

TRUST REFORM AND TRIBAL
EMPOWERMENT: NEW DIRECTIONS IN
INDIAN LAND MANAGEMENT

BUREAU OF INDIAN AFFAIRS

WESTERN REGIONAL OFFICE

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Trust Litigation – Congressional Oversight and the Cobell Litigation

- The Cobell Litigation arose from Congressional Oversight in the early 1990's, culminating in the "Misplaced Trust: The BIA's Mismanagement of the Indian Trust Fund" Report issued by the House of Representatives; that led to the enactment of the American Indian Trust Fund Management Reform Act of 1994.
- The 1994 Act provided for the creation of the Office of the Special Trustee ("OST") and required "comprehensive and coordinated written policies and procedures for each phase of the trust management business cycle."
- The Cobell litigation was filed in the D.C. District Court in 1996, as a class action suit seeking an accounting from the Departments of the Interior and Treasury, rather than as a mismanagement claim seeking damages (which would have had to have been filed in the Court of Federal Claims, and presumably would have been subject to otherwise-applicable statutes of limitations defenses).

The Cobell Litigation Contd.

- Judge Lamberth was assigned to the case and became a harsh critic of the Government (until he was removed from the case by the appellate court in 2006), issuing a “structural injunction” (to “fix the system”) and a number of contempt orders, cost-prohibitive discovery orders, and an “internet disconnect” order that kept the Government from using the internet for more than five years.
- In response to the courts’ stipulations as to breach (and the articulation of nearly unachievable standards, including a duty to maximize “returns”), the Department established the Office of Historical Trust Accounting, and the historical accounting trial ultimately resulted in an award of about \$450 million, which was vacated by the appellate court in 2008, in a reversal of its earlier endorsement of strict common law fiduciary standards.
- In December 2009, the Obama Administration announced that it had reached a negotiated settlement, and the Claims Resolution Act was enacted in 2010, providing for \$1.4 billion to be paid to the class members (out of a total \$3.4 billion settlement which included \$1.9 billion for the Land Buyback Program).

Tribal Trust Litigation

- The Cobell Litigation was followed by Tribal Trust Litigation, which began around 2002 and resulted in more than 100 accounting claims being filed by tribes, and in the establishment of the Indian Trust Litigation Office within Interior (with total costs expended on all “claims” agencies’ salaries and expert/consultant services now nearing \$400 million).
- Unlike the Cobell class action case, much of the tribal accounting claims workload has fallen on BIA field offices, not just in document production but also in settlement negotiations and litigation strategies, with nearly \$3 billion in settlements having been agreed to (about 40 tribes having accepted a framework offered by the Obama Administration in 2012) and made payable from the Judgment Fund rather than direct appropriations.
- In the Western Region, a number of tribal claims remain open as of November 2016 (including Hopi and San Carlos), with others (e.g., CRIT and Gila River) having been settled in principle but with further administrative or legislative actions still being needed.

Ongoing Implications of the Trust Litigation Era

- Allotted landowners that accepted payments as members of the Cobell class generally waived any damages claims against the Government that accrued prior to 2009 (with similar waivers being incorporated in most of the negotiated settlements with tribes).
- Tribal groups have sought to reverse many of allotment-oriented organizational changes and budget priorities that sprang from the Cobell Litigation, while favoring broader legal authorities based on self-determination and not a common law fiduciary relationship (cf. a general “trust relationship” vs. specific “trust duties”).
- Given some courts’ expansion of trust duties (and the corresponding erosion of certain Government defenses) over the past 20 years, it may be assumed that case-specific trust litigation will be more prevalent in the future, with tribes and Indian landowners seeking to force BIA action or recover damages before the statute of limitations runs.

Tribal Empowerment Legislation during the “Cobell Era”

- The American Indian Agricultural Resource Management Act (“AIARMA”) , as enacted in 1993, allows tribes to regulate the leasing process as well as the use of agricultural land (even where inconsistent with otherwise-applicable federal regulations), while encouraging tribal resource management planning.
- 25 U.S.C. § 81, which previously required BIA approval of any contract “relative to” tribal land (including construction contracts and loan transactions secured simply by assignments of income), was amended in March 2000 to only require approval of those contracts - not subject to approval under a more specific authority - that could “encumber” tribal land for seven or more years (perhaps including long-term lease options and restrictive use covenants).
- The Indian Land Consolidation Act Amendments of 2000 and 2004 broadly authorized tribes to: (1) adopt Tribal Probate Codes to regulate the inheritance of individually-owned trust land; (2) acquire allotted land during the probate process, via escheat, purchase option or “forced sale”; and (3) acquire fractional interests in allotted lands under the Land Buyback Program, greatly expanded under the Cobell settlement legislation enacted several years later.

Tribal Empowerment Legislation during the Obama Administration

- The HEARTH Act, as enacted in 2012 (expanding on a Navajo bill enacted in 2000, the Tribal Energy Resource Agreement (“TERA”) concept enacted in 2005, and other bills introduced by Senator Campbell – but opposed by the environmental lobby - during the “Bush 43” Administration) allows tribes to enter into all types of surface leases without BIA approval, if they have BIA-approved Tribal Regulations and some type of “environmental review” process.
- The Indian Trust Asset Reform Act (“ITARA”), as enacted in June 2016, appears to provide a procedural alternative to the HEARTH Act for any tribe that wishes to enter into surface leases without BIA approval, with an approved Trust Asset Management Plan (incorporating Tribal Regulations that presumably meet the HEARTH Act standards) being required.
- ITARA also provides for potentially sweeping organizational changes favored by tribes, authorizing the appointment of an Undersecretary of Indian Affairs and requiring a plan for the termination/absorption of OST, while also “accepting” appraisals by qualified appraisers without OAS review.

Other Legislation Proposed in the 114th Congress

- Hearings on the proposed “Interior Improvement Act” were held in the Senate, with the bill providing a “Carcieri fix” that would benefit non-historical tribes now deemed ineligible (by the Supreme Court) to acquire land in trust under the IRA, while amending the IRA to impose more specific acquisition standards and incentivize agreements with state and local governments.
- An Indian Energy bill passed the House in October 2015, providing for the streamlining of the appraisal and NEPA processes in mineral transactions (relying, in part, on a June 2015 GAO audit), limiting the applicability of BLM’s fracking rules in Indian Country, and extending the Navajo Nation’s HEARTH-Act-type authority to mineral leases.
- An Indian Energy bill passed the Senate in April 2016, as part of a much larger Energy Policy Act amendment, with provisions similar to what the House passed on appraisals and Navajo mineral leases, and with additional provisions intended to facilitate the TERA option (via presumptions of “capacity”) for tribes wishing to develop their minerals without BIA approval.

Rulemaking during the “Cobell Era”

- A “Final Rule” published during the Clinton-Bush Transition in January 2001, and purporting to overhaul the Fee-to-Trust Regulations at 25 CFR Part 151, was withdrawn (without ever taking effect) in November 2001, and has never been revived or re-prioritized even as most other Realty regulations have been updated.
- As part of the BIA’s Trust Reform Initiative, AIARMA was implemented through new regulations published at 25 CFR Part 162, Subpart B, and made effective in March 2001, and the “Section 81” substitute enacted in 2000 was implemented through new regulations published at 25 CFR Part 84 and made effective in September 2001.
- The ILCA Amendments of 2000 and 2004 were largely implemented through new regulations that became effective in December 2008, covering the probate process (BIA, 25 CFR Part 15; OHA, 43 CFR Part 30), Tribal Probate Codes (25 CFR Part 18), and Life Estates (25 CFR Part 179); however, the companion Proposed Rule to implement the conveyancing provisions in the ILCA Amendments - through a revision of 25 CFR Part 152 - was never finalized, and has not yet been revived or reconsidered.

Rulemaking during the Obama Administration

- As part of its Trust Modernization (Tribal Empowerment) Initiative, the Obama Administration completed the overhaul of the surface leasing regulations at 25 CFR Part 162 that began in 2001 with the implementation of AIARMA, and paved the way for full-scale implementation of the HEARTH Act, through new regulations published at 25 CFR Part 162, Subpart C (residential leases), Subpart D (business leases), and Subpart E (renewable energy leases); prior to these revisions, the BIA's surface leasing regulations had generally not been updated since 1961.
- Continuing with its Trust Modernization (Tribal Empowerment) Initiative, the Obama Administration completed an overhaul of the regulations on rights-of-way at 25 CFR Part 169, with the revision ultimately being made effective in April 2016; prior to the revision, the right-of-way regulations had generally not been updated since 1969.
- In an amendment to the first section in 25 CFR Part 151, effective in January 2015, the Obama Administration effectively removed the "Alaska Exception" incorporated in those fee-to-trust regulations since 1980, and extended the general acquisition authority to Alaska native groups, based on recommendations by two separate commissions and a Departmental review of the Alaska Native Claims Settlement Act.

Individual Landowner Empowerment Initiatives

- The ILCA Amendments authorize “owner management” of agricultural lands and the establishment of “family-owned-entities” with the implied authority to hold land in trust status, but as a practical matter both require unanimity (and the latter requires restraints on alienation to ensure continuous “family” ownership); the Amendments also established much-needed and more flexible owner consent requirements for residential, business, and mineral leases.
- The ILCA Amendments give individual landowners significant new options for acquiring and consolidating ownership interests, including the rights to: (1) negotiate a purchase price and acquire at less than the appraised value; (2) match certain purchase offers made by or on behalf of tribes; (3) “force” the sale of highly fractionated tracts in which they own interests.
- The Obama Administration’s Trust Modernization rules afford individual landowners the same deference rights as tribes, with respect to the economic terms of negotiated surface leases and rights-of-way, so long as the owners are acting in concert and with full knowledge.

Organizational Change

- The BIA's Appraisal function (historically housed within Realty but separated at the Western Regional Office in the early 1990's) was relocated to OST prior to the sweeping 2003 reorganization, and the newly-established Office of Appraisal Services ("OAS") was briefly moved to the Department level before returning to OST as an independent office; Probate and Land Titles & Records were also relocated from Realty (but remained within BIA) when their functions received heightened scrutiny during the "Cobell Era."
- OST completed its Fiduciary Trust Model in the mid-2000's, focusing primarily on systems needs and accounting requirements but also recommending further organizational changes, including the establishment of the Office of Trust Review and Audit and the Office of Trust Records within OST, and the placement of BLM Indian Land Surveyors at the BIA's Regional Offices.
- Following the 2003 reorganization, the BIA's Energy and Environmental programs were relocated from Trust Services to the Assistant Secretary's office at the Central Office level, while remaining integrated at field offices; subsequently, project – as opposed to program - funding for those programs received marked increases, and a \$4 million annual appropriation for a new Indian Energy Service Center in Colorado was enacted in FY 2016, while the Realty base budget remained stagnant (\$4 million for real-estate-related rights protection and lease enforcement having been zeroed out in FY 2012).

Management Initiatives

- The centerpiece of the trust reform effort was the establishment of the Trust Asset and Accounting Management System (“TAAMS”) as the BIA’s official system of record for trust ownership and encumbrance data, in order to accurately distribute funds to trust beneficiaries; in 2015, a TAAMS Change Management Board and TAAMS User Groups (aligned to the modules within TAAMS) were established, to provide a structure for the recommendation of system design and business rule changes, going forward.
- New Realty workload items were created by the new legal framework, other items were shifted to programs following the 2003 centralization of BIA’s administrative functions, more authorities were delegated down from Washington, and higher standards were established in response to the Trust Litigation, all resulting in the development of new performance measures and tracking systems to evaluate whether legal requirements and time lines are being met (and, theoretically, whether additional resources are needed).
- Although training was emphasized during the early phases of trust reform, and a state-of-the-art training facility was constructed in Albuquerque, comprehensive land management training for BIA and tribes was never implemented (although TAAMS training is ongoing), limiting BIA’s ability to assist tribes in a more advisory role.

Looking Back: Top Ten Takeaways

- The new legal framework for transactions is more complex, and the performance standards are higher.
- Historic claims have largely been resolved, but new claims are accruing and the Realty funding to address the underlying issues has been eliminated.
- The ILCA Amendments and the Buyback Program have reduced fractionation, but mixed tribal/individual ownership and life estates created by operation of law bring complications.
- The TAAMS and Lockbox initiatives have greatly improved the accuracy and timeliness of distributions of trust funds.
- Tribal autonomy (acting without BIA approval or under “alternative” tribal rules) is now possible in most land use transactions, where certain preconditions are met.
- Tribal authority to directly tax lessees and right-of-way grantees has been clarified/expanded through new federal regulations.
- Where BIA approval is needed, appraisal requirements have been lessened and deference to negotiated economic terms is generally required.
- Where BIA approval is needed, strict time lines for decision-making have been established.
- Off-reservation trust acquisitions have accelerated, with the courts left to chip away on “authority” and “process” issues while Congress considers the imposition of legislative standards.
- In some locations, BIA may be able to provide a “technical assistance” service as well as perform more ministerial functions, but institutional support for that type of service throughout Realty is lacking.

Looking Ahead

- Congress has enacted ITARA, and the incoming Administration will need to evaluate the new authority for the appointment of an Undersecretary, and submit a plan outlining its vision for the role and placement of OST within the Department; new versions of the Indian Energy bills may pass early in the next Congressional session, expanding the HEARTH Act and TERA models to facilitate mineral development in Indian Country, with limited environmental review.
- The Obama Administration's broad support for off-reservation trust acquisitions (with broadly-delegated authority) may face reconsideration, and the priority and funding associated with renewable energy projects may be reallocated; while the deference and streamlining elements of the Trust Modernization (Tribal Empowerment) rules will likely find support, the rules preempting state and local taxation of lessees and right-of-way grantees may come under review, and the issue of transmission line compensation (which was the subject of the "Section 1813 Report" mandated by the Energy Policy Act of 2005) may also be revisited.
- Congressman Lujan of New Mexico has proposed legislation requiring an inventory of all "undocumented easements" in Indian Country, approximately 10,000 of which were identified under the Indian Claims Limitation Act of 1982 (not including federal projects); with the BIA's rights protection and lease enforcement funds having been eliminated in FY 2012, new funding for both offensive and defensive litigation support will need to be identified, and the establishment of a BLM-type cost recovery program (which has generally been endorsed by GAO, but opposed by tribes and project proponents alike) may need to be considered.