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IN THE SEVENTH JUDICIAL DISTRICT COURT

IN AND FOR SAN JUAN COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, -vs- ROSALIE JEAN CHILCOAT, Defendants.	**MOTION TO DISQUALIFY THE SAN JUAN COUNTY ATTORNEY'S OFFICE** Case Number: 171700041 Judge: Lyle R. Anderson

COMES NOW Rose Chilcoat, by and through undersigned counsel, to move to have the San Juan County Attorney's Office ("the County") disqualified from this case.

The Court should order that County be recused from further participation in this criminal prosecution for two reasons. First, the County agreed to recusal on April 18, 2018, and the Court should order it to fulfill its agreement. Second, given public statements made by San Juan County Commissioner Phil Lyman and County Attorney Kendall Laws, a clear appearance of partiality now exists requiring that the County Attorney be disqualified from this prosecution.

[1] This daytime business address is provided for identification and correspondence only and is not intended to imply institutional endorsement by the University of Utah for this private representation.

FACTUAL BACKGROUND

Because this motion involves issues related to an appearance of partiality, some factual background is necessary to them motion's resolution.

As the Court is aware, the County has chosen to make Ms. Chilcoat's membership in a conservationist organization − Great Old Broads for Wilderness − a component of its argument for "criminal intent." Indeed, this Court's recent order denying Ms. Chilcoat's and Mr. Franklin's motions to quash bindover (on charges of attempted wanton destruction of livestock) specifically pointed to "Ms. Chilcoat's position with Great Old Broads for Wilderness" as showing "that she thinks the world would be a better place if Odell's cattle were gone." Ruling on Motion to Quash Bindover at 3 (Apr. 24, 2018).

A. Ms. Chilcoat Has Been Harshly Criticized by San Juan County Officials for Actions Connected to this Prosecution.

Based on publicly-available records, an appearance now exists that County officials – including the County Attorney – are biased against Ms. Chilcoat, and thus also against her husband, Mr. Franklin. As a result of her leadership in Great Old Broads for Wilderness,[2] Ms. Chilcoat is a well-known conservationist, whose advocacy of her positions appear to be anathema to those in San Juan County who support extensive grazing of livestock on public lands and oppose restrictions on ATV use.

The bias can be further more specifically traced to federal crimes committed by San Juan County Commissioner, Phillip Lyman, on the morning of May 10, 2014. As later charged by

[2] According to its website, Great Old Broads for Wilderness (hereinafter "Broads") is a national grassroots organization, led by women, that engages and inspires activism to preserve and protect wilderness and wild lands. Conceived by older women who love the wilderness, Broads gives voice to the millions of Americans who want to protect their public lands as wilderness for this and future generations. The organization thus strives to bring knowledge, commitment, and humor to the movement to protect our last wild places on earth. http://www.greatoldbroads.org/

federal prosecutors,[3] Lyman led a conspiracy to violate BLM restrictions on the use of off-road vehicles in Recapture Canyon. Criminal Information, *United States v. Lyman*, No. 2:14-cr-00470-DN, DE 1 (filed Sept. 17, 2014). Specifically, he led an illegal ATV ride through the canyon to protest BLM protective measures.[4] On May 5, 2015, Lyman (and Monte Wells) were found guilty of federal conspiracy charges, DE 149, and on December 18, 2015, Lyman was sentenced to serve ten days in the custody of the federal Bureau of Prisons.

Rose Chilcoat publicly applauded the conviction of Commissioner Lyman, explaining in a local newspaper:

> "I was pleased to see the guilty verdict for Commissioner Lyman and Monte Wells," said Rose Chilcoat, associate director with Great Old Broads for Wilderness, an environmental group that has been involved in issues in San Juan County. "Those were intentional and willful acts that just can't be tolerated in a civil society where you have to have some constraints and it can't be a free-for-all of everybody doing what they want. It is refreshing to see the federal government pursue cases where people have been flouting federal law, especially as it relates to public lands."

Four Corners Free Press, http://fourcornersfreepress.com/?p=2522 (May 12, 2015).[5]

After praising the criminal conviction was a San Juan County Commissioner, Ms. Chilcoat was investigated by the San Juan County Sheriff's Office in April 2017. The

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[3] This Court can take judicial notice of records from the U.S. District Court for the District of Utah, as their accuracy cannot be reasonably questioned. *See* Utah R. Evid. 201(c).

[4] According to popular media reports, Great Old Broads for Wilderness were blamed for the BLM closure. In 2006, Great Old Broad conducted monitoring of the construction of the illegally-constructed trail through Recapture Wash, which "raised awareness within the BLM about the trail and threats to cultural resources. The following year, the route was closed, because of vandalism to the archaeological sites in the area. Such vandalism triggers automatic closures to motorized vehicles under the Archaeological Protection Act, but locals blamed the Broads." *See* Stephanie Paige Ogburn, *Fear and Loathing in San Juan County*, HIGH COUNTY NEWS, Oct. 8, 2012.

[5] These statements are not hearsay, as they are being presented to show effect on the hearer – i.e., the San Juan County officials who took an unfavorable view of Chilcoat's praise of the criminal prosecution. *See, e.g., Provo City v. Warden,* 844 P.2d 360 (Utah Ct. App. 1992) (statement admissible to show reason for subsequent conduct).

responding law enforcement officer who investigated the complaint against Chilcoat and her husband immediately concluded that no crimes appeared to have been committed. *See* Rogers Decl., Ex. 1, at 4 (quoting exchange between responding officer and dispatch as "I think all we'd have is probably just trespassing, I don't even think it is criminal trespassing if it wasn't done with malice."). And yet, after the matter was reviewed by the County Attorney's Office, the result was multiple felony charges against both Ms. Chilcoat and Mr. Franklin – including second-degree felony charges carrying a potential penalty of fifteen years in prison.

The politically-charged atmosphere in which that charging decision was made strongly suggests political motivations.[6] After charges had been filed, on June 25, 2017, San Juan County Commissioner Lyman shared a Facebook post and stated, "Interesting that even after being caught red-handed in criminal destruction of cattle Rose is still proselytizing for the annihilation of other people's livestock. Apparently, in this odd religion, if you eat meat, you are a climate denier. FYI-Cows are not the only animal that poops." Rogers' Decl., Ex. 1 at 1. On July 6, 2017, in a post that is best described as a rant against the BLM and the Salt Lake Tribune, Commissioner Lyman states, "[BLM Agent] Dan Love is a thug, *Rose Chilcoat, the self-proclaimed founder of Friends of Cedar Mesa, is a manipulator and a reprobate*. Somehow San Juan County has attracted the worst of the worst. We have been kind and we have been accepting, but it is time to recognize that the Brian Mafly's, the Rose Chilcoat's, the Lance

[6] It is well known that Great Old Broads for Wilderness is unpopular in some quarters of San Juan County. *See* Stephanie Paige Ogburn, *Fear and Loathing in San Juan County*, HIGH COUNTY NEWS, Oct. 8, 2012 (recounting threats leveled against the group during camping trip in the county, including hanging of a Halloween mask, doused in fake blood, near to a camping site of Great Old Broads members, which included a threatening message: Stay out of San Juan County. No last chance."

Porters, the Steve Bloch's and Robert Shelby's of the world resent us not because we are evil but because *they are evil.*" *Id.* (emphases added).

The Facebook posts also show the Commissioner Lyman believed Ms. Chilcoat was responsible for his criminal prosecution for the illegal ATV ride in Recapture Canyon. For example, on August 24, 2017, Commissioner Lyman posted a lengthy diatribe on Facebook, concerning Congressman Bishop seeking a full investigative report on BLM Agent Dan Love, in which Lyman directly blames Ms. Chilcoat for his conviction: "10 years too late, but welcome to the party congressman. Where are your colleagues on this? This investigation should have started when *Dan Love teamed up with Rose Chilcoat to defame, accuse, prosecute, and kill people in Blanding* by creating a big fat lie about our friends and neighbors, Ken Brown and Dustin Felstead and the beginnings of the Recapture witch hunt." *Id.* at 2 (emphasis added). The next month, Commissioner Lyman was more explicit about the linkage: "Let's not forget Dan Love's role in prosecuting innocent men for the trail in Recapture. He developed a strange accord with *the great old broads executive director, Rose Chilcoat, who is, herself, being prosecuted for felony acts of monkey-wrenching*. When Rose began falsely accusing Ken Brown of illegal trail construction, BLM employees who had authorized the maintenance work slowly shrank into the background allowing the false charges to gain traction." *Id.* (emphasis added).

The County Attorney who filed charges against Ms. Chilcoat also weighed in to support Commissioner Phil Lyman and Monte Wells, publicly stating on Facebook in May 2015 that "Phil and Monte are good friends of mine and I am proud of that." *Id.* at 3. Laws also wrote: "Phil's ideas for what are best for the county reflect my ideas very well . . . ." *Id.* Law further argued that, in his view:

> the issue with this case [i.e., the Recapture Canyon prosecution] goes beyond the men and beyond the charges. Had you followed the case you would know that since Monte was convicted of CONSPIRACY, your 1st amendment rights were eroded a little more. Trent and Shane were charged with conspiracy for LIKING A FEW FACEBOOK POSTS (only evidence presented against them on the conspiracy). Sure they were exonerated but how much did it cost them in legal fees?
>
> I would hope to shout that people in this country could see past their nose and view the broader issues and implications on their lives and the lives of their children.

Id. The County Attorney concluded by asking critics of Recapture Canyon prosecution not to post that "crap" on his Facebook page: "[I]f you would like to spew your blind hate about Phil and Monte (my friends) and ignore what this case could mean for you then take that crap somewhere else and leave it off my page." *Id.* Following the sentencing of Lyman, the County Attorney was asked whether it would lead to Lyman's replacement on the County Commission: Laws responded: "I sure as hell hope not." *Id.*

Later, on March 20, 2018, the County Attorney posted on Commissioner Lyman's Facebook page, encouraging San Juan County residents who may have been surveyed by Dan Jones on pre-trial publicity to call him, concluding: "Email me at klaws@sanjuancounty.org." *Id.* at 3.

It is relevant to note that on November 29, 2017, San Juan County, represented by the County Attorney and another lawyer, filed a lawsuit in the U.S. District Court for the District of Utah seeking to establish quiet title over a right of way in Recapture Canyon, arguing that a road through the canyon had been generally used for the required period of time to vest title in the right of way in San Juan County, not the BLM. Complaint to Quiet Title, *San Juan County v. United States*, No. 2:16-cv-012228-DBP, DE 2 (D. Utah 2017).

B. The County Attorney Had Agreed to Recuse.

Given these troubling facts, the County Attorney himself agreed that recusal of his office was appropriate. Because discussions with the County Attorney are relevant to the motion to enforce his agreement to recuse, a brief review of the pertinent discussion is appropriate.

On about April 16, 2018, Mr. Franklin's defense counsel, Jon Williams, received a telephone call from Mr. Kendall Laws, the San Juan County Attorney. Williams Decl., Ex. 2, at 1. During the call Mr. Laws mentioned that the community he represented had historically questioned why the Sheriff's Office and the County Attorney's Office had not prosecuted any individuals for past acts related to alleged interference with cattle operations in San Juan County. *Id.* Mr. Laws explained during this call that the community was now demanding that since "someone" was caught "messing with a gate" that his office needed to "do something about it." *Id.*

Mr. Laws further stated that because he is an elected official, if he reacts in a way that appears that he would be condoning the prior acts (i.e., acts not committed by Mr. Franklin or Ms. Chilcoat) that he would be "screwed" locally. *Id.* Mr. Williams understood him to mean that he would not win a reelection unless he prosecuted Mr. Franklin and Ms. Chilcoat. *Id.* Mr. Laws did mention that he believed as a prosecutor that Mr. Franklin did have a malicious intent to cause harm, although he did state that maybe Mr. Franklin did not have any intent to cause harm to the cows,[7] but maybe Mr. Franklin did have intent to cause harm to Mr. Odell. *Id.*

[7] The most serious charges against Ms. Chilcoat and Mr. Franklin both alleged "attempted wanton destruction of livestock" in that, according to the charges, Ms. Chilcoat and Mr. Franklin attempt to "intentionally or knowingly injure, physically alter, release, or cause the death of livestock." *See* Count 1 of the pending Criminal Informations.

Two days later, on about April 18, 2018, Mr. Williams initiated a conference call between himself, County Attorney Laws, Ms. Chilcoat's defense counsel, Jeremey Delicino, and defense team attorney Paul Cassell. *Id.* During that call, Mr. Cassell explained that a soon-to-be-filed reply brief in support of a motion to quash bindover, previously sent to Mr. Laws as a courtesy, established a conflict of interest. *Id.* Mr. Cassell requested that in order to avoid further disputes, Mr. Laws should disqualify or recuse his office from any further prosecution in the Franklin/Chilcoat case. *Id.* The conversation continued and discussed points such as the fact that if Mr. Laws recused or disqualified his office, that there would be no need to litigate any potential bias by Mr. Laws' office. *Id.*

Ultimately, after a few minutes of further discussion, Mr. Laws agreed to recuse his office, stating to all involved in the call that "it's the right thing to do." *Id.* There were further discussions about a "Commissioner who must not be named" (which was understood to be a reference to San Juan County Commissioner Phil Lyman) and how Lyman had created an unmistakable appearance of partiality. *Id.* It was agreed between Mr. Laws and defense counsel that Mr. Laws would be given the opportunity to announce the recusal, within fourteen days, in whatever manner he chose. *Id.* It was further agreed that Mr. Laws would have the opportunity to select the most appropriate County Attorney office to take over the case. *Id.* The callers discussed potential other County Attorney's Offices who could take over the case. *Id.* In exchange, the defense agreed to delay filing the reply brief pending further developments. *Id.*

It was also agreed that one of the defense attorneys would draft the appropriate recusal papers to file with the court and circulate that to Mr. Laws. *Id.* Mr. Laws also stipulated to a fourteen-day stay of all proceedings to avoid having the defense to have to file the reply

memorandum mentioned above before Mr. Laws recused his office. *Id.* That reply brief was due on April 20, 2018. *Id.* at 2.

Towards the end of the call, Mr. Laws stating that his reputation was important, and that he wanted to make clear that only one prospective juror had contacted him in connection with a request Laws made on Commissioner Lyman's Facebook page. *Id.*

The conference call ended cordially, with a mutual agreement to move forward with the recusal and a stipulated stay to avoid the need for filing of the reply brief. *Id.* Mr. Williams understood that, at the conclusion of that call, both sides had reached a binding agreement that the San Juan County Attorney's Office would recuse from prosecuting this case and that the defense would hold off filing its reply brief in support of the pending motion to quash for a period of (at least) fourteen days and reevaluate whether some of the arguments in the brief would remain relevant after the recusal. *Id.*

In light of the agreement that had been reached to stay further proceedings, Messrs. Cassell, Delicino and Williams all agreed that there was no need to continue working on the reply memorandum in support of the motion to quash bindover, locating any additional experts, and any other short term work. *Id.* Later that same day, Mr. Williams emailed a proposed motion to stay any further proceedings to Mr. Laws. Attached to my emails was a draft stipulated motion for a fourteen-day stay. *Id.*

It appears to be the case that, the next day, Mr. Laws contacted other prosecutors and asked whether those offices would be willing to take over the prosecution of Mr. Franklin and

Ms. Chilcoat because of his conflict.[8] Mr. Laws, however, did not respond to the defense at all that day. So the next morning, Mr. Williams sent a follow-up inquiry to Mr. Laws. *Id.*

It wasn't until after 5:00 p.m. on April 19, 2018, that defense counsel heard back from Mr. Laws by email. *Id.* That email contained unsupported and unspecified allegations that the defense attorneys involved in this case were being "unethical." That email (and others follow-up emails) are attached as exhibits to Ms. Chilcoat's previously-filed motion to enforce the plea agreement, *id.*, which Ms. Chilcoat incorporates by reference here. To date, Mr. Laws has never offered an explanation as to why his statement that recusal is "the right thing to do" had changed. *Id.* at 2-3.

ARGUMENT

Mr. Laws was correct when he agreed with defense counsel that recusing his Office was "the right thing to do." This Court should simply enforce the County's agreement to recuse. In the alternative, the Court should order the San Juan County Attorney's Office to recuse, because disqualification is necessary to preserve the appearance of impartiality and to protect Ms. Chilcoat's and Mr. Franklin's federal and state due process rights.

I. THE COURT SHOULD ENFORCE MR. LAWS' AGREEMENT TO RECUSE HIS OFFICE.

Mr. Laws reached an agreement with defense counsel that his office would recuse from the case and stay further proceedings while the case was transferred to a different office and, in exchange, the defense agreed that they would delay filing the reply support of the motion to quash bindover so as to permit time for the stay and recusal to take effect. Thereafter defense counsel operated in detrimental reliance on that offer, by stopping working on an important reply

[8] In any response, the County should explain whether they had attempted to transfer the handling of this case from the San Juan County Attorney's Office to another prosecuting entity.

memorandum even though several important deadlines were looming. For unexplained reasons, Mr. Laws' has apparently since decided not to honor his agreement.

This Court should simply direct the County to recuse, as Mr. Laws had agreed to do. The fact that the agreement reached was an oral agreement makes no difference because "[i]t is a basic ... principle of contract law that agreements are enforceable even though there is neither a written memorialization of that agreement nor the signatures of the parties." *McKelvey v. Hamilton,* 2009 UT App 126, ¶ 31, 211 P.3d 390, 397. Ms. Chilcoat has previously briefed the principles relating to enforcement of plea agreements in connection with her motion to enforce dismissal of charges, and she incorporates those authorities here. A binding agreement existed between the County and the defense – and Mr. Laws has never attempted to deny that he made such an agreement. To avoid any complicated inquiries into the surrounding circumstances, the Court should simply enforce the agreement.

II. IN THE ALTERNATIVE, THE COURT SHOULD DIRECT THAT THE SAN JUAN COUNTY ATTORNEY'S OFFICE IS DISQUALIFIED FROM FURTHER INVOLVEMENT IN THIS PROSECUTION.

In the alternative, the Court should disqualify the San Juan County Attorney's Office from further involvement in this prosecution. One of the three currently-elected San Juan County Commissioners[9] has very pointedly attacked Ms. Chilcoat and praised this very criminal prosecution. Given the clear legal and social linkage between the County Attorney and Commissioner Lyman, these attacks have created an innate conflict of interest that requires this

[9] A federal judge has found that the current district lines for the electing the County Commissioners were drawn in violation of the Equal Protection Clause of the Utah Constitution. *See Navajo Nation v. San Juan County*, No. 2:12-cv—00039-RJS-DPB, DE 312 (D. Utah 2016). Elections with new boundaries are to be held in November of this year.

Court's intervention and disqualification of the Office from further involvement in the prosecution.

A. Prosecutors Have a Duty to Avoid Creating an Appearance of Partiality.

The Utah courts have made clear that "[i]n our judicial system, the prosecution's responsibility is that of a minister of justice and not simply that of an advocate, which includes a duty 'to see that the defendant is accorded procedural justice . . . .'" *State v. Todd*, 2007 UT App 349, ¶ 17, 173 P.3d 170, 175 (internal quotations omitted); *see also State v. Hay*, 859 P.2d 1, 7 (Utah 1993). A prosecutor is a "representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all." *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 803 (1987) (internal quotation omitted).

A prosecutor's conflict of interest can impact the fundamental fairness of a criminal trial, resulting in denial of due process. *See Marshall v. Jerricho, Inc.*, 446 U.S. 238, 249 (1980). A defendants' right to due process requires that the prosecutor be free of any conflicts of interests and any appearance of partiality. 446 U.S. at 249; *see* U.S. Const. Amend. XIV; Utah Const. art. I, § 7.

As a result of these basic principles, it is a generally accepted principle of American jurisprudence that a "trial court has the power to disqualify a prosecuting attorney from proceeding with a particular criminal prosecution if the prosecuting attorney suffers from a conflict of interest which might prejudice him against the accused, such as where he has a personal interest in convicting the accused . . . ." 12 A.L.R.5th 909 (originally published in 1993). Thus, "a prosecuting attorney who has a personal interest in the outcome of a criminal prosecution such as might preclude his according the defendant the fair treatment to which he is

entitled should be disqualified from the prosecution of such a case." *State v. Harris*, 477 S.W.2d 42, 44–45 (Mo. 1972).

While Utah does not appear to have a statute directly covering the situation, "[w]here there is no applicable legislation, courts may invoke their inherent authority to regulate the bar, as they do in civil litigation, to justify granting a disqualification motion" of a prosecutor. Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 463, 492 (2017). Consistent with this conclusion, it is settled law in Utah that "trial courts are given broad discretion to control the conduct of attorneys in matters before the court. The ultimate decision to grant or deny a motion to disqualify counsel is within the trial court's discretion . . . ." *State v. Gray*, 851 P.2d 1217, 1227 (Utah Ct. App. 1993) (*citing Margulies v. Upchurch*, 696 P.2d 1195, 1199 (Utah 1985)).

It is widely-recognized that "[t]he role of the public prosecutor is not merely to convict but to foster the trust of the public in the criminal justice system. In fulfilling that function it is essential that a prosecutor avoid even the appearance of impropriety." *People v. Gentile*, 127 A.D.2d 686, 688, 511 N.Y.S.2d 901, 904 (1987); *see, e.g., State ex rel. Kirtz v. Delaware Circuit Court No. 5*, 916 N.E.2d 658 (Ind. 2009) (fact that accused had testified in unrelated case against brother-in-law of man specially appointed to prosecute him created an appearance of impropriety that required disqualification of the prosecutor); *Lacey v. Maricopa Cty.*, 693 F.3d 896, 933 (9th Cir. 2012) ("If the County Attorney has a conflict of interest in a case, the entire office may 'have to divorce itself from the prosecution in [that] case, because even the appearance of unfairness cannot be permitted'" (*citing State v. Latigue*, 108 Ariz. 521, 502 P.2d 1340, 1342 (1972)); *State v. Robinson*, 2008-NMCA-036, ¶ 17, 143 N.M. 646, 650, 179 P.3d 1254, 1258 (New Mex. App. 2008) ("In addition to representing the public interest, a prosecutor must also

protect the rights of the accused and maintain both actual and perceived impartiality."); *see also* ABA Model Code of Professional Responsibility, Canon 9 ("A lawyer should avoid even the appearance of professional impropriety."). The ultimate question is "whether a reasonable person standing in the shoes of the defendant should be satisfied that his or her interests will not be compromised" in light of the appearance of partiality. *See, e.g., State ex rel. Romley v. Superior Court In & For Cty. of Maricopa,* 184 Ariz. 223, 228, 908 P.2d 37, 42 (Ct. App. 1995) (applying this standard to hiring conflict of interest). To protect Ms. Chilcoat's and Mr. Franklin's rights, this Court should apply an appearance of partiality standard here and disqualify the San Juan County Attorney's Office from further handling of this prosecution.

B. An Appearance of Partiality Exists from the San Juan County Attorney's Office's Prosecution of this Case.

This case presents unique facts, where one of the three County Commissioner's (Phil Lyman) has made direct and repeated personally attacks on Ms. Chilcoat and called her guilty of the pending criminal charges – in circumstances where the County Attorney's connection to Commissioner Lyman create a clear appearance of partiality. As recounted in the fact section above, Commissioner Lyman has been convicted for federal conspiracy charges for leading a protest ride through public lands restricted from such use by the BLM – and he directly blames Ms. Chilcoat for his conviction. Thereafter, Commissioner Lyman has called Ms. Chilcoat (among many other disparaging terms) "evil". Following the County Attorney's decision to prosecuted Ms. Chilcoat and her husband for second-degree felony charges, Commissioner Lyman posted on his Facebook page such comments as that Ms. Chilcoat had been "caught red-handed in criminal destruction of cattle" and that she was "still proselytizing for the annihilation of other people's livestock."

These comments now serve to create a clear appearance of partiality. As the San Juan County Attorney, Ms. Laws is responsible for "all prosecutions for a public offense committed within a county or prosecution district." Utah Code Ann. § 17-18a-401. At the same time, Mr. Laws is responsible for acting "as the civil legal advisor to the county" as well as attending "the meetings and hearings of the county legislative body as necessary." § 17-18a-501(4) & (5). While as the County Attorney Mr. Laws "does not represent a county commission, count agency, county board, county council, county officer, or county employee," § 17-18a-802, he "*receives direction from the county through the county elected officers* in accordance with the officer's duties and power in accordance with law." § 17-18a-802(a) & (c) (emphasis added). In other words, one of the persons statutorily-authorized to be involved in providing "direction" to San Juan County Attorney Laws is San Juan County Commissioner Lyman – who has made clear his personal feelings that convicting Ms. Chilcoat is (to put it mildly) a personal priority. Indeed, Commissioner Lyman has commented not only on her guilt, but the appropriate sentence and civil liability, offering his view that she should be sent to jail and then then "[w]hen she gets out of jail, I hope she has to pay Mr. O'Dell five or six mil [i.e., five or six million dollars]." Rogers Dec., Ex. 1, at 2.

In addition to this statutory connection to Commission Lyman, County Attorney Laws has also made clear that he is a "good friend" of Lyman and is generally supportive of Lyman's attack on those who criminally prosecuted him. For example, while County Attorney, Laws posted on his publicly-accessible Facebook page that he hoped that "people in this country could see past their nose and view the broader issues and implications on their lives and the lives of their children" rather than "spew blind hate about Phil and Monte (my friends) and ignore what this case could mean for you." Rogers Decl., Ex. 1, at 3. This connection requires recusal. *Cf.*

People v. Gentile, 127 A.D.2d 686, 688, 511 N.Y.S.2d 901, 904 (1987) (where prosecutor "confessed deep emotional involvement in the case, he should neither have tried this case nor been involved in its course.").

Not only do these connections create an appearance of partiality, but County Attorney Laws has admitted that, as an elected county official in San Juan County, he would be "screwed" locally if he did not pursue this case. Williams Dec., Ex. 2, at 1. But "[i]n making the decision to prosecute, the prosecutor should give no weight to the personal or political advantages or disadvantages which might be involved or to a desire to enhance his or her record of convictions." ABA Standards for the Prosecution Function § 3-3.9(d). And Laws has also conceded his doubt about whether Ms. Chilcoat and Mr. Franklin had the required criminal intent to harm livestock, *id.*, raising serious questions about his discharge of his ethical duty to "[r]efrain from prosecution a charge that [he] knows is not supported by probable cause." Rule 3.8, Utah Rules of Professional Conduct.

To his credit, when these conflicts were raised with Mr. Laws in a telephone call with defense counsel on April 18, 2018, he agreed to recuse his Office from the case, acknowledging that it was "the right thing to do." *Id.* However, for reasons that have never been explained, Mr. Laws has now reversed course. It should go without saying that "[p]ublic confidence in the disinterested conduct of [a prosecutor] is essential." *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. at 813. This Court should order Mr. Laws to do what he himself recognized was "the right thing": This Court should direct disqualification of the Office.

To be clear, the issue in this case is not whether Commissioner Lyman and County Attorney Laws have a right express their own views on Ms. Chilcoat, the BLM, or any other aspect of contemporary American society. Nor is the issue whether these officials may have

engaged in impropriety. The narrow issue before this Court is whether, in light of their statements and other associated facts, an appearance of partiality now exists such that the interests of justice will be served by disqualification of the San Juan County Attorney's Office. Such an appearance exists and the Court should direct that this case be assigned to another prosecuting office in Utah.

CONCLUSION

Given all the surrounding circumstances, unfortunately an appearance exists that the County Attorney is impermissibly and criminally attempting punish a conservationist and her husband for years of advocating on behalf of responsible use of public lands. The County Attorney agreed last week that recusing his office was "the right thing to do." He was right and the Court should direct recusal. Ms. Chilcoat and Mr. Franklin respectfully requests this Court either enforce the County's agreement to recuse from this case or enter an order disqualifying the San Juan County Attorney's Office from prosecuting this case.

DATED this 30th day of April, 2018.

/s/ Jeremy M. Delicino
Jeremy M. Delicino

/s/ Paul G. Cassell
Paul G. Cassell

Counsel for Defendant Rose Chilcoat

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was electronically served on this 30th day of April, 2018, to:

San Juan County Attorney
Via Green File

/s/ Paul Cassell

EXHIBIT 1

Case: STATE OF UTAH

Plaintiff, Case No. 171700041

v.

ROSALIE CHILCOAT,

Defendant.

DECLARATION OF GREG ROGERS, FBI-RETIRED;

APRIL 30, 2018

I have reviewed the public-available website sites and Facebook pages of San Juan County officials, and some of the persons who liked and/or shared those posts, for evidence that this criminal prosecution might be in any way politically motivated. In connection with that review I have observed the following:

1. In and around April 2014, Kendall G. Laws wrote a Facebook post criticizinig the "heavy-handed tactics of the BLM Rangers" in arresting "amateur archaeologists" in San Juan County. Laws also praised "Mr. Bundy" (apparently rancher Cliven Bundy), writing: "If the fees were THAT big a deal why did it take the Feds 20 years to come after him?"
2. On about April 10, 2014, Kendall G. Laws wrote a Facebook post regarding the Bundy situation, stating: "Friends, watch this and consider what the man says.... I actually agree with him 100%. I have been following the story of Mr. Bundy for about 18 months now and there is much more to this story than grazing permits. Today it is Mr. Bundy and his family, tomorrow it is the people of Utah or Idaho or Wyoming because someone dares cross the BLM and stands up for their rights."
3. In June, 2017, San Juan County Commissioner Phil Lyman posts a video on Facebook which was shot at the Zane Odell corral near Bluff, Utah. In that video Lyman states that "Rose Chilcoat claims to be closing the gate out of goodwill" and postulates that he believes she closed the gate to kill cattle or cause them to become dehydrated and emaciated. That video clearly depicts Lyman as does his Facebook page which contains a number of his photographs.
4. On June 25, 2017, Lyman shared a post and stated, "Interesting that even after being caught red-handed in criminal destruction of cattle Rose is still proselytizing for the annihilation of other people's livestock. Apparently, in this odd religion, if you eat meat, you are a climate denier. FYI-Cows are not the only animal that poops."
5. On July 6, 2017, in a post that is best described as a rant against the BLM and the Salt Lake Tribune, Lyman states, "{BLM Agent} Dan Love is a thug, Rose Chilcoat, the self-proclaimed founder of Friends of Cedar Mesa, is a manipulator and a reprobate. Somehow San Juan County has attracted the worst of the worst. We have been kind and we have been accepting, but it is time to recognize that the Brian Mafly's, the Rose Chilcoat's, the Lance Porters, the Steve Bloch's and Robert Shelby's of the world resent us not because we are evil but because they are evil."
6. On July 7, 2017, Ted Powell, among other things, posted on Facebook, "…the extreme environmental groups have the same goal as ISIL, Al-Qaeda and Hitler. That is to destroy America and take over control of all public lands, and control everything else in our lives." On that same date, Phil Lyman replied, "I believe the same, Ted."
7. On July 10, 2017, in the Free Range Report on Facebook, Phil Lyman posted a lengthy editorial entitled, Lyman: 'Envirophiliacs' smear San Juan County locals with fake news about Recapture

Canyon. That editorial contains the exact same quote concerning Rose Chilcoat, Dan Love, Brian Mafly, Lance Porter, Steve Bloch, and Robert Shelby, as detailed in paragraph 3.

8. On August 24, 2017, Lyman posts a lengthy diatribe on Facebook, concerning Congressman Bishop seeking a full investigative report on BLM Agent Dan Love, wherein he states,"10 years too late, but welcome to the party congressman. Where are your colleagues on this? This investigation should have started when Dan Love teamed up with Rose Chilcoat to defame, accuse, prosecute, and kill people in Blanding by creating a big fat lie about our friends and neighbors, Ken Brown and Dustin Felstead and the beginnings of the Recapture witch hunt." Lyman continued, "Where are the prosecutorial misconduct charges for John Huber and Jared Bennett? Where is the impeachment proceedings for Robert Shelby, good friend of Steve Bloch and Brent Hatch (yeah he is pals with the senator and SUWA-we are being played folks)." Later in that same post Lyman states, "Now if someone with integrity will take a look at why the State AG is gong (sic) after our Sherrif (sic), they would see that it is Great-Old-Broad spurred just like all the BS of the last decade. Note to our elected representatives: Pick the side your (sic) on!"
9. On September 18, 2017, in a Phil Lyman Facebook post, he states, "Let's not forget Dan Love's role in prosecuting innocent men for the trail in Recapture. He developed a strange accord with the great old broads executive director, Rose Chilcoat, who is, herself, being prosecuted for felony acts of monkey-wrenching. When Rose began falsely accusing Ken Brown of illegal trail construction, BLM employees who had authorized the maintenance work slowly shrank into the background allowing the false charges to gain traction."
10. On November 2, 2017, on The Petroglyph cite, accessible via Facebook and maintained by Monte Wells, it stated "Rose Chilcoat bound over for trial on 2 felony charges and one misdemeanor, husband Mark Franklin bound over on all charges. More to follow", Lyman replied, "I hope Zane files a civil suit. These cow haters do a hundred acts of vandalism that go unprosecuted for every one that is prosecuted. When she gets out of jail, I hope she has to pay Mr. O'Dell five or six mil. Friends of Cedar Mesa, Grand Canyon Trust, Great old Broads from Colorado, and any other group she has founded or chaired should be thrilled to back her up. Her noble act of Monkey Wrenching and civil disobedience should bring out big money. Edward Abbey would be proud."
11. On December 2, 2017, on the Petroglyph cite, a video was posted titled Recapture Canyon Road Graded by County &Great Old Broads for Wilderness Lie About Recapture Protest. In that video, after a scene wherein Rose Chilcoat is being interviewed concerning the damage caused to archeological sites in that canyon, Wells states, "The Great Old Broads worked with Special Agent Dan Love to fabricate evidence against two Blanding residents who were later fined for $35,000.00 for doing trail maintenance on the trail in an open area. Through threats and intimidation Love coerced the two citizens into a conviction."
12. In a much earlier string of conversations in May, 2015, on County Attorney Kendall G. Law's Facebook page, which displays his photograph, he states:

> I'm not sure if you noticed, but this post had nothing to do with Phil, the trail (or not trail) or whether the law was broken by those that drove on the trail. Phil and Monte are good friends of mine and I am proud of that. Your comments are so incredibly off topic that I hesitate to even respond but I will in order to make a couple of points.

First, Phil's ideas for what are best for the county reflect my ideas very well and apparently most citizens agree because his republican challenger didn't even make it past the convention.

Second, I can't imagine how on earth you can back up the comment that Phil is out to pad his wallet... You realize that there is a very good chance that with legal fees, fines, restitution, and lost work if he serves jail time, he will be out close to $500,000? How the hell is that padding his pocket?

Third, my post wasn't talking about Phil, it was talking about Monte Wells being convicted of conspiracy based on evidence presented that he wrote about the upcoming event (that was very important to many of his readers) on his blog.

Fourth, just because Monte wrote something about your dad in his blog doesn't make him guilty of conspiracy against the Federal Government. Heck he wrote untrue things about my dad and I still support him, as does my father.

Fifth, the issue with this case goes beyond the men and beyond the charges. Had you followed the case you would know that since Monte was convicted of CONSPIRACY, your 1st amendment rights were eroded a little more. Trent and Shane were charged with conspiracy for LIKING A FEW FACEBOOK POSTS (only evidence presented against them on the conspiracy). Sure they were exonerated but how much did it cost them in legal fees?

I would hope to shout that people in this country could see past their nose and view the broader issues and implications on their lives and the lives of their children. That was my post originally and if you would like to spew blind hate about Phil and Monte (my friends) and ignore what this case could mean for you then take that crap somewhere else and leave it off my page.

13. In May 2015, Kendall G. Laws wrote (apparently following the conviction of Monte Wells for conspiracy in connection with the Recapture Canyon Ride: “If a Blogger can be convicted of federal conspiracy for somewhat biased coverage of a news event then what does that mean for reporters at the Salt Lake Tribune or CNN?” Following a question about (apparently) whether the federal conspiracy conviction of San Juan County Commissioner Phil Lyman meant that a new commissioner would be put in place, Laws wrote: “I sure as hell hope not.”

14. Laws evidences an ongoing participation on Lyman’s Facebook page when on March 20, 2018, Lyman receives the following, “Just had a Dan Jones surveyor call asking about you, Monte, the fairness of the courts in SJ County and bears ears oh the petroglyph website, Glad they are calling at least one sj county resident lol.” Along with numerous other responses, Lyman replies, “Thanks for the heads up. There have been a lot of people who have been called. I hope it makes The Petroglyph the most visited news site in the state of Utah!” After several more responses to that string, Laws states, “Any of you that would be willing to answer a couple of

questions about their survey experience, I would appreciate it. The survey was done by a party in a case I have for the county. Email me at klaws@sanjuancounty.org."

15. Based on the aforementioned posts, it is clear that there is a long running animosity between San Juan County Commissioner Phil Lyman, Monte Wells, and numerous other San Juan County residents who both read and respond to these posts, and The Great Old Broads for the Wilderness, more specifically Rose Chilcoat. These posts articulate a conspiracy theory wherein Rose Chilcoat, through an alleged relationship with Dan Love at the BLM, is responsible for the federal prosecution of Lyman and his codefendants, the state prosecution of the San Juan County Sheriff and two of his deputies, the closure of the Recapture trail to motorized vehicles, and the killing of people in Blanding as a result of Operation Cerberus. Those posts also evidence a strong support by those same persons for the prosecution of Rose Chilcoat for her activities, if any, at Zane Odell's corral. Due to Commissioner Lyman's position and influence in the community, and his close association with Kendall Laws and their shared belief in "what is best for the county", there is at the very least the glaring appearance of impropriety and a supportable argument that he has inappropriately used that political influence in this case.
16. I have also reviewed a body cam video recording made by investigating officer Jay Begay. After interacting with Mark Franklin, and the ranchers who confronted and detained him, Officer Begay called and spoke with both Deputy Rob Wilcox and Sheriff Eldredge. In those conversations Officer Wilcox's statement "I think all we'd have is probably just trespassing. I don't even think it's criminal trespassing if it wasn't done with malice" is shared. This contemporaneous statement by one of the investigating officers, the fact that no credible evidence was introduced at the Preliminary Hearing to even place Rose Chilcoat at the scene on the day the gate was actually closed, and the fact that there was another larger, clearly visible to Mark Franklin, opening in the fence line, leads one to question why felony charges were brought for closing a gate in this case.

I declare the foregoing to be true, under penalty of perjury, to the best of my knowledge, information, and belief.

/s/ Greg Rogers

Greg Rogers

EXHIBIT 2

State of Utah,
Plaintiff, Case No.: 171700041

vs.

Mark Franklin,
Defendant.

Declaration of Jon D. Williams

1. The undersigned is a licensed attorney in the State of Utah, and in that capacity represents the defendant in the above-captioned matter, along with co-counsel Jeremy Delicino and Paul Cassell.

2. On or about April 16, 2018, I received a telephone call from Mr. Kendall Laws, San Juan County Attorney. During that call, Mr. Laws mentioned that the community had historically questioned why the Sheriff's Office and the County Attorney's Office had not prosecuted any individuals for past acts related to alleged interference with cattle operations in San Juan County. I recall that Mr. Laws explained to me during this call that the community was now demanding that since "someone" was caught "messing with a gate" that his office needed to "do something about it."

3. Mr. Laws told me that because he's elected, and if he reacts in a way that appears that he would be condoning the prior acts, not committed by Mr. Franklin, that he would be "screwed" locally. I took that to mean that he would not win a reelection unless he prosecuted Mr. Franklin and Ms. Chilcoat. Mr. Laws did mention that he believed as a prosecutor that Mr. Franklin did have a malicious intent to cause harm, although he did state that maybe Mr. Franklin did not intend to cause harm to the cows, but maybe Mr. Franklin did intend to cause harm to Mr. Odell.

4. On or about April 18, 2018, I initiated a conference call between Messrs. Laws, Delicino, Cassell, and me. During that call, Mr. Cassell explained that a soon-to-be-filed reply brief in support of a motion to quash bindover, which we had previously sent as a courtesy to Mr. Laws, established a conflict of interest. Mr. Cassell requested that in order to avoid further disputes, Mr. Laws should disqualify or recuse his office from any further prosecution in the Franklin/Chilcoat case. The conversation continued and we discussed points such as the fact that if Mr. Laws recused, or disqualified his office, that there would be no need to litigate any potential bias by that office.

5. Ultimately, after a few minutes of further discussion, Mr. Laws agreed to recuse his office, stating to all involved in the call that "it's the right thing to do." There were further discussions about a "Commissioner who must not be named," which was understood to be a reference to San Juan County Commissioner Phil Lyman, and how Lyman had created an unmistakable appearance of partiality. Mr. Laws and defense counsel agreed that Mr. Laws would be given the opportunity to announce the recusal, within fourteen days, in whatever manner he chose. It was further agreed that Mr. Laws would have the opportunity to select the most appropriate County Attorney office to take over the case. In fact, I suggested discussing with the County Attorneys for Davis and Tooele Counties whether those offices would be willing to take over given that both Counties have ranching and farming interests, so those prosecutors

might have a better grasp of the interests of Laws's own community.

6. In exchange, the defense agreed that they would delay filing the reply support of the motion to quash bindover so as to permit time for the stay and recusal to take effect. It was also agreed that one of the defense attorneys would draft the appropriate papers to file with the court and circulate that to Mr. Laws. Mr. Laws also stipulated to a fourteen day stay of all proceedings to avoid requiring the defense to file the reply memorandum mentioned above before Mr. Laws recused his office. That reply brief was due on April 20, 2018.

7. I recall Mr. Laws stating that his reputation was important, and that he wanted to make clear that only one prospective juror had contacted him in connection with a request Laws made on Commissioner Lyman's Facebook page.

8. The conference call ended cordially with an agreement to move forward with the recusal and a stipulated stay. It was my understanding that, at the conclusion of that call, both sides had reached a binding agreement that the San Juan County Attorney's Office would recuse from prosecuting this case and that the defense would hold off filing its reply brief in support of the pending motion to quash for a period of (at least) fourteen days and reevaluate whether some of the arguments in the brief would remain relevant after the recusal.

9. In light of the agreement that had been reached, Messrs. Cassell, Delicino and I all agreed that there was no need to continue working on the reply memorandum in support of the motion to quash bindover, locating any additional experts, and any other short term work in light of the agreement that had been reached to stay the case and the recusal of Mr. Laws.

10. Later that same day, I emailed a proposed motion to stay any further proceedings to Mr. Laws. My email stated: "Hi, Kendall. Attached is our first crack at a stipulated motion to stay as we discussed earlier today. Let me know if you have any suggestions etc. If you are good with this then we will file it along with a proposed order and request to submit. Thanks, Jon."

11. Attached to my emails was a draft stipulated motion for a fourteen-day stay. The draft read:

> COME NOW all parties in this action – the State of Utah and defendants Mark Franklin and Rosalie Jean Chilcoat – to together stipulate to and together move this Court for an immediate stay of all further proceedings in this matter, including the defendants' pending motion to quash bindover. The parties ask for the stay to extend for a period of fourteen days and that the defendants' reply on the pending motion to quash bindover would not be due until further order of the Court establishing a specific deadline for the filing of that reply brief.

12. On information and belief, it is my understanding that Mr. Laws did contact other prosecutors and asked whether those offices would be willing to take over the prosecution of Mr. Franklin and Ms. Chilcoat because of his conflict.

13. I was surprised that I had not heard back by the end of the day Tuesday from Mr. Laws confirming that our stipulated motion had been drafted as we had all agreed. So Tuesday morning, I sent a follow-up inquiry to Mr. Laws: "Kendall, Just checking in to see whether you had a chance to review the stipulated motion we sent yesterday. Also, we had a couple of thoughts we wanted to discuss with you related to who might take the case over for you. Do you have a minute for a call?"

14. It wasn't until April 19, 2018, that I heard back from Mr. Laws by email. That email

contained threats that the defense attorneys involved in this case were acting "unethical." Those emails are attached as exhibits to Ms. Chilcoat's motion to enforce the plea agreement. To date, Mr. Laws has never explained why his statement that recusal is "the right thing to do" had changed.

I declare the foregoing to be true, under penalty of perjury, to the best of my information, knowledge, and belief.

Executed on April 29, 2018, in Salt Lake City, Utah.

/s/ Jon D. Williams
Jon D. Williams