BILLY J. WILLIAMS, OSB #901366
United States Attorney
District of Oregon
ETHAN D. KNIGHT, OSB #992984
GEOFFREY A. BARROW
CRAIG J. GABRIEL, OSB #012571
Assistant United States Attorneys
ethan.knight@usdoj.gov
geoffrey.barrow@usdoj.gov
craig.gabriel@usdoj.gov
1000 SW Third Ave., Suite 600
Portland, OR 97204-2902
Telephone: (503) 727-1000
Attorneys for United States of America

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA	**3:16-CR-00051-BR**
v.	**GOVERNMENT'S RESPONSE TO DEFENDANTS' MOTIONS (#1240, 1241, 1243, 1245, 1246)**
AMMON BUNDY, et al.,	
Defendants.	

The United States of America, by Billy J. Williams, United States Attorney for the District of Oregon, and through Ethan D. Knight, Geoffrey A. Barrow, and Craig J. Gabriel, Assistant United States Attorneys, hereby submits this response in opposition to defendants Ryan Bundy's and Shawna Cox's recent motions (ECF Nos. 1240, 1241, 1243, 1245, 1246), filed on behalf of all defendants.

On September 9 and 12, 2016, months after this Court's deadline for filing pretrial motions, defendants nevertheless filed new motions seeking dismissal, suppression, and various

forms of other relief. Because each motion is untimely, these motions should be denied on that basis alone. Federal Rule of Criminal Procedure 12(c)(1) provides that the court may set a deadline for filing pretrial motions; Rule 12(c)(3) authorizes the court to decline to consider untimely motions absent a showing of "good cause." *See, e.g.*, *United States v. Walden*, 625 F.3d 961, 964-65 (6th Cir. 2010) (affirming trial court's refusal to consider an untimely motion to suppress given the absence of a "legitimate explanation for the failure to timely file"); *United States v. Winbush*, 580 F.3d 503, 508 (7th Cir. 2009) (recognizing that busy trial courts "possess great authority to manage their caseload").

Alternatively, should this Court examine the substance of these late motions, they should also be denied on the merits.

Motion to Suppress, ECF No. 1240

Ryan Bundy and Shawna Cox move to suppress evidence seized from various digital devices searched pursuant to a warrant issued on April 22, 2016 (ECF No. 1240-1, filed under seal). They argue that the warrant lacks sufficient particularity; they fail, however, to explain how or why they neglected to file a timely motion to suppress, particularly when their Motion is neither based on new evidence nor new law.

The warrant is, however, plainly facially valid. It was accompanied by an attachment ("A") that specifically identified the digital devices to be searched, and it carefully explained the basis for the seizure: each specified digital device was believed to be used by a member of the conspiracy to plan, carry out, or further the unlawful occupation of the MNWR. The second attachment ("B") explained why the devices were apt to yield evidence relevant to several specified charges, including the conspiracy charged in Count 1 of the Superseding Indictment.

Attachment B described financial records relevant to travel, calendars and schedules relevant to planning, and correspondence between co-conspirators about the charged crimes.

Defendants criticize the affidavit submitted in support of the warrant because the agent relied, in part, on his training and experience in investigating criminal conspiracies. Courts routinely rely on such expertise when assessing whether an affidavit specifies facts giving rise to probable cause. *United States v. Gil*, 58 F.3d 1414, 1418 (9th Cir. 1995). The affidavit supporting this warrant did more than simply rely on the agent's training and experience, however, it also identified well-publicized incidents in which members of the charged conspiracy photographed themselves using laptops, cell phones, and other digital devices during the occupation.

Defendants also criticize the affiant's use of the word "may." This conditional phrasing is consistent with the legal standard; that is, that the affiant must identify facts raising a "fair probability," not a "certainty," that responsive evidence will be found in the location sought to be searched. *United States v. Krupa*, 658 F.3d 1174, 1177-78 (9th Cir. 2011). The expectation that searching defendants' digital devices would yield criminal evidence was sound.

Motion for Jury Trial, ECF No. 1241

Cox moves for a jury trial on the question of whether the federal government truly owns the MNWR. Preliminary questions of admissibility are for the court pursuant to Fed. R. Evid. 104. Moreover, the MNWR ownership "issue" has no direct bearing on either the crimes charged or the alleged good faith, adverse possession-based defense. The government need not establish that the MNWR is owned by the federal government to prove that the conspiracy impeded federal employees from doing their jobs. And regardless of who owns the land, there

is no question that the federal government owned the buildings on the MNWR that form the basis for the firearms charges.

This Court has already stated that defendants may freely testify about their beliefs regarding why they thought that their occupation of the MNWR was lawful, and that defense does not depend upon the jury accepting or rejecting anyone's theory regarding property ownership. The judicial notice the government has asked this Court to take relative to the MNWR land is strictly limited to an acknowledgment of what appears in Harney County property records.

Cox's Motion for a jury trial on this issue should be denied.

Amendment to Motion to Dismiss, ECF No. 1243

Cox seeks to amend her Motion to Dismiss (ECF No. 1186) to include an additional citation to *United States v. Otley*, 127 F.2d 988 (9th Cir. 1942). Because her Motion to Dismiss should be denied, this Motion should be deemed moot.

Motion for Judicial Notice, ECF No. 1245

Cox opposes the government's request (ECF No. 1229) and, in turn, moves for judicial notice consistent with the separately filed McIntosh Declaration (ECF No. 1252). McIntosh repeats the adverse possession theories that this Court has already rejected many times, although he reads the government's Houghton Declaration (ECF No. 1230) as further support for his views. McIntosh's theory is that the federal government simply could not have obtained lawful title to the MNWR absent permission from the state. His theories are contrary to the law that this Court has already recognized controls this issue, and his stated credentials (i.e., his stated directorship of two web-based, environmental-sounding organizations) reveal that he is an

advocate who shares defendants' misguided views. (One organization promises to give a "strong voice that will dominate and control state and federal bureaucrats").

Cox's counter-Motion for Judicial Notice should be denied.

Motion for Evidentiary Hearing, ECF No. 1246

Cox moves for a pretrial evidentiary hearing that would force the government to prove the existence of a conspiracy prior to the admission of any co-conspirator statements. The Motion is, at least partially, moot since trial is already underway. In any event, the Ninth Circuit does not require a preliminary 104(a) showing to admit co-conspirator statements at trial. *United States v. Tamez*, 941 F.2d 770, 775 (9th Cir. 1991). This Motion should also be denied.

Dated this 14th day of September 2016.

Respectfully submitted,

BILLY J. WILLIAMS
United States Attorney

s/ Geoffrey A. Barrow
ETHAN D. KNIGHT, OSB #992984
GEOFFREY A. BARROW
CRAIG J. GABRIEL, OSB #012571
Assistant United States Attorneys