

[SCHEDULED FOR ORAL ARGUMENT ON APRIL 11, 2006]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELOUISE PEPION COBELL, et al.,

Plaintiffs-Appellees,

v.

No. 05-5388

GALE A. NORTON,
Secretary of the Interior, et al.,

Defendants-Appellants.

**RESPONSE TO PLAINTIFFS' MOTION FOR FURTHER
SUPPLEMENTATION OF THE JOINT APPENDIX**

Defendants-appellants respectfully respond to plaintiffs' motion for further supplementation of the joint appendix on this appeal.

1. The government has sought to accommodate plaintiffs' requests for items to be included in the joint appendix even though the vast majority of plaintiffs' items are not cited in the briefs of either party. See Attachment A (plaintiffs' designations). As a result, the joint appendix originally filed comprised 21 volumes.

2. The creation of the joint appendix was further complicated by the existence of a protective order entered by the district court. See Attachment B (4/22/05 protective order). Under the terms of the protective order, the government provided the district court with unredacted documents and with documents containing proposed redactions. Both versions have been submitted to the district court under seal pending further

district court action. The government has placed documents filed under seal in district court in volumes of the joint appendix filed under seal.

3. After the government filed the joint appendix, plaintiffs suggested that certain materials in the sealed volumes properly could be included in public volumes. After review and further consultation with plaintiffs, the government submitted two supplemental public volumes, along with a motion for leave to file the supplemental volumes. That motion is pending. Plaintiffs' motion indicates that they do not oppose the request to file the two supplemental volumes. Accordingly, there is no dispute as to the supplemental volumes lodged with the Court.

4. The issue raised by plaintiffs' motion concerns the redacted trial exhibits filed under seal in district court and contained in the joint appendix volumes filed under seal. Plaintiffs urge that the appendix should have included unredacted versions instead. In including the redacted versions, the government accommodated plaintiffs' express appendix designation. See Attachment A, point II (designating the "Complete set of the parties' exhibits (redacted versions) of the May-July 2005 IT Security Evidentiary Hearing") (emphasis added).

As noted above, only a small fraction of the hundreds of trial exhibits are cited in the appellate briefs. Plaintiffs do not explain how this Court's review will be facilitated by the filing of more joint appendix volumes containing unredacted trial exhibits. If the Court believes that the filing of those volumes

will be useful, however, the government will, of course,
supplement the appendix as the Court directs.

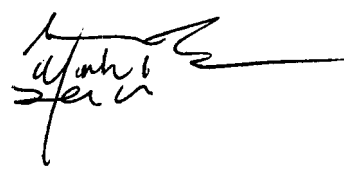
Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

KENNETH L. WAINSTEIN
United States Attorney

GREGORY G. KATSAS
Deputy Assistant Attorney General

ROBERT E. KOPP
MARK B. STERN
THOMAS M. BONDY
ALISA B. KLEIN
MARK R. FREEMAN
I. GLENN COHEN
ISAAC J. LIDSKY

A handwritten signature in black ink, appearing to read "Mark B. Stern", is written over the names of Mark R. Freeman and I. Glenn Cohen.

(202) 514-5089
Attorneys, Appellate Staff
Civil Division, Room 7531
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

MARCH 2006

Attachment A

**APPELLEES' LIST OF DOCUMENTS
FOR JOINT APPENDIX IN CASE NO. 05-5388**

I. Complete set of Redacted Transcripts of the May-July 2005 IT Security Evidentiary Hearing, including those referenced in Appellees' Brief (2/10/06), Appellees' Combined Opposition to Appellants' Motion for Stay and Appellee Motion for Sanctions (11/8/05) and District Court's Memorandum Opinion (10/20/05) (*Cobell XVI*, 394 F. Supp.2d 164 (D.D.C 2005)).

II. Complete set of the parties' exhibits (redacted versions) introduced into evidence in conjunction with the May-July 2005 IT Security Evidentiary Hearing, including those referenced in Appellees' Brief (2/10/06), Appellees' Combined Opposition to Appellants' Motion for Stay and Appellee Motion for Sanctions (11/8/05) and District Court's Memorandum Opinion (10/20/05) (*Cobell XVI*, 394 F. Supp.2d 164 (D.D.C 2005)).

III. Pleadings, Reports and Other Documents:

- January, 16, 2002 Eighth Quarterly Report [Dkt # 1090]
- June 30, 1998 High Level Implementation Plan
- October 27, 2005 James Cason Declaration., att'd to Appellants Motion for Stay
- August 25, 2005 Defendants' Notice [Dkt. # 3147]
- December 17, 2001 Consent Order [Dkt. # 1063]
- November 14, 2001 Report and Recommendation of the Special Master Regarding the Security of Trust Data at the Department of Interior [Dkt. # 932]
- Mona Infield Declaration (11/3/05), att'd as Exhibit 2 to 11/8/05 combined opposition
- Phase 1.5 Trial Testimony of Cason 6/4/03 A.M. page 42, att'd as Exhibit 3 to 11/8/05 Combined Opposition
- 4/20/05 TRO hearing at 57-58.
- *Appeals Court Shelves Shutdown of Interior Computers*, Federal Computer Weekly, (Aliya Sternstein) 10/24/05, att'd as Exhibit 13 11/8/05 Combined Opposition
- April 6, 2005 Inspector General Memorandum and Report regarding the Bureau of Land Management (Redacted Copy) [Dkt # 2938]
- 9/6/05 IG Memorandum re: Penetration Testing (redacted version), att'd Exhibit 33 to 11/8/05 Combined Opposition
- September 2005 IG report re NBC (redacted version)., att'd as Exhibit 34 to 11/8/05 Combined Opposition

IV. Under Seal Documents

- Under Seal Exhibit attached to Appellees' Combined Opposition to Appellants' Motion for Stay and Appellee Motion for Sanctions (11/8/05) and referenced in Appellees' Brief (2/10/06)
- Plaintiffs' Exhibit 247 in IT Evidentiary (unredacted copy)

Attachment B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,)
on their own behalf and on behalf of)
all those similarly situated,)
)
Plaintiffs,)
)
v.)
)
GALE NORTON, Secretary of)
the Interior, et al.,)
)
Defendants.)

Civil Action No. 96-1285 (RCL)

ORDER

In accordance with the proceedings at the Status Conference held by the Court on April 20, 2005; and upon consideration of the defendants' Motion [2929] for a Protective Order Regarding Sensitive IT Security Information, the applicable law, and the entire record herein, it is hereby

ORDERED that the Defendants' Motion [2929] is GRANTED; and it is further

ORDERED that good cause exists to preserve the confidentiality of Information Technology ("IT") security information, the public disclosure of which poses a risk to the security of Defendants' IT systems and may expose individual Indian trust data housed on these systems to unauthorized access, loss or harm. Good cause also exists to preserve the confidentiality of trade secrets and proprietary information related to Defendants' IT systems; and it is further

ORDERED that any testimony, documents and other tangible things to be given or

otherwise produced to an opposing party or filed with or presented at any hearing before this Court that contain, in whole or in any part, IT security information or any confidential trade secrets or proprietary information related to Defendants' IT systems shall be deemed "Protected Material" and shall be accorded the following treatment to prevent its disclosure to anyone besides the actual named parties, their counsel, designated IT experts and certain support staff for the sole purpose of litigating issues in the above-captioned case.

1. If any information contained in any testimony, document or other tangible thing is determined by Defendants to contain Protected Material because its public disclosure (i) poses a risk to the security of Defendants' IT systems and/or may expose individual Indian trust data housed on these systems to unauthorized access, loss or harm, or (ii) poses a risk of disclosing confidential trade secrets or proprietary information related to Defendants' IT systems, Defendants shall designate each transcript, document or thing as containing Protected Material by one of the following methods:

- (a) designating the matter as Protected Material under this Order either at the time it is elicited on the record either in deposition or in open court, or by a notice to Plaintiffs (or, in case of a hearing, by notice to the Court and to Plaintiffs) citing the line and page numbers of the Protected Material after reviewing the transcript;

- (b) marking pleadings, transcripts, documents and other evidence containing Protected Material, to be filed with the Court, by filing one unredacted copy under seal pursuant to the leave which is granted by this Order along with a public redacted version of each item filed under seal pursuant to this Order; or

- (c) designating the matter as Protected Material for purposes of a document production, by legend placed upon all documents or other tangible things produced to Plaintiffs.

2. For any deposition or hearing where Defendants declare on the record that testimony elicited or evidence used at the deposition or hearing contains Protected Material because its public disclosure (i) poses a risk to the security of Defendants' IT systems and/or may expose individual Indian trust data housed on these systems to unauthorized access, loss or harm, or (ii) poses a risk of disclosing confidential trade secrets or proprietary information related to Defendants' IT systems, all testimony and exhibits from said deposition or hearing shall be placed under seal and may not be publicly disseminated or disclosed to anyone other than as set forth expressly below. During a hearing when Protected Material is discussed in open court, the hearing shall be closed and persons not authorized to have access to Protected Material shall be excluded from the proceeding while such Protected Material is discussed or considered.
3. Within ten (10) business days after a transcript becomes available, Defendants shall designate the testimony, by page and line number, and the specific matter within the exhibits that shall remain under seal as Protected Material. Defendants shall serve a copy of these designations on Plaintiffs, and any participating non-parties or their counsel, and to the Court in case of a hearing. Defendants shall file a redacted public version of all exhibits filed in open Court that are to remain under seal. Except for materials designated pursuant to this paragraph, testimony and exhibits from the deposition that are designated as Protected Material by Defendants shall not remain under seal upon expiration of the ten (10) business day period.

4. If Plaintiffs believe that any Protected Material should not be designated as such or should otherwise not remain under seal, they may file a motion with the Court, under seal, requesting that the seal be lifted with regard to any identified testimony or exhibits and set forth the reasons that the matter is either not Protected Material or that it should be unsealed regardless of its status. The requirement to file this motion to unseal does not alter the fact that it is the defendants' burden to establish the basis for the sealing of any documents or testimony.
5. All individuals gaining access to Protected Material shall use the information solely for purposes of this litigation and for no other purpose. Protected Material may be disclosed by counsel for Plaintiffs to attorneys and employees of Plaintiffs' counsel, as well as any IT experts retained by Plaintiffs, provided the disclosure of the information is necessary for the representation of Plaintiffs in this matter. Individuals shall be provided such access only after being provided a copy of this Order and his or her agreement to comply with its terms. Plaintiffs' counsel shall retain the original signed statements of all recipients. Each person to whom Protected Material is disclosed shall make no disclosure of such Protected Material, other than to persons to whom disclosure is permitted and only for the purposes of this litigation. Except upon further Order from this Court, Protected Material shall not be disclosed to any other individual or entity and shall not be publicly disclosed in any form, including oral, written, or electronic disclosures.
6. Within six months of the conclusion of this case, Plaintiffs, their counsel, experts

and employees shall destroy all copies of transcripts and other documents that contain Protected Material, regardless of the form in which such material may be stored or recorded, and shall certify the completion of such destruction in writing to Defendants' counsel.

SO ORDERED.

Signed by Royce C. Lamberth, United States District Judge, April 22, 2005.

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March, 2006, I caused copies of the foregoing response to be sent to the Court and to the following by hand delivery:

Keith M. Harper
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036-2976
(202) 785-4166

G. William Austin
Mark I. Levy
Kilpatrick Stockton
607 14th Street, N.W., Suite 900
Washington, D.C. 20005
(202) 508-5800

and to the following by federal express, overnight mail:

Elliott H. Levitas
Law Office of Elliott H. Levitas
1100 Peachtree Street
Suite 2800
Atlanta, GA 30309-4530
(404) 815-6450

and to the following by regular, first-class mail:

Dennis Marc Gingold
607 14th Street, N.W.
Washington, D.C. 20005

Earl Old Person (pro se)
Blackfeet Tribe
P.O. Box 850
Browning, MT 59417



Alisa B. Klein