

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' MOTION TO STRIKE
PLAINTIFFS' "EMERGENCY NOTICE"**

Pursuant to Federal Rule of Civil Procedure 12(f), Defendants respectfully move to strike Plaintiffs' "Emergency Notice of Individual Indian Trust Records in Imminent Risk of Destruction and Loss" (filed April 28, 2004) ("Plaintiffs' Notice").¹ In a case in which it has become customary for Plaintiffs to dispense with even the most basic evidentiary requirements, their latest filing lacks even a pretense of legal competence. Through their notice, Plaintiffs purport to "inform" the Court that Defendants have placed trust records "in imminent risk of loss, corruption, and destruction." Plaintiffs offer no competent evidence in support of this now boilerplate allegation. They include with their submission no affidavit, declaration, or qualified documentary proof of the statements they seek to make part of the public record. Rather, they rely solely on two letters that contain a laundry list of allegations from sources unknown, as well as unseemly personal slurs directed at Interior officials. The filing of these unsupported and derogatory materials is improper on its face, and they should be stricken from the record.

¹ Defense counsel has consulted with Plaintiffs' counsel, who state that they oppose this motion.

ARGUMENT

Plaintiffs seek to place in the record assertions from unidentified sources that are neither supported nor verifiable. In dramatic fashion, Plaintiffs announce that they have received "extremely disturbing information concerning the current status of records retention" at the Department of the Interior ("Interior").² But they provide no evidence at all for this "information." Instead, Plaintiffs accuse Interior of wrongdoing based entirely on accusations from secret sources. Only in a Star Chamber proceeding could the submission of such charges as evidentiary fact be taken seriously.³

The allegations Plaintiffs seek to make part of the record are contained in two letters they attach to their notice. The sources of the charges in neither letter are identified, much less supported by sworn testimony from individuals with knowledge of the matters asserted. In the first, which purports to be written by some Interior employees, not only are the authors unidentified, but they promise to deny ever having written the letter if asked. Letter from unidentified sources to Elouise Cobell of 3/21/04, attached to Plaintiffs' Notice as Exhibit 1, at

² Plaintiffs' characterization of their filing as an "emergency notice" is dubious on its face, given that they waited well over a month after receiving the subject letters to file their notice.

³ The relaxed evidentiary standards to which the Plaintiffs hold themselves stand in stark contrast to their insistence that Defendants not only provide sworn jurats attesting to matters relevant to information technology security, but that such jurats not be limited to matters within the affiant's knowledge, information or belief. See Plaintiffs' Comments on Interior Secretary Gale Norton's and Acting Assistant Secretary Aureen [sic] Martin's Proposed Procedures to Reconnect Information Technology Systems Which House or Access Individual Indian Trust Data (filed Sept. 10, 2003) (arguing that Interior's "understanding of 'adequate evidence' consists of . . . defective jurats, rendering the purported 'certification' evidentially incompetent and patently unreliable."); see also Mem. Op. (Mar. 15, 2004) at 8-11.

1.⁴ Thus, the allegations are neither supported nor verifiable.⁵ The second letter, written by a union representative, repeats allegations purportedly conveyed to her by union members, none of whom is identified. Letter from Susan Sandoval, Field Representative, Indian Educators Federation, AFT, AFL-CIO to Michael M. Billings, Labor Relations Officer, U.S. Department of the Interior, of 3/14/04, attached to Plaintiffs' Notice as Exhibit 3. Thus, it consists entirely of hearsay derived from anonymous sources. These facially incompetent letters and Plaintiffs' repetition of their contents have no legal pertinence nor, therefore, a place in the public record. See Pigford v. Veneman, 215 F.R.D. 2, 3 (D.D.C. 2003) (striking papers filed by class counsel alleging racism against Government counsel where it "provided no factual basis or evidence in support of its charges."); Alexander v. FBI, 186 F.R.D. 21, 53 (D.D.C. 1998) (finding "no evidence to support the claim made by plaintiffs" and, accordingly, striking it from the record). Plaintiffs' Notice and its attachments should be stricken.

⁴ The anonymous letter submitted by Plaintiffs appears to be motivated, at least in part, by labor issues relating to the potential relocation of jobs from Albuquerque, New Mexico to Interior's new facility in Lenexa, Kansas. See Plaintiffs' Notice, Ex. 1 at 2-3 (suggesting the facility should have instead been built in Albuquerque); id. at 6 ("A facility needs to be constructed in Albuquerque for the records."). This litigation is not the proper forum in which to raise such issues, regardless of the manner in which they are framed.

⁵ Aside from being barren of evidentiary support, the anonymous letter also includes derogatory slurs (including race-based remarks) against certain Interior officials, see Plaintiffs' Notice, Ex. 1 at 2, providing an additional ground for striking the material. See Fed. R. Civ. P. 12(f) (court may strike from any pleading "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter"); Pigford v. Veneman, 215 F.R.D. 2, 4 (D.D.C. 2003) ("The word 'scandalous' in Rule 12(f) 'generally refers to any allegation that unnecessarily reflects on the moral character of an individual or states anything in repulsive language that detracts from the dignity of the court.'") (quoting 2 Moore's Federal Practice § 12.37[1] at 12-93 - 12-94 (3d ed. 2002)); Johnson v. McDow, 236 B.R. 510, 523 (D.D.C. 1999) (striking "scandalous and highly insulting allegations" from the record).

As Plaintiffs have put forth no evidence, nor sought any relief (bringing into question their motives for filing these materials), no substantive response to the accusations contained in their notice is required. However, it warrants mention that, shortly after receiving the letter from the union representative, and well before Plaintiffs filed that letter with the Court, Interior provided a detailed response to the concerns she raised. See Letter from Michael M. Billings to Susan Sandoval of 3/25/04, attaching Letter from Ethel Abeita, Director, Office of Trust Records, to Michael Billings of 3/23/04 (a copy of the letter, which Plaintiffs did not attach to their notice, is attached hereto as Exhibit 1).

For example, in response to questions concerning the condition of boxes in which records are being kept, Interior explained that, while some boxes received from the field were in poor condition, the vast majority of records are being stored in boxes that are in satisfactory condition, and any damaged records that are discovered are repaired and placed in protective sleeves. Id. at 2. With respect to a concern that there is no protocol to guarantee that contractors do not place original documents in a "shred box," Interior explained that there is, in fact, a protocol for reviewing such boxes and that, in any event, no documents currently are being shredded. Id. at 3. Interior also informed the union representative, in response to a complaint that employees lack sufficient time to verify the contents of boxes against inventories, that the contents of boxes are being indexed, archives technicians will be assigned to randomly check boxes being shipped, and upon receipt, NARA performs random quality assurance checks of the boxes to determine if the series are correctly identified and the dates accurate. Id. Interior responded in like fashion to each issue raised in the union's letter and, while the procedures it described may change at Interior's discretion, as necessary to effectively implement records management and protection,

its response to the union letter demonstrates that Interior is taking appropriate steps in this regard.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the Court issue an Order granting their motion to strike Plaintiffs' "Emergency Notice."

Dated: May 12, 2004

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that, on May 12, 2004 the foregoing *Defendants' Motion to Strike Plaintiffs' "Emergency Notice"* 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



United States Department of the Interior
OFFICE OF THE SPECIAL TRUSTEE FOR AMERICAN INDIANS
Washington, D.C. 20240



March 25, 2004

Susan Sandoval, IEF, AFT
2301 Yale Blvd SE
Albuquerque, NM 87106

Dear Ms. Sandoval:

Transmitted herewith is the response from the Office of Trust Records to your March 14, 2004, correspondence. In that March 14, 2004, correspondence the union provided the basis for earlier union comments regarding the "shape of records". Management has investigated this situation and Ms. Abeita's attached response provides a detailed summary of their findings and our perspective on records.

Michael M. Billings
Labor Relations Officer for OST

EXHIBIT 1
Defendants' Motion to Strike
Plaintiffs' "Emergency Notice"

TOTAL P.02



IN REPLY REFER TO:

United States Department of the Interior
OFFICE OF THE SPECIAL TRUSTEE FOR AMERICAN INDIANS
Office of Trust Records
1551 Mercantile NE, Suite A
Albuquerque, New Mexico 87107

MAR 23 2004

Mr. Michael Billings, Labor Relations Officer
United States Department of the Interior
Minerals Management Service
Personnel Division
381 Elden Street
Herndon, Virginia 20170-4817

RE: Ms. Sandoval's Letter of March 14, 2004

Dear Mr. Billings:

This letter responds to Ms. Sandoval's letter dated March 14, 2004 to you. As stated in your letter to the Union, the Department of the Interior ("Department") wanted to know the basis for Ms. Sandoval's statement that "the records are in no better shape than last year when such transfers were stopped by the Special Master, Alan Balaran." While considerable progress has been over the course of the last year, and even acknowledged by the Special Master, the Department was interested in those events occurring prior to February 13, 2004, upon which she relied in making her statement. The integrity of the boxes is a daily concern of current Office of Trust Records (OTR) management, the organization in the Department responsible for the management of Indian records.

First, boxes shipped to Lenexa, Kansas, from Albuquerque, New Mexico, last week, arrived safely, and have been accepted into the American Indian Records Repository. Boxes are grouped and shipped in blocks, which are one or more chronological segments of cutoff, or closed, records that are in the same series and are dealt with as a unit for disposition purposes. These blocks are referred to as accessions. Each accession had a Standard Form 135 "Records Transmittal and Receipt" (SF 135) in the first box. The SF 135 is a standard government form which is used by federal agencies to ship records to the National Archives and Records Administration (NARA). Each SF 135 identified the number of boxes which made up the accession and a listing of the contents of the boxes. Following NARA policy, OTR can only ship accessions which have SF 135s. The SF 135 was prepared when an accession was fully indexed by OTR's contractors. The boxes were prepared for shipment by OTR records management staff, OTR archives technicians and contractor staff under the direction of the Division Chief, Records Management Operations. Boxes were shipped with the approval of the Associate Deputy Secretary of the Department and the move plans were reviewed by the Special Master who voiced no concerns.

Second, the following are OTR's observations regarding each of Ms. Sandoval's numbered items. The fact that OTR does not attempt to address each allegation in the numbered items does not mean that it should be construed as an agreement.

1. OTR received some boxes from the field that were in poor condition; however, currently the vast majority of records are in boxes which OTR considers to be in satisfactory condition. The boxes which were sent from the field contained records that were identified as being in jeopardy either because of the means of storage under which they were housed or because of the condition of the contents of the boxes. While we recognize that some boxes were received in "over stuffed" condition, it has been held by many, including the Special Master, that OTR cannot break apart overstuffed boxes as that would compromise the integrity of the boxes. With regard to torn or crumbled documents, OTR employees are instructed to repair torn documents with archival tape as such documents are discovered. Documents which are crumbling are placed in protective sleeves as they are discovered.

2. Records bound with metal clips, clasps or bindings are being found as they are being indexed and as research occurs. Contractors have been directed to replace old staples and paper clips with stainless steel products supplied by OTR when rust is observed. Contractors have been instructed to immediately notified OTR archives technicians when they come across such documents. OTR archives technicians provide advice and necessary supplies to replace any rusted clips or clasps.

3. Boxes which have been indexed, as well as those which have not been indexed, will continue to be accessed and searched. Boxes are being indexed to facilitate the finding of records. In fact, the Cobell court has ordered the Department to index all documents under the control of OTR. The researchers have required access to boxes of records which have been indexed. This will continue to be true as long as the tribal and Cobell litigation continue and as long as records need to be retrieved from the boxes. The Office of Historical Trust Accounting (OHTA) continues to complete its accounting of all judgment accounts, special deposit accounts and per capita accounts which requires research in boxes regardless of whether the boxes have been indexed.

OTR archives technicians from the Records Research Branch have been tasked to work with the contractors to ensure that the contractors handle and return the documents to the correct box. If these employees observe any mix-up, they are responsible for informing the contractor of the proper placement of the file and informing management of their concerns. To date, I am unaware that any specific instances have been brought to management's attention.

While documents are being handled for various litigation and research projects, "how many times" is "too many" is a subjective evaluation. Many current research projects have been directed by the courts or are in response to requests by the litigants. Before researchers are allowed to handle the contents of a box, they are instructed on proper handling of documents. This training is given by an OTR records management employee. Additionally, an OTR archives technician, and when appropriate, an attorney from the Solicitor's office, oversee the research. OTR's employees are instructed to monitor so that no harm comes to the records. Again, when records are discovered to be torn, the OTR employee is instructed to assist in the repair of the document using appropriate supplies.

If documents tear, bend or break, OTR Records Research Branch employees (archives technicians) are to provide assistance to the contractors to mend the documents. Training has

been provided to a number of the branch employees tasked with assisting the contractors. These employees have provided assistance as the contractor staff identified such documents. To date, I am unaware that any specific instances have been brought to management's attention.

4. OTR management is also concerned about original documents being placed in a "shred box." Currently no documents are shredded even though the box is called a "shred box". No documents are thrown away once they're placed in the box. The vast majority of the boxes are reviewed page by page by contractors before being sent to temporary storage. Regardless, it is OTR's intention to reexamine each "shred box" in the future before final disposition is determined. The protocol, in the instance Ms. Sandoval cited, worked as intended as three documents were recovered and returned to their original box. OTR employees provide the last line of defense in this process. It must be noted that this event occurred February 19, 2004, six days after Ms. Sandoval's original letter. Not only was OTR management made aware of the situation immediately by an OHTA employee but also the contractor took immediate steps to counsel the employee and no records remained in jeopardy.

5. As previously noted, OTR is shipping only boxes which have been indexed and a listing of the contents of the boxes is included in the first box of each accession. OTR will assign archives technicians to randomly check boxes prior to shipping to assure that the contents of the box matches the listing provided. Furthermore, upon receipt of shipments, NARA performs quality assurance in boxes at random to determine if the series are correctly identified and whether dates are correctly listed.

6. Some boxes came in from the field with mold. These boxes were quarantined and removed from other boxes. The initial cleaning process undertaken by Iron Mountain was not successful. OTR has been searching for a suitable contractor to clean the records, one which will certify that the records have been cleaned; an additional requirement is that the contractor will provide security for the boxes while being cleaned. Thus far, the search has proven difficult and OTR is expanding its geographic search parameters beyond Albuquerque. We have identified approximately 350 boxes as being moldy out of approximately 50,000 boxes currently in Albuquerque.

7. About four years ago, when it was discovered that some boxes contained mouse droppings, OTR contracted with Iron Mountain to get the boxes cleaned. Occasionally, during indexing or researching of boxes, some boxes which were not identified for cleaning are discovered with mouse droppings. When this occurs, OTR quarantines the box. OTR is in the process of locating a suitable contractor to clean and certify that the newly discovered boxes have been properly cleaned.

It was brought to OTR's attention in mid-January 2004, that some boxes which the Bureau of Indian Affairs Southwest Regional Office had stored in its own storage locations contained some mouse droppings. OTR took this situation seriously and worked with SWRO management and the environmental officer to address the situation. It was decided that the boxes should be stored in another location until a suitable vendor could be identified to clean and certify that the boxes had been cleaned. OTR has actively been searching for a suitable contractor and has been experiencing difficulty in identifying such a contractor. Security at vendor locations is a paramount concern.

As a consequence, OTR is developing guidance on how to handle such situations in the future. Identification of a suitable contractor is a prerequisite prior to the issuance of such guidance.

8. Boxes have been labeled by various individuals over time which may have made the information on the outside of the box confusing to some people. However, protecting and preserving that information is critical.

For boxes which came to OTR with no inventories, OTR will never know with certainty if the boxes contain all files as originally sent to OTR. Prior to current management's arrival, research projects, including those conducted under Cobell court orders, required extensive research in the boxes to produce certain documents. The current OTR indexing project is designed to determine exactly what the boxes now contain. It is possible that a file is not in the box it was originally taken from during the research project; however, the file may be located through the indexing project and its location will be duly recorded. Once all the boxes have been indexed, OTR will have a description of the contents of each box under its jurisdiction.

OTR Branch of Records Research employees have been assigned to oversee researchers for the very purpose of ensuring that contents of boxes are put back and in correct order.

9. Boxes that are identified as old and weak are reboxed with the front of the old box put inside the new box. OTR Records Management Operations employees identify boxes which should be reboxed as a daily part of their work. It is the joint responsibility of OTR employees, other federal employees and contractors to work on a daily basis to ensure that the boxes are handled properly.

10. Labat employees are trained for a two week period before they are allowed to start indexing. In the training, the importance of documents, and the importance of the documents emphasized by the court in the Cobell litigation, is stressed. Contractor employees, like OTR employees, receive the vast majority of their training on the job.

Labat has experienced some turnover in its personnel. For example, during the past three months fourteen employees left Labat employment. Seven employees left within two days of being hired because they did not like the work they would be required to perform; one left for medical reasons; one left for personal reasons; one employee was terminated and four found permanent employment. Over the past year, OTR has had twelve employees leave OTR for various reasons.

The Iron Mountain project predates the current OTR management. Current OTR management stopped the inventorying project at Iron Mountain over one year ago because of a number of concerns, including those noted in Ms. Sandoval's letter, associated with the project. Further, OTR is in the process of terminating its storage contract for boxes with Iron Mountain.

Depending upon the nature of the accession, the records may well be indexed differently. For example, social services records are indexed at a file folder level and realty records are indexed

to identify the types of documents in the folder. Labat indexes files according to their approved indexing manual. OTR records research staff is a part of the procedure for quality assurance.

We have placed OTR archives technicians in positions to observe the indexing and research

processes. As noted before, they are the last line of defense against human error. There have been a few instances where a document was discovered left on a copier. The archives technicians are responsible for taking the document back to the contractor and ensuring that the document is properly placed back in the file. OTR believes that this process works very well.

11. During the Paragraph 19 research for records required by the Cobell court, records were temporarily withdrawn from federal records centers. In addition, any records pulled from those boxes by authorized users prior to temporary withdrawal by OTR of course were not sent to OTR. There is no way that current OTR management can determine what was pulled from a box by another user in the past. What OTR is doing, is indexing the contents of the boxes as they currently exist and which we now have under OTR control. OTR intends to permanently withdraw these boxes, index them as they presently exist and re-accession these boxes to the Lenexa facility with new SF 135s and an index of the contents of the boxes. As noted above, files which previously may have been in these boxes should be re-found in other boxes during the indexing process.

12. As damaged boxes are discovered, the contents are placed in new containers using appropriate procedures. Pallets are shipped with boxes stacked five high. While boxes are in OTR facilities, they may be stacked six high depending on the needs. When boxes are gathered for researchers, they are stacked with identifiers out in order to facilitate the researchers. In other instances, when boxes are not being researched, they may be stacked in different ways, i.e., a tile pattern may be used when boxes will not be disturbed for a period of time. Stacking in a tile pattern reduces pressure on the lower boxes but does not readily allow identification of the contents of the boxes in the interior of the stack. The Records Management Records Center employees are charged with identifying and re-boxing any boxes that are damaged.

13. Seven days after Ms. Sandoval's letter, the roof at the Yale location leaked. On February 24, 2004, the 24-hour security guard service alerted the OTR staff early that morning of the leak. All boxes were immediately covered. All boxes were removed and relocated to the Montano facility beginning on February 25, 2004. Some boxes did sustain some water damage and were moved to another location to ensure complete drying. The boxes have since been dried. The lease required that the roof at the Yale location be free from leaks. OTR is now in the process of terminating this lease.

14. In addition to other paper products, the storage facility on Montano also houses U.S. Department of Agriculture food commodities. The facility must meet stringent standards for the storage of commodities which requires that it be free of pests, mold and moisture. The facility sprays monthly for pests. The AADF warehouse is regularly inspected by federal and local health authorities as well as private pest control companies to ensure that there are no pests.

It is worth noting that OTR is criticized for preparing to move the records to an archival quality facility where the records will be housed in the best possible environment and, on the other hand,

criticized for housing the records in less than archival quality conditions in Albuquerque. There is no "unspoken rule of thumb" regarding the temporary facilities as suggested by Ms. Sandoval. The OTR Division of Records Management Chief and OTR's facility manager have

worked diligently to find sites which would provide the best protection for the records and provide the space necessary to prepare the boxes for moving to archival quality storage facilities. Unfortunately, in the Yale instance, representations made by the landlord were not accurate and OTR immediately removed the boxes from that facility.

15. The index project is not designed to find a particular document but rather to limit the number of boxes that need to be searched for a particular document. The documents that could be searched in the index system was developed by OTR staff and the contractor with considerable input from the OTR records research staff. The contractor most certainly did not do so without considerable input from the OTR records research staff. Meetings were held with the contractor and individual staff members. The staff was given the opportunity to review the draft indexing manual and some of their suggestions were incorporated.

The OTR staff is directly involved in quality assurance. We have not received any reports from the Albuquerque OTR staff charged with performing quality assurance checks that they are concerned about the accuracy of the Labat index.

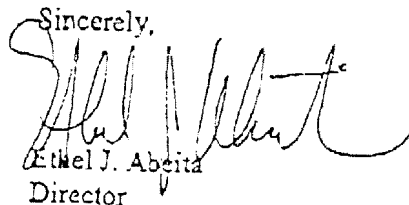
16. We are unable to respond to the contents of paragraph 16 as the information provided is insufficient. We are unaware of the training being referenced and who in management made such statements. The indexing database is constantly being monitored for errors, corrected as necessary and enhanced as new requirements are identified. During the learning curve period, some of the boxes were not indexed as completely as is now being done and OTR intends that the contractor will re-index those boxes to reconfirm their accuracy.

Third, while it is true that OTR has permanent full time employees who are knowledgeable about some records, OTR has relied upon these same employees to work on the very projects which Ms. Sandoval now identifies as "problems." OTR has relies on employees to provide oversight which should prevent these types of "problems." Unfortunately, Ms. Sandoval's letter indicates to OTR management that its reliance may be misplaced.

Finally, it is impossible to deal with the "perception" among some employees who believe they have brought these issues to the Director's attention when there is nothing in the record which supports their actually doing so. If an employee has experienced reprisal as a result of coming forth with information, then specific regarding such activity should have been brought to the Director's attention. Employee concerns are not dismissed; corrective action is taken when necessary. Certainly as Ms. Sandoval is well aware, the OTR employees have never kept "the problem quiet."

If I can be of any further assistance, please do not hesitate to contact me.

Sincerely,



Ethel J. Abeita
Director

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

This matter comes before the Court on the *Defendants' Motion to Strike Plaintiffs' "Emergency Notice"*. (Dkt. # _____). Upon consideration of the Defendants' Motion, any opposition, and any reply thereto, the applicable law and the entire record of this case, it is hereby

It is FURTHER ORDERED that the Clerk of the Court is directed to strike said *Emergency Notice of Individual Indian Trust Records in Imminent Risk of Destruction and Loss* (Dkt. # 2564) from the docket and the record of this case.

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

Date: _____

cc:

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