

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.) No. : 1:90-cv-00229
) 1:17-cv-00006
 ROBERT BRACE, ROBERT BRACE)
 FARMS, INC. and ROBERT BRACE and)
 SONS, Inc.,)
)
 Defendants.)

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PROCEEDINGS: Deposition of
MICHAEL FODSE

DATE: October 6, 2017

TIME: 9:02 a.m. - 1:51 p.m.

PLACE: U.S. Army Corps of Engineers
Pittsburgh District
1000 Liberty Avenue
Pittsburgh, Pennsylvania 15222

REPORTER: Roberta Swank
CSR 6042 - RPR 6846
Notary Public

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EXHIBIT

56

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1 APPEARANCES:

2
3 Appearing on behalf of the Plaintiff:

4 Laura J. Brown, Esquire

5 U.S. Department of Justice

6 Environment & Natural Resources Division

7 Post Office Box 7611

8 Washington, D.C. 20044

9
10 Appearing on behalf of the Defendants:

11 Lawrence Kogan, Esquire

12 Kogan Law Group

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14 Suite 14-F

15 New York, New York 10017

16
17 Also Present:

18 Dana Adipietro, Esquire

19 Army Corps of Engineers

20 Chloe H. Kolman, Esquire

21 Army Corps of Engineers

22 Robert Brace

23 Beverly Brace

I N D E X

MICHAEL FODSE

EXAMINATIONPAGE

By Mr. Kogan

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- - -

E X H I B I T S

NUMBERDESCRIPTIONMARKED

No. D-32	November 3, 2008 Letter to Robert Brace from Michael Fodse with Attachments	13
No. D-33	September 8, 2011 Memo to File	15
No. D-34	June 18, 2012 E-mail Chain	79
No. D-35	July 5, 2012 E-mail Chain	83
No. D-36	July 23, 2012 E-mail Chain	84
No. D-37	July 24, 2012 Memo to File	95
No. D-38	June 27, 2013 Memo to File	160
No. D-39	September 2011 to June 2013 Jurisdictional Determination, Agricultural Drainage Ditch	171
No. D-40	November 13, 2013 Memo to File	173

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I N D E X (CONTINUED)

- - -

E X H I B I T S

<u>NUMBER</u>	<u>DESCRIPTION</u>	<u>MARKED</u>
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Exhibits were previously marked, attached for reference

No. D-1	Color Map	17
No. D-2	Color Map	119
No. D-14	January 11, 2016 Letter to Neal Devlin, Esquire from Scott Hans	94
No. D-16	Color Maps	164
No. D-17	September 12, 2011 E-mail from Todd Lutte to Robert Brace and Rhonda Brace	50
No. D-18	October 11, 2012 E-mail from Rhonda McAtee to Todd Lutte	122
No. D-18-A	December 20, 2011 Letter from Lori Boughton to Robert Brace	72
No. D-20	October 7, 2011 E-mail from Michael Fodse to Robert Brace	59
No. D-22	December 19, 2012 Letter from Scott Hans to Robert Brace	180
No. D-23	January 4, 2013 E-mail from Robert Brace to Todd Lutte	145
No. D-24	January 17, 2013 Letter to Todd Lutte from Robert Brace	146
No. D-27	May 23, 2013 E-mail Chain	157
No. D-28	May 28, 2013 E-mail Chain	157
No. D-29	June 17, 2013 E-mail from Todd Lutte to Robert Brace	159

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1 Q. That's the exclusive -- within the
2 exclusive province of the U.S. Army Corps,
3 correct?

4 A. Yes, under the Clean Water Act.

5 Q. Under the Clean Water Act.

6 So you would have to look to the
7 Clean Water Act for the U.S. Army Corps to have
8 the authority to do things, correct?

9 A. Yes.

10 Q. So therefore, going back again to
11 the visit, if we have Elk Creek being a
12 jurisdictional water as of the time you stepped
13 onto the property on July 24, 2012, and also the
14 wetlands as jurisdictional water at the same
15 time, what would the jurisdictional determination
16 be for?

17 A. To make a classification of the
18 channels.

19 Q. But it's already a jurisdictional
20 water. You just said that in your testimony.

21 A. I also didn't know that those
22 channels were in the consent decree at the time.

23 Q. Hold it. I'm confused, Mr. Fodse.

24 Are you saying that when you walked
25 on the property, you didn't know that these

1 channels were in the consent decree area?

2 Was there a map?

3 A. Yes.

4 Q. I know there's a map. Can we go
5 back to Defendant's Exhibit -- where is the
6 consent decree, Counsel, do you know, by any
7 chance? Here it is.

8 MS. BROWN: How are you doing?

9 THE WITNESS: Good.

10 MS. BROWN: Can we take a break in
11 about five minutes?

12 MR. KOGAN: Yes. D-14 is the
13 exhibit. U.S. Department of Justice letter dated
14 January 11, 2016, and attachments with the
15 consent decree and a map. You need the whole
16 consent decree and the maps. That would be all
17 you need to show him.

18 (Defendant Exhibit No. D-14
19 previously marked for identification, attached
20 hereto for reference.)

21 MS. BROWN: Can we take a
22 five-minute break to figure this out?

23 (Whereupon, a recess was taken from
24 11:03 a.m. until 11:11 a.m.)

25 ///

1 BY MR. KOGAN:

2 Q. What I'd like to do is, in order
3 for you to -- if you recall my questions dealing
4 with the issues that you addressed at the on-site
5 visit of July 24, 2012, presumably with that map
6 tied to the consent decree that you had carried
7 with you that day, so you had some sense of where
8 you were, so what I'd like to do is to help you
9 along in recalling events of that day, because
10 you did write a memo to the file, this may help
11 you.

12 I'd like to enter into evidence
13 Defendant's Exhibit D-37. It is a memo to the
14 file from Michael Fodse concerning the July 24,
15 2012 on-site visit including a list of attendees
16 and the overview of the issues he addressed.

17 (Defendant Exhibit No. D-37 marked
18 for identification, attached hereto.)

19 BY MR. KOGAN:

20 Q. Can you describe what you were
21 looking at at the July 24, 2012 on-site visit at
22 the Brace Waterford farm, please.

23 A. We were looking at the unnamed
24 tributary to Elk Creek that ran --

25 Q. Which one, if you could describe it

1 for the record by relating it positionally on
2 exhibit -- on Defendant's Exhibit D-1 map and
3 also referring to the consent decree map that you
4 likely had in your hand at the time.

5 A. I didn't have this map in my hand.

6 Q. Oh, you didn't?

7 A. No.

8 Q. So did you have any map of the --

9 A. The map that was provided to me was
10 from Todd Lutte and it showed the consent decree
11 area as a blue-shaded hatched area.

12 Q. Was it rough hand-drafted like that
13 or more precise computer, do you recall?

14 We'd like to see a copy of
15 Mr. Lutte's map if he had that map. Mr. Lutte's
16 map you said --

17 A. Is this --

18 Q. Mr. Lutte's map was not that map,
19 right? That was tied to the consent decree in
20 Defendant's Exhibit D-14.

21 A. Yeah, there was one generated from
22 the U.S. EPA that was given to us and it was kind
23 of an aerial photograph that showed the consent
24 decree as like a blue hatched area.

25 Q. From an aerial perspective?

1 MS. BROWN: I told Mr. Fodse we'd
2 be done at 1:00. We'll take a brief break and
3 see how he's doing.

4 (Whereupon, a recess was taken from
5 1:02 p.m. until 1:03 p.m.)

6 MS. BROWN: It looks like there has
7 been highlighting added.

8 MR. KOGAN: Counsel for Defendant
9 admitted, in perusing Mr. Fodse' memos to the
10 file, that he became a bit over anxious and
11 enthusiastic with highlighting.

12 BY MR. KOGAN:

13 Q. I'm not going to ask you if you
14 recall that at this particular point, but I'm
15 reserving an opportunity to do so at another time
16 given our shortness of time here.

17 I also want to enter into evidence
18 at this point another memo to the file from
19 Mr. Fodse concerning an aerial on-site visit or
20 aerial over-site visit and dated November 13,
21 2013.

22 A. A flyover?

23 Q. A flyover. I'm searching, grasping
24 for the right terminology.

25 ///

1 (Defendant Exhibit No. D-40 marked
2 for identification, attached hereto.)

3 (Whereupon, Mr. Fodse reviewed
4 Defendant Exhibit D-40 from 1:05 p.m. until
5 1:06 p.m.)

6 BY MR. KOGAN:

7 Q. Why did you believe there was a
8 need for a flyover on November -- during November
9 2013?

10 A. I was asked -- I specifically
11 believe that the Fish & Boat Commission set the
12 flyover meeting up with the state troopers and
13 asked if the Corps or the U.S. EPA wanted to
14 attend, and being that Todd Lutte is in
15 Philadelphia, I attended.

16 Q. What were you looking at
17 particularly on that flyover, if I may ask?

18 A. We were photographing potential
19 violations of the site.

20 Q. Which particular portion of the
21 site were you looking at?

22 A. All three portions.

23 Q. Does that mean the 30-acre wetland
24 area of the Murphy tract subject to the consent
25 decree south of Lane Road?

1 A. Yes.

2 Q. Does it mean that you were looking
3 at potential violations on the homestead tract
4 which is all that upland area up in the center?

5 A. I wouldn't say specifically, but
6 all of those areas were photographed through the
7 photography.

8 Q. Did you have anything in particular
9 that you were looking for?

10 Did it include the Marsh tract,
11 including those two tax parcels --

12 A. Yes.

13 Q. -- that you referenced before?

14 A. Yes.

15 Q. Would you say that one of the
16 tracts was more of a priority than the other
17 tract?

18 A. No.

19 Q. And may I ask you if you recall
20 from that flyover what -- was there anything that
21 stuck out in your mind from that flyover of
22 November 13, 2013?

23 A. There was a trench in the very
24 western portion of the consent decree area. I
25 remember that.

1 Q. Of the what? When you say "very
2 western portion" --

3 A. I'm sorry. Hold on. I'm referring
4 to sometimes as the western portion of the U, but
5 it's actually the eastern portion of the consent
6 decree, the southeastern portion.

7 Q. So we're talking about near
8 Greenlee Road near the boundary, the eastern
9 boundary of the Murphy tract?

10 A. Greenlee Road would be the closest
11 physical structure to that area.

12 Q. I just walked it yesterday. That's
13 why I was wondering. What --

14 A. It was really -- yeah, I mean you'd
15 have to consider it the southwestern portion.

16 Q. Southeastern portion?

17 A. I'm sorry. I'm sorry, southeastern
18 portion.

19 Q. What did you observe there?

20 A. A ditch.

21 Q. In the red hatch mark?

22 A. Yes.

23 Q. I know there's a small area -- is
24 there a small area there that's not part of the
25 wetland, the upland area?

1 MS. BROWN: Objection.

2 BY MR. KOGAN:

3 Q. On the eastern border -- on the
4 eastern boundary of the Murphy tract subject to
5 the consent decree, is there a small upland area?

6 A. There's a contoured area along
7 Greenlee Road that's outside of the consent
8 decree.

9 Q. Right. Judging from the air, you
10 were in an airplane -- or was it a helicopter?

11 A. It was a helicopter.

12 Q. -- how did you know that the area
13 that you observed the ditch in was not in that
14 upland area along the southeast corner of the
15 Murphy tract along Greenlee Road?

16 How could you be certain it wasn't
17 in the upland area as opposed to the wetland
18 area?

19 A. Because of its proximity to what
20 would have been considered remnants of this
21 channel this blue line (indicating).

22 Q. So you are saying it was remnants
23 of an old agricultural ditch?

24 A. No, remnants of a stream channel.

25 Q. Which blue line are you talking

1 about, sir?

2 A. This one here (indicating), the one
3 that runs -- that's shown on a blue line on D-1
4 that runs to the southern portion --

5 Q. Is that at Elk Creek itself or a
6 tributary to Elk Creek?

7 A. Well, it's the one you were
8 referring to as Elk Creek.

9 Q. I guess the record will bear that
10 out but ...

11 So where was the actual area of
12 disturbance?

13 A. It was in an angle in close
14 proximity to what would appear to be remnants of
15 that stream channel.

16 Q. Remnants? What does a remnant of a
17 stream mean? What is a remnant of a channel?

18 A. This blue line seems to show the
19 location of a stream.

20 Q. Right.

21 A. It seems to cross -- seems to be
22 intercepted by the manmade ditch, so most of that
23 flow is probably following --

24 Q. Part of that same ditch --

25 A. -- and this remnant of this channel

1 would cease to carry water in it.

2 Q. So the ditch -- are you talking
3 about a ditch or a remnant of a channel?

4 A. The one that is identified as an
5 unnamed tributary to Elk Creek.

6 Q. How far south along the eastern
7 boundary of the Murphy tract -- which dashed line
8 are you speaking of? There's two dashed lines
9 running across.

10 A. The northern one, the one that we
11 had walked, the whole channel in question.

12 Q. That was the one, as I recall you
13 saying, that there was no permit required for
14 cleaning?

15 A. Right.

16 Q. So when you did the flyover, what
17 were you seeing that had anything to do with that
18 ditch?

19 A. No, there was a ditch that was dug
20 in a direction in this general area (indicating).

21 Q. From where to where?

22 A. I don't remember.

23 Q. You don't remember?

24 A. Huh-uh.

25 Q. Was it connected to this ditch from