

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	No. : 1:90-cv-00229
)	1:17-cv-00006
ROBERT BRACE, ROBERT BRACE)	
FARMS, INC. and ROBERT BRACE and)	
SONS, Inc.,)	
)	
Defendants.)	

**REPRODUCTION OF THIS TRANSCRIPT IS PROHIBITED
WITHOUT THE AUTHORIZATION OF THE CERTIFIED AGENCY.**

PROCEEDINGS: Deposition of
 MICHAEL FODSE

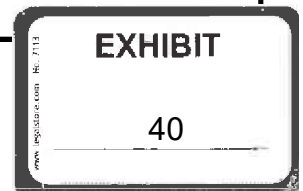
DATE: October 6, 2017

TIME: 9:02 a.m. - 1:51 p.m.

PLACE: U.S. Army Corps of Engineers
 Pittsburgh District
 1000 Liberty Avenue
 Pittsburgh, Pennsylvania 15222

REPORTER: Roberta Swank
 CSR 6042 - RPR 6846
 Notary Public

ASAP-BUCKLER & ASSOCIATES COURT REPORTING
Registered Professional Reporters
167 South McKean Street
Kittanning, Pennsylvania 16201
(724) 543-4996 - (412) 471-3117 - (866) 382-6878
FAX: (724) 543-5054
e-mail: asap10@windstream.net
www.asap-buckler.com



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES:

Appearing on behalf of the Plaintiff:

Laura J. Brown, Esquire
U.S. Department of Justice
Environment & Natural Resources Division
Post Office Box 7611
Washington, D.C. 20044

Appearing on behalf of the Defendants:

Lawrence Kogan, Esquire
Kogan Law Group
100 United Nations Plaza
Suite 14-F
New York, New York 10017

Also Present:

Dana Adipietro, Esquire
Army Corps of Engineers
Chloe H. Kolman, Esquire
Army Corps of Engineers
Robert Brace
Beverly Brace

1 THE WITNESS: Okay. I'm ready.

2 BY MR. KOGAN:

3 Q. Can you state for the record the
4 occasion for which you met with Mr. Brace on his
5 Waterford property on September 8, 2011?

6 A. I'm sorry, can you say that again?

7 Q. Can you state why you were meeting
8 with Mr. Brace about his Waterford property --

9 A. We were there to talk about him --
10 he wanted to remove beaver dams on the property.

11 Q. Do you recall where the beaver dams
12 were located? Were they on his property or --

13 A. I never saw them, but I believe
14 they were on his property. I was given a general
15 direction as to where they were. The area we
16 were looking at, if I remember, was too wet for
17 us to get to.

18 Q. Do you recall, if I were to show
19 you a map of the farm, would you have an idea
20 whether it was north, south, east or west?

21 A. Yeah, the general location.

22 MR. KOGAN: Let me state for the
23 record that we're going to look at, and counsel
24 has it for you, Exhibit D-1 which shows the three
25 different farm tracts that comprise the single

1 A. I would say yes.

2 Q. If I can ask you to step back a
3 couple years going back to your time as DEP
4 agent, was that the same amicable meeting that
5 you had on his property at the time with DEP?

6 A. I believe so, yes.

7 Q. I just wanted to make sure.

8 Now, did you make any
9 recommendations to Mr. Brace concerning the
10 removal of the beaver dam at your September 2011
11 on-site visit?

12 Do you recall, is it in your memo
13 there that we have entered as Defendant's Exhibit
14 D-33?

15 Does it mention anything about a
16 jurisdictional determination?

17 A. Yes.

18 Q. If you would explain why you
19 thought that was necessary, it would be helpful.

20 A. The jurisdictional determination
21 wasn't in reference to the beaver dams but the --
22 for -- what he described as maintaining
23 agricultural drainage ditches.

24 Q. Where was he describing he would do
25 that?

1 with me. I just want you to tell me what you
2 remember.

3 A. I apologize for that.

4 Q. I understand.

5 A. I didn't have much knowledge of the
6 history of Mr. Brace's property.

7 Q. But you just testified that if
8 there is a lot of water --

9 A. Yeah.

10 Q. -- in a mud bottom or dirt bottom
11 tributary and the water is there for a continuous
12 period of time and there's a lot of water, other
13 than normal sediment carry would occur, correct?

14 MS. BROWN: Objection.
15 Speculation.

16 MR. KOGAN: No, he just testified
17 to this.

18 BY MR. KOGAN:

19 Q. Please restate in your own words
20 what you recall saying.

21 A. When you have the unnatural
22 situation, you clearly have areas where that
23 deposition is going to occur.

24 To specifically determine how that
25 sediment got there, I think Mr. Brace had

1 MS. BROWN: (Indicating).
2 (Defendant Exhibit No. D-2
3 previously marked for identification, attached
4 hereto for reference.)

5 BY MR. KOGAN:

6 Q. This also is part of Defendant's
7 Exhibit D-15 which is the report from Micro
8 Strategies.

9 A. I don't believe I've ever seen
10 this.

11 Q. Okay. That's fine. This was a
12 report dated, I believe, 2015 that was submitted
13 to the U.S. Army Corps and the EPA, was it not?

14 It has since been introduced into
15 evidence as Defendant's Exhibit D-15 in its
16 entirety and then through this map as Defendant's
17 Exhibit D-2.

18 Do you see two culverts that are
19 pointed out on this map? Do you see the
20 similarity between the different tracts here
21 between Defendant's Exhibit D-1, enlarged, as
22 compared to Defendant's Exhibit D-2?

23 Can you relate the Murphy tract on
24 Defendant's Exhibit D-1 and the consent area to
25 Defendant's D-2?

1 undersized or blocked culvert near the consent
2 area of the approximately 30 acres?

3 A. I'm not an engineer. I can't make
4 a determination of whether a culvert is
5 undersized or not for the size of this a channel.

6 Q. Do you recall seeing the culvert in
7 the general area of the --

8 A. I remember seeing the location of
9 where the culvert is. I don't remember actually
10 seeing the culvert, whether it was under water or
11 not.

12 Q. Do you recall ever seeing Lane Road
13 under water --

14 A. No.

15 Q. -- July 24, 2012?

16 A. No.

17 Q. Is there anything else that you
18 recall during the visit of July 24, 2012?

19 MS. BROWN: Objection, vague.

20 BY MR. KOGAN:

21 Q. From your notes. From your notes,
22 Exhibit D-37, does it jar your memory any
23 further?

24 MS. BROWN: I'll object. It's a
25 vague question.

1 So that request was to get an exact
2 distance of channel that Mr. Brace wanted to
3 remove the sediment from.

4 Q. Can you describe by reference to
5 the map where that ditch or channel started just
6 by pointing to the map? The ditch, that area
7 that you were walking?

8 A. The reason I was asking for the
9 distance was we had entered it at some point, and
10 we were asking, knowing that we had talked about
11 Elk Creek to this culvert, and that's why we were
12 looking for a distance, to determine how far back
13 he was asking to do that.

14 Q. So he was the one --
15 And what did he end up giving you
16 as a distance?

17 A. It was something like 4,000 -- I
18 believe the e-mail from Rhonda said 9/10 of a
19 mile.

20 Q. Can you show me on this map what
21 area he was referring to that he measured? What
22 area did he measure on this map?

23 A. I can't do that.

24 Q. And now, also -- so this was a
25 ditch that he was measuring, correct?