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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, v. CLIVEN D. BUNDY, RYAN C. BUNDY, AMMON E. BUNDY, RYAN W. PAYNE, Defendants.	2:16-CR-00046-GMN-PAL **GOVERNMENT'S BRIEF OPPOSING DISMISSAL WITH PREJUDICE**

CERTIFICATION: This brief is timely filed; the government's motion for leave to file this oversized brief [ECF No. 3079] is pending before this Court.

On December 20, 2017, this Court granted defendants' motion for mistrial over the government's objection. ECF No. 2856; *see also* ECF Nos. 2883, 2906 (R. Payne motions to dismiss). The Court found the government had willfully failed to disclose several

documents favorable to the defendants, potentially exculpatory, and/or useful to bolster the defense and rebut the Government's theory. It concluded the potential remedies of recalling witnesses or granting a continuance would be impractical and insufficient, and that a mistrial was thus "the most suitable and the only remedy that is available." 12/20/17 Tr. at 23. The Court specifically found that "a mistrial is required to a high degree of necessity," and thus granted Defendants' request for a mistrial based on manifest necessity. *Id.* at 24. The Court reset trial for February 26, 2018, but ordered the parties to file simultaneous briefs addressing whether the mistrial should be with or without prejudice.[1] *Id.* at 25. This brief is filed in accordance with that Order.

DATED this 29th day of December, 2017.

Respectfully,

/s/ Steven W. Myhre

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[1] Where defendants consent to or request a mistrial and manifest necessity justifies the mistrial, the Double Jeopardy Clause does not bar retrial. *See United States v. Bates*, 917 F.2d 388, 398 (9th Cir. 1990).

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I. Introduction

As with any large case, this multi-agency, multi-defendant, multi-trial case has presented significant discovery challenges: hundreds of thousands of pages of documents, hundreds of hours of video and audio recordings, and thousands of emails, to name a few, balanced against factors such as witness security and disclosure procedures acceptable to the Court. This complexity notwithstanding, and ever mindful of its Constitutional, statutory, Department, and Court-ordered discovery obligations, the government has always strived to meet these challenges with diligence, fairness, and efficiency.

Against this backdrop, the Court's recent rulings—that the government should have turned over additional material, including information relating to an internet-enabled security camera, law enforcement 302s, and threat assessments documents—do not transform this case into one involving both flagrant government misconduct and substantial prejudice to the defendants. Indeed, *neither* is present here.

Likewise, the government's belated disclosure of these materials is not so grossly shocking or outrageous as to violate the universal sense of justice. Rather, the late disclosures stem from the government's good-faith reliance on its understanding of its discovery obligations, as informed by its reasonable interpretation of the governing law on available affirmative defenses, and supported by Court orders on these subjects. The government did not withhold material to gain a tactical advantage or harm the defendants. Rather, it litigated these issues in good faith, arguing that the materials were neither helpful nor material, and provided reasoned explanations for its decisions. Although the Court disagreed with the government's legal reasoning and ordered disclosure, a legal error by the government—remedied immediately upon having the benefit of the Court's ruling—does not equate with misconduct, let alone flagrant misconduct.

The *Brady* violations found by the Court are regrettable and benefit no one. But because the government neither flagrantly violated nor recklessly disregarded its obligations, the appropriate remedy for such violations is a new trial. That remedy is particularly appropriate here because it will cure all three areas of prejudice alleged by the defendants. Namely, a new trial will provide opportunities to develop different *voir dire* questions and peremptory challenges, and craft stronger opening statements and cross-examinations in light of the recently produced materials.

Because the government withheld materials that the prosecutors believed in good faith did not fall under any of their discovery obligations, and because the prejudice raised by defendants is not substantial, but rather readily curable by a new trial, the Court's mistrial order should be without prejudice.

II. Factual and Procedural Background

A. Investigation and Indictment

The 16-count superseding indictment in this case arises from events that occurred in and around Bunkerville, Nevada, in April 2014. *See generally* ECF No. 27. The grand jury alleges the 19 named defendants planned, organized, conspired, led, or participated as gunmen in a massive armed assault against federal law enforcement officers to threaten, intimidate, and extort the officers into abandoning approximately 400 head of cattle owned by Defendant Cliven Bundy. *Id.* at 2. Law enforcement officers sought to enforce three orders issued by this Court to seize and remove the cattle from federal public lands, based on Bundy's refusal to obtain the legally required permits or pay the required fees to keep and graze his cattle on the land. *Ibid.*

The superseding indictment alleges that a cattle removal operation began on April 5, 2014, but on April 12, defendants, along with hundreds of recruited followers, executed a

plan to recover the cattle by force, threats, and intimidation. *Id.* at 2-3. Defendants and their followers demanded that officers leave and abandon the cattle and threatened to use force if the officers did not do so. *Id.* at 4. Armed gunmen took positions behind concrete barriers and aimed assault rifles at the officers. *Ibid.* The potential firefight posed a threat to the lives of everyone on scene, not only the officers, but also unarmed bystanders, including children. *Ibid.* Thus, the officers were forced to leave and abandon the lawfully impounded cattle. *Ibid.* After this confrontation, the conspirators organized armed security patrols and checkpoints in and around Bunkerville to deter and prevent any future law enforcement actions against Bundy, his coconspirators, and his cattle. *Ibid.*

B. The Government's Discovery Efforts Before Trial 1

From the beginning of this case, the government has worked diligently to fulfill its discovery obligations. The government's goal has always been to provide the defendants all of the materials to which they are entitled, and more—while at the same time avoiding a disorganized "document dump," meeting speedy trial obligations, and protecting witnesses and victims. The Government has devoted hundreds upon hundreds of hours to this goal, collecting, reviewing, and indexing a massive discovery database, striving to produce all discoverable material to the defendants.

1. The Database

The investigation in this case began with parallel and independent investigations by two different federal agencies: the FBI and BLM. Their efforts began in April 2014 and continued until at least October 2014, with many of the investigative efforts of one agency overlapping, and in some cases duplicating, the efforts of the other. These parallel investigations generated massive volumes of cumulative and redundant information, often emanating from the same sources.

In late October 2014, the United States Attorney's Office for the District of Nevada began working closely with both agencies to collect potential discovery information. In addition to collecting possible investigative materials, it also collected historical documents related to Cliven Bundy's long-running dispute with the BLM over control of public land, administrative documents related to cattle sales and impoundment planning, the costs and planning for the investigation of the case, the ownership of the land, and previous administrative attempts to resolve the dispute with Bundy.

The USAO worked to combine all investigative documents and non-investigative documents into a single database for the purposes of organizing and analyzing the case for potential charges. The resulting collection included many duplicative documents, documents missing attachments, and documents wholly unrelated to the ultimate charges in the case, with no logical way to electronically link related documents. With no technology-based solution available, the prosecution team went "low-tech," spending hundreds of hours conducting word searches for documents, reviewing documents one at a time for relevant information, and tagging documents individually for relevancy and future production. Notwithstanding this effort, the database still contained tens of thousands of pages of duplicative and unrelated documents. At the time of the government's initial productions, the database comprised more than 30,000 documents totaling more than 250,000 pages.

In addition to collecting documents, the government devoted tremendous investigative and case management resources to collecting, identifying, and organizing social media content and audio/video recordings. The government drafted and executed more than 45 search warrants on various social media and email accounts, generating more than 500,000 pages of returns, 75 videos, and more than 82,000 emails. Investigators

spent additional time searching for and collecting hundreds upon hundreds of hours of video and audio recordings from the more than 400 participants and bystanders to the events of April 12. This included, among other things, capturing open-source media broadcasts from conventional and alternative media outlets, and collecting dashcam and bodycam recordings from officers in non-federal agencies who participated in the impoundment, including the Las Vegas Metropolitan Police Department (LVMPD) and Nevada Highway Patrol (NHP). The government then undertook the mammoth task of reviewing all of this material, and converting it into useable formats for the prosecution team and the defendants in preparation for trial. The government's disclosures included more than 24,000 pages of printed material, 2,000 video recordings, and 1,600 audio recordings. In all, the government provided more than 1.5 terabytes of information to the defendants, by far the largest review and disclosure operation in this USAO's history.

2. Witness Security Concerns

This case is highly unusual not only because of the unprecedented acts that took place on April 12, 2014, but also for the emotionally charged nature of the subject matter underlying the charges. As early as the beginning of the impoundment operation, and continuing through the first two trials, witnesses, victims, and law enforcement officers involved in the operation have been subjected to harassment and threats.

Following the tasing of Ammon Bundy on April 9, 2014, agents who participated in that event saw their pictures quickly spread across the internet, virtual "wanted" posters published by individuals seeking the agents' home addresses. Testifying witnesses were similarly vilified. Many witnesses expressed reluctance to testify out of fear of what might happen to them in retaliation. Notwithstanding the Protective Order entered in this case, protected information disclosed during discovery quickly leaked into social media. In

perhaps the most recent example, within days of the Court issuing a special Protective Order to preclude public dissemination of the "Wooten email," it was leaked to the media, and the news of its existence and content has been widely disseminated.

As a result of threats to witnesses and the speed at which personal information can spread on social media, the government concluded it could not simply turn over its entire database. Instead, to avoid needless exposure of witness identity and other sensitive personal information, the government culled the database with witness protection in mind. The only reliable method for finding and redacting this type of information was individually reviewing documents to avoid needlessly exposing names of witnesses or agents who had nothing materially helpful to either side. The government has taken seriously the safety and security concerns throughout this case and has devoted resources to this task accordingly.

Unprecedented database volume and witness concerns aside, the government never let these obstacles stand in the way of diligently working to fulfill its discovery obligations.

C. The Government's Disclosure Decisions Before and During Trial, and This Court's Rulings

The government's disclosure decisions were, and are, driven by *Brady/Giglio*, Rule 16, and the Jencks Act as they relate to (1) the violations charged in the Superseding Indictment; (2) controlling law and authority in this Circuit regarding cognizable defenses, as informed by this Court's rulings; (3) the government's theory of the case; and (4) witness security concerns. As to the charged violations, the Superseding Indictment focused on the following events:

April 6, 2014: An attempted block of a BLM convoy on State Route 170 (Obstruction of Justice/Interference with a Court Order)

April 9, 2014: An attempted block of a BLM convoy on State Route 170

(Assault on a Federal Officer and Obstruction of Justice)

April 12, 2014: Events at the Impoundment Site, located near Exit 115, along I-15 (Assault on a Federal Officer, Extortion, and Obstruction of Justice)

The law applicable to claims of self-defense to an assault-on-a-federal-officer charge formed the basis for the government's understanding of its related disclosure obligations, as informed by this Court's rulings on that issue. Under controlling authority, self-defense to a charge of assault on a federal officer can arise only under a "narrow set of circumstances:" (1) a reasonable mistaken belief of the identity of the victim as a law enforcement officer; or (2) a claim of the use of excessive force by the officer.[2] *See United States v. Morton*, 999 F.2d 435, 437 & n.1 (9th Cir. 1993). Where excessive use of force is claimed, an individual may make out an affirmative defense of self-defense against a law enforcement official only when he offers evidence to show (1) a reasonable belief that the use of force was necessary to defend against the *immediate* use of *unlawful* force; and (2) the use of no more force than was reasonably necessary under the circumstances. *United States v. Urena*, 659 F.3d 903, 907 (9th Cir. 2011) (quoting *United States v. Biggs,* 441 F.3d 1069, 1071 (9th Cir. 2006)).

The government has extensively briefed the issue of evidence relevant to a claim of self-defense and/or third-party state of mind (beliefs). *See, e.g.*, ECF Nos. 1390, 1799, 2064, and 2514. The gravamen of these motions was seeking the Court's guidance regarding the limits of what did or did not relate to a cognizable defense or relevant state of mind (beliefs), to preclude the possibility of jury nullification. *See Merced v. McGrath*, 426

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[2] Excessive force claims usually arise in the context of arrest/resisting arrest cases where police force is used. In those case, the courts analyze the force requirement under the Fourth Amendment—a situation wholly different from the charges in the Indictment. The Indictment does not charge that any defendant resisted arrest. Under these circumstances, any use or threat of use of force is analyzed under the Due Process Clause.

F.3d 1076, 1079–80 (9th Cir. 2005) ("Inasmuch as no juror has a right to engage in nullification—and, on the contrary, it is a violation of a juror's sworn duty to follow the law as instructed by the court—trial courts have the duty to forestall or prevent such conduct…") (citation omitted).

The government's disclosure decisions were informed, in part, by the Court's ruling on these issues. *See* ECF Nos. 1518, 1799, 2138, and 2770. Relevant to the government's disclosure decisions are the Court's recent *in limine* rulings regarding the limits of cognizable defenses. First, the Court explained that its ruling from Trial 1—that Defendants were not entitled to a jury instruction on self-defense or justification—"is applicable to the upcoming trial because Defendants have failed to establish the essential elements necessary for the defense." ECF No. 2770, at 5. Second, noting that it became apparent in Trial 1 that the defendants failed to meet their burden to show objective reasonableness, the Court explained that in Trial 3 the Defendants would likewise have to meet the same burden. *Id.* at 6. Finally, the Court found some information about perceived government misconduct (*e.g.*, allegations that the BLM "brutalized" protestors, "occupied Bunkerville," and violated the First Amendment) is relevant. *Id.* at 7-8.

As explained in Parts III.B-III.E below, the government's good-faith interpretation of the law, as informed by these rulings, helped inform the government's belief of its disclosure obligations in this case, including obligations under *Brady/Giglio*, Rule 16, the Jencks Act, and Department of Justice's policies. Although the Court concluded the government fell short of these obligations, the government's errors—which were based on a reasonable (even if erroneous) understanding of the law and its obligations, and good-faith and diligent (even in inadequate) efforts to satisfy those obligations—do not equate with flagrant violations or intentional disregard of its discovery obligations. Nor do the

errors warrant the extreme sanction of dismissal with prejudice, where a new trial will cure the claimed prejudice.

III. Points and Authorities

Dismissal With Prejudice is Unwarranted.

A. Dismissal with Prejudice Legal Standard

Where both flagrancy and substantial prejudice are shown, a district court may dismiss an indictment on one of two bases: outrageous government conduct that amounts to a due process violation, or as an appropriate exercise of the Court's supervisory powers. *United States v. Chapman*, 524 F.3d 1073, 1084 (9th Cir. 2008). The standards to dismiss, either for a due process violation or under the district court's supervisory powers, are high and permit dismissal only in extreme cases. *United States v. Christensen*, 624 F. App'x 466, 476 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 628 (2017) (citing *United States v. Nobari*, 574 F.3d 1065, 1081 (9th Cir. 2009)); *United States v. Doe*, 125 F.3d 1249, 1257 (9th Cir. 1997) ("This is a high standard … and even in some of the most egregious situations it has not been met" (internal citation omitted)).

To violate due process, governmental conduct must be "'so grossly shocking and so outrageous as to violate the universal sense of justice.'" *Id*. (*quoting United States v. Restrepo*, 930 F.2d 705, 712 (9th Cir. 1991)); *see also Nobari*, 574 F.3d at 1081 (defendant "cannot meet this standard, as the government's alleged conduct plainly would not 'violate the universal sense of justice,' as required for dismissal"). "Dismissal under the court's supervisory powers for prosecutorial misconduct requires (1) flagrant misbehavior and (2) substantial prejudice." *United States v. Kearns*, 5 F.3d 1251, 1253 (9th Cir. 1993). Such dismissal is appropriate only "when the investigatory or prosecutorial process has violated

a federal constitutional or statutory right and no lesser remedial action is available." *United States v. Barrera-Moreno*, 951 F.2d 1089, 1092 (9th Cir. 1991).

Because "[d]ismissing an indictment with prejudice encroaches on the prosecutor's charging authority," this sanction may be permitted only 'in cases of flagrant prosecutorial misconduct.'" *Chapman*, 524 F.3d at 1085 (9th Cir. 2008) (quoting *United States v. Simpson*, 927 F.2d 1088, 1090 (9th Cir. 1991)); *see also United States v. Struckman*, 611 F.3d 560, 577 (9th Cir. 2010) ("Because it is a drastic step, dismissing an indictment is a disfavored remedy.") (citing *United States v. Rogers*, 751 F.2d 1074, 1076-77 (9th Cir. 1985)). Absent flagrant and prejudicial misconduct, dismissal of an indictment for misconduct is an abuse of discretion. *United States v. Jacobs*, 855 F.2d 652, 655-56 (9th Cir. 1988).

"[A]ccidental or merely negligent governmental conduct is insufficient to establish flagrant misbehavior." *Id*. (citing *Kearns*, 5 F.3d at 1255). The Ninth Circuit has made clear that *Brady* and *Giglio* violations "are just like other constitutional violations," and that, although a "district court may dismiss the indictment when the prosecution's actions rise … to the level of flagrant prosecutorial misconduct," the "appropriate remedy will usually be a new trial." *Chapman*, 524 F.3d at 1086 (citing *Giglio v. United States*, 405 U.S. 150, 153-154 (1972)); *see United States v. Kohring*, 637 F.3d 895, 912-913 (9th Cir. 2011) ("We have previously observed that 'the appropriate remedy' for a *Brady*/*Giglio* violation 'will usually be a new trial.' That is the case here.") (internal citation omitted)).

In the Ninth Circuit, the "extreme remedy" of dismissal is very rarely applied and its use always depends on the facts of the case. *See United States v. Lopez*, 4 F.3d 1455, 1464 (9th Cir. 1993). In *Chapman*, the court of appeals upheld the district court's resort to that

extreme remedy. The Government is unaware of any other Ninth Circuit case in which the remedy of dismissal for a *Brady/Giglio* violation has been upheld.[3]

* * *

The Government's conduct in this case does not meet this high standard for dismissal. As explained below, its failure to disclose the information underlying the court's mistrial order was due, in a few instances, to simple inadvertence, but in the overwhelming majority of instances to a good-faith—and, we submit, reasonable—belief that the information was not subject to disclosure. The government understands the Court's conclusion that the government's assessment was erroneous, and that it fell short. But *in no case* did its failure to disclose result from a flagrant or reckless disregard of its obligations, or from the intentional withholding of information it was obligated to disclose. And although the Court found prejudice necessitating a mistrial, the defendants' proposed prejudice is not substantial because it is curable in a new trial.

B. The Government's Nondisclosure of Information about the Surveillance Camera and FBI Law Enforcement Operation Order Does Not Rise to the Level of Flagrant or Reckless Disregard to Warrant Dismissal; Nor Did It Result in Substantial Prejudice.

In its oral ruling granting the defendants' mistrial motion, the Court concluded an FBI 302 "about an interview with Egbert" and the FBI Law Enforcement Operation Order ("LEO") constituted *Brady/Giglio* information and that this information was disclosed late. *See* 12/20/17 Tr. at 8-9. For the reasons explained below, neither document was flagrantly or intentionally withheld. Instead, the government made its disclosure decisions based on information known to it at the time, and on that good-faith

[3] Conversely, in *Jacobs*, *Kearns*, *Barrera-Moreno*, and *Lopez*, the Ninth Circuit overturned district court decisions to dismiss.

interpretation, the materiality of this information was not reasonably apparent to the government until the Court ruled on its materiality on November 8, 2017. The late disclosure of this information also did not result in substantial prejudice because defendants can incorporate it at a new trial.

1. "Egbert Interview" and the FBI Law Enforcement Operation Order

At the time of its initial disclosures, the government reasonably and in good faith believed that the information contained in the "Egbert Interview"[4] (*hereinafter* "Burke 302," Exh. 1),[5] and the FBI LEO (Exh. 2) could neither advance proof nor lead to proof in support of a legally cognizable defense, or otherwise materially undermine the government's theory of the case.

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[4] In its oral ruling, the Court referred to an interview with Egbert as revealing that the FBI SWAT Team placed the camera, repaired it, relocated it, and the FBI monitored the live feed from the camera. 12/20/17 Tr. at 9-10. The information about the repair and relocation of the camera is included in the Gavin interview of Egbert recounted in the Gavin 302 dated November 10, 2017 ("Gavin 302"), which the Court found as timely disclosed. 12/20/17 Tr. At 20. The Burke 302, on the other hand, contains information that FBI SWAT investigated the damage to the camera and that it had been placed by Electronic Technicians earlier in the day. The Burke 302 further states that Egbert advised that the camera was not working properly and that he decided to remove the equipment to the Forward Operating Base ("FOB"). The government therefore is unclear as to which Egbert interview the Court is referring. In all events, the government did not have the Gavin 302 at the time of its initial disclosures and thus only could have relied upon the Burke 302 at the time of disclosures.

[5] Pursuant to this Court's order on December 20, *see* Tr. at 29-30, the government is filing this brief publicly with eight exhibits unsealed and redacted where possible to protect personally identifiable information. The remaining exhibits are filed under seal pursuant to the Protective Order entered in this case (ECF No. 609) as the exhibits contain "Confidential Documents" not in the public domain. Many of these exhibits are investigative documents, witness interviews, and/or contain law enforcement sensitive information that has not been placed on the public record and where it was not practicable to redact given the nature of the information.

According to the Burke 302, the surveillance camera was placed in the vicinity of the Bundy residence and was "not configured to record." *See* Exh. 1 at para. 1. BLM agents observed Ryan Bundy operating a yellow ATV in the vicinity of the Bundy residence. *Id.* Shortly thereafter, according to the 302, the camera became inoperable and it was removed to the Forward Operating Base. *Id.*

The Court found material the fact that the FBI LEO stated (p. 7): "Internet camera with view of Bundy residence." The Court stated that the "U.S. Attorney's Office was aware of the camera, at least the latest information based on the Ryan Bundy interview,[6] and did not follow-up or provide any information about the reports or the recording that was created." 12/20/17 Tr. at 10.

At the time of the government's disclosure decisions, however, nothing about the Burke 302 suggested anything existed on which to "follow-up" or to "provide." The Burke 302 says the camera was *not* configured to record, leading the government to reasonably conclude that no recordings existed. Indeed, no record of any electronic recording exists in the files of the FBI. It was not until November 10, 2017, that the government discovered a Tactical Operations Center ("TOC") log with notations memorializing four, entirely innocuous, human observations from the surveillance camera near the Bundy residence.[7] But nothing on the face of the Burke 302 would have led to the TOC log. *See infra*, discussion regarding TOC log.

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[6] The Ryan Bundy undercover interview was disclosed timely on May 6, 2016.

[7] Specifically, the three notations from April 5, 2014 were as follows: (1) "5:35 p.m. -- Small silver SUV arriving at subject's house"; (2) "5:40 p.m. -- Red/Burgundy SUV tinted windows arrived at subject's house"; and (3) "6:07 p.m. -- Bundy located at the Gold Butte Camera on the phone." The fourth notation, from April 6, 2014, read "11:22 a.m. -- Quad observed crossing Bundy property in front of camera, shortly after, camera feed was lost."

The government neither flagrantly nor intentionally suppressed the Burke 302. At the time the government made its initial disclosures, the materiality of this information was not apparent to the government, a concern the government shared with the Court during the evidentiary hearing on November 8, 2017. *See* 11/8/17 Tr. at 19 ("It's not apparent to the Government even as I sit here today how the existence of a surveillance camera during the course of an impoundment operations used for security . . . somehow assists the defense in defending against an assault on a federal officer or extortion or conspiracy to commit same."); *see also id*. at 67, 103. In response, the Court said "the materiality that the Court is accepting to be reasonable is that this information is relevant to developing a possible defense to the allegation that false statements were provided about the existence of snipers and being isolated and surrounded, feeling isolated and surrounded." *Id.* at 103-104.

The government argued in good faith that the information was not material, and this Court concluded that it was. That may make the government wrong, but being wrong does not equate to bad faith, nor does it show a flagrant disregard of the government's discovery obligations. This is especially so because, even though the Court found the government was wrong in its assessment of materiality, that assessment, at the time, was reasonable.

Before the Court's determination of materiality, nothing in the Burke 302 or the FBI LEO reasonably suggested to the government that a camera placed on public lands in proximity of the Bundy property provided any evidence (or could lead to any evidence) to support a valid self-defense claim to assaulting federal officers on April 9 or 12, or otherwise undercut the government's theory of the case. As the government understood its *Brady/Giglio* obligations, the information was not helpful to the defendants in developing a

claim of self-defense because the short-lived placement (April 5-6) of a single surveillance camera on public lands did not pose an immediate threat of unlawful force on April 9 or 12 (the dates of the charged assaults). Nor did it appear to the government that on April 12—when no BLM or FBI presence existed within 5 miles of the Bundy Ranch and the BLM was located in the Incident Command Post (ICP)—the earlier presence of a surveillance camera could be used to support an argument that it provoked Bundy into lawfully inciting his followers and supporters to remove his cattle from the ICP.

Finally, until the Court ruled to the contrary on November 8, 2017, it was not apparent to the government that either the Burke 302 or the FBI LEO could serve as rebuttal to specific overt acts alleged in the Superseding Indictment. On December 20, the Court identified those specific overt acts as follows:

> a. *Para. 58(b):*[8] *the Defendants used the internet and other facilities in interstate commerce to knowingly broadcast false, deceitful, and deceptive images and messages for the purpose of recruiting gunmen and other Followers.*

The government did not foresee that the existence or placement of a surveillance camera (as reflected in the Burke 302 and the FBI LEO) would reasonably bear on the truth or falsity of this recruiting allegation. At the time of its initial disclosures, the government did not anticipate that the Burke 302—which says the camera was damaged on April 6 and removed to the Forward Operating Base —or the FBI LEO—which says

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[8] The transcript of hearing references paragraph 59, *see* 12/20/17 Tr. at 9, but that paragraph alleges that gunmen travelled to Bundy Ranch with firearms to join the conspiracy to assault federal officers. Based on the Court's other comments, we believe this was either a misstatement or typographical error, and that the Court intended to refer to paragraph 58(b). The government did not, and even after the Court's ruling does not, see how the Burke 302 or FBI LEO could reasonably rebut any act alleged in paragraph 59, because that allegation says nothing about a camera, false statements, or the defendants claiming to be surrounded by snipers.

the plan was to place an internet camera with view of Bundy residence—could be interpreted to support a claim that the defendants reasonably believed they were being surrounded or that snipers were employed against the Bundy family. It was not until the November 8 hearing, when the Court ruled on the materiality of law enforcement presence around the Bundy residence, that the government became aware of the helpfulness of this information.[9]

b. Para. 84: The defendants caused images of the Dave Bundy arrest to be broadcasted over the internet, combining them (i.e., the images) with the false, deceitful and deceptive statements to the effect that BLM supposedly employed snipers against Bundy family members.

The arrest of Dave Bundy (which occurred on S.R. 170, miles away from the Bundy residence) did not occur anywhere near the camera and the camera did not record or even witness any images of the Dave Bundy arrest. Thus, the government—acting on information it possessed at the time and its good-faith interpretation of the law—did not foresee that the camera placed miles away from the Bundy arrest site would reasonably support a claim that BLM employed snipers against the Bundy family, particularly when the allegation in context referred to claims of snipers observing the Dave Bundy arrest. In alleging this act, the government was reasonably relying on images Dave Bundy posted on the internet depicting two officers in over-watch positions during his arrest. Those images were not captured by the FBI security camera referenced in the LEO or the Burke 302.

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[9] Indeed, the Court on November 8, 2017, appeared to confirm that, until its ruling that day, the government's determination that it was not required to disclosure information about the surveillance camera was reasonable. *See* 11/8/17 Tr. at 91-92 ("And as I said, it appears from the Court's order that there was no apparent or readily apparent materiality of the item requested, and so the Government does not appear to have acted in bad faith by not providing that. *But, now, I believe*, this Court believes that the Defense has provided sufficient evidence of materiality and a basis for disclosure of information.") (emphasis added).

And as noted above, the government did not foresee that the Burke 302 or the FBI LEO could be interpreted to support a claim that the defendants reasonably believed they were surrounded.

> c. *Para. 88: That on or about April 7, Payne used the internet . . . to recruit gunmen . . . stating falsely . . . that the Bundy Ranch was surrounded by BLM snipers, that the Bundy family was isolated, and that the BLM wanted Bundy dead.*

The government did not foresee that the existence or placement of a surveillance camera, as reflected in the Burke 302 and the FBI LEO, would reasonably bear on the truth or falsity of this allegation. The government's conclusion was informed, in part, by the Court's Trial 2 ruling that "defendants' state of mind regarding their beliefs or why they were present in Bunkerville, Nevada, on April 12, 2014, [wa]s not relevant to the charged offenses or the allowed mere presence defense." ECF No. 2138, at 4; *see also* ECF No. 2770, at 13 (noting prior inability to establish reasonableness of state of mind). The government interpreted this ruling as meaning that, without showing reasonableness, the beliefs and opinions of Bundy supporters (*e.g.*, Payne) as to what happened at Bundy Ranch before they arrived were irrelevant. All of the evidence known to the government at the time of disclosure showed that Payne did not arrive at Bundy Ranch until late April 8 or early April 9. According to the government's information at the time, the FBI was no longer present at the Forward Operating Base or anywhere near the Bundy residence on late April 8 or early April 9. Thus, Payne could not have reasonably observed the FBI, based on the information known to the government.

> d. *Para 92: On or about April 8, 2014 . . . using deceit and deception . . . Bundy told listeners . . . that: "they have my house surrounded . . . the federal government is stealing my cattle . . . [the BLM] are armed with assault rifles . . . they have snipers . . . .*

At the time of its disclosures, the government did not foresee that the Burke 302 or the FBI LEO about the camera could be interpreted by a reasonable person as showing that the BLM had the home surrounded or support any other claims alleged in this overt act. It was not until the November 8 hearing, when that the Court ruled on the materiality of the camera, that the government became aware of the possible significance of this information. Simply put, the government's oversight was not in bad faith.

2. The Court's Finding That the Government Made False Representations

In its oral ruling, the Court said "the government falsely represented that the camera view of the Bundy home was incidental and not intentional, and claimed that the defendants' request for the information was a fantastic fishing expedition." 12/20/17 Tr. at 10. The government respectfully submits that the Court is mistaken.

Camera View. The government has reviewed the record extensively, and cannot find a single instance in which it represented or implied, orally or in writing, that the camera view of the Bundy home was incidental or not intentional. If the government ever made such a representation, it could only have been an inadvertent misstatement or typographical error, as the government has never believed such facts to be true and would never have intentionally made representations to the Court contrary to what it believed to be true.

Indeed, records show the government repeatedly acknowledging that the camera was set up for surveillance of the Bundy house and surrounding area. On November 3, 2017, and in response to a question from the Court, BLM Ranger Mary Hinson testified: "the camera was set up on public land so that it could [ ] monitor the Bundy house, the roadway, the [ ] where the cattle gathering was going to be coming and going, where we had law enforcement officers out in the area." 11/3/2017 Tr. at 118. The April 9, 2014

Burke 302, states that Burke was "dispatched to investigate "the loss of a live camera feed in the area of 3315 Gold Butte Road" (the street address of the of Bundy residence), and that the TOC reported seeing an ATV on the property at the Bundy residence **"**via the live feed" Exh.1.

The Gavin 302 of November 10, 2017, reports that Egbert said the camera (1) was capable of "pan/tilt/zoom," (2) was "set up on public lands on a hillside north of the Bundy Ranch facing toward the road," (3) could be operated remotely that would allow the operator to "change views if necessary," (4) was used as "overwatch" to provide situational awareness, and (5) was damaged on April 6, and thereafter was moved to another location (the staging area) "away from the Bundy Ranch." *See* Exh. 3. Moreover, defense witness Arthur Sessions's testimony on November 8 made clear that the defendants were well aware of the camera. He testified that he could see a device on some kind of tripod or pole on the hillside north of the Bundy residence, and that others could see it as well. 11/8/17 Tr. at 82-84 ("Look they're spying on us.").

Summarizing the facts regarding the camera, at the November 8 hearing, the government proffered to the Court that (1) the camera was initially put up on April 5 and knocked over on April 6, *see* Tr. at 14-15; (2) that after the camera was knocked over, it "was moved from the area north of the Bundy property from the high ground on public lands to an area closer to the staging area . . . away from the Bundy property" Tr. at 15; and (3) that it could "be operated remotely from a site to be able to view the area." Tr. at 13. If any of these comments were construed as representing an "incidental" view of the Bundy home, that was certainly not the government's intention and the government apologizes for any misunderstanding.

Fishing Expedition. Next, the Court stated the government claimed that the defendants' request for information about the camera was a fantastic fishing expedition. 12/20/17 Tr. at 10. The reference to "fantastic fishing expedition" comes from the government's response to Ryan Bundy's Motion to Compel (ECF No. 2299) (Sept. 9, 2017). Among other things, that Motion sought information about the "make, model, and characteristics of every piece of equipment being used on the hills above the Bundy home and the American People between March 26, 2014, and April 12, 2014." It also sought all data "captured by use or aid of the mysterious devises [sic] including but not limited to photographs, video, audio, mapping, painting/target acquisition information, or any and all other information related to these devices." In his affidavit attached as Exhibit A to his motion, Ryan Bundy "speculated that it was for video and audio surveillance for remote viewing and or 'painting' the Bundy home for artillery or airial [sic] target acquisition." *Id.*

The government's September 17 response stated, in relevant part, as follows:

> On its face information about surveillance cameras around the Bundy residence, even if, as he claims fantastically, they were capable of allowing for aerial "target acquisition" or functioning as "parabolic listening devices," is immaterial to the charges of assaulting, threatening, extorting, obstructing law enforcement officers and conspiring to do these acts. Thus, it is unclear how such information would aid in Bundy's defense.
>
> Bundy also failed to meet and confer either through writing or through his standby counsel prior to moving to compel. LCR 16-1(c) (Before filing any motion for discovery, the attorney for the moving party must meet and confer with the opposing attorney in a good-faith effort to resolve the discovery dispute.) Instead, he filed the instant motion and attached affidavit wherein he describe the BLM as a "military force" and as "military armed personnel." Bundy's motion appears to be little more than a fantastical fishing expedition for evidence justifying attacking law enforcement officers because he did not like the way they dressed while enforcing court orders. In essence, his motion is another attempt at jury nullification.
>
> While Bundy's motion fails to establish any materiality of the information he seeks and should be denied, the government has and will continue to meet all of its discovery/production obligations in this case.

ECF No. 2340; *See also* ECF No. 2526 (Judge Leen's September 25 order denying Ryan Bundy's motion for, *inter alia*, failing to show materiality)).

A "fantastical fishing expedition" referred to Ryan Bundy's request for information about the capabilities of technical equipment, combined with his description of BLM as "a military force" and "military armed personnel," and his "speculat[ion]" that the camera was being used to "paint" the Bundy home "for artillery or [aerial] target acquisition." Those assertions made it appear to the government that he was seeking this information for the purpose of seeking jury nullification.

The information provided to the Court about the camera began on November 3, 2017, through testimony of BLM Ranger Mary Hinson. As recounted above, none of that information was false or misleading or intended to be false or misleading.

The government took the legal position that existence of a surveillance camera was immaterial, believing in good faith this was a legally sound position. That belief notwithstanding, the government never represented, and certainly never intended to imply, that *the Court's request* for information about the surveillance camera was a "fantastic fishing expedition." The government did not and would not use those words with respect to any request by the Court, and certainly never intended such an implication.

The government regrets if any statements it made to the Court conveyed that the short-lived surveillance camera had only "incidental" views of the Bundy ranch, or that the government viewed any requests for information by the Court as a "fishing expedition." As demonstrated by the pleadings and hearings recounted above, this was certainly not the government's intention. The government has at all times been honest with the Court and worked to comply with all Court orders and requests in good faith.

C. The Government's Inadvertent Failure to Disclose the TOC Log Does Not Rise to the Level of Flagrant and Reckless Disregard to Warrant Dismissal.

On November 8, 2017, in the course of discussing whether any notes existed regarding observations from the surveillance camera, the government represented that any notes would be located in the police assist file—not an investigative file—and that its review revealed no notes. 11/8/17 Tr. at 25. It further represented that "there are no contemporaneous notes or other documents generated by what they were viewing that exist in the file and the only place we can look for that is the file." *Id.* at 58. At the time of that representation, the government had searched known files where documents would likely be found to exist and found no records of recordings, written or otherwise.

When the government made those representations, the prosecutors understood that any written documentation would be located in the FBI police assist file or the criminal investigation file. The next day, an agent assigned to the Tactical Operations Center ("TOC") at the time of the impoundment assist operation recalled that there might be a TOC in the TOC vehicle. It is the government's understanding that the TOC log was indeed found in the vehicle, as opposed to an investigation or police assist file, because members of the FBI SWAT never took any law enforcement action during the time the TOC was deployed.

The TOC log was recovered from the thumb drive on November 10 and disclosed to the defendants on November 11, 2017, redacting only agent call signs. *See* Exh. 4. The log reflects the activities of SWAT personnel, including notations reflecting observations from the camera feed, and the fact that that snipers[10] had been inserted for training on

[10] *See* pp. 32-34 for a discussion of the government's use of the term "snipers" in this case.

April 5 (entries 34, 35, and 36). Upon defendants' request for the names of the agents, on November 17, 2017, the government produced a copy of the TOC log with the names of the agents superimposed over the call signs. Exh. 5.

At the December 20 hearing, the Court stated that the unredacted TOC log was late disclosed on November 17, 2017, and that the FBI created the document, was aware of the evidence, and chose not to disclose it. Tr. at 14. The government respectfully submits that its failure to discover the TOC log before November 9 was at most inadvertent, and that an understanding of how records are maintained for the TOC when SWAT is *not* deployed reasonably explains that the failure to discover the log sooner demonstrated neither reckless disregard for the government's disclosure obligations nor intentional failure to disclose.

TOC logs are intended to account for the presence of personnel and assets assigned to a SWAT team. At least in the FBI Las Vegas Field Office, the TOC log generally is not placed into an investigative file until the need arises. In this case, because SWAT did not take any law enforcement action during the impoundment operation, the TOC log remained in the TOC vehicle and was never put in either the police assist file or the investigative file.

The prosecution team in this case includes the FBI, and the government is responsible for searching for and disclosing any *Brady/Giglio* information in the possession of the FBI. But because the SWAT team did not take any law enforcement action during the impoundment operation, the FBI believed there was no reason to put the log in a file where it would have been reviewed by the prosecution them. Moreover, before the November 8 hearing, the FBI had no reason to believe the TOC log contained

discoverable information, and the prosecution team had no reasonable way to know of the log.

The government believes its failure here was at most inadvertent. But even if the Court were to conclude its conduct rises to the level of negligence, dismissal with prejudice would be unwarranted. *See Jacobs*, 855 F.2d at 655-56 ("[A]ccidental or merely negligent governmental conduct is insufficient to establish flagrant misbehavior."). In addition, there is no substantial prejudice because the log has been disclosed.

D. The Government's Inadvertent Failure to Disclose the 2015 DelMolino 302, the 2015 Felix 302, and the 2014 Racker 302 Does Not Rise to the Level of Flagrant and Reckless Disregard to Warrant Dismissal; Nor Did It Result in Substantial Prejudice.

On April 12, 2014, hundreds of Bundy supporters surrounded the BLM Incident Command Post, forcing withdrawal of BLM personnel and the release of cattle impounded pursuant to Court Orders. In the week leading up to that event, more than one hundred law enforcement officers participated in security for the impoundment. In its immediate aftermath, investigators interviewed numerous individuals about the events of that day, and then re-interviewed many of those same individuals regarding the entire week of the impoundment. Most law enforcement officers wrote one or more reports about their activities and observations. Many government witnesses have authored anywhere from one to four or more written statements.

Between April 2016 and October 2017, the government produced more than four hundred witness statements including BLM, National Park Service ("NPS"), LVMPD, and NHP Memoranda of Activity ("MOA") and officer reports; 302 summaries of interviews with victims and law enforcement officers, federal and state civilian employees,

and third party witnesses; and BLM memoranda of interviews of the same.[11] Although the government sought to ensure that all reports for a testifying officer had been produced, on occasion prosecutors discovered otherwise, *e.g.*, that a supplemental 302 was produced without the officer's report, or vice versa.

The government endeavored to produce any such Jencks materials that had been inadvertently excluded from production before witnesses testified. NHP Sergeant Shannon Serena's officer report provides an example. Before Sgt. Serena took the stand in the first trial, the government discovered that his 302 had been produced in January 2017, but his officer report had not. Accordingly, the government produced this report to the Trial 1 defense counsel and then to all defendants in March 2017. *See* Exh. 6 (Discovery Indices), at 51.

During the third trial, the government produced the 302s discussed in the Court's December 20, 2017 Mistrial Order: (1) a March 2015 supplemental 302 summarizing an interview of BLM Special Agent ("SA") Edward Delmolino ("2015 Delmolino 302"); (2) a 302 summary of interview with BLM Ranger Curtis Racker, dated May 14, 2014; and (3) a 302 summary of interview with NPS Officer Ernesto Felix, dated January 12, 2015.

In its December 20, 2017, oral order, the Court found that these 302s were "favorable to the accused and potentially exculpatory," and that they had been untimely disclosed. It concluded that the 302s "bolster the defense and [are] useful to rebut the Government's theory" because they included "information regarding BLM individuals

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[11] From the commencement of this criminal case, the government expressed its goal of producing witness statements constituting Jencks material thirty days prior to trial. The Court explicitly advised the defendants that the government was not required to do so by law. *See*, *e.g.*, ECF No. 1017 at 6-7. No benefit inured to the government from producing these statements early, but it was willing to do so to allow the defendants time to review the statements in preparation for trial.

wearing tactical gear, not plain clothes, carrying AR-15s assigned to the LP/OP on April 5th and 6th 2014," and that this information "potentially rebuts the indictment's allegations of overt acts, including false pretextual misrepresentations that the Government claims the Defense made about snipers, Government snipers, isolating the Bundy family, and defendants using deceit and deception to normally recruit gunmen." 12/20/17 Tr. at 12-13.

While the government inadvertently failed to disclose these 302s, its failure does not amount to a flagrant or intentional violation of its discovery obligations. *See Jacobs*, 855 F.2d at 655-56 ("[A]ccidental or merely negligent governmental conduct is insufficient to establish flagrant misbehavior."). Nor is there substantial prejudice. Indeed, even if the government had anticipated this Court's ruling that the information in those 302s could be helpful to the defense or potentially exculpatory, it would have had no reason to intentionally withhold them because it had already produced abundant discovery containing the same, or very similar, information.

1. 2015 Delmolino 302

The 2015 Delmolino 302, produced after the third trial commenced, stated in relevant part:

> During the nights of April 5 to 6, 2014 and April 6 to 7, 2014, Delmolino held his LPOP position in the desert area east of the Bundy Ranch. During this time Delmolino was dressed in BLM tactical clothing and carried a BLM AR-15 rifle. Delmolino utilized a seismic sensor on Old Gold Butte Road near the Bundy Ranch to alert him and BLM Ranger Terrell Bradford, who was located also in the desert to the north of Delmolino, of vehicles traveling northbound on Old Gold Butte Road.

Exh. 7.

The government's failure to disclose the 2015 Delmolino 302 was simply an oversight. Prosecutors did not discover that oversight before the third trial because

Delmolino was never listed as a government witness in any of the trials. *See* ECF Nos. 1152, 1424, 1670, 2116, 2583 (Government Witness Lists).

On November 3, 2017, counsel for Cliven Bundy sent discovery requests to the government regarding surveillance of the Bundy residence. Having attended the Delmolino interview in 2015, government counsel knew Delmolino mentioned using a seismic sensor near the Bundy home. Counsel searched for the production number for that 302, only then discovering it had never been produced. Government counsel immediately sent the 302 to defense counsel via email. *See* Exh. 8 (Email from government counsel to Defense dated 11/7/17).

Although the government inadvertently failed to disclose the 2015 Delmolino 302, it had already turned over numerous other documents containing the same, or substantially similar, information. For example, in May 2017, the government produced the BLM Operation Plan, which described the night LP/OP around the Bundy residence as follows:

> LP/OP Teams (Night Shift): LP/OP Teams will be strategically placed at elevated positions around the Bundy residence each evening. They will operate as dual units and maintain a 360-degree visual surveillance of the Bundy residence at all times when feasible. . . . *The LP/OP Teams will wear multi-cam attire with subdued police markings and operate as covertly as possible.* . . .
>
> LP/OP Teams will utilize binoculars, spotting scopes, night vision goggles, and thermal imaging devices as appropriate to maintain visual surveillance of the Bundy residence. *The LP/OP Teams will have agency issued rifles with them at all times.* Team members will not utilize rifle optics to conduct surveillance unless they identify a threat and deem the use of deadly force may be eminent [sic].

Exh. 9 (emphases added). The government also produced documents showing that the operation plan had been put into action.

In March 2017, many months before trial, the government produced a 2014 Delmolino 302, which primarily discussed his activities and observations on April 11 and

12, 2014. The government also produced Delmolino's 2014 MOA, which noted that, during the April 4, 2014 briefing, Delmolino received this assignment to maintain a "lookout post/observation post (LP/OP)" with BLM Ranger Terrell Bradford beginning on April 5, and that his "call sign" for the operation was "Oscar 2." Exh. 10; *see also* Exh.11 (similar 2014 Bradford interview).

In December 2016, the government produced dispatch records chronicling Delmolino's activities in the LP/OP above Bundy's residence and his retrieval and relocation of the seismic sensor. *See* Exh. 12 (dispatch records). And even earlier, in June 2016, the government produced maps reflecting drop points (also referred to as DP)—location coordinates used during the impoundment. These maps clearly showed the location of the "DPX/DP X LPOP manned by Delmolino and Bradford near the Bundy residence. *See* Exh. 13.

2. 2014 Racker 302

As noted above, in June 2017, the government disclosed the Operation Plan discussing BLM Night LP/OP around the Bundy residence. Exh. 9. Also, on March 31, 2017, the government disclosed that the officers assigned to Night LP/OP positions included Dan Barnes, Edward Delmolino, Curtis Racker, and Terrell Bradford. Exh. 14. An additional officer, Joe Wilcox, was also assigned to Night LP/OP/Rover. *Id.*

During the third trial, the government sought to respond to discovery requests in Ryan Payne's November 27, 2017 motion to dismiss. ECF No. 2906. Although defendants knew well before October 1, 2017, which officers were assigned to Night LP/OP overlooking the Bundy residence, they did not request any information relating to those officers until after the third trial began.

In response to Payne's mid-trial request, the government produced three reports, including the 2014 Racker 302 and the 2015 Felix 302.[12] The 2014 Racker 302 states in relevant part:

> On approximately 04/04/2014, Racker was assigned to a listening post/observation post (LP/OP) position. Initially Racker conducted LP/OP duties in the area of the Bundy Ranch and was later pulled back to the ICP with an LP/OP position where he had the night shift. Racker's partner was identified as Special Agent Dan Barnes . . .

Exh. 15.

On December 15, 2017, the government also provided a 2014 MOA authored by BLM Agent Dan Barnes, which stated:

> I arrived on the detail on evening of Sunday, April 6, 2014. My original assignment was LP/OP. Throughout the week, I partnered with Ranger Curtis Racker, "Oscar 3". We worked the night shift, normally from 1600/1800 hours to 0600/0800 hours. We shifted from a LP/OP assignment to a roving assignment. We covered many roads surrounding the ICP at night looking for any activity.

Exh. 16.

Although neither of these reports provides any new substantive information regarding an LP/OP near the Bundy residence, defendants argued these disclosures bolster their claims that the Bundy household was surrounded and snipers were in the area. ECF No. 3027, n.8. Even if the government had anticipated this argument, it would have had no reason to intentionally withhold this 302 because it had already disclosed the sum and substance of the information in it. As discussed above, the defendants clearly knew, according to the organization chart, that as many as five BLM officers were assigned to LP/OP positions around the Bundy residence well before October 1, 2017.

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[12] These documents were neither raised nor discussed in Payne's Motion to Dismiss that was under submission as of the Court's December 20, 2017 ruling. The government was therefore unable to address them with the Court before its oral ruling.

3. 2015 Felix 302

In March 2017, the government produced two MOAs authored by NPS Officer Ernesto Felix, as well as a 302 summary of an interview with Felix dated April 22, 2014. Exh. 6. The 2014 Felix 302 stated: "Felix was assigned the over watch position on the incident when Dave Bundy was arrested." Exh. 17.

In December 2017, as the government scoured for documents responsive to Payne's November 27, 2017, discovery requests, it found that the supplemental 2015 Felix 302 had inadvertently not been produced. Like Delmolino, Felix was not called as a witness for the government in any trial; thus, this inadvertent omission had gone undiscovered. The 2015 Felix 302 stated that, on April 6, "Felix observed a BLM Agent on high ground in a 'tactical over watch position', southwest of where Dave's arrest occurred." Exh. 18.

It appears that the Court—perhaps relying on defense representations—understood this Felix statement regarding over watch during Dave Bundy's arrest to be new information. Specifically, Payne asserted that the defense "received additional reports on December 15, 2017, bolstering the notion that snipers were in the area and that the Bundy household was surrounded." ECF No. 3027, n.8 (citing 2/9/15 302).

Long before October 1, 2017, however, the government had produced numerous documents with the same information, *including dash cam video recordings showing Officers Brunk and Russell in over watch above the April 6 Dave Bundy arrest site*, Bundy family members posting on social media that "snipers" were pointing weapons at the family just for taking photographs,[13] and Brunk's and Russell's own reports stating that they were in an over

[13] In a complaint filed with LVMPD, Ryan Bundy alleged that he "saw and photographed men on our hill tops with sniper rifles pointed at unarmed men women and

watch position above Dave Bundy on April 6, 2014. Felix's statement that he saw these officers could hardly bolster this point more than the dash camera videos—produced to the defendants in May 2016—clearly depicting the officers in those positions. Thus, the government did not, and would not have had any reason to, intentionally withhold this supplemental 302.

4. The government's belated disclosure of the 2015 Delmolino 302, 2014 Racker 302, and 2015 Felix 302 was not a flagrant Brady *violation.*

Before defense arguments were raised during the third trial and the Court issued its resulting rulings, it was not apparent to the government that these 302s were helpful to the defense in defending against the charges of assault, threatening, extortion, obstruction and the conspiracy to do these acts.[14] This was especially so because none of the charged assaults took place near the residence, but rather several miles away. Although the Court ruled differently, the fact that the government timely produced the same information in various ways (*e.g.*, BLM operation plan showing night surveillance, organization charts showing posts, night surveillance records, similar 302s) shows the suppression was neither intentional nor flagrant. Notably, when the defense requested more information on

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children" GB.014006 (Produced to Trial 1 defendants in January 2017, and to Trial 3 defendants in May 2017). Notwithstanding this allegation, no photograph depicting officers pointing weapons from sniper positions has ever been produced by any defendant to the government.

[14] Before opening statements, the government noted "the theory of the defense is now becoming apparent to the government, so we want to make sure our review is in accord with the theory of the defense," and requested a one-week continuance because "[t]he last thing we would want to do is discover [new] email, during the course of the trial . . . and . . . run the risk of a mistrial because of representations that openings would have been different, cross-examination would have been different." 11/14/17 Tr. at 7. Payne agreed that "it wasn't fair to go ahead with the trial," but requested a mistrial instead of a continuance. *Id.* at 9-12 (other defendants generally agreeing).

Delmolino's LP/OP over the residence, the government re-interviewed him. *See* Exh. 19 (Willis 302 attaching map, produced 11/22/17). No substantial prejudice resulted.

Because the government provided nearly identical information through other sources, no bad motive can be inferred from belated disclosure of these 302s. The government did not intentionally delay production or act in flagrant disregard of its Constitutional and statutory obligations. Thus, dismissal with prejudice is not warranted. *See Kearns*, 5 F.3d at 1254 (reversing dismissal of indictment because defense received document before end of trial and erroneous responses due to "non-invidious factors rather than to intentional deception" do not constitute "flagrant misbehavior").

5. The government did not intentionally hide or misrepresent whether snipers were deployed during the impoundment operation.

Background. Payne insinuates that the government operated under the belief it had to produce only information specifically including the word "sniper." ECF No. 3027 n.11. He further asserts the 2014 Brunk 302 and the 2015 Brunk 302 were the only produced BLM reports referencing "sniper." *Id.* Apparently relying on these representations, the Court found "evidence of willfulness" because the April 14, 2014 Pratt 302 about Brunk mentioned a BLM sniper, but in February 2015, FBI Agent Willis drafted a new report clarifying that Brunk "never said he was a spotter for the sniper." The Court noted prosecutors "were present at this later interview which was documented specifically to be held for the purpose of clarifying the earlier interview answers," (*i.e.*, whether the word "sniper" was used). The court concluded this presence, "coupled with the Government's strong insistence in prior trials that no snipers existed, justifies the Court's conclusion that the nondisclosure was willful." 12/20/17 Tr. at 14.

The government respectfully disagrees. The government did not seek to obfuscate law enforcement officers acting as snipers.

Sniper Disclosures. In the first two trials, other than reference to the officers above Dave Bundy on April 6, the focus of the testimony and argument regarding snipers concerned the defendants' assertion that snipers were on the mesa to the northeast of the BLM impoundment site. The government advised the Court that no officers on the mesa were manning sniper positions, but it never insisted or suggested that snipers did not exist elsewhere on April 12.[15]

With respect to discovery, the government produced countless reports, well in advance of trial, documenting federal officers deployed in "tactical positions," "marksmen positions," and "sniper positions," many (but not all) of which explicitly used the term "sniper." For example, the 2014 NPS Special Events Tactical Team ("SETT") Officer "J.R." 302 (produced to Trial 1 defendants in January 2017, and to Trial 3 defendants in May 2017) recounted that "[J.R.] . . . responded to the area of the ICP as part of the designated sniper team." GB.018868. Similarly, the 2014 BLM Ranger "J.L." MOA (produced to Trial 1 defendants in January 2017, and to Trial 3 defendants in May 2017) recounted that [J.L.] "identified three precision rifles, operators … and spotters … within

[15] The government argued in the first trial that, *even if* officers were deployed into what could be characterized as sniper positions, the defendants could simply not make a self-defense or defense of others showing, and therefore officer conduct was irrelevant. The government correctly advised the Court that no officer positioned on the mesa significantly higher than the bridge and the Incident Command Post were manning sniper positions. *See* 2/16/17 Trial Tr. at 113 (BLM Ranger Briscoe testifying that there were no snipers on the mesa). The government took the same position in the second trial. *See* 8/10/17 Trial Tr. at 82-85. The government neither hid nor misrepresented that officers, in the wash or in the ICP *below* the I-15 bridges, may have taken up sniper, counter-sniper, or long range precision positions.

our SETT Team"; officers "provided overwatch from a hilltop overlooking the SOB" as BLM prepared to depart the ICP; officers called for another officer "to bring his .308 precision rifle up onto our hilltop"; and, perhaps most notably, officers identified a sniper team in the area and were initially concerned that that team was "not friendly," but were able to confirm that "the team was in fact part of LVMPD SWAT." GB.018876-9; *see also* GB.019656-8 (referencing "sniper" position) (2014 MOA by BLM SA "L.S.", produced to Trial 1 defendants in January 2017, and to Trial 3 defendants in May 2017); GB.018651 (referencing "marksman observe team") (2014 NPS SETT Officer "D.K." MOA, produced to Trial 1 defendants in January 2017, and to Trial 3 defendants in May 2017).[16]

These examples show the government did not hide or obfuscate information about officers and agents participating in sniper and counter-sniper operations. The government's good-faith efforts to produce such information demonstrates that any belated disclosure was not flagrant. Moreover, no substantial prejudice resulted because the information has been disclosed.

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[16] Other examples with similar references, too numerous to describe at length, include GB.019515, GB.018728, GB.019956, and GB.020180. The government consistently produced documents to the defendants long before their respective trials in which SETT officers were deployed in the wash on April 12 (in positions *below* Eric Parker and others on the I-15 bridge), but who were designated as long range sharp shooter/sniper teams.

During the first trial, Swanson likewise testified that he and other officers were assigned to cover officers under the bridge and act as counter-snipers. *See* 3/1/17 Tr. at 117-119. The government also produced Payne's own statements indicating that Cliven Bundy showed him exactly where various BLM "sniper positions" were, and that Payne developed "counter-sniper positions." GB.007594 (produced in June 2016).

6. The government did not intentionally withhold maps.

In 2016, the government produced maps to the defense reflecting the coordinates by which officers identified their locations during the impoundment, *i.e.*, the drop point locations. Exh. 13. These maps clearly identified drop points near the Bundy residence. *Id.*

On December 15, 2017, the government produced additional maps in response to the defendants' requests for maps. Exh. 20. These maps were not the subject of the Motion to Dismiss the Court considered on December 20, 2017, thus the government was unable to respond to Payne's assertions about them. *See* ECF No. 3027, at 19 n.8. A comparison of the maps produced in 2016 and 2017, however, shows no material differences in identifying the LP/OPs. All produced maps used the same "Drop Point" letter and number coordinates. The only difference between the maps produced in 2016 and December 2017 is the latter set zoomed in on areas within the closure area to reflect where the cattle impound operation took place on a particular day (*not* where night operations or LP/OP operations took place). The government timely gave the defense all the information they needed on these locations before October 1.

Setting aside the congruency of the maps, the government did not intentionally withhold the maps produced on December 15, 2017. Nor would it have had any reason to do so. The government believed in good faith that it had complied with its obligation to disclose LP/OPs. The timing of the disclosure was not in flagrant disregard of discovery obligations.

The common thread among the belatedly disclosed 302s, documents referencing snipers, and maps, is the government's diligent efforts to produce information providing the same substance earlier in the case. Although the Court identified mistakes made by the government in this regard, these mistakes do not rise to the level of flagrant suppression or

disregard of obligations.[17] The substantial disclosure of other documents disclosing similar facts, locations, and events shows the government did not withhold these materials to gain tactical advantage. To the contrary, the government's nondisclosure was inadvertent and does not justify the extreme remedy of dismissal, especially where no substantial prejudice resulted.

E. The Government's Nondisclosure of Certain Information about Threat Assessments Does Not Rise to the Level of Flagrant and Reckless Disregard to Warrant Dismissal; Nor Did It Result in Substantial Prejudice.

The government's decision not to disclose the 2012 threat assessments before November 17, 2017, was made in good faith. Considering the nature of threat assessments generally, the government's review of case-related threat assessments reasonably led it to conclude that the nondisclosed material was neither helpful to the defense nor potentially exculpatory.

1. The Nature of Threat Assessments

Threat Assessments are an evaluation of factors indicative of nonviolence and of violence. These factors are frequently referred to as threat mitigators and threat enhancers. Threat mitigators and threat enhancers function like pluses and minuses in an equation. Just as the pluses and minuses are factored together to reach a sum, the threat mitigators and threat enhancers are factored together to reach an assessment. The principal value of the assessment is the final assessment or, as in an equation, the sum.

[17] Although the Court referenced 1,000 pages of post-October 1 discovery (12/20/17 Tr. at 20; ECF No. 3027 at 36), a review of these materials shows the majority are Jencks material. The documents the Court ruled to be untimely *Brady* (excluding the OIG reports) is fewer than 200 pages.

2. The Threat Assessments in this Case

The Court's oral ruling addressed three 2012 threat assessments—the FBI BAU Threat Assessment, the Southern Nevada Counterterrorism Center Threat Assessment, and the BLM OLES Threat Assessment. The Court also addressed the March 24, 2014 FBI Law Enforcement Operations Order (actually dated March 28, 2014), and the Gold Butte Risk Assessment, neither of which was a threat assessment.

2012 FBI BAU Threat Assessment. This assessment was limited solely to the question whether Cliven Bundy posed a threat. It did not assess the risk of violence presented by members of the Bundy family, their associates, or anyone else, because the BAU personnel lacked sufficient information to assess those threats. Exh. 21 (FBI BAU Threat Assessment), at 2. After identifying and considering threat mitigators and threat enhancers, the FBI BAU Threat Assessment concluded "there is a low to moderate risk of significant or imminent violence at this time." *Id*. at 7.

Southern Nevada Counterterrorism Center Threat Assessment. This assessment presented its results in summary form rather than providing a final risk assessment (*e.g.*, low, moderate, high). This assessment was based on LVMPD interviews with people from Arizona, Nevada, and Utah to determine how "the Bunkerville and surrounding communities may react when the cattle removal begins." Exh. 22 (Southern Nevada Counterterrorism Center Threat Assessment), at GB.023900. The summary of this assessment concludes:

> It is unlikely Mr. Bundy will negotiate with the BLM, and he may resist any action taken by the BLM to remove his cattle. Resistance is expected to be in the form of protests and peaceful gatherings, but some individuals have stated that they would defend themselves and return fire if fired upon. There is the potential that the use of non-lethal weapon or instrument could be misinterpreted as being fired upon and quickly escalate the violence of any confrontation.

Id. at GB.023902.[18]

BLM OLES Threat Assessment. This assessment was based on interviews of eighteen people familiar with Cliven Bundy or in contact with members of the Bundy family, and on an interview of Cliven Bundy. These individuals expressed both positive and negative opinions, leading the writer of the assessment to conclude that the general opinion was that the "Bundy's response to an impoundment operation could be '50/50' on a physical confrontation or a passive response." Exh. 23, (BLM OLES Threat Assessment), at GB.023979.

FBI Operations Order. This Order was not a threat assessment, but contained portions of the FBI BAU threat assessment. It noted plus and minus factors relevant to risk of confrontation, including that Cliven Bundy "has been assessed by BAU as not being violent based on past history, but if backed into a corner could be." *See* Exh. 2 (FBI Operations Order), at 2. It also stated that Ryan Bundy, on the other hand, "[h]as had violent encounters with law enforcement officers in the past. As a result of interviews with family members and associates of Cliven Bundy, the majority have warned interviewers that Ryan could be violent." *Id*. at 3.

Gold Butte Risk Assessment. This assessment did not assess the risk of threat posed by the Bundys, their associates, and others, but instead assessed whether BLM was prepared to conduct the impoundment within an acceptable range of risk. This assessment included the strategic communications provision discussed below. *See* GB.023914-023923.

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[18] The assessment also explained that a Bundy relative reported that Bundy "plans on conducting a citizen's arrest against any BLM official attempting to remove his cattle," and in the views of LVMPD, "[a]ny response by BLM to being placed under citizen's arrest may escalate the violence level involving Mr. Bundy, his family, or the citizens of the surrounding community." *Id*.

3. Application of Threat Assessments to this Case

The BLM prepared for the risk of confrontation posed by Cliven Bundy and his supporters—not just Cliven Bundy. Indeed, BLM's objective was to protect the impoundment operation from all forms of threats. The threat assessments were aids to achieving that objective.

Because threat assessments are created to assess overall risk considering myriad factors, and BLM's objective was to protect the operation from *all* forms of threat, it was not readily apparent to the government that the defendants would seek to use snippets of the threat assessments piecemeal and out of context as a viable defense. That is, the government did not anticipate the defense could extract one or more mitigating factors and point to it as conclusive evidence that, *e.g.*, Cliven Bundy personally was not a threat, and therefore BLM decided unreasonably to deploy a large law enforcement presence. But the reasonableness of BLM's law enforcement presence (*e.g.*, size, officers' dress)—an issue not material to the outcome of the case—was based on the risk of threat presented by *everyone*, not just Cliven Bundy. Just as pluses and minuses are used to calculate a sum or ingredients are used to bake a cake, so too are factors used in a threat assessment. Ingredients of a cake are not meant to be removed and eaten separately; nor are factors in a threat assessment meant to be removed and applied separately when evaluating BLM's mission. This is particularly so here where the BLM was not assessing whether Cliven Bundy alone presented a threat, but whether all persons involved—as a whole—presented a threat. This is how the government viewed the threat assessments when making its good-faith discovery decisions.

The information relied on by the Court were just some of the factors (or ingredients) the defendants extracted from the overall assessments. The defendants did not

rely on the whole assessments to make their argument. *See* ECF 3027 (Payne's Sur-reply), at 26-31.

Additionally, the Government did not consider the overall 2012 Threat Assessments material or helpful to the defense because they involved a proposed cattle impoundment operation that did not occur. It based its discovery decisions on the conclusion that this information was irrelevant to the charges and, at best, stale. Ultimately, the Court rejected the government's position and found that the assessments should have been disclosed earlier. That the Court concluded the government was wrong, however, does not mean that the government's error constituted a flagrant violation or reckless disregard of its discovery obligations. In addition, no substantial prejudice resulted because the assessments have been produced.

4. Disclosures of the Threat Assessments

The government disclosed the 2014 Threat Assessment before the first trial because BLM ASAC Rand Stover used it to refresh his recollection while preparing to testify. Neither ASAC Stover nor any other witness testified in the first two trials about the 2012 impoundment, other than ASAC Stover testifying summarily that it was planned but canceled.

Civilian BLM employee Rugwell testified in the third trial about the planning of the 2012 impoundment, stating that the LVMPD was included because of the potential violence. 11/16/17 Tr. at 35-39. The government did not ask Rugwell to testify about any 2012 Threat Assessment, but she was asked on cross-examination about the FBI BAU Threat Assessment.

In preparation for testifying at trial, government counsel and an FBI agent interviewed Rugwell by telephone on November 3, 2017. She did not review any threat

assessment during trial preparation, but said she had reviewed an FBI threat assessment in anticipation of commencing the impoundment action in 2012. The FBI agent took notes of the interview. On December 1, 2017, soon after government counsel realized he had inadvertently failed to disclose the FBI agent's notes, he produced them. *See* Exh. 25 (12/1/17 email from government counsel to defense counsel with copies of notes of the telephonic November 3, 2017 interview and of an October 26, 2017 in-person meeting).

The government produced the 2014 BLM threat assessment on March 31, 2017, without its attachments. When Payne requested "all threat assessments in this case" on July 5, 2017, the government responded the same day by confirming its belief that it had complied with all disclosure obligations. Exh. 26. The government's response was based on its good-faith belief that the 2012 threat assessments were not relevant or helpful to the present case and thus were not discoverable.

5. The "OIG" report

As this Court is aware, the 2012 BLM OLES Threat Assessment and the March 6, 2014, JTTF report mistakenly reference an "OIG report" when referring to an Office of Internal Affairs report (*hereinafter*, "OIG/IA Report"). This distinction is important to understanding why the report was not located earlier.

a. The Government's efforts to locate the report

On September 29, 2017, during trial preparation, government counsel learned of an "OIG" report. Government counsel asked BLM Special Agent Kent Kleman to locate the report. Between September 29, and October 2, SA Kleman contacted several people within BLM who might have known about the report. None did. SA Kleman also contacted an investigator from the Department of Interior, OIG, and had him search OIG's database for the report. He too could not locate the report. *See* Exh. 27 (SA

Kleman's notes reflecting efforts he undertook to find the report); Exh. 28 (emails between government counsel and SA Kleman summarizing efforts to find report).

The government continued to look for the report. On December 2, 2017, government counsel found in the USAO database several pages of the report eventually produced, but under the name "Mojave Desert Tortoise Complaint." The government then immediately requested that SA Kleman locate the complete report, and he did so from BLM's Office of Professional Responsibility (formerly known as its Office of Internal Affairs). The government obtained a copy of the report and produced it December 8, 2017. Along with the report, the government produced a statement from the Chief of BLM's Office of Professional Responsibility explaining why the report was difficult to locate. Exh. 29 (Letter from OPR Chief Tom Huegerich to government counsel).

b. The government accurately represented its understanding of the existence of the OIG report, and used the phrases "urban legend" and "shiny object" to convey its then-current understanding of the evidence and defense arguments.

In its December 20, 2017 oral ruling, the Court found the OIG/IA Report was willfully suppressed, "despite representations by the Government that this report was an urban legend and a shiny object to distract the Court." The government respectfully believes the Court misunderstood the government's statements. The government did not represent to the Court that the report was *actually* an urban legend, but rather that the report *appeared to be* an urban legend based on the government's inability to verify its existence, let alone find it.

On November 20, 2017, the defendants informed the Court that they believed an OIG report existed. Based on the information provided by SA Kleman, the government represented to the Court that the prosecution understood that no *OIG* report existed, but based on updated information, the purported OIG report may actually be a GAO report.

The next day, the defense renewed its request and the government responded, "We are unaware of any OIG report that is referenced in this threat assessment. That does not mean we won't continue to look, but as I stand here today, I'm not aware of it." 11/21/17 Tr. at 94; Exh. 30.

A few minutes later, the government, in the context of discussing with the Court whether the OIG report existed and on the basis that it could not locate the report, said "that OIG report—whether this [threat] assessment got it right, or that's urban legend, or if there is, in fact, an OIG report, it—I can represent we don't have an OIG report in our possession directing the BLM to enforce a federal district order requiring Bundy to remove his livestock." *Id.* at 98. The transcript of the government's statements shows the government candidly reported to the Court it was unaware of the report and had not yet received any confirmation that it actually existed. The government did not make a representation to the Court that in fact the report did *not* exist.[19]

6. The Disclosure of the Gold Butte Risk Assessment and BLM's Strategic Communications Plan

The Court ruled that the government willfully failed to timely disclose the Gold Butte Risk Assessment. It found that the Gold Butte Risk Assessment was material because it supports a defense theory that BLM could have prevented a large crowd from assembling in Bunkerville by following its strategic communications plan to publish its

[19] Likewise, the government did not represent that the OIG report was a "shiny object" to distract the Court. The government used the phrase "shiny object" in response to the defendants' assertion that the *2012 threat assessment* would be helpful to their defenses, not in response to their arguments about a purported OIG report: "The threat assessment has nothing to do with what was actually occurring on the ground between the 5th of April and the 12th of April. . . . But that's got nothing to do with *the threat assessment from 2012*. So, I understand—you know, so, this is just a shiny object that's, you know, being thrown around on the wall here to totally distract us all from what the issue is that we are here for." 11/21/17 Tr. at 114 (emphasis added).

"'talking points' in order to stay ahead of negative publicity." The government made a good faith decision not to produce the Gold Butte Risk Assessment because it was not readily apparent to the government that the defense could rely on the strategic communications plan to blame BLM for the large crowd traveling to Bunkerville. It simply did not occur to the prosecution team that the defendants would argue they should be able to rely on BLM's media *silence* to shift blame to the BLM and excuse their own conduct. Although the Court disagreed and ruled the assessment was untimely, the government's mistaken, yet good faith, belief that the BLM's media strategy was irrelevant and not helpful to the defense was not a flagrant *Brady* violation or misconduct. *See United States v. Salyer*, No. CR. S-10-0061 LKK (G, 2010 WL 3036444, at *5 & n.7 (E.D. Cal. Aug. 2, 2010) ("While potential disputes concerning the prosecution's decisions about what is *Brady/Giglio* may always exist, a *Brady* non-disclosure cannot be cause for sanctions" absent incurable prejudice); *Cf. United States v. Mohamud*, No. 3:10-CR-00475-KI-1, 2014 WL 2866749, at *4 (D. Or. June 24, 2014), *aff'd*, 843 F.3d 420 (9th Cir. 2016) (government corrected mistaken legal conclusion, produced information, and conducted second review of case; thus no prosecutorial misconduct and dismissal unwarranted).

F. Disclosure Summary and Remedy

1. Disclosure Summary

The government takes its discovery obligations seriously. The government seeks justice on the merits of a case, not through dodging discovery rules and technicalities, or by obscuring violations if and when they may occur. Throughout this case, the government has acted in good faith to produce voluminous discovery that it believed went above its Constitutional, statutory, Department, and Court-ordered obligations. Though the government worked to prove its diligence, establishing a long-running reliable and

efficient track record in this case, unfortunately the Court's recent orders cast a shadow on one small portion of the discovery. Although the government has acted at all times in good faith to produce documents and litigate disputes where needed, relying on what it believed were reasonable litigation positions, certain positions did not prevail. Yet as soon as the government learned of the Court's orders adverse to its position, it acted quickly in good faith to achieve full compliance. *See United States v. W.R. Grace*, 235 F.R.D. 692, 694 (D. Mont. 2006) (Although the government initially disagreed that its discovery obligations were so broad, the government's revised position to "provide discovery of the materials at issue here is not so untimely that it shows bad faith.").

Following these rulings, the government is continuing to review its database for information related to the defendants' new theories and to ensure it produced information related to the defendants' originally known defense.[20] The government will keep the Court advised of the progress of this review and seek guidance from the Court where needed in light of the recent rulings.

The government's overall conduct in this case, including the recent discovery violations identified by the Court, does not rise to the level of flagrant government misconduct resulting in substantial prejudice. As demonstrated above, the facts here vary substantially from *Chapman*. In *Chapman*, the court found that the prosecutor, on multiple

[20] In particular, the government began this in-depth review on December 5, 2017, with assistance from several agents and other personnel supervised by an AUSA, completing the initial review on December 8, 2017. Alongside other demands in this case, the prosecution team has begun reviewing the agents' and others' work, and is conducting its own independent review of the database. The government expects this thorough review will be completed shortly and will result in the production of other documents to the defense. If defendants include new claims in their simultaneous brief filed today based on the government's compliance with its ongoing obligations, the government respectfully requests an opportunity to respond to those claims before the Court rules on them.

occasions, recklessly failed to produce material to the defense that he *knew* to be material at trial. 524 F.3d at 1078. It found, for example, that the prosecutor tried to introduce evidence of prior convictions of government witnesses at least twice, and was confronted with objections that those prior convictions—perhaps the most obvious *Giglio* evidence there is—had not been disclosed. *Id*. The prosecutor lacked a discovery log and thus could not provide proof of disclosure to satisfy the court's demand. *Id*. The trial court granted dismissal, ruling that the prosecutor had acted "flagrantly, willfully, and in bad faith," and the Ninth Circuit affirmed. *Id*. at 1081.

Unlike in *Chapman*, in this case the government acted in good faith, relying on its understanding of the law and its discovery obligations. The government did not withhold anything it knew to be material or obvious *Giglio* material like a prior conviction. The government has also taken painstaking efforts to keep organized discovery and production records, and has worked to provide the Court and defendants any and all required information. Thus, dismissal with prejudice is unwarranted.

2. The Scheduled Retrial is the Appropriate Remedy.

As the Ninth Circuit has recognized, the "appropriate remedy" for a *Brady* or *Giglio* violation "will usually be a new trial." *Chapman*, 524 F.3d at 1086 (citing *Giglio*, 405 U.S. at 153-154; *Kohring*, 637 F.3d at 912-913). Other circuits agree. *See*, *e.g.*, *Poventud* v. *City of New York*, 750 F.3d 121, 133 (2d Cir. 2014) (*en banc*) ("[T]he remedy for a *Brady* violation is … a new trial in which the defendant now has the *Brady* material available to her."). The Second Circuit has explained that dismissal of the indictment is appropriate "only when it is otherwise 'impossible to restore a criminal defendant to the position that he would have occupied vis-a-vis the prosecutor,' or when there is a 'widespread or

continuous' pattern of prosecutorial misconduct." *United States* v. *Halloran*, 821 F.3d 321 (2d Cir. 2016) (*quoting United States v. Fields*, 592 F.2d 638, 647 (2d Cir. 1978)),

Neither of those conditions is satisfied here. The scheduled retrial will restore the defendants to the position they "would have occupied vis-a-vis the prosecutor," and they will go to trial with all the information to which they are entitled under the Constitution, federal statutes, and rules. Specifically, the Court found prejudice in the government's failure to disclose information on the grounds that the defendants represented that they would have proposed different jury questions for *voir dire*, exercised their peremptory challenges differently, and provided stronger opening statements; and that they could have used information in the 2012 FBI BAU Threat Assessment to cross-examine a government witness. The new trial the Court ordered as a remedy for the government's violations will effectively cure each of these stated grounds of prejudice. *See United States v. Williams*, 547 F.3d 1187, 1202 (9th Cir. 2008). Accordingly, dismissal without prejudice is proper.

IV. Conclusion

WHEREFORE, for all the foregoing reasons, the government respectfully requests that the Court deem its Order granting Defendant's Motion for Mistrial to be without prejudice to re-trial.

DATED this 29th day of December, 2017.

Respectfully,

/s/ Steven W. Myhre

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CERTIFICATE OF SERVICE

I certify that I am an employee of the United States Attorney's Office. A copy of the foregoing **GOVERNMENT'S BRIEF OPPOSING DISMISSAL WITH PREJUDICE** was served upon counsel of record via separate correspondence and to Pro Se Defendant, Ryan C. Bundy, at the following email address:

c4cfforall@gmail.com

DATED this 29th day of December, 2017.

/s/ Steven W. Myhre

STEVEN W. MYHRE
Acting United States Attorney

Brief Exhibit No. 4

TACTICAL OPERATIONS CENTER ACTIVITIES LOG

ORGANIZATIONS/FILE NO	LOCATION(S)	PERIOD COVERED FROM HOUR	FROM DATE	TO HOUR	TO DATE
FBI / BLM [redacted]	Gold Butte Cattle Impoundment	0430	04/05-08/2014		04/08/2014

ITEM NO.	TIME	INCIDENTS, MESSAGES, ORDERS, ETC.	ACTION TAKEN	CALL SIGNS	INITIALS SWAT	INITIALS TOC
1	0430	SWAT depart main office for ICP.		[redacted]	------	
2	0600	SWAT arrive at ICP.		[redacted]	------	
3	0635	Radio communication checks complete.		[redacted]	------	
4	0650	Information from ICP of silver Mitsubishi sedan with Nevada plate [redacted]B (registered to Joshua Logue) observed following /watching BLM and Contract Vehicles.		[redacted]	------	
5	0719	[redacted] depart ICP for FOB.		[redacted]		
6	0826	SWAT depart ICP for FOB.		[redacted]		
7	0840	SWAT arrive at FOB.		[redacted]		
8	0851	Radio communication checks with ICP complete.		[redacted]	------	
9	0900	[redacted] depart FOB with Tech Agents/ETs for camera install.		[redacted]		
10	0902	[redacted] depart FOB with ETs for Repeater (DNB16) set up.		[redacted]		
11	0906	[redacted] arrive at camera site.		[redacted]		
12	0911	[redacted] arrive at Repeater site.		[redacted]		
13	0926	Radio communication checks with Repeater (DNV16) completed.		[redacted]	------	
14	0931	Two white SUVs observed near camera install site.	Confirmed with ICP to be BLM vehicles closing down access road.	[redacted]		
15	0934	[redacted] depart Repeater site.		[redacted]		
16	0942	[redacted] depart camera site.		[redacted]		
17	0946	[redacted] arrive at FOB.		[redacted]		
18	0946	[redacted] arrive at FOB.		[redacted]		

NAME(S) OF TOC PERSONNEL	SIGNATURE(S)
[redacted]	

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FBI / BLM [redacted]	Gold Butte Cattle Impoundment	0430	04/05-08/2014		04/08/2014

ITEM NO.	TIME	INCIDENTS, MESSAGES, ORDERS, ETC.	ACTION TAKEN	CALL SIGNS	INITIALS SWAT	INITIALS TOC
19	1145	Request to ICP for authorization to utilize helicopter for surveillance of first cattle movement.	Request denied.	[redacted]		
20	1205	LA radio communication checks comleted.		[redacted]	------	
21	1211	[redacted] departs FOB to ICP.		[redacted]		
22	1219	[redacted] arrives ICP.		[redacted]		
23	1230	[redacted] depart ICP – [redacted] heading to Mesquite, [redacted] returning to FOB.		[redacted]		
24	1242	[redacted] arrives at FOB.		[redacted]		
25	1245	LV relieved by LA		[redacted]		
26	1316	Two SUVs by 1st Amendment area; One male		[redacted]		
27	1330	[redacted] departing FOB with Two ET's to check repeater located at Mesa		[redacted]		
28	1336	One protestor at the local Walmart and the vehicles have left the 1st Amendment area		[redacted]		
29	1340	Reached the repeater location at Mesa		[redacted]		
30	1344	Departing repeater station		[redacted]		
31	1352	[redacted] returned to FOB with Two ET's from repeater located at Mesa		[redacted]		
32	1420	[redacted] depart FOB with [redacted] for surveillance fly over		[redacted]		
33	1441	[redacted] return to FOB, [redacted] and [redacted] departing with [redacted] and [redacted]		[redacted]		
34	1452	Snipers inserted (Training)		[redacted]		
35	1455	Snipers inserted 36.36468/114.9098		[redacted]		
36	1458	[redacted] on deck picking up [redacted] to return to FOB; enroute to FOB		[redacted]		
37	1549	[redacted] heading over to ICP		[redacted]		

NAME(S) OF TOC PERSONNEL	SIGNATURE(S)
[redacted]	

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FBI / BLM [redacted]	Gold Butte Cattle Impoundment	0430	04/05-08/2014		04/08/2014

ITEM NO.	TIME	INCIDENTS, MESSAGES, ORDERS, ETC.	ACTION TAKEN	CALL SIGNS	INITIALS SWAT	INITIALS TOC
38	1610	[redacted] arrived at ICP		[redacted]		
39	1620	ET's [redacted] and [redacted] heading to town to get diesel		-----		
40	1705	[redacted] enroute to FOB from ICP		[redacted]		
41	1715	[redacted] back at FOB		[redacted]		
42	1735	Silver small SUV arrived at subjects house		------		
43	1740	Red/ Burgundy SUV tinted windows arrived at subjects house		------		
44	1742	Escort team departing FOB to Gold Butte Camera		[redacted]		
45	1750	[redacted] and attachments at repeater		[redacted]		
46	1805	[redacted] and attachments enroute back to FOB		[redacted]		
47	1807	Bundy located at the Gold Butte camera on the phone				
48	1815	26 and attachments have returned to FOB		[redacted]		
49	1825	Ammon Bundy looked over berm at FOB; deployed [redacted] and [redacted] for surveillance; ATV not spotted [redacted] and [redacted]; [redacted] and [redacted] departed for LV LZ				
50	1830	Began shutdown of FOB TOC		[redacted]		
51	1838	TOC shut down for the night		[redacted]		
52	0605	TOC Operational (Sunday)		[redacted]	------	
53	0615	Radio communication checks complete.		[redacted]	------	
54	0625	[redacted] and attachments depart FOB for camera install site		[redacted]		
55	0625	[redacted] and attachments depart FOB for Repeater site		[redacted]		
56	0628	[redacted] arrive at camera site		[redacted]		

NAME(S) OF TOC PERSONNEL	SIGNATURE(S)
[redacted]	

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FBI / BLM [redacted]	Gold Butte Cattle Impoundment	0430	04/05-08/2014		04/08/2014

ITEM NO.	TIME	INCIDENTS, MESSAGES, ORDERS, ETC.	ACTION TAKEN	CALL SIGNS	INITIALS SWAT	INITIALS TOC
57	0634	[redacted] arrive at Repeater site		[redacted]		
58	0640	[redacted] depart camera site		[redacted]		
59	0644	[redacted] arrive at FOB		[redacted]		
60	0650	Radio communication check with DNB16 Repeater conducted (117)		[redacted]		
61	0652	[redacted] depart Repeater site		[redacted]		
62	0700	[redacted] arrive at FOB		[redacted]		
63	0730	ETs ([redacted]) depart FOB to Overton Marina	Relayed to ICP	[redacted]	------	
64	0819	[redacted] depart FOB		[redacted]		
65	0830	Helo 15 minutes out from FOB, recon for fuel site in Mesquite en route		[redacted]		
66	1033	ETs ([redacted]) arrive back at FOB		[redacted]		
67	1122	Quad observed crossing Bundy property in front of camera, shortly after, camera feed was lost.		[redacted]		
68	1124	4 vehicles observed at MM125 on hwy170. 1 identified as Shiree Bundy. BLM Contacted and requested to move. Vehicles refused to leave. SETT and NPS to recontact.	Info received from ICP	[redacted]		
69	1131	[redacted] in White Chevy going to check camera.		[redacted]		
70	1134	Gray/Blue Toyota Highlander [redacted] registered to Duke Cox – likely driver Shiree Bundy – Duke's wife. Maroon lifted pickup truck [redacted] registered to John Clark – married to prior surveillant Diana Clark. Silver Dodge pickup [redacted] registered to Rulon Lee – last seen with blue Highlander. 1999 White Toyota pickup [redacted] registered to Steven Barnes Alexander.	Info received from ICP with specifics on vehicles located on route 170 (approx mile marker 125)	[redacted]		

NAME(S) OF TOC PERSONNEL	SIGNATURE(S)
[redacted]	

TACTICAL OPERATIONS CENTER ACTIVITIES LOG

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FBI / BLM [redacted]	Gold Butte Cattle Impoundment	0430	04/05-08/2014		04/08/2014

ITEM NO.	TIME	INCIDENTS, MESSAGES, ORDERS, ETC.	ACTION TAKEN	CALL SIGNS	INITIALS SWAT	INITIALS TOC
		2012 Chevy pickup truck (NV [redacted]) registered to Leo Reber – friends of Bundys.				
71	1136	[redacted] in Gray armored truck going to check camera with ET	[redacted] going as backup in White Chevy	[redacted]		
72	1140	Individuals in cars on 170 are outside vehicles with cameras and phones	Info from SETT			
73	1157	Camera confirmed damaged by ATV	Info from ET	[redacted]		
74	1202	[redacted] et al, depart camera site		[redacted]		
75	1205	[redacted] et al, arrive FOB		[redacted]		
76	1240	LA SWAT and attachments relieved LV SWAT and attachments		[redacted]		
77	1240	[redacted] (3) advised vehicles potentially blocking ingress and egress on 170 were contacted by NHP and have dispersed		[redacted]		
78	1328	[redacted] departing FOB for fuel		[redacted]		
79	1430	[redacted] departing TOC for perimeter check		[redacted]		
80	1448	[redacted] returned to FOB		[redacted]		
81	1454	[redacted] returned to TOC from perimeter check		[redacted]		
82	1458	[redacted] departing TOC for food run		[redacted]		
83	1544	[redacted] returned to TOC from food run		[redacted]		
84	1557	[redacted] standing by in helo		[redacted]		
85	1600	Advised one person arrested at DP1	Information from SETT	SETT		
86	1610	Advised by ICP one vehicle blocking convoy on route 170 btwn mile marker 4 and 5. NHP notified	Information from ICP	ICP		
87	1612	HELO spinning in Standby with [redacted]		[redacted]		

NAME(S) OF TOC PERSONNEL	SIGNATURE(S)
[redacted]	

TACTICAL OPERATIONS CENTER ACTIVITIES LOG

ORGANIZATIONS/FILE NO	LOCATION(S)	PERIOD COVERED FROM HOUR	FROM DATE	TO HOUR	TO DATE
FBI / BLM [redacted]	Gold Butte Cattle Impoundment	0430	04/05-08/2014		04/08/2014

ITEM NO.	TIME	INCIDENTS, MESSAGES, ORDERS, ETC.	ACTION TAKEN	CALL SIGNS	INITIALS SWAT	INITIALS TOC
88	1626	Advised by ICP that individual arrested was Harold Bundy	Information from ICP	ICP		
89	1640	Convoy reached ICP – HELO stand-down		ICP		
90	1730	[redacted] departing TOC with ET's to break down repeaters		[redacted]		
91	1739	[redacted] and ET's arrived at repeater		[redacted]		
92	1753	[redacted] departing repeater for TOC		[redacted]		
93	1800	[redacted] arrived at TOC with ET's		[redacted]		
94	1801	TOC secure for the evening		[redacted]		
95	0600	TOC Activated (Monday)		[redacted]		
96	0639	Notification sent from ICP to FOB to break down and relocate FOB to ICP location		[redacted]		
97	0654	[redacted] depart FOB with ET to establish camera on ridge near DP1		[redacted]		
98	0721	Camera set and connected to ICP		[redacted]		
99	0730	[redacted] departing DP1		[redacted]		
100	0735	LA TOC personnel notified of FOB relocation to ICP		[redacted]		
101	0740	FOB SWAT, TOC, NOC personnel depart FOB location		[redacted]		
102	0750	FOB personnel arrive at ICP and re-establish TOC communications		[redacted]		
103	0845	Noon shift notified of relocation of FOB and placed on standby for today's shift		[redacted]		
104	0950	Helo relocates from Mesquite airport to ICP		[redacted]		
105	1045	Radio communications check w/handheld		[redacted]		
106	1230	LV SWAT relieved by LA SWAT		[redacted]		
107	1348	[redacted] departing TOC Northbound to patrol		[redacted]		

NAME(S) OF TOC PERSONNEL	SIGNATURE(S)
[redacted]	

TACTICAL OPERATIONS CENTER ACTIVITIES LOG

ORGANIZATIONS/FILE NO	LOCATION(S)	PERIOD COVERED FROM HOUR	FROM DATE	TO HOUR	TO DATE
FBI / BLM [redacted]	Gold Butte Cattle Impoundment	0430	04/05-08/2014		04/08/2014

ITEM NO.	TIME	INCIDENTS, MESSAGES, ORDERS, ETC.	ACTION TAKEN	CALL SIGNS	INITIALS SWAT	INITIALS TOC
108	1357	[redacted] and attachments approx 1500 meters N of ICP and still moving		[redacted]		
109	1404	[redacted] and attachments 1500 meters W of TOC; working on alt route out to 15		[redacted]		
110	1417	[redacted] and attachments ran surveillance and only way in and out is the front		[redacted]		
111	1428	[redacted] and attachments enroute back to TOC		[redacted]		
112	1445	[redacted] and attachments have returned to TOC		[redacted]		
113	1737	TOC breakdown and end for the day		[redacted]		
114	0545	TOC established		[redacted]		
115	0615	[redacted] departs TOC with [redacted] to refill generator at FOB Malcolm		[redacted]		
116	0623	[redacted] depart TOC for a food run		[redacted]		
117	0625	[redacted] and [redacted] arrived at FOB Malcolm		[redacted]		
118	0636	[redacted] depart FOB Malcolm for TOC		[redacted]		
119	0644	[redacted] return to TOC		[redacted]		
120	0708	[redacted] return to TOC		[redacted]		
121	0713	ICP notified us that the two BLM HELOs will be flying approx 8-12 miles S of ICP for roundup patrol				
122	0742	[redacted] depart LV LZ for TOC		[redacted]		
123	0808	[redacted] departing TOC to LV and will not be returning		[redacted]		
124	0830	[redacted] landed the HELO at the ICP				
125	0915	[redacted]) departed TOC to Wal-mart				
126	0939	[redacted] have departed TOC in 4 vehicles for surveillance E of ICP at 3km		[redacted]		

NAME(S) OF TOC PERSONNEL	SIGNATURE(S)
[redacted]	

TACTICAL OPERATIONS CENTER ACTIVITIES LOG

ORGANIZATIONS/FILE NO	LOCATION(S)	PERIOD COVERED FROM HOUR	FROM DATE	TO HOUR	TO DATE
FBI / BLM [redacted]	Gold Butte Cattle Impoundment	0430	04/05-08/2014		04/08/2014

ITEM NO.	TIME	INCIDENTS, MESSAGES, ORDERS, ETC.	ACTION TAKEN	CALL SIGNS	INITIALS SWAT	INITIALS TOC
127	0948	[redacted] enroute back to TOC in 4 vehicles		[redacted]		
128	0959	[redacted] back to TOC in 4 vehicles		[redacted]		
129	1042	[redacted] returned to TOC from Wal-mart		[redacted]		
130	1200	SWAT/TOC shift change complete		[redacted]	------	
131	1730	TOC deactivated – mission complete	(Per SSA Turner)	[redacted]	------	

NAME(S) OF TOC PERSONNEL	SIGNATURE(S)
[redacted]	

Brief Exhibit No. 8

Gmail by Google

Whipple, Bret [redacted]

US v Bundy et al

1 message

[redacted] Tue, Nov 7, 2017 at 2:23 PM

[redacted]

Dear Counsel:

This responds to Mr. Whipple's letter of November 3, 2017. The letter contains numerous mischaracterizations and unfounded accusations concerning government misconduct with which we neither agree nor accept. As we represented previously, the government is unaware of any recorded "live stream" video or any surveillance video that has not already been disclosed and produced to you. As you know, the government's disclosures in this case are voluminous and include hundreds of hours of video recordings, including surveillance recordings, most of which have been disclosed to the defendants for more than a year.

Please find attached to this email a 302 and its attached photos regarding an FBI camera placed on public lands on April 6. Also attached is a second 302 regarding an interview of Edward Delmolino.

Sincerely,

Nadia Ahmed

From: Whipple, Bret [redacted]
Sent: Friday, November 3, 2017 3:56 PM
To: Myhre, Steven (USANV) [redacted]
Subject: Letter Requesting Discovery (Cliven Bundy)

Please see attached letter.

--

Justice Law Center

Office of Bret Whipple & Associates

1100 S. Tenth Street

Las Vegas, Nevada 89104

[redacted]

Brief Exhibit No. 12

WildCAD Incident Card - Gold Butte Communication Center: 2014-76
"MISSION 18- BUNDY RESIDENCE-OSCAR2/4" Law Enforcement 04/04/2014 16:58:00

Initial Location:

Dispatcher: [redacted] **Status:** Closed

Job Codes:
Web Comment:

Resource	Commit	Respond	On Scene	Avail Inc	Returning	Off Incident
OSCAR 2	04/04 17:34					04/04 19:02
OSCAR 3	04/04 17:17					04/04 17:32
OSCAR 4	04/04 17:14					04/04 19:02

Entry Date/Time	From	To	Details
04/04/2014 16:59:02			HIGH ELEVATION AREA OF BUNDY RESIDENCE FOR IPOP
04/04/2014 17:01:41	DTC	LOG	PER OSCAR 3 & 4- DO NOT STATUS CHECK!. THEY WILL HAVE THERE CELL PHONES WITH THEM IF YOU NEED TO MAKE CONTACT
04/04/2014 17:09:00	OSCAR 4	DTC	MYSELF AND OSCAR 3 ARE DEPARTING. CAN YOU LET POST 2 KNOW WE WILL BE HEADING OUT HIS WAY
04/04/2014 17:09:09	DTC	POST 2	INFORMATION PASSED

VOR	ATB	Helibase

WildCAD Incident Card - Gold Butte Communication Center: NV-MISS 2014-96
"MISS 20 OP YOU'RE WELCOME SETT O-2 O-4" Law Enforcement 04/05/2014 20:00:00

Initial Location:

Dispatcher: [redacted] **Status:** Closed **Sub-Type:** Other Agency Assist: (All)

Job Codes:
Web Comment:

Resource	Commit	Respond	On Scene	Avail Inc	Returning	Off Incident
OSCAR 2	04/05 20:24					04/05 22:37
OSCAR 4	04/05 20:24					04/05 22:37
POWER 1	04/05 20:22					04/05 22:35
POWER 2	04/05 20:23					04/05 22:36
SETT 2	04/05 20:22					04/05 22:36
SETT 3	04/05 20:23					04/05 22:36
SETT 4	04/05 20:22					04/05 22:35

Entry Date/Time	From	To	Details
04/05/2014 20:05:05	SAM 3	AKC	TO COMMENCE SHORTLY- SPECIFIC LOCATION 36 43.087 X 114 14.186.
04/05/2014 21:45:48			fob and sett 1 reporting helo in area and w5 states helo out of airport on training run
04/05/2014 21:48:10			sett 1 reporting veh in area of op
04/05/2014 21:48:27			veh in wash
04/05/2014 21:58:02			o2 sett2 moving due to subj out of nearby trailer
04/05/2014 21:58:30		RJR	subj has a spotlight and has dog in area
04/05/2014 22:01:16			o3 sett2 has package
04/05/2014 22:33:17			sett 1 reports mission complete att
04/05/2014 22:33:42		RJR	all set units back at fob att
04/05/2014 22:34:13		RJR	o2 and 4 remaining at dpx

VOR	ATB	Helibase

WildCAD Incident Card - Gold Butte Communication Center: SIGVE 2014-120
"miss 27 - sensor relocate - lpop/sett" Law Enforcement 04/07/2014 20:33:00

Initial Location:

Dispatcher: [redacted] **Status:** Closed **Sub-Type:** INFO

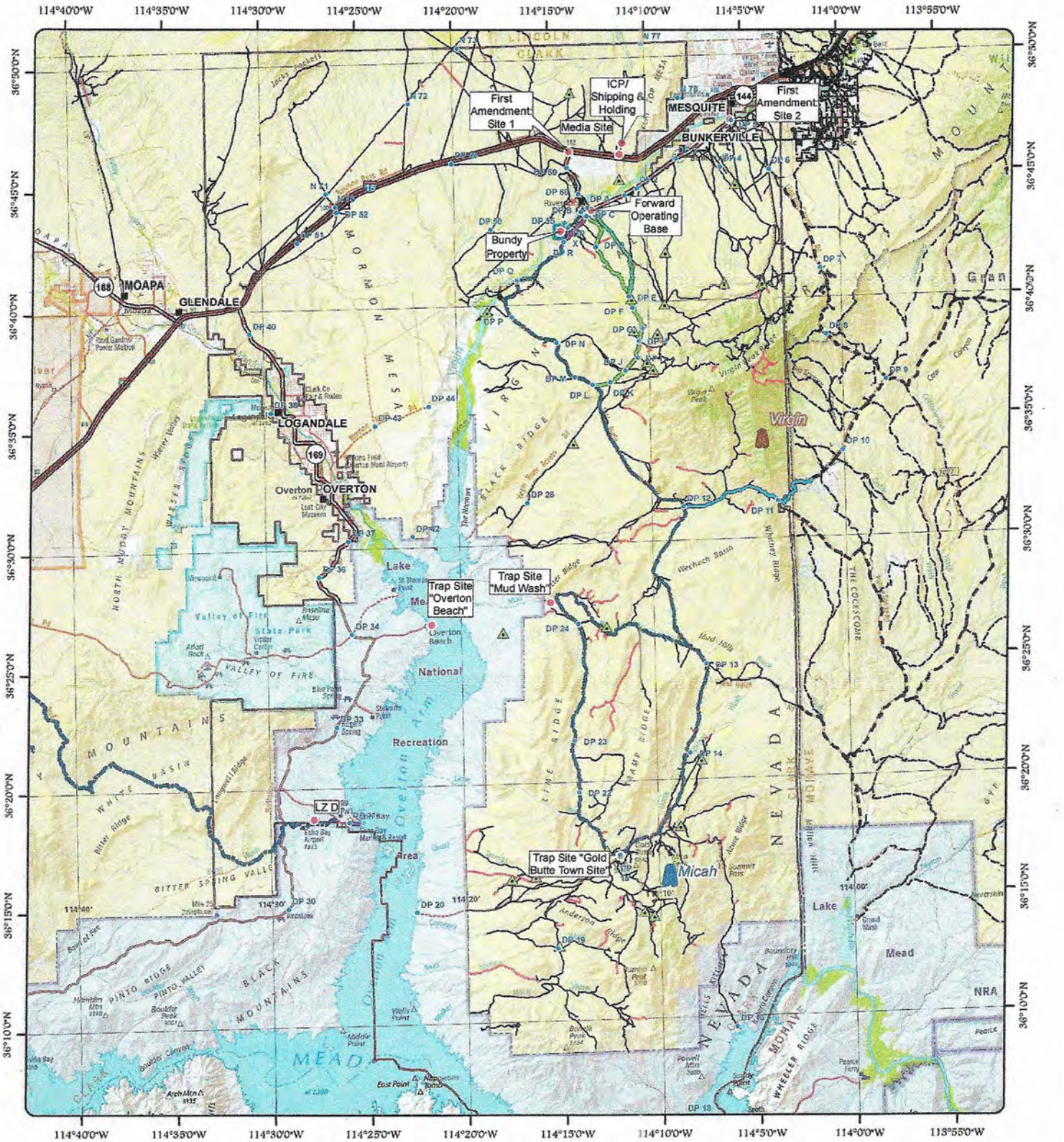
Job Codes:
Web Comment:

Resource	Commit	Respond	On Scene	Avail Inc	Returning	Off Incident
OSCAR 2	04/07 20:54					04/07 22:41
OSCAR 4	04/07 20:54					04/07 22:41
POWER 1	04/07 20:43					04/07 22:41
POWER 2	04/07 20:44					04/07 22:41
SETT 1	04/07 20:43					04/07 22:41
SETT 2	04/07 20:44					04/07 22:41
SETT 3	04/07 20:44					04/07 22:41
SETT 4	04/07 20:43					04/07 22:41

Entry Date/Time	From	To	Details
04/07/2014 20:38:53			retrieve siesmic sensor near bundy residence on roadway and relocate to more effective location
04/07/2014 20:59:46			mission underway
04/07/2014 22:36:05			mission complete

VOR	ATB	Helibase

Brief Exhibit No. 13



Drop Points
POI
Range Improvements
BLM Repeaters
Alt A
Alt B
Route # 1
Route # 2
Back Country Byway

Open (hatched & solid)
Closed
Project Boundary

Land Status
Bureau of Indian Affairs
Bureau of Land Management
Bureau of Reclamation
National Park Service
Nevada State Lands
Private
Water

Briefing Map

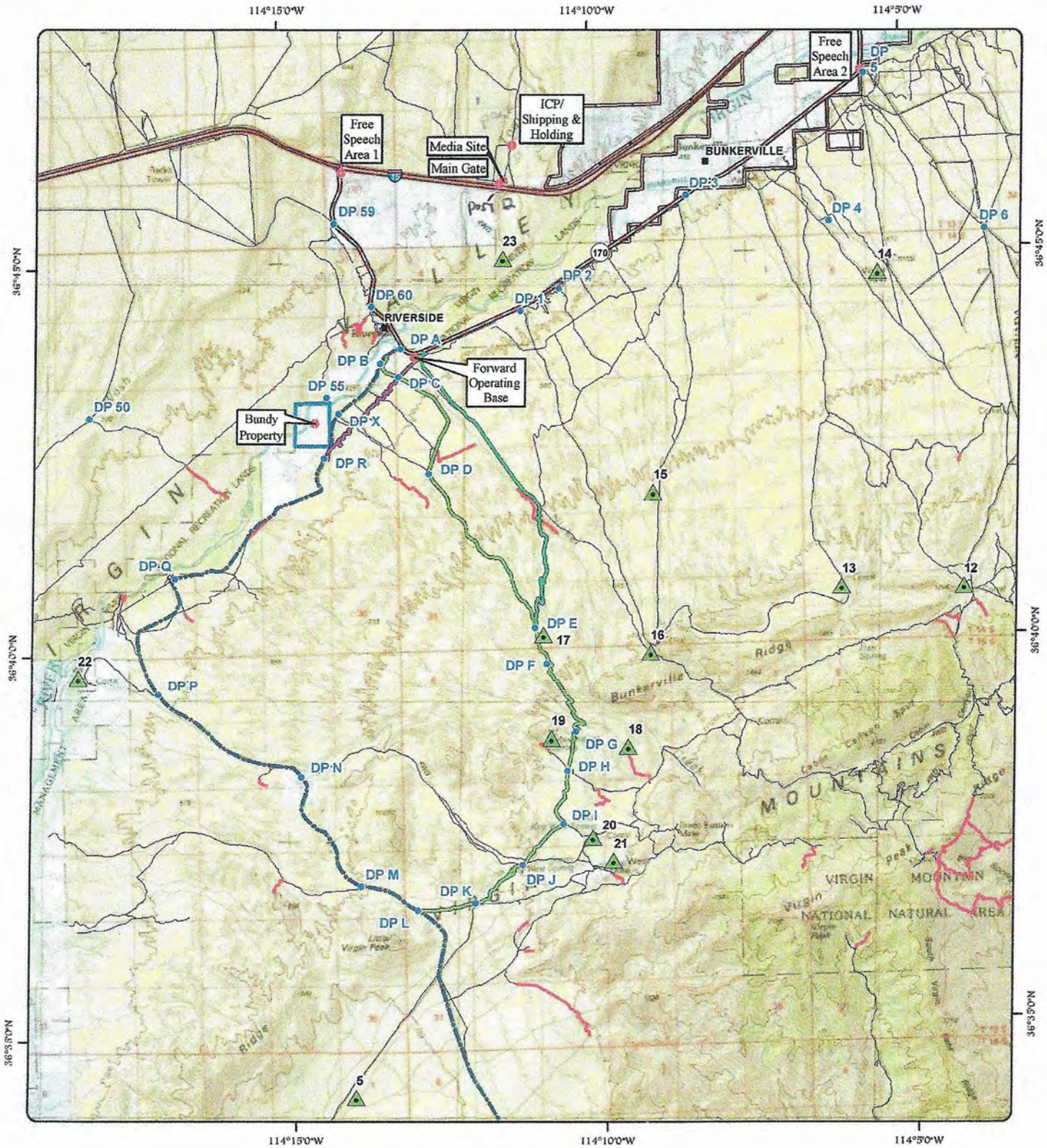
Gold Butte
Cattle Trespass Impoundment
2014

0 3.75 7.5 15
Miles

N

Date: 3/26/2014

No warranty is made by the Bureau of Land Management as to the accuracy, reliability, or completeness of these data for individual use or aggregate use with other data. This information may not meet National Map Accuracy Standards.



Area of Interest

Gold Butte
Cattle Trespass Impoundment
2014

Drop Points
Points of Interest
Range Improvements

Project Routes
Alt A
Alt B
Route # 1

Back Country Byway
Open Route
Closed Route
Project Boundary

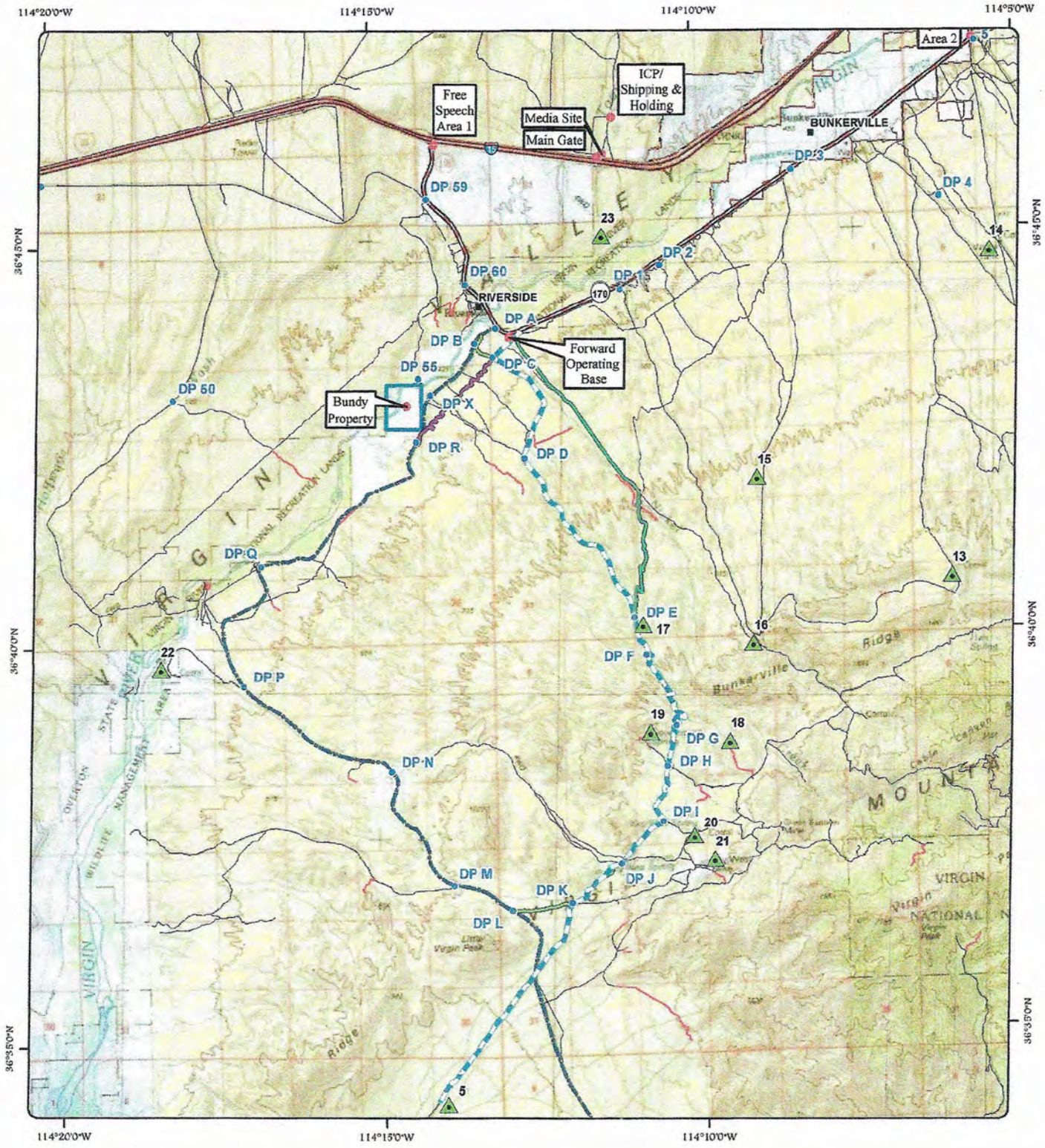
Land Status
Bureau of Land Management
Bureau of Reclamation
National Park Service
Private

0 1.5 3 6
Miles

Date: 4/22/2014

N

No warranty is made by the Bureau of Land Management as to the accuracy, reliability, or completeness of these data for individual use or aggregate use with other data. This information may not meet National Map Accuracy Standards.



Route of Egress 4_9_14

Gold Butte
Cattle Trespass Impoundment
2014

Date: 4/22/2014

Drop Points
Points of Interest
Range Improvements

Project Routes
Alt A
Alt B
Route # 1
Route of Egress 4_9_14

Back Country Byway
Open Route
Closed Route
Project Boundary

Land Status
Bureau of Land Management
Bureau of Reclamation
National Park Service
Private

0 1.5 3 6
Miles

N

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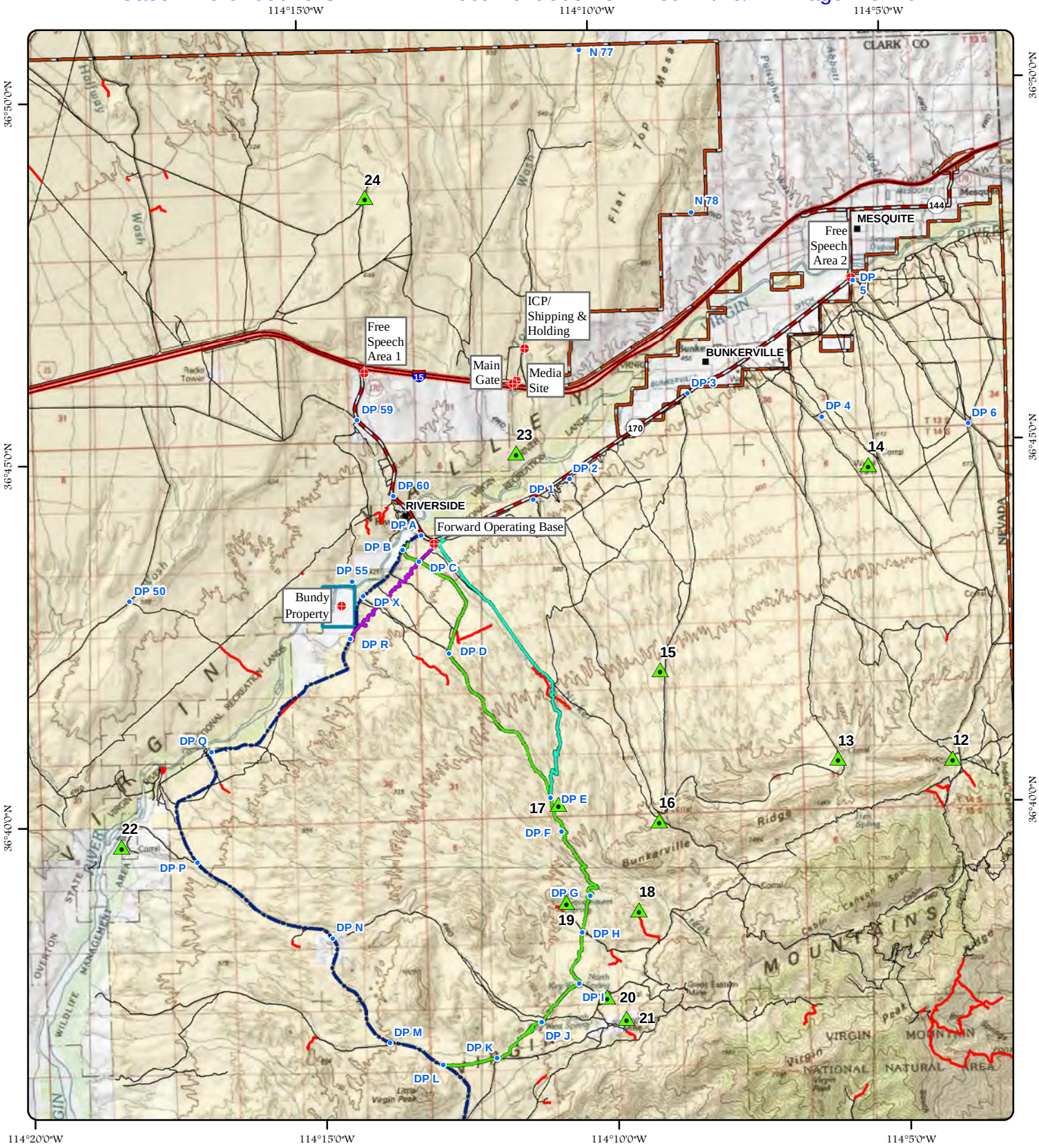
Brief Exhibit No. 20



Drop Points
Points of Interest
Range Improvements
Alt A
Alt B
Route # 1
Back Country Byway
Open
Closed
Project Boundary

Land Status
Bureau of Land Management
Bureau of Reclamation
National Park Service
Private

Area of Operation

Gold Butte
Cattle Trespass Impoundment
2014

0 1.5 3 6
Miles

Date: 4/4/2014

N

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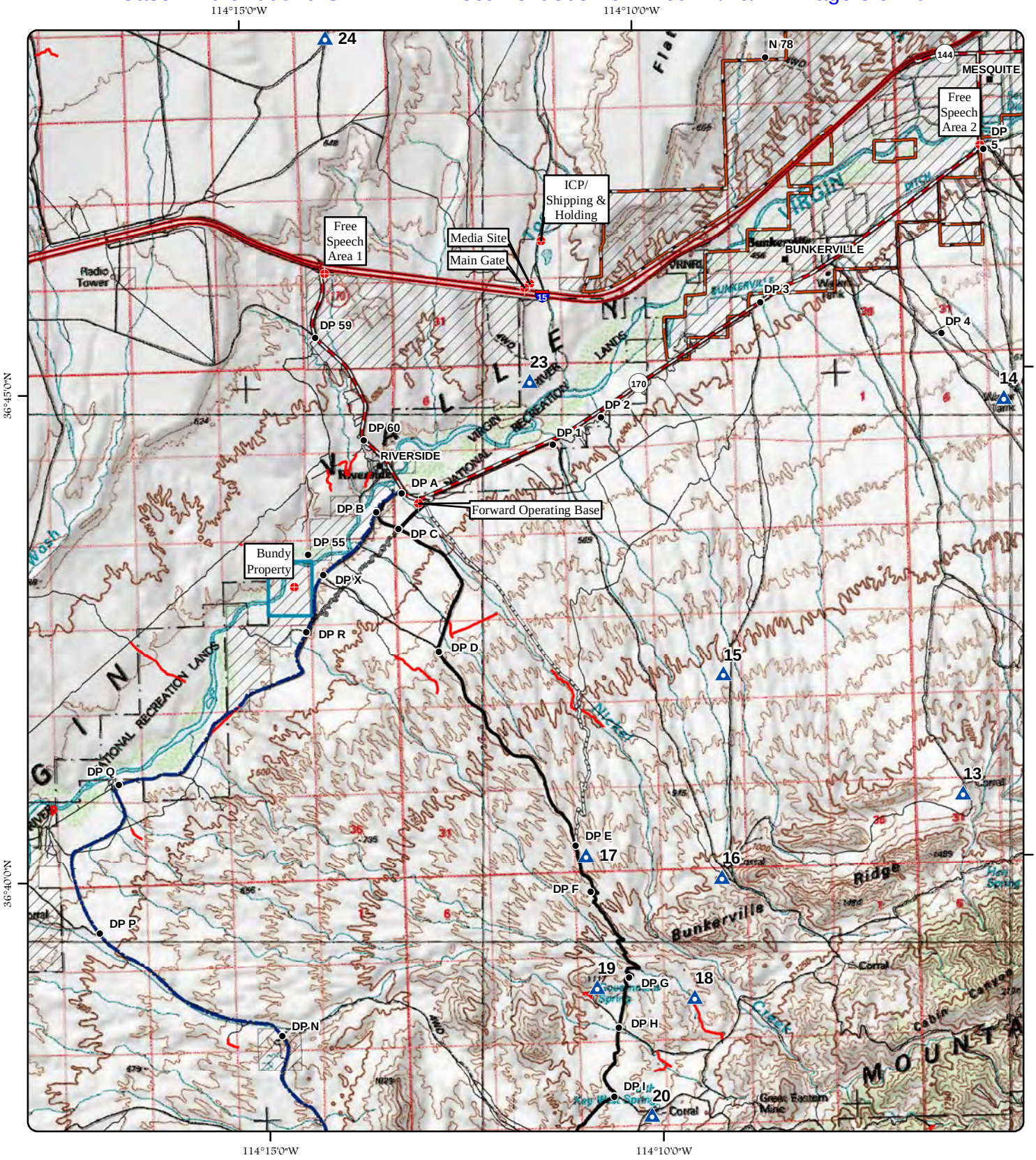
GB.024629



Area of Operation: 4/6/2014

Gold Butte
Cattle Trespass Impoundment
2014

- Drop Points
- Points of Interest
- Range Improvements
- Alt A
- Alt B
- Route # 1
- Back Country Byway
- Open
- Closed
- Project Boundary

Land Status

- Private

0 1.25 2.5 5
Miles

Date: 4/5/2014

N

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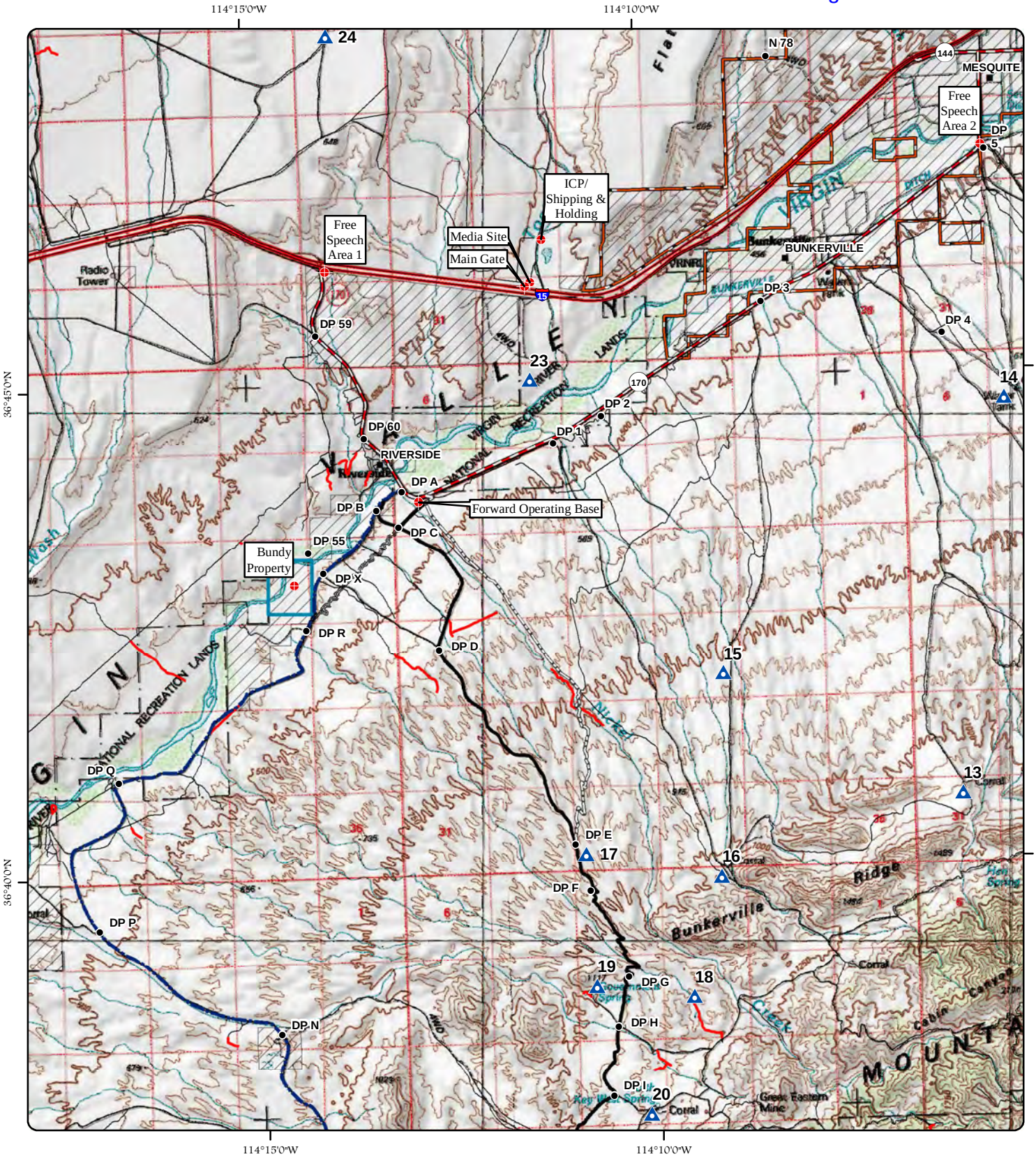
GB.024630



Area of Operation: 4/7/2014

Gold Butte
Cattle Trespass Impoundment
2014

- Drop Points
- Points of Interest
- Range Improvements
- Alt A
- Alt B
- Route # 1
- Back Country Byway
- Open
- Closed
- Project Boundary

Land Status

- Private

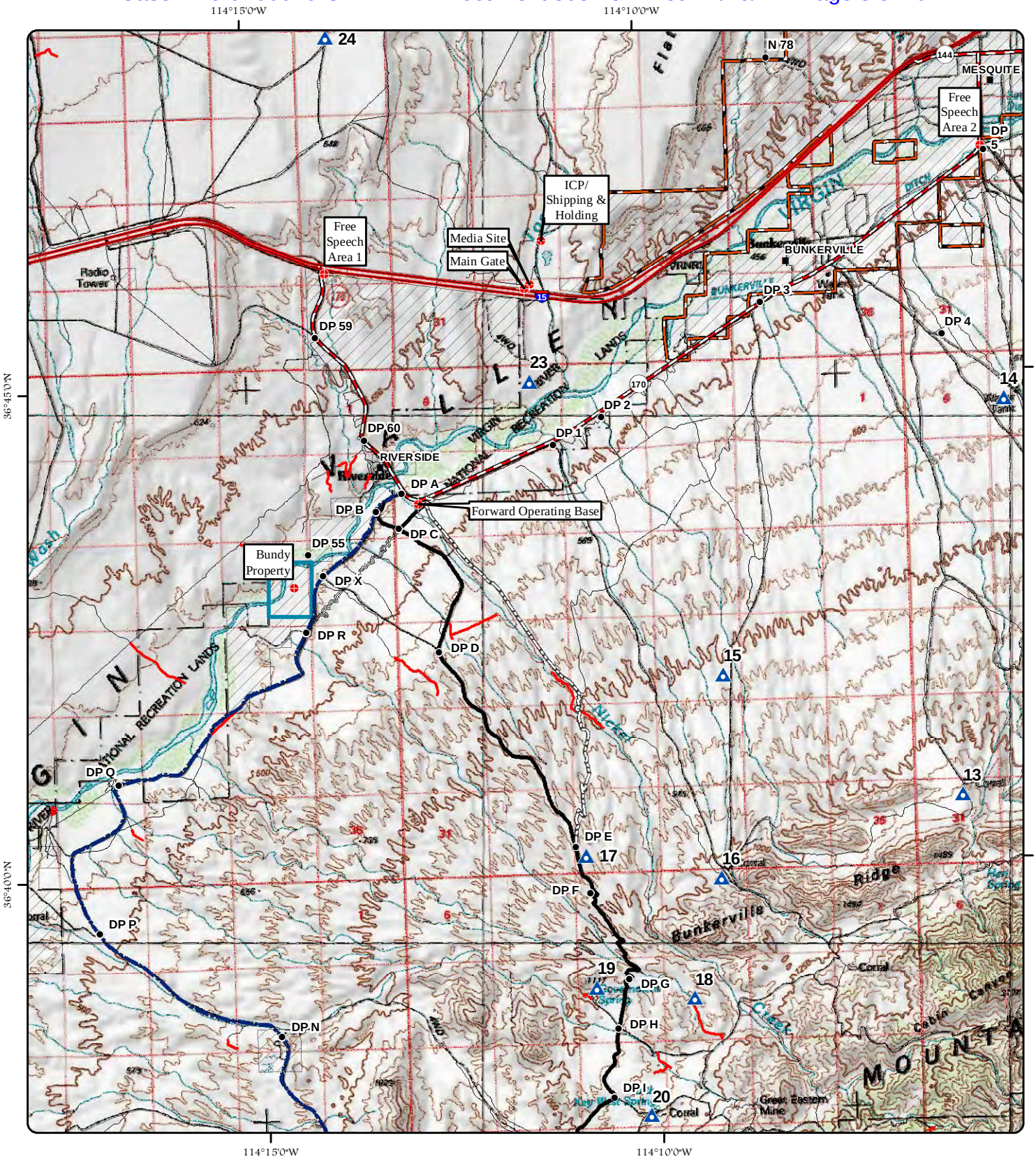
0 1.25 2.5 5
Miles

Date: 4/6/2014

N

No warranty is made by the Bureau of Land Management as to the accuracy, reliability, or completeness of these data for individual use ore aggregate use with other data. This information may not meet National Map Accuracy Standards.

GB.024631



Area of Operation

Gold Butte
Cattle Trespass Impoundment
2014

- Drop Points
- Points of Interest
- Range Improvements
- Alt A
- Alt B
- Route # 1
- Back Country Byway
- Open
- Closed
- Project Boundary

Land Status

- Private

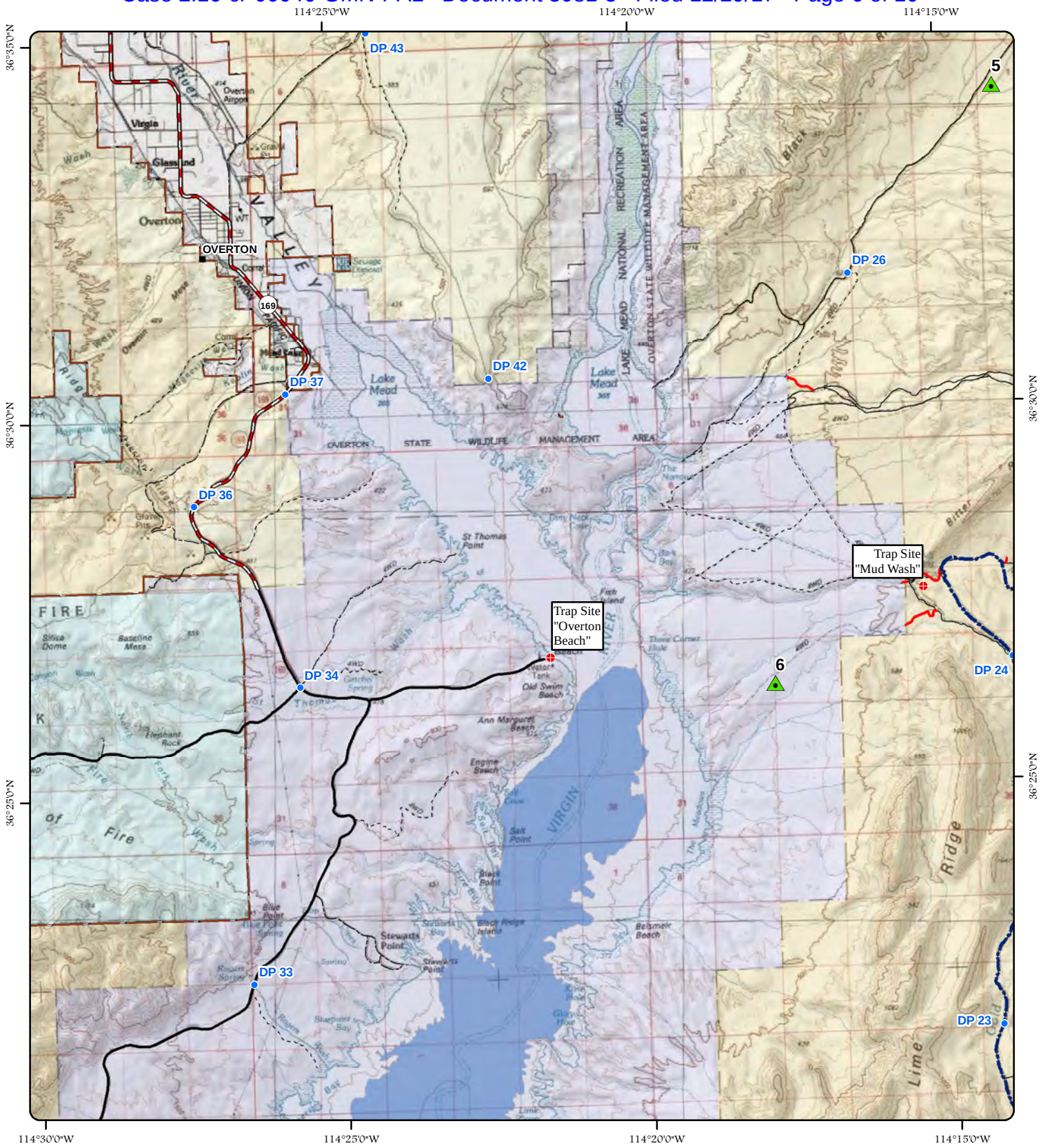
0 1.25 2.5 5
Miles

Date: 4/7/2014

N

No warranty is made by the Bureau of Land Management as to the accuracy, reliability, or completeness of these data for individual use ore aggregate use with other data. This information may not meet National Map Accuracy Standards.

GB.024632



Area of Operation

Gold Butte
Cattle Trespass Impoundment
2014

Drop Points
Points of Interest
Range Improvements
Back Country Byway
Open
Closed

Project Boundary

Land Status
Bureau of Land Management
Bureau of Reclamation
National Park Service
Nevada State Lands
PVT
Lake Mead

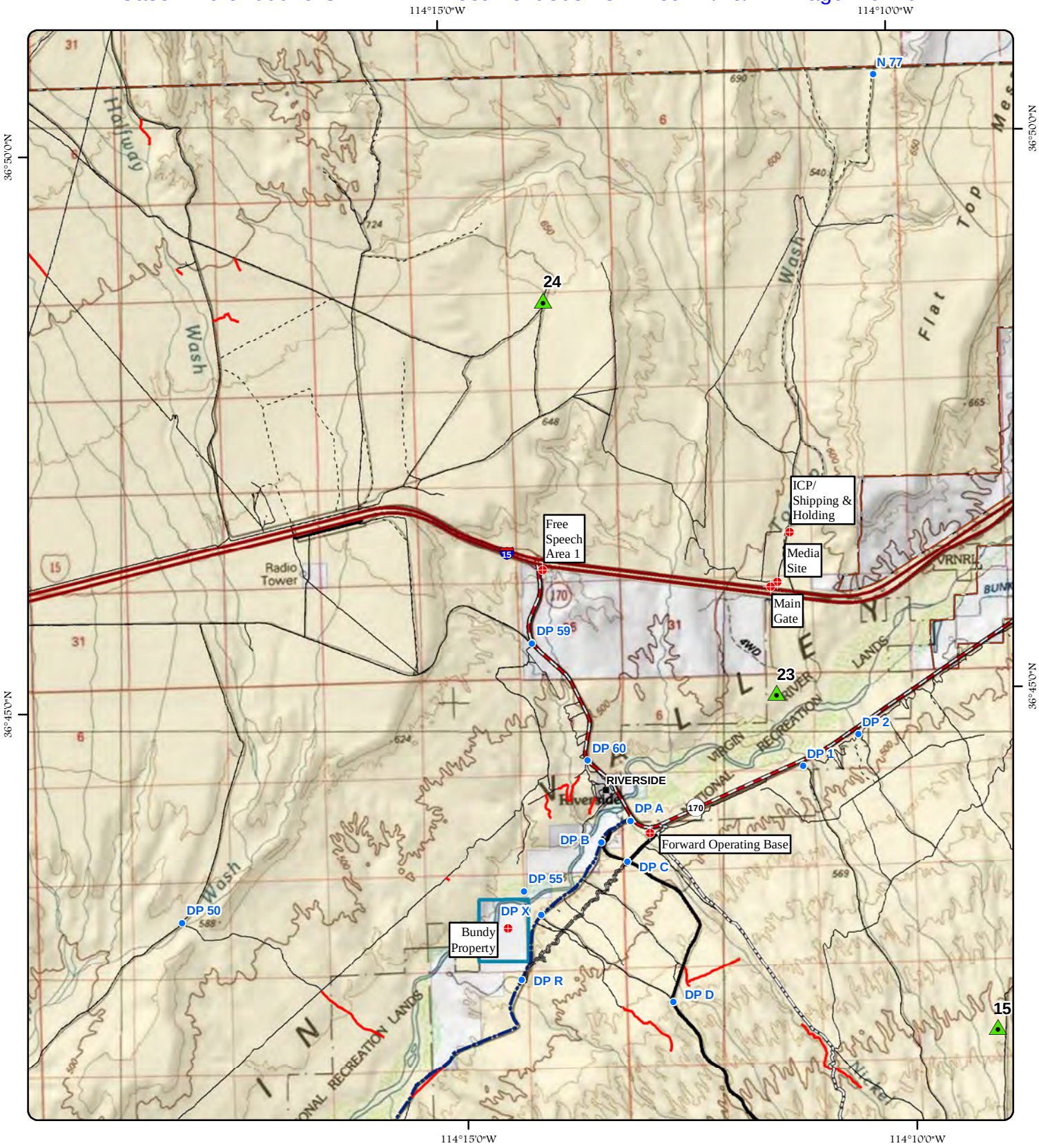
0 1.5 3 6
Miles

N

Date: 4/8/2014

No warranty is made by the Bureau of Land Management as to the accuracy, reliability, or completeness of these data for individual use ore aggregate use with other data. This information may not meet National Map Accuracy Standards.

GB.024633



Drop Points
Points of Interest
Range Improvements
Alt A
Alt B
Route # 1
Back Country Byway
Open
Closed

Project Boundary

Land Status
Bureau of Land Management
PVT

Area of Operation

Gold Butte
Cattle Trespass Impoundment
2014

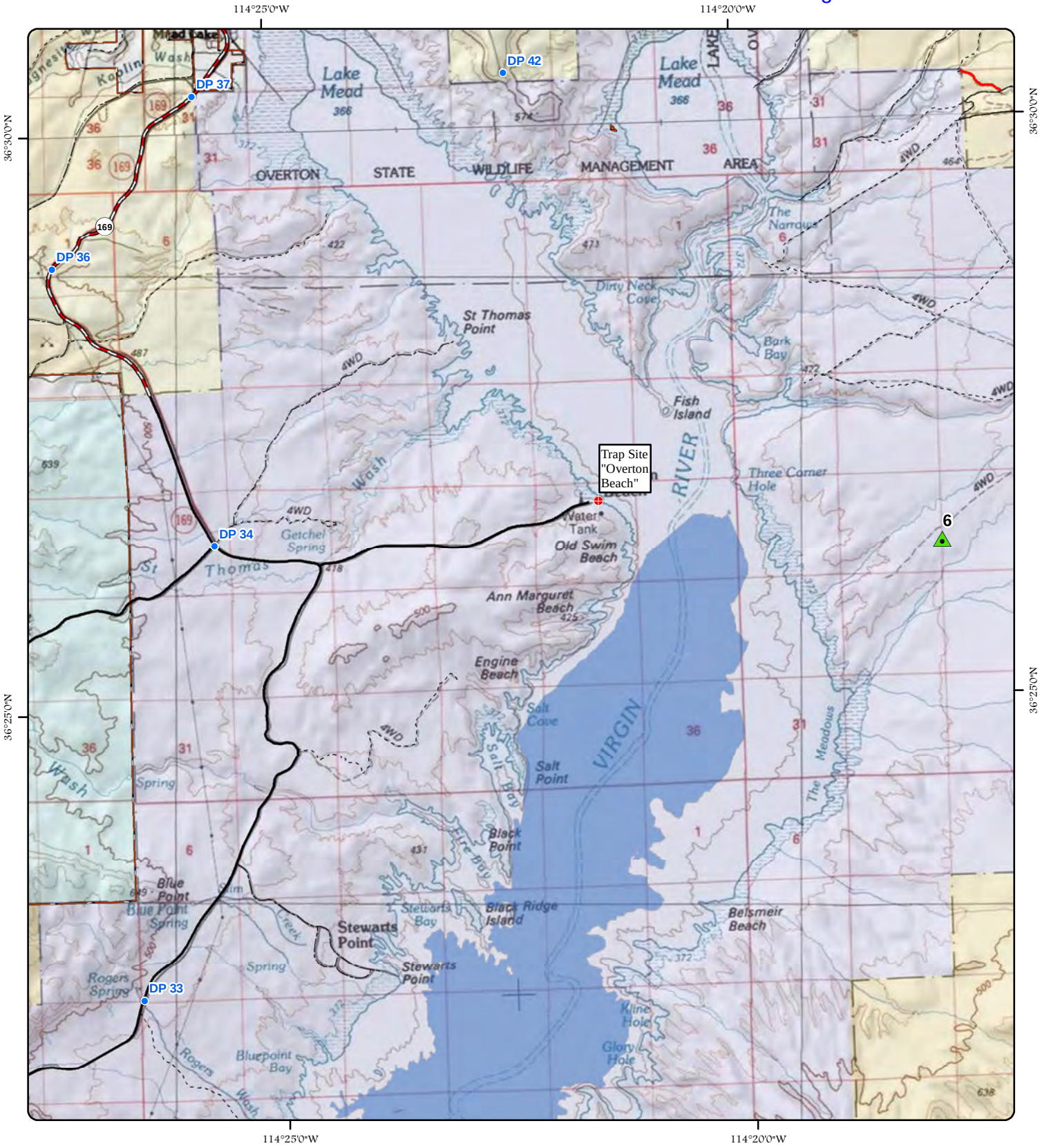
0 1 2 4
Miles

N

Date: 4/8/2014

No warranty is made by the Bureau of Land Management as to the accuracy, reliability, or completeness of these data for individual use ore aggregate use with other data. This information may not meet National Map Accuracy Standards.

GB.024634



Area of Operation

Gold Butte
Cattle Trespass Impoundment
2014

Drop Points
Points of Interest
Range Improvements
Open
Closed
Project Boundary

Land Status
Bureau of Land Management
Bureau of Reclamation
National Park Service
Nevada State Lands
PVT
Lake Mead

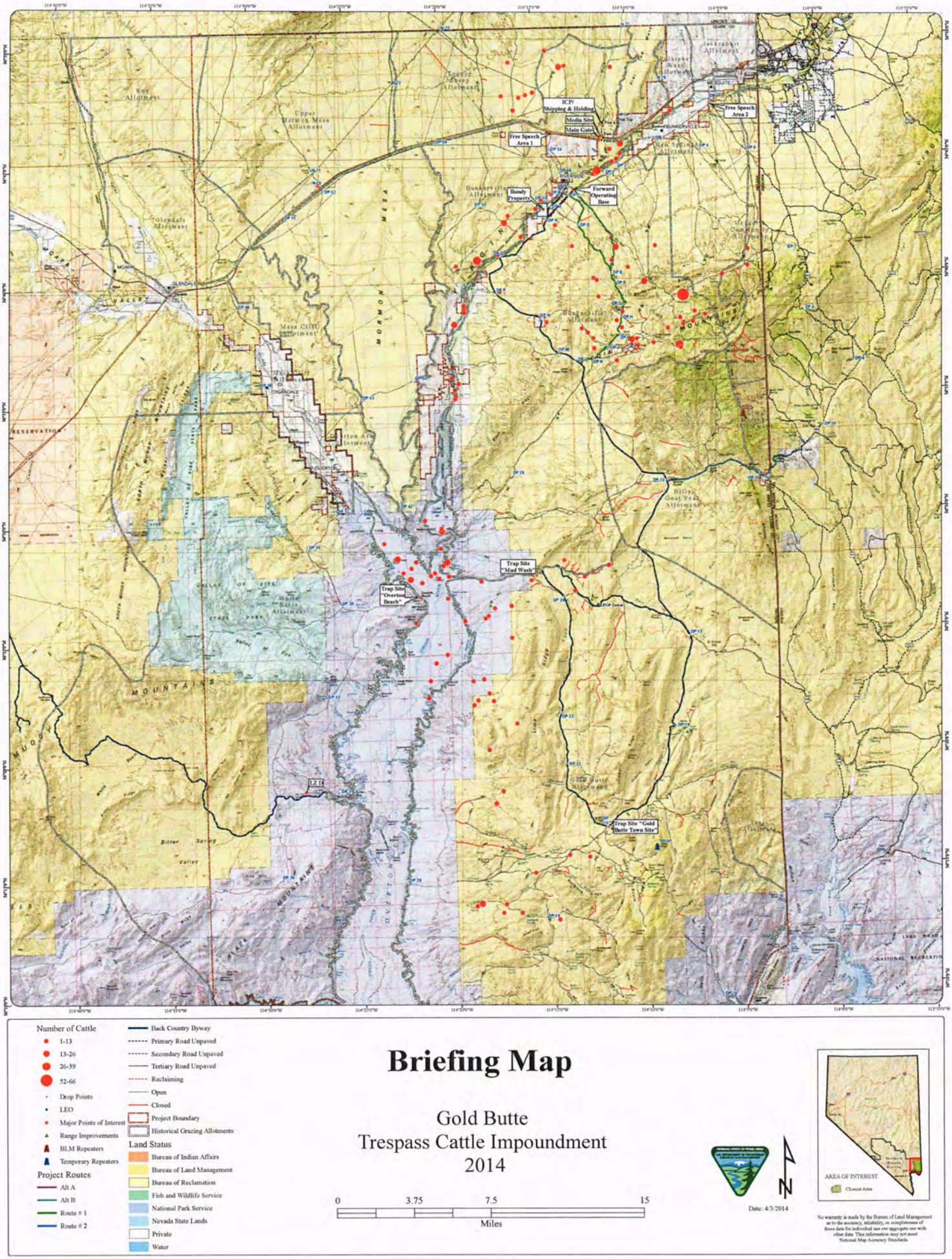
0 1 2 4
Miles

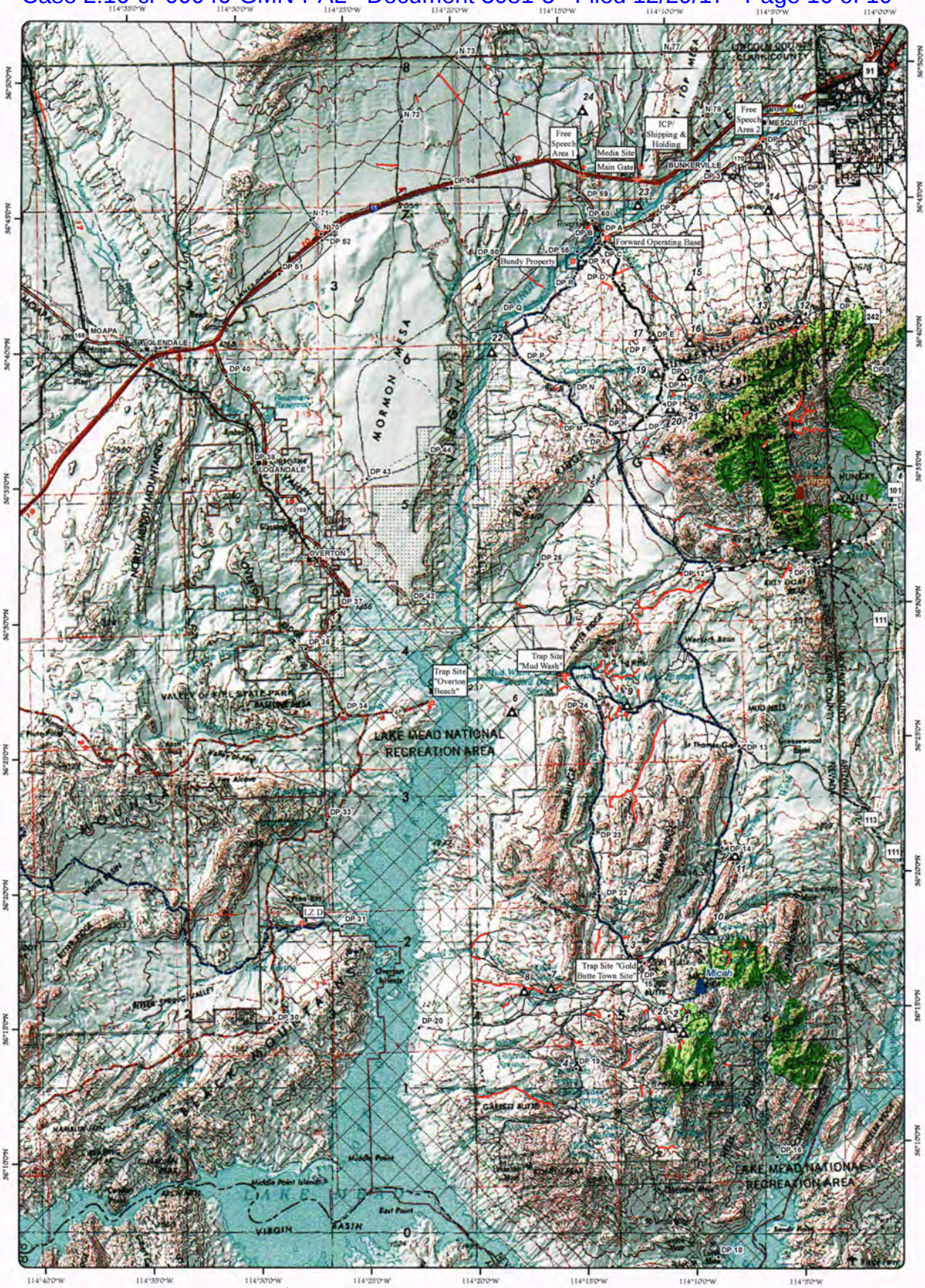
N

Date: 4/9/2014

No warranty is made by the Bureau of Land Management as to the accuracy, reliability, or completeness of these data for individual use ore aggregate use with other data. This information may not meet National Map Accuracy Standards.

GB.024635


ICP/ Shipping & Holding
Media Site
Main Gate
Free Speech Area 1
Free Speech Area 2
Bundy Property
Forward Operating Base
Trap Site "Mud Wash"
Trap Site "Overton Beach"
Trap Site "Gold Butte Town Site"
LZ D
Number of Cattle
1-13
13-26
26-39
52-66
Drop Points
LEO
Major Points of Interest
Range Improvements
BLM Repeaters
Temporary Repeaters
Project Routes
Alt A
Alt B
Route # 1
Route # 2
Back Country Byway
Primary Road Unpaved
Secondary Road Unpaved
Tertiary Road Unpaved
Reclaiming
Open
Closed
Project Boundary
Historical Grazing Allotments
Land Status
Bureau of Indian Affairs
Bureau of Land Management
Bureau of Reclamation
Fish and Wildlife Service
National Park Service
Nevada State Lands
Private
Water
Briefing Map
Gold Butte
Trespass Cattle Impoundment
2014
0
3.75
7.5
15
Miles
Date: 4/3/2014
AREA OF INTEREST
Closure Area



Drop Points
Points of Interest
Range Improvements
BLM Repeaters
Alt A
Alt B
Route # 1
Route # 2
Back Country Byway
Open
Closed
Project Boundary

Land Status
Private
National Park Service
Bureau of Reclamation
Bureau of Land Management

Briefing Map

Gold Butte
Cattle Trespass Impoundment
2014

0 3 6 12
Miles

Date: 4/7/2014

No warranty is made by the Bureau of Land Management as to the accuracy, reliability, or completeness of these data for individual use ore aggregate use with other data. This information may not meet National Map Accuracy Standards.

Brief Exhibit No. 26

From: Brenda Weksler [mailto:Brenda_Weksler@fd.org]
Sent: Wednesday, July 5, 2017 3:58 PM
To: Myhre, Steven (USANV) [redacted]; Ahmed, Nadia (USANV) <[redacted]>; Dickinson, Nicholas (USANV) [redacted]; Creegan, Erin (NSD) (JMD) [redacted]
Cc: Ryan Norwood <Ryan_Norwood@fd.org>
Subject: Fw: [redacted]

I forgot to add that we need all the threat assessments prepared in this case. we have the threat assessment provided last month, but we understand there were threat assessments that took place during the impoundment (by [redacted]) and the one that was ultimately prepared by the FBI in DC explaining why they need to stop operations. Lastly, please let us know whether you plan on disclosing information relating to [redacted] and his arrest (as outlined in motion to dismiss by Drexler, Stewart and Parker).

Thanks.

Brenda Weksler
Assistant Federal Public Defender
Trial Training Director
[redacted]

From: "Myhre, Steven (USANV)" [redacted]
To: Brenda Weksler <Brenda_Weksler@fd.org>, "Ahmed, Nadia (USANV)" [redacted], "Dickinson, Nicholas (USANV)" <[redacted]>, "Creegan, Erin (NSD) (JMD)" [redacted]
Cc: Ryan Norwood <Ryan_Norwood@fd.org>
Date: 07/05/2017 04:24 PM
Subject: RE: [redacted]

Hi Brenda:

As to your requests for information related to meetings, threat assessments, and interviews of witnesses, we have made, and will continue to make, all disclosures appropriate by Rule, Statute and the U.S. Constitution. Further, we will make all Jencks disclosures at the appropriate time. To the extent the information you seek does not fall into those categories, we do not intend to make further disclosures. Of the names you have listed below, we intend only to call [redacted] and [redacted] as witnesses in our case and we have made, or will make, all disclosures appropriate as to them. If that changes, we will let you know.

As to the allegations of [redacted] arrest, our position on disclosures will be set out in our responses to the Motions that have been filed. Thank you.

----Forwarded by Brenda Weksler/NVF/09/FDO on 07/05/2017 03:48 PM ----

From: Brenda Weksler/NVF/09/FDO
To: Steven [redacted]v, Nadia [redacted]v, Nicholas [redacted] Erin [redacted]
Cc: Ryan Norwood/NVF/09/FDO@fdo
Date: 07/05/2017 03:24 PM
Subject: Fwd: Brandon Rapolla 302

Hi.

I'm following up on this request as I have not heard back from you.

In addition, I am trying to resolve informally discovery issues concerning:
--all the different memos or records of conversations for phone calls and meetings on 4/11 and 4/12 including Love, ASAC Stern, Bogden, Gillespie, Lombardo, McMahill, Komze, Bucheit and Sen Reid (or representative of his office).
--information regarding Burleson's past cooperation with the government.

Please let me know what your position is on these matters.

Thanks.

Brenda Weksler
Assistant Federal Public Defender
Trial Training Director

Begin forwarded message:

From: "Brenda Weksler" <Brenda_Weksler@fd.org>
Date: July 3, 2017 at 11:24:10 AM PDT
To: "Brenda Weksler" <Brenda_Weksler@fd.org>
Subject: Fw: Brandon Rapolla 302

-----Forwarded by Brenda Weksler/NVF/09/FDO on 07/03/2017 11:24AM -----
To: Steven [redacted]v, Nicholas [redacted], Nadi [redacted]gov, Erin.[redacted]ov
From: Brenda Weksler/NVF/09/FDO
Date: 05/30/2017 04:12PM
Subject: Brandon Rapolla 302

Hello everyone,

It is my understanding he was interviewed by the FBI. Could you please provide us that 302?

Thanks,

Brenda.

Brenda Weksler
Assistant Federal Public Defender
Trial Training Director

Brief Exhibit No. 29

United States Department of the Interior

BUREAU OF LAND MANAGEMENT
Office of Law Enforcement and Security
Office of Professional Responsibility
3833 S. Development Avenue
Boise, Idaho 83705

December 6, 2017

In Reply Refer To:
9260 (WO120) I

Steven Myhre
U.S. Attorney's Office
District of Nevada
501 Las Vegas Boulevard South STE 1100
Las Vegas, Nevada 89101

Steve,

I wanted to provide a follow up to my conversation with AUSA Dan Schiess from earlier today regarding a DOI OIG case OI-HQ-09-0718-R, "Mojave Desert Tortoise". A case that was referred to the Bureau of Land Management (BLM) Internal Affairs (IA) for investigation in 2009. I wanted to clear up some of the confusion as to why the OIG could not locate the case file when your office contacted them.

Historically, the Department of Interior, (DOI), Office of the Inspector General (OIG), created a hotline complaint intake system that receives complaints on a variety of issues either telephonically or by email from all sources –both private citizens and government employees alike. The DOI, OIG, will monitor those phone calls and email complaints and assign an OIG number to the complaint referral such as OI-HQ-09-0718-R. On or about October 5, 2009, they received a complaint from an anonymous person regarding the Mojave Desert Tortoise alleging that for several years the BLM has had a chronic pattern of not taking effective actions to stop trespass livestock grazing, especially in the critical habitat of the endangered desert tortoise. As I mentioned the OIG assigns a case number to all complaints received, and determines if they are going to investigate the matter or refer it out to one of the "Bureau(s) in the Department of Interior" to handle. In this case, they assigned the tracking number of OI-HQ-09-0718-R to the BLM as a mandatory response required referral. The OIG did not conduct any investigation into the matter, but rather requested the BLM Internal Affairs office to handle the complaint referral.

The BLM Internal Affairs office also logs in the complaint, and generates a BLM case number. In this instance, BLM IA assigned a new case number 10-893-00073, but it is also OI-HQ-09-0718-R. I assigned case 10-893-00073 to BLM Special Agent (SA) Bart Fitzgerald for further investigation. Upon conclusion of SA Fitzgerald's report of investigation, BLM issued correspondence back to the OIG to reflect our findings, but BLM Internal Affairs retained the case file because my office did the investigation.

My belief is that when the OIG referred the matter to our BLM Internal Affairs office, BLM conducted the investigation and sent closing documentation to the OIG with our findings. I speculate that a search of their system probably couldn't locate a case file because they didn't conduct any investigation, but assigned a number to the complaint. This happens quite frequently that the OIG logs in a complaint, assigns a case number and then refers it out to a Bureau to investigate. My office tracks cases using both the OIG case referral number and the BLM Internal Affairs case number, so I was able to locate the archived case file from 2009-11. I have provided your office with a copy of the archived case file. The OIG should have been able to locate the memos and the accountability form we sent them back in 2011, but I don't believe they would have received the case file since we retain that at BLM.

I hope this clarifies some of the confusion surrounding your earlier requests to the OIG for the case file. In the future, please feel free to reach out to my office for any assistance we can provide you.

Please do not hesitate to contact me with any additional questions or concerns.

Best Regards,

Thomas Huegerich
Chief, Office of Professional Responsibility
[redacted]

Brief Exhibit No. 30

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff, vs. CLIVEN D. BUNDY (1), RYAN C. BUNDY (2), AMMON E. BUNDY (3), and RYAN W. PAYNE (4), Defendants.	Case No. 2:16-cr-00046-GMN-PAL Las Vegas, Nevada November 21, 2017 8:24 a.m. Day 10

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE GLORIA M. NAVARRO
UNITED STATES DISTRICT COURT CHIEF JUDGE, AND A JURY

APPEARANCES:

For the Government:

STEVEN W. MYHRE, USA
DANIEL SCHIESS, AUSA
NADIA JANJUA AHMED, AUSA
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Appearances continued on page 2.

Court Reporter: Katherine Eismann, CSR, CRR, RDR
(702)431-1919 ke@nvd.uscourts.gov

Proceedings reported by machine shorthand, transcript produced by computer-aided transcription.

February of 2012. And the government believes that this report was created in preparation for an impound operation in 2012 or 2013, definitely not 2014.

The 2014 report refers to the 2012 report. So, this is the 2012 report. This 2012 OLES threat assessment mentions an OIG report that would have had to have existed at the time, otherwise you can't mention it. So, it's not the future reports that we have already talked about in other hearings.

MR. MYHRE: No, Your Honor, those are separate and apart. And I can -- I can address that as well.

THE COURT: Okay.

MR. MYHRE: And I will wait for Mr. Hill to finish.

THE COURT: Tell me what you know about this OIG report.

MR. MYHRE: We are unaware of the existence of any OIG report. The OIG database is as accessible to us as it is to the defense or is as accessible to the defense as it is to us. They can certainly search that database.

We are unaware of any OIG report that is referenced in this threat assessment. That doesn't mean we won't continue to look, but as I stand here today, I'm not -- we're not aware of it.

With respect to some of the other representations, I think there needs to be a little clarity brought to this. First of all, to the extent the defense is saying that the BAU

supplement Miss Weksler's motion, so we can keep it --

MR. HILL: Yes, Your Honor. Of course.

THE COURT: -- on calendar. Let's see.

MR. MYHRE: And Your Honor, did you wish -- I have a copy of the redacted version that was provided to defense, if the Court wishes me to make this a court record at this point.

THE COURT: You can file it under seal if you'd like to.

What is the OIG report that's mentioned in the OLES report? Is it referring to a threat assessment or something? It's not. It's referring to something else. Does it have any keywords?

MR. MYHRE: I can read the relevant portion that Mr. Hill is referring to, Your Honor. It says, "A US Department of Interior, Office of Inspector General Report, directed the BLM to enforce the federal district court order requiring Bundy to remove his livestock from public lands."

And that OIG report -- whether this assessment got it right, or that's urban legend, or if there is, in fact, an OIG report, it -- I can represent we don't have an OIG report in our possession directing the BLM to enforce a federal district order requiring Bundy to remove his livestock.

And the OIG database is available to the defense. If they wish to search it, they can search for it as well.

MS. WEKSLER: So -- Judge, so that the Court has some

of lying about.

I find it curious that two documents, that this -- that this BLM or that this OIG report was talked about at a joint terrorism task force meeting, and now it's being talked about in this threat assessment, it's obviously entering in to people's calculus.

It's at the joint terrorism task force meeting, and it's in this threat assessment. It's entering into people's calculus, this OIG report.

MR. MYHRE: Your Honor, even if all that was -- existed, let's assume there was an OIG report that said, "Get the cattle off the land. Get it off now." And let's assume that someone just made up a threat assessment out of thin air, and a thousand officers show up in Bunkerville. None of that would provide an excuse, justification, or defense to the -- to the charges.

With respect to the rebuttal of the allegations in the indictment, the indictment says he sent out false -- basically, false messaging about being surrounded and with snipers. And isolated -- I don't have the indictment in front of me. I can get it. I can pull out the exact words.

But the government's theory of the case, nonetheless, is going to be that Bundy was sending out false messaging to the effect of he was isolated, that he was surrounded by snipers who had laser beams on his chest ready to shoot him,

that he couldn't move and so forth.

That's going to be just a question of fact as to what was going on on the ground. The threat assessment has nothing to do with what was actually occurring on the ground between the 5th of April and the 12th of April.

And we will present evidence that that was not true. He was not surrounded. There were not snipers and so forth. But that's got nothing to do with the threat assessment from 2012.

So, I understand -- you know, so, this is just a shiny object that's, you know, being thrown around on the wall here to totally distract us all from what the issue is that we are here for.

MR. HILL: So, Judge, the overarching point -- and I will reiterate again. This OIG report is obviously entering -- this is back in 2012 they are talking about it, and then again weeks before the operation, they are talking about it again at a joint terrorism task force.

The point is that the BLM had to justify why they had not acted. Their answer is that the Bundys are dangerous. The 2014 operation that seems, in whole or in part, in line with what Mr. Whipple's been scratching at, was not designed to impound cattle, but to prove the Bundys' dangerousness by provocation.

That is why the potential motive, which has been now