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April 25, 2015

Joseph Robertson
P.O. Box 67
Basin, MT 59631-0067

Dear Mr. Robertson:

This is in regard to the on-site field inspection and environmental site assessment that we, Kagel Environmental, LLC (KE), performed on property which was the subject of a recent criminal trial held in federal district court on April 4-7, 2016 in Missoula, Montana. We inspected the alleged violation area (ponds) on Saturday and Sunday, April 23 & 24, 2016. It's KE's understanding that you were convicted of three charges (counts) associated with filling waters of the U.S., including wetlands; one of the counts was for the alleged destruction/degradation of publicly owned property, e.g. lands administered by the U.S. Forest Service. It's also KE's understanding that the subject criminal trial is identified as Cause No. 15-07-H-DWM, United States of America v. Joseph David Robertson, and that the charges were/are all related to alleged unauthorized discharges of dredged or fill material resulting from the work of excavating nine (9) ponds adjacent to an unnamed tributary to Cataract Creek. We understand that Cataract Creek flows into the Boulder River, and the Boulder River eventually flows into the Jefferson River, a traditionally navigable water of the U.S.

The alleged violation site is located near Big Limber Gulch, Township 7 North, Range 5 West, Section 33 in Jefferson County, Montana. KE received word of the subject case via an on-line newsletter published by the Swamp School, LLC located in Raleigh, North Carolina. KE is an environmental consulting firm with a main office in Rigby, Idaho and a field office in Bozeman, Montana (formerly main office), and we therefore have a public and professional interest in the identification and delineation of federally protected waters and wetlands, federal Clean Water Act permitting, and protection of the aquatic ecosystem. As a former U.S. Army Corps of Engineers' (COE) senior regulatory project manager and enforcement officer, KE managing member Ray Kagel and his managing partner, wetlands biologist Susan Kagel, Ph.D., were naturally interested in reading about the subject criminal prosecution and your conviction regarding this [relatively] nearby alleged wetland violation. After speaking with the federal public defender last week (April 21st) and learning he didn't wish to put any expert witnesses on the stand in your defense, KE contacted you on Friday, April 22, 2016 and politely requested your permission to visit the site on the upcoming weekend, April 23-24th. As we explained to you, KE is in the business of environmental protection, but we were curious as to the extent of alleged aquatic damage, etc., and that we would not be charging you for any professional fees for a site assessment; our visit would be strictly conducted pro bono.



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The purpose of this site assessment was to provide you with KE's professional opinion regarding the general identification and location of the extent of any federally regulated waters of the U.S., including wetlands, especially as regards the alleged violation of the Clean Water Act. As a former COE senior regulatory permitting and enforcement officer, the methodology KE used to identify the existence of regulated areas and/or impacted aquatic resources, etc., was that approved by the U.S. Army Corps of Engineers and Environmental Protection Agency, including adherence to the official *1987 Corps of Engineers Wetlands Delineation Manual, including the Western Mountains, Valleys, and Coast Regional Supplement, 2008*.

Before summarizing our site inspection, findings, and conclusions, etc., let me iterate that KE is not charging you any professional fees for the work we performed this weekend, and that our sole purpose for visiting the site of the alleged violation was to render an unbiased professional opinion of the work you performed relative to the ponds you excavated within the unnamed tributary of Cataract Creek.

SITE DESCRIPTION & METHODS

The site is located within a mostly forested mountain valley. KE researched the site using Google Earth Pro Tools, USGS Topographical Mapping, NRCS Web Soil Surveys, EPA's My Waters, and USFWS National Wetlands Inventory (NWI) Maps in order to gather baseline information. According to the USGS topo map (Mt. Thompson Quadrangle) the unnamed tributary to Cataract Creek is an intermittent headwater drainage channel. According to the NRCS Soil Survey, none of the ponds are underlain by hydric (wetland) soils, and according to the USFWS NWI maps, none of the ponds are located within federally mapped wetlands. Upon arriving at the site, KE identified a total of nine (9) ponds that appeared to be the subject of the alleged violation. It is our understanding that three of the ponds are located on public property, and the remaining [downstream] ponds are located on your land. For descriptive purposes, KE refers to the ponds as #1 through #9 beginning at the most upstream pond.

Prior to physically inspecting (walking) the full length of the intermittent creek channel from Pond #9 to its terminus at Cataract Creek (approximately 0.7 miles), KE inspected each pond site, and measured/calculated both the area (square footage) and volume (cubic yards) of excavated native soil material that was discharged into alleged jurisdictional adjacent wetlands. Since it was raining during our site inspection, it wasn't practicable to dig soil sampling pits for positively identifying all the requisite parameters for delineating wetlands, so KE employed both the parameter for dominance of hydrophytic vegetation, and best professional judgment for identifying wetland fills. Any benefit of doubt was granted in favor to the public interest, i.e. it's KE's policy to lean on the side of the resource even when areas such as yours are absent of federally mapped wetlands and absent of federally mapped hydric soils.

Each of the excavated ponds are relatively small ($1/10^{\text{th}}$ acre or smaller), and excavated material appeared to be side cast either immediately adjacent to the pond or discharged



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upon existing historic berms that have been constructed across the channel at several locations below (downstream) of the alleged violation area. We understand that the ponds were excavated for several purposes, chiefly for livestock stock water and for fire protection.

As previously mentioned, it was raining during KE's site visit which made employing comprehensive wetland sampling techniques impracticable, and since wetland delineations must be conducted during normal conditions of the growing season (April 23rd is early), we'd need to return in May or June if you'd like a more precise delineation of wetlands. Since we took a liberal approach in our current identification and calculations, it's likely that impacted areas of wetlands would be less if soil pit analysis were to corroborate the NRCS Soil Survey that indicate a total absence of wetland soils, and NWI maps that do not show wetlands in the area.

Despite unfavorable weather conditions and being in questionable normal growing season, KE nonetheless took detailed site information and measurement in order to provide a reasonably accurate professional determination of the alleged violation. All distances (i.e. length and width) and measurements of discharge impacts were taken with a Luftkin 12 foot and 100-foot length steel tapes, and were referenced from the OHWM of the intermittent creek and/or the limits of fill material placed in wetlands (see photos). Channel distances were calculated using Google Earth Pro Measuring tools of the *traced channel meanders* and the totals are summed for you in the following section of our findings and presented in the Figures and Tables at the end of this report. KE's methodology provides a reliable tool for calculating a reasonably accurate estimate of adverse impacts to waters of the U.S., including wetlands as associated with the excavation of the nine ponds.

FINDINGS

KE observed that the pond construction, either within the narrow channel of the intermittent creek or adjacent wetland, did not appear to have required a permit since the work was accomplished via non-regulated excavation. We understand that the pond excavation was accomplished using a Case 780 trackhoe with a 36-inch wide bucket and/or a 580 Case backhoe with a 24-inch wide bucket. Any dredged material dripping from the bucket back into the water or wetland is considered an incidental fallback and therefore not subject to any requirement for a Section 404 permit (Tulloch Rule). Consequently, KE identified, measured, and calculated only those areas below the ordinary high water mark (OHWM) of intermittent channel and adjacent wetlands, where dredged material was actually discharged once it was excavated from the channel and/or an adjacent wetland.

Based upon KE's April 23 and 24 on-site field inspection and data collection of the nine ponds, we find and offer the following professional opinions regarding the alleged violation. To begin, KE observed and photo-documented that the unnamed intermittent creek lacks a continuous surface hydrological connection to a traditionally navigable water of the U.S. It's KE's understanding that Justice Scalia, writing for the plurality in the Supreme Court's [*Rapanos*](#) decision, stipulated that intermittent and ephemeral streams are not "waters of the



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United States" and therefore are not-regulated under Section 404 of the Clean Water Act: "...The phrase *"the waters of the United States"* includes only those relatively permanent, standing or continuously flowing bodies of water *"forming geographic features"* that are described in ordinary parlance as *"streams," "oceans, rivers, [and] lakes," Webster's New International Dictionary 2882 (2d ed.), and does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall..."*

Upon careful visual inspection of the intermittent channel between Pond #9 and the confluence with Cataract Creek, the subject unnamed intermittent creek channel completely disappears where the flow goes fully underground for a measured distance of 84 linear feet before it again reaches the surface of the ground. The ground surface above the subterranean flow has no evidence of a channel, no bed or banks, and is completely absent of any OHWM whatsoever.

In addition to the absence of a continuous surface hydrologic connection as required according the Supreme Court in [Rapanos](#), KE also determined that any discharge into the unnamed intermittent creek channel, including adjacent wetlands, lacks a significant nexus as defined by Justice Kennedy [[Rapanos](#)]. It's KE's professional opinion that it's implausible that the discharge of dredged or fill material could have a *"significant effect on the physical, chemical, and biological integrity of the nearest TNW"*, which is the Jefferson River located a minimum of 59.6 miles downstream of Pond #9. If necessary, this conclusion would be easily demonstrated by performing a scientifically controlled chemical tracer test that KE has used successfully to convince the agencies in other alleged wetland violation cases.

Besides an obvious lack of Section 404 Clean Water Act (CWA) jurisdiction, KE determined that the total area of discharged material into wetlands is liberally calculated to be less than 0.11 acres, and is therefore already authorized by one or more nationwide permits, each of which allows the placement of dredged or fill material into 0.50 acre of wetland. Some of these nationwide permits do require pre-construction notification to the COE in order to ensure that the discharge complies with general conditions of the permit, but failure to first notify the agency is typically resolved via filing a simple after-the-fact application. It's important for you to also understand that since 2012, the COE/EPA has had a nationwide policy of not requiring any compensatory mitigation for placing dredged or fill material into small areas of wetlands that cover an area of 0.10 (1/10th) acre or less of wetland. Additionally, and as your attorney probably informed you, discharges into wetlands associated with the construction of stock ponds, farm roads, forest roads, construction or maintenance of irrigation ditches, maintenance of drainage ditches, etc., are exempt from needing a Section 404 permit; you can read about these exemptions by Googling 33CFR Part 323.4. If you get confused by the language of the last paragraph in the regulation regarding recapture based upon "change in use" or "reduction in reach" please ask me about this and I'll explain why the recapture clause does not pertain/apply to your work.

With regard to damages or degradation to public property, KE determined that the creation of Ponds #1, #2, and #3, which we understand are located on USFS lands, have actually enhanced the aquatic resources relative to the intermittent channel and adjacent wetlands. To begin, the total area of discharge is only a fraction of the 1/10th acre threshold for even needing any compensatory mitigation, and the resulting work actually enhances water quality due to the functional value of the shallow ponds. For instance, during heavy storms and/or other high runoff events of upstream hillsides, particularly areas that have been logged or burned, the small ponds serve as important settling basins that trap suspended and bedload sediments from being carried downstream toward Cataract Creek. This functional enhancement also significantly reduces accelerated erosion and headcutting of the channel which actually protects (as opposed to damaging) public property. Finally, it's commonly known by both aquatic and terrestrial biologists, including the professional



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opinion of KE, that the small ponds created along the channel provide important fish and wildlife habitat by establishing submergent, emergent, and floating vegetative diversity in an otherwise monotypic highly erosive drainage way. They also provide scarce open water areas for nesting, resting, and feeding habitat utilized by waterfowl, as well as creating biologically important riffle and pool habitat for aquatic invertebrates. Although small in size, the few ponds significantly provide flood attenuation and protection during extreme storm events, and they certainly are a water source from which firefighting trucks can draw water from an otherwise unusable intermittent channel just a few inches deep. In view of the myriad public resource benefits identified herein by KE, it remains unknown to KE what justification(s) have been identified to support and document that the 3 little ponds have allegedly damaged and/or degraded any Forest Service land. KE found no evidence of degradation or destruction whatsoever.

CONCLUSION

As a certified professional wetland scientist, former COE federal regulator, and a federal enforcement officer specializing in Section 404 Clean Water Act jurisdictional determinations, KE found powerful evidence that the approximate 1/10 acre of total discharge into alleged wetlands associated with the nine (9) small ponds is **not** waters of the U.S. KE's office research, two-day on-site field investigation, and boots-on-the-ground study of the project site resulted in a determination that the subject unnamed intermittent tributary lacks "continuous surface hydrological connectivity" to Cataract Creek. Furthermore, KE also determined that it's virtually impossible for the relatively tiny (1/10th acre) total discharge of native soil that was placed into a wetland adjacent to the little headwater unnamed intermittent creek, would have a "significant effect on the physical, chemical, and biological integrity of the Jefferson River located approximately 59.6 miles downstream of the nearest pond.

Not only did KE professional wetland scientists fail to identify any federal jurisdiction of Section 404 of the Clean Water Act (i.e. no violation), we also failed to identify any significant nor measureable degradation/damage to public land resulting from the excavation of the several small ponds located adjacent to your (Mr. Robertson's) property. KE's assessment and determination is the antithesis of degradation/damage, in that the ponds on forest service land created functional values and public interest benefits such as fish and wildlife habitat, catch basins for trapping sediment loads during storm events, improving water quality, energy dissipation and control of accelerated bank erosion, prevention of head-cutting, flood attenuation, and increasing overall diversity of the immediate aquatic ecosystem.

Please note, Mr. Robertson, that even if your work had occurred in regulated waters of the U.S. in accordance with the written opinions of Justice Scalia and Justice Kennedy in their decision in [*Rapanos*](#), such a relatively tiny amount of discharge into wetland areas 0.11 acre, would have already have been authorized by one or more existing Section 404 nationwide permits, and the government would have considered the discharge to be so insignificant that it would not have even required any compensatory mitigation unless the COE decided it was necessary to compensate for 1/10th of an acre.



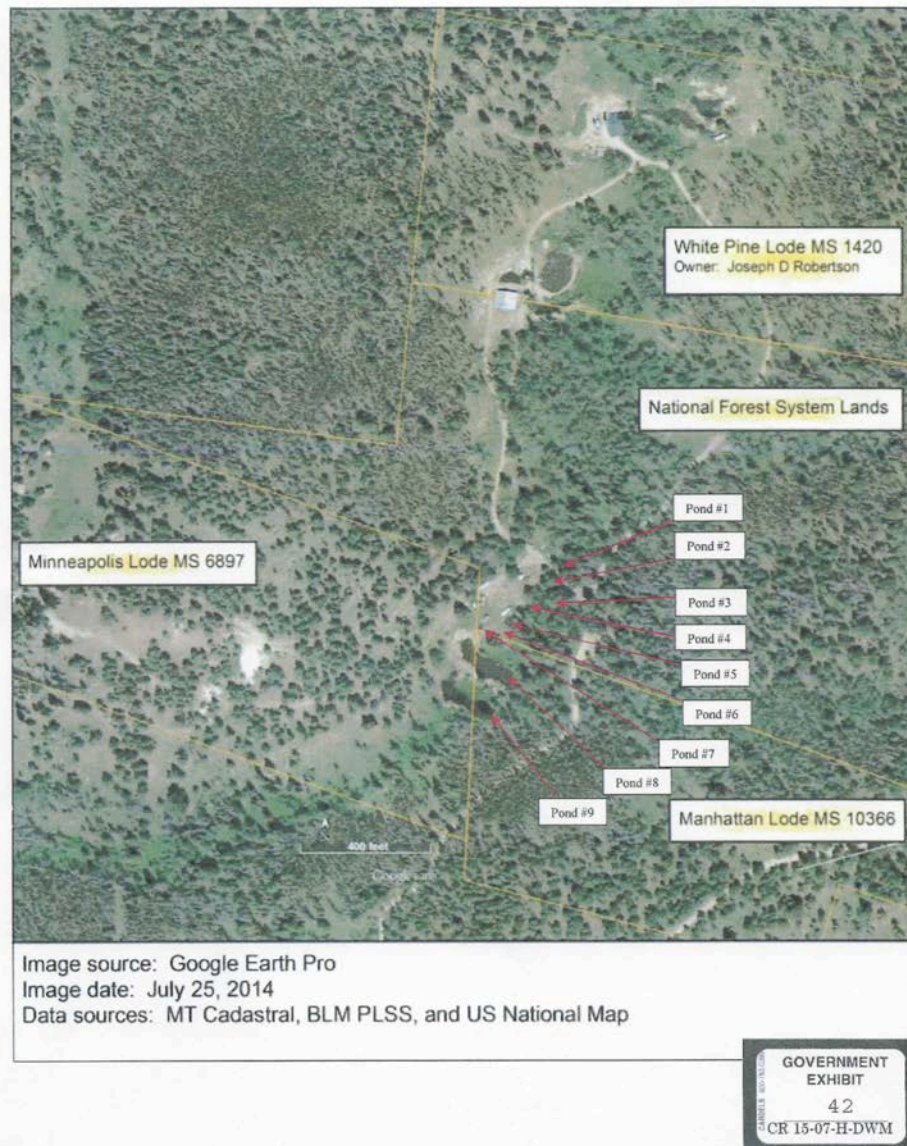
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Should you have any questions, comments, or need additional information, please feel welcomed to contact us at your convenience.

Sincerely,

Ray L. Kagel, Jr., M.S.
Professional Wetland Scientist #2234
Wildlife Biologist

Susan W. Kagel, M.S., Ph.D.
Wetland Scientist
Project Manager



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NO SCALE

FIGURE 1. OVERVIEW OF THE ROBERTSON/FOREST SERVICE PONDS.

As KE understands, ponds #1-#3 are on National Forest Service land. The remainder are on Mr. Robertson's land. The figure is a government exhibit in Mr. Robertson's trial.

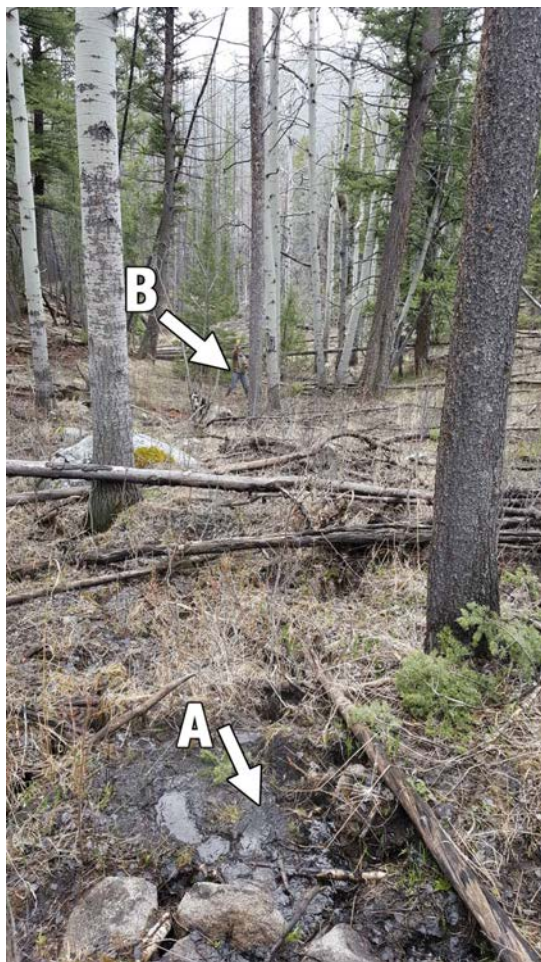


Top: Typical extant berm that was historically built on Forest Service Land to pond water.
Bottom: Similar berm where Robertson added excavated material to repair low spots on his property. The two berms are approximately 150 yards apart.



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SITE PHOTOGRAPHY



Left: Unnamed intermittent creek disappears and goes subterranean at A for 84 feet and surfaces at B. Right: Size of the 2-inch deep channel terminus where it flows into a small road culvert and into Cataract Creek, approximately 25 feet away.



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SITE PHOTOGRAPHY