IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	No. 1:96CV01285
Plaintiffs,	)	(Judge Robertson)
v.	)	
	)	
DIRK KEMPTHORNE, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF WITNESSES FOR DEPOSITION AND REQUEST FOR SANCTIONS

INTRODUCTION

In their March 9, 2007 Motion to Compel Production of Witnesses for Deposition and Request for Sanctions ("Motion to Compel"), Plaintiffs again seek to revive moot discovery issues. Defendants interpret this Court's January 16, 2007 Order – denying Interior Defendants' October 7, 2005 Motion for A Protective Order Quashing Plaintiffs' Amended Notices of Deposition Served Sept. 29, 2005 (Dkt. No. 3186) ("Protective Order Motion") – as a denial based on the mootness of the proposed discovery. Defendants do not see how it could be reasonably interpreted as allowing additional, broad-ranging discovery regarding allegations of contempt Plaintiffs made in a motion that was also denied in the same order, and regarding IT security – a matter that was the subject of an extended evidentiary hearing in 2005, with a vacatur of the resulting injunction in July 2006. Furthermore, even assuming, solely for the sake of argument, that IT security and the contempt allegations were relevant to the accounting the Secretary of the Interior must perform, this Court is not currently reviewing the accounting.

Even if it were, under the Administrative Procedure Act ("APA"), review of agency action normally is a record review, which does not involve broad discovery. The APA thus does not contemplate discovery, much less the perpetual, roving and intrusive discovery into agency operations that Plaintiffs seek. Defendants respectfully submit this memorandum in opposition to Plaintiffs' motion.

BACKGROUND

On July 26, 2005, Plaintiffs filed a Motion for an Order to Show Cause Why Secretary Norton, W. Hord Tipton and Other Interior Employees Should Not Be Held in Civil and Criminal Contempt of Court for Violating This Court's Anti-Retaliation Order ("Plaintiffs' Contempt Motion"). On September 29, 2005, Plaintiffs served Defendants with amended deposition notices for nine Interior officials, including the Secretary of the Interior. Plaintiffs later confirmed that at least one topic of deposition for each witness would be the allegations raised in Plaintiffs' Contempt Motion. See September 30, 2005, Letter from Tracy L. Hilmer to Dennis M. Gingold (appended as Attachment A).[1] Plaintiffs' counsel further advised that three of the proposed depositions – including that of Larry Jensen, Deputy Solicitor for the Department of the Interior – would be *limited* to those contempt allegations. See id.

In addition, on September 29, 2005, Plaintiffs served Defendants with a deposition notice of the Office of the Inspector General for the Department of the Interior ("OIG"), pursuant to Federal Rule of Civil Procedure 30(b)(6), requesting designation of a witness to testify regarding seven subject matters, three of which involved the allegations from Plaintiffs' Contempt Motion. Three other subjects in the Rule 30(b)(6) deposition notice involved IT

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[1] This letter was attached as Exhibit 2 to Defendants' Protective Order Motion.

security investigations by OIG. The only other noticed subject concerned any investigation by Interior's OIG regarding document destruction at the National Archives and Records Administration ("NARA").

On October 7, 2005, Defendants' filed their Protective Order Motion seeking to quash all the September 29, 2005 deposition notices. Defendants explained in the motion why Plaintiffs were not entitled to conduct discovery into their contempt allegations and why their IT security discovery was duplicative and cumulative of the vast discovery already obtained during the 59-day evidentiary hearing held in the summer of 2005. Defendants further established that Plaintiffs were not entitled to conduct perpetual, continuing IT security discovery after the hearing record had been closed. See Protective Order Motion, at 2-10. Defendants also explained that Interior's OIG could not reasonably be expected to designate a Rule 30(b)(6) witness with knowledge about an investigation being conducted by NARA's Inspector General. See id. at 12-13. Finally, Defendants explained that Plaintiffs should not be permitted to take the deposition of the Secretary of the Interior because high-ranking government officials cannot be deposed absent extraordinary circumstances, not present here. Id. at 13-14.

On January 16, 2007, the Court denied Defendants' Protective Order Motion. See Order (Dkt. No. 3283) ("January 16, 2007 Order"). The Court denied the motion without explanation, listing it among a number of pending motions that were being denied by the same Order. Included in this list of denied motions was Plaintiffs' Contempt Motion.

On March 8, 2007, Plaintiffs' counsel inquired by telephone whether Defendants would make Mr. Jensen and the OIG Rule 30(b)(6) witness available for deposition, in light of the Court's January 16, 2007 Order. Defendants' counsel informed Plaintiffs that Defendants

believed that their Protective Order Motion was denied on January 16, 2007 because the discovery sought in 2005 was now moot with the Court's denial of Plaintiffs' Contempt Motion and the appellate vacatur of the IT security injunction. Thus, Defendants' counsel indicated that the witnesses would not be made available for deposition.

On March 9, 2007, Plaintiffs filed their Motion to Compel. It is unclear whether Plaintiffs now seek to conduct the depositions of all nine Interior officials – including the Secretary of the Interior – and the Rule 30(b)(6) deposition of OIG, that were the subject of the September 29, 2005 deposition notices, or whether they have now limited their demand to Mr. Jensen and the OIG Rule 30(b)(6) deposition. The proposed order attached to their Motion to Compel would only order the latter, but the rhetoric of their Motion to Compel is broader. See, e.g., Motion to Compel at 1-2 ("[I]t is now necessary to order Interior defendants under Rule 26(c) to produce each named individual for deposition . . . . [T]he government's continued refusal to produce the noticed individuals makes this motion necessary.").

ARGUMENT

I. The Discovery Plaintiffs Seek is Moot

Defendants' interpretation of the Court's January 16, 2007 Order – that Defendants' Protective Order Motion was denied because it was moot – is entirely reasonable under the circumstances. In the very same order denying Defendants' Protective Order Motion, the Court also denied Plaintiffs' Contempt Motion. Plaintiffs had informed Defendants in 2005 that the allegations in their Contempt Motion would be explored in all of the noticed depositions and that three of the noticed depositions – including that of Mr. Jensen – would be *limited* to that issue. See Attachment A. Three of the seven subject areas in the Rule 30(b)(6) deposition notice also related to their contempt allegations. The Court's denial of the Contempt

Motion would seem to render discovery into contempt allegations contained within the motion moot.

With regard to IT security discovery, it is also reasonable to conclude that the Protective Order Motion was denied as moot. Defendants had already produced a massive amount of IT security discovery and testimony in connection with the IT security hearing in 2005. The record in that hearing was closed in July 2005, the Court issued its injunction in October 2005, and the Court of Appeals vacated that injunction in July 2006. Several of the motions that the Court denied in the same order were also associated with that injunction. See Order of January 16, 2007 (Dkt. Nos. 3097, 3168, 3186-3188, 3192, 3197, and 3200).

Moreover, Interior Defendants already provide relevant information on IT security matters in the Quarterly Status Reports filed with the Court. See, e.g., Status Report to the Court Number Thirty-Eight, at 43-49 (Feb. 1, 2007). In their Contempt Motion, Plaintiffs tell the Court that they need the Rule 30(b)(6) deposition on the IT security incident at MMS because Interior Defendants have not "provided such information in their quarterly reports to this Court." Contempt Motion at 3 n.2. This is untrue. Interior Defendants reported on the status of the investigation in the Twenty-Third Quarterly Report. See Status Report to the Court Number Twenty-Three, at 5 (Nov. 1, 2005) ("The incident is still under investigation with the OIG and FBI. Based upon the investigation to date, there is no reason to believe the integrity of any data was compromised. Changes have been made . . . .") (appended as Attachment B). Interior Defendants also reported on the final results of the investigation. See Status Report to the Court Number Twenty-Four, at 4 (February 1, 2006) ("Final security scans and a security review were conducted by an independent contractor, which confirmed that the integrity of IITD was not compromised.") (appended as Attachment C).

Under these circumstances, the only reasonable interpretation of the Court's Order is that it denied Defendants' Protective Order Motion as moot. Plaintiffs' contrary interpretation – that the Court intended to re-open discovery into IT security issues that were the subject of a hearing completed in 2005 – is simply unreasonable. Plaintiffs' assertion – without any discussion – that the depositions of Mr. Jensen and OIG officials will "undoubtedly lead to the discovery of admissible evidence," Motion to Compel at 4, rests on an assumption that the requested discovery is still relevant to a current issue in the case. Currently, there is no proceeding for which IT security information would be relevant, much less admissible.[2] No government witnesses are scheduled to testify about IT security. As noted above, the evidentiary portion of the IT Security Hearing closed in the summer of 2005, the Court issued its injunction in 2005, and that injunction was vacated in July 2006. Moreover, a principal reason the Court of Appeals gave for vacating the Court's 2005 IT Security Injunction was that it was "unconvinced the class members demonstrated that they would necessarily suffer harm without th[e] injunction." Cobell v. Kempthorne, 455 F.3d 301, 315 (D.C. Cir. 2006).

Plaintiffs argue that the January 16, 2007 Order should be interpreted completely out of context, without consideration of intervening appellate decisions, the current posture of the case, or common sense. Defendants' interpretation – that the Court considered the Protective

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[2] Although Defendants recently filed a Motion to Vacate Consent Order Regarding Information Technology Security (Dkt. No. 3296), discovery is neither necessary nor should be permitted for any response to this motion which Plaintiffs may file. The motion involves only a question of law and recites facts that have already been found by the Court or cannot be reasonably disputed.

Order Motion moot because the IT Security hearing and appellate review of the matter are long over – is more reasonable.[3]

The discovery Plaintiffs seek to obtain from Defendants regarding NARA's investigation is also moot.[4] Defendants have already reported on this matter to the Court – and NARA also wrote two letters directly to Plaintiffs' counsel providing information about their investigation, and its results. See Letter of September 28, 2005 from Jason Baron to Dennis Gingold (attached as an exhibit to Defendants' Notice of Filing of September 2005 Status Report by the Department of the Interior Office of Trust Records [Dkt. No. 3191]) (appended as Attachment D); Letter of December 9, 2005 from Jason Baron to Dennis Gingold (attached as an exhibit to Defendants' Notice of Filing of November 2005 Status Report by the Department of the Interior Office of Trust Records [Dkt. No. 3220]) (appended as Attachment E). Furthermore, as was made clear in the Protective Order Motion, the OIG for Interior is not in a position to designate a Rule 30(b)(6) witness because the investigation was conducted by the OIG at NARA. See Protective Order Motion at 12-13.

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[3] To the extent that Plaintiffs seek to compel the deposition of the Secretary of the Interior, it is also unreasonable to assume that the Court would have intended to permit such an extraordinary deposition by denying the Protective Order Motion without comment. Defendants incorporate here by reference the arguments made in their Protective Order Motion, explaining why the deposition of a cabinet official is improper. See Protective Order Motion at 13-14.

[4] The Rule 30(b)(6) deposition notice requested OIG to designate an official knowledgeable about:

"4. Any investigation performed relating to the actual or potential destruction of documents containing Indian Trust Data ("ITD") at the National Archives and Records Administration, including the nature of documents destroyed or disposed of, and the substance of interviews with potential witnesses."

See Plaintiffs' Amended Rule 30(b)(6) Notice of Deposition of OIG, at 2 (appended as Attachment F).

II. The Discovery Plaintiffs Seek To Compel Is Improper Under the APA

The APA also forecloses Plaintiffs from obtaining the roving discovery they seek. Although this Court previously permitted Plaintiffs discovery on certain topics notwithstanding this case's jurisdictional footing in the APA, the Court of Appeals has since reiterated and clarified the limits of the Court's jurisdiction under the APA vis-a-vis the common law governing trusts. Cobell, 455 F.3d at 303-07. Therefore, future proceedings, including discovery, must be viewed in the context of the recent Court of Appeals decisions and the well-established constraints of the APA.

In its July 11, 2006 decision, the Court of Appeals reconciled the fact that this is an APA case with the fact that Interior is acting as a fiduciary to whom common trust law would apply. In vacating the preliminary injunction entered following the IT Security hearing, the Court of Appeals explained:

> Because "an on-going program or policy is not, in itself, a 'final agency action' under the APA," our jurisdiction does not extend to reviewing generalized complaints about agency behavior. Consequently, each case only presents the court with a narrow question to resolve, it can have no occasion to order wholesale reform of an agency program. Still, "because the underlying lawsuit is both an Indian case and a trust case in which the trustees have egregiously breached their fiduciary duties," the court "retains substantial latitude, much more so than in the typical agency case, to fashion an equitable remedy." These equitable powers, limited at one end of the spectrum by the court's inability to order broad, programmatic reforms, are also limited in the opposite direction by an inability to require the agency to follow a detailed plan of action. The court generally may not prescribe specific tasks for Interior to complete; it must allow Interior to exercise its discretion and utilize its expertise in complying with broad statutory mandates. These restraints are put in place by both administrative law and trust law. The ability of the agency itself to exercise its discretion is somewhat constrained, however. Rather than its normal freedom to choose

> 'any reasonable option,' the agency's actions must satisfy fiduciary standards.

Id. at 307 (internal citations omitted).

The APA's limitations articulated in this appellate decision are consistent with the Court of Appeals' decisions in prior APA cases. In all but exceptional situations, judicial review of agency action is confined to the administrative record. See Commercial Drapery Contractors, Inc. v. United States, 133 F.3d 1, 7 (D.C. Cir. 1998) (in most instances, the APA "limits review to the administrative record . . . ." (citations omitted)); see also Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F. Supp. 2d 57, 65 (D.D.C. 2002), aff'd, 333 F.3d 156 (D.C. Cir. 2003) ("It is well-established that the scope of review under the APA is narrow and must ordinarily be confined to the administrative record." (citation omitted)). As established over thirty years ago in Camp v. Pitts, 411 U.S. 138, 142 (1973) (per curiam), "the focal point for judicial review [of agency action] should be the administrative record already in existence, not some new record made initially in the reviewing court." Accord Fla. Power & Light v. Lorion, 470 U.S. 729, 743 (1985); see also Common Sense Salmon Recovery v. Evans, 217 F. Supp. 2d 17, 20 (D.D.C. 2002) ("[P]laintiffs fail to recognize the basic rule that generally discovery is not permitted in Administrative Procedure Act cases because a court's review of an agency's decision is confined to the administrative record." (citations omitted)); Marshall County Health Care Auth. v. Shalala, 988 F.2d 1221, 1226 (D.C. Cir. 1993) ("[C]hallengers to agency action are not . . . ordinarily entitled to augment the agency's record with" discovery.); Texas Rural Legal Aid, Inc. v. Legal Services Corp., 940 F.2d 685, 698 (D.C. Cir. 1991) ("The general principle that informal agency action must be reviewed on the administrative record predates the APA . . . ." (citations omitted)); National Law Ctr. on

Homelessness and Poverty v. Department of Veteran's Affairs, 736 F. Supp. 1148, 1152 (D.D.C. 1990) ("[D]iscovery is not [generally] permitted prior to a court's review of the legality of agency action . . . .").

With respect to IT security, in its July 11, 2006 decision, the Court of Appeals noted that the Federal Information Security Management Act of 2002 ("FISMA")[5] established a statutory scheme to manage and provide oversight of IT security risks. Cobell, 455 F.3d at 308-14. The appellate court further observed that "[n]otably absent from FISMA is a role for the judicial branch," and concluded that "[t]his is not a FISMA compliance case, whether or not such an animal exists elsewhere." Id. at 314 (dictum). Thus, APA review of final agency action on an accounting does not translate into perpetual discovery and judicial oversight of Interior's programmatic efforts concerning IT security.

In contradiction to this controlling authority, Plaintiffs apparently wish to engage in a roving investigation into IT security, untethered to any proceeding. Such a fishing expedition is not merely improper under the APA, it is never appropriate under the federal rules.

Plaintiffs have already been afforded vast discovery into the Interior Department's efforts to secure and protect its IT systems – well beyond that countenanced in any APA case – and nothing warrants further departure from the firm rule that APA cases are decided on the administrative record. Before the Court can ascertain whether additional extra-record discovery is appropriate in this case, Interior must file an administrative record on its accounting. Only at that point will it be appropriate for Plaintiffs to attempt to demonstrate

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[5] See Pub. L. No. 107-347, Title III, §§ 301-305.

that this is one of the exceptional circumstances in which judicial review of an agency action may consider matters not in the administrative record.[6]

III. Defendants' Interpretation of The Court's January 16, 2007 Order Is Substantially Justified

Even if the Court determines that Plaintiffs are entitled to some or all of the requested discovery, Defendants' interpretation of the Court's January 16, 2007 Order is substantially justified and, therefore, sanctions are not appropriate. In adjudicating discovery disputes, sanctions are not appropriate if, as in this instance, a party was "substantially justified" in advancing its position. Fed. R. Civ. P. 37(a)(4)(A). "If there is an absence of controlling authority, and the issue presented is one not free from doubt and could engender a responsible difference of opinion among conscientious, diligent but reasonable advocates, then the opposing positions taken by them are substantially justified." Athridge v. Aetna Cas. & Sur. Co., 184 F.R.D. 200, 205 (D.D.C. 1998) (citations omitted).

For all the reasons articulated in this Opposition, Defendants' interpretation of the Court's January 16, 2007 Order – that the Court denied Defendants' Protective Order Motion as moot – is reasonable. The context in which Defendants' Motion was denied would lead a reasonable litigant to understand that the Court denied Defendants' Motion because the issues were moot. Under these circumstances, an adverse ruling by the Court should not warrant sanctions.

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[6] Also, to the extent that Plaintiffs still intend to investigate the criminal contempt allegations in their Contempt Motion, notwithstanding its denial, this Court's decision in Landmark Legal Foundation v. EPA, 272 F. Supp. 2d 70, 76 (D.D.C. 2003), citing Young v. United States ex rel. Vuitton et Fils, S.A., 481 U.S. 787, 801, 814 (1987), makes clear that the Plaintiffs cannot assume this role.

CONCLUSION

For these reasons, the Court should deny Plaintiffs' Motion To Compel.

Dated: March 23, 2007

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General
MICHAEL F. HERTZ
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director

/s/ Robert E. Kirschman, Jr.
ROBERT E. KIRSCHMAN, JR.
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CERTIFICATE OF SERVICE

I hereby certify that, on March 23, 2007 the foregoing *Defendants' Opposition to Plaintiffs' Motion to Compel Production of Witnesses for Deposition and Request for Sanctions* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

Earl Old Person (*Pro se*)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417
Fax (406) 338-7530

/s/ Kevin P. Kingston
Kevin P. Kingston

U.S. Department of Justice

Civil Division

MFH:THilmer

Atty: Tracy Hilmer
Tel: (202)307-0474

Post Office Box 261, Ben Franklin Station
Washington, D.C. 20530

September 30, 2005

By Facsimile (202)318-2372

Dennis M. Gingold, Esq.
Box No. 6
607 14th Street, NW
Washington, DC 20005

Re: *Cobell v. Norton*, Civ. Action No. 96-1285 (RCL) (D.D.C.)

Dear Mr. Gingold:

This is to confirm Bob Kirschman's and my discussion with you today regarding plaintiffs' amended notices of deposition issued on September 29, 2005, for the following: W. Hord Tipton, Larry Benna, Selma Sierra, Joel Hurford, Gale Norton, Kathleen Clarke, Michael Nedd, Larry Jensen, Kathleen Wheeler, and the Department of the Interior Office of Inspector General (pursuant to Fed. R. Civ. P. 30(b)(6)). We also discussed plaintiffs' request for production of documents served September 29, 2005.

In your voicemail message to me on Tuesday, September 27, 2005, you advised that plaintiffs intended to issue a series of deposition notices with regard to the Levine matter that is the subject of plaintiffs' show cause motion. In our conversation today, you advised that the proposed depositions of Michael Nedd, Larry Jensen, and Kathleen Wheeler would seek information solely about the Levine matter, but that the other proposed depositions could go beyond the Levine matter. The notice for the proposed Rule 30(b)(6) deposition and the document requests identify some categories limited to the Levine matter as well as categories that address other topics.

We informed you of our intent to file a motion for a protective order regarding the various deposition notices. Our conversation with you was conducted to satisfy the requirements of Local Rule 7(m), as well as to inform you that we do not intend to produce any of the noticed witnesses pending resolution of our motion for protective order so that plaintiffs would not unnecessarily incur the costs of engaging a court reporter. We understand that you will oppose

our motion for protective order. We also understand that plaintiffs may serve additional deposition notices and requests for production, which we will address at the appropriate time.

We also discussed briefly the potential issue regarding the holding of depositions on consecutive days and the seven-hour limitation on depositions set forth in Fed. R. Civ. P. 30(d)(2). The government will reserve the right to raise these issues and/or other procedural objections should the Court determine that the depositions may proceed on some or all topics. We also reserve the right to raise all appropriate objections to the document requests in accordance with Rule 34.

We appreciate your taking the time to clarify plaintiffs' intentions regarding the depositions so that the parties can focus their briefings appropriately.

Sincerely,

Tracy L. Hilmer

Tracy L. Hilmer
Trial Attorney
Commercial Litigation

P.01

TRANSACTION REPORT

SEP-30-2005 FRI 04:15 PM

FOR:

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DATE	START	RECEIVER	TX TIME	PAGES	TYPE	NOTE	M#	DP
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FRAUD SECTION

FACSIMILE TRANSMISSION RECORD

Date: September 30, 2005

Fax No.: (202)318-2372

To: Dennis M. Gingold, Esq.

From: Tracy L. Hilmer
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ATTACHMENT A
DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF WITNESSES FOR DEPOSITION AND REQUEST FOR SANCTIONS

- OIG completed a FISMA documentation review for OST, with no deficiencies noted during the review. The draft or final report has not been received.

- BLM conducted two significant, separate table-top contingency exercises of MAs and the enclave GSS. BLM conducted an exercise of the ALIS contingency plan on August 9, 2005. Multiple other MAs participated in a contingency plan exercise on September 14, 2005.

- As reported to the court on September 2, 2005, a limited amount of IITD was discovered in BLM's LR2000 database on August 18, 2005. Internal access to LR2000 was immediately blocked. A data quality review was conducted by BLM. All IITD was removed from LR2000. The security module was modified to include access disclaimers requiring users to refrain from using LR2000 for any Indian trust-related work. Additional scans were completed on August 24, 2005. BLM's DAA approved access restoration on an internal basis as of August 26, 2005.

- MMS conducted monthly network vulnerability scans on internal servers and network devices. Due to the hurricane impacts to the Gulf of Mexico, including severe damage to MMS facilities, limited remediation occurred for the August and September scan results. The tracking system in New Orleans was not restored until after the end of the reporting period.

- As reported to the Court on August 25, 2005, MMS detected an unauthorized change of an administrator password on the MRMSS externally-hosted portal in August 2005. The incident is still under investigation with the OIG and FBI. Based upon the investigation to date, there is no reason to believe the integrity of any data was compromised. Changes have been made to increase event monitoring at both the perimeter firewalls and application. Security scans of the application have been conducted, additional scans are scheduled. Final security scans and a security review are expected to be conducted by an independent third party contractor.

- NBC initiated remediation activities to address vulnerabilities identified in the second OIG penetration testing conducted on NBC systems in July. Personnel data was accessed, in the course of testing NPS systems. Immediate action was taken on critical vulnerabilities and NBC continues to track progress of remaining tasks from both penetration testing exercises.

Policies and Guidance

- The Interior CIO issued OCIO Directive 2005-012, "Wireless Network Security," to the bureau and office chief information officers on July 29, 2005. This directive outlines the security requirements for wireless networking devices within Interior and requires adherence to "Wireless Security Technical Implementation Guide," Version 2.0, July 21, 2005. The CIO also approved the "DOI Wireless Data Communications Strategy" on August 3, 2005.

In addition to the vulnerability assessment performed, an independent information assurance test is conducted to verify whether vulnerabilities identified are false positives. As of the end of this reporting period, 40 critical, 32 major and zero SANS Top 20 vulnerabilities were identified. All identified critical or major vulnerabilities were either remediated or were false positives.

- Twenty-eight successful incidents involving non-trust bureaus were reported to DOI-CIRC during this reporting period. These incidents were primarily virus (or other malware) infections of limited scope and duration. Only two successful incidents were reported from trust bureaus: a laptop misconfiguration (corrected) and a server theft (currently being investigated for prosecution by external law enforcement). There was no IITD involved.

- Interior acquired an Interior-wide license for an internal scanning tool to be deployed at ESN, and is preparing to conduct Interior-wide internal vulnerability scans in test mode.

- OST completed integration of additional monitoring tools, enabling near real-time monitoring and correlation of security related events.

- NBC initiated a number of major security projects as corrective actions in response to the March and July OIG penetration test results. These are on-going activities that are expected to continue through the fiscal year:
    - Investigation, testing and implementation of encryption mechanisms; and
    - An independent security assessment, including penetration testing.

- As previously reported to the Court, MMS detected an unauthorized change of an administrator password on the contracted MRMSS (Data Warehouse) in August 2005. Final security scans and a security review were conducted by an independent contractor, which confirmed that the integrity of IITD was not compromised.

Policies and Guidance

- The BLM Assistant Director for Information Resources issued Instruction Memorandum 2006-13, "Revised Policy and Guidance for the Bureau of Land Management (BLM) Regarding the Movement of Federal Records" to state directors, center directors and assistant directors on October 3, 2005. This instruction memorandum established policy, procedures, and documentation requirements governing the movement of Indian fiduciary trust records. It also restated existing policy for the movement of all other official BLM records.

- The Interior CIO issued "Implementing OCIO Directive 2005-007 for Fiscal Year (FY) 2006 Plans of Actions and Milestones (POA&M) and Federal Information Security Management Act (FISMA) Performance Measures" to the heads of bureaus and offices on November 4, 2005. This memorandum provides guidance in completing POA&Ms and FISMA performance measures.

National Archives and Records Administration
8601 Adelphi Road
College Park, Maryland 20740-6001

Tel. 301-837-1499
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September 28, 2005

By Facsimile 202-318-2372
Dennis Gingold, Esq.
607 14th St. N.W.
Box 6
Washington, D.C. 20005

Re: *Cobell v. Norton*

Dear Dennis:

I am writing to provide you with an update about the matters that we discussed in our telephone conversation on Wednesday, September 21, 2005, concerning the recent series of what appear to be several unsuccessful attempts at improper disposal of records at the National Archives. See my letter dated September 13, 2005, to Interior Assistant Deputy Secretary Haspel. I base the following update on specific information that NARA's Office of Inspector General (IG) has provided me and on my own research into the incidents, including viewing the recovered records.

As I told you over the telephone on September 21, NARA's IG is presently conducting an investigation into a series of incidents that have occurred over the past three weeks, involving what appear to be the attempted disposal of various types of permanent records of different federal agencies, including the Departments of Interior and Veterans Affairs, that were stored in the stacks at the Main Archives Building in downtown Washington, D.C. It appears that, in each of the incidents under investigation, an attempt was made to improperly dispose of record and non-record materials in various trash baskets (or in boxes designated as trash) located within restricted areas of the building. In the first incident on September 1, after a NARA staffer noticed the records in a trash basket, NARA staff found and recovered additional records in a dumpster and trash compactor (also located in a restricted area of the Main Archives Building). Since September 1, there appears to have been as many as six additional attempted disposal incidents, all of which are currently under investigation by our IG.

A point that I made during our September 21 telephone conversation bears re-emphasis: these attempted disposal incidents involve federal agency records that have passed into both the physical *and* legal custody of the National Archives, as the permanent records of the United States. Neither Secretary Norton nor any other agency head controls the preservation of such records. Accordingly, it is NARA's responsibility to ensure, among other things, that a proper and thorough criminal investigation into the incidents proceeds apace and that all reasonable steps are taken to maintain the continued integrity of NARA's permanent record holdings.

It is important to note that the person or persons responsible for these attempted disposal incidents has not or have not focused solely on the records of the Bureau of Indian Affairs (BIA) or of the Interior Department. Rather, it appears that the perpetrator(s) of the actions randomly removed records that either were being worked on as part of NARA's "preservation processing," or that were otherwise easily available (*i.e.*, within easy reach) on the stacks of the Main Archives Building. It is also important to note that some of what has been recovered consists of "non-record" materials, such as old, empty file jackets (fronts and backs); old, empty folders; out cards, and empty envelopes.

Based on currently available information, the NARA's IG has recovered the following record and non-record materials in connection with the attempted disposal incidents. The materials are listed below in descending order of volume. The listing is not intended to be comprehensive.

Department of Veterans Affairs

- Over 3,000 VA Form "40-1330s" (applications for a headstone or marker)

Department of the Interior

- One entire file (cover and 105 pages) marked "Blackfeet," dated 1946, consisting of an Annual Credit Report of the Northern Plains Indian Crafts Association
- Various partial files from the Consolidated Chippewa tribe (BIA Record Group 75), circa 1940s and 1950s, including timber sales contracts and correspondence, heirship files, receipts for fee/trust patents, transmittals of patents (approx. 200 pages of record material in different boxes)
- Numerous file covers and other assorted nonrecord file jackets and empty folders associated for the Consolidated Chippewa tribe
- One bound volume of Bureau of Land Management "Letters re Surveyors General," dated March 13-April 16 1883

- One file consisting of Flathead Agency loans for the purchase of land circa 1950
- Two files consisting of Billings area office correspondence circa 1957

- Bound volume of the U.S. Army Continental Command, 1821-1920, Whipple Barracks Area

War Department

- One page of War Department correspondence dated July 13, 1918 (possible duplicate or nonrecord material)

Navy Department

- A published engineering report on the electrical equipment on the "Mauretania," from Attache Registers (reports), Record Group 38, Records of the Office of Naval Intelligence.

NARA staff are presently in the process of determining whether there are any "gaps" in NARA's existing holdings at the Main Archives Buildings, which may indicate that other records, in addition to those recovered above, might have been subject to improper disposal.

The Archivist of the United States, Allen Weinstein, has ordered that NARA staff increase security measures at the Main Archives Building immediately to safeguard NARA's permanent record holdings in the building. These measures include increasing security in not only the stack areas but also on the loading dock, and in monitoring trash disposal. As noted above, the stack areas, the loading dock, and the trash disposal areas are among those to which access is restricted to NARA staffers only.

If you deem it necessary, it may be possible to make special arrangements for you to view the documents recovered by the IG, consistent with other demands on our IG's time and resources.

I will provide you with additional updates, as circumstances warrant. Please feel free to

contact me if you have any questions or concerns.

Sincerely,

JASON R. BARON
Director of Litigation
Office of General Counsel

cc:
Abraham E. Haspel, Ph.D.
Assistant Deputy Secretary
U.S. Department of the Interior

National Archives and Records Administration

8601 Adelphi Road
College Park, Maryland 20740-6001

Tel. 301-837-1499
Fax 301-837-0293
Email: jason.baron@nara.gov

December 9, 2005

By Facsimile 202-318-2372
Dennis Gingold, Esq.
607 14th St. N.W.
Box 6
Washington, D.C. 20005

Re: *Cobell v. Norton*

Dear Dennis:

In my September 28, 2005 letter to you, I stated that I would provide you with a further update concerning the incidents of attempted records disposal at Main Archives which occurred in September 2005. This letter serves as that update.

On Friday, December 9, 2005, Archivist Allen Weinstein issued the attached notice to all National Archives and Records Administration (NARA) staff. As the notice states, and as you are aware from my prior correspondence, a series of seven incidents occurred on and after September 1, 2005, involving the attempted disposal of various types of permanent records amongst our agency's holdings at the Main Archives building in Washington, D.C. The documents involved included those from the Department of Veterans Affairs, the U.S. Army, Navy Department, and War Department, as well as from the Department of Interior.

As the notice goes on to state, NARA took swift action to investigate and cure the situation that led to those September incidents. NARA's Inspector General gathered evidence, and based on that evidence, on September 28, 2005, NARA management barred one NARA employee (an archives technician) from having further access to the secured, nonpublic stack areas in the Main Archives building. NARA also placed that individual on administrative leave. The employee subsequently resigned from NARA, effective November 18, 2005. Most importantly, no additional incidents of attempted disposal of records have been reported since the September 2005 incidents referred to above.

In my September 28 letter to you I noted that NARA staff were taking steps to discover whether there were any "gaps" in NARA's existing holdings corresponding to the records

that the former employee was processing for preservation, in addition to the records recovered in the September 2005 incidents. The Archivist's notice reaffirms that NARA staff are continuing to review records holdings in this regard. Based on the review conducted to date, I am in a position to supply you with the following additional facts.

Other than with respect to VA records, the employee in question who has resigned was most recently involved in processing Consolidated Chippewa record holdings (including being tasked to replace old, nonrecord file covers and jackets with new covers). To date, NARA staff have determined that approximately 250 of the actual files that correspond to the approximately 275 Consolidated Chippewa nonrecord file covers and jackets recovered from various trash areas in September are, in fact, intact, in NARA's permanent holdings. As stated above, NARA's review process is ongoing, and NARA staff members are continuing to search for the remaining 25 or so files. In the event these additional records are located, NARA will provide you with a further update.

Please call me if you have further questions or concerns.

Sincerely,

JASON R. BARON
Director of Litigation
Office of General Counsel

Enclosure

cc:
Abraham E. Haspel, Ph.D.
Assistant Deputy Secretary
U.S. Department of the Interior

From: NOTICE
To: NOTICE
Date: 12/9/05 2:50PM
Subject: NARA Notice 2006-064, Incident of Attempted Disposal of Archival Records at Archives I

This is a NARA notice to all employees.

Attention supervisors: If you have employees who do not have access to a computer, please ensure that those employees receive a copy of this notice. This includes employees on LWOP or paid leave.

December 9, 2005

During September, 2005, a series of seven incidents occurred involving the attempted disposal of various types of permanent records amongst our holdings at Archives I. Several staff members and contractors, including archivists, a security guard and an electrician, found the original documents in trash containers and quickly brought them to the attention of their supervisors. The documents were from the Department of Veterans Affairs, the U.S. Army, Navy Department, and War Department, as well as from the Department of Interior.

The incidents were immediately reported to the Inspector General who opened an investigation and gathered evidence. Based on that evidence, on September 28, 2005, a NARA employee was barred from having further access to the secured, nonpublic stack areas at Archives I. NARA also placed that individual on administrative leave. The employee subsequently resigned from NARA. Most importantly, no additional incidents of attempted disposal of records have been reported.

I want to take this opportunity to thank those employees who found the records in the trash containers and the IG for his assistance in this case. The staff in the Office of Records Services, Washington DC, is continuing to review our records holdings to assess whether there are any gaps related to these prior incidents.

I also want to remind all of you of the important work that you do in safeguarding our nation's records. We must continue to work together to find ways to ensure the safety of our documentary heritage, while making these records available to the widest possible audience.

ALLEN WEINSTEIN
Archivist of the United States

For questions on this notice contact:
Susan Cooper, NCON
susan.cooper@nara.gov
Room 102, AI
Phone: 202-501-5526 ext. 236
Fax: 202-208-2046

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Elouise Pepion Cobell, et al.	)	
Plaintiffs	)	
v.	)	Civil Action No. 96-1286 (RCL)
Gale A. Norton, et al.	)	
Defendants.	)	

RULE 30(b)(6) NOTICE OF DEPOSITION OF THE OFFICE OF THE INSPECTOR GENERAL FOR THE DEPARTMENT OF INTERIOR

To: ROBERT E. KIRSCHMAN, Jr.
Assistant Director
United States Department of Justice
Civil Division
Commercial Litigation Branch
1100 L Street, NW, Room 10008
Washington, D.C. 20005

PLEASE TAKE NOTICE, that on October 13, 2005, at the offices of plaintiffs' counsel, **Kilpatrick Stockton, LLP,** 607 14th St., N.W., 9th Floor, Washington, D.C. 20005, plaintiffs will take the deposition of the **Inspector General for the Department of Interior,** pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. The deposition will commence at 9:00 a.m. and will continue on consecutive days thereafter until completed. Testimony will be recorded by stenographic means.

The deponent is hereby requested to designate one or more knowledgeable individuals to testify regarding the following subject matters:

1. Any investigation performed related to the employment of Ronnie Levine ("Ms. Levine"), chief information officer ("CIO") of the Bureau of Land Management ("BLM") including documents reviewed and the substance of interviews with potential witnesses.

2. Any investigation performed relating to any retaliatory action taken against Ms. Levine by any employee of the Department of the Interior ("DOI") including documents reviewed and the substance of interviews with potential witnesses.

3. Any investigation performed relating to any proposed transfer of Ms. Levine from the position of CIO of BLM, including documents reviewed and the substance of interviews with potential witnesses.

4. Any investigation performed relating to the actual or potential destruction of documents containing Indian Trust Data ("ITD") at the National Archives and Records Administration, including the nature of documents destroyed or disposed of, and the substance of interviews with potential witnesses.

5. The Inspector General's testing of the IT systems at Minerals Management Service ("MMS") from January 1, 2005 to the present.

6. Any investigation performed relating to any unauthorized access obtained to any IT system of MMS through Usi/Accenture as reported to the Court on August 25, 2005.

7. The testing of any IT system at DOI by the Inspector General from April 2005 to the present.

Respectfully submitted, this the 28th day of September, 2005.

Dennis M. Gingold (DSI)
Dennis M. Gingold
DC Bar No. 417748
P.O. Box 14464
Washington, DC 14464
Telephone: (202) 661-6380

OF COUNSEL:

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	
Plaintiffs,	
v.	Case No. 1:96cv01285JR
DIRK KEMPTHORNE, Secretary of the Interior, et al.,	
Defendants.	

ORDER

This matter comes before the Court on *Plaintiffs' Motion to Compel Production of Witnesses for Deposition, Request for Sanctions, and Memorandum in Support Thereof* (Dkt. # 3296). Upon consideration of the Plaintiffs' Motion and Request, Defendants' Opposition, any Reply thereto, and the entire record of this case, it is hereby

ORDERED that the Motion to Compel Production of I-T Security Personnel Document is DENIED and;

It is further ORDERED that the Request for Sanctions is also DENIED.

SO ORDERED.

_____
Hon. James Robertson
UNITED STATES DISTRICT JUDGE
United States District Court for the
District of Columbia

Date:_____