

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

ELOUISE PEPION COBELL, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No.
	)	1:96CV01285 (TFH)
	)	
SALLY JEWELL, Secretary of the Interior, <i>et al.</i> ,	)	
	)	
Defendants.	)	
	)	

**PLAINTIFFS’ UNOPPOSED MOTION TO INCLUDE AND AUTHORIZE PAYMENT  
TO ADDITIONAL INDIVIDUALS IN THE HISTORICAL ACCOUNTING CLASS**

Plaintiffs move the Court, without opposition from defendants, to include an additional 12,558 individuals in the Historical Accounting Class and to authorize payment to them. In support, plaintiffs respectfully show the Court as follows:

1. The Class Action Settlement Agreement authorized by Congress defines the Historical Accounting Class as individual Indian beneficiaries alive on the Record Date, which was set as September 30, 2009,<sup>1</sup> “who had an IIM Account open *during any period between October 25, 1994 and the Record Date*, which IIM account had at least one cash transaction credited to it *at any time* as long as such credits were not later reversed.” Settlement Agreement [Dkt. 3660-2] at ¶ A.16 (emphasis added). That definition thus contains two requirements for Indian beneficiaries alive as of September 30, 2009 to be in the Historical Accounting Class: (a) an IIM account open during any period between October 25, 1994 and September 30, 2009; and

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<sup>1</sup> Settlement Agreement [Dkt. 3660-2], ¶ A.30.

(b) at least one cash transaction credited to that IIM account at any time as long as the cash transaction was not later reversed.

2. In making payments to the Historical Accounting Class, Class Counsel and the Claims Administrator, the Garden City Group (“GCG”), are to rely on the information provided by Interior Defendants. Settlement Agreement, ¶¶ E.1.F and E.3.b.

3. As set forth in *Plaintiffs’ Unopposed Motion to Approve Payments to the Historical Accounting Class* dated December 10, 2012 [Dkt. No. 3920] (“Motion to Approve HAC Payments”), and as contemplated by the Settlement Agreement, the Department of the Interior (“Interior”) provided GCG the names and contact information for those individuals who it considered to be members of the Historical Accounting Class as defined in ¶ A.16 of the Settlement Agreement, except for those deemed whereabouts unknown or who did not otherwise have a current address. Settlement Agreement at ¶¶ E.1.f and E.3.b. At the time of the Motion to Approve HAC Payments, Interior had identified 327,965 members of the Historical Accounting Class. See Affidavit of Jennifer M. Keough [Dkt. No. 3920-1] at ¶ 4. This determination was based on extensive work by FTI Consulting, Inc. (“FTI”), a contractor of Interior, and in particular its Senior Managing Director, Michelle Herman (“Ms. Herman”), who has dedicated most of her professional career to the examination and study of Interior’s Indian trust records and historical bookkeeping practices. Declaration of Michelle D. Herman [Dkt. No. 3764-1] dated May 16, 2011 (“First Herman Declaration”) at ¶¶ 1-3.

4. On December 11, 2012, this Court authorized GCG to “commence payment of \$1,000 to each living member of the Historical Accounting Class who is not considered whereabouts unknown and has an address in Interior’s contact information or who otherwise is

located by GCG.” *Order Authorizing Distribution of Historical Accounting Class Settlement Funds* [Dkt. No. 3923] (“HAC Distribution Order”) at ¶ 2.

5. In accordance with the HAC Distribution Order, GCG began distribution of settlement funds to the members of the Historical Accounting Class identified by Interior Defendants. However, based on inquiries received by GCG through its call center and calls made to Class Counsel, concerns arose regarding whether all members of the Historical Accounting Class had been identified. It appeared that some beneficiaries who satisfied the definition of the Historical Accounting Class had not been included in Interior’s information.

6. As a result, GCG and Class Counsel made inquiries of defendants. It was determined that Interior had only provided information for individuals who had an open IIM account which had at least one cash transaction in the account between October 25, 1994 and September 30, 2009 which had not later been reversed. The Settlement Agreement, however, does not require that the cash transaction be made between October 25, 1994 and September 30, 2009. Rather, it states that the cash transaction can have been made “at any time.” *See* Settlement Agreement at ¶ A.16.

7. As a result, Interior had its contractor, FTI, undertake an investigation to determine which individuals should be added to the Historical Accounting Class because they had an open IIM account between October 25, 1994 and September 30, 2009 and had a cash transaction in that account prior to October 25, 1994 which cash transaction was not later reversed. As described in detail in the attached Declaration of Ms. Herman of FTI (“Second Herman Declaration”) (Exhibit A), she analyzed the additional 86,363 individuals who had accounts with cash transactions prior to October 25, 1994 which were not later reversed in order to determine if their accounts were open at any time between October 25, 1994 and September

30, 2009. Second Herman Declaration, ¶¶ 12-21. This analysis was necessary because Interior's electronic archives are not sufficient to determine the open status of an account in every case and she therefore had to consider other indicators to determine which accounts fell within the Historical Accounting Class definition. *Id.*, ¶¶ 13-14. Her analysis was based on the electronic databases of Interior, which are the most complete and accessible records available from which to make these determinations. *Id.*, ¶ 8.<sup>2</sup>

8. Based on her analysis of Interior's records for the 86,363 individuals, she determined that 11,727 had an account that remained open after October 25, 1994, 73,805 had accounts which are shown by Interior's electronic records as being treated as being closed prior to October 25, 1994, and that the records are inconclusive as to whether the accounts of 831 were closed by October 25, 1994. *Id.*, ¶¶ 22-23. Though Ms. Herman acknowledges that some of her analyses are not perfect given the incomplete nature of the databases, she notes that those databases are the most complete and accessible records from which to make objective determinations. *Id.*, ¶¶ 8, 16

9. Accordingly, 11,727 additional individuals are entitled to be included in the Historical Accounting Class. Regarding the 831 individuals for which the analysis of the records are inconclusive, it is clear that each had an IIM account with at least one cash transaction which was not later reversed and for which Interior has presented no evidence that their accounts were closed prior to October 25, 1994. As a result, plaintiffs submit that these 831 individuals should be included in the Historical Accounting Class, along with the additional 11,727 individuals for a total increase in the Historical Accounting Class of 12,558 individuals. These individuals are already members of the Trust Administration Class.

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<sup>2</sup> Ms. Herman previously described these databases and the numerous tests performed to confirm the data's integrity in her earlier declaration. First Herman Declaration at ¶¶ 7-28.

10. The original amount estimated to be available for the Trust Administration Class was based on the initial information provided by Interior on the number of members of the Historical Accounting Class. Payment of an additional \$12,558,000 to the Historical Accounting Class thus means that less will be available for the Trust Administration Class than originally calculated.

11. In addition to this unanticipated increase in the Historical Accounting Class payments, the costs associated with the administration of the settlement are significantly greater than originally estimated. This is due in large part to the delays caused by the appeals of the Court's approval of the settlement during which time the Claim Administrator's call center had to be maintained, and the far greater than expected volume of calls and claims.

12. These two factors – the increase in Historical Accounting Class payments and greater than anticipated expenses – will have only a modest impact on payments made to some members of the Trust Administration Class. While the Court-approved Long Form Notice to the plaintiff classes contained estimates of the amounts that members of the Trust Administration Class might be paid, that Notice was clear the amounts stated there were “estimates,” “could be more or less,” and were dependent on the amount left after deducting Historical Accounting Class payments and costs of administration. *See Important information about the \$3.4 billion Indian Trust Settlement* (“Long Form Notice to Class Members”) at 8 (Exhibit B).

13. For most of the members of the Trust Administration Class, the increased membership of the Historical Accounting Class and the increased administrative costs will not reduce the estimated payments in the Notice. However, some will receive less than estimated in the Notice though the percentage of the reduction is anticipated to be relatively small.

14 It is evident that the additional individuals should be included in the Historical Accounting Class. Accordingly, plaintiffs respectfully request that the 12,558 additional individuals identified by Interior Defendants be included in the Historical Accounting Class and GCG be authorized to distribute Historical Accounting Class payments to them in accordance with the Settlement Agreement.

Class Counsel has discussed this Motion with counsel for defendants, who report that defendants do not oppose this Motion.

Respectfully submitted, this 29<sup>th</sup> day of November, 2013.

/s/ David C. Smith  
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing PLAINTIFFS' UNOPPOSED MOTION TO INCLUDE AND AUTHORIZE PAYMENTS TO ADDITIONAL HISTORICAL ACCOUNTING CLASS MEMBERS was served on the following via facsimile, pursuant to agreement, on this 29<sup>th</sup> day of November, 2013.

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/s/ David C. Smith  
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