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

- - -

UNITED STATES OF AMERICA: CIVIL ACTION

:

vs. : No. 1:90-cv-00229
: 1:17-cv-00006

ROBERT BRACE, ROBERT :
BRACE FARMS, INC. and :
ROBERT BRACE and SONS, :
INC. :

- - -

Tuesday, October 3, 2017

- - -

Oral Deposition of TODD M. LUTTE, taken
at the DoubleTree by Hilton Hotel, 301 West DeKalb
Pike, Summit 11, King of Prussia, Pennsylvania
19406, beginning at 8:49 a.m., before Barbara C.
Stalheim, Certified Shorthand Reporter and a
Notary Public.

- - -

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I N D E X

- - -

TESTIMONY OF: TODD M. LUTTE

By Mr. Kogan.....6,309
By Ms. Brown.....302

E X H I B I T S

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D18A	Letter to Robert Brace from Lori A. Boughton, dated 12/20/11; Re: Permit Requirements	73
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D20	Email from Michael M. Fodse to Brace Farms; Karen Gross; Lori A. Boughton; Todd Lutte; Earl J. Brown; Nancy J. Mullen, dated 10/7/11; Subject: Beaver dam removal on the Waterford Farm (Unclassified)	113

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3		dated 5/11/11; Letter to Todd	
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DEPOSITION SUPPORT INDEX

INSTRUCTION NOT TO ANSWER:

Page Line

(None)

REQUEST FOR PRODUCTION OF DOCUMENTS:

Page Line

(None)

STIPULATIONS:

Page Line

(None)

PREVIOUSLY-MARKED EXHIBITS REFERENCED:

D-1, D-2, D-7, D-16, P-1, D-12

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P R O C E E D I N G S

- - -

TODD M. LUTTE, after having been first
duly sworn or affirmed, was examined as
follows:

- - -

E X A M I N A T I O N

- - -

MR. KOGAN: Good morning, everybody.

BY MR. KOGAN:

Q. Okay. Mr. Lutte, thank you for
joining us today.

A. Yes.

Q. My name is Lawrence Kogan, and I, with
Neal Devlin, are co-counsel for Robert Brace,
Robert Brace and Sons, Inc., and Robert Brace
Farms.

We thank you for allowing us to depose
you this -- this Tuesday, the 3rd of October,
2017.

Can you please state your full name
for the record, sir?

A. Todd Michael Lutte.

TODD M. LUTTE

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1 he sends this letter -- Mr. Lapp sends this letter
2 with Mr. Fodse to Mr. Brace over a year later
3 saying that he had made an error, and Mr. Brace
4 had probably relied upon the representation during
5 that site visit; no? Or do you know if Mr. Brace
6 relied upon that representation during the July
7 site visit?

8 A. I believe he relied upon that site
9 visit.

10 Q. Okay. And that was in and along Elk
11 Creek?

12 A. It was specifically the dredging of
13 the bottom of Elk Creek.

14 Q. And -- and that was for a distance of
15 how -- how long a portion of Elk Creek was -- was
16 that determination made with respect to? How much
17 of Elk Creek was dredged based on that
18 determination, which later proved to be in error?
19 Do you know?

20 A. I'm -- at the time of the site visit,
21 I believed it -- I believed it to be from the
22 bridge over Lane Road and Elk Creek to where Elk
23 Creek goes under Greenlee Road --

24 Q. Okay.

TODD M. LUTTE

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1 Q. Do you recall?

2 Can you describe the date, or
3 approximate date, of those visits or visit?

4 A. I'm bad with dates. It was 2015.
5 Both Ms. Lazos and --

6 MS. BROWN: We can't help you.

7 THE WITNESS: Sorry.

8 BY MR. KOGAN:

9 Q. Was there a large group of people that
10 attended that 2015 --

11 A. Yes. It was 2015, and I can't
12 remember, was it September? I can't remember. It
13 was 2015. Yes, there was a lot of individuals
14 present on the site.

15 Q. Now, was that more of an on-site visit
16 with photography and sampling, or more an on-site
17 visit to walk the site with all of those other
18 people to explain what you were finding?

19 A. That was a -- a site visit to document
20 the con -- current condition of the Consent Decree
21 area, or the area subject to the Consent Decree,
22 and -- and document that site.

23 Q. So are we talking about the site known
24 as the --

TODD M. LUTTE

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1 A. -- as the Murphy.

2 Q. -- Murphy?

3 A. Murphy tract.

4 Q. And that's all that you recall the
5 2015 meeting addressing?

6 A. From my perspective, that was my role
7 was to document any activities that have
8 transpired within the Consent Decree area.

9 Q. Did you recall any other federal
10 officials accompanying you from either EPA or
11 other federal agencies?

12 A. Yes. I believe it was Nancy Mullen
13 from the U.S. Army Corps of Engineers, Dana
14 Adipietro from the U.S. Army Corps of Engineers,
15 Jeffrey Lapp from USEPA, Katelyn Almeter from
16 USEPA, Pamela Lazos from USEPA, Laura Brown from
17 the Department of Justice, an individual from -- I
18 believe who was Mike Nester from the Pennsylvania
19 Department of Environmental Protection, and
20 there -- it was probably -- there may have been
21 other --

22 Q. Was Mr. Smolko there?

23 A. On that date? I can't recall if he
24 was there that date.

TODD M. LUTTE

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1 satellite imagery, and our desk audit, and all of
2 our case review and -- and development that we --
3 I had felt comfortable that there were activities
4 performed in and around -- particularly around Elk
5 Creek, particularly within the Consent Decree
6 area, that were not authorized by either the EPA
7 or the Corps of Engineers, regardless of any
8 enforcement discretion which we may have exhibited
9 upon the dredging of Elk Creek, itself. I felt
10 there were activities performed outside of that,
11 that were not authorized explicitly or other.

12 Q. And you're referring to the -- the
13 forgiveness of certain activities from that
14 August 29, 2013, letter?

15 A. Certain activities like the appearance
16 of tile drains and the plowing or grubbing or --
17 or disking of areas that were within that Consent
18 Decree.

19 Q. Is there a temporal dividing line
20 between the activities that were relied upon --
21 that relied upon prior representations by
22 Mr. Fodse and the activities that you conclude in
23 your Declaration are unauthorized?

24 A. Was there a time lag between --

TODD M. LUTTE

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1 the distinction being made between the activities
2 that would have taken place between the July 24,
3 2012, visit and the August 29, 2013, letter from
4 Mr. Lapp and Mr. Hans, that would involve
5 agricultural ditches which would be forgiven, and
6 the other activities you just described that would
7 not be forgiven?

8 A. Are you asking me to make a
9 distinction between the activities?

10 Q. In other words, it -- it serves as the
11 basis, really, in part, if not in whole, of the
12 enforcement action scope of activities that were
13 deemed unauthorized. I'm trying to figure out,
14 based on a combination of your reading of the
15 August 29, 2013, letter, and your Declaration,
16 which of the activities -- where was the stopping
17 point of activities that were forgiven, compared
18 to activities that were not?

19 A. The removal of sediment and
20 maintenance of the channel of Elk Creek.

21 Q. Yes. And that's what I'm trying to
22 find out here.

23 Is there a way you could help me
24 identify that -- that difference between the

TODD M. LUTTE

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1 that Mike Fodse and the Braces were talking about
2 this portion of Elk Creek all the way through the
3 site (indicating).

4 Q. So my --

5 A. In 2012, I believed that this was the
6 portion for which we were talking about
7 (indicating).

8 Q. Now, is that the same portion --

9 A. Of --

10 Q. -- of which erroneous advice was
11 given?

12 A. Yes (indicating).

13 MS. BROWN: So if you could just
14 narrate for the record what you're pointing
15 to.

16 THE WITNESS: Okay. I'm -- I'm
17 pointing to the area where Elk Creek crosses
18 under Lane Road at the northwest portion of
19 the Murphy tract that is demarcated as the
20 Consent Decree area, and the portion of the
21 blue line on this map which coincides with
22 the Consent Decree area and makes a U shape
23 and concludes at the top of the hatched area
24 demarcated as Lane Road on the Murphy tract

TODD M. LUTTE

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1 (indicating).

2

3 BY MR. KOGAN:

4 Q. That -- that's what you believed --

5 A. I believed that Mike Fodse had -- was
6 speaking of that section, and -- and if it would
7 qualify as an agricultural ditch, he would be
8 allowed to dredge, which was his words, that
9 portion of Elk Creek --

10 Q. Okay.

11 A. -- to remove -- remove sediment and
12 dredge.

13 Q. Okay. So that was your --

14 A. It was --

15 Q. -- perception of what Mike Fodse
16 had --

17 A. Yes.

18 Q. -- in error determined?

19 A. And what they were referring to in
20 this letter --

21 Q. Okay.

22 A. -- of Exhibit D-12 (indicating). The
23 dredging activities were what they were -- what
24 they were exhibiting enforcement discretion to --