

Exhibit 5

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

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UNITED STATES OF AMERICA,)
Plaintiff,)
vs.)No.
ROBERT BRACE, ROBERT BRACE)1:17-cv-00006-BR
FARMS, INC., et al.,)
Defendants.)

Deposition of ROBERT BRACE
Tuesday, January 9, 2018

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The deposition of ROBERT 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 9:14 o'clock a.m., the day and date above set forth.

1 Ingersoll, the law firm that represented you?

2 A Why would I do that?

3 Q I'm asking you the question.

4 A We had and have had --

5 Q It's a yes or no question.

6 A -- the information I gave you yesterday and
7 I hope you review it, when this all happened, in '96
8 there was supposed to be 300,000 acres of farmland in
9 Pennsylvania that was wet pasture that would be prior
10 converted.

11 Q I want to explain when we have a hearing or
12 trial, you will have the opportunity to make this
13 testimony. This deposition is for me to get questions
14 answered so I am prepared to know what you are going
15 to say. My sole question is did you file a
16 malpractice claim, yes or no?

17 A No.

18 Q Were you involved at all with the
19 negotiation of the consent decree? Or did you leave
20 that to your lawyers?

21 A No. I told my attorney, when he told me
22 they want 100,000 plus, I said I won't pay 100,000. I
23 don't have it. They negotiated down to 10,000. I
24 said it's against my better principle. But I don't
25 have a choice. So what am I going to do? This is

1 what is wrong with the Clean Water Act and Dangerous
2 Species Act. We don't have due process.

3 (Thereupon, Plaintiff's Exhibit No. 14 was
4 marked for identification.)

5 Q Mr. Brace, you have been handed Plaintiff's
6 Exhibit 14. This is a consent decree entered in the
7 90-229 action. If you turn to the sixth page, it is
8 signed by Henry Ingram of Buchanan Ingersoll, who is
9 represented to be attorney for defendants. Is that
10 your attorney?

11 A Yes.

12 Q Are you familiar with the wetlands
13 restoration plan that is attached to the 1996 consent
14 decree?

15 A Talking about the hatched area?

16 Q If you turn the page. Are you familiar
17 with that?

18 A Yes.

19 Q What is your understanding of what that
20 restoration plan required?

21 A Basically, they wanted me to tear, and I
22 did tear out the tile lines that was placed in there
23 and filled the ditches. As far as I know, they have
24 given me credit for complying with this restoration
25 order.

1 Q So under the restoration order you were
2 required to remove a certain amount of drainage tile?

3 A I tore it all out.

4 Q You tore every ounce, every line?

5 A Every line that was in there, it's gone.

6 Q Do you know, first of all, what is the
7 purpose of drainage tile?

8 A To make your land productive so you can
9 raise crop as I indicated before, which I gave you a
10 map of yesterday, it's in the magazine from the last
11 couple issues, the importance of drainage.

12 Again, you asked me that question. I will
13 try to explain that. There is a bad misconception of
14 drainage. Drainage is an important part of
15 agriculture, a normal part. Without it we don't have
16 very much of anything, because you don't have the
17 productivity.

18 It's like buying a house and not fixing the
19 last three rooms you had. It's important we have
20 these -- that should be part of normal farming. I'm
21 just telling you my thoughts.

22 Q I understand. I am limited on time.

23 A That is why I can't do any more. You have
24 to remember this property was drained in '77 and '76.
25 And it had been worked on all these years. And it was

1 dry when this happened until Andy Martin came out on
2 site.

3 Q You will have your chance to tell your
4 story. I just need to use this time to ask my
5 questions. I appreciate you have your story. You
6 will have the opportunity to tell it. I need to focus
7 on my questions.

8 So you removed the tile drain. What else
9 were you required to do under this restoration plan?

10 A Put a check dam in.

11 Q Do you recall where that check dam is?

12 A It is still in place. Down on that U-turn.

13 Q Is it still functioning?

14 A It has to be. It's not working. Nothing
15 it draining right.

16 Q Were you required to fill ditches?

17 A Yes. Surface ditches. There was a couple
18 surface ditches. Again, those ditches are all put in
19 within the time frame I thought and should have been.
20 But that is your -- their determination. I can't help
21 what the courts decided.

22 Q Were you personally involved with the work
23 as it was completed, the restoration work?

24 A The restoration work, there is a Showman I
25 kind of grew up -- he was ten years younger than I.

1 Q Where did you add the tile drain?

2 A The same places I tore them out of.

3 Q How did you remember? How did you know
4 where you placed the tile before?

5 A If you look at those maps, you can see.

6 Q What happens?

7 A The one where the 32 acre CW on it.

8 Q Can you, looking at this aerial, can you
9 give me a general idea where the tile drain was
10 placed?

11 A Again, the metes and bounds have never been
12 given. This area you have hatched off is part of the
13 area.

14 Q How much tile drain was added there?

15 A I can't tell you. It's all our own. We
16 could go back and try to find out.

17 Q What is the linear footage, do you know?

18 A No. I don't.

19 Q Who actually installed it?

20 A We did.

21 Q We meaning?

22 A You asked me about that tiling machine this
23 morning. That is what that is for.

24 Q So you used that tiling machine. Did your
25 sons operate it or you?

1 Q So September 2012 sounds like the time --
2 does that refresh your recollection when the tile
3 drain may have been installed?

4 A Yes. I believe.

5 Q So I think you said you re-installed the
6 tile drain everywhere where you ripped it out prior to
7 complying with the consent decree.

8 A Yes.

9 Q Did it take several weeks to do that,
10 months?

11 A To tear it out?

12 Q Put it back in.

13 A Well, we did all this work in a very short
14 time. I'm not sure. I guess the whole thing, we
15 would all know, if we looked back. I will guess six
16 weeks.

17 Q Looking at P1. Is there any way you can
18 relate to me from looking at that photograph where
19 that tile drain was being installed?

20 A This one here?

21 Q Yes.

22 A Yes. Where is this culvert? It would be
23 right in here, I guess.

24 Q So north of Lane Road?

25 A Right near the culvert. I'm looking at the

1 consent decree area after 2012?

2 A The only ditch I know on that consent
3 decree, area that you call the consent decree area, is
4 what I pointed out. That is where they indicated you
5 go to here. You can do anything you want up to this
6 point. Do all the tiling. Raise anything you want.
7 That's why this was planted again. Then you put the
8 cease and desist on us. Then we had to abandon it
9 again.

10 Q So did you -- I'm not talking about
11 cleaning ditches -- excavate any ditches in the
12 consent decree area?

13 A I just told you none except the one they
14 told us to put it for the water coming around the
15 beaver dam could roll back into the ditch.

16 Q Who told you to put it there?

17 A Todd and the people who told us to do this.
18 This is your point of no return here.

19 Q Todd told you where to excavate a ditch?

20 A Yes.

21 Q Could you identify on this map?

22 A I did.

23 Q Can you draw it?

24 A It's there. Right here. See that?

25 Q Could you put a D there?

1 A D.

2 Q Who excavated the ditch?

3 A It would have been Randy. He runs the
4 excavator.

5 (Thereupon, Plaintiff's Exhibit No. 18 was
6 marked for identification.)

7 Q You have been handed Plaintiff's Exhibit
8 18. These are aerial photographs produced by the
9 United States to defendants that were taken in
10 November 2013 of the various parcels we have been
11 discussing today, the Murphy site, the Marsh site, and
12 the Homestead site.

13 Now, if you could take a minute to review
14 these and let me know if you are familiar with the
15 property they depict. I know you may not have seen
16 them before.

17 MR. KOGAN: Counsel, what year was that
18 again?

19 MS. BROWN: 2013.

20 A Maps don't do justice to me. I get a
21 feeling I know where you're at.

22 Q I want to give you an opportunity to review
23 them. But if we turn to the first photograph.

24 A Okay.

25 Q Is the ditch that was excavated, are you

1 email.

2 MR. KOGAN: That would help.

3 THE WITNESS: It would be on those emails.

4 Q Let's look at tab 32.

5 (Thereupon, Plaintiff's Exhibit No. 23 was
6 marked for identification.)

7 Q You been handed what has been marked
8 Exhibit 23. It's a September 12th, 2011 email from
9 Todd Lutte to Brace Farms copying Mike Fodse, Pam
10 Lazos and Earl J. Brown. Take a moment to review that
11 document.,

12 A All right.

13 Q Do you recall does this email refresh your
14 recollection Mr. Lutte came out to your site some time
15 before September 2011 to look at the beaver dams?

16 A It appears. Again, I will keep stating
17 what I tried to and try to make note of. I asked
18 every time we went on site, why are we here. I had a
19 conservation plan and had authority to do this, but
20 I'm trying to get authority from all these people to
21 clarify what we are talking about before we move ahead
22 with anything. And if this is what I'm talking about,
23 again, I can't tell you until I see the list on the
24 email who was there. Was anybody else here?

25 Q I don't know.

1 A I don't know.

2 Q Do you recall that the purpose of that
3 visit was to discuss the removal of beaver dams?

4 A Yes. That's what it said. We took the
5 beaver dams out. We were supposed to be able to clean
6 the agricultural ditches. What they are saying, I
7 guess, we didn't need this or didn't need that. Might
8 talk to the Corps.

9 Q The last sentence of that email says, "To
10 verify the necessity of a permit, I have been in
11 contact with Mike Fodse at U.S. Army Corps of
12 Engineers, Pittsburgh district, who was willing to
13 meet you on site to discuss the above mentioned
14 activities."

15 A Is there a date put in place? Or did they
16 just say they were going to?

17 Q It doesn't say.

18 A That's what I'm asking. I always had
19 people on site to verify what we were talking about.

20 Q Could I have tab 36?

21 MR. KOGAN: Did you establish the date of
22 the 2011 site visit?

23 MS. BROWN: I did not. I don't think it's
24 in dispute that a site visit occurred.

25 MR. KOGAN: A site visit occurred in 2011.

1 This email is dated September 12. What day are
2 we talking about regarding the site visit? It
3 might trigger Mr. Brace's memory.

4 MS. BROWN: It says a few weeks back from
5 September 2011. Counsel, if there is an
6 objection.

7 MR. KOGAN: The objection is I'm trying to
8 figure out how you are reading the first
9 sentence.

10 MS. BROWN: "Per our own conversation from
11 a few weeks back and our site visit."

12 MR. KOGAN: Are they related concepts?

13 MS. BROWN: I have no idea. I don't think
14 there is any dispute there was a site visit in
15 2011.

16 MR. KOGAN: There is no dispute.

17 (Thereupon, Plaintiff's Exhibit No. 24 was
18 marked for identification.)

19 Q You have been handed what has been marked
20 Exhibit 24. There are two emails on this chain. I
21 will direct your attention to the bottom email that is
22 dated Friday, October 7th, 2011.

23 A Could I look at this?

24 Q Does this refresh your recollection that --
25 the bottom email from Mike Fodse to