

1 - - -
2 IN THE UNITED STATES DISTRICT COURT
3 FOR THE WESTERN DISTRICT OF PENNSYLVANIA
4 - - -

5 UNITED STATES OF AMERICA: CIVIL ACTION

6 vs. : No. 1:90-cv-00229
: 1:17-cv-00006

7 ROBERT BRACE, ROBERT :
BRACE FARMS, INC. and :
8 ROBERT BRACE and SONS, :
INC. :

9
10 - - -
11 Tuesday, October 3, 2017
12 - - -

13 Oral Deposition of TODD M. LUTTE, taken
14 at the DoubleTree by Hilton Hotel, 301 West DeKalb
15 Pike, Summit 11, King of Prussia, Pennsylvania
16 19406, beginning at 8:49 a.m., before Barbara C.
17 Stalheim, Certified Shorthand Reporter and a
18 Notary Public.

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21
22 VERITEXT LEGAL SOLUTIONS
MID-ATLANTIC REGION
23 1801 Market Street - Suite 1800
24 Philadelphia, Pennsylvania 19103

1 A P P E A R A N C E S:

2 U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT & NATURAL RESOURCES DIVISION

3 BY: LAURA J. BROWN, ESQUIRE

SARAH BUCKLEY, ESQUIRE

4 601 D Street, N.W., Suite 8000
Washington, District of Columbia 20004
5 202.514.3376

laura.j.s.brown@usdoj.gov

6 Representing the Plaintiff

7 ENVIRONMENTAL PROTECTION AGENCY

8 REGION III

BY: PAMELA J. LAZOS, ESQUIRE

9 3RC20

1650 Arch Street

10 Philadelphia, Pennsylvania 19103-2029

215.814.2658

11 lazos.pamela@epamail.epa.gov

Representing Environmental Protection Agency

12 KOGAN LAW GROUP, P.C.

13 BY: LAWRENCE A. KOGAN, ESQUIRE

14 100 United Nations Plaza

Suite 14F

15 New York, New York 10017

212.644.9240

16 lkogan@koganlawgroup.com

Representing the Defendants

17 KNOX, McLAUGHLIN, GORNALL & SENNETT, P.C.

18 BY: NEAL R. DEVLIN, ESQUIRE

19 120 West Tenth Street

Erie, Pennsylvania 16501-2800

20 814.459.2800

ndevlin@kmgslaw.com

21 Representing the Defendants

22

23

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TODD M. LUTTE

Page 19

1 here to talk about the Murphy tract, the Homestead
2 tract and the Morris tract, which we will get into
3 more detail about momentarily.

4 But do you recall the first time you
5 were on Mr. Brace's Homestead Farm that is the
6 immediate subject matter of these two lawsuits
7 that were filed --

8 A. Yes.

9 Q. -- on January 9 of this year?

10 A. I believe that was 2011.

11 Q. Okay. Do you recall the reason you
12 were there?

13 A. I was there to look at beaver dams to
14 see if he needed any federal authorization to
15 remove beaver dams. I was sent from my office to
16 make sure that any, you know, activities would not
17 affect the 30-acre tract which was part of the '96
18 Consent Decree, and -- and to assess the condition
19 of a clogged channel.

20 Q. A -- a culvert?

21 A. Yes.

22 Q. A single culvert, or there was -- was
23 there more than one?

24 A. It was completely clogged. I do

TODD M. LUTTE

Page 20

1 recall seeing one culvert that was completely
2 filled with sediment.

3 Q. Do you recall where on the farm that
4 was? Was it, you know --

5 A. Yes. Could I use this map
6 (indicating)?

7 Q. Oh, please. Absolutely. Sure.
8 We're just referring now to
9 Defendants' Exhibit 1 map.

10 A. It was this right here (indicating).

11 Q. So this is the lane -- okay. We have,
12 actually -- we can even give you Defendants'
13 Exhibit 2 where the culverts are.

14 It was this one, I guess, Lane Road
15 culvert?

16 A. No. It's --

17 MS. BROWN: One second. Okay. I'm
18 just going to make -- for the record, we're
19 looking at D-1 and D-2. I think you -- if
20 you could, narrate where you indicated on
21 D-1, for the record.

22 THE WITNESS: Okay.

23 BY MR. KOGAN:

24 Q. And then relate it to where -- if it's

TODD M. LUTTE

Page 21

1 similar to the location depicted in D-2.

2 A. Yeah. Here it says "agricultural
3 ditch" on D-1. It's demarcated with orange, and
4 it hits -- where the word "Lane Road" is, it hits
5 the "A" in the word "road."

6 MS. BROWN: Okay. And that is on
7 Exhibit D-1?

8 THE WITNESS: On Exhibit D-1.

9 BY MR. KOGAN:

10 Q. Now, on D-2, is that in the same
11 location?

12 A. On D-2, the stream -- the watercourse
13 that's demarcated on the legend labeled "farm
14 drainage ditch flow direction" is -- is different
15 than the orange one on Exhibit D-1, but it's in
16 the same general location.

17 Q. So would you say -- is -- is it
18 accurate to say that it is other than Lane Road,
19 the Lane Road culvert identified on Exhibit D-2?

20 A. Could you restate the question? I'm
21 not sure.

22 Q. Is -- is it fair to say that the
23 clogged ditch or artery that you're describing was
24 other than the Lane Road culvert identified in

TODD M. LUTTE

Page 22

1 Exhibit D-2?

2 A. Yes.

3 Q. Okay. So -- Okay. And was there
4 anything else that you had noticed, observed, or
5 were looking at, examining --

6 A. No.

7 Q. -- on your own at the site when you
8 were there in 2011?

9 Do you recall what month in 2011 that
10 was?

11 A. I believe it was May. I mean, I
12 noticed a lot of things. It was the first time at
13 the site. It was a -- a -- a large farm.

14 Q. Were you there --

15 A. I'm sorry. It was a large farm. It
16 was my first time at the site. So I -- I mean,
17 you asked me if I observed specific things. I
18 observed a lot.

19 Q. Were you --

20 A. Just as I'm gathering -- when I walk
21 on a site, I assess the site, I assess where I am
22 on the topography, I assess the watershed, the
23 drainage areas that I can see from the site, land
24 features, obviously looking for aquatic resources.

TODD M. LUTTE

Page 23

1 Those are things that stick out at me. Where do I
2 see wetlands? Where do I see streams? Where do I
3 see drainage? What's happening on a site --

4 Q. Right.

5 A. -- from a hydrologic standpoint
6 when -- both when it rains, and what's happening
7 during normal stream flow, and just -- that's --
8 that's part of my observations.

9 Q. You -- were you the sole
10 representative of EPA at the site at that time?

11 A. Yes, I was.

12 Q. Were you there with officials from any
13 other agency?

14 A. I believe I was there with a Water
15 Control Officer, Darin Clark. I believe he was
16 from Fish & Boat Commission, may have been from
17 Erie County. He was there to assess the -- the
18 beaver dams, and if there was any necessary
19 authorizations that they would need.

20 Prior to going, I had contacted other
21 agencies, also, to see what they would need.

22 Q. Anyone from the Corps?

23 A. I had contacted them, but they could
24 not --

TODD M. LUTTE

Page 28

1 the landscape, you can tell that there's a low
2 probability of wetlands there (indicating).
3 Wetlands tend to be around the watercourses. So
4 as I walk the site, and I see the watercourses,
5 the clogged culvert, I would say the probability
6 that the wetlands on this map were located south
7 of Lane Road around this knoll, and this knoll was
8 fairly evident (indicating).

9 Q. All right. So if you were to describe
10 the shape of the 30-acre wetland area, I think
11 it's been -- been described in the Restoration
12 Plan, which you -- are you familiar with the
13 Restoration Plan accompanying the Consent?

14 A. Yes.

15 Q. I believe, just for your reference,
16 it's still -- this is part of Defendants' Exhibit
17 D-7, and it's described as a, in the first
18 sentence, U shape?

19 A. Yes, a U shape.

20 Q. Okay. Now, you said just before,
21 please correct me if I'm wrong, that there was no
22 map that you had officially from the file, you had
23 to recreate it from the file, or as you were at
24 the site, and you -- even though there weren't any

TODD M. LUTTE

Page 29

1 precise boundaries placed to identify the -- the
2 30-acre portion of this 50-acre -- acre tract, you
3 were able to approximate where it was.

4 Am I correct? Or, please, if I'm not
5 correct, please, clarify.

6 A. I'm not sure that was much of the
7 intent.

8 Q. Okay.

9 A. The intent was to see, you know, where
10 the beaver dams were and what -- if he would need
11 anything -- any authorization from the EPA --

12 Q. So you --

13 A. -- or the court to conduct those
14 activities.

15 Q. Okay. So you were not looking for --

16 A. Yeah, I wasn't looking for --

17 Q. Were you there looking for a violation
18 based on somebody's tip?

19 A. Oh, no. Not at all.

20 Q. Okay.

21 A. I -- I -- I was there to assist
22 Mr. Brace. In fact, I was at -- we were
23 previously at the Garland site, and -- and he --
24 they had asked me if I could stop by, and I felt

TODD M. LUTTE

Page 30

1 that was a good time because I was out there. I
2 would not be able to get out there again, and so I
3 was not anticipating -- I was not there under --
4 looking for violations or suspecting of any
5 unauthorized activity other than, you know, trying
6 to facilitate what Mr. Brace would need to -- to
7 remove those dams, and to --

8 Q. Okay.

9 A. -- remove that clogged culvert.

10 Q. So if I may recall your just -- your
11 very recent testimony, there was a clogged ditch
12 boarding Lane Road on the parcel above the Murphy
13 tract?

14 A. Yes.

15 Q. Okay. And that parcel is referred to
16 as -- are you familiar with the term
17 "Homestead" --

18 A. Yes.

19 Q. -- farm tract?

20 A. (Nods head up and down.)

21 Q. Okay. In Exhibit D-1.

22 And did -- where -- where did you find
23 the beaver dam?

24 A. I never found -- we walked to about

TODD M. LUTTE

Page 31

1 the bridge at -- we spent -- well, we started in
2 the parking lot, walked down (indicating).

3 Q. And that parking lot is in the
4 Homestead tract?

5 A. I'm sorry. Along Greenlee Road --

6 Q. Okay.

7 A. -- is where I parked at the farm
8 (indicating).

9 MS. BROWN: Just for the record, we're
10 looking at Exhibit D-1. Okay.

11 So go ahead.

12 THE WITNESS: And we had a small -- a
13 conference there indicating, you know, why we
14 were there, what we were going to see.

15 Walked down -- proceeded down Lane Road,
16 spent some time at the culvert, clogged, and
17 then walked out to about the bridge at where
18 Elk Creek is, and I observed to the north, I
19 observed to the west, I observed to the
20 south, and it was -- it was ponded at the
21 time, and so I didn't -- we -- I couldn't
22 observe any beaver dams.

23 BY MR. KOGAN:

24 Q. Okay. When you say "ponded," is that

TODD M. LUTTE

Page 33

1 MS. BROWN: Okay. There was a preface
2 to the statement about why he was out there.
3 So I'm just going --

4 BY MR. KOGAN:

5 Q. Okay. Mr. Lutte, you were out
6 there -- just to restate for the record, you were
7 out there to investigate a clogged agricultural
8 ditch by a culvert by Lane Road?

9 A. (Nods head up and down.)

10 Q. And you were also out there to look
11 for beaver dams that were also -- that were
12 holding up water and -- and causing water to spill
13 onto the farm tracts; is that correct?

14 A. I'm --

15 Q. From the description Mr. Brace gave
16 you?

17 A. I wasn't out there to observe the
18 beaver dams as much as I -- I was out there to
19 provide information on what he may need from our
20 agency as far as permits if he wished to remove
21 those beaver dams.

22 Q. Right.

23 A. So I had to assess how he planned on
24 doing it, what equipment, where is the 30 acres,

TODD M. LUTTE

Page 37

1 recall the ponding.

2 Was there water on Lane Road, itself?

3 A. No. No. Lane Road is elevated above
4 the Elk Creek. There was culverts that were
5 36 inches, I believe, that were underneath there.
6 Also can't recall the widths of those culverts.

7 Q. Exhibit D-2, that would be the
8 culvert --

9 A. Yeah.

10 Q. -- the Lane Road culvert I believe
11 you're referring to at the junction of the Elk
12 Creek and Lane Road?

13 A. Correct. There was at least half of
14 that culvert --

15 Q. Right.

16 A. -- was under water. It -- it wasn't
17 clogged. It was water passed through at that
18 time, and on the south side of Lane Road was also
19 ponded.

20 Q. So that's in the Murphy tract?

21 A. Correct.

22 Q. Is it -- was it, to the best of your
23 recollection, within the 30-acre area of the
24 Murphy tract, or was it beyond that area, as the

TODD M. LUTTE

Page 47

1 A. Time -- I wasn't --

2 Q. Okay. So after -- what -- what was
3 the outcome of your visit in May of 2011?

4 A. The outcome, I -- I felt satisfied
5 that I had provided the Braces with some better or
6 another indication of where their 30 acres was. I
7 indicated, at the time, I believe, that they --
8 under maintenance exclusions, they could easily
9 clean that ditch, and they would not require a --
10 a permit -- 404 permit from the EPA.

11 Q. Okay.

12 A. I thought that they could -- you know,
13 he could maintain that ditch, he could clean it
14 out, he could clean the ditch, he could clean the
15 culvert.

16 Q. Okay.

17 A. I noticed that it -- it -- it needed
18 maintenance. It was in bad shape.

19 Q. Okay. And --

20 A. And -- and absolutely I felt -- you
21 know, I was, like, I can't believe he would not
22 clean that ditch because he thought he needed -- I
23 felt bad. I was, like, yes, please clean this
24 tomorrow.

TODD M. LUTTE

Page 48

1 Q. Okay. Now, why -- why did you
2 conclude it didn't require a permit?

3 A. Because it was a completely clogged
4 permit [sic]. You are allowed to maintain a
5 clogged permit. If you have an authorized permit
6 in place, whether you're a farmer or a home owner,
7 and that culvert is clogged with sediment, and
8 there's no water going through it, you are allowed
9 to clean that and maintain it, and particularly if
10 you are a farmer, and that's an agricultural
11 ditch, and it's been determined that way, then,
12 yeah, you have the right to clean that culvert --

13 Q. Now, you said --

14 A. -- and remove the sediment.

15 And then to further answer your
16 question, at the conclusion, I had, also, to the
17 best of my abilities, there was nothing I -- that
18 I -- I did not believe he needed anything from the
19 EPA or the Corps of Engineers to remove those
20 beaver dams.

21 Q. And --

22 A. And so --

23 Q. -- assuming what -- where -- what
24 location did you -- where were -- did you identify

TODD M. LUTTE

Page 57

1 A. -- with me on the site, so they can
2 provide that regulatory guidance that people need.

3 Q. Okay.

4 A. When they're not with me on-site --

5 Q. Right.

6 A. -- I have to provide the best
7 information that I can. I was not -- that was a
8 clogged culvert. Even if it was -- I didn't -- I
9 couldn't determine if it was an agricultural
10 ditch.

11 Q. Okay.

12 A. In my mind, it was a clogged culvert
13 that appeared to be an agricultural ditch,
14 considering its location, the fact that it started
15 up top here, and it was in the middle of a farm
16 (indicating). There was also indications along
17 it --

18 Q. Right.

19 A. -- that it had been previously
20 maintained as an agricultural ditch. I -- you
21 know, I even saw terracotta pipe, but that didn't
22 tell me that it was being tile drained, but,
23 regardless, the wetlands were demarcated over here
24 (indicating). Those were 30 acres. There was no

TODD M. LUTTE

Page 58

1 other place on this parcel where I had -- I
2 believed everything else to be uplands.

3 Q. Okay.

4 A. And there was no --

5 MS. BROWN: So could you just
6 reference the parcel that you just
7 identified?

8 THE WITNESS: I'm sorry. The --

9 BY MR. KOGAN:

10 Q. -- Homestead?

11 A. -- Homestead parcel.

12 Q. On Exhibit D-1.

13 A. To the best of my information at the
14 time, the entire Homestead parcel --

15 Q. Uh-huh.

16 A. -- was under agricultural, and was
17 deemed uplands. Were no wetlands. Even though
18 the culvert had been clogged for long enough that
19 hydrophytes, wetland vegetation -- the area I'm
20 pointing to is along the agricultural ditch north
21 of Lane Road on D-1 -- exhibited wetland
22 characteristics due to the culvert being clogged,
23 and the water backing up there not being able to
24 drain caused hydrophytes (indicating). That was

TODD M. LUTTE

Page 59

1 not in -- I did not want -- you know, Mr. Brace
2 has the right to -- to maintain that --

3 Q. Right.

4 A. -- as a culvert or as an agricultural
5 ditch so he can continue to farm up there, and I
6 was not going to stand in the way of that, because
7 that -- to the best of my knowledge, he had every
8 right to clean that out.

9 Q. Okay.

10 A. I would have cleaned it myself because
11 I don't like to see that --

12 Q. Okay.

13 A. -- on a farm.

14 Q. So before you left, did you provide
15 Mr. Brace with any verbal advice, or did you wait
16 until you returned to the office and corresponded
17 back and give him your observations and
18 conclusions thereafter?

19 A. With respect to the agricultural ditch
20 maintenance, I provided -- I indicated to him that
21 he could clean that.

22 Q. Okay. And that was verbal or written?

23 A. That was verbal.

24 Q. Okay.

TODD M. LUTTE

Page 66

1 question.

2 MS. BROWN: Thank you.

3 BY MR. KOGAN:

4 Q. This e-mail, can you describe the --
5 the subject matter of the discussion that you had
6 with Mr. Brace in this email, which you had copied
7 to all those other persons previously identified?

8 A. Yes. I indicated that our discussions
9 out on-site indicated that he would not need any
10 authorization from the EPA to remove beaver dams,
11 and that, after consulting with the Corps, he --
12 any activities he wished to commence on the
13 agricultural ditch that is on the --

14 Q. -- Homestead tract?

15 A. -- Homestead tract, he would not need
16 any authorizations from us; however, consultation
17 with the other agencies would be required.

18 Q. Okay. When you mentioned the beaver
19 dam, did the email at all -- did email -- did it
20 identify a location for the beaver dam, or did it
21 just identify -- just describe a beaver dam?

22 A. Just described beaver dams. Multiple
23 dams.

24 Q. Dams. Multiple dams.

TODD M. LUTTE

Page 67

1 Okay. And did it describe a culvert
2 that was clogged -- or a single culvert or
3 multiple culverts?

4 A. A single culvert.

5 Q. And just, lastly, it described a
6 single ditch or multiple ditches?

7 A. The channel and culvert would indicate
8 singular.

9 Q. Okay. And that's the -- the
10 agricultural ditch on Homestead tract running down
11 to Lane Road?

12 A. Yes. From the back of the farm
13 adjacent to Greenlee Road.

14 Q. Okay. Okay. So after this email, do
15 you recall whether you had any further contact
16 with Mr. Brace about these subject matters?

17 A. I can't recall.

18 Q. Okay. Did -- do you recall whether
19 you had any further contact with Mr. Fodse
20 concerning the subject matters of the Army Corps?

21 A. I'm -- yes. Yeah. We had talked
22 about it in the future.

23 Q. Okay. Did you -- do you recall
24 whether you had any discussion with any state

TODD M. LUTTE

Page 152

1 say --

2 A. It may not have been a ditch. For the
3 purposes of my inspection with Mr. Brace --

4 Q. But on May 11 --

5 A. -- the fact that I observed clay tile
6 pieces within the area that was the channel and at
7 the culvert, it -- it had a culvert under it.

8 Q. But did you --

9 A. Culverts could be in ditches or
10 channels. When they're clogged, I don't know
11 which is which; however, the agricultural
12 activities, the fact that it's at the back of the
13 property on the uplands, which were being actively
14 farmed, as far back as any map that we had ever
15 viewed or aerial of farm --

16 Q. Uh-huh.

17 A. -- I may have -- I indicated it was an
18 agricultural ditch.

19 Q. Right.

20 That could be maintained; correct?

21 A. That could be maintained.

22 Q. Without a permit; correct?

23 A. Correct.

24 Q. Okay. Now, why would you now say that