IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

INTERIOR DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs' Motion for a Preliminary Injunction to Protect Individual Indian Trust Data and to Ensure That Individual Indian Trust Funds Are Distributed Without Further Delay ("Motion for Preliminary Injunction"), filed December 16, 2001, should be denied because the relief it seeks is overbroad and because relief to which Interior Defendants have consented[1] provides sufficient protection for individual Indian trust data. Moreover, much of the additional relief Plaintiffs seek beyond that to which Interior Defendants have consented is not available under the Administrative Procedure Act ("APA").

[1] The relief to which Interior Defendants have consented is that included in the Consent Order Regarding Information Technology Security ("Consent Order"), entered by the Court on December 17, 2001. The Consent Order was consented to by Interior Defendants, against whom the relief it provides runs. Plaintiffs did not agree to the Consent Order and opposed its entry.

BACKGROUND

I. PROCEDURAL BACKGROUND

On December 5, 2001, the Court entered a Temporary Restraining Order, amended on December 6, 2001, requiring the Interior Defendants to "immediately disconnect from the Internet all information technology systems that house or provide access to individual Indian trust data" and to "immediately disconnect from the Internet all computers within the custody and control of the Department of the Interior, its employees and contractors, that have access to individual Indian trust data." On December 6, 2001, in open court, Interior Defendants offered to prepare a proposed consent order regarding information technology security. On December 7, 2001, Interior Defendants submitted a proposed consent order to the Court and to Plaintiffs. Over the course of the next several days, Interior Defendants and Plaintiffs negotiated the terms of a consent order that they could submit jointly to the Court and, on December 13, 2001, filed with the Court an Agreed Consent Order.[2] After Plaintiffs, with the Court's permission, withdrew their agreement to the consent order on December 14, 2001, Interior Defendants moved

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[2] Plaintiffs' Motion for Preliminary Injunction alleges that Interior Defendants engaged in bad faith negotiations regarding this Agreed Consent Order in that Interior Defendants allegedly agreed during negotiations that they would not argue to the Court that the Agreed Consent Order would have any effect on the Supplemental Order to Show Cause, entered December 6, 2001. See Motion for Preliminary Injunction at 3 ("because of the bad faith demonstrated by Norton and McCaleb, and their counsel, in the negotiation of a fraudulently induced consent order . . ."). Interior Defendants deny any such agreement. Moreover, the possible relationship between the Agreed Consent Order and the Supplemental Order to Show Cause was raised twice in open court. See Ex. 1, Dec. 6, 2001 Tr., 21:5 - 24:18; 27:6 - 28:16; Ex. 2, Dec. 10, 2001 Tr., 28:5 - 29:10. The Agreed Consent Order did not address the Supplemental Order to Show Cause and Interior Defendants' consent was not conditioned on the Court agreeing to vacate that Order. Indeed, during proceedings in open court on December 14, 2001, the parties took different positions on whether the provisions in the Agreed Consent Order satisfied the purposes of civil contempt and, therefore, should result in vacating the Supplemental Order to Show Cause. See Ex. 3, Dec. 14, 2001 Tr. at 810:7 - 822:3.

orally that day and in writing on December 17, 2001, that the Court adopt a modified version of the Agreed Consent Order. These modified versions deleted references to Plaintiffs' agreement with the order and to the award of attorney fees to Plaintiffs. The modified version filed in writing on December 17, 2001, also provided that it would supersede the Temporary Restraining Order, rather than simply modify it.

On December 16, 2001, Plaintiffs filed their Motion for Preliminary Injunction, seeking a preliminary injunction "[t]o ensure adequate protection of individual Indian trust funds and trust data and to enhance the safe and sound disbursement of IIM trust monies without further delay." Motion for Preliminary Injunction at 9. Plaintiffs' proposed Preliminary Injunction Regarding Information Technology Security ("Proposed Order"), while similar in many respects to the proposed consent order offered by Interior Defendants on December 14 and 17, 2001, goes far beyond it in certain terms. Differences between the two orders are discussed below.

On December 17, 2001, the Court granted Interior Defendants' motion and entered the Consent Order with the understanding that doing so would neither resolve the Supplemental Order to Show Cause nor prevent Plaintiffs from seeking additional relief through their motion for a preliminary injunction. The Consent Order provides, *inter alia*:

- an ongoing role for the Special Master in (1) reviewing Interior Defendants' operation of information technology systems that currently or formerly (as of December 5, 2001) housed or provided access to individual Indian trust data; (2) ensuring the adequacy of safeguards to protect individual Indian trust data before such systems are reconnected to the Internet; and (3) verifying compliance with the Consent Order;

- comprehensive definitions of the critical terms at issue;

- a mechanism for Interior Defendants to resume operation of information technology systems that were shut down pursuant to the December 5, 2001

Temporary Restraining Order, as amended on December 6, 2001, if those systems are not connected to the Internet;

- a mechanism for the reconnection to the Internet of information technology systems that neither house nor provide access to individual Indian trust data;

- a mechanism for the temporary reconnection to the Internet of information technology systems that house or provide access to individual Indian trust data for the limited purposes of "testing the security of the information technology systems" or "performing those functions necessary to receive, account for, and distribute trust funds or appropriated funds, or to provide other necessary services," including making payments to individual Indians;

- a mechanism for the reconnection to the Internet on an ongoing basis of information technology systems that house or provide access to individual Indian trust data; and

- a mechanism for Interior Defendants to be relieved of the requirements of the Order when they have brought their systems into compliance with OMB Circular A-130.

II. DIFFERENCES BETWEEN PLAINTIFFS' PRELIMINARY INJUNCTION AND THE CONSENT ORDER

Plaintiffs' Proposed Order (PPO) and the Consent Order (CO) have the following differences:

- Plaintiffs' Proposed Order takes the form of a preliminary injunction, rather than a consent order;

Introductory paragraphs and definitions:

- In addition to the items referenced in the Consent Order, Plaintiffs' Proposed Order makes reference to the agreed consent order, the Deposition of Jeremy Katz, taken on June 11, 2001, and Interior Defendants' counsel's statements made in open court on December 14, 2001 (PPO 14);

- Plaintiffs' Proposed Order begins the definition of individual Indian trust data with the phrase "[i]nformation stored in an information technology system that evidences, embodies, refers to or relates to the existence of . . ." (PPO 14), rather than the Consent Order's phrase "[a]ll data stored in an information technology

system upon which the Government must rely to fulfill its trust duties to Native Americans pursuant to the Trust Fund Management Reform Act of 1994 (P.L. No. 103-412), other applicable statutes and orders of this Court reflecting, for example, the existence of . . ." (CO 4).

Interior Defendants' Representations:

- Plaintiffs' Proposed Order requires Interior Defendants "to comply" with its representation that it has already contracted Predictive Systems, Inc. to perform specified services (PPO 15-16);

- Plaintiffs' Proposed Order adds a 60-day time frame for Interior Defendants to task an independent contractor to assess the requirements to bring certain information technology systems into compliance with applicable standards from OMB Circular A-130 and orders Interior Defendants "to comply" with its representation that it will do this (PPO 15-16);

- Plaintiffs' Proposed Order adds a 120-day time frame for Interior Defendants to bring certain information technology systems into compliance with applicable standards from OMB Circular A-130 and orders Interior Defendants "to comply" with its representation that it will do this (PPO 15-16);

Receiving, accounting for, and distributing trust funds and appropriated funds:

- Plaintiffs' Proposed Order requires Interior Defendants to "take all steps possible to ensure that trust funds and appropriated funds are received, accounted for, and distributed in a timely manner and without further delay" (PPO 16);

Resuming operation of systems and reconnection to the Internet:

- Plaintiffs' Proposed Order does not provide a mechanism for Interior Defendants to resume operation of information technology systems that were shut down pursuant to the Temporary Restraining Order if those systems are not connected to the Internet (CO 5);

- Plaintiffs' Proposed Order requires Interior Defendants to obtain written approval from the Special Master before reconnecting to the Internet any information technology system that houses or provides access to individual Indian trust data (PPO 16). The Consent Order requires Interior Defendants to provide the Special Master and Plaintiffs' counsel with adequate notice and documentation of any plan to reconnect to the Internet any information technology system that houses or provides access to individual Indian trust data and prohibits such reconnection

unless any objections raised by the Special Master have been resolved to his satisfaction (CO 6-7).

- Plaintiffs' Proposed Order does not provide a mechanism by which Interior Defendants can seek relief from the Court if they are unable to resolve the Special Master's objections. The Consent Order includes such a mechanism (CO 6, 7).

Systems that do NOT house or provide access to individual Indian trust data:

- Plaintiffs' Proposed Order requires Interior Defendants to obtain written approval from the Special Master before reconnecting to the Internet any information technology system that does NOT house or provide access to individual Indian trust data, but which was shut down pursuant to the Temporary Restraining Order (PPO 16-17). The Consent Order requires that Interior Defendants provide the Special Master and Plaintiffs' counsel with adequate notice and documentation that such systems do not house or provide access to individual Indian trust data before reconnecting such systems (CO 5-6);

- Plaintiffs' Proposed Order requires Interior Defendants to provide the Special Master "with a verification executed under oath by an Interior official with appropriate authority and personal knowledge as to the access and housing issues" before reconnecting to the Internet any information technology system that does NOT house or provide access to individual Indian trust data (PPO 16-17). The Consent Order requires Interior defendants to provide the Special Master with appropriate documentation, subject to the Special Master's overall authority to verify compliance with the Consent Order (CO 5-6);

Temporary reconnection of systems that do house or provide access to individual Indian trust data:

- Plaintiffs' Proposed Order requires Interior Defendants to provide the Special Master with respect to any proposed temporary reconnection to the Internet of an information technology system that houses or provides access to individual Indian trust data, a "step-by-step plan, a listing of all personnel who will implement the temporary reconnection, a listing of all systems to be temporarily reconnected, all steps and measures that will be taken to protect individual Indian trust data, the duration of the temporary reconnection and appropriate verifications attesting to the foregoing items." (PPO 17) The Consent Order requires Interior Defendants to provide the Special Master with appropriate documentation, including "its plan to reconnect temporarily," and prohibits reconnection if the Special Master objects that the documentation provided is inadequate (CO 6);

- Plaintiffs' Proposed Order does not provide a mechanism to permit Interior Defendants to temporarily reconnect to the Internet an information technology system that houses or provides access to individual Indian trust data to provide necessary services other than "to receive, account for, and distribute trust funds or appropriated funds" (PPO 17). The Consent Order provides such a mechanism. (CO 6);

Reconnection to the Internet on an ongoing basis:

- Plaintiffs' Proposed Order prohibits Interior Defendants from reconnecting to the Internet on an ongoing basis any information technology system that was shut down pursuant to the Temporary Restraining Order, regardless of whether it houses or provides access to individual Indian trust data, unless the Special Master first determines that Interior Defendants "have satisfied the requirements set forth in OMB Circular A-130."[3] Plaintiffs' Proposed Order also requires Interior Defendants' supporting documentation provided to the Special Master to include "a risk assessment and certifications from the Chief Information Officer that the relevant information technology systems are in compliance with the requirements set forth in OMB Circular A-130." (PPO 17-18). The Consent Order distinguishes between information technology systems that do and do not house or provide access to individual Indian trust data. The Consent Order's treatment of the former is discussed above. The Consent Order would permit reconnection to the Internet on an ongoing basis of systems that do house or provide access to individual Indian trust data if the Special Master is satisfied that Interior Defendants' plan for reconnection provides adequate security for individual Indian trust data and subject to his ongoing verification of compliance with the Consent Order (CO 7);

Involvement of the Special Master:

- Plaintiffs' Proposed Order would permit the Special Master to conduct interviews or site visits without prior notice to the parties or their counsel (PPO 18-19). The Consent Order requires that at least one counsel representing both parties be permitted to attend such interviews or site visits, but prohibits them from informing their clients about such interviews or visits in advance without written permission from the Special Master (CO 7-8); and

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[3] This is internally inconsistent with Plaintiffs' Proposed Order's allowance of reconnection to the Internet of systems that do NOT house or provide access to individual Indian trust data if accompanied by a specified verification and if approved by the Special Master (PPO 16-17).

- Plaintiffs' Proposed Order provides explicit permission for the Special Master to "conduct penetration and similar security tests of Interior information technology systems that houses [sic] or provides [sic] access to individual Indian trust data." (PPO 8). The Consent Order does not address this issue.

ARGUMENT

I. PLAINTIFFS ARE NOT ENTITLED TO A PRELIMINARY INJUNCTION

A. Requirements for Obtaining a Preliminary Injunction

"Injunctive relief is an extraordinary remedy, and the party seeking it bears a substantial burden." Herrera v. Riley, 886 F. Supp. 45, 48 (D.D.C. 1995). To obtain this extraordinary remedy, a plaintiff must show: (1) a substantial likelihood of success on the merits; (2) that without injunctive relief he or she would suffer irreparable harm; (3) that issuance of an injunction would not substantially harm other interested parties; and (4) that the public interest favors the requested injunction. CityFed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 746 (D.C. Cir. 1995); Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). The decision whether to grant injunctive relief requires the court to "balance the strengths of the requesting party's arguments in each of the four required areas." CityFed, 58 F.3d at 747. This "drastic and extraordinary form of relief should not be granted absent a clear and convincing showing by the moving party." Kahane v. Secretary of State, 700 F. Supp. 1162, 1165 (D.D.C. 1988) (citing Yakus v. United States, 321 U.S. 414 (1944)).

If injunctive relief is ultimately granted, it "must be narrowly tailored to remedy the harm shown." Gulf Oil Corporation v. Brock, 778 F. 2d 834, 842 (D.C. Cir. 1985); see also, e.g., Aviation Consumer Action Project v. Washburn, 535 F.2d 101, 108 (D.C. Cir. 1976) ("Injunctive relief granted to a party in a lawsuit must be framed to remedy the harm claimed by the party.");

Waldman Publishing Corp. v. Landoll, Inc., 43 F.3d 775, 785 (2d Cir. 1994) ("Injunctive relief should be narrowly tailored to fit specific legal violations.").

B. Plaintiffs Cannot Demonstrate Entitlement to Injunctive Relief

Plaintiffs cannot carry their burden of demonstrating that they are entitled to injunctive relief because some of the relief they seek is not available under the APA, because the relief they seek is overbroad, and because the alternative relief to which Interior Defendants have consented provides sufficient protection for individual Indian trust data.

1. Plaintiffs Cannot Demonstrate Likelihood of Success on the Merits

a. Aspects of the requested relief are not available under the APA.

Plaintiffs cannot demonstrate a likelihood of success on the merits of their claim for injunctive relief because aspects of that relief are not available under the APA. Under the APA, upon a finding of a violation of the law, agencies have the discretion to determine the steps they will take to bring themselves into compliance, subject to further court review. See, e.g., Cobell v. Norton, 240 F.3d 1081, 1109 (D.C. Cir. 2001) (as a matter of judicial policy, courts grant agencies "'discretion to determine in the first instance,' how to bring themselves into compliance" with applicable law) (citing Global Van Lines, Inc. v. ICC, 804 F.2d 1293, 1305 n.95 (D.C. Cir.1986)); Public Citizen Health Research Group v. Comm'r, Food & Drug Admin., 740 F.2d 21, 35 (D.C. Cir. 1984), disapproved of on other grounds, Telecommunications Research and Action Center v. F.C.C., 750 F.2d 70, 77 n.30 (D.C. Cir. 1984). In this case, Interior has already decided on some of the steps it will take to remedy the identified deficiencies in its information technology systems, and is actively working with the Special Master with

respect to those steps. Some of these were included as representations of Interior's intent in the Consent Order.

Plaintiffs' Proposed Order would require Interior Defendants to undertake several specific tasks. Specifically, the Proposed Order requires Interior Defendants to hire a specific contractor, Predictive Systems, Inc., to install specific equipment to guard certain Internet access points; to task an independent contractor to evaluate requirements to bring information technology systems into compliance with "applicable standards outlined in OMB Circular A-130" within 60 days; and to bring all "individual Indian trust information technology systems into compliance with applicable standards outlined in OMB Circular A-130" within 120 days. See Proposed Order at 15-16. None of these tasks constitutes non-discretionary, legally-enforceable duties under the APA. Interior Defendants have decided to undertake each of these specific tasks, though not within the unreasonable time frame proposed by Plaintiffs with respect to the last task, and have represented this to the Court. However, neither Interior's decision nor its representation provides authority to order Interior Defendants to undertake these specific tasks, nor to eliminate Interior Defendants' discretion to implement a better solution if one becomes available. Of course, under the relief to which Interior Defendants have consented, their actions in this regard will continue to be subject to consultation with and verification by the Special Master until their information technology systems that house or provide access to individual Indian trust data "are in compliance with the applicable standards outlined in OMB Circular A-130." Consent Order at 8.

b. The relief must be narrowly tailored to remedy the identified deficiencies.

Plaintiffs also cannot demonstrate a likelihood of success on the merits because several aspects of the relief they seek are overbroad. Injunctive relief must be narrowly tailored to remedy the harm shown. See Aviation Consumer Action Project, 535 F. 2d at 108-09 (finding overbroad an injunction prohibiting certain activity by a number of advisory committees to the Department of Commerce where evidence in the record only related to the activities of one advisory committee). In this case, the injunctive relief must be narrowly tailored to remedying the identified deficiencies in Interior's information technology systems that house or provide access to individual Indian trust data. Plaintiffs' Proposed Injunction goes well beyond this.

First, Plaintiffs offer a definition of individual Indian trust data that is overbroad and, therefore, might encompass information technology systems that would have no possible impact on the integrity of individual Indian trust data. Plaintiffs' Proposed Order would affect all of Interior's information technology systems that store information that "refers to or relates to," among other things, the existence of individual Indian trust assets. This definition goes well beyond establishing protections for the data that is needed to perform an accounting or to make payments to individual Indian trust beneficiaries. Based on this definition, an e-mail sent from an employee at the National Park Service ("NPS") to a friend at the Fish and Wildlife Service ("FWS") asking what the Cobell case is about, and eliciting an e-mail response that, in part, it is about monies held in trust for individual Indians, could arguably "refer to" individual Indian trust assets. This, therefore, could make NPS's and FWS's information technology systems into systems that house or provide access to individual Indian trust data. This would be true even if

those systems have no way of reaching or in any way affecting the accounts of individual Indian trust beneficiaries or any data necessary or useful to performing an accounting.

Second, Plaintiffs ask the Court to order Interior Defendants to "take all steps possible to ensure that trust funds and appropriated funds are received, accounted for, and distributed in a timely manner and without further delay." Plaintiffs' Proposed Order at 16. As noted in the attached Declaration of James McDivitt ("McDivitt Decl."), Interior Defendants have taken steps to bring up systems necessary to receive, account currently for, and distribute trust funds and appropriated funds to individual Indians. See Ex. 4, ¶¶ 3-11; Ex. 5, Letter from Sandra P. Spooner to Alan L. Balaran, December 21, 2001 (providing information to the Special Master and stating that "Interior will, of course, await your approval before connecting"). Interior Defendants sought permission from the Special Master to bring up the system necessary to make social services payments (payments for general assistance, child assistance, emergency assistance, and burial assistance for eligible Indian clients for whom no other assistance is available) the same day the Consent Order was entered, and received permission shortly thereafter. See Ex. 4, McDivitt Decl. ¶ 6 & Attach. A. Pursuant to the Consent Order, Interior Defendants have sought permission to bring up the systems necessary to receive, account for, and distribute other trust funds and appropriated funds to individual Indians and to tribes, and are currently working with the Special Master to provide the additional assurances he has requested. See Ex. 4, McDivitt Decl., ¶¶ 8-11 & Attach. B; Ex. 5. Plaintiffs' proposed language is not supported by any factual allegations or evidence that Interior Defendants are likely to delay any such distributions once they, working with the Special Master, are able to provide adequate

protection for individual Indian trust data while operating the systems necessary to make such payments.

Third, Plaintiffs' Proposed Order would require Interior Defendants to bring certain information technology systems into compliance with applicable standards from OMB Circular A-130 within 120 days. Plaintiffs have provided no evidence suggesting that this is either necessary or possible. In fact, bringing information technology systems as large and complicated as Interior Defendants' systems that house or provide access to individual Indian trust data into compliance with OMB Circular A-130 is a complicated process that cannot possibly be achieved in that short time frame. See Declaration of Hart Rossman, ¶¶ 4-6, Ex. 6. Attempting to rush that process to meet an arbitrary time frame is unlikely to achieve effective protection for individual Indian trust data. An reasonable, estimated time frame to bring all of Interior's individual Indian trust information systems into compliance with OMB Circular A-130, provided by a contractor who Interior has contracted to provide information technology security services to Interior, is between two and four years. See id. ¶ 5.

Although it is not reasonable to expect that all of Interior Defendants' information technology systems can be fully compliant with OMB Circular A-130 within 120 days, it is possible that other assurances of sufficient security can be provided to permit Interior Defendants to reconnect to the Internet its information technology systems that house or provide access to individual Indian trust data. See id. ¶ 7. Because Interior Defendants have consented to a system under which they will not reconnect to the Internet such systems unless the Special Master agrees that sufficient protections for individual Indian trust data are in place, it is unnecessary to require compliance with OMB Circular A-130 before systems can be reconnected to the Internet on an

ongoing basis. Nor is doing so practical over the course of the entire process of obtaining compliance. Such relief is not narrowly tailored to remedying the identified deficiencies.

Fourth, Plaintiffs' Proposed Order lists specific items Interior Defendants must present to the Special Master before reconnecting certain systems to the Internet, regardless of the circumstances of the reconnection. For a temporary reconnection, such items include "a listing of all personnel who will implement the temporary reconnection, a listing of all systems to be temporarily reconnected, all steps and measures that will be taken to protect individual Indian trust data . . . ." See Proposed Order at 17. The Proposed Order does not include any exceptions for circumstances in which it might not be possible or sensible to list "all personnel" who will be involved or to predict "all steps and measures" that will be necessary to protect data if a complicated set of systems must be brought up at the same time. If, in a complicated reconnection plan, it is only possible to list key personnel, rather than all personnel, this plan should still be able to go forward if the Special Master agrees there is adequate protection for individual Indian trust data. Plaintiffs' requirements would not only remove flexibility in establishing viable reconnection plans that provide adequate security, but they would also take away from the Special Master discretion as to establishing what assurances are necessary in particular circumstances. These inflexible and cumbersome requirements could impede reconnections, thereby delaying provision of services supported by the systems. Under the Consent Order, the Special Master could demand these specific items, if they are appropriate to the situation, or he could demand additional or alternative assurances.

Plaintiffs cannot demonstrate a substantial likelihood of success in achieving the relief requested in their Proposed Order because aspects of that relief are not attainable under the APA

or are not narrowly tailored to remedy the identified deficiencies in Interior's information technology systems that house or provide access to individual Indian trust data.

2. *Plaintiffs Cannot Demonstrate Irreparable Harm*

Plaintiffs cannot demonstrate that they would suffer irreparable harm in the absence of injunctive relief because the relief to which Interior Defendants have consented provides sufficient protection for individual Indian trust data. The Court of Appeals has stated that to constitute irreparable harm, the "injury must be both certain and great; it must be actual and not theoretical . . . the party seeking injunctive relief must show that the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) (emphasis in original). Therefore, "[b]are allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur. The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future." Id.

Plaintiffs argue that without their preliminary injunction, individual Indian trust data stored in Interior's information technology systems will be "subject to alteration, modification and corruption." Plaintiffs' Motion at 7. However, the relief to which Interior Defendants have consented provides protection for this data. The Consent Order does not allow Interior Defendants to reconnect to the Internet information technology systems that house or provide access to individual Indian trust data without providing sufficient assurances that the individual Indian trust data is sufficiently protected. Furthermore, the Court, as a result of the ongoing role of the Special Master, has the ability to verify this protection. Plaintiffs have not demonstrated

why this relief does not provide adequate protection for individual Indian trust data, or how the additional relief they request would provide such protection. Nor have Plaintiffs demonstrated what "harm will in fact occur" if the relief to which Interior Defendants have consented remains in place.

Plaintiffs also cannot demonstrate that they would suffer irreparable harm in the absence of the preliminary injunction they seek because the injury they allege is speculative. Although Interior Defendants acknowledge the existence of substantial deficiencies in the security of its information technology systems that house or provide access to individual Indian trust data, and are working to address those deficiencies, Plaintiffs have not produced any evidence that these security deficiencies have led to any actual harm from the manipulation, alteration, or corruption of individual Indian trust data. The only evidence of actual intrusion and alteration of data is that performed by Predictive Systems under the direction of the Special Master. Such loss, therefore, is speculative, especially with the protections in place as part of the relief to which Interior Defendants have consented.

3. *Neither the Balance of Harms nor the Public Interest Favor Granting the Preliminary Injunction*

The balance of hardships and the public interest both oppose entry of injunctive relief in this case. Entry of the preliminary injunction would harm Interior, and hinder Interior's ability to provide services to the public, in several ways. First, if Plaintiffs' unreasonable 120-day time frame for fully complying with applicable standards from OMB Circular A-130 were imposed, Interior Defendants would not be able to comply with the order. See Ex. 6, Rossman Decl., ¶ 6. Second, adopting Plaintiffs' definition of individual Indian trust data could result in keeping off

the Internet Interior information technology systems that would have no impact on individual Indian trust data if reconnected. This, in turn, might prevent Interior from providing valuable services to the public. See supra, at 11-12. Third, if Interior Defendants were required to produce Plaintiffs' inflexible specific lists of items before reconnecting to the Internet relevant information technology systems, Interior Defendants' ability to reconnect and provide essential services could be hindered. Under the Consent Order, the Special Master can request all, or if the specific situation calls for it, different information.

Fourth, Plaintiffs' Proposed Order's prohibition on Interior Defendants reconnecting to the Internet on an ongoing basis information technology systems that provide adequate protection for individual Indian trust data until those systems are fully compliant with OMB Circular A-130 could lead to unreasonable delay in providing essential services and inordinate amounts of unnecessary expense and risk. Fifth, Plaintiffs' Proposed Order would not permit Interior to reconnect temporarily to the Internet, subject to the Special Master's review, information technology systems that house or provide access to individual Indian trust data for the purpose of providing necessary services other than receiving, accounting currently for, and distributing trust funds or appropriated funds. This would deny Interior and the Special Master the flexibility to address needs that might arise, including law enforcement and fire protection needs. See Declaration of James Cason, ¶¶ 7-8, Ex. 7.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE COBELL, ET AL,	.	Docket Number: CA 96-1285
Plaintiffs,	.	
v.	.	Washington, D.C.
	.	Thursday, December 6, 2001
DEPARTMENT OF THE INTERIOR, ET AL,	.	10:00 A.M.
Defendants.	.	

TRANSCRIPT OF HEARING ON MATTERS RELATING TO TRIAL
BEFORE THE HONORABLE ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

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EXHIBIT 1

SUSAN PAGE TYNER, OFFICIAL COURT REPORTER

MR. NAGLE: Yes, Your Honor.

THE COURT: All right, go ahead.

MR. NAGLE: Thank you, Your Honor. For the record, Mark Nagle, Assistant United States Attorney for the defendants.

Your Honor, as my colleagues were identifying the witnesses that defendants may call, and as they noted that would be in addition to those identified by the plaintiffs, I do want to make one note, Your Honor -- note one objection.

Far down the list of the 26 or so individuals identified by plaintiffs' counsel was Mr. William Myers, the current Solicitor of Interior.

We need to note an objection for the record given the fact that he is currently the principal legal officer of the Department of the Interior, and as the court can well imagine, since the Secretary herself and one of the Assistant Secretaries are the responding parties in this contempt proceeding, it would work a significant prejudice against them if he had to assume the role of witness in this case.

I think under the Code of Professional Conduct that that could well disqualify him from performing other legal functions.

Given the number of witnesses plaintiffs have identified, Your Honor, and the sequence in which we heard

them, I don't know that Mr. Myers is an essential witness, but we would note an objection for the reasons I just stated to him being called.

THE COURT: Okay.

MR. NAGLE: I have one other matter, Your Honor, and I would like to just state this for the record, mindful of the fact that you have commenced the proceedings this morning by handing down to us your supplemental show cause order.

As this court is aware, counsel for the defendants currently present in court this morning are not responsible for handling the merits aspects of this case, but we obviously are in close touch with those Department of Justice attorneys who are.

We are aware of the course of yesterday's events, both in court and outside of court, and I wanted to just make a representation for the record that we were prepared this morning with the express authorization of the Secretary of the Interior to propose to the court that we would have submitted by noon tomorrow a proposed consent order governing what has come to be referred to in shorthand as IT security.

We say this, Your Honor, because we recognize that the court views these matters with the absolute utmost gravity, and also because we recognize that the court knows

that civil contempt fundamentally has a curative corrective purpose.

We believe, Your Honor, that --

THE COURT: As well as compensatory, what you usually overlook.

MR. NAGLE: Well, I was going to touch on compensatory, Your Honor, and I am happy to do that in just a moment.

But the curative purpose of civil contempt we recognize --

THE COURT: Is to get the job done.

MR. NAGLE: Is to get the job done, Your Honor, and we are going to have this trial. Your Honor issued an order on November 28th with four defined specifications, and we have been laboring mightily to be prepared to go forward Monday, two business days from now, on those four specifications.

Recognizing, Your Honor, that at the end of that proceeding, since it is a proceeding for civil contempt, should the court have concluded, or should the court conclude at the end of the proceeding that the curative purposes of civil contempt would be served by entry of an order, we thought that there was some purpose served by tendering to the court this morning our willingness to try to craft a consent order.

I understand, Your Honor, that there were discussions yesterday to which counsel now present in court were not a party. I understand that those discussions between defendants' counsel and the plaintiffs' counsel did not culminate in an agreed upon order tendered to the court.

Our proposal was going to be to tender an order to the court by noon tomorrow that would set out with specification the security measures to be taken to accomplish, in the court's phrase, the goal of getting the job done.

Plaintiffs, in our view, could have an opportunity to respond to that. The court can entertain their response, their objections, and fashion an order accordingly.

THE COURT: I welcome that. I think that is constructive, and I think it would be helpful.

MR. NAGLE: May I inquire in light of that, Your Honor, what effect that would have on the supplemental show cause that was just --

THE COURT: I don't know until I see it.

MR. NAGLE: All right, Your Honor. That is fair enough. And I do want to touch on the compensatory point Your Honor just eluded to.

Were we to get to an order, a consent order, and -- assuming, Your Honor, and in fairness to plaintiffs' counsel,

they are now hearing this for the first time, and I understand that they may want to reserve on this on any number of levels.

Insofar as the compensatory purposes of civil contempt would bear upon a request by plaintiffs for attorney fees and expenses of the sort encompassed by, for example, the Equal Access to Justice Act.

I am quite confident, Your Honor, that an arrangement could be arrived at in that respect.

I understand that the plaintiffs are hearing this for the first time. We would obviously need to see some sort of representation documentation from them of what sort of compensation that they had in mind, but I did want to make that representation for the record, and I take the court's comments of a moment ago to heart, and we will labor hard at getting something before you and over to the plaintiffs tomorrow.

THE COURT: All right.

MR. NAGLE: Thank you, Your Honor.

MR. GINGOLD: Your Honor, a couple of brief points. With regard to the current solicitor, he has been identified in the court monitor's I believe fourth report as an active participant regarding the quality or accuracy and completeness of the seventh quarterly report.

We think he is directly implicated in the order to

show cause, and that matter, I think, has to be addressed directly.

How the court wants to treat him because he is also the legal counsel for the Secretary is clearly within your discretion, but we want to point out that there is direct involvement in the problem -- one of the problems we are dealing with here.

THE COURT: Well, let me put it this way. I think he may be a possible witness. I don't think counsel are ever preferred witnesses when you have other knowledgeable people that can testify to things.

Without finally ruling on whether he may be called as a witness, I will just say that because of the critical nature of his ability and the Secretary's ability to continue to function while this contempt trial is on-going, I will waive any sequestration rule as to him.

MR. GINGOLD: Okay, Your Honor.

THE COURT: But I won't finally rule on whether he may be required to testify at this time.

MR. GINGOLD: Your Honor, one further point in that regard. The government has identified lawyers.

THE COURT: Right.

MR. GINGOLD: I believe either Blackwell and Mr. Brooks, and I imagine the same consideration would be taken by this court with regard to their testimony.

THE COURT: Well, the first problem will be as to anyone who is represented by counsel will need to talk to their counsel. I don't know who may have what advice of their counsel to do what.

So if someone is being called before the court who has counsel, the first thing I do is get their counsel to hear it, to see what their preference is.

MR. GINGOLD: We agree, Your Honor.

With regard to the last points that were made by the government, we also find that it may be positive to have a consent order if a court's consent orders are obeyed, which doesn't seem to be the case generally in this case, Your Honor.

THE COURT: Well, you are making some progress, so let's not go too far here.

MR. GINGOLD: You are an optimist, Your Honor.

THE COURT: They offered a consent order. That is more than they have been offering.

MR. GINGOLD: Your Honor, they consented to Mr. Keefer, and they consented to the standard of review of Mr. Keefer. They consented to the time period with Mr. Keefer, and we are going to go through potentially a long protracted trial because they don't like what they consented to.

They consented to the first order of production on November 27th.

THE COURT: I understand, but they also know I am sitting here for life.

MR. GINGOLD: Okay. This could be a long trial, Your Honor.

(Laughter.)

MR. GINGOLD: With regard to a couple of other issues, Equal Access to Justice. As you know, Your Honor, Equal Access to Justice provides for certain fee caps unless there is evidence of bad faith. Defense is evidence of fraud, things of that sort.

That is clearly within the context of the order to show cause. In addition, we are not just talking about -- there are various types of compensatory remedies, including evidentiary and issue preclusion matters that may result as a result from the violations of the orders if this court so holds.

So there are other issues that would relate to it, Your Honor, that clearly plaintiffs would be willing to talk to the United States Attorneys about this, but I just wanted to point out that the issues are not nearly that simple.

THE COURT: Anything you all can simplify I will appreciate.

Is it your notion we may need a hearing on that proposed consent order tomorrow, or would we do it on Monday?

MR. NAGLE: Your Honor, it was not our expectation that a hearing would be necessary. As we understand the issues in the IT security area, our expectation was that we could tender to the court and serve on the plaintiffs an order that was self-explanatory within its own four corners.

Of course it will not include a stipulation to fraud, or bad faith, or these other things, but we are mindful --

THE COURT: It could separate out that issue.

MR. NAGLE: It could separate out that issue, and it could also be -- it could also be the case, Your Honor, that a negotiated resolution of a monetary request by the plaintiffs would not have to make specific representations in that regard.

THE COURT: Right.

MR. NAGLE: It could simply reflect the sum certain, or it could say that the sum certain will be arrived at later, something of that nature.

There is one final scheduling matter, Your Honor, just in light of the statement by the plaintiffs that the plaintiffs call Secretary Norton.

We are informed that the Secretary is, of course, keenly aware of these proceedings, aware of the court's plan to begin on Monday, but also, given the nature of her duties,

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	:	Civil Action 96-1285
Plaintiffs,	:	
v.	:	Washington, D.C.
	:	Monday, December 10, 2001
DEPARTMENT OF THE INTERIOR, et al.,	:	10:06 a.m.
Defendants.	:	

DAY ONE
TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Pages 1 through 201

THERESA M. SORENSEN,
OFFICIAL COURT REPORTER

EXHIBIT 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	:	Civil Action 96-1285
Plaintiffs,	:	
v.	:	Washington, D.C.
	:	Monday, December 10, 2001
DEPARTMENT OF THE INTERIOR, et al.,	:	10:06 a.m.
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DAY ONE
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UNITED STATES DISTRICT JUDGE

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Pages 1 through 201

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that the evidence this Court will hear will establish that contempt sanctions are not warranted.

I would note for the record, Your Honor, the presence in court this morning of Neil McClaub, the Assistant Secretary of Interior for Indian Affairs. The Secretary of the Interior, with appreciation and respect for the Court's comments last week concerning the other demands on her schedule, was not able to be present this morning. But also present in court, Your Honor, is Steven Griles, the Deputy Secretary of the Interior, who will serve as the agency's representative for the duration of these proceedings.

Your Honor, while this is not in the nature of an opening statement, I believe that at least a brief remark or two is in order with respect to the defendants' position concerning the admissibility of the Court monitor's reports in these proceedings. In light of the comments of plaintiffs' counsel, we believe it is important to clarify that what the plaintiffs asked in their motion in limine and the proposed order tendered with it, and what the order signed by this Court directs is that defendants were obliged to identify by December 7th, last Friday -- and I'm quoting from the proposed order now -- "the admissibility on hearsay, any objections we had to admissibility on hearsay or other foundational grounds of 'documents generated by or statements of or attributed to the defendants, their employees or agents, to the extent

referenced by the Court monitor.'"

Your Honor, the filing that the defendants tendered to the Court and served on the plaintiffs Friday evening was a diligent effort to make a full, fair review of those reports, identify, first of all, documents or statements adopted or attributed to defendants' agents or employees, and state as clearly as we could the particular grounds for objection if we had any. And I'm confident, Your Honor, that as these matters come up during the course of the proceedings, the number of objections will be quite substantially smaller than what's been characterized by the plaintiffs.

Mindful of the need to be particular in stating those objections, a number are asserted, the resolution of any one of which will in all likelihood, Your Honor, dictate the resolution of a great many others.

There is no attempt here to --

THE COURT: Well, I have another suggestion in that regard, and that is I asked the Court monitor this morning if either side had spoken to him about those matters in the objections in which it was unclear who the speaker was or unclear what the source was, and he said neither side had. And I am going to direct that both sides meet with the Court monitor and let him specify, because he has notes that would show what the source of all the various information was, and that may well lead to some further reduction of the objections

as well, and may provide some further information about other possible witnesses. So we will talk about a schedule when that can be done, but I think that may also simplify things as well.

MR. NAGLE: That would be very helpful, Your Honor, and I might, in the spirit of clarification and simplification, I might inquire of the Court at this juncture, in a colloquy, in a proceeding on Thursday of last week, the Court was informed and subsequently defendants filed a proposed consent order regarding information technology security issues.

Counsel for the defendants inquired of the Court what effect, if any, the tendering of that consent order might have on the supplemental show-cause order that the Court issued Thursday morning. If there was anything by way of clarification or guidance the Court could provide now, that would be most helpful.

THE COURT: Well, I take it it was a proposed consent order. I haven't pursued separately whether the Court should have any involvement in seeing if that can be turned into a final order or whether there are ongoing discussions, or I don't know the exact status of that.

MR. NAGLE: There were comments tendered. As the Court knows, the Justice Department Civil Division is lead counsel on those issues, Your Honor. It is the information to

the United States Attorney's Office's knowledge that comments were provided by plaintiffs' counsel to the draft that was tendered to the Court.

THE COURT: They weren't provided to me, so I don't know anything about it.

MR. NAGLE: I see.

THE COURT: Or if they were, I haven't seen them.

MR. NAGLE: I understand, Your Honor. Well, perhaps counsel can work that out outside these proceedings.

THE COURT: Okay.

MR. NAGLE: Thank you.

THE COURT: In any event, I told the government because of the lateness of the issuance of the order to show cause on computer security that I wouldn't expect responses to that in the early parts of this trial, but if there's going to be a response, we'll get to it when we do.

MR. NAGLE: Very well, Your Honor. Thank you.

THE COURT: Are you ready to call your first witness?

MR. GINGOLD: Yes, Your Honor.

THE COURT: Any other person in the courtroom other than Secretary Griles as the agency representative, and Secretary McClaub as the named party, should retire to the witness room if you expect to be called as a witness in the trial of this matter. Or Ms. Cobell, who is a named party as

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	:	Civil Action 96-1285
Plaintiffs,	:	
v.	:	Washington, D.C.
	:	Friday, December 14, 2001
DEPARTMENT OF THE INTERIOR, et al.,	:	10:45 a.m.
Defendants.	:	

DAY 5
TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE ROYCE C. LAMBERTH
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Pages 808 through 917

THERESA M. SORENSEN,
OFFICIAL COURT REPORTER

EXHIBIT 3

PROCEEDINGS

THE CLERK: In the matter of Elouise Cobell, et al., v. Department of the Interior, et al. Civil Action 96-1285. Mr. Gingold, Mr. Harper, Mr. Brown and Mr. Levitas for the plaintiffs. Mr. Lawrence, Mr. Nagle, Mr. Harris and Mr. Myers for the defendants.

THE COURT: I have first lodged with me last night in chambers a proposed consent order regarding information technology security, and I have a question about one ambiguity in it that I need to resolve with counsel. Mr. Kohn is here, I see, and Mr. Gingold.

On its face the order would resolve the motion for order to show cause that had been filed as well, but the order does not provide for my vacating the order to show cause which has already been issued. So I'm not sure if there's an agreement on the status of that or where that stands.

MR. NAGLE: Good morning, Your Honor, Mark Nagle for the defendants. If I might speak to that issue, Your Honor. The absence of a specific reference to that was specifically a consequence of the colloquy that we had on December 6th, last Thursday. The Court may recall that I inquired of the Court what effect the submission of a consent order would have on your supplemental show-cause order, and our very clear recollection of the Court's response was, well, let me see your order and we'll see.

So we are obviously -- it is very much the defendants' position that this does render moot the issues otherwise raised by your supplemental show-cause order, but we understood your comment to say let me see your order, and I will inform the parties.

It would certainly be our view that this moots out that supplemental show-cause order, Your Honor, and to whatever extent you need further elaboration on why, we're happy to provide it.

THE COURT: Okay. Are the plaintiffs in agreement?

MR. GINGOLD: No, we're not, Your Honor.

THE COURT: Okay.

MR. GINGOLD: Your Honor, for several reasons. Number one, what we are dealing with, as we understand the count, the fifth count in the order to show cause, deals with fraud that's been perpetrated on this Court. We have had more than a year and a half of material representations made to this Court and reliance by this Court on those material misrepresentations to the detriment.

This consent order, although it is a significant advancement with regard to how things may be changed going forward in the future, does not resolve what has occurred in the last year and a half, Your Honor.

Furthermore, as this Court will see, when we -- if we have the opportunity to go through the Special Master's

report that there are significant problems that have been caused by this year and a half of deception practiced on the Court, that the data bases, the integrity of the data bases is clearly at issue, and that the sanctions which this Court discussed on December 6th, which include compensable sanctions and coercive sanctions, also include within the ambit of possible issue preclusion and evidentiary preclusion, Your Honor.

This is very important relative to the phase 2 trial. There is probably no more single document that has relevance and no more single pattern and practice of conduct that has relevance to the phase 2 issues than what has been reflected in the Special Master's report and there is no greater harm that may have been done in the last year and a half than what we have seen with regard to the conduct of the Secretary and Assistant Secretary during that period of time, Your Honor.

Moreover, Your Honor, we also believe that the nature and scope of the deception and the reliance placed by this Court on the representations implicates, by the Justice Department's own standards, potential criminal contempt, and although we are not dealing with that in this case, this Court has not ruled on that going forward, but --

THE COURT: Well, I understand that the issue of criminal contempt could not be resolved by this order, but if

the -- if this order resolves the motion for order to show cause, this Court has no power to proceed with civil contempt. Civil contempt -- the jurisdiction for civil contempt is based solely on a motion by the plaintiffs.

MR. GINGOLD: Your Honor, this was not negotiated as a solution to civil contempt. This was negotiated principally as a basis to enable the Interior Department to reconnect its systems and for the business of the Interior Department to go forward with oversight from the Special Master to ensure that protections are built in.

This was not -- and that is one of the reasons it is not reflected in this document --

THE COURT: Well, except the payment of attorneys' fees has to be in part a settlement of compensatory part of civil contempt.

MR. GINGOLD: We are in full agreement with that, Your Honor, but the issue of issue and evidentiary preclusion was not addressed in this document, either, Your Honor. And we believe those are material issues relative to phase 2.

MR. NAGLE: May we be heard on that, Your Honor?

THE COURT: Yes.

MR. NAGLE: The problem with the plaintiffs argument is that it is misstating the vehicle of civil contempt. As the Court noted in our proceeding on Thursday the 6th, the purpose of civil contempt is curative or coercive and

compensatory, and the show-cause specification issued by the Court in its supplemental order is fully and completely addressed and resolved by this consent order.

To the extent that facts relevant to the issues embraced by the consent order are also relevant or, at least in the plaintiffs' view, arguably relevant to merits issues in Trial 2, they have every opportunity to present those facts.

It cannot be the law, however, that the plaintiffs can try to keep alive what is a moot issue in the contempt context solely for the purpose of gaining issue preclusion opportunities in the later merits phase of the trial.

The facts are what they are, Judge, and the consent order obviously on its face contains no restrictions or prohibitions on what facts the plaintiffs can introduce in the merits phase of this proceeding, and that is why defendants submit this consent order does in fact moot out the supplemental show-cause order, and whatever remains to be litigated is not a civil contempt issue but rather a merits issue for the later phases of the case.

MR. GINGOLD: Your Honor, with all due respect, this Court has the inherent power with regard to contempt.

THE COURT: No, inherent power really goes to criminal. Our Court of Appeals -- one of the first cases I worked on in the U.S. Attorney's Office was when the -- we had a Metro strike that shut down the city and Judge Oberdorfer

brought me in to help the Court as amicus to figure out what power he had to get Metro operating again. I did a lot of research at the time and the research became clear that absent a motion, a court really has no power of civil contempt, a motion by a party.

So I don't think -- if this resolves the motion for order to show cause, I don't think I have any power. Other than criminal. I'm not resolving criminal today, but --

MR. GINGOLD: Your Honor, first of all, we don't think it resolves fraud. It resolves correction going forward. It doesn't resolve the fraud that's been practiced.

THE COURT: I think the only way a court can preserve -- can pursue fraud is by criminal, if there's no motion by a party.

MR. GINGOLD: Your Honor, this very Court, in Shepherd, which is -- you recall Shepherd.

THE COURT: Vividly, since I got reversed. Which opinion are you citing?

MR. GINGOLD: I'm reciting the Court of Appeals --

THE COURT: When I was reversed or --

MR. GINGOLD: Your Honor, I'm reciting the Court of Appeals and this -- you do get reversed, but there are certain aspects that the Court of Appeals embraces, Your Honor, with the exception, of course, in our case --

THE COURT: Accidents happen.

MR. GINGOLD: That's right. And let me read the language from 62 F.3d at 1474, which means, Your Honor, that's the United States Court of Appeals. The language is as follows:

The powers of this Court, quote, the powers of this Court includes the power, quote, to sanction an attorney or party misconduct, which may include fines or awards of attorneys' fees and expenses, contempt citations, disqualification or suspension of counsel, and drawing adverse evidentiary inferences or precluding the admission of evidence, period, close quote.

And, Your Honor, that is the Court of Appeals at 1474.

THE COURT: Oh, I agree, but all of that can only be done on motion of a party, not sua sponte.

MR. GINGOLD: Yes, but, Your Honor, what we were expecting during the course of the contempt trial was our ability to raise that issue once we are able to flesh out the particular issues involved.

If this Court is saying that plaintiffs retain the ability for evidentiary and issue preclusion based on the findings of the Special Master, then there wouldn't be any further need for this to be a contempt issue. But, Your Honor, that is normally something within the contempt ambit, as the Court of Appeals reaffirmed your own authority in that

regard.

THE COURT: Well, let me ask the government a couple of questions.

MR. GINGOLD: Your Honor, the -- we will be willing to brief this if you feel uncomfortable about it.

THE COURT: In terms of what this is doing, what does this do with the objections to the Special Master report as well? Do you know what this contemplates?

MR. NAGLE: I'm not sure I understand exactly what you mean, Your Honor.

THE COURT: Well, in other words, Mr. Kohn filed some fairly lengthy objections to the Special Master report, and are those resolved by this as well, Mr. Kohn, or not?

MR. NAGLE: That's Mr. Kohn's part of the case, Your Honor.

THE COURT: I Know.

MR. NAGLE: I'll let him speak to that.

THE COURT: Because I suppose that might go to this issue, preclusion issue as well.

MR. KOHN: To the extent that we have provided both a cure going forward and compensation for the problems in the past, and I think, as with the contempt similarly it resolves the objections and those aspects of the report.

MR. NAGLE: I don't wish to tag-team the Court on this, Your Honor, but I think Mr. Kohn's comments actually go

right to what the government sees as the heart of the issue here, and I think the Court has already put its finger on it. There is a very specific purpose for civil contempt, and as the Court has correctly noted, it has to come on motion of a party. That has been done.

The vehicle of civil contempt, curative and compensatory, is served and, in our view, fully accomplished by the consent order that's been tendered for the Court's signature.

Insofar as the plaintiffs are looking for other procedural uses of the underlying facts going forward, there is a Special Master appointed pursuant to Rule 53, Mr. Balaran, and he has prepared his report. There were objections filed. The adjudication of those issues to the extent that there's even anything left to be adjudicated is the vehicle by which the plaintiffs can try to gain whatever advantage or use going forward in the merits part of this case that they can try to get. But it cannot be the law that the plaintiff seeking to secure further advantages in the merits phase of the case can purport to keep alive a contempt issue when the vehicle for which contempt is designed in the first place has already been accomplished.

We submit, Your Honor, that this consent order does just that.

THE COURT: Can you, over the lunch hour, see if I

could add a provision to this when I approve it, in which I satisfy the plaintiffs on issue preclusion and still approve this?

MR. NAGLE: We'll be happy to look at that, Your Honor.

THE COURT: But I think in connection with that that I would have to vacate the supplemental show-cause order. Otherwise, it just leaves it ambiguous.

MR. NAGLE: No, we would certainly request that the Court do that, and as I said, the only reason that wasn't specifically set forth was the Court's own comments on December 6th, that you wanted to see the order.

THE COURT: Right.

MR. NAGLE: We're happy to do that and, actually, Your Honor, in light of that request, if I might be excused now from the courtroom, Mr. Lawrence has the witness for this morning. Thank you.

THE COURT: I didn't get the plaintiffs' agreement to that yet.

MR. GINGOLD: If I may make one last point, Your Honor. First of all, the fraud hasn't been cured. That is a fact, and it is not just, as Mr. Nagle said, the curative effect is one of the critical issues. Fraud has not been cured.

Secondly, Your Honor, we did request in our motion

for contempt --

THE COURT: I don't know about that. Why has the fraud not been cured? If they now, by entry of this consent decree, agree to do all these things to get the system up to the A-130 standards and do all these other things, why doesn't that now resolve it, other than the possibility of criminal?

MR. GINGOLD: Well, because, Your Honor, during the over year and a half that this issue was before this Court, we don't know the effect of the failure to have these protections on the system. We do know there are significant problems, and the failure to protect the system during that time, which was, in our opinion, a material misrepresentation to you, is fraud and fraud on the Court. And the consequences of that fraud have not been cured, and that's one of the reasons it's essential to go through the issues.

May I also say, Your Honor, in our motion for order to show cause, we did request issue and evidentiary sanctions. So the motion is before the Court and it is relevant to the contempt that we sought in this case.

Moreover, I think it's important to point out in the proposed consent order that is before you, there is a paragraph that defendants have explicitly consented to, which reads as follows:

"Whereas Interior defendants recognize significant deficiencies in the security of information technology

security systems protecting individual Indian trust data, correcting these deficiencies merits Interior defendants' immediate attention."

Your Honor, they acknowledge there are deficiencies and they must be corrected, but they have not been corrected, and they have been allowed to fester for the last year and a half, with substantial adverse consequence to the plaintiffs.

In addition, these are traditional remedies for contempt. These are not unique remedies for contempt. And what I mean is with regard to issue and evidentiary preclusion, and that's with regard to civil contempt, not criminal contempt, Your Honor.

MR. NAGLE: What more is the Court to do, Your Honor, with regard to solving the problem, or in the Court's phrase of last Thursday, getting the job done? This is an order of the Court. It has the full force and effect of an order of this Court. It clearly has a significant, detailed, very specific, ongoing role for the Special Master as an officer of the Court to talk with Department of Interior and contractor employees, to have on-site inspections, and to do essentially everything else necessary to ensure that, in the Court's phrase, getting the job done is in fact accomplished. That's what civil contempt is all about. Curative. Coercive. Fix the problem. And that's what this order does. And compensatory.

information or e-mails in my position are contained. I looked at all e-mails from the period mid-December through approximately the middle of March. In each instance where I saw an e-mail that even referenced breach report, from whatever source, from whatever party, I printed that e-mail off and brought a copy here -- copies here to the court.

Included are several e-mails from and between Solicitor's office representatives and the Special Trustee's office.

Q. And you have those with you right now?

A. I do.

Q. Can we begin to go through your e-mail at this point in time, Your Honor?

THE COURT: Yes.

BY MR. GINGOLD:

Q. Mr. Thompson, would you present the Court with a copy of, and defendants and plaintiffs with a copy, if you have it, of the e-mail?

MR. GINGOLD: May I approach the witness?

THE COURT: Yes.

THE WITNESS: There are three copies.

MR. GINGOLD: Your Honor, I think we would like to identify this as one exhibit.

THE COURT: Yes. There are three copies, so you can just Plaintiffs -- what is your next number?

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

DECLARATION OF JAMES H. McDIVITT

5

1. I am the Deputy Assistant Secretary for Management – Indian Affairs of the Department of the Interior (Interior).

2. My responsibilities include oversight of administrative operations, including supervising Indian Affairs' Chief Information and Chief Financial Officers.

3. The Bureau of Indian Affairs (BIA) operates two primary systems involved in making regular distributions to individual Indians. These are the Social Services Automated System (SSAS) and the Integrated Resource Management System (IRMS). I have been involved in Interior's efforts to bring these systems up to allow payments to individual Indians to be made, while working with the Special Master to ensure that individual Indian trust data is adequately protected.

Social Service Automated System (SSAS)

4. The SSAS program is physically located on an IBM mainframe computer owned by the National Business Center in Denver, Colorado. On December 5, 2001, the mainframe

EXHIBIT 4

computer was connected to the Internet. The SSAS programs and database on that computer shared a logical partition with individual Indian trust data (IITD) that supported the Land Records Information System (LRIS) and the National Indian Irrigation Management System (NIIMS). The SSAS does not contain individual Indian trust data, but LRIS does, thereby providing potential access to such data through SSAS. SSAS generates general assistance (GA) welfare checks from appropriated funds to the neediest Indians, pays for foster care, institutional care, and burial assistance. The preliminary estimate was that Internet connections could be severed immediately, but the SSAS could not be immediately isolated from the rest of the mainframe and, therefore, the system had to be shut down.

5. BIA came up with three possible options, without resuming operation of the system, for GA checks to be provided to eligible Indians and for foster care payments, institutional care recipients and burial assistance. They were as follows:

   a. Through the Federal Financial System (FFS), a vendor payment could be issued to eligible vendors or clients. This was used for payment of a small number of individuals in tribes that had small populations. However, since each individual had to be entered separately into FFS, this was not an option to pay large numbers.

   b. The Regional Offices could negotiate with a tribal contractor that generated their own checks through their own finance system, and have the tribal contractor issue checks to eligible recipients in the Region. Funds were provided to the tribal contractors rather than using a Treasury disbursement. This method was used to pay approximately 4600 individuals in the Dakotas.

c. Regions could use convenience checks to pay eligible recipients of GA. However, since the checks would be in a form not familiar to local merchants, and it was thought that local merchants might not cash them, this approach was not used.

6. The SSAS was permitted to resume operations on December 19. See Attachment A, Letters from Sandra P. Spooner to Alan Balaran, dated December 17, 2001, with attachments, and December 19, 2001. The mainframe computer on which SSAS runs was disconnected from the Internet (see attachment B to the December 17, 2001 letter). In addition, the SSAS program and data were extracted from the existing logical partition shared with the IITD and were placed within a separate partition such that only the SSAS program and data, which contained no IITD, were accessible (see attachment A to the December 17, 2001 letter). The computer was able to access BIA's internal network through a virtual private network (VPN) that had also been disconnected from the Internet. On December 19, the Special Master approved use of this system.

7. All individual checks, not paid by other means, were processed within days after the system returned to use. BIA is now current in GA payments.

Integrated Resource Management System (IRMS)

8. IRMS is a collection of separate programs and data physically located on a UNISYS minicomputer owned by the BIA in Reston, Virginia. These programs and data serve the functions of determining how funds should be distributed to tribes and individuals based on certain rules such as proportionate shares of ownership in a piece of land. This system processes data that leads to payments to individual Indians for leasing trust lands, and for selling oil, gas, and minerals. These programs are also used to determine per capita

payments to individual tribal members. Distributions based on oil and gas revenues require the receipt of information and funds from the Minerals Management Service (MMS). On December 5, IRMS was connected to the BIA network and the BIA network was connected to the Internet. IRMS clearly houses individual Indian trust data. Because it was not possible to assure that all Internet connections to the BIA network had been severed, the computer was shut off to deny all access.

9. BIA has tried to find alternatives to the IRMS system to make distributions. The only alternative to using the IRMS system that has been developed to date relates to per capita payments. Since these payments use only the portion of IRMS related to membership in a tribe, a copy of the database from the previous payment can be put on a CD and edited for adjustments necessary to make the current payment. These payments can them be made directly from the Office of Trust Funds Management to the recipients. This process is underway to make the per capita payments on the Wind River Reservation, for approximately 2,500 individuals, and could be used to make other such payments for approximately three other reservations where the payments are made frequently and the database does not need significant revision between payments. Because most per capita payments occur infrequently, other databases might require considerable revision that would not make this a viable solution.

10. On December 17, 2001, BIA requested that it be allowed to turn on IRMS, but not reconnect it to the Internet, and resume making distributions. See Attachment B, Letters from Sandra P. Spooner to Alan Balaran, dated December 17, 2001 and December 21, 2001, with attachments. IRMS has been certified to be disconnected from the Internet

and a new firewall was installed on December 14, 2001, between the UNISYS computer and the BIA network to prevent unauthorized access. In addition, all users who would have access through the firewall have been re-certified by their supervisors as having a need to access IRMS. The Special Master requested additional assurances that BIA personal computers were not connected to the Internet. The following additional actions requested by the Special Master were taken:

a. The Deputy Secretary sent to all employees a memorandum dated December 21, 2001 stating that the prohibition on Internet connectivity continues (attached to December 21, 2001 letter).

b. On the same date, the Chief Information Officer of Indian Affairs sent a memorandum to all employees outlining the BIA Internet policy and stating that disciplinary action would be taken against anyone who violated the policy (attached to December 21, 2001 letter).

c. Warning banners noting the no Internet connection policy were placed on log-on screens when users enter BIA's network, and will be established as part of the log-on process for IRMS once approval to turn the system back on is given by the Special Master (part of memorandum from Deputy Secretary to BIA and OST employees, attached to December 21, 2001 letter).

11. Interior is continuing to work with the Special Master to provide any additional assurances he seeks.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: January 4, 2002

James H. McDivitt

United States Department of Justice
Civil Division
Commercial Litigation Branch

SANDRA P. SPOONER
DEPUTY DIRECTOR

P.O. BOX 875, BEN FRANKLIN STATION
WASHINGTON, D.C. 20044-0875

TEL: (202) 514-7194
FAX: (202) 307-0494
EMAIL:SANDRA.SPOONER@USDOJ.GOV

December 17, 2001

By Facsimile

Alan L. Balaran, Esq.
1717 Pennsylvania Avenue, NW
12th Floor
Washington, DC 20006

Re: Cobell v. Norton: SSAS Assurance

Dear Mr. Balaran:

The Consent Order entered by the Court on December 17, 2001, contains the following provision:

> ORDERED that Interior Defendants may operate any information technology system that is not connected to the Internet, but which was shut down pursuant to the December 5, 2001 Temporary Restraining Order, following submission of reasonable assurances to the Special Master, and Interior shall not reconnect any information technology system to the Internet without the concurrence of the Special Master as provided herein . . . .

I am writing to advise you that the Department of the Interior intends to recommence operation of its Social Services Automated System (SSAS) pursuant to this paragraph. The SSAS is used to generate checks from Federal appropriated funds for general assistance, child assistance, emergency assistance, and burial assistance for eligible Indian clients for whom no other assistance is available. Clients include eligible individuals and families and institutions where eligible individuals reside. Data collected is personal data related to applications for services. This data is not individual Indian Trust data, as the funds are appropriated through Congress and SSAS does not provide input to any IIM accounts or IT systems. Attachment A.

Currently, the Department of the Interior is unable to process payments for eligible individuals, tribes and institutions who care for children and disabled Indian clients because SSAS is an IT system that was shut down pursuant to the temporary restraining order entered by

the Court on December 5, 2001, as amended.

Interior is submitting the statement of Richard H. Koebert, Assistant Director, Products and Services, National Business Center, Attachment B, as assurance that SSAS has been disconnected from the Internet.

Although the paragraph quoted above does not contain a waiting period, Interior plans to wait 24 hours to bring SSAS back on line, unless you advise us that we may act sooner.

Thank you.

Sincerely,

SANDRA P. SPOONER

cc: Dennis Gingold (By FAX)
Keith Harper (by FAX)

AH. A

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Washington, D.C. 20240

IN REPLY REFER TO:

Bureau/Agency: Bureau of Indian Affairs, DOI

System Name: Social Services Automated System (SSAS)

System Address: National Business Center
7301 West Mansfield Avenue
Denver, Colorado 80235

Principal Types of Data/Applications:

The Social Service Automated System (SSAS) is used to generate checks from Federal appropriated funds for general assistance (GA), child assistance, emergency assistance and burial assistance for eligible Indian clients for whom no other assistance is available. Clients include eligible individuals and families and institutions where eligible individuals reside. Data collected is personal data related to application for services. This data is not individual Indian trust data, as the funds are appropriated through Congress and SSAS does not provide input to any IIM accounts or IT systems. Currently, we are unable to process payments for eligible individuals and institutions who care for children or disabled Indian clients.

Name of Certifying Official: Michael R. Smith

Title of Certifying Official: Acting Director, Office of Tribal Services

Certifying Official's Telephone Number: (202) 208-3463

Certifying Official's E-mail Address: mikesmith@bia.gov.

I certify that the system identified above does not contain "Individual Indian trust data" as defined herein; and, I certify that the system identified above does not provide "access" to any individual Indian trust data.

Michael R. Smith

Signature

12-12-01

Date

AH B

The BIA Social Services system (SSAS) has been disconnected from the Internet.

Richard H. Koebert
Assistant Director, Products and Services
National Business Center
(303)969-7200

Date: December 17, 2001

United States Department of Justice
Civil Division
Commercial Litigation Branch

SANDRA P. SPOONER
DEPUTY DIRECTOR

P.O. BOX 875, BEN FRANKLIN STATION
WASHINGTON, D.C. 20044-0875

TEL: (202) 514-7194
FAX: (202) 307-0494
EMAIL:SANDRA.SPOONER@USDOJ.GOV

December 19, 2001

By Facsimile

Alan L. Balaran, Esq.
1717 Pennsylvania Avenue, NW
12th Floor
Washington, DC 20006

Re: Cobell v. Norton: SSAS

Dear Mr. Balaran:

I am writing to confirm that this morning you advised us that the Department of Interior may immediately recommence operation of its Social Services Automated System (SSAS) as proposed in my letter dated December 17, 2001.

Thank you for your consideration of this matter.

Sincerely,

SANDRA P. SPOONER

cc: Dennis Gingold (By FAX)
Keith Harper (by FAX)

United States Department of Justice
Civil Division
Commercial Litigation Branch

SANDRA P. SPOONER
DEPUTY DIRECTOR

P.O. BOX 875, BEN FRANKLIN STATION
WASHINGTON, D.C. 20044-0875

TEL: (202) 514-7194
FAX: (202) 307-0494
EMAIL:SANDRA.SPOONER@USDOJ.GOV

December 17, 2001

By Facsimile

Alan L. Balaran, Esq.
1717 Pennsylvania Avenue, NW
12th Floor
Washington, DC 20006

7

Dear Mr. Balaran:

The Consent Order entered by the Court on December 17, 2001, contains the following provision:

> ORDERED that Interior Defendants may operate any information technology system that is not connected to the Internet, but which was shut down pursuant to the December 5, 2001 Temporary Restraining Order, following submission of reasonable assurances to the Special Master, and Interior shall not reconnect any information technology system to the Internet without the concurrence of the Special Master as provided herein . . . .

I am writing to advise you that the Department of the Interior intends to recommence operation of its Integrated Resources Management System (IRMS) pursuant to this paragraph. IRMS, located at the BIA facility in Reston, Virginia, processes data that results in payment to individual Indians for leasing lands (farming, grazing, etc.), sale of oil, gas and minerals, and per capita distributions as directed by the tribal entity. The data include individual and tribal accounts, property ownership and leasing transactions. This system produces an output file which is sent to the Office of Trust Funds Management, a management unit included within the Office of the Special Trustee, where checks are issued by OTFM or a file is sent to the Treasury Department Regional Disbursing Office in San Francisco for checks to be issued.

Currently, the Department of the Interior is unable to make payment to individual Indians for leasing lands, sale of oil, gas and minerals, and per capita distributions because IRMS is an IT system that was shut down pursuant to the temporary restraining order entered by the Court on

December 5, 2001, as amended.

Interior is submitting the statement of Debbie Clark, Acting Chief Information Officer, Bureau of Indian Affairs, as assurance that IRMS has been disconnected from the Internet.

Although the paragraph quoted above does not contain a waiting period, Interior plans to wait 24 hours to bring IRMS back on line, unless you advise us that we may act sooner.

Thank you.

Sincerely,

SANDRA P. SPOONER

cc: Dennis Gingold (By FAX)
Keith Harper (by FAX)

The Bureau of Indian Affairs Integrated Resources Management System (IRMS) has been disconnected from the Internet.

Debbie L. Clark
Chief Information Officer, Acting
Bureau of Indian Affairs
(202) 208-6087
December 17, 2001

United States Department of Justice
Civil Division
Commercial Litigation Branch

Sandra P. Spooner
Deputy Director

P.O. Box 875, Ben Franklin Station
Washington, D.C. 20044-0875

Tel: (202) 514-7194
Fax: (202) 307-0494
Email:sandra.spooner@usdoj.gov

December 21, 2001

By Facsimile

Alan L. Balaran, Esq.
1717 Pennsylvania Avenue, N.W.
12th Floor
Washington, D.C. 20006

Re: Cobell v. Norton - Additional Assurances Regarding IRMS

Dear Mr. Balaran:

In response to my letter of December 17, 2001, you asked for additional assurances that IRMS personal computers are not connected to the Internet.

Enclosed is a copy of :

-- a memorandum dated December 21, 2001, from the Deputy Secretary to all BIA employees. It has been emailed (via the BIA intranet) to some BIA employees and will be mailed to all BIA employees before BIA recommences use of IRMS. The same memo has been emailed to all OST employees.

– a December 21, 2001 "Notice To All Users Of Information Technology Systems Supporting Individual Indian Trust Data" that has been emailed (via the intranet) to all of the authorized users of the IRMS system. Access control for authorized users will be managed through the firewall recently installed by SAIC.

– a December 19, 2001 memorandum from the Assistant Secretary, Indian Affairs to The Associate Deputy Secretary setting out procedures to be used to ensure no unauthorized Internet Access. It also explains the access

control described above.

In addition, the banner set out in the Deputy Secretary's memorandum will be part of the log-on screen of the Unisys NX system that houses the IRMS application. All users will see this banner as part of the log-on process.

If these assurances are adequate, please let me know as soon as possible so that Interior can proceed to operate IRMS.

Thank you for your consideration of this matter.

Sincerely,

SANDRA P. SPOONER

cc: Dennis Gingold (By FAX)
Keith Harper (By FAX)

CERTIFICATION

The attached December 21, 2001 "Notice To All Users Of Information Technology Systems Supporting Individual Indian Trust Data" has been emailed to all of the authorized users of the IRMS system.

The attached memorandum dated December 21, 2001, from J. Steven Griles has been emailed to some BIA employees and will be emailed to all BIA employees before BIA recommences use of IRMS.

The banner set out in the Griles memorandum will be part of the log-on screen on the Unisys NX system that houses the IRMS application. All users will see this banner as part of the log-on process.

JAMES H. McDIVITT
Deputy Assistant Secretary – Indian Affairs

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Washington, D.C. 20240

IN REPLY REFER TO:

December 21, 2001

To: ALL Information Technology System Users

From: Debbie L. Clark
Chief Information Officer, Acting

Subject: NOTICE TO ALL USERS OF INFORMATION TECHNOLOGY SYSTEMS SUPPORTING INDIVIDUAL INDIAN TRUST DATA

As we begin to bring information technology systems (ITS) back on-line to process transactions and payments to individual Indians, it is crucial that each user of Indian Affairs ITS not violate the "NO INTERNET" policy of the Assistant Secretary, Indian Affairs. December 19, 2001 Memorandum from Assistant Secretary - Indian Affairs.

- You may not use any modem in your government-issued or personal PC or laptop in your office.

- You are not authorized to connect to your local Internet Service Provider, such as America On Line in your office.

- You are not authorized to connect your government issued laptop to the Internet from your home or while on travel.

This policy is applicable to all Indian Affairs ITS, including servers, PCs, laptops, etc.

No connections to the Internet are permitted until we receive ITS specific approval from the Associate Deputy Secretary. There is an established process for requesting this approval. All requests will go through your Office or Regional Director, who will forward the request and supporting documentation to the Indian Affairs Chief Information Officer (CIO). The Office of the CIO will prepare the package for submission to the Department Associate Deputy Secretary, who is charged with obtaining the concurrence of the Special Master.

There are NO EXCEPTIONS to this policy; if in doubt, obtain guidance from your Office or Regional Director or the Office of the CIO. You can contact the Office of the CIO via e-mail (debbieclark@bia.gov) or telephone at (202) 208-6033. Failure to adhere to this policy will result in disciplinary action.

United States Department of the Interior

OFFICE OF THE DEPUTY SECRETARY
Washington, D.C. 20240

DEC 21 2001

MEMORANDUM

To: All BIA Employees

From: J. Steven Griles
Deputy Secretary

James E Cason
Associate Deputy Secretary for

Subject: Continued Prohibition of Internet Access

Pursuant to a Temporary Restraining Order entered by the U.S. District Court and a subsequent Consent Order, the Department of Interior, with the exception of the U.S. Geological Survey is disconnected from the Internet and may not be reconnect to the Internet until authorized to do so.

The Consent Order provides a means through which segments of DOI can connect to the Internet following assurances and concurrence of the Special Master. No connection to the Internet is permitted until approved by the DOI Associate Deputy Secretary. Currently the U.S.G.S. is the only agency that has been authorized to use the Internet.

Until further notice the following banner shall be used during the log-in process to remind DOI employees of our policy. I have asked the Department's Chief Information Officer to work with agency personnel to insure that this banner is prominently displayed during the log-in process for each information technology system within Interior that does not have Internet connection approval.

THIS IS A NOTICE OF MONITORING OF DEPARTMENT OF THE INTERIOR INFORMATION SYSTEMS. This system and all related equipment may be used only for official US Government business. This system may not be connected to the Internet, in any way, unless authorized by the Office of the Secretary. Unauthorized use of this system will subject you to disciplinary action and/or other penalties. Use of this system constitutes consent to monitoring for this purpose.

Subsequent notifications will be provided as appropriate. If you have questions, please contact your supervisor or agency Chief Information Officer.

CERTIFICATION

The attached memorandum dated December 21, 2001, from J. Steven Griles has been emailed to all OST employees.

ROBERT C. McKENNA
Acting Chief Information Officer
Office of Special Trustee

United States Department of the Interior

OFFICE OF THE DEPUTY SECRETARY
Washington, D.C. 20240

DEC 21 2001

MEMORANDUM

To: All Office of Special Trustee (OST) Employees

From: J. Steven Griles
Deputy Secretary
James E Cason
Associate Deputy Secretary for

Subject: Continued Prohibition of Internet Access

Pursuant to a Temporary Restraining Order entered by the U.S. District Court and a subsequent Consent Order, the Department of Interior, with the exception of the U.S. Geological Survey is disconnected from the Internet and may not be reconnect to the Internet until authorized to do so.

The Consent Order provides a means through which segments of DOI can connect to the Internet following assurances and concurrence of the Special Master. No connection to the Internet is permitted until approved by the DOI Associate Deputy Secretary. Currently the U.S.G.S. is the only agency that has been authorized to use the Internet.

Until further notice the following banner shall be used during the log-in process to remind DOI employees of our policy. Initially this banner will be used in conjunction with the BIA Integrated Resource Management System (IRMS) and the OST Fund Accounting System (TFAS). I have also asked the Department's Chief Information Officer to work with agency personnel to insure that this banner is prominently displayed during the log-in process for other information technology systems located within Interior that does not have Internet connection approval.

THIS IS A NOTICE OF MONITORING OF DEPARTMENT OF THE INTERIOR INFORMATION SYSTEMS. This system and all related equipment may be used only for official US Government business. This system may not be connected to the Internet, in any way, unless authorized by the Office of the Secretary. Unauthorized use of this system will subject you to disciplinary action and/or other penalties. Use of this system constitutes consent to monitoring for this purpose.

Subsequent notifications will be provided as appropriate. If you have questions, please contact your supervisor or agency Chief Information Officer.

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

DEC 19 2001

Memorandum

To: Associate Deputy Secretary

From: Assistant Secretary, Indian Affairs

Subject: Request for approval to operate IRMS within the BIANET

The offices and staff reporting to the Assistant Secretary, Indian Affairs (AS-IA) will remain disconnected from the Internet until further notice, pursuant to the Consent Order of December 17, 2001. This policy is in effect for trust and non-trust systems housed throughout BIA. AS-IA will disseminate a letter to all BIA employees that clearly articulates the "No Internet" access policy for any information technology system (ITS) that houses individual Indian trust data or could allow access to individual Indian trust data.

All Regional Directors (RD) and Deputy Regional Directors (DRD) were instructed that specific written approval from the Indian Affairs Chief Information Officer (CIO) is required to reconnect any ITS disconnected pursuant to the Court Order. The CIO will ensure that approval is received in advance from the Department of Interior, Associate Deputy Secretary. The Associate Deputy Secretary is charged with obtaining concurrence from the Special Master.

In the interim, BIA is seeking approvals to use the Integrated Records Management System (IRMS) to facilitate distribution of individual Indian funds. Indian Affairs has taken steps to limit the access to the IRMS. We have installed a firewall between the BIANET and the IRMS Unisys NX hardware. Initially, this firewall will only allow access from the users identified below. As additional personnel are certified for access we will add their Internet Protocol (IP) addresses to the firewall access control list.

If we receive approval to operate IRMS, it is imperative that no one in the BIA, especially individuals using IRMS accesses the Internet.

We will notify all authorized users via the BIANET Lotus Notes e-mail system (with return receipt notification) of the AS-IA policy on no Internet access without specific approval as outlined above. All users will sign a certification indicating they understand and accept the restrictions on accessing individual Indian trust data.

United States Department of Justice
Civil Division
Commercial Litigation Branch

Sandra P. Spooner
Deputy Director

P.O. Box 875, Ben Franklin Station
Washington, D.C. 20044-0875

Tel: (202) 514-7194
Fax: (202) 307-0494
Email:sandra.spooner@usdoj.gov

December 21, 2001

By Facsimile

Alan L. Balaran, Esq.
1717 Pennsylvania Avenue, N.W.
12th Floor
Washington, D.C. 20006

Re: Cobell v. Norton - Notice of Intent to Reconnect MMS Information Technology Systems with Plan for Reconnection

Dear Mr. Balaran:

The Consent Order entered by the Court on December 17, 2001, contains the following provision:

> ORDERED that Interior may reconnect to the Internet any information technology system that houses or provides access to individual Indian trust data. At least seventy-two (72) hours before reconnecting, Interior shall give actual notice to the Special Master and Plaintiffs' counsel with appropriate documentation of its intent to reconnect. At that time, Interior shall provide its plan to reconnect to the Special Master. . . .

I am writing to provide notice that the Department of the Interior's Minerals Management Service (MMS) intends to reconnect all its information technology systems to the Internet. Enclosed, as documentation, is MMS's reconnection plan ("MMS Application/Network/Internet Re-connection Action Plan) and a description of the security systems to protect individual Indian Trust Data. In addition, enclosed is a contact list for key MMS personnel to assist you in the event you need additional information.

I would appreciate your reviewing this information and advising us as soon as possible whether it is satisfactory. Interior will, of course, await your approval before reconnecting. I

EXHIBIT 5

understand that you will inform us in the event you have objections so that we may attempt to resolve them.

Sincerely,

SANDRA P. SPOONER

cc: Dennis Gingold (By FAX)
Keith Harper (By FAX)

United States Department of the Interior

MINERALS MANAGEMENT SERVICE
Washington, DC 20240

DEC 13 2001

Memorandum

To: James Cason
Associate Deputy Secretary

From: Lucy Querques Denett
Acting Director, Minerals Management Service

Subject: Certification of MMS Systems and Request for Relief

The Minerals Management Service has assembled the attached package that we believe demonstrates that the MMS is providing a secure environment for all of its systems. As such, the MMS is asking that the Court grant us relief from the temporary restraining order, allowing the MMS to reconnect its systems and networks to the internet. The MMS submission provides certifications for all of its systems that, to the best of our knowledge, do not store "individual Indian trust data" or provide "access" to any individual Indian trust data, as defined in the certification.

The MMS also provides certifications for all of its systems that do store or may store "individual Indian trust data" and provide or may provide "access" to individual Indian trust data as defined in the certification. However, recognizing that no system is completely secure, we believe that sufficient security measures are in place that adequately protects this information from unauthorized access. We have provided documentation that describes our system and network security to support our position. Additionally, we have documented the processes we used to revalidate user access to the MRM systems.

Attachments

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

DECLARATION OF HART M. ROSSMAN

1. I am an employee of Science Applications International Corporation ("SAIC"), an international consulting firm providing information technology and systems integration services worldwide.

2. SAIC is currently under contract with the Department of the Interior ("Interior") to provide information technology security services.

3. I am employed at SAIC as a Technical Director for the Secure Business Solutions Group. In this role I have been involved with the certification and accreditation of information systems for a variety of clients.

4. Certification and accreditation of information systems takes the form of a standards-based approach to risk management. Bringing information systems into compliance with identified standards and providing independent verification of compliance is a time consuming task that requires planning and careful implementation.

EXHIBIT 6

5. Based upon my current understanding of the Department of the Interior's situation, I estimate that it would take 2-4 years to bring all individual Indian trust information systems into compliance with OMB Circular A-130, Appendix III.

6. I understand that Plaintiffs' have proposed an order that would require Interior to fully comply with OMB Circular A-130 within 120 days. That time frame is not reasonable, because the standards set forth by OMB Circular A-130, Appendix III require further technical clarification and requirements to be agreed upon to account for Interior's business process; policies must then be developed that support the specific accreditation requirements; procedures must then be developed to implement the policy; the procedures must then be implemented; the implemented procedures must then be tested; and the integration of the above steps must then be approved by the recognized approval authority.

7. In the interim period between beginning the certification and accreditation process and actual accreditation of the existing information system, agreed-upon measures can be taken to reasonably protect the information system while maintaining Intranet and Internet connections.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: January 4, 2002

Hart M. Rossman

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

DECLARATION OF JAMES E. CASON

1. I am the Associate Deputy Secretary of the Department of the Interior ("Interior"). I assumed this position on August 13, 2001.

2. My position includes responsibility for the management of a broad range of issues within the Department. For the most part, I have spent most of my time to date providing assistance with matters associated with individual Indian trusts.

3. I have taken the lead in coordinating Interior's efforts, pursuant to the Consent Order entered December 17, 2001, to work with the Special Master.

4. Under the Consent Order, Interior may reconnect to the Internet such systems, providing the Special Master agrees that Interior's plan for reconnection provides adequate security for individual Indian trust data, under three different paragraphs.

5. The second of those three paragraphs provides for temporary reconnection to the Internet "for the limited purposes of (1) testing the security of the information technology systems, or (2) performing those functions necessary to receive, account for, and

EXHIBIT 7

distribute trust funds or appropriated funds, or to provide other necessary services." (emphasis added).

6. I have reviewed Plaintiffs' proposed Preliminary Injunction Regarding Information Technology Security ("Proposed Preliminary Injunction"), which also includes a provision for temporary reconnection of information technology systems, but does not permit such temporary reconnection to allow Interior to "provide other necessary services." Proposed Preliminary Injunction at 17.

7. Interior provides necessary services beyond the distribution of trust and appropriated funds, including law enforcement, fire protection, public health and safety or other services required by statute.

8. To provide some of these necessary services, it may become important to have the capability to temporarily reconnect to the Internet selected information technology systems that may or may not house or provide access to individual Indian trust data prior to the Special Master's concurrence for long term connection of the system to the Internet. In such circumstances, Interior believes it is important to be able to work with the Special Master, pursuant to any temporary reconnection paragraph, to seek concurrence to provide these services.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: January 4, 2002

James E. Cason

CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on January 4, 2002 I served the foregoing Interior Defendants' Response to Plaintiffs' Motion for a Preliminary Injunction by facsimile upon:

Keith Harper, Esq.
Native American Rights Fund
1712 N Street, NW
Washington, D.C. 20036-2976
202-822-0068

Dennis M Gingold, Esq.
Mark Brown, Esq.
1275 Pennsylvania Avenue, N.W.
Ninth Floor
Washington, D.C. 20004
202-318-2372

by facsimile and by hand:

Alan L. Balaran, Esq.
Special Master
1717 Pennsylvania Ave., N.W.
12th Floor
Washington, D.C. 20006
(202) 986-8477

and by hand:

Joseph S. Kieffer, III
Court Monitor
420 - 7th Street, N.W.
Apartment 705
Washington, D.C. 20004

by U.S. Mail upon:

Elliott Levitas, Esq.
1100 Peachtree Street, Suite 2800
Atlanta, GA 30309-4530

K.P. Kingston

Kevin P. Kingston