

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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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’ MOTION, WITHOUT OPPOSITION FROM DEFENDANTS, TO  
ALLOW COMMENCEMENT OF TRUST ADMINISTRATION CLASS  
DISTRIBUTIONS PRIOR TO EXPIRATION OF APPEALS**

Plaintiffs hereby move the Court, without opposition from Defendants, for approval to commence distribution of Trust Administration Class payments prior to expiration of appeals from adverse determinations of eligibility and to create a reserve sufficient to cover the monetary claims underlying each appeal. In support thereof they respectfully pray the Court as follows:

1. On December 11, 2012, this Court ordered that the Notice Contractor, Kinsella Media, Inc., proceed with the required supplementary notice campaign and that all claim forms be postmarked by March 1, 2013. 12/11/12 Order [Dkt. No. 3923] at ¶¶ 3, 4(a). That order set forth a schedule for consideration of claims by the Claims Administrator, the Garden City Group (“GCG”), opportunities for production of additional information by claimants, and review of adverse determinations by the Special Master.
2. On April 10, 2013, that schedule was modified to accommodate claimants having difficulty obtaining documentation to support their claims. 4/10/13 Order [Dkt. No. 3950].

Under the terms of that Order, the deadline for appeals from final determinations of GCG to the Special Master was extended to September 4, 2013. *Id.* at ¶ 1(d).

3. Approximately 467,208 claim forms constituting 382,520 unique claims were received by GCG. Of these, 113,082 were determined to be personally eligible and 73,597 were determined to be potential heirs to an eligible Class Member estate. The remaining claimants were not determined to be eligible based on the information provided to GCG. From this mailing, 85,979 claimants requested reconsideration by the Claims Administrator of which 53,169 were determined to be eligible based on receipt of additional information. There have been 2,451 appeals from a determination of ineligibility by GCG to the Special Master with a total value of approximately \$1.5 million. In many cases, these appeals are very time consuming and voluminous – up to 685 pages. As of May 21, 2014, 550 decisions have been rendered. The Settlement Agreement contemplates that claimants have the right to appeal beyond the decision of the Special Master. Settlement Agreement at ¶ E.4.e.7.

4. Historical Accounting Class members were those individuals who had active and open IIM accounts between October 25, 1994 and September 30, 2009 based on records of the Department of Interior. Settlement Agreement at ¶ A.16. As each Historical Accounting Class member received the identical per capita payment, those payments could be paid immediately to those Class Members whose contact information was known. Pursuant to this Court's order, payment of those amounts commenced in December 2012. 12/11/12 Order [Dkt. No. 3923] at ¶ 2.

5. However, unlike the Historical Accounting Class, Interior did not have electronic records of all Trust Administration Class members, particularly those in Oklahoma and Alaska, and there were omissions, inconsistencies or errors in some trust records. Therefore, the

Settlement Agreement provided for the self-identification of Trust Administration Class members before distributions were made. To accomplish this task, the Settlement Agreement provided for the claims process set forth above. The parties and GCG have worked together over the past 18 months to update and reconcile account information to facilitate the distribution. Settlement Agreement at ¶¶ E.4.e.2 and L.3.

6. The Claims Administrator, with the assistance of Class Counsel, has undertaken substantial efforts to address issues and conflicting information within the trust records that impaired the identification of Class Members. Through extensive outreach, GCG has identified, among other things, single beneficiaries with multiple account records in the Interior contact data which would result in an overpayment of that Class Member; single records that contained accounts for multiple beneficiaries, which would result in underpayment of Class Members; and living Class Members who were identified as deceased, which would have improperly led to their exclusion from the Class. More critically, due to historical delay in Interior's receipt of death notification and backlogs in the processing of probate cases, the data reflected a large number of beneficiaries identified as alive who had passed away before the Record Date, so that the true Class Members were the heirs of that beneficiary. In working with Interior, these records were updated in August 2013 and March 2014.

7. The Claims Administrator has completed the process of reconciling the Trust Administration data it has received to date. However, GCG has been advised by Interior's vendor that questions were raised regarding the most recent property ownership update. The update requires verification due to its potential affect on class membership status. Interior is addressing that issue, and it is anticipated it will be resolved within the next 30 days.

8. However, given the large number of appeals, the need of the Special Master to give them his full attention to ensure every claimant has an opportunity to be heard, and the possibility of appeals from his decisions, the self-identification process may not be completed for some time.

9. The Settlement Agreement provides that the Plaintiffs may petition the Court to commence the Trust Administration Class distribution when Class Members have been “substantially identified.” Settlement Agreement at ¶ E.4.e.7. However, the Agreement further states that “[n]o Stage 2 [Trust Administration] payments *shall* be made until *all* Stage 2 Class Members have been identified in accordance with this Agreement and their respective pro rata interests have been identified.” (emphasis added). The reason for this provision is that the pro rata calculation may not be made until all Trust Administration Class members are known. Moreover, the Settlement Agreement allows the Plaintiffs to set aside funds for “identified Class Members,” *id.*, permits Plaintiffs to exclude from the distribution specifically designated expenses, *id.* at ¶ E.4.b.2, and provides for the creation of a “Reserve Fund” “to cover beneficiaries who did not receive notice of Stage 2 distributions and come forward after distribution of Stage 2 funds,” *id.* at ¶ E.4.e.6. The Settlement Agreement contemplates but does not expressly address claimants whose status as a Class Member has yet to be conclusively determined due to pending appeals.

10. The Settlement Agreement has been “authorized, ratified, and confirmed” by Congress with the enactment of the Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064 (Dec. 8, 2010) (“Claims Resolution Act”). Settlement Agreements that have been ratified by Congress are typically construed as any other statute. *See, e.g., Connecticut v. Dep’t of Interior*, 228 F.3d 82, 88 (2d Cir. 2000) (construing the Connecticut Indian Land Claims

Settlement Act); *Peabody Coal Co. v. Navajo Nation*, 75 F.3d 457, 465 (9th Cir. 1996) (construing the Navajo-Hopi Land Settlement Act). Words in a statute are interpreted in accordance with their ordinary meaning. *NetCoalition v. S.E.C.*, 715 F.3d 342, 348 (D.C. Cir. 2013) (citing *Engine Mfg. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004)). In construing the Settlement Agreement the word “shall” can fairly be interpreted as imposing a mandatory obligation. *See generally Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (“[T]he mandatory ‘shall’ ... normally creates an obligation impervious to judicial discretion”); *Cook v. Food and Drug Admin.*, 733 F.3d 1, 7 (D.C. Cir. 2013) (holding “shall” means “must”). Moreover, the plain meaning of the word “all” is “the entire number of; the individual components of, without exception.” *Van Hollen v. Fed. Election Comm’n*, 851 F. Supp. 2d 69, 84-85 (D.D.C.), *rev’d on other grounds*, 694 F.3d 108 (D.C. Cir. 2012) (quoting the Oxford English Dictionary, 2d edition (1989) (online version 2012)).

11. The orders of this Court require that Plaintiffs disburse settlement funds to Class Members “in accordance with the terms of the Settlement Agreement and any order of this Court.” 7/27/11 Order [Dkt. No. 3850] at ¶ 23. However, the Settlement Agreement as incorporated in the Claims Resolution Act should not be interpreted so as to produce an unreasonable or absurd result. *United States v. District of Columbia*, \_\_\_ F. Supp. 2d \_\_\_, 2014 WL 1273608, \*14 (D.D.C. 2014). Moreover, it must be construed to give effect to all its terms. *Gilman v. U.S. Dep’t of Homeland Security*, \_\_\_ F. Supp. 2d \_\_\_, 2014 WL 984309, \*14 (D.D.C. 2014) (citing *Corley v. United States*, 556 U.S. 303, 129 S.Ct. 1558, 1566 (2009)). An interpretation of the Agreement that forecloses a Trust Administration distribution while there remain a relatively modest number of claimants with appeals pending, and with claims totaling approximately 00.15% of the entire sum to be distributed, is not in accordance with the parties’

intentions. Otherwise, it would have made no sense to allow Plaintiffs to apply to the Court for permission to commence the Trust Administration Class distribution once those Class Members have been “substantially identified.” Settlement Agreement at ¶ E.4.e.7. Moreover, the Settlement Agreement provides that distribution of the Trust Administration Class payments is to be completed “no later than 14 days after the Court’s decision of the last claimant’s appeal becoming final.” *Id.* That statement is inconsistent with an interpretation that precludes a distribution prior to all appeals becoming final as it would not be realistic to complete the entire Trust Administration distribution within 14 days.

12. The parties agree that, although claimant appeals remain to be determined, the Claims Administrator, upon verification of the latest property ownership update, will be ready to begin distribution to the Trust Administration Class. The universe of all class members “have been identified in accordance” with the terms of settlement, Settlement Agreement at ¶ E.4.e.7, even though a relatively small number, those with pending appeals, are only tentatively so identified. The Settlement Agreement expressly authorizes settlement funds to “be set aside for any identified Class Members,” *id.*, and the parties concur that a small set aside of funds to account for the remaining appeals is appropriate under the Settlement Agreement. Holding back from the distribution the approximate \$1.5 million necessary to cover pending appeals would not have a material impact on the amount to which any Class Member is to receive and would allow calculations to be made to properly allocate to each Class Member his or her Trust Administration Class payment. However, continuing to withhold payment while appeals are pending would increase the administrative costs to the class.

13. The needs in Indian Country are great and the distribution of these funds now will be a significant benefit to Class Members. These distributions were already delayed by the

appeals of four class members from this Court's order approving the Settlement Agreement. The Special Master has given and needs to continue to give his full consideration to the large number of appeals before him without feeling pressure to hastily make decisions in order to expedite distributions. There should be no need to withhold distributions while the appellate process continues.

14. Accordingly, it is respectfully requested that once the Trust Administration Class information held by the Claims Administrator is finalized, Plaintiffs be permitted, upon order of this Court, to commence distribution of Trust Administration Class payments, setting aside sufficient funds to cover the pending appeals.

Respectfully submitted this the 23st day of May, 2014.

/s/ David C. Smith

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing PLAINTIFFS' MOTION, WITHOUT OPPOSITION FROM DEFENDANTS, TO ALLOW COMMENCEMENT OF TRUST ADMINISTRATION CLASS DISTRIBUTIONS PRIOR TO EXPIRATION OF APPEALS was served on the following via facsimile, pursuant to agreement, on this day, May 23, 2014.

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/s/ David C. Smith



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**ORDER ON PLAINTIFFS’ MOTION, WITHOUT OPPOSITION FROM  
DEFENDANTS, TO ALLOW COMMENCEMENT OF TRUST ADMINISTRATION  
CLASS DISTRIBUTIONS PRIOR TO EXPIRATION OF APPEALS**

THIS MATTER came on to be heard on Plaintiffs’ Motion, without opposition from Defendants, for approval to commence distribution of Trust Administration Class payments prior to expiration of appeals from adverse determinations of eligibility and to create a reserve sufficient to cover the monetary claims underlying each appeal, and it appearing to the Court that said motion should be allowed;

NOW THEREFORE, it is hereby ORDERED that the Claims Administrator shall be permitted to commence distribution of Trust Administration Class payments before final decisions on appeals by claimants seeking review of adverse determinations of the Claims Administrator regarding eligibility for participation in the settlement. Prior to commencement of Trust Administration payments, the Plaintiffs shall present to the Court a proposed order setting forth the amount of the distribution, and all amounts being withheld from distribution including projected expenses, claims subject to pending appeals, and the Reserve Fund set forth in the Settlement Agreement.

SO ORDERED this the \_\_\_\_\_ of May, 2014.

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Thomas F. Hogan  
United States District Judge