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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL et al.,

Plaintiffs,

v.

GALE A. NORTON, Secretary of the Interior, et al.,

Defendants.

No. 1:96CV01285
(Judge Lamberth)

INTERIOR DEFENDANTS' OBJECTIONS TO "INTERIM" REPORT OF THE SPECIAL MASTER REGARDING THE FILING OF INTERIOR'S EIGHTH QUARTERLY REPORT

Interior Defendants respectfully submit the following Objections to the Interim Report of the Special Master Regarding the Filing of Interior's Eighth Quarterly Report ("Interim Report").

INTRODUCTION

On November 5, 2002, the Court appointed Special Master Balaran to investigate whether Interior Defendants ("Interior") "withheld information from the Court that should have been disclosed in the Eighth Quarterly Report." November 5, 2002 Order at 1. On April 21, 2003, before his investigation was complete, and before he had given Interior officials a chance to be heard, the Special Master filed his Interim Report, publicizing his not fully investigated "findings." By the Special Master's own admission, the Interim Report is based on information "obtained outside of normal channels and to which the parties may have no familiarity." Interim Report at 1, n.1. Interior objects to the Special Master's unauthorized and secret acquisition of evidence during his investigation, and to his reliance upon it in preparing his Interim Report. Interior objects to the filing an interim report as unauthorized. Interim reports, based upon

incomplete investigations, are profoundly unfair to the persons being investigated. Interior objects to the preliminary conclusions of the Special Master that Interior withheld information from the Court that should have been disclosed in the Eighth Quarterly Report and that the information was withheld to deceive the Court about the accuracy of Interior's previous quarterly reports. Neither charge is supported by the evidence in the Interim Report, let alone the evidence that the Special Master has failed to consider.

Interior recommends that this investigation be terminated as unnecessary. If the investigation is to continue, the Special Master should not participate because he is tainted by his secret acquisition of evidence. No one to whom the secret evidence acquired by the Special Master has been communicated should participate in any further proceedings related to this investigation.

BACKGROUND

On August 30, 2002, Native American Industrial Distributors, Inc. ("NAID"), a former Interior contractor, filed a motion to intervene in this case, alleging that its contracts with Interior had been terminated in retaliation for preparing information related to the Trust Asset and Accounting Management System ("TAAMS") that Interior wished to conceal from the Court. On September 24, 2002, the Court denied NAID's motion to intervene on procedural grounds.

On October 7, 2002, Special Master Balaran wrote a letter to counsel for Interior indicating that the "Court directed me to investigate whether the Department of the Interior withheld any information provided by NAID." October 7, 2002 Letter from the Special Master at 1 (attached as Exhibit A). In the October 7 letter the Special Master requested the "administrative records" for the Sixth, Seventh and Eighth Quarterly Reports. See October 7

Letter at 1. By letters of October 9 and 10, 2002, counsel for Interior informed Special Master Balaran that Interior was gathering and securing the documents requested in his October 7 Letter, but that Interior did not believe that the Special Master had authority to request them, without a written order from the Court authorizing his new investigation.[1] See October 9 & 10, 2002 Letters to Special Master Balaran (attached as Exhibit B). On November 5, 2002,[2] the Court issued an order authorizing Special Master Balaran to investigate NAID's claims that information that should have been disclosed was concealed from the Court in the Eighth Quarterly Report. The November 5 Order further directed that "[a]t the conclusion of his investigation, the Special Master shall file with the Court, with copies to defendants' and plaintiffs' counsel, his report and recommendation detailing his findings and conclusions." November 5 Order at 1-2.

Due to the voluminous nature of the collection of documents responsive to the Special Master's October 7 request,[3] the Special Master indicated that he would like to examine the collection in camera to determine with more specificity which, if any, documents would be helpful in his investigation. Consequently, on December 10, 2002, the collection was made available for the Special Master's in camera review. The Special Master's assistant, Shana Greatman, arrived at Interior and informed counsel for Interior, and the assembled Interior

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1/ Interior is unaware of any written record of the initial direction from the Court to Mr. Balaran referenced in his October 7, 2002 letter. It appears that the Court instructed Mr. Balaran to commence an entirely new investigation in an off-the-record communication.

2/ The handwritten date of the Order is "12-5-02," but this is obviously a mistake, as the Order was filed on November 5.

3/ The collection is contained in three lateral filing cabinet drawers and nine banker's boxes.

employees, including Associate Deputy Secretary James Cason, that the Special Master was busy on other issues, but that she would prepare an inventory of the document collection. Ms. Greatman took an hour and a half to finish her inventory and announced that the Special Master would review her inventory and then get in touch with counsel for Interior with a more targeted request for documents.

Counsel for Interior received no further communication from the Special Master related to his NAID investigation until the end of January 2003, when he inquired about the status of his document requests. Interior's counsel informed the Special Master by letter of January 29, 2003, that Interior had been waiting for the more focused request from the Special Master. See Letter of January 29, 2003 (attached as Exhibit C). On January 31, 2003, Interior's counsel informed the Special Master that the entire collection would be copied and reviewed for privilege, and that it was anticipated that the collection could be given to him on February 14, 2003. See Letter of January 31, 2003 (attached as Exhibit D).

When it became obvious that the February 14 date for production was unrealistic given the large volume of documents that needed to be reviewed for privilege, while Interior was simultaneously responding to other requests from then Special Master-Monitor Kieffer and Plaintiffs, the Special Master asked for, and was given, another opportunity to review the collection in camera. On February 27, 2003, the Special Master examined the collection of requested documents and decided that he wanted to have the entire collection produced to him.[4] Meanwhile, the Special Master sent a series of letters in late March and early April requesting

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[4] The Special Master was accompanied by Mike Smith, an NAID employee, during the February 27, 2003 in camera inspection.

additional documents and information needed for his investigation. See Letters of March 25, 2003; April 2, 2003; April 3, 2003; April 4, 2003 (attached as Exhibit E). With the exception of two of the four requests in the April 2, 2003 Letter from the Special Master[5] – and it is believed that most of the documents responsive to these two requests are contained in the collection of documents responsive to the initial October 7 request – the Special Master has been given all of the documents and information responsive to these supplemental requests. See Letters of April 7, 2003; April 8, 2003; April 11, 2003 (attached as Exhibit F). On April 4, 2003, in the first of a projected series of productions, the Special Master was given a batch of documents – totaling 2,310 pages – responsive to his original October 7 request. See Letter of April 4, 2003 (attached as Exhibit G).

On April 21, 2003, the Special Master filed his Interim Report. The Special Master reveals that his investigation is not complete and that he anticipates reviewing the balance of the documents that he has requested, taking oral testimony, and considering the comments of the parties to his Interim Report before he files a final report. Interim Report at 1 n.1. The Special Master does not explain why he issued a preliminary report before his investigation was complete.

In an extraordinary footnote, the Special Master discloses that his report relies upon "documentation obtained outside of normal channels and to which the parties may have no familiarity." Id. The Special Master does not reveal in his Interim Report the source of his

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[5] These two requests from April 2, 2003 are related to the surnaming process for which the Special Master indicates that he has not yet received documents. See Interim Report at 31 n.28, 34 n.30.

authority to gather secret evidence or the source of his authority to rely upon this evidence in a report to the Court. Interior Defendants are unaware of any such authority.

The Special Master has attached seventy-three exhibits to his Interim Report. The Special Master does not reveal the source and authenticity of many of these exhibits. Some may contain privileged information. The Special Master did not give Interior an opportunity to assert any privileges before he publicly released the documents.

THE SPECIAL MASTER'S INTERIM FINDINGS

The Special Master made many findings in his fifty-five page Interim Report. Some of these interim findings are not currently disputed by Interior.[6] For example, Interior does not dispute that NAID was an Interior contractor who worked primarily on TAAMS in 2001. See Interim Report at 5-7. Interior does not dispute that it decided to hire an independent consultant to evaluate, among other things, the effectiveness of TAAMS. See Interim Report at 13; Seventh Quarterly Report at 5, 27. Interior does not dispute that it hired EDS to conduct this evaluation. See id. Interior does not dispute that EDS drafted several lengthy reports related to its evaluations of and recommendations about TAAMS during October through December 2001, including an Observations Report, a For Comments Report, and an EDS Interim Report. See Interim Report at 13-20. These reports were mostly critical of TAAMS and recommended that the Realty and Accounting portion of TAAMS be deferred (the title portion of TAAMS was recommended to continue). See EDS Reports. Interior does not dispute that the TAAMS Project

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[6] Because the investigation is not complete, Interior reserves the right to modify its position on which facts and conclusions are in dispute as additional facts become available.

Team[7] provided comments on the EDS draft reports. See, e.g., Interim Report at 13-20. Some of the Project Team's comments were incorporated or addressed in later drafts of the EDS reports. See id. at 19-20. Interior informed the Court that it had "engaged Electronic Data Systems Corporation (EDS) to provide an independent analysis of the TAAMS project and the associated BIA data cleanup effort." Seventh Quarterly Report at 5. Interior provided EDS reports to the Court. See Motion to Permit Filing Modified Form of Trust Reform Status Report for the Period Ending October 31, 2001 (filed November 26, 2001); Eighth Quarterly Report. Interior informed the Court that it was going to adopt many of EDS's recommendations regarding TAAMS. See, e.g., Eighth Quarterly Report at 14, 15, 121.

Interim Findings in Dispute

Many of the Special Master's interim findings of fact are simply not supported by the evidence – including the secret evidence – provided in the Interim Report. The preliminary conclusions drawn from his inaccurate findings of fact are also mistaken, and unsupported.

On pages 2 and 3 of his Interim Report, the Special Master presents his preliminary findings, the basis for which he then discusses in the body of the Interim Report. As noted above, the Special Master bases his preliminary findings not on the full documentary record, but primarily on documents that he obtained "outside of normal channels" and with which Interior "may have no familiarity." Interim Report at 1 n.1. Moreover, the Special Master makes

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[7] Throughout his report, the Special Master repeatedly refers to "NAID and the TAAMS Project Team" as if NAID had a status and role independent of the Project Team, and as if its views were deserving of attention and comment separate from those of the Project Team. This is misleading. NAID was a contractor hired by the BIA to assist the Project Team and it participated in the events described in the Interim Report as a member of the team. Accordingly, in this response, Interior will use the phrase "Project Team" to refer to the TAAMS Project Team as a whole, including NAID.

preliminary findings about the motivation and intent of persons at Interior and EDS who were involved in the events described in the Interim Report without asking any of those persons their versions of the events or what their motivation and intent was.

Each of the Special Master's preliminary findings is stated and discussed below. Interior has had only ten business days to prepare these objections while engaged in preparing for the Phase 1.5 trial, which began on May 1. Interior thus respectfully reserves the right to supplement its response as more information is gathered. This is Interior's preliminary response to the Special Master's preliminary findings. It is not intended to be a response to every fact, allegation, speculation or aspersion asserted by the Special Master, and Interior's failure to comment on any particular assertion shall not be interpreted as agreement with that assertion.

Preliminary Finding No. 1.

> **"Interior withheld material information from the Court in the Status Report to the Court Number Eight ... to conceal infirmities in the TAAMS system and misleading and inaccurate representations in previous quarterly submissions." Interim Report at 2.**

Interior denies this allegation.

The Special Master identifies several pieces of information that he claims were withheld from the Eighth Quarterly Report for the purpose of concealing from the Court certain "infirmities in the TAAMS system" or certain "misleading and inaccurate representations in previous quarterly submissions." Interim Report at 2. First, in many cases, the information, or its substantial equivalent, that the Special Master claims was omitted was included in the Eighth Quarterly Report. Second, in those cases where the information was omitted, the information was not necessary to present an accurate description of the "steps taken" by Interior during the

reporting period to bring itself into compliance with its obligations. Third, there is no evidence that the information was deliberately withheld so as to mislead the Court as to the accuracy of the previous quarterly reports, which were the subject of contempt proceedings at the time the Eighth Quarterly Report was prepared and filed with the Court. The Special Master's bottom line contention that Interior withheld information "to conceal adverse information that undoubtedly would have been introduced in the contempt trial that commenced on December 10, 1991," Interim Report at 46, is inaccurate.

In evaluating whether material information was withheld from the Eighth Quarterly Report, it is important to keep in mind the purpose of the quarterly reports. The Court ordered Interior to file quarterly reports for the purpose of "setting forth and explaining the steps" that Interior has taken to bring itself into compliance with its obligations to plaintiffs, as declared by the Court. Cobell v. Babbitt, 91 F. Supp. 2d 1, 59 (D.D.C. 1999). "Each quarterly report shall be limited, to the extent practical, to actions taken since the issuance of the preceding quarterly report." Id.

The Project Team, upon whose opinions the Special Master uncritically relies, was responsible for the implementation of TAAMS and had prepared the reports on TAAMS that were included in the previous quarterly reports. It is those reports that were the subject of the contempt proceedings and that the Court ultimately found misleading.

The EDS assessment of TAAMS was sharply critical of the implementation effort led by the Project Team and recommended that significant portions of that effort be deferred until Interior could better understand and document the business processes TAAMS was intended to serve. EDS's first report, the Observations Report, contained preliminary findings about the

status of TAAMS and the related BIA Data Cleanup Project. While the Project Team believed "[t]he report contains several observations and findings that are not supported," it subsequently acknowledged that EDS "does not identify any problems that we did not know about and make known to EDS to support their efforts." Interim Report at 14, 16, 18. In other words, the Project Team agreed that EDS had, with their help, accurately identified the core problems that the implementation effort was facing. Its principal concern was that EDS "neither acknowledges nor gives credit for activities already begun to address problems"– i.e., the activities that the Project Team was undertaking to address the problems. Interim Report at 18.

EDS's second report, the For Comments Report, contained forty-six recommendations on all aspects of the TAAMS/BIA Data Cleanup. While the Project Team did not believe that "[s]ufficient time was . . . allotted to fully review and reach consensus on comments to the report," it nevertheless prepared a twenty-two page document giving its views on all forty-six of the recommendations. See Interim Report, Exhibit 28 at 1. EDS's recommendations were based on and grew out of the findings in the Observation Report. The Project Team concurred with twelve of the recommendations; concurred with comment with thirty-one of the recommendations; and non-concurred with three of the recommendations.

The principal recommendation in which the Project Team non-concurred was the recommendation to "Defer Realty and Accounting Functionality." Interim Report, Exhibit 28 at 1. This recommendation was the one that reflected most poorly on the implementation efforts of the Project Team and the one in which NAID had a direct financial interest. NAID surely understood that if this recommendation were adopted, the need for its services would be sharply reduced.

The TAAMS portion of the Eighth Quarterly Report, the accuracy or adequacy of which is challenged by the Special Master, was drafted by the Project Team (with NAID as the principal draftsman), not by other Interior officials. See Interim Report at 38, Exhibit 63. The Eighth Quarterly Report was presented to the Court during the contempt trial and was relied upon by the Court in deciding that the earlier quarterly reports were misleading. The Court noted that the Eighth Quarterly Report made "three important concessions." Cobell v. Norton, 226 F. Supp. 2d 1, 84 (D.D.C. 2002). First, it conceded that "the previous seven reports did not provide the Court with a sufficiently detailed or objective assessment of trust reform." Id. Second, it "acknowledged that the Department now considers the HLIP, the plan by which trust management reform progress was measured and reported to the Court in the past, to be obsolete." Id. at 85. Third, it "noted that the Eighth Report 'marks the beginning of the transition from a narrow, non-integrated, task oriented set of activities related to trust reform, to an integrated, goal focused approach to managing and accounting for trust assets.'" Id. (quoting Eighth Quarterly Report).

The Special Master's Interim Report paints the Project Team, and especially NAID, as the good guys who are seeking to tell the Court the truth about TAAMS, and certain unnamed Interior officials as the bad guys who are seeking to thwart that effort. While the Special Master does not hesitate to ascribe bad motives to the unnamed Interior officials without even taking their testimony, he is surprisingly silent about the possible motives of NAID. NAID, after all, lost a multi-million dollar contract as a result of Interior's adoption of the recommendations of the EDS study and its current allegations of suppressed information should be viewed in that light.

An examination of each piece of information that the Special Master claims was withheld from the Eighth Quarterly Report does not support his conclusions.

1. Interior "excluded the concerns raised by the draft December 2001 Risk Assessment." Interim Report at 46.

The Project Team did not recommend that "the concerns raised by the draft December 2001 Risk Assessment" be included in the Eighth Quarterly Report, only to have someone else at Interior decide to exclude them. The Project Team, which drafted the TAAMS portion of the Eighth Quarterly Report, never suggested that the information from the Risk Assessment be included in the Eighth Quarterly Report. See Interim Report, Exhibit 63.

2. Interior "ignored 32 of the 47 comments offered by the TAAMS Team on October 23, 2001 to the Observations Report." Interim Report at 47.

The Project Team did not recommend that their forty-seven comments on the EDS Observations Report be included in the Eighth Quarterly Report. Interim Report, Exhibit 63. Significantly, the November 30 draft of the Eighth Quarterly Report, which the Special Master endorses as satisfactory, did not include this information.

3. Interior "never apprised the Court . . . that milestones in use for the first seven quarterly reports did 'not accurately reflect the status of TAAMS at the current summary level.'" Interim Report at 48.

This criticism of the milestones "in use for the first seven quarterly reports" was not omitted from the Eighth Quarterly Report. The Eighth Quarterly Report concedes the deficiencies of the milestones as reporting tools. Eighth Quarterly Report at 3-5, 7. As noted above, the Court was aware of this concession and relied upon it in finding that the first seven quarterly reports were misleading.

4. Interior "never apprised the Court . . . that . . . '[t]he EDS recommendation to defer all work on Realty and Accounting would disrupt current plans as described in this quarterly report." Interim Report at 48.

The obvious point that deferral of "Realty and Accounting" would result in some delay in the implementation of TAAMS was not omitted from the Eighth Quarterly Report. The Eighth Quarterly Report states: Consistent with EDS's recommendation, "Interior . . . is deferring realty and accounting functionality until the business processes are documented and defined. This delay will enable full definition of requirements for the automated system and is in conformance with recommendations by both the General Accounting Office (GAO) and Congress." Id. at 121.

5. The "Court was never apprised . . . of the concern that 'documented and fully traceable security requirements have not been developed to assure that the implemented security mechanisms are based on an engineered analysis of trust data needs, regional concerns, threat environment, or applicable laws;" that '[t]hree sites are not ready for deployment because their users have not completed the required security packages or passed initial screening;'" and that '[o]ne site is not ready for deployment because the computers designated for TAAMS do not meet minimum requirements.'" Interim Report at 48.

Security concerns about TAAMS were not omitted from the Eighth Quarterly Report. There is extensive discussion in the Eighth Quarterly Report, beyond even what the Special Master cites, of security issues involving TAAMS. Eighth Quarterly Report at 42, 47, 48, 123. EDS's concerns about security were more serious than simply the fact that certain sites had "not completed the required security packages." Interim Report at 48.

Interior had also previously informed the Court about the security concerns of TAAMS when it filed the November 12, 2001 EDS report entitled "Interim Information Assurance Report and Roadmap for TAAMS and BIA Data Cleanup," on November 20, 2001. Because this report contained sensitive security information, it was filed under seal. See Motion to File Portions of EDS Report Under Seal (filed November 20, 2001).

6. "Interior never apprised the Court the Interim Report was 'a subjective assessment based on interviews with a wide audience with varying degrees of understanding of the true state of TAAMS.'" Interim Report at 48.

Although the January 10 outline of the TAAMS portion of the Eighth Quarterly Report that was prepared by NAID for the Project Team contained this comment, it was immaterial information, unnecessary for an accurate description of the "steps taken" by Interior to bring itself into compliance with its obligations during the reporting period. The "steps taken" were the completion of the EDS study and the adoption of its recommendations by Interior. Those steps were fully disclosed to the Court. Moreover, a detailed description of EDS's assessment process was provided to the Court in EDS's Interim Report, including the fact that information was gathered through interviews, which are necessarily somewhat subjective. EDS Interim Report at 36-37.

7. "Interior undertook to conceal from the Court that 'efforts were already in progress to develop and standardize business models and processes to the maximum extent possible but were hindered by lack of management support,' and 'efforts were already underway to improve the requirements determination and gathering process but were hindered by lack of management support.'" Interim Report at 48-49.

This criticism about the lack of management support for certain TAAMS initiatives was not omitted from the Eighth Quarterly Report. The Eighth Quarterly Report lists, under "Problems, Issues and Concerns," the following: Inadequate resources, e.g., suitable staffing that is dedicated to the project; need for establishment of consistent project management; and lack of universal accountability and support for Trust Reform efforts. Eighth Quarterly Report at 123. The EDS Interim Report, which was filed with the Court, also comments on this problem. Indeed, it was recognition of this problem that underpinned EDS's recommendation that a single executive sponsor be appointed for TAAMS.

8. "Noticeably absent . . . was the observation that EDS' 'recommendation to accelerate deployment of TAAMS title and defer realty and accounting functionality lacks vision and understanding.'" Interim Report at 49.

Although the January 10 outline of the TAAMS portion of the Eighth Quarterly Report that was prepared by NAID for the Project Team contained this comment, this information was immaterial and unnecessary for an accurate description of the "steps taken" by Interior during the reporting period to bring itself into compliance with its obligations. The "steps taken" were the completion of the EDS study and Interior's adoption of its recommendations. Those steps were fully disclosed to the Court. Interior was not obliged to include in the Eighth Quarterly Report every comment and criticism about EDS's study that it received from its employees and contractors in the course of its deliberations about whether to adopt EDS's recommendations. There is no evidence that the information was deliberately withheld so as to mislead the Court as to the accuracy of the previous quarterly reports. This criticism of EDS's recommendation, even if valid – which Interior does not concede – had nothing to do with the accuracy of previous quarterly reports.

9. "Interior offered the pithy analysis of the Deputy Special Trustee" rather than NAID's "detailed contribution to the 'Comments on EDS & Special Trustee Observations' section." Interim Report at 50.

NAID's comments on EDS were omitted from the Eighth Quarterly Report. The January 10 outline of the TAAMS portion of the Eighth Report that was prepared by NAID for the Project Team contained "NAID's 'detailed contribution.'" See Interim Report at 38. This information, however was not material. It was unnecessary information for an accurate description of the "steps taken" by Interior during the reporting period to bring itself into compliance with its obligations. The "steps taken" were the completion of the EDS study and

Interior's adoption of its recommendations. Again, those steps were fully disclosed to the Court. Interior was not obliged to include in the Eighth Quarterly Report every comment and criticism on EDS's study that it received from its employees in the course of its deliberations about whether to adopt EDS's recommendations. There is no evidence that the information was deliberately withheld so as to mislead the Court as to the accuracy of the previous quarterly reports. NAID's criticism of EDS's study, even if valid – which Interior disputes – had nothing to do with the accuracy of previous quarterly reports. If anything, it emphasized the positive about the TAAMS implementation effort in the same way that the Court found so objectionable in its findings about the accuracy of the previous seven quarterly reports. Even at the late date of January 10, 2002, two months after Interior had adopted EDS's deferral recommendation, NAID, by seeking to include its criticism of EDS in the Eighth Quarterly Report, was still trying to convince people that if Interior would just give it more money and time it could succeed in implementing TAAMS.

It should be noted here that the rest of the Special Master's preliminary findings are dependent on his claim that material information was deliberately withheld from the Eighth Quarterly Report to deceive the Court. As no material information was withheld from the Court for that purpose, the rest of the Special Master's preliminary findings are moot. His charge from the Court was to ascertain whether "Interior withheld information from the Court that should have been disclosed in the Eighth Quarterly Report," not to examine the peripheral issues that are the subject of his other preliminary findings. Interim Report at 1-2. Interior will nonetheless briefly comment on each of them.

Preliminary Finding No. 2.

> **"Interior's last-minute attempt to substitute the November 12 Interim Report generated by [EDS] for the High Level Implementation Plan (HLIP)-driven Eighth Quarterly Report, generated by NAID and the TAAMS Project Team, was part of this plan." Interim Report at 2.**

Interior denies this allegation. As noted above, there was no plan or effort to conceal from the Court TAAMS's infirmities or allegedly misleading and inaccurate representations in previous quarterly reports. An effort was made to substitute the November 12 EDS Interim Report for the regular HLIP-driven quarterly report because Interior believed that EDS's Interim Report would provide the Court with a current, comprehensive, and detailed report on the status of TAAMS by an independent third party. As the EDS Interim Report was critical of TAAMS, and at odds with some of the information about TAAMS provided in previous quarterly reports, it was hardly the sort of report that Interior would want to file with the Court if its purpose had been to conceal TAAMS infirmities or the inaccuracy of previously quarterly reports. Indeed, the "(HLIP)-driven" report "generated by NAID and the TAAMS Project Team" on November 30 presented a rosier picture of TAAMS and thus would have been more suitable to present to the Court if Interior had been acting with the motive ascribed to it by the Special Master. In other words, contrary to the Special Master's allegation, it is obvious that Interior's purpose in seeking to substitute the EDS report for the regular quarterly report was not to conceal information about TAAMS from the Court, but, rather, to reveal all that it knew as a result of the EDS study, even though that information presented a somewhat different picture of TAAMS than had been reported in previous quarterly submissions.

Preliminary Finding No. 3.

> **"[N]either the Final January Eighth Quarterly Report, nor the Interim Report upon which it relied, was designed to provide the Court with a candid assessment of the TAAMS effort. Rather, they were contrived to present a gilded portrait of the TAAMS system and avoid adverse consequences arising from contempt proceedings pending at the time." Interim Report at 2.**

Interior denies this allegation. Both the Interim Report and the Eighth Quarterly Report were specifically designed to give the Court a clearer picture about TAAMS. Rather than present a "gilded portrait," both documents present facts so critical of TAAMS that they justify the decision to put the implementation of major components of it on hold.

As noted above, EDS was hired to do an independent study of TAAMS so that senior Interior officials could get answers to their questions about its true status. Over the course of several months, EDS conducted over eighty interviews of people with knowledge about TAAMS and reviewed thousands of pages of documents. A list of the interviewees and a list of the documents reviewed are attached as Exhibits H and I, respectively. In addition, EDS solicited and received substantial comments from the Project Team and others on the two reports that formed the basis of its Interim Report.

The Special Master seeks to discredit this process, and the EDS Interim Report it was based upon, by asserting (without ever giving EDS a chance to be heard) that EDS lied about the process it followed in generating its reports. See Interim Report at 52-53. The Special Master's assertions are simply wrong. First, the Special Master claims, based upon deposition testimony of an EDS employee, that EDS did not interview Interior employees when performing its TAAMS assessment. See Interim Report at 52. But as is clear even from the quotation included

in the Interim Report, the EDS testimony referred to the AS-IS business modeling work sessions, not the TAAMS assessment. See Interim Report at 53 & Exhibit 70.

Second, the Special Master claims that EDS did not interview "key stakeholders." See Interim Report at 51-52. Again, as the material quoted in the Interim Report makes clear, the Special Master was relying on testimony about the AS-IS process, not the TAAMS assessment. A list of the "key stakeholders" interviewed in the TAAMS assessment is attached as Exhibit J.

Third, the Special Master claims that EDS did not "independently determine the invitation list of who went to these meetings" to be interviewed. Interim Report at 53. Again, the Special Master is relying on testimony about the AS-IS process, not the TAAMS assessment.

Finally, the Special Master claims that "EDS's representation that it 'utilized objective references for its reviews such as EDS' Project Management Health Check PLUS' is unsupported." Interim Report at 53. While this representation may be "unsupported" in the limited record the Special Master examined, that does not mean that it is unsupportable. To determine that, the Special Master should give EDS a chance to be heard. Interior does not have sufficient information on Project Management Health Check PLUS at this time to comment.

With respect to the design of the Eighth Quarterly Report, the Report itself explains in detail the need for changes in Interior's reporting format and the changes that were adopted for the first time in the Eighth Report. See Eighth Quarterly Report at 3-5. The Department had concluded that the HLIP-driven reporting format had "become increasingly disconnected from the overall objectives of trust reform" and that reports based on the HLIP milestones did "not reflect the true status of trust reform." Id. at 4. Interior noted that:

> the format of the HLIP did not encourage reporting on lack of success or the need for additional resources or efforts. In contrast, [the 8th Report] covers matters in

addition to the status of the subprojects. Subproject managers have been asked to discuss obstacles, resource needs, and whether they know at this time the full extent of the endeavor required. These matters are important for an accurate picture of the state of trust reform.

Id. at 5.

The Special Master does not even attempt to explain his assertion that this new reporting format is somehow not "designed to provide the Court with a candid assessment of the TAAMS effort." Interim Report at 2. He just makes the bald, unsupported claim. He is wrong.

Preliminary Finding No. 4.

> **The findings of EDS about TAAMS were "unsupportable" and prepared by an organization "with a fledgling grasp of the complexities of the TAAMS system." Interim Report at 2.**

Interior denies this allegation. It is a misstatement of the facts by the Special Master that recklessly tarnishes EDS's reputation in an effort to discredit Interior and that is refuted by the documents the Special Master cites in his Interim Report. The Special Master notes that the TAAMS Project Team stated, with reference to EDS's findings in its Observations Report, that EDS did "not identify any problems that we did not know about and make known to EDS to support their efforts." Interim Report at 18. This demonstrates that EDS's core findings about the problems with TAAMS were essentially accurate (indeed, according to the Project Team, the problems identified were apparently based on information provided by the Team). In addition, as the Special Master notes, the TAAMS Project team stated that "[d]espite the flaws in [EDS's For Comments report,] the TAAMS review team concurred with the majority of the recommendations."[8] Interim Report at 39. It should be noted that this is a bit of an

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[8] It is worth noting here that NAID, in a pleading filed with the Court, claimed that the assertion that "the TAAMS review team concurred with the majority of the recommendations" is

understatement. Of the forty-six recommendations made by EDS, the Project Team concurred with twelve, and concurred with comment on an additional thiryt-one, for a total of forty-three concurrences. Interim Report, Exhibit 28, at 2-22. As all of the recommendations were based on and grew out of EDS's findings, it is difficult to understand how the Special Master can assert that the findings of EDS about TAAMS were "unsupportable." EDS must have got something right or the Project Team presumably would not have concurred in 93% of EDS's recommendations.

Interior did not hire EDS because EDS purported to have a "grasp of the complexities of the TAAMS system." Interim Report at 2. Senior officials hired EDS to do an independent review of the status of TAAMS because they were concerned about the quality of the information that they were getting from the persons who purported to have a grasp of the complexities. Moreover, by the time EDS prepared its Interim Report, EDS did, in fact, have a firm grasp of the complexities. It had studied TAAMS for over four months, during the course of which it interviewed over eighty people, reviewed thousands of documents, and sought and received feedback on both its findings and its recommendations before publishing its Interim Report. EDS's grasp of the complexities after completing its assessment process is amply demonstrated by the fact that it was able to formulate forty-six specific recommendations about practically every aspect of TAAMS/BIA Data Cleanup, 93% of which were concurred in by the TAAMS Project Team, whose credentials on the subject of TAAMS the Special Master views as impeccable.

"blatantly false." NAID's Motion For Temporary Restraining Order at 8 (filed August 30, 2002). The assertion, however, is a direct quote taken from the outline NAID prepared for the Project Team of the TAAMS portion of the Eighth Quarterly Report. See Interim Report at 39.

Preliminary Finding No. 5.

> **"When NAID and the TAAMS Project Team repeatedly exposed 'inaccurate' representations in draft versions of the Eighth Quarterly Report, Interior modified the reporting process and substituted NAID's particularized findings for the more vague observations of EDS." Interim Report at 3.**

Interior denies this allegation. The basic drafts of the TAAMS portion of the Eighth Quarterly Report were prepared by the Project Team (with NAID itself as the principal draftsman), not by someone else on whose drafts the Project Team was then asked to comment, and whose inaccuracies it repeatedly exposed. As the Project Team did not repeatedly "expose inaccurate representations in the draft versions," it follows that Interior did not "modify its reporting process" or replace NAID's findings with those of EDS as a result of those exposures.

Interior modified its reporting process for the reasons stated on pages 3-5 of the Eighth Quarterly Report. Interior had become convinced that the HLIP-driven reporting system had served its purpose and was no longer facilitating fully accurate reporting on the "true status of trust reform." Eighth Quarterly Report at 4. Further, it is wrong to charge that in place of "NAID's particularized findings" (Interim Report at 3) "Interior offered the Court a list of 12 'Problems, Issues and Concerns.'" Interim Report at 49. That list, which the Special Master characterizes as "the more vague observations of EDS" (Interim Report at 3), is taken directly from the outline of the TAAMS portion of the Eighth Quarterly Report that was prepared by NAID for the Project Team. See Interim Report, Exhibit 63.

Preliminary Finding No. 6.

> **"When NAID and the TAAMS Project Team criticized the first EDS report as 'lacking vision and substance,' Interior accelerated the production of the EDS Interim Report to preempt inclusion of similar comments." Interim Report at 3.**

Interior denies this allegation. The Project Team did not criticize "the first EDS report," which was the Observations Report issued on October 10, 2001, as "lacking vision and substance." Nor did the Project Team criticize the second EDS report, which was the For Comments Report issued on October 31, 2001, as "lacking vision and substance." Instead, it criticized just one of the forty-six recommendations in the second EDS report as "lacking in vision and understanding." Interim Report at 39.

The EDS Interim Report was published just two days early – November 12 instead of November 14 – and this did not prevent EDS from receiving or taking into account the comments of the Project Team. EDS had a lengthy teleconference with the Project Team on November 8 to discuss their concerns about the For Comments Report, and the Project Team submitted twenty-two pages of comments on the report on that date. Those comments, as explained above, were overwhelmingly favorable and concurred in 93% of EDS's recommendations.

Thus, the Special Master is wrong in asserting that the "acceleration" of the issuance of the Interim Report "ensured the 22 pages of comments emerging from the Phoenix conference would not be incorporated in the Interim Report or reflected in the Final January Eighth Quarterly Report." Interim Report at 47. EDS had four days to take them into account when preparing its Interim Report, and Interior, through the instrumentality of the Project Team, had over two months to consider whether it was necessary or appropriate to have them reflected in the Eighth Quarterly Report. The two day "acceleration" of the issuance of EDS's Interim Report had no bearing whatsoever on that decision.

Preliminary Finding No. 7.

> **"Interior attempted to substitute an incomplete EDS report for one thoroughly reviewed and commented upon by NAID and other TAAMS experts." Interim Report at 3.**

Interior denies this allegation. Interior sought the Court's permission to substitute the Interim Report of EDS for the regular quarterly report because it wanted the Court to have in its entirety a current, comprehensive and detailed assessment of TAAMS by an independent third party that had no vested interest in TAAMS. Senior officials at Interior wanted to make a full disclosure to the Court of what they had learned from EDS about the status of TAAMS so they would not be accused (as the Special Master now ironically does) of hiding criticism of TAAMS from the Court.

Moreover, the Project Team had an opportunity to review and comment on the two EDS reports that were used as the basis for the EDS Interim Report. It is thus wrong for the Special Master to seek to leave the impression that the proposed quarterly report was "thoroughly reviewed and commented on" by the Project Team while EDS's report was not. The Project Team produced fourteen pages of comments on the Observations Report and, although the Project Team would have preferred to have more time to comment on the For Comments Report, it nonetheless produced twenty-two pages of comments on it. The bottom line of those comments was that the Project Team concurred with 93% of the report's recommendations. In addition, the Project Team participated in a teleconference with EDS and others on November 8 that lasted several hours.

Preliminary Finding No. 8.

> **"When the Court rejected this subterfuge, the agency filed a Final January Eighth Quarterly Report omitting all criticism of the TAAMS project, EDS, and previous quarterly submissions." Interim Report at 3.**

Interior denies this allegation. As explained above, the attempt to file EDS's Interim Report with the Court in place of the regular quarterly report was not a subterfuge designed to hide criticism of TAAMS from the Court. Rather, it was an attempt to share with the Court in its entirety a current, comprehensive and detailed assessment of TAAMS by an independent third party that had no vested interest in TAAMS.

The Special Master is wrong in asserting that the Eighth Quarterly Report omitted "all criticism of the TAAMS project." The Eighth Report listed thirteen "Problems, Issues and Concerns" with TAAMS. Eighth Quarterly Report at 123. In addition, it included critical observations about TAAMS by EDS, the Special Trustee and the Deputy Special Trustee. Id. at 124-127. Moreover, Interior provided the Court with EDS's Interim Report, which contains sixty pages of Detailed Findings about the status of TAAMS and the related BIA Data Cleanup Project.

The Special Master is also wrong in asserting that the Eighth Quarterly Report omitted all criticism of "previous quarterly submissions." As the Court recognized in its September 17, 2002 opinion on the contempt charges, the Eighth Quarterly Report conceded that "the previous seven reports did not provide the Court with a sufficiently detailed or objective assessment of trust reform." Cobell, 226 F. Supp. 2d at 84.

While it is true that the Eighth Quarterly Report does not include comments prepared by the Project Team criticizing portions of EDS's assessment of TAAMS, that is not an appropriate

basis for criticizing Interior. Quarterly reports are required to report the steps taken by Interior during the relevant quarter to bring itself into compliance with its obligations, as declared by the Court. Interior reported that it had employed EDS to do an independent assessment of TAAMS, gave the results of that assessment and explained which of EDS's recommendations it had adopted. Interior was not required to report every objection or criticism that was made in the course of its deliberations about whether to accept the recommendations of the EDS study. As explained more fully in the response to the Preliminary Finding No. 1 above, the Special Master's suggestion that this deliberative information was improperly withheld from the Court is wrong.[9]

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[9] Curiously, the Special Master (Interim Report at 45) takes an argument from a document filed on November 15, 2001 – the Consolidated Opposition to Plaintiffs' August 27, 2001 and October 19, 2001 Motions for Orders to Show Cause Why Interior Defendants and Their Employees and Counsel Should Not Be Held in Contempt – and reaches the conclusion that the argument conflicted with a document not filed until two months later, January 16, 2002 – the Eighth Quarterly Report. The argument from the Consolidated Opposition addressed Plaintiffs' motions, which themselves addressed events that necessarily had occurred prior to October 19, 2001, when their last motion was filed. Defendants' argument fairly characterized the record and responded to Plaintiffs' pending motions:

> [w]hile any review can – with the benefit of hindsight – reveal problems that DOI might have better foreseen or communications that might been more clearly worded, this is quite different from suggesting that alleged defects in the submissions warrant contempt. In fact, the plain language of DOI's submissions communicated the major problems encountered with TAAMS development in a manner that was accurate and in keeping with the Court's order.

Consolidated Opposition at 43.

DISCUSSION

I. THE SPECIAL MASTER HAS NO AUTHORITY TO ISSUE AN INTERIM REPORT

Interior objects to the filing of an interim report by Special Master Balaran. Special masters are not granted the authority to issue preliminary reports in Fed. R. Civ. P. 53, the rule governing the appointment and powers of special masters.[10]

Absent express authority in Rule 53, a special master's powers are conferred, and circumscribed, by the order appointing him. Fed. R. Civ. P. 53(c). The Special Master's premature explication of the documents, and secret evidence, gathered thus far is not authorized by the November 5, 2002 Order.[11] To the contrary, the November 5 Order directs that "[a]t the conclusion of his investigation, the Special Master shall file with the Court, with copies to defendants' and plaintiffs' counsel, his report and recommendation detailing his findings and conclusions." November 5 Order at 1-2 (emphasis added). The Special Master, by his own admission, has not concluded his investigation. He still intends to review additional documents and take oral testimony. Interim Report at 1 n.1.

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[10] Rule 53(e)(5) permits a special master to prepare a draft report and submit such a report to counsel for the parties for comment before filing with a court. Interior believes that it would have been inappropriate to submit to the parties any draft of an interim report before the investigation was concluded. However, for reasons unknown to Interior, the Special Master did not even follow Rule 53(e)(5). Instead, he filed his preliminary report with the Court and then invited comment from the parties. See Interim Report at 1 n.1.

[11] The authority to issue interim reports is also not expressly authorized in any of the other appointment orders regarding Special Master Balaran. See Orders of February 24, 1999, August 12, 1999, and September 17, 2002.

It is thus unclear how the Special Master concluded that he possessed authority to issue an "interim" report prior to the conclusion of his investigation.[12] The only purported authority cited by the Special Master for filing an interim report is a Note published in 1991 in the New York University Law Review. See Interim Report at 1 n.1. Curiously, the Special Master does not reveal that the excerpt from this Note quoted in his Interim Report purporting to authorize comments on interim reports relates to the Note author's proposed new Federal Rule of Civil Procedure (denominated by the author as Rule 53.1) to govern the activities of special masters. See Note, *Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits on Special Masters*, 66 N.Y.U. L. Rev. 800, 846 (1991).[13] In addition, the interim reports to be authorized by the Note's proposed rule are solely limited to reports on the status of the investigation. Id. at 846. The interim reports contemplated by the Note's author are not intended to contain preliminary findings and conclusions. See id.

In any event, the author does not suggest that special masters have the authority currently, in the absence of adoption of his proposed rule, to issue interim reports, especially where no such authority is granted in the order of reference. Indeed, the Note reiterates that the authority of special masters is constrained by their order of reference. Id. at 805 (the order of reference defines "the boundaries of her activities"). To our knowledge, the law review author's Rule 53.1

12/ He may have simply decided to issue an interim report on his own. Alternatively, the Court may have directed the Special Master to issue an interim report at this time in an ex parte "logistical" meeting with the Special Master (see Cobell v. Norton, 237 F. Supp. 2d 71, 89-90 (D.D.C. 2003)). In any event, there is no record of any such order, or the reasons for it.

13/ The Special Master inaccurately cites to page 843 of the Note for the quotation provided in the Interim Report and incorrectly identifies the author as "Jerry" DeGraw, rather than James.

is not currently in effect in the D.C. Circuit. The Special Master thus cannot have been conferred any power by that proposed rule.

Moreover, even if the Special Master had some implied power to issue preliminary findings and conclusions in an interim report, Interior is unaware of what caused the Special Master to issue his Interim Report now. The Special Master does not explain in the Interim Report why he suddenly issued a preliminary report before the conclusion of his investigation.[14] In the first of many non sequiturs in his Interim Report, he suggests that the "report is 'interim' because the Special Master, not having received the bulk of the discovery he has repeatedly requested, has been constrained to utilize documentation obtained outside normal channels." Interim Report at 1 n.1. The lack of requested documents,[15] if true, might serve as an explanation, in part, for why his investigation is incomplete. It does not explain why he decided to issue an interim report now containing interim findings and conclusions about the subject of the incomplete investigation.

Interior objects to the filing of an interim report and asks the Court not to consider any portion of the Interim Report.

14/ It is especially ironic that a Special Master who has not issued a final report for an investigation that is apparently complete (see Interior Motions to release IT security report) feels compelled to issue an interim report on an incomplete investigation.

15/ The history of the Special Master's document requests, his opportunities to view documents in camera, and the status of productions to him, are described in detail above.

II. THE SPECIAL MASTER HAS NO AUTHORITY TO RELY UPON SECRETLY OBTAINED EVIDENCE

Interior also objects to the Special Master's acquisition of, and reliance upon, evidence obtained "outside of normal channels and to which the parties may have no familiarity."[16] Interim Report at 1 n.1. Interior does not believe that Special Master Balaran had the authority to gather evidence ex parte during this investigation and objects to any finding or conclusion in his Interim Report that was based upon such evidence.

Interior recognizes that the Court believes that a special master who is conducting an investigation in an "institutional reform" case is authorized to acquire secret evidence and meet secretly with witnesses. See Cobell, 237 F. Supp. 2d at 80-81. But the Court cites no authority from the D.C. Circuit for such an expansive view of a special master's powers, and Interior is unaware of any. Rule 53 does not contain any such authority. Instead, the Court relies upon decisions from other jurisdictions and upon law review articles.[17] See id.

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[16] The Special Master claims that he was "constrained" to use secretly acquired evidence because he has not received all of the documents he has requested. Interim Report at 1 n.1. As discussed above, the Special Master has been given a large volume of responsive documents and was given the opportunity to view the entire collection in camera. Interior does not believe that the Special Master has authority to gather, and rely upon, secret evidence; but if Interior is wrong, then the Special Master had the authority to obtain evidence from "outside of normal channels" (Interim Report at 1 n.1) even if he had received all of the documents requested from Interior. The status of document production is thus not relevant to the issue of the Special Master's authority to acquire secret evidence in this investigation.

[17] In quoting from an article in the Columbia Law Review to support the proposition that special masters in "institutional reform" cases can have additional powers not granted to ordinary special masters, the Court omitted the author's description of the types of institutions that qualified for institutional reform as "various social institutions." Compare Cobell, 237 F. Supp. 2d at 80 with *Special Project, The Remedial Process in Institutional Reform Litigation*, 78 Colum. L. Rev. 784, 788 (1978). Obviously, Interior is not a mere "social institution." It is part of a branch of government co-equal with the judiciary.

However, even if "institutional reform" masters could be granted such powers, a case cannot become an "institutional reform" case – and thus eligible for appointment of a super-special master with exceptional ex parte powers – merely because a court chooses to label it as such. Interior respectfully disputes the Court's finding that this is an "institutional reform" case. The Court's jurisdiction here is derived from the Administrative Procedure Act, 5 U.S.C. § 706. See Cobell v. Norton, 240 F.3d 1081, 1095-97 (D.C. Cir. 2001). Interior is unaware of any "institutional reform" jurisdictional grant in the APA.

Moreover, even if this case were generally an "institutional reform" case, the investigation being conducted by Special Master Balaran here cannot be classified as "institutional reform." The Special Master is investigating whether Interior improperly withheld information from a report submitted to the Court. This has nothing to do with "institutional reform."

It also appears that the Court views the Special Master as an "agent" with the Court as his "principal." See 237 F. Supp. 2d at 89 ("the Court, as principal" consulted with its "agents," the two special masters). An agent obviously cannot have greater powers than his principal. The Court surely would not go out and secretly gather evidence on its own outside the presence of counsel about whether information was improperly withheld from the Eighth Quarterly Report. If the Court does not have this power, it is difficult to comprehend how the Court's "agent," Special Master Balaran, can have such power.

To the extent that Interior's consent is needed for the Court to authorize the Special Master to engage in the ex parte acquisition of evidence during this investigation, no such

consent has been given. Interior vigorously disputes the authority of the Special Master to obtain secret evidence.

However, even if the Court had authority to grant ex parte powers to a special master, the Court did not expressly grant Special Master Balaran such powers in the November 5, 2002 Order of reference authorizing this investigation. Such extraordinary power should not be inferred.

It would be especially improper to infer ex parte powers so casually in a case where Special Master Balaran already wears many hats. While he is acting as a roving investigator, secretly gathering information about the Eighth Quarterly Report, he is also acting in an adjudicative fashion on other matters in this case. Currently before the Special Master for his report and recommendation are: (1) Treasury Defendant's Motion for Determination that it Purged Contempt (filed May 1, 2001); (2) Defendant's Motion for Protective Order (filed July 13, 2001); (3) Treasury's Motion for a Treasury Department Document Retention Order (filed July 9, 2001); (4) Treasury's Motion for Reconsideration of Special Master's Order Granting Plaintiffs an Enlargement of Time (filed July 23, 2001); (5) Plaintiffs' Motion to Compel Production of Documents (filed May 8, 2002); and (6) Interior Defendants' Motion for a Protective Order Regarding Confidential Information (filed March 7, 2003).

It is beyond dispute that the Special Master has secretly gathered evidence here and that he has relied upon that evidence in his Interim Report. What is unknown, and perhaps unknowable, is how much additional secret evidence the Special Master has obtained, and perhaps relied upon in forming his conclusions, but which was not included in the Interim Report. For example, some of the documents attached as exhibits to the Interim Report

seemingly came from NAID employees.[18] See, e.g., Interim Report, Exhibit 31 ("Mike Smith" computer file name and "4/9/2003" along the bottom of the document); Exhibit 35 at 5, 8 ("user name: Michael Smith"); Exhibits 41, 44, 46, 49, 50, 58 (Jerry L. Moran emails); Exhibit 55 (fax to Jerry Moran). The source of other exhibits is unclear. See, e.g., Interim Report, Exhibits 2-5, 9-11, 17, 22, 27, 42-43, 45, 57, 62, 64, 69.

The documents obtained ex parte by the Special Master obviously did not magically appear in his hands. Somebody gave them to him in secret, perhaps upon request, and may have secretly given other information to the Special Master that was then relied upon in drafting the Interim Report – or perhaps influenced some of his conclusions. If oral testimony was taken by the Special Master during his investigation, Fed. R. Civ. P. 53(e)(1) requires the master to file with any report "a transcript of the proceedings and of the evidence and the original exhibits." The Special Master did not file a transcript of any ex parte proceeding in which he may have secretly gathered evidence. This secret information was obtained without the knowledge of Interior Defendants and without affording them an opportunity to comment upon it or to cross-examine any witness regarding evidence relied upon by the Special Master before it was reflected in the Interim Report.[19]

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[18] It is unclear if these documents were improperly taken from Interior by NAID employees when their contract expired. Perhaps the Special Master should investigate whether NAID improperly removed documents, including any that contain IIM data, rather than rely upon those documents during this investigation.

[19] Also, the Special Master did not give Interior an opportunity to object to the exhibits attached to his Interim Report before publicly filing them. The exhibits obtained ex parte may contain information protected by the deliberative process privilege or other confidential information. Interior reserves the right to assert any such privilege after it is given an opportunity to determine the source and authenticity of the documents and has more time to examine them.

In any event, because the Special Master relied upon secretly acquired information, his findings and conclusions in the Interim Report cannot be accorded any deference. See Cobell, 237 F. Supp. 2d at 83 ("well-established rule that, to the extent that a special master's report relies upon information obtained from one-sided communications, it cannot be accorded the same level of deference as reports based upon evidence obtained during a more formalized proceeding"). The Special Master's findings cannot be reviewed upon a clearly erroneous standard. See id.

As discussed throughout this Objection, NAID's claims are meritless and Interior does not believe this investigation is necessary or appropriate. If the Court disagrees and wants the investigation to continue, it cannot be conducted by Special Master Balaran because he has been tainted by his ex parte activities. The Court should instruct any future special master to conduct the balance of his or her investigation in the open, without resorting to the secret acquisition of documents or testimony that Interior is unable to address until after it has been relied upon by the special master and publicly disclosed.

III. THE SPECIAL MASTER'S INTERIM CONCLUSION THAT INFORMATION WAS WITHHELD FROM THE EIGHTH QUARTERLY REPORT IS UNSUPPORTED

One of the structural difficulties in responding to the Special Master's interim findings that information was withheld from the Eighth Quarterly Report is that the Court's November 5 Order is ambiguous and vague about the purposes of this investigation:

> The Court wishes to ascertain whether there is any validity to NAID's contention that the Department of the Interior withheld information from the Court that should have been disclosed in the Eighth Quarterly Report; and is directing the Special Master to investigate whether Interior engaged in any such concealment.

November 5 Order at 1. This Order gives the Special Master no standards to use in determining whether information "should" have been disclosed to the Court. Surely the Court is not suggesting that every comment, every thought, every criticism that crosses the desk of decisionmakers at Interior regarding IIM trust matters must be disclosed to the Court. The Quarterly Reports are meant to inform the Court of the steps taken by Interior to bring itself into compliance with its trust obligations. Interior hired EDS to evaluate, among other things, the effectiveness and feasibility of TAAMS. EDS conducted its review and issued reports about its findings. After reviewing EDS's reports and all available information, Interior officials decided to defer further use of TAAMS Realty and Accounting systems. Interior kept the Court informed of all of these things.

What the Special Master has found, at most, is that Interior did not inform the Court that some people – Interior employees and consultants like NAID hired to work on TAAMS – did not unanimously agree with all of EDS's findings and recommendations. The Special Master does not point to any evidence that the criticisms from NAID and others were ignored by Interior decisionmakers or EDS personnel. The Special Master concludes, based on nothing identified in his report (and thus possibly from unidentified sources), that the mere fact that not all of the Project Team comments were included in subsequent EDS reports or in the Eighth Quarterly Report must mean that Interior "withheld" this information. Preparing a report that includes some information and excludes other information does not mean that the omitted information was "withheld."

As discussed extensively above, many of the Special Master's findings are strikingly inaccurate. Information that he claims was withheld from the Court was disclosed, either directly

or with substantially equivalent information. The Special Master does not reveal to the Court that the Project Team drafted the TAAMS sections of the Sixth and Seventh Quarterly Reports. It is difficult to understand how their later comments surrounding the Eighth Quarterly Report, about the very same issues, can be relied upon uncritically by the Special Master.

Interior does not have an obligation to provide the Court with all of the predicate information that Interior decisionmakers weighed when selecting a course of action. There is simply no obligation to provide to the Court in the Quarterly Reports every piece of information in Interior's files. Interior opted to get an outside analysis of TAAMS and informed the Court about this decision. Interior opted to follow the EDS recommendations and informed the Court about this decision. Nothing in the NAID criticism of the EDS report makes any information provided to the Court untrue or misleading.

The Special Master's findings that Interior withheld information from the Court in the Eighth Quarterly Report that should have been disclosed are not supported by any evidence in his Interim Report.

IV. THE SPECIAL MASTER'S INTERIM CONCLUSION THAT INFORMATION WAS WITHHELD FOR IMPROPER PURPOSES IS UNSUPPORTED

As discussed above, no documents and no testimony (of record) identified in the Interim Report indicate that Interior was concealing information from the Court. The Special Master notes the existence of various comments by the Project Team critical of the EDS reports and the absence of some of these comments from the Eighth Quarterly Report. From this absence the Special Master presumes that any omission must have been for improper reasons. This presumption, in the absence of direct evidence, is inappropriate. It would seem that a neutral judicial official should presume that no improper action occurred unless he finds evidence of it;

he should not presume improper action simply because he has not yet found evidence of impropriety.

The Special Master does not find that the decision to seek an outside review of TAAMS was improper. The Special Master does not find that the vast bulk of the extensive EDS reports about TAAMS were false or inaccurate.[20] The Special Master does not make the claim that every comment Interior ever receives must be included in a submission to the Court. The Special Master's findings could be easily dismissed if it were not for his conclusion that the reason the Project Team comments were not included was because Interior was seeking to mislead the Court. This ominous charge is unsupported and incongruent with the nature of the Project Team comments.

The basic premise of the NAID allegations which led to the November 5 Order authorizing this investigation was that NAID prepared negative comments about TAAMS and that Interior somehow concealed this negative information from the Court in the Eighth Quarterly Report, in an effort to make it look like TAAMS was working. What the Special Master's Interim Report reveals is that NAID, a TAAMS contractor, prepared critical comments about an EDS report that was critical of TAAMS and that some, but not all, of these comments were included in the Eighth Quarterly Report.

The EDS report was critical of TAAMS and recommended dropping the Realty and Accounting portion of it. NAID employees must have realized that if TAAMS were eliminated, NAID might lose its job. NAID's comments, critical of the EDS report, are thus understandable.

20/ Tellingly, the Special Master omits from his Interim Report that for thirty-one of the EDS recommendations, although the Project Team had comments, they concurred with the recommendation, and concurred without comment on twelve other recommendations.

What makes the Special Master's conclusion about the motives of Interior so misguided is that the Project Team comments were supportive of TAAMS as a workable system. In its estimation, with a little more funding and time, TAAMS could be made to work. If, as the Special Master suggests, Interior were trying to mislead the Court during the then-pending contempt proceedings, it is difficult to comprehend why Interior would deliberately omit comments that indicated that some of the TAAMS employees and contractors at Interior still believed TAAMS could work. As the Court will recall, the specifications at the contempt trial that related to TAAMS charged Interior with misleading the Court into believing that TAAMS was more effective than it really was. The Project Team comments would have bolstered Interior's defense, not harmed it. Interior had no incentive to conceal these comments from the Court.[21]

What the Special Master has really concluded in his Interim Report is that he disagrees with Interior's management decision to defer operation of TAAMS, as recommended by EDS. This attack on Interior's decisionmaking is improper. It is also not supported by any evidence identified in his Interim Report.

It is perhaps understandable that the people at NAID, and the Interior employees that had worked so hard to make TAAMS succeed, would be disappointed about a recommendation that TAAMS be deferred.[22] It appears, however, that more than just pride in one's work could have been behind NAID's criticism of the EDS reports, and behind the way in which the NAID

21/ The Special Master's conclusions are also belied by the extraordinary amount of information and sworn testimony about the operations of TAAMS and Interior's decisions regarding TAAMS that were supplied to the Court at the contempt trial and elsewhere in this case.

22/ Many of the people who worked so hard for such a long time trying to make TAAMS work undoubtedly believed that it would work with additional funding and additional time.

comments were eventually brought to the Court's attention. Its comments were essentially that if more money were spent on TAAMS (i.e. more money paid to NAID), then TAAMS might be made to work. If implementation of TAAMS were deferred, NAID surely realized that the services of a contractor hired to work on TAAMS would no longer be necessary.[23]

Support for this proposition can be found in a letter that NAID sent to Interior. Letter of August 1, 2002 (attached as Exhibit K). In this letter from NAID's attorneys, NAID threatened to bring to the Court's attention that some of its comments about TAAMS had not been included in submissions to the Court, unless Interior agreed to renew its contract. See August 1, 2002 Letter at 2. If NAID truly believed that the Court had been deceived or that NAID's TAAMS comments had been deliberately suppressed, it should have immediately brought its concerns to the Court. NAID did not say that Interior should disclose NAID's comments to the Court or that NAID would be forced to do so. Rather, NAID informed Interior that if it allowed "the contract to expire without immediate senior-level intervention, DOI will leave the company no choice but to intervene in the Cobell case to seek judicial relief." Id. at 2. This letter can certainly be interpreted as a threat, a threat that NAID carried out. The letter was sent to Interior on August 1, 2002. NAID's Motion to Intervene, which first brought NAID's contentions to the attention of the Court, was filed on August 30, 2002. It is puzzling that the Special Master did not consider the motives of NAID employees making the critical comments about the EDS report and did not

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[23] After Interior completes its systems re-engineering process, the utility of the TAAMS Realty & Accounting software can be re-evaluated. At that time, an informed decision regarding future investment can be made.

explore the manner of, and motives behind, NAID's effort to bring its claims to the Court's attention.[24]

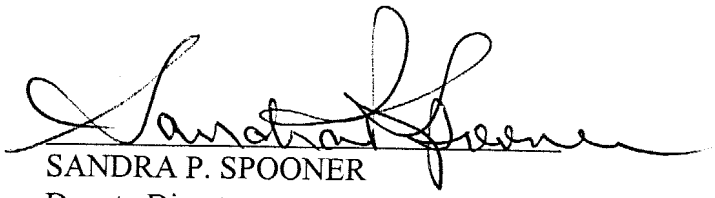
CONCLUSION

For these reasons, Interior Defendants object to the Special Master's Interim Report. Interior requests a hearing pursuant to Fed. R. Civ. P. 53(e)(2) before any part of this Interim Report is adopted by the Court.

Dated: May 7, 2003

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Assistant Attorney General
STUART E. SCHIFFER
Deputy Assistant Attorney General
J. CHRISTOPHER KOHN
Director



SANDRA P. SPOONER
Deputy Director
D.C. Bar No. 261495
JOHN T. STEMPLEWICZ
Senior Trial Attorney
Commercial Litigation Branch
Civil Division
P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875
(202) 514-7194

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[24] It is surprising that the Special Master apparently did not even consider the notion that NAID's efforts in bringing this matter to the Court might be the foundation for a contract claim against Interior.