

# UNITED STATES COURT OF FEDERAL CLAIMS

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

Pages: 301 through 527/599

Place: Washington, D.C.

Date: January 12, 2005

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## HERITAGE REPORTING CORPORATION

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EXHIBIT

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1 Q Now, what do you mean by "restore the  
2 hydrologic drive?"

3 A Because of the activities, the hydrology was  
4 no longer staying in the wetland area. Because of the  
5 drainage tile and the ditches and the deepening of the  
6 one tributary, it was facilitating the movement of  
7 water off of the wetland areas.

8 Q So you needed to design a plan that did  
9 what?

10 A Basically corrected the activities that  
11 occurred on the site in order to reintroduce the  
12 hydrology as it existed and I think our target date  
13 was 1984.

14 Q Why 1984?

15 A It was my understanding that was the  
16 timeframe of which activities that we were looking at  
17 had begun and that was the date in time they wanted to  
18 go back to.

19 Q So how did you go about determining to  
20 restore wetlands to 1984 when it's now 1996?

21 A We had information as to, you know, what had  
22 been done. As I mentioned, there was information as  
23 to that the drain tiles had been put in place, we also  
24 had historic aerial photos of the parcel where you  
25 could go back and see the events, sequencing of things

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Pages: 600 through 897  
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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

ROBERT BRACE,

Plaintiff,

v.

UNITED STATES,

)  
)  
)  
)  
)  
)  
)

Docket No.: 98-897L

Courtroom 5, Room 505  
National Courts Building  
717 Madison Place, N.W.  
Washington, D.C.

Thursday,  
January 13, 2005

The parties met, pursuant to adjournment, at  
9:06 a.m.

BEFORE: HONORABLE FRANCIS M. ALLEGRA  
Judge

APPEARANCES:

For the Plaintiff:

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NANCIE G. MARZULLA, Esquire  
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For the Defendant:

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1 out of the wetland area and discharge that into  
2 unnamed tributary B.

3 And so what we had was you could put in a  
4 plug in it. Basically they are no longer taking the  
5 surface water out of that wetland system.

6 Q Now, what was the goal of this restoration  
7 plan?

8 A The goal of this restoration plan was to  
9 restore the hydrologic drive back to this wetland  
10 system, and we used a target date of 1984. So it was  
11 to remedy those activities which had occurred from  
12 1984 onward.

13 Q And why back to 1984?

14 A The information, if I recall at the time  
15 that the enforcement coordinator had was that the  
16 activities had occurred in 1985 forward, and also  
17 usually what we do is when we look for remedies is  
18 like we use a five-year limit that we go back to and  
19 try to get remedy for.

20 Q And in terms of the goal of the restoration  
21 plan, what area of the property was intended to be  
22 impacted, or in your opinion, would be impacted by the  
23 restoration?

24 A The intent and in my opinion the extent of  
25 impact of this restoration was solely on the 30-acre

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1 wetland tract.

2 Q Would it be possible for Mr. Brace to  
3 approach the agency concerning modifying this  
4 restoration plan?

5 A Certainly.

6 Q And under what circumstances or how would  
7 that be likely to occur?

8 A If maybe there was need for relief in other  
9 areas of the parcel or something like that outside  
10 this 30 acres, you know, that would have been  
11 something that we would work with Mr. Brace, you know,  
12 to try to correct.

13 Q And does that remain true to this day?

14 In other words, if Mr. Brace felt that the  
15 restoration was impacting more than the 30 acres,  
16 could he approach the agency about modifying the  
17 restoration plan?

18 A Certainly.

19 Q Now I want to talk for a moment about some  
20 of the exemptions to the Clean Water Act, and in a  
21 slightly different context than we have before.

22 But looking again at the Attachment A  
23 restoration plan attached to the consent decree, I  
24 notice a amoebic-like blank area in the center of the  
25 Murphy farm parcel that does not contain hatch marks.

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1       A     I think that if let's say, and again I'm  
2 giving you a scenario because we're talking about  
3 hypotheticals at this point, but if there was an issue  
4 with facilitative drainage off of one of his upland  
5 agricultural crops, that would be something that we  
6 could sit down, see what the issues are. Perhaps get  
7 other folks who are, you know, versed in this, you  
8 know, from either the federal or state entities, and  
9 possibly come up with a plan that would help him.

10           And so whether he would need a consultant  
11 for that, it depends on the magnitude. Whether he  
12 could perform that work himself, again it would depend  
13 on the magnitude.

14           It could be a simple dip-out of an upland  
15 drainage ditch. I don't know. So without really  
16 knowing the context of what we are trying to do, it's  
17 tough for me to say how many folks would need to be  
18 there to be part of that cure.

19       Q     Well, how about if what we are trying to  
20 cure is water backing up across South Hill Road onto  
21 the Homestead property?

22       A     Okay. Then again we would have to look at  
23 what the root causes for that would be. It could be  
24 that perhaps the ditches that are moving water off of  
25 those agricultural fields are not sufficient in size.

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1 It could be that maybe the culvert underneath the  
2 road is blocked.

3 Again, without having, you know, these  
4 conversations in a real world context, and being able  
5 to look at what the root causes were, it's very  
6 difficult for me to give you a real answer.

7 Q Okay. EPA is not in the business of helping  
8 Mr. Brace unblock or design ditches for the Homestead  
9 property, is it? I thought we were talking about  
10 modification of restoration plan.

11 A I think that EPA is in a position to assist  
12 an help citizens who have issues. And although we may  
13 not be the answer if there was an issue, we would  
14 certainly try to find someone who could answer that  
15 issue.

16 Q Okay, who at EPA would Mr. Brace go to to  
17 talk about the failure to operate his drainage system  
18 on the Homestead property?

19 A That would be myself.

*E.P.H. Jeff Lapp*

20 Q That would be you? And that's part of your  
21 job description, to help with drainage that's not on  
22 wetlands, that doesn't effect wetlands?

23 A It would be because of the past history that  
24 we have had that that would be something that he could  
25 talk to me, and then I would try to figure out who the

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1 so that's what I was basing it on, that 1984 date  
2 from.

3 THE COURT: All right. Now, you have made  
4 some references to topography and some other things  
5 which at least from the standpoint of your projection  
6 led you to believe that the modifications that were  
7 done by the plan would not have a greater hydrological  
8 impact than what was intended.

9 Did I understand your testimony correct in  
10 that regard?

11 THE WITNESS: That's correct.

12 THE COURT: Have you actually gone back at  
13 any point to see whether or not the plan had a greater  
14 hydrological -- had you, or to your knowledge, had  
15 anyone associated with your agency gone back to see  
16 whether or not the plan is adequate for the impact it  
17 was intended?

18 THE WITNESS: No, they have not.

19 THE COURT: All right. So it could in fact  
20 be the case --

21 THE WITNESS: It could. I have never heard  
22 of that. It had not been brought to my attention that  
23 it in fact may have.

24 THE COURT: Okay. Mr. Marzulla asked you  
25 some questions about what would happen if, for

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1 example, Mr. Brace approached you, indicating that,  
2 for example, the water levels were impacting property  
3 that previously was not the subject of the consent  
4 decree and was considered uplands.

5 I mean, you could clearly have a situation,  
6 for example, where you have an increase in topography  
7 where erosion is occurring underneath that land as a  
8 result of the waters and eventually the land would  
9 collapse, so it's not necessarily the case that the  
10 water has to be on top of the property for there to be  
11 a problem.

12 THE WITNESS: That's correct.

13 THE COURT: All right. Just out of true  
14 confession here, my undergraduate degree -- well, not  
15 degree -- studies were in geology, and so I actually  
16 took hydrology and sedimentology and all those  
17 wonderful, nice, little things, although I did live in  
18 Cleveland and we didn't have any oceans.

19 All right, so it's not necessarily the case  
20 that the water table would actually have to reach the  
21 top, for example, of a topographic particular area for  
22 it to have an impact on that area, because you could  
23 have undercutting, which would eventually cause the  
24 land to start to collapse down and reduce its  
25 viability, correct?

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1 THE WITNESS: Yes. Yes, but my  
2 understanding is that would be a significant -- I  
3 mean, that would be pretty significant events that  
4 would cause that.

5 THE COURT: But if the water table and other  
6 things was going higher than what was originally  
7 intended, it could start to impact upon the uplands  
8 without it necessarily reaching the top of the  
9 uplands, correct?

10 THE WITNESS: Right. The only element in  
11 the plan that would even come close to doing that  
12 would be the check dam, because the drainage tunnels,  
13 as I stated before, were only -- the only activity  
14 where they were dismantled or dismembered, whatever  
15 the correct word would be, was within the wetland  
16 system itself, and so the hydrology for may effect  
17 this is very localized.

18 That's why you need to place these laterals  
19 so frequently, because these soils are fairly tight,  
20 and depending on soil type may only have an influence  
21 of, you know, a number of feet outside of where they  
22 are placed.

23 THE COURT: All right, but you actually  
24 haven't gone back, and to your knowledge, no one has  
25 actually gone back to see whether or not the plan has



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1 been functioning as intended.

2 THE WITNESS: That's correct.

3 THE COURT: All right. Am I correct that  
4 you indicated that if Mr. Brace approached you and  
5 indicated that the plan appears to be -- that the  
6 hydrologic drive is the term that you were using, had  
7 a few more RPMs than was intended, that the agency  
8 would actually assist him without him coming forth  
9 with his own specific plans, would actually assist him  
10 in perhaps making modifications that would eliminate  
11 the unintended consequences?

12 THE WITNESS: I mean, I think we would go  
13 out and take a look and see what was causing those  
14 impacts and try to, you know, assist him in doing  
15 that. I mean, by assistance, trying to figure out  
16 those people that might be able to tell him that he  
17 could do this or that, that type of thing.

18 We wouldn't do it per se. That's not the  
19 way that the agency works, but, you know, we would  
20 look at the root cause of what it was, and try to come  
21 up with an answer.

22 THE COURT: Looking at the consent decree,  
23 the consent decree, and maybe this is not unusual, it  
24 doesn't contain any assurances, does it, regarding the  
25 uplands themselves?

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1 THE WITNESS: Okay.

2 THE COURT: If in fact the process of the  
3 modifications that were put in place as a result of  
4 the consent decree caused water, and for that matter  
5 soils and plants to migrate into areas of the property  
6 that were not previously wetlands, what would be the  
7 agency's position in terms of restoring that to upland  
8 status as opposed to leaving it as a redelineated  
9 wetland?

10 Do you understand the question?

11 THE WITNESS: Yes, I do. Although I don't  
12 think that is likely, but --

13 THE COURT: I'm asking hypothetically.

14 THE WITNESS: Right. If in fact that  
15 occurred, I think that we would, you know, go out  
16 there. Again, we would need to have a discussion, see  
17 if in fact that was happening, and certainly the  
18 intent of the restoration plan was not to increase the  
19 extent of waters of the U.S. on Mr. Brace's property.

20 So again, we would have to work with him,  
21 and you know, I couldn't say with finality because  
22 some of these things involve other people other than  
23 EPA and their views. But I think that we would look  
24 at those as, you know, areas that were not previously  
25 subject to Clean Water Act jurisdiction under 404

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1 prior to the inception of the restoration plan. And  
2 so we would probably not look at that in terms of the  
3 normal circumstance.

4 THE COURT: All right, but then there would  
5 be some agency discretion involved in terms of the  
6 decision between redelineating --

7 THE WITNESS: That's correct.

8 THE COURT: -- as opposed to restoring,  
9 correct?

10 THE WITNESS: That's correct. My position  
11 today sitting up here, you know, again without going  
12 through management approval, is that we would be  
13 staying with the 30-acre line that's already been  
14 demarked.

15 THE COURT: Now, the process of delineation  
16 itself, all right, we talked about the fact that you  
17 likely would have to get, wouldn't you almost  
18 absolutely have to get an environmental consultant to  
19 to accomplish that because it's got to be flagged,  
20 doesn't it?

21 THE WITNESS: For a property of this size,  
22 yes. I would say yes. You know, there are small  
23 instances where people might want to put in a driveway  
24 or there are things like that where, you know, someone  
25 from the Corps will walk out and say, well, here is

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