

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

3:16-cr-00051-BR

Plaintiff,

ORDER TAKING JUDICIAL
NOTICE OF FEDERAL
OWNERSHIP OF THE MALHEUR
NATIONAL WILDLIFE REFUGE
(#1229); ORDER DENYING
AMMON BUNDY'S MOTION
(#1248) TO ENJOIN
PROSECUTION

v.

AMMON BUNDY, RYAN BUNDY,
SHAWNA COX, DAVID LEE FRY,
JEFF WAYNE BANTA, KENNETH
MEDENBACH, and NEIL WAMPLER,

Defendants.

BROWN, Judge.

This matter comes before the Court on the government's Motion (#1229) for Judicial Notice Regarding Ownership of the Malheur National Wildlife Refuge Headquarters Area and Defendant Ammon Bundy's Emergency Motion (#1248) to Enjoin Prosecution, Dismiss With Prejudice, and Other Relief.

The Court initially entered an Order (#1317) on September 21, 2016, denying Ammon Bundy's Motion (#1248). That Order, however, was inadvertently entered without the benefit of Ammon Bundy's Reply Memorandum (#1318) which reiterates and expands

1 - ORDER TAKING JUDICIAL NOTICE OF FEDERAL OWNERSHIP OF THE
MALHEUR NATIONAL WILDLIFE REFUGE (#1229); ORDER DENYING
AMMON BUNDY'S MOTION (#1248) TO ENJOIN PROSECUTION

arguments made in his Memorandum in Support of his Motion (#1248). Later on September 21, 2016, the Court, therefore, withdrew its Order (#1317). The Court has now reconsidered the entire record on these matters, which includes the following:

1. The government's Motion (#1229) for Judicial Notice Regarding Ownership of the MNWR Headquarters Area;
2. Declaration (#1230) by Charles Houghten in support of the government's Motion (#1229) for Judicial Notice Regarding Ownership of the MNWR Headquarters Area;
3. Defendant Shawna Cox's Response (#1245) to [the government's Motion (#1229)] and Motion for Judicial Notice Regarding Ownership & Ceding of the MNWR Headquarters Area¹;
4. Defendant Ammon Bundy's Emergency Motion (#1248) to Enjoin Prosecution, Dismiss with Prejudice, and Other Relief;
5. Declaration (#1252) by Angus P. McIntosh, Ph.D. attached to Ammon Bundy's Motion (#1248);
6. The government's Response (#1295) to Defendant Ammon Bundy's Emergency Motion (#1248) to Dismiss; and
7. Ammon Bundy's Reply (#1318) in Further Support of his Emergency Motion (#1248) to Enjoin Prosecution, Dismiss with Prejudice, and Other Relief.

¹ The government did not file a reply in support of its Motion (#1229) for Judicial Notice.

In addition, on September 22, 2016, Cox filed a Motion (#1322) to Reconsider Order Taking Judicial Notice. Although Cox's Motion to Reconsider related to the Court's now-withdrawn Order (#1317), the Court, nevertheless, has reviewed Cox's arguments therein and considers them as part of the record on these Motions. Accordingly, the government need not file a response to Cox's Motion (#1322) to Reconsider.

The record on this Motion is now complete, and the Court concludes oral argument would not be helpful.

Based on the entire record and for the reasons that follow, the Court: (1) **GRANTS in part** and **DENIES in part** the government's Motion (#1229) for Judicial Notice Regarding Ownership of the Malheur National Wildlife Refuge Headquarters Area; (2) **DENIES** Defendant Ammon Bundy's Emergency Motion (#1248) to Enjoin Prosecution, Dismiss With Prejudice, and Other Relief; and (3) **DENIES** Defendant Shawna Cox's Motion (#1322) to Reconsider Order Taking Judicial Notice.

I. Government's Motion (#1229) for Judicial Notice Regarding Ownership of the Malheur National Wildlife Refuge Headquarters Area

In its Motion the government requests this Court take judicial notice that: (1) the Malheur National Wildlife Refuge (MNWR) is comprised of approximately 187,167 acres; (2) on February 21, 1935, Harney County, Oregon, recorded a deed

transferring land from Eastern Oregon Land and Livestock Company to the federal government; (3) the MNWR headquarters is located on the property purchased by the federal government in 1935; and (4) the property to the north of the headquarters was purchased by the federal government from Paul C. and Ruth Stewart as reflected in a deed recorded in Harney County, Oregon, on November 27, 1940. The government supports its request for judicial notice with the Declaration (#1230) of Charles Houghten, which has copies of the deeds related to the two parcels attached thereto.

"Federal Rule of Evidence 201(b) permits judicial notice of an adjudicative fact that is 'not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'" *United States v. Daychild*, 357 F.3d 1082, 1099 (9th Cir. 2004). Under Rule 201(b), courts routinely take judicial notice of public documents, including copies of recorded deeds of trust. See *Mann v. Nationstar Mortgage, LLC*, 623 F. App'x 410, 412 (9th Cir. 2016).

The Court has reviewed the pertinent county records submitted by the government showing title to these lands and concludes the accuracy of those records cannot reasonably be

questioned. Defendants were provided with an opportunity to respond to the government's Motion, but there is not any contrary evidence in the record. Accordingly, the Court takes judicial notice as follows:

1. The lands comprising the Malheur National Wildlife Refuge are owned by the United States government and include lands reserved from the public domain, lands transferred by other federal agencies, and lands acquired from private parties.

2. The Malheur National Wildlife Refuge Headquarters buildings are located on land that was purchased by the United States government from the Eastern Oregon Land and Livestock Company. Title passed via an instrument recorded February 21, 1935, in Book 36 Page 437, Deed records of Harney County, Oregon.

3. The area immediately north of the Refuge Headquarters was purchased by the United States government from Paul C. Stewart and Ruth Stewart. Title passed via Warranty Deed recorded November 27, 1940, in Book 39 Page 214, Deed records of Harney County, Oregon.

The Court, however, cannot take judicial notice of the total acreage of the MNWR because the documents submitted by the government in support of its Motion do not establish that particular fact.

On this record, therefore, the Court **GRANTS in part** and

DENIES in part the government's Motion (#1229) for Judicial Notice Regarding Ownership of the Malheur National Wildlife Refuge Headquarters Area. At the government's request the Court will give a judicial notice instruction in the form attached hereto as Exhibit 1 before the close of the government's case-in-chief.

II. Ammon Bundy's Emergency Motion (#1248) to Enjoin Prosecution and Shawna Cox's Arguments in her Response (#1245) to the Government's Motion (#1229) for Judicial Notice Regarding Ownership of the Malheur National Wildlife Refuge Headquarters Area

Defendant Shawna Cox filed a Response (#1245) to the government's Motion on September 12, 2016. In that Response Cox acknowledges the government has demonstrated it owns the land in question, but, nonetheless, she contends the government does not have any regulatory jurisdiction over that land because it did not obtain the consent of the Oregon State Legislature as required by the Enclave Clause of Article I, Section 8, Clause 17 of the United States Constitution. Related to Cox's arguments, Ammon Bundy requests in his Emergency Motion (#1248) to Enjoin Prosecution that this Court reconsider its previous orders denying Ammon Bundy's Motions to Dismiss for Lack of Subject Matter Jurisdiction on the basis that the record now clearly reflects that the property on which the MNWR headquarters sits was not part of the land the federal government has owned since

before Oregon statehood, but instead was acquired from the Eastern Oregon Land and Livestock Company in 1935.

Although it is now clear that the MNWR is made up of a combination of lands that the federal government reserved from the public domain, acquired from other federal agencies, and purchased from private parties, the government, nevertheless, properly exercises jurisdiction over all such lands under the Property Clause of Article IV, Section 3, Clause 2.

"The Property Clause of the Constitution states that '[t]he Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.'" *Confederated Tribes of the Siletz Indians of Oregon v. United States*, 110 F.3d 688, 694 (9th Cir. 1997) (quoting U.S. Const. art. IV, § 3, cl. 2). When the United States acquires property pursuant to the Property Clause, it may also exercise jurisdiction over those lands concurrently with the jurisdiction of the state in which that property is located.² As the Supreme Court has explained:

[W]hile Congress can acquire exclusive or partial jurisdiction over lands within a State by the State's consent or cession, the presence or absence of such jurisdiction has nothing to do with Congress' powers under the Property Clause. Absent consent or cession a

² Notably, at trial Harney County Sheriff David Ward testified the state exercised jurisdiction over the MNWR concurrently with federal jurisdiction over those lands.

State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant the Property Clause.

Kleppe v. New Mexico, 426 U.S. 529, 543 (1976). See also *United States v. Bohn*, 622 F.3d 1129, 1133-34 (9th Cir. 2010). “[E]ven over public land within the States,” the federal government “‘doubtless has a power over its own property analogous to the police power of the several states, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case.’” *Kleppe*, 426 U.S. at 540 (quoting *Camfield v. United States*, 167 U.S. 518, 525 (1897)). Accordingly, the arguments of Ammon Bundy and Cox regarding the Enclave Clause are “beside the point” because the federal government may constitutionally exercise jurisdiction over the MNWR pursuant to the Property Clause.

Ammon Bundy also contends Congress enacted legislation in 1936 to divest the federal government of jurisdiction over lands that include the MNWR. See 49 Stat. 2035. That statute, however, only disclaims any exclusive federal jurisdiction over such lands. As noted, the government’s proprietary jurisdiction over the MNWR is not exclusive of the State of Oregon’s jurisdiction. See *Kleppe*, 426 U.S. at 543.

Similarly, as amplified in his Reply, Ammon Bundy contends

the Farmers' Home Administration Act of 1946, 60 Stat. 1062, required the federal government to liquidate the MNWR Headquarters and its buildings. That argument is without merit. The Farmers' Home Administration Act of 1946 only required the liquidation of certain property controlled by the Farm Security Administration and the National Housing Agency. There is not any evidence that MNWR has ever been owned or operated by either agency.

Moreover, the arguments of Cox and Ammon Bundy fail for a more fundamental reason: Even if there was a factual or legal scenario under which the federal government could not exercise jurisdiction over the MNWR, that fact would still not negate any element of any charged offense in this case. In particular, neither Ammon Bundy nor Cox cite any authority for the unusual proposition that an alleged claim that the federal government lacks jurisdiction over a parcel of land somehow would negate a charge such as the conspiracy charged in Count One, especially when, as in this case, there is not any controlling legal authority that supports Ammon Bundy and Cox's assertion that the federal government lacks jurisdiction over the MNWR.

Ammon Bundy also contends the Court should revisit the arguments he made in his Motion (#1155) to Dismiss for Lack of Subject Matter Jurisdiction re: Adverse Possession that the Court

denied by Order (#1228). That Order, however, was not based on the method by which the United States acquired the lands that constitute the MNWR. Thus, the additional information concerning the source of the federal government's ownership of the MNWR does not affect the Court's analysis in its Order (#1228) Denying Ammon Bundy's Motion to Dismiss for Lack of Subject-Matter Jurisdiction re: Adverse Possession.

On this record, therefore, the Court DENIES Ammon Bundy's Emergency Motion (#1248) to Enjoin Prosecution, Dismiss With Prejudice, and Other Relief and Shawna Cox's Motion (#1322) to Reconsider Order Taking Judicial Notice.

In addition, the Court notes Defendants have made an exhaustive record through multiple filings and arguments on the record regarding their contentions that the federal government lacks constitutional authority to own and to exercise jurisdiction over the MNWR and as to their assertions that their alleged adverse-possession claim deprives this Court of subject-matter jurisdiction or otherwise constitutes a basis to dismiss the Superseding Indictment (#282). The Court, therefore, will not entertain any additional motions regarding any such arguments. In addition, Defendants may not seek to introduce any evidence or make any argument to the jury inconsistent with the Court's Orders on these issues except, as the Court has

consistently ruled, as these issues pertain to Defendants' alleged state of mind which is relevant to the alleged intent to impede officers of the United States by force, intimidation, or threat. To the extent that the government requests limiting instructions on these issues as the trial continues, the government should so move.

CONCLUSION

For these reasons, the Court: (1) **GRANTS in part** and **DENIES in part** the government's Motion (#1229) for Judicial Notice Regarding Ownership of the Malheur National Wildlife Refuge Headquarters Area; (2) **DENIES** Defendant Ammon Bundy's Emergency Motion (#1248) to Enjoin Prosecution, Dismiss With Prejudice, and Other Relief; and (3) **DENIES** Defendant Shawna Cox's Motion (#1322) to Reconsider Order Taking Judicial Notice.

IT IS SO ORDERED.

DATED this 22nd day of September, 2016.



ANNA J. BROWN
United States District Judge

United States v. Ammon Bundy, et al.

3:16-cr-00051

**Judicial Notice Statement re: Ownership of the Malheur National
Wildlife Refuge**

The Court has decided it is not necessary to receive additional evidence of the following facts:

1. The lands comprising the Malheur National Wildlife Refuge are owned by the United States government and include lands reserved from the public domain, lands transferred by other federal agencies, and lands acquired from private parties.
2. The Malheur National Wildlife Refuge Headquarters buildings are located on land that was purchased by the United States government from the Eastern Oregon Land and Livestock Company. Title passed via an instrument recorded February 21, 1935, in Book 36 Page 437, Deed records of Harney County, Oregon.
3. The area immediately north of the Refuge Headquarters was purchased by the United States government from Paul C. Stewart and Ruth Stewart. Title passed via Warranty Deed recorded November 27, 1940, in Book 39 Page 214, Deed records of Harney County, Oregon.

You may, but are not required to, accept these facts as true.