



April, 2010

**FY2010
2nd QUARTERLY REPORT
JANUARY – MARCH 2010**

Much of the second quarter of 2010 was spent reviewing and monitoring the activity surrounding the proposed Cobell Settlement Agreement that was introduced to Indian Country via media on December 7, 2010 by the Plaintiffs and the Department of Interior. At this time there was no information available to Tribes or Indian individuals other than what they heard through the national news media. Facing the reality that many Indian individuals did not have access to internet services, the information was slow in reaching certain Tribes and individuals.

Cobell Settlement Agreement. Questions and concerns brought to ITMA's attention by various Tribes and Indian individuals in regards to the Agreement included the following:

- the inclusion in the proposed settlement of Indian beneficiaries' resource mismanagement claims and the fact that they were not included in the *Cobell* complaint
- the mismanagement claims would constitute the 'second round' of litigation to address the real grievances of landowners.
- the formation of a "new class," how will it be identified, whether the notice to individual landowners will designate which class they belong to, and the process for determining payment beyond the base amount of \$500 to each member of this class.
- there are issues regarding the opt out provision and the ability to obtain an accounting of individuals trust assets to ascertain their damages for mismanagement by the United States,
- there are concerns about lack of information regarding the incentive payments that would be paid to the named plaintiffs, why the payments are being allowed in the first instance, and why the payments would come out of the \$1.4 billion that would be divided among the class members. .
- Tribes had expressed concerns that the last fractionated land purchase efforts were simply focused on purchasing interests and closing IIM accounts rather than purchasing lands that would strategically benefit Tribal use and development.
- regarding the attorneys fees, why are fees coming out of the \$1.4 billion that would be divided among the class members.

March 10, 2010 Hearing on Cobell Agreement. The Committee on Natural Resources conducted a hearing on the Settlement Agreement of the *Cobell v. Salazar* litigation. The ITMA was invited to testify and provided ITMA Chairman Michael Finley provided verbal testimony and a written statement was provided as well. A copy can be located on the ITMA website at www.itmatrustfunds.org.

ITMA Board of Directors Meeting. The Board met at Las Vegas, NV on February 23, 2010, and received detailed reports from staff and consultants regarding current Office of the Special Trustee Trust Reform and Appraisals projects and the Bureau of Indian Affairs) Land Consolidation and Estate Planning Project. Acting Special Trustee Donna Erwin joined the Board meeting and reported on the recent OST Advisory Committee meeting and other trust reform related matters.

The Estate Planning Pilot Project which began in 2008 will wrap up in April 2010 and while the initial proposal to conduct the pilot project had three parts (life time consolidation agreements, consolidation agreements at probate and will drafting), the scope changed due to the overwhelming response by families to participate in consolidation agreements at probate. Statistics regarding the project were provided.

The OST Monitoring report included; the call center and questions from beneficiaries about the *Cobell* settlement. The flexibility the program to buy land for less than fair market value was discussed. It is unknown whether the Five Civilized Tribes will be included in buyback program given that ILCA excludes these tribes.

OST's budget request proposed a \$25 million reduction in budget from Office of Historical Accounting, assuming passage of the *Cobell* settlement.

Weather tribes will be able to contract for the appraisal tracking system is function will eventually be up for notice and comment. It was reported the 2007 policy in the Northwest Region has been lifted, which required all fee to trust applications to include a chain of surveys. The requirement was unfair given that the policy was the result of one specific fee to trust acquisition which cost the department approximately \$30,000 to clear up title work. Efforts to relax regulations governing environmental site assessments continue.

Following the conclusion of the official ITMA Board meeting ITMA staff and consultants met with Ms. Erwin regarding concerns regarding the Cobell Settlement Agreement.

ITMA Tribal Leaders and Representatives Meeting. On February 24, 2010 the Intertribal Monitoring Association conducted a tribal meeting to report on trust reform issues, and land consolidation and estate planning issues. In addition, the Cobell Settlement Agreement was addressed. At the meeting;

- Office of the Special Trustee Acting Trustee Donna Erwin explained the genesis of the OST, including OST's oversight functions as mandated in 25 U.S.C. § 42 and 25 U.S.C. § 162a. Donna discussed how many of OST's programs satisfy these mandates, including a centralized lockbox in order to receive trust payments. Donna also discussed the trust beneficiary call center, which is a centralized call center that provides timely responses to beneficiaries' questions regarding their trust assets. Donna also discussed the trust accountability fiduciary trust model, and the American Indian Records Repository (AIRR), located in Lenexa, Kansas. AIRR is a state of the art records storage facility for the centralization of all Indian Affairs records. Donna stated that tribes can also store their records at this facility.
- Bureau of Indian Affairs Trust Services Deputy Director Vicki Forrest focused on her philosophy that BIA staff should be encouraged to have open and honest communication with Tribes. Vicki discussed renewable energy projects in the department and stated that there is an emphasis on encouraging Indian projects and that she would like to have tribes in other natural resource projects, including the Department's collaboration with the Department of Justice Services to create an assistance program, focused on providing families of conservation officers with the tools to cope with the demands of the job and its effect on families. Land into trust is a high priority for the Secretary and the Assistant Secretary and that there is a need to employ staff who would be specifically dedicated to working on this issue. Information will be generated for the budget cycle to support efforts to dedicate more staff to this issue. The fee to trust handbook and certain provisions was discussed. Regarding environmental site assessments, it was acknowledged that the EPA rule requiring the same type of sit assessment regardless of the type of land use is problematic. Work on providing some relaxation for these standards is required. In the area of risk management tribes should be provided with technical assistance for tribes to have sustainable financial economies. Work is occurring with the Bureau of Indian Education and Haskell University to start a degree or certificate program in order to recruit more individuals into natural resources.
- A unbiased power point presentation which summarized the main sections of the *Cobell* settlement agreement was presented and included; the two classes of plaintiffs, the \$2 billion dollars dedicated to the Department of Interior's ILCP for the purchase of fractionated land interests and creation of a scholarship fund.
- Richard Monette, former Chairman of the Turtle Mountain Band of Chippewa Indians in North Dakota, and presently Professor of Law at the University of Wisconsin Law School, moderated a panel discussing the December 7, 2009 Cobell Settlement Agreement. Panelists included John Dausset, general counsel to the National Congress of American Indians; Keith Harper, a Cherokee and partner in the Washington, D.C. offices of Kilpatrick-Stockton, who serves as Class Counsel to the Cobell plaintiffs; David Harrison, an Osage and attorney who has worked with ITMA since its inception; and Amanda Wilbur, an attorney who has long worked with and represented tribes in the Great Plains region and the Great Plains Tribal Chairmen's Association.

Professor Monette opened with a discussion of the profound effects on tribes of both the 14-year-old litigation and the proposed settlement and observed that Tribes have been left completely out of the discussions to date. He observed that the litigation has been presented for years as a claim for an equitable accounting, and only a claim for an accounting. With no announcement or notice, he said, the settlement proposal has transformed the litigation into a case about money.

Individuals and tribes attending the session stated concerns with the Agreement and asked for clarification on whether the agreement states anything about mismanagement of Indian lands by BIA which has caused tribal members to lose considerable value, and, when and from whom the authority was given to allow trust mismanaged claims to be a part of this settlement. Questions were asked whether the Indian Land Consolidation Program acquisition of lands will involve tribes and if the individual's lands will be appraised at their original value or at the current diminished value. It was stated the current regulations on appraisals will need to be followed in acquiring these tracts.

Keith Harper discussed the Settlement Agreement,

- stating there is transparency in the Agreement and that *Cobell* was about three principle things: accounting, restitution of funds and fixing a broken trust management system.
- addressed the statement that the case was not initially about money damages saying that is incorrect and referenced a 1986-87 case in which plaintiffs sued government for monetary relief.
- discussed the preliminary approval requirement, stating this is the time when every beneficiary who opposes the settlement can be heard. After preliminary approval by the Court, there will be a notice period.
- additional resources will be utilized to ensure as many class members as possible can be identified.
- after notice, which will include approximate payouts (in the second class), beneficiaries can decide to opt out, be included, object, or a variety of other things. This will occur at fairness hearing.
- clarified that the tribal trust cases are not part of the settlement, and the settlement does not directly impact those actions, as they are expressly excluded from settlement,. Further, he stated that the legislation cannot be changed, however the settlement can be changed

Mr. Dossett followed with a short statement of NCAI's interest in the litigation, including the size of the dollar figures contained in the settlement proposal. He said he has been advised by key Congressional staff that members of Congress will regard any requests for delay, such as the Affiliated Tribes of Northwest Indians (ATNI) resolution, as actual opposition to the settlement. This proposed settlement represents the fulfillment of a campaign pledge by President Obama.

Mr. Harrison said that in any negotiations involving collective interests, there comes a time when the negotiators become advocates for the agreement they have reached. This is especially true, he said, when representatives of both sides feel they have achieved significant advantages beyond the matters actually in dispute between the parties they represent, he questions if we are there. David noted that under the proposed settlement, those individuals who have sold their land altogether will almost certainly receive the largest payments. Those who were paid money that should have gone to others will profit again from the error, and those who should have been paid but were not will again be victimized.

Ms. Wilbur pointed out that the Great Plains Region contains a very large proportion of the present *Cobell* class members, and perhaps an even larger proportion of the new class that will be created under the proposed settlement. She said many of these individuals think it is fundamentally unfair that claims that have never been included in the lawsuit should suddenly be thrust into the litigation for the sole purpose of settling them with no notice, no evidence, and no fact-finding to support either the claim or the proposed settlement. She said the class representatives and class counsel owe it to the class members to explain the proposed settlement, and the reasons underlying the inclusion of claims that have been so explicitly disclaimed for many years.

Chris Fluhr, staffer for Congressman Doc Hastings, top Republican on the House Natural Resources Committee, was asked to comment on John Dausset's statement regarding Congress' possible perception that the ATNI resolution is aimed at killing settlement efforts. Chris commented that the House Natural Resource Committee, which has jurisdiction to implement the settlement agreement, has not received any information from the Department of Justice regarding the agreement. Chris stated that he did not believe it would be Congress' perception that asking questions would result in delay or that the purpose of posing questions is intended to delay settlement. Chris announced that Ranking Member Hastings has called for expedited hearings on the settlement.

Several tribal governments and tribal organizations have taken official action requesting transparency and specific information regarding the details of the Agreement.

Quarterly ITMA Trust Reform Monitoring Report

- OST Activities Related to Proposed *Cobell v. Salazar* Settlement. On February 18, 2010, ITMA Executive Director Mary Zuni and OST Liaison Brian Gunn met with Acting Special Trustee Donna Erwin and OST staff to discuss pending OST developments and initiatives. ITMA was also able to have additional discussions with Ms. Erwin and OST staff at a February 23, 2010 meeting of the ITMA Board of Directors.

Of significant interest to ITMA was OST's role in and ongoing work related to the proposed settlement of the *Cobell v. Salazar* litigation. Press reports have circulated indicating that the Department had entered into contracts with various contractors to assist with the implementation of the \$2 billion Indian Land Consolidation portion of the proposed settlement, if or when the settlement is ultimately approved.

OST stated that the framework of the settlement agreement was already agreed-to by the parties when OST became involved and that OST's work largely consisted of providing and generating data. OST also indicated that OST officials have been participating in meetings with others within the Department to explore ways to streamline the Department's existing practices governing acquisitions of fractionated interests. These discussions, ITMA understands, are geared toward ensuring that if the settlement is ultimately approved, fractionated interests can be acquired as quickly as possible. OST officials explained that the Department is currently discussing issues such as appraisals, the general requirement that fair market value be paid to acquire fractionated interests, and the scope of existing authority under the American Indian Probate Reform Act.

Separately, ITMA was able to meet with the Director of the BIA on January 12, 2010 about ongoing activities at the BIA in anticipation of approval of the proposed *Cobell* settlement. According to the BIA Director, the BIA has been making preparations to ensure that, if the \$2 billion for Indian land consolidation becomes available, the funds can be spent quickly. The BIA's Indian Land Consolidation program is the entity that would be charged with purchasing fractionated interests.

- OST's FY 2011 Budget Request. OST also provided ITMA with an overview of the Administration's FY 2011 budget request for OST. The FY 2011 request proposes a \$25.7 million decrease for OST, the largest of which is a \$25.0 million decrease for historical accounting for activities that will no longer be necessary in light of the *Cobell v. Salazar* settlement. As noted in the detailed budget justifications, OST's FY 2011 budget request "assumes enactment in 2010 of a settlement of the *Cobell v. Salazar* lawsuit." The remaining \$700,000 proposed decreases are spread among several other OST accounts. The FY 2011 request has yet to be considered by the House and the Senate appropriations committees.
- Update on implementation of Appraisal Request and Review Tracking System (ARRTS). ITMA has been reporting for some time on the Appraisal Request and Review Tracking System, or the "ARRTS." The ARRTS is a web-based system that is currently used by other agencies within the Department to input, track and monitor work flow for appraisal requests. The ARRTS is maintained by the National Business Center (NBC), a entity within the Department that provides acquisition and management services to agencies

and bureaus within the Department. The ARRTS is currently available for all agencies within the Department except for BIA and OST.

ITMA received a demonstration of the ARRTS in early 2009. Based on the system that was demonstrated, it appeared that ARRTS would have an immediate impact at the agency level if or when fully implemented. Significantly, the ARRTS is designed so that if officials place a “hold” or otherwise require additional information on a particular appraisal request, the officials must identify themselves by name in the system. This would address one of the concerns that ITMA has heard at ITMA meetings and listening conferences: that tribes and agency staff do not have a point of contact to address appraisal requests.

At the time that OST provided ITMA with the demonstration in early 2009, OST officials had hoped to have ARRTS online for Indian appraisals within a matter of weeks. Since then, OST has scaled back its relationship with NBC. ITMA also understands that the Department has begun reevaluating how appraisals are prepared for the Department generally. Although the ARRTS is currently being tested at certain BIA regional offices it has yet to be made available at the tribal or agency level. It is unclear at this time when the ARRTS will be fully implemented.

OST indicated that tribes or individuals that are interested in seeing the ARRTS implemented should ensure that the Department understands that this is a priority for them.

- **OST Initiative to Reallocate Tribal Shares.** In 2009, OST initiated tribal consultation on how to reallocate tribal shares for appraisals. Tribal shares is a term that refers to the dollar amount that is available for Indian tribes and tribal organizations should they decide to contract or compact the appraisal function from OST under P.L. 93-638, the Indian Self-Determination and Education Assistance Act of 1975. Also affected by any reallocation would be the residual, a term that refers those appraisal-related functions that, by law, can be performed only by federal officials. According to OST, approximately 40 Indian tribes and tribal organizations have contracted or compacted the appraisal program. OST held six tribal consultation sessions on this issue between June and August 2009.

OST indicated that it is still formulating a share reallocation proposal based on the input it received during the consultation sessions. ITMA was assured that tribes will be able to have input on any reallocation plan that OST proposes before it is implemented.

- **Northwest Regional Office Policy Modified.** In early February 2010, the BIA’s Northwest Regional Office modified a December 5, 2007 policy relating to fee-to-trust applications that many Indian tribes had expressed concern

about at ITMA meetings and listening conferences. The policy had required a detailed land description review and a chain of surveys for all fee-to-trust applications. A number of tribes had complained that the chain of survey requirement, for practical purposes, was unnecessary, specifically for parcels that were contiguous to or surrounded by other Indian trust lands. The modified policy eliminates the chain of survey requirement in the absence of exceptional circumstances. Although this was a BIA policy, ITMA reported the tribal concerns to OST and OST, in turn, had previously made inquiries with the BIA on the status of the policy.

ITMA Listening Conference at Fort Peck Tribes' Reservation The ITMA was funded in FY2010 to conduct one listening conference. At the request of the Fort Peck Tribes, ITMA and OST agreed to hold the meeting on the reservation. The Tribal Council has approved the dates of April 14-15 for the session to be conducted at the Tribe's community center.

Council of Energy Resources Tribes The ITMA continues to work closely with the Council of Energy Resources Tribes on trust-related issues. ITMA reported at a meeting conducted at Denver on January 14-15. There was a great deal of interest in the *Cobell* Settlement Agreement. CERT reiterated their support for ITMA activities on behalf of tribes. The director was invited to attend the February 11-12 meeting scheduled for Denver with members of the Board and member tribes.

Montana-Wyoming Tribal Leaders Council At the invitation of the Chairman of the MT-WY TLC, on February 17-18, the ITMA director and consultant attended a meeting with Tribal leaders. ITMA was invited to listen to and participate on a telephone conference call with Keith Harper, plaintiff's attorney.

ITMA staff also met with the Fort Peck Tribal Council representatives regarding trust reform issues and the upcoming ITMA Listening Conference. The dates of April 14-15 will be fielded with the OST staff.