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 A. NORTON, Secretary of the Interior, et al.,	)	
	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' EMERGENCY MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL AND FOR EXPEDITED CONSIDERATION

Pursuant to Rule 7(b) of the Federal Rules of Civil Procedure and Local Civil Rule 7, Defendants respectfully move this Court for an order staying the preliminary injunction entered by the Court on March 15, 2004 (Dkt. No. 2531) ("March 2004 PI"), pending Defendants' appeal to the United States Court of Appeals for the District of Columbia. Further, because the preliminary injunction has already caused great harm to the public's interests and continues to cause great harm, Defendants respectfully request expedited consideration of this motion. Pursuant to Local Civil Rule 7(m), counsel for the Defendants conferred with Plaintiffs' counsel on March 22, 2004, regarding this motion, and Plaintiffs' counsel stated that Plaintiffs would oppose this motion.

I. The Court's March 15, 2004 Preliminary Injunction Should Be Stayed Because It Was Issued Without Any Legal Basis

The issuance of the March 2004 PI was without any legal basis. As is explained below, the March 2004 PI is legally deficient for at least four reasons.

First, this is an action to compel an accounting under the American Indian Trust Fund Management Reform Act, Pub. L. No. 103-412, 108 Stat. 4239 (1994) ("1994 Act"). The 1994 Act provides that "[t]he Secretary shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to the Act of June 24, 1938 (25 U.S.C. 162a)." Pub. L. No. 103-412, § 102(a). Nothing in the 1994 Act permits the Court to sever the Department of the Interior's electronic communications to promote data security.

Following this Court's entry of its September 25, 2003 injunction, which purported to assert control over virtually all accounting and trust operations (to be overseen by a Monitor and agents with unlimited powers of access), Congress responded by enacting legislation. Public Law Number 108-108 provides that "nothing in the American Indian Trust Management Reform Act of 1994, Public Law 103-412, or in any other statute, and no principle of common law, shall be construed or applied to require the Department of the Interior to commence or continue historical accounting activities with respect to the Individual Indian Money Trust," absent new legislation or the lapse of Public Law Number 108-108 on December 31, 2004. Pub. L. No. 108-108, 117 Stat. 1241, 1263 (2003). Insofar as the March 2004 PI purports to continue to require Interior to undertake steps to commence or continue historical accounting activities, such requirements are unauthorized by law in light of Public Law Number 108-108.[1]

Second, the Court's entry of the March 2004 PI was contrary to Federal Rule of Civil Procedure 65 and Local Civil Rule 65.1 in that it was entered following none of the process

[1] Of course, to the extent the March 2004 PI purports to require steps unrelated to the accounting activities, it is beyond any legal basis recognized for this litigation either by this Court or the D.C. Circuit.

provided in those rules. Plaintiffs filed no motion with the Court requesting the issuance of the March 2004 PI, and while Plaintiffs undoubtedly welcomed the Court's sua sponte efforts, the Court's actions wrongfully deprived Defendants of any opportunity to be heard before the Court ordered the Department of the Interior to undergo the disruptive, expensive, and harmful process of disconnecting virtually all of its Internet connections for the third time in slightly over two years. See generally Temporary Restraining Order (Dec. 5, 2001) (Dkt. No. 1036) (amended by Order (Dec. 6, 2001) (Dkt. No. 1038)); July 28, 2003 Preliminary Injunction ("July 2003 PI")

It is fundamental that before a party is subject to a preliminary injunction, it has the right to receive specific notice of the proposed order and the right to be heard. Thus, Rule 65 specifically provides that "[n]o preliminary injunction shall be issued without notice to the adverse party." Fed. R. Civ. P. 65(a)(1). In this case, however, the Court issued the March 2004 PI on its own, thus denying Defendants any opportunity to be heard before the public suffered the damages of yet another court-ordered shutdown.

Third, in response to the July 2003 PI, Interior officials submitted voluminous certifications, under penalty of perjury,[2] explaining in detail why Individual Indian Trust Data ("IITD") was not at risk on Information Technology ("IT") systems that remained connected to the Internet. This Court apparently refused to consider these certifications on the ground that the certifications were purportedly "procedurally" invalid. Each of the government's certifications stated that "I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief." The Court concluded that this language deviated from

[2] The Court's statement that "agency representatives refused to certify to the security of their systems under penalty of perjury," Memo. Op. at 11, is incorrect.

the requirements of 28 U.S.C. § 1746 and Local Civil Rule 5.1(h) because they included the words "to the best of my knowledge, information, and belief." See Memo. Op. at 9-11.

By their terms, 28 U.S.C. § 1746 and Local Civil Rule 5.1(h) apply only where "under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported . . . by the sworn declaration, verification, [or] certificate . . . of [a] person . . . ." 28 U.S.C. § 1746 (emphasis added); see also Local Civil Rule 5.1(h). No statute, regulation, or rule required the "certifications" here to be executed under oath, and this Court cited none. Moreover, both the statute and the local rule provide that a certification meets applicable requirements if it is substantially in the form of the language set forth in those provisions, i.e., "I declare under penalty of perjury that the foregoing is true and correct." A declaration or certification "to the best of" the declarant's knowledge, information, and belief is plainly sufficient under the statute and the rule, and also under the requirements of Federal Rule of Civil Procedure 56. See United States v. Roberts, 308 F.3d 1147, 1154-55 (11th Cir. 2002), cert. denied, 123 S. Ct. 2232 (2003) (false statement attested to as "correct and true to the best of my knowledge and belief" was substantially in the form provided by 28 U.S.C. § 1746); Colon v. Coughlin, 58 F.3d 865, 872 (2d Cir. 1995) (reversing summary judgment against plaintiff because verified complaint "attesting under penalty of perjury that the statements in the complaint were true to the best of his knowledge" was sufficient under Rule 56).

Furthermore, the July 2003 PI required only that the certifications made to the Court were to comply with Rule 11 of the Federal Rules of Civil Procedure. See July 2003 PI, ¶ B.1(b). Rule 11 governs the signing of pleadings, not evidentiary submissions by witnesses, and nothing

in the Rule would, in any event, support the imposition of the requirement now announced by the Court. To the contrary, to the extent Rule 11 is of any arguable relevance, it provides that "[e]xcept when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit." Fed. R. Civ. P. 11(a). No rule or statute imposes a specific requirement of this kind with respect to the certifications submitted to the Court here pursuant to the July 2003 Order.

Finally, the Court's Memorandum Opinion apparently recognizes that Defendants' appeal of the July 2003 PI creates a jurisdictional impediment to the issuance of the March 2004 PI. Thus, the Court implicitly criticizes Defendants for appealing the July 2003 PI "[i]n late September 2003, before this Court had made its determinations as to whether any systems should remain connected or be disconnected . . . ."[3] Memo. Op. at 8. Nevertheless, the Court asserts that while "the normal rule is that a party's filing of a notice of appeal divests the district court of jurisdiction over the matters being appealed," its efforts to replace or supercede the July 2003 PI are authorized by Rule 62(c) of the Federal Rules of Civil Procedure. Memo. Op. at 8 n.10 (citing Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982)). As explained below, Rule 62(c) does not provide authority for the issuance of the March 2004 PI.

While Rule 62(a) of the Federal Rules of Civil Procedure generally provides for an automatic stay of efforts to enforce an appealed judgment, there is no automatic stay in injunctive actions. Charles A. Wright, Arthur R. Miller & Mary K. Kane, 11 Federal Practice and Procedure § 2904, at 498 (1995). As a result, absent a court order, a party that appeals an

[3] In fact, Defendants filed their Notice of Appeal near the end of the sixty-day period allowed for filing notices of appeal. 28 U.S.C. § 2107(b). Had Defendants delayed their filing by even a few days, the Notice of Appeal would have been untimely.

adverse injunction remains subject to that injunction during the pendency of the appeal. Id. ("If no stay has been obtained, an injunction that the district court has granted remains in effect.").

Contrary to the Court's conclusion that Rule 62(c) provides it with the authority to issue substantive injunctive relief that supercedes or replaces the matters addressed by the July 2003 PI, Rule 62(c) simply provides that the district court retains limited powers with regard to a preliminary injunction that has been appealed. By its terms, once a preliminary injunction has been appealed, Rule 62(c) limits the matters left within the district court's power:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as its considers proper for the security of the rights of the adverse party.

Fed. R. Civ. P. 62(c) (emphasis added).[4] Thus, Rule 62(c) does not provide a district court with the authority to revisit the substantive issues addressed in the preliminary injunction under appeal, as the March 2004 PI does by expressly superceding and replacing the July 2003 PI. Rule 62(c) is addressed to matters of bonds and other forms of security for a party during the pendency of an appeal. Indeed, if a district court retained authority to revisit substantive matters under appeal, it could effectively moot any appeal by withdrawing the injunction on appeal and replacing it with another injunction. Such a process would be inimical to the fundamental concepts of due process and a party's right to seek appellate review.

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[4] Wright, Miller & Kane explain that "[Rule 62(c)], taken together with Rule 62(g), codifies the inherent power of courts to make whatever order is deemed necessary to preserve the status quo and to ensure the effectiveness of the eventual judgment. Any order of this kind that the court makes is to be 'upon such terms as to bond or otherwise as it considers proper for the security rights of the adverse party.'" Charles A. Wright, Arthur R. Miller & Mary K. Kane, 11 Federal Practice and Procedure § 2904, at 500 (1995) (footnotes omitted).

The Court relies upon three cases for the proposition that it possesses jurisdiction to issue the March 2004 PI. None of these three cases authorizes the revisitation by the district court of substantive matters which are the subject of an appeal. In Venen v. Sweet, 758 F.2d 117 (3d Cir. 1985), the appellate court expressly stated:

> As a general rule, the timely filing of a notice of appeal is an event of jurisdictional significance, immediately conferring jurisdiction on a Court of Appeals and divesting a district court of its control over those aspects of the case involved in the appeal. "Divest" means what it says – the power to act, in all but a limited number of circumstances, has been taken away and placed elsewhere.

758 F.2d at 120-21 (citing Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58 (1982), and United States v. Leppo, 634 F.2d 101, 104 (3d Cir. 1980)) (footnote omitted) (emphasis added). The Venen Court further described in a footnote to the above quotation the "limited number of circumstances" as to which the district courts retain jurisdiction: applications for attorney's fees, matters governed by Rules 7 and 8 of the Federal Rules of Appellate Procedure, record on appeal issues, bail bond and arrest orders. 758 F.2d at 120 n.2. The Court further stated:

> Although we do not suggest that these are the only circumstances in which a district court retains power to act, we reiterate that the instances in which such power is retained are limited.

Id. (emphasis added).

The Court also relies upon Securities Industry Ass'n v. Board of Governors, 628 F. Supp. 1438 (D.D.C. 1986), but the issue before the district court was simply whether the court possessed personal jurisdiction over one of the defendants, Bankers Trust. Id. at 1440. There, the district court observed that while a notice of appeal normally divests the district court of

jurisdiction, "that rule does not obtain in a case such as this one, where a party has filed a timely motion under Rule 59 to amend a judgment." Id. at 1440 n.1 (citing, inter alia, Fed. R. App. P. 4(a)). Of course, that exception has no application in this case.

Finally, the Court relies upon Board of Education v. Missouri, 936 F.2d 993 (8th Cir. 1991), as providing authority for the granting of "substantial injunctive relief during the pendency of an appeal in an education desegregation case because the court of appeals believed that the nature of the district court's ongoing supervision over the integration of vocational educational programs required it to retain the broadest discretion possible." Memo. Op. at 8-9 n.10. In contrast to the school desegregation case before the Eighth Circuit, however, this Court's issuance of the July 2003 PI did not transform this matter into a case in which the Court is "supervis[ing] a continuing course of conduct." 936 F.2d at 996 (quoting Hoffman v. Beer Drivers & Salesmen's Local Union No. 888, 536 F.2d 1268, 1276 (9th Cir. 1976)). In fact, the statement about the district court's retention of "broad discretion" appeared in a prior Eighth Circuit opinion regarding the school desegregation litigation. 936 F.2d at 996 (quoting Liddell v. Board of Education, 822 F.2d 1446, 1455 (8th Cir. 1987)).

The July 2003 PI is plainly distinguishable from the long history of court-supervised efforts to integrate St. Louis schools. See 936 F.2d at 995 & n.2. While the ongoing efforts to desegregate St. Louis schools were properly before the courts, the only issue before this Court is Plaintiffs' action seeking an accounting pursuant to the 1994 Act. Even before Congress enacted Public Law Number 108-108, the Court did not properly have an ongoing role in supervising the Department of the Interior's efforts to prepare an accounting pursuant to the 1994 Act.

II. The Preliminary Injunction Should Be Stayed Because None of the Elements Required for the Issuance of a Preliminary Injunction Has Been Satisfied

In considering whether to grant an application for a preliminary injunction, this Court must examine (1) whether there is a substantial likelihood that the plaintiff would succeed on the merits, (2) whether the plaintiff would suffer irreparable injury if the injunctive relief is denied, (3) whether the granting of injunctive relief would substantially injure the other party, and (4) whether the public interest would be served by the granting of the injunctive relief. E.g., Davenport v. International Brotherhood of Teamsters, AFL-CIO, 166 F.3d 356, 360-61 (D.C. Cir. 1999) (citing Serono Laboratories, Inc. v. Shalala, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998)); Kudjodi v. Wells Fargo Bank, 181 F. Supp. 2d 1, 2 n.2 (D.D.C. 2001); Memo. Op. at 24-25.

Even assuming this Court may rely upon Plaintiffs' June 2003 application for a temporary restraining order, the Plaintiffs never sought the complete shutdown of Interior IT systems irrespective of whether they housed or accessed IITD. In that motion, Plaintiffs sought an order directing as follows:

- "that Interior defendants immediately shall disconnect from the Internet all information technology systems which house or provide access to individual Indian trust data until such time as the Special Master has determined that all Individual Indian Trust data is properly secured . . . " and
- "that Interior defendants immediately shall disconnect from the Internet all computers within the custody and control of the Department of the Interior, its employees and contractors, that house or provide access to individual Indian trust

data until such time as the Special Master has determined that Individual Indian trust data is properly secured . . . ."

Plaintiffs' Consolidated Motion for a Temporary Restraining Order and Motion for a Preliminary Injunction to Ensure the Protection of Individual Indian Trust Data, at 9-10 (filed June 26, 2003) (Dkt. No. 2116) (proposed temporary restraining order) (emphasis added). The Court's March 2004 PI, however, requires "[t]he Office of Inspector General, the Minerals Management Service, the Bureau of Land Management, the Bureau of Reclamation, the Office of the Special Trustee, Fish and Wildlife, the Bureau of Indian Affairs, the Office of Surface Mining, and the National Business Center [to] disconnect all Information Technology Systems within their respective custody or control . . . whether or not such Information Technology Systems House or Access Individual Indian Trust Data," and requires the remainder of Interior's bureaus (with the exception of the National Park Service, the U.S. Geological Survey, and the Office of Policy, Management, and Budget) to disconnect all of their IT systems if they have "custody or control" over any IT system that houses or accesses IITD. March 2004 PI, ¶¶ B.3., B.4. As explained below, even disregarding that the Court has, sua sponte, granted injunctive relief far beyond that sought by the Plaintiffs in June 2003, the March 2004 PI fails to satisfy the four elements for issuance of a preliminary injunction.

A. The Preliminary Injunction Provides No Basis for Concluding that Plaintiffs Have Established a Substantial Likelihood of Success of the Merits

The Court's justification for the March 2004 PI largely relies upon the Court's previous analysis supporting the July 2003 PI, which is currently on appeal. See Memo. Op. at 24-25. The Court's Memorandum Opinion also relies upon its analysis of the legal requirements for

certifications made pursuant to 28 U.S.C. § 1746 and Local Civil Rule 5.1(h), Memo. Op. at 9-11, as well as its analysis of various reports prepared by the Special Master's experts, the Department of the Interior, the General Accounting Office, and the congressional "report card" for the Department of the Interior, Memo. Op. at 14-24. Defendants previously addressed these matters in their Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for an Order to Show Cause Why the Department of the Interior Secretary, Gale Norton, and Her Senior Managers and Counsel Should Not Be Held in Civil and Criminal Contempt for Violating Court Orders (Dkt. No. 2451) (filed Jan. 27, 2004), which is incorporated herein by reference. Contrary to the Court's conclusion, see Memo. Op. at 25, whether Plaintiffs succeeded on the merits in other proceedings in this case is wholly irrelevant to an assessment of their likelihood of success on the merits of this matter.

As the Court has been apprised in prior submissions, the overwhelming majority of Interior's IT systems – approximately ninety-four percent – do not house or access IITD. Of the six percent of the IT systems that do house or access IITD, the overwhelming majority – approximately five percent of Interior's IT systems – remain disconnected as a result of the Court's December 2001 temporary restraining order. Moreover, as explained previously to the Court, the reports referenced by the Memorandum Opinion do not address IT security with regard to systems housing or accessing IITD.

B. The Preliminary Injunction Does Not Establish the Potential for "Irreparable Harm"

As noted above, the overwhelming majority of Interior IT systems that house or access IITD have been and remain disconnected from the Internet as a result of the Court's December

2001 temporary restraining order. Moreover, there has been no showing that any of the systems housing or accessing IITD that were previously approved for reconnection by this Court (comprising one percent of Interior's IT systems) have become insecure.

Putting this complete failure of showing aside, there is absolutely no justification in the March 2004 PI for the Court's order to disconnect any of Interior's IT systems that do not house or access IITD.[5] Whatever claims Plaintiffs properly have before this Court, there can be no serious dispute that Plaintiffs have no cognizable interest in the security of IT systems that do not house or access IITD.

Thus, the only potential for irreparable harm is with respect to one percent of Interior's IT systems, and there has been no showing that the security of any of those systems has been compromised. One would be hard pressed to find a clearer absence of a showing of the potential for irreparable harm.

C. The Preliminary Injunction Substantially Harms Both the Operations of the Department of the Interior and the Public Interest

In the wake of two previous Court-ordered shutdowns, the harm caused to the operations of the Department of the Interior and to the general public should be obvious. The March 2004 PI – issued with no justification and with breadth far beyond any cognizable interest of the Plaintiffs – seriously cripples the operations of the Department of the Interior. In turn, the public suffers because of the issuance of this preliminary injunction. Even if one accepts the Court's conclusions about the likelihood of success on the merits and the potential for irreparable harm –

[5] The March 2004 PI does exempt the National Park Service, the U.S. Geological Survey, and the Office of Policy, Management, and Budget because the Court concluded that their systems do not house or access IITD. March 2004 PI, ¶ B.4.

which Defendants seriously dispute – the grave consequences of the Court's latest shutdown order cannot be squared with consideration of harm to the Department of the Interior and the public.

The Department of the Interior exists to serve the public, and any action that hampers the operations of the Department harms the public. It is impossible to provide an exhaustive listing of the harms that have occurred already and will occur as a result of the Court's issuance of the March 2004 PI, but the attached declarations of the Secretary of the Interior (Exhibit 1) and W. Hord Tipton, Chief Information Officer for the Department of the Interior (Exhibit 2) demonstrate the substantial adverse impact upon the public. The following examples are illustrative:

(a) Procurement: The March 2004 PI prevents Interior from complying with regulatory procurement requirements and will prevent or, at least, delay public access to information necessary for government procurements. Declaration of W. Hord Tipton In Support Of Emergency Motion For Stay Pending Appeal ("Tipton Decl.") at 3-4 (Ex. 2). Moreover, the March 2004 PI prevents Interior from performing necessary procurement actions, some of which will extend to matters involving national security, even though, strictly speaking, the actions are not "essential" for the protection of threats to fire, life, and property. Id.

(b) Financial Management: Disconnection of Interior's Internet connections will seriously impact the provision of financial accounting, funds control, management accounting, and financial reporting for both Interior and other entities. Tipton Decl. at 4. The disconnection will hinder the preparation of financial statements and management of grants. Id. at 4-5

(c) Databases: As a result of the March 2004 PI, numerous databases relied upon by the public will not be accessible. Tipton Decl. at 5-6.

(d) Education: Prior to the issuance of the March 2004 PI, the education of Native American students was supported by Internet access. Tipton Decl. at 6. Such access is particularly critical because so many Native American students live in remote areas. See id. The Internet connection was the link to provide these students with access to educational resources and curriculum materials. Id. As a result of the disconnection, these materials are no longer available for students, teachers, administrators, and staff. Id.

(e) Hiring and Personnel: Interior relies upon the Internet for a wide array of hiring and personnel activities. See Tipton Decl. at 6-7. The March 2004 PI adversely affects these activities. Id.

(f) MMS Royalties: The Minerals Management Service receives, processes, and disburses over $500 million of minerals revenues each month. Tipton Decl. at 7. These activities are heavily dependent upon the Internet, and the lack of an Internet connection will adversely affect approximately 2,000 reporting entities and the payment of royalties to tribes, Native Americans, states, and the federal government. Id.

(g) IT Security: The March 2004 PI undermines and impedes progress already made by Interior with regard to improving its IT security. Tipton Decl. at 8. As a result of the March 2004 PI, Interior may be required to reconfigure its systems and recertify and reaccredit those systems. Id. Moreover, disconnection will hinder Interior's ability to obtain and distribute to users security software patches and updates, including antivirus definition files and intrusion detection systems signature files. Id.

(h) Freedom of Information Act: Pursuant to federal law, Interior has electronic Freedom of Information Act ("FOIA") capabilities. Tipton Decl. at 8-9. The public will lose this access as a result of the March 2004 PI. Id.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court stay the preliminary injunction entered on March 15, 2004 (Dkt. No. 2531) and, further, because the preliminary injunction has already caused great harm to the public's interests and continues tocause great harm, Defendants respectfully request expedited consideration of this motion.

Respectfully submitted,

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March 22, 2004

CERTIFICATE OF SERVICE

I hereby certify that, on March 22, 2004 the foregoing *Defendants' Emergency Motion To Stay Preliminary Injunction Pending Appeal And For Expedited Consideration* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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/s/ Kevin P. Kingston
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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.	)	

ORDER

This matter comes before the Court on *Defendants' Emergency Motion To Stay Preliminary Injunction Pending Appeal And For Expedited Consideration* (Dkt No. _____). Upon consideration of Defendants' motion, any response thereto, and the entire record of this case, it is hereby

ORDERED that Defendants' motion is GRANTED.

SO ORDERED this _____ day of _____, 2004.

_____
ROYCE C. LAMBERTH
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	
v.	)	
GALE A. NORTON, Secretary of the Interior, et al.,	)	Civil Action No. 96-1285 (D.D.C.)
Defendants.	)	

DECLARATION OF GALE A. NORTON IN SUPPORT OF EMERGENCY MOTION FOR STAY PENDING APPEAL

I, Gale A. Norton, am Secretary of the United States Department of the Interior. I am making this declaration because the impact of the district court's March 15, 2004, injunction is not confined to any one program, office or bureau of our department. The ruling cripples our overall departmental ability to carry out a host of statutory mandates and to provide services on which the public depend.

The breadth of the Department's duties and the variety of its functions defy easy summary. Taken together, they affect on a daily basis the lives of millions, the operations of other federal agencies, of states and localities, and private business nationwide.

At some point in the not-so-distant past, activities such as procurement, hiring, financial management, mine supervision, and educational programs placed little or no reliance on electronic communications. That is no longer the case. The Department is integrated into the web of electronic communications as fundamentally as the telephone system. Internet communication is not merely a useful tool – it is essential to much of what we do.

That dependency is reflected in our basic operations. As detailed in the declaration of W. Hord Tipton, our financial management, procurement, grant management, hiring and recruitment are heavily reliant upon electronic communications. Absent a stay, the delay and disruption caused by the injunction will result in lost opportunities and incalculable added costs. We all understand that the Department could not conduct its activities properly without using the telephone. In 2004, it cannot do so without access to the Internet.

The lack of Internet communications has an immediate effect on departmental management. Our workforce is spread across thousands of locations, spanning vast distances and

Exhibit 1
Defendants' Emergency Motion to Stay
Preliminary Injunction Pending Appeal

several time zones. The Internet allows managers to handle both incoming and outgoing information needed to fulfill our responsibilities. Like many Interior managers, I frequently use the Internet to obtain information about specific programs and locations within my department, to gain external perspectives on important issues, or to review legislation pending in Congress. We also use our computer network to communicate policies, updates, assignments and ideas to employees.

It is not only Interior's operations that are seriously affected. The activities of one federal agency often rely on the services of another. As Mr. Tipton explains, by closing down a system such as MMS/GovWorks, the injunction short-circuits acquisition services provided to virtually every federal agency involved in national security operations.

The effects of the injunction are wide-ranging. Education provided via the Internet to over 50,000 students on 63 American Indian reservations has been brought to a halt. Crucial data bases, including those maintained by the Bureau of Land Management and the Office of Surface Mining, are off-line. Citizens will be denied ready access to information about our land use planning, environmental analysis, and other opportunities for public comment. Visitors to the national wildlife refuges and the nation's wetlands will find that the information on which they rely daily is unavailable.

Interior has invested substantial time, effort and funding in improving our information technology security. It is a responsibility we take seriously. But security demands are not our only responsibilities, and must be evaluated in the broad context of meeting all the demands placed upon government: serving the informational needs of the public, managerial effectiveness, Congressional appropriations, and resource protection. The injunction hampers or prevents us from effectively fulfilling other important duties, and disrupts the balancing of responsibilities determined by working within the Executive Branch and with Congress.

I have not attempted to replicate the detailed discussion provided by Mr. Tipton which, as he notes, is itself only an illustrative summary of the impact of the injunction. However, as the Cabinet officer charged with responsibility for carrying out the missions of hundreds of statutes and meeting the needs of the public, I can say with absolute certainty that the harm resulting from the injunction will be severe and widespread, and I believe that we are still in the process of discovering just how far-reaching the injury to our programs and the public will be.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief. Executed on March 22, 2004.

Gale A. Norton

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	
v.	)	
GALE A. NORTON, Secretary of the Interior, et al.,	)	Civil Action No. 96-1285 (D.D.C.)
Defendants.	)	

DECLARATION OF W. HORD TIPTON IN SUPPORT OF EMERGENCY MOTION FOR STAY PENDING APPEAL

I, W. Hord Tipton, am the Chief Information Officer (CIO) for the United States Department of the Interior (Interior). In this capacity, I oversee management of the information technology ("IT") systems and implementation of applicable Interior policies and directives. I also coordinate with bureau/office CIOs in the development and maintenance of bureau-specific IT systems and am responsible for overseeing the portfolios of all IT investments and spending for Interior. In this capacity, I rely upon information from Interior management and staff to make program management decisions or to prepare communications with the Court, as is the case with this declaration.

The Department of the Interior (the Department) is a cabinet level agency with an annual budget of $11 billion and 70,000 employees. It is responsible for managing one out of every five acres of land in the United States; provides the resources for nearly one-third of the nation's energy; provides water to 31 million people through 900 dams and reservoirs; receives over 450 million visits each year to the parks and public lands it manages; and implements hundreds of statutorily-mandated programs. In addition, the Department provides a variety of critical services on which other federal agencies rely.

To meet its responsibilities, the Department manages a portfolio of approximately $1 billion of IT, including approximately 110,000 computers. Surveys by the Department have shown that approximately 6,600 of those computers – only about 6 percent – house or provide access to Individual Indian Trust Data (IITD). Of those 6,600 computers, approximately 5,500 have been disconnected from the internet for over two years, and are therefore unaffected by the preliminary injunction. Based on current information, approximately 1,100 computers housing or providing access to IITD were being used on March 15, 2004, when the preliminary injunction was entered. As set forth below, the

Exhibit 2
Defendants' Emergency Motion to Stay
Preliminary Injunction Pending Appeal

immediate disconnection of IT systems ordered by the court will cause significant and irreparable harm to Interior and the public.

The internet is a crucial and perhaps primary way by which the Department communicates with the world. By means of the internet, the Department maintains numerous data banks regularly used by governmental organizations and private persons. The internet allows the Department to provide educational opportunities to children of Indian tribes. As mandated by law and government-wide regulations, the internet is the primary means by which the Department receives most proposals for Department contracts. The internet is the chief means by which the Department advertises employment opportunities and receives applications. It is a crucial means by which the Department distributes certain royalty payments. And, ironically, the injunction will impair the Department's ongoing efforts to provide and improve IT security.

The consequence of the injunction is that these and other fundamental agency activities must stop in their tracks. The injunction contains an exception for portions of systems that are "essential for the protection against fires or other threats to life or property." It contains no exception for programs that are crucial to the Department's operations and the public welfare.

The consequences of the injunction are, however, even broader than those specifically directed by the court, and will cripple intra-Department communications as well as communications between Interior and the public. As noted, the injunction permits the Department to maintain connections for portions of systems necessary to protect against fires and other threats to life or property. The Department cannot, consistent with the public health and safety, fail to make use of that exception. In so doing, however, the Department will be forced to reconfigure its IT systems in ways that will drastically impact the overall functionality and effectiveness of those systems.

The computers used for "essential" services are linked to the internet through a series of connections that are shared by computers devoted to "nonessential" [as that term is defined in the injunction] services. To maintain the internet link for essential systems and also sever all internet links for nonessential systems, the Department must physically disconnect from all communications access thousands of laptops and personal computers not directly used for essential functions. The employees who use those computers will be unable to communicate electronically within the Department as well as outside the Department. The termination of intra-agency electronic communication will have a debilitating effect on the operations of the Department that can hardly be overstated. Moreover, the emergency reconfiguration of "essential" systems that will be necessary to keep those systems on line may well result in substantial impairment to the effectiveness of those systems.

It is impossible to catalogue briefly the full range of programs immediately affected by this court's preliminary injunction. The following discussion is illustrative of non-emergency system impacts only.

1. Procurement.

The Federal Acquisition Regulation (FAR) requires that procurement actions be electronically posted on a single point of entry for the federal government through the General Services Administration (GSA). Since October 1, 2001, the government-wide mechanism for complying with this requirement is the internet-based Federal Business Opportunities web-site managed by GSA. At any one time, the Department generally advertises as many as 100 requests for quotes, requests for proposals and invitations for bids. The Department averages more than 50 announcements per business day on requirements that exceed $4 billion dollars in obligations annually.

The injunction will impact or prevent the Department's ability to post notices for millions of dollars for critical time-sensitive construction and repair contracts. Delays will affect the ability to award contracts in time to complete critical maintenance tasks during this year's construction season and will reduce the pool of available competitors for the Department's contracts.

Disconnection will prevent most Interior users from accessing the Interior Department Electronic Acquisition System-Electronic Commerce (IDEAS-EC) via the Internet to obtain procurement data necessary to perform their duties. Users will be unable to initiate or complete any contract actions in the system. Vendors will be unable to obtain contract actions such as delivery orders, modifications, change orders to contracts, or to provide proposals to active procurement actions. The Department's solicitations for vendor responses through the electronic commerce process will be blocked because vendors will be unable to submit the required electronic offers. As a result of disconnection and the general shutdown of Interior's purchasing and contracting, thousands of small businesses which rely on Interior's procurements will be seriously affected.

Further, the Department's contracting officers and grants officials are unable to access the Excluded Parties Listing System (EPLS), which identifies people and companies that have been suspended or debarred from doing business with the federal government.

The Minerals Management Service (MMS)/GovWorks will only operate for emergency support. MMS/Gov Works, through its Franchise Fund operation, provides acquisition services to virtually every federal agency involved in national security operations either domestically or in other countries, including the Executive Office of the President, the Department of Homeland Security, the United States Secret Service, and the Department of the Treasury. Because of their diverse locations, the internet is the

primary line of communication with these agencies and the contractors who support them. The internet is used to receive requirements, conduct necessary acquisition actions, provide contract administration, and process timely payments to contractors. Disconnection will jeopardize the delivery of critical services.

2. **Financial Management.**

The Federal Financial System ("FFS") provides financial accounting, funds control, management accounting, and financial reporting processes for the Department's bureaus and offices, as well as approximately twenty entities outside the Department. Most of the Department's bureaus use the FFS to manage and control financial activity related to appropriated funds, including funds management, payments to vendors, reimbursement of charge card transactions, travel reimbursements and other financial transactions. The inability to fully access FFS could impact effective financial management. It would result in delayed payments to vendors, which carry a 4% penalty per transaction and could impede or prevent the ability to control funds or produce financial reports.

The Department's Consolidated Financial Statement (CFS) system is critical for the preparation of bureau and Department financial statements. The CFS System provides financial statement management and reporting capabilities to all Department bureaus and offices and to non-Interior clients. In addition, the CFS system supports the annual financial statement audits of the Department and its bureaus and provides access to the KPMG audit team engaged by the Department's Inspector General. The ability of the Department and its clients to meet monthly, quarterly, and year-end financial statement deadlines or to reconcile account balances may be seriously impeded. It would be unlikely that the Department or its clients could complete their annual financial statement audit, in violation of the Government Management Reform Act and OMB Circular A-109. Further, delays in the completion of bureau financial statements will substantially increase the audit costs and could jeopardize the data submission to Treasury for the consolidated financial statements of the federal government.

The Department uses CASHLINK to view daily receipts and disbursements for daily reconciliation of account balances with Treasury. As an example of the impacts from not being able to reconcile daily fund balances, the Office of the Special Trustee prior to disconnection used CASHLINK for the approximately $3.3 billion portfolio held in trust for individual Indians and Tribes. Without daily reconciliation, the investment income may be either over- or under-invested, with associated financial repercussions, as manual processes cannot be done timely.

3. **Financial Assistance.**

Disconnection will also affect the Department's ability to manage over $3 billion in grants and cooperative agreements that are awarded annually. Federal agencies are

required to post financial assistance opportunities on the "Grants.govFIND" web site where prospective recipients may also apply for financial assistance via the "Grants.govAPPLY" web site. Without internet access, the Department's bureaus will be unable to post financial assistance opportunities, and prospective recipients will be unable to submit grant proposals. Disconnection would prevent the public from finding out about these opportunities and obtaining access to this funding.

The Federal Aid Information Management System (FAIMS) serves as an internet-based link between the Department of Health and Human Services' (HHS) Payment Management System (PMS), which manages Treasury payments to grant recipients, and Interior's FFS. Obligation and payment transactions for over 3,000 grants involving over $800 million in federal funds to the States are synchronized between these two systems via FAIMS. The FFS relies on FAIMS to shuttle payments made to grantees from the PMS to the FFS. The Treasury subsequently uses this information to balance cash between the PMS and the FFS. Thus, disconnection will adversely affect the Department's ability to accurately balance cash with Treasury on a timely basis, as required by federal law.

4. Databases.

The Department maintains a variety of vital databases that serve the public in any number of ways. A few examples are highlighted below.

The Bureau of Land Management (BLM) maintains case status for all public domain lands, which consist of approximately 270 million acres and an additional 500 million acres of subsurface minerals. These land and records management systems are used to maintain information regarding ownership status, leasing rights, encumbrances, and other land use authorizations. The public accesses approximately 5,100 reports from these systems per month and provides data to numerous private vendors who use the data in their applications. If these systems are no longer accessible via the internet, the public would be required to visit individual BLM offices to obtain this data from the case files.

The MMS Public Information Data System (PIDS) is a huge electronic repository of publicly available document images, consisting of documents such as geophysical and geological permits, plans of exploration and development, and drilling permits. This system contains over one million documents and 2,114 documents are added weekly on average. Prior to the implementation of PIDS, it was necessary for customers to visit the Public Information Office (PIO) in order to obtain copies of the paper documents. In 2003, PIDS was used over 6,000 times per month. (This does not represent the actual number of documents viewed during these visits.) The absence of PIDS will require customers to visit the PIO to retrieve copies of electronic documents. However, many of the paper copies of documents contained within PIDS are no longer immediately accessible at the MMS office, as they have been archived at Federal Records Centers.

The Office of Surface Mining (OSM), which regulates surface coal mining and

reclamation operations, administers the Technical Innovation and Professional Services (TIPS) database containing critical information pertaining to mines. This information includes technical designs, permitting information, subsidence data, and other materials. State regulatory authorities access TIPS approximately 135 times each day. OSM's disconnection from the internet will prevent or delay access to this information and could thereby likely result in: (1) delayed mine permitting decisions, which may result in reduced coal production and mine layoffs; (2) less accurate technical evaluations and designs, which could cause mine slope failures resulting in mudslides, property loss, blocked highways, and possible fatalities.

Many of the forty million annual visitors to the National Wildlife Refuge System rely on web pages (both national- and regional- level as well as individual sites hosted by individual field stations) to get driving directions, learn about activities and special events offered, and understand site-specific regulations before making a visit. Moreover, the National Wetlands Inventory (NWI) Mapping Service produces information on the characteristics, extent, and status of the nation's wetlands and deepwater habitats. Through personal computers and internet browsers, members of the public view produce on average 26,300 maps a month using the Wetlands Interactive Mapper.

5. Education.

Among other activities, the Bureau of Indian Affairs (BIA) operates the Office of Indian Education Programs (OIEP). The OIEP is a program designed to provide quality education opportunities for the children of Indian Tribe and Alaskan Native Tribe members. The program serves over 60,000 students attending more than 180 schools and dormitories in over 2,000 facilities located on 63 American Indian reservations in 23 states and is administered almost entirely through the internet. It provides children from remote areas with a vast pool of educational resources and curriculum. The BIA's disconnection from the internet has prevented Interior from providing this vital service to Indian students.

In addition, the Department operates the Education Native American Network ("ENAN II"), a stand-alone network that has a single connection to the National Business Center for the purpose of accessing critical financial management and payroll systems. All Bureau-funded schools and colleges rely heavily on ENAN II and the internet to augment their daily instructional programs and maintain enrollment data, student attendance reports, and grades. The internet is also the only mechanism for schools to access programs like the Free and Reduced Lunch Program and the Department of Education Grant Administration Program System (GAPS). Grant schools, which are typically quite isolated, rely heavily on ENAN II for internet access to their banking, payroll and procurement systems.

6. Hiring and Personnel.

All the Department's bureaus announce vacancies using the "USAJOBS" web site

administered by the Office of Personal Management (OPM). In fact, OPM requires that all vacancies open to the general public be posted on the USAJOBS site. The Department posts about 85 vacancy announcements per day on the site. Applicants apply to vacant positions through the internet. Applicants receive e-mail notification of the receipt of their applications, their eligibility for the vacant positions and selection or non-selection for the vacant position. In addition, most bureaus have web-based hiring systems that accept, rate, rank, and refer candidates. The court's disconnection order stops this internet-based hiring and recruitment process in its tracks.

The Department's Paycheck system requires direct interface with FFS and the Federal Personnel Payroll System (FPPS). Without proper information from these systems, employees will be paid, but perhaps improperly, and corrections will have to be made manually within both the Paycheck and FPPS systems. Without FPPS access, personnel actions cannot be processed in FPPS. This includes appointment of new hires, promotions, awards, reassignments, retirements, transfers to other government agencies, and changes in enrollment resulting from open season for federal employees for Thrift Savings Plan. FPPS customers would lose secure network connectivity to the VPN to input time and attendance data for payroll processing.

The Department relies on the internet to receive monthly tax bulletins to load correct federal, state and local tax information into the payroll systems. This will affect not only the correct computation and collection of payroll taxes for Interior, but also 34 other government agencies, law enforcement, fire fighter personnel, and other emergency workers.

The ability to collect electronic time and attendance information for employees and submit that information to the FPPS system could impede the correct and prompt pay of employees.

7. <u>MMS Royalties</u>.

Disconnection will adversely affect the ability of the Department's MMS to receive, process, and disburse over $500 million in mineral revenues on federal and Indian leased lands each month. MMS accomplishes its assigned mission through delivery of reporting, accounting, and financial services. About 2,000 companies report and pay royalties to MMS each month. All such functions are heavily reliant on the automated systems and access to the internet. Minerals revenues are a major source of income for forty-one Indian Tribes; approximately 20,000 individual Indian minerals owners; the federal government, and thirty-eight states. The court's injunction will prevent or hinder MMS from being able to make timely monthly disbursements of over $500 million in mineral revenues to States, Indians, and Treasury accounts.

8. IT Security.

Disconnection will undermine and impede the progress the Department has already made with regard to IT security. Interior has fully certified and accredited 30 of its systems and issued interim approval to operate for 108 systems at an approximate cost of $13.2 million. These efforts to enhance security measures have been undertaken in accordance with guidance provided to federal agencies by OMB and the National Institutes of Standards and Technology (NIST) and are intended to assure compliance with federal statutes (e.g., the Federal Information Security Management Act of 2002) requiring agencies to secure the availability, integrity and confidentiality of federal systems and information. However, if the Department must reconfigure its systems to meet the court's demands, security compliance must be completed anew.

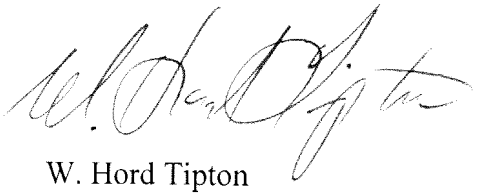
Disconnection will also hinder maintenance of the Department's IT systems. For example, disconnection will prevent the Department from electronically obtaining security software updates and patches, including anti-virus definition files and intrusion detection systems signature files. In addition, the Department will lose the capability to electronically report and coordinate with the Department of Homeland Security, which operates the Federal Computer Incident Reporting Center ("FedCIRC"). This would hinder or eliminate the Department's ability to coordinate security reporting with Homeland Security and would affect such operations as reporting incidents to the FedCIRC and obtaining patches that allow the Department to secure, update and measure IT system configuration compliance. Further, the Department will not receive the electronically transmitted Daily Open Source Infrastructure Reports from Homeland Security. In addition, the Department's security managers and other network operations personnel will not be able to access the Department's website that provides IT security policy, patch updates, and a library of information relevant to system management. Interior has successfully reduced the vulnerabilities detected through monthly scanning from 1000 to less than 10 in 14 months. The effectiveness of this program is threatened by the shutdown.

9. Freedom of Information Act (FOIA).

The Department has Electronic Freedom of Information Act ("E-FOIA") capabilities required by 5 U.S.C. § 552(a)(2)(E). E-FOIA requires the Department to make records subject to FOIA electronically available. The total number of FOIA requests will increase as a result of disconnection because the public information currently available on the Department's websites will no longer be available on-line. The time required to process the average FOIA request will increase because the FOIA guidance currently available on the Department's website will no longer be available to the public and the internal electronic FOIA tracking system will no longer be available to employees processing these requests. The Department's websites have become a key communication vehicle for the program, directing requestors to the appropriate FOIA office, informing requestors of current regulations and fee schedules. The Department's

website is a key research and communication tool for FOIA staff, and it will no longer be accessible under the court's preliminary injunction. Interior has successfully reduced the vulnerabilities detected through monthly scanning from 1000 to less than 10 in 14 months. This program is threatened by the shutdown.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief. Executed on March 22, 2004.



W. Hord Tipton