



Erie County farmer continues fight over wetlands issue

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United States goes to court, again, against Robert Brace

By **Jim Martin**

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It was 30 years ago this spring that Bob Brace, a Waterford-area farmer, first clashed with the U.S. Fish and Wildlife Service about his right to repair drainage pipes that allowed him to farm some soggy ground.

The government claimed he was draining a wetland; Brace countered that he was following the provisions of a government-approved conservation plan.

The ensuing David-vs.-Goliath battle would make Brace a national figure in the property-rights movement, spawn a video and then a DVD explaining his case, and lead to the formation of the Pennsylvania Landowners Association.

It also would touch off a protracted court battle that continued this week with a round of new filings against Brace by the U.S. Department of Justice.

For a time in 1996 it seemed as if that battle might be over. Brace had signed a consent decree with the government, agreeing to pay \$10,000 and to dismantle the drain lines that made some of his acreage suitable for planting. The government, in turn, agreed to drop its case and a \$125,000 fine.

But it wasn't over.

Not for Brace, who continued to do battle in the courts, running up legal bills that he says have topped \$1 million. He had hoped that the U.S. Supreme Court would hear his unlawful-takings claim that the federal government had deprived him of the use of his property without compensation. The nation's highest court, however, refused to hear the case in 2008.

The case wasn't over either for the federal government, branches of which have continued to maintain that Brace wasn't living up to the terms of the consent decree.

Earlier this week, the Department of Justice filed a motion in federal court in Erie to enforce the consent decree and to levy penalties against Brace and his company, Robert Brace and Sons Inc.

In a separate complaint, the Department of Justice is seeking an injunction against Brace, claiming that he has contributed to the discharge of pollutants into a wetland on a separate piece of property that adjoins Elk Creek.

The government's motion contends: "Defendants have cleared, ditched, drained, plowed and planted approximately 18 acres of wetlands, causing the unpermitted discharge of pollutants into waters of the United States that were required to be restored pursuant to the Consent Decree."

Brace, 77, agrees on one point.

He said he has been using his land, but only after getting clearance to do so from the Environmental Protection Agency in 2014.

In a Nov. 28 letter to the Department of Justice's environmental defense section, Neil Devlin, Brace's lawyer, wrote: "That meeting ended with a clear direction from the EPA that Mr. Brace was allowed to do work and return a significant portion of the ... farm for farmable property."

Devlin wrote that the EPA later "took the position that the permission Mr. Brace received was incorrectly given and that he would now have to remediate the property."

The Justice Department offers a different recollection of the facts.

Its motion says Brace and his company "without any authorization, have since undone all the work required by the restoration plan."

The government said Brace's actions "will continue to damage the wetland hydrology, cause long-term damage to the affected wetlands, and reverse the restoration work this Court ordered under the Consent Decree."

The case is long and complex. Brace quotes easily from a series of court decisions and thousands of pages of testimony and evidence.

But his summary of the case is simple: "I took the drainage out once. They gave me permission to put it back in."

The government's case also cites the possibility of civil penalties that could reach tens of millions of dollars. That's based on allowable penalties of up to \$37,500 a day for each day between Jan. 2, 2009, and Nov. 2, 2015.

A paper trail of correspondence illustrates that Brace, who grows more than 1,600 acres of corn and other grain, had been working to reach a settlement.

In a July 27 letter to the Justice Department, Devlin outlined the steps that Brace was willing to take, including allowing EPA access to his property so that it could identify the steps needed for restoration.

At that point, Brace said, he was hopeful he could reach a settlement.

In a letter to the Department of Justice, Devlin wrote: "My client recognizes that he has no choice but to take steps to appease the government to avoid subjecting himself to serious financial consequences."

But a meeting with Department of Justice officials in late 2016 convinced Brace they would find no common ground.

"I told them (Justice officials) I will do what you want, but I will not say that I am guilty," Brace said in an interview Wednesday. "When you are innocent you shouldn't have to prove you are innocent."

Margaret Philbin, a spokeswoman for the U.S. attorney's office for the Western District of Pennsylvania, said the government tried to avoid litigating the matter.

"But we were unsuccessful," she said. "That is why we had to file the complaint."

U.S. Rep. Glenn Thompson, of Centre County, R-5th Dist., declined to comment specifically on the pending litigation.

However, his press secretary, Renee Gamela, said, "Mr. Thompson strongly believes the culture within federal agencies must change in order to work in a more collaborative manner, rather than simply taking punitive actions that undermine private property rights, the vitality of our farms and small businesses, and our economy as a whole."

U.S. District Judge Barbara Rothstein has been assigned the case and will set a briefing schedule.

Devlin said Wednesday that his client is prepared to vigorously defend himself.

"We fully believe that everything Bob has done has been completely legal," Devlin said. "We feel very confident in our position that everything has been done to the letter of the law."

Even so, Devlin said his client is prepared to reverse the work he's done.

What he won't do, Brace said, is concede wrongdoing and agree to heavy fines.

"I will do what you want, but I will not admit I am guilty when I'm not," Brace said. "They've been trying to make an example of me."

Devlin said Brace attempted repeatedly over several years to obtain clarification from the EPA about he was allowed to do.

Brace, who farms with his two sons, doesn't know that he wants to go on farming if he can't be assured that the government won't interfere.

"I told my boys, If we can't win this, we are done," he said.

Jim Martin can be reached at 870-1668 or by email. Follow him on Twitter at twitter.com/ETNMartin.