

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT

APR 15 2005

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

In re Gale Norton,

Secretary of the Interior
in her official capacity,

Petitioner.

No. 03-5288

OPPOSITION TO PLAINTIFFS' MOTION TO DISMISS

Although this Court's order of February 25, 2005 directed simultaneous briefing and did not appear to contemplate additional filings, plaintiffs have submitted a response to the government's brief. Accordingly, the government respectfully submits this response in opposition to plaintiffs' motion to dismiss.

1. Plaintiffs profess confusion over the government's position regarding future proceedings, apparently because the government's filing was not captioned as a motion. Thus, we reiterate the position stated in our April 4, 2005 filing: The petition for mandamus is not moot. The issue of Special Master Balaran's bias should be addressed on the merits. Because the Special Master should have been disqualified for bias, his reports should likewise be "disqualified," *i.e.*, vacated. However, the government would not object to an order holding the petition in abeyance pending the resolution of the appeal from the re-issued structural injunction, if the Court believes that deferral is appropriate.

2. As we have explained, Special Master Balaran's resignation mooted the question of his continued participation in the case but did not remove the string of reports that he continued to issue even after the government had sought to disqualify him for bias. Plaintiffs contend that the government

may not argue that the reports should be vacated because the petition did not expressly request this relief and because, in plaintiffs' view, such relief is not authorized. This Court rejected the identical contentions in In re: Brooks, 383 F.3d 1036 (D.C. Cir. 2004):

Several of the petitioners urge that despite Balaran's resignation "this court must rule on whether the Special Master should have been recused from the contempt proceedings under § 455, and if so, permanently enjoin the release of his report and recommendations and any other work product he may have completed." In reply the respondents argue that vacatur of Balaran's reports and recommendations was not the relief requested in the petitions and is "without justification [and] has no basis in the law." If, however, the September 17 referrals to Balaran as special master in the Cobell litigation were made in error because Balaran should have been recused from the contempt proceedings, then any work product produced pursuant to the September 17 referrals must also be "recused" – that is, suppressed. We are constrained, therefore, to determine whether Balaran should have been recused from the contempt proceedings.

Id. at 1044.

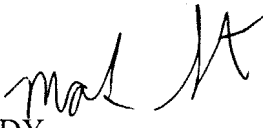
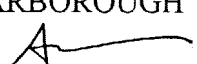
3. Plaintiffs' alternatively contend that the district court should decide in the first instance whether the Master's reports should be vacated, noting that the court has not yet acted on plaintiffs' motion to adopt the August 2003 report (Pet. Exh. 14) and that plaintiffs have not yet moved for the adoption of the September 2003 report (Pet. Exh. 15). See Motion to Dismiss, at 8. The district court, however, has emphatically rejected the government's contention that the Master should have been recused for bias, and plaintiffs do not suggest that the court would revisit this determination. Moreover, as our April 4, 2005 filing explains, plaintiffs have treated the Master's reports and even his resignation letter as "evidence" in this litigation without regard to their adoption by the district court.

4. Finally, plaintiffs argue that the Special Master's conduct in secretly hiring a complaining witness was wholly proper and that the petition should be denied on that basis. Our briefs in support of mandamus address these contentions at length and demonstrate overwhelming evidence of conduct establishing the Master's bias.

Respectfully submitted,

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APRIL 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April, 2005, I am causing the foregoing response to be served on the following in the manner specified:

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