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,	)	
	)	
	)	

OPPOSITION TO SECRETARY NORTON'S
"RESPONSE" TO THE ORDER OF FEBRUARY 25, 2005

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By order dated February 25, 2005, the Court 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 have moved to dismiss. Alan Balaran's resignation as Special Master on April 6, 2004 has rendered the demand for his recusal moot. Clearly, there is ***no*** need for the Court to decide whether to compel the Master's recusal – which is the sum and substance of the relief requested in the Secretary's mandamus petition – when he has stepped aside **voluntarily**.

In her "Response to Order of February 25, 2005" filed concurrently with Plaintiffs' dispositive motion, Secretary Norton once again concedes – just as she did a year ago[1] -- that the Master's resignation has "mooted the question of his further participation in the case . . . ." (Response at 1). She also fails to do what the Court has so clearly required. Nowhere in the Petitioner's April 4 Response is a motion presented "to govern further proceedings." Indeed, the Secretary's eight-page submission to the Court contains no reference to this requirement. Nor does Petitioner offer any excuse for her glaring non-compliance with the Court's order.

[1] *See* Petitioner's 4/16/04 Response to April 6, 2004 "Show Cause" Order at 1.

Instead, the April 4 Response merely repeats the same contentions the Secretary made a year ago when ordered to "show cause why the Petition for Writ of Mandamus should not be dismissed as moot." (*See* April 6, 2004 "Show Cause" Order at 1.) Once again, the Secretary urges that the mandamus be held in abeyance – this time until after Trustee-Delegates' latest interlocutory appeal (the seventh filed in the past two and one-half years) has been decided. Alternatively, she renews an 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.

Neither of these renewed arguments has been presented in support of a "motion [] to govern further proceedings" as the Court's February 25, 2005 order required, and the Secretary's contentions should be rejected out-of-hand for this reason alone. As addressed in greater detail below, the Secretary's contentions also are completely without merit. Accordingly, the mandamus petition should be dismissed without further delay.

A. The Secretary's Suggestion That This Matter Continue to Be Held in Abeyance.

In urging this course of action, the Secretary offers no reason why it would make any sense to further delay this mandamus proceeding until after Trustee-Delegates' appeal of the District Court injunction issued on February 23, 2005 has been decided. The schedule for briefing and oral argument announced on April 7, 2005 in this other matter makes it abundantly clear that while appeal No. 05-5068 is to be expedited, in all likelihood there will be no decision prior to the end of this calendar year.

Further delaying the Court's consideration of the mandamus for another year is absolutely pointless, because there is no connection between this proceeding and appeal No. 05-5068. The District Court's February 23, 2005 decision to reissue the "historical accounting" provisions of the structural injunction is in no way related to the Master's challenged conduct three years earlier in investigating whether Interior had withheld incriminating information from the District Court in the Eighth Quarterly Report. Indeed, the injunction was based on findings made following a 44-day bench trial in which the District Court explicitly rejected any consideration of the 4/21/03 Interim Report reflecting the Master's challenged investigation. *See* 5/29/03 order (Dkt. No. 2076).

Nor is there any reason to anticipate that the outcome of the 05-5068 appeal will have any impact on the mootness issue ripe for decision in this proceeding. In support of the abeyance argument the Court accepted eleven months ago (over Plaintiffs' objection), the Secretary asserted that the outcome of the IT security and 1.5 appeals then pending (*Cobell XII* and *Cobell XIII*)[2] might obviate any need to decide this issue. Alleging that the Master's challenged investigation was "itself a manifestation of the deeply mistaken premise 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.

Contrary to what the Secretary had hoped, however, the Court's decisions in *Cobell XII* and *Cobell XIII* did not result in the dismissal of the *Cobell* case. Instead, key issues of IT

[2] *See Cobell v. Norton*, 391 F.3d 251 (D.C. Cir. 2004) ("*Cobell XII*") and *Cobell v. Norton*, 392 F.3d 461 (D.C. Cir. 2004) ("*Cobell XIII*").

security, trust reform and Plaintiffs' accounting claim have been remanded to the District Court for further proceedings. And the decisions in *Cobell XII* and *Cobell XIII* have 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 XII,* 391 F.3d at 257. Indeed, "[t]o the extent Interior's malfeasance is demonstrated to be prolonged and ongoing, more intrusive relief may be appropriate." *Cobell XIII*, 392 F.3d at 477-478.

Accordingly, the Secretary's plea for further delay in the face of the Court's December 2004 decisions in *Cobell XII* and *Cobell XIII* is wholly unjustified. Whatever the outcome of appeal No. 05-5068, moreover, the IT security and trust reform issues currently before the District Court and unaffected by the appeal will continue to be the subject of discovery and evidentiary hearings in the proceedings below. Thus, no legitimate reason exists to prolong this mandamus proceeding – particularly when this matter has been ripe for dismissal since the Master's resignation on April 6, 2004. Insofar as Secretary Norton's "Response" may be construed as a request to further hold the mandamus in abeyance (notwithstanding her failure to move for such relief per the Court's 2/25/05 order), it should be summarily denied.

B. Petitioner's Improper Attempt to Use This Mandamus To Vacate The Master's 2003 Reports.

For each of the following reasons, this argument (like the Secretary's unfounded plea for further delay) also should be rejected out-of-hand:

1. **The Requested Relief Is Completely Unnecessary** -- Petitioner reiterates the allegation she made a year ago that the Master's 4/21/03 Interim report and the two reports issued later in 2003 constitute "functional indictments" (Response at 2).

In fact, ***none*** of the three reports targeted by the Secretary has ever been adopted by the District Court – much less acted upon to the Secretary's detriment. This critical threshold defect in Petitioner's argument is addressed in detail in Respondent's Motion to Dismiss: The Court is thus referred to pages 7-8 of Plaintiffs' April 4, 2005 filing.

2. **The Requested Relief Is Outside the Scope of the Mandamus** -- The Secretary's attempt to strike the Master's reports is legally defective for this reason as well. ***No*** such relief was requested in the Secretary's October 17, 2003 petition seeking the Master's recusal. While the 4/21/03 Interim Report and the Master's two later 2003 reports were identified in the mandamus petition and attached as exhibits, ***nothing*** improper was alleged with respect to any of their contents.

Accordingly, the relief now being requested is plainly outside the scope of this mandamus proceeding and it should be rejected for this additional reason. *See Hormel v. Helvering*, 312 U.S. 552, 556 (1941) ("[A]n appellate court does not give consideration to issues not raised below"); ***and*** Respondents' motion to dismiss at 8-9 and the other precedents cited therein.

3. **The Requested Relief is Unsupported by The Evidence of Record** – In addition to the foregoing deficiencies, the Secretary's request for relief should be summarily denied because there is ***nothing*** in the record that evidences impermissible bias. As outlined below, the relevant evidence of record is overwhelmingly to the contrary.

First and foremost, the only "on the record" determination of the Secretary's bias charge is the District Court's March 15, 2004 decision ***denying*** the Interior defendants' disqualification motion as "wholly insufficient." *Cobell v. Norton*, 310 F. Supp.2d 102, 121 (D.D.C. 2004). The District Court concluded in that same decision that the 4/21/03 Interim Report contained

"findings firmly rooted in evidence" and that "[e]very 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." *Id.* at 118. The Secretary has pointed to nothing in the record suggesting otherwise.

So too, there is ***nothing*** in the evidence of record which suggests that either of the reports issued later in 2003 was in any way "tainted." While Petitioner alleges that the reports were prepared by a Master who "gathered evidence by whatever means he saw fit, on any subject" (Response at 1), the case record confirms that ***both*** reports were the product of investigations the Master was fully authorized to conduct per the consented-to authority vested in him by the District Court's February 24, 1999 and August 12, 1999 orders. The latter specifically authorized the Master to oversee the 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" (Aug. 12, 1999 order at 2). Indeed, the record reflects that the Master had made 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 (Pet. Exh. 14) was conducted in the presence of Department of Justice and Solicitor's office attorneys representing the defendants in the *Cobell* litigation. In addition, the Master's documented findings of document destruction and asset mismanagement since have been ***corroborated*** by ***independent*** evidence of record. *See* Plaintiffs' April 4, 2005 motion at 9-10 and Exhibits 1 and 2 thereto (the Lewis Affidavit and Baker deposition transcript).

The Secretary thus has fallen far short of demonstrating the "clear and indisputable" right to relief that ***must*** be demonstrated to justify the Court's striking of the Master's reports.

Accordingly, the proper course is for the Court to dismiss the Secretary's mandamus petition as moot and reject Petitioner's invitation to further intervene in the District Court proceedings. Nothing in the record warrants the Court's proceeding otherwise.

In arguing for a contrary result, Petitioner relies on this Court's decision in *In re Brooks*, 383 F.3d 1036 (D.C. Cir. 2004), *cert. denied, Babbitt v. U.S. District Court,* ___ U.S. ___, 125 S.Ct. 1325 (2005). Such reliance is misplaced. Indeed, ***none*** of the factors compelling the Court's suppression of the Master's draft reports in the *Brooks Mandamus* are present here.

In this other matter, the role the District Court assigned the Master per the 9/17/02 referral was clearly "adjudicative." The Master was ordered to examine 37 individuals charged with contumacious misconduct and recommend to the court whether or not civil or criminal contempt proceedings should be initiated against each such individual. *In re Brooks*, 383 F.3d at 1045. In holding that the District Court had erred in assigning the Master such a task when he had previously investigated a number of the same issues that were the subject of the contempt charges, the *Brooks* Court concluded there was an unavoidable risk of "selection bias" in the Master's accomplishing the adjudicative role the District Court had assigned him. *Id.* at 1046.

Here, by contrast, the Master's task was ***solely*** investigative (rather than adjudicative). He was directed by court order to investigate "whether Interior had engaged in any [] concealment in the creation of the Eighth Quarterly Report" and to report his findings to the District Court. *See* Nov. 5, 2002 Order at 1. Moreover, his consented-to authority to investigate was never questioned and the November 5, 2002 order was never challenged.

The Secretary's attempt to manipulate this proceeding to vacate the product of the Master's investigative activities therefore should be summarily rejected. Otherwise, this proceeding will have been converted into a tactical weapon for disrupting and frustrating the

proceedings below and causing further irreparable injury to the Plaintiff-Beneficiaries. This should not be allowed.

CONCLUSION

For all of the foregoing reasons, the arguments advanced in Secretary Norton's "Response" to the Order of February 25, 2005 should be summarily rejected. The Secretary has failed to comply with the Court's order by requiring that the parties "file motions to govern further proceedings," and she has offered no justification for her non-compliance. Furthermore, her arguments in favor of further delay or, alternatively, the vacating of the Master's 2003 reports are completely without legal or factual support. Accordingly, this mandamus proceeding should be dismissed without further delay.[3]

[3] As requested in Respondents' April 4, 2005 Motion to Dismiss, this matter also should be placed on the next available calendar for oral argument. 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 fully support Plaintiffs-Respondents' request for such a hearing.

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Respectfully submitted,

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I hereby certify the forgoing *Opposition to Secretary Norton's "Response" to The Order of February 25, 2005* was served on the following on April 14, 2005.

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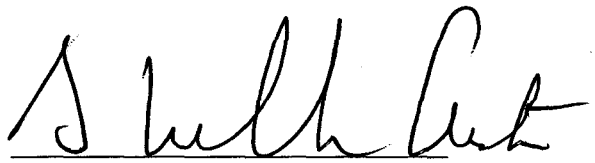

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