

**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.,

Defendants.

UNITED STATES' REPLY IN SUPPORT OF MOTION FOR A PROTECTIVE ORDER

The Court should grant the United States’ Motion for Protective Order, ECF No. 168, and bar discovery on the following topics: (a) the alleged ambiguity of the 1996 Consent Decree, including any discovery that predates or that concerns individuals whose participation in this matter concluded before January 14, 2005; (b) the Consent Decree Area’s designation under the Food Security Act of 1985 (“FSA of 1985”), 16 U.S.C. §§ 3801, et seq.; and (c) the Consent Decree Area’s status as a wetland and/or “water of the United States” under the Clean Water Act, 33 U.S.C. §§ 1251, et seq. (collectively the “challenged discovery”). As we established in our opening brief, ECF No. 169, Defendants seek discovery on factual and legal matters that have already been resolved in this litigation or that are barred as a matter of law. Because those matters are irrelevant to any valid defense Defendants may raise in response to the United States’ claim that they violated the Consent Decree, the single issue before the Court, the Court should preclude Defendants from seeking discovery on those matters.

Defendants' response, ECF No. 179, fails to establish that the challenged discovery is relevant to a valid claim or defense, as required by Federal Rule of Civil Procedure 26(b)(1).

Rather, Defendants' response merely confirms that they intend to improperly use discovery to re-litigate factual and legal conclusions already decided by this Court and the Third Circuit.

Additionally, Defendants unsuccessfully attempt to manufacture "latent ambiguities" within the Consent Decree to justify the discovery of extrinsic evidence. But nowhere in their 59-page brief do Defendants rebut the United States' argument that their purported ambiguity claims, first raised 27 years after signing the Consent Decree, are time-barred. Finally, Defendants' brief is riddled with factual misstatements and unsupported argument that go well-beyond the issues raised in the United States' Motion.¹ It is neither productive nor necessary for the United States to respond to every such inaccuracy to resolve this discovery dispute. Thus, the United States' reply is limited to addressing only those arguments relevant to its Motion for Protective Order.

I. Defendants Have Not Met Their Burden to Establish that the Challenged Discovery Is Relevant to a Valid Claim or Defense.

In their response brief, Defendants mistakenly claim that the United States is not entitled to a protective order limiting discovery because the United States has not demonstrated that the challenged discovery is disproportionate to the needs of the case. ECF No. 179 at 33. However, the first question the Court must address in deciding whether a protective order is warranted is whether the challenged discovery is relevant to a claim or defense. "The party seeking discovery has the burden of clearly showing the relevancy of the information sought." *Westfield Ins. Co. v. Icon Legacy Custom Modular Homes*, 2017 WL 2021514, at *3 (M.D. Pa. May 12, 2017). Only after Defendants establish relevancy should the Court turn to the question of whether the

¹ For instance, contrary to Defendants' unsupported assertions: (1) no government agency has certified the Consent Decree Area as a prior converted cropland, ECF No. 179 at 12; (2) no "decades-old debate" exists as to the legal status of the 30 acre-wetland, *id.* at 23, because that issue was put to rest by the Third Circuit in 1994; and (3) EPA and the Corps never discouraged Defendants modifying the Consent Decree, *id.* at 29. Also, Defendants have not produced a scintilla of evidence to support their claim that the Consent Decree's wetland restoration plan caused or contributed to the flooding of uplands preventing Defendants from farming their land. *Id.* at 27-28.

discovery is proportional to the needs of the case. *Cole's Wexford Hotel, Inc. v. Highmark Inc.*, 209 F. Supp. 3d 810, 833 (W.D. Pa. 2016).

Despite their lengthy response, Defendants have not met their burden by establishing that the challenged discovery is relevant to a valid claim or defense. As explained in the United States' opening brief, the challenged discovery relating to (1) alleged ambiguities within the 1996 Consent Decree, (2) the 1988 designation of the 30-acre parcel covered by the Consent Decree as "commenced converted wetlands" under the FSA of 1985, 16 U.S.C. §§ 3801, et seq., and (3) the site's status as jurisdictional waters of the United States is wholly irrelevant as a matter of law to any defense Defendants may assert to the United States' allegation that they violated the Consent Decree by undoing the restoration work required by the Decree.

A. Defendants Cannot Discover Extrinsic Evidence Based on Untimely and Manufactured Allegations of Ambiguity within the Consent Decree.

As the United States demonstrated in its opening brief, Defendants' claim that the Consent Decree is ambiguous is barred as untimely, *see* ECF No. 169 at 7-9, and, in any event, is not a valid defense for non-compliance, *see id.* at 13-15. It is telling that not a word of Defendants' 59-page brief is aimed at refuting either of those arguments. Accordingly, the Court should grant the United States' Motion and bar discovery aimed at purported ambiguities.

But even if the Court were to entertain the notion that such discovery could be relevant, Defendants have not carried their burden. In their response, Defendants assert that the Consent Decree is ambiguous because it: (1) does not define "hydrologic regime," ECF No. 179 at 19; (2) does not identify the "temporal period to which the hydrologic regime" was to be restored, *id.* at 19-23; (3) does not contain a precise metes and bounds description of the Consent Decree Area, *id.* at 24-25; (4) does not explain "the intended purposes and effects of the Restoration Plan's

three key features, *id.* at 25-26; (5) does not address outside phenomena, *id.* at 26-28; and (6) does not contain a defined procedure for modifying the Consent Decree, *id.* at 28-31.

Until now, Defendants have maintained that the Consent Decree did not specify a purpose. *See* Tr. of Apr. 7, 2017 Status Conference 17:7-13. Now that the United States has demonstrated that Defendants' claim was false, *see* ECF No. 169 at 12-13, Defendants attempt to move the goal posts by manufacturing new purported ambiguities. Not surprisingly, however, Defendants fail to cite to anything—not a single case, statute, or regulation—to support the notion that a consent decree must or even should address any of the six issues they allege render this Consent Decree ambiguous. Additionally, a review of these arguments reveals that they simply fall flat.

First, the Consent Decree states unambiguously that its purpose is “to restore the hydrologic regime to the U-shaped, approximately 30-acre wetlands adjacent to Elk Creek,” which would be accomplished by disabling the drainage tile system located therein, filling surface ditches located therein, and constructing a check dam therein. Consent Decree ¶¶ 3-4, ECF No. 83-2; Wetlands Restoration Plan, Exhibit A to Consent Decree, ECF No. 83-2. Therefore, the Consent Decree unambiguously provides that the intended “hydrologic regime” is what results from the disabling of the drainage tile, the filling of the surface ditches, and the construction of the check dam.²

Second, Defendants, represented by knowledgeable counsel, engaged in negotiations and thereafter executed the Consent Decree in 1996, and then complied with the Decree and managed not to violate it for decades without ever complaining of any alleged ambiguities. In fact, in addition to the evidence we already cited to demonstrate that Defendants were well aware of the location, boundaries, and requirements of the Consent Decree, *see* ECF No. 169 at 11-12,

² Defendants have omitted that EPA employee Jeffrey Lapp unequivocally testified that the purpose of the Consent Decree was to “restore the hydrologic drive” of the Consent Decree Area by “getting water pumped back into the land” and “mak[ing] the ground wet again.” Fed. Cl. Trial Tr. at 656:10-19.

Defendant Robert Brace, under oath, identified the location and boundaries of the Consent Decree Area no fewer than eight times in two court proceedings. *See* Trial Tr., No. 90-229 (“1993 Trial Tr.”), at 369:15-370:14; 374:16-376:6; 376:3-8; 393:4-11; 409:23-410:16; 438:9-15; 440:2-7 (attached hereto as “Exhibit A”); Trial Tr., No. 98-897L (“Fed. Cl. Trial Tr.”), at 154:10-156:17 (attached hereto as “Exhibit B”). In addition, Mr. Brace, under oath, testified that he knew what the Consent Decree Area was, 1993 Trial Tr. at 454:20-23; he clearly identified what the Consent Decree required of him, *see* Fed. Cl. Trial Tr. at 133:20-134:2; he testified that it took three days at most to comply with the Decree, *id.* at 134:2-6; he testified that he did everything that the Decree required of him, *id.* at 135:1-10; and he testified that the Decree included “a map telling what to do,” *id.* at 361:13-18. Indeed, in their response, Defendants agree that they were able to understand and comply with the terms of the Decree and its attached restoration plan after its entry. ECF No. 179 at 41 (“Defendants’ initial compliance with the Consent Decree and Restoration Plan . . .”). In the face of this evidence, Defendants’ new allegations that the Decree is ambiguous simply cannot withstand even the slightest scrutiny.

Third, Defendants cite nothing that suggests that consent decrees are ambiguous if they do not specifically discuss outside phenomena or modification procedures. Federal Rule of Civil Procedure 60(b) delineates the circumstances under which, and the procedure by which, Defendants could have sought relief from the Consent Decree. They never did, but instead engaged in self-help. That Defendants failed to seek modification as required, *see* ECF No. 169 at 13-15, does not render the Consent Decree ambiguous. Because Defendants cannot now legitimately point to any ambiguity in the Consent Decree, discovery of extrinsic evidence related to the Decree’s purpose is unnecessary, irrelevant, and should be barred.

B. Discovery Related to the USDA's Designation of the 30-Acre Wetland Protected by the Consent Decree Is Barred.

Defendants contend that their argument that the Consent Decree Area is prior converted cropland is not barred under the doctrines of law of the case, judicial estoppel, collateral estoppel, or res judicata.³ As to the latter three doctrines, Defendants fail to cite a single case to cast doubt upon the United States' arguments. Regarding law of the case, however, Defendants assert that this Court may re-visit both Judge Mercer's and the Third Circuit's conclusion that the Consent Decree Area is a wetland and "water of the United States" under the CWA and was designated a "commenced conversion wetland" (and not a "prior converted cropland") under the FSA of 1985, because this case presents extraordinary circumstances. In support of that position, Defendants cite six cases, none of which stands for the proposition that a district court sitting on remand may re-visit factual or legal conclusions made by the appellate court or conclusions originally made by the district court following an adjudication of the matter on the merits.

Instead, these cases:

(1) hold that a denial of summary judgment does not establish law of the case (*Roberts v. Ferman*, 826 F.3d 117, 126-27 (3d Cir. 2016); *Krueger Assocs., Inc. v. Am. Dist. Tel. Co. of Pa.*, 247 F.3d 61, 65 (3d Cir. 2001));

(2) hold that an appellate court may re-visit its own conclusion rendered prior to a full adjudication if the trial court's subsequent factual finding on the merits undermines the

³ Defendants argue, *inter alia*, that "they could not have brought the prior converted cropland defense in the prior proceeding." ECF No. 179 at 58. That argument is belied by the facts. On September 26, 1990, the Corps issued Regulatory Guidance Letter 90-07, which stated that prior converted cropland was not subject to CWA Section 404 jurisdiction. See ECF No. 179-18, ¶5(d). That policy was codified, 58 Fed. Reg. 45,032 ("EPA and the Corps stated in the preamble to the proposal that we are proposing to codify existing policy, as reflected in RGL 90-7, that PC cropland is not waters of the United States"), on August 23, 1993 in 33 C.F.R. § 328.3. The trial did not commence until November 29, 1993, more than three years after the policy was instituted and three months after codification; the final adjudication was not issued until December 16, 1993; and the Third Circuit did not rule until November 22, 1994. Thus, even if this Court held that the Consent Decree Area's status under the FSA of 1985 had not actually been litigated, Defendants had ample time to raise the defense, and are thus barred from doing so under the doctrine of *res judicata*.

appellate court's previous decision (*Pub. Interest Research Grp. of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 116-17 (3d Cir. 1997));

(3) hold that the Parole Commission may consider newly discovered evidence to support a finding in the wake of the district court's concluding that the Commission's original factual finding was not supported by the record (*Bridge v. U.S. Parole Comm'n*, 981 F.2d 97, 102-04 (3d Cir. 1992));

(4) hold that a district court may not re-visit another district court's conclusions regarding venue (*Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, 166-69 (3d Cir. 1982)); and

(5) hold that a district court may not re-visit its own pre-trial ruling following an adjudication on the merits (*Williams v. Runyon*, 130 F.3d 568, 573-575 (3d Cir. 1997)).

As articulated the United States' opening brief, the law of the case doctrine is clear: when acting pursuant to remand, as this Court is here, a district court is bound by the factual and legal conclusions established by the appellate court. ECF No. 169 at 16 (case law citations omitted). None of the cases upon which Defendants rely says otherwise—in fact, *Williams* tends to support the United States' position. Consequently, because Judge Mercer concluded that the Consent Decree Area is a wetland and a water of the United States under the CWA and a commenced conversion wetland under the FSA of 1985, and because the Third Circuit agreed with those conclusions and also held that Defendants violated the CWA within the Consent Decree Area, *see* ECF No. 169 at 17, this Court may not re-visit those factual or legal conclusions. Thus, Defendants are barred from arguing and seeking discovery on the Consent Decree Area's designation under the FSA of 1985,⁴ or status as a water of the United States under the CWA.

⁴ The relevant regulations, *compare* 7 C.F.R. §§ 12.2(a)(2) and 12.5(b)(2) *with* 7 C.F.R. §§ 12.2(a)(8) and 12.5(b)(1)(i)-(ii), and jurisprudence demonstrate that a parcel can be commenced converted *or* prior converted, but not both. *See Reichenbach v. U.S. Dep't of Agric.*, 2013 WL 74608, at *1 (S.D. Ind. Jan. 4, 2013); *Maple Drive Farms Family Ltd. P'ship v. Vilsack*, 2012 WL 6212905, at *7-8 (W.D. Mich. Dec. 13, 2012), *rev'd on other grounds*, 781 F.3d 837 (6th Cir. 2015); *see also Horn Farms, Inc. v. Johanns*, 397 F.3d 472, 474-76 (7th Cir. 2005); ROGER A. McEOWEN, AGRICULTURAL LAW IN A NUTSHELL 597-606 (1st ed. 2017) (discussing differences between the two and noting that, unlike commenced converted, a wetland can only be designated as prior converted if it was "totally drained" and the conversion completed before December 23, 1985.).

II. Defendants' Overbroad Discovery Requests are Disproportional to the Case's Needs.

Because Defendants "did not satisfy [their] burden to show that the information [they] request[] from [the United States] is relevant, the court is not required to analyze whether that request is proportional to this case." *Cole's*, 209 F. Supp. 3d at 833. But even if the Court were to find that the challenged discovery was somehow relevant to the United States' Motion to Enforce, Defendants' overbroad discovery requests are disproportional to the needs of this case. In particular, many of Defendants' discovery requests are devoid of appropriate agency and/or subject matter scope and/or temporal constraints. Examples of these overbroad requests include:

Interrogatory No. 5: Identify *all agents or other representatives of the United States Government* who have been physically present on one or more of the Properties at Issue *since October 1, 1990* and, for each individual, identify the following: (a) The date(s) he or she was physically present on one or more of the Properties at Issue[;] (b) The reason he or she was physically present on each identified date[;] (c) Any reports, notes, photos, communications or other documents referring to, related to, or generated in connection with each visit to one or more of the Properties at Issue.

Interrogatory No. 6: Identify *all agents or other representatives of the any Pennsylvania State or Local government agency* who you know to have been physically present on one or more of the Properties at Issue *since October 1, 1990* and, for each individual, identify the following: (a) The government agency with which he or she was affiliated at the time he or she was physically present on one or more of the Properties at Issue[;] (b) The date(s) he or she was physically present on one or more of the Properties at Issue[;] (c) The reason he or she was physically present on each identified date[;] (d) Any reports, notes, photos, communications or other documents referring to, related to, or generated in connection with each visit to one or more of the Properties at Issue.

Request for Production No. 6: All documents in your possession, including, but not limited to, reports, communications, notes, inter-agency communications and intra-agency communications, referring or relating to the Properties at Issue.

Request for Production No. 7: All documents in your possession, including, but not limited to, reports, communications, notes, inter-agency communications and intra-agency communications related to any jurisdictional determinations of one or more of the Properties at Issue.

To respond to these requests, the United States would be required to undertake a Herculean effort and search for information spanning three decades across numerous federal agencies,

much of which has likely been archived or disposed of consistent with retention policies. Also, seven of the federal employees identified by Defendants as deponents are long retired from federal service; most were already deposed in this case in the 1990s (and their deposition testimony has been produced); and none has any knowledge of the facts underlying the United States' Motion to Enforce, as explained in the United States most recent Motion for Protective Order, ECF No. 180.⁵ These retirees should not be burdened with depositions on matters that occurred more than a quarter century ago and on which they were already questioned.

Moreover, notwithstanding the United States' relevancy objection, the United States has already produced to Defendants the non-privileged documents contained within the Department of Justice's litigation files for this action, which includes court filings, deposition transcripts, trial transcripts, and exhibits. To require the United States go beyond that production and devote substantial time and significant resources to searching the archived files of numerous federal agencies for documents spanning almost three decades is overly burdensome, especially when the violations of the Consent Decree identified in our Motion to Enforce occurred at the earliest less than five years ago, in 2012. *See Smith v. Rogers*, 2017 WL 544598, at *4 (W.D. Pa. Feb. 9, 2017) (imposing a preceding three-year temporal discovery constraint and holding that events "that significantly predate" the actions upon which allegations are based are "of little to no relevance" and are, in any event, disproportional under Fed. R. Civ. P. 26(b)(1)); *Grayson v. Dewitt*, 2016 WL 5801699, at *6 (M.D. Pa. Oct. 5, 2016) (imposing a preceding five-year constraint is common and most appropriate) (citation omitted); *D'Angelo v. Coatesville Area Sch. Dist.*, 2016 WL 3388326, at *2-3 (E.D. Pa. June 20, 2016) (imposing a preceding two-year constraint); *Kelly v. Times/review Newspapers Corp.*, 2016 WL 2901744, at *2-3 (E.D.N.Y. May

⁵ The retired employees are Lewis Steckler, Edward Lewandowski, Carroll Lesik, Edward Perry, Charles Kulp, David Putman, and the late Joseph Burawa.

18, 2016) (imposing a preceding three-year restraint); *see also Williams v. Sweet Home Healthcare, LLC*, 2017 WL 2779189, at *4 (E.D. Pa. June 27, 2017) (holding disproportional discovery requests “spanning time periods years and even decades” outside of the scope of the relevant allegations); *Fish v. Air & Liquid Sys. Corp.*, 2017 WL 697663, at *7-8 (D. Md. 2017) (discovery requests spanning 29-year time period disproportional under Federal Rules). Given the preceding case law, the United States’ position that January 14, 2005, serve as the temporal limit on the scope of discovery here is generous considering that the allegations at issue in the United States Motion to Enforce occurred in 2012.⁶

CONCLUSION

For these reasons, and those set forth in the United States’ opening brief, ECF No. 169, the United States respectfully requests that the Court grant its Motion, ECF No. 168, and issue a protective order precluding discovery on issues that are time-barred or that have been previously decided as described above and as set forth in our Motion.

Respectfully submitted,
JEFFREY H. WOOD
Acting Assistant Attorney General
U.S. Department of Justice
Environment & Natural Resources Division

/s/ Brian S. Uholik
LAURA J. BROWN (PA Bar # 208171)
CHLOE KOLMAN (IL Bar # 6306360)
BRIAN UHOLIK (PA Bar # 209518)

⁶ The January 14, 2005 cutoff is appropriate because, as of that date, the Court of Federal Claims concluded that there was no communication between the Defendants and the United States about the Consent Decree. *See Brace v. United States*, 72 Fed. Cl. at 344 (“[D]espite claims that the Consent Decree was overreaching and impacted property outside of the wetlands, plaintiff neither sought modification of the decree, nor clarification from the EPA, either formally or otherwise After 1996, no EPA official has ever visited the property to determine whether the restoration plan had broader impacts than were intended.”), 363 (“[I]t is uncontroverted that Mr. Brace never contacted the EPA, the Corps, any other Federal agency, or even the district court that entered the Consent Decree to complain that the effectuation of the restoration plan was causing his property to flood.”).

SARAH BUCKLEY (VA Bar # 87350)
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
601 D Street, N.W., Suite 8000
Washington, DC 20004
Phone: (202) 514-3376 (Brown)
Phone: (202) 514-9277 (Kolman)
Phone: (202) 305-0733 (Uholik)
Phone: (202) 616-7554 (Buckley)
Laura.J.S.Brown@usdoj.gov
Chloe.Kolman@usdoj.gov
Brian.Uholik@usdoj.gov
Sarah.Buckley@usdoj.gov

OF COUNSEL:

Melissa Schefski, Esq.
United States Environmental Protection Agency
Office of Compliance and Enforcement Assurance
1595 Wynkoop Street
Denver, Colorado 80202

Pamela J. Lazos, Esq.
Assistant Regional Counsel
United States Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103

Dated: October 20, 2017

EXHIBIT A

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

UNITED STATES OF AMERICA
Plaintiff

vs.

Civil Action No. 90-229 Erie

ROBERT BRACE and ROBERT BRACE
FARMS, INC., a Pennsylvania
Corporation
Defendants

PROCEEDINGS

Transcript of Nonjury Trial Proceedings commencing on
Monday, November 29, 1993, United States District Court, Erie
Pennsylvania, before Honorable Glenn E. Mencer, District Judge.

APPEARANCES:

For the Government:

DAVID M. THOMPSON, Esquire
SAMUEL PLAUCHE, Esquire

For the Defendants:

SAMUEL BRAVER, Esquire
JOHN WARD, Esquire
SUSAN KIRCHER, Esquire

Reported by:

Virginia S. Pease
Official Court Reporter
1023-A U.S. Courthouse
Pittsburgh, PA 15219
(412) 471-0377

Proceedings recorded by mechanical stenography. Transcript
produced by computer-aided transcription.

90-51-1-3433

Robert Brace - Direct - Braver

1 A Yes, she is, right back there.

2 Q Did you grow up in the Waterford, Erie County area?

3 A Yes. All my life.

4 Q Did you live in the Waterford area with your parents as
5 you were growing up?

6 A Yes.

7 Q We had introduced earlier in this proceeding Defendant's
8 Exhibit M. From time to time I'm going to ask you to come off
9 the stand to help us with various maps, but using Defendant's
10 Exhibit M, maybe it would be easier if you hold it there, and
11 show Judge Mencer the area in which you lived while you were
12 growing up.

13 A I lived right in this -- this is our homestead, right
14 here.

15 THE COURT: Okay. Got it. You could perhaps help me
16 by identifying some of these roads by name.

17 THE WITNESS: This is South Hill Road.

18 THE COURT: All right. Thank you.

19 THE WITNESS: This is Greenlee Road,.

20 THE COURT: All right.

21 THE WITNESS: This is Sharp Road.

22 THE COURT: Okay.

23 THE WITNESS: And this had Tamrack Road.

24 THE COURT: All right. And as you understand it, the
25 area of your property in question of this lawsuit is located

Robert Brace - Direct - Braver

1 where?

2 THE WITNESS: This is right, in this corner right,
3 comes right across here and right down South Hill Road, over to
4 Greenlee.

5 THE COURT: That's why this looks like the X's on the
6 map.

7 THE WITNESS: The X is the bottom corner. This is
8 roughly in the neighborhood from where the beaver dam was.

9 THE COURT: Okay.

10 MR. BRAVER: The X's, Your Honor, if you recall, were
11 put on I believe by I believe Mr. Putnam during cross
12 examination.

13 THE COURT: Okay.

14 THE WITNESS: This was my boy's home up there.

15 THE COURT: Thank you very much.

16 THE WITNESS: You're welcome.

17 Q Mr. Brace, I'm going to keep you there for a minute, but
18 talk loudly so we can go forward. The property that you just
19 referenced which includes the site, when did you acquire that?

20 A The site, my father -- you want to know when I acquired
21 it?

22 Q Yes.

23 A I acquired it in 1975.

24 Q And you acquired that from your father; is that correct?

25 A Yes, that's right.

Robert Brace - Direct - Braver

1 A Yes, we did.

2 Q I'm going to show you what we've marked as Defendant's
3 Exhibit A. I believe it was also referred to in Mr. Stokely's
4 testimony and marked --

5 MR. BRAVER: What number was that, Dave?

6 MR. THOMPSON: 50?

7 MR. BRAVER: '39 map.

8 MR. THOMPSON: I have to look it up.

9 MR. BRAVER: Well, no problem.

10 MR. THOMPSON: I've got it. Give me a few seconds.

11 MR. BRAVER: It's no problem.

12 MR. THOMPSON: Something like 6 or something.

13 Q Prior to your father acquiring the property, what was the
14 land used for?

15 A It was a farming operation.

16 Q I put before you Defendant's Exhibit A, which is a 1939
17 aerial map. Have you seen this map before?

18 A Yes, I have.

19 Q All right. And with this map can you identify the
20 property and the site area?

21 A Yes. A line right in this area right here.

22 MR. BRAVER: Your Honor, in our defendant's -- it
23 would be -- you have the smaller version of it, which I believe
24 is also -- we can highlight it for you.

25 THE COURT: It's your Exhibit A?

Robert Brace - Direct - Braver

1 MR. BRAVER: Yes. And it's theirs on square, right in
2 here. That has the site.

3 Q Now, using that map, can you indicate where the site is?

4 A The site runs -- can I mark it on here?

5 Q Yes.

6 A That's the general site we're talking about.

7 Q All right. Now, can you describe the area, the general
8 area around the farm? Like you to describe where Elk Creek
9 was, if you can, on that map.

10 A Elk Creek at the time, I believe, and always have, that
11 it's down on the north side of Sharp Road, which is in this
12 general area. Which was the Sibleyville area, and you can see
13 here the tributaries of Elk Creek that run in different areas.
14 And this is about the center of the divide.

15 There's two watersheds in this area, and one runs into
16 the Gulf of Mexico and the other runs into the Atlantic Ocean,
17 and the divide is probably a thousand feet to 1500 feet, I'm
18 guessing, above the site, but it's not too far.

19 Q With that Defendant's Exhibit A can you indicate the usage
20 of the areas from the 1940's and '50's as you were growing up?

21 A I'd like to, I'd like to point out, we heard a lot
22 yesterday about habitat that were being lost, but I'd like to
23 show Your Honor that all these areas were, were farmed and
24 fields in the 1930's and early part of the century. And they
25 have all growed up now, if you'll look at the later maps, but

Robert Brace - Direct - Braver

1 there's this whole area all along you can see a major
2 difference in all this farm land has reverted back to the wild.

3 Q Show you Defendant's Exhibit B. Are you familiar with
4 this exhibit, 1950 map?

5 A Yes, I am.

6 Q All right. Can you highlight the site on Exhibit B?

7 A Yeah. The site here. This is the South Side of the
8 site. This is South Hill Road. This is Greenlee Road.

9 Q Now, in the 11 years from the Defendant's Exhibit A to
10 Defendant's Exhibit B, you indicate where Elk Creek is?

11 A Elk Creek, if you can see it on the map, which is very
12 very hard, it's still -- any indication of it whatsoever is on
13 the north side of Sharp Road, and as you can see now there's no
14 visible drainage area left in this area.

15 Q In the 1950's what did this area look like which is north
16 of this site area and north of South Hill Road?

17 MR. THOMPSON: Your Honor, may I object on two
18 grounds? One, there's been no qualification of Mr. Brace as a
19 photographic interpretation expert. And two, as to his
20 testimony concerning the running of the waters, I specifically
21 asked him if he was an expert on waters of the United States
22 during his deposition, and he said, no.

23 I am not trying to be obstreperous or to block
24 relevant testimony, but I, I think that this requires expert
25 qualification, Your Honor.

Robert Brace - Direct - Braver

1 the site area itself. It was all over covered with beaver
2 dams, and the drainage was very, very poor over the last 40 to
3 50 years.

4 Q Using Exhibit M, can you show where that is a little bit
5 more clearly, where that drainage system extended into the
6 site?

7 A Yes. It extends in this area on the off site of the side
8 of the road, comes on up around, and there's several tile line
9 that run in on this ditch up around this upland area, as well
10 as areas across these other watersheds. They all connect into
11 that drainage system.

12 Q Okay.

13 MR. BRAVER: Your Honor, we would offer Defendant's
14 Exhibit H at this time. We'd also offer Defendant's Exhibits A
15 and B. We'd also offer what had been marked as P-10.

16 THE COURT: Any objection, Mr. Thompson.

17 MR. THOMPSON: I would object to A and B on the basis
18 of my prior objection that Mr. Brace has said during his
19 deposition he's not an expert in waters of the United States,
20 and any of his testimony or any exhibits concerning the
21 question of waters of the United States, and Mr. Brace should
22 be stricken and not allowed.

23 MR. BRAVER: Your Honor, one, this issue, the issue
24 that this Court has to face and adjudicate is how this property
25 was being used and was a part of a farm operation, as the Court

Robert Brace - Direct - Braver

1 Q Let me just show you my copies. It might make it easier
2 for you.

3 A I think I got them here.

4 Q Can you identify G-2 for me?

5 A Yes. It's a bill from Bob Briggs. And it's for backhoe
6 and dig drainage ditch.

7 Q All right. And where was that work done?

8 A This was in 1979. Let's see '79, '78 was in here.

9 Q Orient yourself with the map.

10 A Yeah.

11 Q Would it help you on Plaintiff's Exhibit 20?

12 A I think I should be able to find it here.

13 Q This area has been identified.

14 A Yeah, right. I believe, Your Honor, and I'll show you,
15 I'll use this picture again, in '79 we had put some tile in
16 this general area here.

17 Again, it's hard when I don't have a plan, an overlay
18 like I do with SCS, but going back that far, the best of my
19 recollection, it's in this area in here.

20 Q On the site?

21 A Yes. Um hum.

22 Q And while you have the photo --

23 THE COURT: When you say "on the site", this -- that
24 would be.

25 THE WITNESS: This is on the site side of --

Robert Brace - Direct - Braver

1 THE COURT: Southwest of the site; wouldn't it?

2 THE WITNESS: No. The site is-- again, it's on the
3 south side of, this is South Hill Road here.

4 THE COURT: I know, but the property that we're having
5 this dispute over lies south of South Hill Road.

6 THE WITNESS: Right.

7 THE COURT: And runs toward the east, toward Greenlee;
8 doesn't it?

9 THE WITNESS: Yeah.

10 THE COURT: Okay.

11 THE WITNESS: This whole area.

12 THE COURT: Okay. Now, how far down does it come?

13 THE WITNESS: There's drainage that comes in, and you
14 can see on site there's, there's a couple of tile lines that
15 come right down in here.

16 THE COURT: Yeah.

17 THE WITNESS: Right. Now, we got some other bills
18 there for John, but in '78 I know very well that we were up on
19 this side. And then and the other areas I know in here, but I
20 just can't pinpoint that one particular bill that real close.

21 Q In '79 you were on this side?

22 A Right, right.

23 MR. THOMPSON: I'm sorry, I apologize. I got
24 confused. You said you can't tell in '79 where it was?

25 THE WITNESS: It was on the site side, but I'm not

Robert Brace - Direct - Braver

MR. THOMPSON: Yes, sir.

* * * * *

CROSS EXAMINATION

BY MR. THOMPSON:

Q Morning, Mr. Brace.

A Morning. How you this morning?

Q How is everything with you?

A Fine.

Q Mr. Brace, I want to take you through chronologically from the earliest to the latest, if we can. Mr. Stokely testified about the aerial photograph from 1959 that you see in front of you, and he said that Elk Creek was clearly visible in 1959, running all the way through what is now called the site.

You see it?

A Yeah, I see the I site, the site area, yes.

Q You see the Elk Creek going through the site?

A I can't actually say it's Elk Creek going through the site. I see some water in two places.

Q You don't see a ribbon running right through the site?

A I wouldn't say that was Elk Creek.

Q You're not an expert in aerial photography; is that correct?

A I've looked at a lot of aerial photographs in the last six and a half years.

THE COURT: Can you identify on that exhibit Route 86,

Brace - Cross - Thompson

1 A Um hum.

2 Q Mr. Brace, that's the overlay on a 1989 aerial photograph
3 that Mr. Stokely said corresponded to the map that is in
4 Defendant's Exhibit H.

5 A Okay.

6 Q And this is the site right here.

7 A Correct.

8 Q Does not that map in your father's conservation plan in
9 1961 indicate that half the site is for wildlife?

10 A It indicates there's wildlife area there.

11 Q And the other half for pasture; correct?

12 A That -- well there's two wildlife areas on there. It
13 doesn't --

14 Q Does this indicate that this part is wildlife, Mr. Brace?

15 A Part of that, yes.

16 Q I'm talking about in the site.

17 Here to here is indicated as wildlife; is it not?

18 A Yeah. That's what I'm saying, part of that is, yes.

19 Q And the other part for pasture; is that correct?

20 A That's right.

21 Q And you adopted your father's plan; is that correct?

22 A Yes, we did.

23 Q Did you ever change that plan?

24 A Well, conservation plans are derived to work with the
25 conservation office, and they are very flexible on plans. I

Brace - Cross - Thompson

1 point that I brought up.

2 Q I mean, okay, you had planted something in the ground?

3 A Yes, and it will come up.

4 Q I understood, understood.

5 A It did come up.

6 Q Bud you had taken all the natural indigenous vegetation
7 out?

8 A That had been going on over all the years, right.

9 Q The natural indigenous vegetation was there in 1983 in
10 that picture; was it not?

11 A Like I have indicated prior, we had worked on that site,
12 continuously moving vegetation. I've never denied that.

13 Q Okay. The part in the middle of the site is upland;
14 correct?

15 A That's correct.

16 Q The United States isn't suing you on that; right?

17 A I don't know. They started with 200 acres, and I don't
18 know where -- I really, to this day I am not truly sure where
19 we are and aren't.

20 Q You don't know what the site is?

21 A I know what the site is.

22 Q That's what we're suing you on.

23 A All right.

24 Q Okay. I want to talk about the commenced conversion,

25 Mr. Brace. You go to ASCS in 1988 after the government had

EXHIBIT B

ROBERT BRACE,

Plaintiff,

v.

UNITED STATES,

Defendant.

Docket No. 98-897L

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

Tuesday,
January 11, 2005

The parties met, pursuant to notice of the Court,
at 10:10 a.m.

BEFORE: HONORABLE FRANCIS M. ALLEGRA
Judge

APPEARANCES:

For the Plaintiff:

NANCIE G. MARZULLA, Esquire
ROGER J. MARZULLA, Esquire
BRENDA D. COLELLA, Esquire
Defenders of Property Rights
1350 Connecticut Avenue N.W., Suite 410
Washington, D.C. 20036
(202) 822-6770

For the Defendant:

SUSAN COOK FLORENTINE, Esquire
SYDNEY F. COOK, Esquire
U.S. Department of Justice
Environment and Natural Resources Division
601 D Street, N.W.
Washington, D.C. 20004
(202) 305-0470 / (202) 514-4565

Heritage Reporting Corporation
(202) 628-4888

BRACE - DIRECT

133

1 hey, we were in compliance, we didn't do anything that
2 wasn't exempt, and then, when the Appellate Court judges
3 reversed it, why, that put us in a real catch-22. I mean,
4 we had to apply to the Supreme Court.

5 Q Okay. But did you enter into a -- eventually
6 enter into a consent decree?

7 A Yes. Yes.

8 Q Would you describe that decision to enter into a
9 consent decree with the government as voluntary?

10 A No, it was sure not. I mean, I tried and tried
11 and tried to work the problem out, but, at this time, I was
12 forced into doing something and trying to stay out of any
13 more major problems than they already had me in.

14 Q Mr. Brace, could I turn your attention to
15 Plaintiff's Exhibit No. 22?

16 A Okay.

17 Q Is this the consent decree that you entered into,
18 Mr. Brace?

19 A Yes, it is.

20 Q What did this consent decree require you to do?

21 A Well, I had to tear out several miles or feet of
22 tile line, took the excavator down to both sites and had to
23 go four feet deep and intersect any tile lines that were in
24 there, on Greenlee Road as well as Lane Road, and then I had
25 to put riprap in and bring the water table up and excavate

Heritage Reporting Corporation
(202) 628-4888

BRACE - DIRECT

134

1 and fill that back over to make your tile lines all quit
2 functioning and your drainage system quit.

3 Q How long did it take you to do what was required
4 under the consent decree?

5 A It probably was, working with two track hoes and a
6 bulldozer, the better part of two-and-a-half, three days.

7 Q Did you do this by yourself?

8 A I hired it.

9 Q And how many men did you hire?

10 A There was roughly four or five people. There were
11 three on the equipment. I believe there was two of us
12 building and constructing the riprap.

13 Q And how much did you pay for this work done under
14 the consent decree?

15 A I cannot tell you for sure, but it was a lot more
16 work than it should have been, but it was -- you know, it
17 was just -- it was -- in paying for it, it was something
18 that was the worst devastating situation that I ever had in
19 my life to destroy something that I had worked for 20 years
20 to work on and try to improve, and, you know, I got to the
21 point where I still am.

22 I don't know what to do anymore. I am lost for
23 words when it comes to whether I should continue to try to
24 get food and fight or whatever. I just -- it's the most
25 devastating thing I ever had in my life.

Heritage Reporting Corporation
(202) 628-4888

BRACE - DIRECT

135

1 Q Have you done everything required by this consent
2 decree?

3 A With what?

4 Q Have you done everything that the consent decree
5 requires you to do?

6 A Yes. Yes.

7 Q Is there anything left to do?

8 A No.

9 Q Have you recorded this consent decree?

10 A Yes, I did.

11 Q In what condition is the property in today,
12 Mr. Brace?

13 A Today, it's in pretty bad shape again. I mean,
14 the beaver moved in in several places and people are
15 throwing out tires and washing machines and everything else
16 that they had done prior to. You know, I mean, that's what
17 happens. I mean, the -- it looks sad.

18 Q After the consent decree was entered into, have
19 you been able to use the Murphy farm for productive farming?

20 A No, I haven't. Again, like I said, I have had
21 corn on a couple pieces that we've talked about up until the
22 last couple of years, and now the Clean Water Act being
23 expanded, I don't believe -- as I've said, I don't believe
24 there's anything we can do with it. That's all, and I'm
25 afraid to even use it for anything.

Heritage Reporting Corporation
(202) 628-4888

BRACE - CROSS

154

1 Q -- north of the Murphy farm?

2 A Yes. It's not too far. Well, it's actually just
3 a -- it's -- it runs right -- if that was the field today,
4 it runs right around there, and that's the way it runs.
5 There's some other maps that I think you will see a lot
6 better on from in the wintertime.

7 Q Well, why don't we look at some of those?

8 A Okay.

9 Q 9A.

10 MS. FLORENTINE: For the record, Your Honor, I've
11 just placed a volume of Defendant's exhibits in front of the
12 witness, Defendant's Exhibit 9A, which is a photograph.

13 THE COURT: Thank you.

14 BY MS. FLORENTINE:

15 Q Now does this help you identify the area you were
16 just -- have you had a moment to look at this, Mr. Brace?

17 A Yes, I have.

18 Q Does this help you identify the area you were
19 talking about?

20 A Yes. That's where I'm saying, but this is much
21 later.

22 Q Right. This is -- do you have any -- does this
23 picture look familiar?

24 A Yes, it does.

25 Q Was it taken in about 1987?

Heritage Reporting Corporation
(202) 628-4888

BRACE - CROSS

155

1 A Probably. I don't see it on the exhibit right
2 there, but I believe it's somebody's. 6-30 of '87 maybe.
3 I'm not sure. It looks like 07, but maybe it's '87.

4 Q I think that refers to when it was made an
5 exhibit. I don't think there's actually a date on the
6 photo.

7 A Okay.

8 Q My question would be whether you can tell from
9 what is shown in the photo approximately when it was taken,
10 and let me first establish what's shown in the photo. What
11 is in the photo?

12 A Well, there's a picture of the site and what you
13 are declaring as wetlands and upland.

14 Q And, by "the site," we mean the Murphy farm
15 parcel?

16 A Yeah, the Murphy farm parcel, plus there's some in
17 here on the Homestead parcel.

18 Q Now, looking at this Defendant's Exhibit 9A, which
19 direction is north?

20 A North is towards me.

21 Q To the right of the photograph?

22 A It would be on the bottom of the photograph.

23 Greenlee Road runs pretty much east and west. So, if you
24 take Lane Road, and as you're coming down Lane Road, on your
25 right-hand side, it would be pretty much north.

Heritage Reporting Corporation
(202) 628-4888

CFC-FRC0000157

BRACE - CROSS

156

1 Q Now there's a road going not quite horizontal,
2 it's slanted a little bit in the photo. Which road is that?

3 A Well, again, the road that's going by the upland
4 pieces, that's South Hill Road.

5 Q Okay.

6 A South Hill Lane. I mean that's actually Lane Road
7 right there, yeah.

8 Q And the road that's closer to the bottom of the
9 photo?

10 A That's Greenlee.

11 Q Now, the area that's labeled wetland, is that the
12 area that was the subject of the enforcement action?

13 A Yes. That -- all of that was -- has been grown
14 about for several years, everything except those -- excuse
15 me -- all except those two areas where you marked it upland,
16 and that's what I'm disputing even there. You know,
17 that's -- could be classified as wetland a lot up there.

18 Q Okay. Which upland -- you're referring to both
19 upland areas in your view are wetlands?

20 A Uh-huh.

21 Q And why are they wetlands?

22 A Because they're hillside seeps as well as you've
23 got highly vertical land there. I don't know how you row
24 the land. It's pretty tough to do any of that today because
25 of the viewers and the crops you have to have tillage in.

Heritage Reporting Corporation
(202) 628-4888

BRACE - CROSS

177

1 farm property.

2 A Right.

3 Q And would you, as you grew up, on occasion walk
4 through the Murphy farm tract?

5 A Yeah. I used to camp out there sometimes.

6 Q What do you mean by "camp out"?

7 A Sleep overnight.

8 Q And why did you do that?

9 A I guess we didn't have enough recreation. That's
10 why I would go out there.

11 Q What part of the Murphy farm tract would you camp
12 on?

13 A Just about where that white spot is there.

14 Q And you're talking about the white spot that we
15 were talking about earlier in the western south corner,
16 southwestern corner?

17 A No. The other -- that you asked you me about.

18 Q Oh. In the center of the property, approximately
19 where the upland area is, right?

20 A Right.

21 Q The main upland area that's approximately 11 to 12
22 acres?

23 A Right.

24 Q We're on the same page on that?

25 A Right.

Heritage Reporting Corporation
(202) 628-4888

BRACE - CROSS

361

1 Q To your knowledge, was that the only time
2 the consent decree was recorded in the local land
3 records?

4 A I have no knowledge --

5 Q Now, I notice as we page through this
6 document there's a few pages out of order. Actually,
7 let me rephrase that. The current exhibit is in
8 order, but as recorded, if you look at the recorded
9 page numbers in the upper right the pages are slightly
10 out of order, correct?

11 A I never -- I couldn't tell by looking at
12 it -- I'll take your word on it without checking --

13 Q Is there a map that was attached to the
14 consent decree as it was recorded with the Court?

15 A A map?

16 Q An illustration of the restoration plan for
17 the property?

18 A Yeah. They had a map telling what to do.

19 (The document referred to was
20 marked for identification as
21 Defendant's Exhibit No. 7.)

22 BY MS. FLORENTINE:

23 Q I'd like to show you Defendant's Exhibit No.
24 7 and ask you to look at the last page, which I've
25 placed on top for you there. Is that the map or the

Heritage Reporting Corporation
(202) 628-4888

BRACE - CROSS

362

1 illustration, whatever you want to call it, that
2 you're referring to?

3 A Yes.

4 Q Now, what happened after you entered into
5 the consent decree? How did the discussion start
6 about what the restoration plan was going to look
7 like?

8 A On the phone.

9 Q Were you asked whether you wanted to propose
10 a restoration plan?

11 A Ma'am, I done this the best I could. I
12 believe that I had to take what they had up there.

13 Q So to your knowledge, EPA never gave you the
14 option to submit a restoration plan to EPA?

15 A No.

16 Q Did they ever give you that option early on?
17 In other words, in 1987, 1988, 1989, when negotiations
18 were undergoing?

19 A We were in negotiations trying to solve the
20 problem there.

21 Q At that time, did EPA indicate to you that
22 it wanted the wetlands restored?

23 A They always said that. Yeah.

24 Q Did they ask you to submit a restoration
25 plan?

Heritage Reporting Corporation
(202) 628-4888

CFC-FRC0000263

LAPP - CROSS

656

1 acres?

2 A I'm not sure I understand the question.

3 Q Sure. Wouldn't you normally -- is this a
4 photograph, a kind of photograph you looked at prior
5 to going out and doing the delineation, doing the
6 field work?

7 A I do not know.

8 Q You do not know. Okay, then perhaps you
9 can't answer the question.

10 Let's move on then to the restoration plan.
11 In simple terms is the purpose of the restoration plan
12 to make the ground wet again?

13 A That's correct.

14 Q Okay. So when you use the phrase "restore
15 the hydrologic drive," you were talking about getting
16 water pumping back into the land, right?

17 A Into the wetland area, that's correct.

18 Q Into the wetland areas, right?

19 A Excuse me. Yes.

20 Q Okay. Now, part of that restoration plan
21 was filling in drainage ditches that had been
22 constructed; is that right?

23 A Yes.

24 Q Because those drainage ditches were carrying
25 water away from the site?

Heritage Reporting Corporation
(202) 628-4888

CFC-FRC0000487