

# INTERTRIBAL MONITORING ASSOCIATION on Indian Trust Funds

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## ITMA GREAT PLAINS REGION MEETING ON FRACTIONATED LAND OWNERSHIP

Ramkota Hotel  
Rapid City, South Dakota

DECEMBER 2, 2008

This meeting convened at 1:30 p.m. on December, following a meeting of the Great Plains Tribes with state and federal agencies to discuss water management issues in the Missouri River Basin. Those attending the meeting included representatives from the following tribes.

Lower Brule Sioux

Cheyenne River Sioux

Rosebud Sioux

Crow Creek Sioux

Blackfeet Tribe

Crow Tribe

Mary Zuni opened the meeting with a discussion of the ITMA agreement with the Office of Special Trustee to conduct consultation meetings with tribes and Indian landowners throughout the country for the purpose of developing recommendations for the federal government to consolidate fractionated ownership of Indian lands.

Majel Russell led the discussion with a review of the history and current situation regarding fractionated Indian lands throughout the country. She explained that the number of undivided fractional ownership interests in Indian lands now exceeds 4 million, and the cost to the federal government of administering these interests is some \$432 million per year. This represents an enormous economic and fiscal waste not only of the land that goes unused, but also of the federal expenditures of scarce federal funds that are badly needed for other Indian programs.

She explained that Congress has attempted several times in the last twenty-five years to address the issue, but has not achieved any significant success, except for the recently formed Indian Land Consolidation Office, and that there have been criticisms of that office's failure to coordinate its activities sufficiently with tribal objectives and with tribal land consolidation plans. Besides, she said, no funds have been requested to continue that office in Fiscal Year 2009.

The chairman of the Lower Brule Sioux Tribe expressed concern that the federal government's trust responsibility is tied so closely to administering the trust and providing services to individuals that eliminating individual ownership will weaken the federal commitment to carrying out its trust responsibilities to treaty tribes.

Landowners present volunteered the suggestion that many landowners would sell their ownership interests willingly to the tribes if there were funds available to pay a reasonable purchase price. This observation led to an extended discussion on the various means that might be employed to finance voluntary land purchase programs. Some suggested that loan programs for land consolidation purchases should be available to individuals as well as to tribes. A representative from the Crow Creek Tribe said there should be a way for individuals to receive fair and equitable treatment in loan programs. Too often, she said, BIA families and employees get favorable treatment from financing sources.

Another participant suggested that BIA funding of the ILCO should be continued with appropriations levels reflecting the avoided costs to the Bureau of consolidating fractionated interests in tribal ownership. One suggested that since the federal government created the problem of fractionated ownership, the federal government should fund programs to fix the problem. Others urged that the federal program should be equally available to individuals who want to consolidate and use their land as it is to tribes. There should be direct funding of consolidation programs, not loans that inhibit the vigor of consolidation efforts because so much of the tracts are too small and too remote from each other to be readily formed into usable tracts. Another suggested that commercial loan programs are not available on reasonable terms, considering the productive capacity of many individual parcels. Some suggested that individuals need access to low interest loans in order to buy out their co-owners who are willing to sell.

Some representatives suggested that tribes should be offered a right of first refusal to purchase any lands that become available for sale on the reservation, whether the lands are in trust status or fee. One suggested that unless tribes have financial assistance and the flexibility to purchase fee lands as well as undivided trust interests the federal policy of consolidation will be frustrated because it does not always match the tribe's own consolidation and land use plans. Another suggested that tribes should be in control and make decisions regarding parcels to be purchased so that acquired lands would more likely be immediately beneficial to the tribe.

Several participants discussed the issue of appraisals, and the fact that appraisals take far too long and sometimes result in missed opportunities to purchase from willing sellers. Some suggested that a "reasonable purchase price" is often far less than the price suggested by a formal appraisal. Some suggested that the Secretary should be willing to approve any purchase price that is agreed upon by a willing seller and a willing buyer, and that such transactions should not require any appraisal at all.

A participant suggested that the liens held on all lands acquired by the BIA purchase program result in the tribes' actually financing the purchase of fractionated interest since the

lands are supposedly held in trust for the tribe, but the Secretary has the authority to lease them and to collect and hold all the rents until the purchase price has been recovered. Some suggested that extended lien periods should not be required, and some that liens should not be placed on the lands at all, but all acquired lands should immediately be placed into trust for the tribe, with full tribal control of them. One suggested that if such a practice could be adopted, tribes themselves could make land use decisions, including making assignments to individuals for grazing, farm, or home site uses.

Participants agreed that the Bureau's Land Consolidation Office should be retained and funded by the government. Some suggested again that the program should be authorized to make purchases of undivided fee interests, as well as trust or restricted interests to facilitate the consolidation of parcels that are immediately usable by the tribe, especially since 50% tribal ownership now conveys tribal prerogatives to make land use decisions and to force partition of remaining interests. The Bureau and tribal programs should be coordinated to make maximum use of all the tools that are presently available to consolidate ownership in the tribe and to reduce fractionation.

Participants also discussed the issue of estate planning, and there was complete agreement that the Bureau made a serious mistake in ending the practice of assisting individuals in drafting wills. One participant suggested that, even if the Bureau is unwilling to reconsider that decision it should make an effort to provide assistance in this and other areas by providing 'templates' or other forms of 'guidance' on language to be used in wills to prevent further fractionation of interests in trust land. Another suggested that the Bureau should be willing to admit mistakes and reconsider prior decisions that are having unintended or untoward consequences. A participant suggested the Bureau should offer to retain wills in realty records so they would be readily available for probate officers.

Individuals are simply unaware of the intricacies and complexities of probate and intestate succession. Without assistance in estate planning and will drafting, participants stated, the tools of AIPRA will go largely unused by the vast majority of Indian landowners. The real issue for the Bureau is whether it wants to see its own policies carried out or continue to be frustrated with all the problems and all the expenses of administering fractionated interests in land.

One participant suggested that all the Bureau's decisions since the advent of the *Cobell* litigation have been driven by considerations of potential liability, and appropriations have been directed to dealing with issues presented to the court. As a result, issues presented by tribes and landowners to whom the Bureau actually owes trust duties are going unaddressed while the Bureau addresses presented by the court and by the *Cobell* plaintiffs. Another suggested that the *Cobell* litigation appears to be in its final stages, and the Bureau will not have that excuse much longer. Someone else suggested that the "*Cobell* excuse" cuts both ways, and that tribes need to be focused on plans to use the tools available to them and won't always have the *Cobell* case to blame for their own failure to adopt probated codes, land use plans, and consolidation programs.

A participant suggested that maybe we should suggest that the Bureau make participation in the Indian Land Consolidation Program and access to credit programs for land consolidation contingent upon the tribes' adoption of land use plans and land consolidation plans so that all could see what their plans are, more importantly, that they have some plans and are not using scarce purchase money funds to benefit their own family members or otherwise buying lands that won't actually benefit the tribe or anyone else for the foreseeable future.

The discussion turned to acquisition of fractionated interests from Whereabouts Unknown individuals and unwilling sellers. In order to make a real dent in the problem of fractionated interests, someone said, we have to consider some form of forced sale by the Bureau. Some tribes will be very reluctant to force their own members to sell the land if they are unwilling to do so. For some, even if they are not actively seeking to use or consolidate their lands, their ownership nevertheless represents a birthright and their connection to the tribe and to the reservation. We need to empower the tribes to be able to cause the Bureau to make involuntary sales happen, or to force partition. Another participant said that co-owners should be able to cause partition or to cause the Bureau to force involuntary sales.

A participant said that just like the Bureau should provide templates of wills and probate codes, the Bureau should provide information on the circumstances in which it will seek involuntary sales or partition, in order that landowners who want to protect themselves from a forced sale of their birthright can have time and opportunity to avoid it. Participants said some form of condemnation should be considered. One said that all the consolidation opportunities that are available to tribes should also be available to individuals. When someone pointed out that individuals will not be able to condemn land, it was suggested that maybe tribes should be responsive to individual consolidation plans, just like everyone is saying the BIA should be responsive to tribal consolidation plans.

Someone suggested there should be certain thresholds met before there is any effort to force involuntary sales or condemnation. Thresholds might include such things as the number of owners in a tract, the proportion of ownership interest an individual holds, or owners whose whereabouts are unknown and cannot be determine. There was some discussion about how many owners should trigger an involuntary sale. Everyone seemed to agree that fifty owners should certainly qualify; others suggested as few as ten, some as many as twenty. But all agreed that more than fifty owners in a tract should trigger some automatic process to reduce the number of owners. There seemed less agreement on the size of ownership interest that might trigger an involuntary sale. The ability to force consolidation of interests owned by persons whose whereabouts are unknown generally seemed to be acceptable as long as the money was held in trust in case the person reappeared some day.

Someone suggested that ITMA should also consider making some recommendations that go beyond the approaches previously tried or considered. One suggested perhaps Congress should legislate a maximum number of owners of a single parcel of trust land. Other suggestions for consideration included allowing tribes to tax individual ownership interests; or

requiring tribes to offer assignments for life in exchange for permitting forced sale or partition of allotted tracts. Someone wondered aloud if a co-owner actually making use of land should be able eventually to acquire co-owners' interests through adverse possession.

Someone raised the question whether we should encourage a federal policy that discouraged passive ownership of trust land since the purpose of allotment in the first place was to encourage individuals to put their individual lands to productive use to support Indian families. While the policy as a whole is largely considered to have been a failure, many Indian families did put their land to productive use, and many individuals today would make productive use of trust lands if they could simply assemble a large enough tract to make it productive. Passive landowners who do won't work the land, or consent to their co-owners' productive use of it are in a position to tie up the land in unproductive status and defeat the original purpose of allotment as well as to frustrate the current policy of consolidating ownership.

In the ensuing discussion of barriers to consolidation and reducing fractionation, some suggested again that the exclusive focus on acquiring trust interests is short-sighted, and that consolidation would be much more quickly achieved if the land purchase plans included authority to purchase fee interests and have them taken into trust quickly. This would permit many more acquisitions of the percentage of interest required to force a partition or involuntary sale of the remaining trust interests.

A participant said that fee to trust transfers take far too long, and are too often frustrated by environmental clearances. Another said that trust-to-trust transactions should be approved automatically, and the government should facilitate reacquiring trust status of all lands within reservations.

Someone suggested that recommendations should include the options put forward by Robin Jaeger of the Indian Land Consolidation Office.

The meeting adjourned at 4:30 p.m. due to an approaching winter storm.