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FY2010
OST 1st QUARTERLY REPORT
OCTOBER – DECEMBER 2009

The month of October was spent largely preparing close-out reports and preparing for the 19th ITMA Annual Conference scheduled for November. In particular, ITMA wrapped up its Listening Conference program for previous years and compiled a report on the program which has been rolled out in all parts of the country over the past five years. This report highlighted some of the most common themes heard from tribal leaders and individual account holders across the various federal Regions. In addition, this report summarized the results of the Listening Conferences, including some issues identified several years ago, and still unresolved as of the end of FY 2009. This report also indicated that significant improvements in OST processes had resulted in significant differences in the mood and content of these Listening Conferences, and that advances in the *Cobell* litigation had resulted in a much more subdued level of “expectation” among individual account holders from prior years.

ITMA Listening Conferences ITMA worked at preparing a five-year report of the most common issues received from the past five years of Listening Conferences. Continued confusion among account holders and some tribal representatives regarding the respective roles of OST and BIA, including responsibility for the appraisals, land consolidation were cited. How to access information regarding the estate planning tools available under the American Indian Probate Reform Act was a common frustration.

ITMA reported that OST in 2010 planned to restrict the number of Listening Conferences to be conducted; it was noted that requests do continue to come in from various locations for Listening Conferences tailored to specific concerns related to individual reservations. In the meantime, however, ITMA plans to continue to follow up on unresolved issues from previous Listening Conferences and to make productive use of the insights gained from five years of sessions throughout Indian country.

OST Appraisals Initiative ITMA has developed a tentative schedule for the meetings required in regards to tribal and Indian individual outreach on the subject of appraisals. Fort Peck Tribe is willing to host a session in conjunction with the Listening Conference, they have offered March as a timeframe for the session. A specific date is being considered at the tribal level, then we will inquire with OST regarding availability.

Monitoring Trust Litigation ITMA also conducted a research and a review of pending trust litigation, including the *Cobell* case and some 99 tribal cases pending in various federal courts throughout the country. Some cases, or portions of some cases have been resolved by settlement. Others are still litigating access to documents and various privilege claims, even though they have already been in court for several years. ITMA noted that the judge presiding over the *Cobell* case also has claims from more than sixty tribes pending on his docket. Nine

cases were identified as pending in the federal courts in Oklahoma, and twenty-six were pending in the U.S. Court of Federal Claims.

ITMA's Monitoring of OST Report ITMA conducted a monitoring session with Acting Special Trustee Donna Erwin on November 2, 2009. OST provided ITMA with updates on ongoing initiatives and provided new information on OST activities in the upcoming months.

Wrap-Up on OST Consultation on Reallocation of Tribal Shares Between June and August 2009, OST held six consultation sessions throughout Indian country to obtain input on how it should reallocate tribal shares. Now that the consultation sessions are complete, OST is currently in the process of organizing and evaluating the comments it received.

ITMA inquired about the type of comments provided by the participants in the consultation sessions. According to OST, many of the attendees commented that if OST intended to consider workload as a factor in the reallocation of tribal shares, the workload would need to be measured over a period of years. Other comments were directed at the appraisal process generally. Some tribes that had compacted or contracted the appraisal function questioned why appraisal requests needed to be sent first to the BIA and then to OST, instead of directly to OST. Other commentators expressed concern about relying on mass appraisals.

According to OST, it hopes to have a proposal for allocating tribal shares by the end of the calendar year. OST stated that its proposal will first be published in the *Federal Register* for comment before being implemented.

Update on ARRTS Implementation and National Business Center Contract As noted in prior monitoring reports, the Appraisal Request & Review Tracking System (ARRTS) continues to be tested in various regions and OST expects to complete testing by the end of the calendar year.

Delay in implementation of the ARRTS system correlated with OST's decision to scale back its contract with the National Business Center (NBC), the service providing entity within the Department that coordinates and manages appraisals. Since January 2009, OST, not NBC, has had managerial control over the appraisals that OST conducts. For FY 2010, OST's contract with NBC will be limited to providing technical support for the ARRTS and conducting reviews of appraisals in the regional offices. NBC continues to administer the Office of Minerals Evaluation.

Online Payment to be Available through Pay.gov Pay.gov, an online payment system for making payments to federal agencies, will soon be available for making payments to OST. Once implemented, individuals will either be able to use the Pay.gov.com website via the Internet or kiosks that will be made available at BIA agency offices to make payments. The Pay.gov system was established by the Treasury Department but this application of the system will be administered by OST. OST expects the system to be implemented in FY 2010.

New Lockbox Contract A new contractor will be taking over operation of the lockbox beginning January 31, 2009. The new contractor is Data Dash, Inc., a data entry, document and IT services provider based in Missouri. The company is a woman owned, HUBZone certified small business. Data Dash will be able to clear checks that it receives from the lockbox directly with the Department of Treasury. The previous contractor sent checks to Bank of America, which then cleared the checks with Treasury, so this intermediate step will be eliminated under the new contract.

The new lockbox address will be in Farmington, Missouri. OST will begin a coordinated publicly effort to notify lessees and agency offices of the new lockbox address.

Other OST Developments KPMG conducts an annual external audit of OST's financial statements and internal controls. OST has announced that for the first time, KPMG's annual audit will not show any material weaknesses in the IIM account area. Last year, the annual audit did not, for the first time, show material weaknesses for tribal accounts.

OST FY2010 Budget President Obama signed the FY 2010 Interior, Environment and Related Agencies spending into law on October 30, 2009. The bill, which funds OST, provides OST an additional \$2 million for appraisals over FY 2009 enacted levels.

White House Tribal Nations Conference President Obama conducted a November 5, 2009 White House Tribal Nations Conference for Tribal Leaders. The President spoke of his directive, pursuant to Executive Order 13175, to federal agencies to submit to the Director of the OMB a detailed consultation plan within 90 days of November 5, 2009. The November 6, 2000 Executive Order 13175 requires every Cabinet agency to conduct regular consultation and collaboration with tribal officials in the development of federal policies affecting Indian tribes. The 90 day plan is to be developed after consultation with Indian tribes and tribal officials.

Many of the conference attendees were particularly pleased with the President's message that Indian Country should be making decisions that affect tribes and Individual Indians, not the government. Several Chairmen who attend the session commented that although the meeting was historical and left participants with a lot of encouragement, they were frustrated that trust issues was not discussed more. The format of the meeting (town hall style) was criticized, but Indian nations agreed the President appeared committed to the issues facing Indian Country.

ITMA 19th Annual Conference ITMA conducted it's 19th annual session at the Luxor Casino Hotel at Las Vegas, NV on November 11-13, 2009. The conference was attended by approximately 75 participants representing 22 tribal governments. The OST and BIA staff participated in the sessions bring attendees up to date on trust related activities. Congressional representatives could not attend due to priorities.

Election of Officers was conducted for FY2010. Current Tribal Board members include: Colville Tribes, Tlingit & Haida Tribes, Crow Tribe, Nez Perce Tribe, Oneida Nation, Warm Springs Tribes, Tohono O'odham Nation, Three Affiliated Tribes, Sac and Fox Nation, Salish & Kootenai Tribes, Chippewa Cree Tribe, Yakama Nation.

The Board elected Officers for 2010; Colville Chairman Michael Finley-ITMA Chair; Crow Councilman Scott Russell-ITMA Vice Chair; Tlingit & Haida President William Martin-ITMA Secretary; Nez Perce Chairman Sam Penney-ITMA Treasurer.

Following are issues presented at the Annual Conference.

Deputy Director of Trust Services, Bureau of Indian Affairs, Department of Interior Vicki Forrest provided an overview of BIA trust related activities, including announcing new Chief of Staff Tamela Ross. DOI Secretary established a task force on renewable energy and climate change, to include tribal representation to determine future impacts on Indian communities. BIA will have meetings to determine how best to revise the land use regulations. The Geographic Information Systems (GIS), which is currently reservation wide, does not provide information down to the allotment level, BIA will work with BLM (entity in charge of boundary data) to ensure

boundary information put into TAAMS and GIS is reasonably accurate. BIA intends will work with tribes in determining proper boundaries.

The Department's ITMA Rocky Mountain Pilot Project on consolidation agreements at probate is very successful, and, therefore, has expanded into Great Plains Region. Vicki also stated that 99% of the eligible backlog estates have been closed. Due to the BIA's lack of funding and resources a possible reconfiguring of the 8 Land Title Records Offices is considered, she is advocating contracting out these services for tribes.

Brenda Walhovd, Acting Director Indian Land Consolidation Center, Bureau of Indian Affairs discussed the Indian Land Consolidation Program's (ILCP) mission, to acquire as many fractionated interest as economically feasible and to consolidate the land interests into Tribal ownership to promote & enhance Tribal self-determination, economic, social and cultural development needs. As of September, 2009, the program was successful in acquiring 416, 622 interests, and the number of willing sellers has exceeded the available resources. She noted that ITMA's listening conferences held in 2008 and 2009 resulted in ITMA's proposal to address fractionated lands. ITMA's report, submitted to the Department of Interior in May 2009, included proposal concepts such as actively engaging landowners, economic development, renewable energy grid, reducing landowners on a tract, and reducing IIM accounts by 80%, which is the basis for work being planned and performed at BIA. .

Fred Matt, Director, Intertribal Fish & Wildlife Association stated that the Native American Fish & Wildlife Society, which has been in place for over 27 years includes members from seven regions and has grown to support 220 tribes. Recently, NAFWS met with a working group of environmental organizations in Denver to develop strategies to elevate natural resources in Indian communities. It was reported the working group discussed the importance of making permanent, long-lasting institutionalized change in environmental policy which will survive the Obama administration.

Council of Energy Resource Tribes Executive Director David Lester stated CERT's mission is to use to use energy as a means to achieve two important tribal goals: first, to strengthen ability to govern tribal lands and to identify tribes as primary regulatory body; and two, to use energy as means to achieve tribal economic sustainability. Reducing reduction of imported energy and how energy efficiency is intricately related to that goal, as is developing tribal wind and solar energy—using a revised developmental model—which will result in more competitive, sustainable tribal communities and contribute to the national energy issue.

ITMA-BIA Land Consolidation & Estate Planning Pilot Project The goal of the pilot project is to utilize estate planning tools in the American Indian Probate Reform Act (AIPRA) to address and manage fractionated interests in trust land; namely, consolidation agreements at probate and will drafting. The conference attendees acknowledged and BIA agreed, that preventing fractionation should begin prior to a probate and expanding the project to include lifetime consolidation agreements would benefit trust beneficiaries. The process by which the project coordinates with the Office of Hearings and Appeals was discussed. Will drafting remains an issue and BIA considering alternatives, including housing wills at Lenexa Records facility.

Statistics showing the project's success were presented; thus far, the pilot project has received 30 referrals of which 24 have been mediated. Of the 24 mediated, 19 resulted in settlement agreements. Of the 19 probates mediated, it was estimated that approximately 992

new undivided interests would have been created absent the consolidation agreements. The consolidation agreements resulted in approximately 201 new undivided interests.

Tribal Probate Codes issues was presented by Majel Russell. The Indian Land Consolidation Act allows tribes to adopt their own probate codes, Secretarial approval is necessary if the code provides rules on the descent and distribution of trust land. Upon approval, a tribe's probate code will be effective after 180 days. To date, the Umatilla Tribe has the only tribal probate code approved by the Department of Interior. The major areas in which tribes are allowed to draft their own unique rules was discussed. The restrictions on tribes in drafting a probate code seems contradictory to President Obama's statement that government should not be dictating Indian policy. One solution is to go back to Congress to obtain more latitude for tribes or to lift restrictions entirely. BIA is developing a model probate code that can be distributed to and revised appropriately by tribes.

Special Trustee for American Indians Acting Trustee Donna Erwin and Osage Chief Jim Gray OST Advisory Board Member discussed the interrelationship between the BIA and OST, and the future of the OST. Donna stated that she believes this administration will be looking at how to most appropriately organize OST and BIA. One concern in reorganizing is how to uphold the fiduciary trust model, and to ensure that OST's functions are adequately funded. Donna believes that OST has been successful on the money management side.

Chief Gray discussed his historical perspective on the relationship between BIA and OST and Individual Indians and tribes and the massive push from tribal leaders to sunset OST, a push that came out of BIA's Modernization efforts. Chief Gray recognized OST's successes in improving services to individual and tribal trust beneficiaries, including the lock box. Chief Gray and Ms. Erwin agreed that the dialogue on restructuring OST should focus on maintaining and improving level of services for individual Indian and tribal trust beneficiaries, regardless of how OST may be restructured.

David Lester stated that it is important for some form of independent oversight is in place—in the nature of a bank examiner—to ensure that systems in place are not self-evaluating, even if OST remains independent. To that end, David also stated that the dialogue needs to include a discussion about a regulatory body with the ability to examine and alert management as to deficiencies in the system.

President George Howell of the Pawnee Nation of Oklahoma offered a comment that he suspects BIA is likely not funded at the level it should be, and that partnering with OST, rather than criticizing OST for the functions it does provide, would be more productive.

Brian Gunn asked whether—in light of S.1439—Donna felt that OST had any discrete functions of OST that could be transferred to Assistant Secretary of Indian Affairs. Donna Erwin stated that Ross Swimmer had previously discussed transferring Data Quality and Integrity and Post Quality Assurance at title plants back to BIA, and that Vicki Forrest was currently determining how those functions can be best carried out.

Panel on Climate Change Wizipan Garriott, Policy Advisor to Assistant Secretary Indian Affairs; David Harrison, Chair, National Congress of American Indians Energy Sub-Committee of Regulatory Management; David Lester, Director, Council on Energy Resource Tribes participated on a panel to discuss climate change. Secretary Salazar has made climate change one of his top priorities. Secretarial Order 3289 establishes framework within the Department for moving forward to address issues, including tribal consultation, and includes specific

language about tribes, including tribal sovereignty. Climate change response offices will be established in western states and others impacted by climate change.

Wizipan encouraged tribal input on location of these offices and whether they are functioning appropriately and encouraged tribal participation in carbon markets as well. As other climate change initiatives a means of cultural restoration and economic development and discussed the opportunities and challenges for renewable energy, including basic capacity and resource assessment funding and transmission. He stated that DOI needs to start looking at other financial incentives—possibly legislative incentives—to help tribes finance projects.

Regarding trust litigation, Wizipan stated that a team has been established to discuss the Cobell case, and other trust litigation cases, stating that he believes there will be movement on those issues within the next couple months. To gain the most leverage, he recommended discussing trust reform in conjunction with climate change and renewable energy, as the latter two cannot likely move forward without resolution of trust reform.

David Lester discussed the issue of whether advancement of tribal sovereignty is compatible with tribal trust responsibility and encouraged the viewing the federal trust as a tool to enhance and empower tribal sovereignty. He discussed environmental protection in Indian Country, including the importance of protecting individual allottees' rights. He stated the need for a system which will be flexible enough to aggregate allottee lands to develop wind, solar and other energy projects and the importance to focusing on tribal community needs first, stating that environmental protection in Indian Country will require successful tribal economies, and it is typically affluent communities that can afford environmental protection.

David Harrison stated that an Administration which acknowledges the issues related to climate change is a historical event in itself. The greatest and most-overlooked opportunity in renewable energy is conservation. One of the primary impediments is the concern of tribes' potential TERA partners to avoid tribal court jurisdiction in the likelihood that an objection would need to be filed. An impediment requiring tribes to release all liability when entering into a TERA.

Cheryl Lohman, Indian Land Owner, Numu Allottee Association stated, as a trust beneficiary, her perspective on trust reform and the importance of individual allottees initiating strategic planning for land management. As an example, Cheryl discussed the efforts of the Numu Allottee Association to manage trust land.

Native American Rights Fund attorney Donald Wharton reported on the tribal trust fund litigation and the status of several trust fund cases and concluded that currently, it is believed that administration will settle claims, therefore removing the need for Congressional action to resolve these claims.

Donald discussed *Chippewa Cree v. U.S.*, a 1992 case involving the largest distribution of trust funds and the *Nez Perce v. Kempthorne*, 2006 case in which NARF filed a class action lawsuit on behalf of a dozen tribes asking for an accounting was presented.

Trust Litigation was presented by ITMA Legal Consultant David Harrison. In addition to 43 tribes representing the Plaintiffs in the *Nez Perce* case, there are presently 103 cases in federal courts; of those, about 57 are in the Court of Federal Claims. The issues in the cases before the Court of Federal Claims are varied, including trespass, right-of-way, valuation of

resources, timber claims, mineral claims and underpaid royalties. 12 or 13 cases are in the District Court in Oklahoma and involved claims seeking an accounting.

ITMA's Position Paper to Obama Administration ITMA Legal Consultant Shenan Atcity lead the discussion on the formulation of a paper to be submitted to the Obama Administration; this takes into account the paper submitted earlier this year. The discussion began on the first day of the session and concluded as the last presentation, this, to provide tribal representatives the opportunity to review the draft paper and consider comments. Suggestions included: focusing more intensely on S.1439; including language to address CH. 11 bankruptcy issue in order to obtain more protection for tribes when a party to IMLA leases; including additional language on career/political appointees from previous administrations; broadening the scope of the first priority—implementation for Phase II of the tribal Trust Fund Settlement Project to allow for additional input of tribes seeking any type of resolution of trust fund claims; and clarifying that ITMA is currently, rather than anticipating, conducting a dialogue with OST and BIA regarding merging or eliminating OST.

Finally, on December 7, 2009, the parties to the *Cobell* litigation announced a settlement of the fourteen-year-old litigation that will require both federal legislation to authorize and a cooperative federal court to implement. ITMA has been inundated with requests from account holders, tribes, and Congressional Committee staffs for analysis, concerns, and recommendations regarding this proposed settlement. To meet this volume of interest, ITMA will plan a national meeting in the second quarter of FY 2010 to provide a forum for a national-level discussion of the proposed settlement. ITMA has not taken a position on the Settlement Agreement. The Board requested that at this meeting Ms. Donna Erwin, Acting OST Special Trustee and BIA's Jerry Gidner and Vicki Forrest be invited to update tribes on trust reform activities. And to the extent possible, if it is, provide a report on their involvement in the process leading up to the Cobell Agreement.

In addition, ITMA produced for review a position paper for the Obama Presidential Administration on trust reform matters that member tribes would like to commend to the Administration's consideration. Among these are recommendations for continuing to fund the Land Consolidation effort, to continue and expand the estate planning pilot that ITMA has successfully implemented in the Rocky Mountain Region, and to consider expanding the benefits of AIPRA and land consolidation to the Alaska Region.