

[ORAL ARGUMENT NOT YET SCHEDULED]

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

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ELOUISE PEPION COBELL, <u>et al.</u> ,	)	
	)	
Plaintiffs-Appellees,	)	
	)	
KIMBERLY CRAVEN,	)	
	)	
Movant-Appellant,	)	
	)	
v.	)	No. 11-5205
	)	
KENNETH LEE SALAZAR,	)	
Secretary of the Interior, <u>et al.</u> ,	)	
	)	
Defendants-Appellees,	)	
	)	
HARVEST INSTITUTE FREEDMAN FEDERATION, LLC, <u>et al.</u> ,	)	
	)	
Movants-Appellees.	)	

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**GOVERNMENT’S RESPONSE TO APPELLANT’S MOTION TO REQUIRE UNSEALING  
OF ANY MATERIALS DESIGNATED IN THE APPENDIX BY THE APPELLEES**

The government defendant-appellees, the Secretary of the Interior, et al., hereby respond to appellant Kimberly Craven’s “Motion To Require Unsealing of Any Materials Designated in the Appendix by the Appellees.” For the following reasons, the motion should be denied.

**BACKGROUND**

1. This appeal concerns a challenge to the settlement of the Cobell class action by a class member, Kimberly Craven. The

underlying case has been ongoing for 15 years and has involved multiple trials and appeals.<sup>1</sup>

2. Over the course of the litigation, the district court has issued several orders sealing particular records. The sealed documents address a variety of matters including: Privacy Act material and personal account information, see, e.g., Protective Order (Nov. 27, 1996) [Dkt. 15]; records of an accounting study about certain Individual Indian Money Accounts, protected pursuant to the Trade Secrets Act (18 U.S.C. § 1905) and Indian Mineral Development Act (25 U.S.C. § 2103), see, e.g., Order (Mar. 29, 2000) [Dkt. 481]; information technology (IT) security protocols used by the Department of the Interior, see, e.g., Order (Jan. 22, 2004) [Dkt. 2448], Order (Apr. 22, 2005) [Dkt. 2937]; information concerning land sale records, see, e.g., Order (Sept. 1, 2004) [Dkt. 2659]; and deliberations among Executive Branch officials, see, e.g., Cobell v. Norton, 257 F. Supp. 2d 203 (D.D.C. 2003). Some of these items were sealed at the request of the plaintiffs; some at the request of the defendants; and some were sealed sua sponte by the district court.

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<sup>1</sup>Cobell v. Salazar, 573 F.3d 808 (D.C. Cir. 2009); Cobell v. Kempthorne, 455 F.3d 317 (D.C. Cir. 2006); Cobell v. Kempthorne, 455 F.3d 301 (D.C. Cir. 2006); In re Kempthorne, 449 F.3d 1265 (D.C. Cir. 2006); Cobell v. Norton, 428 F.3d 1070 (D.C. Cir. 2005); Cobell v. Norton, 392 F.3d 461 (D.C. Cir. 2004); Cobell v. Norton, 391 F.3d 251 (D.C. Cir. 2004); In re Brooks, 383 F.3d 1036 (D.C. Cir. 2004); Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003); Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001).

3. On September 12, 2011, the appellant here, Ms. Craven, filed in this Court a "Motion to Require Unsealing of Any Materials Designated in the Appendix by the Appellees." In her motion, Ms. Craven expresses concern that plaintiffs-appellees might "designate unnecessary sealed material in the appendix in violation of Fed. R. App. Proc. 30(b)(2) and Circuit Rule 30(b)," and might not provide her with access to such material. Motion 1, 3. Ms. Craven asks in advance that any such material be unsealed. Ms. Craven suggests even further that "[t]here is no reason for any portion of the record to be sealed." Id. at 3.

4. Also on September 12, 2011, at the request of Ms. Craven, plaintiffs-appellees filed a consent motion for the parties to this appeal to forgo a joint appendix and submit separate appendices instead. On September 13, this Court granted that motion.

#### **DISCUSSION**

1. Ms. Craven's motion to unseal appears moot. Her motion requests that this Court unseal materials that are later "designated" by the appellees. However, after Ms. Craven filed the motion now at issue, this Court granted a consent motion for the parties to file separate appendices. Although the motion to unseal is not specific about exactly why the motion should be granted, its underlying concern appears to be that Ms. Craven might be required to place into a joint appendix documents that

she cannot access. See Motion at 2-3. Now that this Court has granted the consent motion for the parties to file separate appendices, that is no longer an issue.

2. Even if Ms. Craven's motion remains applicable to items now to be filed in the parties' separate appendices, the motion is premature. It is entirely unclear at this point that either the plaintiffs-appellees or the government defendants-appellees will necessarily include any sealed material in their respective appendices. The motion to unseal thus appears directed to a scenario that may never come to pass.

Ms. Craven also has not offered any reason to bypass this Court's normal procedure pertaining to an appeal touching upon sealed material. This Court's rules expressly provide for appendices containing matters under seal. See D.C. Cir. R. 47.1(e). The rules also provide that sealed materials are to be placed in a supplement to the appendix and served on any "party [who] is entitled to receive the material." See D.C. Cir. R. 47.1(e)(1)&(2). If Ms. Craven is concerned that she might not be "entitled to receive the material," D.C. Cir. R. 47.1(e)(2) (an argument she has not made in her motion), the matter can be addressed in due course, if and when the issue actually arises.<sup>2</sup>

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<sup>2</sup>Even if that issue should arise, the correct resolution may not be to unseal the documents. Rather, depending on any documents, privileges, and interests at issue, the appropriate remedy may be to modify an applicable protective order, thereby

3. The motion is also without basis to the extent it calls for a general unsealing of the record. Ms. Craven has made no specific reference to any particular sealed document, nor has she made any argument that would apply to the sealed documents as a whole. As noted, in the course of this litigation, various kinds of materials have been sealed for different reasons, at the behest of multiple parties. Without specifying which (if any) sealed materials might be at issue, Ms. Craven has not come close to showing that any particular materials should now be unsealed, much less that all sealed materials should now be unsealed.

**CONCLUSION**

For the foregoing reasons, appellant's motion to unseal should be denied.

Respectfully submitted,

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S/ Thomas M. Bondy

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permitting appropriate disclosure to Ms. Craven and/or counsel. We take no position on that question at this time, as it pertains to circumstances that have not yet arisen and that may not arise.

**CERTIFICATE OF SERVICE**

I hereby certify that on September 26, 2011, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the District of Columbia Circuit using the CM/ECF system, which will provide notification of such filing to all counsel of record.

s/ Thomas M. Bondy

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Thomas M. Bondy