

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____ ELOUISE PEPION COBELL et al.,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:96CV10285
)	(Judge Lamberth)
GALE NORTON, Secretary of the Interior, et al.,)	
)	
Defendants.)	
_____)	

**DEFENDANTS' EMERGENCY MOTION FOR DISSOLUTION OF THE
AUGUST 31, 2004 TEMPORARY RESTRAINING ORDER INsofar AS IT
RESTRAINS TRIBAL ACQUISITIONS FUNDED BY THE DEPARTMENT OF
ENERGY AS PART OF ITS FISH AND WILDLIFE MITIGATION PROGRAM**

Defendants respectfully move for an order dissolving the Court's August 31, 2004 Temporary Restraining Order ("TRO") insofar as it prohibits tribal land acquisitions under 25 CFR Part 152 that are funded by the Bonneville Power Administration ("BPA") of the United States Department of Energy ("DOE") pursuant to its statutory obligation to protect, mitigate and enhance fish and wildlife affected by federal hydroelectric power projects in the Columbia River Basin. The inability to consummate pending and future transactions under this program will create an unwarranted hardship on the wildlife mitigation program and the Indian tribes that are partners in the program.

ARGUMENT

The Pacific Northwest Electric Power Planning and Conservation Act requires DOE, through its federal power marketing entity BPA, to "protect, mitigate, and enhance fish and wildlife to the extent affected by the development and operation of any hydroelectric project of the Columbia River and its tributaries" 16 U.S.C. § 839b(h)(10)(A). One of the ways in

which BPA satisfies this statutory obligation is by funding the acquisition by tribes of lands to be permanently protected and managed by them as fish and wildlife habitats. Declaration of Gregory K. Delwiche, Acting Vice President of Environment, Fish and Wildlife, BPA, executed Sept. 7, 2004 ("Delwiche Decl.") and submitted herewith, at ¶ 3. Such acquisitions can include lands held by the Department of the Interior and subject to regulation under 25 CFR Part 152.

Several pending mitigation land acquisitions are scheduled to close before the end of the fiscal year, September 30, 2004.¹ Delwiche Decl. at ¶ 5. For all of these parcels, the relevant appraisals, hazardous waste surveys, and related federal compliance actions (such as those related to the National Environmental Policy Act and the Endangered Species Act) have already been performed by BPA. *Id.* at ¶ 6. If Defendants are not permitted to allow these mitigation sales to go forward, the delay to BPA in acquiring these important wildlife lands would create extreme budgeting difficulties for that agency and, in some cases, could result in a loss of funding to acquire the subject lands because of other pressing mitigation needs. *Id.* On a broader scale, effectively restraining BPA from fulfilling its statutory mandate would impose an unreasonable and unnecessary hardship on the fish and wildlife mitigation program, as well as on the Indian tribes who receive the subject lands. On the other hand, allowing this important public function to continue would result in no injury to Plaintiffs. Therefore, the TRO should be dissolved insofar as it restrains Defendants from allowing these land transactions to proceed, both with respect to those that are already pending and those that may be scheduled in the future.²

CONCLUSION

¹ DOE reports that the transactions are all negotiated sales pursuant to 25 CFR § 152.25.

² Counsel for Defendants conferred with counsel for Plaintiffs concerning this motion, and Plaintiffs oppose the motion.

For all of the foregoing reasons, Defendants respectfully request that the Court issue an order dissolving the TRO insofar as it restrains Defendants from permitting the sale of land to tribes in transactions under 25 CFR Part 152 that are funded by BPA pursuant to its mitigation responsibilities under the Pacific Northwest Electric Power Planning and Conservation Act.

Dated: September 8, 2004

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that, on September 8, 2004 the foregoing *Defendants' Emergency Motion for Dissolution of the August 31, 2004 Temporary Restraining Order Insofar as it Restrains Tribal Acquisitions Funded by the Department of Energy as Part of its Fish and Wildlife Mitigation Program* 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*)
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/s/ Kevin P. Kingston
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GALE NORTON, Secretary of the Interior, et.al.,)	
)	
Defendants)	

DECLARATION OF GREGORY K. DELWICHE

1. I, Gregory K. Delwiche, am the Acting Vice President of Environment, Fish and Wildlife at the Bonneville Power Administration (BPA), a federal power marketing entity of the United States Department of Energy, headquartered in Portland, Oregon.
2. Under the provisions of the Pacific Northwest Electric Power Planning and Conservation Act, BPA is required to protect, mitigate, and enhance fish and wildlife affected by federal hydropower projects in the Columbia River Basin, consistent with the program developed by the Northwest Power and Conservation Council. 16 U.S.C. § 839b(h)(10)(A).
3. One way that BPA provides such mitigation is by funding the acquisition by tribes of lands to be permanently protected and managed by them as fish and wildlife habitat. Those acquisitions can include lands covered by the regulations at 25 CFR Part 152.
4. Upon receipt of information about the temporary restraining order issued in this case relating to actions under the Part 152 regulations, I asked my staff to compile a list of affected BPA mitigation lands.
5. Our initial review indicates we have a number of affected pending fish and wildlife land acquisitions, as show in Table 1, below:

TABLE 1

NAME	STATE	TRIBE	ACRES	APPRAISED VALUE
Allotment 154	WA	Spokane	148.59	\$146,000
Allotment 1052	WA	Spokane	79	\$56,000
Kit Allotment	ID	Coeur D'Alene	315	\$400,000
Felsmen Allotment	ID	Coeur D'Alene	160	\$500,000
TOTAL			702.59	\$1,102,000

6. All appraisals, hazardous waste surveys, and related federal compliance actions (such as compliance with the National Environmental Policy Act, and the Endangered Species Act) have been conducted on the parcels. The inability to close on these parcels by the end of this fiscal year (September 30, 2004) will unnecessarily delay the acquisition of important and valuable wildlife mitigation lands. In addition, a delay beyond the fiscal year creates extreme difficulties in terms of budgeting and in some cases could mean the loss of funding for acquisition of the lands given other pressing mitigation needs.
7. BPA has exercised due diligence in the acquisition of important and valuable wildlife mitigation lands and the temporary restraining order will create a hardship on BPA's wildlife mitigation program and the Indian Tribes that are our partners in the program.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, executed this 7th the day of September, 2004, in Seattle, Washington.



Gregory K. Delwiche
Acting Vice President
Environment, Fish and Wildlife
Bonneville Power Administration
United States Department of Energy

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ORDER

This matter coming before the Court on *Defendants' Emergency Motion For Dissolution Of The August 31, 2004 Temporary Restraining Order Insofar As It Restrains Tribal Acquisitions Funded By The Department Of Energy As Part Of Its Fish And Wildlife Mitigation Program*, Dkt. _____, and any response thereto, the Court finds that the motion should be GRANTED.

IT IS THEREFORE ORDERED that the Temporary Restraining Order dated August 31, 2004 is dissolved insofar as it restrains Defendants from permitting the sale of land to tribes in transactions under 25 CFR Part 152 that are funded by the Bonneville Power Administration of the Department of Energy pursuant to its mitigation responsibilities under the Pacific Northwest Electric Power Planning and Conservation Act.

SO ORDERED this ____ day of _____ 2004.

ROYCE C. LAMBERTH
United States District Judge

cc:

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