

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
BEFORE THE SPECIAL MASTER**

ELOUISE PEPION COBELL, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No.
)	1:96CV01285 (TFH)
)	
Sally Jewell, Secretary of the Interior, et al.,)	
)	
Defendants.)	
)	

**UNOPPOSED MOTION TO PERMIT THE USE OF FEDERAL PROBATE ORDERS
IN THE DISTRIBUTION OF SETTLEMENT FUNDS TO ESTATES AND HEIRS OF
DECEASED CLASS MEMBERS**

Plaintiffs, in accordance with the *Order Granting Unopposed Motion to Modify Distribution of Settlement Proceeds to Estates and Heirs of Deceased Class Members* dated June 19, 2013 [Dkt. No. 3958] (“*Estate Distribution Order*”), hereby move the Special Master, without opposition from defendants, for an order permitting use of federal probate orders for the distribution of Historical Accounting and Trust Administration payments to the estates and heirs of deceased class members. In support thereof, plaintiffs respectfully show as follows:

1. The district court, in its *Estate Distribution Order*, determined that with respect to the estates of those deceased members of the Historical Accounting and Trust Administration Classes for which there was no personal representative, executor or administrator, or where there existed no state or tribal probate order, “payments shall be made by [Garden City Group (“GCG”), the Claims Administrator] in accordance with orders

of the Special Master as he may determine in his discretion, including using procedures under applicable state or tribal law for small estates and federal probate orders for the disposition of trust property.” *Id.* at ¶ 2.

2. In accordance with the *Estate Distribution Order*, the Plaintiffs respectfully request that, where GCG has not been notified by the heir or heirs of a deceased class member of the identity of a personal representative, executor or administrator of the class member’s estate, has not been provided either a copy of the class member’s will which has been accepted for probate or a state or tribal probate order disposing of the assets of the class member, and where no affidavit or other documentation has been provided permitting distribution of the funds in accordance with state procedures for small estates, to the extent those procedures have been approved by the Special Master, that it be allowed to distribute settlement payments owed to deceased members of the Historical Accounting and Trust Administration Classes, or to their heirs, as follows:

a. Where the class member died prior to June 20, 2006:

(1) In accordance with federal probate orders for the distribution of trust funds to individual heirs; and

(2) If a federal probate order does not identify trust funds for distribution at the time of death, in accordance with a federal probate order for the distribution of trust land to individual heirs, disregarding any provision of that order allowing for the escheatment of trust land to a tribe.

b. Where the class member died on or after June 20, 2006:

(1) In accordance with federal probate orders to the extent they provide for the distribution of trust funds to individual heirs; and

(2) When a federal probate order exists but makes no order for distribution of trust funds but does address trust land, and that order identifies heirs of the deceased class member, then in accordance with the rules of descent set forth in 25 U.S.C. §§ 2206(a)(1), (2)(A)(i)-(iv), and (B)(i)-(iv) for the distribution of trust personalty to individual heirs based on those heirs identified in the probate order and any other heirs who have properly identified themselves as an heir of that decedent in accordance with the claims process established by the district court.

3. Since December 11, 2012, in accordance with the order of the district court, *see* Dkt. No. 3923 at ¶ 2, GCG has made efforts to distribute Historical Accounting funds to the estates or heirs of deceased class members in accordance with state or tribal probate orders. However, state or tribal probate orders are used infrequently and many tribes have no probate system. Moreover, the cost of initiating a state or tribal probate proceeding is a deterrent for many heirs of class members. Therefore, despite considerable efforts undertaken by GCG to encourage heirs to submit state or tribal probate orders, distributions have been made to the heirs of only 1,246 deceased class members. There are 37,189 remaining deceased Historical Accounting Class members for whom distributions must be made.

4. Every class member with trust assets at the time of death should eventually have a federal probate of those assets and an order resulting in their disposition. Because of the absence of state or tribal probate orders, considerable interest has been expressed by heirs of class members, or their representatives, in using federal probate orders for the distribution of settlement payments.

5. There are several challenges to using federal probate orders in that the heirs under a federal probate order may differ from those entitled to distribution under state or tribal law.

a. First, with respect to class members who died prior to June 20, 2006, federal probate orders were generally based on state or tribal law. However, some federal probate orders issued between approximately 1983 and 1997 contain tribal escheatment provisions based on federal laws held unconstitutional by the Supreme Court. Beginning in 1983 with the Indian Land Consolidation Act (“ILCA”), Pub. L. 97-459, 96 Stat. 2517 (1983), Congress attempted to address the problem of fractionation of trust land by providing for the escheatment to the tribe of highly fractionated land interests generating minimal income. Section 207 of ILCA provided that no undivided fractional interest in trust lands could descend by intestacy or devise, but instead would escheat to the tribe where the land interest represented 2% or less of the total acreage of the tract and earned less than \$100 during the preceding year. This provision was held to constitute an unconstitutional taking without just compensation in *Hodel v. Irving*, 481 U.S. 704 (1987).

In 1984, anticipating the constitutional concerns raised in *Irving*, Congress amended Section 207 of ILCA in three ways. *See* Pub. L. 98-608, § 1(4), 98 Stat. 3173. First, it defined a fractional interest subject to escheat as one constituting 2% or less of a single tract, which interest would be incapable of generating \$100 or more of income in any one of five years following the decedent’s death. The interest’s failure to generate \$100 of income in any one of the five years prior to the decedent’s death would raise a rebuttable presumption that the interest would not generate \$100 of income in any one of the five years following the decedent’s death. Second, in lieu of a total ban on devise and descent of fractional interests,

the amended Section 207 permitted devise of an otherwise escheatable interest to any other owner of an undivided fractional interest in the same tract of land. Finally, the amendment authorized tribes to override the provisions of amended Section 207 through the adoption of their own codes governing the disposition of fractional interests (subject to the approval of the Secretary of the Interior). The revised Section 207 was held unconstitutional in *Babbitt v. Youpee*, 519 U.S. 234 (1997). Despite the decisions of the Supreme Court in *Irving* and *Youpee*, many probate orders issued between the passage of ILCA and the *Youpee* decision reflect the unconstitutional tribal escheatment provisions of ILCA.

b. Second, federal probate orders of those class members who died on or after June 20, 2006, may be affected by the American Indian Probate Reform Act (“AIPRA”), Pub. L. 108-374, 118 Stat. 1773 (2004) (codified as amended at 25 U.S.C. §§ 2201-2221). AIPRA was enacted on October 27, 2004 and amended the ILCA. Most of the provisions of AIPRA pertaining to probate and relevant here became effective on June 20, 2006. For estates of class members who died on or after June 20, 2006, federal probate orders apply the inheritance provisions of AIPRA. The AIRPA differs from state or tribal laws particularly with respect to the probate of beneficial interests in land held in trust in that, under certain circumstances, a surviving spouse and certain other lineal descendants may be excluded from distribution under a federal probate order. *See, e.g.*, 25 U.S.C. § 2206(a)(2)(D)(i)-(iv) (excluding surviving spouse from distribution of highly fractionated trust land and giving priority to the older of certain lineal descendants). In addition, should there be no descendant, trust property may pass to the tribe having jurisdiction over the trust assets, to co-owners of trust land, or to the United States. *See* 25 U.S.C. §§ 2206(2)(B)(v),

2206(2)(C)(i). A copy of 25 U.S.C. § 2206 setting forth the manner in which individual Indian trust property is distributed under AIPRA is attached hereto as Exhibit 1.

6. In light of these potential concerns, Plaintiffs request that GCG be allowed to distribute settlement funds to the heirs of deceased members of the Historical Accounting and Trust Administration Classes to the extent those orders provide for the distribution of trust property to individual heirs. With respect to those class members who died prior to June 20, 2006, it is requested that GCG be permitted to use those orders but disregard any provision allowing escheatment of trust property to a tribe, because those provisions are based on the tribal escheatment provisions of ILCA held unconstitutional in *Irving* and *Youpee*. With respect to class members who died on or after June 20, 2006, it is requested that GCG be permitted to make distributions as set forth in 25 U.S.C. §§ 2206(a)(1), (a)(2)(A)(i)-(iv), and (a)(2)(B)(i)-(iv), thereby limiting distribution to individual heirs of the decedent and excluding any distribution to tribes, co-owners of land, or the federal government. In addition, where the probate order distributes only trust land but sufficiently discloses the heirs of the deceased class member, it is requested that GCG be permitted to distribute settlement funds to the heirs identified in that probate order in accordance with 25 U.S.C. §§ 2206(a)(1), (a)(2)(A)(i)-(iv), and (a)(2)(B)(i)-(iv).

7. In order to advise the heirs of class members that federal probate orders for the distribution of trust funds may be used, Plaintiffs will post a notice thereof on www.cobellsettlement.com and distribute the notice in a press release. This will give heirs of deceased class members a final opportunity to submit a state or tribal probate order to GCG. Plaintiffs suggest that GCG be entitled to use the federal probate orders commencing August 1, 2013.

Wherefore, Plaintiffs respectfully request that their motion to permit the use of federal probate orders for the distribution of settlements funds to the heirs of deceased class members be allowed.

Respectfully submitted this 12th day of July, 2013.

/s/ David C. Smith
DAVID COVENTRY SMITH
D.C. Bar No. 998932
KILPATRICK TOWNSEND & STOCKTON LLP
607 14th Street, N.W.
Washington, D.C. 20005
202-508-5844

WILLIAM E. DORRIS
GA. BAR NO. 225987
Admitted Pro Hac Vice
KILPATRICK TOWNSEND & STOCKTON LLP
1100 Peachtree Street
Suite 2800
Atlanta, GA 30309
404-815-6500

Attorneys for Plaintiffs