

1 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

2 REGION 5

3

IN THE MATTER OF:)
4)
ROBERT J. HESER, ANDREW) DOCKET NO.
5 HESER and HESER FARMS) CWA-05-2006-0002
Respondents.)

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8 Hearing held, pursuant to notice, on Friday, May
9 4, 2007 at the hour of 9:00 a.m. at Clinton County
10 Courthouse, 850 Fairfax, Carlyle, Illinois, before
11 THE HONORABLE WILLIAM B. MORAN, United States
12 Administrative Law Judge.

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21 SULLIVAN REPORTING CO.,

22 By Laurel Patkes, Reporter, CSR #084-001340

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A P P E A R A N C E S

U.S. ENVIRONMENTAL PROTECTION AGENCY
BY: THOMAS J. MARTIN & CRISSY PELLEGRIN
77 W. Jackson Blvd. (C-14J)
Chicago, Illinois 60604-3590
(312)886-4273

appearing on behalf of Complainant;

SORLING, NORTHRUP, HANNA, CULLEN & COCHRAN
BY: CHARLES E. NORTHRUP
607 E. Adams
Suite 800 Illinois Bldg.
Springfield, Illinois 62701
(217)544-1144

-and-

MATHIS, MARIFIAN, RICHTER & GRANDY, LTD.
BY: BRADLEY W. SMALL
23 Public Square
Suite 300
Belleville, Illinois 62220
(618)234-9800

appearing on behalf of Respondents.

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I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RE CROSS
MARK EWEN				
By Ms. Pellegrin	4		112	
By Mr. Small		67		115
By Mr. Northrup		99		117
By Judge Moran		101		
BOBBY HESER				
By Mr. Northrup	128			
By Judge Moran		217		

EXHIBITS

COMPLAINANT'S	IDENTIFIED	ADMITTED
Exhibit 41	37	50
Exhibit 43A	14	52
RESPONDENTS'		
Exhibits 1 thru 6	25	51
Exhibit 9	148	151
Exhibit 13	161	

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2
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PROCEEDINGS

JUDGE MORAN: So we're ready to continue with the testimony of Mr. Ewen is it?

MS. PELLEGRIN: Yes, Your Honor.

JUDGE MORAN: Okay. Go ahead, Ms. Pellegrin.

MARK EWEN

called as a witness herein, having been previously sworn on his oath, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. PELLEGRIN: (Cont'd.)

Q. Good morning, Mr. Ewen.

A. Good morning.

Q. Mr. Ewen, are you receiving compensation for your work in this case?

A. My firm is, yes.

Q. Your firm is.

Okay. And could you remind us of the name of your firm?

A. It's Industrial Economics.

Q. And to your knowledge, does Industrial Economics receive different compensation based upon

1 the outcome of your analysis of ability to pay?

2 A. It does not.

3 Q. Okay. And I believe I asked you this
4 yesterday, but have you ever determined that a
5 respondent or a defendant was unable to pay a penalty
6 that was proposed by USEPA?

7 A. Many times, yes.

8 Q. Okay. And what were your official
9 recommendations in those cases?

10 A. Well, they really run the gamut. They've
11 involved minimal reductions from the proposed
12 penalty. They've involved recommendations for
13 flexible payment schemes over a period of time,
14 multiple years. In some instances, they've involved
15 structured settlements or contingent settlements
16 based on particular business metrics and that sort of
17 thing, and in other cases they've involved
18 recommendations of very limited penalty payments.

19 Q. And can you just tell me a little bit more
20 about structure or contingent?

21 A. Well, sometimes in, you know, a lot of
22 times they're bigger super fund related cases where

1 there are large liabilities involved. There might be
2 a payment scheme linked to the commodity price of
3 gold, that sort of thing.

4 Q. Mr. Ewen, what work were you asked to
5 perform in this case?

6 A. I was asked to review the available
7 financial information submitted by the respondents,
8 consider the magnitude of the financial resources
9 available to them, and provide some insight on the
10 amount of money, the potential sources of funds that
11 may be available for a penalty payment in this case.

12 Q. Okay. And is that what an ability to pay
13 analysis is?

14 A. Yes.

15 Q. And generally speaking, what's involved in
16 an ability to pay analysis?

17 A. Well, I think it's pretty straightforward
18 in a general sense. I think we all have a feel for
19 what we'd do if we faced an unexpected one-time
20 expense. We would think about what sources of funds
21 we have to pay it, and there's really, in a general
22 sense, two sources of funds.

1 We'd look at what we immediately have
2 available, our assets, essentially cash, other assets
3 that could be liquidated or potentially borrowed
4 against to meet that expense, and in the sense of
5 borrowing against an asset that also links to the
6 second source of funds is do we have cash flow,
7 personal or business cash flow in excess of our
8 personal or business needs after meeting of all of
9 our personal and business obligations, do we have
10 some excess cash flow left that's generated over time
11 to fund that penalty over time, either paying it
12 directly over time or borrowing the money to pay the
13 penalty and repaying the loan over time.

14 So there's really two sources of
15 funds. We look at it in a gross sense, total assets,
16 total cash flow, and then we want to make sure we
17 burden those potential sources of funds appropriately
18 with existing obligations like existing debt and
19 existing expenses.

20 Q. Okay. And then focusing on an individual
21 specifically, when you analyze the ability to pay of
22 an individual, what methodology do you use? Does it

1 differ from what you've just described?

2 A. It's a very similar approach.

3 In this case, we've got a business
4 enterprise we've got to look at that's operated as a
5 sole proprietorship, but that obviously links
6 directly with the personal livelihood of the two
7 respondents here, so we've got to look at both the
8 operating performance of the business enterprise,
9 look at their personal financial obligations,
10 personal income and cash flow, personal assets and
11 business assets, and assess all of those metrics
12 collectively to come up with some identified
13 potential source of funds.

14 Q. Okay. And is this a generally accepted
15 methodology in the field of ability to pay analysis,
16 what you've just described?

17 A. Well, it's certainly consistent with EPA
18 policy guidance in this realm.

19 I think it's also just consistent with
20 a common sense standard. I mean, if you go to take
21 out a mortgage, the bank is going to ask about the
22 assets, asset or assets that you're using as

1 collateral to back that mortgage and its valuation,
2 and the bank is going to look at what kind of cash
3 flow you're generating, likely to generate over time
4 to assess your ability to repay that loan over time.

5 I'm really doing the same thing here.
6 This is, in essence, an alleged liability of the
7 respondents to EPA. I'm assessing the respondents'
8 ability to pay off that liability.

9 Q. Okay. And what kind of financial documents
10 do you need to review in order to assess that?

11 A. Well, in the case of individuals,
12 obviously, the starting point is their individual tax
13 returns, Form 1040, and then we've got to supplement
14 that with more complete rendering of their assets and
15 liabilities and existing expense requirements.

16 Q. Okay. And when you say supplement that
17 with a more complete rendering, what do you mean by
18 that?

19 A. Well, I think we're all familiar with Form
20 1040. The IRS is concerned about taxable income for
21 individuals. That's what they're concerned about
22 measuring, and so the individual tax return really

1 doesn't provide any information or no explicit
2 significant robust information about a person's
3 assets, about a person's liabilities, about an
4 individual's personal expenses or debt payment
5 obligations.

6 It really gives you just one piece of
7 information that's relevant to the analysis, and that
8 is income, and, as a result, when we're dealing with
9 individuals, to get a full picture of their apparent
10 financial resources, we've got to supplement that
11 with some rendering of their assets and liabilities
12 and expenses so we understand the whole picture.

13 Q. Okay. And then when you're trying to
14 understand the big picture as you said, do you
15 request supporting documentation of assets and
16 liabilities?

17 A. I do.

18 Q. Okay. Now, you just mentioned tax returns.

19 Why do you rely on tax returns to
20 begin an analysis?

21 A. They're a useful starting point because
22 obviously, they provide for a structured means of

1 tallying income tax related information. There's
2 obviously a consistent set of rules and regulations
3 about how you report income and identify income, and
4 obviously, if you sign it, you're attesting to the
5 accuracy of the information that is set forth in the
6 tax return, and so we get some corroboration that the
7 information is accurate as well, and obviously,
8 they're readily available for the most part.

9 Q. And now, you mentioned if you sign them,
10 you're attesting to the reliability, credibility.

11 What, if any, concerns do you have
12 about unsigned tax returns?

13 A. Well, I prefer to work with signed tax
14 returns because that's the personal attestation,
15 affirmation that the information in there is
16 accurate, so to the extent it's not signed, then I
17 have less assurance that those are the actual tax
18 returns submitted to the IRS and what I'm seeing has
19 that personal affirmation attached to it.

20 Q. Mr. Ewen, are tax returns alone always
21 reliable indicators of a party's ability to pay?

22 A. Well, you certainly can't get an accurate

1 picture of individuals by the tax returns alone as a
2 general rule. You need to supplement with that. As
3 I said, it really only provides good information for
4 one piece of the puzzle, and that's income, and we
5 need some rendering of personal expenses and assets
6 and liabilities to have a good sense for what's going
7 on with the respondents in question.

8 Q. Okay. And let me ask you this question.

9 Can a person who has a small income
10 reported on their tax return, could they actually
11 have significant ability to pay in your experience?

12 A. They could. If they happen to hold large
13 holdings of assets that have a market value or are
14 salable or liquid but at the moment aren't generating
15 a stream of income, there could be very limited
16 appearances of income with a relatively large asset
17 holding that represents a potential source of funds
18 for penalty payment.

19 Q. Okay. And what are some common examples of
20 large asset holdings?

21 A. Well, probably the most common is
22 landholdings that happen to not generate a rental

1 income stream or some other income stream.

2 Less common would be gold bullion in
3 the basement or something like that, but that's a
4 couple of examples.

5 JUDGE MORAN: Money in the freezer? Would that
6 do?

7 THE WITNESS: Yeah. That would work. That
8 would work too.

9 Q. BY MS. PELLEGRIN: Mr. Ewen, are you
10 familiar with a form entitled "The Individual Ability
11 to Pay Claim Financial Data Request Form"?

12 A. Yes. It's a form prepared by EPA that they
13 often submit to respondents, individual respondents
14 in ability to pay cases, and the purpose of it is to
15 elicit the kind of information I mentioned before.

16 It provides corroborating information
17 on the individual's income and revenue sources, cash
18 flow sources. It requests the expense information
19 that I mentioned that the individual tax return
20 doesn't have, and it also requests an itemization of
21 the individual's assets and liabilities and a little
22 bit of other information to try to build a, you know,

1 more robust information resource for purposes of
2 assessing ability to pay.

3 Q. And so that I can understand how this
4 works, EPA uses a form to request information, and if
5 information is received, do you then review that
6 information?

7 A. Sure, and I incorporate it into the ability
8 to pay analysis.

9 Q. Directing your attention to Complainant's
10 Exhibit 43A.

11 (Pause)

12 MS. PELLEGRIN: Your Honor, can we go off the
13 record for a second while I find my third volume?

14 JUDGE MORAN: Sure.

15 (Off the record.)

16 JUDGE MORAN: We'll go back on the record.

17 Q. BY MS. PELLEGRIN: Okay. Mr. Ewen, can you
18 flip through 43A and let me know when you're --

19 A. I've done so, yes.

20 Q. Do you recognize this exhibit?

21 A. This is the financial data request form we
22 were talking about.

1 Q. Okay. And just generally, what kind of
2 information does this form request?

3 A. Again, it provides some household
4 information, number of people in the household. Then
5 it asks for an itemization of the household members'
6 income to try to get an income measure for the
7 household, and then it asks for an itemization of the
8 household living expenses.

9 It goes into the household's net worth
10 requesting an itemization, any asset holdings and
11 debt holdings, and then just asks a few other
12 additional questions at the end to make sure we
13 understand whether any significant changes with
14 respect to the respondents' income or financial
15 situation has occurred recently.

16 Q. Okay. And I'm going to have you look at a
17 page Bates stamped 1334.

18 A. Okay.

19 Q. And if you would please, can you read the
20 paragraph into the record under the word
21 certification? Do you see that on this page?

22 A. Yes.

1 Q. And can you please read that into the
2 record?

3 A. Under penalties of perjury, I declare that
4 this statement of assets, liabilities, and other
5 information is true, correct, and complete to the
6 best of my knowledge and belief.

7 I further understand that I will be
8 subject to prosecution by the U.S. Environmental
9 Protection Agency to the full extent possible under
10 the law should I provide any information that is not
11 true, correct, and complete to the best of my
12 knowledge.

13 Q. Okay. Thank you, Mr. Ewen.

14 The information that you referred to
15 that this form requests, how do you use this
16 information in your analysis of ability to pay?

17 A. Well, it links back to my general
18 commentary on the ability to pay approach before.
19 We're really looking at two potential sources of
20 funds on a gross basis, personal cash flow and asset
21 holdings, and then we've got to make sure we burden
22 those potential sources of funds appropriately with

1 existing obligations, namely, the respondents' debt
2 levels and their existing expense, household expense
3 levels and debt payment obligations, and we can use
4 that information in combination to see if there's
5 anything left over for penalty payment.

6 Q. And, Mr. Ewen, sometimes do you not receive
7 information from respondents and from USEPA in
8 response to this form?

9 A. On occasion I receive very limited
10 information; that's right.

11 Q. Okay. And in the absence of specific
12 information about a person's assets, how, if at all,
13 do you obtain any information about a person's
14 assets?

15 A. Well, you know, I can impute or infer a few
16 things from the individual tax return; namely, if
17 there are interest or dividend payments that appear
18 on the tax return, I can impute an asset value based
19 on an assumed interest rate or some dividend rate for
20 that asset, so I can potentially get to some asset
21 valuations in that regard.

22 If there are interest payments

1 appearing on the tax return, I can assume some
2 interest rate term related to that stream of interest
3 payments and maybe infer a gross value, principal
4 value of a loan, but it's all imputed and inferred.
5 I can't get explicit valuations for those things.

6 Then in other instances I can go to
7 publicly available information concerning a
8 respondent's asset holdings.

9 Q. Okay. And I'm going to follow up in a
10 little bit about the information you can infer from a
11 tax return, but first let me ask you, what are some
12 of the sources of publicly available information on
13 assets that you've reviewed in the past?

14 A. Well, anything that needs to be licensed or
15 that you need to pay tax on is basically going to be
16 registered in the public domain, so you can go and
17 get information about vehicle ownership, that sort of
18 thing, and you can also generally identify real
19 estate ownership information as well.

20 Q. Okay. Focusing on real estate ownership,
21 how do you or why do you obtain information about
22 real estate ownership?

1 A. Some of it's available online. Some
2 jurisdictions have all of their tax assessment
3 records and their property holding records on line.
4 It's readily accessible.

5 Other places like Marion County still
6 haven't put that information online, so you've got to
7 go directly to the county assessor's office.

8 Q. When you're looking at the county
9 assessor's office, what specific kinds of records are
10 you looking for?

11 A. Namely, the ownership and tax assessment
12 records.

13 Q. What are tax assessment records?

14 A. Just the records that document ownership
15 and legal description of the property and provide
16 information related to the assessed value of land so
17 taxes can be appropriately assessed to the rightful
18 owner of the property.

19 Q. And you may have just answered this, but
20 besides what you've just said, what information do
21 these tax assessment statements provide to you?

22 A. Well, I can't remember what I just said but

1 I'll say it again. You can get some assessed value
2 and market value information for the land and the
3 ownership and some sales history related to the
4 parcel as well if you go back far enough.

5 Q. Okay. Can you just tell me, what does
6 assessed value mean?

7 A. It's the value that is applied for tax
8 purposes.

9 Q. Okay. And then what is the market value?

10 A. That is the value of the land if it were
11 sold today or in the near future.

12 Q. And when you're looking at a tax assessment
13 document, can you determine the fair market value of
14 a parcel of land looking at the tax assessment
15 record?

16 A. Sometimes you can and sometimes you can't.

17 Sometimes the jurisdiction, there's at
18 least an implicit link between the assessed value and
19 the market value; that is, they have specific
20 regulations that they try to set the assessed
21 available at some fraction of the market value, so it
22 might be one-third or one-half or three-quarters of

1 the market value, so if you know the assessed value,
2 you can convert it properly to get some rough
3 estimate of the property's market value.

4 For other assessments, there's no link
5 between the assessment and the market value.

6 Q. Okay. And so then how do you use these tax
7 assessment records, if at all, in analyzing ability
8 to pay?

9 A. Well, it's an independent publicly
10 available source for identifying assets and their
11 valuation for a particular respondent. You know,
12 that's an obvious potential source of funds for
13 penalty payment.

14 Q. And when you say potential source of funds,
15 how can real estate holdings be a potential source of
16 funds?

17 A. Well, they might generate an income stream
18 that contributes to available cash flow for penalty
19 payment.

20 If not significantly leveraged, they
21 may provide a source of collateral for borrowings
22 related to penalty payment, and it could represent

1 the possibility of liquidating the asset for support
2 of penalty payment.

3 Q. Okay. I think earlier you mentioned
4 something about expenses. Let me ask about that now.

5 In the absence of specific information
6 about household expenses provided by respondent, how
7 do you account for household expenses when you're
8 analyzing ability to pay?

9 A. You can gin up some properties using
10 publicly available sources of information, again,
11 just to kind of get a rough estimate. There are
12 various resources that provide estimated or typical
13 household expenses by household size for different
14 regions of the country.

15 Q. And by publicly available information, what
16 specifically are you referring to?

17 A. The two sources I've used in the past is
18 the Bureau of Labor Statistics conducts a household
19 survey which documents typical household expenses for
20 different household sizes for different regions of
21 the country.

22 The Internal Revenue Service also has

1 expense guidelines that they employ in tax collection
2 actions, so there are a couple of different resources
3 that provide, you know, itemized and gross typical
4 expense levels for households.

5 Q. Okay. And if you know, how did the U.S.
6 Bureau of Labor Statistics, how did they come up with
7 the average household expenses?

8 A. They do an actual survey of households
9 periodically and just document the results of that.

10 Q. Okay. Let's get to the respondents in this
11 case.

12 Did you analyze the respondents'
13 ability to pay in this case?

14 A. I did.

15 Q. Okay. And did you follow the method or
16 approach that you explained to us earlier in your
17 testimony today?

18 A. I did.

19 Q. Okay. And what information did you view in
20 analyzing the two respondents in this case, their
21 ability to pay?

22 A. Well, at the start, I just had three years

1 of tax returns, individual tax returns, Form 1040,
2 for the two respondents for the years 2003, 2004, and
3 2005.

4 JUDGE MORAN: You had individual tax returns
5 for both of them?

6 THE WITNESS: That's correct.

7 Q. BY MS. PELLEGRIN: Okay. And I think you
8 said to start, you viewed.

9 What, if anything, did you do next to
10 view the or try to determine respondents' ability to
11 pay?

12 A. Well, I mentioned the advantages and
13 limitations of the individual tax returns earlier on.

14 They operate their farming enterprise
15 as a sole proprietorship, as something of an informal
16 partnership between the two, so that business
17 enterprise shows up on Schedule F of the individual
18 tax return, Form 1040.

19 So I reviewed that, and obviously, the
20 first issues that came to mind were, you know, what's
21 happening with these other three components that I'm
22 interested in, what's their asset and liability

1 situation, what is their household and personal
2 expense situation, and so I embarked on the course I
3 outlined further of trying to go find some publicly
4 available sources of funds, sources of information to
5 conduct that analysis, and I think at the same time
6 and prior to that, EPA was out trying to collect some
7 of that information directly from the respondents.

8 Q. Okay. Let's turn first to some
9 respondents' exhibits. There's a Respondents'
10 Exhibit I believe 1. We'll start with Exhibit 1 now.

11 Okay. Mr. Ewen, can you flip through
12 Respondent's Exhibits 1 through 6?

13 A. Yes.

14 Q. Okay. And looking at Respondents'
15 Exhibits 1 through 6, have you seen these documents
16 before today?

17 A. I have. These are the individual tax
18 returns for Andrew and Robert Hesel for the years
19 2003 through 2005.

20 Q. Okay. And have you reviewed these tax
21 returns in performing your analysis of the
22 respondents' ability to pay?

1 A. I have.

2 Q. Okay. And just generally tell me, what do
3 these tax returns tell you about respondents'
4 financial situation in this case?

5 A. Well, you can get a little bit of
6 information, as I mentioned, on their personal income
7 and cash flow and kind of the nature of the farming
8 enterprise from the tax return, and basically the
9 take away from the tax return is this is a farming
10 enterprise that generates in the three years for
11 which I have information about 350 to \$450,000 in
12 gross revenues.

13 You subtract out all the deductible
14 expenses related to that farming enterprise and add
15 in a little bit of other limited sources of income to
16 the respondents, they end up having taxable income
17 each year in the neighborhood of \$41,000.

18 And importantly, of course, when we've
19 got a business enterprise involved here, particularly
20 a capital intensive one, we have to account for the
21 fact that there are likely to be significant expenses
22 deducted for tax purposes that don't actually

1 represent outflows of cash, so we've got to reconcile
2 the taxable income figure to actual personal gross,
3 personal cash flow, and so the real bottom line here
4 on the cash flow side from the farming enterprise
5 over the three years is this farming enterprise
6 generates for each of the two respondents about
7 \$88,000 in after tax cash flow after all is said and
8 done.

9 JUDGE MORAN: \$88,000 together?

10 THE WITNESS: Each.

11 Q. BY MS. PELLEGRIN: Mr. Ewen, can you just
12 sort of briefly describe the method or the formula
13 that you use to calculate the \$88,000 cash flow for
14 each respondent in this case?

15 A. Right, that's important because, and it can
16 be a little confusing because in typical instances
17 with individuals, most of us operate on a cash basis.
18 Income that comes in represents actual cash coming to
19 us, and expenses that we pay for represent actual
20 expenditures of cash, and so a measure of taxable
21 income that appears on our individual tax return
22 actually represents our personal cash flow. It is

1 the difference between cash in and cash out if it's
2 positive.

3 Here, since we have a
4 capital-intensive business enterprise intertwined
5 with the personal income tax return, we've got to
6 make sure that we reconcile taxable income to cash
7 flow, if that makes sense, because in this case,
8 we've got expenses that can be deducted for tax
9 purposes that do not represent actual outflows of
10 cash.

11 So we've got to get a clean measure of
12 cash flow before we start anything, and to do that,
13 we reconcile the taxable income amount to the cash
14 flow amount by adding back any non-cash expenses that
15 appear in the tax return.

16 Q. Okay. And by non-cash expenses that appear
17 in the tax return, what do you mean by that?

18 A. The main one here is depreciation.

19 Q. And what is depreciation?

20 A. Depreciation is simply a means for
21 allocating the purchase price of an asset over its
22 useful life, so you spend money today to buy the

1 asset, but for purposes of accounting, and in this
2 case, tax accounting, you allocate the cost of that
3 purchase over a period of years based upon a
4 depreciation scheme, and the tax code has particular
5 depreciation schemes and allowances set up to allow
6 for that.

7 But we want to get all that reconciled
8 so we have a clean measure of cash flow for these
9 individuals each year, and then we can apply the
10 appropriate level of household expense burdens and
11 debt burdens so we get to a net amount.

12 Q. Okay. Let's take a look at one of these
13 tax returns.

14 Let's look at Exhibit 1.

15 A. Okay.

16 Q. And for the record, can you read in whose
17 tax return this is for?

18 A. This is the 2003 tax return for Andrew
19 Heser.

20 Q. Actually, let me have you turn to -- let's
21 start with Exhibit 6 for now.

22 Just read into the record whose tax

1 return this is.

2 A. This is the 2005 individual income tax
3 return for Robert Hesel.

4 Q. Okay. Now, as reflected on this, what is
5 the adjusted gross income as reflected on this tax
6 return?

7 A. Well, this is, for this year, it's \$30,135.

8 Q. And can you tell us on the face of this
9 form where you find that information at?

10 A. That's line 37 on the front page.

11 Q. Okay. And for the record, that's at the
12 lower right-hand corner of the page, is that correct?

13 A. That's correct.

14 Q. Okay. So looking at the adjusted gross
15 income, Mr. Ewen, does that or does that not reflect
16 the actual money that this taxpayer received at the
17 end of the tax year?

18 A. Well, it doesn't reflect the individual's
19 personal cash flow.

20 Q. Okay. And can you tell me how?

21 A. In terms of it's their gross cash flow
22 because we want to get the non-cash expense that's

1 deducted embedded in this net amount reconciled back
2 to cash flow, okay?

3 So if we can just, if I can guide you
4 through it.

5 Q. Okay. Yeah.

6 A. We want to go back to Schedule F.

7 Q. And where are you looking at?

8 A. Page 81. There's a page number on here.

9 Q. Okay. You are looking at -- there's two
10 Bates numbers on this page for the record. Can you
11 please read those two? At the very bottom of the
12 page, it looks like there's two Hesper exhibit
13 numbers. Can you read those into the record?

14 A. Well, it's Hesper Exhibit No. 67.

15 Q. And do you see the bottom middle of the
16 page?

17 A. Page 81.

18 Q. Okay. And now please continue.

19 A. All right. And if you go down to the
20 middle of the page, Part 2, line 16, you'll note the
21 depreciation charge there.

22 Q. Okay. And what is that number?

1 A. 39,396.

2 Q. Okay.

3 A. And you'll note in Part 2, this is farm
4 expenses, so these are farm expenses deducted from
5 farm revenues. The difference between revenues and
6 expenses, the 23,623, is then reported on the front
7 page, and that's embedded in the \$30,135 figure that
8 I mentioned earlier.

9 So we've got a non-cash expense
10 embedded in the taxable income figure. To get that
11 reconciled to actual cash flow, we have to add it
12 back.

13 Q. Okay. And can you please explain a little
14 more for us English majors what you mean by embedded
15 in and why you have to add it back?

16 A. Because they're deducting the depreciation
17 expense from the farming revenues, perfectly
18 legitimate from a tax perspective, and as such, the
19 depreciation expense is a deduction from revenue and,
20 therefore, a reduction in apparent taxable income.
21 It's an expense. It reduces your taxable income. It
22 reduces the amount of taxes that you pay.

1 It doesn't represent an actual outflow
2 of cash however, so we want to add that back to the
3 taxable income figure to get a measure of cash flow.

4 Q. Okay. And then the measure of cash flow
5 when you add those two together, what is that number?

6 A. That is, the gross cash flow amount is the
7 starting point for identifying whether net cash flow
8 is going to be available, potentially available for
9 penalty payment. In other words, we get to a figure
10 of gross cash flow -- in this case on average year to
11 year is about 88,000. Based on the information we
12 have, excluding 2006, it's about \$88,000 each on an
13 after tax basis.

14 And then we've got to start burdening
15 that with existing obligations; namely, their
16 personal household expenses, existing principal debt
17 payments and the like, and then we see if anything is
18 left.

19 JUDGE MORAN: And just so I can understand this
20 as you're going along here, when you're talking about
21 depreciation, you're including things like I guess on
22 a farm we'd have a farm tractor, right?

1 THE WITNESS: Yes.

2 JUDGE MORAN: Okay. But you're not suggesting
3 that, while you're trying to put back depreciation on
4 let's say this hypothetical tractor, you're not
5 suggesting at all that the tractor is not, in fact,
6 aging and wearing out during this period of time.

7 THE WITNESS: I am -- well, they're using it.
8 It is, in fact, wearing out.

9 JUDGE MORAN: It has a life.

10 THE WITNESS: Yes, it has a life, but I want to
11 get to a clean cash flow measure for purposes of a
12 projection.

13 The cash flow component is forward
14 looking. It's what you can generate over a period of
15 time to fund a penalty payment. It's not backward
16 looking, so I'm using historical information to look
17 forward.

18 JUDGE MORAN: So to make sure I understand
19 this, you don't really consider the fact that a piece
20 of equipment during this period of time, which is
21 what depreciation is all about, you don't consider
22 that it is, in fact, aging. You just look at that as

1 available cash, is that right?

2 THE WITNESS: Right. I will, once we get that
3 gross cash flow amount and we start burdening it with
4 existing obligations, we might consider whether we
5 need to provide an allowance for purposes of
6 continued reinvestment in the business enterprise.

7 JUDGE MORAN: Isn't that what depreciation is
8 about though itself? Isn't it about as things wear
9 out...

10 THE WITNESS: To some extent, it captures the
11 rate at which you would reinvest in the business.

12 JUDGE MORAN: So you would, you're in effect --
13 let me see if I understand this. You're in effect
14 applying your own schedule of depreciation maybe.

15 THE WITNESS: I am trying to reconcile net
16 income to cash flow because what we're concerned
17 about is...

18 The penalty is going to be paid with
19 cold hard cash. Ultimately, if there's a penalty in
20 this case, they're going to have to write a check, so
21 I want to get to a measure of cash flow that
22 represents cash in, cash going out.

1 Taxable income here, it isn't an
2 accurate measure of that because we've got this
3 depreciation charge.

4 Now, we'll appropriately control for,
5 you know, we would like to appropriately control for
6 whether we've got a burden perspective cash flow or a
7 forecast of cash flow with some allowance for
8 continued reinvestment in the firm, but we want to
9 get it to a clear forecast of gross cash flow first.

10 JUDGE MORAN: Okay. Go ahead, Ms. Pellegrin.

11 Q. BY MS. PELLEGRIN: Mr. Ewen, do the tax
12 returns on Exhibits 1 through 6, do these provide you
13 with enough information about the respondents'
14 assets?

15 A. No.

16 Q. And in this case, other than these tax
17 returns, Exhibits 1 through 6, what other sources of
18 information, if any, did you look at in performing
19 your analysis of respondents' ability to pay?

20 A. Well, the main thing, I went out to the
21 Marion County tax assessor's office and tried to get
22 a database pulled on the properties and real estate

1 owned by the respondents, accessed the publicly
2 available sources of information I mentioned earlier,
3 in this case I guess the Internal Revenue Service,
4 the household expense information, and then I think I
5 mentioned yesterday the general Internet-based ag
6 research that I completed.

7 Q. Okay. Let's look at Complainant's
8 Exhibit 41.

9 JUDGE MORAN: What was the exhibit number,
10 counsel?

11 MS. PELLEGRIN: Exhibit No. 41.

12 JUDGE MORAN: Respondents?

13 MS. PELLEGRIN: Complainant's Exhibit No. 41.

14 Are you there?

15 THE WITNESS: I'm there, yes.

16 Q. Looking at Complainant's Exhibit No. 41, do
17 you recognize this document, Mr. Ewen?

18 A. I do. It's the database pull from the
19 Marion County Supervisor of Assessments.

20 Q. And who obtained these records?

21 A. I did.

22 Q. And how did you obtain these records?

1 A. I called the Marion County Supervisor of
2 Assessments.

3 Q. Okay. And in general terms, looking at
4 Exhibit No. 41, what information is contained in
5 these records?

6 A. This is the tax assessment pull. It
7 matched the names that I provided to her in terms of
8 Robert and Andrew Hesel with any matches of parcels
9 in the county, and this is the results, and it
10 provides the parcel pin number and the acreage and
11 the land use type and the owner and the owner's
12 address and assessment information.

13 Q. Okay. Now, looking at all the documents in
14 Exhibit 41, did you consider all these records in
15 evaluating the two respondents in this case, their
16 ability to pay?

17 A. Well, I reviewed all of them, but I
18 excluded -- a number of them came up under Robert and
19 Shelby Hesel, so I excluded those and just focused on
20 the ones that were jointly owned by Robert and Andrew
21 Hesel.

22 Q. And, Mr. Ewen, why did you not look at the

1 records for Robert and Shelby Hesper?

2 A. I think it was a representation from EPA
3 counsel that that was a different -- that's a
4 different couple not involved in the case.

5 Q. Okay. So what, if anything, do these
6 records, the ones that you looked at for Robert and
7 Andrew Hesper, what do they tell you about the
8 respondents' financial condition in this case?

9 A. Well, by my reading of this, my initial
10 interpretation was it looked like they owned about
11 1,331 acres of farmland in Marion County. They owned
12 a couple different parcels of real estate, real
13 property with structures or buildings on them, and
14 some mineral interests also appear on these
15 assessment records as well.

16 Q. Okay. And did you say 1,331 acres of
17 farmland?

18 A. That's correct.

19 Q. Do you have any information about the value
20 of this farmland looking at these tax assessment
21 records?

22 A. Well, this is a case where the assessment

1 records themselves for the farmland don't give you
2 any picture of the farmland's actual market value.
3 That is, there's no link between the assessed value
4 and an implied market value, so we've got to get that
5 from a different source.

6 Q. Okay. And what, if anything, did you
7 obtain from different sources?

8 A. Well, I asked the Marion County assessor if
9 she had a general sense of what ag land was selling
10 for in the county, and she provided that information.

11 I also had some information just on
12 the statewide level from the Illinois Ag Department.

13 Q. Okay. And looking at the document Bates
14 stamped 1220, let's see, can you read the second
15 paragraph into the record, please, starting with
16 "this value"?

17 A. This value? The second paragraph you said?

18 Q. Yes. Starting with I believe "this value,"
19 or actually, let's start with, "You can multiply,"
20 about midway through that paragraph.

21 A. Okay. "You can multiply the assessments
22 for home site, land lot, and building dwelling by

1 three to reach a calculated market value for a
2 parcel. Farm buildings are assessed according to
3 their contribution to the farm and farmland is by its
4 productivity. We have been seeing farmland selling
5 in the range of \$2,500 to \$3,000 per acre."

6 Q. And is this what you mentioned was one of
7 the sources that you obtained the information about
8 the value of farmland?

9 A. That's correct.

10 Q. Okay. And in this case, were you -- I
11 think you said you obtained information about the
12 value of farmland from another source as well in this
13 case?

14 A. Just in the Illinois Ag Department
15 information, the statewide. I think in '05, the
16 statewide selling price was \$2,900 an acre, so that
17 just corroborated that we've got a range in Marion
18 County consistent with that point estimate.

19 Q. Okay. Now, based on the estimated value
20 that you got from a couple different sources that you
21 just described, what is the total dollar value, if
22 you know, of respondents' 1,331 acres of farmland

1 holdings, and by value, you know, what is it based on
2 the estimated value you looked at?

3 A. Right. Well, just using the county
4 assessor's lower bound estimate of 2,500, you
5 multiply 2,500 by 1,331, and I think the product is
6 about \$3.3 million market value of the landholdings.

7 Q. Mr. Ewen, I believe earlier you talked
8 about looking at the tax returns through 2005, and I
9 think you said you couldn't or you didn't look at
10 2006.

11 Was the 2006 tax return, if you know,
12 provided in this case?

13 A. It was not to my knowledge.

14 Q. Okay. Now, are you familiar with any data
15 regarding the price of corn in the State of Illinois?

16 A. Right. I looked at, as part of the general
17 research I mentioned earlier, that's what I looked
18 at, price of the relevant commodities over the last
19 year.

20 Q. Okay. And how did you find the data on the
21 commodities in the past year?

22 A. It was provided in the Web research pages

1 that were forwarded to me, and then I just, you know,
2 it's very easy to quickly look up commodity price.

3 Q. Okay. And how did Illinois corn prices in
4 2006 compare to corn prices in previous years?

5 A. Well, this is one of the big concerns I
6 have here with this case is we've got farming
7 performance information up through 2005, and
8 basically, the whole marketplace has changed over the
9 course of the past year. I mean, it's really
10 critical to get some information here about what
11 happened in 2006 because we had corn prices going
12 from about 2 bucks a bushel to for a time over \$4 a
13 bushel. Soybeans were around a little over \$5 per
14 bushel in '05 and prior to that. Now they're up to
15 over \$7 a bushel.

16 Same thing for wheat. I understand
17 they grow some winter wheat here. You know, we've
18 got wheat prices going from \$3 per bushel up way over
19 \$4 per bushel, so we've got a completely different
20 operating environment presumably for this farm, and
21 we're really flying blind with respect to its current
22 financial performance.

1 Q. Okay. And based on the publicly available
2 information you obtained about corn and soybean
3 prices, can you form an opinion about what
4 respondents' gross profits might have been in 2006
5 relative to the previous years?

6 A. Well, it's no better than a ballpark
7 estimate. Obviously, I don't know the mix of crops
8 that the Hesers used in '06 nor their specific yield
9 nor the particular point in the year or how they
10 specifically marketed the crop and what price they
11 received, but you do some...

12 MR. SMALL: Your Honor, then I'll object
13 because if he doesn't know all these things, this
14 number is just going to be irrelevant.

15 JUDGE MORAN: Sustained.

16 Q. BY MS. PELLEGRIN: All right. That being
17 said, Mr. Ewen, without giving me a number, can you
18 tell me if, in your opinion, it would be more or less
19 than the previous years?

20 A. I would think it would be a good bit
21 better. The relative commodity prices are doubled.

22 MR. SMALL: I'm going to object. It's still

1 based on the same thing. How can you even say that?

2 I mean, you just don't know.

3 JUDGE MORAN: It's speculative, but I'll allow
4 that.

5 You can explore that again in
6 cross-examination if you think it's worth your time.

7 Q. BY MS. PELLEGRIN: All right, Mr. Ewen.
8 Moving on and returning specifically to Complainant's
9 Exhibit 41, do these records indicate whether
10 respondents own any other real estate besides
11 farmland?

12 A. They do indicate that they own a couple of
13 other parcels that have homes or rental property on
14 them, various buildings, farm structures, that sort
15 of thing.

16 Q. Okay. And do these records provide any
17 information on the value of these other property
18 holdings?

19 A. They do. It's not overly significant. I
20 think the market value of the two that I identified
21 is about \$60,000, something like that.

22 Q. And how did you, the method you

1 described -- strike that.

2 Do these records indicate whether
3 respondents hold any other property interests besides
4 the ones that you just described?

5 A. I think I alluded to one other category, a
6 couple of mineral royalty holdings show up related to
7 the property holdings.

8 Q. And are you aware of any valuation of the
9 mineral holdings?

10 A. I don't have any valuation information for
11 the mineral holdings.

12 Some very limited royalty income
13 appears on their individual tax returns, but that's
14 all I have.

15 MS. PELLEGRIN: Okay. Your Honor, may we have
16 five minutes?

17 JUDGE MORAN: Sure.

18 About how long do you anticipate going
19 with Mr. Ewen?

20 MS. PELLEGRIN: Maybe about 20 minutes longer.

21 JUDGE MORAN: Okay. All right. We'll take a
22 five-minute break.

1 (Recess taken.)

2 JUDGE MORAN: Ready to resume?

3 MS. PELLEGRIN: Yes, Your Honor.

4 Q. Mr. Ewen, how, if at all, did the
5 information about the respondents' real estate
6 holdings affect your analysis of respondents' ability
7 to pay in this case?

8 A. Well, it's important. I mean, it indicated
9 that they've got a sizeable amount of landholdings
10 with a significant valuation, and as I mentioned
11 earlier, on a gross basis, that's a starting point
12 for identifying potential sources of funds when we've
13 got \$3.3 million potentially of landholdings sitting
14 there on the balance sheet.

15 Q. Okay. And landholdings on the balance
16 sheet, Complainant's Exhibit 41, the landholdings you
17 looked at, how might respondents use those
18 landholdings to generate revenues for payment of a
19 penalty?

20 A. Well, they could farm it and hopefully
21 generate income off of it. The asset is generating
22 an income stream to the benefit of its owners, and if

1 that contributes sufficiently to cash flow, then
2 we've got a measure of available cash flow for
3 penalty payment.

4 If it is not significantly burdened
5 with debt, it can provide a source of collateral for
6 borrowing against it and potentially could represent
7 a source of funds if a portion of it were liquidated
8 or sold to generate cash for penalty payment.

9 Q. Okay. Now, based on your review of the
10 information identified thus far, what were your
11 overall impressions of respondents' financial
12 condition and ability to pay?

13 A. Well, they're making a living as farmers.
14 It's their primary and basically sole source of
15 income. There's two households that appear to be
16 able to make a living off of this amount of acreage.
17 They continue to reinvest in the farming enterprise.

18 If you tally up the apparent purchases
19 over the years 2003 through 2005, it looks like
20 they've expended about a half million dollars in new
21 property and planting equipment.

22 Over those years, it indicates some

1 optimism for the future that reinvestment in the
2 business does, and they've got a reasonably good
3 sized asset base of ag land to support that farming
4 enterprise.

5 And then lastly, most importantly,
6 they're obviously operating into much improving
7 market conditions in the past couple years, and I
8 would presume that they're benefiting from that as
9 well.

10 MS. PELLEGRIN: Your Honor, at this point, I'd
11 like to move to admit Complainant's Exhibit 41 into
12 evidence.

13 MR. SMALL: Your Honor, we have a limited
14 objection to that, and that is that there are some
15 portions of Exhibit 41 that contain Robert and Shelby
16 Hesper tracts which, of course, are not Bobby or Andy
17 Hesper. Robert and Shelby Hesper are the father and
18 mother of the respondents.

19 And this may be something closer to
20 cross-examination but the first letter indicates a
21 total number of tracts, and I can't tell from that
22 letter whether or not, in fact, that's included in

1 these other tracts that are owned by non-respondents,
2 so that limited objection.

3 JUDGE MORAN: Okay. Having heard that, I agree
4 with what you suggested. It's really within the
5 realm of cross-examination, so I'm admitting the
6 document, and to the extent that you want to make
7 points about that, the limitations of this exhibit,
8 I'm not going to not admit the exhibit based upon
9 what you've stated.

10 That's my ruling.

11 So Exhibit 41 is admitted.

12 (Whereupon Complainant's Exhibit
13 41 was admitted into evidence at
14 this time.)

15 MS. PELLEGRIN: Your Honor, at this time, we'd
16 also like to move to admit -- they're respondents'
17 exhibits, but I don't know how you want to work this,
18 call them Joint Exhibits 1 through 5 which are the
19 tax returns that respondent provided.

20 MR. NORTHRUP: 1 through 6.

21 MS. PELLEGRIN: 1 through 6.

22 MR. NORTHRUP: We have no objection to that.

1 MS. PELLEGRIN: Yes, and I'll look for what you
2 just said as well.

3 JUDGE MORAN: We'll go off the record.

4 (Off the record.)

5 JUDGE MORAN: Let's go on the record.

6 MS. PELLEGRIN: Your Honor, first of all,
7 regarding Exhibit 43A which is the exhibit that I
8 referred to earlier in Mr. Ewen's testimony,
9 Mr. Northrup and I agreed to stipulate to the
10 admissibility of that document which was a financial
11 request form that Mr. Ewen talked about earlier in
12 his testimony.

13 JUDGE MORAN: Is that right, Mr. Northrup?

14 MR. NORTHRUP: Yes, it is.

15 JUDGE MORAN: Okay. So EPA Exhibit 43A is
16 admitted.

17 (Whereupon Complainant's Exhibit
18 43A was admitted into evidence
19 at this time.)

20 MS. PELLEGRIN: And also, respondent provided
21 us a copy of Respondent's Exhibit 25 which I brought
22 to Your Honor and to Mr. Ewen to provide to include

1 in your respondents' exhibit binders.

2 JUDGE MORAN: Okay. But I don't have any
3 description. I just have some sheets of paper.

4 Is that Respondents' Exhibit 25?

5 MR. NORTHRUP: It is, and there are page
6 numbers down in the lower, handwritten page numbers.

7 JUDGE MORAN: And beginning with 403?

8 MR. NORTHRUP: Beginning with 403.

9 JUDGE MORAN: And ending with 411?

10 MR. NORTHRUP: Correct.

11 JUDGE MORAN: And that's Respondent's
12 Exhibit --

13 MR. NORTHRUP: 25.

14 JUDGE MORAN: I'm marking on my personal copy
15 that notation that it's R Exhibit 25.

16 Q. BY MS. PELLEGRIN: Mr. Ewen, since the week
17 ending March 31, 2007, have you reviewed any other
18 information relating to respondents' financial
19 condition?

20 A. I have.

21 Q. And just tell me in general terms what that
22 was.

1 A. It was a submission of some additional
2 financial information from Andrew and Robert Hesper.

3 Q. Okay. And let me ask you to turn to
4 Respondents' Exhibit 25.

5 A. Okay.

6 Q. And do you recognize this exhibit,
7 Respondents' Exhibit 25?

8 A. I do.

9 Q. And have you seen this exhibit before
10 today?

11 A. I have.

12 Q. Approximately when did you first see this
13 exhibit?

14 A. I think it was mid month.

15 JUDGE MORAN: What month?

16 THE WITNESS: I'm sorry. The middle of April.
17 I can't recall the specific day when I received it.

18 Q. BY MS. PELLEGRIN: Okay. And can you
19 describe the documents from a document Bates numbered
20 403 through a document Bates numbered 411?

21 A. Right. It's a handwritten rendering from,
22 I guess initialed by Andrew, various pages initialed

1 by Andrew Robert Hesel, and it basically provides
2 information that speaks to three of the four
3 components that I talked about earlier.

4 There's some further information
5 detailed about personal and business expenses, and
6 then for each individual it provides some itemization
7 of their assets, holdings, and liabilities.

8 Q. Okay. And looking at these documents or at
9 the face of these documents, do any -- I believe you
10 said handwritten. Is there any letterhead on any of
11 these documents?

12 A. No.

13 Q. Is there any indication that these
14 documents have been reviewed by an accountant?

15 A. No.

16 Q. Okay. Let's see, you said that these
17 documents appear to indicate certain assets and
18 liabilities. Let's focus on first the parts of these
19 that deal with liabilities.

20 Mr. Ewen, how does the information
21 contained in these documents regarding liabilities
22 compare to the information that was reported by

1 respondents on their tax returns that we reviewed
2 earlier?

3 A. The amount of liabilities that they cite
4 here which total, for the two of them, total to about
5 \$2.3 million worth of debts surprised me considerably
6 when I received it because the magnitude of interest
7 expenses that were deducted on Schedule F as part of
8 the farming enterprise I think in 2005 was about
9 \$16,000, and obviously, under any sort of, I mean, I
10 don't know anything about the interest rate or the
11 term of any of these loans, but \$16,000 in interest,
12 I can't make that comport to \$2.3 million in
13 liabilities. I mean, you would expect much higher
14 interest expense, unless I'm missing something on
15 this, but you'd expect much higher interest expenses
16 from liabilities totaling \$2.3 million.

17 Q. Okay. And you said unless you're missing
18 something.

19 Let me ask, from these handwritten
20 documents, can you determine anything about the terms
21 or the conditions of the liabilities listed?

22 A. No. It's just one line item lump sum

1 liability. I don't know anything about the types of
2 loans, whether they're equipment loans, land loans,
3 crop loans, what kinds of terms, what kind of rates
4 are attributable to them so I can have any means of
5 trying to comport that to the expense information
6 that appears on the tax return.

7 Q. Okay. And can you determine the time
8 period over which the liabilities must have been paid
9 according to this document?

10 A. No.

11 Q. And by looking at this document, can you
12 determine how accurate the statements of liabilities
13 are in this document?

14 A. No, and, in fact, I'm concerned about the
15 accuracy because I can't get it to match with what
16 limited information I have from the tax returns
17 regarding the interest expense that they deduct
18 there.

19 Q. Okay. And in addition to the tax returns
20 that are in the record, are there any documents in
21 the record that you're aware of that corroborate
22 respondents' statements of their liabilities?

1 A. No.

2 Q. Okay. Now, Mr. Ewen, you said unless
3 you're missing something.

4 Now, what additional information would
5 you need in order to determine the actual extent of
6 respondents' liabilities?

7 A. Well, any of the corroborating documents,
8 you know, the loan documents that back up this total,
9 you know, that would be the ideal situation to really
10 get a handle on things, but even the payment
11 statements, the monthly mortgage statements that
12 provide some information regarding the principal
13 value of the debt and the monthly payments and that
14 sort of thing would be helpful to get an accurate
15 crosswalk applied here.

16 Q. Okay. And if you know, did USEPA request
17 these loan documents from respondents?

18 A. It's my understanding that EPA did.

19 Q. Okay. And if you know, has EPA received
20 any of these loan documents from respondent?

21 A. Not to my knowledge, no.

22 Q. Okay. Have you been provided with any loan

1 documents regarding this?

2 A. I have not.

3 Q. Okay. Let's just turn generally
4 to -- we've looked at liabilities on Respondent's
5 Exhibit 25. Let's turn to evaluation of their
6 assets.

7 Can you determine how accurate each
8 respondent's evaluation of his assets are from
9 Respondents' Exhibit 25?

10 A. I can't confirm the accuracy other than the
11 representation that's here.

12 Q. What additional information would help you
13 determine the actual value of respondents' assets in
14 this case?

15 A. Well, you know, I'm not too concerned about
16 getting every detail on the equipment. You know,
17 we're not looking at that explicitly as a potential
18 source of funds. You know, that's farming equipment
19 and probably other necessary equipment.

20 So it would be nice to get -- I
21 presume the tax accountant prepares a depreciation
22 schedule for their equipment holdings. It would be

1 nice to see that so you'd get an itemization of all
2 the equipment and the cost basis, you know, the
3 purchase price for the equipment. That would be
4 helpful.

5 But the main concern here is the
6 valuation of the real estate holdings. That's
7 relevant to the ability to pay analysis.

8 Q. Okay. Just looking at this exhibit as a
9 whole, what are your areas of uncertainty, if any?

10 A. Well, linking to the real estate holdings,
11 they do provide an itemization of their holdings, and
12 the good news here is the total acreage that they
13 indicate that they own is 1,351.7 acres. That's
14 obviously consistent with my rough estimate from the
15 county assessor's database information where I
16 thought they own in the ballpark of 1,331 acres. So
17 we're pretty close on the number of acres I guess.

18 The big difference here is if you take
19 the valuation of the land, it applies a per acre
20 value of about \$1,330 an acre, and you can see that
21 here. They provide a gross value for their
22 landholdings, their ag landholdings, again, 1,350

1 acres, of about \$1.8 million. So \$1.8 million
2 divided by 1,350.7 acres yields a value per acre of
3 \$1,330 based on their information.

4 Obviously, I have different
5 information about what the value of this land might
6 be.

7 JUDGE MORAN: Just let me stop you there.

8 So by your calculation, they come up
9 with \$1,130 an acre, and you came up with what?

10 THE WITNESS: They come up with 1,330.

11 JUDGE MORAN: I'm sorry; 1,330.

12 And what did you come up with a value
13 per acre?

14 THE WITNESS: Based on the two sources of
15 information I have, it's somewhere in -- it could be
16 2,500 to \$3,000 per acre.

17 JUDGE MORAN: And I take it if their figure is
18 more accurate than your figure, that would have a
19 very significant impact on your whole analysis here,
20 right?

21 THE WITNESS: That is correct. If you look at
22 their representation here, they're pretty well

1 levered up with debt. They're citing total assets
2 here of about \$2.4 million, the land plus equipment.
3 They're citing liabilities of about \$2.3 million, so
4 there's very limited net worth in the farming
5 enterprise as indicated by their representation here.

6 If you use an alternative valuation,
7 we suddenly have a net worth of about \$1.5 million,
8 and we're talking about a difference in per acre
9 value of \$1,200, the difference between \$1,300 and
10 2,500.

11 JUDGE MORAN: Or more.

12 THE WITNESS: Or more.

13 So that difference on the low end
14 times 1,350 acres and you get \$1.5 million, so you go
15 from a very limited net worth to a relatively
16 significant net worth.

17 JUDGE MORAN: Okay. And I would just make the
18 comment here that as I told counsel for the
19 respondents weeks ago, you know, if that is really
20 the case, if the net worth is closer to the \$1,330,
21 it's a shame that more information wasn't provided
22 because essentially, it's too late now to be doing

1 that, you know, the prehearing exchange requirements,
2 etc.

3 So if the picture, as Mr. Ewen just
4 conceded, if the picture is closer to what this
5 Exhibit 25 would indicate, if it really is that, then
6 it's unfortunate that that information wasn't
7 provided in a more reliable fashion than just the
8 handwritten notes that I have in front of me for
9 Exhibit 25.

10 Having said that, of course, ability
11 to pay assumes that liability is established. It
12 assumes that the statute of limitations has not run,
13 and it also assumes that if we get through all of
14 those hurdles, that after I consider all the other
15 statutory criteria, I would have to arrive at, what
16 is it, 120,000 was it, EPA?

17 MS. PELLEGRIN: Yes, Your Honor.

18 JUDGE MORAN: I'd have to get to that point,
19 but, for instance, if I went through the calculation,
20 I'm just throwing this out, but let's say I assume
21 that after looking at the other statutory criteria
22 it's \$30,000 penalty.

1 Please, if I ever get to that point
2 and I write 30,000, that doesn't mean that I
3 formulated that now. It would just be happenstance,
4 okay? Because I don't know what's going to happen.

5 But the point is that this witness is
6 not testifying about ability to pay 30,000. It would
7 be a fortiori I guess his conclusions that he thinks
8 they could pay 120,000 based upon the reliable
9 information that's in the record now. Then the case
10 would be stronger that they could pay something less
11 than that.

12 Just a few musings I wanted to express
13 at this point in the proceeding regarding strictly
14 ability to pay.

15 Okay. Go ahead, Ms. Pellegrin.

16 Q. BY MS. PELLEGRIN: Okay. Mr. Ewen, what,
17 if any, other areas of uncertainty do you have
18 regarding Respondent's Exhibit 25?

19 A. Well, we've been talking about a big one.
20 I mean, there's really two big issues here. We've
21 got potentially a significantly different measurement
22 of the valuation of this land and a measure of

1 apparent net worth of the farming enterprise which
2 really changes the perspective on ability to pay for
3 the farming enterprise.

4 In addition, we've got I presume, I
5 won't speculate about what 2006 looked like, but I
6 certainly don't have to speculate when I say
7 commodity prices have increased substantially
8 relative to the operating environment for which I
9 have tax return and income information for. We have
10 a doubling of corn prices, both wheat and soybeans up
11 a couple dollars per bushel, and so we've got some
12 significant uncertainty regarding the apparent
13 financial resources that are potentially available to
14 these folks for a penalty payment.

15 Q. Mr. Ewen, that being said, I'm just going
16 to be blunt here. USEPA asked you to come up with
17 whether respondents had an ability to pay in this
18 case.

19 Were you able to do that in this case?

20 A. Well, I grappled long and hard about what
21 I'm willing to say here, and I think the answer is, I
22 mean, you choose, you make an inference about what

1 2006 and subsequent years might look like, and you
2 use my valuation of their landholdings and you've got
3 potential financial resources available here
4 potentially approaching the proposed penalty.

5 I think the proposed penalty is on the
6 upper end, but we could potentially get there.

7 On the other hand, we've got a
8 representation here of basically no net worth in the
9 farming enterprise and performance information
10 through 2005 which is representative of much weaker
11 and much lower commodity prices, and in that case,
12 you use all that, it would argue for much more
13 limited financial resources available for penalty
14 payment.

15 So that's sort of where this leaves us
16 I think is we've got to fill in these gaps or
17 hopefully fill in some of these gaps throughout the
18 rest of this hearing.

19 MS. PELLEGRIN: Your Honor, I have no further
20 questions.

21 JUDGE MORAN: Okay. Do you need a minute,
22 counsel for respondents, to begin cross-examination

1 or can you go into it?

2 MR. SMALL: We're ready to go, Your Honor.

3 JUDGE MORAN: Okay. And I take it this is
4 EPA's last witness?

5 MS. PELLEGRIN: Yes, Your Honor, it is.

6 JUDGE MORAN: Whenever you're ready.

7 MR. SMALL: Thank you, Your Honor. Good
8 morning.

9 JUDGE MORAN: Good morning.

10 CROSS-EXAMINATION

11 BY MR. SMALL:

12 Q. Mr. Ewen, my name is Brad Small, and I'm
13 going to be asking you a few questions just to try
14 and clarify a few matters this morning.

15 If I ask you anything that you don't
16 understand, just tell me that, I'll try and rephrase
17 the question. Fair enough?

18 A. Okay.

19 Q. Mr. Ewen, you indicated that you work for
20 Industrial Economics, is that correct?

21 A. Yes.

22 Q. And that's located in Massachusetts?

1 A. That's correct.

2 Q. And I don't want to mischaracterize it, but
3 the great bulk of your clientele work is for EPA, is
4 that correct?

5 A. I wouldn't characterize it as for EPA
6 probably. In terms of the firm?

7 Q. Yes.

8 A. Or for me personally?

9 Q. For the firm.

10 A. Oh, I think it's about a third.

11 Q. Okay. And how about you personally?

12 A. Less than that; well, about a third as
13 well.

14 Q. Okay. And then the other balance of the
15 time you represent some other governmental agencies,
16 is that correct?

17 A. I work in sort of the public policy realm.
18 I work for some other federal governmental agencies,
19 that's correct.

20 Q. What percentage of the time would you be
21 working for private business as opposed to the
22 government?

1 A. Ten to twenty percent of my time.

2 Q. So the great bulk of your work is for
3 agencies of the federal government?

4 A. That's correct.

5 Q. And if you had to characterize it, do you
6 represent, as an expert witness, more often or are
7 you involved as a complainant or a plaintiff or the
8 respondent or defendant?

9 A. Most of the time I work on the side of the
10 plaintiffs.

11 Q. Okay. And what percentage of the time
12 would that be?

13 A. It's tough to calculate a percentage. It
14 has been a couple of times, a handful of times that
15 I've worked on the defendant's side of a case.

16 Q. Okay. Now, you indicated you came from a
17 farm in North Dakota or South Dakota?

18 A. North Dakota.

19 Q. North Dakota.

20 And you raised sugar beets?

21 A. Yes.

22 Q. Okay. What else did you raise out there?

1 A. Soybeans and wheat and barley.

2 Q. Okay. And your land out there was
3 irrigated?

4 A. No.

5 Q. Was that typical of that area?

6 A. Yes.

7 Q. Are you familiar with raising corn?

8 A. No, not so much.

9 Q. Did you raise any winter wheat out in that
10 area?

11 A. We tried. It's a little too cold. Unless
12 you get a good snowfall up there, it's tough to grow
13 winter wheat.

14 Q. So it didn't work too well?

15 A. It doesn't work too well unless they have
16 better varieties now, but it didn't work too well
17 when we tried to do it.

18 Q. Now, Mr. Ewen, having run a bank for 12
19 years myself, I've looked at a lot of cash flow
20 statements too, and I want to discuss with you a
21 little bit about cash flow.

22 First off, is it my understanding the

1 way that you calculate cash flow is first off define
2 what net income remains on their tax return? Is that
3 how you start?

4 A. In this case, yes.

5 Q. And then to that figure, you add any
6 depreciation that they may have taken on their tax
7 return?

8 A. That's correct.

9 Q. And that would be on Schedule F?

10 A. That's correct.

11 Q. And so that is, when you add those two
12 figures together, that's how you get your figure. I
13 think you said \$88,000.

14 A. That's correct, on average over three
15 years.

16 Q. Your ballpark?

17 A. Yes.

18 Q. Okay. But as a matter of fact,
19 depreciation is used just exactly what it's labeled.
20 The government allows you to take a certain amount of
21 depreciation off your tax return based upon the type
22 of equipment that you might have or be it land or

1 depreciation for tax purposes where we have
2 accelerated means of depreciation that likely allows
3 you to fully depreciate your capital asset well
4 before the capital asset is worn out.

5 Obviously, it's an advantage, it's a
6 financial advantage to expense the capital asset as
7 quickly as possible because that expense is worth
8 more today than it is some years from now.

9 Q. So you're telling me there's different
10 types of depreciation in effect?

11 A. There are, right.

12 Q. And again, that's authorized by law. The
13 government allows you to do that.

14 A. Yes.

15 Q. And there are limits on that quick
16 depreciation, are there not?

17 A. That's correct.

18 Q. Now, having reviewed I believe it was
19 Respondents' Exhibits 1 through 6, would you look at
20 those again, please?

21 A. Okay.

22 Q. Now, I'd like to start with, we'll start

1 with Exhibit 1, and that's Andrew Heser's tax return
2 for 2003, is that right?

3 A. Correct.

4 Q. And in that year in Line 34, your adjusted
5 gross income is \$44,143, correct?

6 A. That's correct.

7 Q. And then I want you to refer to Exhibit 2.

8 Is that Andrew Heser's 2004 tax
9 return?

10 A. That's correct.

11 Q. And referring in this case to line 36, the
12 adjusted gross income that year is \$35,955, correct?

13 A. Yes.

14 Q. And so that's a decline of roughly \$8,000
15 from 2003 to 2004, correct?

16 A. Correct.

17 Q. And then referring to Exhibit 3, the
18 adjusted gross income that year on line 37 was
19 \$38,407, is that correct?

20 A. Correct.

21 Q. And when we look at that figure, that
22 figure actually has figured into it the depreciation

1 which has been taken out under Schedule F, is that
2 correct?

3 A. That's correct, without the accelerated tax
4 schedules, yes.

5 Q. Whatever depreciation it is it is?

6 A. That's correct.

7 Q. Now, I'd like to have you turn to
8 Respondent's Exhibit 4, and that's Robert J. Heser's
9 tax return for 2003, is that correct?

10 A. Correct.

11 Q. Now, I don't want to confuse matters but we
12 have two Robert J. Hesers in this room right now. I
13 have a Bobby Heser who I refer to sitting next to my
14 left. He is one of the respondents here. There is a
15 Robert J., both have the same middle initial, but
16 Jules Heser who is his father who's also sitting back
17 in the gallery, but the one we are talking about
18 here, Robert J. Heser, is who I will call Bobby.

19 Now, looking at line 34 of the 2003
20 1040 form, the adjusted gross income for Bobby that
21 year was \$46,388?

22 A. Correct.

1 Q. And referring to Respondents' Exhibit 5
2 being Robert J. Hesper's, Bobby Hesper's 2004 tax
3 return, on line 36, the adjusted gross income that
4 year was what?

5 A. \$38,991.

6 Q. All right. So that's approximately 7,000
7 plus dollars less that year, is that correct, from
8 2003?

9 A. Correct.

10 Q. Now, referring to Respondents' Exhibit
11 No. 6 which is the 2005 tax return of Bobby Hesper, on
12 line 37, the adjusted gross income that year was
13 what?

14 A. \$30,135.

15 Q. Okay. So in the case of Bobby Hesper, his
16 income over that, his adjusted gross income over that
17 period of time was steadily going down, is that
18 correct?

19 A. Correct.

20 Q. From 46,388 in 2003 down to \$30,135 that
21 last year?

22 A. Correct.

1 Q. And Andy Hesper's had gone down from \$44,143
2 in 2003 down to \$38,407 during that same time frame.

3 Do you see that?

4 A. Between '03 and '05?

5 Q. Yes.

6 A. Yeah, from 44,000 down to 38,000.

7 Q. Okay. So both of these, would you describe
8 both of these defendants' incomes as trending
9 downward during that time frame?

10 A. No.

11 Q. During that time frame.

12 A. No, because the taxable --

13 Q. Let me reask that question.

14 Are the adjusted gross incomes of both
15 Andy Hesper -- let's do one at a time.

16 Are the adjusted gross incomes of
17 Bobby Hesper from 2003 to 2005, are they trending
18 downward?

19 A. Yes.

20 Q. Are the adjusted gross incomes of Andrew
21 Hesper from 2003 to 2005 trending downward?

22 A. Yes.

1 Q. Now, you indicated when you began looking
2 for valuations of assets, and really, I'm talking
3 about assets and liabilities or a balance sheet, you
4 were looking for other sources of information, did
5 you run any uniform commercial code searches for any
6 liens upon any properties?

7 A. I didn't personally.

8 Q. Okay. Would you normally look for that?

9 A. No, not necessarily.

10 Q. Even in a case where it's a
11 capital-intensive industry where you would have large
12 equipment or machinery that might be encumbered, you
13 still wouldn't run that?

14 A. I may or may not. It depends on if
15 requested from the respondent.

16 Q. Okay. But in this particular case, you did
17 not do that?

18 A. I did not.

19 Q. Okay. And the valuation that you had
20 placed upon the real estate, as I understand it, and
21 correct me if I'm wrong, was, number one, from a
22 statewide survey of some sort, is that correct?

1 A. That was just used to kind of corroborate
2 the range provided by the county assessor's office.

3 Q. Okay. So you didn't really use that as a
4 guide then?

5 A. Just as a supporting piece of information.

6 Q. Okay. So your primary source of
7 information for your valuation was simply a letter
8 back from the assessor's office, is that correct?

9 A. That's correct.

10 Q. Now, I'd like to refer to Complainant's
11 Exhibit No. 41.

12 Referring to Page 1230, this was a
13 March 6, 2007 letter from a Patty Brough, is that
14 correct?

15 A. Correct.

16 Q. And she's with Marion County Supervisor
17 Assessments Office?

18 A. Yes. I think she is the supervisor of
19 assessments.

20 Q. Okay. Now, looking at the first sentence,
21 it indicates that there were 42 properties which
22 Robert Jeffrey or Andrew Hesel own, is that correct?

1 A. That's correct.

2 Q. Now, referring to Respondent's Exhibit No.
3 25, will you count the number of tracts that are
4 indicated on that document, real estate tracts?

5 A. There's 14 here.

6 Q. Okay. So there may not be any disagreement
7 because the Hesers are actually telling you they own
8 more land than what the assessor told you, but at
9 least according to the Hesers, these are the 14
10 tracts that they own.

11 Maybe they have multiple parcel
12 numbers. Is that possible?

13 A. Well, I think this is... The assessor's
14 office, she just, you know, typed into the database
15 Robert J. Hesper and Andrew, and whatever came up, she
16 sent to me, okay?

17 Q. Okay.

18 A. So there are 42 hits cross-referencing
19 property ownership with those names.

20 Now, I think you're right. I think
21 there's, in my head, there's 16 parcels that were
22 jointly owned by Robert J. and Andrew, and those are

1 the ones that I used, and if you tally up the
2 acreage, you get to 1,331.

3 Q. So we may not have any disagreement here.
4 It just may be that one is calling it so many pieces
5 of property and the other one is saying parcels. It
6 could be just how they allocate the tax bills.

7 A. Right. Well, in the pull, there were, you
8 know, of the 42, there were in excess of 20 that had
9 Robert J. and Shelby Hesel as the owners. Those are
10 the ones I excluded.

11 Q. Okay. So there could be some possibilities
12 that some of the attachments to this exhibit contain
13 land that's not owned by Bobby or Andy Hesel, is that
14 right?

15 A. That is almost certainly true.

16 Q. Okay. And I want to refer you to page
17 1241.

18 A. Okay.

19 Q. And does that show the ownership to be
20 Robert and Shelby Hesel?

21 A. Correct.

22 Q. So that would be one of the instances we're

1 talking about where the respondents don't own that
2 land?

3 A. That's correct.

4 Q. But was included in that letter that was
5 sent by the assessor?

6 A. That's correct.

7 Q. So the assessor's letter would be
8 inaccurate as to that, is that correct?

9 A. Well, I think the text of her letter, 42
10 properties to which Robert Jeffrey -- well, I guess
11 she's assuming the hits that brought up Robert J.
12 matched with Robert Jeffrey.

13 Q. Right. So there may be some confusion
14 there.

15 A. So, you know, I took my best crack at
16 cleaning up that database pull. I gave her two names
17 and some addresses, and I cleaned it up.

18 Q. I understand.

19 Would you refer to page 1248?

20 A. Okay.

21 Q. And that's the same problem there. That's
22 owned by Robert J. and Shelby Hesser, correct?

1 A. Correct.

2 Q. And refer to page 1249. The ownership
3 there is Robert J. and Shelby Hesel, correct?

4 A. Correct. That's just the second page of
5 the same parcel number.

6 Q. And look at page 1250.

7 A. Okay.

8 Q. And that ownership is Robert and Shelby
9 Hesel, correct?

10 A. Correct.

11 Q. Page 1251, that's Robert and Shelby Hesel,
12 is that correct?

13 A. Correct.

14 Q. And page 1252, again, that's Robert J. and
15 Shelby Hesel, is that correct?

16 A. Correct.

17 Q. Page 1253, is that also Robert J. and
18 Shelby Hesel?

19 A. Yes.

20 Q. Page 1256, what ownership do you see there?

21 A. Robert J. Hesel and Shelby J.

22 So for purposes of my analysis, I

1 presumed that was mom and dad, not mom and son.

2 Q. Right.

3 And 1257, the same issue, right?

4 A. Correct.

5 JUDGE MORAN: But my understanding is that you
6 didn't, when you did your calculations, you weren't
7 counting any of those.

8 THE WITNESS: I was not. I mean, my best count
9 based on this pull yielded 1,331 acres under Robert
10 and Andrew's name.

11 JUDGE MORAN: Right.

12 My point is if you look, for example,
13 at 1257, that was a, although it's part of this EPA
14 exhibit, that's one you didn't count when you tallied
15 up properties, right?

16 THE WITNESS: That is correct.

17 JUDGE MORAN: And every time you saw Robert J.
18 and Shelby J., you didn't count those?

19 THE WITNESS: That is correct.

20 JUDGE MORAN: Okay.

21 Q. BY MR. SMALL: And so anything contained in
22 Complainant's Exhibit 41 that says Robert J. or

1 Shelby Hesper really has nothing to do with this case,
2 and you ignored that for your calculations, correct?

3 A. I did.

4 Q. But the letter from the assessor which is
5 on Page 1230, that would be inaccurate because of
6 that confusion between the named parties?

7 A. Yes. In terms of the number of parcels or
8 properties linked to the respondents, it overstates
9 the number I think.

10 Q. And do you know Patty Brough personally?

11 A. I do not.

12 Q. And so do you know what her expertise would
13 be in valuing real estate other than she's the
14 assessor of Marion County?

15 A. No.

16 Q. But that is the figure, from that figure,
17 that's how you calculated the value of the real
18 estate, is that correct, by using her indication in
19 that letter?

20 A. That's correct.

21 Q. Now, if you owned a half interest in real
22 estate, would you not discount that half interest

1 because it is a half interest?

2 A. I don't know what you mean.

3 Q. In other words, if I owned 100 percent of a
4 20-acre tract as opposed to me owning a one-half
5 interest in that 20-acre tract, do you have an
6 opinion which would be more valuable between the two
7 ownership interests?

8 A. Well, I'd value it as half the market
9 value.

10 Q. Okay. So in other words, you're not
11 placing any discount whatsoever by reason of the fact
12 that it is a minority interest that's being held by
13 each of the respondents?

14 A. That's not how I interpreted what they
15 presented here.

16 If I interpret that incorrectly,
17 then...

18 Q. Okay. You're interpreting that each one
19 owns a hundred percent?

20 A. No. I'm interpreting this as each of them
21 owns half.

22 Q. Okay. Now, what if one person wanted to

1 sell and the other person didn't want to sell, what
2 would you do? Would that make it more valuable or
3 less valuable if you owned it in that manner?

4 A. To whom? I mean...

5 Q. To anybody.

6 A. Well, they have an undivided half interest
7 in the parcel as they represent. They both own it.

8 Q. But you didn't discount it in any manner
9 from viewing it as owning a hundred percent of a
10 certain tract. You've applied no discount to that
11 figure whatsoever, did you?

12 A. No.

13 Q. Okay. Are you aware of any laws in the
14 State of Illinois relating to ownership interest in
15 minerals if they own a half interest in minerals?

16 A. I am not.

17 Q. Now, you indicated that on Respondents'
18 Exhibit 25, you couldn't confirm the accuracy of the
19 value of the assets, is that correct?

20 A. That's correct.

21 Q. Would you consider using Exhibit No. 25,
22 Respondents' Exhibit No. 25 in a court of law as

1 having any bearing on the accuracy of what's being
2 represented to the court?

3 In other words, would you believe that
4 the respondents here would present something that was
5 false to the court?

6 MS. PELLEGRIN: Your Honor. Objection. Calls
7 for speculation, and I don't know if it's relevant.

8 JUDGE MORAN: I'll sustain the objection.

9 Q. BY MR. SMALL: Now, I'd like you to refer
10 to Respondent's Exhibit No. 25.

11 Are you there?

12 A. I've got it, yes.

13 Q. Referring to page 404.

14 A. Okay.

15 Q. And in that page 404, it lists loans,
16 correct?

17 A. Correct.

18 Q. And that's to -- there's \$1,082,006.14 loan
19 from Farmers State Bank?

20 A. To Andy Heser, correct.

21 Q. And \$108,016.10 from Deer Credit, is that
22 correct?

1 A. Correct.

2 Q. Now, if you know, is it generally the
3 policy of most banks that in their loan documents,
4 there will be a provision that they cannot go out and
5 encumber their assets any further by getting
6 additional loans upon same collateral?

7 A. That is often the case.

8 Q. Okay. As a matter of fact, it's very
9 common, is it not?

10 A. I have often see it.

11 Q. And so it would be very difficult for the
12 respondents to go out and get a loan on collateral
13 that was already encumbered in general?

14 A. Correct. I think I mentioned that earlier.
15 They want to know what the existing burdens are on
16 the asset holdings.

17 Q. Now, are you familiar with the term joint
18 and several liability?

19 A. Yes.

20 Q. And if I told you that Bobby and Andy Hesper
21 were jointly and severally liable in debt for
22 \$1,190,000, what would that mean to you?

1 MS. PELLEGRIN: Your Honor, objection. It
2 calls for a legal conclusion.

3 JUDGE MORAN: No. I overrule the objection.

4 A. I think I indicated prior that there's a
5 significant amount of debt here, particularly if we
6 use the lower valuation for the assets.

7 MR. SMALL: Well, could we reread that question
8 back again and let you try and answer it again
9 please.

10 (The reporter read back the last
11 question.)

12 MS. PELLEGRIN: Your Honor, calls for
13 speculation.

14 JUDGE MORAN: I already ruled on that. Even on
15 your second basis, I still overrule the objection.

16 So would you read the question again?

17 (The reporter read back the last
18 question.)

19 THE WITNESS: It would mean they'd have to pay
20 back \$1,190,022.

21 Q. BY MR. SMALL: Okay. Now, does that mean
22 to you that each one would have to separately come up

1 with \$1,190,022 each?

2 A. Well, this is the total for Andrew by my
3 reading. There is a separate total for Robert.

4 Q. Now, what if I told you that the total debt
5 for both of these gentleman was \$1,190,022.24, what
6 would you say?

7 A. That's their debt. That's what they have
8 to repay.

9 Q. All right. And do you understand that both
10 of these defendants could be liable for that whole
11 amount, but it doesn't mean that they owe \$1,190,000
12 times two?

13 A. That would be an alternative interpretation
14 of this I suppose.

15 Q. Okay. But they would still be a hundred
16 percent liable for that whole debt load. Do you
17 understand that?

18 A. I presume. I mean, I don't have a the loan
19 documents. I presume they both signed...

20 Q. That was a presumption that you went under
21 when you did your calculations, is that correct?

22 A. I presumed they had \$2.3 million in debt in

1 total between the two of them. That's what I
2 presumed.

3 Q. And I'm just trying to clarify this.

4 A. I'm saying they have borrowed --
5 \$2.3 million has come into their hands is my
6 interpretation of this presentation.

7 Q. Now, referring to page 406 of that same
8 document.

9 A. Yes.

10 Q. Would you consider the bank accounts owned
11 by Andy Hesel to be average, low, high, what?

12 A. Limited.

13 Q. And on page 407, looking at the living
14 expenses of Andy Hesel and his average monthly
15 expenses, would that seem to be fair when you're
16 looking at -- I think you said you looked at bureau
17 statistics for average expenses.

18 Would that seem to be in line with
19 what would be an average expense for a farmer?

20 A. Both Andrew's and Robert's representation
21 of their household expenses, their personal expenses,
22 were right within the proxy range that I was looking

1 at. It seemed reasonable.

2 Q. And so when you say Bobby's expenses,
3 you're referring to page 410 and 411 of that exhibit?

4 A. Correct, right, and for purposes of both of
5 these, I'm splitting kind of the business expense
6 from the personal expense.

7 Q. Okay. But in this particular case, there
8 are no corporate entities that are involved, is that
9 right?

10 A. Correct.

11 Q. And so we really have a proprietorship that
12 flows directly to their individual tax returns?

13 A. Correct.

14 Q. And so the Respondents' Exhibits 1 through
15 6 really do accurately reflect all the income from
16 any source. Whether it is their business or whether
17 it was some other income or expenses, that's all
18 reflected in those tax returns?

19 A. I think through 2005 we have a good sense
20 of their income and their personal cash flow. I've
21 got a good sense of that.

22 Q. Now, back to the valuation of land, do you

1 believe that land located in, we'll call it bottom
2 land, land that's lower than upland land is going to
3 be worth more or less?

4 A. I don't know. I would imagine, you know,
5 more poorly drained land would be worth less.

6 Q. And if there were lawsuits that were
7 associated with bottom ground with streams running
8 through them or ditches running through them, that
9 would probably even further cause that price per
10 acreage to go down, is that correct?

11 A. What does the lawsuit entail --
12 constraints, access?

13 Q. Let's just take this lawsuit, okay?

14 These respondents have been here for
15 ten days. They haven't even started to put their
16 case on yet, and it's cost them money to do that.

17 If other farmers heard about that, you
18 think that's going to make that bottom ground go up
19 in value or down in value?

20 A. Well, it depends if the bottom ground, how
21 it's farmed. I mean, they're going to... Relative
22 to what?

1 Q. You don't have an opinion?

2 A. Well, prices go up or down relative to land
3 that isn't burdened with litigation or...

4 Q. You think litigation on a real estate would
5 be helpful to a rising price on that piece of ground
6 in general?

7 A. Litigation with respect to the use of the
8 property?

9 Q. Yes.

10 A. Yeah, any constraint affects, any
11 constraint on its use is going to affect the value.

12 Q. And the price would go down, is that right?

13 A. Well, it could go up or down depending on,
14 relative to what your starting point is.

15 Q. Now, Mr. Ewen, a good deal of your
16 calculations relates to the fact that you think farm
17 commodities are going up in value, is that correct?

18 A. A good amount of my uncertainty related to
19 their apparent financial condition is related to
20 that, yes.

21 Q. Okay. And I think you indicated that the
22 commodities have doubled. You said corn has doubled?

1 A. Well, the price of corn, yeah, although I
2 looked yesterday. It's down under 4 bucks, but,
3 yeah, roughly doubled.

4 Q. And the reason for that increase in value,
5 you believe that might be related to the use of
6 ethanol in the United States and the use of corn,
7 among other things?

8 A. Yeah, that's part of it. The demand for
9 corn has gone up.

10 Q. Do most farmers contract out their crops to
11 be sold, if you know?

12 A. I don't understand what you mean by that.

13 Q. Do farmers enter into contracts to sell
14 their commodities at a certain price? Is that a
15 common practice among farmers?

16 A. I think it's pretty common for them to sell
17 their crops at different points in time of the year,
18 hedge against price fluctuations and the like, yes.

19 Q. And so commodity prices don't always go
20 straight up, do they?

21 A. No.

22 Q. As a matter of fact, that's a good way to

1 lose money a lot of times, is it not?

2 A. Well, I don't know. You could make money
3 if you timed it right.

4 Q. You can make money or you could lose money,
5 right?

6 A. Correct.

7 Q. Both ways.

8 So the fact that corn is going up
9 right now doesn't mean that two years from now corn
10 won't be going down in price, isn't that right?

11 A. I don't know. It could, yes.

12 Q. It could, yeah.

13 Let's say somebody comes out and
14 invents a hydrogen car that runs on water, then what
15 do you think the price of corn would do then?

16 A. If it resulted in lower demand for corn,
17 the price of corn would go down.

18 Q. Right. It's all dependent upon the demand.

19 A. Correct, and farmer response to that demand
20 in terms of how much corn they plant.

21 Q. And it's quite possible that within this
22 short time frame that somebody could have contracted

1 for corn at \$2 or \$3 a bushel?

2 A. Correct. I'll even give you the personal
3 example. My brother now grows corn, and he was
4 lamenting the fact last fall that he had sold a good
5 part of his crop last year prior to the rise.

6 Q. That happens.

7 Now, I think you had an objection or
8 at least you had a concern about the loans on page
9 404 of Exhibit 25, Respondents' Exhibit 25?

10 A. Correct.

11 Q. Now, whether they're personal or whether
12 they're business, the loans would still have to be
13 paid, correct?

14 A. Correct.

15 Q. And that would come out of cash flow?

16 A. Correct.

17 Q. Are you a certified public accountant?

18 A. I am not.

19 Q. Do you utilize a certified public
20 accountant personally?

21 A. I do not.

22 For my firm we do.

1 Q. Have you ever tried to get any documents
2 from a certified public accountant, your own
3 documents, during the middle of tax season?

4 A. I haven't personally requested documents
5 from a CPA, but I'm certain a lot of the other
6 enforcement cases receive documents from a CPA.

7 Q. Would it be possible that it would be very
8 difficult to obtain these documents in a timely
9 fashion from a certified public accountant during the
10 middle of his main tax season which would end on
11 April 15? Is that possible?

12 A. I can hardly speculate. I mean, I presume
13 you're talking about your client's CPA here, right?
14 I have no idea what his circumstances are.

15 Q. I'm just asking you if you have an opinion.

16 A. If I couldn't get my documents from my CPA
17 in a timely manner, he would not be my CPA any
18 longer.

19 MR. NORTHRUP: I've just got a few questions.

20 CROSS-EXAMINATION

21 BY MR. NORTHRUP:

22 Q. Looking at page or referring to 1230,

1 that's the Patty Brough letter?

2 A. Yes.

3 Q. The second paragraph, the last sentence
4 where she talks about, quote, "We have been seeing
5 farmland selling in the range of 2,500 to 3,000 per
6 acre."

7 Did you have any conversation with her
8 about what nonproductive land was selling for?

9 A. I did not.

10 Q. Do you have any idea how much of the 1,330
11 or 1,350 acres that the Hesers have title to is
12 nonproductive?

13 A. I am not certain. I use the acres employed
14 for assessment purposes, so that is the basis for my
15 acreage estimate.

16 Q. Okay. So you can't tell how much of that
17 is nonproductive and productive?

18 A. Correct.

19 Q. Do you know how much the -- well, you
20 understand this case involves a certain parcel of
21 property, correct?

22 A. Yes.

1 Q. Do you know how much the Hesers paid for
2 that property?

3 A. I do not.

4 Q. Did you do any lien searches for real
5 estate?

6 A. I did not.

7 MR. NORTHRUP: That's all, Your Honor.

8 JUDGE MORAN: Okay. I have a couple questions
9 for you. Do you need a break or something?

10 THE WITNESS: I wouldn't mind five minutes for
11 a restroom break.

12 JUDGE MORAN: Okay. We'll take a five-minute
13 break.

14 (Recess taken.)

15 EXAMINATION

16 BY JUDGE MORAN:

17 Q. Okay. Mr. Ewen, you know, before you
18 arrived here, I actually misspoke because I, and I
19 mean before you arrived here and physically here. At
20 the outset of the hearing, I made a reference to
21 problems I had with unsigned tax returns, but
22 actually, and you can tell me whether you agree with

1 this or not, I think I misspoke when I made that
2 characterization because, and speaking personally as
3 well, isn't it common nowadays for people to, because
4 of electronic filing, and that's either with or
5 without an accountant being involved, tax returns are
6 submitted without a signature, without a physical
7 signature attached, correct, nowadays?

8 A. Yes, I guess that's correct. I mean, I
9 guess there's an equivalent electronic signature
10 where you're verifying, there's a verification
11 process that you're attesting to the accuracy of the
12 tax return.

13 Q. That's not actually submitted, is it?
14 That's something the accountant would hold onto.

15 If I were to file my tax returns using
16 Quicken, which I don't use because I use an
17 accountant, but if I were to file my tax return, I
18 wouldn't be using some sort of auto pen for the IRS
19 to see my signature, would I?

20 A. Well, I do that. I do my own taxes.

21 Q. You use an auto pen?

22 A. No. You do not use an auto pen, but there

1 is, under the electronic signature laws, you attest
2 to the accuracy through some other process by which
3 you verify the accuracy of the return.

4 Q. Right. And isn't one of those processes
5 where the accountant submits the return on behalf of
6 the person that he or she is preparing the tax
7 return, and that suffices unless there's further
8 inquiry on the part of the IRS?

9 A. I believe so, yes.

10 Q. Right. And so that's just to correct my
11 misspeaking about that not being up-to-date because
12 it used to be before electronic filing, people would
13 sign, physically sign the documents.

14 And so would it be fair to state,
15 Mr. Ewen, that you have no reason to doubt the
16 accuracy of the tax returns which are reflected in
17 Respondents' Exhibits 1 through 6, any of those,
18 right?

19 A. I do not.

20 Q. No.

21 And you know that for each of those
22 tax returns for Exhibits 1 through 6, there does

1 appear to be the signature of an accountant. The
2 actual physical signature of an accountant
3 accompanies each of those tax returns, right?

4 A. That's correct.

5 Q. Okay. Now, hopefully I won't be unfair
6 about this so you tell me if I am being unfair, but
7 my notes indicate that you said that you have
8 analyzed 130 separate cases involving a business
9 entity's ability to pay.

10 Is that the right number, 130?

11 A. Yeah, approximately, uh-huh.

12 Q. And of those 130 cases, how many of those
13 were EPA cases would you say?

14 A. Well...

15 Q. In other words, cases where you were
16 helping out EPA and analyzing the ability to pay
17 issue or otherwise EPA cases if there's some other
18 ones.

19 A. Yeah, I think I had testified to the fact
20 that all of them were for regulators. I've only done
21 a couple state cases as I recall, so the vast
22 majority of these are for EPA or for the Department

1 of Justice for certain cases that were referred from
2 EPA to the Department of Justice.

3 Q. And is it fair to say, I think you said
4 that only on a couple of times you worked for a
5 respondent in analyzing financial issues?

6 A. In the context of environmental enforcement
7 cases, I...

8 Q. You've never done that.

9 A. ...I've never worked for a respondent.
10 I've been approached on several occasions, but we
11 have difficulty getting around contractual
12 constraints with EPA.

13 Q. And would this be fair; when you said that
14 you were trying to put your firm out of business, in
15 effect, you said in a jocular fashion that you were
16 helping EPA people on how to do an ability to pay
17 analysis, right?

18 A. That's correct.

19 Yes, we are not dependent upon this
20 work for the livelihood of the firm. I was
21 metaphorically using that phrase.

22 Q. And so when you talk about helping them to

1 do an ability to pay analysis, you're not helping
2 them figure out how a person cannot pay. You're
3 helping them figure out how a person can pay.

4 Would that be a fair characterization
5 of what you're doing?

6 A. We're helping them better be able, to
7 improve their ability on their own without hiring
8 outside expertise.

9 Q. But to reach what conclusion?

10 A. To reach an ability to pay conclusion
11 that's fair to the respondent, an amount the
12 respondent is capable of paying without incurring
13 undue financial hardship.

14 Q. Okay. I believe you indicated that there
15 were a number of cases where you concluded -- well,
16 let's focus on the 130 EPA cases that you've been
17 involved with.

18 You said in a number of those cases,
19 you concluded the individual or entity did not have
20 an ability to pay, is that right?

21 A. Correct.

22 Q. You want to quantify that? Out of those

1 130, how many did you conclude there was a problem
2 with the ability to pay, just a ballpark?

3 A. Well, again, it's a little bit complicated
4 because sometimes the case comes to us before a
5 penalty is even determined, so it is, in essence,
6 kind of ability to pay. Financial capabilities in
7 some respects are bounding the penalty calculation in
8 a sense if that makes any sense.

9 But I would say the majority of the
10 cases probably there's some adjustment; at least 50
11 percent, there's some adjustment. It might be very
12 modest.

13 The cases that come to us tend to be
14 not, you know, they're not the no brainers, you know.
15 They're more complex or there seems to be real
16 concerns about financial capabilities, so the ones we
17 get are ones that haven't passed the laugh test.

18 Q. Okay. But my sense of what you had to
19 say -- tell me whether I've misconstrued this or
20 not -- I had the sense that you essentially do this
21 in a two-stage fashion, and your initial analysis of
22 the ability to pay is -- and these folks, as in this

1 case, can they pay in one big wallop now the penalty
2 that EPA would like to impose? That's your first
3 step, is it not?

4 A. It would be nice. I mean, that's...

5 Q. Well, isn't that what you've been doing in
6 this case, that they could pay this?

7 Let's assume hypothetically that I
8 find that the Hesper brothers violated, and all these
9 other things I'm not going to go through again,
10 statute of limitations didn't run, etc., and I find
11 that they violated, and it was of a magnitude of
12 gravity, etc., that I think 120,000...

13 Is that what it is, or change, 120
14 even?

15 MR. MARTIN: 120 even.

16 JUDGE MORAN: 120 even. ...I find that
17 \$120,000 is appropriate as a civil penalty.

18 It was your analysis, was it not, that
19 they could write that check now?

20 A. No, I don't think I conceded that at all.
21 If that was your interpretation, I think... So no.

22 Q. Okay. Then that does change my

1 understanding then.

2 So then your testimony is, it would be
3 fair to state, that this is this other category where
4 there would have to be some sort of structured, maybe
5 a payment plan worked out, etc.? Is that what you
6 mean?

7 A. Well, I mean, I think the opinion is a
8 little bit more nuance than that.

9 Q. Tell me the nuances.

10 A. I would have liked to have come out
11 stronger with a definitive opinion of, yes, they
12 could pay X and here's how I think they could do it.

13 What I'm really saying is there was a
14 huge disconnect between what their net worth might
15 be, from a significant sum to their representation of
16 a relatively limited sum. There is a big disconnect
17 between the financial performance information that I
18 have through 2005 and what I can infer is potentially
19 happening with the farming enterprise over the course
20 of the past year and going into the coming year given
21 the dramatic change in commodity prices. I mean, it
22 significantly changes the financial resources that

1 are potentially available to these folks to pay a
2 penalty.

3 Q. But you did reach the conclusion that you
4 felt that these respondents could pay \$120,000 as a
5 civil penalty, right?

6 A. I don't believe I conceded that opinion.

7 Q. Oh, okay.

8 Well, but working on certain
9 assumptions that you built in, if your assumptions
10 were correct such as how much you could take from
11 depreciation and move over to cash flow, if all of
12 that was correct, then you'd conclude that they could
13 pay 120,000?

14 A. If my valuation of their assets were
15 correct, and what happened in '06 is what I think may
16 have happened, then I think we're probably
17 approaching, perhaps approaching, but I wasn't even
18 allowed to speculate about what happened in '06, but
19 I think the whole environment, their whole operating
20 environment changed.

21 Q. Okay. Well, if your assumptions are
22 correct, it strengthens your position?

1 A. Yes, it does. I mean, there's really two
2 -- there's a distinct dichotomy between two scenarios
3 here. You know, I was so uncertain that I was
4 unwilling to pick one or split the difference or do,
5 you know, a probabilistic analysis of what's the
6 likeliest outcome.

7 Q. But in these other ability to pay cases
8 when you talked about a number of cases where you
9 found there was a problem, your second step, am I
10 fair in stating this, that if you determine that an
11 individual or some business entity cannot pay the
12 fine that EPA would wish to have assessed, that
13 doesn't end your analysis. What you then do is you
14 look for ways that, as I think you used the term some
15 sort of structured payment can be a way of getting
16 the money. Is that fair?

17 A. That's correct, but I will say sometimes to
18 the receiver of the payment, it may appear to be a
19 one time penalty payment, but the respondent may have
20 borrowed that money from someone else and is paying
21 them back over time, so it can look like a one time
22 payment to EPA when, in fact, it's a structured

1 settlement of sorts because they're borrowing the
2 money and repaying it over time to someone else.

3 But the basic notion here is there's
4 two sources of fund. There's what you've got right
5 now and there's what you can generate over time.

6 Q. Right. And consistent with what you've
7 just said, if I can do a little nuance there, that if
8 the individual or an entity can't look to some other
9 source for the money and then have to pay that source
10 over a period of time and write a check directly to
11 EPA, the EPA might have to get involved in working
12 out some sort of a payment plan if there aren't
13 creditors willing to, other individuals willing to
14 help finance the civil penalty, right?

15 A. That's correct. EPA can act as the banker
16 as well.

17 JUDGE MORAN: Okay. Thank you, Mr. Ewen.

18 Any questions on redirect from EPA?

19 MS. PELLEGRIN: Just a few minor points of
20 clarification.

21 REDIRECT EXAMINATION

22 BY MS. PELLEGRIN:

1 Q. Mr. Ewen, let's turn to Respondents'
2 Exhibits 1 through 6.

3 Mr. Small asked you on
4 cross-examination whether you looked at the adjusted
5 gross income for both respondents from 2003 and 2005,
6 and he asked if, according to the adjusted gross
7 income, were they trending downward.

8 My question to you is, according to
9 the income that you looked at, which as I understood
10 it was the adjusted gross income with depreciation
11 added back in, is that trending downward, do you
12 know?

13 A. It's more variable because it's driven by
14 significant up and down variation in the depreciation
15 expenses.

16 I think I mentioned that they
17 purchased a good amount of equipment in these three
18 years, and so the depreciation charges related to
19 those purchases started to hit the books, so that's
20 sort of the reason for the variability.

21 There's some variability in gross
22 revenues from the sale of their commodities as well,

1 but there's also a variability in these annual
2 expenses that is driving this as well.

3 Q. And Mr. Small also asked you some questions
4 about the assessor's office and Patty Brough, and if
5 I could just get you to turn to Complainant's Exhibit
6 41.

7 A. Okay.

8 Q. And Complainant's Exhibit 1230, Bates
9 number 1230.

10 Can you just read into the record what
11 Patty Brough's title is? I'm looking at the bottom
12 in the closing salutation at the bottom, the bottom
13 left hand corner of the page.

14 A. She indicates here she's the supervisor of
15 assessments for Marion County.

16 Q. And when you're looking at information from
17 assessors' offices -- well, first of all, how common
18 is it for you to look at information from tax
19 assessors' offices?

20 A. It's not overly common but this is a
21 regular thing that we do when a particular case
22 involves a lot of real estate holdings or real estate

1 holdings relative to the ability to pay analysis.

2 Q. Okay. And I believe you stated that you've
3 looked at the valuation that was given on this page,
4 the range of 2,500 to 3,000 per acre.

5 Did you do anything, any other
6 research to sort of confirm whether that was fair for
7 this area?

8 A. Only the one supporting piece of
9 information from the Illinois Agriculture Department
10 indicating that statewide land was about \$2,900 per
11 acre.

12 MS. PELLEGRIN: Okay. I have no further
13 questions, Your Honor.

14 JUDGE MORAN: Okay. Anything on recross?

15 MR. SMALL: Very quickly.

16 RECCROSS-EXAMINATION

17 BY MR. SMALL:

18 Q. So is it your indication that your cash
19 flow amount, which I think is what EPA's counsel is
20 talking about, fluctuates only because the
21 depreciation amount has gone up in a given year
22 because the actual income to the respondents went

1 down in those years in general, is that correct?

2 A. It's a combination because there's also --
3 the top line revenues is variable as well, so we've
4 got that going up and down plus variable depreciation
5 expenses deducted from those revenues, so you have
6 taxable income going up and down. We add back the
7 depreciation charge, so that has a smoothing effect.

8 Q. But the primary reason why it would
9 fluctuate would be the depreciation could change each
10 year substantially?

11 A. No. It's also because commodity prices
12 vary and their revenues went up and down and their
13 yield went up and down and, you know, this is a
14 farming enterprise. The locusts came, the hail came,
15 you know, there's all sorts of variables that are
16 affecting profitability.

17 Q. And the expenses could go up too?

18 A. Correct.

19 Q. Okay. Just a minor point.

20 Exhibit No. 41, page 1230, as a
21 practical matter, it doesn't say Patty Brough is
22 Marion County supervisor of assessments, does it? It

1 just says Marion County, and then the next line says
2 Supervisor of Assessments. That's the name of an
3 office.

4 A. Correct. I believe she is --

5 Q. I don't know if she is or isn't?

6 A. -- the head of the office.

7 MR. SMALL: That's it, Your Honor.

8 MR. NORTHRUP: One question.

9 RECROSS-EXAMINATION

10 BY MR. NORTHRUP:

11 Q. You talked about you've got this disconnect
12 on two issues. There's a property value and then
13 this sort of figuring out what direction farm prices
14 are going to go in the future.

15 A. Right.

16 Q. And, you know, that can be tied to whether
17 ethanol plants are built or what the crop is like in
18 Brazil, things like that, right?

19 A. There's a variety of market factors
20 affecting the commodity prices.

21 Q. Right. And it can go up and it can go
22 down.

1 A. Correct.

2 Q. Is there anything that the respondents can
3 provide to you now to sort of divine what's going to
4 happen in the future that you would then rely upon?

5 MS. PELLEGRIN: Objection, Your Honor. I'm
6 objecting because we asked for documents --

7 JUDGE MORAN: That's not what the question is
8 about.

9 MS. PELLEGRIN: Okay.

10 JUDGE MORAN: He's asking about
11 prognostication, are you not?

12 MR. NORTHRUP: Right.

13 JUDGE MORAN: Do you want the question reread?

14 MR. NORTHRUP: Sure.

15 (The reporter read back the last
16 question.)

17 A. The most relevant information would be
18 up-to-date tax returns from last year just because
19 we're using historical information to create a
20 projection of the future, and we know the historical
21 information we have is highly unlikely to be
22 representative of the past year or this coming year.

1 Q. But that doesn't have anything to do with
2 what the crop is going to be like in Brazil or how
3 many ethanol plants are going to be built in the next
4 year and how that will affect commodity prices,
5 right?

6 A. Well, it gives us a better sense. I mean,
7 we know -- no, I'm not asking for a market forecast
8 from the respondents to tell me what they think
9 market prices are doing.

10 All I'm interested in is what does the
11 farming enterprise look like given the prices,
12 commodity prices that are currently in play.

13 MR. NORTHRUP: That's all I have.

14 JUDGE MORAN: Okay. Anything else from EPA?

15 MS. PELLEGRIN: No, Your Honor.

16 JUDGE MORAN: Mr. Ewen, you're excused. Thank
17 you for your testimony, sir.

18 (Witness excused.)

19 JUDGE MORAN: Does the government now rest?

20 MS. PELLEGRIN: If we can just have a moment to
21 check to make sure all the documents that we wanted
22 to get in are in.

1 JUDGE MORAN: Yes.

2 (Pause)

3 (Discussion held off the
4 record.)

5 JUDGE MORAN: In an off-the-record discussion,
6 EPA had questions, uncertainties as to whether
7 certain documents were admitted.

8 The Court explained that's the
9 responsibility of the respective litigants, not the
10 Court, to keep an accurate tally of documents that
11 are admitted.

12 Momentarily, I believe EPA is going to
13 announce that they are resting in this case but
14 subject to during a lunch break their seeking
15 assurances that certain critical documents were, in
16 fact, admitted and whether counsel for respondent
17 agrees to that or not.

18 So other than that, apparently, EPA is
19 about to rest, but they are not precluded from
20 identifying certain exhibits later when we resume in
21 the afternoon session as being admitted or stipulated
22 for admission.

1 Okay. That's on the record.

2 Now, you want to make a statement
3 about EPA's case?

4 MS. PELLEGRIN: Yes, Your Honor.

5 Subject to the things that you've just
6 stated on the record, we rest.

7 JUDGE MORAN: Okay. The government rests.

8 Are respondents ready to put on their
9 case?

10 MR. SMALL: Yes, Your Honor, but prior to doing
11 that, I would like the court to indulge me, if you
12 would, for just a few minutes, and I would like to
13 make a verbal motion for a directed verdict for the
14 respondents.

15 Your Honor, I've practiced law for 28
16 years, and I've done lots and lots of trials, and I
17 understand that directed verdict motions are, you
18 know, everyday sort of things that get involved in
19 trials, and for the most part, they are just kind of
20 a, you know, dot your I, cross your T sort of motion
21 which a lot of times, you know, everybody agrees
22 there's enough to go forward.

1 I've noticed as I've gone through this
2 case the Court's rulings in particular regarding
3 evidence and how it relates to the allegations of the
4 amended complaint, and I think the Court obviously
5 has been around the block a time or two with trial
6 work also, and I have spent some substantial time the
7 last several days thinking this thing through, and,
8 Your Honor, it appears to me that even taking into
9 account what the plaintiffs have shown for the last
10 nine and a half days, it simply does not match up
11 with the allegations of the amended complaint. There
12 is a total disconnect. There are allegations that
13 the respondents discharged some sort of pollution
14 from a point source. I haven't heard any testimony
15 about that at all.

16 We've had days and days of testimony
17 that Martin Branch is not pristine, that it's
18 impaired, that upstream from this location there are
19 all kinds of problems from soil erosion to a variety
20 of other factors, and the best that can be said is
21 that it flows through the Hesers' property and ends
22 up in Lake Centralia which was built in 1910 and

1 which has certain problems, and those problems
2 revolve around the very same matters, you know, the
3 sediment that was upstream from the Hesper channel,
4 which is undisputed, and which contains manganese,
5 which is undisputed that that's natural, and
6 phosphorus, and that phosphorus comes from a variety
7 of sources, and as a matter of fact, the plaintiffs
8 really in the second half of this case have tried to
9 expand the scope of the case to make this into I
10 believe an action not against the Hesper, not against
11 what they actually had done or what their conduct was
12 involved with but rather a much larger case to say,
13 well, this whole area has problems.

14 Well, you know what, that's not the
15 allegations of this complaint. I go back and I read
16 the allegations of this complaint and it says they
17 discharged pollutants into it.

18 There's been testimony there's been
19 absolutely no testing whatsoever done by the EPA
20 upstream, in the L, downstream, whatsoever.

21 The only, only provision that we see
22 is that there was some probes that were put in to

1 find out whether soil was hydric or non-hydric.

2 Now, EPA's own witnesses, much to
3 their surprise I believe because there was at least
4 three times when they tried to get them to turn their
5 testimony around, but there was clear testimony by
6 their own witnesses that the tract of land that's
7 involved here was disturbed, and it was disturbed by
8 logging prior to the Hesers buying the property, and
9 the only probes that were taken by them, none of
10 which were in the L, were in that disturbed area
11 where these woods had been logged by a predecessor
12 unbeknownst to the Hesers. They come in and inherit
13 a mess. They have a bunch of treetops that are
14 burning, that they have to burn just to clean the
15 place up.

16 When I go through the complaint, you
17 know, there just isn't anything. There is a
18 disconnect totally. I can't find one speck of
19 evidence that's been put on that supports that
20 complaint.

21 And I realize that a directed verdict
22 motion is not something that you normally see or

1 grant, but, Your Honor, if there was ever a case for
2 this to be granted, it belongs here.

3 These defendants have sat through nine
4 and a half days of testimony paying two counsel,
5 expert witnesses, and to this point in time, I don't
6 see it. I don't see anything that even remotely
7 matches up with what were the allegations of the
8 amended complaint, and for that reason, I would ask
9 that a directed verdict be entered in favor of the
10 respondents.

11 JUDGE MORAN: Okay. Does EPA want to speak to
12 this or just have me rule on it?

13 MR. MARTIN: Well, I'll speak briefly. He said
14 a lot, I mean, it's hard to respond to each point,
15 but --

16 JUDGE MORAN: Let me stop you though. To help
17 the court reporter out, don't let your voice trail
18 off, Mr. Martin.

19 MR. MARTIN: Okay.

20 When a wetland is filled in and EPA
21 has to delineate that wetland after it has been
22 filled in, it's a difficult task. We have spent nine

1 and a half days presenting our case, yes, and we have
2 presented adequate evidence as to the delineation of
3 the site, the fact that pollutants were discharged
4 into the site. We have, you know, admissions in the
5 answer to the complaint in this matter as to
6 activities at the site. We have videotape showing a
7 bulldozer at the site which is a point source under
8 the Clean Water Act. We have presented evidence
9 containing a specific nexus between the site and Lake
10 Centralia, and I can't go through each parts of our
11 case now but I believe we have addressed each part of
12 the allegations set forth in our complaint in this
13 matter.

14 JUDGE MORAN: Okay. Thank you,
15 Mr. Martin.

16 It should be obvious I have great
17 respect for Mr. Northrup and Mr. Small as well as for
18 counsel for EPA, but, as Mr. Small alluded to, based
19 on his experience, and it's consistent with my
20 experience as well, the occasions when a directed
21 verdict is granted are rare.

22 To use a farm analogy, it's as rare as

1 hen's teeth, and in this particular instance, you
2 know, without engaging in a colloquy or without
3 enumerating the reasons in my head potentially for
4 denying your motion for a directed verdict, I do not
5 find a basis to grant your motion for a directed
6 verdict at this juncture.

7 That doesn't mean, of course, that the
8 respondents might ultimately prevail on one or
9 several different bases. I don't know that, and I'm
10 not suggesting by the way by that remark I just made
11 one way or the other about that, so with due
12 consideration, and you know I've been alert, I've
13 been involved during this whole hearing, didn't nod
14 off once, I deny the motion for directed verdict, and
15 let's proceed with the respondents' presentation of
16 their case.

17 MR. SMALL: Thank you, Your Honor.

18 MR. NORTHRUP: We would call Bobby Hesel to the
19 stand.

20 JUDGE MORAN: Okay.

21 (Whereupon the witness was sworn
22 by the Judge.)

1 JUDGE MORAN: Have a seat, Mr. Hesper.

2 State your name, and we'll go by the
3 informal Bobby Hesper just for no confusion. Does
4 that work for you?

5 THE WITNESS: Yes.

6 JUDGE MORAN: Okay. So just state your name
7 for us and spell it for us.

8 THE WITNESS: Bobby Hesper (B-o-b-b-y
9 H-e-s-e-r).

10 BOBBY HESER

11 called as a witness herein, on behalf of the
12 Respondents, having been first duly sworn on his
13 oath, was examined and testified as follows:

14 DIRECT EXAMINATION

15 BY MR. NORTHRUP:

16 Q. Where do you live, Mr. Hesper?

17 A. 515 Oakdale Drive, Centralia.

18 Q. And is that a house or an apartment?

19 A. It's a home.

20 Q. Are you married?

21 A. No.

22 Q. Have you ever been married?

1 A. Yes.

2 Q. Do you have any children?

3 A. Yes.

4 Q. How many children?

5 A. Two.

6 Q. Boys, girls, ages?

7 A. Both girls, 12 and 14.

8 Q. You said you weren't married. Divorced

9 or --

10 A. Divorced.

11 Q. Okay. Are you the primary means of support

12 for your two children?

13 A. Yes, I am.

14 Q. Where did you go to high school?

15 A. Centralia High School.

16 Q. And did you graduate?

17 A. Yes.

18 Q. What year?

19 A. 1983.

20 Q. How about any college course work?

21 A. I attended Kaskaskia College.

22 Q. Where is Kaskaskia College?

1 A. It's on Shattuc Road just northwest of
2 Centralia.

3 Q. Can you speak up a little bit. I'm having
4 trouble hearing you.

5 A. It's on Shattuc Road just northwest of
6 Centralia.

7 Q. And what kind of college is that?

8 A. It's a two-year.

9 Q. It's a community college?

10 A. Community college, yes.

11 Q. Have you ever testified before at a
12 hearing?

13 A. No.

14 Q. Are you nervous today?

15 A. A little, yes, sir.

16 Q. Did you get a degree from Kaskaskia
17 College?

18 A. Yes.

19 Q. Okay. What was that degree?

20 A. It was a two-year Associate's in
21 agriculture business.

22 Q. What types of courses did you take to get

1 that degree?

2 A. Oh, gosh, it's been awhile. There were all
3 the general courses plus there was a lot of
4 specialized courses in agriculture and the business
5 of agriculture.

6 Q. The general course work, is that
7 nonagricultural related?

8 A. Yes.

9 Q. Okay. Tell me what some of those specific
10 courses were.

11 A. I think there was -- it's been awhile. It
12 was probably about agriculture production for crops
13 and growing crops, and then there was some classes
14 about soil science, and there was a biology class,
15 and then there was some shop-related classes for work
16 with machinery, welding.

17 Q. And did you say you graduated?

18 A. Yes, I did.

19 Q. What year was that?

20 A. I didn't check this, but I went right from
21 high school to college, so two years. It should have
22 been 1985.

1 Q. Now, you were living at home while you were
2 attending Kaskaskia College?

3 A. Yes.

4 Q. Have you taken any college courses since
5 you received your degree?

6 A. Yes. I went back a year or so later I
7 believe, and I took a couple of classes that I was
8 interested in, and one was geology. I found it very
9 interesting.

10 Q. Just a personal interest?

11 A. Yes.

12 Q. Okay. What was the other course you took?

13 A. Administrative objectives.

14 Q. Any other courses besides those two?

15 A. Not that I can remember.

16 JUDGE MORAN: And by the way, if you want
17 water, it's available for you.

18 Q. In terms of employment now, did you work
19 during high school?

20 A. I worked farming but I'm not for sure when
21 I started working.

22 I also worked at a machinery

1 manufacturing business in Centralia.

2 Q. Your parents are farmers?

3 A. Yes.

4 Q. Did you grow up on a farm?

5 A. We didn't grow up farming. Dad had to live
6 within four miles of the city limits to work at the
7 fire department, so we weren't actually residing on
8 the farm.

9 Q. But you did farm when you were growing up?

10 A. Yes.

11 Q. And, I'm sorry, can you tell me what you
12 did employment-wise after college, or strike that.

13 Were you employed when you were
14 attending Kaskaskia College?

15 A. Yes.

16 Q. Okay. Where was that?

17 A. It was more like on-the-job training. As
18 part of the agriculture business degree, you had to
19 have so many hours of on-the-job training, so you
20 could come up with places to work on your own or they
21 would help you place in some of those, and I don't
22 remember the particulars very much of how that

1 worked, but I worked at Irvington Elevator, and I
2 also worked at the Soil Conservation Service.

3 Q. I have to ask you again, can you speak up a
4 little bit more?

5 A. I'm sorry.

6 Q. What is the Irvington Elevator?

7 A. It's a grain and plant food for crops, feed
8 facility.

9 Q. Is that in Marion County?

10 A. No, I think it's Washington.

11 Q. Is Washington an adjacent county to Marion?

12 A. Yes.

13 Q. And then you worked at the NRCS?

14 A. It was called the Soil Conservation
15 Service, SCS back then.

16 Q. Now, is this while you were attending
17 college or is this afterwards?

18 A. I think the Soil Conservation Service I
19 didn't actually look up. I think it might have been
20 during and after, but I'm not 100 percent sure of
21 that.

22 Q. What were your duties? What kind of things

1 did you do at the Soil Conservation Service?

2 A. I was out in the field a lot on waterway
3 work where we would like flag the centerline for the
4 contractor, and then we would go back and check for
5 slope after the construction, see that the shape was
6 correct, go back and check to see if the seedings
7 were actually working afterwards too.

8 Q. Okay. Now, you talked about doing work for
9 a contractor. What types of projects are these that
10 you're involved with?

11 A. Erosion control so you don't lose topsoil.

12 Q. And how long were you at the Soil
13 Conservation Service?

14 A. It was at least one year, but I think there
15 was like -- I think it was maybe more than that. I
16 think it was like, to the best of my recollection, I
17 was thinking it was two summers actually. It wasn't
18 full year-round employment I don't think. It was
19 kind of a placement sort of thing through the job
20 placement I think with the college.

21 Q. That's even after you graduated?

22 A. Yeah, I think that's how it worked.

1 Q. Okay. So it was not continuous employment?

2 A. No, no, it wasn't.

3 Q. What other types of things did you do? You
4 talked about placing flags for contractors.

5 A. Yes.

6 Q. What do you mean by that?

7 A. We would just step it out, and we would put
8 the flags up through the drainage areas or waterways
9 where they were going to build them, and we would put
10 the flags through there to I think mark the
11 centerline of what we wanted them to follow.

12 Q. Okay. And did you do that at someone's
13 direction?

14 A. Yes, there was always somebody with me that
15 was over me, yes.

16 Q. So you were being supervised?

17 A. Yes.

18 Q. You didn't on your own decide I'm going to
19 go out and place these flags?

20 A. No.

21 Q. And these were activities tied to specific
22 erosion projects?

1 A. Yes.

2 Q. Waterway projects?

3 A. Yes.

4 Q. Okay. What else did you do besides placing
5 the flags?

6 A. I think we took readings. As far as for
7 grade, I think we used eye levels and maybe transit
8 rod and stuff like that.

9 Then we went back to the office and
10 actually did the work on graph paper of the grade.

11 Q. Okay. You talked about -- what do you mean
12 when you use the term grade?

13 A. How much drop there is per hundred foot I
14 think. It's been awhile.

15 Q. What types of equipment did you use when
16 you were in the field?

17 A. There was definitely an eye level, and I
18 think we used occasionally rod and transits.

19 Q. When you say eye level, is that a piece of
20 equipment or do you just mean your eyes?

21 A. An eye level that you would hold and you
22 would take a sighting on a rod that someone else is

1 holding so you could determine the difference in
2 elevations from where they were standing to where you
3 were holding the rod.

4 Q. How many projects do you think you worked
5 on?

6 A. It would only be a guess. I don't know.

7 Q. So we talked about the flagging and the
8 grading.

9 What else would you do on these
10 projects, if anything?

11 A. We would go back and check them to make
12 sure that afterwards, you know, to see that they were
13 actually doing what they were supposed to do.

14 Q. What were these projects supposed to do?

15 A. Hold the soil, not blow out or wash.

16 Q. What do you mean by not blow out?

17 A. There were some failed ones.

18 Q. Well, what does that mean when an erosion
19 project fails?

20 A. There was at least a case or two where they
21 had to go back and redo and reseed the waterway, and
22 there was unfortunate rain events to likely have

1 caused some of those cases.

2 Q. Okay. You talked about reseeded.

3 Would you seed these waterways? Was
4 that part of your job?

5 A. No, but the contractor or the owner of the
6 property was given a list of seed and fertilizer and
7 lime requirements to make sure that the seeding took
8 hold.

9 Q. What would you seed with?

10 A. I think most of the time it was tall fescue
11 when I was there.

12 Q. So grasses?

13 A. Grasses.

14 Q. And were there occasions where you would go
15 back and monitor and, for whatever reason, the grass
16 didn't hold or there were problems in these
17 waterways?

18 A. Yes.

19 Q. And would you do anything? Did you have
20 any duties with respect to those situations?

21 A. I was just pretty much along to look at
22 them. I didn't have the authority to actually make

1 the requests on the parties to redo them.

2 Q. You didn't make any determinations about
3 what seed might be required or what additional work
4 might be required?

5 A. No, I didn't.

6 Q. What did you do after your employment at
7 the SCS?

8 A. I think I just mainly, I think it was only
9 grain farming.

10 Q. And I believe you mentioned but I can't
11 remember, the SCS stands for what?

12 A. Soil Conservation Service.

13 Q. And do you have an understanding if that
14 ultimately became the NRCS?

15 A. Yes, that's what I believe.

16 Q. Okay. And what does NRCS stand for?

17 A. Natural Resource Conservation Service.

18 Q. In terms of a date, do you know when you
19 stopped working at the SCS roughly?

20 A. Not for sure. It wouldn't have gone beyond
21 two years after the college. It would have been
22 within probably the '84 to 1987 range.

1 Q. Okay. You said you're a grain farmer?

2 A. Yes, I am.

3 Q. Okay. What does that mean? What do you
4 do?

5 A. We grow crops for the production of the
6 seeds.

7 Q. What kind of crops?

8 A. Corn, soybeans, and wheat.

9 Q. Do you grow all one crop one year or do you
10 alternate? How do you know what to grow?

11 A. It's generally understood that it's better
12 to do crop rotation so you follow some sort of crop
13 rotation so there's all three crops growing usually
14 every year unless there would be some problem with a
15 given certain year where you couldn't plant one of
16 the crops due to the weather.

17 Q. Does the crop rotation provide any benefit
18 to your farming operation?

19 A. Probably spreads out the workload.

20 Q. Is there any benefit to the soil with crop
21 rotation?

22 A. Yes.

1 Q. What does that benefit?

2 A. Well, I'm pretty sure that the better the
3 crops do, the more root mass, the more residue, the
4 better they hold the soil, so it would tie in that
5 the rotation and being able to grow better crops such
6 that one doesn't follow the same, that if they're
7 doing better that they're going to hold the soil a
8 lot better.

9 Q. Since graduating from college, well, you
10 farm full-time now, is that correct?

11 A. Yes.

12 Q. Okay. And you have since approximately
13 1987?

14 A. Yes, and before.

15 Q. And before. Okay.

16 Were you farming during the same time
17 you were working at the SCS?

18 A. Yes.

19 Q. Since that time, you know, roughly '85 or
20 '87, have you periodically attended seminars or
21 specialized training?

22 A. Yes, I have.

1 Q. Okay. Tell me what seminars or training
2 you attended.

3 A. We make it to a lot of meetings put on by
4 pesticide companies. We do regular testing when it's
5 for our license for spraying pesticides.

6 Q. Did you have to have a license to spray
7 pesticides?

8 A. Yes. Restricted use pesticides require a
9 license to spray.

10 Q. Okay. Is that a state license?

11 A. Yes.

12 Q. And how do you go about getting that?

13 A. You attend -- there's a training followed
14 by a testing, and then you take the test and you have
15 to score above a certain level for them to send you
16 your license.

17 Q. Do you currently hold one of those
18 licenses?

19 A. Yes, I do.

20 Q. Do you know how long you've had such a
21 license?

22 A. A long time. I don't know dates, how far

1 back, but a long time.

2 Q. Any other licenses related to your farming
3 business that you have?

4 A. At one point in time I went for the testing
5 for I believe it was grain fumigants, and I held that
6 for I believe it was just one term, and then it
7 wasn't found to be useful.

8 Q. What's a grain fumigant?

9 A. So you can apply some of the fumigants to
10 the grain to control insects that are like in stored
11 grain.

12 Q. How many acres do you have title to?

13 A. I believe by my calculations I own one-half
14 undivided interest in 1,351.7.

15 JUDGE MORAN: Could you repeat that number?

16 THE WITNESS: 1,351.7, a one-half undivided
17 interest in that.

18 JUDGE MORAN: Thank you.

19 Q. BY MR. NORTHRUP: And you were here during
20 the testimony this morning of Mr. Ewen?

21 A. Yes.

22 Q. And he talked about those numbers, correct?

1 A. Yes.

2 Q. The 1,351, and he had 1,330, something like
3 that?

4 A. Yes.

5 Q. How much of that acreage is productive?

6 A. I think by my calculations, it's somewhere
7 in the 1,175 range, give or take a little.

8 Q. In this area, is that considered a large
9 farming operation?

10 A. That would probably be more of a mid.

11 Q. Mid or medium?

12 A. Yes.

13 Q. And at any given time, I assume you were
14 growing any variety of crops on that acreage,
15 correct?

16 A. Yes.

17 Q. You don't plant all corn or all soybeans or
18 anything like that?

19 A. No, we don't.

20 Q. Are you currently enrolled in any
21 government farm programs?

22 A. No.

1 Q. Have you ever?

2 A. No.

3 Q. Now, you're aware that the government has
4 sued you and your brother and an entity named Hesper
5 Farms, correct?

6 A. Yes.

7 Q. And that's why we're here, right?

8 A. Yes.

9 Q. Is there any legal entity named Hesper
10 Farms?

11 A. Not that I know of.

12 Q. Now, you also know that this lawsuit
13 focuses on one parcel of ground, correct?

14 A. Yes.

15 Q. And we've been talking about that for the
16 last nine days?

17 A. Yes.

18 Q. And you do own that property, is that
19 correct?

20 A. One-half undivided interest in that with
21 Andy.

22 Q. Who do you own it with?

1 A. Andy.

2 Q. And who is Andy?

3 A. My brother sitting right there.

4 Q. Obviously you're familiar with this
5 property at issue, correct?

6 A. Yes.

7 Q. Do you recall when you purchased it?

8 A. I believe it was August of 1998.

9 Q. And from whom did you purchase it?

10 A. Max and Dorothy Mercer.

11 Q. Now, did you seek them out to purchase this
12 property?

13 A. No, I did not.

14 Q. How did you come to purchase the property?

15 A. I believe they approached and offered it to
16 us. It might have been through her brother that come
17 by to see us regularly.

18 JUDGE MORAN: Counsel, would you just clarify
19 for me this purchase from Max and Dorothy Mercer
20 around 1998? Was that, the number of acres, was that
21 all 1,351.7 -- would you ask that; I'm not clear --
22 or just this parcel that's at issue? Would you ask?

1 Q. BY MR. NORTHRUP: Mr. Hesel, the property
2 that you purchased from Max and Dorothy Hesel, how
3 many acres was that?

4 A. 60.

5 Q. And that's the property that is at issue in
6 this case?

7 A. Yes, it is.

8 Q. Okay. Why don't you take a look at, I
9 believe you have respondents' exhibit book in front
10 of you.

11 May I approach, Your Honor?

12 JUDGE MORAN: Sure. Please.

13 Q. Can you take a look, Mr. Hesel, at Exhibit
14 No. 9 which is on page 62?

15 A. I believe I'm there. I just didn't see the
16 page number 62, but it says Hesel Exhibit 9 on here.

17 Q. Can you describe what that is for me,
18 please?

19 A. It's the warranty deed for the Mercer
20 property that my brother and I purchased.

21 Q. And this is the property that we've been
22 talking about?

1 A. Yes.

2 Q. Can you tell me what is in the upper
3 right-hand corner? There's a date there, is that
4 correct?

5 A. August 6th of '98.

6 Q. Okay. Do you know what that stamp is from?

7 A. They do that at the courthouse where they
8 record the deed.

9 Q. Can you look at the bottom of that page?
10 Sort of on the left and in the middle, there are
11 property tax stamps, correct?

12 A. Yes.

13 Q. And could you describe those for me?

14 A. Yes. They're supposed to total up to
15 exactly what you paid for the property. It's so much
16 per thousand or something like that.

17 The first one says \$50. Then there's
18 one for 4, and then the last one, it's kind of half
19 cut off on this page, it looks like a 3, so that
20 would be 57 total.

21 Q. Okay. So does that mean, according to
22 these stamps, you paid \$57,000 for the --

1 A. That's what I understand, and based on my
2 memory, I think that's accurate.

3 Q. Are you familiar with Max and Dorothy
4 Mercer's signatures?

5 A. This is the only time I've ever seen them.

6 Q. Okay. Does that appear to be Max and
7 Dorothy Mercers' signatures?

8 A. To the best of my knowledge.

9 Q. Okay. And can you turn the page to Page
10 83?

11 JUDGE MORAN: It's just the next page on that
12 same Exhibit 9.

13 A. Oh, yes. I've got page numbers now. Thank
14 you.

15 Q. Do you see where there's a typed notation,
16 return deed and tax statement to...

17 A. Yes.

18 Q. And who is listed there?

19 A. Robert and Andy Hesper.

20 Q. And Robert, that's you?

21 A. Yes, it is.

22 Q. Do you recall getting this warranty deed?

1 MR. NORTHRUP: Yes.

2 JUDGE MORAN: Before we go off the record,
3 you're doing fine. Don't be nervous. You're very
4 articulate, and so just as long as you're telling the
5 truth, no reason to be worried, so just don't be
6 nervous up here at all.

7 Okay. It's 12:45. We'll resume at
8 1:45.

9 (Whereupon the lunch recess was
10 taken.)

11 JUDGE MORAN: Obviously, you know you're still
12 under oath.

13 THE WITNESS: Yes, sir.

14 JUDGE MORAN: Okay. Go ahead, Mr. Northrup.

15 MR. NORTHRUP: Thank you, Your Honor.

16 Q. Let's see, Bobby, I think when we left off
17 we had talked about the Mercers came to you to see if
18 you wanted to buy this property.

19 A. Yes.

20 Q. What did they tell you, if anything, about
21 the condition of the property?

22 A. They told me that the logging company left

1 it in a terrible mess. They'd been trying to clean
2 it up, burning.

3 Q. When you say they, you mean the Mercers?

4 A. Yeah, Max and Dorothy.

5 Q. Do you own other property in the vicinity
6 of this parcel?

7 A. Yes.

8 Q. How close?

9 A. A quarter of a mile.

10 Q. And why did you purchase this parcel?

11 A. Oh, that was not when we purchased this
12 one. If you mean when we purchased this one?

13 Q. Right.

14 A. We purchased it because we wanted to buy
15 some farmland. We didn't own anything -- I think the
16 closest was maybe a half a mile from it that was
17 owned prior to the purchase of this.

18 Q. Okay. So you owned property in the area?

19 A. In the area, yes.

20 Q. And is the majority of the acreage you own
21 within a particular radius of this property?

22 A. I would say that would be close. I haven't

1 really ever studied it like that but that's probably
2 in the ballpark.

3 Q. Okay. Well, is most of the property you
4 own within a 20-mile-radius or a 50-mile-radius of
5 this?

6 A. Oh, less than that.

7 Q. Less than that. What mileage would you
8 pick?

9 A. Fifteen or less maybe.

10 Q. Now, specifically, the government has filed
11 a complaint that deals with the, what I'll refer to
12 as the southeast corner of this property, correct?

13 A. Yes.

14 Q. Okay. And when I say that, you'll
15 understand what I'm referring to?

16 A. Yes.

17 Q. Okay. When you purchased the property in
18 August of '98, can you describe for me what the
19 southeast corner profit looked like?

20 A. It's an area that had treetops laying in it
21 and grass. It was pretty much as Max and Dorothy had
22 described. It was left a mess by the logging

1 company.

2 Q. I want you to take out complainant's
3 exhibit book.

4 JUDGE MORAN: There are three books for
5 complainants.

6 MR. NORTHRUP: This would be Volume I of
7 USEPA's exhibits, and I want you to turn to
8 Complainant's Exhibit 12, page 183-1998.

9 Okay. Bobby, are you at Complainant's
10 Exhibit 12, page 183-1998?

11 A. Yes, I am.

12 Q. And is there a particular feature that is
13 circled in red?

14 A. Yes, there is.

15 Q. Let me take a step back.

16 Do you know what this page is? What
17 is it?

18 A. It's an aerial photo.

19 Q. And were you present in court when I
20 believe it was Mr. Carlson that circled this area in
21 red?

22 A. Yes, I believe so.

1 Q. Okay. This is the area at issue in the
2 government's complaint, correct?

3 A. Yes.

4 Q. Now, assuming that within that circle the
5 dark area represents trees. Is this what the
6 property looked like when you purchased it?

7 A. No, it isn't.

8 Q. And again, what did it look like when you
9 purchased it?

10 A. There was grass, treetops, logging debris
11 left.

12 Q. Okay. Turn, well, look at the next page
13 which is 184-1999. That's also an aerial photograph?

14 A. Yes.

15 Q. And there's also a portion of that
16 photograph that is circled in red, correct?

17 A. Yes.

18 Q. Now, assuming for me the dark area within
19 that circle is trees, is that the way the property
20 looked like when you purchased it?

21 A. No.

22 Q. Now, you mentioned that there were treetops

1 on the property when you purchased it.

2 What did you mean by that?

3 A. Left over from where they cut the, I guess
4 the trunk out of the tree when they logged it.

5 Q. Okay. What's a treetop in your mind?

6 A. It would be the unusable portion by the
7 logging company.

8 Q. Of what?

9 A. Of the tree.

10 Q. Do you have any idea or recollect how many
11 treetops were on the property?

12 A. No. They were decaying so you couldn't
13 really tell with all the weeds and grass.

14 Q. From your observations of the property, was
15 there any evidence of any water coming across the
16 property?

17 A. Yes, there was.

18 Q. Okay. Describe that for me, please.

19 A. It was taking off topsoil. It was doing
20 what I guess I would call sheet erosion.

21 Q. Was there a defined channel across your
22 property?

1 A. No, there wasn't.

2 Q. Where did that erosion enter your property?

3 A. It entered at the same place the water
4 enters now, at the north end of the L.

5 Q. Where was it coming from?

6 A. Bill Hesper's property.

7 Q. Where did that sheet erosion leave your
8 property?

9 A. Where the water leaves the property from
10 the L currently.

11 Q. How often would you observe water in that
12 area?

13 A. Only when it like had major storm events.

14 Q. Okay. What do you define as a major storm
15 event?

16 A. When we had a lot of rain or the ground was
17 already saturated and you had some more rain.

18 Q. Can you quantify for me in terms of, you
19 know, half an inch, an inch, an inch and a half of
20 rain?

21 A. I was going to say it would depend on what
22 the surrounding land was able to hold. You know, as

1 far as if it was dry, you could get a large rain, you
2 wouldn't get any runoff.

3 Q. Now, was this area vegetated?

4 A. Which area?

5 Q. Well, in general, the southeast corner of
6 your property.

7 A. There was probably grass there and weeds.

8 Q. What about in the area where the water was
9 coming across?

10 A. No. It was taking the weeds and the growth
11 with it. That was our concern.

12 Q. Did this raise a concern with you of some
13 sort?

14 A. Oh, yes.

15 Q. What was the concern?

16 A. We didn't want to lose our topsoil. It
17 takes thousands of years to create an inch of
18 topsoil.

19 Q. And did you observe the loss of topsoil in
20 this area?

21 A. Yes.

22 Q. Now, in August and September of 1999, you

1 performed some earth work in this area, correct?

2 A. Yes.

3 Q. What did you do?

4 A. Constructed --

5 Q. In general, in general.

6 A. Constructed the L, put up a small berm
7 along the upper end of the L.

8 We limed and then we put on the
9 fertilizer and grass seed, and then we harrowed it in
10 and then we strawed it.

11 Q. Let me go back.

12 You indicated that this water was
13 coming off of Bill Hesper's property, correct?

14 A. Yes.

15 Q. Bill Hesper is your uncle?

16 A. Yes.

17 Q. What do you attribute, if anything, the
18 water coming across your property from?

19 A. There was an upstream project done. I
20 believe they called it CP-2000 or something like that
21 in the testimony. We started seeing from Highway 37
22 as we drove by trees being pushed out and piled, and

1 then there was, a little while later, there was some
2 large piles of dirt stockpiled appearing, mountainous
3 piles, large, large piles of dirt, and we became
4 concerned.

5 Q. Okay. Why don't you open up respondents'
6 exhibit book and turn to Exhibit 13 which begins on
7 page 88.

8 MS. PELLEGRIN: Your Honor, I'm going to
9 object. This wasn't part of the prehearing exchange.
10 The first time I saw this document was Tuesday night,
11 this Tuesday night when I got this book from
12 respondent on Tuesday during the day.

13 JUDGE MORAN: This is Respondents' Exhibit 13
14 which has on it Hesel Exhibit No. 88 we're talking
15 about?

16 MR. NORTHRUP: That's what we're talking about,
17 and I believe this document was provided in the
18 prehearing exchange.

19 MS. PELLEGRIN: No.

20 JUDGE MORAN: And just before we go off the
21 record for a moment or so, when you're talking about
22 this, Mr. Northrup, you're also including the

1 photographs that are a part of that?

2 MR. NORTHRUP: Yes, I am.

3 JUDGE MORAN: Okay. So see if you can clear
4 this up and we'll go back on the record.

5 Perhaps, for example, I'm just
6 speculating, maybe the cover letter wasn't there but
7 the photos were exchanged or maybe not. I do not
8 bring the prehearing exchanges with me, but I do have
9 them back in my offices in Washington.

10 So now we'll go off the record for a
11 moment.

12 (Discussion held off the
13 record.)

14 JUDGE MORAN: In an off-the-record discussion,
15 there appears to be a problem with Respondent's
16 Exhibit 13 which consists of several photographs
17 putatively of the Hesper property or adjacent area and
18 with a cover sheet that has ten different numbered
19 items on it, and I don't know whose handwriting that
20 is.

21 The problem the record should reflect
22 is that EPA is unable to identify this as being part

1 of the prehearing exchange, and, Ms. Pellegrin, you
2 came into possession of this you believe for the
3 first time on when?

4 MS. PELLEGRIN: Tuesday night. Well, I came
5 into possession Tuesday during the day. I reviewed
6 it Tuesday night.

7 JUDGE MORAN: Okay. Here's my reaction to
8 this. I'll hear any objection, but EPA has been in
9 possession of this since Tuesday. This record is --
10 an understatement -- filled with photographs of the
11 Hesper property, of Lake Centralia, up and down the
12 site, and we have people, Ms. Melgin, Mr. Carlson, et
13 al., and so in the spirit of fairness in this hearing
14 which was scheduled to last five days in total and
15 took nine and a half days for EPA to put on their
16 case, and I wouldn't in any way attribute that to
17 excessive cross-examination as an explanation for
18 doubling the length of time it was estimated for the
19 whole case to be presented, in that spirit of
20 fairness, it seems to me that over the weekend,
21 Mr. Carlson and Ms. Melgin and others can look over
22 these photographs and see if they can recognize them

1 as being the subject property and not some other
2 property, and we'll also be waiting to see whether
3 Mr. Northrup was able to confirm whether this was, in
4 fact, exchanged or not.

5 But what I'm hinting at is I'm
6 inclined to allow these photos. Subject to Bobby
7 Hesar's testimony identifying it, I'll allow it in.
8 I mean, it just seems to me to be -- it would be
9 manifestly unfair, given the number of photographs,
10 this is not something that, oh, this is a photo of
11 someplace in Texas and, you know, how could we
12 possibly know. You know, we've been talking a bit
13 about this area.

14 So now you know how I feel about that.
15 We're going to wait till Monday, and in the meantime,
16 I'm going to take a short break and call my office
17 and see if they can locate this exhibit, so we'll
18 take a five-minute break while I make that call.

19 (Recess taken.)

20 JUDGE MORAN: In an off-the-record discussion,
21 apparently what's going to happen is Mr. Northrup is
22 going to proceed and lay a foundation of what we've

1 described now as disputed Respondents' proposed
2 Exhibit 13, disputed in the sense of whether it was
3 part of the prehearing exchange or not and whether it
4 would be admitted if it was not.

5 That's not to be resolved at this
6 point, but the foundation is going to be laid about
7 this exhibit as we proceed now.

8 Is that correct, everyone?

9 MS. PELLEGRIN: Yes, Your Honor.

10 JUDGE MORAN: Okay. Go ahead, Mr. Northrup.

11 MR. NORTHRUP: Okay.

12 Q. Bobby, do you have in front of you
13 Respondents' Exhibit No. 13?

14 A. Yes.

15 Q. Which begins on page 88 and goes through
16 98?

17 A. Yes.

18 Q. Why don't you take a look at Exhibit 88.

19 Can you tell me what that is?

20 A. It's some handwritten notes I made for the
21 photographs that followed.

22 Q. So this is your handwriting?

1 A. Yes, it is.

2 Q. And when did you make these notes, if you
3 know?

4 A. After I took the pictures which would have
5 been after the project was started because the dirt
6 piles were there, but I don't know the exact time.

7 Q. And there are ten notations there, correct?

8 A. Yes.

9 JUDGE MORAN: Mr. Northrup, could you happen to
10 be a little more precise about after the project?
11 Which project? Was it work done before they bought
12 the property? Even though you might not give me a
13 specific date or dates, month and year.

14 Q. BY MR. NORTHROP: Now, Bobby, you talked
15 about these photographs were taken after a project,
16 correct?

17 A. Yes.

18 Q. What project are you referring to?

19 A. It's the one they were talking about. They
20 referred to it here at the trial as the
21 CP-2000. That was done on the Bill Hesel property.

22 Q. Okay. This was a project done on Bill

1 Heser's property?

2 A. Yes.

3 Q. Do you know when this project was
4 undertaken?

5 A. I believe it's in the range of August of
6 1997 but I can check the documents in here to make
7 sure I'm correct.

8 Q. Do you recall the testimony of Mr. Carlson,
9 well, and others as well, where they discussed this
10 project on Bill Heser's property?

11 A. Yes.

12 JUDGE MORAN: So these photographs are not of
13 your property?

14 THE WITNESS: No.

15 Q. BY MR. NORTHRUP: And, in fact, didn't
16 Mr. Carlson discuss a Freedom of Information Act
17 request that he sent to the NRCS I believe on this
18 project?

19 A. I believe -- is it in here? I thought I
20 saw something like that.

21 Q. Well, I'm looking for it.

22 I apologize, Your Honor.

1 A. It's Exhibit 14 I think.

2 Q. Why don't you take a look at Complainant's
3 Exhibit 9A.

4 (Pause)

5 A. I'm there.

6 Q. Okay. And take a look at page 153.2.

7 A. Okay.

8 Q. And this appears to be a letter to
9 Mr. Gregory T. Carlson, USEPA Region 5, from W. Burke
10 Davies at the Marion County Soil and Water
11 Conservation District, correct?

12 A. Yes.

13 Q. And don't the documents following that
14 reflect a project on Mr. Bill Hesel property?

15 A. Yes.

16 Q. Okay. And, in fact, aren't these pictures
17 in Respondents' Exhibit 13 pictures of that project?

18 A. Yes.

19 Q. And when was that project undertaken, if
20 you know?

21 A. I believe it to be -- most of these show
22 September. Oh, gosh.

1 JUDGE MORAN: You know, one thing you could do,
2 Mr. Northrup, is direct the witness to a particular
3 page if that would help him focus because there's
4 many pages to deal with within EPA Exhibit 9A, in
5 order to assist him with the question about the date.

6 Q. BY MR. NORTHRUP: Okay. Mr. Hesper, can you
7 take a look at page 168.9?

8 A. Okay. I'm there.

9 Q. Okay. And what is in document? What's the
10 title of it?

11 A. It's a C-2000 conservation practices
12 program application/contract/payment form.

13 Q. And this is a project that was undertaken
14 on the Bill Hesper property?

15 A. Yes.

16 Q. Is there a -- look up at the right-hand
17 corner. Is there a box with some dates in it?

18 A. Yes. That would be August 13th of 1997.

19 Q. That's by the words "date approved"?

20 A. Yes.

21 Q. Okay. There's also a start/end date?

22 A. It would be August of 1997. Then it seems

1 to go backwards to July -- no, no, July of '98.

2 Q. Okay. So does that sort of refresh your
3 recollection as to when this project took place?

4 A. Yes.

5 Q. Okay. Now, also then, can you go back to
6 Respondent's Exhibit 13 on page 88?

7 A. Yes.

8 Q. Okay. Now, at the top of that page, isn't
9 there a reference to a time?

10 A. Fall of '97.

11 Q. Okay. Now, is that approximately the time
12 that you took these photographs?

13 A. Yes, that would have been correct.

14 Q. Why don't you turn to the next page, page
15 89.

16 Can you tell me what that is?

17 A. It's a picture of their project from east
18 of Route 37.

19 Q. What does this picture depict? What
20 direction are you looking from?

21 A. Pretty much due west.

22 Q. And when was this picture taken, do you

1 know?

2 A. In the fall of '97.

3 Q. Is this a picture that you took?

4 A. Yes.

5 Q. Was anyone else with you at the time?

6 A. I believe Andy was with me.

7 Q. And describe for us, what are we looking
8 at?

9 A. We're looking at this project they did on
10 Martin Branch on the Bill Hesel property.

11 Q. Okay. What about this photograph tells us
12 that a project is being worked on?

13 A. It's from a farther away picture, so it
14 shows the whole area, and it gives the picture of --
15 they're pretty far away but it gives the picture as
16 to the location on the property, the brush pile, and
17 the dirt pile.

18 Q. From whose property did you take this
19 picture from?

20 A. Chris Phoenix's property.

21 Q. If you look dead center in that photograph,
22 there appears to be some sort of pile. Is that what

1 you're talking about?

2 A. Yes, there would be a dirt pile, and there
3 would also be, just to the left of the power pole,
4 there's a brush pile right at the end.

5 Q. And again, this is a photograph of your
6 Uncle Bill's property, correct?

7 A. Yes.

8 Q. Why don't you turn to page 90?

9 A. Okay.

10 Q. Can you tell me what that is a picture of?

11 A. It's a picture from the same Chris Phoenix
12 property across on the east side of Highway 37
13 looking down at the project that they were doing on
14 Martin Branch.

15 Q. And when you say they, who do you mean?

16 A. Bill Hesel.

17 Q. Again, this is a photograph that you took?

18 A. Yes.

19 Q. Is this just sort of a more zoomed in
20 photograph as what appears on page 89?

21 A. Yes, slightly I believe.

22 Q. Do you recall, did you move up from this

1 first photograph to take the second photograph? Did
2 you change location?

3 A. It appears that I did slightly.

4 Q. Do you recall?

5 A. No, not exactly.

6 Q. Again, looking dead center of that
7 photograph, is that a -- what is that?

8 A. The dirt piles. They appear to hide behind
9 each other. It's taken more laterally, so the first
10 one tends to get more, and it's pretty far away, but
11 it's a picture of their project that they were
12 digging the dirt out, and you can see the distant
13 brush pile down there.

14 Q. Why don't you turn to page 91. Can you
15 tell me what that is?

16 A. It's also a picture of the project Bill
17 Hesel was doing. It shows the multiple dirt piles,
18 and it was taken from the east side of the highway.

19 Q. What direction is the photograph being
20 taken towards?

21 A. It would be better described as probably
22 more of a west-northwest.

1 Q. And in the center of the photograph, do you
2 see some what appear to be piles of dirt?

3 A. Yes, I do.

4 Q. Is that, in fact, what that is?

5 A. Yes.

6 Q. If you turn back to Exhibit 88, there are
7 some notations there, correct?

8 A. Yes.

9 Q. How do those notations relate to these
10 pictures, if at all?

11 A. It gives the location of where they were
12 taken and just some general comments of what the
13 pictures show on the project.

14 Is that what the question was?

15 Q. I don't know. You're going to have to tell
16 me.

17 A. I forgot the question.

18 Q. Well, let's look at page 89. Does that
19 photograph match up with any of the notations on page
20 88?

21 A. Yes, I believe that's probably No. 1.

22 Q. Okay. Look at page 90 and tell me if that

1 matches up with any of the notations on page 88.

2 A. It would be No. 2.

3 Q. Okay. Look at page 91 and does that match
4 up with any of your notations on page 88?

5 A. I believe that's No. 3.

6 Q. Let's take a look at page 92. Does that
7 match up with any of your notations on page 88?

8 A. I believe that's No. 4.

9 Q. Describe for me what this is a picture of,
10 page 92.

11 JUDGE MORAN: Page what, counsel?

12 MR. NORTHRUP: 92.

13 A. It's a picture of the grassed area exiting
14 mom and dad's property where the drainage goes over
15 to their project.

16 Q. Where are you standing... This is a
17 picture you took, correct?

18 A. Yes.

19 Q. Whose property are you standing on when you
20 took this picture?

21 A. My mom and dad's.

22 JUDGE MORAN: You're on what?

1 THE WITNESS: Mom and dad's property.

2 Actually, I was standing I believe in
3 the back of the pickup truck to try to get high
4 enough to get a better picture.

5 Q. BY MR. NORTHRUP: Okay. You talked about
6 a -- well, you see some trees in the background.

7 A. Yes.

8 Q. Whose property are those trees on, if you
9 know?

10 A. Bill Hesel's.

11 Q. Is Martin Branch depicted in this picture
12 anywhere?

13 A. The branch itself is invisible but it's
14 there.

15 Q. Well, what do you mean it's not visible but
16 it's there?

17 A. It would be on the other side of the dirt
18 piles. You couldn't get a good enough picture down
19 to actually view -- we couldn't get close enough.

20 Q. Okay. So your testimony is Martin Branch
21 is behind these dirt piles which are on the left side
22 of the picture?

1 A. That's correct.

2 Q. Does Martin Branch continue on to the right
3 of these dirt piles?

4 A. Well, as I understand it, it would come
5 right up by where I was taking the pictures from on
6 some maps that I've seen, but I've heard stuff here
7 today that points that it goes up the Department of
8 Transportation's dredge ditch to Highway 37 which
9 goes down the middle of an old township road.

10 Q. So are you saying that water flows along
11 this grassy area that's pictured at the bottom of the
12 photograph and goes towards the trees in the
13 photograph?

14 A. Yes, it goes towards the corner and then it
15 takes a left behind the dirt piles.

16 Q. Okay. And that is Martin Branch?

17 A. Yes.

18 Q. So this grassy area in the foreground, is
19 that part of Martin Branch?

20 A. It would be my opinion that it is.

21 JUDGE MORAN: And just so I understand this
22 picture, Mr. Heser, this water, as I'm looking at

1 Heser Exhibit No. 92, proposed Exhibit No. 92, right?

2 THE WITNESS: Yes.

3 JUDGE MORAN: The water is flowing out -- if
4 one could see water or if water was flowing at that
5 time, it would be flowing away from this vantage
6 point. It wouldn't be coming towards the photograph.
7 It would be away.

8 THE WITNESS: That's correct, Your Honor.

9 JUDGE MORAN: Okay.

10 Q. BY MR. NORTHRUP: Why don't you turn to
11 page 93.

12 Now, does that correspond with any of
13 the handwritten notations on Exhibit 88, on page 88?

14 A. Yes. It would be No. 5, and it would show
15 just a little bit more of a backed away view that
16 would show a little broader picture of more dirt
17 piles and a wider area.

18 Q. We are seeing more of a westerly direction,
19 is that correct?

20 A. Yes, yes, slightly more westerly, yes.

21 Q. And the location that you took this
22 photograph is the same location where you took the

1 preceding photograph on page 92?

2 A. Yes, unless I backed up a little bit.

3 Q. Do you recall if you did or didn't?

4 A. I was trying to look at the picture and

5 see.

6 No, it looks about the same.

7 Q. It looks to me like there is -- on the
8 left-hand side of the picture in front of the dirt

9 piles, that is a cropped area, is that correct?

10 A. Yes.

11 Q. What is the crop, if you know, or what was
12 it?

13 A. It was either corn or milo. I believe it's
14 corn.

15 Q. Whose property is that, if you know?

16 A. Bill Hesper's property.

17 Q. Now, do you see the cropped area sort of in
18 the middle of the photograph on the other side of the
19 dirt piles?

20 A. Which picture?

21 Q. 93.

22 A. Can you repeat the question?

1 Q. Sure.

2 Do you see the cropped area on the
3 further side of the dirt piles?

4 A. Yes, I do.

5 Q. And whose property is that?

6 A. Bill Hesper's.

7 Q. Can you turn to page 94?

8 A. Okay.

9 Q. Is there a particular notation on page 88
10 that relates to the photograph on page 94?

11 A. No. 6.

12 Q. And what is this a picture of on page 94?

13 A. Same area. Might be looking a little bit
14 more back north again but it includes this corner
15 steel post.

16 Q. What is that? Does that corner steel post
17 have any significance?

18 A. It's to measure the property marker between
19 grandma's, to divide grandma's portion.

20 Q. Grandma, grandmother?

21 A. Yes, Winnie Hesper, my grandmother.

22 Q. So there's different property ownership on

1 either side of that steel post?

2 A. Yes.

3 Q. Who owns the property on the right-hand
4 side of the post?

5 A. It's probably not described quite that way,
6 Charlie.

7 Q. How is it described?

8 A. We're at the corner of the farthest corner
9 right before the steel post on grandma's 20 that my
10 dad has now, and this all on the other side of the
11 steel post is Bill Hesper's, both the 20 acres on the
12 north side and all the land to the west.

13 Q. And to the west would be on the left side
14 of the farm?

15 A. Yes.

16 Q. Can you turn to page 95?

17 JUDGE MORAN: Can I just, before he does that,
18 Mr. Northrup.

19 So, Bobby Hesper, would it be fair to
20 state that if you look at 94, so go back to 94, that
21 as I understand your testimony, virtually everything
22 in that photograph is Bill Hesper's property? Is that

1 not true? All the grassy area, all the mounds, or
2 did I misunderstand you?

3 THE WITNESS: That would be correct, Your
4 Honor.

5 JUDGE MORAN: Okay.

6 Q. BY MR. NORTHRUP: On that page, what about
7 those trees on the right-hand side?

8 A. Those are Bill Heser's.

9 Q. Bill Heser's property?

10 A. Yes.

11 Q. Take a look at page 95.

12 A. Okay.

13 Q. Is there a notation on page 88 that matches
14 up with the photo on page 95?

15 A. I believe it's No. 7.

16 Q. And did you take this photograph?

17 A. Yes, I did.

18 Q. And tell me what this is a photograph of?

19 A. It's dirt piles looking further west on his
20 project.

21 Q. And where, if you know, where did these
22 dirt piles come from?

1 A. They dug out Martin Branch.

2 Q. So where would Martin Branch be on this
3 photograph?

4 A. Just on the other side of the dirt piles.

5 Q. Do you see sort of a green area that runs
6 in the middle of the photograph?

7 A. Yes.

8 Q. From left to right?

9 A. Yes.

10 Q. What is that?

11 A. It's probably the grass they seeded. I
12 don't know for sure.

13 Q. Is that where Martin Branch is?

14 A. Yes.

15 Q. And Martin Branch would be, water would be
16 moving from right to left, correct?

17 A. That's correct.

18 Q. And again, the trees in the background, do
19 you know whose property those are on?

20 A. They're on a property boundary line between
21 Bill Hesel and Shannon Kell or Cecil Kell's estate.

22 Q. These cropped areas, those are on Bill

1 Heser's property?

2 A. Yes, they are.

3 Q. And again, whose property are you on when
4 you're taking this photograph?

5 A. Mom and dad's.

6 Q. Can you look at Page 96?

7 A. Yes.

8 Q. And is there a notation on page 88 that
9 relates to this photograph?

10 A. I believe it's No. 8.

11 Q. And can you read that for me, please?

12 A. Brush pile at outlet end of dredged ditch;
13 Martin Branch in parentheses.

14 Q. So looking at page 96, what is this a
15 picture of?

16 A. Looking further west on their project.

17 Q. And do you know where these dirt piles came
18 from?

19 A. It's material they dug out.

20 Q. And again, sort of running across the
21 center of the photo, you see what appears to be a
22 greenish area?

1 A. Yes.

2 Q. What is that?

3 A. It's either a seeding or wheat growth or
4 something of that nature in that area where they dug
5 that out.

6 Q. Okay. But that's where Martin Branch is?

7 A. That's where Martin Branch is, yes.

8 Q. If you look over at the left-hand side of
9 the photograph sort of in the middle of the page, can
10 you tell me, is there anything significant about that
11 area of the photograph?

12 A. It shows that brush pile they pushed up
13 against the downstream woods.

14 Q. And what is included in that brush pile if
15 you know?

16 A. Trees that used to be in this project area.

17 Q. Do you know where in the project area those
18 trees used to be?

19 A. They were scattered throughout it.

20 Q. Turn to page -- oh, where were you located
21 when you took the picture on page 96?

22 A. Same general location, the corner of mom

1 and dad's property.

2 Q. And what direction is that photograph
3 facing?

4 A. West-northwest.

5 Q. Okay. Look at page 97 for me, please.

6 A. Yes.

7 Q. Now, are there notations on page 88 that
8 relate to the photo on page 97?

9 A. It would be No. 9.

10 Q. Okay. Can you read No. 9 for me, please?

11 A. Full view of brush pile removed by NRCS,
12 Bill Hesper, and excavator Mark Ayet.

13 Q. In the center of that photograph, what does
14 that depict? What is that a photograph of?

15 A. The downstream woods with the large brush
16 pile pushed up against it.

17 Q. Now, is this the same brush pile that we
18 saw in the preceding photograph?

19 A. Yes, but it's a lot clearer shot of it.

20 Q. Again, this is a photograph you took?

21 A. Yes.

22 Q. And where were you standing when you took

1 the photograph?

2 A. Near the corner of mom and dad's property.

3 Q. Can you look at page 98 for me, please, and
4 is there a notation on page 88 that goes along with
5 the photograph on page 98?

6 A. Yes, there is.

7 Q. And what's that notation?

8 A. It would be No. 10. Same as No. 9 with a
9 view of steel post to show all pictures were taken
10 from dad's property.

11 Q. The steel post that's in the photograph on
12 page 98 was the same steel post that is in the
13 photograph on page 94?

14 A. Yes, it is.

15 Q. And on the left hand center of that
16 photograph, is that a dirt pile?

17 A. On No. 98?

18 Q. Correct, yes.

19 A. Will you repeat that? Did you say left
20 hand?

21 Q. Right hand, I'm sorry, right hand.

22 A. Yes, it is.

1 Q. And again, this is a photograph that you
2 have taken?

3 A. Yes.

4 Q. Sort of in total, just so I make sure I've
5 went over it, all of these photographs from page 89
6 to 98 were photographs that you took?

7 A. Yes, they were.

8 Q. And do they accurately reflect the area
9 that was being photographed?

10 A. Yes, they do.

11 Q. Was anybody else with you when you took
12 these photographs?

13 A. I believe Andy was with me on all of them.

14 MR. NORTHRUP: Your Honor, at this time I would
15 move for the admission of Hesel Exhibit 13.

16 JUDGE MORAN: I thought we agreed we were going
17 to postpone that until Monday.

18 MR. NORTHRUP: That's fine.

19 JUDGE MORAN: But remember that.

20 MR. NORTHRUP: All right.

21 Q. Now, getting back to the work that you
22 performed in the southeast corner of your property, I
188

1 believe you indicated you'd undertaken some
2 earth-moving activities, is that correct?

3 A. Yes.

4 Q. Now, what specifically did you do?

5 A. We cleaned up the treetops and burned them,
6 and we also constructed an L-shaped ditch.

7 Q. Why did you clean up the treetops?

8 A. They were laying all over the place. There
9 was a mess just like the previous owners had told us
10 from the logging company.

11 Q. And what did you do with the treetops?

12 A. We put them in a pile and we burned them.

13 Q. Now, we saw a video of certain I'll call it
14 earth-moving activities in the southeast corner of
15 your property as part of the complainant's case. Do
16 you recall that?

17 A. Yes.

18 Q. And was that essentially a video of the
19 work that you had done on your property?

20 A. Yes.

21 Q. Do you remember how many piles of treetops
22 you had on the property?

1 A. Yes.

2 Q. How many?

3 A. One.

4 Q. Describe the dimensions of that tree pile
5 for me.

6 A. Well, you could see over it, but it was
7 probably 12, 15 feet wide, maybe 30, 40 feet long
8 along the new constructed ditch.

9 Q. Again, what went in that pile?

10 A. The treetops left over from the logging.

11 Q. Can you open Complainant's Exhibit Volume I
12 for me, please?

13 JUDGE MORAN: Complainant's Exhibit Volume I?
14 Which Exhibit in Volume I?

15 MR. NORTHRUP: Exhibit 8.

16 MS. PELLEGRIN: Can I have five minutes before
17 we go on to the next question?

18 JUDGE MORAN: Sure. We'll take a five-minute
19 break.

20 (Recess taken.)

21 JUDGE MORAN: We're back on the record.

22 Let me just state that I just took a

1 phone message, a voice mail message from my staff
2 attorney back in Washington, D.C., and she reports to
3 me that having examined the prehearing exchange
4 documents, she was unable to locate Respondents'
5 proposed Exhibit 13 as I described it to her. She
6 said there's nothing fitting that description, and I
7 took some time speaking to her personally to do that.

8 Having said that, that doesn't change
9 my disposition about potentially admitting these
10 documents for the reasons I already articulated but
11 we're going to wait until Monday before there's a
12 ruling on that.

13 I hope that this is not a recurring
14 problem in terms of respondents' exhibits.

15 MR. NORTHRUP: I hope so too.

16 JUDGE MORAN: Go ahead, Mr. Northrup.

17 Q. BY MR. NORTHRUP: Mr. Heser, can you take a
18 look at Complainant's Volume I -- maybe you're
19 already there -- Exhibit 8?

20 A. Yes.

21 Q. Specifically, pages 63 through 70.

22 Are you in Complainant's Volume I,

1 USEPA's Volume I?
2 A. Yes.
3 JUDGE MORAN: I'll give you a hint. It's when
4 the photos begin.
5 THE WITNESS: Thank you.
6 MR. MARTIN: Which exhibit are you on?
7 MR. NORTHRUP: Exhibit 8, pages 63 through 70.
8 THE WITNESS: I'm here.
9 Q. And these are photographs of the earth
10 moving that you did on the site, correct?
11 A. Yes.
12 Q. The top photo on page 63, can you tell me
13 what that shows, what it appears to show?
14 A. It shows the north-south part of what they
15 refer to here as the L.
16 Q. And is that a -- there's what appears to be
17 a pile in the middle of the photograph?
18 A. Yes.
19 Q. Is that your debris pile you talked about?
20 A. Yes.
21 Q. That's where you put the treetops?
22 A. Yes.

1 Q. Look at page 65, the top photograph.

2 A. Okay.

3 Q. Well, actually, the top and the middle, no,
4 and the bottom photograph, what do those depict, can
5 you tell?

6 A. The top photograph I believe is still taken
7 from the north-south section of the L looking
8 northwest at the debris pile from the logging where
9 we burned it.

10 Q. And what about that middle photo?

11 A. The same thing but it's not a very good
12 picture.

13 Q. Okay. And the bottom photo?

14 A. It's probably from the top end of the L
15 more near the inlet.

16 Q. And we're looking at the debris pile?

17 A. Debris pile looking southwest.

18 Q. And this is the sole debris pile on the
19 property?

20 A. Yes.

21 Q. In that top photo, although it's unclear,
22 are there tree roots and things like that in the

1 pile?

2 MS. PELLEGRIN: Objection. I just -- this is
3 completely unclear. I can't see anything in it. I
4 don't know if he's asking him about this photo.

5 Certainly we saw in the video certain
6 things. I mean, if he wants to ask him about the
7 video, then I'm okay with that, but as I'm looking at
8 this, I can barely even, you could barely even see
9 what this is.

10 JUDGE MORAN: Okay. Which photograph are you
11 talking about, counsel?

12 MS. PELLEGRIN: I think they're talking about
13 the top photo on Bates page 63.

14 JUDGE MORAN: I was making a notation so you'll
15 have to tell me, Mr. Northrup, which photograph did
16 you just ask Bobby Hesel about?

17 MR. NORTHRUP: I was actually talking about
18 page 65, the top photo.

19 JUDGE MORAN: Okay. I thought it was 65 as
20 well.

21 See, here's the thing, counsel for
22 EPA, this is an EPA exhibit, right?

1 MR. MARTIN: Yes.

2 MS. PELLEGRIN: Yes, Your Honor.

3 JUDGE MORAN: Okay. So if you're having
4 trouble with it not being clear, that's not really my
5 worry. The question is if Mr. Hesper cannot discern
6 what's going on in the photo, not whether you can.

7 And to the extent that you want to
8 through cross-examination show that I shouldn't be
9 considering these photographs of EPA, you can do that
10 when you have your opportunity on cross.

11 MS. PELLEGRIN: Okay. Thank you, Your Honor.

12 MR. NORTHRUP: Do you remember my question?

13 THE WITNESS: No, I don't.

14 Q. BY MR. NORTHRUP: Looking at the photograph
15 at the top of page 65, that debris pile, you
16 testified there are treetops in there, correct?

17 A. Yes.

18 Q. How about tree roots?

19 A. There were probably some that are attached
20 to some of the, it appears to be some of the stumps
21 that were from the fallen trees or trees that were
22 pushed over by the logging company that were already

1 on top of the ground.

2 Q. Are you just remembering that or can you
3 actually see that?

4 A. There's some clumps there that look like
5 that.

6 Q. And your recollection of your work on the
7 site on that day, you recall seeing this?

8 JUDGE MORAN: I didn't hear the last part. You
9 said your recollection on the site was what?

10 MR. NORTHRUP: On the site on the day that he
11 recalled the tree roots in the debris pile.

12 THE WITNESS: Yes.

13 Q. Recalling the video that was shown, there
14 was one portion of the video where it focused on what
15 appeared to be cut logs.

16 Do you recall that?

17 A. Yes.

18 Q. Where were those -- how many logs were
19 there?

20 A. I don't remember. Maybe six or seven.

21 Q. Okay. Do you remember where those logs
22 came from?

1 A. Oh, those came from upland fence rows.

2 JUDGE MORAN: From where?

3 A. Fence rows on property either to the west
4 or to the north.

5 Q. Those logs did not come from this corner of
6 the property we're talking about?

7 A. No, they did not.

8 Q. What did you do with those logs?

9 A. I think we ultimately gave them away
10 because there were too few. Nobody will come by for
11 just a few logs. They want loads to make their
12 trucking efficient.

13 Q. This work that you did on your property in
14 the southeast corner, I believe the video had a date
15 September 4th of '99.

16 Do you recall that?

17 A. I think I remember that. Yeah, I remember
18 seeing September I think of '99 on that video on the
19 stamp.

20 Q. Okay. And is that an accurate date of when
21 you did the work on the property, if you know?

22 A. Yes.

1 Q. Now, I believe you indicated you also
2 constructed the L, correct?

3 A. Correct.

4 Q. Why?

5 A. Because we wanted to stop the sheet erosion
6 that was from the water coming across and taking the
7 topsoil off.

8 Q. And again, where was the water coming from?

9 A. From Bill Hesper's property.

10 Q. How long did it take to construct the L?

11 A. I don't remember for sure. This was done
12 in August of '99.

13 Q. Well, in general, did it take a day, a
14 week, two weeks, three weeks, if you can remember?

15 A. Maybe a couple weeks.

16 Q. You did this work during the day?

17 A. Yes.

18 Q. You didn't try and conceal what you were
19 doing?

20 A. No.

21 Q. How exactly did you go about constructing
22 the L?

1 A. Well, we took the dirt out of the ditch,
2 shaved it, and checked the grade with the transit and
3 made a small berm on the upstream section, and then
4 we had it limed, fertilized and seeded with I believe
5 it's what they call tall fescue, Kentucky 31, and I
6 believe we used some wheat there too to help hold it
7 and harrowed it in, and then we strawed it so that
8 the wheat and the grasses would keep moisture, it
9 wouldn't dry out and it wouldn't die, so it would be
10 very successful.

11 Q. Successful in what way?

12 A. That it wouldn't have erosion.

13 Q. What's a transit?

14 A. It's an instrument you use to check the
15 elevations.

16 Q. Where were you using -- was it you that
17 used the transit?

18 A. Yes.

19 Q. Why were you using the transit?

20 A. Because I wanted to make sure that this was
21 done right.

22 JUDGE MORAN: Just let me ask a question before

1 you proceed to the next one. I want to make sure I
2 understand this.

3 Were you, either you individually or
4 with your brother Andy, actually doing this work or
5 did you subcontract it out for someone else to run
6 the equipment to construct this?

7 THE WITNESS: No, no, we did it.

8 JUDGE MORAN: You did it?

9 THE WITNESS: We did it.

10 JUDGE MORAN: So you had to rent the equipment?

11 THE WITNESS: Yes.

12 JUDGE MORAN: Okay.

13 Q. BY MR. NORTHRUP: How wide did you make the
14 L?

15 A. The bottom of it was one scraper paddle
16 wheel width and the sides were sloped so -- it's been
17 awhile so I wouldn't know the exact measurement but
18 something like 30 plus feet.

19 Q. Was the size of the L, did that hold any
20 particular significance to you? Why did you make it
21 that big or that small?

22 A. Well, we wanted to make it large enough

1 that it would absorb the impact from the upstream
2 project that was done. We believe that that was
3 causing the damage to the property that we purchased
4 since they did that project upstream, and we wanted
5 it to absorb that.

6 Q. So when you were doing that and you wanted
7 to accomplish that, were you just sort of eyeballing
8 this project?

9 A. Yes, yes.

10 Q. You didn't make any calculations or
11 anything like that in designing the L?

12 A. No, I did not.

13 Q. How did you know what size of slope to
14 make?

15 A. You mean from right to left in the channel?

16 Q. In the channel of the L.

17 A. In the channel, the size of slope?

18 Q. Yes.

19 A. Well, I just wanted it gentle enough that
20 it wouldn't have the straight sides that erode that
21 are seen sometimes in ditches.

22 Q. Have you observed eroding channels before?

1 A. Yes.

2 Q. You talked about you seeded the L, correct?

3 A. Yes.

4 Q. And what did you seed it with?

5 A. Fescue and I believe some wheat, but you're
6 not supposed to put the wheat in too heavy because it
7 will compete too heavily with the grass and the grass
8 won't get established.

9 Q. Why did you happen to pick fescue? Why
10 didn't you plant it with something else?

11 A. That was used a lot when we did waterways
12 with the Soil Conservation Service. I believe they
13 use some different grass mixes now, but that's widely
14 accepted that that's a good one.

15 Q. You talked also about you constructed a
16 berm along the L?

17 A. Yes.

18 Q. Okay. Why did you do that?

19 A. To keep the water from that upstream
20 project that was being dumped on us from taking more
21 soil off of the land.

22 Q. You also used the terminology harrowed?

1 A. What did you say?

2 Q. Harrowed.

3 A. Harrowed, yes.

4 Q. You said you harrowed the seed in?

5 A. Yes.

6 Q. What is that?

7 A. That's a very shallow mixing. A harrow,
8 it's like a little spike tooth harrow, and you just
9 drag it along, and it will mix the grass, seed and
10 wheat and fertilizer and lime in a very shallow seed
11 bed mixed with the soil so the end result would be
12 best achievable on getting a stand of fescue and
13 grass.

14 JUDGE MORAN: I note in my portable dictionary
15 that harrow is described as to cultivate with a
16 harrow which doesn't help us much, does it, but for
17 what that's worth.

18 You know what a harrow is?

19 THE WITNESS: It would be kind of like dragging
20 your hairbrush along the ground if there weren't very
21 many teeth in it.

22 JUDGE MORAN: Oh, mine is still in good shape,

1 but, yeah, I understand. Okay. Thank you.

2 Go ahead.

3 Q. BY MR. NORTHRUP: After you harrowed in the
4 seed, you said you strawed it?

5 A. Yes.

6 Q. Why do you do that?

7 A. Oh, the straw holds the moisture, and when
8 you get a shower of rain, it's very possible at this
9 time of the year that you can get some extended dry
10 periods and you can get a shower of rain that's
11 enough to germinate the seed but then it won't have
12 enough to sustain life because of its limited root
13 system and it will all die off.

14 That's happened in cases and I've
15 heard warnings of that before, but if you put straw
16 in there, it's likely to shade the ground and keep it
17 more moist so that grass can take hold and you can be
18 successful.

19 Q. And grass ultimately did take hold?

20 A. Yes, it did.

21 Q. And again, did you do anything to determine
22 the specific angle of the slopes in the L?

1 A. No; probably eyeballing it.

2 Q. Just eyeballing it.

3 When you constructed the L, did you
4 take into account the possibility that there might be
5 increased erosion where the water came into the L
6 than when it exited the L?

7 A. Yes.

8 Q. Okay. Did you do anything about that?

9 A. Yes. We lined the turns with some concrete
10 as far as like to make a riprap and laid it in there
11 and pieced it all together so it would fit very
12 nicely together on the slope so that there wouldn't
13 be a chance of water, as it came in, to erode away or
14 take soil with it.

15 Q. And did you put that concrete just at the
16 top of the L and the end of the L?

17 A. Yes.

18 Q. You didn't put any in the elbow of the L?

19 A. No.

20 Q. Can you turn to Complainant's Exhibit 8
21 again, specifically page 147?

22 A. 147?

1 Q. Yes.

2 (Pause)

3 A. I'm there.

4 Q. Okay. Is that a picture of the concrete
5 that you put down?

6 A. Yes.

7 Q. And can you tell from this photograph what
8 portion of the L that's at?

9 A. That would be at the inlet for the top, the
10 north end where the water comes in from Bill Hesper's
11 property.

12 Q. Do you remember where you got the concrete
13 from?

14 A. Yes.

15 Q. Where did you get it from?

16 A. We got it from some old grain bin pads that
17 were on mom and dad's property. We had it piled up
18 for a long time.

19 Q. How did you know how much concrete to put
20 down?

21 A. Just wanted to do the slope of the banks
22 where the water came in and where the water went out

1 to make sure that it was extra stable.

2 Q. When you were constructing the L, was the
3 ground within the L wet? Was there any standing
4 water?

5 A. No, absolutely not.

6 Q. Was there any flowing water?

7 A. No.

8 Q. Why don't you take a look at page 151.

9 A. Okay.

10 Q. Can you tell me what that picture depicts?

11 A. It's concrete at the downstream where the
12 water would and the branch would exit the property.

13 Q. And again, why did you put that there?

14 A. So there wouldn't be any chance of that
15 eroding.

16 Q. If you know, can you tell me the width of
17 the L, say on the north-south leg from the property
18 line to the westward side of the berm?

19 A. That might be somewhere in the range of
20 40 feet.

21 Q. And was that fairly uniform, the length of
22 the L?

1 A. Fairly. I added a little bit because of
2 the berm. It might be just a little bit wider up
3 there. I haven't measured it recently and I don't
4 remember exactly.

5 Q. Again, why did you pick that particular
6 width?

7 A. Sort of eyeballed it, wanted to be sure
8 that it was wide enough to handle the impact of what
9 we saw coming from the upstream property after they
10 did the project there that increased the flow onto
11 our property.

12 Q. And not only did you vegetate a channel but
13 you vegetated the berm as well, is that correct?

14 A. That is correct.

15 Q. Using the same method that you just talked
16 about earlier?

17 A. Yes.

18 Q. And you didn't hire a consultant or an
19 engineer or anything to assist in this project?

20 A. No, we didn't.

21 Q. It was just you and Andy?

22 A. Yes, that's correct.

1 Q. Anybody else help you?

2 A. No.

3 Q. Now, you understand that in this complaint,
4 the government has alleged that you have done this
5 work without a permit, correct?

6 A. Yes.

7 Q. Why didn't you go get a permit, Mr. Hesel?

8 A. Because I don't think we needed one.

9 Q. And why did you not think you needed a
10 permit?

11 A. Because we attended a meeting in Mount
12 Vernon back in, oh, gosh, I'd have to look it up to
13 see when it was, but it was a lot of government
14 agencies and stuff put on this meeting, and at the
15 meeting, I actually still have a handout from it that
16 we picked up, it was talking about it was fine to do
17 this kind of work on your property as long as you
18 didn't change where the inlet was or the outlet was
19 to your property.

20 Q. This meeting was certainly before you
21 constructed the L, correct?

22 A. Yes.

1 Q. It was in Mount Vernon. Is that Mount
2 Vernon, Illinois?

3 A. Yes.

4 Q. Do you know who some of the other people
5 were who attended this meeting?

6 A. I don't remember the names of the people.

7 Q. I mean, do you know, did any of your
8 neighbors go?

9 A. I don't recall.

10 Q. And when you use the word meeting, this was
11 something that was open to the public or was it just
12 a meeting for you, the Hesers, to attend?

13 A. No, it was open to the public. I think the
14 Department of Transportation was there and the Farm
15 Bureau, and I'm not sure which other agencies. I
16 think maybe -- I don't know. It's been awhile.

17 Q. When you say it's been awhile, do you
18 recall how far in advance of your L construction work
19 you went to this meeting?

20 A. I couldn't recall without looking it up.

21 Q. What is the Farm Bureau?

22 A. It's an organization that farmers can

1 choose to belong to.

2 Q. Is it a national organization, do you know?

3 A. I think they are nationally but I think
4 they're specifically state by state or region by
5 region or something like that.

6 What we have is the Illinois Farm
7 Bureau.

8 Q. DOT stands for what?

9 A. Department of Transportation.

10 Q. Would that be Illinois or U.S.?

11 A. Illinois.

12 Q. And do you remember the names of any
13 representatives from either DOT or the Farm Bureau?

14 A. No.

15 Q. What was the format of this meeting?

16 A. I'm thinking it was about drainage.

17 Q. Well, was it an informal discussion where
18 you were sitting around a table or were there people
19 making presentations?

20 A. People were making presentations.

21 Q. How long did this meeting take? How long
22 did it last?

1 A. Oh, it might have been a couple hours or
2 more.

3 Q. So what was your belief after attending
4 this meeting with respect to drainage type issues?

5 A. It was okay to work on or take care of
6 these kind of things, these problems with losing
7 topsoil, as long as you did not change the inlet or
8 the outlet location on your property. That would be
9 where the water comes in from the other property
10 owner to your property or where it goes out into that
11 property owner, that you cannot change those
12 locations.

13 Q. And the L that you constructed, did you
14 keep the same entry and exit point?

15 A. Yes, as best as we could tell, we made a
16 real importance on that.

17 Q. Now, Mr. Hesel, would you intentionally
18 violate the law?

19 A. No.

20 Q. Do you remember when you were first
21 notified by a government agency that they had
22 concerns about the work you had performed on your

1 property?

2 A. No.

3 MR. NORTHRUP: If I may take a minute, Your
4 Honor.

5 JUDGE MORAN: Sure.

6 (Pause)

7 JUDGE MORAN: Go ahead, Mr. Northrup.

8 Q. BY MR. NORTHRUP: Do you recall when you
9 were first notified by a government agency that they
10 were interested in the work that you had done at the
11 L?

12 A. Yes, but I don't know the date of it.

13 Q. Okay. How were you notified?

14 A. I guess by mail.

15 Q. Were you surprised when you received this
16 letter?

17 A. Yes.

18 Q. Why were you surprised?

19 A. Because we'd thought we'd done a very nice
20 job and that they should be like impressed by it,
21 that they would like it.

22 MR. NORTHRUP: This is a good point for me to

1 stop, Your Honor.

2 JUDGE MORAN: Okay. So, Mr. Small, you said
3 after Bobby Hesper, then you'll have Andy Hesper?

4 MR. SMALL: Andy Hesper and then Terry Lendy,
5 and we would think that would probably be it.

6 JUDGE MORAN: And Terry Lendy is --

7 MR. SMALL: An expert.

8 MR. NORTHRUP: He's our wetlands guy.

9 JUDGE MORAN: Okay. Now, what did I want to
10 mention to you. There are two things that I want you
11 just to think about, and, you know, maybe it's not
12 important, I don't know, but just, and this is a
13 hypothetical, okay?

14 First thing is, if I were to assume
15 that from the north end of the Hesper L which we'll
16 call it, okay, and assume two sub assumptions.

17 One is, assume that there was no
18 defined channel but I still had a forested wetland in
19 this area and whether water flowed across it or not,
20 let's assume that it fits the definition of a
21 wetland, and then further assume as a possible
22 finding, without saying I'm finding this, assume that

1 I were to then determine that based on the evidence
2 of record and applying the preponderance of evidence
3 standard, that water traveled, it was a wetland, from
4 the north end of the Hesper L and didn't resume a
5 defined channel until it exited the property at the
6 south end of the L.

7 My question for you to mull over is --
8 and then the second sub assumption is assume there
9 was no forested wetland there; that when the Hesper
10 took over the property, all there was existing was
11 remnants of previous forest clearing, and the
12 remnants would be treetops and other debris.

13 Still, in all, even under the second
14 assumption, if the evidence shows that I have wetland
15 material in this interim area, doesn't that require a
16 permit? A wetland is a wetland is a wetland, and
17 whether there's a forest on it, whether there isn't a
18 forest on it, doesn't one have to have a permit in
19 order to touch the wetland other than there's some
20 exception for things like negligible, I think it's
21 defined like, don't hold me to this, to some fraction
22 of an acre.

1 So that's one.

2 See, I think it's better to let you
3 know things that I'm thinking, and then you can
4 either dismiss it as something that's totally off
5 point and not worthy of much comment or you might
6 consider it, no, that's something to think about and
7 respond to either in the briefs or through a witness
8 or whatever.

9 So that's one thing I'm thinking
10 about.

11 Now, on the other side of the coin if
12 you will, one other thing I'm thinking about is I
13 know that there are provisions under the Clean Water
14 Act dealing with farmland and ditch maintenance.

15 In fact, I had a decision that I
16 issued and I don't think it was appealed, and, you
17 know, it's been so many years ago, my memory is
18 terrible for these kinds of things, but it was called
19 some ditch maintenance or it had the word, I think it
20 had the word ditch maintenance in the property that
21 was cited, and I held that that's exactly what was
22 going on there. It was ditch maintenance, and there

1 was an exception.

2 You would say, why are you talking
3 about ditch maintenance. Well, here's my question.

4 Is there something under the Clean
5 Water Act that also allows for, where farmland is
6 concerned, ditch creation? Is there an exception,
7 which I would check on my own.

8 But it's something else I'm thinking
9 about here, whether there's a ditch maintenance
10 provision, and I know there is, is there a provision
11 for ditch creation.

12 Okay. So those are the couple things
13 I was thinking about.

14 EXAMINATION

15 BY JUDGE MORAN:

16 Q. And just before we do end here, Mr. Bobby
17 Heser, do you remember at least the year when you
18 went to this meeting in Mount Vernon? What year are
19 we talking about?

20 A. Guessing from the hip, it's 1990, but I
21 could probably look it up.

22 Q. You think it was 1990?

1 A. That's just from the hip.

2 Q. What does that mean?

3 A. That's just a guess.

4 Q. Oh, literally from the hip. Okay. I
5 thought you were doing some acronym like the HIPP
6 document or something like that.

7 And do you remember, were the Corps of
8 Engineers present at that meeting?

9 A. They might have been too, Your Honor. I
10 was trying to remember.

11 Q. And you think you kept some document from
12 this?

13 A. Yes.

14 Q. Is that what you think?

15 A. Yes.

16 Q. Don't look at your attorney. Just tell me
17 what you recollect or don't.

18 A. Yes. We did keep a document from it, and I
19 think it's in this stuff.

20 Q. Okay. And how did you learn of this
21 meeting? Was it on the radio or newspaper? Did you
22 get a letter?

1 A. I think it was in the newspaper or we might
2 have got it from the Farm Bureau. I don't know. One
3 or the other I think, Your Honor.

4 JUDGE MORAN: All right. It's 3:53.

5 I guess because of the risk of not --
6 we do want to wrap it up next week. Do you want to
7 start at 9 or 9:30? We'll go off the record now.

8 (Discussion held off the
9 record.)

10 JUDGE MORAN: All right. See you all at 9.
11 Have a nice weekend.

12 (Whereupon the hearing was
13 continued to May 7, 2007 at 9:00
14 a.m.)

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