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

UNITED STATES OF AMERICA, Plaintiff v. ROBERT BRACE, and ROBERT BRACE FARMS, INC., Defendants	)	Civil Action No. 1:90-cv-00229

AFFIDAVIT OF ROBERT BRACE

My name is Robert H. Brace. I am making this affidavit in connection with my opposition to the United States Motion to Enforce Consent Decree and Stipulated Penalties (ECF No. 207) and Memorandum of Law in Support of Motion to Enforce Consent Decree and Stipulated Penalties (ECF No. 208).

I am seventy-nine years old and have been engaged in farming in Erie County, Pennsylvania for over sixty-four years.

I have prepared this affidavit, in part, as a supplement to my recent deposition testimony to clarify the circumstances surrounding my prior execution and the subsequent implementation of the 1996 Consent Decree and Wetlands Restoration Plan that is the subject of this litigation. (Ex. A, Consent Decree, Restoration Plan, Attachment A). Facing hundreds of thousands of dollars of assessed fines and penalties and the resulting cancellation and withdrawal of bank credit lines and potential bankruptcy after almost ten years of nonstop multiple federal agency administrative regulatory enforcement actions beginning in May 1987, and United States government litigation initiated in this Court in October 1990, all of which ended in an **unappealable** December 1994

adverse Third Circuit Court of Appeals ruling against me, my former counsel and I had decided, in the best interests of my family, to execute the Consent Decree.

The Consent Decree was not an arm's length bargained agreement under any circumstances, and I must insist, to this day, that I followed all then applicable laws and regulations under counsel's advice, as well as the advice of federal, state and local government officials concerning the applicability of the Clean Water Act ("CWA") to normal farming activities. Once I executed the Consent Decree, I had no choice but to trust in and rely on the honesty, integrity, good faith and technical expertise of the federal government officials who had been responsible for drafting the Consent Decree, its Wetlands Restoration Plan, and its hand drawn map referred to as "Attachment A."

The Restoration Plan's December 1996 implementation was performed by an independent contractor under the supervision of the United States' agent, Lewis Steckler. Mr. Steckler was a former United States Department of Agriculture Soil Conservation Service official who had previously worked with me to design and obtain USDA cost-sharing for the several tile drainage systems I had installed on my Waterford Township, Pennsylvania farm from 1977 to 1987. Unfortunately, since the Restoration Plan's implementation, my one hundred fifty-seven (157)-acre three farm tract hydrologically integrated Waterford Township, Pennsylvania farm has suffered surface and subsurface inundation and flooding on an ongoing periodic basis extending far beyond the designated approximate thirty (30)-acre "Consent Decree Area." Since the Government never determined the precise boundary measurements of the Consent Decree Area, I believe, based on the manner in which it has implemented the Restoration Plan that the Consent Decree Area actually measures closer to thirty-two (32) acres.

I always had suspected that the Restoration Plan features had been either over-designed or over-implemented, and that the Restoration Plan designers had not factored in long recurring beaver dams and clogged improperly designed state and county culverts that had previously temporarily altered the hydrology of my farm tracts. The Restoration Plan designer, Environmental Protection Agency ("EPA") representative Jeffrey Lapp, recently testified that, although he knew of the beaver dams and of at least one of the problematic culverts when he had first visited my farm in 1990, he did not factor these phenomena into the Restoration Plan's design. Although Mr. Lapp also recently testified that EPA had been willing "to work with us" to resolve the inundation and flooding problem, from 2008-2011, EPA would not consider my numerous prior informal requests to modify the Consent Decree to achieve that objective. It is still my belief that the Government never intended for my family to farm the Murphy Farm tract ever again.

EPA and the U.S. Army Corps of Engineers ("Corps"), however, did agree to evaluate our 2011 request to secure a CWA agricultural ditch maintenance exemption to enable use to clean the sediment, debris and growth that accumulated in the ditches and tributary and reach areas of the watercourse the Government has continued referring to as "Elk Creek" running north and south of Lane road between and within my three hydrologically integrated farm tracts. On July 24, 2012, EPA representative Todd Lutte and Corps representative Michael Fodse visited our Waterford Township farm. After sizing up the situation, they authorized us to undertake the agricultural ditch maintenance work and to farm the areas I described but warned us to leave untouched the southcentral portion of the Consent Decree Area. Since we fully complied with this authorization and condition, I was quite disturbed to learn of the United States' subsequent denial that such authorization had ever been granted, and by the Government' five-year effort thereafter to mischaracterize those authorized actions and to allege additional acts in which we had not engaged

(i.e., Reversal of the Restoration Plan's three features (Tasks), as Consent Decree and CWA violations.

I also have prepared this affidavit, in part, to discuss the circumstances surrounding the Consent Decree Restoration Plan's requirement to remove all tile drainage system components on the Murphy Farm tract without regard to whether they had been legally installed. I had legally installed drainage tile on the Murphy Farm tract as part of the process of converting it from farmed pasturelands to more profitable cropland production consistent with the U.S. Department of Agriculture Agricultural Stabilization and Conservation Service ("USDA-ASCS")'s September 1988 commenced conversion determination made pursuant to the Food Security Act of 1985, which I had until January 1, 1995 to complete. (Ex. **B**, Commenced Conversion docs). My installation of drainage tile on the Murphy Farm tract also was legal under the CWA as part of my construction of dual-function irrigation/drainage ditches that had qualified for the CWA Section 404(f)(1)(C) irrigation ditch construction exemption from Corps permitting available until August 17, 1987. These dual-function ditches served the purpose of irrigation (through pumping of water) to the Murphy Farm tracts' contour fields designated by USDA-SCS as "Highly Erodible Lands, and of drainage to remove excess water from the wetter areas of the Murphy Farm tract. United States representatives Lutte and Fodse had no difficulty concluding, on July 24, 2012, that these already constructed ditches qualified as "agricultural ditches" that could be maintained without obtaining a Corps permit, and proceeded to provide my sons and I with authorization to engage in agricultural ditch maintenance activities in all ditches, tributaries and reaches south of Lane Road in the Consent Decree Area. We completed our maintenance activities by November-December 2012, only to find out that the EPA and Corps had disavowed and revoked that authorization. It

is extremely troubling to me that the United States can now hold us legally responsible for the very same acts its representatives had previously authorized us to perform.

In addition, I have prepared this affidavit, in part, to discuss the circumstances surrounding the check dam's installation during the Restoration Plan's 1996 implementation, which installation I recently discovered, to my surprise and horror, did not go according to plan. In this enforcement action, the United States has falsely alleged that we removed the check dam from its design-specified location in violation of the Restoration Plan, when it was actually the Government that had substantially relocated and overbuilt it.

According to my sons, Randall Brace and Ronald Brace, the United States, during its agent's oversight of the 1996 check dam installation, and without my knowledge or awareness, had substantially changed the check dam location and specifications inconsistent with the Restoration Plan and the accompanying hand drawn map – Attachment A. I do not recall the United States ever notifying me or the Court in writing about these changes or seeking approval for them, in 1996 or anytime thereafter. I also do not recall that the Court had issued an Order approving such changes and modifying the Consent Decree or Restoration Plan in 1996 or anytime thereafter. I understood from the Government and my former counsel that written approval and a Court Order were two necessary steps that had to be taken before the Consent Decree or the Restoration Plan could be modified. It is now apparent to me that the Government had never intended to notify me of these changes.

With respect to the check dam's location, my sons recently informed me about the GPS readings they had recorded and the photographs they had taken to prove that the check dam had been installed in 1996 approximately four hundred-sixty (460) feet east of where the Restoration Plan's design specifications called for it to be installed, at a location where the main ditch running

through the approximate 30-acre Consent Decree Area located within our Murphy Farm tract changes direction and drops in elevation. I had never suspected the check dam had been repositioned since it had long remained submerged under water and covered with significant sedimentation, and we did not, until recently, have a relatively accurate computer-generated map or accurate GPS readings at our disposal.

With respect to the check dam's specifications, I learned from my sons that the check dam's height, width and length dimensions were substantially larger than what the Restoration specifications had called for. According to my sons, who had taken measurements and photographs to prove this claim: 1) the actual height of the check dam measured more than two to three (2-3) feet higher than what the Restoration Plan required; 2) the actual length of the check dam measured approximately two (2) feet longer than what the Restoration Plan had required; and 3) the actual width of the check dam measured up to eight (8) feet wider than what the Restoration Plan had required. Once again, since the check dam had long remained submerged under water and covered by significant sedimentation, I never suspected that it had been overbuilt.

I especially found the check dam's width measurement to be alarming since the Restoration Plan only required the dam's width to be as wide as the ditch/tributary bottom. As my sons and my counsels have recently concluded, the installer of the check dam must have been instructed to ensure the dam's width included several feet of the main ditch's northern bank. I know that the bottom of our main ditch was no more than four to four and one-half (4-4 ½) feet wide, since I had been the one to construct it, along with other ditches on our Murphy Farm tract, back during the mid-to-late 1970's and early 1980's. I thereafter accompanied my sons to the check dam to witness for myself what the Government officials had done years ago without my knowledge or awareness.

It is now obvious to me that the United States intentionally over-designed and over-implemented the check dam it ensured had been installed in 1996. It also is abundantly clear that, since 1996, the Government had intentionally refused to modify any of the Restoration Plan's three features, including the check dam, to compensate for recurring beaver dams and inoperable culverts which it was unwilling to assist with, in order to severely disrupt the hydrology of not only the Consent Decree Area, but also, my family's entire 157-acre three farm tract hydrologically integrated Waterford farm.

Furthermore, I have prepared this affidavit, in part, to clarify the circumstances surrounding the surface ditches the Restoration Plan had required to be plugged and the isolated ditch EPA and Corps representatives observed during their May 20, 2015 onsite visit to our Murphy Farm tract. My sons are absolutely correct in asserting that neither one of the two surface ditches the Restoration Plan had required to be plugged have since been re-excavated. One such ditch has remained submerged under water for years, while the other is plainly visible to the naked eye. Had the EPA and Corps representatives known what they were looking for and looking at during their May 20, 2015 onsite visit, and later compared their recorded observations with the Consent Decree Attachment A and their own computer-generated maps, they would have correctly determined the locations of the plugged surface ditches and concluded they had not been re-excavated.

Moreover, based on their representatives' May 20, 2015 onsite observations, the United States has falsely alleged that we excavated an isolated ditch the purpose and effect of which is to drain the Consent Decree Area. Much to the contrary, since this isolated ditch does not connect to the main horizontal ditch of the Murphy Farm tract, it does not therefore drain any waters from the Consent Decree Area. The isolated ditch had been excavated solely to comply with EPA representative Todd Lutte's July 24, 2012 instruction not to farm past a certain portion of the

Consent Decree Area to which he had pointed as being off-limits. During my January 9, 2018 deposition, I marked that area with a "D" on the map the Government lawyer provided and explained to him that the isolated ditch was excavated merely as a boundary ditch so that we would not inadvertently farm beyond it.

Lastly, I have prepared this affidavit to reemphasize the false nature of the Government's claim that the Consent Decree Restoration Plan's objective was to restore the hydrologic regime of the approximate 30-acre Consent Decree Area to its prior *wetland* physical condition as of October 1984. Much to the contrary, the Government's own satellite imagery spanning 1968 through 1993, which we have included in our response to the United States enforcement action, unequivocally shows that the physical condition of the Murphy Farm tract in October 1984 was mostly dry, and not a wet marshland/bog as it now appears. It also shows the progression of my prior legal conversion activities from 1977 through 1987, as revealed in the 1983 and 1993 satellite images included with our filings. These activities transformed a previously undefined narrow drainage ditch into a wider defined ditch bearing bed and bank which we thereafter utilized as a dual function irrigation/drainage ditch. The excavation of that undefined ditch had begun in 1977 at the intersection of Sharp and Greenlee Roads and extended south across Lane Road through the Murphy Farm tract. In fact, the 1977 satellite image shows that there was barely any defined drainage ditch south of Lane Road on the Murphy Farm tract, and that the area south of the Murphy Farm tract's southern boundary had then been mostly dry. While the Government now refers to this defined ditch as "Elk Creek," my recent deposition testimony (Ex. **A**, Bob Brace 1-9-18 Depo at 298-299) and the prior 1992 deposition testimony of my former neighbor, Mr. Adrian Sharp (Ex. **C**, Adrian Sharp 3-17-92 Depo, at 1-4, 20-21) states that the headwaters of Elk Creek actually

began west of Sibleyville located several miles west-northwest of our Waterford Township Farm. (Ex. **D**, Google Map Image of Sibleyville), (Ex. **E**, USGS Topo Map).

In sum, I am quite disturbed and outraged that our Government has sought repeatedly to cover up its own prior misdeeds by making false allegations against my family and I which now serve as the basis for this Consent Decree enforcement action. I hope, trust and pray that the Court will recognize this and do the right thing.

I declare that, to the best of my knowledge, and belief, the information herein is true, correct and complete.

FURTHER AFFIANT SAITH NOT.

DATED this 16th day of April, 2018

Robert H. Brace

NOTARY ACKNOWLEDGEMENT

SUBSCRIBED AND SWORN TO before me this 16th day of April, 2018

STATE OF Pennsylvania COUNTY OF Erie .ss:

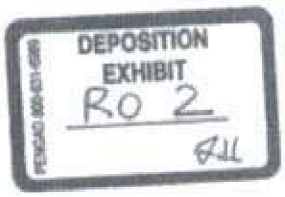
COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
Ashley Rae Rutter
NOTARY PUBLIC
Erie City, Erie County
My Commission Expires 08/07/2021

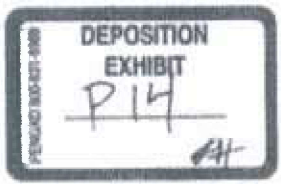
Notary Public Ashley Rae Rutter

(SEAL)

My Commission Expires 08/07/2021

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





UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
V	)	Civil Action No 90-229 Erie
	)	
ROBERT BRACE and ROBERT BRACE FARMS, INC., a Pennsylvania Corporation,	)	
	)	
	)	
Defendants	)	

CONSENT DECREE

WHEREAS Plaintiff United States of America, in its Complaint, alleged that Defendants committed violations of the Clean Water Act ("CWA"), including the unpermitted discharge of pollutants by dredging, filling, leveling, and draining of waters of the United States, specifically a wetlands of approximately 30 acres that is adjacent to Elk Creek, and Plaintiff sought injunctive relief and civil penalties;

WHEREAS the United States District Court for the Western District of Pennsylvania after trial dismissed the Complaint on December 22, 1993, holding that Defendants' activities were exempt from permitting requirements under Section 404 of the CWA;

WHEREAS the Third Circuit Court of Appeals, on November 22, 1994, reversed the District Court and ruled that Defendants are liable for the asserted violations, and

remanded the matter to the District Court for remedial measures, and the United States Supreme Court denied Defendants' petition for writ of certiorari; and

WHEREAS the parties have agreed to this Consent Decree,

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED, and DECREED that:

FINDINGS

1. This Court has jurisdiction over this action pursuant to CWA Section 309, 33 U.S.C. §1319, and 28 U.S.C. §§1331, 1345, and 1355.

2. This Consent Decree is fair, reasonable, in the public interest, and in accordance with the CWA.

INJUNCTION

3. Defendants, their officers, directors, agents, servants, employees, successors, assigns, and those in active concert or participation with them are enjoined permanently from discharging any pollutants (including dredged or fill material) into the approximately 30 acre wetland site depicted on Attachment A, unless such discharge is in compliance with the CWA.

RESTORATION

4. Defendants will perform restoration in accordance with the wetlands restoration plan, which is attached hereto as Exhibit A and made a part hereof.

CIVIL PENALTY

5. Within thirty days after the entry of this Consent Decree, Defendants will pay a civil penalty of $10,000 by cashier's or certified check payable to the Treasurer of the United States and delivered to David M. Thompson of the U. S. Department of Justice. If said payment is not made within said period, then interest will be charged in accordance with the statutory judgment interest rate, as provided in 28 U.S.C. § 1961, from the time payment is due until the time payment is made.

OTHER PROVISIONS

6. Within thirty days after the entry of this Consent Decree, Defendants will record this Consent Decree in the applicable land records office.

7. Until all requirements in paragraphs 4, 5, and 6 have been performed and at least thirty days prior to any proposed transfer of any interest in any part of the property affected by this Consent Decree, Defendants will provide a true copy of this Consent Decree to any proposed transferee and simultaneously will notify the United States of any proposed transfer. A transfer of interest in the said property will not relieve Defendants of any responsibility in this Consent Decree, unless the United States, Defendants, and the transferee agree to allow the transferee to assume such responsibility.

8. Each party will bear its own expenses and costs to the time of the entry of this Consent Decree. Thereafter, if Defendants fail to perform any requirement in paragraph 4, 5, and 6, then, upon receipt of written notice of such failure from Plaintiff, Defendants will pay a stipulated penalty of $250 for each day of failure, by cashier's or certified check payable to the Treasurer of the United States and delivered to David M. Thompson of the U. S. Department of Justice. Additionally, Defendants will be responsible for any expenses and costs incurred by the United States in enforcing this Consent Decree.

9. In addition to any other legal authority, representatives of the United States will have the authority for a period of eighteen (18) months after the entry of this Consent Decree, at reasonable times and with proper identification, to enter upon the property affected by this Consent Decree for the purposes of monitoring and measuring compliance with this Consent Decree.

10. This Consent Decree constitutes a complete settlement of any and all claims by any of the parties that arise from the Complaint through the date of the entry of this Consent Decree. The United States does not waive any rights or remedies available to it for any violations by Defendants of laws, regulations, rules, and permits other than the violations alleged in the Complaint, and this Consent Decree does not relieve Defendants of responsibility to comply with any federal, state, and local laws, regulations, rules, and permits, except that this Consent Decree provides all necessary federal authority to implement paragraph 4. Defendants do not waive any rights or remedies available to

them under any applicable law against the Plaintiff which may arise after the date of the entry of this Consent Decree.

11. Defendants consent to the entry of this Consent Decree without further notice. The parties acknowledge that after the lodging and before the entry of this Consent Decree, final approval by the United States is subject to the requirements of 28 C.F.R. §50.7, which provides for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this Consent Decree based upon such public comment.

12. Upon approval and entry by this Court, this Consent Decree will have the effect and force of a final judgment. This Court will retain jurisdiction over this action for the purposes of enforcing, interpreting, and modifying this Consent Decree. The United States reserves all legal and equitable remedies available to enforce the provisions of this Consent Decree. Any stipulated modification of this Consent Decree must be in writing, signed by the parties, and approved by this Court.

DATED: September 23, 1996

UNITED STATES DISTRICT JUDGE

DATED: July 23, 1996

LOIS J. SCHIFFER
Assistant Attorney General
Environment & Natural Resources Division

By: David M. Thompson
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Attorneys for the United States

DATED: June 25, 1996

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Attorneys for Defendants

Wetlands Restoration Plan

The primary objective of this plan is to restore the hydrologic regime to the U shaped, approximately 10-acre wetlands adjacent to Elk Creek. In order to restore the hydrology to the area, the drainage tile system currently located in the wetlands is to be disabled, surface ditches filled in, and a check dam constructed. The series of tasks to be performed to sufficiently disable the drainage system are as follows:

1 Excavation of trenches; removal of drainage tubing

(a) Excavate a set of two parallel trenches to a depth of five (5) feet at each of the three following locations, as depicted on the map attached as Attachment A:

(1) the first set shall be located parallel to the western side of Elk Creek (marked as "Set 1" on Attachment A);

(2) the second set shall be located parallel to the southern side of the waterway referenced as "unnamed tributary A" (marked as "Set 2" on Attachment A); and

(3) the third set shall be located parallel to the northern side of the waterway referenced as "unnamed tributary B" (marked as "Set 3" on Attachment A),

for a total of six trenches.

(b) The first trench in each set shall be located at a distance of twenty five (25) feet from the bank of the referenced waterway; the second trench in each set shall be located at a distance of fifty (50) feet from the first trench (a total of seventy five (75) feet from the bank of the waterway).

(c) The trenches shall be excavated at a length necessary to intercept the drainage tubes located in the wetlands. During the course of excavation of the trenches, each time a drainage tube is intercepted, a twenty five (25) foot length of the drainage tube shall be removed. Upon removal of all intercepted drain tile, the area shall be inspected by EPA (or its representative). Following the inspection and approval of the work by EPA (or its representative), the trenches shall be filled in with the soil that was excavated from them and the tile disposed of properly.

2. Fill in Two Surface Ditches

The two surface ditches that run in a southwesterly

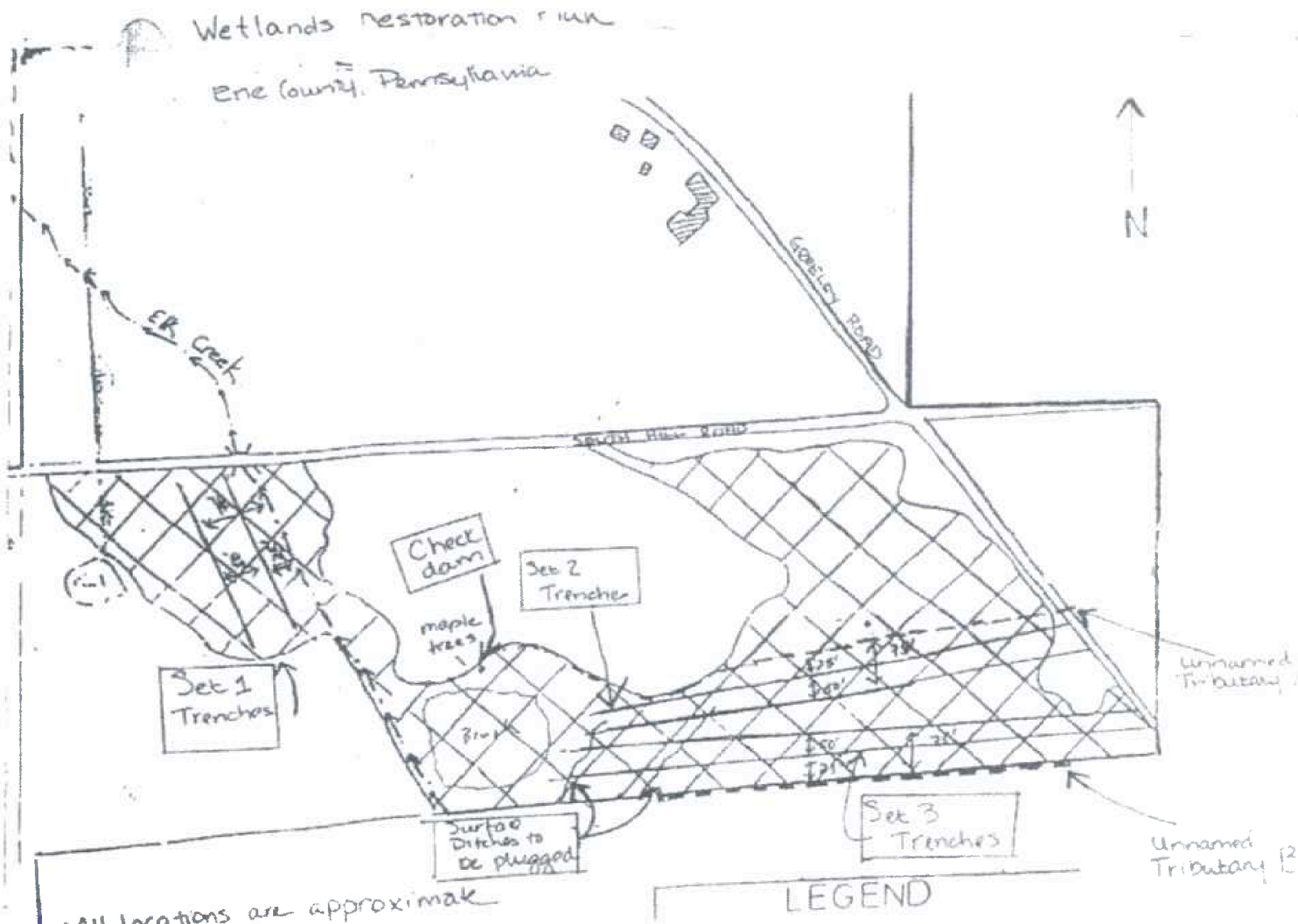
EXHIBIT A

direction into unnamed tributary B, as indicated on Attachment A, shall be filled in beginning at the mouth for a distance of at least twenty five (25) feet.

J. Install Check Dam

A check dam shall be installed in unnamed tributary A at the location indicated on Attachment A. This dam shall be one and one-half (1 1/2) feet high, four (4) feet long, and as wide as the tributary bottom. The dam shall be constructed of concrete, gabions, or compacted rock.

All work shall be completed, if feasible, within ninety (90) days after entry of this Consent Decree and, in any event, no later than one year after entry of this Consent Decree. All required State and local permits must be received prior to performing any of the above work. The site will be inspected at the completion of the trench work and again at the completion of the restoration work.



· All locations are approximate
· Map not to scale

ATTACHMENT "A"