

APR 16 2004

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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

RESPONSE TO ORDER TO SHOW CAUSE

INTRODUCTION AND SUMMARY

In the face of overwhelming evidence of conduct requiring his recusal, Special Master Balaran submitted his resignation days before this Court was to hear argument on the government's petition seeking his disqualification.

Mr. Balaran's resignation has mooted the question of his further participation in the case. But the resignation neither obviates the ongoing impact of his actions nor resolves the issues they have raised. In the name of "institutional reform," and in a "quasi-inquisitorial, quasi-prosecutorial role" that this Court has disapproved, 334 F.3d 1128, 1142 (D.C. Cir. 2003), the Master gathered evidence by whatever means he saw fit, on any subject he perceived to have even a tangential relation to trust management generally, whether or not it concerned the claim for an accounting of IIM accounts that is the basis for this suit under Section 706(1) of the APA. The Master then framed voluminous reports for presentation to the court and the public that have served as functional indictments. These reports have charged Interior officials with deliberate concealment, obstruction, malfeasance, and incompetence. Indeed, the Master's resignation

letter repeats many of these baseless charges and adds new ones, insisting that the government sought his recusal not because of his own misconduct but to impede his quest for the “truth.”

The Master’s departure from the case does not eliminate the effects of his work. Because the Master’s conduct has been incompatible with 28 U.S.C. § 455, the Court should reverse the district court decision denying recusal, and direct the vacation of the “Interim Report” prepared with the assistance of NAID Vice President Mike Smith (Pet. Exh. 1), and the two subsequent reports issued in the months after the government file its recusal motion (Pet. Exhs. 14 & 15).

It is impossible to assess the full impact of the Master’s actions on the development of this litigation, and, indeed, the Master’s conduct is itself a manifestation of the deeply mistaken premises on which this litigation has proceeded. Those issues are appropriately resolved in the government’s pending appeals from the structural injunction and from the injunctions terminating Interior’s internet communications. See No. 03-5314 (appeal from structural injunction) (opening brief filed April 6, 2004); Nos. 03-5262, 04-4084 (appeals from internet injunctions) (opening brief filed April 6, 2004) (scheduled for argument September 14, 2004). As we demonstrate in those appeals, quite apart from the question of bias, the district court has acted without foundation in law or fact. There is no longer any basis for continuing jurisdiction under Section 706(1) of the APA, and the class action lawsuit should be dismissed.

Those appeals do not, however, reach the question of whether Mr. Balaran’s conduct comported with 28 U.S.C. § 455, which can be addressed only in the context of this petition. At a minimum, to the extent that the Court believes that the relief granted on the pending appeals may bear on the exercise of its mandamus jurisdiction, it should defer further consideration of the mandamus petition pending resolution of those appeals. If this Court, after considering the

government's pending appeals, were nevertheless to approve the district court's further continuing jurisdiction, resolution of the mandamus petition would be imperative. The district court, which has presumed to effect an indefinite takeover of trust operations, has made clear that the case will outlast the court's life tenure. See 226 F. Supp. 2d 1, 161 (D.D.C. 2002). The actions of a biased judicial officer cannot be allowed to infect the case indefinitely.

BACKGROUND

On April 21, 2003, the Special Master, after investigating charges brought by Native American Industrial Distributors, Inc., a government contractor, released an Interim Report containing his findings and conclusions. Pet. Exh. 1. The first footnote of the report indicated that it was based on information "obtained outside of normal channels and to which the parties may have no familiarity." A review of the Master's billing records noted the paid assistance of "MSS." These notations proved to refer to Mike S. Smith, who had been Vice President of NAID at the time it sought to intervene in this litigation to press its complaint against Interior.

The government moved for the Special Master's disqualification in May 2003. Despite repeated requests for expedition, neither the Special Master nor the district court responded to that motion until ten months later, after the government's mandamus petition had already been filed with this Court. In the interim, the Master continued in his "quasi-inquisitorial, quasi-prosecutorial role," 334 F.3d at 1142, investigating on his own initiative whatever matters he perceived to have any relation to trust reform. Asserting "the authority of institutional reform special masters to uncover facts and collect evidence via ex parte contacts with parties and counsel," he issued two new reports charging the government with wrongdoing. See Site Visit Report of the Special Master to the Dallas, Texas Office of the Minerals Revenue Management

Division of the Department of the Interior's Minerals Management Service (undated), at 1 (Pet. Exh. 15) (quoting Order of March 29, 2002 (dkt. # 1235), cited in Cobell v. Norton, 237 F. Supp. 2d 71, 75 (D.D.C. Jan. 17, 2003)). See also 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), at 38 (dkt. #2219) (Pet. Exh. 14).

The Special Master finally responded to the government's recusal motion with a statement filed in district court, shortly before the deadline this Court had set for plaintiffs to respond to the government's mandamus petition. The Master left it to plaintiffs to provide this Court with a copy of his filing and subsequent submissions.

The district court did not rule on the recusal motion until after briefing on the government's petition in this Court was complete. The court issued its ruling on March 15, 2004, together with its ruling requiring immediate disconnection from the internet. The court accepted all arguments advanced by the Special Master, echoing its defense of the unorthodox conduct of former Special Master-Monitor Kieffer, whose appointment had been vacated by this Court. See Order of March 15, 2004, 2004 WL 515491; 334 F.3d at 1142-45.

Nevertheless, after this Court scheduled argument on the government's petition, the Master resigned. The Master declared that the district court had been correct in finding the government's recusal motion "frivolous" and in "suggesting that it was Interior that acted improperly by impeding my investigation and that Interior had an ulterior motive for seeking my removal." Letter at 1. Referring to his ex parte visit on September 19, 2003 to the Mineral's Management Services Dallas office, the Master insisted that he was asked to leave because his recent "findings" had "implicated the agency's systemic failure to properly monitor the activities

of energy companies leasing minerals on individual Indian lands.” Id. at 2. The Master declared that his findings “could cost the very companies with which senior Interior officials maintain close ties, millions of dollars.” Ibid. He further announced that the government’s reasons for seeking disqualification “bear no relationship to the reasons it offers in its recusal motion, but rather to my discovery of significant problems in its appraisal and record-keeping practices.” Id. at 3. His investigation into these matters, the Master asserted, “might well result in energy companies being forced to repay significant sums to individual Indians. Interior could not let this happen.” Id. at 3.¹

The district court accepted the Master’s resignation on April 6, 2004 and ordered that the resignation letter be made part of the record. In a separate order, the court required the government to pay over \$65,000 in attorney’s fees incurred by the Master with respect to the disqualification issue in the period commencing January 28, 2004.² On April 6, 2004, plaintiffs filed a suggestion of mootness with this Court.

¹ The Master made these charges without mentioning the contradictory evidence in the record. For example, in March 2002, the Secretary transferred the authority to conduct valuation and appraisal of Indian trust lands from the Bureau of Indian Affairs to the Office of the Special Trustee to “ensure the independence, accountability, and oversight of the Indian trust lands valuation and appraisal staff.” Eleventh Quarterly Report, at 81 (dkt. # 1586). Subsequently, all valuation and appraisal functions for the Department were consolidated into a single Office of Appraisal Services (OAS) located within the Office of the Special Trustee. An independent review of OAS was conducted in 2003 by the Appraisal Foundation. In its August 2003 report, the Appraisal Foundation concluded that “the degree of appraisal independence within OAS is very good, with virtually no reports of pressure being placed on staff or contract fee appraisers to achieve preconceived value estimates.” Fifteenth Quarterly Report, at 61 (dkt. # 2356).

² The district court also ordered payment of fees to Mr. Balaran through April 30, 2004. Mr. Balaran has received over \$1,775,000 in fees (exclusive of expenses and payment for assistance and experts, which bring the total bill for his services to over \$3,800,000).

ARGUMENT

The Special Master's Resignation Does Not Obviate The Ongoing Impact Of His Actions Or Resolve The Fundamental Issues They Raise.

The Special Master has resigned. Although the issue of his continuing participation in the case is thus moot, that resignation does nothing to address the impact of a biased judicial officer on the course of this litigation.

A. The Special Master has essentially functioned as a prosecutor and grand jury – a role “unknown to our adversarial legal system,” 334 F.3d at 1142 – creating evidence and issuing indictments with regard to any matter that, in his view, had some relationship to trust accounting. In the Interim Report of April 21, 2003 (Pet. Exh. 1), he purported to find contumacious misconduct. In his report regarding his visit to the Texas Office of the Minerals Revenue Management Division (Pet. Exh. 15), the Master purported to find mismanagement with regard to Interior's oversight of oil leases. In his report regarding his visit to the Office of Appraisal Services in Gallup, New Mexico (Pet. Exh. 14), the Master purported to find mismanagement with regard to appraisals of rights-of-way on Indian lands, and charged present officials with malfeasance even though the appraisals he purported to review were completed before they took office. The reports were developed entirely outside of the adversarial process. In his resignation letter, made part of the record by the district court, Mr. Balaran charges that the recusal motion filed by the government in May 2003 was a sham intended to prevent him from issuing the reports of his investigations.

The Master's resignation does not remove the string of indictments, their consequences in this litigation, and the seeds of mistrust that his reports have sown among trust beneficiaries and

the public generally. Because Mr. Balaran's conduct has been incompatible with the standards of 28 U.S.C. § 455, the Court should reverse the district court's denial of the government's recusal motion and direct the vacation of the Interim Report of April 21, 2003, and the two reports issued after the government moved for Mr. Balaran's recusal. See generally United States v. Microsoft Corp., 253 F.3d 34, 116 (D.C. Cir. 2001) ("prospective disqualification of the offending judge" is the "minimum" remedy for conduct that calls the judge's impartiality into question).³

B. It is impossible to trace the full impact of the Master's conduct which, in turn, is a manifestation of the deeply mistaken premises on which this litigation has proceeded. Those issues are properly addressed in the related appeals from the structural injunction and the internet injunctions, in which the government's opening briefs were filed on April 6, 2004. The injunctions, like Mr. Balaran's investigations, rest on fundamentally unsound assumptions. They assume that the court's limited continuing jurisdiction in a suit under Section 706(1) of the APA encompasses a general power to effectuate reform of any matter pertaining to Indian trusts, whether or not it concerns a claim to produce an accounting of IIM accounts that furnished the basis for this suit. They assume that the declaratory judgment affirmed by this Court in 2001 constitutes a decree of liability with regard to trust management generally, to be enforced through extraordinary means; and that, in the face of all evidence to the contrary, the executive branch officials accountable to the public and to Congress are irredeemable wrongdoers to be circumvented or subordinated in the quest for reform. As we show in the pending appeals, these

³ In earlier filings, plaintiffs urged that mandamus relief was inappropriate because the district court had not yet ruled on the government's recusal motion. As noted, the court has since ruled, concluding that the Master's conduct was wholly unobjectionable and was, indeed, commendable.

assumptions are flatly at odds with both of this Court's decisions in this case and with the established separation of powers principles they reflect. The injunctions are without basis in law or fact, and events have long overtaken the basis for the limited continuing jurisdiction under the APA that this Court approved in 2001. But even if the theoretical basis for the district court's continuing jurisdiction had not ceased to exist, the court's abuse of its jurisdiction would require that its jurisdiction be terminated and that the class action lawsuit be dismissed.

Those appeals do not, however, address the separate question of bias, which can only be addressed on this petition. To the extent that the Court believes that the disposition of those appeals may bear on the exercise of its mandamus jurisdiction, it should, at a minimum, defer further consideration of the mandamus petition pending resolution of the appeals. If the Court, after considering the government's appeals, were nevertheless to approve the district court's further continuing jurisdiction, the importance of resolving the issues raised by the petition would assume particular urgency. The series of indictments by a biased judicial officer and the court's approval of the Master's conduct cannot be permitted to remain in place for the indefinite duration contemplated by the district court for this litigation.

Respectfully submitted,

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APRIL 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April, 2004, I am causing the foregoing Response

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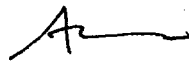
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