

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

- - -

UNITED STATES OF : CIVIL ACTION
AMERICA, : NO.
Plaintiff, : 1:90-cv-00229
 : 1:17-cv-00006
vs. :
 :
ROBERT BRACE, ROBERT :
BRACE FARMS, INC., and :
ROBERT BRACE and SONS, :
INC., :
Defendants. :

- - -

October 2, 2017

- - -

Oral deposition of JEFFREY LAPP,
taken at the offices of DoubleTree by Hilton
Hotel Philadelphia - Valley Forge, 301 West
DeKalb Pike, Summit 11, King of Prussia,
Pennsylvania 19406, beginning at 9:03 a.m.,
before LINDA ROSSI-RIOS, a Federally Approved
RPR, CCR and Notary Public.

- - -

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1 culverts that were perhaps part of the source
2 of a problem with the property flooding during
3 the enforcement of the restoration plan? In
4 other words, what two culverts, do you recall
5 there being any culverts on the Brace farm?

6 A. Yes.

7 Q. Does this figure depict the
8 same culverts that you know and are familiar
9 with?

10 A. There are two culverts represented
11 on this figure. One is labeled as "Sharp Road
12 Culvert Crossing," the other as "Lane Road
13 Culvert Crossing." And to the best of my
14 recollection, there are culverts located at
15 both of those.

16 Q. And that Lane Road culvert
17 crossing connects which two tracts, the water
18 flow from which two tracts?

19 MS. BROWN: Objection. Form.

20 MR. KOGAN: Well, based upon
21 his description and his identification
22 of where the Murphy tract is and where
23 the Homestead and Marsh tracts are, can
24 you describe how that culvert operates?

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1 THE WITNESS: I would describe
2 that culvert as being located under
3 Lane Road, and it is Elk Creek flowing
4 from the Murphy tract to bisect both
5 the Homestead and the Marsh tract.

6 BY MR. KOGAN:

7 Q. Would you say based upon that
8 function, it served a vital role of moving
9 water from the Murphy tract to either one or
10 both of the Marsh and Homestead tracts?

11 A. I'm not sure. I could not
12 attest as to the role, but it is certainly
13 part of the watershed of Elk Creek.

14 Q. If that culvert were in any way
15 obstructed, clogged with foreign matter, would
16 that affect the flow of water from the Murphy
17 tract to either or both the Marsh and
18 Homestead tracts?

19 MS. BROWN: Objection. Calls
20 for speculation. You can answer.

21 THE WITNESS: Would a clogged
22 culvert affect flow? Yes.

23 BY MR. KOGAN:

24 Q. Would a clogged culvert

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1 effectuating flow to two parcels from a single
2 parcel, would that -- if that flow were
3 impeded in any way, could that result in
4 flooding?

5 A. I don't know.

6 Q. Is there another culvert
7 depicted on this Defendants' Exhibit 2?

8 A. Yes, I believe I indicated
9 there was also one labeled a Sharp Road
10 culvert crossing.

11 Q. And the Sharp Road culvert
12 crossing, can you describe where it's located
13 relative to the tract and the farm?

14 A. It is located on Sharp Road,
15 I'm basing this off of Exhibit D-2, to the
16 southwest, just southwest of the intersection
17 with Greenlee Road.

18 Q. And what tract is that on?
19 What tract borders, is that the Marsh tract
20 because that is --

21 A. I think it's a border. I'm not
22 exactly clear.

23 Q. Well, let's compare Defendants'
24 Exhibit 1 with Defendants' Exhibit 2.

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1 Defendants' D-4?

2 A. Exhibit D-3 is labeled as
3 "SHARP ROAD & LANE ROAD CULVERT PHOTOS," dated
4 July 31, 2015. And then below the photo,
5 there is a -- it says, "PHOTO 1. Sharp Road
6 culvert with over 2 feet of concrete and stone
7 base along the bottom, which acts like a dam
8 causing water to backup on the Brace
9 Property." [As read.]

10 MS. BROWN: I just want to --
11 just for the record, you're reading
12 from D-3.

13 THE WITNESS: Correct. I am
14 reading from the Exhibit D-3. And then
15 it shows an arrow, three arrows
16 pointing at the bottom of the culvert
17 as well as on the sides. And it is a
18 corrugated metal culvert, looks like
19 there's concrete placed on top of it.
20 Under concrete.

21 BY MR. KOGAN:

22 Q. And that is --

23 A. That is Exhibit D-3.

24 Q. And that is a Sharp Road

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1 And then there is a, for lack of a better way
2 to describe it, an inset photo with "Half
3 submerged drain tile" and "Fully submerged
4 drain tile," and yellow arrows pointing to the
5 drain tile outlets.

6 Q. When you were present on the
7 Brace site in 1990 and thereafter, do you
8 recall seeing these culverts?

9 A. I do not recall seeing the
10 Sharp Road culvert. And my recollection is
11 that there was a culvert under Lane Road. The
12 condition what it looked like, any of those
13 things, I do not recall.

14 Q. Would you recall the condition
15 of Lane Road by the culvert anything unusual
16 or --

17 A. Not that I recall. I recall it
18 as a gravel road.

19 Q. Do you recall ever hearing from
20 Mr. Brace that these culverts were clogged
21 following the completion and implementation of
22 the restoration plan accompanying the Consent
23 Decree from 1996?

24 A. I don't recall specifically

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1 about culverts, no.

2 Q. Mr. Lapp, do you recall that
3 there are any natural phenomena also that are
4 present on the Brace farm such as beaver dams?
5 Were there beaver dams anywhere that you may
6 recall, along any of the tributaries on the
7 three Brace farm tracts?

8 A. I do not specifically recall
9 locations of beaver dams. I do recall that
10 Mr. Brace had a conversation with Mr. Lutte of
11 my staff, concerning the removal of beaver
12 dam.

13 Q. So are you saying for the
14 record that you do not recall a discussion and
15 correspondence between yourself, Mr. Brace and
16 Mr. Lutte or any other official concerning
17 beaver dams located on or around Elk Creek or
18 on or along named tributaries identified on
19 this map?

20 MS. BROWN: Objection.

21 Mischaracterizing his testimony. You
22 said --

23 MR. KOGAN: No. I'll rephrase
24 the question. It was a compound

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1 question, so I'll keep it simple.

2 MS. BROWN: Okay.

3 MR. KOGAN: I have complicated
4 thoughts in my mind, I apologize.
5 Because this is a very complicated case
6 for the record.

7 BY MR. KOGAN:

8 Q. Do you recall, Mr. Lapp, that
9 there were beaver dams on the Brace farm in
10 any one or more of the tributaries flowing
11 through it?

12 A. My recollection, which I
13 believe I stated earlier, is that there was
14 concern about beaver dams. I don't recall
15 having a specific conversation with Mr. Brace
16 about the location of those, but my
17 recollection is that Mr. Lutte went out and
18 actually talked to Mr. Brace about those.

19 Q. Do you recall what Mr. Brace
20 was describing as a problem caused by beaver
21 dams or did he describe a problem that beaver
22 dams caused to his farm?

23 A. My understanding is that he was
24 describing beaver dams constructed in one of

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1 did you have a role in designing and drafting?

2 That was compound, the question.

3 A. I was involved in the
4 development of the restoration plan that was
5 attached as part of the Consent Decree, and
6 that would have been in concert with counsel
7 and others.

8 Q. And how were you involved in
9 its design and development? What specific --
10 is there a specific portion of the Consent
11 Decree for which you had responsibility or was
12 it the entire restoration plan of the Consent
13 Decree?

14 A. The restoration plan, as I was
15 the technical person who crafted that.

16 Q. So you designed it from soup to
17 nuts, A to Z from the beginning?

18 A. I mean, in concert as I had
19 stated before with counsel as well as other
20 technical folks who were part of the team.

21 Q. Did you use any sources of
22 information to design and develop that
23 restoration plan?

24 A. We would have used, I used the

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1 where this document came from?

2 MR. KOGAN: I believe it came
3 from Mr. Brace.

4 MS. BROWN: Okay. That's all
5 I'm asking is if it was something that
6 we produced.

7 BY MR. KOGAN:

8 Q. I don't think he's had the
9 typed one. The restoration is the third page,
10 I think. There's this document also. The
11 reason I introduced these documents into
12 evidence, again, is for the purposes of
13 clarifying the record.

14 You had said, if I may have you
15 recall your previous statement, that you did
16 use outside sources in addition to your own
17 observations and thoughts to develop the
18 restoration plan that accompanied the 1996
19 Consent Decree. Is that a correct statement?

20 A. I said that I believe my -- if
21 I recall correctly, is that I did this in
22 concert with counsel as well as other
23 technical folks within the office who would be
24 familiar.

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1 Q. You're stipulating that it's
2 approximately 30 acres?

3 MS. BROWN: Counsel, I think he
4 just said -- that's what he just said.

5 MR. KOGAN: I just want to make
6 sure that we're all on board.

7 BY MR. KOGAN:

8 Q. Approximately 30 acres. Was it
9 possible at that time to -- for the EPA to
10 have more accurately measured that area
11 subject to the restoration plan? Instead of
12 saying approximately 30 acres, couldn't it
13 have been 30.1 or 30.2 acres to be more
14 precise? Was there a survey taken -- to the
15 best of your knowledge and recollection, was
16 there ever a survey taken of the wetland area
17 subject to the restoration plan?

18 A. No, to the best of my
19 knowledge, there was not a survey.

20 Q. So if there was not a survey
21 with accurate metes and bounds taken of the
22 30-acre portion of the Murphy tract, how did
23 you, as an expert, know where it began and
24 ended?

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1 MS. BROWN: I'm going to object
2 to the characterization. You can
3 testify to your own personal knowledge.
4 We haven't proffered him as an expert
5 in any portion of this case.

6 MR. KOGAN: If he wrote the
7 restoration plan, if he designed and
8 developed the restoration plan for an
9 approximately 30-acre portion of a
10 50-acre parcel known as the Murphy
11 tract, then he must know where his area
12 begins and ends.

13 MS. BROWN: I'm allowing him to
14 answer the question. My objection is
15 to the characterization of him as an
16 expert in your question.

17 MR. KOGAN: I'll rephrase the
18 question.

19 BY MR. KOGAN:

20 Q. Do you know exactly where it
21 begins and ends, the metes and bounds of this
22 area?

23 A. The approximate 30-acre area
24 was, to the best of my knowledge, I was not

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1 the entity who did this, who undertook the
2 actual metes and bounds, but it was done
3 through the analysis of the wetland upland
4 boundary in concert with aerial photo
5 interpretation which would have been done by
6 an expert and is fairly accurate.

7 Q. So is it fair to say it was an
8 extrapolation of an extrapolation?

9 MS. BROWN: Objection. Form.

10 THE WITNESS: No, I don't
11 believe so.

12 BY MR. KOGAN:

13 Q. Let me make it more simple.
14 You are looking at Defendants' Exhibit D-1
15 which is colored to show the area of the
16 approximately,
17 the 30 -- approximately the 30-acre area
18 relative to the other portions of the Murphy
19 tract. Is that an accurate statement? What
20 color is the crosshatch?

21 A. I believe I indicated earlier
22 it's red.

23 Q. Okay. Now, what color is the
24 area around the crosshatch?

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1 A. 7.

2 Q. There's a map, Attachment A,
3 which is the subject of both the restoration
4 plan and Consent Decree. Now, that map is
5 less -- is that map as accurately depicted --
6 does this map as accurately depict the
7 approximate 30-acre wetland area of Murphy
8 tract as does the image that is known as
9 Defendant Exhibit 1?

10 MS. BROWN: If I could just
11 lodge an objection to the foundation.
12 If you could lay some foundation of
13 whether he knows how this was created,
14 the second one was created.

15 BY MR. KOGAN:

16 Q. Do you know how either of these
17 maps were created? Let's go back to the first
18 map attached to the Consent Decree and
19 restoration plan. Did you create this map?

20 A. No, I do not believe I created
21 that map.

22 Q. Did you approve of the map once
23 it was created?

24 A. The underlying map to the

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1 restoration plan I did not create, nor was I
2 part of that. I believe that was created by
3 the investigator at the site.

4 Q. Okay. Now, as the author and
5 designer of the restoration plan, wouldn't it
6 have been your responsibility to have
7 correlated the instructions in the restoration
8 plan with the map depicting the area subject
9 to the restoration plan?

10 A. I'm not sure I understand.

11 Q. Okay. I'll rephrase the
12 question.

13 If you did not create
14 Attachment A depicting a map of the area
15 that's -- approximately 30-acre area subject
16 to the restoration plan but you did create the
17 restoration plan which must be applied to the
18 area depicted in the map, how did you know
19 that it was accurate? How did you know that
20 it correlated to your plan?

21 A. And if you note on Attachment
22 A, it indicates that all locations are
23 approximate and the intent of the restoration
24 plan was to undue those activities which

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1 one in Exhibits -- Defendants' Exhibits D-2,
2 D-3 and also D-4, you were aware of those
3 culverts? You just discussed earlier that
4 they were present on the Brace farm at the
5 time you were there in 1990. You were not
6 intimately familiar as I recall you saying,
7 but you were generally familiar that there
8 were culverts present?

9 MS. BROWN: Objection.

10 Mischaracterizes his testimony.

11 BY MR. KOGAN:

12 Q. Then can you characterize what
13 you said earlier?

14 A. I believe that my prior testimony
15 was that I recalled that there was a culvert
16 under Lane Road, and I don't recall the
17 condition of it or anything like that. And
18 also I do not recall Sharp Road. I don't
19 recall being there at all.

20 Q. Is it possible that other
21 persons within EPA or even the Corps of
22 Engineers were familiar with those culverts
23 being engineers?

24 A. I don't know.

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1 not recall being there.

2 Q. Is it fair to say that the
3 restoration plan took into account the Lane
4 culvert crossing, but not the Sharp Road
5 culvert crossing?

6 A. The restoration plan took into
7 account those activities that were undertaken
8 and determined to be a violation of Clean
9 Water Act to restore those activities that
10 were affecting the hydrology of the 30-acre
11 system.

12 Q. I'll just ask for a simple yes
13 or no. Did the restoration plan take into
14 account the existence of the Lane Road culvert
15 crossing? Yes or no?

16 A. No.

17 Q. And based on your -- just on
18 your most recent testimony that you did not
19 know about the existence of the Sharp Road
20 culvert crossing when designing and developing
21 the restoration plan, is it accurate to say
22 that the restoration plan does not all take
23 into account the Sharp Road culvert crossing?

24 A. The Sharp Road culvert crossing

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1 was not taken into account as part of the
2 design. As I stated earlier, the design of
3 the restoration plan was to remedy those
4 activities undertaken in violation of
5 Section 404 to reestablish hydrology in the
6 30-acre system.

7 Q. So basically if I can
8 summarize, and you may object, Counsel. The
9 restoration plan was drawn up in an office
10 taking into account what evidence and what
11 information which did not include two vital
12 pieces of information, the culverts?

13 MS. BROWN: Objection. Vague.

14 MR. KOGAN: I'll rephrase,
15 Counsel. You know, I really appreciate
16 this. It's shaping me up.

17 BY MR. KOGAN:

18 Q. Of all the information that you
19 took into account, and there must have been a
20 lot of information in developing this
21 restoration plan. Is that an accurate
22 statement, you took into account a lot of
23 information?

24 A. The information that was taken

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1 A. One of our concerns is not --
2 to try to minimize additional environmental
3 insult by remedying the underlying violation.

4 Q. So I guess the point I'm trying
5 to make here, the information I'm trying to
6 get from you, to elicit from you, is, okay,
7 you design this restoration plan based on the
8 information you were provided which did not
9 include information about these two culverts
10 and you -- did you expect this plan to operate
11 as designed not taking into account the
12 culverts?

13 A. Yes, I'm not -- you mentioned
14 the culverts several times, but I'm -- this is
15 all upstream of those culverts.

16 Q. I understand that. But, you
17 know, is it accurate to say that when water
18 flows to a certain point and it's obstructed,
19 where does water go? Does it continue to move
20 forward or does it come backward downstream?

21 A. If you would obstruct water, it
22 backs up behind that obstruction.

23 Q. That's right. Okay. Now, we
24 know there are two culverts that are within

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1 the Brace farm tract. You also testified that
2 you were aware of beaver dams also being
3 present on the Brace farm?

4 MS. BROWN: Objection.

5 Mischaracterizes testimony.

6 BY MR. KOGAN:

7 Q. Did you testify earlier today
8 that you were aware at the time and before the
9 time you designed the restoration plan, were
10 you aware that beaver dams were on the Brace
11 farm before and during the development of the
12 restoration plan?

13 A. No, I don't believe that was my
14 testimony.

15 Q. I'll ask you the question for
16 the first time then. Were you aware of any
17 beaver dams being present on the Brace
18 property before or during the development of
19 the restoration plan?

20 A. I was aware that -- and this
21 is -- I was personally not aware but I
22 remember being or having overheard
23 conversations about beaver dams in the area
24 and activities prior to the actual violation,

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1 but not as part of the restoration plan.

2 Q. Did you have communications
3 with Mr. Brace or did your colleague Mr. Lutte
4 have conversations with Mr. Brace to the best
5 of your recollection about beaver dams?

6 A. As I testified earlier, that
7 was 20 years after the installation of the
8 restoration plan.

9 Q. So it was after the
10 installation of the restoration plan?

11 A. Significantly, yes.

12 Q. Did you ever have any
13 communications with any state officials from
14 Pennsylvania Fish and Boat Commission, the
15 Pennsylvania Game Commission or the
16 Pennsylvania Department of Environmental
17 Protection, did you have any communication
18 with any of those agencies about beaver dams
19 prior to the -- during the restoration plan's
20 development?

21 A. No.

22 Q. So to sum up, the restoration
23 plan was developed and designed without regard
24 to beaver dams on the Brace farm and their

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1 impacts on water flow. Is that an accurate
2 statement?

3 A. As I stated earlier, the
4 purpose of the restoration plan was to
5 reestablish the hydrology that was impacted by
6 the discharges regulated under Section 404 of
7 the Clean Water Act.

8 Q. I'll rephrase it again. Are
9 you saying that the restoration plan as
10 designed and developed did not take into
11 account the instances of beaver dams on the
12 Brace property?

13 A. Correct.

14 Q. And you previously testified
15 that the restoration plan as designed and
16 developed did not also take into account the
17 existence of two culverts. Correct?

18 MS. BROWN: Counsel, asked and
19 answered.

20 BY MR. KOGAN:

21 Q. Let me repeat the question.
22 Will you answer my question, sir?

23 MS. BROWN: You can answer.

24 It's been asked and answered.

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1 A. The first line is restore all
2 wetland disturbance since October 1984.

3 Q. When it refers -- disturbed
4 since 1984 refers to those dredge and fill
5 activities you just described that the
6 restoration plan seeks to undo?

7 A. Approximately, yes. I mean,
8 it's not the same verbiage.

9 Q. No, of course, but it's the
10 same concept?

11 A. In essence, yes.

12 Q. Did you testify to as much in
13 the court of claims back in 2005 that the
14 purpose of the restoration plan was to restore
15 the hydrologic drive back to 1984?

16 A. That's my recollection.

17 Q. That would seem to correlate
18 with what you're telling me today and with
19 what this March 1, 1988, letter from Fish and
20 Wildlife to James Butch of EPA also says?

21 A. Yes, I believe it also states
22 that somewhere in the Third Circuit opinion as
23 well.

24 Q. I'm glad we got that clear.

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1 caveating or including in the farming
2 activities, but as I stated earlier, on the
3 Murphy tract, those areas outside the
4 30 acres, at least from 404 perspective, is
5 that Mr. Brace could conduct farming or
6 whatever other activities he wanted to do.

7 MR. DEVLIN: It's 12:30. I
8 don't know if there was a plan that we
9 were going to break for lunch. I
10 really don't care.

11 MS. BROWN: I'd like to break
12 for lunch.

13 - - -

14 (A recess was taken from
15 12:24 p.m. to 1:28 p.m.)

16 - - -

17 BY MR. KOGAN:

18 Q. Hope everybody had a good
19 lunch. Thank you for returning.

20 Mr. Lapp, if I could trigger
21 your recall just a moment, you had said that,
22 as I recall, that the approximate 30-acre
23 wetland portion of the Murphy tract had been
24 delineated back in 1990 when you had done your

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1 fieldwork on the Murphy tract. Is that correct?

2 A. My understanding is that based
3 upon that field visit and maybe prior
4 information or subsequent information, I'm not
5 sure, but then that Mr. Rhodes provided an
6 expert report as to the metes and bounds of
7 the wetlands on the Murphy tract.

8 Q. To your recollection, do you
9 know if that 30-acre portion was re-delineated
10 thereafter?

11 A. Not that I am aware of.

12 Q. Now, is a wetland delineation
13 important to a jurisdictional determination in
14 your practice?

15 A. It is a part of a
16 jurisdictional determination, yes.

17 Q. So, because you can have a
18 wetland that's not part of the waters of the
19 US?

20 A. Right. You can have streams
21 and other aquatic features.

22 Q. Okay. Now, when a wetland
23 delineation is performed, and given the nature
24 of nature, nature changes over time, does it

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1 not?

2 A. Yes.

3 Q. Soil, vegetation, hydrology can
4 change?

5 A. Yes.

6 Q. Not necessarily drastically but
7 it can change?

8 A. Correct.

9 Q. Unless there's a catastrophe.
10 Correct?

11 A. Yes.

12 Q. Now, is there a rule of thumb
13 in the practice that every so many years a new
14 wetland delineation must be performed on a
15 given area that's been previously delineated?

16 A. The Army Corps in its permit
17 process gives a five year limit to its
18 approved jurisdictional determinations.

19 Q. Now, is that five-year limit a
20 rule of thumb also? Is it binding, that
21 five-year limit as a matter of law do you know
22 or is it just practice?

23 A. I don't know. I honestly don't
24 know.