

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

- - -

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.) No.

ROBERT BRACE, ROBERT BRACE) 1:17-cv-00006-BR

FARMS, INC., et al.,)

Defendants.)

- - -

Deposition of RANDALL BRACE

Wednesday, January 10, 2018

- - -

The deposition of RANDALL BRACE, called as a witness by the plaintiff, pursuant to notice and the Federal Rules of Civil Procedure pertaining to the taking of depositions, taken before me, the undersigned, Lance E. Hannaford, Notary Public in and for the Commonwealth of Pennsylvania, at the offices of U.S. Attorney's Office, 17 South Park Row, Erie, Pennsylvania 16501, commencing at 9:06 o'clock a.m., the day and date above set forth.

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1 APPEARANCES:

2 On behalf of the Plaintiff:

3 U.S. Department of Justice:

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18 ALSO PRESENT:

19 Beverly Brace

20 Robert Brace

21 - - -

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EXAMINATION BY:

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RA EXHIBIT:

MARKED:

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- - -

1 RANDALL BRACE

2 called as a witness by the Plaintiff, having been
3 first duly sworn, as hereinafter certified, was
4 deposed and said as follows:

5 EXAMINATION

6 BY MR. UHOLIK:

7 Q Good morning, Mr. Brace. My name is Brian
8 Uholik for the United States. With me is Laura Brown,
9 Sarah Buckley, and on the phone Chloe Kolman, also
10 counsel for the United States. Could you state your
11 full name and address for the record?

12 A Randall Joseph Brace. 10770 Sharp Road,
13 Waterford, PA 16441.

14 Q Thank you, sir.

15 Have you ever been deposed before?

16 A Yes.

17 Q When?

18 A 1991. And approximately 2007, I think.

19 Q What were you deposed for in '91?

20 A This case here.

21 Q And 2007?

22 A It was a separate case.

23 Q Even though you have been through it
24 before, I will go over basic instructions. You are
25 under oath. Therefore, you must testify truthfully as

1 if you were in court. Do you understand?

2 A Yes.

3 Q You must answer all of the questions
4 verbally for the court reporter. They can't record
5 uh-huhs or nods or anything like that. Do you
6 understand?

7 A Yes.

8 Q Wait to answer until I finish my question.
9 Another courtesy to the court reporter. They can't
10 record two people speaking over one another. Do you
11 understand?

12 A Yes.

13 Q Your attorney may object to some of my
14 questions. Unless he instructs you not to answer on
15 the basis of privilege, you have to answer the
16 question.

17 Do you understand?

18 A Yes.

19 Q If you do not understand a question or
20 require some clarification, please ask me to clarify.
21 Otherwise, we will assume you answered the questions
22 you understood.

23 A Yes.

24 Q If you need a break, please let us know, we
25 are happy to take a break. The only thing that may

1 happen, if there is a pending question, I will ask you
2 to finish answering. Do you understand?

3 A Yes.

4 Q Are you taking medication that would impact
5 your ability to testify today?

6 A No.

7 Q Do you suffer from any illness that would
8 affect your ability to testify today?

9 A Not to my knowledge.

10 Q Is there anything else that is going on,
11 that you believe could affect your ability to testify
12 today?

13 A Old age.

14 Q I am going to start questioning you about
15 some activity on properties in Erie County. Before we
16 get started I want to make sure we are on the same
17 page in terms of what we call the various properties.

18 I'm going to ask that we pull out
19 yesterday's Exhibit No. 1, which is right here. I
20 will have it remarked -- we are going to use a new
21 exhibit, I will represent it is the same as Exhibit
22 No. 1. We are going to have it marked as RA1.

23 (Thereupon, Exhibit No. RA1 was marked for
24 identification.)

25 Q This is a blowup of a document produced in

1 this litigation, Bates No. USACE000088. Have you ever
2 seen that document before?

3 A This one here?

4 Q That one there.

5 A I have seen maps like this, yes. I don't
6 know if I saw this particular one.

7 Q But you are familiar with what that map
8 depicts. Is that correct?

9 A Yes.

10 Q Just so we are on the same page --

11 MR. KOGAN: Counsel, what area are we
12 speaking of?

13 MR. UHOLIK: The area that is in question
14 in litigation in this case. In this instance
15 it's an overview of some of Mr. Brace, Brace
16 Farms and Brace & Sons properties in Waterford
17 Township, Erie County. We are about to go over
18 which parcels.

19 MR. KOGAN: Thank you.

20 Q If you are looking at that, do you have
21 that oriented north to south, sir?

22 A Yes.

23 Q I'm going to be referring to the parcel
24 outlined in black, south of Lane Road, parcel
25 ID47-012-028.0-001.00 as the Murphy site. Do you

1 understand?

2 A Yes.

3 Q I am going to be referring to the area
4 south of Lane Road within the Murphy site that is
5 marked as red as the consent decree area. Do you
6 understand?

7 A Yes.

8 Q I'm going to be referring to the parcel
9 north of Lane Road directly west of Greenlee Road,
10 parcel ID47-011-004.0-002.00 as the Homestead site.
11 Do you understand?

12 A Yes.

13 Q I'm going to be referring to the two
14 parcels west of the Homestead parcel and east of Sharp
15 Road, parcel numbers 31-016-063.0-002.00 and parcel
16 47-011-004-0-003.00 as the Marsh site. Do you
17 understand?

18 A Yes.

19 Q I'm going to be referring to the culvert on
20 the western portion of Lane Road between the Marsh
21 site and the Murphy site through which what the United
22 States represents is Elk Creek passes as the Lane Road
23 culvert. Do you understand?

24 A Yes.

25 Q And I'm going to be referring to the

1 culvert on Sharp Road located just south of the
2 intersection of Sharp Road and Greenlee Road through
3 which what the United States represents is Elk Creek
4 passes as the Sharp Road culvert.

5 Do you understand?

6 A Yes.

7 Q Excellent.

8 We will just start with basic information
9 about you and some corporate information about Brace &
10 Sons, Incorporated.

11 Could you describe your employment history
12 sort of since you graduated high school?

13 A Pretty much labor.

14 Q Have you worked for the same company? Have
15 you worked for different entities?

16 A I worked for the family.

17 Q Since you have been out of school?

18 A Yes.

19 Q It is my understanding, correct me if I'm
20 wrong, that you are the president of Brace & Sons,
21 Incorporated.

22 Is that correct?

23 A Yes.

24 Q How long have you been the president?

25 A Since it was formed.

1 Q And what business is Brace & Sons,
2 Incorporated involved in?

3 A Farming.

4 Q Does Brace & Sons engage in any other
5 businesses?

6 A Brace & Sons is in farming.

7 Q Just farming.

8 What are your duties as an officer?

9 A I don't really have any duties as an
10 officer. I'm just -- they say I'm the president. But
11 I don't have nothing to do with anything.

12 Q Who runs the company?

13 A Robert, my dad.

14 Q So if you had to describe your duties, is
15 it basically just the operation of the farming aspect?

16 A Labor.

17 Q Do you draw a salary from Brace & Sons?

18 A I am getting paid out of a company loan
19 right now. That is how I'm getting paid right now,
20 yes.

21 Q When you say you are getting paid out of a
22 company loan, I'm unclear what that means.

23 A It was an intercompany loan my dad had.
24 They had to pay it down. The accountant wanted to do
25 it this way.

1 Q So what entity --

2 A I really don't know. Honestly, I don't
3 know.

4 Q Do you know who maintains the operating
5 records for Brace & Sons? When I say operating
6 records, I mean say articles of incorporation.

7 A I don't. I don't really know to tell you
8 the truth.

9 Q I will run down some questions on the same
10 lines. If you don't know, just say same answer.
11 By-laws?

12 A Don't know.

13 Q Do you maintain corporate meeting minutes?

14 A I don't. No.

15 Q Annual reports?

16 A I don't. No.

17 Q Balance sheets?

18 A I don'tment no.

19 Q Income statements?

20 A I don't.

21 Q Cash flow statements?

22 A I don't.

23 Q Does Brace & Sons have any business plans?

24 A Farmingment.

25 Q Does Brace & Sons operate or utilize any

1 email accounts?

2 A That I don't know.

3 Q You never send emails on behalf of --

4 A No.

5 Q Do you know if Brace & Sons maintains a
6 computer?

7 A There is a computer there in the office.
8 But I don't know -- I don't use it.

9 Q Do you know who has access to that
10 computer?

11 A The secretary.

12 Q Who is the secretary?

13 A Rosalie.

14 Q Do you know her last name?

15 A Actually, I don't. She is fairly new.

16 Q Is Rosalie, generally speaking, the only
17 person who uses the computer? To your knowledge.

18 A I really don't know who uses the computer.

19 Q I'm going to turn to -- you can put that
20 aside.

21 I will turn to what we had marked yesterday
22 as Plaintiff's Exhibit 10. We will mark today as RA2.

23 (Thereupon, Exhibit No. RA2 was marked for
24 identification.)

25 Q I'm handing you what has been marked as

1 Exhibit RA2. It's a packet of financial documents
2 produced by Robert Brace, Robert Brace & Sons and
3 Robert Brace Farms in this litigation.

4 I would appreciate it if you could turn
5 to -- there is a Bates stamp at the bottom right which
6 will give you page numbers. If you can flip through
7 until you reach Brace 001044.

8 Take a second to look over that. Have you
9 ever seen that document before?

10 A I have not.

11 Q You have not.

12 Can you identify what that is?

13 A I don't have a clue.

14 Q I will represent it's a balance sheet for
15 Brace & Sons, Incorporated. We will just run down
16 some of the numbers to see if you know what any of the
17 stuff is.

18 Are you aware, does Brace & Sons maintain a
19 checking account?

20 A I think they do.

21 Q Looking at the assets, particularly looking
22 at other current assets --

23 MR. KOGAN: Counsel, you may want to set a
24 foundation as to what an asset is, liability. If
25 he -- first of all, have you asked whether he

1 looked at financial statements at all, let alone
2 this one?

3 MR. UHOLIK: I assume you are objecting to
4 foundation?

5 MR. KOGAN: Yes.

6 Q Looking at other current assets -- do you
7 know what this entry CD Mercer NFG is?

8 A I am not involved in this at all.

9 Q Are you familiar at all with the properties
10 that Robert Brace & Sons, Incorporated owns?

11 A Yes.

12 Q My question would be would you know what
13 properties are owned by Robert Brace & Sons, what
14 properties are owned by your father, Robert Brace, and
15 what properties are owned by Robert Brace Farms?

16 A I think for the most part.

17 Q Under fixed assets on this page, there is
18 various listing of properties. I see Deer Head Inn
19 here is listed. Correct?

20 A Correct.

21 Q Is that owned, to your knowledge, by Robert
22 Brace & Sons?

23 A To my knowledge, yes.

24 Q The office building, do you know what that
25 is?

1 A That is the office right now.

2 Q That is Robert Brace & Sons headquarters?

3 A That's the main office, yes.

4 Q The Bliley property?

5 A Yes.

6 Q That's owned by Robert Brace & Sons?

7 A Yes.

8 Q Where is that located?

9 A It's located on Union Road.

10 MR. KOGAN: Counsel, objection. Do you
11 have a map he can point to that might help you?

12 MR. UHOLIK: I don't have a map. I'm
13 asking if he generally knows where it is.

14 Q Do you know of any other properties that
15 are owned by Robert Brace & Sons that are not listed
16 on this page?

17 A The Garland farm, I believe, is owned by
18 Robert Brace & Sons. I think that's all. If you
19 have -- do you have a paper I could look at with all
20 the farm names on them?

21 Q Actually, if you flip to the next page,
22 Brace 00105. You did mention the Garland property.
23 Is McWilliams property also owned by --

24 A Yes.

25 Q Can you think of any others?

1 A I believe that's all for Robert Brace &
2 Sons.

3 Q On this balance sheet under other assets,
4 there is an entry that says, "Loan pay Robert Brace
5 Farms, Incorporated." Do you know what that is for?

6 A Where are we?

7 Q Down in the middle of the page under other
8 assets, line 2073.

9 A I have no idea what that is.

10 Q No idea?

11 A No idea.

12 Q Yesterday I will represent your father
13 testified that, in addition to Robert Brace & Sons,
14 Incorporated, you are involved in something called
15 BCD?

16 A Yes, sir.

17 Q Can you describe to me just briefly what is
18 BCD?

19 A It's a small gas company.

20 Q Who are the shareholders at BCD?

21 A I think it would be my father. The only
22 thing is that I think I'm an authorized signer. But
23 that would be all. Other than I can sign papers and
24 stuff, that's it. I don't have no --

25 Q Are you familiar in sort of the day to day

1 operation of BCD?

2 A Yes.

3 Q It is involved in oil and gas you said. Is
4 that correct?

5 A Yes. Natural gas.

6 Q How many wells does BCD operate?

7 A Approximately, 90 to 100.

8 Q Where are they located?

9 A They are in Union Township, Waterford
10 Township, McKean Township. And there is one we
11 operate down in Cambridge Springs.

12 Q Do you operate any wells on property that
13 Robert Brace & Sons owns?

14 A Yes. It would be the McWilliams and the
15 Blileys.

16 Q Do you operate any wells on property that
17 Robert Brace Farms, Incorporated owns?

18 A Yes.

19 Q Whereabouts would those be?

20 A Those would be on Kilbane farm. They would
21 be on the Homestead farm -- I'm sorry, it would be on
22 the Murphy side of the Homestead farm.

23 Q Do you operate any wells on land that your
24 father, Robert Brace, owns?

25 A Yes. There is two at the main farm right

1 there.

2 Q When you say the main farm, you mean --

3 A The one on 97, Route 97.

4 Q In Waterford?

5 A Yes.

6 Q For the other wells, do you lease the
7 mineral rights?

8 A Yes. We have gotten through acquisitions.
9 And just like that. Yes.

10 Q So you -- someone else has sunk the well,
11 you acquired the well thereafter?

12 A Yes.

13 Q Do you draw a salary for your work with
14 BCD?

15 A No. I'm getting paid through the
16 intercompany loan.

17 Q Your entire income comes from an
18 intercompany loan between Robert Brace & Sons and --

19 A To tell you the truth, I don't know.

20 Q You are allowed to not now. It's totally
21 fine.

22 How much -- how much are you being paid
23 through the intercompany loan?

24 A I get paid 12 dollars an hour.

25 Q The profits from BCD -- let me start with

1 the income from BCD. So the money BCD actually makes.
2 Where does that money go?

3 A I have no idea. I don't take care of that
4 part.

5 Q What is the relationship between BCD and
6 Robert Brace & Sons?

7 A It's a company my dad owns.

8 Q I guess my question is, you may not know,
9 does money move between the entities? Does money move
10 from Robert Brace & Sons to BCD and vice versa?

11 A I have --

12 MR. KOGAN: Counsel, I think he just
13 answered about he doesn't know where the money
14 comes from the intercompany loan. So I doubt he
15 would know --

16 MR. UHOLIK: I understand. We need to get
17 it on for the record.

18 MR. KOGAN: Of course.

19 Q Are you aware if BCD has any debts or
20 liabilities owed to Robert Brace & Sons, Incorporated?

21 A I do not know.

22 Q Same question for Robert Brace Farms,
23 Incorporated.

24 A I don't know.

25 Q The wells that BCD presently opens, how

1 would you characterize their production?

2 A Old mom and pop wells.

3 Q Could you be a little more specific?

4 A They are just old '80s vintage wells, low
5 producers.

6 Q You don't think you'll be running
7 Chesapeake or XTO?

8 A No.

9 Q Now I will turn to farm operations on
10 Murphy and Homestead sites. Exhibit RA1.

11 Sir, are you familiar with the Homestead
12 site marked on Exhibit RA1 north of Lane Road.

13 A Yes.

14 Q On average, how many times a year do you
15 visit that site?

16 A Usually down through there once a day
17 driving through. I mean, I live right there.

18 Q Generally, what is your purpose for going
19 to the Homestead site?

20 A That's the way you have to go through it to
21 go to Waterford or go to Erie.

22 Q Are you involved with the farming operation
23 on that site?

24 A Yes. In the spring and the fall I am, yes.

25 MR. KOGAN: Counsel, which side are you

1 referring to? All three parcels?

2 MR. UHOLIK: Right now we are just talking
3 about the Homestead farm.

4 A On the north side of Lane Road.

5 Q On the north side of Lane Road.

6 A All right.

7 Q Since 1996 have any of the sites on the
8 Homestead -- any of the Homestead site been planted
9 with crops?

10 A Yes.

11 Q Can you mark where on the Homestead site
12 it's been planted?

13 A How do you want me to mark it?

14 Q What kind of crops have been planted there?

15 A Cabbage, corn. I think there was wheat
16 there a few years.

17 Q What is presently -- what have you been
18 planting lately?

19 A Corn.

20 Q If you could just write "corn" wherever
21 it's been planted with corn on the Homestead site.

22 How long have you been planting corn -- let
23 me rephrase.

24 In the last ten years what crops have you
25 planted there?

1 A Mainly corn.

2 Q Who did the day to day farming work?

3 A My brother usually takes care of all that.
4 Like I said, I'm involved in the spring and the fall
5 some.

6 Q Have the crops been sold -- in the last ten
7 years have the crops been sold every year?

8 A I think so. Yes.

9 Q Has there ever been an instance where they
10 weren't sold?

11 A No.

12 Q Was there ever -- did you ever have a year
13 you didn't plant -- when I say have a year, now we are
14 talking the last ten years, in the last ten years have
15 you ever had a year you didn't plant corn on the
16 Homestead site?

17 A No. I'm just thinking -- you are going
18 from -- we got out of cabbage in 2005. So everything
19 has been corn since 2005.

20 Q Since 2005 everything has been corn. So
21 since 2005 have you planted corn on Homestead site
22 every planting season?

23 A To the best of my recollection, yes.

24 Q Do you know what companies operate the
25 Homestead site?

1 A It's owned by Robert Brace Farms.

2 Q Does Robert Brace Farms and Robert Brace &
3 Sons operate together?

4 A They use stuff together, yes.

5 Q Now we will move to the Murphy site there
6 on the same thing.

7 So are you familiar with the Murphy site
8 south of Lane Road?

9 A Yes.

10 Q On average how many times per year are you
11 on the Murphy site?

12 A Approximately, the same way I'm on --

13 Q Daily?

14 A No. Not daily. I drive through there.

15 Q You drive through daily?

16 A Pretty much daily.

17 Q How often would you say you physically
18 visit or walk out there?

19 A I don't know.

20 Q That's fine. You are allowed not to know.
21 When you do visit the Murphy site, what is
22 generally your purpose for going there?

23 A Taking a walk, if I want.

24 Q In the last ten years he -- let's start
25 with since 2005, since that is when you switched over

1 to corn. What portions of the Murphy property have
2 been planted in the last ten years?

3 A Now, if we are talking about what happened
4 a few years ago when we got permission to plant
5 everything there.

6 Say that again.

7 Q What portions of the Murphy site have been
8 planted in the last ten years at any point?

9 A Within the last ten years pretty much all
10 of it.

11 Q I will break this up into two categories.
12 What portions of the site have been planted -- when I
13 say the site, I mean Murphy site we are talking about
14 now -- have been planted or planted pre2012?

15 A Right where it says parcel
16 ID47012028.0-001.00.

17 Q Is that that sort of --

18 MR. KOGAN: Can you describe it?

19 Q Just to further describe it, I believe, you
20 can confirm if I'm wrong, the witness is pointing to
21 it's a green section that is surrounded by the red
22 hatched area south of Lane Road. Is that correct,
23 sir?

24 A Yes, sir.

25 Q Is that generally referred to as the

1 uplands?

2 A I always refer to it as the contour field.

3 Q Contour field is fine. So pre2012, the
4 only portion of the Murphy site that was planted was
5 the contour field?

6 A To the best of my recollection, yes.

7 Q Then after 2012, so 2012 and on what
8 portions of the site, the Murphy site, were planted?

9 A We have to go back to where we got
10 permission to plant the stuff. It's in the hatched
11 parts after 2012.

12 Q In the hatched parts after 2012.

13 A Right. Not all of the hatched parts. Not
14 all of it.

15 Q What did you plant there?

16 A Corn.

17 Q Is the farming operation at least at this
18 time, 2012 and on, is it fairly reasonable to say it's
19 a corn farming operation right now?

20 A Yes.

21 MR. KOGAN: Counsel, I object to the
22 characterization of all of the hatched area being
23 farmed. So if you would clarify for the sake of
24 the witness what area he responded to your
25 question.

1 MR. UHOLIK: The witness testified not all
2 of the hatched area was planted. But that some
3 of it was. We are going to get to where in a
4 second.

5 MR. KOGAN: Thank you.

6 Q Could you please, with the pen that you
7 have, write "corn" wherever corn was planted in the
8 red hatched area from 2012 on?

9 A Okay. I think that about does it.

10 Q And do you know in what years after 2012
11 that those areas were -- that you marked with the word
12 "corn" to indicate where it was planted, what years
13 corn was planted? Was it every year?

14 A It was after 2012, before you guys shut us
15 down again.

16 Q When were you shut down? When did you stop
17 planting in there?

18 A I can't recall exactly what year it was.

19 Q Did you first plant that area in the spring
20 of 2012?

21 A I don't know if it was 2012 or not. I
22 really can't -- my brother could probably tell you
23 with the records he has. I really don't have any
24 records of it.

25 Q And the corn that you planted after 2012,

1 was that corn sold?

2 A I know it was harvested, yes.

3 Q You are not sure I guess -- trying to
4 narrow down the time frame. You are not sure if there
5 was a harvest in 2012. Was there a harvest in 2013?

6 A I really have lost track of time. I can't
7 really -- you know.

8 Q The contour field, has that also been
9 planted -- has the contour field effectively been
10 planted the last ten years, continuously?

11 A No. I think it was cropped. Then it sat
12 idle until they came back out. Then we planted again.
13 That was some time after 2012. Like I say, exact year
14 I don't know.

15 Q That's fine.

16 Were you involved with any of the planting
17 work on that piece of property?

18 A I was not.

19 No.

20 Q Your brother, Ronnie?

21 A Yes.

22 Q We can put that away for a moment.

23 We are going to turn next to your knowledge
24 of the consent decree and the restoration plan. What
25 was previously marked yesterday as P14. We will mark

1 RA3.

2 (Thereupon, Exhibit No. RA3 was marked for
3 identification.)

4 Q Earlier you testified you were deposed in
5 this matter in 1991. Would you say you are familiar
6 with the lawsuit that is involved in this case?

7 A Just from living here, yes.

8 Q Are you aware what wetlands -- what areas
9 are at issue in the suit?

10 A I don't really know. No. I mean, I have
11 an idea. I really don't get involved with it.

12 Q Were you -- have you ever seen that
13 document? The consent decree?

14 A No.

15 Q You have never seen the consent decree?

16 A No.

17 Q I assume I probably know the answer. Were
18 you involved in negotiation of that consent decree?

19 A No.

20 Q In front of you, what has been marked RA3,
21 as the consent decree that was entered into this
22 litigation, if you could please flip back, you will
23 reach page 6. There is one page beyond that at the
24 top it is called wetlands restoration plan.

25 The wetlands restoration plan is on this

1 page and the following page. But have you ever seen
2 this?

3 A Never seen it.

4 Q You have never seen it?

5 A No, sir.

6 Q If you would take a moment and please
7 review that page and the following page.

8 A Okay.

9 Q Are you familiar, I know you said you have
10 never seen the document before. But are you familiar
11 with the activities that are described in the
12 document?

13 A I had nothing to do with this.

14 Q So when the consent decree was entered and
15 the tile drain was removed from the Murphy site, you
16 had no involvement in that whatsoever?

17 A No involvement at all.

18 Q You had nothing to do with it.

19 A Nothing.

20 Q And you weren't involved in filling in
21 surface ditches?

22 A No.

23 Q Do you know who was involved in doing the
24 work that is described?

25 A You mean the restoration plan?

1 Q The restoration plan. Who was involved in
2 actually putting that in place on the property?

3 A I believe it was Showman, I believe. I'm
4 not 100% sure.

5 Q Can you spell that?

6 A S-H-O-W-M-A-N.

7 Q Is Showman a company or an individual?

8 A It's an individual company.

9 Q You weren't involved in this. But are you
10 aware the tile drain was removed?

11 A Yes.

12 Q Are you aware that surface ditches were
13 filled in?

14 A That I don't know.

15 Q You don't know. Are you aware a check dam
16 was installed?

17 A Yes.

18 Q Do you know if that check dam is still in
19 place?

20 A Yes. It is.

21 Q If you could on Exhibit RA1, if you could
22 indicate on the Murphy site the approximate location
23 of where you believe the check dam to be situated?

24 A Now, this is a roundabout.

25 Q It's roundabout.

1 A Yes. Just mark it?

2 Q Yes, sir. CD. Write CD for check dam.

3 A All right.

4 Q Has it always been in that location, to
5 your knowledge?

6 A To my knowledge, yes.

7 Q When is the last time you have seen it?

8 A When I cleaned the ditch out.

9 Q When did you clean the ditch out?

10 A After the EPA gave us permission.

11 Q When you say clean the ditch out, what does
12 clean the ditch out mean? What did you do?

13 A Cleaned it out.

14 Q What does cleaning out entail? What do you
15 do if you are cleaning out the ditch?

16 A Take the -- take any debris out of it.

17 Q Take debris out of the ditch. How do you
18 take debris out of the ditch?

19 A With a track hoe.

20 Q And you operate that yourself?

21 A Yes.

22 Q The track hoe, does Robert Brace & Sons own
23 the track hoe?

24 A You know, I don't know what name -- what
25 company name.

1 Q One of the companies --

2 A One of the companies, right.

3 Q -- owns the tractor.

4 You said you cleaned the ditch after -- you
5 said the EPA gave you permission. Do you have -- I
6 won't hold you to a specific date. Do you have an
7 approximate -- do you have an approximate date when
8 you did it? Do you have any idea?

9 A It was after the meeting when Todd Lutte
10 and what is his name, Fodse came out.

11 MR. KOGAN: I would like to take a moment,
12 counsel. Off the record.

13 (Discussion off the record.)

14 MR. KOGAN: Counsel for Defendant Randall
15 Brace asked counsel for the government whether
16 there was any design specification or picture
17 separate --

18 MS. BROWN: Let's say it on the record.
19 Ask me on the record.

20 MR. KOGAN: I will ask you on the record
21 did you produce in discovery any specifications
22 for design of the check dam that was to be
23 installed in the 1996 restoration plan.

24 MS. BROWN: My response is I believe it's
25 in the consent decree. If there is anything

1 that -- I will double-check, but I am quite
2 certain everything we have has been produced, but
3 I will follow up on counsel's request.

4 MR. KOGAN: Pictorially as well as in
5 writing.

6 MS. BROWN: That is my answer for both. I
7 understand.

8 MR. KOGAN: Thank you.

9 MR. UHOLIK: I will just for the record,
10 I'm going to read from the consent decree from
11 the restoration plan page 2 under No. 3, install
12 check dam where it says, "This dam shall be one
13 and one half feet high, four feet long and as
14 wide as the tributary bottom. The dam shall be
15 constructed of concrete gambions or compacted
16 rock."

17 Q Back to my questions.

18 It was after -- I think my question was
19 when after the EPA -- after you said EPA gave you
20 permission to do work, did you clean out the ditches,
21 and you said what?

22 A Repeat that question.

23 Q You said you cleaned out the ditches in the
24 consent decree area. Correct?

25 A The one that goes down -- yes, this one

1 right here.

2 Q Let the record reflect the witness is
3 pointing --

4 MR. KOGAN: Could you repeat the question?
5 I didn't hear it.

6 MR. UHOLIK: Sure.

7 Q I asked him when after the EPA provided
8 what Mr. Brace described as permission did he clean
9 out the ditch.

10 MR. KOGAN: Did you establish when the when
11 was?

12 MR. UHOLIK: We are working on it. I
13 believe he said he cleaned out the ditch after
14 Mike Fodse and Todd Lutte were on site.

15 Q Do you recall when that was?

16 A It wasn't too long after they were on site.

17 Q Do you know when they were on site?

18 A I don't have any recollection of the exact
19 date. I'm sure you have it.

20 Q Would July -- does July 2012 sound
21 accurate?

22 A Somewhere in there, yes.

23 Q Somewhere in there they were on site.

24 So after July 2012 is when you cleaned out
25 the ditch. Do you know he when after July 2012,

1 approximately? If you know a month.

2 A It was that summer. Like I said, I don't
3 know if it was two days or a week or what.

4 Q If you could draw with your pen just the
5 ditch so we will be able to see it.

6 MR. KOGAN: Which site are you referring
7 to?

8 MR. UHOLIK: In the consent decree area.
9 If you could draw the ditch in the consent decree
10 area you cleaned out.

11 Q Let the record reflect I actually will have
12 the witness highlight it. The pen is probably not
13 good enough.

14 A Right now just in the hatched area. Right?

15 Q Just on the Murphy site.

16 A Just on the Murphy site.

17 Q For now. If there is ditches on the Murphy
18 site you cleaned outside the hatch area, feel free to
19 draw those places as well.

20 Let the record reflect the witness is
21 drawing the ditch with a pink highlighter.

22 When you say you cleaned out the ditch, I
23 believe you testified that you removed debris with a
24 track hoe. How does that work? If you could explain
25 to me how cleaning out the ditch works as if I was

1 five.

2 A It's a bucket, it has a bucket on it, a
3 boom and a bucket.

4 Q The track hoe has a boom and a bucket. In
5 order to get the debris out of the ditch, do you dig
6 it out? Is that how it works? You dig it out?

7 A Yes.

8 Q When you dug out the ditch where did you
9 place the material that you were digging out?

10 A Right where Todd Lutte told me to.

11 Q Where would that be?

12 A On the north side of the ditch.

13 Q North side of the ditch. Would that also
14 be in the red area, the consent decree area?

15 A Yes.

16 Q Do you know approximately how long it took
17 you to complete that work? By that work I mean
18 digging out of the ditch within the consent decree
19 area.

20 A Oh, I mean, this would just be a guess.

21 Q That's fine. An estimation is fine.

22 A Maybe four or five days. Like I said,
23 that's a guess.

24 Q Did you do that consecutively? When you
25 started doing it, is that what you did? Did you do it

1 over four or five consecutive days, or was it broken
2 up, did you do it in bits and pieces?

3 A No. We stayed at it.

4 Q Stayed at it.

5 A Yes.

6 Q Were you involved in any other work in the
7 consent decree area?

8 A When my brother tiled it, I would do
9 hookups.

10 Q What does it mean to do the hookups?

11 A Well, you hook the tile together.

12 Q You said when your brother tiled it. When
13 did your brother tile the consent decree area?

14 A I think it was that same summer. Like I
15 said, I can't say any particular dates, because I
16 can't remember any dates.

17 Q That's fine. If you have an approximation,
18 give me a week, if you give me a month, that's fine.
19 Or if you just say the summer, that's fine. Be as
20 specific as you can be.

21 So did your brother tile it -- tile the
22 consent decree area before or after you cleaned the
23 ditch?

24 A It would have been after.

25 Q And was your -- that the extent of your

1 involvement in the tiling, hooking up the tile, as you
2 said? Were you involved in using the track hoe or any
3 other sort of heavy equipment?

4 A Yes. Where an outlet would be, we dig an
5 outlet. That is where he would start. Then when the
6 run was done, you would fill it up.

7 Q If you could, I will hand you a yellow
8 highlighter. Obviously, this is approximate.
9 Approximate the areas that you were involved in the
10 installation of tile drains in the consent decree
11 area.

12 A I will just draw a line?

13 Q Just draw lines.

14 A Like I said, this is just an --

15 Q We are approximating here.

16 A Right. This isn't exact.

17 MR. KOGAN: Counsel, did you ask the
18 question of whether he is going to indicate where
19 the tile that he hooked up was placed? Or where
20 it was tiled itself by his brother?

21 MR. UHOLIK: Larry, you will be free to ask
22 your questions.

23 MR. KOGAN: I'm asking you what you asked.

24 MR. UHOLIK: I asked him, he said that he
25 was involved in one, hooking up tile, and two,

1 digging out outlets. I asked him where he was
2 personally involved in the tile installation
3 process. There may be other tiling he wasn't
4 involved in. I assume he won't mark that.

5 A That is roughly about it.

6 Q Let the record reflect that the witness has
7 marked in yellow highlighter where in the consent
8 decree he was involved in installing tile drains.
9 Thank you, sir.

10 Do you know approximately how long it took
11 to install the tile drains that you were involved in
12 installing? I know you said ditch cleaning was over
13 four or five days. About how long was this?

14 A I don't know. Not very long.

15 Q Sort of the same question that I asked
16 before, as you described it, did you keep at it?

17 A Yes.

18 Q Do you know when the installation was
19 completed by?

20 A I don't think it was ever completely
21 completed, because that is when I think it was Smolko
22 came out that tried shutting us down.

23 Q Let me rephrase. When did you stop
24 installing tile drain?

25 A Like I say, it was all that summer. Any

1 dates or anything, I don't know. But it was that
2 summer. To the best of my recollection.

3 Q So you started tiling in the summer.
4 Somewhere during the summer you stopped tiling for
5 whatever reason.

6 A Right.

7 Q This is a topic -- we talked about it
8 before, but when is planting season?

9 A Planting season is in the spring.

10 Q What is the purpose -- what was the purpose
11 of clearing the ditch, why did you clean the ditch is
12 my question.

13 A Well, it was backing everything up on both
14 sides of the road.

15 Q It was backing everything up.

16 And why did you install -- by you I mean
17 you and your brother, why did you install tile drain?

18 A To farm.

19 Q I guess my question is if planting is in
20 the fall -- is in the spring, why was it necessary to
21 install tile drain in the summer like immediately,
22 effectively?

23 A Because we did it after Todd Lutte and
24 Fodse came out and told us we could do that.

25 MR. KOGAN: It would be a good time for a

1 recess.

2 MR. UHOLIK: Yes.

3 (Recess taken.)

4 BY MR. UHOLIK:

5 Q I will circle back to something you said
6 earlier. Earlier you said you believe that the
7 restoration work that was done in connection with the
8 consent decree was done by a Showman Company.

9 A Yes. I think. Yes.

10 Q Do you know where Showman is located?

11 A Waterford.

12 Q And what kind of work do they do?

13 A Excavation.

14 Q Also, I believe you testified, again please
15 correct me if I'm wrong, that the first time you had
16 seen the check dam is when you did -- when you cleaned
17 out the ditch in 2012 some time?

18 A I don't know if I said that. The check dam
19 was pretty much covered up when we cleaned the ditch
20 out. So I'm not saying I didn't see it after when
21 they first put it in.

22 I didn't walk back there and look at it. I
23 had seen it before. It was something I didn't do on a
24 daily basis.

25 Q So you had seen it before 2012 at some

1 point?

2 A At some point, yes.

3 Q Can you describe to me what it looks like?

4 A Mafia blocks. That is what I call mafia
5 blocks, big cement blocks.

6 Q How are they arranged?

7 A They are just laying across there somehow.
8 I haven't been back to look at them. They are just
9 laying across the ditch.

10 Q Are the blocks just straight across the
11 ditch?

12 A In some sort, yes. Like I said, I don't
13 know how they are really placed. Basically, yes.

14 Q Basically, straight across the ditch.

15 We are going to turn to what was marked
16 yesterday as Plaintiff's Exhibit 16. Today will be
17 RA4.

18 (Thereupon, Exhibit No. RA4 was marked for
19 identification.)

20 Q Mr. Brace, I'm showing you what has been
21 marked as Exhibit RA4, which I will represent to you
22 is photos taken by Waterways Conservation Officer
23 James Smolko. In and around the Murphy and Marsh
24 sites. If you could please flip to the page -- you
25 will see the Bates numbers once again in the lower

1 corner. Flip to 0457. EPA 000457.

2 Are you there, sir?

3 A Yes.

4 Q Do you recognize what is shown in this
5 photograph?

6 A Yes.

7 Q What is your understanding of what that
8 photograph shows?

9 A It is a tractor and tile plow.

10 Q According to the caption this is -- was
11 taken 50 feet south of Lane Road at a culvert pipe,
12 apparently --

13 MR. KOGAN: Counsel, I object to form.

14 Could you describe -- and foundation. Could you
15 describe what the accompanying description of the
16 photo contained in the photo says for the record?

17 MR. UHOLIK: The description in the photo
18 says photograph IMG3759 taken September 10th,
19 2012 at 1722 hours. Tile drain installation
20 approximately 50 feet south of Lane Road at the
21 culvert pipe.

22 Q First of all, do you recognize the property
23 here?

24 A Yes.

25 Q Can you tell me what property that is?

1 A It's on the Murphy site.

2 Q Is this photo taken in what you know --
3 what the United States is referring to as the consent
4 decree area?

5 A Looks like it. Yes.

6 Q If you could, please, turn to page 459 in
7 that same exhibit.

8 MR. KOGAN: Counsel, could you specify --
9 again, objection to form. Could you specify
10 where on the Murphy site you are referring in the
11 consent decree area on Exhibit RA1?

12 MR. UHOLIK: Larry, that is a question you
13 can ask him later.

14 MR. KOGAN: I'm not asking him. I'm asking
15 you. You asked him a question. You weren't
16 specific enough on asking him where on the
17 consent decree area this is.

18 MR. UHOLIK: I don't specifically need to
19 ask him that. It's my question. You can ask him
20 later, if you would like. I just asked him if it
21 was in the consent decree area. He answered in
22 the affirmative.

23 Q On 459, EPA 000459, I will read the
24 caption. It is photograph 015 taken October 2nd,
25 2013, 1757 hours, new tile drain south of Lane Road.

1 Do you recognize, Mr. Brace, what this
2 photo depicts?

3 A You know, I don't know exactly where this
4 is at. Because all that is shown is -- it's not big
5 enough. I can't see no landscape behind it.

6 Q I guess what I want to ask is do you see
7 the white tubing in the middle?

8 A Yes.

9 Q Do you know what that is?

10 A It's a tile.

11 Q Is that the type of tile that was installed
12 in the consent decree area?

13 A Yes.

14 Q We are going to now turn to what was
15 yesterday marked Plaintiff's Exhibit 19. Today we
16 will mark RA5.

17 (Thereupon, Exhibit No. RA5 was marked for
18 identification.)

19 Q I am now showing you what has been marked
20 Exhibit RA5, which I will represent were photos taken
21 by the EPA in and around the Murphy and Marsh sites
22 during a May 2015 site visit. I would like you to
23 turn to Bates page EPA 0001109. Mr. Brace, first
24 question before I get to the photos, did you attend
25 this site visit?

1 A What was the date again?

2 Q May 20th, 2015. If you look at EPA 1110,
3 there is a photo of a group of people.

4 A I know they sign names. If my name was on
5 there, I'm sure I was.

6 Q If you switch to the next page, maybe you
7 will recognize yourself. I don't know.

8 A Yes. I think I'm right there on the left.
9 I'm right behind the girl with the green and white
10 coat.

11 Q Are you in brown and jeans, sir?

12 A Yes. I think that's me.

13 Q Looking at the page right before that, EPA
14 0001109. Photo No. 7. What does this photo depict,
15 sir?

16 A A tile line.

17 Q Is that the type of tile line that you
18 installed on the consent decree area?

19 A Yes.

20 Q I will flip to EPA 0001126. These
21 questions will be basically similar.

22 A Okay.

23 Q And what does this depict, sir?

24 A A hole.

25 Q In the middle of the photo, do you see a

1 tube?

2 A Okay. Yes. I do.

3 Q Is that also a tile drain?

4 A I can't say for sure. Because it's not
5 clear enough.

6 Q Down on the lower right-hand portion of the
7 photo, is that a tile drain?

8 A That almost looks like a pop can. Don't
9 it? I don't know. That is what it looks like.

10 Q We will flip to photo 24 which is EPA
11 0001128, two pages down.

12 A Okay.

13 Q What does this depict, sir?

14 A A tile line.

15 Q Is that the sort of tile line that has been
16 installed in the consent decree area?

17 A Yes.

18 Q And one more. Actually, a couple more.
19 Flipping to EPA 0001132.

20 A Okay.

21 Q Are you familiar with what this photo
22 shows?

23 A Yes. That is a culvert pipe coming across
24 Lane Road. Lane Road or south hill, I've seen the
25 name on different ones.

1 Q Would this be the eastern Lane Road
2 culvert?

3 A This would be about halfway between
4 Greenlee Road and the main culvert that goes
5 underneath. That's about halfway.

6 Q This is to the east of that main western
7 culvert?

8 A Yes.

9 Q Is there tile drain depicted in this photo?

10 A Yes.

11 Q Would that be the white tube?

12 A It would be the white tube. Yes.

13 Q Do you know where that white tube
14 originates?

15 A Up by the gas well there.

16 Q And where on the property, where on the
17 Murphy site is that located?

18 A It's in the contour field.

19 Q Can you identify on Exhibit RA1 that map
20 that we keep referring to? Could you just write a W
21 where that well is located?

22 A Yes.

23 Q Now, do you know if the tile line that goes
24 in that direction up to the well, is that tile line --
25 does it just drain the area around the well? Or are

1 there other tile lines attached to it?

2 A There is a few other ones attached to it.

3 Q Where would those other lines run?

4 A Up around the well back this way.

5 Q Would any of the lines that drain the
6 consent decree area be tied into that? This one?

7 A No.

8 Q All right. Now we will switch to EPA
9 0001134.

10 A Okay.

11 Q Do you see -- what does this photo depict?

12 A Tile line.

13 Q Same sort of tile line that has been used
14 in the consent decree area?

15 A Yes.

16 Q Can you tell from this photo where it's
17 located?

18 A I cannot. No.

19 (Thereupon, Exhibit No. RA6 was marked for
20 identification.)

21 Q RA6 I will represent is a photo log of the
22 locations of the photos that were taken that we are
23 discussing from RA5.

24 Photo 7, which was EPA 0001109. If you
25 will look on the left of this photo log, Mr. Brace.

1 There is a number 7 which corresponds with the photo
2 here.

3 Generally, is there tiling in that area?

4 A Very little. I'm trying to get my bearings
5 here. Most of it is down on the other side of it.

6 Q When you say down on the other side of it.

7 A Toward Lane Road.

8 Q So most of the -- there is tiling, but most
9 of it is back up towards Lane Road moving to the
10 north?

11 A Yes.

12 Q Photo 22 which was EPA 0001126. If you
13 want to go to photo 22.

14 MR. KOGAN: Objection. Foundation. Where
15 are the -- on what information are the placement
16 of these dots placed on RA6?

17 MR. UHOLIK: I believe they are located
18 based on GPS locations.

19 MR. KOGAN: Did you produce those GPS
20 locations? They are on the photograph right
21 there. Do you have a summary of the GPS
22 locations by photo? Only on each photo but not a
23 summary sheet of any kind.

24 MR. UHOLIK: I don't know that there is a
25 summary sheet.

1 MR. KOGAN: A summary sheet that would
2 accompany this.

3 MS. BROWN: That is what this is. Just to
4 make clear on the record, the GPS was taken --
5 when you take the picture, they recorded the GPS
6 with the photo. They use that and put it in a
7 map.

8 MR. KOGAN: I understand. I thought maybe
9 there would be an accompanying summary sheet for
10 photo 1, GPS marker here. So a person could sit
11 here with --

12 MS. BROWN: You have to use the photo.

13 MR. KOGAN: Thank you, counsel.

14 Q Photo 22 in the notes which says photo of
15 drain.

16 A Where are we?

17 Q Photo 22 corresponds with 22. You
18 testified you can't really tell if that thing in the
19 middle is a drain because it was covered up. My
20 question for you, is there drainage -- is there a tile
21 drain in the area of 22?

22 MR. KOGAN: Which dot relates to 22? There
23 is several dots here and multiple pictures
24 related to each dot.

25 MR. UHOLIK: There is a dot. Right above

1 it and slightly to the right is a 22. It's
2 within the consent decree area.

3 MR. KOGAN: Could you point for the
4 witness?

5 MR. UHOLIK: Sure.

6 Q This dot right here --

7 A Okay. We are on the back side of the
8 contour field.

9 Q My question for you, is there tile drain in
10 that area?

11 A Yes. Yes.

12 Q And the tile drain that is located in that
13 area, is that a part of the tile drain system that
14 drains the consent decree area?

15 A That is probably an outlet that does --
16 from that dot back toward Greenlee Road.

17 Q Is that a yes? That would be part of the
18 system that would drain the consent decree area?

19 A Yes.

20 Q Now we will hop to photo 24.

21 My question for you on 24, can you see
22 where 24 is located?

23 A Yes.

24 Q Where would -- this is approximating.
25 Would that pipe there be part of a drainage system

1 draining the consent decree area?

2 A Well, if that is right on 24, if that is
3 the one right next to the road and it is on the
4 outside red line, it would be -- the answer would be
5 no, if that was the case. If that is the tile line at
6 24, it goes up along the road.

7 Q We will go to photo 28. We actually
8 already discussed photo 28 and where it drains.

9 We will go to photo No. 30. EPA 0001134.

10 A Okay.

11 Q Orient yourself.

12 A That is 30 right there.

13 Q Obviously, I know that you can't
14 necessarily tell from the photo, apart from the GPS
15 coordinates, where this is taken.

16 But is there tile drain in the area of --

17 A Where I got my finger on this tile right
18 here. That would be No. 30 on the dot, right?

19 Q Right.

20 A That is probably one of my dad's old tile
21 lines from back in the '70s. I'm assuming. That
22 looks like an old tile line.

23 Q How can you tell the difference between old
24 tile line --

25 A Because I knew there was an outlet right in

1 there someplace.

2 Q Is there any difference between -- can you
3 tell by looking at a drainage tile if it is an old
4 tile or new one?

5 A That one is all dirty. I can't tell what
6 color it is.

7 Q Just generally. Is older tile made of a
8 different material? Does it look different?

9 A No. I mean, they have used plastic tile
10 for a long time. I don't really know.

11 Q You can put the photos away for the time
12 being. You may want to grab RA1 for orientation
13 purposes.

14 So we discussed a little bit the work that
15 was done within the consent decree area. And you have
16 highlighted where you were involved in tile drain
17 installation. Can you tell me who is the person who
18 said, "Go tile that"? Did you do it on your own? Did
19 your father tell you? Who told you?

20 A My father.

21 Q Do you recall, you may not, do you recall
22 whereabouts, when he may have told you to do that?

23 A I don't.

24 Q And who actually installed the tile drain
25 in the consent decree area?

1 A My brother.

2 Q Did your brother have any help? Or did he
3 do it on his own?

4 A He run the machine by himself.

5 Q And I know you helped with hooking up the
6 outlets -- hooking up the tile, then digging some
7 outlets. Outside of you and Ronnie, was there anybody
8 else assisting?

9 A My boy.

10 Q Which?

11 A Zach.

12 Q And what is it that you understand the
13 purpose of tile drain to be?

14 A So you can farm.

15 Q How does it help you farm?

16 A It takes water off the surface so the crops
17 don't flood.

18 Q So it drains water from the land?

19 A Yes.

20 Q We discussed -- I won't get the photo back
21 out. I will just ask you. How is it installed? I
22 know we saw there is some sort of machine. What is
23 the machine called?

24 A It's called a tile plow.

25 Q How does a tile plow work?

1 A A knife, and it just lays it in there. It
2 feeds it through the tube and then lays it down.

3 Q Do you have to -- you have to bear with me.
4 Obviously, I don't know about this.

5 Do you have to dig out a trench in order to
6 lay tile? Or does the tile plow effectively dig and
7 lay tile by itself?

8 A You have to dig the outlet, and you drop
9 the tile plow -- you just need maybe four, five foot,
10 three to five foot, just enough to drop the tile plow
11 down. Then you take off. Then it lays it. It feeds
12 it and lays it down.

13 Q So when you and Ronnie installed the tile
14 drain, if you could just sort of describe to me how
15 that worked. Would you dig the outlet with the
16 excavator?

17 A Yes. Track hoe.

18 Q You would dig an outlet with the track hoe.
19 Then Ronnie would come, and he would -- when you say
20 knife, what is --

21 A Just a slang word. Like I say, it's a big
22 arm. It's a big arm with a tube on the end. And as
23 you drop it down in, once you get your grade, you get
24 it started. And you hold it for just a couple feet.
25 Then he takes off. Then it just lays it across there.

1 Q So you would dig the outlet, Ronnie would
2 come with the tile plow. And then, as you say, take
3 off, and it would drag tile?

4 A It would lay tile.

5 Q Lay tile. When it lays tile, I would
6 assume -- I won't assume. Does it push earth out?
7 Sort of from either side? What I'm trying to imagine
8 is when you lay tile, is it completely covered? Do
9 you have to go back and cover the tile?

10 A It's completely covered with this knife,
11 with this type of tile plow.

12 There are different types of -- you might
13 be thinking of a trenching machine. This is
14 altogether different.

15 Q I'm just trying to imagine when you go to
16 lay the tile, you lay some tile, you pull the tile
17 plow out, is the tile completely covered and
18 underground?

19 A It is completely covered and underground.

20 Q Who designed the tile system that you
21 installed in the consent decree area? How did you
22 decide where to put it?

23 A My dad.

24 Q Did he -- was he out on the property with
25 you while the installation was occurring?

1 A Certain times.

2 Q Saying "Put tile here, put tile there"?

3 A Yes.

4 Q When he wasn't there, how did you know
5 where to put the tile?

6 A Because he told us where to put it.

7 Q At some other previous point he said put
8 tile in this area, did he ever draw it on a map?

9 A You would go from point A to point B. We
10 had to go exactly where he wanted it.

11 Q Did he ever, like, draw a map of the tile
12 system? Give you any sort of written thing, or just
13 sort of like "put it there"?

14 A No. No written thing. Not to my
15 knowledge.

16 Q And how much tile drain, when I say how
17 much, you can approximate a length, if you know, how
18 much tile drain did you install in the consent decree
19 area?

20 A I can honestly say. I don't have a clue.

21 Q That's fine.

22 I'm going to flip over what was previously
23 marked Plaintiff's Exhibit 18. We will mark it RA7.

24 (Thereupon, Exhibit No. RA7 was marked for
25 identification.)

1 Q You have been handed what has been marked
2 Exhibit RA7 which I will represent are aerials
3 produced in this litigation, aerials taken by Army
4 Corps of Engineers.

5 We will look at the first page of this.
6 Now, I know that we earlier discussed that you had
7 cleaned some ditches in the consent decree area. Is
8 that correct?

9 A Yes.

10 Q The photo you are looking at right now,
11 USACE00000174.

12 Can you tell what this depicts?

13 A Yes. It depicts contour field and the so
14 called site behind it.

15 Q So called site, you mean the consent decree
16 area?

17 A Yes.

18 Q On this photo can you identify where the
19 ditches are that you excavated?

20 A Uh-huh. I mean unless --

21 MR. KOGAN: Counsel -- okay. I will just
22 let it go for now.

23 A Do you want me to draw something?

24 Q Sure.

25 MR. KOGAN: Counsel, have you established

1 that the witness understands where the consent
2 decree area is on the map, on the picture?

3 MR. UHOLIK: Right now we are asking where
4 on this photo he has excavated ditches. If some
5 of those ditches happen to be in the consent
6 decree area, we can discuss them. He said he
7 knows the contour field is on there as well as
8 the consent decree area. We will discuss where.

9 Q Let the record reflect the witness is
10 highlighting in yellow ditches that he excavated --
11 cleaned, excuse me.

12 Looking at this photo, when you said that
13 it depicts the contour field in the consent decree
14 area. Just sort of describe where is the contour
15 field on this photo?

16 A Right in the center. See the gas well down
17 by the road and that tree.

18 Q You are referring to in the middle of the
19 photo sort of lower left part, there is a tree and
20 right above that two little specs?

21 A Yes. That's the gas well.

22 Q And so this center portion, basically?

23 A Yes.

24 Q Just south of Lane Road which on this photo
25 would be above the road is what you refer to as the

1 contour field?

2 A Yes.

3 Q Is this little -- on the contour field to
4 the north do you see a clump of trees sort of little
5 gathering of trees? Sorry, to the south. Up on the
6 photo which is actually to the south.

7 A Yes. Basically, right behind the gas well.

8 Q If you go straight back.

9 A Yes.

10 Q Is it your understanding that is also the
11 contour field?

12 A It goes down to the ditch. There is trees
13 there.

14 Q To the diagonal left of that which would be
15 southeast. Do you see a V?

16 A Yes.

17 Q Can you tell me, do you know what that is?

18 A Yes. Give me your highlighter. I forgot
19 to mark one ditch. That is where Todd Lutte and Fodse
20 told us we could farm to.

21 Q What did you mark there?

22 A That little one right here. Right there.

23 Q Is the whole V a ditch? Or is it just that
24 line there?

25 A I had dug where he told us to.

1 Q You dug there.

2 When did Todd Lutte tell you that you could
3 dig there?

4 A Whatever date it was when him and Fodse
5 were up there.

6 Q So if you can remember, what exactly did he
7 say?

8 A Well, we walked up through there. That is
9 about where we stood. They told us to step away.
10 They were going to take a side bar. They come back.
11 They told us we are going to declare these
12 agricultural ditches. That was it. We walked back to
13 the road. Talked to dad, mom, Rhonda, and I think Ron
14 Bosworth was there.

15 Q When you say us, Todd and Fodse, which I
16 will represent is Michael Fodse of Army Corps of
17 Engineers. When you say they told us, do you mean --

18 A My brother and I.

19 Q You and your brother?

20 A Right.

21 Q Did he tell you anything else?

22 A Yes. When we got back to the road I asked
23 him when we could start. And he said any time. I
24 says, "What are you going to do when you get calls?"

25 "All calls will be directed to the EPA."

1 I said, "There is going to be calls."

2 Q Is that it?

3 A That is it pretty much in a nutshell, I
4 guess, yes.

5 Q We may have covered this before. I
6 apologize. So what is the purpose of cleaning out the
7 ditch? How does that help you?

8 A So it drains water.

9 Q So when you clean -- so when you clean out
10 the ditch -- so are you cleaning out debris from the
11 ditch? Is that basically what cleaning out the ditch
12 means?

13 A Yes.

14 Q So from where does it drain the water?

15 A You have to start down at the outlet.

16 Q You clean out the ditch. How does the
17 outlet come into --

18 A You can't start where it's not cleaned out.
19 You have to start at the outlet where it drains into.

20 Q So you clean out the ditch to enable you to
21 install tile drain? Is that what you are saying?

22 A Yes. You need to clean it out so you can
23 make a place for the water to go. Yes.

24 Q Does the removal of debris from a ditch,
25 forgetting about the tile drain for a second, does it

1 generally just lower the water in the ditch?

2 A Well, if a ditch plugs up, there is no
3 place for the water to go.

4 Q Right. I'm just trying to get it on the
5 record.

6 A Yes.

7 Q Did you usually use the same track hoe,
8 basically, to clean out all of the ditches that you
9 highlighted in yellow on RA7?

10 A Yes.

11 Q Now, down at the last thing you
12 highlighted, that you said you forgot to highlight,
13 that you said Fodse and Lutte told you you could dig
14 to, which is in -- I'm referring to it is a
15 highlighted portion of the photo sort of in the center
16 left. It comes off of a V.

17 A Out toward Greenlee?

18 Q I'm talking about right here.

19 A Yes.

20 Q It is just sort of diagonal up and to the
21 left from -- it's between two clumps of trees.

22 A Right.

23 Q That ditch, was that a new ditch?

24 A No. That was a ditch my dad put in.

25 Q How long has that ditch been --

1 A Probably back in the '70s, probably. I'm
2 guessing. I don't know. I didn't do it.

3 Q There has been a ditch there, as far as you
4 can remember, your entire life? As far as you can
5 remember?

6 A As far as I can remember. Yes.

7 Q Did you, after Lutte and Fodse told you you
8 could work in that area, by that area I mean the
9 consent decree area. Did you excavate any new
10 ditches?

11 A No. Everything that we did was existing.

12 Q What was your reaction when Fodse and Lutte
13 told you that you could do the work in the area?

14 A We were happy.

15 Q Do you know the approximate -- again, I
16 know you may or may not know this, the approximate
17 length of the sort of the ditch work that you did?

18 A We started down by Sharp Road, 86. And
19 that was approximately -- that's over on the Marsh
20 side. That is approximately -- because they told us
21 to measure it off. It was, approximately, I think it
22 was around nine-tenths of a mile. More or less.

23 Q From start to finish?

24 A Yes.

25 Q Including whatever work you did up by Sharp

1 Road all the way down?

2 A From Sharp Road all the way back to
3 Greenlee, yes. Approximately.

4 Q We will go back to what has been previously
5 marked as I believe RA5. And if you could please --
6 actually, before we get to that. The check dam that
7 was installed, was it repositioned in any way?

8 A No, sir.

9 Q It's been in the same location, and it
10 remains in the same location?

11 A Yes, sir.

12 Q If you could turn to EPA 0001114. Are you
13 familiar with what this photo shows?

14 A Yes. That shows a check dam.

15 Q And does this depict a check dam as you
16 have always known it?

17 A Yes.

18 Q When you were working in the consent decree
19 area, how did you get around the check dam with the
20 track hoe?

21 A Well, I was up on the bank. And I cleaned
22 to it and went on the other side. I didn't move the
23 check dam.

24 Q Was there -- you can put the photos away
25 for now.

1 Were there -- was there vegetation on the
2 site?

3 A You mean when we did the excavating?

4 Q When you did the excavating, was there
5 vegetation on the site, trees, shrubs, et cetera?

6 A Yes.

7 Q Did you clear the site? Or did someone
8 clear the site of vegetation?

9 A Where are we talking about?

10 Q In the consent decree area.

11 A In the consent decree.

12 Yes, my dad would have done that. After we
13 done the ditch.

14 Q Your dad, personally, would have?

15 A He is the one that ran the bulldozer, yes.

16 Q Do you know whereabouts in the consent
17 decree area that he would have cleared vegetation?
18 Let me rephrase. Whereabouts did he clear vegetation?

19 A Everywhere they said we could.

20 Q Do you have any idea where that would be?

21 A Everywhere where Todd Lutte and Fodse said
22 we could.

23 Q What I'm asking is where did Todd Lutte and
24 Mike Fodse say that you could clear?

25 A Everything there. All except in the back,

1 in the very back. Everything except -- he was
2 concerned about this ditch right here where we were
3 going to put the dirt and stuff. And we put the dirt
4 on it would be the north side of the ditch.

5 Q You are saying that Todd Lutte and Mike
6 Fodse told you you could clear vegetation from the
7 entire consent decree area?

8 A Yes. They said we could farm that, yes.

9 Q How was the vegetation cleared?

10 A Bulldozer.

11 Q I think we know the answer, but why was it
12 cleared?

13 A To farm.

14 Q Were you told that you could clear
15 vegetation at the same visit where you were told that
16 you could clean the ditches?

17 A You can't farm without clearing vegetation.

18 Q I understand. What I'm saying is were you
19 told that you could clear the vegetation at the
20 same --

21 A Yes. When they stood back there and said
22 they were going to declare all this agricultural
23 ditches, that was the day right there.

24 Q And they told you that --

25 A And then they said the government would

1 write something up. But as we know, the government
2 works slow.

3 Q When they told you that you were back --
4 you were back in the consent decree area --

5 A Yes.

6 Q And along the ditch --

7 A We were standing in what I call the contour
8 field right here overlooking everything.

9 Q If you could just draw --

10 A Where we were standing?

11 Q Write an M. We will call that meeting for
12 where you were standing.

13 A Right in there roundabout.

14 Q Let the record reflect the witness drew an
15 M on RA1 to indicate where Michael Fodse and Tom Lutte
16 were meeting with I believe --

17 A My brother and I.

18 Q Ronnie Brace and Randy Brace.

19 A Right.

20 Q Did you -- so after the cleaning and after
21 the clearing and after installation of tile drain, you
22 planted. Correct? The areas that you have written
23 corn in in the consent decree area.

24 A Yes. I can't remember -- I don't think it
25 was that year. I can't remember the exact date, but

1 yes.

2 Q Those crops were harvested?

3 A Yes.

4 Q And they were sold?

5 A I assume.

6 Q That would probably be -- if it wasn't 2012
7 which I guess from your testimony makes sense,
8 planting season is in the spring. It would have been
9 2013 would have been the year?

10 A Ronnie would have a better handle on that.

11 Q We will ask Ronnie.

12 A I figure you will.

13 Q I think that is probably a good place for a
14 break.

15 (Recess taken.)

16 MR. KOGAN: Relating to deposition RA6,
17 have you established foundation that the picture
18 of the land in this exhibit, which contains the
19 photo locations that correspond to RA5 exhibit
20 with all the photos taken during the May 20th,
21 2015 visit, does this picture of the land reflect
22 the land as it appeared on May 20th, 2015?

23 MR. UHOLIK: Can you repeat that?

24 MR. KOGAN: Does this picture, which shows
25 all the points of photographs taken during the

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1 visit on -- site visit of May 20th, 2015, it
2 shows the location of the photographs. But does
3 the picture of the land depicted in this image
4 show the land as it was in May 20, 2015? Does
5 the picture of the land correspond to the date
6 that these photos located on the map --

7 MS. BROWN: I think the question -- your
8 question is whether or not the photograph was
9 taken in 2015, the aerial photograph. The answer
10 is I don't see that there is a date. Obviously,
11 if we are going to use this in evidence, we could
12 lay the foundation. If you are going to object
13 this is not an accurate representation --

14 MR. KOGAN: I'm objecting it's not an
15 accurate representation unless you can establish
16 it is an accurate representation. If it isn't,
17 then you have to replace it with a map of the
18 land at that time.

19 MS. BROWN: This is not at trial. This is
20 deposition.

21 MR. KOGAN: Right now you don't. But if
22 you present it as evidence, you need to.

23 MR. UHOLIK: I'm aware of how it works.

24 MR. KOGAN: For the record you are not
25 certain whether the picture of the land in RA6

1 was taken on the day or within the period,
2 including the day on which the on site visit
3 occurred on May 20th, 2015 where all of the
4 photographs shown in dots and numerically were
5 taken. That's all I want to make sure.

6 MS. BROWN: I will clarify for the record,
7 since I was part of that document production,
8 what I think happened is Mr. Lutte took the
9 photographs, then he wanted to correlate them.
10 So he pulled an aerial. The date of the aerial
11 we can figure out when it is.

12 BY MR. UHOLIK:

13 Q Mr. Brace, one more thing we will do with
14 RA1. You said that Lutte and Fodse did tell you to
15 stay out of some area on the consent decree area. You
16 sort of made a general representation as to where the
17 area was. I will hand you an orange highlighter. And
18 if you could sort of approximate what area they told
19 you to stay out of.

20 Do you know -- let the record reflect the
21 witness highlighted an area in orange which he is
22 representing is the area that Mike Fodse and Todd
23 Lutte told him to stay out of in the consent decree
24 area.

25 Do you know approximately how much acreage

1 that is?

2 A I don't.

3 Q Next thing we will talk about is flooding.

4 There have been representations made by defendants in

5 this matter that there has been various amounts of

6 flooding on the land that is involved in this case.

7 Particularly what has been referred to as the uplands.

8 So I guess the first thing I would like to

9 do is establish what are the uplands, as far as you

10 know? If I asked you what are the uplands of this --

11 of the Murphy site.

12 A On the Murphy site or the Homestead site?

13 Q Let's start with the Murphy site.

14 A Well, the contour field.

15 Q The contour field are the uplands on the

16 Murphy site.

17 Now, on the Homestead property, is the

18 whole property considered to be the uplands? Is it a

19 portion?

20 A It's supposed to be, yes.

21 Q The whole property.

22 A As far as I know.

23 Q Are you familiar with the flooding that has

24 been alleged here?

25 A Yes.

1 Q Can you describe the type of surface
2 flooding that you yourself have witnessed?

3 A You want me to draw a map? Want me to draw
4 on this?

5 Q I'm going to give you a blue highlighter to
6 draw. When I say describe the sort of flooding --

7 A Where it is wet and you can't get in it
8 because the ditches were all plugged. I will just
9 draw a line.

10 Q Let the record reflect the witness has --
11 are the areas -- this line here I'm pointing to, does
12 this come back around?

13 A This is the ditch. It comes from Lane Road
14 up to here. This was completely filled here, all the
15 way down and around. When that is all filled, nothing
16 will drain, and it is all subsurface, it will flood,
17 but it's all subsurface flooding. None of the tile
18 lines in here work.

19 Q For the moment, we are talking about
20 surface flooding.

21 Now, the highlighted here, is that -- on
22 this portion here, see where I'm pointing, you
23 circled, is that whole area in here --

24 A I know you are talking about surface
25 flooding.

1 Q That's what I'm asking about.

2 A The surface flooding would be down here
3 more.

4 MR. KOGAN: Counsel, do you have a
5 different color marker you want to distinguish?

6 Q Your blue you have written there is what
7 you refer to as subsurface flooding?

8 A Yes. Because everything is plugged, and
9 nothing will drain.

10 Q For the time we will ask questions about
11 surface flooding. Have you seen surface flooding in
12 the contour area?

13 A Yes. Down around here.

14 Q By down around here, where are you
15 describing?

16 A Down by the well.

17 Q And how deep has the water been?

18 A Deep enough you can't do nothing with.

19 Q Is that an inch? Is that a foot?

20 A I have seen it an inch, I've seen it six
21 inches. Around about. I didn't get out and measure
22 it.

23 Q Just eyeballing.

24 A Yes.

25 Q Anywhere else on the contour field?

1 A Yes. In the very back --

2 Q We are asking about surface flooding right
3 now.

4 A Yes. When this ditch is filled up, it will
5 creep out into the field here.

6 Q So when the ditch, which you highlighted --
7 you are referring to the ditch you highlighted in
8 pink. It will creep up?

9 A Yes.

10 Q Into the contour field?

11 A Yes. Now, there is a bank there. It will
12 go in there a ways, then it comes way up. Yes, it
13 does affect it.

14 Q How far into the contour field have you
15 seen standing water?

16 A Most of it was done here by the road. And
17 a lot of it was back in the very back of the contour
18 field. Basically about where we were standing off the
19 ditch. When that ditch was completely filled, it
20 would flood right there.

21 Q So you are saying where we have put M for
22 meeting.

23 A Yes. We were standing up a little bit
24 higher than that. But yes, it got to the point where
25 you couldn't do nothing at the end of the field.

1 Q Does the water ever overtake Lane Road at
2 the Lane Road culvert?

3 A Before we cleaned it out, yes, it has.

4 Q How often?

5 A With all the dams and stuff that were in
6 there, every time it rained hard.

7 Q So when you say every time it rained
8 hard --

9 A There was one time I seen it overflow the
10 road.

11 Q You have seen it overflow the road one
12 time? Or you have seen it overflow the road?

13 A I seen it overflow the road one time.
14 Don't ask me what date, because I don't remember what
15 date it was. But yes. And actually, like I said,
16 when the plugs in the end of it, the water is up.

17 Q What I'm trying to get is how many times
18 have you seen it over top Lane Road. Is it once?

19 A I seen it over the road at least once.
20 Yes.

21 MR. KOGAN: He said at least once.

22 Q When you say every time it rained hard, how
23 often do you get a rain that is hard enough to over
24 top?

25 A Well, with the beaver dam and stuff that

1 was down there, the whole thing would flood, yes.

2 Q Right. I'm asking, about how often?

3 A Every time you got a hard rain. I don't
4 know how many times --

5 Q If you had an estimate, how many times a
6 year are you talking about?

7 A I can't say how many times a year.

8 Q What is the worst flooding that you have
9 ever seen on the property? How far from the culvert
10 did water spread out from Lane Road?

11 If you were standing at the Lane Road
12 culvert, if you were standing directly in the middle
13 of it. The worst flooding you have ever seen, how far
14 did it go out?

15 A When it would flood, and it was back, it
16 would come all the way back up this ditch. And it
17 would flood this whole field right here. And it would
18 flood a lot of this -- it would flood all this down in
19 here. It would flood this field here on the inside of
20 where I have the blue line.

21 Q Specifically, I'm just asking right now
22 about if you were standing at the Lane Road culvert,
23 and you were standing in the middle of the culvert.

24 A In the middle of the culvert?

25 Q If you were standing on Lane Road.

1 A On the top of the culvert.

2 Q On top of the culvert. The worst flooding
3 you have seen.

4 A I seen it over the road once. At least
5 once.

6 Q How far -- if you were standing on top of
7 the culvert in the middle of it, how far from -- if
8 you are standing, obviously it comes over the road.
9 How far to the left is the water, how far to your
10 right?

11 A Quite a ways. I can't say how many feet.
12 I don't know.

13 Q Is it ten feet? Is it 20 feet? Is it 50
14 feet?

15 A There is no -- I never measured it. I have
16 no idea.

17 Q When you observed the time that you recall
18 seeing water over top Lane Road, how long -- how long
19 did Lane Road remain underwater?

20 A Once the main storm went through, then it
21 would go down. But everything was still right to the
22 top of the road. It was to the top. To the top of
23 the road. I seen it go over one time, at least once.
24 It would always stay to the top of the road.

25 Q I guess my question is when it was over,

1 the water was on the road, how long was water on the
2 road?

3 A The one time it was over it, it was at
4 nighttime, I come through. Like I said, I don't know.

5 Q Have you ever seen water over top the Sharp
6 Road culvert?

7 A Yes.

8 Q How often has that happened?

9 A Several times. A lot of that comes --
10 these are all full of dams. There is another where it
11 comes down out of here. There is a beaver dam, there
12 is a house -- this house right here. It would come
13 out this side of the road and then come over to our
14 side. So right about in here, it would come out right
15 here, flood all this and flood over on our side.

16 Q You are talking about there appears to
17 be -- looking at RA1. There appears to be a tributary
18 that comes off what the United States represents is
19 Elk Creek and runs south. And that tributary is on --
20 it is west of Sharp Road. So what you are saying is
21 this stream or creek or whatever it is will flood and
22 run over?

23 A It will flood and run over. Right.

24 Q Okay.

25 You saw that occur several times. So two

1 or more?

2 A Yes. A lot.

3 Q It would appear that that flooding has to
4 do with a different creek?

5 MR. KOGAN: You might want to establish
6 foundation with the beaver dam.

7 MR. UHOLIK: I'm not asking about beaver
8 dams.

9 Q We discussed a little bit a couple minutes
10 ago, the worst flooding you have seen, talking about
11 the Murphy site, and I think you may have seen six
12 inches by the well?

13 A Yes. Like I said, I didn't get out and
14 measure nothing.

15 Q Just eyeballing. Approximately.

16 What is the worst surface flooding that you
17 have seen on the Homestead site? Whereabouts would
18 that have been?

19 A Down in here, over here, back up around the
20 back side of this field and along this ditch right
21 here. And right in here.

22 Q What is the deepest -- what is the deepest
23 point you can recollect.

24 A I never got out and measured it.

25 MR. KOGAN: Counsel, was the witness

1 pointing to the blue area that he previously
2 highlighted?

3 MR. UHOLIK: He pointed to some of the blue
4 areas. And some other areas. It's a little
5 confusing since the blue area is now subsurface
6 flooding versus surface.

7 MR. KOGAN: It could include both, counsel.
8 It is possible.

9 MR. UHOLIK: I'm asking about surface
10 flooding.

11 Q Here is another question. So you have seen
12 flooding. Have you taken any notes? Did you make any
13 notes about the flooding that you have seen?

14 A I have never taken any notes, no.

15 Q Did you take any photos of surface
16 flooding?

17 A I have not. No.

18 Q Do you know if anybody else did?

19 A I do not know.

20 Q Do you know if anyone else took any notes?

21 A I do not know.

22 Q When there was flooding, have you notified
23 Waterford Township about flooding?

24 A I haven't. I think my dad has. I never
25 notified Waterford Township.

1 Q Do you have any idea when your dad may
2 have?

3 A No.

4 Q Same for Erie County? Have you notified
5 Erie County about flooding?

6 A I haven't. No.

7 Q Do you know if your father has?

8 A I don't know if he has or not. I think he
9 has, yes.

10 Q Would you know when?

11 A I don't have a clue.

12 Q Basically, same questions for the
13 Commonwealth of Pennsylvania. You didn't notify the
14 Commonwealth yourself, did you?

15 A No, sir.

16 Q Do you know if your father did?

17 A I think he had tried. I don't know if he
18 ever got ahold of them. I'm pretty sure he was trying
19 to. Like I said, I'm not 100% sure.

20 Q If you don't know, that's fine. You can
21 say, "I don't know."

22 Would anybody, other than your father, when
23 I say anybody, I mean involved in -- anybody that is
24 involved in the farming operation with Robert Brace &
25 Sons or Robert Brace Farms, Incorporated, would anyone

1 else, do you believe -- did anyone else contact an
2 entity, Waterford Township, about flooding?

3 A He is the main man. Unless he had my
4 sister, one of the secretaries do it. I have no idea.

5 Q Have you personally told anybody at EPA
6 about flooding?

7 A Have I, personally?

8 Q Yes. You.

9 A Unless we were talking with Pat and Mike
10 the day they were out there. But I never called
11 nobody. No.

12 Q Who is Pat?

13 A I'm sorry. I know Pat Lutte. I'm talking
14 about --

15 Q You are talking about Todd Lutte?

16 A I'm talking about Todd. I'm sorry.

17 Q I didn't know if there was a third person I
18 never met. I was a little concerned.

19 So to your knowledge, you didn't talk about
20 it?

21 A I never talked about it, no.

22 Q Would you give the same answer if I asked
23 you about any other federal agency, an employee of any
24 other federal agency, USDA, Corps?

25 A Right.

1 Q To your knowledge, has there ever been an
2 insurance claim submitted on any damage on the Murphy
3 site related to flooding?

4 A I do not know.

5 Q Same question for the Homestead site.

6 A Yes. I do not know.

7 Q Same question for the Marsh site.

8 A Do not know.

9 Q I know there has been defendants submitted
10 an expert report that discusses issues with the Sharp
11 Road culvert. Are you familiar with the expert
12 report, the report created by Andy Johnson?

13 A Never read it over. I have glanced through
14 it. But never read it.

15 Q You never read it.

16 A Right.

17 Q But are you familiar with problems that
18 defendants perceived to have with the Sharp Road
19 culvert?

20 A Say that again.

21 Q Are you familiar with problems that
22 defendants have with the Sharp Road culvert?

23 A Yes.

24 Q What are those problems?

25 A One of them is concrete in the bottom of

1 them.

2 Q Do you know who installed that culvert?

3 A I don't know. I'm assuming it would be the
4 state. I don't know.

5 Q Do you know if anybody has contacted the
6 State of Pennsylvania? By anybody I mean anyone
7 involved with Robert Brace & Sons?

8 A I haven't. I think my dad has. Like I
9 say, I'm not 100% sure.

10 Q Now, a couple times you mentioned that
11 there has been -- related to the flooding is beaver
12 dams. Beaver dams backing up water.

13 A Yes, sir.

14 Q Have beaver dams -- within the consent
15 decree area, how many beaver dams have you had since
16 2005?

17 A Since 2005?

18 Q Yes.

19 A I can't say right offhand. I know when we
20 got the okay, we started down here in 86, the same
21 commission went down and helped us take it out,
22 stopped the traffic. We are down on 86 culvert.

23 Q On Sharp Road.

24 A Yes. That was one of the first ones we
25 took out.

1 Q There was a beaver dam up here someplace?

2 A Yes. Down by the pipe.

3 Q And do you know when that was?

4 A Yes. We took it out after Todd Lutte and
5 Darren Clark give us permission to take it out. Then
6 the game commission, we took the track hoe down. The
7 game commission parked there, turned their lights on,
8 parked their truck in the middle of the road so I
9 could get my excavator over there to take it out.

10 And then we took that one out.

11 Q Was that east or west of Sharp Road?

12 A It would be on this side. It would be the
13 east side. And then we came up. I can't remember if
14 there was another smaller one up through here. And
15 there was a couple other ones over here behind the
16 contour field. I think there was one or two down
17 here. I'm not 100% sure.

18 Q To the best of your recollection, if you can
19 just make an X wherever it is that you -- just use
20 your pen -- wherever it is that you removed beaver
21 dams since 2005.

22 A Like I say, this is not to scale or nothing
23 here.

24 Q We aren't expecting GPS coordinates.

25 A I think there was a couple in here. And I

1 know over on this side there was one here. Might have
2 been one here. And I think there was another one back
3 in here someplace. Like I said, the exact location,
4 that is roughly.

5 Q Do you know when for each of those?

6 A Yes. After we got permission to do that.
7 Yes.

8 Q If we move from north to south, moving
9 backwards, with each X, if you know, if you can tell
10 me when you would have removed them.

11 A Would have removed them after the first
12 visit with Todd Lutte and Darren Clark.

13 Q Do you have any idea what dates?

14 A I'm thinking it was 2011. I'm not 100%
15 sure. It was one of the very first meetings. To the
16 best of my recollection. Yes.

17 Q Were they all removed in 2011?

18 A It was after -- whatever the first meeting
19 was with Todd. So whatever date it was. Right after
20 that. Yes.

21 Q Did you sort of do them in a fell swoop?

22 A I don't know if it was a couple days. I
23 think it was in a few day period or whatever. I do
24 know that the game commission was on site on this one.
25 And I know they were on site on these up here.

1 Q Up here, you are referring to beaver dams
2 in the Marsh site?

3 A No. Referring to the dams that were on the
4 Murphy site. I'm sorry, the Murphy site up in here.
5 There is a couple here. As a matter of fact, I met it
6 was Darren, and I met another man, I can't remember
7 his name, he was up in here, too.

8 Q When you removed the beaver dams, what
9 happened?

10 A The water started draining.

11 Q By draining do you mean the water level
12 dropped?

13 A Yes. It was all flooded up through here.
14 All the way up through the ditch.

15 You have to start --

16 Q When you say the ditch, what do you mean?

17 A The ditch that my dad made.

18 Q Which ditch is that?

19 A Up through the Marsh going into the Murphy
20 site.

21 Q Are you referring to what the United States
22 refers to as Elk Creek?

23 A I refer to it as a ditch.

24 Q I'm saying are you referring to what the
25 United States is referring to --

1 A You call it whatever you want to call it.
2 I'm referring to it as a ditch.

3 Q I'm just trying to understand for the
4 record so it's clear for the parties. What the United
5 States calls Elk Creek you are referring to a ditch.

6 A Right.

7 Q So all the beaver dams were along that.

8 A Yes. To the best of my recollection. Yes.

9 Q And so you removed the beaver dams.

10 A Removed the beaver dams. And I think there
11 was another on site meeting. That was the day when
12 Todd and Mike Fodse came out. I don't know how long
13 after it was after we took the dams and stuff out.

14 Q But the dams were out before the meeting
15 with Fodse --

16 A To the best of my recollection, yes.

17 Q And I think I may have gotten lost in the
18 shuffle there. You took the beaver dams out, and the
19 effect was the water level and what you call the
20 ditch, and we call Elk Creek, dropped. Right?

21 A Yes. Obviously.

22 Q What happened with the flooding that you
23 had observed in this portion? By this portion the
24 upper position of the Homestead farm.

25 A This up here is still flooded, because that

1 ditch was never cleaned out. There is a ditch that
2 comes off Greenlee down through here. And that is
3 where I am saying this has this all screwed up in
4 here.

5 Q So this area is still flooded now.

6 A This area is still flooded up in here.
7 Yes. On the end of this field here, all the way down
8 and around. Yes.

9 Q So we are talking -- it's on the I guess
10 northern section of the Homestead site, where you have
11 marked in blue. This area is still flooded?

12 A Right.

13 Q The very top area.

14 A It would be on the inside of this blue
15 line.

16 Q Your highlight is, basically, the water is
17 limited to the blue line.

18 A Right. Now, this here, like I say, you
19 call it surface flooding, it will surface flood real
20 bad down in here. It will be all subsurface flooding
21 up in here.

22 Q And is it still wet?

23 A Well, we have never been able to finish it.
24 So yes. Like I said, this ditch up in here, this is
25 completely filled in and overflowing its banks into

1 the field. There is a ditch that comes off the road.
2 It comes down and hooks into this.

3 Q There is a ditch that comes off of -- is
4 that Greenlee?

5 A That is Greenlee. Right.

6 Q To the east of the Sharp Road Greenlee
7 intersection?

8 A Right. You were asking what was flooded
9 down in here. I'm just telling you. This will all
10 flood down in here. This will flood down in here.
11 And then this will all be subflooded up in here.

12 Q What I'm asking is recently. This is still
13 a problem.

14 A Yes.

15 Q At the top. Your top blue line.

16 A Well, there is no dams in there right now.

17 Q How about your blue line right here. Is
18 this still an issue?

19 A Yes. This will flood down in here. And
20 then this, like I said, I know you are talking about,
21 but this is all subflooded.

22 Q Right now I'm just trying to find out, so
23 the very top blue line that you drew, that is still a
24 problem?

25 A Yes.

1 Q The second, right below the top blue line,
2 the second blue line, that is still a problem?

3 A That's a problem, yes.

4 Q Now, I'm going below the second blue line.
5 The second blue line is sort of like a circuit. It's
6 an enclosed -- you drew a blue line, and it went all
7 the way around enclosed. I'm going below that now.
8 Which is this line right here. Which is just
9 northeast of the Lane Road culvert.

10 A Right.

11 Q How are we here now?

12 A How are we here?

13 Q Yes. Is this flooding still a problem?

14 A Yes. Not really flood. It will right down
15 in here on this side. Like I said, this just stays
16 wet up in here.

17 Q So this is wet, generally?

18 A Yes. Because there is another ditch that
19 goes down through there that wasn't actually -- that
20 has never been cleaned out.

21 Q Is that a ditch --

22 A It's on the Homestead.

23 Q We will go down to this line here which is
24 the one -- it's touching Lane Road. And it comes sort
25 of up and humps over, goes towards Greenlee Road. And

1 it seems you stopped drawing right before you get to
2 what is an orange I assume that's a ditch.

3 A That's a ditch.

4 Q An orange ditch that runs down towards Lane
5 Road.

6 So is this line here, is this still -- do
7 you still have subsurface flooding here?

8 A Some subsurface. These ditches were all
9 cleaned out when Todd and Mike -- this isn't as bad
10 right now. But yes, this is where it will flood in
11 here. Yes.

12 Q When you say these ditches, are you
13 referring to the orange line ditch that is north of
14 Lane Road?

15 A Yes.

16 Q So that was cleaned out, too, when you did
17 the other -- when you cleaned the ditches out in the
18 consent decree area, you also cleaned this ditch out
19 in the Homestead property.

20 A Right.

21 Q We will hook back moving east to what I
22 think is your last blue line. So this blue line also
23 comes up from Lane Road and hooks over towards the
24 orange dip on the Homestead property. And that one is
25 swooping up moving west. Is the subsurface flooding,

1 that you marked here, is that still a problem today?

2 A Not bad. Because the ditch is cleaned out.

3 Q By the ditch you mean this orange ditch
4 here.

5 A Yes. This was all completely flooded when
6 Todd came out. This comes down across the road, comes
7 down in here, goes all the way around.

8 Q So you cleaned out the ditch, this orange
9 line, basically, this orange line that extends from
10 Lane Road up north on the Homestead property. And
11 since then you are saying that this blue line, which
12 indicates subsurface flooding or surface flooding,
13 isn't as bad, basically? Is it a problem? Or is it
14 fine?

15 A No. It's better now.

16 Q It's better. Is it still a problem,
17 though?

18 A If you let it go, it would be, yes.

19 Q What you are saying, as long as you keep
20 this orange ditch clear here, and by this orange ditch
21 I'm referring to the one in the middle of the
22 Homestead property extending up from Lane Road.

23 A Yes. Once that fills up, then you lose all
24 this.

25 Q This is probably a good place for lunch.

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1 Just a reminder, please do not discuss your
2 testimony with anyone.

3 A Yes, sir.

4 (Thereupon, a luncheon recess was taken
5 from 12:23 p.m. until 1:35 p.m.)

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1 A-F-T-E-R-N-O-O-N S-E-S-S-I-O-N

2 Q Welcome back.

3 You can get RA1 back out. We are going to
4 talk about the Marsh site now. For the record, are
5 you familiar with the Marsh site?

6 A Yes.

7 Q As marked on that exhibit.

8 And who owns it?

9 A Robert Brace.

10 Q Do you know when it was purchased?

11 A I think it was '11 or '12. I'm not 100%
12 sure. Somewhere in there.

13 Q Do you know why it was purchased?

14 A No.

15 Q How long have you been familiar the Marsh
16 site?

17 A Well, I have lived next to it for 30 some
18 years.

19 Q Okay. All right. So fairly familiar.

20 A Yes.

21 Q Throughout -- when the Marsh site was
22 purchased, what were the conditions on the site?

23 A Wet. Grewed up.

24 Q And do you have any idea how long it had
25 been sort of, quote, unquote, "wet and grewed up"?

1 A No. Not really.

2 Q More than a year? It's been a while?

3 A It's been a while.

4 Q So on average how many times a year do you
5 visit the Marsh site?

6 A Drive by it every day.

7 Q And how often are you physically on it?

8 A Not very often.

9 Q Would that be once a month, once a week,
10 once every couple months?

11 A Maybe in the summertime take a walk around
12 it, that's about it.

13 Q When you go there, what is your purpose for
14 going?

15 A Take a walk.

16 Q In the last ten years, have you ever seen
17 the Marsh site planted with crops?

18 A Not with crops. No.

19 Q Is there something else you can plant it
20 with other than crops?

21 A Is there something you can plant --

22 Q For a farming operation, is there something
23 other than crops that you would plant?

24 A We wouldn't, I guess, no.

25 Q So in the last ten years, would it be safe

1 to say that the Marsh site hasn't been farmed?

2 A Correct.

3 Q Can you recall any time that it was farmed?

4 A Yes.

5 Q Do you have any idea when that might have
6 been?

7 A It's been a while. Can't specifically say
8 when. But I remember when it was worked.

9 Q Was it during your childhood?

10 A Yes. Probably, yes.

11 Q You may not remember this. Do you have any
12 idea what was planted there when it was planted?

13 A No. I don't.

14 Q So has -- since 2011, 2012, since the Marsh
15 site has been taken over, has it been planted?

16 A No. It hasn't been planted.

17 Q Have you yourself done any work on the
18 Marsh site?

19 A Yes.

20 Q So let's walk through that. When did you
21 start doing anything? Start from there.

22 A When we cleaned the ditch out.

23 Q When you cleaned the ditch out. By the
24 ditch you are referring to, is that the ditch the
25 United States refers to as Elk Creek?

1 A Yes. The ditch.

2 Q I want to make sure we are talking about
3 same thing regardless what we call it.

4 A Okay.

5 Q When did that occur?

6 A After Todd Lutte and Darren Clark made a
7 visit to tear the dams out.

8 Q That is after the dams visit. And so what
9 work did you perform? Was it just the dams? Did you
10 just clear the dams?

11 A When he tiled it, I did the same thing, I
12 did the hookups.

13 Q So the first thing, what was the first
14 thing you did? Todd Lutte and Darren Clark came on
15 site. What was the next thing you did?

16 A Tore the dams out.

17 Q Which we already talked about.

18 A Right.

19 Q What was the next thing that you were
20 involved in, sort of the next thing?

21 A The tiling.

22 Q Do you know when that occurred?

23 A Somewhere in, like I said, I don't know if
24 it was '12 or '13. But after Todd Lutte and Fodse
25 were up. Mike Fodse.

1 Q So the tiling of the Marsh site occurred
2 after.

3 A Yes.

4 Q Is the same -- were the same individuals
5 involved in this tiling that were involved in the
6 tiling on the consent decree, meaning you and your
7 brother, Ronnie?

8 A Correct.

9 Q Anybody else?

10 A My boy, Zach.

11 Q So I think you mentioned that -- we moved
12 the beaver dams from the ditch or what we call Elk
13 Creek. Did you also clean debris, did you clean the
14 ditch as you described before?

15 A Yes.

16 Q With the track hoe I believe it is?

17 A Yes.

18 Q We are going to go back to our pink marker.
19 If you could please mark on the Marsh site the
20 portions of what you call the ditch that you cleaned
21 out.

22 Thank you, sir. Let the record reflect the
23 witness has marked in pink highlighter the portion of
24 the what he refers to as the ditch, and what the
25 United States refers to as Elk Creek, that he cleaned

1 out on the Marsh property.

2 Now, do you know whereabouts, when you did
3 that? Is it sort of the same answer?

4 A Yes. All within the same time frame.

5 Q Did you clean -- when you were cleaning the
6 ditch out before the tiling was done?

7 A Yes.

8 Q So it was beaver dam, cleaning out the
9 beaver dam, removing beaver dams, cleaning out, and
10 then followed by installation of tile drain?

11 A Correct.

12 Q Who directed you to perform those tasks?

13 A My dad.

14 Q So we can save time, was the tile installed
15 in the same way in the Marsh property that it was
16 installed in the consent decree area?

17 A Correct.

18 Q You dug the outlet, Ronnie installed it
19 with the tile plow?

20 A Correct.

21 Q Would you be kind enough, just like you did
22 before, use this yellow highlighter to mark where tile
23 drain -- where you were involved in the installation
24 of tile drain on the Marsh since 2012? The same
25 lines. I understand it is approximate.

1 A I don't know if it is the same amount. But
2 I will put lines down through here.

3 Q I appreciate it. Thank you.

4 A That's not exact. That's about.

5 Q Thank you. Let the record reflect the
6 witness has, with yellow highlighter, drew lines on
7 the Marsh site on Exhibit RA1 to illustrate where a
8 tile drain -- the approximate location tile drain has
9 been installed.

10 Did you excavate any additional ditches in
11 the Marsh site since your father acquired it?

12 A Yes. I think there was one right along
13 here.

14 MR. KOGAN: There is several ditches along
15 the bottom. Then along the center area.

16 MR. UHOLIK: I think that is 27.

17 Q We are going to mark what we previously
18 marked plaintiff's Exhibit 27 will be RA8.

19 (Thereupon, Exhibit No. RA8 was marked for
20 identification.)

21 Q You have been handed what has been marked
22 Exhibit RA8. I will represent it's a photo of the
23 Marsh site and additional outlying areas. Are you
24 able to orient that? Do you recognize what that is?

25 A Yes.

1 Q If you could just do me a favor. And with
2 this blue highlighter --

3 MR. KOGAN: Want to do it the same color as
4 flooding on the other one?

5 Q We will go back to pink. If you could just
6 highlight in pink the ditches that you excavated on
7 the Marsh site after your father acquired it.

8 A Should I mark the same one I marked on this
9 site?

10 Q Just the ditches that you newly excavated,
11 that you created?

12 MR. KOGAN: That may be confusing. Apart
13 from the creek you are saying.

14 MR. UHOLIK: Right. He asked if he should
15 remark what we call the creek and he is calling
16 agricultural ditch.

17 MR. KOGAN: Are you asking the question in
18 the same time frame?

19 MR. UHOLIK: Yes. After Robert Brace
20 acquired the property to mark ditches in pink
21 that he excavated.

22 Q Thank you, sir. Do you know whereabouts,
23 when you excavated those ditches?

24 A Around the same time we tiled it.

25 Q So that would have been after the Fodse and

1 Lutte?

2 A Yes.

3 Q What was the purpose of the new ditches?

4 A Dad told me to dig it, so I dug it.

5 Q Did you use the same type of equipment, a
6 track hoe, to do that work?

7 A Correct.

8 Q When you dug it out, when you excavated the
9 ditches, what did you do with the material?

10 A Side casted it.

11 Q Side casted it where?

12 A Off to the side.

13 Q In the Marsh site?

14 A Yes.

15 Q When you side cast, is it normally within a
16 few feet of where you are digging out?

17 A Correct.

18 Q Is that what you did here?

19 A Yes.

20 Q So when you installed -- when you were
21 involved in installation of tile drain, I realize
22 Ronnie installed the tile drain, was that also
23 installed at your father's direction?

24 A Yes, sir.

25 Q Did he -- similar as he did in the consent

1 decree area, did he tell you where he wanted tile,
2 basically? Did he design the tile system?

3 A You said the consent decree?

4 Q Originally, you testified when you
5 installed the tile drain in the consent decree area,
6 you put it basically where your father told you to put
7 it.

8 A Correct.

9 Q Did you do the exact same thing in the
10 Marsh site?

11 A Correct.

12 Q Now, you said that when your father
13 purchased -- please correct me if I'm wrong -- when
14 your father purchased the Marsh site that it was I
15 believe wet and grewed up. So when you say grewed up,
16 it was covered -- was it covered with shrubs,
17 vegetation?

18 A In a vegetated --

19 Q There were trees?

20 A Some, yes.

21 Q Did anyone clear any of the vegetation?

22 A Robert. Dad.

23 Q How much of the Marsh site was cleared?

24 A Pretty much all of it except right there.

25 Q When you say right there?

1 A Where the pink is, there is still brush and
2 stuff there, it wasn't finished.

3 Q The pink on RA8?

4 A Right there where I got the pink, there is
5 still vegetated. That is where we got stopped.

6 Q There was still some vegetation around the
7 ditches that you excavated, but prior to the entire
8 Marsh site had been cleared?

9 A Yes.

10 Q Was this to prepare for farming?

11 A Yes.

12 Q Would that be -- the tiling, was that for
13 farming?

14 A Correct.

15 Q And the cleaning out of the ditches?

16 A Correct.

17 Q Were there tree stumps on the Marsh
18 property?

19 A Some, yes.

20 Q Were those cleared out as well?

21 A Yes.

22 Q When you were working in what the U.S.
23 calls Elk Creek, and you call the ditch that we have
24 become familiar with, did you add any additional
25 channels to the ditch?

1 A No.

2 Q Did you dredge the ditch?

3 A Yes. I cleaned the debris out of it.

4 Q Did you create any berms along the banks?

5 A Berms?

6 Q A berm. With the material from -- when you
7 cleaned the ditch out, where did you place the
8 material?

9 A Beside it.

10 Q Which side?

11 A Beyond the west side, northwest side. West
12 is that way. North goes on an angle.

13 Q We have it oriented backwards. Northwest
14 side of what we call Elk Creek and you call the ditch
15 is where you put it. Thank you.

16 Are there fish in Elk Creek?

17 A I haven't seen any.

18 Q Are there minnows in Elk Creek?

19 A I have no idea.

20 Q Are there tadpoles?

21 A I have no idea.

22 Q Is there always water in that agriculture
23 ditch, what you call the agriculture ditch and we call
24 Elk Creek?

25 A Yes. Back a long time ago there before it

1 all filled in, it would just about dry up in the
2 summertime.

3 Q If you can, up to what point was it still
4 drying up into the summertime?

5 A He used to keep it cleaned out all the
6 time. Then when he had to put everything back, that
7 is when it all flooded over.

8 Q Are we talking some time in the '80s?

9 A I can't recollect what years it was.

10 Q So the ditch -- it would sometimes dry up
11 in the summer. Apart from that there would be water
12 in it?

13 A Yes.

14 Q Do you know if there was ever a stream and
15 wetland delineation done for the Marsh site?

16 A I don't have a clue.

17 Q Are you aware whether anyone with the EPA
18 or the Corps requested that a stream and wetland
19 delineation be done on the site?

20 A Say that again.

21 Q Are you aware if anyone at the Corps or the
22 EPA requested that a stream and wetland delineation be
23 done?

24 A I have no idea.

25 Q In addition to the alleged violations of

1 the Clean Water Act at the Marsh site and the consent
2 decree area, are you aware of any other violations of
3 the Clean Water Act that either your father or Robert
4 Brace & Sons or Robert Brace Farms, Incorporated have
5 been --

6 A No. I don't.

7 Q Are you familiar with the Garland site in
8 Warren County?

9 A Yes.

10 Q Has that ever been subject to any Clean
11 Water Act?

12 A I don't know if it was Clean Water Act.
13 But Fish Commission tried to bust us.

14 Q And when you say the Fish Commission tried
15 busting you, what did they try to do?

16 A Put a 14,000 dollar fine against us.

17 Q How did that turn out?

18 A I think it got throwed out. They never
19 showed up.

20 Q I'm going to take a short break to see what
21 else, if anything, I have left. Hopefully, we will be
22 able to wrap up soon.

23 (Recess taken.)

24 Q We are rounding the bend hopefully coming
25 to a stop here soon. I don't want to keep you longer

1 than I have to.

2 I want to talk briefly about the different
3 site visits that have occurred. It is my
4 understanding that you have attended at least a few, I
5 want to talk about a couple of them.

6 Before we get into that, you mentioned the
7 name Darren Clark a couple times. Who is Darren
8 Clark?

9 A Pennsylvania Game Commission guy.

10 Q Do you know what does he do?

11 A He is a game warden. I don't know his
12 exact title. He's a game warden.

13 Q Did you ask him out to the site?

14 A No. I think from what they say, I think
15 the EPA tried getting everybody on site, I think.

16 Q When you say they, who are we talking about
17 they?

18 A I think my dad. I mean, they were trying
19 to get everybody out on site so everybody was on the
20 same page.

21 Q To your knowledge, is Darren Clark, is he a
22 beaver dam guy?

23 A He's a game -- game warden.

24 Q He's involved with animals, something
25 animal related activity?

1 A Correct.

2 Q Do you recall the first time that anyone
3 from EPA came out to the site after 2006?

4 A The best of my recollection was Todd Lutte.

5 Q Does May 2011 sound about right?

6 A Somewhere in there.

7 Q Somewhere in there.

8 A I think that was the day that Darren was
9 there. Now, there might have been someone else. I
10 honestly don't remember if anybody else was there or
11 not.

12 Q Did you attend that visit?

13 A Yes.

14 Q I don't mean to ask the same question
15 twice. Did you attend the entire visit?

16 A We walked around the farm.

17 Q You were with -- I guess what I'm asking,
18 were you with Todd Lutte and Darren Clark the entire
19 time?

20 A I think dad was there. I think Ronnie was
21 there. I'm not sure if my sister was there or not.
22 But probably most of the time. Yes.

23 Q So you attended. Your father, Robert
24 Brace, attended. Your brother, Ronnie Brace,
25 attended. And possibly your sister?

1 A Possibly my sister.

2 Q Do you recall what the purpose of the visit
3 was?

4 A Yes. To get the water off the farm.

5 Q And how were you planning to get the water
6 off of the farm?

7 A All the ditches were filled up.

8 Q This is Plaintiff's 23 from yesterday. We
9 are going to mark now as Exhibit RA9.

10 (Thereupon, Exhibit No. RA9 was marked for
11 identification.)

12 Q This is the September 12th, 2011 email.
13 Mr. Brace, you have been handed an email which I will
14 represent is from Todd Lutte to Brace Farms dated
15 September 12th, 2011. Have you ever seen this email?

16 A I have not.

17 Q Could you do me a favor, take a second and
18 read it?

19 A Out loud?

20 Q To yourself. Familiarize yourself with it.

21 A Okay.

22 Q Does that email -- does the content of the
23 email accurately reflect your recollection of what was
24 discussed at that meeting?

25 A No. I never seen this email before.

1 Q Right. But you were at the meeting. Is
2 what is discussed in that email, does it match up with
3 what --

4 A Not from what I recollect, no.

5 This would be the first -- 9-12-2011. This
6 would have been the first one with Darren Clark.

7 MR. KOGAN: Counsel, can you establish a
8 foundation as to when my last site visit was to
9 which this email is referring?

10 MR. UHOLIK: If you have an objection to
11 foundation --

12 MR. KOGAN: I'm objecting to the
13 foundation.

14 MR. UHOLIK: It's on the record.

15 A Okay. The Fish Commission never showed up.

16 Q The Fish Commission never showed up to --

17 A The PA Fish and Boat Commission never
18 showed up.

19 Q To what?

20 A The directions -- let me read this. "This
21 activity may be undertaken provided there is no
22 discharge of dredge -- into the U.S. and is done in
23 compliance with direction of the PA Fish and Boat
24 Commission and U.S. Army Corps of Engineers in Erie
25 County conservation district."

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1 Q Right. I don't think the email is saying
2 they were there at the site. I'm saying what Todd
3 Lutte is discussing in the email, does it accurately
4 reflect what you recall discussing with Todd Lutte
5 during that visit?

6 MR. KOGAN: Foundation. I object to
7 foundation. What sentence are you referring to
8 reflects his understanding? Let's go sentence by
9 sentence, if you have to.

10 Q That's fine. I'm going to just read.
11 First of all the subject line of the email is beaver
12 dam removal on the Waterford farm.

13 There is a sentence in here, that says,
14 "Due to the presence of beaver dams that have
15 developed on the property water has backed up. And it
16 is your desire to remove these dams."

17 Was that an accurate description at the
18 time of what was discussed on the site?

19 A Yes.

20 Q "It is also our understanding that once the
21 beaver dams are removed you wish to clean the channel
22 and the culvert so that the water which is currently
23 encroaching into your agricultural fields can drain
24 properly." Does that accurately match up with what
25 you remember being discussed?

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1 A Yes.

2 Q He goes on to say, to verify whether or not
3 you need a permit, I have been in contact with Mike
4 Fodse who is going to meet you on the site to discuss
5 the above mentioned activities.

6 Does that match up with what you recall
7 being discussed?

8 A I don't remember that.

9 Q Do you remember discussing anything else?

10 A No. I don't.

11 Q So that about covered it. Okay.

12 On that 2011 -- the May 2011 visit, around
13 about there, where on the property do you remember
14 walking? By the property I mean between Murphy,
15 Homestead and Marsh site, which of those sites were
16 you on?

17 A Pretty much around the whole thing.

18 Q You were around the whole thing.

19 Do you recall after that May 2011 site
20 visit, there was another site visit with Mr. Fodse?

21 A Yes. That would have been, I think, the
22 time with Todd Lutte.

23 Q Before --

24 A I can't remember the dates.

25 Q I'm just asking if you remember attending a

1 site visit where Mike Fodse was present and Todd Lutte
2 wasn't.

3 A I don't. No, I don't. Maybe he was. But
4 I don't recall.

5 Q That's fine.

6 But you do recall the site visit with
7 Mr. Fodse and Mr. Lutte in 2012 that you mentioned a
8 few times?

9 A Yes.

10 Q Do you know when that visit was?

11 A In 2012, wasn't it in July? I'm not sure.
12 Like I say, I can't remember.

13 Q Your best memory. If you can't recall, you
14 can say, "I think it was, but I'm not sure."

15 A Right.

16 Q Did you attend that whole visit?

17 A Yes.

18 Q Who else attended?

19 A My dad. My sister, Rhonda. I think my mom
20 was there. And Ron Bosworth.

21 Q Who is Mr. Bosworth?

22 A Legislator man.

23 Q Was Ronnie there, too?

24 A Yes. Ronnie was there, yes.

25 Q Did that whole group of people -- strike

1 that.

2 What portions of the -- did you visit the
3 consent decree area?

4 A Yes.

5 Q Did you visit the Murphy -- the Murphy site
6 outside of the consent decree area?

7 A Walked up around it. Yes.

8 Q Did you visit the Marsh site during that?

9 A Along the road, yes.

10 Q When you say along the road --

11 A Down by the culvert.

12 Q Along Sharp Road?

13 A No. On Lane. Or south hill.

14 Q On Lane or south hill. You didn't cross
15 over and go into the Marsh site.

16 A Right.

17 Q You were just on the road.

18 Did you spend any time on the Homestead
19 site?

20 A Yes. Because we walked -- we were actually
21 walking around the Homestead. I can't remember if we
22 walked back down behind the house. I'm not sure.

23 Q And that whole group of people you
24 mentioned, yourself, Ronnie, your father, et cetera,
25 et cetera, did everybody stick together through the

1 whole visit? Or were there parts --

2 A The whole visit until we walked back in
3 around the contour field that was Ronnie, me and
4 Mr. Fodse and Todd.

5 Q By Todd you mean Todd Lutte, right?

6 A Yes.

7 Q Do you remember what Mr. Fodse and
8 Mr. Lutte told you during that visit?

9 A Yes. When we were in the back, yes, that
10 is where he told us they were going to declare these
11 agricultural ditches.

12 Q When you say in the back, just to get --

13 A Basically, back where that check dam was,
14 right.

15 Q Is that where we marked M, meeting?

16 A Yes.

17 Q That was you, Ronnie, Todd Lutte and Mike
18 Fodse?

19 A Right.

20 Q What does it mean when you say we are going
21 to declare you agricultural ditches?

22 A He's the one who said it. They were going
23 to go ahead and declare them agricultural ditches.

24 Q Which one said it?

25 A Both of them. They had a side bar. They

1 made us stand off to the side. They went over and
2 talked. They came over and said we are going to
3 declare this agricultural ditches.

4 Q Did they say anything else?

5 A Yes. I asked them, "So we can farm to that
6 point right there?"

7 Ronnie asked them the same thing.

8 He said yes.

9 We walked out to the road. Mom, dad,
10 Rhonda, Ron, they both come up and said we are going
11 to declare these agricultural ditches.

12 "When can we start?"

13 "Any time."

14 I said, "What are you going to do when you
15 start getting phone calls?"

16 "All calls will be directed to the EPA."

17 Q Did they say anything else?

18 A Yes. "The government works slow, we are
19 going to get something written up, we will get
20 something written up for you, but it might take some
21 time because the government works slow."

22 Q And that -- is that everything you recall?

23 A That's everything I recall. Yes.

24 Q When you asked them can we farm up to that
25 point, can you sort of tell us what you mean by that

1 point?

2 A Yes. Everything in the crosshatches here.

3 Q Try to explain. Because there is --

4 A It's pretty simple.

5 Q When you say we can farm up to that

6 point --

7 A Where is another diagram at?

8 MR. KOGAN: Which one are you looking for?

9 THE WITNESS: Where that ditch is back
10 behind the Murphy spot.

11 Q Are you looking for the photo?

12 MR. KOGAN: This one.

13 THE WITNESS: There was another one.

14 Q Is that one?

15 A Yes. That one there.

16 Q Which exhibit is that?

17 MR. KOGAN: This is RA7.

18 Q You were standing somewhere -- would you do
19 me a favor, can you write M on RA7 just as you have
20 written it on RA1, to designate where you were
21 standing, approximately, where you were standing when
22 you were talking to --

23 A What do you want me to put?

24 Q Just write an M. Just the same thing so we
25 know whereabouts, basically, the meeting was.

1 MR. KOGAN: Does this picture help out?

2 This is a closeup. This is 265. Would this
3 help?

4 THE WITNESS: Yes. Same place I got that
5 marked.

6 Q Here is my question. When you say can we
7 farm up to that point, how do you describe -- like all
8 the area you wanted to farm. Because the consent
9 decree area, it is not just a straight line. I'm just
10 asking how you --

11 A I'm just telling you what he said.

12 Q What I'm asking is you testified that you
13 said, "Can we farm up to that point?"

14 A Yes.

15 Q And that you interpreted that --

16 A That means we can plant. I specifically
17 asked that, too. "Can we plant up to there?"

18 "Yes."

19 Q But plant up to there from where is my
20 question.

21 A All of it. It was all going to be cleaned
22 up. All he was worried about was this back part right
23 here.

24 Q I'm pulling out what was marked yesterday
25 as Plaintiff's Exhibit 17. We will mark this RA10.

1 (Thereupon, Exhibit No. RA10 was marked for
2 identification.)

3 Q I will give you a chance to page through so
4 I can ask you if you have ever seen this before.

5 A I never seen this. I don't get involved
6 with any paperwork.

7 Q Do me a favor and flip to the second page
8 of that -- I will represent this is a letter from
9 Robert Brace to Todd Lutte dated January 17th, 2013
10 which has been marked as a part of RA10.

11 I would like, if you could, just take a
12 couple moments, read over the letter and familiarize
13 yourself with it.

14 MR. KOGAN: Are you establishing a
15 foundation he actually saw this letter before and
16 is just refreshing his memory? Or are you
17 setting forth a letter for him to review for the
18 very first time?

19 MR. UHOLIK: He said he hasn't reviewed it.
20 So he's reviewing it for the very first time.

21 MR. KOGAN: I just want to establish it for
22 the record.

23 I will state for the record, Randy, since
24 you never read this letter before, your
25 interpretation of it now is not binding --

1 MR. UHOLIK: Larry, you can't give
2 directions to the witness.

3 MR. KOGAN: I'm not giving directions.

4 MR. UHOLIK: You can't let him know.

5 MR. KOGAN: I will state it to you straight
6 out. I will object to foundation and form.

7 MR. UHOLIK: You objected. It's been noted
8 for the record.

9 MR. KOGAN: You, therefore, cannot bind him
10 to whatever he interprets --

11 MR. UHOLIK: The Judge determines what we
12 can bind him to.

13 MR. KOGAN: I understand. I'm just letting
14 you know.

15 MR. UHOLIK: I don't know what you are
16 letting me know. The Judge determines.

17 A Want me to read the whole thing?

18 Q You can stop after the first paragraph on
19 page 2.

20 A Okay.

21 Q So what is described in this letter, is
22 that -- I will ask you about the second paragraph. It
23 says, "As you know, the above noted letter from the
24 Army Corps makes reference to jurisdictional
25 determation as performed by you and Mike Fodse of the

1 Army Corps of Engineers back on July 24th, 2012."

2 Is that the July meeting between Lutte and
3 Fodse and the rest of you on the site? Do you
4 believe?

5 A Say that again.

6 You know, I'm really not a scholar here
7 reading stuff. Like I said, I can't just read
8 something real quick and explain it to you.

9 Q Let me ask you this. Mike Fodse and Todd
10 Lutte, were they ever on site -- how many times were
11 they on site in 2012 together?

12 A At least once that I recall.

13 Q This letter states that Todd Lutte and/or
14 Mike Fodse or whomever, one of the two, informed you
15 that you could perform ditch cleaning south of Lane
16 Road.

17 So you would agree that is an accurate
18 representation of what was said to you?

19 A Yes.

20 Q And Todd Lutte said to stay out of the
21 southern back 30 acres?

22 A Yes.

23 Q Do you recall that?

24 A I showed you before where he told us to
25 stay out of. And when he pointed to this right here,

1 this is what he was talking about right there.

2 MR. KOGAN: Counsel, state for the record
3 where he is pointing to.

4 THE WITNESS: This.

5 MR. UHOLIK: He is pointing to a portion of
6 Exhibit RA7 which appears to be on the Marsh
7 property, the Marsh site.

8 A This isn't the Marsh site. That's on the
9 Murphy site.

10 Q Sorry. You are right. The Murphy site.
11 Just beyond the yellow line.

12 He told you that you were to stay out of
13 that 30 acre area?

14 A Yes.

15 Q Now, here it says in this letter from your
16 father. It says the only work that was performed on
17 the land south of Lane Road was ditch cleaning.

18 A I didn't make the letter. I can't --

19 Q I'm just asking you.

20 A All I can tell you is what they told us.

21 Now, what was corresponded in letters, I
22 have no idea.

23 Q All I'm asking you, sir, it says the only
24 work that was performed south of Lane Road was ditch
25 cleaning. But earlier you testified that you cleaned

1 the ditch and installed tile drain.

2 A What year was this?

3 Q The date of the letter is January 17th,
4 2013. I'm asking if that squares up with what you
5 actually did.

6 A We started, like I said before, we
7 started -- within a day, two or week or whatever after
8 they told us to do it. And then we kept doing it
9 until they shut us down.

10 So that was it. I don't know what else to
11 say. The letters and all the correspondence, I
12 haven't seen it. I'm just telling you what was said
13 out there. Because I don't get involved with this.

14 The only thing I can tell you is what was
15 said out in the field. What I'm trying to say, I
16 can't answer none of this, because I didn't do it.

17 Q What I'm saying is the letter states that
18 all that you and Ronnie performed was ditch cleaning.

19 A I didn't write the letter.

20 Q I'm asking if that is accurate.

21 A I didn't write the letter.

22 Q I understand you didn't write the letter.

23 A We did exactly what they told us to do.
24 That's all I have to say. I can't say anything more.
25 We did what they told us to do.

1 Q Mr. Brace, I understand that you testified
2 that both Mike Fodse and Todd Lutte told you that you
3 could clean the ditch. I understand that.

4 A They said we could farm. When somebody is
5 telling you you can farm that, that is what they were
6 telling me. That is what they were telling us. He
7 came down and he told them guys that.

8 Like I said, whatever was written there, I
9 didn't do it.

10 Q I know you didn't do it.

11 A Right.

12 Q I'm saying earlier you testified that you
13 cleaned the ditch and you installed tile drain.

14 A Yes. Because he told us we could farm it.

15 Q If a letter was written that said the only
16 thing you did was ditch cleaning --

17 A You have to talk to somebody else then. He
18 told us what we could do. That is what we did.

19 Q Okay.

20 Did you attend a site visit in June 2013 at
21 the Marsh site?

22 A Yes. I don't recall the date. But it was
23 raining that day. Yes, whatever the date was, yes.

24 Q Does that sound about right?

25 A Yes.

1 Q Do you happen to recall who attended?

2 A There was a lot of people there. There is
3 a list. Everybody wrote their name down. I don't
4 know who they were.

5 Q Okay.

6 Did you attend the entire visit?

7 A I think so. Mainly just stayed on the
8 road.

9 Q Do you recall at all what was discussed?

10 A I didn't discuss nothing with anybody.

11 Q Did you hear anybody else discuss anything
12 with anybody?

13 A No. Everybody was going every which way.
14 A bunch of rabbits.

15 Q So at these site visits -- when I say role,
16 I don't mean official, what do you personally usually
17 do?

18 A At the site visits?

19 Q Yes.

20 A Set there and watch everybody run around.

21 Q I know I asked this before. Do you take
22 any notes?

23 A I didn't take any notes. No.

24 Q At any of these?

25 A I didn't take no notes.

1 Q Did you take any photographs?

2 A I did not take any photographs.

3 Q Have you taken any videos?

4 A I have not taken any videos.

5 Q Do you know of anybody else that took
6 notes?

7 A No. I don't.

8 Q Do you know of anybody else that took
9 photographs?

10 A No. I don't.

11 Q Do you know of anybody else that took
12 videos?

13 A We took photographs this past -- when you
14 guys were there in October. Those are the only
15 photographs I took on my phone.

16 Q What photographs did you take?

17 A When you guys were out there. You were in
18 the ditch holding up the --

19 Q Why were you taking photographs?

20 A Because I wanted to.

21 MR. UHOLIK: Counsel, do you know if the
22 photographs that --

23 MR. KOGAN: They should have been produced.
24 They are not? You don't have them? They are
25 being produced. I have communicated that to

1 Knox. They are taking charge of all production
2 here.

3 MR. UHOLIK: We will take the
4 representation that we will get the photos.

5 MR. KOGAN: I think I showed you that
6 yesterday, there would be photographs coming of
7 the October site visit. Because you actually
8 asked I think about them.

9 MS. BROWN: I didn't hear that. Thanks.

10 Q When you and -- I should say during that
11 July 2012 visit, did you specifically discuss
12 installing tile drain with Mike Fodse and Todd Lutte?

13 A I didn't discuss anything with anybody.
14 Oh, on the '12. I thought you meant the '13 or
15 whatever.

16 No.

17 Q The only other question I have or questions
18 I have are in preparation for this deposition, did you
19 speak to anyone?

20 A No.

21 Q Did you do anything to prepare?

22 A Not much. No.

23 Q What was the not much?

24 A Talked to Larry a little bit. That was it.

25 Q Did you discuss your father's testimony

1 with your father in the past 24 hours?

2 A No. I haven't.

3 Q Okay. That's all I have.

4 MR. KOGAN: I am going to cross examine.

5 Will you give us a ten minute break?

6 (Recess taken.)

7 EXAMINATION

8 BY MR. KOGAN:

9 Q Mr. Brace, thank you for being so patient.

10 Counsel for government has discussed with
11 you a number of issues today. And I'm going to go
12 through several questions starting with the phrase
13 counsel has been speaking with you about this and
14 this, then I will ask you some questions.

15 Question No. 1, counsel for government
16 discussed with you when you had planted corn on the
17 Murphy site in the red area. You answered you planted
18 after you were given permission to plant by officials
19 of the U.S. government.

20 Can you please explain what you meant when
21 you said you were given permission?

22 A The permission to farm it.

23 Q Can you explain what you understood when
24 they said you can farm it. What does you can farm it
25 mean?

1 A Go in there and do whatever is necessary to
2 make it farmable.

3 Q Could you describe the types of things you
4 would do to farm, to make it farmable?

5 A Yes. You clear the brush. You tile it.
6 And you work it.

7 Q Are all those things related?

8 A Yes.

9 Q You need all of them to farm it, you do all
10 of them to farm it?

11 A Yes.

12 Q I think you mentioned in response to
13 government counsel's question who gave you permission.
14 You mentioned two specific officials.

15 A Yes.

16 MR. UHOLIK: Objection. Characterization.

17 Q Did government counsel -- in your response
18 to government counsel's questions, who gave you
19 permission? Who did you say gave you permission?

20 A Todd Lutte and Fodse.

21 Q Do you know what agencies those guys are
22 from?

23 A Todd Lutte I think is from EPA. Fodse was
24 with the Army Corps, I think.

25 Q I believe government counsel had discussed

1 with you a visit of July 2012?

2 A Yes.

3 Q Was it at that visit of July 2012 that
4 Mr. Fodse and Mr. Lutte gave you that permission?

5 A Yes.

6 MR. UHOLIK: Objection. Characterization.

7 Q Were you present at a July 2012 on site
8 visit by government officials?

9 A Yes.

10 Q Did the government attorney discuss with
11 you an on site visit that took place in July 2012,
12 that government officials came during which government
13 officials were present?

14 A Yes.

15 Q Were Mr. Lutte and Mr. Fodse government
16 officials who were present at the on site July 2012
17 visit?

18 A Yes.

19 Q Was it at that visit that Mr. Fodse and
20 Mr. Lutte gave you that permission to farm certain
21 points?

22 A Yes.

23 MR. UHOLIK: Objection. Characterization.

24 MR. KOGAN: It's a question.

25 MR. UHOLIK: But you are characterizing

1 what the Corps and EPA did as permission. The
2 witness is allowed to testify that he believes
3 that it was permission.

4 MR. KOGAN: I appreciate the instruction.

5 Q Did government counsel talk with you
6 about -- you answered the government counsel, when he
7 asked who gave you permission, you said Mr. Lutte and
8 Mr. Fodse. Correct?

9 A Correct.

10 Q Did you say in your answer to government
11 counsel's question when that permission was given,
12 that it was given during a July 2012 visit?

13 A Correct.

14 Q And the permission that you said Mr. Lutte
15 and Mr. Fodse gave you during the July 2012 visit, was
16 that to farm certain points on the Murphy site in the
17 consent decree area?

18 MR. UHOLIK: Objection. Asked and
19 answered.

20 A Yes.

21 MR. KOGAN: Excuse me?

22 MR. UHOLIK: The witness already testified
23 he believed they told him he could plant in that
24 area.

25 MR. KOGAN: I'm asking the question of

1 farming.

2 MR. UHOLIK: He said that he already
3 testified he said, "Can I farm up to this point?"
4 His interpretation is that that meant he could
5 farm in the consent decree. He testified to
6 that. It's asked and answered.

7 MR. KOGAN: Has he pointed out on the map
8 where he could farm to? To your satisfaction?

9 MR. UHOLIK: He pointed out on the map
10 where he thinks they meant he could farm to.

11 Q Where was that on the map, Mr. Brace?
12 Let's go to RA1. Where was that on the map Mr. Lutte
13 and Mr. Fodse said you could farm to on the Murphy
14 tract? Could you describe it?

15 A We were standing here.

16 Q Where the M --

17 A That's where the M is.

18 Q In the contour field?

19 A Yes.

20 Q Where do you understand them to have
21 allowed you to farm?

22 A Right to there.

23 Q Where?

24 A Right here.

25 Q Could you describe where the area is?

1 A Yes. Basically --

2 MR. UHOLIK: Right to where you were
3 standing?

4 Q Was it north or south of that ditch that
5 goes across the bottom of the contour field?

6 A Well, it would have been south of that
7 ditch.

8 Q How far south did they allow you to farm
9 from that ditch?

10 A All the way from the road all the way up.

11 Q Did they tell you to stay out of any given
12 area?

13 A Yes. They did. They told us to stay out
14 of back in here.

15 Q Is there another exhibit here that you
16 could look to to describe where that area you were
17 supposed to stay out of was?

18 A Yes. That one right there.

19 Q RA7. What area on RA7 were you supposed to
20 stay out of?

21 A Back in here.

22 Q How would you describe that? Would you say
23 that's the entire area south of the ditch? Or a
24 portion of that area south of the ditch?

25 A It's pretty much all south and west of the

1 ditch. Right, on the back side.

2 Q On the back side. So you could farm up to
3 the ditch?

4 A Right.

5 Q From the south side looking north, you
6 could farming up to the ditch or within so many feet
7 of the ditch?

8 A Up to the ditch. As long as we stayed out
9 of back in here we were good.

10 Q What was back in there?

11 A It was all beaver dams.

12 Q Is there water back there?

13 A Yes.

14 Q Are you saying then they gave you
15 permission to plant in the red area of the Murphy
16 site?

17 MR. UHOLIK: Objection. Characterization.

18 Q Skip the question.

19 MR. UHOLIK: I'm just objecting to the
20 characterization of what they did. The witness
21 can testify to what he thinks he received.

22 MR. KOGAN: I appreciate the education.
23 Thank you.

24 MR. UHOLIK: I'm not trying to educate.
25 You can ask your question.

1 Q We already stated the answer. That means
2 you could farm -- your understanding was Mr. Lutte and
3 Mr. Fodse allowed you to farm north of that ditch?

4 A Yes. Everything around coming back. That
5 was all our understanding, yes.

6 Q Were you allowed to farm east of the water
7 area, south of the ditch?

8 A Yes. Down on this side, yes. If we go
9 back to --

10 Q RA7.

11 MR. UHOLIK: If I could interject. The
12 witness has testified that basically all of the
13 area that is in red that we call the consent
14 decree, that he didn't highlight in orange, he
15 believes he was allowed to farm. I mean, he
16 testified to that.

17 Q Did you testify earlier today why you
18 thought installing tile was important for crops
19 already planted?

20 A Yes. You need drainage.

21 Q You need drainage. Could you explain that
22 a little more?

23 A If you don't have drainage, your crops will
24 die.

25 Q How do you create drainage?

1 A Tile lines.

2 Q And is there anything else to create
3 drainage?

4 A Ditches.

5 Q That is to you considered part of normal
6 farming?

7 A Yes.

8 Q Now, you pointed earlier in exhibit Bates
9 01132. Which exhibit is that?

10 MR. UHOLIK: I don't know off the top of my
11 head. It's probably the EPA site inspection
12 photos.

13 Q Do you remember this picture from earlier
14 today? What is the RA number on this? RA5.

15 Did you testify that the tile line in that
16 picture was around for a long time?

17 A Yes.

18 Q Do you remember how long that might have
19 been?

20 A This stuff was all put in back in the '70s.
21 We maintained it.

22 Q Who would have put that tile line in in the
23 1970s?

24 A My dad.

25 Q Now we will go back to this. You were

1 shown by government counsel a map identified as RA6.
2 RA6 shows photo locations for each of the photographs
3 that are identified in Exhibit RA5 along the Murphy
4 tract. Aside -- first of all, does this picture to
5 you illustrate the land as it appeared on May 20,
6 2015?

7 MR. UHOLIK: Objection. Foundation.

8 Q RA6, is RA6 entitled "Photo locations with
9 corresponding photo log numbers Brace inspection May
10 20, 2015"?

11 A That's what it says.

12 MR. UHOLIK: I'm not saying it's not. I'm
13 stating my objection. It's based on the fact
14 it's an aerial photo. Unless he was sitting up
15 high above, he would have no idea if that was an
16 accurate representation. That's all.

17 Q Does this photo, to the best of your
18 understanding, show the land as it was as of May 20th,
19 2015?

20 A This is before 2011, I believe.

21 Q How do you know that?

22 A Because it's all vegetated. This field
23 right here, my boy had mowed that for deer hunting and
24 stuff. That is all vegetated. This is vegetated
25 here.

1 Q When you say here --

2 A That's the contour field.

3 Q Your son's land is where relative to the
4 contour field?

5 A Just basically across the ditch. On the
6 hill.

7 Q To the east or west?

8 A To the west, near the township line.

9 Q Does this picture show any other physical
10 phenomenon?

11 A It's all flooded.

12 Q Can you state for the record where on this
13 map you see waters flooded?

14 A I see water flooded here --

15 Q Let's start from the north to the south.

16 MR. UHOLIK: Objection. Foundation.

17 MR. KOGAN: Foundation for what?

18 Q You just testified in response to my
19 question regarding -- you said that this picture does
20 not depict the land as it was in 2015. Is that
21 correct?

22 A That's correct.

23 Q Can you repeat for the record when you
24 think this picture shows the land as being?

25 A I believe it's before 2011.

1 Q I asked you why do you believe that?

2 A Because the contour field is still
3 vegetated. The field over in the township line is
4 still vegetated. And it's all flooded down through
5 there.

6 Q Can you now state for the record as
7 precisely as you can where the areas that you see
8 flooded are on this map?

9 MR. UHOLIK: Objection. Foundation.

10 Q How do you know these areas look flooded?

11 A There is blue water on them.

12 Q There is blue water here. Can you state
13 where there is blue water?

14 A Down through the ditch.

15 Q Starting from the top. Actually, can you
16 use a marker to show where the blue water is?

17 A You can actually see where the blue water
18 is, you can actually see where there is nothing in
19 that field right there on the Homestead site. You can
20 see where it is nothing on that field.

21 Q Are you saying the dark areas are where
22 water is?

23 A No. See the light areas?

24 Q Yes.

25 A We couldn't plant that, you couldn't fit it

1 or something there. It's all wet.

2 Q Is there a way you can mark all those areas
3 you are saying flooding is on this map?

4 A Yes.

5 Q Let's choose a color that might show up.
6 Red.

7 The areas you colored in red. Are those
8 areas for surface flooding or subsurface erosion?

9 A Subsurface.

10 Q Where are the areas that are surface
11 flooding?

12 A Surface flooding is down --

13 Q We need another color. Can you point with
14 an arrow. I don't want you to color that in. Orange.
15 Point with an arrow, where are all the water areas
16 here? Draw from the white border in. Show where
17 those areas are?

18 MR. UHOLIK: Let the record reflect the
19 witness removed his glasses.

20 THE WITNESS: There is a glare.

21 MR. UHOLIK: It's all about the record.

22 THE WITNESS: I will put them back on for
23 you.

24 MR. UHOLIK: I'm just letting the record
25 reflect.

1 A Do you want me to color in or put an arrow?

2 Q I don't want you to color it in. It
3 actually shows up very well where the water is. I
4 want you to point an arrow to it.

5 MR. UHOLIK: Objection to counsel's
6 testimony.

7 A Do you want me to do it in the white?

8 Q Yes.

9 Where do you see the surface water flooding
10 on this map?

11 A On the Homestead site.

12 Q On any site. On the Marsh site, where do
13 you see the water -- is the water flooded on the
14 Homestead?

15 A It's on the Homestead. You can see it on
16 the Homestead. And it flooded on the Marsh side.

17 Q How far down the picture, where would you
18 say surface water flooding starts from the top of
19 Greenlee Road? Where would it start?

20 A It would actually start --

21 Q I'm pointing now to a ditch. What am I
22 pointing to here?

23 A That's a ditch.

24 Q Where is it going from so we can describe
25 it for the record?

1 A Going down between the two fields.

2 Q Where does it start?

3 MR. UHOLIK: I have to lodge a foundation
4 objection based on the fact that Mr. Brace --
5 unless Mr. Brace has some sort of special
6 training in aerial photography interpretation,
7 he's not an aerial photography expert. You can
8 keep asking questions.

9 MR. KOGAN: We are not establishing him as
10 an expert. We are just saying what is in plain
11 sight.

12 MR. UHOLIK: Objection to counsel's
13 testimony.

14 MR. KOGAN: What the witness believes is
15 plain in sight.

16 A Wherever you see blue is flooded there.
17 This is all on the Homestead side. That is all
18 flooded. That is water flooded there. That is water
19 there.

20 Q How far down the ditch that the government
21 refers to as Elk Creek do you see flooding on the
22 Marsh and Homestead sites?

23 A All the way. In this picture here you
24 don't see all the way over to Sharp Road. You can't
25 see that. It's flooded.

1 Q To the extent the picture shows a portion
2 of Marsh property -- the Marsh site west of the ditch,
3 the government refers to as Elk Creek, you see surface
4 level flooding in this image?

5 MR. UHOLIK: Objection. Leading.

6 Q Do you?

7 A Yes.

8 Q We can have counsel look at that.

9 Counsel for government discussed with you
10 during your deposition where flooding -- where in your
11 mind flooding had occurred near the Sharp Road
12 culvert. You responded to government counsel's
13 questions in part by saying that there was flooding on
14 both sides of Sharp Road. Is that correct?

15 A Correct.

16 Q You also testified -- is it correct you
17 also testified that sometimes additional flooding
18 occurs on Marsh property, on the Marsh site from
19 across Sharp Road to the west?

20 A Right. Correct.

21 Q Is it correct to say that you also
22 mentioned that some of the flooding comes from the
23 watercourse on another person's property west of Sharp
24 Road?

25 A Yes. It does.

1 Q Can you describe how that water goes from
2 across Sharp Road over to the Marsh site, and which
3 way it flows when it goes across Sharp Road and floods
4 Sharp Road?

5 A Yes. The water is flowing north. And then
6 it hits beaver dams. And then it goes -- it would be
7 east.

8 Q Can you point this out on the map and
9 describe it for the record? Where would it start
10 from?

11 A It would actually start right about where
12 this driveway is, there is a bridge to that house
13 right there. And just past that bridge, that is where
14 it would come out and come across the road.

15 Q Where would it go once it crossed the road
16 and ended up -- is there a ditch along the Marsh site
17 on the east side of Sharp Road?

18 A Yes.

19 Q When the water crossed over Sharp Road from
20 the west to the east, which way did it flow?

21 A It would flow back north northeast back
22 into the ditch and then back --

23 Q Which ditch did it flow to?

24 A The one on the Marsh.

25 Q Is that the ditch that the government

1 refers to as Elk Creek?

2 A Yes.

3 Q Can you approximately describe where along
4 the property the water would flow?

5 A Yes. Do you want me to mark it? It comes
6 across just past this driveway and comes across like
7 this.

8 Q It goes straight across the Marsh property
9 on an angle?

10 A Right. From right about here.

11 Q From Sharp Road?

12 A Yes.

13 Q On an angle northeast?

14 A Right.

15 Q To the ditch the government refers to as
16 Elk Creek?

17 A Correct.

18 Q What happens after that?

19 A Well, the road is flooded. Nobody can get
20 through.

21 Q When the water hits the ditch, which way
22 does it go?

23 A Then it goes back north. And it goes back
24 west.

25 Q What happens when that flooding water comes

1 back up the creek -- the ditch the government refers
2 to as Elk Creek and it goes -- does it go up to the
3 Sharp Road culvert?

4 A Yes. It floods everything.

5 Q What happens when you take into account the
6 beaver dams that you testified exist near the Sharp
7 Lane culvert at that time?

8 A Say that again?

9 Q Did you testify there was at least one
10 beaver dam near the Sharp Road culvert?

11 A Right.

12 Q When the flood waters came over Sharp Road
13 and flowed up the Marsh property northwest to
14 southeast and then went into the ditch that the
15 government calls Elk Creek and then proceeded to the
16 Sharp Road culvert, was that Sharp Road culvert
17 blocked?

18 A Yes.

19 Q It was blocked you said earlier with two
20 feet of concrete?

21 A That and beaver dams.

22 Q So what would that all do?

23 A That would back up here.

24 Q How far did that water go back up?

25 A All the way up. All the way back up south

1 of Lane Road.

2 Q It would back up the entire length of the
3 ditch the government calls Elk Creek?

4 A Yes. The water is flowing that way. But
5 everything would be flooded. Yes.

6 Q That means it would flood the Marsh tract?

7 MR. UHOLIK: Objection. Leading.

8 A The Marsh tract.

9 Q All that flooding water would flood the
10 Marsh tract?

11 MR. UHOLIK: Objection. Leading.

12 A Yes.

13 Q Would it flood the Murphy tract?

14 A Yes. Because the Murphy tract, as water is
15 coming down, it's backed up. That is all flooded.
16 Then it would flood over on to the Homestead here.

17 Q Counsel for the government asked you to
18 mark on all three sites, the Marsh site, the Homestead
19 site, and the Murphy site, where you recall there
20 being beaver dams. Is that correct?

21 A Correct.

22 Q Did he ask you to place an X at every spot?

23 A Yes.

24 Q Can you count how many Xs you placed on
25 that RA1 exhibit?

1 A One, two, three, four, five. At leastify
2 of them.

3 Q At least five beaver dams. And those
4 beaver dams you testified to were blocking the ditch
5 that the government refers to as Elk Creek?

6 A Yes.

7 Q Were all those beaver dams on that ditch
8 the government refers to as Elk Creek, or were there
9 other ditches those beaver dams were located on?

10 A They were all on that ditch.

11 Q On that one ditch.

12 A Yes.

13 Q To the best of your understanding,
14 Mr. Brace, the government refers -- it is your
15 understanding the government refers to this ditch as
16 Elk Creek, yes or no?

17 A Yes.

18 Q What is your understanding where Elk Creek
19 actually begins?

20 A On the other side of Sharp Road.

21 Q Can you point to the map?

22 A Right down in here.

23 Q The witness is pointing to an area west of
24 Sharp Road and just west of -- southwest of Greenlee
25 Road to the west of Sharp Road. That is north or

1 northwest of the Sharp Lane culvert?

2 A Correct.

3 Q That is where -- is it your understanding
4 that is where the headwaters of Elk Creek actually
5 begin?

6 A Yes.

7 Q Counsel for the government asked you
8 whether -- what the condition of the Marsh property
9 was, the Marsh site was when he bought it. Did you
10 testify the Marsh site was bought some time in 2012?

11 A Somewhere in around there, yes.

12 Q Was it in the springtime or wintertime? Or
13 was it in the summertime?

14 A That I really don't recollect.

15 Q Do you recall whether he bought the site
16 before the visit by Mr. Lutte and Mr. Fodse?

17 A I can't remember.

18 Q When was the site first cleared? Was it
19 cleared before Mr. Lutte and Mr. Fodse visited or
20 afterwards?

21 A After.

22 Q So you are testifying it was after the July
23 2012 visit of Mr. Fodse and Mr. Lutte was the first
24 time the Marsh site was cleared?

25 A Yes.

1 Q Since your dad acquired it?

2 A Yes.

3 Q I believe you said in your prior testimony
4 in response to government counsel's questions, that
5 the first time -- that you had not cleared -- you
6 testified in response to government counsel's
7 questions earlier that you had first cleared the
8 Murphy site only after the same visit by Mr. Lutte and
9 Mr. Fodse. Correct?

10 A Correct.

11 Q And that there was no clearing between 2005
12 and 2012. It was only after that visit?

13 A Correct.

14 Q Now, do you recalling government counsel's
15 questions surrounding this letter dated January 17th,
16 2013 that you had never seen before?

17 A Yes.

18 Q I believe that is Exhibit RA10.

19 Now, can you look at the third paragraph of
20 that letter and just read that paragraph for a second?

21 A Out loud?

22 Q You don't have to read the whole paragraph.
23 Can you read from the sentence that begins with -- the
24 second sentence.

25 Who is the letter written to, first of all?

1 A Mr. Lutte.

2 Q Second of all, in Exhibit RA10, can you
3 read that sentence where it begins with "you both"?

4 A "You both indicated, however, that we could
5 proceed in our efforts to clean the ditches and
6 perform our maintenance activities as you knew the
7 high water was affecting our crops and ability to farm
8 that property, efficiently."

9 Q Okay. What does that mean to you?

10 A That the water was -- we couldn't farm it.

11 Q Even though you never saw this letter
12 before, that is what that means to you?

13 A Yes.

14 Q I think we are finished.

15 EXAMINATION

16 BY MR. UHOLIK:

17 Q Just a quick few redirect.

18 The contour area, Mr. Brace, was that
19 farmed -- I don't mean ever, but between 2006 and
20 2012, was that farmed?

21 A Not to my recollection, no.

22 Q That was first farmed --

23 A It was farmed before that, yes.

24 Q I'm saying from 2006 to 2012 just for a
25 time frame. It wasn't farmed?

1 A No.

2 Q So on the day of the site visit in July
3 2012, was it being farmed -- was it already being
4 farmed?

5 A No.

6 Q It had not been planted?

7 A No.

8 Q I already objected. But I will ask this
9 question.

10 Is it possible that that was the area that
11 Mr. Lutte was giving you permission to farm?

12 A No. Because he specifically said this. He
13 said, "This sure as heck ain't. Go ahead and do
14 whatever you have to do here." So yes -- no, that
15 wasn't the area. No.

16 Q I objected to this. But I will ask anyway.
17 Do you have any training in aerial photography
18 interpretation?

19 A No, sir.

20 Q Looking at RA6. You said that you think
21 what you see here is the property area, the area you
22 are looking at, the photo depicts a time before 2012.

23 A Yes.

24 Q Do you have any idea just when you think
25 that might be?

1 A I'm guessing 2010, '9, '10. Because this
2 field right here, my son brush hogged this for deer
3 hunting. I don't know if it was exactly '9, '10.
4 Somewhere in there.

5 Q At that time did -- the Marsh property had
6 not been purchased yet. Correct?

7 A Not to my knowledge, no.

8 Q The only other question I have is how many
9 beaver dams exist along Elk Creek now? Do you know?
10 If any.

11 A There is none in the ditch right now that I
12 know of from Sharp Road to Lane Road.

13 Q So there is no beaver dams from Sharp to
14 Lane?

15 A I haven't been back in there.

16 Q To the best of your recollection.

17 Are there any beaver dams from Lane to
18 Greenlee?

19 A Back in here, yes.

20 Q There are beaver dams back to the back?

21 A Yes.

22 Q Just one more question. Back to RA1. The
23 orange area that you have testified Mr. Lutte and
24 Mr. Fodse said that is the only area you have to stay
25 out of. What is the condition of that area?

1 A Flooded.

2 Q How flooded is that area?

3 A There is beaver dams back there.

4 Q You are familiar with the site. I've only
5 been to the site once. I can't testify. What is sort
6 of the condition -- would you describe that area back
7 there as a pond?

8 A There it is right there. You can see it
9 plain as day. That's a pretty good picture.

10 Q So we are looking at RA6 -- sorry, RA7.
11 The area beyond the yellow line that Mr. Brace drew to
12 reflect the ditches that he cleaned.

13 Would you describe that area as a pond?

14 A No. It's beaver dams. We used to take --
15 we used to farm that.

16 Q When?

17 A Back in the '70s and '80s. We had combines
18 back there. We had combines back in here.

19 Q Do you believe you own that property?

20 A See that right there? This is the line
21 right here, it comes up across like this. That is the
22 line that comes down right there. So this is all ours
23 right there.

24 MR. KOGAN: Let it be known for the record
25 that the witness has testified that the property

1 line includes an area that now appears wet in the
2 image on Exhibit RA7. The property line runs
3 horizontally across a portion of that wet area
4 from east to west and west to east.

5 Q I guess my only real question is how wet is
6 it back there?

7 A Yes. It's all full of beaver dams.

8 Q How deep is the water? Do you have any
9 idea?

10 A I have no idea. I haven't been back in
11 there for quite a while because you can't walk in it.

12 Q It's so deep you can't walk in it?

13 A Well, where it is flooded there, right
14 there, yes, we used to have combines back in there.

15 Q What I'm asking is now.

16 A Obviously, I can't walk on water.

17 Q I understand. If you have six inches of
18 water, you could still walk in it. What I'm asking,
19 is that deep water?

20 A It all depends how high the beaver dam is.
21 I don't know. Obviously, it's flooded.

22 Q Then would you say -- would it be fair to
23 characterize your testimony is Todd Lutte and Mike
24 Fodse directed you to stay out of and not farm the
25 flooded area?

1 A Yes.

2 Q That's it.

3 EXAMINATION

4 BY MR. KOGAN:

5 Q I would like to ask one or two more
6 questions in response to counsel for government's
7 questions.

8 Counsel for government just asked you
9 whether you and your brother and your father had
10 farmed the contour field on the Murphy site before
11 2012.

12 A Yes.

13 Q Did you testify that you did not?

14 A We -- yes, we farmed before. And then
15 after 2006 some time it sat idle until 2012 or
16 roughly.

17 Q Could you explain why it sat idle between
18 2006 and 2012?

19 A Yes. Because of the consent decree. If
20 you had any erosion that went down into the consent
21 decree, it was jail time. That is why he didn't do
22 it. That is what he told me.

23 Q Was it your understanding, Mr. Brace, that
24 you could not farm any of the area which you referred
25 to as the contour field or the uplands earlier in your

1 testimony, because of concern that even though the
2 land was legal and could be farmed, you were concerned
3 that soil erosion would end up in the ditch which the
4 government refers to as Elk Creek to the south of the
5 contour field?

6 A My dad said if he had erosion and got down
7 in there, it could be jail time. That is why he
8 didn't do it. I'm just telling you what he said.

9 Q And you have followed and continue to
10 follow his direction?

11 A Yes. Then when Todd Lutte and Mike Fodse
12 came out, they said, "No, go ahead and farm it. Farm
13 all this."

14 Q And then the area you just testified to
15 today?

16 A Yes.

17 Q Thank you very much.

18 EXAMINATION

19 BY MR. UHOLIK:

20 Q When you said "all this," what were you
21 referring to?

22 A The contour field.

23 Q Thank you, sir.

24 (Thereupon, at 3:40 p.m. the deposition was
25 concluded.)

ERRATA SHEET

I, Randall Brace, have read the foregoing 161 pages of my deposition given on January 10, 2018, and wish to make the following, if any amendments, additions, deletions or corrections:

Page/Line	Should Read	Reason for Change
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In all other respects, the transcript is true and correct.

Randall Brace

Subscribed and sworn to before me this _____ day of _____, 2018.

Notary Public

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1 CERTIFICATE
2 COMMONWEALTH OF PENNSYLVANIA,)
) SS:
3 COUNTY OF ALLEGHENY.)

4 I, Lance E. Hannaford, do hereby certify that
5 before me, a Notary Public in and for the Commonwealth
6 aforesaid, personally appeared RANDALL BRACE, who then
7 was by me first duly cautioned and sworn to testify
8 the truth, the whole truth, and nothing but the truth
9 in the taking of his oral deposition in the cause
aforesaid; that the testimony then given by him as
above set forth was by me reduced to stenotypy in the
presence of said witness, and afterwards transcribed
by means of computer-aided transcription.

10 I do further certify that this deposition was
11 taken at the time and place in the foregoing caption
specified, and was completed without adjournment.

12 I do further certify that I am not a relative,
13 counsel or attorney of either party, or otherwise
interested in the event of this action.

14 IN WITNESS WHEREOF, I have hereunto set my hand
15 and affixed my seal of office at Pittsburgh,
16 Pennsylvania, on
17 2018.



18 Lance E. Hannaford, Notary Public
19 My commission expires October 19, 2018

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