

**INTERTRIBAL MONITORING ASSOCIATION on Indian Trust**  
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**DISCUSSION PAPER**  
**Meeting with Commission on Trust Administration and Reform**  
**Albuquerque, New Mexico**  
**June 12, 2012**

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ITMA is a tribal organization dedicated to monitoring and improving the government's delivery of trust services to Indian beneficiaries for more than 20 years. Presently, there are 65 member tribes of ITMA.

We are pleased to respond to the questions the Commission has asked us to address today, but think a little history will help set stage for our remarks. First, we would like to point out that this Commission itself is in large part a result of ITMA's work. This Commission was created in conjunction with the announcement of the *Cobell* settlement. The *Cobell* case was still in court only because of the 1994 Indian Trust Fund Management Reform Act. All of the common law trust claims had been dismissed with prejudice in 1998. The court's jurisdiction of the *Cobell* case rested entirely on the 1994 Reform Act. ITMA had drafted and presented the Trust Fund Reform Act to Congress, which passed it in 1994.

We think it is important for this Commission to remember that the Clinton Administration back in 1994 objected to the need for legislation and opposed the Reform Act. ITMA did not get everything we wanted in the Act. We had to accept some amendments to avoid a veto threat, but for the first time we did get some clear-cut trust duties spelled out in the law for administering Indian trust funds. Those duties included the duty to provide accurate cash balances and periodic account statements. In addition, the law clearly required the Secretary to establish adequate systems, policies and procedures, controls, and training to maintain appropriate management of Indian trust funds and resources.

The government has never been very good at accepting reforms that do not originate within the government itself. Based on that experience, we urge this Commission to exercise the full range of the independent judgment and experience of its members, and not to be led to conclusions and recommendations already desired by the government.

## RECOMMENDATIONS TO IMPROVE OR STREAMLINE DELIVERY OF SERVICES TO TRUST BENEFICIARIES

### ***1. The Department should withdraw the interim final rule stating that permanent improvements to trust property are not trust property***

We have urged the Department to change the background statement or to withdraw this interim final rule, published in the Federal Register on February 10, 2011 and confirmed as a final rule on July 28, 2011. The background statement says "As a general rule, the Department considers permanent improvements to by non-trust property, and OHA does not probate them." 76 Fed. Reg. 7501 (Feb.10, 2011).

We are particularly concerned that this statement, when applied to the land purchases authorized by the *Cobell* settlement, will result in purchases that do not reflect the value of homes or barns or fences or stockwater ponds or tanks that have become a part of the trust property where they are located.

This has the potential of creating another *Cobell*-type lawsuit by all the sellers of the lands that will be purchased in the land consolidation plan. In addition, this policy has the potential of grossly under-valuing any appraisals of Indian trust property when tribes attempt to exercise the right of first refusal they presently enjoy under the law to purchase allotted lands.

### ***2. The Department should seek legislation or a general revenue ruling to exempt interest earnings on IIM funds from federal income taxation.***

The present policy of the Treasury Department that interest earned on IIM funds is taxable, while the underlying principal fund derived from trust resources is not taxable. With more than 107,000 accounts containing less that fifteen dollars, this presents an enormous reporting burden and expense on Interior, with no prospect of recovering that amount in taxes from hundreds of thousands of very small accounts.

### ***3. OST should not treat statutory interest on trust funds receipts for late payments on mineral production as earned interest for tax reporting purposes.***

The Federal Oil and Gas Royalty Management Act requires the Secretary to collect interest on late royalty payments. When this statutory interest is transferred to Indian trust accounts, it is recorded and reported to IRS the same as earned interest on deposited funds. The result is that some individuals find themselves in trouble with the IRS. This statutory interest is intended simply to make the mineral owner whole, and is not intended as additional, or earned income on non-taxable receipts. It should not be reported to the IRS as taxable income.

#### ***4. OST should invest and pay interest on advance bid deposits***

Often, competing bidders for Indian leases or sales are required to post a portion of their bid as an advance deposit. When the successful bidder is selected, the advance deposit should be invested with the earned interest to follow the principal. If the Indian resource owner ultimately receives the money, the earned interest should also be paid to the Indian owner. If the bid ultimately fails for some reason not the fault of the bidder, then the earned interest should be returned to the bidder along with the earned interest.

The current situation either unnecessarily enriches the government, or results in unnecessary transaction costs to Indian landowners ... or both.

### **RECOMMENDATIONS TO IMPROVE TRUST MANAGEMENT BASED ON LESSONS LEARNED FROM RECENT TRIBAL BREACH OF TRUST CASES**

#### ***1. We recommend that the Commission shift its attention to focus more on natural resource management functions.***

If the Department takes seriously its own rhetoric about risk management, it should focus more of its attention on trust resource management and less on the organization, reorganization, realignment, or relocation of OST. The risks to Indian trust management today lie much more in the administration of timber, mineral, range, agriculture, environmental, and wildlife resources than in the administration of funds already in the cash drawer.

In all the settlements that have been announced lately, including the *Cobell* settlement, the bulk of the judgments relate to resource management claims, and not to claims from fund mismanagement. Even in those cases where resource claims were not directly at issue, the settlement amounts reflect the release of all resource management claims.

In my own tribe's case, we reached settlements a few years ago that totaled a little more than \$100 million. Most of that amount reflected damages from management, or mismanagement, of our timber resources. Another ITMA member tribe recently accepted a settlement of more than \$300 million dollars that mostly came from failure to collect appropriately for the tribe's oil and gas production.

#### ***2. The government should simplify and streamline the method for paying judgments against tribes.***

The Judgment Fund Distribution Act is a relic of a much more paternalistic period of Indian Affairs, and imposes a number of costs on successfully litigating tribes. The requirement that a distribution plan be prepared and laid before Congress for months before a tribe can actually realize the benefits of a settlement or other judgment should be reviewed for possible repeal, or at least for consultation with tribes throughout the country.

## **RECOMMENDATIONS FOR IMPROVING TRUST MANAGEMENT AND ADMINISTRATION TODAY**

ITMA again offers the recommended actions presented to the Principal Deputy Special Trustee on January 3 of this year. In particular, ITMA recommends that:

- The Secretary confer with OMB and Congress to ensure that the former Principal Deputy Special Trustee's proposed policy changes do not become official without consultation or other organizational review simply by permitting his proposed budget to become effective.

The Commissioners here agreed with ITMA's suggestion at the February meeting that the ultimate policy document for a government agency is its budget. The former Principal Deputy Special Trustee made profound changes in the OST organization and plan of operation through a budget that will become effective in October of this year unless changed. ITMA urges the Department and this Commission to review those proposed policy and budget changes immediately.

- The Department should make the same public commitment to both transparency and accountability for OST and Indian trust administration that Secretary Salazar made so often and so publicly in the wake of the sex and drug scandal in the former Minerals Management Service.
- Any writings of the former Principal Deputy Special Trustee regarding the policies and procedures, internal controls, and investment policies of OST should be immediately suspended or withdrawn, pending a review for compliance with law, regulation, OMB guidance, and fiduciary prudence.

**ITMA-OST MEETING NOTES**  
**January 3, 2012**

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On January 3, 2012 ITMA representatives met with the newly appointed acting Principal Deputy Special Trustee, Michele Singer.

ITMA Meeting Participants:

ITMA Vice Chair Scott Russell (Crow Tribal Secretary)  
ITMA Treasurer Ron Suppah (Warm Springs Vice Chair)  
ITMA Executive director Mary Zuni  
ITMA Consultant David Harrison

OST Meeting Participants:

OST Acting Principal Deputy Special Trustee (PDST) Michelle Singer  
OST External Affairs Rep Patricia Gerard

The ITMA Vice Chair opened the meeting with ITMA's appreciation for the meeting and offered a brief overview of ITMA's tribal constituency. Copies of the ITMA Tribal Membership list and resolutions of support to continue ITMA's trust monitoring and funding from various national Intertribal organizations (NCAI, Montana-Wyoming Tribal Leaders Council and the Affiliated Tribes of Northwest Indians) were shared. ITMA offered our assistance during this transition time. It was pointed out that ITMA supports the Obama initiatives and there is only (possibly) a short time left to complete some initiatives.

The ITMA Treasurer commented there was a great need for more information regarding the OST activities. He stated we look forward to OST's implementing the Obama Administration's policy initiative of transparency and consultation. He requested; 1) a current OST organization chart, 2) information on the OST budget, 3) reconsideration of ITMA's FY2012 grant, 4) specific information on the rationale for decisions that have been made to date at OST that affect tribes, and, 5) a government-to-government session between tribes and OST. The Treasurer requested that OST conduct a side-by-side analysis between the Don Young Letter to the Secretary and recent IG Report on OST to determine commonalities and differences.

The acting PDST stated she was called at 4:00 p.m. and told to report to a meeting with Deputy Assistant Secretary David Hayes the following morning where she was told she would be acting PDST. She advised she was completely unaware until that time that there would be a change in leadership.

The acting PDST stated she was asked to come in and assess the situation at OST and offer suggestions regarding recent decisions made by the former PDST, Ray Joseph. She stated that she has no intention of coming in to "undo" things that had been put in place by her predecessor; that was not her directive. She felt more comfortable taking

on the task when Hayes offered the assistance of a seasoned budget officer from the Department's budget office. She stated that in addition to the PDST, she would still be handling the Department's regulatory work. She stated that the leasing regulations and energy drafts were posted and they would be scheduling consultations and awaiting comments. Ms. Singer stated she was a firm believer in and supported transparency and consultation.

Ms. Singer made it clear she had emphasized to the Deputy Secretary and senior Department officials that she has a great regard for the value of the work performed within OST, and for the capabilities of the individuals who perform it. She did not come to this position with any direction or any intention to dismantle OST. On the other hand, she made clear that she is not committed to un-doing or reversing without careful review any of the decisions or changes instituted by her predecessor.

In response to the request to reconsider ITMA's FY2012 grant, she stated she was informed about the meeting at Washington, D.C., and could not make a decision today, but that she was willing to review and get an understanding of why the decision was made. She said she understood that her boss verified and approved the decision. ITMA pointed out that her boss, Associate Deputy Secretary Meghan Conklin was in the room when ITMA was advised of the no funding decision, but that she did not indicate any approval or ratification of the notice. ITMA suggested that Ms. Conklin would almost certainly be willing to consider Ms. Singer's own recommendation in the matter and might well not object to a different decision. Ms. Singer said that was a very helpful observation, and she would keep that in mind.

Examples of what she would be focusing on include, staffing, contract solicitation bids and ITMA's request for continued funding. She stated regarding solicitations for contract bids, that just because they are already advertised does not mean they will continue with them. She will assess each one. The PDST indicated she would move forward with the Booz-Allen contract report on possible efficiencies for OST and investment processes. She met with them and it is a joint collaboration effort with BIA that started about eight months ago and they want to see it go through, and might add some specific requests.

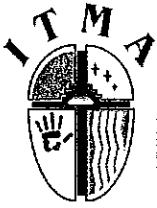
Regarding the FY2012 budget, the PDST stated it was out and there was nothing she could do with it at this point. The FY2013 budget is also prepared and she and her budget official are reviewing the budget narratives; she believes that she will have the flexibility to redirect the dollars. She agreed with our suggestion that the "budget reflects the real policy."

It was agreed that ITMA would continue dialogue and have a second meeting. It is her intent to have a first meeting of the newly appointed Commission on Trust Administration at Washington, DC, late February or early March and perhaps we would meet again with the acting PDST just prior to the Commission meeting.

The entire conversation took place with very little mention of Mr. Ray Joseph by name, or of ITMA's concerns with his tenure. ITMA did, however, provide a discussion paper outlining specific issues of concern and recommendations regarding budgetary, solicitations, staffing, etc., for her review and consideration.

There was reference to a recent letter to Secretary Salazar from Congressman Don Young regarding many of the changes that Mr. Joseph had initiated. Ms. Singer said it was clear from that letter that some of those internal deliberations "had left the building," and she would almost certainly be asked to respond to them at a future hearing Mr. Young indicated he will convene, probably later this month or in February.

At conclusion, the acting PDST indicated ITMA's request for reconsideration of ITMA's FY2012 grant was a priority and she intended to present it at the next weekly Senior Executive telephone conference call.



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**ITMA DISCUSSION PAPER**  
**Meeting with Acting Principal Deputy Special Trustee**  
**Office of the Special Trustee**

**January 3, 2012**

ITMA requests OST to reconsider the decision of the former Principal Deputy Special Trustee not to continue with a grant for FY2012 to fund the continuing monitoring and reporting activities of the only national tribal organization devoted to fostering continuous Indian trust reform.

In addition, ITMA has a number of recommendations designed to roll back unilateral actions of that former official that would have seriously undermined many trust reform initiatives of recent years.

**RECOMMENDED ACTIONS**

- The Secretary should immediately confer with OMB toward the end that the former PDST's proposed policy changes do not become enshrined in the budget President Obama will submit to Congress in early 2012. If the Department must live within the ceiling reflected in OMB passbacks, the Department must be permitted to rewrite the program narratives so that the training budget is not eliminated, for instance.
- The Department should immediately cancel all current solicitations for services that the former PDST has caused to be issued.
  - In particular, the current solicitation for consulting services to evaluate systems and processes for trust fund investment operations should be canceled.
  - In addition, the proposed solicitation to acquire a Trust Custody and Order Management System should be withdrawn.
  - Any contract currently in place with Booz Allen or other in-place IDIQ (indefinite quantity indefinite delivery) contractor to study or report on OST efficiencies should be withdrawn or placed on hold pending a thorough review for value to the government.
  - All other contracts or solicitations initiated under the former PTSD's direct authority should immediately be withdrawn or canceled for convenience of the government.



- All programmatic realignments initiated by the former PDST should be reversed immediately. In particular, the following programs and staff should immediately be returned to the supervision and OST organizations from which the former PDST unilaterally removed them:
  - Risk Management;
  - Trust Policies and Procedures;
  - Investments;
  - *Youpee* Distributions and Special Deposit Accounting.
  
- The current Acting or Interim Principal Deputy Special Trustee should provide a complete statement of qualifications to lead the Office of the Special Trustee or a statement of intent to rely on the professional staff that developed, designed, superintended, and implemented the reforms that were in place for administering the Indian trust before the former PDST assumed those duties.
  
- The former PDST's policies regarding prior restraint and approval of all communication from OST personnel to the trust beneficiary community should immediately be rescinded.
  
- Any plans for transferring check writing authority from OST to the Department of the Treasury should immediately be withdrawn. The law requires thousands of these checks to be accompanied by an Explanation of Payments, for instance, for which Treasury has no information to provide such explanations. In addition, the law currently requires that account holders be provided with periodic statements of account, and it makes no sense for Interior to continue providing those statements if another Cabinet Department is put in charge of making disbursements from those accounts.
  
- Any writings of the former PDST or documents prepared at his direction regarding the objectives, requirements, policies, procedures, internal controls, or systems of awards and sanctions in the administration of the Indian trust should be suspended or withdrawn immediately, pending a review for compliance with law, regulations, OMB guidance, and fiduciary prudence.
  
- Any plans or initiatives underway as a result of the former PDST's tenure to alter or amend the current contract for trust fund accounting (TFAS) or custodial services for securities purchased as investments should immediately be suspended pending a review for value to the government of any such plan.

Concern:

## **CONCLUSION**

ITMA is eager that the former PDST's short tenure should not result in a lasting legacy that will roll back significant reforms that have been accomplished.

ITMA trusts that the newly appointed acting Principal Deputy Special Trustee will faithfully report the concerns and recommendations of this intertribal organization to appropriate officials within the Department.

We look forward to continuing to work cooperatively with the Department, and hope for favorable consideration of our funding request.