



OFFICE OF
INSPECTOR GENERAL
U.S. DEPARTMENT OF THE INTERIOR

INDIAN LAND CONSOLIDATION ADVISORY

PROBATE AND ESTATE PLANNING ACTIVITIES



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Memorandum

To: Michele F. Singer
Acting Principal Deputy Special Trustee, Office of the Special Trustee for
American Indians

From: Kimberly Elmore *Kimberly Elmore*
Assistant Inspector General for Audits, Inspections, and Evaluations

Subject: Advisory – Indian Land Consolidation: Probate and Estate Planning Activities
Report No. WR-EV-BIA-0009-2012

This advisory, regarding the U.S. Department of the Interior's (Department) implementation of the land consolidation portion of the *Cobell v. Salazar* settlement, is part of our ongoing effort to monitor and evaluate the funding appropriated to the Department to satisfy the settlement. Although Congress approved the *Cobell* settlement via legislation and appropriation, the settlement is not final until entry by the Court of a Final Order and Judgment and resolution of any appeals from that Final Order and Judgment. In the meantime, the Department has consulted with tribes regarding Indian land consolidation and is working to complete a strategic plan. Our advisories serve to provide helpful information to the Department in advance of implementation efforts.

Our objective was to identify, within the provisions outlined by the *Cobell* settlement, the potential impact that probate and estate planning may have on the Department's ability to successfully conduct American Indian land consolidation activities. We interviewed officials from the Bureau of Indian Affairs (BIA) Probate Division, the Office of the Special Trustee for American Indians (OST), the Department's Office of Hearing and Appeals (OHA), and the Office of the Solicitor. We completed our work in accordance with the Quality Standards for Inspection and Evaluation issued by the Council of the Inspectors General on Integrity and Efficiency.

The purchase option at probate, introduced in the American Indian Probate Reform Act of 2004 (AIPRA), is an authorized acquisition option aimed at reducing land fractionation. This purchase option allows individual landowners, tribes, or BIA to purchase fractionated interests in the early stages of the probate process before the interests become further fractionated among heirs. With a few exceptions, consent by the heirs is not required for the purchase when an interest represents less than 5 percent of the land parcel.

Estate planning has also been identified as a way to reduce land fractionation, as well as a means to protect the rights and interests of American Indian landowners. Estate planning is designed to inform, advise, and assist American Indian landowners to facilitate the transfer of

trust or restricted lands to beneficiaries selected by the landowners. Estate planning dramatically increases the use of wills and other methods of devise among American Indian landowners and substantially reduces the quantity and complexity of American Indian estates for individuals who die without a valid will. BIA and OST budget justifications emphasize a continuing effort to foster relationships with tribal leadership, American Indian organizations, legal services organizations, and law schools regarding estate planning. These efforts, however, are not currently funded nor are they an authorized use of *Cobell* funds.

Involved Parties Voice Valid Concern Regarding the Purchase Option at Probate

BIA's Indian Land Consolidation Office (ILCO attempted to utilize the purchase option at probate through the Indian Land Consolidation Program (Program). By January 2011, ILCO had submitted to OHA 570 offers to purchase interests within the Great Plains and Midwest Regions at probate. The majority of those offers was for interests under 5 percent and thus did not require consent by the heirs. OHA officials questioned, however, whether affected tribes had given explicit consent or were even aware of this acquisition method. AIPRA requires that eligible purchasers submit a written request to purchase at probate. It is unclear, however, how such a request would be handled in the case where the Department or BIA purchases an interest on behalf of a tribe.

OHA did not approve any of the 570 offers due to overall concerns of its Administrative Law Judges (ALJs) as to the type of sale and the suitability of appraisals being received from OST's Office of Appraisal Services (OAS). The purchase option at probate is often viewed as a forced sale due to the lack of a willing and/or knowledgeable seller. This is so because consent is not required by an heir receiving less than a 5 percent interest; additionally, the heir may not have adequate knowledge of the land interests as they may not have been informed of their ownership prior to the start of the probate process.

There is no uniform requirement for the type of appraisal report needed in purchase-at-probate sales. To make efficient use of its limited resources, OAS generally provided OHA with appraisals that came from its automated Undivided/Fractionated Appraisal System (U/FAS) or that were completed as a restricted-use report.¹ A restricted-use report limits the use of the report to the client and is allowable under Federal appraisal standards when, by virtue of the properties' low value or simplicity, the in-depth analysis and presentation required in a detailed appraisal is not necessary. For purchase-at-probate, however, OHA's ALJs may require full land appraisals rather than mass appraisal or restricted-use reports due to the fact that the heirs may be unwilling and/or may not be knowledgeable about the land interest. Full appraisals require more OAS resources and take longer to complete than restricted use reports.

In the absence of a regulation or statute mandating a particular appraisal level of reporting, ALJs have used their own judicial discretion, which has resulted in inconsistent levels of appraisals. This has led to an inconsistent acquisition process. A uniform appraisal reporting requirement for all ALJ cases involving the purchase option at probate, whether the offer is made

¹ The discussion of OAS' use of U/FAS and development of its new Mass Appraisal Program System is further discussed in advisory report WR-EV-BIA-0001-2011.

by an individual American Indian, tribe, or BIA, would require new rulemaking by the Department.

Outside of rulemaking, BIA Probate Division, OAS, and OHA have begun drafting a memorandum of understanding (MOU) outlining the purchase-at-probate process, including how the various offices will communicate with each other and timelines for completing their respective responsibilities. While these offices have identified the draft MOU as a short-term tool for providing transparency of roles and responsibilities, an MOU cannot rectify the lack of a uniform appraisal reporting requirement in the same way as rulemaking. The MOU is currently in draft and has not yet been issued.

Currently there are no offers to purchase at probate since the BIA Director requested in January 2011 that ILCO recant all 570 offers and that no further offers be made at this time. Even if the Department does not emphasize the use of the purchase option at probate, individuals and/or tribes will likely continue to request to purchase fractionated interests at probate. For this reason, it is important that there be a transparent and uniform administration of the purchase-at-probate process.

Estate Planning Can Help Prevent Further Land Fractionation.

Without estate planning, probates directly result in an increased number of fractionated interests. Historically, the average probated estate has seven heirs. BIA is currently completing a project to create informational materials regarding probate and AIPRA. We were told, however, that the informational materials will not provide specific details on certain pieces of AIPRA, such as the purchase option at probate. Although this project stalled with a change in personnel at BIA's Probate Division, the project is expected to be completed by the end of fiscal year 2012.

Tribes have expressed their desire for federal funding for estate planning activities. The Department, however, does not currently fund estate planning services and these services are not eligible to be funded by *Cobell's* Indian Land Consolidation Fund. The *Cobell* settlement states that the Indian Land Consolidation Fund can be used only for land acquisitions, costs for establishing a land consolidation program, and costs associated with the Secretarial Commission on trust reform.

We found examples of estate planning activities occurring within Indian Country. The Indian Land Tenure Foundation (Foundation) provides estate planning services directly to American Indians on select reservations and training to the legal community and tribal officials. The Foundation program, initially piloted in 2006 and funded by BIA, covered the Northwest and Great Plains regions. During the 8-month pilot, over 1,000 clients received direct legal services resulting in over 820 wills and over 640 other estate-planning documents, such as gift deeds. Of the wills written, more than 540 directly reduced fractionation according to the Foundation. Tribes have since funded the program because no additional BIA funds have been received. To be more cost effective and to provide services to more reservations, the program has since shifted from full-time lawyers and paralegals to summer internships for second year law students who work under a supervising attorney.

We also identified promising examples of will drafting programs for two Nations within Arizona and Oklahoma. These programs were funded through non-Federal means and were initiated by an OST Fiduciary Trust Officer and supported by the tribal governments and partnering law education institutions.

In addition to will drafting programs, consolidation agreements have been used as an estate planning mechanism to avoid further fractionation. In 2009, the Intertribal Monitoring Association on Indian Trust received funding from BIA to conduct an 8-month pilot project in the Rocky Mountain Region. During the pilot, the grantee facilitated 25 consolidation agreements out of the 35 estates referred by OHA, resulting in the avoidance of over 2,000 undivided interests.

While estate planning has demonstrated its ability to combat further fractionation, there are a few factors to consider. Estate planning is a continuous activity needed for each generation as wills and consolidation agreements are specific to the individuals involved. In addition, the storage of these documents varies from law firms to the individuals, which can make it difficult to determine the existence and location of a valid will. Also, will drafting does not guarantee that land does not fractionate, as an individual could still choose to leave a share of their fractionated trust interests to each of their heirs. These factors illustrate the need for comprehensive estate planning for individual Indian landowners.

Recommendations

1. Establish and implement a process to obtain consent from Tribes before purchasing fractionated interests at probate on their behalf.
2. Complete the memorandum of understanding regarding purchase-at-probate procedures.
3. Consider rulemaking to provide transparent and universal administration of the purchase option at probate, including appraisal requirements.
4. Include estate planning information and specific details of AIPRA, such as the purchase option at probate and other provisions, in future outreach to tribes and tribal members regarding Indian land fractionation/consolidation.

Please provide a written response to this advisory within 30 days of report issuance. The response should detail the Department's corrective action plan, as well as targeted completion dates and title(s) of the official(s) responsible for implementation. Information contained in this advisory will be included in our semiannual report to Congress. Please contact me at 202-208-5745 if you have any questions.

cc: Deputy Secretary, U.S. Department of the Interior
Assistant Secretary – Indian Affairs
Director, Bureau of Indian Affairs
Audit Liaison, Office of the Secretary
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