

# UNITED STATES COURT OF FEDERAL CLAIMS

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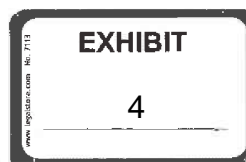
ROBERT BRACE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Docket No.: 98-897L
	)	
UNITED STATES,	)	
	)	
Defendant,	)	

Pages: 600 through 897  
Place: Washington, D.C.  
Date: January 13, 2005

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## HERITAGE REPORTING CORPORATION

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1 Exhibit 8.

2 THE COURT: Do you want to distribute them?

3 MS. COOK: Yes.

4 THE COURT: Thank you.

5 BY MS. COOK:

6 Q Mr. Steckler, what is Defendant's Exhibit 8?

7 A This is a portion of one of the sheets out  
8 of the Erie County soil survey.

9 Q And what is it used for?

10 A Soils information. This is a map that  
11 depicts the different types of soils. In the whole  
12 book, the Erie County soil survey book, there is a  
13 sheet that covers every acre of Erie County.

14 Q And does this page, this map include both  
15 the Murphy farm?

16 A Yes, the Murphy farm is at the upper end,  
17 upper portion.

18 Q And how do you know this map includes the  
19 Murphy farm?

20 A Well, you can see the road configuration.  
21 Although the road names aren't on here, there is  
22 Greenlee Road, South Hill Road, there is Route 86. It  
23 somewhat corresponds to the map I can see over here  
24 too.

25 MS. COOK: Your Honor, Defendant moves

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1 admission of Defendant's Exhibit 8.

2 THE COURT: Mr. Marzulla?

3 MR. MARZULLA: No objection, Your Honor.

4 THE COURT: All right, Defendant's Exhibit 8  
5 is admitted.

6 (The document referred to was  
7 marked for identification as  
8 Defendant's Exhibit No. 8,  
9 and was received in  
10 evidence.)

11 BY MS. COOK:

12 Q Now, looking at this map, what is the soil  
13 type of the 30-acre wetland area, Mr. Steckler?

14 A To the best of my interpretation, because  
15 the 30-acre area is not mapped out on here.

16 THE COURT: Can we get a better  
17 identification of this because, quite frankly, at this  
18 point I know he may be testifying about this document,  
19 but I still haven't pinpointed where he is looking at?

20 MS. COOK: Excuse me, did you say a better?

21 THE COURT: Identification of which portion  
22 of this map he is relying up, because at this point I  
23 am sure he knows where he is looking at, but I am not  
24 sure where he is looking at.

25 THE WITNESS: Could I come up and show you?

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1 THE COURT: Well, that's one possibility,  
2 but of course that would put -- can't you do it  
3 descriptively maybe at this point as to something  
4 here?

5 THE WITNESS: Let me try this. If you look  
6 at the left corner and see the word "McKean".

7 THE COURT: Correct.

8 MS. COOK: Yes.

9 THE WITNESS: Okay, go right to the end, the  
10 end of McKean.

11 THE COURT: Okay.

12 THE WITNESS: That is the beginning of the  
13 western edge of the Murphy tract.

14 THE COURT: Okay.

15 THE WITNESS: Do you see the dashed line  
16 there? That's the township line between McKean  
17 Township and Waterford Township. And the road right  
18 above that is South Hill Road, Your Honor.

19 THE COURT: Okay.

20 THE WITNESS: And then if you run over to  
21 the first intersection, there is a road that kind of  
22 tees at kind of an angle, that's Greenlee Road.

23 THE COURT: Okay.

24 THE WITNESS: And if you run down Greenlee  
25 Road, you will see a change in the photograph there



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1 where it looks a little more open, and some of it's  
2 wood, if you go down Greenlee Road about three-  
3 quarters of an inch, and then go back to the west to  
4 that beginning line, you have the Murphy tract.

5 THE COURT: Okay.

6 BY MS. COOK:

7 Q Mr. Steckler, does that bottom line that you  
8 just described to the judge, does that run right below  
9 the letters P-A-B for descriptive purposes? Does that  
10 help explain where the bottom line is?

11 A It runs right above the 8-J-A. Actually,  
12 it's above P-A-B too. You're correct.

13 Q Now, Mr. Steckler, what is the soil type of  
14 that 30-acre wetland area looking at this map?

15 A Nominally, that 30 acres is -- soil type is  
16 SBA, which is Sloam silty clay loam. This soil is  
17 found in Erie County near flood plains, near streams.  
18 It often floods. It's described as wet and very wet.  
19 For internal drainage, it's described as poor and  
20 very poor.

21 But as far as our soil conservation use of  
22 this soil, it is in capability case 6W, which means  
23 out of eight classes, it's class 6 for wetness  
24 reasons. Although it's not steep, it is very wet.

25 Q What does 6W classification mean?

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1           A     USDA has eight classes of soil types or  
2 eight classes that we use for agricultural  
3 productivity. As you go from class 1 to 2 to 3 to 4  
4 agricultural productivity decreases for various  
5 reasons: because of steepness, rockiness, wetness,  
6 thinness of top soil. For all these reasons your  
7 agricultural productivity decreases, and this  
8 particular soil was in class 6W for wetness reasons,  
9 because it floods and it's very wet.

10          Q     And so what would the SCS recommend in terms  
11 of drainage for area classified as 6W?

12          A     Normally we would recommend leaving that  
13 alone practically 100 percent of the time. If a  
14 landowner -- in this case, it would be classified as  
15 wetlands, and we would have to inform the landowner  
16 that permits would be needed to do any type of  
17 drainage work. And similar to that plan, it was left  
18 in wildlife.

19          Q     And pursuant to this plan in 1961, why would  
20 they, based on the classification of 6W, recommend  
21 leaving it for wildlife?

22          A     Well, in the Soil Conservation Service's  
23 best recommendation, it would be way too expensive to  
24 do any other land use with it. You can't build houses  
25 on it. It's very difficult to drain and grow crops on

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1 that particular soil.

2 MR. MARZULLA: Your Honor, I would object  
3 and move to strike this witness's comment about  
4 building houses. He is not qualified as a soils  
5 engineer.

6 THE COURT: Ms. Cook?

7 MS. COOK: Based on his knowledge and  
8 expertise from his job, what he is doing is  
9 commenting, giving his opinion on the soils of the  
10 wetland area.

11 THE COURT: Right, but there has been no  
12 testimony indicating he has any expertise regarding  
13 soil and how it relates to housing as opposed to  
14 agriculture.

15 THE WITNESS: That's correct. The soil  
16 conservation plan does not get into houses. The soil  
17 survey does, but that -- the conservation plans that  
18 we do does not talk about building houses.

19 MS. COOK: Okay.

20 THE COURT: Is that adequate, Mr. Marzulla?

21 MR. MARZULLA: Well, I was hoping, Your  
22 Honor, that you would strike the testimony related to  
23 the effect that houses could not be built on it.

24 THE COURT: I'll strike that testimony.

25 MR. MARZULLA: Thank you, Your Honor.

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1 BY MS. COOK:

2 Q Now, in the highly erodible determination  
3 that we talked about prior to lunch, you've testified  
4 that Mr. Brace requested a highly erodible  
5 determination for the Murphy parcel.

6 A Yes, it was marked out on the two upland  
7 fields.

8 Q Now, did Mr. Brace request a highly erodible  
9 conservation plan?

10 A Not to my knowledge. We have other  
11 employees in the office, but not to my knowledge.

12 Q Now, the purpose of requesting a  
13 conservation plan for highly erodible lands would be  
14 what, Mr. Steckler?

15 A The reason they would like -- most -- a lot  
16 of farmers requested plans because that made them  
17 eligible for farm bill programs. It also helped those  
18 farmers establish a minimum amount, a basic amount of  
19 conservation practices on those fields because they  
20 are prone to have soil erosion on those fields if no  
21 conservation practices are implemented.

22 This would include things such as strip  
23 cropping, cover crops, crop rotations, conservation  
24 tillage, grow for pay crops. It could be quite a list  
25 of conservation practices that we would recommend

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1 depending on the type of agricultural operation that  
2 we were dealing with.

3 Q So specifically, a highly erodible  
4 conservation plan as it pertains to soil erosion would  
5 be what?

6 A About the minimal three things -- it would  
7 be hard to say, but the minimal practices being the  
8 crop rotation, contour farming, and the type of  
9 tillage.

10 Q Now, you had also testified before lunch  
11 that you have known Mr. Brace for how many years?

12 A I believe I first met him in 1979.

13 Q And during those years since 1979, so that's  
14 about 25 years, how many times has he been into your  
15 office?

16 A Several dozen.

17 Q And any one of those times he visited your  
18 office did he ever ask you about a 404 permit?

19 A We've had lots of discussions. Mr. Brace  
20 was in the office a lot, especially after 1987, 1986-  
21 87. I mostly listened. Basically, most of my  
22 discussions with Mr. Brace were to explain to him that  
23 our agency had little to do with what's happened on  
24 his tract, the Murphy tract, that it wasn't our rules  
25 and regulations from the Department of Agriculture.

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1 Q Now, who, Mr. Steckler, provided technical  
2 assistance to Mr. Brace for the drainage that was  
3 removed pursuant to the consent decree?

4 A To my knowledge, it was Mr. Brace and the  
5 contractor with a trencher.

6 Q And who provided financial assistance to Mr.  
7 Brace for the drainage that was removed pursuant to  
8 the consent decree and the restoration plan?

9 A There was no government cost-sharing on  
10 that.

11 MS. COOK: That's it, Your Honor.

12 THE COURT: Okay. Mr. Marzulla.

13 MR. MARZULLA: Thank you, Your Honor.

14 CROSS-EXAMINATION

15 BY MR. MARZULLA:

16 Q I have only a few questions for you, Mr.  
17 Steckler. We may need to clear up some of the points  
18 in your testimony.

19 Do you have Plaintiff's Exhibit 1 in front  
20 of you? Could I ask you to turn to that, sir? That's  
21 the 1961 drainage plan.

22 You testified that it was prepared for Mr.  
23 Brace's father; is that correct?

24 A Yeah, that's what is typed in the middle --  
25 it says right at the top, soil conservation plan, and

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1 then the cooperator is Charles T. Brace.

2 Q Right. It also says sold to Bob Brace?

3 A Yes.

4 Q Is that your handwriting?

5 A No, that is Mr. Lebedowski's handwriting  
6 from our office.

7 Q Okay. Now, I believe you testified that  
8 this plan showed someone's recommendations about how  
9 the property should be used; is that correct?

10 A Yes, there is -- there is a full  
11 conservation plan, it includes all the parts that we  
12 normally include.

13 Q Right. In answering counsel's questions  
14 about the various fields and what they were shown for,  
15 it was your understanding that those designations are  
16 how the property ought to be used; is that correct?

17 A Yeah, I believe it talks about conservation  
18 and plan of operations, and it's cooperator decisions,  
19 and these are recorded with discussion between the  
20 soil conservation person and the farmer, and then we  
21 write down on there things that were decided upon like  
22 the type of hay he is going to grow. We recommend the  
23 amount of fertilizer to add.

24 Q I wonder if you could look down at the  
25 bottom of page 4 of that plan, and perhaps explain

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1 what the language means there where it indicates that  
2 this plan shows you present use of land. Do you see  
3 that right here?

4 A Yeah, I see it. It's clear at the bottom.

5 Q Okay. Now, might that indicate that at  
6 least in 1969, which was before you joined the Soil  
7 Conservation Service, the plan was drawn up, the one  
8 you have been testifying from, actually showed how Mr.  
9 Brace, Sr. was using the property at that time?

10 A Yeah, that would be true, and it also -- it  
11 showed like, for example, field 14, or some other  
12 field where some improvements are still going to be  
13 made.

14 Q Okay. So it might show but, but in any  
15 event is it fairly likely, for example, that he did  
16 have a hay field in field 12 at the time that the plan  
17 was drawn up?

18 A Yeah, I'm assuming -- yeah.

19 Q Okay, good. Now, you also testified,  
20 looking at Exhibits P-2, 3 and 4, why don't you turn  
21 to P-2, if you would. It's the first technical  
22 assistance request.

23 A Yes.

24 Q And do you recall counsel asking you about  
25 the reference to wetlands designation 2, 3 and 4 -- 3,

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1 4 and 5, rather, and you said, well, if it was marked  
2 "yes," then we couldn't give assistance, right?

3 A That's true.

4 Q Okay. Now, the reason you couldn't give  
5 assistance had nothing to do with the Clean Water Act  
6 did it?

7 A No, those wetlands types were from a  
8 publication called Circular 39, I believe.

9 Q Right. Those are wetland soils  
10 designations, and actually if you go back to page 4 of  
11 Exhibit 1, the same page you were on before, it  
12 actually lists those soils way back in 1961, doesn't  
13 it?

14 A If you go to page 5.

15 Q Right.

16 A It has soil types.

17 Q Right. Those are the soil types that are  
18 referenced in the document, so that has nothing to do  
19 with whether or not these were wetlands under the  
20 Clean Water Act, right?

21 A They couldn't have. This was before the  
22 Clean Water Act was passed.

23 Q Exactly. Thank you. Now, I'm glad you've  
24 clarified that for me because that's how it appeared  
25 to me. Okay, good.

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1 Now, you indicated that you've been with the  
2 service in Erie County since about when?

3 A September 1978.

4 Q September 1978.

5 And from September 1978 through about 1985,  
6 you provided technical assistance to, well, maybe 60  
7 to 100 farmers a year in connection with soil  
8 conservation projects?

9 A That's a pretty good estimate, yes.

10 Q Is that about right? And is it also a good  
11 estimate that about 75 percent of those projects  
12 involved draining their fields?

13 A I think in my deposition I probably came up  
14 with that.

15 Q Right.

16 A Depending on the year.

17 Q And knowing now what you do about wetlands  
18 here in 2005, is it accurate to say that probably at  
19 least some of those fields were what would be called  
20 wetlands today under the Clean Water Act?

21 A Well, that's a lot of projects for me to  
22 recall.

23 Q Well, I'm just asking whether some of them  
24 might be.

25 A You're asking me to recall 100 projects or

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1 60 projects for 10 years?

2 Q No, I'm not asking you to recall all the  
3 projects. I'm asking you to recall any of the  
4 projects, and I could turn the question around and  
5 say, can you tell the Court under oath today that not  
6 one of those projects involved wetlands as defined  
7 under the Clean Water Act?

8 A I followed our policy in all of our  
9 technical assistance.

10 Q Right. Now, you were here when Mr.  
11 Burawa --

12 A There are a lot of people that have worked  
13 in my office, but to the best of my knowledge, we  
14 followed our policy.

15 Q Okay. And your policy up to 1985, did that  
16 establish or did that reflect a belief that normal  
17 farming activities were exempt from the Clean Water  
18 Act?

19 A The drainage practices had to reflect active  
20 cropping or active hay land conditions to be eligible  
21 for the drainage practices.

22 So if we went to a field at a farmer's  
23 request and there was small trees, brushy shrubs that  
24 reflected not actively being farmed, these type of  
25 areas, and if it met wet enough conditions, this was



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1 an area that we did not provide drainage on. We did  
2 not provide technical assistance on.

3 Q And did that --

4 A That did not meet the criteria of being  
5 actively farmed.

6 Q But that's what I am trying to understand.  
7 Is that because you believed, contrary to Mr. Burawa's  
8 testimony, that normal farming activities weren't  
9 exempt under the Clean Water Act? Did you have some  
10 other belief?

11 A I guess I don't understand exactly what that  
12 question is for sure.

13 Q Okay. Let's take your early years, 1978-  
14 1979 with the Soils Conservation Service in Erie  
15 County.

16 Did you at that time believe that normal  
17 farming activities were covered under the Clean Water  
18 Act or not?

19 A We were very well aware of the Clean Water  
20 Act, of course. Our regulations and our policies were  
21 developed and sent to our field office from our state  
22 office based on what the Clean Water Act said.

23 Q Okay. And what I'm trying to ask you, sir,  
24 is what you understood those policies and those  
25 regulations to reflect as an understanding of the

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1 normal farming activities exemption as of 1978-1979.

2       A     My recollection still goes back to the  
3 agricultural tillage. The fields had to be -- you  
4 could have wet spots in fields where you corn grew  
5 poorly, and the corn turned yellow and you got stuck  
6 with your machinery. Those are the type areas that we  
7 drain lots of times.

8       Q     Okay.

9       A     If these areas had no history, had never  
10 been cropped, we didn't provide assistance for  
11 drainage.

12       Q     Okay, But, Mr. Steckler, I have asked you a  
13 question which I would ask you to respond to yes or  
14 no. As of 1978 and 1979, did you understand that  
15 normal farming activities were subject to the Clean  
16 Water Act or not?

17       A     There is too may ifs, ands, and buts to  
18 answer that yes or no. I'm sorry.

19       Q     You don't know -- okay.

20             What is unclear about that question?

21       A     I have to know if it's in an agricultural  
22 field, if it has a history of being farmed.

23       Q     But my question was normal farming  
24 activities. You can define it any way you want. Were  
25 normal farming activities exempt?

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1           A     If it had a history of being farmed, we were  
2 allowed to drain. That meant no permit was needed.  
3 It would have been exempt, yes.

4           Q     Okay. And in fact a lot of the fields which  
5 you provided technical assistance for would have  
6 fallen under the definition of wetlands that you heard  
7 Mr. Lapp testify about, but the activity was exempt  
8 because it was normal farming activity; isn't that  
9 right?

10          A     They may have been wetlands 10,000 years ago  
11 or something like that. But if they had the cropping  
12 history, had been actively cropped, then that was the  
13 exemption is the way we interpreted it.

14          Q     Right. You were within the exemption, and  
15 you provided technical assistance for those exempt  
16 normal farming activity lands, didn't you?

17          A     That's correct.

18          Q     Okay. Good. And then something changed in  
19 1985, didn't it?

20          A     That was the farm bill, 1985 farm bill.

21          Q     Right. And you could no longer provide  
22 assistance for drainage of those lands which would  
23 qualify as wetlands under the Clean Water Act, right?

24          A     We still provided assistance if the fields  
25 had a cropping history. Eventually, eventually there

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1 was a new wetlands system into place that replaced the  
2 old Circular 39, and the regulations got more strict;  
3 that they came in with abandonment rules and  
4 regulations and different things like that. Yes, and  
5 we had to be very cautious on what field we drained  
6 and what ones we didn't because the regulations got  
7 increasingly stricter.

8 Q Okay. So let me go back to the question I  
9 asked you some time ago, and that is, as you sit here  
10 today, don't you believe that some of the lands that  
11 you provided technical assistance for, at least prior  
12 to 1985, were wetlands within the definition that Mr.  
13 Lapp gave to the Court?

14 A That's hard to say. I suppose there could  
15 have been. I mean, I -- you're asking me to evaluate  
16 600 projects.

17 Q I'm asking you some, sir, remembering one  
18 project. You, for example, have testified about  
19 several projects today on Mr. Brace's farm. I guess  
20 is that you might remember some other projects other  
21 than Mr. Brace's.

22 I'm just asking you whether your testimony  
23 is that absolutely, positively not one of these  
24 drainage projects was on a wetland. Is that what  
25 you're telling the Court?

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1 A Well, I can't agree to that.

2 Q No, of course not.

3 A Because there was four or five other people  
4 who worked in at office who have come and gone. I  
5 didn't do every project in the whole office.

6 Q I can only ask you about projects you know  
7 about, sir. Can you -- are you telling the Court  
8 under oath today that not one of the projects you  
9 worked on ever involved a drainage of property that  
10 would qualify as a wetland under the definition given  
11 us today under the Clean Water Act?

12 A I would say probably not. You could  
13 probably find some if we absolutely went back through.

14 Q Good.

15 A At least some would be questionable.

16 Q Thank you.

17 A I mean, that's a little -- I can't evaluate  
18 every project.

19 Q Absolutely.

20 Now, before 1984, there were actually  
21 drainage ditches on Mr. Brace's property, weren't  
22 there?

23 A Yes.

24 Q So when you testified today that you  
25 understood the restoration project -- the restoration

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1 to restore only conditions going back to 1984, you  
2 were pretty much just repeating what Mr. Lapp said,  
3 right?

4 THE COURT: Just pause before you answer  
5 that question.

6 Yes, Ms. Cook?

7 MS. COOK: Can counsel clarify when he says  
8 "property," what he is referring to?

9 MR. MARZULLA: The 30 acres, and I would be  
10 happy to ask the question again, Your Honor.

11 THE COURT: Why don't you go ahead and  
12 rephrase it then.

13 MR. MARZULLA: Yes.

14 BY MR. MARZULLA:

15 Q You testified earlier today that the  
16 restoration plan for the 30 acres, which you observed  
17 on December 23rd and 24th of 1996, was to restore the  
18 property back to 1984, right? Is that what you said?

19 A Yes.

20 Q Okay. And in fact, that restoration plan  
21 filled in ditches that were built before 1984, didn't  
22 it?

23 A I really don't know the answer to that. I  
24 didn't keep track of every ditch that was filled out  
25 there, especially if we didn't have anything to do



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1 with it. So I don't really know.

2 Q Okay. Well, just a moment again, Mr.  
3 Steckler, you agreed, and I want to make sure your  
4 testimony is clear here, I thought you agreed with my  
5 question when I said some of the drainage ditches in  
6 the 30 acres were constructed before 1984.

7 Did you say yes to that?

8 A Yes, some of them had.

9 Q Absolutely. So when they got filled in, you  
10 actually restored a condition that was pre-1984. Some  
11 of the stuff that got filled in, the drainage ditches  
12 --

13 A There were also ditches that weren't filled  
14 in.

15 THE COURT: Pause before you answer. Yes?

16 MS. COOK: Your Honor, counsel is misstating  
17 the testimony. There hasn't been any testimony that  
18 said all of the drainages were refilled during the  
19 restoration plan.

20 THE COURT: I think the line of questioning  
21 is appropriate. Go ahead, Mr. Marzulla.

22 BY MR. MARZULLA:

23 Q Do you recall the question, sir?

24 A No.

25 Q Okay. Some of the drainage ditches that

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1 were filled in that you observed being filled in were  
2 subject to the restoration plan were actually  
3 constructed before 1984, weren't they?

4 A I think some of them were, yes.

5 Q Okay. Now let's talk about your soils map.  
6 Would it be accurate to say that on occasion a soil  
7 test done at a specific spot will, shall we say, fail  
8 to confirm the soil that is shown on that map?

9 A That's correct. I did my research on that  
10 subject.

11 Q Did you?

12 A So there is what they call mapping unit  
13 variability.

14 Q Right. And making unit variability means  
15 that on a large scale the map is pretty accurate, but  
16 maybe not into a smaller scale, right?

17 A That's a true statement.

18 Q Okay. So when you look at the soils map,  
19 it's a pretty good indication of what's probably  
20 there, but it can be off as to a particular parcel or  
21 a particular acre, can't it?

22 A It can be -- it may be off according to some  
23 characteristics, and accurate in other  
24 characteristics.

25 Q Right, because it's just a question of how

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1 many samples you take, and how good the information is  
2 that went into the map in the first place, right?

3 A Right, and it's not a clear-cut -- there is  
4 always a transition in nature. Soils -- there is no  
5 line per se. Mother nature doesn't stop and say this  
6 is what is -- there is no absolute. There is a  
7 transition between soil types.

8 Q Mother nature doesn't work for a soils map,  
9 does she?

10 A That's right.

11 Q So the map is a pretty good indication, but  
12 if you were to be provided evidence that some soil  
13 tests show that some of the soils on property shown in  
14 that map didn't match the designation on the map, you  
15 wouldn't be too surprised, would you?

16 A It's possible if you want to get down to  
17 looking at acre by acre, square foot by square foot.

18 MR. MARZULLA: Okay, great. Nothing  
19 further, Your Honor.

20 THE COURT: Very good. Ms. Cook.

21 REDIRECT EXAMINATION

22 BY MR. MARZULLA:

23 Q Referring back to three exhibits,  
24 Plaintiff's 2, 3 and 4, in any of those technical  
25 determination did the SCS provide assistance to Mr.

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1 Brace for area that included wetlands, either as  
2 defined under the Clean Water Act or prior to that in  
3 1961?

4 A No. We've started --

5 Q Excuse me, let me rephrase the question.

6 In Plaintiff's Exhibit 2 and Plaintiff's  
7 Exhibit 3.

8 A Two and three.

9 Q Was there any technical assistance given to  
10 Mr. Brace for an area that included wetlands?

11 A No. Basically what it says in the front of  
12 the page here is that after going to the field and  
13 looking at the areas that was desired to be drained  
14 with the farmer and a soil conservation technician, it  
15 was checked "no", that we weren't going to be draining  
16 wetland because we were looking at areas that had  
17 cropping history and/or had grown hay crops.

18 So you can't have trees and woody vegetation  
19 on there and still have been cropped.

20 MS. COOK: Thank you, Your Honor.

21 THE COURT: That's it.

22 Mr. Marzulla?

23 MR. MARZULLA: One moment, Your Honor.

24 (Pause.)

25 MR. MARZULLA: Nothing further. Thank you,

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1 Your Honor.

2 THE COURT: Very good. I have a few  
3 questions for you, Mr. Steckler. After I am done with  
4 my questions, then I will first give Ms. Cook and then  
5 Mr. Marzulla an opportunity to follow up in case I  
6 overlooked something that they want to pursue.

7 Let's go to Plaintiff's Exhibit 2, which is  
8 the one that you were just asked about by Ms. Cook.  
9 So we've been talking a lot about the language that's  
10 in the middle of the first page of that exhibit. It  
11 says "wetland types 3, 4 or 5". It has a hyphen and  
12 then it says "yes" or "no".

13 THE WITNESS: That's correct.

14 THE COURT: All right. If you know, and I  
15 get the sense that you do know, but if you know, at  
16 the time that that designation was made here what did  
17 it mean to have wetlands type 3, 4 or 5? What did  
18 that refer to?

19 THE WITNESS: There was -- that Circular 39  
20 had 20 wetland types, like No. 20 is the ocean.

21 THE COURT: Okay, very wet, yes.

22 THE WITNESS: Twenty, you may be familiar  
23 with what I'm referring to, but from 20 it went to  
24 one, which one was basically a small depression in an  
25 open field. Two would be a little bigger depression

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1 in an open field. And then once you got into types 3,  
2 4, and 5, you started getting a lot of wetlands,  
3 especially woody vegetation that would indicate it  
4 didn't have a cropping history.

5           Actually, you know, No. 5, if I recall, it  
6 had quite a bit of sand and water for most of the  
7 year. The water gets deeper. The vegetation gets  
8 more wetland plants are you progress.

9           THE COURT: Well, actually, you're getting  
10 to the point I want to sort of break out into two  
11 pieces, so let's do it one piece at a time.

12           So if you had had cropping history for the  
13 land that you were seeking to drain, in other words it  
14 had been used to plant crops previously, would it by  
15 virtue of that not be wetland type 3, 4, or 5?

16           THE WITNESS: That's a pretty fair  
17 statement.

18           THE COURT: All right. So one way that you  
19 could not be wetlands 3, 4, or 5 is if there had been  
20 a prior cropping history on the land that you were  
21 seeking to drain. You had been growing hay on it for  
22 example for whatever number of years.

23           THE WITNESS: That's a fair statement for  
24 this time.

25           THE COURT: Okay. All right, now, let's say



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1 that you hadn't been growing something on it, all  
2 right, but you are still trying to determine at this  
3 point whether or not, I assume, it could be converted  
4 into what would be crop land, correct? So that would  
5 be the type of situation we would be dealing with,  
6 correct?

7 THE WITNESS: Or you're referring to as the  
8 farm land in a idle state maybe?

9 THE COURT: Well, idle, and I assume,  
10 depending on how long it's been idle, the level of  
11 vegetation that would be on it would range from plants  
12 to small bushes to even small trees, depending on if  
13 had been sitting there fallow for five or 10 years say  
14 for example, correct?

15 THE WITNESS: Yes, that's possible. Back  
16 then that was possible. Now it's a different story.

17 THE COURT: All right. So there was two  
18 different scenarios that were covered by this wetland  
19 designation. So one was a situation in which somebody  
20 had a preexisting crop history. But you could have,  
21 could you not, one of these referrals for technical  
22 determination applying to a field that had not been  
23 used for some time, or maybe for whatever reasons had  
24 never been used but where drainage was still designed?  
25 Could you have that?



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1 THE WITNESS: If it didn't -- yes, if it  
2 didn't exhibit wetland characteristics 3, 4 or 5, yes.

3 THE COURT: All right. Well, that's going  
4 to get to the question I'm going to ask, which is --  
5 so let's say we're not dealing with the prior crop  
6 history, which sounds like it's a pretty bright line.

7 THE WITNESS: Basically, you're saying there  
8 could be idle upland fields.

9 THE COURT: All right. Well, conceivably  
10 idle fields that are not wetlands, all right, at least  
11 within the designations of 3, 4, and 5. So the  
12 question I have for you is in that situation, so not  
13 where there is a prior crop history which seemingly  
14 answers the question, but where there is not a prior  
15 crop history, at least a recent one, what type of  
16 criteria were used for determining whether or not it  
17 was a type 3 wetland, a type 4 wetland, a type 5  
18 wetland?

19 THE WITNESS: Oh, that would be Circular 39,  
20 Your Honor.

21 THE COURT: Okay. Can you give me a sense  
22 of the general nature of the criteria that were used?

23 THE WITNESS: It would be the plants.

24 THE COURT: Okay.

25 THE WITNESS: Whether you saw elder berries,

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1 willows. We had a copy of that Circular 39 in our  
2 office at the time. You know, basically, what you're  
3 saying is if you didn't have a crop history, then  
4 basically that put the red flag up for us to further  
5 investigation.

6 THE COURT: Did you do hydrology studies at  
7 that time? Do you know?

8 THE WITNESS: Normally the way it was done  
9 is if the woody vegetation and the surface water  
10 depths, there wasn't water standing on the surface, if  
11 the soil types was such that it was only 3W or 4W, it  
12 would have still been eligible.

13 THE COURT: All right. So in other words,  
14 if you didn't see water on the property, standing  
15 water, or it wasn't sort of unusually wet in that  
16 spot, and if the soil type at least appeared to be  
17 consistent with what you would expect to find in  
18 something that was not a wetland.

19 THE WITNESS: And it wasn't completely  
20 overgrown with brush and that type of thing.

21 THE COURT: Okay. Any sense as to how those  
22 criteria compare to the criteria that we have been  
23 referring to by Mr. Lapp and others in terms of  
24 defining what is a wetland under Section 404 of the  
25 Clean Water Act?

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1           Were those criteria as comprehensive, less  
2     comprehensive, more comprehensive?

3           The criteria I'm talking about are the ones  
4     that were in place under the circular.

5           THE WITNESS: Well, as I said a little while  
6     before, the regulations got stricter once Circular 39  
7     was superseded.

8           THE COURT: All right. Well, let me ask my  
9     question. Let me ask it in somewhat of a different  
10    fashion, similar to what I guess Mr. Marzulla asked,  
11    but I want to make sure I get a clearer answer to it.

12           Is it possible that something would not have  
13    been considered wetlands 3, 4, and 5 under the  
14    circular but when you apply the definition of Section  
15    404 with the types of studies and criteria that were  
16    used there you would conclude that the land were a  
17    wetland?

18           Is my question clear?

19           THE WITNESS: Yeah, because I just said that  
20    the later definitions were more strict.

21           THE COURT: More strict in the sense that  
22    likely to lead to property being more included in  
23    wetlands than not. Is that a fair statement?

24           THE WITNESS: I think that's what is  
25    referred to, yes.

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1 THE COURT: Well, in other words, under the  
2 new criteria it was more likely that a given property  
3 would be a wetland than it would have been under the -  
4 -

5 THE WITNESS: That would be my  
6 interpretation, because before -- before we had this  
7 designation on referral there was nothing wrong back  
8 in the sixties.

9 THE COURT: Do you know, talking about crop  
10 history, were any inquiries made at the time of this  
11 type of technical determination being provided as to  
12 how long the crop history was?

13 I mean, did you -- for example, if somebody  
14 had been -- had crops on that land for five years, but  
15 let's say before the five years it had been something  
16 that might have looked like a wetland but they  
17 actually put in some fill and some other types of  
18 things like that, would that impact the outcome?

19 How far back did the cropping history have  
20 to go before you, just based on cropping history,  
21 would conclude that it was not a wetland?

22 THE WITNESS: To my recollection, they did  
23 use something similar to the time frame like you said,  
24 five years.

25 THE COURT: All right. So if you could show

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1 that you had been growing something on this land for  
2 five years, no inquiry was made as to what the land  
3 would have looked like 10 - 15 years before that?

4 THE WITNESS: Yeah, but then like I said  
5 before, the main thing we used was the woody  
6 vegetation.

7 THE COURT: Okay. Well, the scenario I  
8 guess I'm mapping out to you is where you go out  
9 there, and when you go out there in the summer you see  
10 corn. All right, but the question is what would you  
11 have seen if you looked at that same property five  
12 years earlier, because there could be a reason why you  
13 see corn now, and that person might have pushed a  
14 whole bunch of fill into that previously wet area.

15 THE WITNESS: It's possible.

16 THE COURT: Okay. All right, I think I  
17 understand this a little bit better now.

18 Let's turn to that soil map. That's  
19 Defendant's Exhibit No. 8. Are you there?

20 Oh, the new one, you didn't get into the  
21 book there? It is Defendant's 8, am I correct?

22 MS. FLORENTINE: Yes.

23 THE COURT: If it's not -- you mean there is  
24 no tabs there at all. Did you switch gears into the  
25 Defendant's exhibits as opposed to the Plaintiff's

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