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

UNITED STATES OF AMERICA, Plaintiff v. ROBERT BRACE, and ROBERT BRACE FARMS, INC., Defendants	)))))))))))	Civil Action No. 1:90-cv-00229

AFFIDAVIT OF RONALD D. BRACE

My name is Ronald D. Brace. I am making this affidavit in support of Defendants Robert Brace and Robert Brace Farms, Inc. in the above referenced matter.

I reside at 1065 Route 97, Waterford, Pennsylvania 16441, and I have worked for the family farming business since graduating from high school.

I have prepared this affidavit, in part, to emphasize that the parallel surface ditches in the southcentral portion of the Consent Decree Area that the Restoration Plan had previously required to be plugged, remain plugged today. (Ex. A - CD, Restore Plan, Attach A). These surface ditches, which previously ran from northeast to southwest, have never been re-excavated in violation of the Consent Decree as the government now falsely claims.

The left-most surface ditch shown on the hand drawn map labeled "Attachment A" of the Consent Decree appears as the squiggly line just above the left arrow labeled "Surface Ditches to be Plugged." This filled in surface ditch has remained untouched since it was plugged in December 1996. It is no longer visible or accessible by foot because it has remained submerged under water for many years. In fact, most of the southcentral portion of the Consent Decree Area currently is and has long been submerged under water. However, if one enlarges the recently developed

www.legalstore.com No. 7713
EXHIBIT
75

Centerra Co-op maps of the Murphy Farm tract (Ex. **B** – Centerra Co-op Maps) one will see the left-most surface ditch (left squiggly line on Attachment A) (running from northeast to southwest) largely obscured by water from the wet area at the southcentral portion of the Consent Decree Area. The left-most surface ditch runs up to but short of the boundary ditch excavated to prevent us from inadvertently farming the southcentral area that EPA representative Lutte instructed us to leave untouched.

The right-most surface ditch shown on the hand drawn map labeled "Attachment A" of the Consent Decree appears as the squiggly line just above the right arrow labeled "Surface Ditches to be Plugged." It, too, has remained untouched/filled since it was plugged in December 1996. The plug to this ditch remains visible as depicted both on EPA photograph #18 (Ex. **C**, EPA Photo#18 EPA0001121 5-20-15 visit) and on similar photographs we had taken on April 2, and April 10, 2018 from approximately the same location. (Ex. **D**, Photo Looking at Surface Ditch Plug), (Ex. **E**, Photo at Approximate Location of Plug). The GPS coordinates of these photographed locations are quite close to those recorded on the Centerra Co-op Chart (Ex. **F**, Centerra Co-op Chart) corresponding to the Centerra Co-op Map. The surface ditch plug is located approximately twenty-five (25) to thirty (30) feet north of where the mouth of the former right surface ditch intersects with the southernmost horizontal (property line) ditch on the Murphy Farm tract identified on Attachment A as "Unnamed Tributary B." My father, Defendant Robert Brace, previously excavated the horizontal ditch running along the Murphy Farm tract's southern boundary, which the government refers to as "Unnamed Tributary B" during the 1970's.

The plug to the right-most surface ditch also is located approximately fifteen (15) to twenty (20) feet south of the "Y" junction between the blue line labeled "Trib. 62651 to Elk Creek" on the "PADEP (1998) Enclosure 1" map (Ex. **G** PADEP Enclosure 1 Map), and the southern end of

a short barrier ditch running from northwest to southeast. (Ex. B Centerra Co-op Maps). The barrier ditch measures approximately 240 feet in length from northwest to southeast, and the GPS coordinates of this photographed location (Ex. **H**, Barrier Ditch Photo) is quite close to that recorded on the Centerra Co-op Chart corresponding to the Centerra Co-op Maps. It was excavated following the July 24, 2012 onsite meeting to remind my brother, my father and I where EPA representative Todd Lutte told us to stay out of and not to farm (which I had marked with a purple line just below the "F" on the map I was given by Government counsel during my deposition) (Ex. **I** RO1, Ron Brace Depo Map). We were told not to farm the southcentral portion of the Consent Decree Area. The northern end of the boundary ditch is approximately thirty (30) feet south of the main ditch running across the Murphy Far tract. (Ex. B Centerra Co-op Murphy tract Maps). Since the boundary ditch does not connect to the main horizontal ditch running across the Murphy Farm tract, it does not drain any water from the Consent Decree Area.

On April 2, and 9, 2018, my brother, Randall Brace, I, and a representative from farm contractor Centerra Co-op took GPS readings and photographs of the right-most surface ditch/tributary from the "Y" junction located fifteen (15) to twenty (20) feet north of the surface ditch plug. Our photograph of this area (Ex. **J**, Surface Ditch/Tributary Photo) corresponds to EPA photograph #17 (Ex **K**, EPA Photo #17, EPA0001120 5-20-15 visit). On April 15, 2018, my brother measured from the "Y" junction (located fifteen (15) to twenty (20) feet north of the surface ditch plug) in a north-northeast direction to the end of the right-most surface ditch/tributary. The length of this surface ditch/tributary measured approximately two hundred forty (240) feet. This surface ditch/tributary has never connected with the main horizontal ditch running across the Murphy Farm tract, as the 1983 and 1993 satellite images of this farm tract included in Defendants' recent filings show. (Ex. **L**, 5-11-83 Murphy Sat. Map), (Ex. **M**, 4-7-93 Murphy Sat Map).

Thereafter, my brother measured northward from the northern end of the Tributary approximately two hundred twelve (212) feet along solid ground until he reached the main horizontal ditch running across the Murphy Farm tract. Before my brother had taken these measurements we both noticed how the PADEP Enclosure 1 Map inaccurately portrays Tributary 62651 to Elk Creek as a continuous watercourse running the full length of the Murphy Farm Tract.

I also have prepared this affidavit, in part, to clarify, consistent with my recent testimony, the nature of the tile work I performed with the help of my brother in the Consent Decree Area as part of the agricultural ditch maintenance work that U.S. Environmental Protection Agency representative Todd Lutte and U.S. Army Corps of Engineers representative Michael Fodse had authorized us to conduct in Elk Creek and its reaches and tributaries south of Lane Road, during their July 24, 2012 onsite visit to our farm. My brother and I performed the tile work under the direction of my father, Defendant Robert Brace, soon after that visit. Such authorized work consisted only of replacing existing drainage tile lines and outlets which my father had previously installed in the 1980's that the government thereafter disabled and/or removed in December 1996. Our work did not include the installation of any additional tile lines in the Consent Decree Area.

In addition, I have prepared this affidavit, in part, to describe how the check dam required by the Consent Decree Restoration Plan had been designed one way on Attachment A and installed another way on the ground in December 1996 with a government agent's approval, without my father, Defendant Robert Brace, having been informed of the changes that had been made.

Restoration Plan Attachment A (Ex. A - CD, Restore Plan, Attach A). shows the check dam as designed to be located on the southwest portion of the "U" beside the "Maple Trees," just north of the "Brush" area, and just south of the knoll bordering the contour (crop) field. We were quite surprised when we compared the check dam location on Attachment A with the actual location of

the check dam as installed on April 2, 2018. On April 2, 9, 10, 2018, my brother, I, and a representative from farm contractor Centerra Co-op took GPS readings of both the design and installation locations. (Ex. **N,** Check Dam Designed GPS Location), (Ex. **O**, Check Dam Designed GPS Location), (Ex. **P**, Check Dam Installed GPS Location), (Ex. **Q** Check Dam Installed GPS Location), (Ex. F, Centerra Co-op Chart). We discovered that the distance between these two GPS points measured approximately 460 feet. In other words, we discovered that the check dam as installed in December 1996 had been relocated approximately 460 feet to the east of the check dam design location identified on Attachment A. (Ex. B – Centerra Co-op Maps). My brother, I, and a representative from farm contractor Centerra Co-op also took photographs of the check dam as designed location (Ex. **R**, Photo Check Dam Designed Locale), (Ex. **S**, Photo Check Dam Designed Locale) and (Ex. **T**., Photo Check Dam Designed Locale), and of the check dam as installed location. (Ex. **U**, Photo Check Dam Installed Locale), (Ex. **V**, Photo Check Dam Installed Locale) and (Ex. **W**, Photo Check Dam Installed Locale).

On April 2, 9, 2018 we took measurements and photographs of the installed check dam comprised of three almost identical concrete blocks. Except for most of the installed check dam being submerged at this time, it appears almost identical to the Government photo of the check dam taken during the growing season on May 20, 2015, which is usually a drier time of the year. (Ex. **X**, EPA Photo # 12 EPA00001114 5-20-15 visit).

We were able to measure the individual heights of two of the three identical concrete blocks effectively representing the height of the check dam. We were unable to measure the third block which was mostly submerged and embedded in the bank. The two blocks measured approximately twenty-four (24) to twenty-five (25) inches high. By comparison, the Restoration Plan design required the check dam to be only one and one-half (1 ½) feet or eighteen (18) inches high. We

therefore discovered that the actual height of each concrete block laying roughly side to side across the width of the ditch and representing the height of the check dam was at least six (6) inches higher than the Restoration design specifications called for. (Ex. **Y**, Photo 1 Check Dam Installed Measured Height).

We also were able to measure the width of two of the three concrete blocks which lied roughly parallel and corner to corner across the width of the ditch. The three blocks laying roughly parallel together represent the total length of the check dam from front to back, looking at it from the length of the ditch perspective. Each concrete block measured approximately twenty-four and one-half (24 ½) inches wide, so their total widths combined measured approximately seventy-two to seventy-three (72-73) inches, representing the total length of the check dam. By comparison, the Restoration Plan design required the check dam to be four (4) feet or forty-eight (48) inches long. We therefore discovered that the actual length of the check dam was at least twenty-four (24) inches or two (2) feet longer than the Restoration Plan design specifications called for.

In addition, we were able to measure the width of the check dam by measuring the length of two of the three concrete blocks lying roughly parallel and corner to corner to one another across the ditch. Each of those two blocks measured approximately six (6) feet long. One of those blocks was totally submerged under water and looked partially embedded in the opposite bank. The other block was mostly on and somewhat embedded in the opposite back with some portion submerged at the water's edge. Together, these two blocks represented a twelve (12) foot span across the ditch and one of its banks – (six) 6 feet spanning the ditch bottom just below the bank beneath us, plus approximately six (6) additional feet beginning at the base of the opposite bank and ending further up the opposite bank. (Ex. **Z**, Photo 2 Check Dam Installed Measured Width). By

comparison, the Restoration Plan had called for the width of the check dam to be as wide as the tributary bottom.

After sharing these measurements with our father, Defendant Robert Brace, he informed my brother and I that the width of the ditch back in 1996 was no more than four-to-four and one-half (4)-(4 ½) feet wide. He knew because he was the one that excavated and later maintained the ditch back during the late 1970's-early 1980's. Based on what my father recalled, my brother and I determined that the actual width of the check dam measured approximately eight (8) feet wider than the Restoration Plan specifications called for.

My brother, Randall and I also determined that the difference in height between the two six (6) foot concrete blocks we had measured, one lying totally submerged under water, and the other lying mostly on the opposite bank of the ditch, measured more than two (2) feet from the bottom of the ditch to the top edge at the highest point of the block on the bank. We believed that this meant the actual height of the dam was more than two to three (2-3) feet higher than what the Restoration Plan specifications called for.

My brother Randall and I do not understand how the government can honestly claim we removed the check dam in 2012, when it was the government that substantially relocated and overbuilt the check dam upon installation in December 1996, inconsistent with the Restoration Plan's design specifications without informing our father or the Court.

Lastly, on April 2, 2018, my brother, Randall Brace, I and a representative from farm contractor Centerra Co-op took GPS coordinates and photographs of three (3) beaver dams that have resettled in the western portion of the Murphy Farm tract along the ditch the Government refers to as "Elk Creek." Based on our experience and what we have since learned, these beaver dams will likely contribute, once again, to the flooding of the farm tract largely caused by the relocated and largely

overbuilt check dam. (Ex. **AA**, GPS/Photo Beaver Dam 1), (Ex. **AB**, GPS/Photo Beaver Dam 2), (Ex. **AC**, Photo Beaver Dam 3).

I declare that, to the best of my knowledge, and belief, the information herein is true, correct and complete.

FURTHER AFFIANT SAITH NOT.

DATED this 16 day of April, 2018

Ronald D. Brace

Ronald D. Brace

NOTARY ACKNOWLEDGEMENT

SUBSCRIBED AND SWORN TO before me this 16th day of April, 2018

STATE OF Pennsylvania COUNTY OF Erie .ss:

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
Ashley Rae Rutter
NOTARY PUBLIC
Erie City, Erie County
My Commission Expires 08/07/2021

Notary Public Ashley Rae Rutter

(SEAL)

My Commission Expires 08/07/2021

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

DEPOSITION EXHIBIT RO 2

DEPOSITION EXHIBIT RA 3

DEPOSITION EXHIBIT P 14

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
V	)	Civil Action No. 90-229 Erie
	)	
ROBERT BRACE and ROBERT BRACE FARMS, INC., a Pennsylvania Corporation,	)	
	)	
Defendants.	)	

CONSENT DECREE

WHEREAS Plaintiff United States of America, in its Complaint, alleged that Defendants committed violations of the Clean Water Act ("CWA"), including the unpermitted discharge of pollutants by dredging, filling, leveling, and draining of waters of the United States, specifically a wetlands of approximately 30 acres that is adjacent to Elk Creek, and Plaintiff sought injunctive relief and civil penalties;

WHEREAS the United States District Court for the Western District of Pennsylvania after trial dismissed the Complaint on December 22, 1993, holding that Defendants' activities were exempt from permitting requirements under Section 404 of the CWA;

WHEREAS the Third Circuit Court of Appeals, on November 22, 1994, reversed the District Court and ruled that Defendants are liable for the asserted violations, and

EXHIBIT A

DEFENDANT'S EXHIBIT

remanded the matter to the District Court for remedial measures, and the United States Supreme Court denied Defendants' petition for writ of certiorari; and

WHEREAS the parties have agreed to this Consent Decree;

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED, and DECREED that:

FINDINGS

1. This Court has jurisdiction over this action pursuant to CWA Section 309, 33 U.S.C. §1319, and 28 U.S.C. §§1331, 1345, and 1355.

2. This Consent Decree is fair, reasonable, in the public interest, and in accordance with the CWA.

INJUNCTION

3. Defendants, their officers, directors, agents, servants, employees, successors, assigns, and those in active concert or participation with them are enjoined permanently from discharging any pollutants (including dredged or fill material) into the approximately 30 acre wetland site depicted on Attachment A, unless such discharge is in compliance with the CWA.

RESTORATION

4. Defendants will perform restoration in accordance with the wetlands restoration plan, which is attached hereto as Exhibit A and made a part hereof.

CIVIL PENALTY

5. Within thirty days after the entry of this Consent Decree, Defendants will pay a civil penalty of $10,000 by cashier's or certified check payable to the Treasurer of the United States and delivered to David M. Thompson of the U. S. Department of Justice. If said payment is not made within said period, then interest will be charged in accordance with the statutory judgment interest rate, as provided in 28 U.S.C. § 1961, from the time payment is due until the time payment is made.

OTHER PROVISIONS

6. Within thirty days after the entry of this Consent Decree, Defendants will record this Consent Decree in the applicable land records office.

7. Until all requirements in paragraphs 4, 5, and 6 have been performed and at least thirty days prior to any proposed transfer of any interest in any part of the property affected by this Consent Decree, Defendants will provide a true copy of this Consent Decree to any proposed transferee and simultaneously will notify the United States of any proposed transfer. A transfer of interest in the said property will not relieve Defendants of any responsibility in this Consent Decree, unless the United States, Defendants, and the transferee agree to allow the transferee to assume such responsibility.

8. Each party will bear its own expenses and costs to the time of the entry of this Consent Decree. Thereafter, if Defendants fail to perform any requirement in paragraph 4, 5, and 6, then, upon receipt of written notice of such failure from Plaintiff, Defendants will pay a stipulated penalty of $250 for each day of failure, by cashier's or certified check payable to the Treasurer of the United States and delivered to David M. Thompson of the U. S. Department of Justice. Additionally, Defendants will be responsible for any expenses and costs incurred by the United States in enforcing this Consent Decree.

9. In addition to any other legal authority, representatives of the United States will have the authority for a period of eighteen (18) months after the entry of this Consent Decree, at reasonable times and with proper identification, to enter upon the property affected by this Consent Decree for the purposes of monitoring and measuring compliance with this Consent Decree.

10. This Consent Decree constitutes a complete settlement of any and all claims by any of the parties that arise from the Complaint through the date of the entry of this Consent Decree. The United States does not waive any rights or remedies available to it for any violations by Defendants of laws, regulations, rules, and permits other than the violations alleged in the Complaint, and this Consent Decree does not relieve Defendants of responsibility to comply with any federal, state, and local laws, regulations, rules, and permits, except that this Consent Decree provides all necessary federal authority to implement paragraph 4. Defendants do not waive any rights or remedies available to

them under any applicable law against the Plaintiff which may arise after the date of the entry of this Consent Decree.

11. Defendants consent to the entry of this Consent Decree without further notice. The parties acknowledge that after the lodging and before the entry of this Consent Decree, final approval by the United States is subject to the requirements of 28 C.F.R. §50.7, which provides for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this Consent Decree based upon such public comment.

12. Upon approval and entry by this Court, this Consent Decree will have the effect and force of a final judgment. This Court will retain jurisdiction over this action for the purposes of enforcing, interpreting, and modifying this Consent Decree. The United States reserves all legal and equitable remedies available to enforce the provisions of this Consent Decree. Any stipulated modification of this Consent Decree must be in writing, signed by the parties, and approved by this Court.

DATED: September 23, 1996

UNITED STATES DISTRICT JUDGE

DATED: July 23, 1996

DMT for
LOIS J. SCHIFFER
Assistant Attorney General
Environment & Natural Resources Division

By: David M. Thompson
DAVID M. THOMPSON, Trial Attorney
U. S. Department of Justice
Environment & Natural Resources Division
Environmental Defense Section
Room 7120
Washington, D. C. 20530
Telephone: (202) 514-2617

Attorneys for the United States

DATED: June 25, 1996

HENRY DIGRAM
Buchanan Ingersoll Professional Corporation
One Oxford Centre
301 Grant Street, 20th Floor
Pittsburgh, PA 15219-1410
Telephone: (412) 562-1695

Attorneys for Defendants

Wetlands Restoration Plan

The primary objective of this plan is to restore the hydrologic regime to the U shaped, approximately 10-acre wetlands adjacent to Elk Creek. In order to restore the hydrology to the area, the drainage tile system currently located in the wetlands is to be disabled, surface ditches filled in, and a check dam constructed. The series of tasks to be performed to sufficiently disable the drainage system are as follows:

1. Excavation of trenches; removal of drainage tubing

(a) Excavate a set of two parallel trenches to a depth of five (5) feet at each of the three following locations, as depicted on the map attached as Attachment A:

(1) the first set shall be located parallel to the western side of Elk Creek (marked as "Set 1" on Attachment A);

(2) the second set shall be located parallel to the southern side of the waterway referenced as "unnamed tributary A" (marked as "Set 2" on Attachment A); and

(3) the third set shall be located parallel to the northern side of the waterway referenced as "unnamed tributary B" (marked as "Set 3" on Attachment A),

for a total of six trenches.

(b) The first trench in each set shall be located at a distance of twenty five (25) feet from the bank of the referenced waterway; the second trench in each set shall be located at a distance of fifty (50) feet from the first trench (a total of seventy five (75) feet from the bank of the waterway).

(c) The trenches shall be excavated at a length necessary to intercept the drainage tubes located in the wetlands. During the course of excavation of the trenches, each time a drainage tube is intercepted, a twenty five (25) foot length of the drainage tube shall be removed. Upon removal of all intercepted drain tile, the area shall be inspected by EPA (or its representative). Following the inspection and approval of the work by EPA (or its representative), the trenches shall be filled in with the soil that was excavated from them and the tile disposed of properly.

2. Fill In Two Surface Ditches

The two surface ditches that run in a southwesterly

EXHIBIT A

direction into unnamed tributary B, as indicated on Attachment A, shall be filled in beginning at the mouth for a distance of at least twenty five (25) feet.

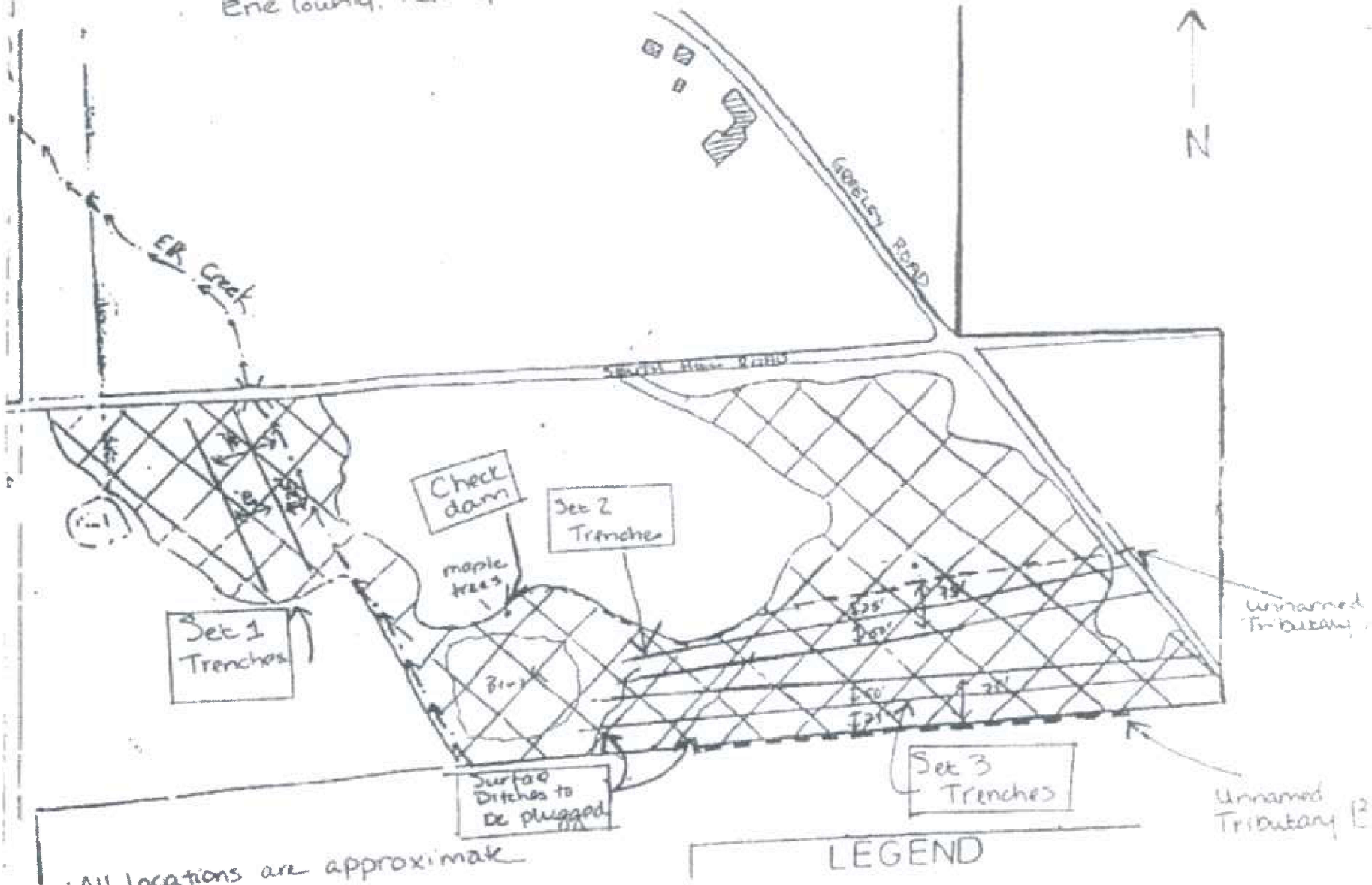
I. Install Check Dam

A check dam shall be installed in unnamed tributary A at the location indicated on Attachment A. This dam shall be one and one-half (1 1/2) feet high, four (4) feet long, and as wide as the tributary bottom. The dam shall be constructed of concrete, gabions, or compacted rock.

All work shall be completed, if feasible, within ninety (90) days after entry of this Consent Decree and, in any event, no later than one year after entry of this Consent Decree. All required State and local permits must be received prior to performing any of the above work. The site will be inspected at the completion of the trench work and again at the completion of the restoration work.

Wetlands Restoration Plan

Erie County, Pennsylvania



· All locations are approximate

· Map not to Scale

ATTACHMENT "A"