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

ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs-Appellees,	)	
v.	)	No. 02-5374
GALE A. NORTON, Secretary of the Interior, et al.,	)	
Defendants-Appellants.	)	

DEFENDANTS-APPELLANTS' RESPONSE TO PLAINTIFFS-APPELLEES' MOTION TO STRIKE JOINT APPENDIX MATERIALS INCLUDED AT THE REQUEST OF SECRETARY NORTON IN HER INDIVIDUAL CAPACITY

Defendants-appellants, the Secretary of the Interior, et al., respectfully respond to plaintiffs-appellees' motion to strike the Joint Appendix materials included at the request of Secretary Norton in her individual capacity.

1. As appellant, with responsibility for assembling the Joint Appendix, the government has attempted to accommodate requests from both plaintiffs' counsel and private counsel for Secretary Norton. At plaintiffs' request, and contrary to the government's preference, the government included full copies of all documents that were cited even in part in plaintiffs' brief, and also included the entire trial transcript. See Exh.A (letter of March 6, 2003). Although Secretary Norton is not a party in this case in her individual capacity, she has submitted briefs in that capacity. Plaintiffs moved to strike those briefs, but the Court has not resolved those motions. Accordingly, the government also sought to

accommodate the request from Secretary Norton's private counsel that materials cited in her briefs be included in the Joint Appendix.

2. Although the resulting appendix is thus significantly larger than the government would have preferred, the government has borne the entire burden and expense of preparing and filing the appendix. Plaintiffs do not suggest that any of the materials included in the appendix are not part of the record. There is thus no basis for concluding that the government violated this Court's rules by including in the Joint Appendix materials cited in various briefs, or for concluding that plaintiffs have suffered any prejudice as a result.[1]

3. Plaintiffs urge that any material cited solely by Secretary Norton's private counsel should have been "submitted to the Clerk separately in a 'Lodged Joint Appendix.'" Pl. Mot. at 4.

Plaintiffs are wrong, and their suggestion misconceives the nature of the Joint Appendix. The Court is free to review any part of the record, whether or not it is specifically cited in the briefs. See D.C. Cir. Rule 30(b). The Court is also free to dispense with those parts of the record that it considers

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[1] Nor is there any basis for plaintiffs' contention that the government "concealed" its inclusion of materials cited by Secretary Norton's private counsel. See Pl. Mot. at 2. Indeed, counsel for the government specifically noted in the cover sheet of a fax to plaintiffs' counsel that its working list of Joint Appendix items includes "materials that the Secretary's private counsel is citing in their reply brief." Pl. Mot. (Exh. A).

irrelevant, even if they form part of the Joint Appendix. No purpose would thus be served by the segregation plaintiffs propose.

Although plaintiffs have suffered no prejudice from the preparation of the Joint Appendix, the prejudice to the government that would result from granting plaintiffs' motion is clear. The expense and burden of reconstructing the ten volume Joint Appendix in order to segregate the materials in the way proposed by plaintiffs would be significant. Plaintiffs urge that the government "must bear the burden of [its] intransigence." Pl. Mot. 5. But, of course, there has been no intransigence. To the contrary, as noted, to accommodate plaintiffs' requests, the government has already been put to considerable expense. And in view of plaintiffs' insistence that all items cited in their briefs be included in their entirety, including the entire trial transcript, their suggestion that the inclusion of additional material cited by Secretary Norton's private counsel "has the effect of cluttering up and confusing the record in this appeal," Pl. Mot. at 5, deserves little weight.

4. Finally, plaintiffs urge that the government "should be directed to certify a list of all the offending materials to be removed from the Joint Appendix," Pl. Mot. at 6, because they claim they cannot identify what material was cited solely by Secretary Norton's private counsel. As counsel for the government has explained to plaintiffs' counsel, however, the materials at issue can be determined by comparing plaintiffs' brief and the

government's briefs with those submitted by Secretary Norton's private counsel. In preparing the Joint Appendix, the government simply added materials cited in the briefs submitted by Secretary Norton's private counsel; it did not create an independent list of those materials.

CONCLUSION

For the foregoing reasons, the Court should deny plaintiffs-appellees' motion to strike the joint appendix materials included at the request of Secretary Norton in her individual capacity.

Respectfully submitted,

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APRIL 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of April, 2003, I am causing copies of the foregoing opposition to be served on the following in the manner specified:

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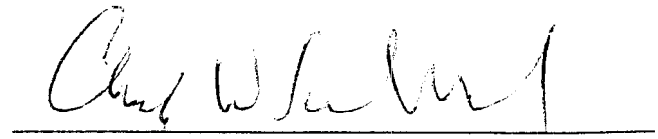

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March 6, 2003

Mr. William G. Austin, Esq.
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Re: Cobell v. Norton, No. 02-5374 (D.C. Cir.)

Dear Bill:

I am writing to confirm our discussions concerning the preparation of the deferred appendix in the above-captioned appeal.

As you know from our phone conversations today, including our conference call with D.C. Circuit Deputy Clerk John Haley, it is the government's position that only the relevant portions of materials cited in the parties' appellate briefs should properly be included in the joint appendix. That position derives from D.C. Cir. Rule 30(b), which specifies that "[t]he appendix must contain a copy of relevant portions of all pleadings, transcripts, and exhibits that are cited in the briefs," and warns that counsel must not "burden the appendix with material of excessive length or items that do not bear directly on the issues raised on appeal."

Pursuant to that rule, the government intends to include copies of the relevant portions of all materials cited in plaintiffs' appellate brief, filed on February 24, 2003. Moreover, at your request, the government has also agreed to include full copies of Interior's quarterly reports and the Court Monitor's reports cited in the brief (with attachments), even if only a few pages have been cited. In order to verify that we are not missing any items, we also provided you today with a working list of documents to be included in the joint appendix and asked you to identify any omissions of material cited in your brief. You have agreed to provide us with a list no later than tomorrow morning of any materials cited in your brief that we may have inadvertently omitted.

Finally, I am writing to confirm our agreement with regard to inclusion of the entire contempt trial transcript in the appendix. As you know, the government believes that only the trial testimony specifically cited in the parties' briefs, on appeal should be included in the appendix – with sufficient surrounding pages to give context to the cited portion of the transcript. In order to avoid burdening

the Court with motions to resolve this issue, however we are willing to include the entire transcript of the contempt trial (totaling approximately 4700 pages) in the joint appendix. To reduce the total number of pages consumed by the transcript, we plan to include it in the "minuscript" format, which condenses four pages to one.

I am pleased that we have been able to resolve these issues on an amicable basis and trust that we will handle any future disputes in a similar spirit of cooperation. Please do not hesitate to contact me if you have any additional questions or concerns.

Cordially,

CHARLES W. SCARBOROUGH
United States Department of Justice
Civil Division, Appellate Staff

cc: John Haley, Deputy Clerk
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