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9 **UNITED STATES DISTRICT COURT**
10 **DISTRICT OF NEVADA**

11 **United States of America,**
12
13 Plaintiff,

14 v.

15 **Cliven D. Bundy,**
Ryan C. Bundy,
16 **Ammon E. Bundy, and**
Ryan W. Payne,

17 Defendants.

2:16-CR-0046-GMN-PAL

**Renewed Motion to Exclude
Irrelevant Evidence**

18
19 The United States renews its motion for the Court to preclude the defendants
20 from introducing evidence of water rights, fencing laws, open range laws, and any
21 other topic that would constitute a collateral attack on the merits of the 1998 and
22 2013 Court Orders and that could lead to jury nullification.

23 A party is not entitled to collaterally attack the merits of a final order for
24 relief. The doctrine of res judicata precludes a party from relitigating issues
25 involving the merits of a claim that were or could have been raised in the original
26 action. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397 (1982).

1 There the Court stated: “A final judgment on the merits of an action precludes the
2 parties or their privies from relitigating issues that were or could have been raised
3 in the action.” *Id.*

4 Here the defendants seek to relitigate the merits of the 1998 and 2013 Orders
5 by introducing evidence of water rights, fencing laws, open range laws, and similar
6 subjects. They have sought to introduce some of these subjects in opening
7 statements and during their cross-examinations of Mary Jo Rugwell, and are likely
8 to do so elsewhere in the trial. Specifically, from Cliven Bundy’s opening statement
9 and his cross-examination of Ms. Rugwell, it is apparent he is seeking to prove and
10 argue to the jury that his water rights on the Bunkerville allotment gave him
11 grazing rights.¹ This argument is nothing short of a collateral attack on the Orders
12 and an attempt at jury nullification.

13 This Court has excluded evidence likely to cause jury nullification. The Court
14 has excluded “argument, evidence, or testimony explaining, demonstrating, or
15 supporting Defendants’ beliefs regarding the Constitution and federal law as
16 irrelevant and as a possibility of jury nullification attempt.” Dkt. 2770, pg. 11.
17 However, the Court stated that evidence would not be excluded by the doctrine of
18 jury nullification if the defendants’ beliefs are interlaced with independently
19 admissible evidence, such evidence will not be excluded simply because it references
20 their opinions.” *Id.* That is not the case here.

21 Defendants have argued that evidence of water rights is interlaced with the
22 defense to the April 9 convoy incident. They have argued that Cliven Bundy’s
23 possession of water rights is relevant to proving they did not obstruct Court Orders
24 on April 9, 2014, because the Orders authorized BLM to remove cattle from the

25 ¹ Cliven Bundy also seems to be arguing that he was protesting the taking of his water rights during the April 2014
26 events, not the Court Orders. The argument is disingenuous. Whatever his reasons for doing what he did, he was
27 allegedly obstructing the Court Orders. He told the armed crowd on April 12, 2014, to get his cows. The issue here
28 is what he did, not what his legal theories were. Stated differently, this case is not about Bundy’s beliefs, but his
means of expressing them.

1 range, not remove range improvements. But defendants do not need to prove Cliven
2 Bundy's arguable water rights to raise this defense. Range improvements are not
3 cows. Defendants allege Ammon Bundy interfered with the convoy because he
4 believed a dump truck in the convoy may have been hauling range improvements,
5 and intend to rely on this fact to argue they did not violate the Orders that
6 authorized removal of cows not pipes. No jury needs to know about water rights to
7 decide that pipes are not cows. Stated in terms of the definition of relevance under
8 Rule 401, evidence of water rights does not have "any tendency to make a fact [that
9 pipes are not cows] more or less probable than it would be without the evidence."

10 The Court should also exclude water rights and any other collateral attack on
11 the merits of the Orders on 403 grounds. The probative value of water rights and
12 similar subjects is substantially outweighed by the danger of unfair prejudice,
13 confusing the issues, misleading the jury, undue delay, and a waste of time. *See*
14 F.R.E. 403. Evidence and arguments of water rights could easily cause the jury to
15 be influenced by the notion that Cliven possessed an ownership interest in the land
16 because he may have possessed water rights on the land, and that he was wronged
17 when ordered to remove his cattle. Indeed, one juror presented that question to Ms.
18 Rugwell, asking whether water rights gives ownership rights. As seen from this
19 question, evidence and argument of water rights invites the jury to evaluate the
20 validity of the Court Orders, and thus potentially engage in jury nullification.

21 Evidence of water rights will also be misleading and confusing because clear
22 case law contradicts Bundy's claim that water rights bestows grazing rights on
23 public land. As early as 1967, the Ninth Circuit expressly rejected a rancher's
24 argument that water rights entitled him to an appurtenant right to graze or any
25 additional or to any 'additional or other easements. *Hunter v. United States*, 388
26 F.2d 148 (9th Cir. 1967). An owner of water rights on public lands possesses a right
27 of way only for diversionary purposes such as by means of construction of ditches
28

1 and canals. *Hunter* at 154. Specifically, the *Hunter* court held that the rancher “is
2 not entitle dot an easement to graze livestock on the lands within the boundaries of
3 the [federal lands]” but that “he should be allowed a right of way over those lands to
4 divert the water by one of the methods contemplated by the [Mining Act of 1866].”
5 *Id.* The Tenth Circuit and Federal Circuits have agreed. *See Diamond Bar Cattle*
6 *Co. v. United States*, 168 F.3d 1209, 1214-15 (10th Cir. 1999); *Estate of Hage v.*
7 *United States*, 687 F.3d 1281, 1290 (Fed.Cir. 2012); *See also Colvn Cattle Co. v.*
8 *United States*, 67 Fed.Cl. 568 (2005).

9 If Bundy is permitted to introduce evidence of water rights, the government
10 would need to introduce case law regarding res judicata and water rights. This will
11 slow down the trial even further.

12 To this end, Cliven Bundy has submitted a notice of expert on water rights.
13 Dkt. 2826. His testimony should not be permitted, nor should the Court allow any
14 other evidence of water rights, fencing laws, open range laws, and so on.

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Certificate of Service

I certify that a copy of the foregoing response was served on counsel of record
by filing in ECF.

/S/ Daniel R. Schiess

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