IN THE UNITED STATES COURT OF FEDERAL CLAIMS

ROBERT BRACE, Plaintiff v. THE UNITED STATES Defendant.	)	Case No. 98-897 L Judge Francis M. Allegra
COMMONWEALTH OF PENNSYLVANIA COUNTY OF ERIE	)	SS:

AFFIDAVIT OF ROBERT H. BRACE

My name is Robert H. Brace. I am making this affidavit in connection with my opposition to Defendant's Motion to Dismiss in the above referenced matter in which I am the Plaintiff. Based on my knowledge, information and belief, the following facts are true and correct.

I am sixty-three years old and have been engaged in farming in Erie County, Pennsylvania for over forty-five years.

In December of 1975, I purchased two working farms from my parents, Charles and Mary Brace for their fair market value in arms length transactions.

One of the farms, the Homestead Farm, consisted of 80 acres of farmland. The other, the Murphy Farm, consisted of 57 acres of farmland. I grew up in this area and observed farming on the Murphy Farm for my entire life.

I purchased the Murphy farm for $45,000.00, its fair market value in the real estate market existing at the time.

From time to time over the fifty years prior to 1987, the condition of the land comprising the Murphy Farm, including the 30 acre Site referred to in the Complaint I filed in this action, has changed. In some periods, substantially all of the land was in production for different crops. In other periods, it was used for pasturing or lay fallow. The natural drainage patterns were disrupted from time to time by beaver dams which, unless removed, caused precipitation to back up and saturate the soil and even inundate portions of the land adjacent to drainage. Manmade agricultural drainage was also disrupted through natural deterioration and lack of maintenance. Throughout this period, the property was a farm and used for farming before my father acquired it.

The Murphy Farm contains the 30 acres which was ultimately found by the United States District Court to meet the regulatory definition of wetlands in the enforcement action brought by the Defendant. This portion of the property is not adjacent to any navigable waters or other water bodies as I understand those terms.

At the time I acquired the Murphy Farm, I planned to continue and expand the family farming business by improving the farmland. My intention was to improve the conditions of the soil which is highly productive for farming but which in its natural condition is considered to be poorly drained and in need of drainage to make it suitable for production of cash crops such as cabbage and potatoes. Because the existing drainage system and natural drainage of the land had deteriorated, I realized the need to repair and expand the drainage system to render the parcel workable.

on the Murphy Farm parcel or other related activity on the parcel would, in 1994, be deemed by the Third Circuit Court of Appeals to be a "discharge" of dredge and material which had to have a permit under and within the meaning of Section 404 of the Clean Water Act.

The improvement of the drainage system on Murphy Farm was funded in part by grants from the United States Department of Agriculture. The funds, aggregating over $5,000.00, in the form of reimbursements to me for expenditures to contractors, were received in 1977, 1978 1979 and 1984.

From 1976 through 1987, I continued my work to improve the soil conditions on the Murphy Farm so that I could use the land for production of row crops which I considered to be a higher form of agricultural production than its previous use, pasturing and production of livestock feed.

Normal farming operations include pasturing, planting, cultivation and harvesting various crops, application of fertilizer, erosion control, installation of drainage and tiling, maintaining and cleaning the components of the drainage systems, farm conservation and maintenance, crop rotation and silviculture.

From 1975 through 1987, I engaged in what are considered to be normal farming operations on the Murphy Farm, including pasturing of livestock, agricultural drainage and the planting, cultivation and harvesting of row crops as I originally planned. I did not apply to the United States Army Corps of Engineers for a Section 404 permit pursuant to the Clean Water Act during that period of time because I did not believe and had no reason to believe then that the Murphy farm land or my farming activities fell within federal regulatory jurisdiction of the United States under the federal Clean Water Act or that farming activities in which I was

At the time I acquired the Murphy Farm, I was familiar with the activities and practice of the United States Department of Agriculture, acting through the ASCS, of providing cooperative assistance to Erie County farmers, including my father, in improving soil and drainage conditions of farm property to make it more productive for farming.

During the period from 1975 to 1985, the ASCS actively encouraged farmers in the vicinity, including me, to maintain, improve and expand agricultural drainage systems on farms in Erie County and elsewhere in the vicinity.

In 1975, I was aware that, in addition to assistance in the development of agricultural drainage plans, agencies of the United States also provided financial assistance to farmers in Erie County which supported the creation, maintenance, improvement and extension of agricultural drainage systems and that no permits for such activities were required in 1975.

At the time I acquired the Murphy Farm, which contains the 30 acre Site, I had no knowledge or reason to know that farming activities in headwaters areas where the farm was located, were subject to regulation under Section 404 of the Clean Water Act.

In 1976, I arranged for and began excavation and burying of plastic tubing as "drainage tile" in the Murphy Farm to improve soil and agricultural drainage conditions render the soil suitable for row crops which could generate higher revenues than pasturing livestock or producing livestock feed. The excavation involved what I later learned is referred to as "side casting," that is depositing the excavated soil sediment and dirt next to the drainage ditches from which it was removed. It also involved what I later learned is referred to as "incidental fall-back" into the drainage ditches of material being excavated

At that time I had no knowledge or reason to expect that the dirt and soil on the Murphy Farm which had been removed from the drainage ditches and redeposited on the ground nearby

engaged required any federal permit and was never so informed by any employee of the United States until 1987.

Although I was generally aware of the existence of the Clean Water Act in 1975, and that, in general terms, it regulated discharges of pollutants into navigable rivers, streams, and water bodies, I was entirely unaware and could not have been aware that farming activities which for example, clearing, leveling, draining and improving soil and hydrologic conditions of farm property, were considered to be violations of Section 404 of the Clean Water Act or were considered to be activities requiring a permit from the COE.

During the period from approximately 1980 to 1987, through publications serving the farming community and discussions with other similarly situated farmers and representatives of government agencies, including those of the United States, I became generally aware that Section 404 of the Clean Water Act provided that normal farming activities such as plowing, seeding, cultivating, drainage, harvesting and upland soil conservation practices and activities for the purpose of construction or maintenance of irrigation and drainage ditches were exempt from regulation under Section 404.

I did not apply to the United States Army Corps of Engineers ("Corps") for a Section 404 permit pursuant to the Clean Water Act in 1975 or thereafter until 1988 because I did not believe my property at issue fell within the jurisdiction of the Corps under the Clean Water Act and I believed that the activities I was engaged did not require a permit pursuant to the Clean Water Act and were exempt from the permitting requirements of Section 404.

Between 1987 and 1988 a corporation in which I have an interest and I received two orders from the Environmental Protection Agency and one order from the Corps. ordering, among other things, me to refrain from further disturbing over 200 acres of land purported to be

wetlands included in the Murphy Farm and in various parcels adjacent to the Murphy Farm to allow the land to revegetate with indigenous plant species and to cease the maintenance and operation of drainage systems.

In 1988, after receiving the three orders, I contacted ASCS and requested Murphy Farm be granted status as "commenced conversion from wetlands" prior to December 23, 1985. ASCS granted my request based on my ongoing farming activities on the Murphy Farm commencing prior to December, 1985.

I also sought to obtain an "after-the-fact" permit by applying to the Corps to avoid being found to be in continuous violation of the Clean Water Act. I was notified by the Corps in May, 1990 that it would not entertain any after-the-fact permit application at that time because of the enforcement action being pursued against me by the United States.

At the time the cease and desist orders were issued, I did not believe that the United States had jurisdiction over the activities and property which is the subject of the orders and I sought the advice of counsel on how to contest the orders and to assert that the activities and property were exempt from Clean Water Act Section 404 regulation and enforcement. I was advised by my counsel that no direct appeal to challenge or contest such orders was provided by the agencies and that other remedies seeking to challenge them would be extremely costly and difficult to pursue and of questionable likelihood of success because federal courts at that time were routinely deciding that administrative orders of the nature involved in my case could not be contested or challenged legally until the United States brought an enforcement action in federal District Court in which claims of exemption and other defenses such as a Fifth Amendment takings claim could be raised. I was also advised that a direct action asserting that the enforcement orders such as the ones I received violated the Constitution of the United States as

takings without compensation were being routinely confronted with arguments by the government agencies that such actions were not ripe for judicial review or could not proceed because the recipient of the orders had failed to exhaust administrative procedures and remedies such as applying for a Section 404 permit and having it granted or denied or having a claim of exemption confirmed and acquiesced in by the United States.

On October 4, 1988, the Environmental Protection Agency of the United States ("EPA") filed an Administrative Complaint to assess administratively a civil penalty of $125,000 for violations alleged in the enforcement orders. I sought administrative review of that assessment, specifically asserting my claim of exemption from regulation by the United States and other defenses, but EPA vacated the administrative assessment and I was advised by counsel that review of that action would be virtually impossible legally, if not prohibitively costly, to obtain because adjudicatory tribunals or courts of appropriate jurisdiction likely would hold that any dispute over the administrative action, having been vacated or withdrawn by the agency was moot and unreviewable.

In 1990, the United States filed a Clean Water Act Section 404 enforcement action against me and Robert Brace Farms, Inc. in the U.S. District Court for the Western District of Pennsylvania alleging violations of a purported requirement that a Section 404 permit be obtained for the discharge of dredged or fill material into waters of the United States, seeking restoration of the 200 acres the United States alleged to be federally regulated wetlands, a permanent injunction and civil penalties, including daily penalties in potentially crippling magnitude. I vigorously contested the enforcement action raising several defenses, including the exemption from regulation of normal farming activities. Prior to the trial, under the advice of counsel, I stipulated that an approximately 30 acre site on the Murphy Farm was wetlands as

then defined pursuant to the Clean Water Act. At no time did I believe or concede that the 30 acre site was subject to regulation by the United States or waive my claim that my activities and the Murphy Farm property was exempt from regulation under Section 404 of the Clean Water Act. After trial, on December 16, 1993 the District Court held that the purported discharges were exempt from the Section 404 permit requirement because they were normal farming activities and dismissed the enforcement action outright.

The United States then appealed the decision of the District Court to the United States Court of Appeals for the Third Circuit. I did not during the pendency of the appeal intend to acquiesce in or concede that the orders were valid. I was, however, advised by counsel to continue to comply with the terms of the orders to the extent practically possible to avoid the potential catastrophic penalty liability and criminal enforcement subjecting me to fines and incarceration should the United States prevail in the appeal.

The Third Circuit Court of Appeals reversed the District Court on November 22, 1994 and found me liable for violations of the Clean Water Act. I then sought and was on January 9, 1995 denied a rehearing before the Court of Appeals. Thereafter, I sought and on June 26, 1995 was denied a writ of certiorari from the United States Supreme Court.

The original enforcement action had been remanded to the District Court by the Court of Appeals. I entered into a "Consent Decree" with the United States governing restrictions on the use of my property, remedial measures I was required to take and the imposition of penalties and I was faced with proceedings in District Court in which the Court would consider and determine civil penalties and mandate measures to eliminate the drainage system and maintain the 30 acre site in a saturated or inundated connection which qualified as wetlands at my expense. I was advised by my counsel that I had not further basis for contesting liability to comply and could

only offer evidence and argument in mitigation of penalty liability and a cost effective remediation plan.

At the time I entered into the "Consent Decree," I did so solely because I was left with no further remedy to challenge the cease and desist orders of the enforcement action. At no time did I voluntarily or willingly acquiesce in the remediation measures and the resulting condition of and burdens on the Murphy Farm or voluntarily accept liability for violations of the CWA.

The Murphy Farm now has no independent viable economic use to me. As a result of conditions resulting from my compliance with the order contained in the Consent Decree, water which would naturally drain from the property is backing on the property, inundating and saturating the soil and subsoil, other parts of the Murphy Farm and land owned by others and those areas are becoming unusable.

As a result of the action of the United States, the Murphy Farm is burdened with a covenant which follows the land and if effect, obligates me to bind potential purchasers and their heirs with the obligation to maintain the property in its restored condition, including maintenance of the 30 acre site and continuing deterioration of soil and hydrologic conditions of the land surrounding the 30 acre site. In its present condition, the Murphy Farm cannot be sold and there is no market for the property.

The fair market value of the land, unaffected by the taking, in and of itself, is at least $1,700,000. This is based on my general knowledge of comparable land value in the vicinity, information relating to sales of real estate including land previously used for farming and

agricultural purposes, growth patterns and development trends in the vicinity. But for the taking, other property rights associated with ownership of the property, for example, the right to take advantage of the land's highest and best use, and to convey it free and clear of encumbrances, add to the value of the property beyond its value as undeveloped real estate.

Robert H. Brace

ROBERT H. BRACE

SWORN TO and SUBSCRIBED
BEFORE ME THIS 5th DAY
OF August, 2002

Shaana E. Proper

Notary Public

My commission expires:

NOTARIAL SEAL
SHAANA E. PROPER, Notary Public
Waterford Twp., Erie County
My Commission Expires July 25, 2005

CERTIFICATE OF SERVICE

The undersigned certifies that this 7th day of August, 2002, a copy of the within Plaintiff's Opposition to Defendant's Motion to Dismiss and Accompanying Memorandum in Support of His Opposition and Affidavit was served upon counsel for the Defendant by United States mail, first-class postage prepaid/hand delivery, properly addressed as follows:

Susan V. Cook, Senior Attorney
General Litigation Section
Environmental & Natural Resources Division
U.S. Department of Justice
P.O. Box 663
Washington D.C. 20044-0663

HENRY INGRAM