

been unable to ascertain heirs or any other means for distribution of the settlement funds.

Payment monies for these estates currently are held on deposit at the Qualifying Bank.

Class Plaintiffs ask that Defendants deposit these payments into Individual Indian Monies (“IIM”) accounts in the name of the estates of decedents as to whom there is already an open federal probate or for whom a federal probate will be opened in the name of the estate in the future. (Mot. at 1-2).

Class Plaintiffs note that the Special Master already has entered various orders authorizing the distribution of settlement funds to the heirs of deceased class members as to whom no state or tribal probate order exists and as to whom the class administrator has been unable to identify an estate personal representative, executor or administrator, including, *inter alia*, distribution according to the terms of federal probate orders. [*See* Special Master Order No. 2 (Dkt. No. 3964)].

Class Plaintiffs argue that depositing payments into the IIM accounts of relevant estates will enable the efficient distribution of these payments to the decedents’ heirs once the requisite federal probates have been completed. (Mot. at 4). Under Plaintiffs’ proposal, the transfer of funds into IIM accounts will remove those claims from the claims administration process and the money in the IIM account, including the claims payment, money from any other source, and any interest earned, will be distributed to a decedent’s heirs upon the conclusion of the federal probate of the deceased’s estate.

Defendants oppose Class Plaintiffs’ request. According to Defendants, under Class Plaintiffs’ proposal, “settlement payments could take *longer* to reach heirs and could end up in the hands of different heirs.” [Opp. at 1 (emphasis in original)]. Defendants note that, once the payment funds are deposited into IIM accounts, the payments can only be distributed to a

decendent's heirs following the entry of a federal probate order. (Opp. at 2-3) Accordingly, the trust administrator will be unable to avail itself of other approved methods of distribution, including distribution based on state or tribal probate decisions. (Opp. at 2). Defendants contend that, because the federal probate process is governed by the American Indian Probate Reform Act of 2004 (AIPRA) and because under AIPRA heirship determinations may differ from those reached under state and tribal probate regulations, requiring payments to be distributed under federal probate procedures may result in payments being misdirected to particular heirs. (Opp. at 3-4).

Finally, Defendants argue that in negotiating the Cobell Settlement Agreement, the government "bargained to remove itself as much as possible from the distribution tasks." (Opp. at 6). For this reason, Defendants contend that the Settlement expressly provides that "Defendants shall have no role in, nor be held responsible or liable in any way for, the Accounting/Trust Administration Fund, the holding or investment of the monies in the Qualifying Bank or the distribution of such monies." [Opp. at 6 (quoting Settlement Agreement § E.1.g)].

II. Discussion

The Special Master concludes that transferring payment funds into either preexisting IIM accounts already established for the estates at issue or into newly created IIM accounts established specifically for the purpose of holding Cobell payment funds presents the most efficient and cost effective method of managing payments to estates for which no probate or other heirship determination has been concluded. In the absence of such an order, payment funds already marked for distribution to the estates in question will remain on deposit with the rest of

the settlement funds at the Qualifying Bank and, therefore, under the management of the claims administrator.

Entry of the Plaintiffs' proposed order will enable the claims administrator to deposit those funds into accounts established for the estates such that, upon entry of a probate order, the funds immediately can be transferred to the heirs named in the probate order. The proposed process therefore will eliminate the need for the claims administrator to be involved in the distribution of funds beyond the initial distribution into the IIM accounts and enable the eventual distribution to heirs to take place through the Department of the Interior's already-established probate process.

Defendants' object to Plaintiffs' proposed procedures for two primary reasons.² First, Defendants contend that depositing the funds into IIM accounts eliminates distribution through alternatives to the federal probate process and may have the unintended effect of directing funds to heirs that the alternative process would not. Second, Defendants contend that, in negotiating and agreeing to the Settlement Agreement, the government bargained for procedures which would remove it from the claims distribution process. Neither of these arguments is convincing.

While Class Plaintiffs' proposed process will require that estates distribute funds received through the Cobell Settlement to heirs under the federal probate process, the Special Master finds persuasive Plaintiffs' unrebutted representations that "[o]f the approximate[ly] 19,000 estates for

² Defendants also argued that depositing funds into an IIM account may violate the intent of the Settlement Agreement because unclaimed payments placed into IIM accounts for individuals whose whereabouts are unknown are paid into the Indian Scholarship Education Fund after five years. In contrast, Defendants note that under Class Plaintiffs' proposal funds placed into IIM accounts for the heirs of an estate will not be paid into the Indian Scholarship Education even if the heirs are whereabouts unknown. The Special Master finds this argument unconvincing. In the case of an heir to an estate, the actual eligible claimant is the estate of the deceased individual, who is not whereabouts unknown and therefore does not fall under the Settlement provisions regarding whereabouts unknown individuals. The Settlement therefore does not provide for funds paid to these claimants to be paid into the fund. Moreover, even assuming that the payments remained on deposit at the Qualifying Bank, Defendants have not presented any reason that the funds to be paid to estate claimants would, in any event, ever be paid into the scholarship fund.

which Historical Accounting Class distributions have been made to date, 18,445, or 97%, have been distributed based solely on federal probate orders.” (Reply at 4). Indeed, Defendants have presented no reason to believe that the remaining estates will be processed through any means other than federal probate. Class Plaintiffs have spent significant funds and time engaged in outreach to tribes and individual claimants and potential heirs have had over three years to attempt to have estates processed through other means. At this time, it is reasonable to believe that any future estates at issue will be processed through the federal probate process, and the cost saving benefits and efficiencies generated by depositing the funds into IIM accounts outweigh the small risk that a minimal number of estates may have been processed through means other than the federal probate process.

Similarly, although processing the distributions through the probate process will entail a determination of heirs based on AIPRA, it is likely that the vast majority of estates will be subject to AIPRA regardless. Meanwhile, while Defendants aver that heirship determinations under AIPRA may differ from those under state or tribal probate procedures, Defendants have not put forth any argument as to why those other determinations are or may be preferable. The vast majority of estate determinations to date have been based on the federal probate process, and, accordingly, heirs who have received funds from eligible estates have largely been determined based on the federal system. Defendants have not argued or demonstrated that such determinations have had the effect of disqualifying otherwise eligible heirs.

Indeed, the language of AIPRA suggests that Congress has endorsed the federal probate process as more efficient than state probates.

“Congress finds that... the reliance of the Federal Government on the State law of intestate succession with respect to the descent of allotments has resulted in numerous problems affecting Indian tribes, members of Indian tribes, and the Federal Government...”

[American Indian Probate Reform Act (“AIPRA”), Pub. L. No. 108-374, 118 Stat. 1773 (2004)].

While the Special Master does not intend to issue a determination as to whether the federal, state, or tribal probate procedures are preferable in any particular case, the facts that: (1) the vast majority of payments to estates have been awarded to heirs based on federal probate orders; (2) heirs to other estates have had over three years to pursue alternate distribution methods and (3) Defendants have not presented any argument supporting their contention that heirs may wish to pursue other means of estate distribution or that such alternate methods may be preferable to the federal probate process, all serve to establish sufficient reasons for granting Plaintiffs’ Motion.

Finally, Defendants contend that they bargained to be excluded from the distribution process and that requiring DOI to place estate payment funds into IIM accounts will deprive the government of a material part of its bargain. (Opp. at 5). In particular, Defendants note that section E.1.g. of the Settlement Agreement provides that

Except as specifically provided in this Agreement, Defendants shall have no role in, nor be held responsible or liable in any way for, the Accounting/Trust Administration Fund, the holding or investment of the monies in the Qualifying bank or the distribution of such monies.

As Class Plaintiffs note, however, this paragraph is qualified by the phrase “[e]xcept as specifically provided in the [Settlement] Agreement,” and elsewhere in the agreement, Defendants agreed to “make their resources and information available to assist in the distribution of notices and, subsequently, settlement payments.” [Reply at 6 (citing Settlement Agreement ¶ L.3)]. IIM accounts already exist for many of the estates at issue, and the government has not shown that it lacks the resources or ability to create IIM accounts for estates without an active IIM account. Because the Settlement Agreement contemplates that the government will use such

resources to facilitate distributions, Plaintiffs' proposal does not contradict the terms of section E.1.g.

Regardless, even assuming that section E.1.g did limit Defendants' obligation to use such resources, any such limitations apply only to the actual distribution of monies from the settlement fund. Under Plaintiffs' proposed method, the actual distribution of monies to eligible estates would be made by the claims administrator into the estates' IIM account, after which those funds would become part of the estates at issue. The eventual distribution of those monies to heirs would therefore occur as part of the federal probate of those estates, outside of the settlement process. Thus to the extent that the government would be involved in the distribution of funds, that involvement would only occur as part of the government's responsibility to oversee estate probates, and not in connection with any obligation under the Settlement Agreement.

III. Conclusion and Order

For all of these reasons, the Special Master concludes that Class Plaintiffs' proposed Motion will facilitate the most efficient, cost effective means of distributing settlement funds to eligible estate.

Accordingly, upon consideration of Class Plaintiffs' Motion, Defendants' Opposition, and Class Plaintiffs' Reply, it is hereby Ordered that where the Garden City Group, the Claims Administrator, has received no state, federal or tribal probate order or other documentation approved by the Court upon which a distribution to the estate or heirs of a deceased Class Member may be made, the Historical Accounting or Trust Administration payment owed to that deceased Class Member may be deposited into an IIM account or estate IIM account for that

deceased Class Member where there is a federal probate estate open and pending for that Class Member or where one in the future will be opened for that Class Member.

This the 10th day of September, 2014.

/s/ Hon. Richard A. Levie (Ret.)
Hon. Richard A. Levie (Ret.)
Special Master