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

In re GALE A. NORTON,	)	
Secretary of the Interior,	)	
in her official capacity,	)	**Case No. 03-5288**
	)	
Petitioner,	)	
	)	
	)	

RESPONDENTS' MOTION TO DISMISS

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I. INTRODUCTION

By order dated February 25, 2005, the Court has returned the Interior Secretary's mandamus petition to the active calendar and directed the parties to "file motions to govern further proceedings."

Accordingly, Plaintiffs-Respondents now move to dismiss. Alan Balaran's resignation as Special Master on April 6, 2004 has rendered the demand for his recusal moot. This was true a year ago, when the Court removed this action from its oral argument calendar and ordered the Secretary to "show cause why the petition for writ of mandamus should not be dismissed as moot." April 6, 2004 Court Order, 03-5288. And nothing since decided in *Cobell v. Norton*, 392 F. 3d 461 (D.C. Cir. 2004) ("*Cobell XIII*") or *In re Brooks*, 383 F. 3d 1036 (D.C. Cir 2004) has changed the situation. Clearly there is no need for the Court to decide whether to compel the Master's recusal when he has stepped aside voluntarily. The Secretary's mandamus petition seeking *only* that relief and no more should therefore be summarily dismissed.

II. BACKGROUND

Eighteen months ago, Interior Secretary Norton petitioned this Court for a writ of mandamus seeking to compel the recusal of the Special Master Alan Balaran from any further involvement in *Elouise Pepion Cobell, et al. v. Gale A. Norton, Secretary of the Interior, et al.*, Civil Action No. 96-1285 (RCL). The Master had served as a Rule 53 appointee in this protracted trust litigation since February 1999 with the consent of the Interior Secretary and the other Trustee-Delegates named as defendants as a sanction for their contumacious conduct.[1]

Even so, Secretary Norton sought an order from this Court compelling the Master's recusal.[2] In support of her demand for such extraordinary relief, the Secretary alleged the Master had acted unethically by "secretly" retaining the former employee of a government contractor to assist him in

[1] *See* April 24, 1999 Order, Case No. 96-1285.

[2] Significantly, the Secretary of the Treasury, also a Trustee-Delegate responsible for administering the Individual Indian Trust and a named defendant in the case, did not join in the petition or in the Motion to Disqualify filed in the proceedings below. No explanation was offered as to why the Treasury Secretary did not share Interior's alleged concern about the Master's impartiality or why Treasury did not join in this proceeding to demand a similar change in Court personnel.

investigating whether Interior withheld incriminating information from the District Court in the Eighth Quarterly Report.[3]

The Secretary initiated this mandamus proceeding without waiting for the District Court to decide the issue.[4] Nevertheless, the District Court examined the charge of bias and concluded in a 20-page Memorandum Opinion issued on March 15, 2004 that the evidence submitted in support of Interior defendants' disqualification demand against the Master was "wholly insufficient." *Cobell v. Norton*, 310 F. Supp.2d 102, 121 (D.D.C. 2004). Among the District Court's findings:

- It was the Interior defendants (rather than the Master) that initially involved the former NAID employee in the Master's investigation (*id.* at 106 and 116).
- The Master thereafter looked to this individual to provide him with relevant file materials *only* because Interior defendants withheld virtually all of the requested documents for eight months, thereby threatening to completely frustrate the investigation the District Court had ordered on November 5, 2002; (*id.* at 106).
- The Master's findings in the "Interim Report" issued on April 21, 2003 were derived solely from his review of seventy-three documents, which were copied in their entirety and attached to the Interim Report (consisting of five volumes). This was done to allow the defendants the chance to review and comment on the source materials before the Master's report was finalized. (*Id.* at 118).
- Contrary to what the Interior defendants alleged in an effort to raise a question about the propriety of the Master's conduct, the former NAID employee who supplied the relevant file materials took

[3] The individual retained by the Master was Mike S. Smith, who was employed by Native American Industrial Distributors, Inc. ("NAID") in August 2002 when NAID attempted to intervene in the Cobell litigation. NAID is a consulting firm that had been retained by Interior to assist with development of the Trust Asset Accounting Management System ("TAAMS"), now discredited but at one time highly touted as the foundation of the Trustee-Delegates' plan for trust reform. Mike Smith was a member of the TAAMS team tasked (among other things) with contributing to preparation of a section of the Eighth Quarterly Report intended to address the status of the TAAMS as of November 2001. *See* Petitioner's Exhibit 5 and 6 (hereinafter, "Pet. Ex.") TAAMS has since been abandoned as unworkable.

[4] The Secretary's failure to properly exhaust District Court remedies was among the deficiencies in her mandamus action identified in Plaintiffs-Respondents' February 19, 2004 response.

no part in drafting the 4/21/03 "Interim Report." Rather, as the more than 135 hours of the Master's own time confirms, the preparation of this document was accomplished entirely by the Master per the Court's 11/15/02 order. (*Id.* at 116-117).

The District Court therefore denied the Interior defendants' disqualification motion, concluding from its thorough examination of the evidence of record that: "Interior's charges of impropriety are misdirected and more properly should have been leveled at its own refusal to comply with the Master's request for documents and for the manner in which it deceived the Special Master into believing cooperation was forthcoming when it was not. No fully informed objective observer would find otherwise." *Id.* at 117.

A. The Master's April 6, 2004 Resignation.

Three weeks after the District Court's decision exonerating him of the Interior defendants' bias charge, Mr. Balaran resigned as Special Master. In his April 5, 2004 letter to the District Court explaining the reasons for his decision, the Master reiterated his firm denial of any impropriety ("You found this accusation frivolous...You were correct.") (April 5, 2004 Letter at 1). (Att'd as Exh. to Dkt. No. 2557) However, Mr. Balaran also acknowledged that "were I to continue as Special Master, the agency's efforts to disqualify me would persist and accelerate. Given this, I will be in no practical service to the Court." *Id.* at 3. He therefore chose to step aside voluntarily "[in the] hope that, with my resignation, the parties will be able to move rapidly toward fundamental reforms." *Id.* In tendering his resignation a year ago, the Master noted that "[j]ustice has been much too long in coming for . . . hundreds of thousands of Native Americans . . . ." *Id.*

The District Court accepted the Master's resignation the following day, "[w]ith profound regret." *See* 4/16/04 Order [Dkt. No. 2557].

B. The Secretary's Ensuing Argument For Delay.

With the Master's resignation, it was clear a year ago – just as it is now – that there was nothing left to be decided in this mandamus action. Indeed, Petitioner requested on April 6, 2004 that the case be

removed from the Court's oral argument calendar (*See* 4/6/04 DOJ Letter) and thereafter conceded that "Mr. Balaran's resignation has mooted the question of his further participation in the case." (*See* Petitioner's 4/16/04 Response to April 6, 2004 "Show Cause" Order at 1).

Yet in response to the Court's April 6, 2004 Order directing the Petitioner to "show cause why the Petition for Writ of Mandamus should not be dismissed as moot," the Secretary urged the Court to "defer further consideration" of the mootness issue until after two other interlocutory appeals then pending in the *Cobell* case (Nos. 03-5262 and 03-5314) had been decided. Alleging that the Master's challenged investigation was "itself a manifestation of the deeply mistaken premises on which this litigation has proceeded," the Secretary announced that Trustee-Delegates would be seeking the complete dismissal of the *Cobell* lawsuit as an appellate remedy necessary to halt "the Court's abuse of its jurisdiction." (4/16/04 Response at 2, 8). In the event of such an across-the-board dismissal of the underlying litigation, there would be no need for the Court to take further action in regard to this matter.

The Secretary also argued ***for the first time ten days after the Master's resignation*** that as part of the mandamus relief to which she was entitled, the "Interim Report" and two other reports the Master issued later in 2003 should be vacated. (*See* Pet.'s Exhs. 14 and 15). Without identifying a single respect in which any of these reports reflected impermissible bias, the Secretary asserted that all three reports should be stricken because of the Master's "incompatible [conduct] with 28 U.S.C. § 455." *Id.*

On May 11, 2004 – over Plaintiffs-Respondents' objection – the Court ordered that the mandamus action "be held in abeyance pending the resolution of Nos. 03-5314 and 03-5262" [*i.e.* the interlocutory appeals decided by the Court seven months later in *Cobell XII* and *Cobell XIII*.] (*See* May 11, 2004 Order in 03-5288). The Court did not address at that time the Secretary's other contentions with respect to the alleged need to strike the Master's reports.[5]

[5] As a consequence of what was ***not*** addressed eleven months ago, Plaintiffs-Respondents assume the Secretary will renew this argument going forward. Accordingly, this contention is addressed in detail in Argument Section "B" below.

C. The December 2004 Decisions In *Cobell XII* And *Cobell XIII* Necessitating That The Court Decide the Mootness Question.

Contrary to what the Secretary had hoped, the Court's resolution of the two interlocutory appeals in *Cobell XII* and *Cobell XIII* did *not* produce the complete dismissal of the *Cobell* litigation. Quite the contrary, rather than halt the District Court's exercise of further jurisdiction in the *Cobell* litigation, the Court has remanded critical issues relating to trust management and historical accounting for further discovery and evidentiary hearings in the proceedings below. And the authority of the District Court to remedy ongoing breaches of declared trust duties has been recognized and re-affirmed.

In *Cobell XII*, decided on December 3, 2004, the Court vacated an order directing that Interior's computer systems housing or affording access to electronically stored Trust Data be disconnected from the Internet. The Court concluded that a further evidentiary hearing should have been conducted before the District Court decided whether IT systems that Interior officials had confessed three years earlier contained "significant deficiencies" remained so insecure as to warrant the imposition of such relief.

In so holding, the Court recognized and re-affirmed "the district court's authority to exercise its discretion, as a court of equity, in fashioning a remedy to right a century-old wrong or to enforce a consent decree." *Cobell v. Norton,* 391 F.3d 251, 257 (D.C. Cir. 2004) ("*Cobell XII*"). The Court also rejected (once again) Defendants-Appellants' argument that the District Court had exceeded its remedial authority, declaring that "the narrower judicial powers appropriate under the APA do not apply." *Id.* And the *Cobell XII* Court reiterated what this Court declared four years earlier in announcing the broad scope of the Court's equitable authority:

> [T]he Secretary has an 'overriding duty . . . to deal fairly with Indians,' [*Cobell VI*, 240 F.3d] at 1099, and the Secretary's actions must be judged by 'the most exacting judiciary standards,' *id.* [citation omitted], in this litigation. ... ***The district court, then, retains substantial latitude, much more so than in the typical agency case, to fashion an equitable remedy because the underlying lawsuit is both an Indian case and a trust case in which the trustees have egregiously breached their fiduciary duties.***

Id. at 257-258. (emphasis added).

One week later, in *Cobell XIII*, the Court remanded other key issues involving historical accounting and trust reform to the District Court for further proceedings. In so doing, the Court noted "the government's failures as trustee, which go back many decades and many administrations . . . ." *Cobell XIII*, 392 F.3d at 474. The Court also reiterated what had been clarified one week earlier in its *Cobell XII* decision: "*To the extent Interior's malfeasance is demonstrated to be prolonged and ongoing, more intrusive relief may be appropriate.*" *Id.* at 477-78 (emphasis added).[6]

Now that *Cobell XII* and *Cobell XIII* have been decided, the basis for the Court's May 11, 2004 abeyance order has ceased to exist. Accordingly, the Secretary's mandamus petition has been returned to the Court's active docket, and the parties have been ordered to "file motions to govern further proceedings." In addition, this Court has directed each side to "address whether the petition is moot in light of the disposition of *Cobell v. Norton*, 392 F.3d 461 (D.C. Cir. 2004) ("*Cobell XIII*") and *In re Brooks*, 383 F.3d 1036 (D.C. Cir. 2004)."[7]

III. ARGUMENT

A. The Mandamus Petition Should Be Dismissed As Moot.

The ***sole*** issue ***properly*** before this Court is whether the resignation of Special Master Balaran a year ago rendered the Secretary's then pending request for mandamus relief moot. Clearly it did. As the Secretary conceded at that time: "Mr. Balaran's resignation has mooted the question of his further participation in the case." (April 16, 2004 Response at 1). Moreover, the ***only*** relief the Secretary sought in her mandamus petition was an order directing that the Master have no future involvement in the *Cobell* case.

Accordingly, this mandamus petition was ripe for dismissal as of April 6, 2004 when the District Court accepted the Master's resignation. Clearly there was no need a year ago for the Court to decide

[6] Per the Court's 2/25/05 Order, *Cobell XIII* is addressed at greater length in Argument Section "C" below.

[7] This other mandamus action (the "*Brooks Mandamus*") was not referenced anywhere in the Court's 5/11/04 abeyance order, presumably because of the significant distinctions between the recusal issues presented in this case and this other matter. These distinctions are addressed in Argument Section "C" below.

whether to compel the Master's removal from further involvement in the case when he has stepped aside voluntarily. Thus, since no controversy thereafter remained which required the Court's decision, this matter has been and remains moot. *See Nat'l Black Police Ass'n v. District of Columbia,* 108 F.3d 346, 349 (D.C. Cir. 1997) (dismissing appeal as moot in recognition that "Article III of the Constitution restricts the federal courts to deciding only 'actual, ongoing controversies.'" (citation omitted)). The Secretary's petition therefore should be dismissed without further delay.

B. Petitioner's Attempt To Use The Mandamus To Vacate The Master's Reports Is Completely Unnecessary and Improper.

Plaintiffs-Respondents assume that in response to the Court's February 25, 2005 order, the Secretary will renew the argument she made for the first time just prior to the entry of the Court's abeyance order eleven months ago: that even though the Master resigned, the Court is authorized to take further action in this matter by vacating the Master's 4/21/03 Interim Report and two other reports he issued later in 2003. Not only is the relief requested by Petitioner completely unnecessary, but it also is outside the scope of the mandamus and should not be addressed by the Court in this proceeding. Tellingly, the Secretary also has failed to offer a shred of evidence that a *single* finding made by the Master in any of the reports evidences impermissible bias.

1. The Requested Relief is Completely Unnecessary.

In an effort to create a basis for the Court's further intervention in the District Court proceedings in *Cobell* where none properly exists, Petitioner alleges that the Master's reports constitute "functional indictments." (*See* 4/16/04 Response at 1).

In fact, ***none*** of the three reports targeted by the Secretary has even been adopted by the District Court – much less acted upon to the Secretary's detriment.[8] Indeed, the District Court granted the Interior defendants' motion in limine with respect to the 4/21/03 Interim Report, excluding the report and any

[8] Per Fed. R. Civ. P. 53 that the report of a Master does not stand approved automatically – even in the absence of an objection. Rather, it ***must*** be confirmed by action of the District Court. *See* 9A Wright & Miller, Federal Practice and Procedure; Civil 2d § 2612.

other evidence regarding the Master's "incomplete investigation" from introduction into evidence during the 44-day Phase 1.5 bench trial. *See* 5/29/03 Order at 1. (Dkt. No. 2076)

Moreover, the District Court has never even ruled on the motion to adopt the Master's Gallup, NM site visit report (Pet. Ex. 14) which Plaintiffs-Respondents filed eighteen months ago, *see* Dkt. No. 2220. And no such motion has yet been made with respect to the Master's 9/29/03 Dallas site visit report (Pet. Ex. 15).

Accordingly, there is no reason whatsoever for the Court to intervene as Petitioner urges. Any concern regarding the Master's reports may properly be addressed in the proceedings below. Since the Interior defendants have filed objections, Fed. R. Civ. P 53(g)(1) requires that they be afforded "an opportunity to be heard "before the District Court adopts, modifies, rejects (wholly or in part) or re-submits to the Master with instructions. *Cf. Wallace v. Skadden Arps, Slate, Meagher & Flom, LLP*, 362 F.3d 810, 815 (D.C. Cir. 2004) (requiring that at minimum, "written submissions" must be taken to satisfy Rule 53(g)). In view of the foregoing, this is clearly ***not*** a situation where the Court's intervention is warranted.

2. <u>The Requested Relief is Outside the Scope of the Mandamus</u>.

The Secretary's attempt to strike the Master's reports also should fail for this additional reason. ***No*** such relief was requested in the Secretary's October 17, 2003 petition seeking the Master's recusal. Indeed, while the 4/21/03 Interim Report and the Master's two later reports were identified in that petition and attached as exhibits, nothing improper was alleged with respect to any of their contents.

For Petitioner "[t]o open here for the first time . . . an inquiry into the broader field is not only to deprive this Court of the assistance of a decision below, but to permit a shift to ground which the [opposing party] had every reason to think was abandoned[.]" *Helvering v. Wood*, 309 U.S. 344, 349 (1940). The case law is very clear. "[A]n appellate court does not give consideration to issues not raised below." *Hormel v. Helvering*, 312 U.S. 552, 556 (1941); *Nat'l Ass'n of Mfrs. v. Dep't of Labor*, 159 F.3d 597, 606 (D.C. Cir. 1998).

Thus, this Court has refused to consider questions beyond the scope of the issues presented by the Petition for Writ of Mandamus. *See Colon v. United States Dep't of State*, 170 F.3d 191 (D.C. Cir. 1999) ("Matters . . . outside of mandamus, can be decided another day in a case properly raising these issues."); *In re Envtl. Def. Fund*, 1994 WL 191678, at *1 (D.C. Cir. May 9, 1994) ("The court will not consider this question because it is beyond the scope of the issue presented by the petition for writ of mandamus."). Such precedents reflect the fact that it is not proper for appeals courts to try issues beyond the scope of the original mandamus petitions. To the contrary, "review via mandamus necessarily is more circumscribed than review by appeal." *In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 378 (3d Cir. 2002).

Accordingly, Petitioner's attempt to obtain additional relief outside the scope of the mandamus petition is improper and it should be rejected out-of-hand.

3. The Requested Relief is Unsupported by the Evidence of Record.

In addition to the foregoing, the Secretary's request for relief should be summarily denied because there is ***nothing*** in the record that evidences impermissible bias. As reflected below, the relevant evidence of record is overwhelmingly to the contrary.

Indeed, the District Court carefully reviewed the evidence of record relating to the 4/21/03 Interim Report in its decision denying Interior defendants' disqualification demand. The District Court concluded that:

> [A]n examination of . . . [the Interim Report] reveals findings firmly rooted in evidence accumulated by the Special Master while carrying out his institutional responsibilities, as authorized by the November 5, 2002 Order. Every fact is supported by one of the 73 exhibits the Special Master attached to his report – exhibits containing the very record Interior was ordered to turn over to the Special Master, but did not.

Cobell v. Norton, 310 F. Supp.2d at 118.

So too, there is nothing to suggest that either of the reports issued later in 2003 were in any way "tainted." Both reflect site visits the Master was fully authorized to make per the consented-to authority vested in him by the Court's February 24, 1999 and August 12, 1999 orders. The latter specifically authorized the Master to oversee Interior's document retention practices "through, among other things,

on-site visits to any location where IIM records are not being protected from destruction or threatened destruction" (August 12, 1999 Order at 22). Indeed, the record in this case reflects literally dozens of prior site visits to which no objection had been made. *See Cobell v. Norton*, 310 F. Supp.2d at 112.

Moreover, the Master's interview of Anson Baker, the Interior official who confessed to destroying his computer files and other Trust-related materials, was conducted in the presence of Department of Justice and Solicitor's Office attorneys representing the defendants in the *Cobell* litigation.[9] In addition, the Master's documented findings of document destruction and asset mismanagement since have been corroborated by ***independent*** evidence of record including the affidavit submitted by another Interior official[10] and Mr. Baker's own deposition testimony.[11]

Petitioner offers no evidence to the contrary. Instead, in an effort to justify the additional relief she is now seeking for the first time, Petitioner cites *United States v. Microsoft Corp.*, 253 F. 3d 34 (D.C. Cir. 2001) as support for the proposition that "a violation of Section 455 could have prospective and retroactive effect." (*See* Pet. Response at 7).

Such reliance is misplaced. First, there has been ***no*** finding here of a Section 455 violation. Moreover, even though the judge in the *Microsoft* case was disqualified, the Court found "full retroactive disqualification [] *unnecessary* to protect [Petitioner's] right to an impartial adjudication" and kept intact all of the judge's findings of fact and conclusions of law, because "[t]here [wa]s no reason to presume that everything the District Judge did [wa]s suspect." 253 F. 3d at 116-17 (emphasis added). Thus, not only is retroactive disqualification ***not*** appropriate even when there has been a finding of prospective disqualification, but in this case there has been no determination made by this Court that the Special

[9] Indeed, the Balaran interview was conducted *ex parte* only to the extent that Plaintiffs' attorneys were not notified or invited to participate.

[10] *See* the Affidavit of Deborah Lewis attached to Plaintiffs' Notice of Supplemental Authority (attached as Respondents' Exhibit 1 hereto).

[11] *See* the 3/31/04 Transcript of Anson Baker's deposition testimony (attached as Respondents' Exhibit 2 hereto).

Master should have been disqualified. Moreover, ***all*** relevant evidence of record and the findings of the District Court are to the contrary.[12]

C. The Summary Dismissal Of This Mandamus Petition Is In Complete Accord With *Cobell XIII* And This Court's Prior Mandamus Decision.

As the foregoing demonstrates, the proper course is for this Court to dismiss the Secretary's mandamus petition as moot and reject the invitation to further intervene in the matter due to the Master's voluntary resignation one year ago. Nothing in the record warrants this Court's proceeding otherwise. Per the Court's February 25, 2005 order, Plaintiffs-Respondents submit that the summary dismissal of this mandamus action also is in full accord with the Court's decisions in *Cobell XIII* and the *Brooks Mandamus*.

1. ***Cobell XIII***.

Rather than produce the dismissal the Secretary had hoped would be the outcome, this Court's 12/10/04 decision resulted in a remand for further District Court proceedings relating to the enforcement of Trustee-Delegates' declared historical accounting obligations and trust reform.

In *Cobell XIII*, the Court rejected Trustee-Delegates' contention that institutional trust reform was outside the scope of the case ("we are puzzled by the idea that the 'fixing' issues represent an expansion of the lawsuit"). 392 F. 3d at 470. It also upheld what it termed the "core" reform provision of the structural injunction requiring that Interior complete and file "a detailed [To-Be] plan to fulfill its fiduciary obligations." *Id.* at 474.

While other "fixing the system" provisions were vacated, ***nothing*** decided in *Cobell XIII* reasonably suggests that the authority of the District Court to address continuing breaches of specific trust duties was in any way limited. To be sure, the Court determined that "[h]owever broad the government's

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[12]The other case on which Petitioners principally rely, *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988) is also readily distinguishable. While the Supreme Court in *Liljeberg* recognized that under certain circumstances it may be necessary to vacate a judgment entered by a judicial officer who has been disqualified on Section 455 grounds, ***no*** such determination of disqualification occurred in this case prior to Master Balaran's resignation. To the contrary, thirteen months ago the District Court declined to order the Special Master's removal, concluding that the allegations of bias against him were legally and factually unfounded. *Cobell v. Norton*, 310 F. Supp. 2d 102. And Petitioner has fallen far short of making the necessary showing that the District Court abused its discretion in arriving at this result.

failures as trustee, which go back over many decades and many administrations," the District Court "cannot issue enforcement remedies – by any means – for trust breaches that it has not found to have occurred." *Id.* at 474. Nevertheless, the Court also declared that upon making "specific findings of unreasonable delay in Interior's performance of its fiduciary duties" (*id.* at 475), the District Court possessed the authority "to order[] specific relief for those breaches." *Id.* at 477. And *Cobell XIII* reiterated and affirmed that "***[t]o the extent Interior's malfeasance is demonstrated to be prolonged and ongoing, more intrusive relief may be appropriate***. . . ." *Id.* at 477-478. (emphasis added).

In urging delay until after *Cobell XIII* (and the appeal decided one week earlier in *Cobell XII*) had been resolved, the Secretary argued a year ago that the Master's challenged conduct "is itself a manifestation of the deeply mistaken premises on which the litigation has proceeded." (4/16/04 Response at 2). In fact, the Court's December 10, 2004 decision confirms that it is the Secretary and the other Trustee-Delegates (rather than the District Court and its Rule 53 appointee) that have been acting on "deeply mistaken premises." Rather than endeavour in good faith to discharge their declared fiduciary duties after a century of malfeasance and recalcitrance, these defendants continue to consciously violate the Court's orders, deceive the Court and Plaintiffs and assail the integrity of judicial officers assigned to monitor their compliance. The Secretary's unfounded prolonging of this mandamus proceeding by converting it into a tactical weapon for use in further delaying the District Court proceedings should not be allowed – particularly where the consequence is to exacerbate the established irreparable injury already being suffered by Plaintiffs.

2. The Brooks Mandamus.[13]

In the *Brooks Mandamus*, the Court addressed recusal demands asserted against the Master and the District Court by non-party individuals who had been charged with contumacious misconduct in the course of the *Cobell* litigation. By order dated September 17, 2002 the District Court had referred 37

[13] On February 22, 2005, the U.S. Supreme Court denied Petitioner's cert. petition without Plaintiffs even making a response. *See Bruce Babbitt et al. v. U.S. District Court for the District of Columbia* ____US _____, 125 S. Ct. 1325 (2005).

such individuals to the Master for his examination. The Master was instructed to "develop a complete record with respect to these 37 non-party individuals [and], upon completing his review of these matters, issue a report and recommendation regarding whether each individual should be ordered to show cause why he or she should not be held in (civil or criminal) contempt of court, or whether other sanctions are appropriate against such individuals." *In Re Brooks*, 383 F.3d at 1039 (*quoting* the District Court's referral at 226 F. Supp.2d 1, 155 (D.D.C. 2002)).

As of the date of his resignation on April 6, 2004, the Master had prepared draft reports in this other matter but had not yet issued his recommendations regarding any of the individuals. He therefore requested that this Court instruct him as to whether he should finalize and release the reports, and renewed the request for the Court's direction even after his resignation had been tendered and accepted by the District Court. *See* 4/29/04 Statement of Alan Balaran, Case No. 03-5047.

The Court ordered that the draft reports ***not*** issue, concluding that inasmuch as the Master had previously investigated a number of the same issues that were the subject of the contempt allegations referred to him on September, 17, 2002, there was an unavoidable risk of "selection bias" in accomplishing the "adjudicative" role the District Court had assigned him. *In Re Brooks*, 383 F.3d at 1046. Concluding that it was therefore error for the District Court to have made the referral in the first place, the Court declared that:

> Because Special Master Balaran had *ex parte* contacts that may have given him personal knowledge of disputed evidentiary facts relevant to the contempt proceedings, those proceedings should never have been referred to him. Therefore any reports, recommendations, or other work product Balaran prepared pursuant to the September 17 referrals may not be submitted to the district court or otherwise disseminated in any manner.

Id. at 1046.

Significantly, the Court's decision in the *Brooks Mandamus* did not turn on any finding that the Master had conducted the referred proceedings in other than a fair, impartial manner. (Indeed, more than half the individuals who petitioned the Court for mandamus relief with respect to the District Court refrained from joining in the bias charge levied against the Master). Moreover, ***none*** of the factors

present in the *Brooks Mandamus* that warranted such relief are present here. In this instance, the Master's assigned task was plainly investigatory (rather than adjudicative); he was ordered "to investigate whether Interior engaged in any [ ] concealment" in the creation of the Eighth Quarterly Report, *See* order dated November 5, 2002 at 1. Moreover, his consented-to authority to investigate was never questioned and the November 5, 2002 order was never challenged.

Instead, the sole charge levied in this mandamus proceeding was that the Master's decision to utilize a former NAID employee to assist him in the court-ordered investigation reflected impermissible bias. The District Court rejected that charge thirteen months ago as "devoid of merit," *Cobell v. Norton*, 310 F.Supp.2d at 104; and Petitioner has not demonstrated clear error in what the District court decided.

Moreover, the *Brooks Mandamus* teaches that where a judicial official makes an unequivocal denial of impermissible bias due to his receipt of *ex parte* information, ***his on-point denial must be believed***. That is what this Court held in the *Brooks Mandamus in* refusing to recuse the District Judge from further contempt proceedings notwithstanding his more than 120 hours of *ex parte* communications with the Special Master and Court Monitor. As the Court there concluded:

> [The district judge] need not recall all that was discussed at those meetings, he need only recall that the substance of the special masters' findings was not discussed. If, as he represents, that was an implicit ground rule for the conduct of those meetings, then the pertinent question is whether it was ever violated. We see no reason for not accepting the judge's unequivocal response.

383 F.3d at 1036.

So here, Master Balaran has declared unequivocally "on the record" that he has conducted himself properly at all times in the Court-ordered investigation giving rise to Petitioners' recusal demand. (Feb.16, 2004 Statement at 31-33). Accordingly, in the absence of clear error the Court should respect the choice of the Master -- just as it did the choice of the District Judge in the *Brooks Mandamus* -- to resist Petitioner's recusal demand. Clearly the Master is in the "best position to appreciate the implications of those matters alleged," and to determine whether or not his recusal may be warranted. *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1998).

Like the District Judge in this other mandamus matter, Master Balaran squarely addressed Petitioner's concerns and provided a comprehensive response to every aspect of Petitioner's claim that should have definitively put to rest any legitimate concern. The Secretary's petition thus should be summarily dismissed to prevent mandamus relief from being exploited as a tactical weapon to disrupt and frustrate the proceedings below and cause further harm to the Plaintiff-Beneficiaries. *See Securities and Exchange Commission v. Loving Spirit Foundation Inc.*, ___ F.3d ___ (No. 03-5234) (D.C. Cir., December 17, 2004).

IV. CONCLUSION

For all of the foregoing reasons, Plaintiffs-Respondents respectfully request that the Secretary's mandamus petition be summarily dismissed as moot. Due to the importance of this issue and the compelling need for the Court to prevent mandamus relief from being used improperly to disrupt District Court proceedings without legal or factual basis, Plaintiffs-Respondents also request that this matter be placed on the next available calendar for oral argument.

Dated April 4, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify the forgoing *Respondents' Motion to Dismiss* was served on the following on April 4, 2005.

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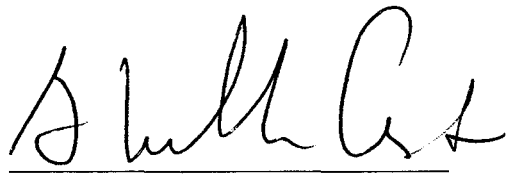

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