No. _____

In the
Supreme Court of the United States

JOSEPH DAVID ROBERTSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner Joseph David Robertson is an elderly Navy veteran who ran a fire fighting support truck business deep in the Montana woods. He dug some water supply ponds in and around a foot-wide, foot-deep channel carrying 2 to 3 garden hoses of flow, 40-plus miles from the Jefferson River, the nearest navigable waterway.

The United States criminally prosecuted Robertson for digging in "navigable waters" without a Clean Water Act permit, and for damaging federal property under 18 U.S.C. § 1361. The district court denied Robertson's motions for acquittal under Criminal Rule 29(c) during a first trial that ended in mistrial after a hung jury. On retrial, the second jury convicted, and the court sentenced him to 18 months in prison and $130,000 in restitution. The Ninth Circuit affirmed, holding that proof of "navigable waters" is governed by Justice Kennedy's concurrence in *Rapanos v. United States*, 547 U.S. 715 (2006), that "navigable waters" is not void for vagueness, and that denials of Rule 29(c) motions in a first trial ending in mistrial are not appealable.

The questions presented are:

1. Is the Clean Water Act term "navigable waters" void for vagueness, as members of this Court have suggested? *See Sackett v. EPA*, 566 U.S. 120, 132-33 (2012) (Alito, J., concurring); *United States Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1816-17 (2016) (Kennedy, Alito, Thomas, JJ., concurring) (citing *Sackett*, 566 U.S. at 133 (Alito, J., concurring)).

2. Should this Court revisit its fractured decision in *Rapanos*, to clearly and authoritatively interpret "navigable waters" under the Clean Water Act?

3. Whether a defendant who is retried and convicted for an offense after a hung jury may appeal, after final judgment, the erroneous denial of his motion for judgment of acquittal during the first trial, as recognized in *United States v. Gulledge*, 739 F.2d 582, 584 (11th Cir. 1984), or whether the appellate courts may not review such denials, as the Ninth Circuit held below?

LIST OF ALL PARTIES

Petitioner Joseph David Robertson was the defendant and appellant below. The United States of America was the plaintiff and appellee below.

CORPORATE DISCLOSURE STATEMENT

Petitioner Joseph David Robertson is a natural person. There are no corporate parties in this case.

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PETITION FOR WRIT OF CERTIORARI

Joseph David Robertson respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion is published at *United States v. Robertson*, 875 F.3d 1281 (9th Cir. 2017), and reproduced in the Appendix at A-1. The Ninth Circuit's unpublished order denying rehearing and rehearing en banc is reproduced in the Appendix at B-1. The district court's unpublished Amended Judgment is reproduced in the Appendix at C-1.

JURISDICTION

The district court entered the Amended Judgment on July 26, 2016. Petitioner timely appealed to the Ninth Circuit, whose opinion was entered on November 27, 2017. Petitioner timely sought rehearing and rehearing en banc, which the Ninth Circuit denied on July 10, 2018. On July 30, 2018, Associate Justice Kennedy granted Petitioner's motion for extension of time to file this petition for writ of certiorari to and including November 7, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The Fifth Amendment to the Constitution of the United States provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law;" U.S. Const. amend. V.

The Clean Water Act, 33 U.S.C. § 1251, *et seq.*, provides as follows:

"Except in compliance with . . . section . . . 1344 of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a).

"The term "discharge of a pollutant" . . . means . . . any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12).

"The term "navigable waters" means the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7).

STATEMENT OF THE CASE

Legal Background: The Confusing Legacy of Rapanos v. United States

The Clean Water Act, 33 U.S.C. § 1251, *et seq.*, regulates discharges of pollutants from point sources to "navigable waters." 33 U.S.C. § 1311(a), § 1362(12). The Act defines "navigable waters" as "waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). Nonexempt discharges require a permit from either the Environmental Protection Agency (EPA) or U.S. Army Corps of Engineers (Army Corps). The permitting regime is time-consuming,

expensive, and can require significant changes to the applicant's intended operations. *See Rapanos v. United States*, 547 U.S. 715, 721 (2006).

A person engaged in unpermitted, nonexempt discharges or permit violations faces administrative cease-and-desist and compliance orders, administrative penalties, civil actions for monetary civil penalties and injunctive relief, and criminal prosecution. *See generally*, *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, *Inc.*, 484 U.S. 49, 52-53 (1987). Liability for violation of the Act is strict, without regard to the responsible party's intent or knowledge. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 151 (4th Cir. 2000). The burdens of the permitting regime, and the significance of the criminal penalties for violating it, make it critically important that the regulated public know what is meant by "navigable waters."

In 1974, EPA and the Army Corps adopted regulations defining "waters of the United States" consistently with this Court's long-standing definition of the term "navigable waters of the United States," appearing in predecessor statutes, as interstate waters that are navigable in fact or readily susceptible of being rendered so. *Rapanos*, 547 U.S. at 723 (citing *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870), and 39 Fed. Reg. 12115, 12119 (Apr. 3, 1974)). In 1975, the District Court for the District of Columbia enjoined this definition as too narrow. Rather than appealing that decision, the agencies rewrote their regulations more broadly. *Rapanos*, 547 U.S. at 724 (citing *NRDC v. Calloway*, 392 F. Supp. 685, 686 (D.D.C. 1975)). The new regulations purported to extend the scope of "navigable waters" to the outer

limits of Congress' commerce power. *Id.* (citing 42 Fed. Reg. 37122, 37144 n.2 (July 19,1977)).

By 1986, the agencies had stretched the term "navigable waters" to include interstate waters, intrastate waters with various relationships to interstate or foreign commerce, tributaries of such waters, and wetlands adjacent to (defined as bordering, contiguous, or neighboring) such tributaries and other waters. *Id.* at 724 (citing 33 C.F.R. § 328.3(a)(1), (a)(3), (a)(5), (a)(7), and §328.3(c) (2004)). The agencies also added isolated waters used by migratory birds. *Rapanos*, 547 U.S. at 724 (citing 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986). By 2000, the agencies had swept "ephemeral streams" and "drainage ditches" with an ordinary high water mark within the ambit of "tributaries." *Id.* at 725 (citing 65 Fed. Reg. 12818, 12823 (Mar. 9, 2000)).

In *United States v. Riverside Bayview Homes, Inc.*, this Court upheld the regulation of nonnavigable wetlands as "navigable waters" as long as the wetlands "actually abut on" traditional navigable waters so closely that it is difficult to tell where one ends and the other begins. 474 U.S. 121, 135 (1985), *cited in Rapanos*, 547 U.S. at 724-25. Then in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* (*SWANNC*), this Court struck down the Migratory Bird Rule, holding that the Act did not extend to "nonnavigable, isolated, intrastate waters." 531 U.S. 159, 171 (2001), *cited in Rapanos*, 547 U.S. at 726.

In *Rapanos*, this Court considered the agency regulations defining tributaries and adjacent wetlands as "navigable waters" and invalidated them for exceeding the scope of the Act. 547 U.S. at 728, *id.*

at 759 (Kennedy, J., concurring). Despite five Justices agreeing that the regulations exceeded the agencies' authority, they did not agree why.

A plurality of four Justices would have held that nonnavigable tributaries are only "navigable waters" if they are "relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams[,] . . . oceans, rivers, [and] lakes." 547 U.S. at 739 (citing Webster's New Int'l Dictionary 2882 (2d ed. 1954). The plurality based this view on a textual analysis of the Act informed by its federalism purpose and relied on the Clear Statement Rule, both as to federal usurpation of local land use authority and Congress' exercise of its Commerce Clause power to its furthest limit. 547 U.S. at 738. As to wetlands, the plurality wrote that "navigable waters" includes only those wetlands abutting actually navigable waters or covered tributaries to the degree that, as in *Riverside Bayview*, it was doubtful where the wetland ends and the abutted waterway begins. *Id.* at 742.

Writing only for himself, Justice Kennedy concurred in the judgment and that the agency regulations including all tributaries and adjacent wetlands were overbroad. *Id.* at 759 (Kennedy, J., concurring). But he read "navigable waters" much more broadly than did the plurality, concluding that the term also encompassed intermittent tributaries, *id.* at 770, and wetlands that do not abut covered tributaries but which nonetheless have a significant nexus, determined alone or in combination with others "in the region," with actually navigable waters, determined on a case-by-case basis according to

physical, chemical, and biological factors, *id.* at 773-75.

The Chief Justice joined the plurality, but also concurred to lament the agencies' failure to issue valid new regulations after the *SWANCC* decision, and that due to the lack of a majority opinion in the case, "lower courts and regulated entities will now have to feel their way on a case-by-case basis." 547 U.S. at 758 (Roberts, C.J., concurring) (citing *Marks v. United States*, 430 U.S. 188 (1977)).

Congress took the same action to clarify "navigable waters" after *Rapanos* as it did following *SWANCC*: nothing. The agencies adopted informal guidance in 2008, which used the reasoning of both the plurality and the concurrence as parallel bases for identifying "navigable waters." *See Cape Fear River Watch, Inc. v. Duke Energy Progress, Inc.*, 25 F. Supp. 3d 798, 808 (E.D.N.C. 2014) (discussing *Rapanos* Guidance).

The circuit courts are split on the application of *Rapanos*. Some hold under *Marks* that only the concurrence is binding. Others hold that jurisdiction may be proven under either the plurality or the concurrence. *Compare United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006) (jurisdiction under plurality and concurrence), *with United States v. Robison*, 505 F.3d 1208, 1211 (11th Cir. 2007) (jurisdiction under concurrence only).

Further, the decision below directly splits with the Seventh and DC Circuits on the question of whether a circuit court may consider a dissent in a fractured decision of this Court in applying *Marks*. *Compare United States v. Robertson*, 875 F.3d 1281,

1291 (9th Cir. 2017) (dissent in *Rapanos* combined with concurrence to conclude that concurrence controls), *with King v. Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991) (no use of dissent in *Marks* analysis); *accord Gibson v. American Cyanamid. Co.*, 760 F.3d 600, 622 (7th Cir. 2014) (*Marks* bars use of dissents in applying *Rapanos*).

As the district court stated during Robertson's sentencing below, "there are significant legal questions in the Supreme Court itself about how to define 'waters of the United States.'" Appendix D-3.

In 2015, the agencies finalized a new regulation, once again broadly defining "navigable waters," based principally on Justice Kennedy's concurring *Rapanos* opinion. This rulemaking was met with multiple lawsuits in both the federal district and circuit courts. *See generally*, *National Association of Manufacturers v. Department of Defense*, 138 S. Ct. 617, 625-27 (2018) (NAM). In *NAM*, this Court held that the district rather than circuit courts have jurisdiction over these lawsuits. *Id.* at 624.

Meanwhile, the current administration has announced its intent to repeal the 2015 Rule and adopt a new regulatory definition of "navigable waters," this time based on the *Rapanos* plurality instead of the concurrence. *See* www.epa.gov/wotus-rule/rulemaking-process. It remains unclear how soon this new regulation will be finalized.

One thing does appear clearly. As long as the fractured *Rapanos* decision stands, the agencies will continue to assert jurisdiction under either or both opinions, based on political and other considerations, with the now real prospect that succeeding

administrations will toggle the regulatory definition from plurality to concurrence and back to suit each other's electoral constituency.

In all of this, "regulated entities" (including Petitioner Robertson) remain left to feel their way on a case-by-case basis, under a statute that is "hopelessly indeterminate," interpreted disparately by the members of this Court and the lower courts, and administered by agencies that continue to assert their jurisdiction to the very outward boundaries of watersheds, over minute channels across which many "regulated entities" would step without noticing.

This case is about one of these waters.

Facts: A Foot-Wide Channel, at the Top of the Watershed, More Than 40 Miles from an Actually Navigable River

The "navigable water" at issue in this case is an unnamed channel, a foot or so wide and a foot or so deep, running through a clearing in the woods in Montana (the Pond Site), carrying two or three garden hoses worth of flow. Appendix G-2; G-5; G-7-8; K-1. The Pond Site is more than 40 miles distant from the nearest actually navigable water body, the Jefferson River. The unnamed channel flows downhill discontinuously about half a mile to drain into Cataract Creek, Appendix I-1, which then flows a further two miles to meet the Boulder River near Basin, Montana. From Basin, the Boulder River flows roughly 40 miles, first east alongside Interstate 15 to Boulder, Montana, and thence south alongside state

highway 69 to meet the Jefferson River near Cardwell, Montana. Appendix J-1.[1]

Forty-plus miles upstream from the Jefferson River is almost as far as one can follow the Boulder River, Cataract Creek, and then the unnamed channel uphill into the woods before running out of water entirely. There is almost no regular channel associated with flow uphill of the Pond Site, which itself is a mere 2,100 feet from the very top of the watershed. Appendix G-12-15.

The unnamed channel forms on or just below a patented mining claim called the White Pine Lode. It then crosses an unpatented mining claim called the Mohawk Lode, before entering another patented mining claim called the Manhattan Lode and then finding its way to Cataract Creek. The White Pine, Mohawk, and Manhattan Lodes sit just inside the boundary of the Beaverhead-Deerlodge National Forest. Appendix D-3-4; I-1 (Exhibit 15 showing patented claims in dark shading, with the Pond Site indicated by blue dot, and Forest boundary in dark red).

Petitioner Joe Robertson is an elderly Navy veteran. He owns the White Pine Lode and has lived there with his wife Carri for many years. They also

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[1] This Court can take judicial notice of the distance from the confluence of Cataract Creek with the Boulder River to its confluence with the Jefferson River as reflected in online mapping websites and the admitted exhibits in this case. *United States v. Perea-Rey*, 680 F.3d 1179, 1182 n.1 (9th Cir. 2012) (taking judicial notice of Google map distance determination) (citing *Citizens for Peace in Space v. City of Colorado Springs*, 477 F.3d 1212, 1218 n.2 (10th Cir. 2007) (same, using different mapping website)).

owned the Manhattan Lode, but lost it in a tax sale in 2013. Robertson has also, at various times, owned the mineral rights associated with the Mohawk unpatented mining claim that sits between the White Pine and Manhattan Lodes. Appendix D-3-5.

The Robertsons ran a fire fighting support truck business until recently. Living deep in the woods in an increasingly fire-prone landscape, they were concerned about their safety and the vulnerability of their property. Appendix G-15-16. In 2013 and 2014, Joe Robertson dug a series of small water supply ponds in and about the unnamed channel at the Pond Site, with a view to being well prepared should fire strike near his home. Some of the ponds sit on the Manhattan Lode, and the government charges that others sit on the Mohawk. Appendix G-15-17.

Robertson dug the ponds without approval from the Forest Service to disturb the surface estate of the Mohawk Lode, and without permission from the Army Corps under the Clean Water Act.

Proceedings Below: Criminal Prosecution of Petitioner Robertson for Digging Ponds in the Foot-Wide Unnamed Channel

On May 22, 2015, the government indicted Robertson charging him with two counts of violating the Clean Water Act, 33 U.S.C. § 1319(c)(2)(A) (Counts I and III) and one count alleging willful destruction of government property under 18 U.S.C. § 1361 (Count II). Appendix A-4-5. The district court denied several pretrial motions to dismiss or clarify the indictment, and the trial commenced on October 5, 2015. Appendix A-5. On October 6, Robertson once

again moved to dismiss Counts I and III, arguing that the current law defining "waters of the United States" violates due process on vagueness grounds because it is impossible to determine with any accuracy what constitutes a violation of the Clean Water Act. *Robertson,* 875 F.3d at 1292. The district court ultimately denied the motion. Appendix A-5, H-2.

Robertson's trial lasted four days. As to Counts I and III, the government offered no flow studies for the unnamed channel, and instead focused on an alleged ordinary high water mark of the channel. Appendix H-7. For Count II, the government relied primarily on cadastral maps to prove that Mr. Robertson's work occurred on the unpatented Mohawk Lode rather than the privately owned White Pine or Manhattan Lodes. Appendix H-11. The jury hung on all three counts. Appendix A-5, H-2.

Robertson moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29, during trial and before the case was submitted to the jury, for insufficiency of evidence that the unnamed channel is "navigable waters" and that any of the ponds were located on the unpatented White Pine Lode. Appendix A-5, H-2. After the jury failed to return a verdict and the judge declared mistrial, Robertson once again moved for judgment of acquittal. Appendix A-5, H-2. The district court judge denied all motions and reset the trial. Appendix H-12.

The second trial began on April 4, 2016. Appendix A-5, E-1. At the second trial, the government significantly bolstered its evidence and changed its litigation strategy. For Counts I and III, the government introduced evidence from a new site investigation made after the first trial, in November

of 2015, Appendix E-4, and provided previously undeveloped evidence of the flow of the channel, Appendix E-4. For Count II, the government primarily relied on Forest Service boundary surveys to prove that Robertson's work occurred on the White Pine Lode, rather than the cadastral maps used in the first trial. Appendix E-2. On April 7, the jury found Robertson guilty on all counts. Appendix E-1, F-1-2.

At the second trial, Robertson renewed his motion to dismiss and made new motions for a judgment of acquittal. Appendix E-1. After the jury returned its verdict but before sentencing, Robertson filed a second motion to dismiss Counts I and III. Appendix A-5, D-2. Based on an intervening *en banc* decision from the Ninth Circuit, the second motion to dismiss argued that Justice Kennedy's opinion was not the controlling opinion of *Rapanos*. Appendix A-13, A-24, D-2. While the district court recognized the seriousness of the legal question of which *Rapanos* opinion controls, the court ultimately denied the second motion to dismiss. Appendix A-5, D-2-3. The judge sentenced Mr. Robertson to 18 months in prison for each of the three counts, one year of supervised release for each of Counts I and III, and three years of supervised release for Count II. In addition, the judge sentenced Robertson to pay $129,933.50 in restitution to the government. Appendix C-4, 10. All sentences were to run concurrently. *Id.*[2]

Robertson timely appealed his conviction to the Ninth Circuit. He argued that (1) the *Rapanos* concurrence is not the controlling opinion in that

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[2] Robertson completed his term of imprisonment on or about December 5, 2017, and is presently under supervised release and making payments on his restitution obligation.

decision, (2) the term "waters of the United States" is void for vagueness, and (3) the trial court should have granted his motions for judgment of acquittal from the first trial. Appendix A-6. Applying *Marks*, the Ninth Circuit held that Justice Kennedy's *Rapanos* concurrence is the controlling opinion and rejected Robertson's due process vagueness argument, holding that at the time of conviction a prior Ninth Circuit decision gave reasonable warning that the Clean Water Act applied. Appendix A-17-19. Finally, the court below, citing *Richardson v. United States*, 468 U.S. 317 (1984), determined that it could not review Robertson's motions for acquittal from his first trial. Appendix A-22.

On July 30, 2018, Justice Kennedy granted Mr. Robertson's application to extend the time to file this petition. *See* Supreme Court docket # 18A108. He now submits this petition, requesting that this Court grant certiorari to review the decision of the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

SUMMARY OF ARGUMENT

The meaning of "navigable waters" under the Clean Water Act is unfinished business; this case offers an ideal vehicle to rectify that situation. Recent decisions holding other criminal statutes void for vagueness suggest that any interpretation of the Act as covering substantially more than traditionally navigable waters is void for vagueness. Revisiting *Rapanos* would give this Court an immediate opportunity to clearly and authoritatively interpret

the Act, if it can be interpreted constitutionally, in a way that will provide fair notice to the public and proper direction to the agencies in their ongoing (and seemingly perpetual) rulemaking efforts. At the very least, the Court should direct the lower courts on the question of which, if either, of the opinions supporting the judgment in *Rapanos* is controlling.

The Court should also grant the petition to resolve a circuit split on whether a defendant may appeal the denial of a motion for judgment of acquittal at a first trial that ends in mistrial and is followed by conviction at a second trial. This is a significant question of criminal procedure that divides the lower federal and state courts. In those circuits and states following the decision below, the government is given an unjust advantage that vitiates the presumption of innocence and the beyond reasonable doubt standard of proof: it may retry a defendant after failing to meet its burden of proof at an initial trial, with no appellate review of its failure to meet the burden in the first trial.

ARGUMENT

I

THE COURT SHOULD GRANT THE PETITION TO DETERMINE WHETHER THE CLEAN WATER ACT TERM "NAVIGABLE WATERS" IS VOID FOR VAGUENESS

The Due Process Clause requires that criminal statutes afford adequate notice of what they proscribe to those who must comply. *United States v. Lanier*, 520 U.S. 259, 265-67 (1997) (discussing doctrine, reciting elements, and citing sources). The three related considerations of constitutionally fair notice

for criminal statutes include: (1) adequate specificity, such that people "of common intelligence" need not "guess at its meaning" and will not "differ as to its application"; (2) application of the rule of lenity to limit the interpretation of criminal statutes to activity clearly covered; and (3) exclusion of criminal liability where a judicial "gloss" that clarifies the law is applied for the first time. *Lanier*, 520 U.S. at 266 (quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926), and *Liparota v. United States*, 471 U.S. 419, 427 (1985)).

A. Members of This Court, and Lower Court Judges, Have Expressed Concern about the Vagueness of "Navigable Waters"

Justice Alito has described the phrases "navigable waters" and "waters of the United States" in terms that clearly call into question whether they are void for vagueness under the Due Process Clause: "The reach of the Clean Water Act is notoriously unclear." *Sackett v. EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring). Further, "[r]eal relief requires Congress to do what it should have done in the first place, provide a reasonably clear rule regarding the reach of the Clean Water Act." *Id.* at 133. "Congress did not define what it meant by "the waters of the United States"; the phrase was not a term of art with a known meaning; and the words themselves are *hopelessly indeterminate*." *Id.* (emphasis added).

Other members of this Court appear to have taken up the same concern. *Hawkes*, 136 S. Ct. at 1816 (Kennedy, Thomas, Alito, JJ., concurring) (citing *Sackett*, 566 U.S. at 130-131 (Alito, J., concurring)); *id.* at 1812 ("It is often difficult to determine whether a particular piece of property contains waters of the

United States."); *id.* at 1816-17 (Kennedy, Alito, Thomas, JJ., concurring) ("[T]he reach and systemic consequences of the Clean Water Act remain a cause for concern."); *id.* at 1816 (citing *Sackett*, 566 U.S. at 132 (Alito, J., concurring)); *see NAM*, 138 S. Ct. at 625 ("In decades past, the EPA and the Corps . . . have struggled to define and apply that statutory term.").

During oral argument in *Army Corps of Engineers v. Hawkes*, Justice Kennedy went so far as to pose the following question:

> Well, I think—I think underlying Justice Kagan's question is that the Clean Water Act is unique in both being quite vague in its reach, arguably unconstitutionally vague, and certainly harsh in the civil and criminal sanctions it puts into practice. What's the closest analogous statute that give the affected party so little guidance at the front end?[3]

Circuit court judges have also expressed concern about the difficulty of determining whether a given property contains "navigable waters." *See Hawkes Co., Inc. v. United States Army Corps of Engineers*, 782 F.3d 994, 1003 (8th Cir. 2015) (Kelly, J., concurring) ("[T]he Court in *Sackett* was concerned with just how difficult and confusing it can be for a landowner to predict whether or not his or her land falls within CWA jurisdiction . . . . This is a unique aspect of the CWA; most laws do not require the hiring of expert consultants to determine if they even apply

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[3] Transcript of Oral Argument at 18:11-19, *Hawkes*, 136 S. Ct. 1807, *available at* https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/15-290_j5fl.pdf.

to your property."); *Orchard Hill Building Company v. Army Corps*, 893 F.3d 1017, 1025 (7th Cir. 2018) ("Justice Kennedy did not define 'similarly situated'—a broad and ambiguous term . . . .").

By contrast, only a handful of district courts have addressed this question and concluded that the Act affords constitutionally adequate notice under the Due Process Clause. *United States v. Lucero*, No. 16-cr-00107-HSG-1, 2017 WL 9534005 (N.D. Cal. Nov. 14, 2017); *United States v. Rodriguez*, No. 1:CR-09-279-BLW, 2011 WL 1458231 (D. Idaho Apr. 15, 2011).

Even the judges of the Ninth Circuit below appeared concerned about this difficulty. During oral argument, Judge McKeown asked:

> It kind of goes back to the basic question of notice. If you can't even figure out which parts of the Venn Diagram fit together amongst all these lawyers and judges, how does a regular citizen figure it out?

Judge Gould followed with:

> I just have the problem in a criminal case as to whether with that sort of convoluted analysis under the *Marks* theory and sufficiently complex [sic] that our court took an en banc in *Davis* to have another run at it, whether a citizen

> is supposed to know that, and go to prison if they don't know that.[4]

And yet the Ninth Circuit concluded in its decision below that "navigable waters" is not void for vagueness based on the non sequitur that it had previously held in *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9th Cir. 2007), that Justice Kennedy's concurring opinion was the holding of *Rapanos* under *Marks*. Appendix A-20. *City of Healdsburg* may have established the law of the circuit on how to apply to *Rapanos*, but deciding which opinion is the holding under *Marks* is not directly germane to whether the Act itself (as interpreted by a single Justice of this Court or otherwise) is void for vagueness. Put another way, Justice Kennedy's interpretation of the Act may, for the sake of argument, be the controlling opinion of this Court, but that does not answer whether that (or any other) interpretation of the Act is void for vagueness.

B. This Court's Recent Decision in *Sessions v. Dimaya* Suggests That "Navigable Waters" Is Void for Vagueness

Sessions v. Dimaya held that 18 U.S.C. § 16(b), defining "crime of violence" for purposes of the Immigration and Nationality Act, is void for vagueness. 138 S. Ct. 1204, 1210 (2018). The Court's analysis rested on the statute's use of two terms: "by its nature" (as applied to the noun "felony") and "substantial risk" (that physical force would be used in committing the crime). Both terms require an

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[4] Available at https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000012065, at 23:55-24:12 (McKeown, J.) and 27:13-42 (Gould, J.).

interpreting court to decide, without any standards, what crimes fall within the definition. *Id.* at 1213-14. Relying heavily on its prior decision in *Johnson v. United States*, the Court noted that applying the "by its nature" provision requires a court to determine the "idealized ordinary case" of a given offense. 138 S. Ct. 1204, 1214 (2018) (quoting *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015)). That exercise yields no clear answer; it depends entirely on a given judge's opinion of what the essential nature—or platonic form—of a given crime involves. 138 S. Ct. at 1214; *id.* at 1231-32 (Gorsuch, J., concurring). Secondly, this indeterminacy is compounded by the requirement that the judge then determine whether the platonic form of a crime poses some threshold level of risk—a "substantial risk"—of violence. *Id.* at 1214. The *combination* of the need to posit an idealized version of a crime with the question whether the idealized form poses a threshold risk level crosses the line into unconstitutional vagueness. *Id.* (quoting *Johnson*, 135 S. Ct. at 2561).

The same analytical approach is applicable to the *Rapanos* concurrence. As with the statute struck down in *Dimaya*, the *Rapanos* concurrence interprets "navigable waters" to require two interacting determinations, one involving an idealized or otherwise undefinable condition ("wetlands . . . in combination with similarly situated lands in the region"), and the second overlaying a threshold relationship ("significantly affects" traditionally navigable waters)." 547 U.S. at 780 (Kennedy, J., concurring).

The "similarly situated within the region" provision requires a judge to make two idealized

determinations: what two or more wetlands are "similarly situated" to each other, and what is "the region" within which those wetlands' situation must be similar? As interpreted by Justice Kennedy, "navigable waters" offers no guidance to answer either of these questions. *Id.* ("wetlands, either alone or in combination with similarly situated lands in the region"). Wetlands can be similar in any number of ways: location, size, plant communities, length of inundation, type of connection to other features, animal communities that use or rely on them, soil types, etc.[5] They may, at the same time, be similar in some of these aspects and dissimilar in others. How is a judge (or regulated party, agency staff, administrative law judge, or citizen suit plaintiff or defendant) to determine whether any two or more wetlands are similarly situated to the requisite degree? Nor is the platonic form of "the region" any more determinate. How large is a region? And how are its borders defined? If by watershed, how large a part of the watershed? The portion in which the similarly situated wetlands appear, or the entire watershed of the applicable traditionally navigable water? The larger the region (whether defined by a watershed or some other geographic concept), the more indeterminate "similarly situated" becomes.

In this respect, Justice Kennedy's "similarly situated within the region" interpretation of "navigable waters" is even less knowable for the regulated citizen or enforcement personnel than the "ordinary case" of any given crime under 18 U.S.C.

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[5] *See, e.g.*, EPA, Classification and Types of Wetlands, https://www.epa.gov/wetlands/classification-and-types-wetlands#marshes (last updated July 5, 2018).

§ 16(b). Justice Kennedy's "significant nexus" requires two abstract determinations ("similarly situated" and "the region") that entirely depend upon the subjective judgment of the reviewing court or enforcing agency staff, whereas the "ordinary case" of a crime only requires one such imaginative abstraction. *See Orchard Hill Building Company*, 893 F.3d at 1025 ("Justice Kennedy did not define 'similarly situated'—a broad and ambiguous term . . . .").

And exactly as in *Dimaya* and *Johnson*, this abstracted concept of similarly situated wetlands in a region is overlaid by an equally problematic significance threshold: a significant nexus with downstream traditionally navigable waters. *See Dimaya*, 138 S. Ct. at 1215-16. The combination of the idealized "similarly situated within the region" wetland combination that also "significantly affects" downstream, boat-floating, commerce-supporting rivers and lakes renders the concurrence's reading of "navigable waters" hopelessly vague and far short of constitutional muster, as Justice Kennedy indeed intimated during the *Hawkes* oral argument.

C. The *Rapanos* Plurality Raises Similar Void for Vagueness Concerns

Riverside Bayview holds that non navigable wetlands which abut navigable waters, such that the end of one and the beginning of the other are not easy to distinguish, may be regulated under the Act. 474 U.S. at 132. *SWANCC* holds that isolated ponds exceed the scope of the Act and may not be regulated under it. 531 U.S. at 167. Somewhere between these two poles, regulated parties must be able to determine which waters are regulated and which are not. The *Rapanos* plurality expressly disclaimed a

comprehensive answer to this question. *Rapanos*, 547 U.S. at 731 ("We need not decide the precise extent to which the qualifiers 'navigable' and 'of the United States' restrict the coverage of the Act.").

The *Rapanos* plurality defines covered tributaries based on the dictionary definition of "waters" in Webster's New International Dictionary. 547 U.S. at 732. Among the features the plurality found to be included as "waters" are "streams." *Id.* at 733. The plurality stated the rule of law based on this analysis as limiting "navigable waters" to, inter alia, "relatively permanent, . . . continuously flowing bodies of water forming *geographic features* [] described in ordinary parlance as streams . . . ." *Id.* at 739 (citing Webster's Second) (internal quotation marks omitted and emphasis added). The plurality establishes no lower bound on the size of "stream" included within its definition, unless the expression "geographic features described in ordinary parlance" provides that boundary. *Id.*

The *Rapanos* plurality also rejects an interpretation of the Act that would extend its coverage in a way that tests the limits of Congress' authority under the Commerce Clause or interferes with local matters like land use, under the Clear Statement Rule. 547 U.S. at 737-38.

The clear application of this analysis is that while the plurality considers certain nonnavigable tributaries to be covered by the Act, this interpretation does not encompass every last "stream" no matter how small or far from an actually navigable river or lake. A line clearly sits somewhere, but cannot be discerned from the plurality's interpretation of the Act.

As with the concurrence, the plurality's interpretation of "navigable waters" relies on two interacting vague standards: whether a tributary is a "geographic feature described in ordinary parlance as a stream" and whether its size, location, or other characteristics would test the limits of the Commerce Power. The plurality, as much as the concurrence, is likely void for vagueness under *Dimaya*.

The Court should grant the petition to answer the question whether "navigable waters" under the Act is void for vagueness, either standing on its own or as interpreted by the plurality and/or concurrence in *Rapanos*.

II

THIS COURT SHOULD GRANT THE PETITION TO REVISIT ITS FRACTURED *RAPANOS* DECISION AND REPLACE IT WITH A CLEAR AND AUTHORITATIVE INTERPRETATION OF THE CLEAN WATER ACT

A. The Court Should Revisit *Rapanos* To Give the Act a Constitutionally Adequate Interpretation

If the Court concludes that an interpretation of "navigable waters" and "waters of the United States" is possible that does not run afoul of the void for vagueness doctrine, then it should grant the Petition in order to adopt such an interpretation of the Act.

The Due Process Clause requires application of the rule of lenity to limit the interpretation of criminal statutes to activity clearly covered. *Lanier*, 520 U.S. at 266 (citing *Liparota* and others).

Petitioner argues above that the Court should grant the petition to decide whether "navigable waters" is void for vagueness. As shown, the *Rapanos* concurrence, which the circuit courts have so far endorsed as either the holding of *Rapanos* or an alternate basis for jurisdiction, appears certainly to be void for vagueness under this Court's recent decision in *Dimaya*. Likewise, the *Rapanos* plurality presents serious void for vagueness problems. However, the Court should take this case to also consider whether the Act is susceptible of a constitutional interpretation. As *Liparota* and *Lanier* hold, when the courts find that an act of Congress is susceptible of both a constitutional and an unconstitutional interpretation, the rule of lenity compels the adoption of the constitutional alternative. *Lanier*, 520 U.S. at 266; *Liparota*, 471 U.S. at 427.

This Court should grant the petition, to replace the currently prevailing unconstitutional interpretation of the Act set forth in the *Rapanos* concurrence with an interpretation that affords the regulated public with constitutionally adequate notice.

B. The Court Should Use This Case To Cut Through the Thicket of Ongoing Regulatory and Litigation Chaos Over the Scope of "Navigable Waters"

Rapanos' fractured outcome amplified the confusion engendered by the Clean Water Act rather than resolving any of it. Instead of the one ambiguous and excessive regulatory standard for tributaries and adjacent wetlands (adopted through notice and comment rulemaking) which *Rapanos* struck down, the agencies spent nine years after 2006 using a non

binding guidance that asserted they could use either of the *Rapanos* interpretations of the statute to determine jurisdiction. As set forth above, some circuit courts have agreed with this view, while others have said only the concurrence may be used.

In 2015 EPA and the Corps adopted a new regulation that is generally "inspired" by the Kennedy test, although it has most of the same features that this Court determined to be illegal about the regulations invalidated in *Rapanos*. *See In re EPA*, (6th Cir. 2015) (staying 2015 Rule and explaining challengers' probability of success on the merits), *vacated for lack of jurisdiction per NAM*, *see In re United States Department of Defense*, 713 Fed. Appx. 489 (6th Cir. 2018).

Many lawsuits were filed over the 2015 regulation in the federal district courts and in the federal circuit courts. It took until January of 2018 to resolve which set of lawsuits the courts had jurisdiction over, and which were to be dismissed. *NAM*, 138 S. Ct. at 627. Those lawsuits continue now in the district courts, three of which have enjoined the 2015 Rule in a total of 28 states. *See Georgia v. Pruitt*, 326 F. Supp. 3d 1356 (S.D. Ga. 2018); *North Dakota v. EPA*, 127 F. Supp. 3d 1047 (D.N.D. 2015); *Texas v. EPA*, No. 3:15-CV-00162, 2018 WL 4518230 (S.D. Tex. Sept. 12, 2018).

Meanwhile, in 2017, the White House ordered a change of direction at the agencies from the *Rapanos* concurrence to the plurality as the basis for a regulatory definition. *See generally*, www.epa.gov/wotus-rule/rulemaking-process. This process has lumbered along for almost two years, involving three separate notice and comment rulemakings. *Id.* Only

one is actually complete, and it was promptly enjoined nationwide. *South Carolina Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959 (D.S.C. 2018). Another pending rulemaking (the Repeal Rule) is intended to revoke the 2015 regulation and informally re-adopt the prior (illegal, as per *Rapanos*) regulations, and yet another pending rulemaking (the Replacement Rule) is intended to adopt a new regulation based on the plurality opinion. www.epa.gov/wotusrule/rulemaking-process.
Supporters of the 2015 Rule have vowed to sue over both the Repeal Rule and the Replacement Rule,[6] while the opponents of the 2015 Rule continue to slog their way through the district courts.

As a result, roughly half of the nation is subject to the illegal 2015 Rule, while the other half is subject to a regime in which the illegal pre-2015 regulations and guidance are used to enforce the Act.

It is impossible to say when (if ever) the resulting thicket of litigation will be sufficiently resolved to arrive in this Court. The pending rulemakings may render the litigation against the 2015 Rule moot, unless litigation over the pending Repeal or Replacement Rules results in injunctions against either or both of them.

Again, it is precisely the fractured nature of the *Rapanos* decision that stokes this chaos.

The framework is well established under *Rapanos* for each successive presidential administration to launch a new rulemaking to reset

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[6]*See* Sierra Club, *Trump & Pruitt Repeal the 2015 Clean Water Rule* (June 28, 2017), https://www.sierraclub.org/ohio/blog/2017/06/trump-pruitt-repeal-2015-clean-water-rule.

the regulation to the *Rapanos* opinion preferred by that administration's political coalition, ad infinitem.

The source of this mess is this Court's split decision in *Rapanos*, yielding two very different rules of decision, both of which the government claims the authority to enforce either through new regulations or informal and putatively non binding guidance. The answer to this ongoing pendulum of regulation and litigation is for this Court to revisit *Rapanos* now, in this case, and adopt a clear majority interpretation of "navigable waters" that provides the public, the agencies, and the lower courts with a rule of decision that makes sense of the statute and affords the due process minimum of constitutional notice. Indeed, as the district court below recognized, this case is the ideal case for resolving the confusion over the interpretation of "navigable waters." Appendix D-2-3.

An important aspect of this case that makes it the ideal vehicle to revisit *Rapanos* is that since it does not involve a regulatory interpretation of the Act; the Court can dispense with any and all issues related to *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and directly interpret the statutory text. Waiting until some or all of the ongoing litigation over the 2015 regulation reaches the Court will necessitate wading through the *Chevron* questions in order to address the central Clean Water Act question that this case presents cleanly.

C. The Court Should Grant the Petition To Resolve the Circuit Splits Over Which (If Either) Opinion in *Rapanos* Provides the Controlling Rule of Law

Last term in *Hughes v. United States*, 138 S. Ct. 1765 (2018), this Court granted certiorari on questions involving the proper application of *Marks v. United States* to this Court's fractured decisions. *Id.* at 1771-72. Ultimately, the Court was able to resolve the underlying issue of criminal procedure in *Hughes*, and did not need to address the *Marks* questions in that case. *Id.* This petition provides a sound vehicle for the Court to address two discrete questions arising under *Marks*, in the event it is not possible to arrive at a majority opinion to replace *Rapanos*.

As stated above, the circuit courts' disparate efforts to apply the various *Rapanos* opinions has resulted in at least two circuit splits, one on whether *Marks* applies to *Rapanos*, and one on whether dissents may be used in applying *Marks*.

First, the Ninth Circuit in the decision below joins the Seventh and Eleventh Circuits in holding that under *Marks*, the concurrence is the holding of *Rapanos*. *See Robertson*, 875 F.3d at 1291; *Gibson*, 760 F.3d at 621; *Robison*, 505 F.3d at 1221-22. By contrast, the First, Third, Sixth, and Eighth Circuits hold that *Marks* does not apply to *Rapanos*, and allow the government to follow both the plurality and the concurrence. *See Johnson*, 467 F.3d at 66; *United States v. Cundiff*, 555 F.3d 200, 210 (6th Cir. 2009); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009); *United States v. Donovan*, 661 F.3d 174, 181 (3d Cir. 2011).

This circuit split is not merely academic. The results are that in four federal circuits regulated entities are subject to jurisdiction under both the *Rapanos* plurality and concurrence, while in three others the government is limited to proving jurisdiction under the concurrence. The Clean Water Act should be enforced uniformly nationwide. The Court should grant the petition to eliminate the existing geographically based double standard.

The application of *Marks* to *Rapanos* has also yielded an important express split between the Seventh and Ninth and D.C. Circuits over whether *Marks* allows the use of dissents in determining the holding of a fractured decision of this Court. *Compare United States v. Robertson*, 875 F.3d at 1291 (dissent in *Rapanos* combined with concurrence to conclude that concurrence is holding under *Marks*), *with Gibson v. American Cyanamid. Co.*, 760 F.3d at 622 (*Marks* bars use of dissents in applying *Rapanos*); *King v. Palmer*, 950 F.2d at 783 (no use of dissent in *Marks* analysis).

Whether or not a dissent may be used to determine the holding of a fractured decision is an important question of law with wide ranging consequences, which the Court should resolve. This petition provides a sound vehicle for resolving that question, since it involves a complete disagreement between the Seventh and Ninth Circuits on the use of dissents in applying *Marks* to the same case.

III

THIS COURT SHOULD GRANT THE PETITION TO RESOLVE A CIRCUIT SPLIT ON REVIEWABILITY OF ORDERS DENYING MOTIONS FOR ACQUITTAL IN A FIRST TRIAL ENDING IN MISTRIAL, FOLLOWED BY CONVICTION IN A SECOND TRIAL

In *Richardson v. United States*, this Court addressed whether criminal defendants may seek interlocutory review of orders denying judgments of acquittal following a mistrial to prevent their retrial, on the ground that retrial would violate double jeopardy. The answer is no. But this Court *did not* address whether a district court ruling on a motion for acquittal based on insufficient evidence can, like any other interlocutory ruling, be reviewed following final judgment after retrial.

In the decision below, the Ninth Circuit joined four other circuits in holding that *Richardson* prohibits such review. *See United States v. Achobe*, 560 F.3d 259, 265-68 (5th Cir. 2008); *United States v. Julien*, 318 F.3d 316, 321 (1st Cir. 2003); *United States v. Willis*, 102 F.3d 1078, 1081 (10th Cir. 1996); *United States v. Coleman*, 862 F.2d 455, 460 (3d Cir. 1988). In contrast, the Eleventh Circuit says that *Richardson* does not preclude post-judgment review. *United States v. Gulledge*, 739 F.2d 582, 584 (11th Cir. 1984). In the Eleventh Circuit, denial of a motion for judgment of acquittal in a first trial ending in a hung jury is assumed to be reviewable despite an individual's subsequent conviction in a second trial. *See, e.g.*, *United States v. Martinez*, No. 11-12131, 2013 WL 563158, at *1 (11th Cir. Feb. 15, 2013).

A criminal defendant's ability to challenge on appeal the legal sufficiency of the evidence presented at their first trial should not rise or fall based on where their prosecution takes place. Yet the circuit split here has allowed this very circumstance to prevail for 30-plus years. This Court should grant certiorari to resolve this express circuit split on a recurring and important issue.

A. The Circuits Are Split on This Question

Richardson holds that a retrial following the erroneous denial of a motion to acquit does not violate double jeopardy. But this Court did not address in *Richardson* whether a defendant can seek review of a sufficiency ruling in its own right on appeal from final judgment following a second trial. In the wake of *Richardson*, lower courts have split over this question.

1. The Eleventh Circuit Allows Post-Judgment Review of Sufficiency Rulings

In *United States v. Gulledge*, the district court denied the defendant's motion for acquittal at a trial that ended in a mistrial. 739 F.2d at 583-84. The defendant sought interlocutory review, challenging the sufficiency ruling and claiming that his retrial would violate double jeopardy. *Id.* at 584. A panel of the Eleventh Circuit rejected the double-jeopardy claim in light of the holding in *Richardson*. *Id.* at 584-85. But it matter-of-factly noted in dicta that a ruling on the sufficiency of evidence at the first trial, like any other interlocutory ruling, is reviewable after a final judgment is rendered. *Id.* at 584 ("[T]he purported insufficiency of the evidence in the first trial is reviewable by this court *only on appeal from a*

conviction after a second trial . . . .") (emphasis added). In the Eleventh Circuit this has been the view, *see United States v. Cooper*, 733 F.2d 91, 92 (11th Cir. 1984), and continues to be the view, *see Martinez*, 2013 WL 563158, at *1 (affirming denial of defendant's motion for judgment of acquittal based on sufficiency of evidence in the first trial that resulted in a hung jury); *United States v. Gavin*, No. 09-15518, 2010 WL 3373973, at *1 (11th Cir. Aug. 27, 2010) (same).

This interpretation comports with the common understanding of the reviewability of interlocutory rulings after a final judgment. *See, e.g.*, *United States v. Taylor*, 176 F.3d 331, 335 (6th Cir. 1999) ("It is elementary, however, that even though a party may not file an appeal from [an interlocutory ruling], that does not mean he may *never* obtain review of the decision, once a final order has been entered.") (emphasis added). The purpose of the final judgment rule contained in 28 U.S.C. § 1291 is not to preclude review of interlocutory rulings altogether, but "to combine in one review all stages of the proceeding." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

As a consequence, parties can seek review of allegedly prejudicial interlocutory rulings following final judgment. "The prohibition against immediate appeal . . . is offset by the rule that once appeal is taken from a truly final judgment that ends the litigation, earlier rulings generally can be reviewed." 15A C. Wright, *et al.*, Federal Practice and Procedure § 3905.1, at 249 (2d ed. 1991) (footnote omitted). The "appeal from final judgment opens the record and permits review of all rulings that led up to the judgment." *Id.* at 250-52 n.3 (collecting cases).

Consistent with this principle, this Court has repeatedly noted the availability of post-judgment review before disallowing interlocutory review of non final orders that fail the collateral order doctrine. *See, e.g.*, *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375-76 (1987).

2. Multiple Circuits Prohibit Post-Judgment Review of Sufficiency Rulings

The holding of the Ninth Circuit below, like the rulings of the four circuits on which it relies,[7] is directly at odds with the more logical position of the Eleventh Circuit. While it is true that "double jeopardy protections do not bar a second trial" after a jury deadlocks, *Robertson*, 875 F.3d at 1293, it does not logically follow that this principle prohibits the reviewability of a denied sufficiency motion after a final judgment is entered. Robertson did not argue on appeal after his conviction that his retrial violated double jeopardy. The attempted double jeopardy arguments made in *Richardson* were simply not present in the appeal before this Court. Robertson contended only that the district court erred by denying his motion to acquit at his first trial. Double jeopardy is "not implicated simply because the Government presented insufficient evidence at a previous trial." *Robertson*, 875 F.3d at 1294. But the Ninth Circuit found that Robertson's ability to challenge the sufficiency of the evidence at his first trial, unlike any other interlocutory ruling, was precluded based on *Richardson* anyway.

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[7] *See Achobe*, 560 F.3d at 265-68; *Julien*, 318 F.3d at 321; *Willis*, 102 F.3d at 1081; *Coleman*, 862 F.2d at 460.

But nothing in *Richardson* disturbs the well-settled rule that parties may seek review of interlocutory rulings after a final judgment. *See Yeager v. United States*, 557 U.S. 110, 123-24 (2009) (discussing *Richardson*'s applicability to double jeopardy arguments related to mistrial, not the reviewability of interlocutory rulings). *Richardson* addressed only whether a retrial following the erroneous denial of a motion to acquit would violate double jeopardy. This Court held retrial would not violate double jeopardy because the mistrial did not terminate jeopardy. *Richardson*, 468 U.S. at 325-26. The defendant in that case asserted only a double-jeopardy claim, because that was the only sort of claim that could be reviewed on an interlocutory basis under *Abney v. United States*, 431 U.S. 651 (1977). *See Richardson*, 468 U.S. at 320. *Richardson* simply did not address, and had no reason to address, whether the erroneous denial of the motion to acquit could be reviewed in its own right following final judgment just like any other interlocutory order.

The lack of double jeopardy below had *no effect* upon the reviewability of Mr. Robertson's denied motion for acquittal based on allegedly deficient evidence in his first trial after final judgment was entered in his second trial. Holding that "a criminal defendant cannot challenge the sufficiency of the evidence presented at a previous trial following a conviction at a subsequent trial" is not a "necessary extension" of the principle that double jeopardy does not bar that retrial. The two propositions are simply not related or analogous. It does no violence to the holding of *Richardson* to recognize that a defendant can challenge the legal sufficiency of the evidence presented by the government in the first trial at the

conclusion of the second trial. Simply put, the decision of the Ninth Circuit, like most of the circuit cases on which it relies, conflates a challenge to a sufficiency ruling with a double-jeopardy claim.

B. This Issue Is Both Recurring and Important

1. The Issue Arises Often

Even before the present circuit split over *Richardson*, this issue repeatedly arose in both federal and state courts, with lower courts almost uniformly allowing post-judgment review of denied motions for acquittal based on insufficient evidence. *See*, *e.g.*, *United States v. Bodey*, 607 F.2d 265, 267-68 (9th Cir. 1979) (defendant entitled to reversal "if the evidence at his first trial was insufficient"). Of the approximately 3,000 federal criminal trials each year, more than 130 are retrials following mistrials. *See* Admin. Office of the U.S. Courts, Judicial Business of the United States Courts 257 tbl.D-7, 279 tbl.D-13 (2008).

Mistrial rates in state courts, which hear more than 50,000 criminal trials each year, are even higher than federal courts. *See* Paula L. Hannaford-Agor, *et al.*, *Are Hung Juries a Problem?* 19-27, National Center for State Courts (Sept. 30, 2002). Some state courts currently allow post-judgment review of prior-trial sufficiency rulings, *see*, *e.g.*, *Ohio v. McGill*, No. 99CA25, 2000 WL 1803650, at *6-9 (Ohio Ct. App. Dec. 8, 2000), while others expressly relying on *Richardson* reject such claims, *see*, *e.g.*, *People v. Doyle*, 765 N.E.2d 85, 91 (Ill. App. Ct. 2002). These courts, like their federal counterparts, would benefit greatly from this Court's guidance on this question.

2. The Issue is Important to the Administration of Justice

The reviewability of prior sufficiency rulings at subsequent trials is a matter of grave importance to the administration of justice. Rather than the narrow question addressed in *Richardson* involving *when* defendants can seek review, this case presents the much broader question of whether such rulings *are reviewable at all*. The consequences of the rule applied below and in the four other circuits denying review is harsh. Defendants are forever barred from obtaining review, however patently erroneous the district court's ruling may have been.

The decision below thus leaves defendants not convicted at their first trial *worse off* than those who actually are convicted. If a jury convicts a defendant and the district court erroneously denies his motion to acquit, that individual can receive review of that denial on appeal. But under the Ninth Circuit's interpretation of *Richardson*, if a jury is unable to reach a verdict and there is a retrial, the error is unreviewable *forevermore*. This result is patently unjust.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: November, 2018.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOSEPH DAVID ROBERTSON, Defendant-Appellant.	No. 16-30178 D,C. No. 6:15-cr-00007-DWM-1 District of Montana, Helena OPINION

Appeal from the United States District Court
for the District of Montana
Donald W. Molloy, Senior District Judge, Presiding

Argued and Submitted August 29, 2017
Seattle, Washington

Filed November 27, 2017

Before: M. Margaret McKeown and Ronald M. Gould, Circuit Judges, and Barbara Jacobs Rothstein,* District Judge.

Opinion by Judge Gould

* The Honorable Barbara Jacobs Rothstein, United States District Judge for the Western District of Washington, sitting by designation.

SUMMARY**

Criminal Law

The panel affirmed convictions for violating the Clean Water Act (CWA) by knowingly discharging dredged or fill material from a point source into a water of the United States without a permit; willfully injuring and committing depredation of property of the United States, causing more than $1,000 worth of damage to the property; and knowingly discharging dredged or fill material from a point source into a water of the United States on private property without a permit.

The defendant's first trial ended with a hung jury, and the defendant was convicted after a second trial.

The panel rejected the defendant's contention that the Government did not establish that there was jurisdiction under the CWA. The panel held that *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (2007) (holding that Justice Kennedy's concurrence in *Rapanos v. United States*, 547 U.S. 715 (2006), is the controlling test for determining CWA jurisdiction), is not clearly irreconcilable with *United States v. Davis*, 825 F.3d 1014 (9th Cir. 2016) (en banc), and remains binding precedent. The panel held that the district court did not err in determining that CWA jurisdiction existed under the "significant nexus" test set forth in Justice Kennedy's concurrence in *Rapanos*.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel rejected the defendant's contentions that the statutory term "waters of the United States" is unconstitutionally vague and that he did not have fair warning of the meaning of that term.

The panel held that a criminal defendant cannot challenge the sufficiency of the evidence at a previous trial following conviction at a subsequent trial. The panel therefore deemed foreclosed the defendant's argument that the district court should have granted his motion to acquit after the jury deadlocked at his first trial.

The panel held that the district court did not abuse its discretion in allowing the Montana State Program Manager for the Army Corps of Engineers and Supervisory Civil Engineer to testify as an expert witness. The panel held that the district court did not abuse its discretion in excluding an Army Corps of Engineers guidance manual or a crystal mine study.

COUNSEL

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Anthony L. François, Pacific Legal Foundation, Sacramento, California, for Amici Curiae Chantell and Michael Sackett, John Duarte, and Duarte Nursery Inc.

OPINION

GOULD, Circuit Judge:

Between October 2013 and October 2014, Joseph David Robertson excavated and constructed a series of ponds on National Forest System Lands and on the privately owned Manhattan Lode mining claim. In the process of creating these ponds, Robertson discharged dredged and fill material into the surrounding wetlands and an adjacent tributary, which flows to Cataract Creek. Cataract Creek is a tributary of the Boulder River, which in turn is a tributary of the Jefferson River—a traditionally navigable water of the United States. Robertson was warned by an EPA Special Agent that his activities "very likely" required permits. Yet, he did not get permits to build the ponds or to discharge dredged or fill material into waters of the United States.

The Forest Service soon learned of Robertson's activities. And on May 22, 2015, a grand jury charged Robertson with three criminal counts. Count I charged Robertson with knowingly discharging dredged or fill material from a point source into a water of the United States without a permit in violation of the Clean Water Act (CWA), 33 U.S.C. § 1251–1388. Count II

charged Robertson with willfully injuring and committing depredation of property of the United States, namely National Forest Service Land, causing more than $1,000 worth of damage to the property, in violation of 18 U.S.C. § 1361. Count III charged Robertson with another CWA violation for knowingly discharging dredged or fill material from a point source into a water of the United States on private property without a permit.

Robertson's initial jury trial was held from October 5 to October 8, 2015. At the close of the Government's case and at the close of the presentation of evidence, Robertson unsuccessfully moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29. That first jury trial ended with a hung jury, and the judge declared a mistrial. Robertson again moved for acquittal on all three counts, arguing that the Government's evidence was insufficient to sustain a conviction. The district court denied this motion.

Robertson's second jury trial was held from April 4 to April 7, 2016. Robertson again moved for acquittal on all three counts after the close of the Government's case and at the close of evidence. And the district court again denied both motions. On April 7, 2016, the jury returned guilty verdicts on all three counts. On April 21, 2016, Robertson renewed his motions for acquittal and moved for a new trial. The district court denied those motions, concluding that the verdict was supported by sufficient evidence.

Robertson timely filed this appeal, over which we have jurisdiction pursuant to 28 U.S.C. § 1291.

I

Robertson argues (1) that the Government did not establish that there was CWA jurisdiction, and (2) that he lacked fair warning of the scope of CWA jurisdiction. He also (3) challenges the sufficiency of evidence at an earlier trial that ended in a mistrial; (4) appeals some evidence rulings; and (5) contests the calculation of restitution.[1]

We review the district court's interpretation of the jurisdictional bounds of the CWA *de novo*. *See United States v. Lewis*, 67 F.3d 225, 228 (9th Cir. 1995). We also review whether a statute is unconstitutionally vague *de novo*. *See United States v. Cooper*, 173 F.3d 1192, 1202 (9th Cir. 1999). We review the challenged evidence rulings and a challenge to the district court permitting an expert to testify for abuse of discretion. *See United States v. W.R. Grace*, 504 F.3d 745, 759 (9th Cir. 2007); *United States v. Layton*, 767 F.2d 549, 553 (9th Cir. 1985).

II

We look first at the CWA jurisdiction issue. To assess Robertson's arguments on these points, some background on the CWA and the cases that have interpreted it is necessary. Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To meet this goal, the CWA prohibits the discharge of dredge or fill material into "navigable waters" unless authorized by a permit from the Secretary of the Army through the Army Corps of

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[1] We address and reject Robertson's challenge to the district court's ruling compelling Robertson to bear a part of the costs of his defense in the concurrently filed memorandum disposition.

Engineers ("the Corps"). *Id.* §§ 1311(a), 1311(d), 1344(a). Any person who knowingly violates § 1311 by discharging a pollutant without a permit "shall be punished" by a fine, imprisonment, or both. *Id.* § 1319(c)(2).

At issue on jurisdiction is the meaning of "navigable waters," and the reach of the CWA. "Navigable waters" is defined as "the waters of the United States, including the territorial seas." *Id.* § 1362(7). For there to be CWA jurisdiction here then, the creek and wetlands that Robertson polluted had to be "waters of the United States."

The reach of the Corps' jurisdiction over "navigable waters" is controversial and has been the subject of many Supreme Court cases. *See*, *e.g.*, *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) (upholding a Corps' regulation that extended the Corps' authority under § 1344 to wetlands "adjacent to navigable or interstate waters and their tributaries"); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (invalidating the Corps' "Migratory Bird Rule" because the Corps does not have CWA jurisdiction over non-navigable, isolated, intrastate waters that are not adjacent to open water).

Central to this appeal is the Supreme Court's fractured 4-1-4 decision, *Rapanos v. United States*, 547 U.S. 715 (2006). In that case, the Court confronted the issue of whether wetlands, which did not contain or directly abut traditionally navigable waterways, were "waters of the United States" subject to the Corps' jurisdiction under the CWA. *See id.* at 729–30 (plurality); *id.* at 759 (Kennedy, J., concurring in the judgment). In answering this question, the Court had

to address whether the Corps' regulations were a permissible interpretation of the CWA. The regulations had interpreted "waters of the United States" very broadly, including not just traditionally navigable interstate waters, but also

> "[a]ll interstate waters including interstate wetlands," [33 C.F.R.] § 328.3(a)(2); "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce," [*id.*] § 328.3(a)(3); "[t]ributaries of [such] waters," [*id.*] § 328.3(a)(5); and "[w]etlands adjacent to [such] waters [and tributaries] (other than waters that are themselves wetlands)," [*id.*] § 328.3(a)(7). The regulation defines "adjacent" wetlands as those "bordering, contiguous [to], or neighboring" waters of the United States. [*Id.*] § 328.3(c). It specifically provides that "[w]etlands separated from other waters of the United States by manmade dikes or barriers, natural river berms, beach dunes and the like are 'adjacent wetlands.'" [*Id.*]

Rapanos, 547 U.S. at 724 (plurality).

The plurality opinion, authored by Justice Scalia, and joined by Chief Justice Roberts, and Justices Thomas and Alito, concluded that the Corps'

regulations were not "based on a permissible construction of the statute." *Id.* at 739 (quoting *Chevron U.S.A. Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984)). The plurality held that "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.'" *Id.* (quoting Webster's Second 2882) (alterations in original). The term, according to Justice Scalia's opinion, "does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall." *Id.* The plurality went on to conclude that wetlands are covered by the CWA only if two conditions are met: first, "the adjacent channel contains a 'wate[r] of the United States,' (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters);" and second, "the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." *Id.* at 742 (alteration in original). The plurality ultimately remanded the case to the lower court so that it could determine, in the first instance, whether the wetlands at issue were subject to the CWA under the new standard.

Justice Kennedy, providing the fifth vote supporting the judgment concurred in the judgment but rejected the plurality's test and outlined his own test to determine whether a wetland that is not adjacent to and does not contain a navigable-in-fact water is subject to the CWA. *See id.* at 758–59, 768–78 (Kennedy, J., concurring in the judgment). Justice Kennedy concluded that the Corps could reasonably

interpret the CWA to cover "impermanent streams," *id.* at 770, and he concluded that the "Corps' definition of adjacency is a reasonable one," *id.* at 775. Justice Kennedy held that the Corps could exercise CWA jurisdiction over a wetland only if there was "a significant nexus between the wetlands in question and navigable waters in the traditional sense." *Id.* at 779; *see also id.* at 767. He explained, "wetlands possess the requisite nexus, and come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780. When "wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id.*

Four members of the Court joined in a dissent authored by Justice Stevens. His dissent concluded that *Riverside Bayview* controlled the cases, that the Corps' regulations were a reasonable interpretation of the CWA, and that any wetland that is adjacent to navigable waters or their tributaries is subject to the CWA. *See Rapanos*, 547 U.S. at 787, 792 (Stevens, J., dissenting). He disagreed with both the plurality and with Justice Kennedy. He noted that "Justice Kennedy's approach had far fewer faults," and concluded that both decisions "fail[ed] to give proper deference to the agencies entrusted by Congress to implement the Clean Water Act." *Id.* at 810. The dissenting Justices would have upheld the Corps' jurisdiction in the cases at issue in *Rapanos* "and in all other cases in which either the plurality's or Justice Kennedy's test is satisfied." *Id.* at 810. Indeed,

although the dissent "assume[d] that Justice Kennedy's approach will be controlling in most cases because it treats more of the nation's waters as within the Corps' jurisdiction," the dissent would uphold jurisdiction when either test was met—even "in the unlikely event that the plurality's test is met but Justice Kennedy's is not." *Id.* at 810 n.14; *see also id.* at 810. The dissent also stated that "in these and future cases the United States may elect to prove jurisdiction under either test." *Id.* at 810 n.14.

All this paints a rather complex picture, and one where without more it might not be fair to expect a layman of normal intelligence to discern what was the proper standard to determine what are waters of the United States. But the substance of that picture was clarified by later decisional law within the Ninth Circuit.

Specifically, in *Northern California River Watch v. City of Healdsburg*, a precedent that is critical to our decision today, we held that Justice Kennedy's opinion was the controlling opinion from *Rapanos*. 496 F.3d 993, 995 (2007). We explained that because it is "the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases, . . . Justice Kennedy's concurrence provides the controlling rule of law for our case." *Id.* at 999–1000; *see also United States v. Moses*, 496 F.3d 984, 990 (9th Cir. 2007) (recognizing Justice Kennedy's "opinion as the controlling rule of law"); *San Francisco Baykeeper v. Cargill Salt Div.*, 481 F.3d 700, 707 (9th Cir. 2007) ("Justice Kennedy's *controlling concurrence* explained that only wetlands with a significant nexus to a navigable-in-fact waterway are covered by the Act" (emphasis added)).

In reaching this conclusion, we relied upon *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7th Cir. 2006). *See City of Healdsburg*, 496 F.3d at 999–1000. In *Gerke*, the Seventh Circuit had explained that Justice Kennedy's test—which it also found to be controlling—was "narrower (so far as reining in federal authority is concerned) than the plurality's in most cases." 464 F.3d at 724–25. The Eleventh Circuit has also concluded that Justice Kennedy's test is controlling. *See United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007) (concluding that under the facts of *Rapanos*, Justice Kennedy's opinion is the narrowest and controlling).

Other circuits have adopted different approaches. The First, Third, and Eighth Circuits have explicitly concluded that the federal Government can establish CWA jurisdiction if it can meet either the plurality's or Justice Kennedy's standard. *United States v. Johnson*, 467 F.3d 56, 64–66 (1st Cir. 2006); *United States v. Donovan*, 661 F.3d 174, 176, 182 (3d Cir. 2011); *United States v. Bailey*, 571 F.3d 791, 799 (8th Cir. 2009). The Fourth Circuit has used Justice Kennedy's test, without deciding whether the plurality's test could provide an alternate ground for establishing CWA jurisdiction. *See Precon Dev. Corp., Inc. v. U.S. Army Corps of Eng'rs*, 633 F.3d 288 (4th Cir. 2011). The Sixth Circuit has expressly not yet decided which test is controlling. *See United States v. Cundiff*, 555 F.3d 200, 210 (6th Cir. 2009). It appears that the Fifth Circuit has also not yet decided which test controls, s*ee United States v. Lucas*, 516 F.3d 316, 324–28 (5th Cir. 2008), although it has indicated—albeit in an unpublished decision—that jurisdiction could be established under either test, *see United States v. Lipar*, 665 F. App'x 322, 325 (5th Cir. 2016).

In view of these competing precedents interpreting *Rapanos*, and further uncertainty engendered by our later en banc decision in *United States v. Davis*, 825 F.3d 1014 (9th Cir. 2016), Robertson argues that Justice Kennedy's test from *Rapanos* is not the controlling test for determining CWA jurisdiction, and that the trial Court erred by basing the jury instructions on Justice Kennedy's test.

III

Robertson's primary argument is that *City of Healdsburg* is not binding in light of *Davis*. He asserts that under the "reasoning-based" framework established by *Davis*, the *Rapanos* plurality opinion is controlling. In reaching this conclusion, Robertson argues that the court cannot consider Justice Stevens's dissent. He argues that if we do not adopt the plurality decision as controlling, we must conclude that "no single rationale commanded a majority of the *Rapanos* court."

In *Marks v. United States*, the Supreme Court explained that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

Recognizing the difficulty that courts have faced in discerning what the Supreme Court meant by "narrowest grounds," we took *Davis* en banc to clarify the approach courts should take in applying *Marks* to fractured Supreme Court decisions. *See Davis*, 825

F.3d at 1021–22. We adopted a "reasoning-based approach to applying *Marks*." *Id.* at 1021. As we explained,

> [W]hen applying *Marks* to a fractured Supreme Court decision, we look to those opinions that concurred in the judgment and determine whether one of those opinions sets forth a rationale that is the logical subset of other, broader opinions. When, however, no "common denominator of the Court's reasoning" exists, we are bound only by the "specific result."

Id. at 1028. In *Davis*, we also assumed, without deciding, that dissenting opinions may be considered as part of a *Marks* analysis. *Id.* at 1025; *see also id.* at 1025 n.12.

As explained above, in *City of Healdsburg*—relying on *Gerke* and taking into account the *Rapanos* dissent—we held that Justice Kennedy's "concurrence is the narrowest ground to which a majority of the Justices would assent if forced to choose in almost all cases." *City of Healdsburg*, 496 F.3d at 999. As *Davis* had not yet clarified the issue, we did not engage in a reasoning-based *Marks* analysis to reach this conclusion. Instead, we relied on and accepted the Seventh Circuit's explanation in *Gerke* as to why Justice Kennedy's concurrence provided the controlling rule. *See id.* at 999–1000. Although the Seventh Circuit did not engage in an explicit reasoning-based analysis, the underlying rationale in *Gerke* is not inconsistent with that analysis.

To assess Robertson's claim that the district court applied the wrong standard to determine whether there was insufficient evidence to conclude that Robertson discharged pollutants into United States waters without a permit, we must first decide whether the en banc decision in *Davis* rendered inapplicable our prior conclusion in *City of Healdsburg* that Justice Kennedy's concurrence in *Rapanos* would control our decision about what are waters of the United States.

Our court in *Miller v. Gammie*, established the general rule that a three-judge panel is not allowed to disregard a prior circuit precedent, but rather must follow it unless or until change comes from a higher authority. 335 F.3d 889, 893 (9th Cir. 2003) (en banc). Higher authority includes decisions by en banc panels of our court. *Overstreet v. United Bhd. of Carpenters & Joiners of Am., Local Union No.* 1506, 409 F.3d 1199, 1205 n.8 (9th Cir. 2005).

This raises the issue whether the precedent of *City of Healdsburg* should have been disregarded by the court below in light of the later en banc decision in *Davis*. *Miller v. Gammie* sets the rule that the district court below had to follow *City of Healdsburg* unless it was "clearly irreconcilable" with *Davis*. *Miller v. Gammie*, 335 F.3d at 893. So the controlling issue on whether *City of Healdsburg* correctly stated the standard for what are waters of the United States, relying on Justice Kennedy's concurrence in *Rapanos*, is whether *City of Healdsburg* is clearly irreconcilable with *Davis*. If so, we should disregard it. But if not, *City of Healdsburg* remains controlling. It is to that question that we now turn.

Some elaboration on the standard developed in *Miller v. Gammie* is helpful here. In that case we considered when "a three-judge panel is free to reexamine the holding of a prior panel in light of an inconsistent decision by a court of last resort on a closely related, but not identical issue." 335 F.3d at 899. The issue before us was whether, in light of intervening Supreme Court authority outlining a functional test for evaluating when immunity applied, a three-judge panel should have disregarded prior Ninth Circuit authority granting absolute immunity to social workers. *Id.* at 900. Our en banc panel in *Miller v. Gammie* held that in cases of "clear irreconcilability, a three-judge panel of this court and district courts should consider themselves bound by the intervening higher authority and reject the prior opinion of this court as having been effectively overruled." *Id.*

The "clearly irreconcilable" requirement is "a high standard." *Rodriguez v. AT&T Mobility Servs. LLC*, 728 F.3d 975, 979 (9th Cir. 2013) (internal quotation marks omitted). So long as the court "can apply our prior circuit precedent without running afoul of the intervening authority" it must do so. *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012) (internal quotation marks omitted). "It is not enough for there to be some tension between the intervening higher authority and prior circuit precedent, or for the intervening higher authority to cast doubt on the prior circuit precedent." *Id.* (internal quotation marks and citations omitted).

City of Healdsburg is not clearly irreconcilable with *Davis*. *Davis* holds that an opinion that concurs in the judgment that is "the logical subset of other,

broader opinions" is the "narrowest grounds" and controlling under *Marks*. *See Davis*, 825 F.3d at 1024, 1028. Contrary to Robertson's argument, *Davis* did not forbid consideration of dissents while engaging in the *Marks* analysis. *See Davis*, 825 F.3d at 1025. Consequently, so long as the opinion that is a "logical subset" is an opinion that concurred in the judgment, the "broader opinion" of which it is a subset can be a dissent.

The overarching issue in *Rapanos* was whether the breadth of the Corps' regulations was permissible. The narrowest holding was the one that restrained the Corps' authority the least. *See Rapanos*, 547 U.S. at 810 n.14 (Stevens, J., dissenting) ("I assume that Justice Kennedy's approach will be controlling in most cases because it treats more of the Nation's waters as within the Corps' jurisdiction . . ."); *Robison*, 505 F.3d at 1221 ("The issue becomes whether the definition of 'navigable waters' in the plurality or concurring opinions in *Rapanos* was less far-reaching (i.e., less-restrictive of CWA jurisdiction)."); *Gerke*, 464 F.3d at 724–25 (concluding Justice Kennedy's "test is narrower (so far as reining in federal authority is concerned) than the plurality's in most cases"). The opinion restricting federal agency discretion the least was Justice Stevens's dissent, which would have provided for the broadest federal jurisdiction of all, and which stated explicitly that it would be satisfied and uphold the Corps' jurisdiction whenever either the plurality's or Justice Kennedy's test was met. *See Rapanos*, 547 U.S. at 810 (Stevens, J., dissenting).

But under the standard announced in *Marks*, when we interpret *Rapanos* we are to find our standard in the narrowest opinion joining in the

judgment. So the dissent that did not support the judgment is out for this purpose. We have a contest then between the plurality opinion of Justice Scalia and the concurring opinion of Justice Kennedy, both of which supported the majority judgment. Both the plurality and Justice Kennedy's opinions can be viewed as subsets of Justice Stevens's dissent because both narrow the scope of federal jurisdiction. Justice Kennedy's concurrence, however, is narrower than the plurality opinion because it restricts federal authority less. *See Rapanos*, 547 U.S. at 810 n.14 (Stevens, J., dissenting).

Although it does not go through this subset analysis explicitly, *Gerke* does recognize that Justice Kennedy's concurrence fits within the dissent, and that it narrows federal authority less than the plurality's decision. *See Gerke*, 464 F.3d at 724–25 (explaining that "[t]he four dissenting Justices took a much broader view of federal authority" than either Justice Kennedy or the plurality, and that Justice Kennedy's grounds were narrower because the plurality criticized Justice Kennedy's expansive reading, and Justice Kennedy rejected the two limitations the plurality would have imposed on federal authority). Its reasoning—how it gets to the "narrowest" opinion—is not completely undercut by *Davis*. *See Rodriguez*, 728 F.3d at 980. *Gerke*—and *City of Healdsburg*, which adopted and relied upon *Gerke*'*s* reasoning—are not "clearly irreconcilable" with *Davis*. *City of Healdsburg* remains valid and binding precedent. Here, jurisdiction was determined to exist under the "significant nexus" test set forth in Justice Kennedy's concurrence in *Rapanos*. We hold that there was no error in this.

IV

Robertson next argues that the statutory term "waters of the United States" is "too vague to be enforced in the due process sense," because Robertson could not have had "fair warning" of the meaning of that term. He asserts that he did not have fair warning because, in light of *Davis*, *City of Healdsburg* is no longer good law.

Robertson had fair warning that his conduct was criminal. The Government violates the Fifth Amendment's guarantee of due process if it "take[s] away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015). The underlying "principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Lanier*, 520 U.S. 259, 265 (1997).

The "touchstone" of whether a statute is unconstitutionally vague, on the one hand, or the defendant instead had fair notice, on the other hand, "is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *Id.* at 267. So long as prior to the defendant's offense there were decisions which gave "reasonable warning that the law [will] be applied in a certain way," the defendant had fair warning that his conduct was criminal. *See Gollehon v. Mahoney*, 626 F.3d 1019, 1024 (9th Cir. 2010).

Robertson does not challenge the general validity of the criminal provisions of the CWA. His argument relies primarily on the effect of *Davis* on *City of Healdsburg*. As explained above, *Davis* does not undermine the continuing validity of *City of Healdsburg* for purposes of jurisdiction. As for the notice issue, the conduct at issue in this case took place between October 2013 and October 2014, well after this court had issued *City of Healdsburg* and had held that Justice Kennedy's test controlled CWA jurisdiction, and well before this court's decision in *Davis*. *See Davis*, 825 F.3d 1014 (published June 13, 2016); *City of Healdsburg*, 496 F.3d at 995 (case published in 2007). Robertson was on notice from *City of Healdsburg* at the time of his excavation activities that wetlands and non-navigable tributaries are subject to CWA jurisdiction "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Rapanos*, 547 U.S. at 780. The jury was instructed in these terms, and convicted Robertson, holding that the elements of his crime where shown beyond a reasonable doubt. *Davis*—which was not decided until 2016, long after Robertson's conduct forming the basis for his convictions—does not affect whether Robertson had fair notice at the time of his excavation activities.[2]

[2] Also, Robertson was warned by an EPA agent that he likely needed a permit to authorize his excavations. According to the agent, Robertson was warned that "if he did not have a permit, then he very likely needed a permit."

V

Robertson next argues that the district court should have granted his Federal Rule of Criminal Procedure 29(c) motion to acquit after the jury deadlocked at his first trial. This circuit has not explicitly addressed whether a defendant has a viable sufficiency of the evidence challenge to his first trial, when his second trial ended in conviction.

If Robertson had prevailed on his sufficiency challenge at the first trial, any subsequent attempt to try him would have been barred on double jeopardy grounds. But such a claim is foreclosed because the Supreme Court in *Richardson v. United States* held that even where the Government has presented inadequate evidence at the first trial and the jury deadlocks, if the trial judge rejects the defendants' insufficiency arguments, double jeopardy protections do not bar a second trial. 468 U.S. 317, 326 (1984) ("Regardless of the sufficiency of the evidence at petitioner's first trial, he has no valid double jeopardy claim to prevent his retrial.").

Several other circuits have held that by necessary extension *Richardson* also forecloses any challenge to the sufficiency of evidence at a prior trial after a conviction at a later trial. *See United States v. Achobe*, 560 F.3d 259, 265–68 (5th Cir. 2008); *United States v. Julien*, 318 F.3d 316, 321 (1st Cir. 2003); *United States v. Willis*, 102 F.3d 1078, 1081 (10th Cir. 1996); *United States v. Coleman*, 862 F.2d 455, 460 (3d Cir. 1988).[3] We believe that these decisions are correct, and we now join them.

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[3] In *United States v. Recio*, we held that *Richardson* did not bar us from considering whether defendants "may be prosecuted at a

Richardson makes clear that the Double Jeopardy Clause is not implicated simply because the Government presented insufficient evidence at a previous trial, and absent double jeopardy protections, a finding that insufficient evidence was offered at the first trial would have no impact on the validity of the second trial. We hold that a criminal defendant cannot challenge the sufficiency of the evidence presented at a previous trial following a conviction at a subsequent trial.

VI

Robertson argues that there are three reasons why the district court erred in allowing Todd Tillinger, the Montana State Program Manager for the Corps and Supervisory Civil Engineer, to testify as an expert witness. First, Robertson asserts that because the law on what constitutes a "water of the United States" subject to CWA jurisdiction is unclear, "the subject matter of [Tillinger's] testimony was not suitable for expert witness consideration." Second, Tillinger's testimony was based on "guidance documents," which do not have the force of law. Finally, Robertson argues that the district court should have rejected Tillinger as an expert witness "because his jurisdictional determination relied heavily on what is termed an ordinary high water mark," which Justice Kennedy

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third trial if the Government presented insufficient evidence at the first." 371 F.3d 1093, 1104 (9th Cir. 2004). We explained that "[t]he procedural posture of this case allows us to consider this question because the third trial has not yet begun." *Id.* at 1104–05. We specifically declined to address the question of whether defendants "could also use their first-trial insufficiency argument to challenge their second trial on double jeopardy grounds." *Id.* at 1105 n.9.

rejected as the determinative measure of whether a water is subject to the CWA.

Robertson's arguments are not persuasive. First, it is the district court—not an expert witness—that instructs the jury on what the law is. *See U.S. v. Weitzsenhoff*, 35 F.3d 1275, 1287 (9th Cir. 1993). Here, the court gave the jury clear instructions on both the elements of a CWA violation, and the meaning of the term "waters of the United States."[4] As discussed above, the law itself is not unclear.[5]

Robertson's second argument is both belied by the record and beside the point. The expert disclosure statement that Robertson relies upon for his argument states that Tillinger "has substantial training and experience in the identification and classification of streams and wetlands to determine if

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[4] Jury Instruction 14 provided: "In order for you to find the defendant guilty of the crimes contained in Counts I or III, the government must prove each of the following elements beyond a reasonable doubt . . . 3. That the discharge was to a 'water of the United States.'" Jury Instruction 22 provided: "The term 'waters of the United States' includes traditional navigable waters and tributaries and/or adjacent wetlands that have a significant nexus to traditional navigable waters. A tributary or adjacent wetland has a significant nexus to traditional navigable waters if it (either alone or in combination with similarly situated water bodies in the region) significantly affects the chemical, physical, or biological integrity of traditional navigable waters." These instructions follow the standard set out in Justice Kennedy's concurrence, and that we adopted as controlling in *City of Healdsburg*. *See Rapanos*, 547 U.S. at 780; *City of Healdsburg*, 496 F.3d at 999–1000.

[5] Robertson does not assert that Tillinger improperly testified on the ultimate issue of law. His argument appears to be that the law is unclear, and it was improper for any expert to testify about "waters of the United States."

they are considered 'waters of the United States' subject to federal regulation under the Clean Water Act ('CWA'); implementing regulations; standards set forth in the United States Supreme Court's opinion in *Rapanos v. United States*, 547 U.S. 715 (2006); and the following EPA/Army Corps of Engineers post-*Rapanos* guidance documents . . . ." Tillinger based his evaluation on regulations, *Rapanos*, and guidance documents.

It does not matter which sources of authority (binding regulations or enforcement guidelines that lack the force of law) Tillinger used in evaluating waters and wetlands because it is the jury, using the instructions provided by the judge, that ultimately determines whether the creek and wetland at issue were "waters of the United States." *See United States v. Phillips*, 367 F.3d 846, 855 n.25 (9th Cir. 2004) (explaining that "whether the water is navigable [*i.e.*, is subject to CWA jurisdiction] is part of one element of a CWA violation," which the Government can be required to prove at trial).

Robertson's third argument is also unpersuasive. At the first trial, Tillinger testified that in determining whether the channel had a continuous or relatively permanent flow he looked for a high water mark.[6] Although Justice Kennedy stated in *Rapanos* that the presence of an ordinary high water mark on a tributary could not be "the determinative

[6] Robertson does not provide a citation for his assertion that Tillinger's jurisdictional determination relied on the ordinary high water mark. The Government cites to Tillinger's testimony from the first trial. The parties do not direct us to any specific testimony from the second trial where Tillinger allegedly relies on the ordinary high water mark.

measure" of whether a wetland adjacent to that tributary is covered by the CWA, he did not forbid the consideration of an ordinary high water mark. *See Rapanos*, 547 U.S. at 781. That Tillinger discussed using a high water mark in his evaluation of whether the channel next to the wetland was a tributary does not render his testimony improper. Regardless, it was the jury (not Tillinger) that—using the court's instructions that did not mention the ordinary high water mark—made the final determination that the creek and wetlands at issue were "waters of the United States." We reject Robertson's challenges to Tillinger's testimony because there was no abuse of discretion in allowing it.

VII

Robertson next argues that the district court erred in excluding two documents: the U.S. Army Corps of Engineers Jurisdictional Determination Form Instruction Guidebook and the Crystal Mine Study. He asserts that the district court should have admitted the Manual because it would have permitted Robertson to show that the Corps "was making its jurisdictional determination on a factor expressly forbidden by Justice Kennedy under his substantial nexus test." He argues that the district court should have admitted the Crystal Mine Study because it showed "that the water quality of the Cataract drainage is very poor due to the extensive mining activity," and the Study "could have supported his argument of insubstantial connection between the wetlands and the Jefferson river."

The district court did not abuse its discretion in excluding either the Guidance Manual or the Crystal Mine Study. The district court is given "wide latitude" to determine "the admissibility of evidence because [the trial judge] is in the best position to assess the impact and effect of evidence based upon what [the judge] perceives from the live proceedings of a trial." *Layton*, 767 F.2d at 554 (quoting *United States v. Ford*, 632 F.2d 1354, 1377 (9th Cir. 1980)).

The district court explained that the Guidebook is used by the Corps "in its performance of jurisdictional determinations and, as such, discusses the applicable regulations and the law." The court excluded the Guidebook under Federal Rule of Evidence 403, concluding that "the danger of confusing the issues and misleading the jury substantially outweighed the potential probative value of admitting the entire Guidebook." As the district court properly explained, the court provides the law to the jury. *See, e.g.*, *Weitzsenhoff*, 35 F.3d at 1287. The Guidance Manual explains how and when the Corps will assert CWA jurisdiction over wetlands and non-navigable tributaries. It was within the district court's discretion to conclude that the Guidance Manual could confuse the jury because the standards and considerations outlined in the Manual were not the same as the jury instructions, i.e., the law that the jury had to follow.[7] The district court did not

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[7] As explained above, Robertson's arguments regarding references to the Ordinary High Water Mark and how the Corps' determines CWA jurisdiction are unpersuasive. The district court provided jury instructions, and the jury (following those instructions) made the determination that the discharge was into "waters of the United States." How the Corps makes CWA

abuse its discretion in excluding the Guidance Manual.

The district court likewise did not abuse its discretion in excluding the Crystal Mine Study. The district court concluded that the Study was not relevant and that "the potential prejudice from its introduction strongly outweighs any probative value." It excluded the Study under Federal Rules of Evidence 401 and 403. The district court acted well within its discretion. Whether a wetland or non-navigable water has a significant nexus to a traditionally navigable water has nothing to do with whether the traditionally navigable water is healthy. Robertson does not support his novel argument that a "significant nexus" exists only when a wetland would be polluting an otherwise clean water, with any authority. Also, this argument undermines the very purpose of the CWA, "to *restore* and maintain the chemical, physical, and biological integrity of the Nation's waters." *See* 33 U.S.C. § 1251(a) (emphasis added). In light of this purpose, it would not make sense to conclude that the CWA protects only clean waters from pollution from their non-navigable tributaries, because that would disregard the CWA's restoration purpose. The district court did not abuse its discretion by excluding the Crystal Mine Study, which addressed the existing contamination in the watershed.[8] We reject

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jurisdictional determinations is not controlling for the purposes of this criminal appeal.

[8] Robertson properly states that the standard of review for decisions on the admissibility of evidence is abuse of discretion. However, he also seems to suggest that the court should review the decisions to determine whether exclusion of the evidence resulted in constitutional error. Robertson does not present any substantial argument as to how exclusion of either the Guidance

Robertson's challenges to the district court's rulings on the rules of evidence. There was no abuse of discretion.[9]

AFFIRMED.

Manual or the Crystal Mine Study resulted in constitutional error. Nor could he do so. As explained above, exclusion of both pieces of evidence was proper. Not only that, but the district court allowed Robertson to question witnesses using the Guidance Manual and allowed Robertson to have the witness read relevant portions of the Manual into the record.

[9] Robertson argues that if we reverse on Counts I and III, those counts will no longer be "offenses of conviction," and "the district court's restitution order should be vacated and the issue should be remanded for reconsideration." Robertson does not otherwise challenge the district court's restitution order. Because we affirm the convictions, we also affirm the restitution award.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed July 10 2018

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOSEPH DAVID ROBERTSON, Defendant-Appellant.	No. 16-30178 D,C. No. 6:15-cr-00007-DWM-1 District of Montana, Helena ORDER

Before: McKEOWN and GOULD, Circuit Judges, and ROTHSTEIN, * District Judge.

The Constitution Society's and the Coalition of Western Property Owners's motion for leave to file amicus curiae brief is GRANTED. The Clerk is directed to file the brief that was received on June 29, 2018.

Appellant's Petition for Rehearing is DENIED.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35. Appellant's Petition for Rehearing En Banc is also DENIED.

The Honorable Barbara Jacobs Rothstein, United States District Judge for the Western District of Washington, sitting by designation.

UNITED STATES DISTRICT COURT
HELENA DIVISION DISTRICT OF MONTANA

UNITED STATES OF AMERICA V. JOSEPH* DAVID ROBERTSON	**AMENDED JUDGMENT IN A CRIMINAL CASE**
Date of Original Judgment: 7/20/2016 **(or Date of Last Amended Judgment)**	Case Number: CR 15-07-H-DWM USM Number: 13726-046 Michael Donahoe (appointed) Defendant's Attorney
Reason for Amendment:	
☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))	☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
☐ Reduction of Sentence for Chanced Circumstances (Fed. R. Crim. P. 25(b))	☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))	☐ Modification of Imposed Term of Imprisonment for Retroactive Amendments(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
■ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)	

☐ Direct Motion to District Court Pursuant ☐28 U.S.C. § 2255 or ☐18 U.S.C. § 3559(c)(7)

☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

■ was found guilty on count(s) **I, II, III** after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
33 U.S.C. 1311(a); 1319(c)(2)(A)	Unauthorized Discharge of Pollutants into Waters of the US	10/2014	I
18 U.S.C. 1361, 2	Malicious Mischief-Injury /Depredation of Property of the US	10/2014	II

The defendant is sentenced as provided in pages 2 through **7** of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on court(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

FILED
Jul 26 2016
Clerk, U S District Court
District of Montana
Missoula

7/26/2016
Date of Imposition of Judgment

s/ Donald W. Molloy
Signature of Judge

Donald W. Molloy, District Judge
Name of Judge Title of Judge

July 26, 2016
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
33 U.S.C. 1311(a), 1319(c)(2)(A)	Unauthorized Discharge of Pollutants into Waters of the US	05/2014	III

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of

Count I: 18 months, Count II: 18 Months, Count III: 18 months, the sentences to run concurrently.

☐ The court makes the following recommendations to the Bureau of Prisons:

■ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation of Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By_____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of

Count I: 1 year, Count II: 3 years, Count III: 1 year, to run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

■ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

■ The defendant shall cooperate in the collection of DNA a directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as

directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record, personal history, or characteristics and

shall permit the probation officer to make such notifications and confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall participate in and complete a program of substance abuse treatment as directed by the United States Probation Office, until the defendant is released from the program by the probation officer. The defendant is to pay part or all of the cost of this treatment, depending upon the defendant's ability to pay, as directed by the United States Probation Office.
2. The defendant shall participate in a program for mental health treatment as directed by the United States Probation Office, until such time as the defendant is released from the program by the probation officer. The defendant is to pay part or all of the cost of this treatment, depending upon the defendant's ability to pay, as directed by the United States Probation Office.
3. The defendant shall abstain from the consumption of alcohol and shall not enter establishments where alcohol is the primary item of sale. This condition supersedes standard condition number 7 with respect to alcohol consumption only.
4. The defendant shall participate in substance abuse testing, to include not more than 180 urinalysis test, not more than 180 breathalyzer tests, and not more than 36 sweat patch applications annually during the period of

supervision. The defendant shall pay all or part of the costs of testing, depending upon the defendant's to pay, as directed by the United States Probation Office.

5. The defendant will provide the United States Probation Officer with any requested financial information and shall incur no new lines of credit in the defendant's own name or in the name of any other person or entity without prior written approval of the United States Probation Officer.
6. The defendant shall apply all monies received from income tax refunds, lottery winnings, judgments, and/or any other anticipated or unexpected financial gains to the outstanding court-ordered financial obligations regarding restitution.
7. The defendant shall submit his person, residence, place of employment, vehicles, and papers, to a search, with or without a warrant by any probation officer based on reasonable suspicion of contraband or evidence in violation of a condition of release. Failure to submit to search may be grounds for revocation. The defendant shall warn any other occupants, adults and minors, that the premises may be subject to searches pursuant to this condition. The defendant shall allow seizure of suspected contraband for further examination.
8. The defendant shall not possess a firearm, ammunition, destructive devices, or any other dangerous weapon. This prohibition extends to all property and land on which he resides, including all vehicles and structures to which

he has access. Upon release by the BOP, the defendant shall remove all firearms, ammunition, destructive devices, or any other dangerous weapons within 5 days of the date of release and provide written verification and contact information for individuals taking possession of the firearms, ammunition, destructive devices, or any other dangerous weapons.

9. The defendant shall not knowingly enter any dwelling or house where firearms are present, and shall not enter or stay in any dwelling or house where there are one or more persons in possession of firearms, without the prior written approval of the supervising probation officer. The defendant shall not knowingly enter any automobile where a person possesses a firearm, nor shall he allow anyone onto his property if they are in possession of a firearm.
10. The defendant shall not possess any police radio scanning devices or possess computer hardware or software that would enable the defendant to monitor law enforcement activity, to include video and audio surveillance devices.
11. Restitution is ordered in the amount of $129,933.50 to be paid following release at a rate of $400 per month or as otherwise directed by the United States Probation Office depending upon the defendant's ability to pay.

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 300.00	$	$129,933.50

☐ The determination of restitution is deferred until ____ *An Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

■ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
U.S. Forest Service	$129,933.50	$129,933.50	
TOTALS	$ 129,933.50	$129,933.50	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

■ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

■ the interest requirement is waived for
☐ fine ■ restitution.

☐ the interest requirement for ☐ fine

☐ restitution is modified as follows:

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ■ Lump sum payment of $300.00 due immediately, balance due

☐ Not later than _____, or

■ In accordance with ☐ C, ☐ D, ☐ E, or ■ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____(e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____(e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____(e.g., weekly, monthly, quarterly) installments of $ _____

over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability pay at that time; or

F ■ Special instructions regarding the payment of criminal monetary penalties:

Criminal monetary penalty payments are due during imprisonment at the rate of not less than $25.00 per quarter, and payment shall be through the Bureau of Prisons' Inmate Financial Responsibility Program. Criminal monetary payments shall be made to the Clerk, United States District Court, P.O. Box 8537, Missoula, MT 59807.

Restitution in the amount of $129,933.50 is to be paid following release at a rate of $400 per month or as otherwise directed by the United States Probation Office dependent upon your ability to pay.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

JoAnn Corson Bacheller
Registered Diplomate Reporter
Certified Realtime Reporter
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United States Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	No. CR 15-7-H-DWM
vs.	)	**TRANSCRIPT OF SENTENCING**
JOSEPH DAVID ROBERTSON, Defendant.	)	

BEFORE THE HONORABLE DONALD W. MOLLOY
UNITED STATES DISTRICT COURT JUDGE
FOR THE DISTRICT OF MONTANA

Russell Smith United States Courthouse
201 East Broadway
Missoula, Montana 59802
Wednesday, July 20, 2016
10:02:27 to 13:15:32

Proceedings recorded by machine shorthand
Transcript produced by computer-assisted transcription

APPEARANCES

For the Plaintiff:

MR. BRYAN R. WHITTAKER
Assistant U.S. Attorney
901 Front Street, Suite 1100
Helena, Montana 59626

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Special Assistant U.S. Attorney
U.S. Environmental Protection Agency
Box 25227
Denver, Colorado 80225

For the Defendant:

MR. MICHAEL DONAHOE
Attorney at Law
Federal Defenders of Montana
50 West 14th Street, Suite 300
Helena, Montana 59624

[27]

* * * * *

THE COURT: . . .

I think there is a remarkably complete and good record made in this case, particularly by the efforts of Mr. Donahoe, to raise this serious legal question, but I think it's a situation where I am going to abide by the decisions that I've made in the past. It does require an answer, and I think that the Ninth Circuit is the correct authority to answer the question, if not the

United States Supreme Court. And I think that the record in this case probably is as good a record for answering the question of what are waters of the United States of any of the cases, I think, that exist.

* * * * *

[78]

* * * * *

THE COURT: Well, that may be. But let me start.

And where I will start is basically the critical and essential question, and that is that the Congress of the United States enacted the statutes and required the Corps of Engineers and the EPA to enforce the law.

However, as has been pointed out in the extensive arguments here today, that there are significant legal questions in the Supreme Court itself about how to define "waters of the United States."

So I'm going to start with a quote from the chief justice, who said, "It is unfortunate," in talking about the *Rapanos* decision, "It is unfortunate that no opinion," of the Supreme Court, "commands a majority of the court on precisely how to read Congress' limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis."

[79]

* * * * *

. . . . Joseph David Robertson has owned numerous patented and unpatented mining claims in Jefferson County.

A patented claim is a valid mining claim that has been sold by the government to an individual and is no longer public land. Both the land and the minerals contained in it become the property of the patent holder.

On the other hand, an unpatented claim is a possessory interest in a particular area solely for the purpose of mining, and it reserves to the United States the right to manage and dispose of surface resources.

And the use of an unpatented mining claim on public land is limited to activities that are reasonably incident to prospecting, mining, and processing operations and subject to the right of the United States to manage the surface resources.

Mr. Robertson and his wife, Carri Robertson, **[80]** currently own and reside on a 20-acre parcel known as the White Pine Lode. White Pine Lode is adjacent to an unpatented parcel of national Forest Service lands directly to the south, which is known as the Mohawk Lode, and a third patented parcel known as the Manhattan Lode, consisting of approximately 14 acres, and that is adjacent to the south of the Mohawk Lode.

An unnamed tributary flows through all three parcels and eventually runs into Cataract Creek approximately 1 mile from the parcels. Cataract Creek is a tributary of the Boulder River, which is a tributary of the Jefferson River. The Jefferson River is a traditionally navigable water of the United States. That is a fact the parties agreed to before the trial of this defendant.

* * * * *

[97]

* * * * *

He is a veteran of the Navy. He claims that he is a Vietnam-era veteran with posttraumatic stress. He has been hospitalized on several occasions and, as indicated, completed the TRU program through the Veterans Administration.

* * * * *

Appendix E-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOSEPH DAVID ROBERTSON, Defendant.	CR 15-07-H-DWM ORDER FILED May 23, 2016 Clerk, U.S. Courts District of Montana, Missoula Division

A jury trial was held April 4 through April 7, 2016.[1] After the close of the government's case, Defendant Joseph Robertson moved for acquittal as to all three counts of the Indictment pursuant to Rule 29 of the Federal Rules of Criminal Procedure. (Trial Tr. 590-98.) That motion was denied. Robertson renewed his motion at the close of all the evidence, and the Court reserved ruling, Fed. R. Crim. P. 29(b). (Trial Tr. 830.) On April 7, 2016, the jury returned guilty verdicts on all three counts: two violations of the Clean Water Act (Counts I, III) and one count of willful injury to property of the United States (Count II). (Doc. 204.) On April 21, 2016, Robertson renewed his motions and moved for a new trial pursuant to Rule 33. (Doc. 213.) His motions are denied.

[1] The first jury trial in this case occurred on October 5 to 8, 2015, and resulted in a hung jury. (*See* Doc. 78. Decl. of Mistrial.) A second trial was set on December 14, 2015, (Doc. 79), but Robertson did not appear due to alleged medical issues, and it was continued, (*see* Doc. 135).

I. Rule 29—Sufficiency of the Evidence

Pursuant to Rule 29(c)(2), "[i]f the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal." A Rule 29 motion may not be granted if "viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Nevils,* 598 F .3d 1158, 1164 (9th Cir. 2010). Here, Robertson contends the evidence presented at trial was insufficient to support a conviction. For Count II, he argues that the government failed to present evidence of property boundaries. For Counts I and III, he argues that the evidence presented was insufficient to show that the waters in question are "waters of the United States."[2] Those arguments are addressed in turn.

A. Count II: Property of United States

Count II charges Robertson with willfully injuring property of the United States. Robertson argues that the government failed to present evidence as to the property boundary. (*See* Trial Tr. 592-93.) He is incorrect. Agent Fisher testified at some length to the various property boundaries in the area. (*Id.* at 87-92). Two surveys were conducted by the Forest Service, (*id.* at 88; *see* Ex. 47), and the boundaries were marked, (Trial Tr. 88; *see* Ex. 2u (depicting red

[2] Robertson raises numerous arguments for the first time in his reply brief that are not addressed herein. *Thompson v. Comm'r,* 631 F.2d 642, 649 (9th Cir. 1980). Even if the Court were to consider his untimely arguments, the issues he raises have been previously considered and rejected. (*See* Docs. 37, 107, 117, 172, & 175.)

and yellow corner boundary marker); Ex. 2v (depicting yellow boundary sign and red paint on tree)). The record also includes the property record from the Montana Cadastral. (Trial Tr. 533; Ex. 58.) Additionally, both Agent Fisher and Agent Siler testified to where the property line fell in relation to the ponds, indicating that at least five ponds are on National Forest System lands. (Trial Tr. 106, 121-22 (Fisher); 571, 578-79 (Siler).) The evidence presented was sufficient for a rational juror to conclude beyond a reasonable doubt that the property at issue in Count II belonged to the United States.

B. Counts I, III: Clean Water Act

Robertson further argues that the government failed to present sufficient proof to show that the waters at issue in Counts I and III were "waters of the United States," a necessary element of the Clean Water Act. *See* 33 U.S.C. § 1311(a). His position is belied by the record.

As a starting point, sufficient evidence was presented from which a rational juror could find that the tributary and its adjacent wetlands have a hydrological connection with traditionally navigable waters. While a mere hydrological connection is insufficient to establish the existence of a significant nexus, *Rapanos v. United States,* 547 U.S. 715, 785 (2006) (Kennedy, J., concurring), such a connection is relevant because completely isolated waters are generally beyond the Clean Water Act's scope, *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs,* 531 U.S. 159, 171-72, 174 (2001). Here, the parties agree that the Jefferson River is a traditionally navigable water. (Instr. No. 22, Doc. 196 at 23.) During his testimony, Todd Tillinger, a civil

engineer with the Army Corps of Engineers, outlined the Cataract Creek watershed, including the drainage in question, (Trial Tr. 401-06; Exs. 13, 15, 17), and explained the hydrological connection between the unnamed tributary and the Jefferson River, via Cataract Creek and the Boulder River, (Trial Tr. 398, 406). Tillinger showed an aerial image of the length of the stream, (*id.* at 407-11; Ex. 18), and discussed walking the entire length of the tributary from the ponds to Cataract Creek, noting the tributary's flow the entire length of the way, (Trial Tr. 425-35 (October 2014 site visit); 440-41 (November 2015 site visit)). Richard Clark, an environmental scientist for the Environmental Protection Agency and an expert in the field of identification and classification of wetlands, also testified to walking the length of the tributary and observing both a defined bed and bank, as well as flowing water. (*Id.* at 489.)

Additionally, Scott Gillilan, an aquatic restoration expert, testified that he performed a visual flow test on the tributary near the ponds, estimating the tributary's flow at 8-16 gallons per minute. (*Id.* at 519; *see also id.* at 693 (defense witness Gary Hopkins testified that flow at end of tributary into Cataract Creek measured 8 gallons per minute); Ex. 28 at p. 296 (Plan of Operations indicating that at least 2-5 gallons per minute were flowing in area prior to disturbance).) And, both Agent Fisher and Agent Siler stated that every time they visited the site they saw water flowing in the still-existing portions of the tributary near the ponds. (Trial Tr. 131, 145 (Fisher); 576 (Siler).) Viewed as a whole, this evidence was sufficient for a jury to find a hydrological connection even with the possibility that the tributary was entirely frozen during portions of the year. (*See, e.g.*,

Trial Tr. 306, 335); *United States v. Moses,* 496 F.3d 984, 990-91 (9th Cir. 2007) (holding intermittent, seasonal streams can be waters of the United States).

The next question then is whether there was sufficient evidence presented to show that the hydrological connection was chemically, physically, or biologically significant. *Rapanos,* 547 U.S. at 780 (Kennedy, J., concurring). There was. Tillinger testified at length about the chemical, physical, and biological effects this tributary and adjacent wetland have on the water system. (*See* Trial Tr. 374-78, 435-39.) Darin Watschke, a fisheries biologist for the United States Forest Service, and Ron Spoon, a fisheries biologist with the Montana Fish, Wildlife and Parks, both testified that the turbidity and temperatures of the water in the tributary and adjacent wetlands at issue affect downstream waters, impacting fish populations in Cataract Creek and the Jefferson River. (*Id.* at 286, 290-91 (Watschke), 236, 247, 249-50 (Spoon).) Clark testified to the existence of wetland conditions at the site, (*id.* at 495-97; Exs. 61, 62, 63), and identified the wetlands as "high watershed wetlands, or upland watersheds" that affect water temperatures, flood and erosion control, and animal and insect habitat for the entire system, (Trial Tr. 498-501). Gillilan also remarked on the nature of the undisturbed wetlands he was able to view between and around the ponds, describing them as "pristine and high quality, good condition. Very diverse wetland and very healthy." (*Id.* at 518.) Gillilan further commented on the high quality of the tributary based on the important role small headwater stream systems such as this play in the larger water system. (*Id.* at 432-34, 522.) He explained how the headwaters streams and wetlands act as a

giant sponge for the watershed, filtering sediments, processing nutrients, and regulating water temperature, noting that "everything is cumulative." (*Id.* at 523.) Tillinger and Spoon also emphasized the cumulative impact of this tributary and its adjacent wetlands based on other similarly situated headwaters tributaries in the area. (*Id.* at 402, 476 (Tillinger); 257, 274 (Spoon).)

To the extent that Robertson's argument is premised on the idea that the government was required to show the results of various tests or that Robertson's discharge caused harm to traditional navigable waterways, such a showing is not required under the law. *See United States v. Iverson,* 162 F.3d 1015, 1021 (9th Cir. 1998) (affirming district court's decision not to give instruction that required government to show pollutive effect). Construing the proof in the light most favorable to the government, sufficient evidence was presented from which a rational juror could find that the significant nexus test was met for both the tributary and its adjacent wetlands.

II. Rule 33—New Trial on Counts I and III

Robertson further requests a new trial pursuant to Rule 33 as to Counts I and III for the improper exclusion of the EPA/Corps Guidance Manual, (Ex. 549), and for prohibiting defense counsel from questioning Mr. Spoon on, and refusing to grant judicial notice of, the Crystal Mine Study, (*see* Doc. 65 (offer of proof)). A "court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). In considering a motion for a new trial, district courts are not obliged to view the evidence in the light most favorable to the verdict, but

are free to weigh the evidence and evaluate the credibility of witnesses. *United States v. Kellington,* 217 F.3d 1084, 1097 (9th Cir. 2000).

Robertson first argues the Court erred in refusing to admit Exhibit 549, a guidance manual titled "U.S. Army Corps of Engineers Jurisdictional Determination Form Instruction Guidebook." He is incorrect. Exclusion of the Guidebook was proper under Rule 403 as the danger of confusing the issues and misleading the jury substantially outweighed the potential probative value of admitting the entire Guidebook. The Guidebook is used by the Army Corps of Engineers in its performance of jurisdictional determinations and, as such, discusses the applicable regulations and the law. It is well settled, however, that while questions of fact are to be decided by the jury, questions of law are to be decided by the Court. *See United States v. Amparo,* 68 F.3d 1222, 1224 (9th Cir. 1995) ("While the jury is the arbiter of the facts, the judge is the arbiter of the law: the judge must be permitted to instruct the jury on the law and to insist that the jury follow his instructions."). Regardless of the status of the law under the Clean Water Act or how the law was explained in the Guidebook, the jury was instructed on a comprehensible standard that it was to follow. Moreover, defense counsel questioned Tillinger about certain provisions in the Guidebook, (Trial Tr. 456-57 (asking Tillinger about ditches)), and was given the opportunity to have the witness read relevant portions of the Guidebook into the record pursuant to Rule 803(18), which allows for a statement contained in a learned treatise that is relied upon by the expert on direct examination and is established as a reliable authority by the expert's

testimony to be read into evidence, but not received, (i*d.* at 465).

Finally, Robertson insists a new trial is warranted because the Court did not judicially note nor allow defense counsel to question Mr. Spoon on the Crystal Mine Study. (Doc. 65.) Robertson argues that the failure to do so gave the distorted picture of Cataract Creek as a healthy waterway despite extensive mining pollution. The exclusion was appropriate because the significant nexus test is not contingent on a healthy watershed. *Iverson,* 162 F.3d at 1021. The Crystal Mine Study is not relevant, Fed. R. Evid. 401, and the potential prejudice from its introduction strongly outweighs any probative value, Fed. R. Evid. 403.

Accordingly, IT IS ORDERED that Robertson's motions for acquittal and for a new trial (Doc. 213) are DENIED.

Dated this 23rd day of May, 2016.

s/ Donald W. Molloy
Donald W. Molloy, District Judge
United States District Court

Appendix F-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOSEPH DAVID ROBERTSON, Defendant.	CR 15-07-H-DWM VERDICT FILED April 7, 2016 Clerk, U.S. District Court District of Montana Missoula

1. We, the Jury in the above-entitled matter, unanimously find the defendant, Joseph David Robertson:

_____ Not Guilty

__X__ Guilty

of unauthorized discharge of pollutants into waters of the United States, as charged in Count I of the indictment.

2. We, the Jury in the above-entitled matter, unanimously find the defendant, Joseph David Robertson:

_____ Not Guilty

__X__ Guilty

of malicious mischief/injury to property of the United States, as charged in Count II of the indictment.

3. We, the Jury in the above-entitled matter, unanimously find the defendant, Joseph David Robertson:

_____ Not Guilty

__X__ Guilty

of unauthorized discharged of pollutants into waters of the United States, as charged in Count III of the indictment.

Date this 7th day of April, 2016.

Foreperson signature redacted. Original document filed under seal.

JoAnn Corson Bacheller
Registered Diplomata Reporter
Certified Realtime Reporter
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406/829-7123 office
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United States Court Reporter

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION**

UNITED STATES OF AMERICA, Plaintiff,	)	No. CR 15-7-H-DWM
vs.	)	**VOLUME 1 TRANSCRIPT OF JURY TRIAL**
JOSEPH DAVID ROBERTSON, Defendant.	)	

**BEFORE THE HONORABLE DONALD W. MOLLOY
UNITED STATES DISTRICT COURT JUDGE
FOR THE DISTRICT OF MONTANA**

Russell Smith United States Courthouse
201 East Broadway
Missoula, Montana 59802
Monday, April 4, 2016
08:05:32 to 09:18:05, 12:08:01 to 17:07:10

Proceedings recorded by machine shorthand
Transcript produced by computer-assisted transcription

[184]

* * * * *

MR. WHITTAKER: The government calls Tom Carey.

THE COURT: Mr. Carey, would you come all the way up to the front, in front of the clerk here, raise your right hand and be sworn?

(Oath administered to the witness.)

THE COURT: Have a seat right over here. Would you tell the jury your full name? And, if you would, spell your last name for them.

THE WITNESS: Thomas Gilbert Carey, Jr., C-a-r-e-y.

* * * * *

[203]

* * * * *

Q Okay. And is that channel that you're talking about, how wide is it?

A It was probably a foot wide.

Q And about 18 inches deep? Is that what you're saying?

A If I remember correctly, yes.

* * * * *

[213]

VOLUME 1 REPORTER'S CERTIFICATE

I, JoAnn Corson Bacheller, a Registered Diplomate Reporter and Certified Realtime Reporter,

certify that the foregoing transcript is a true and correct record of the proceedings given at the time and place hereinbefore mentioned; that the proceedings were reported by me in machine shorthand and thereafter reduced to typewriting using computer-assisted transcription; that after being reduced to typewriting, a certified copy of this transcript will be filed electronically with the Court.

I further certify that I am not attorney for, nor employed by, nor related to any of the parties or attorneys to this action, nor financially interested in this action.

IN WITNESS WHEREOF, I have set my hand at Missoula, Montana this 14th day of April, 2016.

/s/ JoAnn Corson Bacheller
JoAnn Corson Bacheller
United States Court Reporter

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United States Court Reporter

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION**

UNITED STATES OF AMERICA, Plaintiff,	)	No. CR 15-7-H-DWM
vs.	)	**VOLUME 2 TRANSCRIPT OF JURY TRIAL**
JOSEPH DAVID ROBERTSON, Defendant.	)	

**BEFORE THE HONORABLE DONALD W. MOLLOY
UNITED STATES DISTRICT COURT JUDGE
FOR THE DISTRICT OF MONTANA**

Russell Smith United States Courthouse
201 East Broadway
Missoula, Montana 59802
Tuesday, April 5, 2016
08:17:18 to 17:16:51

Proceedings recorded by machine shorthand
Transcript produced by computer-assisted transcription

* * * * *

[230]

* * * * *

WHEREUPON,

MR. RONALD L. SPOON, called for examination by counsel for plaintiff, after having been first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

* * * * *

[243]

Q Okay. How would you describe the stream?

A It was a small stream that runs through a meadow with timber on both sides of this meadow, and a stream that's less than a foot or two wide and less than a foot deep.

* * * * *

[367]

MR. NELSON: The government calls Todd Tillinger.

THE COURT: Would you come up to the front of the room, in front of the clerk here, raise your right hand, and be sworn as a witness?

(Oath administered to the witness.)

THE COURT: Have a seat right over here, please. Would you please tell the jury your full name?

THE WITNESS: My name is Todd Nicholas Tillinger.

* * * * *

[403]

I'd like to show you Exhibit 15, which is already in evidence.

And what is the jury looking at here?

A This is a printout from the same software package but it's a—it's the same image you would find on the 1-to-24,000 or 7.5-minute USGS quadrangle map. The ponds, you can see the place right there, it says "Ponds," and it's got a latitude and longitude on it. This is a zoomed-in view of the bottom part of that Cataract Creek watershed. Cataract Creek would go from the top of the screen, flowing from the top to the bottom. And then there's a solid blue line here that goes up, and there's another blue line that comes in down here, and the pond area would be, you know, up in this area.

* * * * *

[406]

* * * * *

Q All right. I'd like to show you Exhibit 17. And is this another topographic map, different scale?

A It is. It's a slightly zoomed-out scale, 1 to 250,000. And again, the pond area is in the same location here, but it's zoomed out far enough that you have, you know, Cataract Creek coming down here. You've got the Boulder River coming this way, eventually flowing into the Jefferson River. And the Jefferson River comes here, joins—the Boulder joins it.

* * * * *

[427]

* * * * *

But the channel is there. I mean, it's a continuous channel about 1 to 2 feet wide, you know, 6 inches deep, and

* * * * *

[432]

* * * * *

Q All right. I'd like to show you Exhibit 23A, which is already in evidence so the jury can see it.

A Okay.

Q Could you describe what we're looking at there?

A Yeah. This is my right arm and hand. There's a GPS unit, a little hand-held like you'd use on a hike or a backpacking trip. And this is a small channel here. It gives you an idea of the size of channel at this place. It's, you know, several inches deep. And this is, this is representative of the size and scale of channel that flows for almost half a mile down to Cataract Creek.

* * * * *

[514]

* * * * *

THE WITNESS: My name is Scott Gillilan, G-i-l-l-i-l-a-n.

THE COURT: And, Mr. Gillilan, what city do you live in?

THE WITNESS: I live in Bozeman.

THE COURT: And what is your profession or occupation?

THE WITNESS: I am a hydrologist.

THE COURT: Mr . Nelson.

WHEREUPON,

MR. SCOTT GILLILAN, called for examination by counsel for plaintiff, after having been first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

* * * * *

[519]

* * * * *

Q Did you try to estimate or could you estimate, just based on visual observation, some estimate of the amount of flow?

A Yeah. I estimated, when I was out in the field, 8 to 16 gallons per minute. Basically two or three garden hoses at one time are about, you know, three or four minutes to fill a 55-gallon drum.

* * * * *

[550]

VOLUME 2 REPORTER'S CERTIFICATE

I, JoAnn Corson Bacheller, a Registered Diplomate Reporter and Certified Realtime Reporter, certify that the foregoing transcript is a true and correct record of the proceedings given at the time and place hereinbefore mentioned; that the proceedings were reported by me in machine shorthand and thereafter reduced to typewriting using computer-assisted transcription; that after being reduced to

typewriting, a certified copy of this transcript will be filed electronically with the Court.

I further certify that I am not attorney for, nor employed by, nor related to any of the parties or attorneys to this action, nor financially interested in this action.

IN WITNESS WHEREOF, I have set my hand at Missoula, Montana this 15th day of April, 2016.

/s/ JoAnn Corson Bacheller
JoAnn Corson Bacheller
United States Court Reporter

JoAnn Corson Bacheller

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United States Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	No. CR 15-7-H-DWM
vs.	)	**VOLUME 3 TRANSCRIPT OF JURY TRIAL**
JOSEPH DAVID ROBERTSON, Defendant.	)	

BEFORE THE HONORABLE DONALD W. MOLLOY
UNITED STATES DISTRICT COURT JUDGE
FOR THE DISTRICT OF MONTANA

Russell Smith United States Courthouse
201 East Broadway
Missoula, Montana 59802
Wednesday, April 6, 2016
08:19:31 to 17:10:47

Proceedings recorded by machine shorthand
Transcript produced by computer-assisted transcription

* * * * *

[638]

* * * * *

THE COURT: Would you call your next witness, please?

Would you come all the way up to the front of the room, please, raise your right hand, and be sworn?

(Oath administered to the witness.)

THE COURT: Have a seat over here, please.

THE WITNESS: (Complied with request.)

THE COURT: Would you introduce yourself to the jury, telling them your full name, what city you live in, and what your profession is?

THE WITNESS: I'm Gary Hopkins. I live in Helena, Montana, and I'm an investigator with the Federal Defenders of Montana.

THE COURT: Mr. Donahoe.

MR. DONAHOE: Thank you.

WHEREUPON,

MR. GARY HOPKINS, called for examination by counsel for defendant, after having been first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

* * * * *

[642]

* * * * *

Q All right, Mr. Hopkins. So this is your first photo?

A Yes, it is.

Q All right. Before I get into the specific photos and we go through them, can you tell me what entire distance you walked that day?

THE COURT: Can we blow the photos up, too, as we're **[643]** coming through?

MR. DONAHOE: Sure. Anything the Court thinks is appropriate there.

THE WITNESS: We did it in two sections. We did it the top section down to the Robertsons' property, and that was 2,100 feet in distance. And then we started at the bottom of their property, or the last pond, and down to Cataract Creek was another 4,134 feet in distance.

BY MR. DONAHOE :

Q So a little over a mile or thereabouts?

A The last section below the ponds was 4/5th of a mile.

Q Okay. So this first picture, what does this depict?

A This is the top of the drainage at the road intersection, and it's an excavated seep area. So this is just kind of a wet area up by the road that goes up around the top of the property, towards the top of the ridge, and this is the first moisture that is notable up in that area.

MR. DONAHOE: And can I see -01, 501?

DOCUMENT TECHNICIAN: (Complied with request.)

THE WITNESS: That's, that's another picture of the same.

BY MR. DONAHOE :

Q And -03.

A Some more of the same. Just pointed in another—pointed downhill in another direction.

[644]

Q All right. Now in—this is at the top of the property?

A This is at the top of the drainage.

Q At the top of the drainage. Well, where is it in relation to Mr. Robertson's property?

A Above his property.

Q Okay. So it's at the top of the property?

A Well, his property ends and the drainage keeps going, so it's the drainage above his property.

Q Okay. And I understand that. So is there some kind of channel here that leads down?

A No channel yet.

Q All right. Next picture.

A Okay. This is down 233 feet. Continuous intermittent seep area. No channelized flow.

Q Now is the channel beginning to take shape here or—

A I'm sorry; what number are we on?

Q This is 504.

A Okay. That's 504. Yes. 504, first evidence of a V-shaped channel. No surface flow but some damp soil in there.

Q And 505.

A First evidence of puddling in the channel.

Q And -6?

A Channel feature not obvious. No flowing surface water. So we're kind of losing the channel again there.

[645]

Q -7?

A Evidence of surface channel.

Q Can you wait until we get to the—yeah. This is 507.

A Evidence of surface channel, but it's dry.

Q And on to -8.

A Okay. Continue within drainage. No obvious channel. And it's dry.

Q And -9.

A And this is an old spring area. It's been excavated about 6 feet in diameter.

Q And how about -10?

A This is a discharge from the spring and its infiltration into the soil.

Q Now how far, if you know, from the top of the drainage are you here?

A Okay. We are 118—1,821 feet.

All right. So this is—these are measurements that you' re conducting as you walk?

A Yes.

Q Okay. And -11?

A Okay. And that is a surface seep tapped with piping for domestic water supply.

* * * * *

[648]

A Now this is a series of three pictures at 1,473 feet down from the last pond, and here the surface flow seeps underground .

Q So these, this picture and the next two, are sort of related?

A Yes. This is an area where the water has disappeared from the surface. There's no channeling or surface water.

* * * * *

[713]

* * * * *

MR. JOSEPH DAVID ROBERTSON, called for examination by counsel for defendant, after having been first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

* * * * *

[725]

* * * * *

Q All right. Mr. Robertson, if—so you were trying to develop the groundwater; is that it?

A Yes, sir.

Q All right. Why were you trying to do that?

A Like I said before, we've had numerous fires in this area, and we'd been threatened in 2013. We had a fire up below these ponds that could have came up and wiped us out, our home, our friends.

Q Okay. Now about fire suppression, have you ever been engaged in the fire-fighting business, the forest fire-fighting business?

A Yes, sir. My wife has a fire truck, a Tactical Tender, 3,000-gallon. Her contract has been in effect for a little over ten years, but the Forest Service canceled it last year. She no longer works for—we no longer works for the fire.

Q All right. I don't want to spend a lot of time there, but suffice it to say that you were actually engaged in the business of fire-fighting?

A Yes, sir. With many fires. Probably 50 fires.

Q All right. And you had equipment and so on?

[726]

A Yes, sir.

Q Now how, if at all, did these ponds figure into that equation or thinking about fire-fighting?

A Over the years, we've learned that we need several drafting points, and because if you have several, say, 20, 30, 50 pieces of equipment, we need a drafting point, more than one. Never had ran into where we had more—didn't have—we had too many. Never, on a fire. When our property—when property is threatened, you want the trucks being able to go

through and fill up. And if you got one drafting point and 20 trucks, you're in trouble.

* * * * *

[893]

VOLUME 3 REPORTER'S CERTIFICATE

I, JoAnn Corson Bacheller, a Registered Diplomate Reporter and Certified Realtime Reporter, certify that the foregoing transcript is a true and correct record of the proceedings given at the time and place hereinbefore mentioned; that the proceedings were reported by me in machine shorthand and thereafter reduced to typewriting using computer-assisted transcription; that after being reduced to typewriting, a certified copy of this transcript will be filed electronically with the Court.

I further certify that I am not attorney for, nor employed by, nor related to any of the parties or attorneys to this action, nor financially interested in this action.

IN WITNESS WHEREOF, I have set my hand at Missoula, Montana this 16th day of April, 2016.

/s/ JoAnn Corson Bacheller
JoAnn Corson Bacheller
United States Court Reporter

Appendix H-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. JOSEPH DAVID ROBERTSON, Defendant.	CR 15-07-H-DWM OPINION and ORDER FILED Nov. 30, 2015 Clerk, U.S. District Court District of Montana Missoula

Defendant Joseph David Robertson ("Robertson") was charged by indictment with violations of the Clean Water Act, 33 U.S.C. § 1319(c)(2)(A), and for willfully injuring property of the United States, 18 U.S.C. § 1361. The government alleges that Robertson conducted excavation and pond construction activities between 2013 and 2014 on and around mining claims in Jefferson County, Montana that caused a discharge of pollutants into waters of the United States (Counts I, III)[1] and caused damage to National Forest System Lands (Count II). (*See* Indict., Doc. 3.)

On October 5, 2015, Robertson proceeded to trial on all three counts. On the second day of trial, he filed a motion to dismiss for lack of jurisdiction, (Doc. 62), and moved for a judgment of acquittal under Rule

[1] Count I involves conduct on National Forest System Lands and Count III involves conduct on an unpatented mining claim, the Manhattan Lode. (*See* Indict., Ex. A, Doc. 3.)

29, (Tr. Trans. 389-90).[2] At the conclusion of the government's case, those motions were denied. (*Id.* at 415, 473.) Robertson renewed his motions at the close of his case, and they were again denied. (*Id.* at 565.) On October 8, 2015, the jury indicated that it could not reach a unanimous verdict on any of the three counts, (*id.* at 628, 632-36), and a mistrial was declared, (Decl. of Mistrial, Doc. 78; Tr. Trans. 642). Robertson now seeks acquittal post-trial under Rule 29(c) of the Federal Rules of Criminal Procedure as to all three counts. (Docs. 92 (Counts I, III) & 94 (Count II).) Robertson's motions are denied.

SUMMARY CONCLUSION

Sufficient evidence was presented at trial from which a rational trier of fact could have found the essential elements of the offenses alleged in all three counts of the Indictment beyond a reasonable doubt. As to Counts I and III, the jury was instructed on Justice Kennedy's "significant nexus" test outlined in his concurrence in *Rapanos v. United States*, 575 U.S. 715 (2006), and sufficient evidence was presented from which a rational juror could find, beyond a reasonable doubt, that the waters at issue here met that standard. Sufficient evidence was also presented to show the property at issue in Count II belonged to the United States.

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[2] The Trial Transcript is found at Docs. 86-89. To avoid confusion, citations to the transcript will be to the page number denoted by the Court Reporter, not the page number connected to the docket entry (e.g., Tr. Trans. 222).

STANDARD

Pursuant to Rule 29(c)(2), "[i]f the jury has failed to return a verdict, the court may enter a judgment of acquittal." A Rule 29 motion may not be granted if "viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). Courts "may not usurp the role of the finder of fact by considering how it would have resolved the conflicts, made the inferences, or considered the evidence at trial." *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010).

ANALYSIS

Robertson contends the evidence presented at trial was insufficient to support a conviction on all three counts of the Indictment. In regards to Counts I and III, Robertson argues the government failed to articulate a lawful standard for what qualifies as "waters of the United States" and that the evidence presented was not sufficient to establish that the waters in question are "waters of the United States." In regards to Count II, Robertson argues that the evidence presented at trial was insufficient to establish that the property implicated was "property of the United States." Those arguments are addressed in turn.

I. Counts I and III: Clean Water Act

The jury was instructed that in order to find Robertson guilty on Counts I or III, the government must prove beyond a reasonable doubt that: (1) the defendant knowingly discharged a pollutant; (2) the

pollutant was discharged from a point source; (3) the discharge was into "waters of the United States," which are those tributaries and/or adjacent wetlands that have a significant nexus to traditional navigable waters; and (4) the discharge was done without a permit. (Instr. No. 15, Doc. 71 at 15.) Robertson's motion for acquittal focuses on the third element, whether the discharge was into "waters of the United States."

A. The "Significant Nexus" Test

Robertson first argues that the inability of the Supreme Court or the administrative agencies to clarify an understandable definition of "waters of the United States" warrants relief under Rule 29(c). Robertson is incorrect. While Robertson's criticism of the confusion surrounding the definition of "waters of the United States" may have a ring of truth, *see United States v. Moses*, 496 F.3d 984, 988 (9th Cir. 2007) (noting that the "facially simple provisions" of the Clean Water Act "are not hyaline"), the jury here was instructed on an intelligible standard, the "significant nexus" test outlined by Justice Kennedy in his concurrence in *Rapanos*.

In *Rapanos,* the Supreme Court considered the Clean Water Act in the context of Michigan wetlands positioned near ditches or man-made drains. There a plurality of the Court held that "waters of the United State" "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." *Rapanos*, 547 U.S. at 739 (internal quotation marks and alterations omitted). And, for wetlands, the plurality held a "continuous surface connection" is

required. *Id.* at 742. In his concurrence, Justice Kennedy articulated a different standard for wetlands based on a "significant nexus" between the bodies of water at issue and traditional navigable waters. *Id.* at 759-87 (Kennedy, J., concurring).

When a majority of the Supreme Court agrees only on the outcome of a case and not on the grounds for that outcome, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal quotations omitted). Of those circuit courts that have considered *Rapanos,* many have concluded that Justice Kennedy's opinion constitutes the narrowest holding,[3] including the Ninth Circuit. *N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 999-1000 (9th Cir. 2007). Accordingly, Justice Kennedy's concurring "significant nexus test" controls in this case. *See Moses*, 496 F.3d at 990 (applying Justice Kennedy's opinion as the controlling rule of law in a criminal Clean Water Act action).[4] *Rapanos*

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[3] *See e.g. United States v. Bailey*, 571 F.3d 791, 798 (8th Cir. 2009); *United States v. Robison*, 505 F.3d 1208, 1221-22 (11th Cir. 2007); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723, 724-25 (7th Cir. 2006) (per curiam).

[4] In a civil case following *Rapanos*, the Ninth Circuit stated that its previous caselaw did not "foreclose the argument that Clean Water Act jurisdiction may also be established under the plurality's standard." *N. Cal. River Watch v. Wilcox*, 633 F.3d 766, 781 (9th Cir. 2010). And, at least one district has applied both standards in the criminal context. *See United States v. Vierstra*, 803 F. Supp. 2d 1166, 1170-71 (D. Idaho 2011) (holding that the body of water met the statutory and regulatory definitions of "waters of the United States" consistent with "the *Rapanos* decision" after separately applying both tests). However, in affirming that decision, the Ninth Circuit cited only

has been the law in this area for almost a decade, and the Ninth Circuit has applied the standard outlined in Justice Kennedy's concurrence in criminal cases on more than one occasion. *See id. United States v. Vierstra*, 492 Fed. Appx. 738, 740 (9th Cir. 2012) (unpublished).

Under his test, Justice Kennedy interpreted "waters of the United States" to encompass wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Rapanos,* 547 U.S. at 759 (Kennedy, J., concurring). A "significant nexus" exists "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 780. "When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" *Id.* For tributaries, Justice Kennedy stated that while the existence of an ordinary high water mark "may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute 'navigable waters' under the Act," the breadth of the standard does not adequately account for the significant nexus considerations for adjacent wetlands. *Id.* at 781-82. Justice Kennedy calls for a case-by-case significant nexus analysis of wetlands adjacent to non-navigable tributaries. *Id.* at 782. The

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Justice Kennedy's significant nexus test and *City of Healdsburg. United States v. Vierstra*, 492 Fed. Appx. 738, 740 (9th Cir. 2012) (unpublished).

Ninth Circuit has since determined that intermittent, seasonal streams can be waters of the United States under this test. *Moses*, 496 F.3d at 990-91.

The jury in this case was instructed that "'waters of the United States' includes traditional navigable waters and tributaries and/or adjacent wetlands that have a significant nexus to traditional navigable waters." (Final Jury Instr. No. 23, Doc. 71 at 23.) The jury was further instructed that "[a] tributary or adjacent wetland has a significant nexus to traditional navigable waters if it (either alone or in combination with similarly situated water bodies in the region) significantly affects the chemical, physical, or biological integrity of traditional navigable waters." (*Id.*) Instruction Number 23 also defined "traditional navigable waters," "tributaries," "wetlands," and "adjacent." (*Id.*) Accordingly, the jury was provided with a coherent standard to apply in determining whether the waters in question were "waters of the United States."

B. Sufficiency of Evidence

Robertson further argues that even if "waters of the United States" can be defined, the proof presented at trial was insufficient to establish that the waters in question here meet that definition. Robertson insists that the testimony presented by Todd Tillinger, Montana State Program Manager for the United States Army Corps of Engineers and one of the government's primary witnesses, was flawed because it relied on jurisdictional guidance and the existence of an ordinary high water mark, which he argues did not reflect the significant nexus test. Robertson also criticizes Tillinger's purported failure to perform a flow test. Despite these alleged shortcomings, the

evidence presented at trial was sufficient that a rational trier of fact, viewing it in the light most favorable to the government, could have found beyond a reasonable doubt that the waters here have a significant nexus to a traditionally navigable waterway.

As a starting point, sufficient evidence was presented from which a rational juror could find that the tributary and its adjacent wetlands have a hydrological connection with traditionally navigable waters. While a mere hydrological connection is likely insufficient to establish the existence of a significant nexus, *Rapanos,* 547 U.S. at 785 (Kennedy, J., concurring), such a connection is relevant because completely isolated ponds and waters have been found to be largely beyond the Clean Water Act's scope, *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 171-72, 174 (2001). Here, the parties agreed that the Jefferson River is a traditionally navigable water and a water of the United States. (Instr. No. 23, Doc. 71 at 23.) During his testimony, Tillinger outlined the Cataract Creek watershed, including the drainage in question, (Tr. Trans. 297-98), and explained the hydrological connection between Cataract Creek and the Missouri River, via the Boulder and Jefferson Rivers, (*id.* at 303-04). In describing the existence and characteristics of the unnamed tributary at issue, Tillinger showed an aerial of the length of the stream. *(Id.* at 305.) Tillinger also discussed a site visit that occurred in October 2014, when he walked the entire length of the tributary from the ponds to Cataract Creek, noting that the tributary had flow the entire length of the way (approximately 2,500 feet). *(Id.* at 320.) Richard Clark, an environmental scientist for

the Environmental Protection Agency, also testified to walking the entire length of the tributary's drainage below the ponds and saw water flowing in the channel. (*Id.* at 420-21.) Both Agent Fisher and Agent Siler stated that every time they have visited the site they saw water flowing in the still-existing portions of the tributary near the ponds. (*Id.* at 102 (Fisher), 420 (Siler).) Additionally, Scott Gillilan, an aquatic restoration expert, testified that he performed a visual flow test on the tributary near the ponds, which he referred to as the "garden hose" test. (*Id.* at 433.) Gillilan estimated the tributary had a flow of 8-16 gallons based on what it looked like compared to a garden hose. (*Id.)* Viewed as a whole, this evidence was sufficient for a jury to find the existence of a hydrological connection.

The next question then is whether there was sufficient evidence presented to show that the hydrological connection was chemically, physically, or biologically significant. *Rapanos,* 547 U.S. at 780 (Kennedy, J., concurring). There was. The government specifically asked Tillinger about the general chemical, physical, and biological effects tributaries and adjacent wetlands can have in a water system. (*See* Tr. Trans. 325-28.) When asked whether he believed "the tributary and adjacent wetlands flowing through the National Forest Service lands and [the Manhattan Lode] have a significant nexus to the traditional navigable water Jefferson River," Tillinger responded, "[i]t does." *(Id.* at 328.)

Other witnesses also testified to the chemical, physical, and biological connection at issue here. Darin Watschke, a fisheries biologist for the United States Forest Service, and Ron Spoon, a fisheries

biologist with the Montana Fish, Wildlife and Parks, both testified that the turbidity and temperatures of the water in the tributary and adjacent wetlands at issue could affect downstream waters, impacting fish populations in Cataract Creek and the Jefferson River. (*Id.* at 265-67 (Watschke), 210-14, 218-20 (Spoon).) Clark also testified to the specific filtering and temperature stabilizing function wetlands play in a water system and how downstream waters are impacted when wetlands are disturbed or destroyed. (*Id.* at 380, 387, 427.) He estimated that approximately 1.5 acres of wetlands were disturbed here. (*Id.* at 387.) Gillilan also emphasized the importance headwater streams and wetlands have on overall watershed, describing the wetland at issue here as a "high quality wetland." (*Id.* at 432-34.) While some of the evidence more generally discussed impacts a headwaters tributary and its adjacent wetlands can have on a traditionally navigable downstream waterway—as opposed to *this* tributary and its adjacent wetlands—evidence was presented that the impact of this tributary and its adjacent wetlands is tied to the cumulative impact of other similarly situated headwaters tributaries in the area. (Tr. Trans. 219 (Spoon); 434 (Gillilan).) Construing the evidence in the light most favorable to the government, sufficient evidence was presented from which a rational juror could find that the significant nexus test was met for both the tributary and its adjacent wetlands.

Additionally, while Robertson is correct that evidence was also presented that spoke to the plurality standard in *Rapanos*—i.e., a relatively permanent flow and a continuous surface connection—the introduction of such evidence does

not diminish the sufficiency of the evidence presented relating to the significant nexus test. A jury could look to the evidence presented on the important functions tributaries and wetlands play in a water system in conjunction with the evidence presented about the nature of this tributary and its adjacent wetlands and conclude that they have a significant nexus to a traditionally navigable waterway. Robertson's motion for acquittal as to Counts I and III is denied.

II. Count II: Willful Injury to Property of the United States

Robertson insists the evidence presented at trial was insufficient to establish that the property involved was "property of the United States," an essential element of 18 U.S.C. § 1361. Robertson also challenges the government's reference to "cadastral" in its closing, arguing that the term was not previously explained to the jury. Contrary to Robertson's argument, the government's first witness, United States Forest Service Special Agent Jackie Fisher, identified the boundaries of the National Forest System Lands known as the "Mohawk Lode" on Exhibit 42 for the jury. (Tr. Trans. 93-94.) The term "cadastral" was used during the proof stage of trial no less than four times, (*id.* at 105, 137, 435), and was defined during the testimony of Gillilan with reference to Exhibit 27(b):

> Those different shaded blocks in there represent different land ownerships from the cadastral, which is a State of Montana mapping product that is available online. You can see that on the upper northern end of the reconnaissance area is a boundary—near

> a boundary between private property and Forest Service property. That light green in the middle there is representative—that's U.S. Forest Service property. And then at the bottom of the reconnaissance area is again on private property. This is per cadastral.

(*Id.* at 437.) The evidence presented was sufficient for a rational juror to conclude that the property at issue in Count II of the Indictment belonged to the United States. Robertson's motion for acquittal as to Count II is denied.

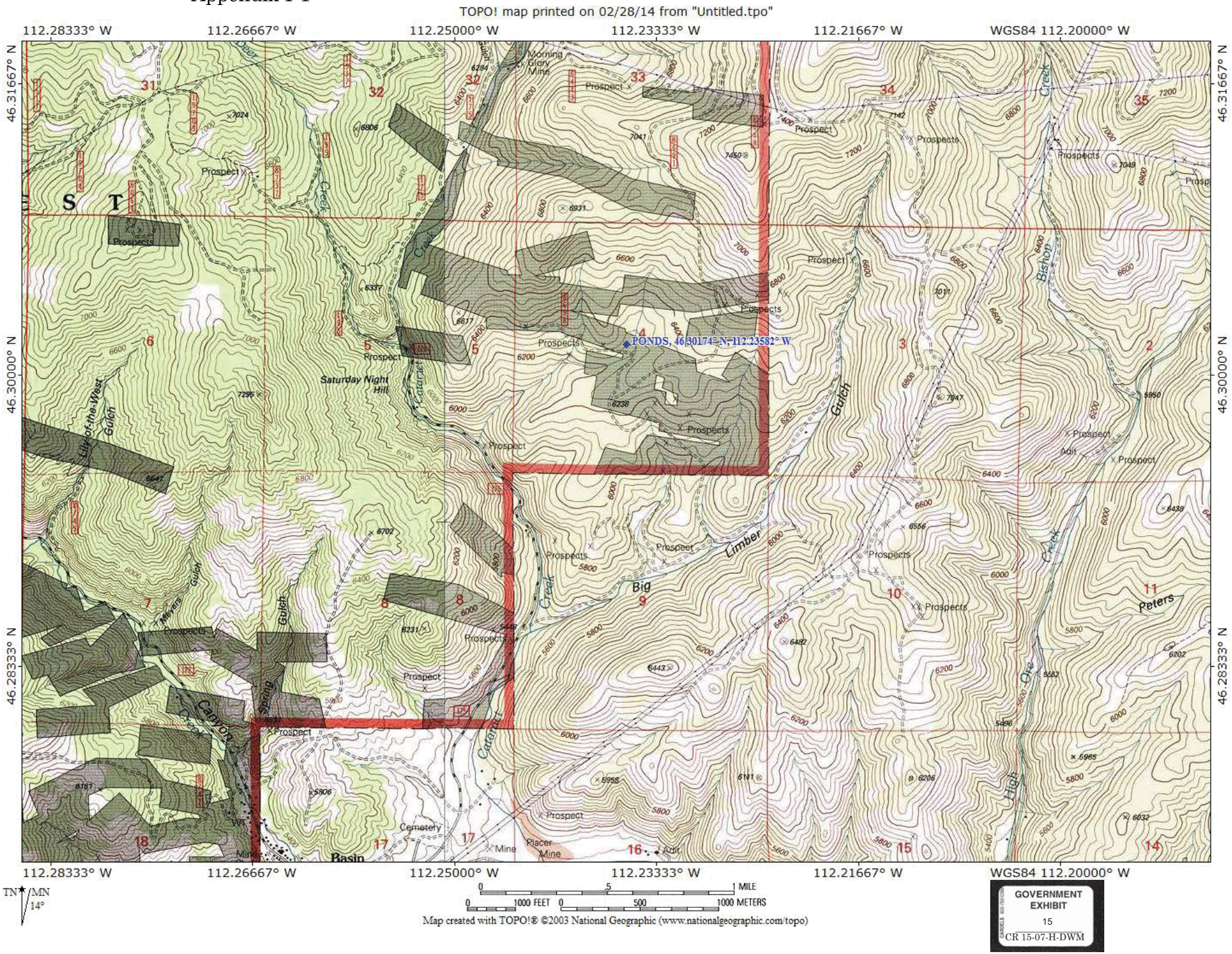
CONCLUSION

Sufficient evidence was presented at trial from which a rational trier of fact could have found the essential elements of the offenses alleged beyond a reasonable doubt. Accordingly, IT IS ORDERED that Robertson's motions for acquittal (Docs. 92, 94) are DENIED.

Dated this 30th day of November, 2015.

s/ Donald W. Molloy,
Donald W. Molloy, District Judge
United States District Court

Appendix I-1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Big Limber Creek
Peters Creek
Bishop Creek
High Ore Creek
Cataract Creek
Deer Creek
Yeast Gulch
Morning Glory Mine
Lily-of-the-West Gulch
Myers Gulch
Spring Gulch
Canyon Creek
Basin
Cemetery
Placer Mine
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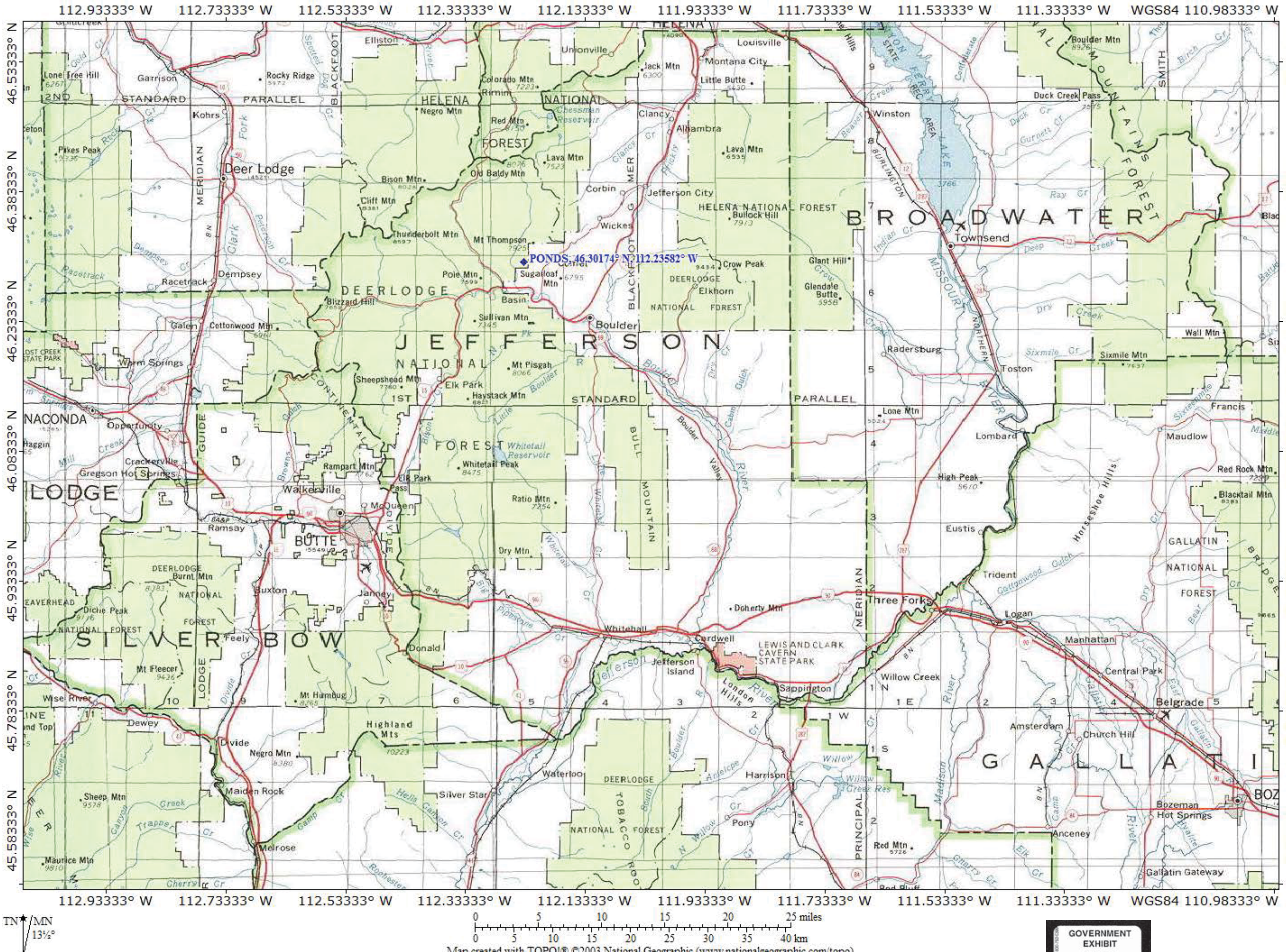
Appendix J-1

TOPO! map printed on 02/28/14 from "Untitled.tpo"



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GOVERNMENT EXHIBIT
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CR 15-07-H-DWM

Appendix K-1


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EXHIBIT
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CR 15-07-H-DWM
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CERTIFICATE OF COMPLIANCE

Docket No.

Joseph David Robertson v. United States of America

As required by Supreme Court Rule 33.1(h), I certify that the Petition for Writ of Certiorari of Pacific Legal Foundation In Support of Petitioner contains 8,943 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 6, 2018.

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No. _____

JOSEPH DAVID ROBERTSON,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

AFFIDAVIT OF SERVICE

I, Andrew Cockle, of lawful age, being duly sworn, upon my oath state that I did, on the 7th day of November, 2018, send out from Omaha, NE 1 package(s) containing 3 copies of the PETITION FOR WRIT OF CERTIORARI in the above entitled case. All parties required to be served have been served by Priority Mail. Packages were plainly addressed to the following:

SEE ATTACHED

To be filed for:

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Counsel for Petitioner

Subscribed and sworn to before me this 7th day of November, 2018.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

PATRICIA BILLOTTE
General Notary
State of Nebraska
My Commission Expires Nov 24, 2020

Patricia C. Billotte
Notary Public

Andrew H. Cockle
Affiant

36866

SERVICE LIST

Joseph David Robertson v. United States of America

Docket No.

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