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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

UNITED STATES OF AMERICA,	**Case No. 6:10-CR-60066-HO**
v.	**UNITED STATES' OPPOSITION TO DEFENDANTS' FOURTH MOTION *IN LIMINE* (BLM PROSCRIBED BURN PROGRAM) OR IN THE ALTERNATIVE TO SET OVER TRIAL (CR 111, 113)**
STEVEN DWIGHT HAMMOND, DWIGHT LINCOLN HAMMOND, JR.	
Defendants.	**Trial Date: June 12, 2012 @ 9:00 AM**

The United States of America, by and through S. Amanda Marshall, United States Attorney for the District of Oregon, and Frank R. Papagni, Jr., and AnneMarie Sgarlate, Assistant United States Attorneys, respectfully opposes defendants' fourth motion *in limine* (CR 111).

Cutting this case down through the muscle to the shank and bone, the prosecution contends the defendants' who were leasing their neighbors' property to graze cattle, never had their neighbors' permission to also burn it. Nor did they ever provide their neighbors with advance notice of their

intent to burn it. They simply burned it and endangered their neighbors' employees who were trying to put the fires out. They burned it because the defendants didn't agree with how the neighbor was managing their land and because burning it was to their financial benefit.

Superseding Indictment

Defendants' fourth motion *in limine* was generated by the grand jury returning a superseding indictment on May 17, 2012, that reduced the charges against them from nineteen to nine.[1] It narrowed the conspiracy count's time span from twenty-four to seven years, decreased the objects of the conspiracy by four, cut the manner and means by three, and deleted ten overt acts (CR 104). Faced with these facts, defendants cannot credibly contend that the Superseding Indictment did not substantially lessen their burden to defend against the remaining charges. *United States v. Rojas-Contreras*, 474 U.S. 231 (1985)(reversing Ninth Circuit holding that a defendant has an automatic right to additional thirty-day preparation period when a superseding indictment is returned).

Moreover, while not required to do so, and to no surprise to defendants who anticipated a reduction of charges in August 2011, the government supplied defendants with a notice on May 4, 2012, of its intent to seek a superseding indictment (CR 97), and, as a courtesy, provided them a draft of the superseding indictment the evening of May 16, 2012. *See Def. Mot.* at 4.[2]

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[1]Defendants correctly point out the government's notice "claimed" it would reduce the number of original charges from the original nineteen to thirteen. Instead, the government cut the charges from nineteen to nine.

[2]Mr. Blackman correctly anticipated in August 2011, that the government may reduce the number of charges when he commented: "If the government is really going to proceed on all of those events, I don't think it's realistic to think we can do it in two weeks." *See* CR 44, RT at 48.

Nothing New in Superseding Indictment

Defendants' claim of surprise by the introduction portion of the conspiracy count and the first two "manner and means" rings hollow after reading the government's "third trial witness list" summaries (CR 91) and reviewing its trial exhibit list (CR 90) filed April 20, 2012. Mindful that all of the summaries and exhibits aree based on reports and items defendants received months ago further undermines a claim that the Superseding Indictment introduced "an entirely new set of factual allegations or an entirely new theory of prosecution."

Defendants further claim the language in the Superseding Indictment introducing the conspiracy count and two of its manner and means "materially changes the nature of the charges," but do not acknowledge that the reduction in charges, objects of the conspiracy, manner and means and overt acts have substantially reduced their burden of defense. Nor do they explain how the introductory language "materially changes" the objects or the substantive counts that followed, or their defense theor(ies).

Most basic, defendants do not describe how the "changes" are "materially" different in the introduction to Count 1 of the Superseding Indictment from that in the original indictment — which defendants never previously objected to, nor moved to strike and exclude.

The pertinent introductory paragraph in Count 1 of the original Indictment stated:

> "Hammond family members have publicly expressed their displeasure with BLM about the land use management methods of BLM. Because the BLM "takes too long" to complete the required environmental studies before doing controlled rangeland burning, the Hammonds have opposed BLM management of the rangelands and have burned the rangelands on their own. * * *. For more than twenty years, Hammond family members have been responsible for multiple fires in the Steens Mountain area" (CR 1, Count 1) (underscore supplied).

The Superseding Indictment has simplified what land use management methods BLM was using which the Hammonds opposed, reduced the number of years from twenty to seven, and redacted inflammatory language.

Having been presented this introductory language in the Indictment returned in June 2010, and now having a more moderate and measured introduction in the Superseding Indictment in May 2012, defendants' demands to "strike," "exclude," "postpone" and "disclose" appear needlessly overstated.

"Entirely New Set of Factual Allegations" Are Not "New"

Defendant's claims that there is an "entirely new set of factual allegations," is negated by the following pertinent portions of witness summaries and exhibits the government supplied defendants on April 20, 2012:

Witness # 1, Thomas H. Dyer, Ret. BLM District Manager:

> "Dyer offered to cooperate with Hammond Ranches as he had with other ranchers with prescribed burnings. He asked Dwight and Steven Hammond to contact their BLM Rangeland Management Specialist Dave Ward if they were interested in initiating a cooperative prescribed burn. Dyer and Brown warned Dwight and Steven Hammond that "in the future" if they conducted burns on their property which burned public lands without a prescribed burn agreement with BLM it would be treated as a fire trespass and legal action would be taken. A record of the meeting was described in a November 5, 1999, letter from Dyer to Dwight Hammond." (Underscore supplied).

Exhibit # 5 (Bates stamped 01.00019-20), the November 5, 1999, letter from Dyer to Dwight Hammond states in pertinent part:

> "The Burns District supports the use of fire to rehabilitate many of the shrub/grasslands and is conducting numerous prescribed burn activities as outlined in approved burn plans within the Steens Mountain area. This fall we have successfully treated 25,000 acres with fire and have worked closely with private landowners and interested public to ensure that our use of fire meets resource objectives and is contained within the areas identified for treatment. Containing prescribed fire within areas identified for treatment is possible and is crucial for the continuance of this program.

As we are both aware, there are many areas within your grazing allotments that are in need of fire to control the conversion of a shrub/grassland to a juniper woodland. We would be happy to work cooperatively with you to develop and implement a prescribed burn treatment for these areas. In the future, however, if you are conducting a prescribed burn on your property and it enters public land without a prescribed burn agreement with the Bureau of Land Management (BLM) in place it will be responded to as a wildland fire and treated as a fire trespass. This will lead to legal action by the BLM to recover costs of suppression and fire rehabilitation." (Underline supplied).

Witness # 11, BLM Rangeland Specialist Dave Ward:

"Before September 30, 1999, Ward worked with Steven and Dwight Hammond in Sections 15 and 16 with the intent to do a cooperative prescribed burn after preparing a plan and doing an environmental study. Ward thought a burn would improve the range conditions. Ward had not been provided notice that Steven and Dwight Hammond intended to do a"controlled" burn on Sunday, September 30, 2001. Ward learned of the burn on September 30, 2001.

On November 26, 2001, Ward was present at the Burns BLM office when Steven, Dwight and Susan Hammond met with BLM Special AgentDennis Shrader. Dwight Hammond stated they had worked for five years to build up fuels to burn the area and had been promised for years and years it was going to be burned, but wasn't." (Underscore supplied).

Witness # 15, Stacey Davies, Rancher (whose grand jury testimony reflecting his anticipated trial testimony was provided to Defendants in September 2011):

"While the "red tape" working with BLM is"pretty thick," starting in 1997, Davies has done numerous cooperative burns with BLM as a tool to manage juniper and sage brush. The prescription burns Davies has done with BLM have occurred after a management plan is completed, and only when the conditions –relative humidity, temperature, wind speed –are right. If the conditions were not right, such as where there is a "red flag warning" or a "no burn order," there was no burning. Davies has done many prescribed fires, but not "controlled burns" because he believes fire cannot be totally controlled.

On May 23, 2007, Davies told BLM LEO Orr and Criminal Investigator Shrader that Steven Hammond told him why go through all this burn prescription stuff in what two matches can do in August." (Underscore supplied).

Witness # 14, Bill Otley, Owner/Operator Diamond Valley Ranch (whose grand jury testimony reflecting his anticipated trial testimony was provided to Defendants in September 2011):

Several days after the fire was out, Steven Hammond told Otley that he had lit a fire on his side of the fence to clean up, straighten up, block up or whatever, some land the other fire had not burned. Steven Hammond was sorry the fire had gotten through the fence and burned onto Otley's property.[3] Otley replied that was no problem and there was nothing to worry about. The fire Steven Hammond started burned 10 to 20 acres of Otley property. The 2006 Grandad fire (Ignition # 3 on August 23, 2006) caused Otley a loss of about 6,637 acres of grazing pasture, and damaged fences and gates in Sections 1, 2, 5, 6, 7, 8, 12, 31 and 32. The fire required Otley purchase 150 tons of hay to feed his cattle. The Oregon Department of Fish and Wildlife offered to buy $49,535 of five different seed mixes for Otley to reseed the burned lands. The helicopter application of the seed was an estimated $25,000. Otley paid for the aerial application of that seed. He had to sell calves in spring instead of selling them at full growth. Otley estimated the fire cost him more than $31,750. The morning after the Grandad Fire, Steven Hammond called Otley and asked if he had lost any cows. Otley didn't know, but ultimately determined he had not. (Underscore supplied)

Witness # 19, David Toney, BLM FMO/Incident Commander:

"He will testify to NEPA requirements applicable to fires on public and private lands, ..." (Underscore supplied).

The government anticipates Dave Toney will also testify that Steven Hammond had told him that he would never do a prescribed burn with BLM.

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[3]This statement in Bill Otley's witness summary refutes Defendants' declaration that the Superseding Indictment "introduces for the first time an entirely new allegation: that defendant Steven Hammond 'started a fire on property near or along the fence line which burned onto private property owned by William, "Bill," Otley of Diamond Ranches, Inc." *Def. Mot.* at 3.

Moreover, this information was contained in Otley's May 20, 2010, grand jury testimony which was provided to defendants on or before October 1, 2011, (*see* Bates stamped GJ_00193). Otley testified: "he (Steven Hammond) had lit a fire on their side of the fence and to straighten up, block up or whatever, some land that the other fire hasn't burned. * * * And that it had leaked through the fence onto a small bit of ours and I told him that was no problem, nothing to worry about." *Id.*

Witness # 28, Lance Okeson, BLM Line Scout/Line Safety Officer, Rangeland Management Specialist:

"Lance Okeson has twenty-two seasons of experience in wildland fire and prescribed burning . . .. Okeson has been an instructor for various wildland fire and prescribed fire courses. Okeson has conducted numerous prescribedburns, including the September 2001, 22,000 acres V Lake burn, in which Roaring Spring Ranch Manager Stacey Davies participated.

After Steven Hammond arrived at Okeson's and Glascock's location, Okeson talked to him about lighting fires underneath the fire crews that were on the ridge at Krumbo Butte. Steven Hammond admitted to lighting a back fire to protect his winter range allotment. Okeson said that he needed to notify BLM of what he is doing because he could kill someone. Steven Hammond told Okeson that: 'Well, then maybe you guys had just better clear out.' Okeson said 'That ain't gonna happen, we're here and were going to deal with this fire.' Okeson radioed Glascock and drove to where Hammond had crossed the road, and pursued him. As Okeson got within 20 feet, he said, 'Dwight, I know you lit that fire and lit those kids (Rott and Megargee) in. I'm not going to let you get away with it. I know you want to see this mountain burn, I do too, but this is not the way. We have people all over this mountain – fire crew, permittees, and the public. If you kill someone by lighting fires you can be charged with manslaughter.' Dwight Hammond rolled his eyes, and Okeson stated, "All these people are sons and daughters of someone, how would you feel if someone burned up a child of yours? Damn it, Dwight, I know you don't care about these kids but I do."

Prior to October 1, 2011, defendants were provided a report of Okeson's being "heavily involved in preparing and implementing the prescribed burns on the Burns BLM District," and that "[d]uring this time, (he) worked closely with many of the local ranchers in cooperative burning projects in the Steens Mountain area. The area in which the Granddad Fire occurred, and the associated arson is in one of the planning areas (he) had in previous years as the fuels planner identified, as an area we – the Burns BLM – was planning on doing future prescribed burns with the objectives of rangeland restoration and hazardous fuels reduction projects." Bates-stamped 00171; *Def. Mot.* at Exhibit B.

In this report, Okeson explained the context of the statement he made to Dwight Hammond when apprehending him ("'I know you want to see this mountain burn, I do to but this is not the way.'I then explained that we (meaning the Burns BLM) were working on plans to burn much of the same area sometime in the future through controlled burning.") *Id.*

Further, at the hearing on March 5, 2012, Okeson testified about his doing "a lot of burn plan reviews, and had written "NEPA document that had been published" (CR 79, TR 281-82).

The detailed descriptions of anticipated witness testimony gave the defendants and their attorneys fair notice of the incriminating evidence they would confront at trial. Fifth and Sixth Amendment to the United States Constitution (*compare witnesses' summaries in Defendants' Joint Witness List)*. Defendant's cries of "surprise" by the introduction to the conspiracy count are muted by the government's having supplied them over the past 600 days with reports, notes and summaries of witnesses' anticipated testimony.

"Entirely New Theory of Prosecution?"

Defendants complain the introduction to the Superseding Indictment's conspiracy count presents them with an "entirely new theory of prosecution." But they do not cite which statute, rule or case requires the government to inform them of its entirely new or entirely old theory of prosecution. And, if defendants knew the government's "old" theory of prosecution, they don't describe it and compare it with what is the "new" theory. Nor do they explain why not knowing the prosecution's theory requires the court to strike pleadings, exclude evidence or postpone the trial.[4]

[4]The only citations proffered by defendants, along with the Fifth and Sixth Amendments, refer to surplusage, Fed.R.Crim.P.; the Speedy Trial Act, 18 U.S.C. §§ 3161(c)(2); and relevancy rules of evidence, FRE 401, 403, and 404.

Nature of the Conspiracy Charge Remains the Same

The basic point of an indictment is to ensure defendants are sufficiently informed of the nature of the charge(s) so that they may prepare a defense. *United States v. Adamson*, 291 F.3d 606, 616 (9th Cir. 2002).

Here, the Superseding Indictment reduced the number of "Objects of the Conspiracy" from seven to three and none allege the object was committed by defendants "without a prescribed burn agreement plan" with the victim. The remaining eight counts likewise, do not contain such allegation.

Introductory Pleadings are Not Essential Elements

Generally, the contents of an indictment are within a prosecutor's discretion with a "floor and ceiling" of judicial review. The floor means each essential element must be alleged to provide enough detail to give defendant fair notice of the charge and to avoid double jeopardy. The ceiling means a prosecutor cannot include allegations to sully or prejudice a defendant.

Here, the pleadings do not change an "essential" or "material" element of the conspiracy charge and do not cause prejudice to the defendants. *United States v. Cina*, 699 F.2d 853, 857 (7th Cir. 1983). "Essential" or "material" elements are those which must be specified with precise accuracy in order to establish the illegality of an act. *Id*. at 859.

Relevancy of Pleadings to Intent and Motive

Upon a defendant's motion, the court can delete any surplusage. *United States v. Aguilar*, 847 F.2d 956, 964 (9th Cir. 1985). Federal Rule of Criminal Procedure 7(d) allows the court to protect the defendant against immaterial and irrelevant allegations in an indictment. *See Advisory Committee Notes; see also United States v. Jenkins*, 785 F.2d 1387, 1392 (9th Cir. 1986).

Defendants contend the introductory language is irrelevant and immaterial to the charges, yet they seek not only to strike the language as surplusage, but to exclude any and all evidence regarding "the Burns District BLM . . . prescribed burn program."

Here, the allegations are material and relevant to defendants' intent – "knowingly and willfully," and motive during all times relevant to the conspiracy (*e.g.,* Steven Hammond allegedly told Roaring Springs Ranch Manager Stacie Davies, "Why go through all this burn prescription stuff in what two matches can do in August?").

On October 28, 1999 and November 5, 1999, BLM District Manager Dyer made defendants aware of the existence of the prescribed burn program and the cooperative burn agreements between BLM and landowners. They were warned by District Manager Dyer not to burn BLM property again unless such an agreement was in effect. These two facts are relevant to proving defendants' intent when they intentionally, willfully and maliciously ignited fires that burned BLM property in 2001 and 2006, and endangered BLM employees and firefighters in 2006. FRE 401, 403 and 404.

Defendants are not surprised by this introductory pleading because they never have had a prescribed burn plan agreement with BLM. And, as Steven Hammond claimed in his June 2002 letter to BLM, "[w]e (Hammond Ranches, Inc.) have asked the BLM for cooperative burning projects for over twenty years." *Def. Mot.*, Exhibit A at 3 (the government provided this letter to defendants in discovery - Bates-stamped "Hammond_Adm_00511").

The government has no record of defendants ever doing a cooperative burn with BLM, and intends to offer testimony that Steven Hammond vowed never to do one with the BLM. Nor have defendants, despite a reciprocal discovery request made more than a year ago, provided the

government with any evidence that defendants have ever had a prescribed burn plan burn agreement with BLM (*see also* Introduction to Count 1 in original indictment*)*.

The case authority relied on by defendants to support their claim is unhelpful because the evidence found to be irrelevant and immaterial in those cases uniformly refers to allegations of "other crimes and bad acts." That is not the case here.

This introductory language does not prejudice the defendants by referring to unlawful or bad conduct. Furthermore, the pleading makes clear: "Private owners' participation in the program was voluntary."

Finally, despite defendants' characterization, their not having a prescribed burn agreement with BLM before they burned BLM property is not the "centerpiece" of the government's allegations against the defendants. The centerpiece(s) include witnesses who catch one defendant walking away from a recently set fire, and after they let him go, he endangers them by setting more fires; and, a witness who is told by another defendant to drop the matches near BLM property and light the whole country on fire, and not to tell anyone what they did.

Postponement Not Warranted

If their motion to strike and exclude is denied, defendants contend the Court "must" postpone the trial which has already been postponed for over 600 days for "at least 60 (more) days" to rebut these "new" allegations.

Defendants seek again to delay the trial by asserting the introductory language to the conspiracy count and two of its manner and means prejudices them and requires additional preparation time. They do not explain why additional preparation is required if defendants never had a prescribed burn plan agreement with BLM.

If defendants have evidence to the contrary, they have never provided it to the government despite persistent requests. The fact that other ranchers (*e.g.,* Roaring Springs Ranch) entered into such agreements simply corroborates witness Dyer's testimony.

Because the government disclosed to defendants its intent to use such evidence months ago, the defendants' asserted need for another continuance would not serve the "ends of justice." 18 U.S.C. §§ 3161(c)(2) and (h)(7).

Failure to Show Materiality of Requested Discovery

Defendants' motion adds discovery demands. These demands are made despite the fact the government has already supplied defendants with 31,927 items of discovery, with some duplication, which includes the entire BLM administrative file with Hammond Ranches, Inc.. This file reflects that BLM records have no record of Dwight and Steve Hammond or Hammond Ranches, Inc., having a prescribed burn agreement with the BLM during the time alleged in the conspiracy count. Accordingly, the government cannot disclose an item which does not exist.

Rule 16(a)(1)(E) permits discovery of documents and objects "material to preparing a defense." The criminal discovery rules, unlike the civil rules, require the documents requested be "material." The Supreme Court held that Rule 16 requires the government to produce evidence material to preparation of a defense against our case-in-chief, and does not extend to material a defendant might want to support a selective prosecution claim. *United States v. Armstrong*, 517 U.S. 456, 463 (1996).

Evidence is material under Rule 16 if it is relevant to the development of a defense. *United States v. Olano*, 62 F.3d 1180, 1203 (9th Cir. 1995), or if it will enable a defendant to "substantially

alter the quantum of proof in his favor." *United States v. Marshall*, 532 F.2d 1279, 1285 (9th Cir. 1976).

First, it is the defendants' burden to make a prima facie showing that the requested documents are material. *United States v. Cadet*, 727 F.2d 1453, 1468 (9th Cir. 1984); *United States v. Mandel*, 914 F.2d 1215, 1219 (9th Cir. 1990). This burden has not been met by the defendants who initially contend the BLM's prescribed burn program and their non-participation is irrelevant and immaterial. *See Def. Mot.* at 7 (seeking to strike pleading as surplusage).

Second, defendants have not shown they ever had a prescribed burn plan agreement which justified their burning BLM property. Lacking such agreement, defendants cannot show why "all documents and reports" in their ten discovery requests about the program and other landowners' participation in it are "material" under *Olano* or *Marshall.*[5]

Third, the "reasonableness requirement of the rule demands that a request for documents not be unduly burdensome to the Government, and equally important, must be framed in sufficiently specific terms to show the government what it must produce." *United States v. Marshall*, 532 F.2d 1285. Defendants' discovery list for everything is restricted only by the time period of the indictment

[5]Defendants' ten discovery requests all "reports and documents" during the time period of the indictment for preparation and implementation of prescribed burns, concerning prescribed burn programs, notification by private owners participation, private landowners prescribed burn plan agreements, NEPA associated with prescribed burns, land use plan, costs to prepare and implement the burns, where prescribed burn crossed into private lands, liability claims by private parties, and, "not limited to all agreements, memoranda of understanding, contracts or the functional equivalent between BLM Burns District and any other Federal Agency, State Land, or Private Landowner in effect for the period of the indictment, as to methods, standards, and protocols for prescribed burns with the BLM Burns District." *Def. Mot.* at 10-11.

and the Burns District BLM area. For example, the request is not even "reasonably" limited to lands and locations similar to or near defendants.

The unreasonableness of defendants' discovery requests are similar to the one made in *United States v. Santiago*, 46 F.3d 885 (9th Cir. 1995). In *Santiago*, a defendant charged with murdering his fellow inmate wanted the government to supply him with Bureau of Prison files on every inmate witness to be called at trial. *Santiago's* defense theory was that because the government planned to talk about prison gangs, he should get to see if any witness was a gang member. The district court denied the request and the Ninth Circuit affirmed. *But see,United States v. Stever*, 603 F.3d 747 (9th Cir. 2010)(a defense theory showed information about Mexican drug cartels was material and should have been disclosed).

Finally, the scope of the request is unreasonable considering defendants have long known since the filing of the original indictment, subsequent discovery, and government witness lists and exhibit list there would be testimony about why they were motivated to burn BLM property without an prescribed burn agreement.

Defendant's Supplemental Memorandum in Support of Motion *in Limine* or in the Alternative Motion to Set Over Trial

Today, defendants filed a supplemental motion claiming that Overt Act 13 of Count 1 of the Superseding Indictment adds to the alleged "overt acts" in furtherance of the conspiracy. Overt Act 13 alleges that:

> "On or between August 25, 2005 and August 30, 2005, defendant STEVEN DWIGHT HAMMOND started a fire on property near or along the fence line which burned onto the private property of William "Bill," Otley of Diamond Ranches, Inc."

On February 2, 2012, as to Count 1, Over Act 5 contained in the original indictment, the government made the following motion to strike (CR 69) which was allowed (CR 73):

> **2005 - Fir Creek Arson – Count 1, Overt Act 5**
>
> On August 22, 2005 and August 23, 2005, there was a fire on public lands which burned approximately 1,343 acres owned by the United States in the Fir Creek area of the Steens Mountain Cooperative Management and Protections Area.
>
> The "Fir Creek" fire was started by a dry lightning storm. There is probable cause to believe based on Steven Hammond's admission to rancher Bill Otley that he ignited a second "clean up" fire. Nevertheless, the government moves to strike Overt Act 3 of Count 1 because the government cannot prove beyond a reasonable doubt where an incendiary fire was set on the approximately 1,343 acres that was burned.
>
> **The government does not move to strike Overt Acts 5a., 5b. and 5c of Count 1 because such evidence is probative to proving that defendants Steven and Dwight Hammond utilized lightning storms as a means to cover up their acts of arson and rebuts the credibility of potential alibi defense(s), and defense claims that lightning storms, spotting(s) from an existing fire(s), BLM employees and firefighters, or other accidental causes were responsible for the fires they ignited in 2001 and 2006.**

CR 69 at p. 4.

As that pleading made clear, while there was insufficient proof to sustain a criminal conviction, evidence from the 2005 fire was probative to proving the conspiracy. It is basic that an overt act does not itself have to be unlawful. A lawful act may be an element of a conspiracy if it was done for the purpose of carrying out the conspiracy. *See* Ninth Circuit Jury Instruction 8.20.

As stated above, defendants have received Mr. Otley's grand jury testimony and a summary of his anticipated testimony reflecting defendant's actions stated in Overt Act 13 in the Superseding Indictment.

The Overt Acts in the original indictment refer only to government property and not William Otley's property. Further, Overt Act 13 simply alleges or describes Steven Hammond's propensity to ignite fires near fence lines and burn property he does not own.

CONCLUSION

Based on the foregoing, the government respectfully submits that defendants' Motion *in Limine,* or in the Alternative, Motion to Set Over Trial and Supplemental Memorandum in Support of it's Motion *in Limine* should be denied.

DATED this 21st day of May 2012.

Respectfully submitted

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