMA concluded its year-long estate planning pilot project for the Bureau of Indian Affairs in the Rocky Mountain Region. Although not an OST-sponsored activity, this project was a direct outgrowth of the report ITMA delivered to OST on land fractionation and recommendations for consolidating ownership of formerly allotted Indian lands. BIA and OST had conferred and agreed that BIA should sponsor the effort.

This project was undertaken as a pilot to test some of ITMA's recommendations, including a greater effort to provide estate planning services, and a concerted outreach to the families and likely heirs of deceased Indians to take advantage of the statutorily authorized means of avoiding further fractionation of Indian land ownership during the probate process. As it turned out, relatively little attention was given to pro-active, advance estate planning as a result of the sheer magnitude of active probate cases that would fractionate exponentially the estates already in probate, absent some intervention. ITMA provided that intervention to willing families at the request of probate judges throughout the Rocky Mountain Region.

The project was considered highly successful by the Department's Office of Hearings and Appeals and from all reports by the families who were assisted in the project. More than 2,900 undivided interests in Indian trust land that otherwise would have been created by operation of law were avoided through the work performed in the course of this project.

The project afforded invaluable experience in demonstrating empirically the value of a pro-active approach to educational and technical assistance to prospective heirs in Indian probate. ITMA has suggested that this approach be replicated in other Regions with highly fractionated Indian land ownership with an emphasis on training trainers in those regions so that this type of effort can become a continuing part of cooperative Indian land consolidation programs.

Trust Implications of Climate Change and Green Energy Activities

A policy advisor to Assistant Secretary Echohawk reported to ITMA in FY2009 that climate change was one of Secretary Salazar's top priorities, and that he had issued a Secretarial Order (3289) to establish the Department's framework for addressing the issue. He further advised ITMA that progress in addressing climate change and renewable energy in Indian country might move forward under Secretary Salazar except in the context of larger trust reform initiatives. During FY2010, officials

have been designated in each of the BIA Regions to respond to climate change issues and inquiries. ITMA is not yet aware of any actual trust-related activities that have emerged from Secretary Salazar's interest in the issue, beyond an exhortation from the Assistant Secretary's office for tribes to participate in carbon markets.

With respect to renewable energy, however, ITMA has reported that the Department has a number of initiatives underway to position DOI agencies and offices to be responsive to economic development and revenue generating opportunities that the "Green Revolution" will afford to Indian landowners. ITMA has been advised that BIA is working on new regulations to govern leasing and other transactions involving the production of solar and wind power from Indian lands. No draft has been shared as of the close of FY2010, however.

ITMA has been advised, however, that some fifteen renewable energy projects on Indian land have been "fast tracked" for review, analysis, and decision within the Department even in advance of the new guidelines or regulations that are being developed.

Trust Reform Legislation

ITMA was asked repeatedly throughout FY2010 to participate in various forums, meetings, conferences, and other smaller deliberations given to the general subject of "trust reform." The general thrust of these gatherings seemed to be to generate support for a plan either to disband OST or to return significant program responsibilities from OST back to the Bureau of Indian Affairs.

ITMA has reported to some of these groups that most of the significant changes in trust administration of the last fifteen years have been made in OST. ITMA has also pointed out that the two largest trust-fund-generating activities, mineral production and water rights settlements, have long been completely removed from the BIA and that those do not seem to generate nearly the negative commentary that accompanies nearly every accretion in OST's duties. One of ITMA's representatives has questioned publicly whether transferring appraisal and survey functions to the BIA would place those important activities into an agency already greatly reduced in trust capabilities even before OST was created.

These conferences and consultations throughout FY2010 did not result in any recommended "Management Reform Acts, "Trust Principles" or proposed legislation, as previous trust reform initiatives have generated. They did lead, however, to what appears to have emerged as an informal agreement that early in FY2011 ITMA will develop a document for further review and consultation addressed to the subject of proposed trust reform legislation.

ITMA suspects early in FY2011 that any such document produced by ITMA will address those issues touched upon in this Annual Report that might benefit from

legislative action, including the various meanings of the term “interest” as applied to Indian trust funds.

Fiscal Year 2010 closed with much anticipation and apprehension over the fate of the *Cobell* settlement, the Supreme Court decisions that will affect much of the future of Indian trust litigation, and the future of trust reform. The Intertribal Monitoring Association concluded Fiscal Year 2010 in preparation for its 20th Annual Conference.