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

DEFENDANTS' MOTION TO STRIKE
PLAINTIFFS' "COMMENTS," FILED AUGUST 27, 2003

With the filing of Plaintiffs' Comments on Interior Secretary Gale Norton's and Acting Assistant Secretary Aureen Martin's Willful Violations of Preliminary Injunction ("Comments") on August 27, 2003, Plaintiffs' counsel have sunk to a new low in acrimony and incivility. The Court should not tolerate, nor should it expect any litigant to tolerate, Plaintiffs' counsel's use of such invective. Moreover, Plaintiffs' Comments contain numerous statements that are demonstrably false. Defendants therefore move pursuant to Federal Rule of Civil Procedure 12(f) to strike Plaintiffs' Comments.[1]

The Court Should Strike Plaintiffs' Comments.

Defendants will not repeat line-by-line Plaintiffs' offensive language, occurring on virtually every page, as doing so would merely serve to repeat the libels. It is difficult to imagine more libelous statements regarding Secretary Norton and other senior government officials.

[1] Counsel for Defendants has consulted with counsel for Plaintiffs, who opposes this motion.

Although courts are generally reluctant to grant motions to strike, see Order, March 3, 2003 (denying Defendants' Motion to Strike); Order, June 4, 2003 (denying Defendants' Motion to Strike); Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distribs. Prop. Ltd., 647 F.2d 200, 201 (D.C. Cir. 1981) (per curiam), this is not an instance of a motion to strike being a "time waster." See Order, March 3, 2003 (denying Defendants' Motion to Strike) (quoting 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1382 (2d ed. 1990)). Rather than committing the "objectionable sin of frivolity," see Order, March 3, 2003 (quoting United States v. Property Identified as Lot Numbered 718, 983 F. Supp. 9, 13 (D.D.C. 1997)), this motion to strike appropriately asks the Court to stop Plaintiffs' counsel's scurrilous name-calling. As such, it is a motion that should be summarily granted. See generally Johnson v. McDow, 236 B.R. 510, 523 (D.D.C. 1999) (striking "scandalous and highly insulting allegations . . . ."); Alexander v. FBI, 186 F.R.D. 21, 53 (D.D.C. 1998) (finding "no evidence to support the claim made by plaintiffs" and therefore striking it from the record); Pigford v. Veneman, 215 F.R.D. 2, 4-5 (D.D.C. 2003) (striking unsubstantiated allegations against government counsel); see also Stabilisierungsfonds, 647 F.2d at 201 n.1 (quoting 5 C. WRIGHT & A. MILLER, supra, § 1382, at 827 (1969)) ("[D]isfavored character [of motions to strike] is relaxed 'in the context of scandalous allegations and matter of this type often will be stricken from the pleadings in order to purge the court's files and protect the subject of the allegations.'").

A. Plaintiffs' Counsel's Comments Violate All Rules of Civility.

Plaintiffs' counsel's outrageous comments violate even the most relaxed interpretation of appropriate standards of attorney civility. In Alexander v. FBI, Nos. CIV. 96-2123, CIV. 97-

1288, 1999 WL 314170 (D.D.C. 1999), the Court ordered counsel to read the "D.C. Bar Voluntary Standards for Civility in Professional Conduct" where the conduct at issue was anticipated in the future and expected to be uncivil so as to require a motion for sanctions. The Court even appended a copy of those standards to its opinion. Id. at *2-7. The Preamble of those standards reads, in part:

> While lawyers have an obligation to represent clients zealously, we must also be mindful of our obligations to the administration of justice. Incivility to . . . adverse parties . . . undermines the administration of justice, and diminishes respect for both the legal process and the results of our system of justice. . . .
>
> Uncivil conduct of lawyers . . . impedes the fundamental goal of resolving disputes rationally, peacefully and efficiently. Such conduct may delay or deny justice and diminish the respect for law, which is a cornerstone of our society and our profession.

Id. at *2. Under "Principles of General Applicability," the standards state in part: "[W]e will treat all participants . . . including . . . parties, . . . in a civil, professional, and courteous manner, at all times and in all communications, whether oral or written. . . . We will treat all participants in the legal process with respect." Id. at *3. The "Principles of General Applicability" also state:

> Except within the bounds of fair argument in pleadings or in formal proceedings, we will not reflect in our conduct, attitude, or demeanor our clients' ill feelings . . . toward other participants in the legal process. . . .
>
> Except within the bounds of fair argument in pleadings or in formal proceedings, we will abstain from disparaging personal remarks or acrimony toward such participants and treat adverse witnesses and parties with fair consideration.

Id.

Here, the offensive conduct is not merely anticipated; rather, it has become a standard practice by Plaintiffs' counsel. Plaintiffs' Comments show an acute disregard for the civility

standards. There can be no justification for directing language of this nature to any litigant or counsel, let alone to a member of the President's cabinet. Plaintiffs' conduct demeans the litigants, the Bar, and indeed even the Court itself. It is time for the Court to direct Plaintiffs' counsel to adhere to basic standards of decency and civility.[2]

B. Plaintiffs Disingenuously Criticize Interior Defendants For A Statement Taken Out of Context.

Plaintiffs accuse Interior Defendants of falsely asserting that "there are no allotted lands within the external boundaries of the Navajo Reservation." Comments at 2 (quoting Office of Surface Mining Reclamation and Enforcement Preliminary Injunction Justification ("OSM Submission") at 12 n.8 (Aug. 11, 2003)) (emphasis omitted). Plaintiffs claim this is false based on an unrelated report of the Special Master referring to "ROW's [rights of way] running across Navajo allotted lands." Comments at 2 (quoting Site Visit Report of the Special Master to the Office of Appraisal Services in Gallup, New Mexico and the Bureau of Indian Affairs Navajo Realty Office in Window Rock, Arizona (Aug. 20, 2003)) (emphasis omitted).

Plaintiffs are trying to create confusion and the appearance of inconsistency where none exists by taking a sentence in a footnote out of context. The footnote at issue – footnote 8 in the OSM Submission[3] – is appended to the following text, in which the discussion is clearly limited

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[2] Defendants recognize that these civility standards are "voluntary and are not intended . . . to be used as a basis for litigation or sanctions . . . . " Alexander v. FBI, Nos. CIV. 96-2123, CIV. 97-1288, 1999 WL 314170, at *2 (D.D.C. May 17, 1999). Nonetheless, "these standards provide useful and appropriate guidance to lawyers when questions are raised about professional conduct." Id. at *1.

[3] Footnote 8 of the OSM Submission states, in its entirety:

(continued...)

to the absence of allotments *in permit areas or areas in which mining and reclamation operations were conducted under the jurisdiction of OSM*:

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[3](...continued)

OSM, through numerous telephone inquiries, confirmed with The Bureau of Indian Affairs ("BIA") Navajo Regional Office, Realty Services, the ownership information as it relates to the Navajo Nation. The BIA office stated that there are no allotted lands within the external boundaries of the Navajo Reservation.

OSM, through a telephone inquiry, confirmed with The BIA Western Regional Office that there were no allotments in those parts of the Black Mesa and Kayenta Mines **permit area** (and leases) that are in the Hopi Reservation.

OSM, through a telephone inquiry, confirmed with the BIA Albuquerque Regional Office that the **permit area** for the La Plata Haulroad, which passes through the Ute Mountain Ute Reservation in northern New Mexico, does not include any individual Indian allotments, and the **permit area** for the underground coal mining operation at the King Mine in southwestern Colorado did not include any individual Indian allotments (the only Ute Mountain allotments were northwest of the Ute Mountain Ute Reservation in Utah).

OSM, through a telephone conversation with the BIA Division of Energy and Minerals (Denver, CO), was informed that there is an individual Indian surface allotment within the Crow Tribe coal lease for the Absaloka Mine. OSM has no information in its records that identifies any allotment in the **permit area** or the lease area for the Absaloka Mine. However, OSM, in a telephone inquiry with the mine operator, determined that the allotment could not be within the **permit area** of the Absaloka Mine because the entire surface within the **permit area** is owned by the operator and all coal is owned either by the Crow Tribe or the State of Montana and leased by them to the operator. Based on BIA's description of the location of the allotment, OSM believes it is on the northern edge of the Crow Tribe coal lease more than two miles north of the **permit area** of the Absaloka Mine, and corresponds to an area designated on OSM's copy of the Absaloka permit application surface ownership map as "Indian."

OSM Submittsion at 12 n.8 (emphasis added). The sentence Plaintiffs picked out of this footnote is the last sentence in the first paragraph.

> OSM's review of the surface and coal ownership information, when responding to Plaintiffs' Request for Production of Documents Number 7, contained no indication that any of the eleven Indian lands operations directly regulated by OSM included individual Indian allotments within the permit area or within the area where coal mining and reclamation operations were conducted under the jurisdiction of OSM. OSM verified these results in numerous inquiries to relevant BIA offices.

OSM Submission at 11-12.

While the statement that "there are no allotted lands within the external boundaries of the Navajo Reservation" is inaccurate if read in isolation, it is not misleading because it did not appear in isolation and cannot be so read. Both the text of the OSM Submission quoted above and the accompanying footnote 8 are plainly addressing the absence of allotments *in permit areas*. See OSM Submission at 12 n.8 (stating that OSM determined, through telephone inquiries, that "there were no allotments in those parts of the Black Mesa and Kayenta Mines permit areas (and leases) that are in the Hopi Reservation;" "the permit area for the La Plata Haulroad . . . does not include any individual Indian allotments;" "the permit area for the underground coal mining area at the King Mine . . . did not include any individual Indian allotments;" "OSM has no information in its records that identifies any allotment in the permit area or the lease area for the Absaloka Mine").

Plaintiffs' disingenuousness is apparent in light of an earlier filing in which they plainly understood a similar statement by OSM – that BIA "stated that there are no allotted lands within the Navajo Reservation" – to refer in context to permit areas. See Plaintiffs' Reply re Motion to Compel Production of Documents re Plaintiffs' Seventh Formal Request for Production of Documents and Request for Sanctions and Affidavit of Mark Kester Brown in Support Thereof at

12 & n.16 (May 30, 2002). Indeed, in that filing, Plaintiffs cited the OSM statement as an alleged example of "defendants put[ting] great store in various contexts in stating that there are no individual Indian interests 'within the permit area' – but never stat[ing] definitively that individual Indian interests (and individual trust data) can exist on OSM computers only within the permit area." Id. at 12.

C. Plaintiffs' Comments Contain Demonstrable Falsehoods.

In addition to Plaintiffs' utter failure to comport with even minimal standards of civility and decency, and their willingness to take a statement out of context, their Comments are replete with statements that are demonstrably false. Plaintiffs complain that "Norton and Martin have proffered **no** competent evidence that systems that house or access Trust Data have been disconnected and provide no justification – specific or otherwise – for these material omissions." Comments at 3 n.4 (Plaintiffs' original emphasis). But Plaintiffs ignore the fact that no systems that house or access trust data have been disconnected precisely because these systems are secure. Therefore, it was unnecessary for Interior to present evidence that it had disconnected them.

They also concoct an argument that Associate Deputy Secretary Cason somehow "declares that this matter [the injunction] is outside the jurisdiction of this Court . . . [and that] this Court has no authority to do anything and must sit helplessly while Trust Data is destroyed and trust funds are misappropriated . . . . " Id. at 8.[8] Plaintiffs also argue that Mr. Cason's

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[8] Plaintiffs quote the following language from Mr. Cason's declaration to support this argument:

(continued...)

declaration claims Chevron deference. It does nothing of the sort, nor does it claim that the Court lacks jurisdiction in this matter. Rather, Mr. Cason's declaration is consistent with the 2001 decision of the Court of Appeals: "Despite the imposition of fiduciary duties, federal officials retain a substantial amount of discretion to order their priorities." Cobell v. Norton, 240 F.3d 1081, 1099 (D.C. Cir. 2001).

Plaintiffs next state, in the context of the submission of the National Business Center ("NBC"): "Perhaps it might occur to Norton and Martin that the segregation of Trust Data is essential to ensure its integrity." Id. at 9 n.17 (referencing Preliminary Injunction Justification, National Business Center, Aug. 11, 2003 at 1) ("NBC Submission"). Plaintiffs obviously have not read the NBC Submission which describes the process of placing Individual Indian Trust Data ("IITD") "systems in isolated server environments; restricting access to isolated network segments; configuring routers, switches, and firewalls to isolate IITD from the Internet; restricting internal support access to specific identified workstations; and implementation of a variety of monitoring and protection systems . . . ." NBC Submission at 2-3.

Plaintiffs also state, with no evidentiary support whatsoever, that NBC "functions as the hub of the Department of the Interior, accessible by every single Interior bureau and agency as

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[8](...continued)

> [T]he decision whether or not to connect an IT system to the Internet should be made by heads of agencies or businesses in the exercise of their sound discretion . . . [who] must consider the benefits and advantages to the agency or office and to the public in being connected to the Internet, as well as the risks of harm that could result from unauthorized access.

Comments at 8 (quoting Declaration of James E. Cason, Associate Deputy Secretary, Supporting Continued Connection to the Internet of the Department's Reconnected Systems, Aug. 11, 2003).

well as over 100 non-Departmental organizations. All Trust Data is potentially accessible to Norton, her employees, agents, contractors and over 100 other organizations external to Interior." Comments at 15. This is not so, as even a cursory review of the NBC Submission demonstrates. See NBC Submission at 14-15 (stating that the Land Records Information System ("LRIS") is not accessible from the Internet); id. at 15 (stating that the National Indian Irrigation Management System ("NIIMS") is not accessible from the Internet and is on an isolated network segment); id. at 17 (describing a private virtual local area network ("PVLAN") for IITD users); id. at 23 (stating that Denver NBC isolated the three IITD applications in a separate logical partition with no Internet access and the personal computers containing IITD were likewise isolated with no Internet access); id. at 25 (stating that at NBC Washington, three servers containing IITD were isolated through a variety of security measures including multiple firewalls, filters, access control restrictions, and physical security measures); id. at 45-48 (describing how NBC IITD is isolated from other parts of Interior's system). In addition, NBC's independent assessment, which Plaintiffs claim is concealed, Comments at 15-16, is actually described at pages 39-40 of its submission. Id. at 39-40.

In their Comments, Plaintiffs quote from the NBC Submission: "The WAN Risk Assessment report identified three findings that were **perceived** to affect the Approval to Operate decision," Comments at 16 n.29 (quoting NBC Submission at 39-40) (Plaintiffs' original emphasis), and allege that "[t]hese findings were not disclosed to the Court or plaintiffs and there is no competent evidence that these, or other, weaknesses have been corrected . . . ." Id. Plaintiffs, however, misleadingly fail to complete the quote:

> Two of those findings were immediately fixed and the third resulted in a recommendation to provide formal training for IT personnel in the configuration and management of new equipment prior to installation. That recommendation was added to the NBC Plan of Actions and Milestones (POA&M) process for resolution and tracking. Based on the results of this assessment, management granted the Interim Approval to Operate on May 30, 2003.

NBC Submission at 40.

Plaintiffs' Comments also state: "Importantly, Norton represents that such reporting [of oil and gas company data to the Minerals Management Service ("MMS")] is secured by MMS's contractor, Inovis. However, no evidence has been presented, competent or otherwise, to support a conclusion that there is any – let alone adequate – security covering oil and gas companies' access to Trust Data." Comments at 17. Plaintiffs further assert that "[n]either Inovis [MMS IT security contractor], nor Norton, nor any other person has attested that Trust Data, in fact, is properly secured from unlawful manipulation or accidental (or deliberate) deletion by third party oil companies." Id. Plaintiffs have obviously missed the wealth of evidence presented in the Minerals Management Service Preliminary Injunction Justification, Aug. 11, 2002 ("MMS Submission"). For example, the MMS Submission states that "strict data center access restrictions" are in place; that application logon and passwords are required of users; that documents are associated with the user that submitted them; that passwords are encrypted when stored and transmitted; that three failed attempts at entry locks the user out; that only registered MMS reporting companies are allowed access; that only MMS reporting company data is on the system and reporting companies can only access their own documents; that reporting companies cannot modify documents once submitted; and that audit trails provide a traceable record of user

actions. Id. at 60-65. All these facts support the conclusion that the data are adequately safeguarded.

Plaintiffs' Comments misleadingly state: "As recently as March 27, 2003, the Master's information technology contractor discovered that certain Bureau of Land Management ("BLM") information technology systems were vulnerable to attack from the Internet." Comments at 18. Plaintiffs fail to disclose, though, that "[n]one of these servers contained IITD and no additional access or damage was able to be perpetrated by using these servers to launch additional exploits." Preliminary Injunction Justification, Bureau of Land Management, Aug. 11, 2003 ("BLM Submission") at 25. Plaintiffs also fail to note BLM's statements that it changed the passwords and that previously vulnerable servers were moved to a more secure location. Id. BLM also "conducts self-scanning on a monthly basis to ensure that the network remains secure." Id. at 48. This involves use of a "Top Twenty" list of "security vulnerabilities provided by the Federal Bureau of Investigation." Id.

Finally, Plaintiffs baldly assert that "NBC forms IT backbone [sic] for each agency and bureau within Interior and therefore facilitates unmonitored – and in many cases unrestricted – access to Trust Data housed in each such linked agency and bureau." Comments at 22. This is simply not so. Along with not serving as the "backbone" for the rest of Interior, even a cursory reading of NBC's submission reveals that the IITD segments are isolated and access is restricted. In fact, the diagrams at the end of NBC's submission make clear that the trust systems are segregated behind the "trust boundary" or in a "trust zone." See NBC Submission at figs. 4, 7.

Conclusion

Plaintiffs' Comments demonstrate an utter lack of decency and civility and a cavalier disregard for factual accuracy. The Court should not entertain such conduct and should strike Plaintiffs' Comments in their entirety.

Dated: September 16, 2003

Respectfully submitted,

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

ORDER

This matter comes before the Court on *Defendants' Motion to Strike Plaintiffs' "Comments," Filed August 27, 2003*. Upon consideration of Defendants' motion, any responses thereto, and the entire record of this case, it is hereby

ORDERED that the Motion is GRANTED.

Dated: _____

_____
Royce C. Lamberth
United States District Judge

cc:

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CERTIFICATE OF SERVICE

I declare under penalty of perjury that, on September 16, 2003 I served the foregoing *Defendants' Motion to Strike Plaintiffs' "Comments," Filed August 27, 2003* by facsimile in accordance with their written request of October 31, 2001 upon:

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