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13

14 **IN THE UNITED STATES DISTRICT COURT**
15 **DISTRICT OF NEVADA**

16 UNITED STATES OF AMERICA,

17 Plaintiff,

No. 2:12-cv-804-LDG-GWF

18 v.

19 CLIVEN BUNDY,

**UNITED STATES' OPPOSITION TO
20 DEFENDANT'S REQUEST FOR
21 EVIDENTIARY HEARING**

22 Defendant.

22 **I. INTRODUCTION**

23 In his reply in support of his cross-motion to dismiss for lack of subject-matter
24 jurisdiction ("Bundy Reply," ECF No. 31), Defendant Bundy devotes the majority of his brief to
25 rearguing points that were, or should have been, asserted in his opposition to the United States'
26 motion for summary judgment. In addition, Defendant Bundy added to his reply brief the
27 following:

28 An Evidentiary Hearing on the Cross-Motion to Dismiss is now in order and is

1 respectfully requested by Defendant to bring forth witnesses showing that Bundy
2 is not the ilk of the community. Moreover, an Evidentiary Hearing is in order to
3 allow Defendant to cross examine the government witnesses that filed all the
4 affidavits as to where they found cattle and improvements allegedly placed on the
5 “New Trespass Lands.”

6 Id. at 7.

7 The United States interprets Defendant Bundy’s request as a motion seeking two
8 alternative forms of relief: a request to introduce evidence extraneous to the complaint in support
9 of his Rule 12(b)(1) motion to dismiss; and a request for discovery in support of his opposition to
10 the United States’ motion for summary judgment pursuant to Rule 56(d). Both requests are
11 without merit and should be denied.

12 **II. ARGUMENT**

13 **A. Defendant’s Motion to Dismiss Does Not Justify an Evidentiary Hearing.**

14 Although evidence extrinsic to the complaint may be considered on a motion to dismiss
15 for lack of subject-matter jurisdiction, Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136,
16 1139 (9th Cir. 2003), Defendant Bundy’s subject-matter jurisdiction challenge is not
17 “intertwined with the merits,” id., or in any way dependent on evidence extrinsic to the
18 complaint. Defendant Bundy argued that this Court lacks subject-matter jurisdiction because the
19 Supreme Court has original jurisdiction over controversies between the states. Bundy Opp’n and
20 Cross-Mot. (ECF No. 12) at 12-13. As the United States pointed out, this action is not brought
21 by a state or against a state, and 28 U.S.C. § 1345 explicitly vests this Court with subject-matter
22 jurisdiction over this claim by the United States against an individual. United States’ Reply
23 (ECF No. 30) at 11-12. As such, Defendant Bundy’s jurisdictional challenge does not “rel[y] on
24 extrinsic evidence,” Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004)
25 (quoting Morrison v. Amway Corp., 323 F.3d 920, 924 n.5 (11th Cir. 2003)), and an evidentiary
26 hearing is not necessary to resolve his cross-motion to dismiss. Whether this Court has subject-
27 matter jurisdiction over the United States’ claims in this case is a pure question of law, and no
28 evidence external to the complaint is relevant to that determination. Thus, Defendant Bundy’s
29 motion for an evidentiary hearing should be denied.

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1 **B. The United States’ Motion for Summary Judgment Does Not Justify an**
2 **Evidentiary Hearing.**

3 “Summary judgment is intended to avoid a useless trial before a finder of fact.” Adler v.
4 Fed. Republic of Nigeria, 107 F.3d 720, 728 (9th Cir. 1997) citing Sartor v. Ark. Natural Gas
5 Corp., 321 U.S. 620, 627 (1944). Defendant Bundy’s evidentiary hearing request thwarts Rule
6 56’s mechanism for efficient judicial resolution of controversies by effectively requesting a mini-
7 trial. To avoid such a result, and in furtherance of the Rule’s purpose, Rule 56 imposes shifting
8 burdens of producing evidence. Once the moving party, here the United States, produces
9 evidence that would entitle it to a directed verdict if the evidence were uncontroverted at trial,
10 C.A.R. Transp. Brokerage Co., Inc. v. Darden Restaurants, Inc., 213 F.3d 474, 480 (9th Cir.
11 2000), the burden shifts to the responding or opposing party, here Defendant Bundy, to produce
12 evidence establishing a disputed issue of material fact for trial, Anderson v. Liberty Lobby, Inc.,
13 477 U.S. 242, 250 (1986). If the opposing party fails to meet its burden of producing evidence,
14 the motion should be granted—without trial and without an evidentiary hearing. See Troutwine
15 v. Nev. County, 990 F.2d 1261 (9th Cir. 1993) (failure to produce any credible evidence
16 supporting element upon which opposing party bears the burden of proof at trial was basis for
17 granting motion for summary judgment). Here, Defendant Bundy has produced no evidence
18 whatsoever in opposing the United States’ motion for summary judgment. Thus, there is no
19 basis for allowing an evidentiary hearing on the United States’ evidence, which remains
20 uncontroverted.

21 Furthermore, if a party opposing a motion for summary judgment believes he needs
22 discovery to properly respond to the motion, Rule 56(d) provides a mechanism to address that
23 situation. Under Rule 56(d), the opposing party must “show by affidavit or declaration that, for
24 specified reasons, it cannot present facts essential to justify its opposition.” Here, Defendant
25 Bundy has not submitted the required declaration or affidavit, nor has he “explained how
26 additional discovery would have affected the disposition of the case.” Barona Group of the
27 Captain Grande Band of Mission Indians v. Am. Mgmt & Amusement, Inc., 840 F.2d 1394,
28 1399-1400 (9th Cir. 1987). Thus, Defendant Bundy’s request should be denied. The fact that

1 Defendant Bundy is a pro se litigant is immaterial to the analysis because pro se litigants in the
2 ordinary civil case are not excused from compliance with procedural rules. Jacobsen v. Filler,
3 790 F.2d 1362, 1364-65 (9th Cir. 1986).

4 Furthermore, there is no need for the Court to entertain the evidence Defendant Bundy
5 seeks to introduce. At the requested evidentiary hearing, Defendant Bundy only wants to present
6 character evidence (that he “is not the ilk of the community”) and to “cross-examine the
7 government witnesses.” Bundy Reply at 7. In addition to being legally-irrelevant, Defendant
8 Bundy’s character evidence is inadmissible. Fed. R. Evid. 404(a)(1). Character evidence is not
9 relevant to the United States’ summary judgment motion.

10 As to the credibility of the United States’ witnesses, “[a] party opposing summary
11 judgment may not simply question the credibility of the movant to foreclose summary
12 judgment.” Far Out Productions, Inc. v. Oskar, 247 F.3d 986, 997 (9th Cir. 2001). In fact, on
13 summary judgment, it is inappropriate for the Court to make credibility determinations.
14 Dominguez-Curry v. Nev. Transp. Dep’t, 424 F.3d 1027, 1036 (9th Cir. 2005). Thus, Defendant
15 Bundy’s hope to impugn the credibility of the United States’ declarants is immaterial to this
16 motion for summary judgment. Defendant Bundy’s request also ignores his admission that his
17 cattle have been grazing continuously on the New Trespass Lands since 2000 without
18 authorization. United States’ Mot. (ECF No. 18) at 9-10. The issue for the Court is whether the
19 United States has introduced undisputed material facts to entitle it to judgment as a matter of
20 law. If that threshold is met, Defendant Bundy can only defeat summary judgment by presenting
21 his own evidence, not by attacking the strength of the United States’ evidence. Thus, even if the
22 Court were to entertain Defendant Bundy’s motion under Rule 56(d), the motion should be
23 denied because Defendant Bundy’s requested evidentiary hearing is irrelevant to the questions
24 presented to the Court for adjudication.

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1 **III. CONCLUSION**

2 Wherefore, for the reasons stated herein, the United States respectfully requests that
3 Defendant Bundy's motion for an evidentiary hearing be denied in full.

4 Respectfully submitted February 15, 2013,

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6 Assistant Attorney General

7 */s/ Stephen R. Terrell*

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CERTIFICATE OF SERVICE

I hereby certify that, on February 15, 2013, I caused the attached document to be served by U.S. Mail on the following:

Cliven D. Bundy
3315 Gold Butte Road
Bunkerville, NV 89007

/s/ Stephen R. Terrell
STEPHEN R. TERRELL