

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANTS' OPPOSITION TO PLAINTIFFS'
RENEWED REQUEST FOR EMERGENCY STATUS CONFERENCE
REGARDING THE SECURITY OF ELECTRONIC TRUST RECORDS

Defendants respectfully oppose Plaintiffs' Renewed Request for Emergency Status Conference Regarding the Security of Electronic Trust Records ("Plaintiffs' Request") (filed Jan. 4, 2005) (Dkt. 2804). In all-too-typical fashion, Plaintiffs repeat the unsupported -- and unsupportable -- assertion that "loss, destruction, and corruption of IITD will continue" Plaintiffs' Request at 1.¹ Moreover, Plaintiffs charge that

it is urgent to discuss actions that must be taken to secure fully all electronic trust data -- including the disconnection of IT systems from the Internet and/or the shut down of insecure computers -- and to set a date certain for an evidentiary hearing in this regard and an expedited discovery schedule related thereto. Time is of the essence.

Id. at 1-2 (emphasis in original). In fact, the above quotes set forth virtually the entire substantiation offered by Plaintiffs to support their assertion that this Court should hold an

¹ In stating this unsupported conclusion, Plaintiffs essentially recite the same claims set forth in Plaintiffs' Request for Emergency Status Conference Regarding the Security of Electronic Trust Records (filed Dec. 3, 2004) (Dkt. No. 2776).

emergency conference and enter yet another order disconnecting Interior Department systems from the Internet.²

While styled as a request for a status conference, rather than a motion, the substance of Plaintiffs' "request" seeks the commencement of another emergency proceeding leading to the issuance of a temporary restraining order. In doing so, Plaintiffs' Request completely disregards the well-settled law regarding their burden in seeking preliminary injunctive relief. As the appellate court recently explained in this matter:

Prevailing on the merits of the liability claim of a breach of fiduciary duty by the Secretary in failing to account for IITD funds did not relieve the plaintiffs of their burden as the moving party to demonstrate the necessity of the IT disconnection injunction to safeguard against imminent and irreparable injury to their interests.

Cobell v. Norton, 391 F.3d 251, 259 (D.C. Cir. 2004). On its face, Plaintiffs' Request, which consists of less than one page of textual conclusions and no factual support, fails to meet the burden that they -- as the moving party -- are required to meet for entry of preliminary injunctive relief. Id.; see generally Davenport v. International Brotherhood of Teamsters, AFL-CIO, 166

² Plaintiffs' Request also contains the usual bald and unsubstantiated assertion that "the malfeasance of the trustee-delegates is continuing . . ." Plaintiffs' Request at 1.

Subsequent to the filing of Plaintiffs' Request, Plaintiffs filed another factually ungrounded set of allegations. Notice of Supplemental Information in Support of Plaintiffs' Renewed Request for Emergency Status Conference Regarding the Security of Electronic Trust Records (filed January 4, 2005) and Continuing Violations of December 17, 2001 Consent Order (filed Jan. 11, 2005) (Dkt. No. 2810) ("Plaintiffs' Notice"). While accompanied by the predictable publicity on Plaintiffs' website and unfounded claims of fraud, a cursory review of the attachment to Plaintiffs' Notice confirms that no Internet connectivity was involved with regard to the BIA systems described therein. The BIA system involved a remote dial-up modem connection from a computer to a BIA e-mail server; none of the systems involved -- the computer using the modem or the e-mail server -- had or has connectivity to the Internet under the configuration discussed in the May 7, 2004 memorandum attached to Plaintiffs' Notice.

F.3d 356, 360-61 (D.C. Cir. 1999) (in considering whether to grant application for temporary restraining order or preliminary injunction, court must examine (1) whether there is substantial likelihood that plaintiff would succeed on the merits, (2) whether plaintiff would suffer irreparable injury if injunctive relief is denied, (3) whether granting of injunctive relief would substantially injure other party, and (4) whether public interest would be served by granting injunctive relief).

Plaintiffs' Request is equally objectionable because it disregards the D.C. Circuit's pronouncements regarding the proper role of this Court and the parties with respect to IT security. While noting greater latitude than in a typical agency case, Cobell v. Norton, 391 F.3d at 257, the appellate court still described a process, identical to that followed in APA cases and endorsed in its December 10, 2004 decision, which should be followed in reviewing claims that the Interior Department has breached a duty to maintain secure IT records systems:

The district court in Cobell V contemplated that the post-liability phase of the underlying litigation would, in part, "involve the government bringing forward its proof of IIM trust balances and then plaintiffs making exceptions to that proof." 91 F.Supp.2d at 31. Given 's superior access to information about the state of its IT system security, this was a reasonable way to proceed in evaluating the plaintiffs' request for injunctive relief to disconnect IT systems. But it was error to shift the burden of persuasion to the Secretary to show why disconnecting most of Interior's IT systems was unnecessary to ensure the security of IITD, and the error was not harmless.

391 F.3d at 259 (citations omitted); see Cobell v. Norton, No. 03-5314, slip op. at 24-27 (D.C. Cir. Dec. 10, 2004) (vacating injunction regarding To-Be Plan "insofar as it directs , rather than the planitiffs, to identify defects in its proposal and requires the agency to comply with the Comprehensive Plan.").

Under the approach endorsed by the appellate court, the next steps to be undertaken with regard to the IT systems will commence when the Interior Department presents its final agency action concluding that its IT systems are adequately secure and compliant with OMB Circular A-130.³ Such agency action would be supported by an administrative record, filed with the Court. It is only at that point in time when Plaintiffs identify defects in the agency's action. Similarly, it is only at that point when it would be appropriate for Plaintiffs to attempt to demonstrate that the Interior Department's action regarding IT security presents one of the exceptional circumstances in which judicial review of an agency action may consider matters not in the administrative record. In all but exceptional situations, the APA confines judicial review of agency action to the administrative record. See Holy Land Foundation for Relief & Development v. Ashcroft, 219 F.Supp. 2d 57, 65 (D.D.C. 2002) ("It is well-established that the scope of review under the APA is narrow and must ordinarily be confined to the administrative record.") (citing Camp v. Pitts, 411 U.S. 138, 142 (1973) (per curiam)), aff'd, 333 F.3d 156 (D.C. Cir. 2003), cert. denied, 540 U.S. 1218 (2004); see also Commercial Drapery Contractors, Inc. v. United States, 133 F.3d 1, 7 (D.C. Cir. 1998) (APA "limits review to the administrative record, except when there has been a 'strong showing of bad faith or improper behavior' or when the record is so bare that it prevents effective judicial review.") (citation omitted); National Law Center on Homelessness and Poverty v. Department of Veterans Affairs, 736 F. Supp. 1148, 1152 (D.D.C. 1990) ("[T]he general rule is that discovery is not permitted prior to a court's review of the legality of agency action under §

³ Defendants do not agree with Plaintiffs' stated assumption that the Consent Order "is again in effect." Plaintiffs' Request at 1. Regardless, assuming solely for the sake of argument that the Consent Order is in effect, the Interior Department's compliance with OMB Circular A-130 would constitute grounds for vacating the Consent Order. See Consent Order at 8 (Dec. 17, 2001).

706(2)(A) of the APA.”).

Plaintiffs’ Request is yet another sensational but unsubstantiated assertion of claims seeking costly and damaging impacts to the operations of the Interior Department and to the general public. For the foregoing reasons, Defendants respectfully request that this Court deny Plaintiffs’ Renewed Request for Emergency Status Conference Regarding the Security of Electronic Trust Records.

Respectfully submitted,

ROBERT McCALLUM, JR.
Associate Attorney General
PETER D. KEISLER
Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director

/s/ John Warshawsky

SANDRA P. SPOONER (D.C. Bar No. 261495)
Deputy Director
JOHN T. STEMPLEWICZ
Senior Trial Attorney
JOHN WARSHAWSKY (D.C. Bar No. 417170)
Trial Attorney
Commercial Litigation Branch
Civil Division
P.O. Box 875, Ben Franklin Station
Washington, D.C. 20044-0875
Telephone: (202) 514-7194

January 13, 2005

CERTIFICATE OF SERVICE

I hereby certify that, on January 13, 2005 the foregoing *Defendants' Opposition to Plaintiffs' Renewed Request for Emergency Status Conference Regarding the Security of Electronic Trust Records* 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

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ORDER

This matter comes before the Court on the *Plaintiffs' Renewed Request for Emergency Status Conference Regarding the Security of Electronic Trust Records*, Dkt. 2804. Upon consideration of Plaintiffs' Motion, Defendants' Opposition, any Reply thereto, the applicable law and the entire record of this case, it is hereby

ORDERED that the Motion is, DENIED.

SO ORDERED

Hon. Royce C. Lamberth
UNITED STATES DISTRICT JUDGE
United States District Court for the
District of Columbia

Date: _____

cc:

Sandra P. Spooner
John T. Stemplewicz
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
Fax (202) 514-9163

Dennis M Gingold, Esq.
Mark Brown, Esq.
607 - 14th Street, NW, Box 6
Washington, D.C. 20005
Fax (202) 318-2372

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

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

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