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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

*Plaintiff,*

v.

AMMON BUNDY, *et al,*

*Defendants.*

Case No. 3:16-cr-00051-BR

RESPONSE TO GOVERNMENT  
OBJECTIONS RE EXHIBITS TO BE  
USED IN AMMON BUNDY'S DIRECT  
EXAMINATION

The Honorable Anna J. Brown

Overview: Below is the full exchange between the government and the defendant on each proposed exhibit for Mr. Bundy's testimony. In summary, the government's argument on most of the exhibits is a "hearsay" objection, and specifically that statements not made by Mr. Bundy cannot qualify as an exception to the hearsay rule. However, this argument misses the point. Defendant is relying on two basic principles when admitting exhibits that have evidentiary significance for proving Mr. Bundy's "state of mind" or "intention."

First, as a general position, the exhibits containing statements made by someone other than Mr. Bundy, are being offered to show the effect on Mr. Bundy (who had viewed or heard the statements). These statements are not offered for the truth of the third party statement, and therefore are not hearsay. This is consistent with well-established authority. "In criminal trials, statements that the defendant heard or read may be admitted to shed light on the question whether he acted innocently or accidentally, or instead acted purposefully or wrongfully or with malicious intent." 4 Federal Evidence § 8:20 (4th ed.). "An out-of-court statement offered to show the effect on the listener, rather than the truth of the matter asserted, is not hearsay." *United*

*States v. Payne*, 944 F.2d 1458, 1472 (9th Cir.1991); *United States v. Lopez*, 185 F.3d 870 (9th Cir. 1999) (Holding that evidence offered to show parties reliance upon another's statement, rather than the truth of the statement itself, does not constitute hearsay under the Federal Rules of Evidence.)

This is particularly true, where statements are offered “for their effect on defendants' state of mind, which was very much in dispute” or “to show the circumstances under which subsequent events occurred” or that “show that the statements occurred and that, given their effect on the defendants' state of mind, they provided a good faith basis for the defendants' actions.” *United States v. Certified Env'tl. Servs., Inc.*, 753 F.3d 72, 89 (2d Cir. 2014). And, a statement “is not hearsay if the witness is reporting what he heard someone else tell him for the purpose of explaining what the witness was thinking, at the time or what motivated him to do something.” *United States v. Leonard-Allen*, 739 F.3d 948, 954 (7th Cir. 2013) (reversing conviction for conspiracy to commit money laundering where the district court erroneously excluded the defendant from testifying regarding the statements of others, in an attempt to give the jury an “alternate explanation” for defendant's actions, making his “defense more believable,” and negating his criminal intent, because “[I]n those circumstances, the out-of-court statement is not being offered as evidence that its contents are true”).

Further, in *United States v. Kohan*, the Second Circuit reversed a defendant's conspiracy conviction based on the trial court's erroneous exclusion of testimony of a witness regarding the statements of a third party: the defendant “was not basing his defense on the truth of [the third party's] statements, but rather on the fact that they were made and that [defendant] believed them to be true.” *United States v. Kohan*, 806 F.2d 18, 22 (2d Cir. 1986) (reversing conviction for conspiracy under 18 U.S.C. § 371 where trial court excluded “circumstantial evidence of [the

defendant's] state of mind – his belief that [the third party's] activities were legitimate”). In *Kohan*, the court noted that the error was especially significant when offered in the defendant's direct case, revealing the defendant's state of mind at the time of the alleged conspiracy, and corroborating statements that the defendant later provided to government agents investigating the matter. *Id.*

Second, exhibits containing direct statements of Mr. Bundy (or Mr. Finicum speaking on behalf of all the Citizens for Constitutional Freedom) are not hearsay because they are offered as prior statements under Rule 801(d)(1)(B), or alternatively if the court finds that they are hearsay they are offered as an admissible exception under Rule 803(3) because they are direct statements or contextual explanations of Mr. Bundy and the occupiers' "motive, intent, or plan" which are part of the Rule's general "state of mind" exception.

Specifically, one question at issue is whether Mr. Bundy's action (and the alleged co-conspirators actions) in Oregon were "reasonable" and "legitimate" as opposed to threatening and intimidating. Another relevant question is generally why Mr. Bundy behaved as he did, given that a core defense in this case is based upon his state of mind and the state of mind of those he was influencing. In these circumstances, third party statements that had an effect on Mr. Bundy are both relevant and not hearsay if not introduced for the truth of the statements made.

In addition to the general application of Rule 803(3), the Ninth Circuit recognizes the Hillmon doctrine which is directly applicable here. "The exception embodied in the Hillmon doctrine... does not require that the state of mind of the declarant be an actual issue in the case. Instead, under the Hillmon doctrine the state of mind of the declarant is used inferentially to prove other matters which are in issue. Stated simply, the doctrine provides that when the

performance of a particular act by an individual is an issue in a case, his intention (state of mind) to perform that act may be shown. From that intention, the trier of fact may draw the inference that the person carried out his intention and performed the act. Within this conceptual framework, hearsay evidence of statements by the person which tend to show his intention is deemed admissible under the state of mind exception.” *United States v. Pheaster*, 544 F.2d 353, 376 (9th Cir. 1976).

These two generally arguments apply to each exhibit below, but as the court has directed, a concise reply is also provided as additional support for admission, to each exhibit below:

**1145 - Box of Files from Burnside Office re Hammond Ranch**

[this is from Government discovery]

Purpose: Inter alia, Defendant’s state of mind, related to actions at Refuge and cause of conflict w/ Hammonds and related to MNWR. Also showing direct and circumstantial evidence that Defendant and other occupiers were not motivated or aimed at preventing federal employees but at gathering information and support for Hammond controversy.

Government’s Position: Object; Hearsay, cumulative, and unduly confusing under FRE 403. The statements are not properly offered as state of mind evidence under FRE 803(3) because the statements are not defendant’s; they are attributed to MNWR employees.

Def. Reply: There is nothing confusing about the images and there is no “statement” being offered, therefore no hearsay. What is being offered is the government’s photograph of records related to the Hammonds, gathered together, and photographed after the occupation. This evidence is not being admitted for the truth of any statement on the documents, but to show visual evidence that the jury could use to determine that the

intention of the occupiers was something other than “prevent[ing]” the discharge of duties of federal employees. Specifically, that the occupier were looking for and gather records related to the Hammonds. Alternatively, even if the “statements” on the documents were at issue, they are introduced for a non-hearsay purpose, “to show the circumstances under which subsequent events occurred” or that “they provided a good faith basis for the defendants' actions." *United States v. Certified Envtl. Servs., Inc.*, 753 F.3d 72, 89 (2d Cir. 2014).

**1146 - Video – Ammon Bundy Confrontation with BLM Officers, Bunkerville, NV in 2014.**

(Most relevant portion 00:00 to 02:00)

Purpose: Inter alia, Defendant’s state of mind regarding his statements made at the Refuge in January 2016, how those statements were informed and his anticipated interaction with federal agents in OR based on experience in Bunkerville, NV. Also showing conduct and context to rebut characterizations of events in Bunkerville, NV circa 2014 made in the government’s case in chief by witnesses such as Ward, Karges, and Rose. Also this evidence shows unique evidentiary support, but for some of the same general purposes as 1150 and 1151 below.

Government’s Position: Object; Hearsay, cumulative, and contrary to the Court’s pre-trial ruling on Bunkerville (ECF 1171 6-7). Also, not proper rebuttal evidence; testimony regarding Bunkerville by government witnesses Ward, Karges, and Rose were not offered for the truth. The statements are not properly offered as state of mind because the statements describe what was occurring at Bunkerville, so while they be properly proffered to show his state of mind at that event, they are not relevant for this case and therefore hearsay.

Def. Reply: First, the government opened the door with its witnesses referencing Bunkerville as the primary reason that the Refuge and BLM offices were closed prior to January 2, and related statements characterizing “what happened” in Bunkerville, NV as it relates to Mr. Bundy. Second, the court’s prior ruling stated that the “limited evidence” on Bunkerville was conditional, and would remain in place “[u]nless a Defendant opens the door to further evidence.” Mr. Bundy has a right to explain his state of mind and events that contributed to the choices he made in Oregon, and opening the door to Bunkerville (which was first done by the government) is something the court confirmed in its order. Third, the evidence is not cumulative, it relates to a specific event that has not yet been discussed, showing Mr. Bundy being tased by BLM agents. Second, it is not hearsay because whatever statements can be discerned in the video are incidental, and not being admitted to establish the truth of those statements, but instead the video shows an encounter that had a direct and lasting effect on Mr. Bundy’s state of mind, particularly as it related to how he acted in Oregon between November 2015 and February 2016. The government’s argument that this event is only relevant to his state of mind at “that” event in 2014 is overly limiting and not justified by the law, because it is a matter of Mr. Bundy’s testimony to the jury, and the credibility that they assess to his motivation and intent related to how he views the BLM, how he has come to believe it is best to respond to the BLM and other federal agents, and why he gave the direct invitation to protestors to come to the Refuge and bring their arms. This evidence is introduced specifically “to show the circumstances under which subsequent events occurred” or that “they provided a good faith basis for the defendants' actions.” *United States v. Certified Envtl. Servs., Inc.*, 753 F.3d 72, 89

(2d Cir. 2014). It is unreasonable to allow the government to suggest to the jury that the government's actions in late 2015 and early 2016 were relevantly related to Bunkerville and what government agents believed regarding what role Mr. Bundy played there, and at the same time to allow the government to argue that Mr. Bundy cannot present to the jury the related government actions at Bunkerville, and an explanation of his role and his actions in that event and the lasting effect that experience had upon him and how it related to decisions he made in Oregon.

**1147 - Video – (6:04) Fox News Report on BLM Bundy Cattle Grave.**

(Most Relevant 00:00 to 2:05)

Purpose: Inter alia, Defendant's state of mind regarding his statements made at the Refuge in January 2016, how those statements were informed by his interactions in Bunkerville, NV in 2014 and regarding his interactions and motivations in Harney County, OR in 2015 and 2016. Also, showing conduct and context to rebut characterizations of events in Bunkerville, NV circa 2014 made in the government's case in chief by witnesses such as Ward, Karges, and Rose.

Government's Position: Object; Hearsay, cumulative, irrelevant, contrary to the Court's pre-trial ruling on Bunkerville (ECF1171 6-7), and unduly confusing under FRE 403. Also, not proper rebuttal evidence; testimony regarding Bunkerville by government witnesses Ward, Karges, and Rose were not offered for the truth. The statements are not properly offered as state of mind because the statements are not defendant's; they are attributed to FOX news so they do not in any way properly implicate FRE 803(3) if they are offered to show Ammon Bundy's state of mind.

Def. Reply: This objection is the same as above, and has generally been answered. The government misconstrues the way “state of mind” is at play for third party statements. If the statements are not Mr. Bundys, and they are offered to show what effect these statements had on Mr. Bundy (if he testifies that he saw these reports or substantially similar reports depicting the same thing) as it relates to his state of mind in Oregon, they are not hearsay. *United States v. Payne*, 944 F.2d 1458, 1472 (9th Cir.1991); *United States v. Lopez*, 185 F.3d 870 (9th Cir. 1999). This exhibit is not being introduced to establish the truth of what was said, or even the truth that the BLM killed cattle or dug a mass grave, they are offered to show that the report was made, and that the report and similar reports had a direct effect on Mr. Bundy’s future motivations, intentions and actions in Oregon. See also *The Kerr v. City & Cty. of San Francisco*, No. C 10-5733 CW, 2012 WL 3877752, at \*7 (N.D. Cal. Sept. 6, 2012) (Unpublished) (Holding that conclusory undetailed objections were “unduly vague” and that “evidence of the news reports” at issue were relevant and “not offered to prove the truth of the matter asserted therein and are therefore not hearsay.”)

**1148 Video – (13:22 total) Cattle killed by BLM in Bunkerville, NV**

(Most relevant first 2:22)

Purpose: Inter alia, Defendant’s state of mind regarding his statements made at the Refuge in January 2016, how those statements were informed by his interactions in Bunkerville, NV in 2014 and regarding his interactions and motivations in Harney County, OR in 2015 and 2016. Also showing conduct and context re Government actions and Defendant’s actions at the time to rebut characterizations of events in Bunkerville, NV circa



2014 made in the government's case in chief by witnesses such as Ward, Karges, and Rose. Also this evidence shows unique evidentiary support, but for some of the same general purposes as described related to 1150 and 1151 below.

Government's Position: Object; Hearsay, cumulative, irrelevant, contrary to the Court's pre-trial ruling on Bunkerville (ECF 1171 6-7), and unduly confusing under FRE 403. Also, not proper rebuttal evidence; testimony regarding Bunkerville by government witnesses Ward, Karges, and Rose were not offered for the truth. The statements are not properly offered as state of mind because the statements are not defendant's; they are various ranchers so they do not in any way properly implicate FRE 803(3) if they are offered to show Ammon Bundy's state of mind.

Reply: This objection has been answered above, third party statements are not hearsay if not admitted for the truth of the matter and show a basis for Defendant's subsequent state of mind, actions, or the potential reasonableness or good faith basis of his actions. This video (the 2 min segment selected) are videos that Mr. Bundy watched and videos that had a direct effect on his view of the proper and reasonable way a rational person would view BLM and other federal agents, and why a person protesting the BLM or other federal agencies should be armed while doing so.

**1149 - Video – (6:13 total) Summary of Bunkerville, NV, Bundy Ranch 2014 Standoff.**

Purpose: Inter alia, to show state of mind for his statements made at the Refuge in January 2016, how those statements were informed by Bunkerville, his conduct and context re Government actions and Defendant's actions to rebut characterizations of events in Bunkerville, NV circa 2014 made in the government's case in chief by witnesses such as Ward, Karges, and

Rose. Also this evidence shows unique evidentiary support, but for some of the same general purposes as described related to 1150 and 1151 below.

Government's Position: Object; Hearsay, cumulative, irrelevant, contrary to the Court's pre-trial ruling on Bunkerville (ECF 1171 6-7), and unduly confusing under FRE 403. Also, not proper rebuttal evidence; testimony regarding Bunkerville by government witnesses Ward, Karges, and Rose were not offered for the truth. The statements from this highly edited video are not properly offered as state of mind because the statements are not defendant's; they are attributed to various parties at Bunkerville so they do not in any way properly implicate FRE 803(3) if they are offered to show Ammon Bundy's state of mind.

Reply: This same objection has been answered above. However, related to this specific video clip, the overwhelming majority of the content of the video is relevant not for the statements made but because it provides contextual evidence including time of day, demeanor, environment, and other situational context to the Bunkerville stand-off. It is not being offered for the truth of any of the statements made. It is being offered – first, because Ammon Bundy will testify that the context, environment, demeanor of those depicted in the video as protestors and as law enforcement (both state and federal) is accurate. Second, the video was seen by Mr. Bundy afterwards, and he will testify as to the effect this video had upon him. Third, the statements that are in the video are admissible under 803(2) because they are statements relating to “a startling event or condition” made while the individual depicted were “under the stress of excitement that it caused.” Finally, the purpose here is to provide evidence to the jury to what Mr. Bundy claims to have experienced both as a participant in the events depicted and

after subsequently viewing this video and others like it – and therefore the fact that it is “highly edited” is irrelevant, because the purpose is to provide evidentiary context to Mr. Bundy’s state of mind in relation to that incident, and how that effected and motivated his decisions in Oregon. So, the video is not hearsay (not admitted for the truth of any statement), and to the extent that any statements in it would be considered hearsay they are made by men in women filmed contemporaneously in a highly startling event or condition and such statements are therefore admissible under 801(3).

**1150 - Video re Bunkerville conflict (17:37 total)**

(most relevant 10:20 to 12:44)

Purpose: Inter alia, to show conduct and context re Government actions and Defendants actions to rebut characterizations of event in Bunkerville, NV circa 2014 made in the government’s case in chief by witnesses such as Ward, Karges and Rose and to rebut any inferences from the court’s statement of judicial notice that law enforcement was not involved, and to make clear that it the Sheriff’s deputies in Nevada were respected by Defendant and that is was the direct involvement of the local Sheriff’s office that resulted in a “brokered” agreement for the federal government to back down. Also to rebut the direct or circumstantial effect of prior witness and court statements that the Bunkerville, NV event was an act of defiance of lawful orders of a federal court, showing that the government’s conduct went well beyond the court’s orders and that this overreaching conduct is why the conflict existed, contributed to Defendant’s actions, and explains the legitimacy of the Sheriff Office’s involvement. This is significant basis for the state of mind underlying statements made at the Refuge in January 2016.

Government's Position: Object; Hearsay, cumulative, irrelevant, contrary to the Court's pre-trial ruling on Bunkerville (ECF 1171 6-7), and unduly confusing under FRE 403. Also, not proper rebuttal evidence; testimony regarding Bunkerville by government witnesses Ward, Karges, and Rose were not offered for the truth. The statements are not properly offered as state of mind because the statements describe what was occurring at Bunkerville, so while they be properly proffered to show his state of mind at that event, they are not relevant for this case and therefore hearsay.

Reply: This objection is already answered above. However, related to this specific 2 minute section of video, the statements at issue are not hearsay because they are not being admitted for the truth of what was said, the video is being introduced to show that an event happened – and that a specific portion of the event happened, namely that local law enforcement were present and intervened in the circumstance/event. This is relevant because the involvement of the local Sheriff Deputies in Bunkerville – and the subsequent portrayal in this video and others like it at the time – had a direct effect on Mr. Bundy's belief and confidence in the role a Sheriff can play in a conflict with the federal government – and directly contributed to how and why Mr. Bundy interacted with Sheriff Ward once he got to Harney County and why he took the approach he did with the Sheriff.

**1151 - Video – Summary of Bunkerville, NV (15:24 total)**

Purpose: Inter alia, to show conduct and context re Government actions and Defendants actions to rebut characterizations of event in Bunkerville, NV circa 2014 made in the government's case in chief by witnesses such as Ward, Karges and Rose and to rebut any inferences from the court's statement of judicial notice that law enforcement was not involved, and to make clear that it the Sheriff's deputies in Nevada were respected by Defendant and that is was the direct involvement of the local Sheriff's office that resulted in a "brokered" agreement for the federal government to back down. Also to rebut the direct or circumstantial effect of prior witness and court statements that the Bunkerville, NV event was an act of defiance of lawful orders of a federal court, showing that the government's conduct went well beyond the court's orders and that this overreaching conduct is why the conflict existed, contributed to Defendant's actions, and explains the legitimacy of the Sheriff Office's involvement. This is significant basis for the state of mind underlying statements made at the Refuge in January 2016

Government's Position: Object; Hearsay, cumulative, irrelevant, contrary to the Court's pre-trial ruling on Bunkerville (ECF 1171 6-7), and unduly confusing under FRE 403. Also, not proper rebuttal evidence; testimony regarding Bunkerville by government witnesses Ward, Karges, and Rose were not offered for the truth. The statements from this highly edited video that contains editorial voice overlay are not properly offered as state of mind because the statements are not defendant's; they are attributed to various parties at Bunkerville so they do not in any way properly implicate FRE 803(3) if they are offered to show Ammon Bundy's state of mind. The limited statements of defendant Ammon Bundy in the video do not demonstrate his state of mind in this case.

Reply: This is a video made over a year after the events in Bunkerville, that was publically

broadcast by a major alternative media outlet. Mr. Bundy will testify that he saw this video, and that this video had an effect on his view as to how his and his families actions in Bunkerville were viewed by a substantial portion of the public, and that it had an effect on his view as to the legitimacy of his actions at the time and that this impact on his state-of-mind contributed directly to why he did what he did in helping the Hammonds, why he did what he did at the Refuge, and his method of encouraging the involvement of the media at the Refuge. Again, the issue is not the “truth” of the statements – or the editorializing – it is that the broadcast itself occurred, and that after watching the broadcast, Mr. Bundy was reasonably – satisfied and encouraged at the approach taken in 2014 and it directly impacted how he acted in 2015 and 2015 in Oregon. This video also shows “the circumstances under which subsequent events occurred” and part of the reason Mr. Bundy believed he had “a good faith basis” his actions (and the actions of the other occupiers) in Oregon. An out-of-court statement offered for some other purpose, such as to show that a statement was made, *United States v. Kohan*, 806 F.2d 18, 22 (2d Cir.1986), to demonstrate the statement's effect on the listener, *United States v. Puzzo*, 928 F.2d 1356, 1365 (2d Cir.1991), or to show the circumstances under which subsequent events occurred, *United States v. Pedroza*, 750 F.2d 187, 200 (2d Cir.1984), is not hearsay.

### **1152 - Photo – Men on horses at Bunkerville, NV**

Government’s Position: Object; irrelevant, and unduly confusing under FRE 403.

Reply: There is nothing confusing about this photo. It shows a circumstance viewed by Mr. Bundy at Bunkerville, and it is relevant in that it is evidence of the environment, number of

participants, type of alleged “confrontation” that took place, and the method and manner in which many of the participants engaged. It is relevant to this case, because it adds support and credibility to Mr. Bundy’s testimony as to his state of mind – related to why he claims the “public” came to the Bundy’s aid in NV and would come to the aid of the Hammond in Oregon, and most relevant because it shows what Mr. Bundy envisions as a proper and meaningful response to overreaching federal bureaucracy – and this state of mind is directly at issue in this case.

**1153 - Photo – Men on horses w/flags at Bunkerville, NV**

Government’s Position: Object; irrelevant, and unduly confusing under FRE 403.

Reply: same as above.

**1154 - Photo – Cowboys On Horses In Standoff Line at Bunkerville, NV**

Government’s Position: Object; irrelevant, and unduly confusing under FRE 403.

Reply: Same as above.

**1155 - Photo – Military Style Rangers at Bunkerville, NV**

Purpose: Inter alia, to show conduct and context re Government actions and Defendant’s actions to rebut characterizations of events in Bunkerville, NV circa 2014 made in the government’s case in chief by witnesses such as Ward, Karges, and Rose. Specifically showing the look, feel, demeanor and behavior of some of those involved, including Defendant. Also to provide direct and circumstantial support for identifying, referencing, and adding credibility to Defendant’s then state of mind regarding his interactions in Bunkerville, NV in 2014 and regarding his interactions and motivations in Harney County, OR in 2015 and 2016. Also showing conduct and context re Government actions and Defendant’s actions at the time to rebut characterizations of events in Bunkerville, NV circa 2014 made in the government’s case in chief by witnesses such

as Ward, Karges, and Rose. Also this evidence shows unique evidentiary support, but for some of the same general purposes as described related to: 1149, 1150, 1151.

Government's Position: Object; irrelevant, contrary to the Court's pre-trial ruling on Bunkerville (ECF1171 6-7), and unduly confusing, misleading and prejudicial under FRE 403.

Reply: It is relevant because it shows one aspect of the circumstance in Bunkerville that Mr.

Bundy will testify contributed both to how that circumstance played out – and also to his understanding of how he expected federal agents to re-act in Oregon, and the image also is evidence of an experience Mr. Bundy will testify to having experienced that explains why he acted the way he did at the Refuge, particularly with regard to supporting the involvement of militia and armed men. It is not contrary to the court's ruling as explained above, and it is not confusing or misleading in and of itself – or prejudicial. Mr. Bundy will be subject to cross-examination on the image and what it meant to him.

**1156 - Photo – Dead Bundy cow (B&W)**

Government's Position: Object; irrelevant, and unduly confusing under FRE 403.

Reply: Same as above. Plus, the evidence relates to Mr. Bundy's frustration with, distrust of, and willingness to confront federal agents – all of which is at issue in this case, and all of which was opened up by the government's case in chief where “what happened” in Bunkerville was recited many times as justification for government action and government characterization of Mr. Bundy and several co-defendants. The fact that a jury member has already written to the court asking for more information on “what happened” in Bunkerville shows that a more



thorough explanation is both relevant – and that the absence of this contextual information is what is more confusing.

**1157 - Photo – Dead Bundy cow being lifted from BLM mass grave**

Government’s Position: Object; irrelevant, and unduly confusing under FRE 403.

Reply: Same as above.

**1158 - Photo – BLM mass grave for Bundy cattle.**

Purpose: This evidence shows unique evidentiary support, but for some of the same general purposes as described related to 1147,1148. This is significant basis for the state of mind underlying statements made at the Refuge in January 2016.

Government’s Position: Object; irrelevant, and unduly confusing under FRE 403.

Reply: Same as above.

**1159 - Photo – Ammon Bundy with wound after being tased (Bunkerville).**

Purpose: Also this evidence shows unique evidentiary support (i.e. the severity of the wound Mr. Bundy received), but for some of the same general purposes as described related to 1146.

Government’s Position: Object; irrelevant, prejudicial, and unduly confusing under FRE 403. Also contrary to the Court’s pre-trial ruling on Bunkerville (ECF 1171 6-7).

Reply: The photo is relevant because it relates directly to “what happened” at Bunkerville on the key issue of why Mr. Bundy was in Oregon, why he acted the way he did with Sheriff Ward, and why he acted the way he did in telling people to bring their arms to the Refuge. The image is relevant because it allows the jury to assess the credibility of Mr. Bundy’s testimony as to his motivations and state of mind related to the occupation of the Refuge and the reasons and manner in which that took place. It is

not prejudicial because it is a discrete photo, explainable by Mr. Bundy who is the subject of the photo, provided in context with the video above, and Mr. Bundy is subject to cross-examination on the issue. It is not contrary to the court's ruling on Bunkerville for the reasons already argued above.

**1160 - Photo – Cliven Bundy with Sheriff in Bunkerville, NV**

Government's Position: Object; irrelevant, and unduly confusing under FRE 403.

Reply: Same as argued above. It is important to show that the Sheriff was directly involved in resolving Bunkerville, because it shows the reasonableness of Ammon Bundy's view (and the others who were at Bunkerville or heard of Bunkerville) in expecting Sheriff Ward could help resolve the conflict with the federal agencies in Harney County Oregon. It also goes to the credibility of Ammon Bundy's testimony related to his account of Bunkerville, and also why he believes what he believes and acts the way he acts.

**1161 - Photo - Cliven Bundy and Ammon Bundy on riser with Sheriff**

Government's Position: Object; irrelevant.

Reply: Same as argued above.

**1162 - Photo – Davey Bundy with Deputy at Gate (Bunkerville)**

Government's Position: Object; irrelevant, and unduly confusing under FRE 403.

Reply: The photo of Ammon Bundy's brother (like 1207 which is not objected to) shows Davey Bundy after having suffered an unprovoked assault by Federal Agents, conversing with a BLM officer, and Ammon Bundy will testify that he was standing right next to him

in this photo. The relevance is that it shows the involvement of the local Sheriff intervening between protestors and the federal government. This relates to Mr. Bundy's state of mind (as argued above) and it relates to Mr. Bundy's credibility on explaining Bunkerville. Mr. Bundy will testify that this kind of response from federal agents is a reasonable basis for why he believes what he believes about the method and manner of federal agents, why he believes and acts the way he does relating to telling others to bring firearms to the Refuge, and why he believes it was necessary to take a "hard stand" in Oregon and finally why he believed and acted the way he did regarding Sheriff David Ward in Harney County.

**1163 - Photo – Closed public land sign at Bunkerville, NV**

Government's Position: Object; irrelevant, and unduly confusing under FRE 403.

Reply: It is relevant because it provides contextual evidence consistent with what Mr. Bundy will testify to regarding what happened in Bunkerville – and this is further relevant for the reasons argued above. Finally, this is relevant because it relates to protest motives of the defendants' efforts in Oregon with signs, particularly the "Closed" signs placed at the BLM.

**1164 - Photo – Ammon Bundy with closed public land sign after removing with Sheriff's assent**

Purpose: This evidence shows unique evidentiary support, but for some of the same general purposes as described related to 1149, 1150, 1151.

Government's Position: Object; irrelevant, and unduly confusing under FRE 403.

Reply: This is relevant because it is part of #1163 above, and because it shows Ammon Bundy having removed the sign after obtaining permission from the local Sheriff deputy. This relates to the credibility of Ammon Bundy's believe regarding both the legitimacy of "what happened" in Bunkerville, and his attitude and respect for law enforcement – which subject has been put at issue by the government in this case.

**1165 - Document – 11/ 12/15 "Facts and Events in Hammond Case."**

Purpose: Inter alia, defendant's motivations, state of mind, and intent regarding his first and subsequent travels to OR, and his conduct and the context of the events from Nov 2015 through January 26, 2016. Also to provide a detailed and more accurate reference to Defendant's prior statements, which government witnesses sought to mischaracterize.

Government's Position: Object; cumulative, prejudicial and unduly confusing under FRE 403. Also, outside the scope of the agreed upon stipulation regarding the Hammond case and lacking foundation. The statements are not properly offered as state of mind evidence under FRE 803(3) because the statements are not defendant's; they are attributed to various unknown authors.

Reply: Defendant Ammon Bundy will testify that this is his written statement. It is not cumulative, it is discretely related to Mr. Bundy's direct expression of his state of mind at the precise time the government alleges he was getting involved with a conspiracy. It is not prejudicial or confusing (the government doesn't explain how) because it is a statement of Mr. Bundy's views and intent that led him to get involved

in Oregon, including his state of mind and motives. It is not being introduced for the truth of the statement and he is subject to cross-examination. While the government does not state it is objecting on “hearsay” grounds, it nevertheless states that it is not “properly offered as state of mind evidence under Rule 803(3) as an exception to hearsay. It is not hearsay because it is not being introduced for the truth of the statement, but to prove that the statement was made. It is introduced also to show Mr. Bundy’s intent in coming to Oregon, and related state of mind – at precisely the time that the government has argued he was involved in an illegal conspiracy. It is also not hearsay because it is a prior statement under 801(d)(1)(B). Finally, it is not hearsay because it Even if it was considered hearsay, it would be admissible

**1167 - Document – 11/ 12/15 “Letter to Sheriff Ward – Harney County” by Ammon Bundy**

Purpose: Inter alia, defendant’s motivations, state of mind, and intent regarding his first and subsequent travels to OR, and his conduct and the context of the events from Nov 2015 through January 26, 2016. Also to provide a detailed and more accurate reference to Defendant’s prior statements, which government witnesses sought to mischaracterize.

Government’s Position: Object, hearsay (document and rationale provided to the Court on 9/29).

Reply: It is not hearsay. First, it is not being admitted for the truth of the matters asserted in the letter, it is being offered to prove that the letter exists and that it was sent/delivered to Sheriff ward. Second, it is not hearsay because it is a “prior statement” under 801(d)(1)(B). Third, if it is hearsay it is admissible under two exceptions. First, under 803(3) it is a direct statement of Mr. Bundy’s state of mind, including his motive,

intent or plan. Second, it is a recorded recollection under Rule 803(5).

**1168 - Video – 11/24/15 “Hammonds Need Our Help” video, with call to action. Speaker and statements are Defendant Ammon Bundy (10:02 total).**

Purpose: Inter alia, defendant’s motivations, state of mind, and intent regarding his first and subsequent travels to OR, and his conduct and the context of the events from Nov 2015 through January 26, 2016. Also to provide a detailed and more accurate reference to Defendant’s prior statements, which government witnesses sought to mischaracterize.

Government’s Position: Object; Hearsay, cumulative, prejudicial and unduly confusing under FRE 403. Also, outside the scope of the agreed upon stipulation regarding the Hammond case.

The statements are not properly offered as state of mind because the statements describe Ammon Bundy’s opinions about the Hammond case which, based on the content of the video and the manner in which it is set up, are clearly being offered for the truth, not his “then existing state of mind.”

Reply: The statement is not hearsay, because it is not offered to show the truth of what is asserted. It is offered to show a statement was made, and that Mr. Bundy’s state of mind was not focused or directed at Refuge employees – to establish the truth of any claim or statement made in the video. Second, it is a not hearsay because it qualifies as a “prior statement” under 801(d)(1)(B). Alternatively, even if the court were to rule that it is hearsay, it is admissible hearsay under Rule 803(3) because it is “offered to show his state of mind at the time” the video was made. *Wagner v. Cty. of Maricopa*, 747 F.3d 1048, 1053 (9th Cir. 2013). The government has alleged that as of the date of

this video Mr. Bundy was directly involved in an illegal conspiracy to “prevent” federal employees at MNWR for discharging their duties. This video, and the content thereof, is directly relevant and admissible because the rule allows statements of “motive, intent or plan” and that is exactly the content of this video. The government doesn’t explain how this video could be confusing or prejudicial, and in any event, Mr. Bundy is subject to cross-examination. Finally, and alternatively, the video should be admitted independently, because this is a statement upon which others (including co-defendants) allegedly relied as part of being induced into the alleged conspiracy. Thus, this video is admissible for the non-hearsay purpose of showing the jury what any other person who allegedly entered into an agreement with Mr. Bundy saw and heard and were thus affected by.

Separately regarding the Hammond Stipulation: The stipulation was regarding what the court could take judicial notice regarding, and inform the jury. Defendant has never agreed to limit or be bound by the stipulation in terms of testifying as to his state of mind, motivation, plan or intent – or admitted evidence to establish the same. It would be egregiously unfair to allow the government to base its allegation of Mr. Bundy’s intention (and the intention of his alleged co-conspirators) on circumstantial evidence and admissible hearsay and then construe the rules of evidence so as to prevent any evidence besides Mr. Bundy’s own testimony rebutting the government’s case.

**1169 - Video – 12/5/15 “Feds Burning Cows Alive, Torching Homes, Imprisoning Ranchers.”**

**(9:59 total). Includes statements by Ammon Bundy.**

Purpose: Inter alia, defendant's motivations, state of mind, and intent regarding his travels to OR, and his conduct and the context of the events from Nov 2015 through January 26, 2016. Also to add context and support to prior testimony from Defendant Banta and the state of mind, purpose and motivations of all Defendants who acted in support of the Hammonds.

Government's Position: Object; Hearsay, cumulative, prejudicial and unduly confusing under FRE 403. Also, outside the scope of the agreed upon stipulation regarding the Hammond case.

The statements are not properly offered as state of mind because the statements describe Ammon Bundy's opinions about the Hammond case which, based on the content of the video and the manner in which it is set up, are clearly being offered for the truth, not his "then existing state of mind." Other portions of the video contain editorial voice overs that are simply hearsay.

Reply: Same as argued above. This video is not being admitted for the truth of the statements contained therein, it is being offered first – to show a video of Mr. Bundy directly declaring his state of mind, including expressly his motive, intent and plan at the time. Defendant, because of the nature of the government's allegation, must be allowed to prove at each step of the alleged conspiracy, that his intention was not to conspire, and that his intention was not to prevent federal employees from discharging their duties. This is covered related to #1168 above.

Related to the section portion of the video, the video showing the burning fire, burning of cows and property, etc., this is not introduced for the truth of those statements, it is introduced to show evidence that Mr. Bundy viewed, the directly had an effect on his



subsequent actions, and that formed his state of mind and intent and plan. The jury must be informed as to what motivated Mr. Bundy, and this video is essential to do that, and one co-defendant has already testified that it was this video that caused him to come to the Refuge. An out-of-court statement offered for some other purpose, such as to show that a statement was made, *United States v. Kohan*, 806 F.2d 18, 22 (2d Cir.1986), to demonstrate the statement's effect on the listener, *United States v. Puzzo*, 928 F.2d 1356, 1365 (2d Cir.1991), or to show the circumstances under which subsequent events occurred, *United States v. Pedroza*, 750 F.2d 187, 200 (2d Cir.1984), is not hearsay.

**1170 - Video –“BLM Destroying Ranches By Fire 002.” Posted December 31, 2015 by Ammon Bundy (6:44 total).**

Purpose: Inter alia, defendant’s motivations, state of mind, and intent regarding his travels to OR, and his conduct and the context of the events from Nov 2015 through January 26, 2016. Also to add context and support to prior testimony from Defendant Banta and the state of mind, purpose and motivations of all Defendants and the other alleged co-conspirator (indicted, unindicted, named and unnamed) who acted in support of the Hammonds and who participated or were present at the occupation.

Government’s Position: Object; Hearsay, cumulative, prejudicial and unduly confusing under FRE 403. The statements from this highly edited video are not properly offered as state of mind because the statements are not defendant’s; they are attributed to various unknown parties that are providing editorial comments about the Hammond case so they do not in any way properly implicate the FRE 803(3) if they are offered to show Ammon Bundy’s state of mind.

Reply: Same as 1169 above. In addition, the main content and evidentiary value of the video is not the statements made in the video. Further, the statements made are apparently made as the speakers watch an unexpected fire burn and destroy property and would qualify as an additional exception for excited utterances. Further, Mr. Bundy will testify that the words on the screen are his words. But, the main argument here is that this video is relevant because it had a direct effect on Mr. Bundy's understanding, it directly influenced why Mr. Bundy took the action he did, and it proves a statement of a prior defendant (that this video exists and shows what Mr. Banta stated it showed) and in any event, an out-of-court statement offered for some other purpose, such as to show that a statement was made, *United States v. Kohan*, 806 F.2d 18, 22 (2d Cir.1986), to demonstrate the statement's effect on the listener, *United States v. Puzzo*, 928 F.2d 1356, 1365 (2d Cir.1991), or to show the circumstances under which subsequent events occurred, *United States v. Pedroza*, 750 F.2d 187, 200 (2d Cir.1984), is not hearsay. The government offers no explanation as to why this video is either confusing or prejudicial.

**1171 - Document – Petition for Redress of Grievances. December 11, 2016.**

Purpose: Inter alia, direct evidence of Defendant's actions. Direct and circumstantial evidence of defendant's motivations, state of mind, and intent regarding his first and subsequent travels to OR, and his conduct and the context of the events from Nov 2015 through January 26, 2016. Also to add context and support to prior testimony from Defendant Banta and the state of mind, purpose and motivations of all Defendants and the other alleged co-conspirator (indicted, unindicted, named and unnamed) who acted in support of the Hammonds and who participated

or were present at the occupation.

Government's Position: No objection if offered for state of mind only.

Reply: It is offered to prove that the Petitioner for Redress of Grievances existed. It is also offered as state of mind evidence.

**1172 - Document – “Action Needed” Notice Re: Petition for Redress. December 11, 2015.**

Purpose: This evidence shows unique evidentiary support, but for some of the same general purposes as described related to 1171.

Government's Position: Object; Hearsay, cumulative, and unduly confusing under FRE 403. This is apparently a blog posting seeking money for the reasons connected to the Redress of Grievances, but it is not clear how it relates to anyone's state of mind.

Reply: Defendant Ammon Bundy will testify that this is his written statement. It is not cumulative, it is discretely related to Mr. Bundy's direct expression of his state of mind at the precise time the government alleges he was getting involved with a conspiracy. It is not prejudicial or confusing (the government doesn't explain how) because it is a statement of Mr. Bundy's views and intent that led him to get involved in Oregon, including his state of mind and motives. Further, the government's case alleges an agreement – as an element of conspiracy – this evidence directly rebuts what any potential agreement would have been aimed at accomplishing – mainly, that as of the date of this publication it was not aimed at preventing Refuge employees from discharging their duties. It is not being introduced for the truth of the statement and he is subject to cross-examination. It is introduced also to show Mr. Bundy's intent in

coming to Oregon, and related state of mind – including his plan and motive – at precisely the time that the government has argued he was involved in an illegal conspiracy.

**1173 - Video – “Stand Up, Not Stand Down – All Patriot Stand Up, We need your Help!!! Come Prepared.” Ammon Bundy call to individuals to come to Burns “on the 2nd or before.” December 31, 2015 (48 seconds total).**

Purpose: This evidence shows unique evidentiary support, particularly related to intent, motivation and plans as of December 31, but for some of the same general purposes as described related to 1168 and 1171.

Government’s Position: Object; Hearsay. This is a counter-narrative of defendant’s being offered for the truth. It is not what FRE 803(3) was designed to capture.

Reply: Rule 803(3) expressly allows an exception to hearsay where the content is a statement of “the declarant’s then-existing state of mind (such as motive, intent, or plan) and that is exactly what this video is. Mr. Bundy states what is motivating him, what his intention is , and what his plan was at that time. The fact that the government is objecting here is egregious because it is direct evidence that bares on whether Mr. Bundy was involved in a conspiracy and it is the precise kind of evidence Rule 803(3) was designed to allow. It is absolutely irrelevant whether the statement made in the video are true – but the jury is allowed, and must be allowed, to assess the statement as to the existence of a conspiracy. Finally, this is a statement that Mr. Bundy made clearly intending others to rely upon in coming to Burns, OR “on the 2<sup>nd</sup> or before”, and it is

thus allowable for the non-hearsay purpose of showing a statement likely relied upon by alleged co-conspirators.

**1174 - Video – “My Dear Friends.” Ammon Bundy on January 1, 2016 (19:27 total).**

Purpose: Inter alia, This is offered as the most complete and plain statement of Defendant Ammon Bundy, made at the time, describing his motivation, plan and intent from November 2, 2015 through January 1, and an explanation for why he directed asked people to come to Harney County, OR as of the date of this video. Also, some of the same purposes as 1173 (including 1168, and 1171)

Government’s Position: Object; Hearsay. Again, this is a counter-narrative of defendant’s being offered for the truth. It is not what FRE 803(3) was designed to capture.

Reply: This same argument has been responded to above. Particularly, this is a direct statement of defendant as to his motive for acting, his intention, and his plan. The government’s objection is conclusory and contradicts the plain language of the exception at 803(3). “Under the state of mind exception, hearsay evidence is admissible if it bears on the state of mind of the declarant and if that state of mind is an issue in the case.” *United States v. Pheaster*, 544 F.2d 353, 376 (9th Cir. 1976)

**1175 - Video – 8 min 2 sec video. “Standing for the rights of men & women.” Outside the Refuge. January 2, 2016.**

Purpose: Inter alia, this is offered as the most complete and plain statement of intent, motivation and plan of Defendant Ammon Bundy, his actions, and those who participated in the initial occupation on January 2. Also this evidence shows unique evidentiary support, but for some of the same general purposes as described related to 1175, 1173, 1171, 1168.

Government's Position: Object; Hearsay. And again, this is a counter-narrative of defendant's being offered for the truth. It is not what FRE 803(3) was designed to capture.

Reply: Rule 803(3) expressly allows an exception to hearsay where the content is a statement of "the declarant's then-existing state of mind (such as motive, intent, or plan) and that is exactly what this video is. Mr. Bundy states what is motivating him, what his intention is, and what his plan was at that time. The fact that the government is objecting here is egregious because it is direct evidence that bares on whether Mr. Bundy was involved in a conspiracy and it is the precise kind of evidence Rule 803(3) was designed to allow. It is absolutely irrelevant whether the statement made in the video are true – but the jury is allowed, and must be allowed, to assess the statement as to the existence of a conspiracy. Finally, this is a statement that Mr. Bundy made clearly intending others to rely upon in coming to Burns, OR "on the 2<sup>nd</sup> or before", and it is thus allowable for the non-hearsay purpose of showing a statement likely relied upon by alleged co-conspirators.

**1176 - Video – 7 min 41 sec video. "Oregon Rancher Asking for Our Help!" January 3, 2016.**

Purpose: Inter alia, this is offered as the intent, motivation and plan of Defendant Ammon Bundy and those who participated in the initial occupation as of January 3, and provides evidence as to the credibility of Defendant's claimed intent and motivation, as well as showing the absence of the government's claimed motivations and intentions (meaning showing no focus whatsoever on preventing Refuge employee from discharging their duties) of Mr. Bundy and the

other occupiers. Also this evidence shows unique evidentiary support, but for some of the same general purposes as described related to 1176, 1175, 1173, 1171, 1168.

Government's Position: Object; Hearsay, irrelevant, unduly confusing under FRE 403. This contains statements of defendant and ranchers offering opinions about the conditions in Harney County. The substance of it clearly suggests that (as to defendant's statement) it is being offered for the truth.

Reply: There are two parts to this video. Related to the first part, Defendant Ammon Bundy's statement, Rule 803(3) expressly allows an exception to hearsay where the content is a statement of "the declarant's then-existing state of mind (such as motive, intent, or plan) and that is exactly what this video is. Mr. Bundy states what is motivating him, what his intention is, and what his plan was at that time. The fact that the government is objecting here is egregious because it is direct evidence that bares on whether Mr. Bundy was involved in a conspiracy and it is the precise kind of evidence Rule 803(3) was designed to allow. It is absolutely irrelevant whether the statement made in the video are true – but the jury is allowed, and must be allowed, to assess the statement as to the existence of a conspiracy. Finally, this is a statement that Mr. Bundy made clearly intending others to rely upon in coming to Burns, OR "on the 2<sup>nd</sup> or before", and it is thus allowable for the non-hearsay purpose of showing a statement likely relied upon by alleged co-conspirators.

Related to the second part of the video- it is important to note that Ammon Bundy commented on the statement of the Ranchers and explains he is introducing the statement because the statement explains his actions. And, a statement "is not hearsay if the witness is

reporting what he heard someone else tell him for the purpose of explaining what the witness was thinking, at the time or what motivated him to do something.” *United States v. Leonard-Allen*, 739 F.3d 948, 954 (7th Cir. 2013) (reversing conviction for conspiracy to commit money laundering where the district court erroneously excluded the defendant from testifying regarding the statements of others, in an attempt to give the jury an “alternate explanation” for defendant’s actions, making his “defense more believable,” and negating his criminal intent, because “[I]n those circumstances, the out-of-court statement is not being offered as evidence that its contents are true”).

**1177 - Video – 14 min 14 seconds. Press Conference at Refuge. January 4, 2016.**

**(Most Relevant 0:00 to 1:00, and 7:30 to 14:14)**

Purpose: Inter alia, this is offered as the intent, motivation and plan of Defendant Ammon Bundy and those who participated in the initial occupation as of January 4, and provides evidence as to the credibility of Defendant’s claimed intent and motivation, as well as showing the absence of the government’s claimed motivations and intentions (meaning showing no focus whatsoever on preventing Refuge employee from discharging their duties) of Mr. Bundy and the other occupiers. Also, same purposes as 1176, 1175, 1173, 1171, 1168. Also, the selected clips show that the motivation behind the occupation was not to prevent any federal employee from discharging his or her duty but a plea and call to action for all federal officials to actually focus on carrying out and actually discharging those duties in accord with the law and the US Constitution.

Government’s Position: No objection to portions CONTAINING ONLY Bundy and Cox if offered for state of mind only. It is the government’s position that the clips cannot be offered to



show the “intent” of Bundy and others, as this would be for the truth of the matter.

Reply: The government does not object to 0:00 to 1:00 and 9:04, and its objection applies to the portion from 7:30 to 9:04 which is a statement from LaVoy Finicum. But this is admissible for the non-hearsay purpose. The truth of what Mr. Finicum is saying is not at issue. “An out-of-court statement offered to show the effect on the listener, rather than the truth of the matter asserted, is not hearsay.” *United States v. Payne*, 944 F.2d 1458, 1472 (9th Cir.1991); *United States v. Lopez*, 185 F.3d 870 (9th Cir. 1999) (Holding that evidence offered to show parties reliance upon another’s statement, rather than the truth of the statement itself, does not constitute hearsay under the Federal Rules of Evidence.) This is particularly true, where statements are offered “for their effect on defendants' state of mind, which was very much in dispute” or “to show the circumstances under which subsequent events occurred” or that “show that the statements occurred and that, given their effect on the defendants' state of mind, they provided a good faith basis for the defendants' actions.” *United States v. Certified Env'tl. Servs., Inc.*, 753 F.3d 72, 89 (2d Cir. 2014). And, a statement “is not hearsay if the witness is reporting what he heard someone else tell him for the purpose of explaining what the witness was thinking, at the time or what motivated him to do something.” *United States v. Leonard-Allen*, 739 F.3d 948, 954 (7th Cir. 2013). Alternatively, Mr. Bundy is allowed to introduce this portion of the video (Mr. Finicum’s statement) to show his “intent, motive, and plan.” The idea that Mr. Finicum’s statement as a spokesperson of the group, and speaking in the presence of Mr. Bundy addressing the media makes Mr. Finicum’s statement the statement of Mr.

Bundy and all the alleged conspirators.

**1178 - Video – “By Dang I’m Mad” LaVoy Finicum explains his frustration with Hammond situation in OR (2 min 38 sec total).**

Purpose: Inter alia, this video was watched by Defendant prior to the event of January 2, 2016 and provides evidence as to what information formed his state of mind, intention and purpose in acting between November 2015 and February 2016, and whereas Mr. Finicum is both a subsequent spokesperson for the Citizens for Constitutional Freedom and has been alleged a co-conspirator who has made statements in alleged furtherance of the conspiracy attributable to Defendants, this video also is offered to rebut the government’s circumstantial evidence and related inferences as to the intentions behind the motivation and plans of Mr. Finicum and Defendant Ammon Bundy and the other alleged co-conspirators.

Government’s Position: Object; Hearsay, irrelevant, unduly confusing under FRE 403. Evidence of Lavoy Finicum’s “state of mind” is irrelevant for the Court’s analysis of 1178 if it is being offered by Ammon Bundy who is NOT the declarant.

Reply: This argument has been addressed above. Mr. Bundy will testify that he saw this video, and that it directly affected him and contributed to his subsequent actions in Oregon. A statement “is not hearsay if the witness is reporting what he heard someone else tell him for the purpose of explaining what the witness was thinking, at the time or what motivated him to do something.” *United States v. Leonard-Allen*, 739 F.3d 948, 954 (7th Cir. 2013) (reversing conviction for conspiracy to commit money laundering where the district court erroneously excluded the defendant from testifying regarding

the statements of others, in an attempt to give the jury an “alternate explanation” for defendant’s actions, making his “defense more believable,” and negating his criminal intent, because “[I]n those circumstances, the out-of-court statement is not being offered as evidence that its contents are true”). The main argument here is that this video is relevant because it had a direct effect on Mr. Bundy’s understanding, it directly influenced why Mr. Bundy took the action he did and an out-of-court statement offered for some other purpose, such as to demonstrate the statement’s effect on the listener, *United States v. Puzzo*, 928 F.2d 1356, 1365 (2d Cir.1991), or to show the circumstances under which subsequent events occurred, *United States v. Pedroza*, 750 F.2d 187, 200 (2d Cir.1984), is not hearsay. In *United States v. Kohan*, the Second Circuit reversed a defendant’s conspiracy conviction based on the trial court’s erroneous exclusion of testimony of a witness regarding the statements of a third party: the defendant “was not basing his defense on the truth of [the third party’s] statements, but rather on the fact that they were made and that [defendant] believed them to be true.” *United States v. Kohan*, 806 F.2d 18, 22 (2d Cir. 1986) (reversing conviction for conspiracy under 18 U.S.C. § 371 where trial court excluded “circumstantial evidence of [the defendant’s] state of mind – his belief that [the third party’s] activities were legitimate”). In *Kohan*, the court noted that the error was especially significant when offered in the defendant’s direct case, revealing the defendant’s state of mind at the time of the alleged conspiracy, and corroborating statements that the defendant later provided to government agents investigating the matter. *Id.* Finally, the government offers no explanation as to why this video is confusing.

**1179 - Video –Religious Service at the Harney County Resource Center (Refuge) During Occupation. Shawna Cox, Ryan Bundy, David Fry, LaVoy Finicum and others in attendance. Praying for “Clemency for the Hammonds.” January 17, 2016. (16 min 5 sec total)**

(Most Relevant Portion: 00:00 to :45, and 2:35 to 2:50, and 6:00 to 6:30, 10:21 to 13:00)

Purpose: This evidence is introduced to rebut the characterization that the occupation of the Refuge was a “militant occupation” and the inferences created by testimony that the Refuge was held by “armed militants” – and showing the very thing being prayed for by the occupiers was governmental reform and relief for the Hammonds – and nothing related to preventing FWS or BLM employees from discharging their duties. Further this video is direct evidence that the union and agreement between the occupiers was not an illegal conspiracy, but a unity of political and religious convictions. The video shows, among many others, Shawna Cox, Ryan Bundy, David Fry, and other alleged coconspirators.

Government’s Position: Object; Hearsay, irrelevant, prejudicial. The statement is offered not as “state of mind” evidence but rather “direct evidence” that the agreement was not illegal – it is hearsay without an exception.

Reply: The evidence challenges that the characterization of the occupation as “militant” by the demeanor, purpose and visible interaction of the participants. It is not hearsay because it is being introduced for a nonhearsay purpose. The statements made in the video are not introduced for the truth – but to show the circumstances under which these events occurred. *United States v. Pedroza*, 750 F.2d 187, 200 (2d Cir.1984). The prayer at the end is not introduced to prove that the participants were telling God the truth, that

God actually heard their prayer or that the praying individuals were stating the truth to each other, but it shows the content of their motive, intention and plan, and the intention and plan of the occupation generally which is admissible as an exception under 803(3). See also *United States v. Leonard-Allen*, 739 F.3d 948, 954 (7th Cir. 2013) (reversing conviction for conspiracy to commit money laundering where the district court erroneously excluded the defendant from testifying regarding the statements of others, in an attempt to give the jury an “alternate explanation” for defendant’s actions, making his “defense more believable,” and negating his criminal intent, because “[I]n those circumstances, the out-of-court statement is not being offered as evidence that its contents are true”). Further, the playing of music and singing of hymns is not introduced for the truth of the statements being sung, but to show the nature, circumstances, mood, temperament, and type of interaction being engaged in by individuals that the government has alleged were “militant[ly]” occupying the Refuge and intending to “prevent” Refuge employees from discharging their duties.

**1180 - Video –Interview of LaVoy Finicum explaining that elected officials were discouraged to come and meet at Refuge. January 10, 2016. (3 min 3 sec total)**

Purpose: Inter alia, to show Defendant’s state of mind related to the actions of government officials in response to the occupation, to add context to Defendant’s conduct, and to show that Defendant and the alleged co-conspirators were inviting government participation – and allowed government representatives onto the Refuge. This evidence is introduced also to rebut the

characterization that the occupation of the Refuge was a “militant occupation” and the inferences created by testimony that the Refuge was held by “armed militants.”

Government’s Position: Object; Hearsay, irrelevant, prejudicial, and unduly confusing under FRE 403. Again, evidence of Lavoy Finicum’s “state of mind” is irrelevant for the Court’s analysis of 1178 if it is being offered by Ammon Bundy who is NOT the declarant.

Reply: This same argument has been addressed above. The fact that it is not a statement of Mr.

Bundy is acceptable for the purposes here. A statement “is not hearsay if the witness is reporting what he heard someone else tell him for the purpose of explaining what the witness was thinking, at the time or what motivated him to do something.” *United States v. Leonard-Allen*, 739 F.3d 948, 954 (7th Cir. 2013). Further, as a spokesperson for the group, Mr. Finicum’s statement is the statement of Mr. Bundy. And, Mr. Bundy will testify that he independently knew of the events that transpired, but that Mr. Finicum’s statement is evidence of the intent and plan of the occupiers. Thus, the truth of Mr. Finicum’s statements is not being made at issue, and that is not the purpose. And, an out-of-court statement offered for some other purpose, such as to show the circumstances under which subsequent events occurred, *United States v. Pedroza*, 750 F.2d 187, 200 (2d Cir.1984), is not hearsay.

**1181 - Video – 2 min 43 sec video, Press Statement of Ammon Bundy. January 5, 2016.**

Purpose: Inter alia, this video shows direct evidence of the plan, purpose and intent of Defendant Ammon Bundy and the occupiers as of January 5, 2015 – including the distinction between “force and threat” and communication and defense, and when and under what

conditions the occupiers planned to “go home.”

Government’s Position: Object; Hearsay, FRE 106, rule of completeness, if offered in its entirety government’s position is that it could be played for limited state of mind purposes.

Reply: The hearsay objection is argued above. The statement, even if it is hearsay, is admissible under 803(3) because it is a direct statement of intent, motive, and plan. Under the “rule of completeness” objection, Defendant has submitted the video he has in its entirety. If the government believes that there is another video showing additional content – it should produce it to the defense. Otherwise, Defendant [ ]

**1182 - Video – 19 min 9 Sec, Press Statement, LaVoy Finicum and A. Bundy. January 19, 2016. Purpose: Direct statement of intent, plan and purpose as of January 19. Also rebuts government presentation on government employees returning.**

Government’s Position: Object; Hearsay.

Reply: In addition to the arguments made previously, the statement is not hearsay, because it is not offered to show the truth of what is asserted. It is offered to show a statement was made, and that Mr. Bundy’s state of mind was not focused or directed at Refugee employees – to establish the truth of any claim or statement made in the video. Second, it is a not hearsay because it qualifies as a “prior statement” under 801(d)(1)(B). Alternatively, even if the court were to rule that it is hearsay, it is admissible hearsay under Rule 803(3) because it is “offered to show his state of mind at the time” the video was made. *Wagner v. Cty. of Maricopa*, 747 F.3d 1048, 1053

(9th Cir. 2013). The government has alleged that as of the date of this video Mr. Bundy was directly involved in an illegal conspiracy to “prevent” federal employees at MNWR for discharging their duties. This video, and the content thereof, is directly relevant and admissible because the rule allows statements of “motive, intent or plan” and that is exactly the content of this video. The government doesn’t explain how this video could be confusing or prejudicial, and in any event, Mr. Bundy is subject to cross-examination. Further, the statements of Mr. Finicum are admissible for nonhearsay purposes, because Mr. Bundy will testify that he heard them and relied upon them, and that Mr. Finicum was speaking for all the occupiers at the Refuge. Finally, and alternatively, the video should be admitted independently, because this is a statement upon which others (including co-defendants) allegedly relied as part of being induced into the alleged conspiracy. Thus, this video is admissible for the non-hearsay purpose of showing the jury what any other person who allegedly entered into an agreement with Mr. Bundy saw and heard and were thus affected by.

**1183 - Video – 11 min 30 sec, Ammon Bundy speaking via Telephone with FBI Negotiator.**

**January 26, 2016. Most Relevant Portion – 00:00 3:25. And 4:27 to 4:47.**

Purpose: Intent and state of mind of Ammon as of January 26, also rebuts gov’t circumstantial evidence regarding intent, particularly related to governmental misconduct as part of the basis of the protest and occupation.

Government’s Position: Object; Hearsay, irrelevant, prejudicial, and unduly confusing under FRE 403, particularly in light of defendant’s purported use to show “governmental



misconduct.” This is being offered to rebut substantive evidence and is therefore not properly “state of mind” under FRE 803(3).

Reply: The general hearsay and relevance arguments have already been addressed above. Regarding the reference to “governmental misconduct” it shows the state of mind of Def. Ammon Bundy, in terms of his motive in asking Sheriff Ward to investigate and regarding the Petitioner for Redress of Grievances. It is not being admitted for the truth of his statement, but it shows his motive – and it explains why he was acting and what was motivating him to gather records, stay at the Refuge, and demand action from law enforcement. The authority cited above clearly supports the admissibility for the nonhearsay purpose.

**1184- Video – 29 min 37 sec, Interview of Ammon Bundy.** (4:43 to 9:08, 19:54 to 21:04, 22:19 to 27:52)

Purpose: Direct statement of plan, intent and motive as of final week of occupation.

Government’s Position: Object; Hearsay. This is a lengthy statement of defendant being offered to show his version of events related to the Refuge as true.

Reply: Defendant has selected from the 29-minute interview, those portions where he is answering questions directly inquiring as to his intent, his motivation, and his plan. This is expressly allowed under Rule 803(3) as an exception to hearsay. Further, the 9<sup>th</sup> Circuit has ruled that such statements are allowable under the Hillmon doctrine cited above. Finally, in the alternative, these sections are admissible as nonhearsay

prior statements under Rule 801(d)(1)(B).

**1186 - Video – 6 min and 12 sec video from Lou Dobbs (Fox News) program interviewing Susan Hammond. January 19, 2016.**

Purpose: Defendant’s state of mind, particularly to rebut the government’s case in chief suggesting that the Hammonds did not accept the protest or occupation.

Government’s Position: Object; Hearsay, irrelevant, prejudicial, and unduly confusing under FRE 403. This is a FOX news report with editorial voice over and interview of the Hammonds no statements of defendant – it is not therefore, within FRE 803(3) relating to defendant’s state of mind.

Reply: This argument has been addressed thoroughly above. Mr. Bundy will testify that he saw this video, and that it had a direct effect on him and on the choices he made related to the occupation and the time he stayed and acted at the Refuge. A statement “is not hearsay if the witness is reporting what he heard someone else tell him for the purpose of explaining what the witness was thinking, at the time or what motivated him to do something.” *United States v. Leonard-Allen*, 739 F.3d 948, 954 (7th Cir. 2013). As with the prior news reports, If the statements are not Mr. Bundys, and they are offered to show what effect these statements had on Mr. Bundy (if he testifies that he saw these reports or substantially similar reports depicting the same thing) as it relates to his state of mind in Oregon, they are not hearsay. *United States v. Payne*, 944 F.2d 1458, 1472 (9th Cir.1991); *United States v. Lopez*, 185 F.3d 870 (9th Cir. 1999). This exhibit is not being introduced to establish the truth of what was said, they are offered

to show that the report was made, and that the report and similar reports had a direct effect on Mr. Bundy's future motivations, intentions and actions in Oregon. See also *The Kerr v. City & Cty. of San Francisco*, No. C 10-5733 CW, 2012 WL 3877752, at \*7 (N.D. Cal. Sept. 6, 2012) (Unpublished) (Holding that conclusory undetailed objections were "unduly vague" and that "evidence of the news reports" at issue were relevant and "not offered to prove the truth of the matter asserted therein and are therefore not hearsay.")

**1187 - Video – 8 min 13 seconds, video with LaVoy Finicum being interviewed about reasons for the occupation and how it came about. January 20, 2016.**

Purpose: Direct statement of purpose of occupation. Shows consistency of intention an purpose, and rebuts government's allegation of intent directed at Refuge employees.

Government's Position: Object; Hearsay. Again, this is a statement of Lavoy Finicum, and not defendant.

Reply: In addition to the arguments made previously, the statement is not hearsay, because it is not offered to show the truth of what is asserted. It is offered to show a statement was made, and that the state of mind and intentions of the occupiers was not focused or directed at Refuge employees – to establish the truth of any claim or statement made in the video. At this time, Mr. Bundy will testify that Mr. Fincium was designated as an official spokesperson for the Citizens for Constitutional Freedom, so these statements are the statements of Mr. Bundy as if he had spoken them. Thus, even if the court were to rule that it is hearsay, it is admissible hearsay under Rule 803(3) because it is

“offered to show his state of mind at the time” the video was made. *Wagner v. Cty. of Maricopa*, 747 F.3d 1048, 1053 (9th Cir. 2013). Further, the statements of Mr. Finicum are admissible for nonhearsay purposes, because Mr. Bundy will testify that he heard them and relied upon them, and that Mr. Finicum was speaking for all the occupiers at the Refuge. Finally, and alternatively, the video should be admitted independently, because this is a statement upon which others (including co-defendants) allegedly relied as part of being induced into the alleged conspiracy. Thus, this video is admissible for the non-hearsay purpose of showing the jury what any other person who allegedly entered into an agreement with Mr. Bundy saw and heard and were thus affected by.

**1188 - Video – 53 min 26 seconds, Ryan Bundy teaching group (at Refuge), about property rights, theory of possession, claims, adverse possession, etc. January 25, 2016. (7:42 - 9:05)**  
**Purpose: Defendants’ state of mind regarding Adverse Possession.**

Government’s Position: Object; Hearsay. Proffered basis clearly demonstrates it is offered for the truth.

Reply: This is a presentation given by Ryan Bundy, that Mr. Ammon Bundy will testify is the same presentation given by him and others to anyone who wanted to know their message, and why they were at the Refuge. Further, the presentation provides evidence of the occupiers intention – specifically adverse possession – regardless of the truth as to the statements made about adverse possession. *See also, United States v. Leonard-Allen*, 739 F.3d 948, 954 (7th Cir. 2013) (reversing conviction for conspiracy

to commit money laundering where the district court erroneously excluded the defendant from testifying regarding the statements of others, in an attempt to give the jury an “alternate explanation” for defendant’s actions, making his “defense more believable,” and negating his criminal intent, because “[I]n those circumstances, the out-of-court statement is not being offered as evidence that its contents are true”). Further, in *United States v. Kohan*, the Second Circuit reversed a defendant’s conspiracy conviction based on the trial court’s erroneous exclusion of testimony of a witness regarding the statements of a third party: the defendant “was not basing his defense on the truth of [the third party’s] statements, but rather on the fact that they were made and that [defendant] believed them to be true.” *United States v. Kohan*, 806 F.2d 18, 22 (2d Cir. 1986) (reversing conviction for conspiracy under 18 U.S.C. § 371 where trial court excluded “circumstantial evidence of [the defendant’s] state of mind – his belief that [the third party’s] activities were legitimate”). In *Kohan*, the court noted that the error was especially significant when offered in the defendant’s direct case, revealing the defendant’s state of mind at the time of the alleged conspiracy, and corroborating statements that the defendant later provided to government agents investigating the matter. *Id.*

**1191 - Video – 24 min 19 sec., Rep. Greg Walden Full Floor Speech. January 5, 2016.**

(00:00 to 01:44, 6:45 to 13:50, 19:20 to 24:19)

Purpose: Defendant’s state of mind to continue the occupation, after seeing consequences of occupation, and the consequence of Rep. Walden’s floor speech on the occupation.

Government’s Position: Object; Hearsay, irrelevant, prejudicial, and unduly confusing under

FRE 403.

Reply: Mr. Bundy will testify that just prior to this floor speech he was in contact with Mr. Walden's office, and had explained to Mr. Walden's chief of staff answers to Mr. Walden's questions about the occupation and the concerns of the Citizens for Constitutional Freedom. Mr. Bundy will also testify that he first heard reports of the speech and watched the recorded version of the speech while at the Refuge and that this speech had a direct effect on him and other occupiers, and directly motivated them to act the way they acted, and confirmed his intention and plan. This evidence is essential, because it provides evidence of the foundation of Mr. Bundy's choices and actions and plans after January 5<sup>th</sup>, and under *United States v. Leonard-Allen*, 739 F.3d 948, 954 it is not offered for the truth of the statements of Congressman Walden, but because it makes the intent, motive, and plan of Mr. Bundy and the other occupiers more credible. . "An out-of-court statement offered to show the effect on the listener, rather than the truth of the matter asserted, is not hearsay." *United States v. Payne*, 944 F.2d 1458, 1472 (9th Cir.1991); *United States v. Lopez*, 185 F.3d 870 (9th Cir. 1999)

### **1208 Video of Margaret Houston.**

Purpose: Part of 1146 above.

Government's Position: Object; Hearsay, irrelevant, prejudicial, and unduly confusing under FRE 403. This is a video containing excerpts of the events of Bunkerville – it is not being offered for state of mind, but even if it was, again, it would not be proper under FRE 803(3) because the declarant is not defendant.

Reply: First, this video is not hearsay because there are no discernable “statements” presented. Second, any “statements” that are in the video are not presented for the truth of the matter, and in any event would qualify for an exception as an excited utterance. The other grounds for this objection has been answered with the other Bunkerville videos above. But, specifically, Mr. Bundy will testify that he saw these events from a distance, that he subsequently saw the video, and that the manner and method of the BLM agent in this video, sneaking up behind his aunt and throwing her to the ground, contributed significantly to his view of the BLM and how to subsequently deal with Federal Agents, and particularly his view regarding why he told those coming to the Refuge to bring their arms.

**1211 Video - Hammond Update Video (Dec. 30, 2015 10 min 43 sec)**

Purpose: Direct statement of intent and plan and state of mind of Defendant Ammon Bundy as of December 30, 2015.

Government’s Position: Object; Hearsay, cumulative, and unduly confusing under FRE 403. This is not state of mind evidence – it contains a detailed description of the manner in which the Hammond case was mishandled (and thus also goes improperly beyond the stipulation on the Hammond matter).

Reply: The video is not hearsay, because it is not offered to show the truth of what is asserted. It is offered to show a statement was made, and that Mr. Bundy’s state of mind was not focused or directed at Refuge employees – to establish the truth of any

claim or statement made in the video. Second, it is not hearsay because it qualifies as a “prior statement” under 801(d)(1)(B). Alternatively, even if the court were to rule that it is hearsay, it is admissible hearsay under Rule 803(3) because it is a direct statement and explanation of Mr. Bundy’s motive, plan and intention at this particular point in time and is “offered to show his state of mind at the time” the video was made. *Wagner v. Cty. of Maricopa*, 747 F.3d 1048, 1053 (9th Cir. 2013). The government has alleged that as of the date of this video Mr. Bundy was directly involved in an illegal conspiracy to “prevent” federal employees at MNWR from discharging their duties. This video, and the content thereof, is directly relevant and admissible because the rule allows statements of “motive, intent or plan” and that is exactly the content of this video. The government doesn’t explain how this video could be confusing or prejudicial, and in any event, Mr. Bundy is subject to cross-examination. Finally, and alternatively, the video should be admitted independently, because this is a statement upon which others (including co-defendants) allegedly relied as part of being induced into the alleged conspiracy. Thus, this video is admissible for the non-hearsay purpose of showing the jury what any other person who allegedly entered into an agreement with Mr. Bundy saw and heard and were thus affected by.

Separately regarding the Hammond Stipulation: The stipulation was regarding what the court could take judicial notice regarding, and inform the jury. Defendant has never agreed to limit or be bound by the stipulation in terms of testifying as to his state of mind, motivation, plan or intent – or admitted evidence to establish the same. It would be egregiously unfair to allow the government to base its allegation of Mr. Bundy’s



intention (and the intention of his alleged co-conspirators) on circumstantial evidence and admissible hearsay and then construe the rules of evidence so as to prevent any evidence besides Mr. Bundy's own testimony rebutting the government's case.

**1212 Sheriff Ward at the January 6, 2016 Community Meeting, asking for show of hands**

Purpose: Shows basis for Defendant's state of mind and belief after seeing video.

Government's Position: No objection within Court's previous ruling on this exhibit.

**1214 - Video – Ammon Bundy Explaining His Views on Rights, Jan. 22, 2015 (2:02)**

Purpose: Statement of Defendant Ammon Bundy's state of mind regarding authority of county Sheriff when there is conflict with federal agencies, and why pressure was put on Ward in November – December 2015 in Harney County, OR.

Government's Position: Object; Hearsay. This is not properly offered as state of mind evidence – it is simply a counter narrative by defendant about his version of events at the Refuge.

Reply: This video is not hearsay under Rule 801(d)(1)(b) because it is a prior statement and is offered to rehabilitate Mr. Bundy's credibility as to his intentions at Bunkerville and in Oregon, where the government has introduced evidence inferring evil or bad motives to "what happened in Bunkerville" and related to Mr. Bundy's statements to Sheriff Ward about how he should intervene in the Hammond dispute. It is also to rebut an express or implied argument that Mr. Bundy's directions and actions towards the Sheriff are only being justified by him now, after the fact, but not as legitimate beliefs. The government made such expressions and implications by introducing hearsay statements about Mr. Bundy's conversations with Sheriff Ward, and regarding

“what happened” at Bunkerville as something bad or wrong that was continuing in Oregon in November/December 2015, without stating that Bunkerville was resolved with Mr. Bundy’s cooperation with the Sheriff deputies on the scene.

**1220 Video – Harney County Resource Center, Training Video Part 1 (January 23, 2016 – 19:06)**

**1221 Video – Harney County Resource Center, Training Video Part 2 (January 23, 2016 – 17:33)**

**1222 Video – Harney County Resource Center, Training Video Part 3 (January 23, 2016 – 20:19)**

**1223 Video – Harney County Resource Center, Training Video Part 4 (January 23, 2016 – 20:57)**

**1224 Video – Harney County Resource Center, Training Video Part 5 (January 23, 2016 – 20:38)**

Purpose: Selections from this training session will be introduced to show direct statements of plan, intent, and motive related to occupation generally, related to adverse possession, and related to what “open defense” means as part of “defending rights” of those put under “chains” of federal agencies, and what role “militia” plays in the view of Defendant’s including at the Refuge.

(Approximately 15 min total)

P1 at 10:40 to 14:33, 17:30 to 18:41

P3 at 16:10 to 19:06

P4 at 18:30 to 20:35

P5 at 16:00 to 19:55

Government's Position (1220-24): Object; Hearsay, irrelevant, prejudicial, cumulative, and unduly confusing under FRE 403. These appear not be offered as state of mind and are clearly hearsay; they contain defendant's detailed descriptions about the law as he sees it, including adverse possession. To that degree, even if they are properly state of mind evidence, the content is cumulative and certainly confusing.

Reply: The government's objection is confusing. Mr. Bundy has specified selections from a recording of the standard presentation he and other occupiers gave explaining why they were doing what they were doing, and what their plan was – in detail. This is clearly allowable under the 803(3) exception. Further, it is not being introduced for the truth of the statements made in the recording – so it is not hearsay in the first instance. It is not cumulative because Mr. Bundy has to be allowed to show that from before the occupation, at the beginning of the occupation and at the end of the occupation his intention was the same, and the presentation he gave to those who had joined him and who might join him is directly relevant to and significantly probative of what his actual intent, motive and plan were at the time that Mr. Bundy consistently and repeatedly explained his belief in and reliance upon the legal doctrine of adverse possession as justification for the occupation, and the video also includes evidence that that state of mind and intent was the plan of Mr. Bundy and others there present. Any confusion (none is explained by the government) is remedied by the fact that Mr. Bundy will be subject to cross-examination.

### **1227 - Ammon Bundy Criminal History Report**

Purpose – Use public record to corroborate Defendant’s statement regarding interaction with government, and his state of mind as to the same.

Government’s Position: Object; Hearsay, irrelevant, cumulative.

Reply: Public Record and Nonhearsay under Fed. R. Evid. 801.

**1231 - Ammon Bundy Family Photo**

Purpose: Background

Government’s Position: No objection.

**1232 - Ammon Bundy Family Photo 2**

Purpose: Background

Government’s Position: Object; cumulative to 1231.

Reply: Two pictures is hardly cumulative, particularly in light of the court’s indulgence of the governments multiple pictures of ammunition and guns. Further, the purpose of showing two pictures is to show Mr. Bundy’s family, and the second picture is actually taken just before the occupation, so Mr. Bundy is wearing a beard.

**1233 - Video – “We do have a plan ... and we will go home.” (2:43) Jan. 5, 2016**

Purpose: Direct statement of plan and purpose as of Jan. 5, 2016.

Government’s Position: Object; Hearsay. It clearly is being offered for the truth – the proposed proffer does not mention “state of mind.”

Reply: The proffer was a direct reference to the hearsay exception at Rule 803(3) because it expressly allows a statement of a declarant’s intention, motive and plan and that is the

content and language of the short video entitled “We do have a plan.” For the reasons stated above related to other videos from Mr. Bundy, this video is essential and permissible as evidence of his plan – as of January 5, 2016.

**1234 - Letter – Aware Citizens and Government Officials. Nov. 3, 2015**

Purpose: Direct statement of Defendant Ammon Bundy’s plan and intention as of November 3, 2015 and also for more accurate recollection of statements made.

Government’s Position: Object; Hearsay, irrelevant (pre-dates conspiracy), cumulative, and unduly confusing under FRE 403.

Reply: Defendant Ammon Bundy will testify that this is his written statement. It is not cumulative, it is discretely related to Mr. Bundy’s direct expression of his state of mind at the precise time the government alleges he was just getting involved with a conspiracy. The statement that it is irrelevant because it “pre-dates” the conspiracy is not credible, it is two days before the government claims the conspiracy started, it explains why he went to Harney County for the first time, and it explains context to his first meeting with Sheriff Ward. It is not prejudicial or confusing (the government doesn’t explain how) because it is a statement of Mr. Bundy’s views and intent that led him to get involved in Oregon, including his state of mind and motives. It is not being introduced for the truth of the statement and he is subject to cross-examination. The statement is not hearsay because it is not being introduced for the truth of the statement, but to prove that the statement was made. It is introduced also to show Mr. Bundy’s intent in coming to Oregon, and related state of mind. It is also not hearsay

because it is a prior statement under 801(d)(1)(B).

**1235 - Post – Hammond Information Update. Nov. 13, 2015**

Purpose: Direct statement of Defendant Ammon Bundy’s plan and intention as of November 3, 2015 and also for more accurate recollection of statements made.

Government’s Position: Object; Hearsay, irrelevant, cumulative. Defendant’s statements regarding the Hammond case are, again, clearly being offered to show that his version of the Hammond case is indeed “true”

Reply: This objection has been answered above. This update is important and relevant because it is between Mr. Bundy’s first and second meeting with Sheriff Ward and shows the jury his motive, intent and plan during that unique time. It is thus not being offered for the truth of the matters asserted in the statement, and is not hearsay. It is also not hearsay because it is a prior statement under 801(d)(1)(B). But, even if it was offered for the truth, it is admissible hearsay under 803(3).

**1236 Post – Hammonds Physically Threatened by Federal Agent**

Purpose: Defendant Ammon Bundy’s state of mind and purpose related to feeling his life was endangered by federal agents, and relationship to arms during occupation.

Government’s Position: Object; Hearsay, irrelevant, prejudicial, lack of foundation, and unduly confusing under FRE 403. This does not appear to involve a statement of the defendant, and therefore cannot be properly tendered as state of mind evidence under FRE 803(3).

Reply: Mr. Bundy will testify that this is his statement. It is not hearsay because it is a prior statement under 801(d)(1)(B) and if it is, its admissible under 803(3) because it explains his motive for acting. He will also testify how the reports communicated directly affected his state of mind. “An out-of-court statement offered to show the effect on the listener, rather than the truth of the matter asserted, is not hearsay.” *United States v. Payne*, 944 F.2d 1458, 1472 (9th Cir.1991); *United States v. Lopez*, 185 F.3d 870 (9th Cir. 1999) (Holding that evidence offered to show parties reliance upon another’s statement, rather than the truth of the statement itself, does not constitute hearsay under the Federal Rules of Evidence.) This is particularly true, where statements are offered “for their effect on defendants' state of mind, which was very much in dispute” or “to show the circumstances under which subsequent events occurred” or that “show that the statements occurred and that, given their effect on the defendants' state of mind, they provided a good faith basis for the defendants' actions.” *United States v. Certified Env'tl. Servs., Inc.*, 753 F.3d 72, 89 (2d Cir. 2014).

### **1237 - Video – Hammonds Threatened and A. Bundy’s Life in Danger**

Purpose: Defendant Ammon Bundy’s state of mind and purpose related to feeling his life was endangered by federal agents, and relationship to arms during occupation. Also more accurate statement of recollection of statements made at the time.

Government’s Position: Object; Hearsay, irrelevant, prejudicial, and unduly confusing under FRE 403. This does not appear to involve a statement of the defendant, and therefore cannot be properly tendered as state of mind evidence under FRE 803(3). Even if it were offered to show the “effect on listener” the chance of prejudice is too great to admit it under that exception.

Reply: The substance of this objection was answered above related to 1136. The prejudice alluded to here by the government is nonspecific. It appears that the government is taking the position that anything that shows Mr. Bundy's motivation in protest to the federal government is prejudicial. But, the prejudice that could be evoked, if any, is not more important than the jury hearing specifically from Mr. Bundy how this affected him, and why he therefore acted based upon this, to tell others to bring arms to the Refuge.

**1238 - Gov't Report on A. Bundy Facebook Activity**

Purpose: Rebut government's use of, and inferences from, the same.

Government's Position: No objection if used for proper non-hearsay purpose.

DATED: October 3, 2016

*/s/ Marcus R. Mumford*

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Marcus R. Mumford

J. Morgan Philpot

Attorneys for Ammon Bundy