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IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF UTAH, CENTRAL DIVISION

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UNITED STATES OF AMERICA,  
Plaintiff,  
v.  
[REDACTED],  
Defendant.

Case No. 2:17-cr-[REDACTED]  
  
SUPPLEMENTAL  
MEMORANDUM AS TO  
MOTION FOR REVIEW OF  
DETENTION

Defendant [REDACTED] through his counsel, files this supplemental memorandum in support of his motion for review of detention (docket entry 52), scheduled for hearing before this court on July 13, 2017.

Defendant is charged with removing paleontological resource fossils under 16 U.S.C. section 407aaa-5(a)(1) from federal land (see Indictment, Count 1), and taking property of the government (see Indictment, Count 2). Therefore, an important question is whether the government can prove at the trial set for August 28, 2017, whether events in this case occurred on federal land.

The defense contends that the events occurred near an uncertain federal land boundary. This boundary question gives rise to 1) a desire for defense counsel to have defendant accompany counsel to the location of the alleged offense, and

2) a factor arguing for release of defendant due to weak evidence of an offense.

The weight of the evidence is a factor to be considered in determining whether to release the defendant. 18 U.S.C. section 3142(g)(2). Therefore, this question is treated in this supplemental memorandum.

#### DISCOVERY FROM THE GOVERNMENT

Discovery includes a map (see discovery page 171, consisting of a Bureau of Land Management, Geographic Information System map, attached as **Exhibit A**), which purports to show the locations: of a boundary between Bureau of Land Management (B.L.M.) and private land, of a fence along the boundary, of defendant [REDACTED], and of evidence said to be found thereat. The map represents that the evidence and defendant were in close proximity to and just within, the federal boundary. Discovery includes law enforcement reports which describe roads and some approximate distances, where events occurred.

#### ADDITIONAL RECORDS FROM GOVERNMENT SOURCES

From the map and law enforcement description of roads, resort to a U.S. Geological Survey map (attached as **Exhibit B**), shows the location of the alleged incident, to be within Section 30 of Township 30 South, Range 26 East, with reference to the Salt Lake Baseline and Meridian.

Records of the Utah office of the B.L.M., include a “dependent resurvey” of this Township during 2014 (survey accepted in 2015). See plat, attached as **Exhibit C**. “A resurvey, properly considered, is but a retracing with a view to determine and establish lines and boundaries of an original survey ....” Cragin v.

Powell, 128 U.S. 691, 698 (1888).<sup>1 2</sup> Title 43 U.S.C. section 752 provides in part:

“The boundary lines, actually run and marked in the surveys returned by the Secretary of the Interior or such agency as he may designate, shall be established as the proper boundary lines of the sections, or subdivisions, for which they were intended, and the length of such lines as returned, shall be held and considered as the true length thereof.”

Here, the patent which created this north-south boundary between public and private land, was issued in 1923. (See Patent attached as **Exhibit D.**) A patent is issued in reliance on the lines established by the government’s survey, which in this case was a survey of 1916. (See plat attached as **Exhibit E.**)

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<sup>1</sup> The B.L.M. dependent resurvey was performed with reference to the 2009 Manual of Surveying Instructions, which in turn provides in section 5-1: “A dependent resurvey is a reconstruction of land boundaries and subdivisions accomplished by rerunning and re-marking the lines represented in the fieldnote record or on the plat of a previous official survey.” Manual section 5-10 provides in part: “A dependent resurvey is a retracement and reestablishment of the lines of the original survey or of a prior resurvey in their true original positions according to the best available evidence of the positions of the original corners.”

<sup>2</sup> “Lawyers, architects and design engineers are accustomed to achieving objectives by first conceiving of abstract ideas or plans, then reducing those ideas (intentions) to paper, and then using the written document from which to construct a physical object or otherwise tangibly achieve the original goal as written. When this is done, the written document is always considered authoritative and any deviation or discrepancy between it and what is actually done pursuant to it is resolved by considering the deviations and discrepancies as being defects or errors in the execution of the original plan to be corrected by changing the physical to conform to the intention evidenced by the writing. ... Where title to land has been established under a previous survey, the sole duty of all subsequent or following surveyors is to locate the points and lines of the original survey.” Tyson v. Edwards, 433 So.2d 549 (Fla. Dist. Ct. App. 1983) (emphasis added).

Upon the issuance of a patent for land by the Federal Government, it is just as if the monuments, survey plat, field notes,<sup>3</sup> laws, regulations, and rules governing how to survey the land described in the patent, are attached to the face of the patent. Cragin v. Powell, 128 U.S. 691 (1888).

The government's Geographic Information System (GIS) map, depicts events as occurring near the south end of a fence, approximately midway along the south border of section 30. Therefore, this "quarter corner" is important in defining the location of this boundary between federal and private land.

The field notes of B.L.M. Cadastral Surveyor Scott Burkhardt during the 2014 dependent resurvey, describe how he endeavored to retrace the position on the ground, of the south quarter-corner of section 30. Mr. Burkhardt explains:

The ¼ section corner of sections 30 and 31, determined at the center of a mound of stone, 2 feet base, 1 foot high. There is no remaining evidence of the 1916 iron post. However, a report submitted to this office, dated January 13, 2016, by the San Juan County Surveyor (a copy of which will be kept in the Cadastral Group File for this survey), contained photos clearly showing the iron most, 1 inch diameter, loosely set and slightly bent, projecting 20 inches above the mound of stone, with brass cap marked as described in the official record of the 1916 survey. [¶] At the corner point, set an aluminum post ..."

See 2014 fieldnotes of Surveyor Burkhardt, page 8, attached as **Exhibit F**.

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<sup>3</sup> Field notes are defined as the official written record of the survey, certified by the field surveyor and approved by proper authority. U.S. Dept. of Interior, Glossary of BLM Surveying and Mapping Terms (1980).

In other words, the 2014 B.L.M. surveyor assumed that a pile of rocks which he came across, was the same pile shown in photos which purported to show the original survey monument placed in 1916.

The question then becomes whether this position on the ground is supported by the other evidence. In his fieldnotes 2014 Surveyor Burckhardt discusses how he found trees which had marks visible on them, placed during the prior 1916 survey as a means to guide future surveyors who seek to retrace the original position. 2014 Surveyor Burckhardt says (see **Exhibit F**):

Note: The blazes on the 1916 bearing trees face a point approximately one chain westerly of the mound of stone, and a point utilizing the 1916 record distances from the bearing trees also falls approximately one chain westerly of the mound of stone. However, it is the opinion of this office that in the course of the 1916 survey that, 1) the corner was erroneously set one chain to the west and the bearing trees marked before the measurement error was discovered and the corner moved to the midpoint, one chain to the east; and 2) the bearing trees were not corrected following this corner move, explaining the inaccurate orientations of their blazes and record ties. This opinion is supported by the evidence of the record distances to the topography calls along the line between sections 30 and 31, described herein, which consistently match the observed distances measured from the mound of stone, which lies N. 7° W., 7 links distance from the calculated midpoint of the section line. Therefore, it was determined that the mound of stone occupies the original location of the corner.

In the fieldnotes above, the 2014 B.L.M. surveyor remarks that the trees with marks on them (to show the location of the north-south boundary which divides section 30), are located approximately 1 chain to the west of the position

where the 2014 B.L.M. surveyor concluded was the boundary. A chain is a measurement of length, equal to 66 feet. See Spainhour v. Huffman, 377 S.E.2d 615 (Va. 1989), n.1. For an explanation of marks made on trees to show the location of a boundary, see excerpt from the B.L.M.'s 2009 Manual of Surveying Instructions, attached as **Exhibit G**.

It might be that Surveyor Burckhardt is correct, in his conclusion as to where on the ground the 1916 surveyor placed the south quarter-corner of section 30. But at best, this location is a judgment call, and his conclusion contradicts the evidence left on trees during the 1916 survey. 2014 Surveyor Burckhardt surmises that the 1916 surveyor 1) made a blunder in counting the chains, such that he was one chain off, and 2) then discovered the blunder and made a correction in the placement of the monument but failed to mark other trees in the corrected location and failed to discuss this in his fieldnotes. No mention of a blunder and a correction is made in the 1916 fieldnotes, or presumably Surveyor Burckhardt would have mentioned this in his 2014 fieldnotes. It is unknown whether the 1916 surveyor (who controls the location of the boundary, afterward relied upon in the 1923 Patent) placed the monument at the location now monumented by the 2014 survey, or placed it near the trees which were marked in 1916 to show its location. The 2014 fieldnotes refer to 2009 photos of a monument, but presumably it is difficult to tell from photos whether a pile of rocks is the same as depicted, and in any event does not reveal whether the monument on the ground was moved sometime after the 1916 survey, considering that 2 trees were marked for the

express purpose of showing a location approximately 1 entire chain to the west.

On this basis, the location of the boundary is uncertain, and it is believed that the government will have difficulty proving the location, considering the contradictory evidence which could place the boundary approximately 66 feet west of the location where the government map shows the boundary. Such a large area of uncertainty is material, in this case where the government depicts that the events alleged, occurred in close proximity to the federal boundary.

Based on the above, it is doubtful whether this case involves entry onto federal land, and hence doubtful whether an offense occurred.

In conclusion, since the evidence is weak, along with the other factors identified as to whether defendant is a risk or flight or a risk or danger to the community, defendant respectfully asks this court to allow his release subject to conditions.

Dated this 8<sup>th</sup> day of July 2017.

s/ Mark J. Gregersen  
MARK J. GREGERSEN  
Attorney<sup>4</sup> for Defendant [REDACTED]

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<sup>4</sup> Defense counsel is dually licensed as an attorney and a land surveyor, but acts for defendant in the capacity of an attorney to preserve attorney-client privilege, etc. See, e.g., Utah State Bar Ethics Opinion No. 108 (1990) (allowing Attorney-CPA to disclose both licenses, but referring to importance of clarifying if engaged in practice of law rather than accounting).

**TABLE OF EXHIBITS**

- A Discovery page 171, BLM GIS Map.
- B USGS 7.5 minute map, overlaid on Google Earth.
- C 2014 Plat of BLM Dependent Resurvey.
- D 1923 Patent from Calvin Coolidge.
- E 1916 Plat of Original Government Survey.
- F 2014 Fieldnotes of BLM Surveyor Burkhardt.
- G 2009 BLM Manual of Surveying Instructions (excerpt).

***Certificate of Service***

I hereby certify that on the date set forth below, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification to the following:

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

Dated this 8<sup>th</sup> day of July 2017.

s/ Mark J. Gregersen