

1 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
2 REGION 5

3 IN THE MATTER OF:)
4 ROBERT J. HESER, ANDREW) DOCKET NO.
HESER and HESER FARMS) CWA-05-2006-0002
5 Respondents.)
6 Proceeding to Assess a Class II) Honorable William
Civil Penalty Under Section) Moran
7 309(g) of the Clean Water Act,)
8 33 U.S.C. Section 1319(g).)

9
10 Hearing held pursuant to notice, on Monday,
11 May 7, 2007 at the hour of 9:00 a.m. at Clinton
12 County Courthouse, 850 Fairfax, Carlyle, Illinois,
13 before the HONORABLE WILLIAM B. MORAN, United States
14 Administrative Law Judge.

15
16
17
18
19
20
21
22
23 SULLIVAN REPORTING CO.,
24 By H. Lori Bernardy, Reporter, CSR# 084-004126

1 APPEARANCES:

2 CHARLES J. NORTHRUP, ESQ.
3 SORLING, NORTHRUP, HANNA, CULLEN, COCHRAN, LTD.
4 Suite 800 Illinois Building
607 East Adams Street
Springfield, Illinois 62701

5 - and -

6 BRADLEY W. SMALL, ESQ.
7 MATHIS, MARIFIAN, RICHTER & GRANDY, LTD.
23 Public Square, Suite 300
P. O. Box 307
8 Belleville, Illinois 62220

9 (Appearing on behalf of Respondents.)

10 THOMAS MARTIN, ESQ.
11 Associate Regional Counsel
77 West Jackson Boulevard
Suite C-14J
12 Chicago, Illinois 60604

13 - and -

14 CHRISTINE PELLEGRIN, ESQ.
15 Associate Regional Counsel
77 West Jackson Boulevard
Suite C-14J
16 Chicago, Illinois 60604

17 (Appearing on behalf of the U. S.
18 Environmental Protection Agency.)

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

I N D E X

WITNESSES	DIRECT	CROSS	REDIRECT	RE CROSS
ROBERT HESER				
By Mr. Northrup		6		
By Miss Pellegrin			43	
ANDREW HESER				
By Mr. Northrup	128			
By Miss Pellegrin		160		183
By Mr. Small			177	
TERRY LENDY				
By Mr. Northrup	188			

I N D E X

EXHIBITS	MARKED	ADMITTED
Respondent's Exhibit 25 (p 408-411)		40
Respondent's Exhibit 13		42
Respondent's Exhibit 25 (complete)		160
Respondent's Exhibit 17		203
Respondent's Exhibit 18		215

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

P R O C E E D I N G S

JUDGE MORAN: Good morning. We're beginning day eleven of this proceeding.

At the close of the proceeding on Friday, I mentioned that a couple of decisions that I've been involved in with a couple thoughts to sort of give the Parties some direction about things I'm thinking about in this case.

Mr. Carlson, who is not in the courtroom today, reminded me of the name of the case that I decided dealing with ditches. And the case is called Greenfield Bayou Levee and Ditch Conservancy District.

And in that case I found that it was exempt from the Clean Water Act involving Section 404(F) which expressly exempts maintenance of drainage ditches from the permit requirement.

And then another decision -- and that case was not appealed.

Another decision -- you know, I didn't say it just a minute ago, but I issued that decision on December 13, 2002.

That's why I couldn't remember the name; it was so long ago for me.

1 The other decision of note also was
2 involving me was called J. Phillip Adams out of
3 Idaho.

4 This decision was issued on October
5 18, 2006.

6 And that was another interesting case.
7 In there what was involved was a question of the farm
8 road provision - and that's found at 33 United States
9 Code Section 134/4 (F) - and that provision in
10 essence is another exemption where construction or
11 maintenance of farm roads are involved.

12 The decision was fairly lengthy and
13 went into the Federal Court Decisions from which I've
14 construed it.

15 And I only mention this again as a
16 way of letting the Parties know about some of the
17 things that I'm thinking about.

18 But also it's clear from those two
19 cases - the Adams case I should note is under appeal.

20 And I'm told that the Environmental
21 Appeals Board, which is the body just above me, and
22 is the Administrator for EPA's final word in terms of
23 the Environmental Protection Agency before it goes on
24 to Federal Court review.

1 A. Good morning.

2 Q. What are the dimensions and square feet of
3 an acre?

4 Do you know off the top of your head?

5 A. An acre is 43,560 square feet.

6 Q. Now we've been coming to this courthouse
7 now for a couple weeks, correct?

8 A. Yes.

9 Q. And this courthouse sits in the middle of a
10 square, correct?

11 A. Correct.

12 Q. Do you by any chance know the dimensions of
13 the square this courthouse sits on?

14 A. I know one side of it and it looked to be
15 squared at a glance.

16 Q. And do you know, the area where this
17 courthouse is in terms of acreage, do you know how
18 much it is?

19 A. Roughly, yes.

20 Q. Okay, and what is that?

21 A. About two acres.

22 Q. Were you present in the courtroom when
23 Mr. Carlson was testifying?

24 A. Yes.

1 Q. And I believe he indicated that as part of
2 his penalty calculation, he assumed that there was
3 added to this site six inches of soil across the
4 entire area of the site; do you recall?

5 A. Yes, I heard that.

6 Q. Did you add any soil to this site?

7 A. No, I did not.

8 Q. Did you bring any soil on to this site from
9 anywhere else?

10 A. No, I did not.

11 Q. Since you did your work on the "L" back in
12 1999, has it remained vegetative?

13 A. Yes, it has.

14 Q. Have you ever mowed it?

15 A. One time.

16 Q. And when was that?

17 A. It was way early, probably a year or two
18 after that. It was just to make sure that the grass
19 kept hold and did well.

20 Q. Okay, what do you mean it was a year or two
21 after that? What do you mean?

22 A. It was a year or two after we did the work.

23 Q. Do you fertilize the "L"?

24 A. No, I do not.

1 Q. Do you do anything to it?

2 A. No.

3 Q. Since you did your work in the area of the
4 "L" in 1999, has it maintained its original grade?

5 A. Yes.

6 Q. And has it maintained its original slope --

7 A. Yes.

8 Q. -- (continuing) on the sides?

9 Let me go back to this mowing issue:

10 Why did you mow it this one time?

11 A. Well, it's generally understood if you mow
12 that, you know, it helps to get the grass established
13 at the best case scenario so that you have the best
14 cover possible.

15 Q. At the "L", have you observed any erosion
16 of the slopes?

17 A. No.

18 Q. Since your work in the area of the "L" in
19 1999, have you observed any wildlife or evidence of
20 wildlife in the "L" or in close proximity in the "L"?

21 A. Yes, I have.

22 Q. Okay, and what types of wildlife have you
23 seen?

24 A. I've seen lots of deer. There's been lots

1 of deer beds in the fields, in the crops.

2 Q. What's a deer bed?

3 A. It's where they rest or sleep or whatever
4 out in the crop fields. The crops are all matted
5 down.

6 Q. Okay, anything else?

7 A. I've seen frogs in the "L", raccoon tracks
8 I don't know, there's probably others.

9 Q. There was -- I think there was testimony, I
10 can't remember who it was Mr. Carlson or Miss Melgin
11 talked to a downstream owner who had turkeys, wild
12 turkeys on her properties?

13 A. Oh, yes, I've seen turkeys, too.

14 Q. Any kind of bird life?

15 A. I don't know. I'm drawing a blank.

16 Q. You've seen birds in the area?

17 A. Yes, I have.

18 Q. How about red tail hawks?

19 A. Yes.

20 Q. Turkey vultures?

21 A. Yes.

22 Q. Have you observed any evidence of wildlife
23 foraging in or around the "L"?

24 A. Foraging, what is that?

1 Q. Feeding.

2 A. Oh, yes, yes.

3 Q. Tell me --

4 A. Deer graze our wheat; they really like it.

5 And raccoons, they really like our corn.

6 They like it. They tear it down and

7 they eat it when it's in more of that soft sweet corn

8 stage. They really, really chow on it then.

9 Q. Is your microphone turned on?

10 A. Yes, it is.

11 Q. I believe Mr. Carlson observed a snake or

12 more; have you seen snakes in the area?

13 A. Yes, somewhat.

14 Q. Have you ever had occasion to observe the

15 "L" during or after a large rain?

16 A. Yes. There was one time back a few years

17 ago when it came, a rain. I believe we had something

18 like a red cell sitting over that area in there,

19 south of Salem. And it rained very heavily.

20 Q. And what do you mean by a red cell?

21 A. On radar.

22 Q. Can you describe what the flow through the

23 channel was like on that occasion?

24 A. Yes, it did very well. The water went

1 through it and we were very well pleased with how it
2 was handling the rain event.

3 Q. Was the water contained within the banks of
4 the "L"?

5 A. Yes.

6 Q. And where was the water coming from and
7 where did it go to?

8 A. It was coming from Bill Heser's property
9 and it was going to Bill Heser's property downstream.

10 JUDGE MORAN: You mean to say that Bill Heser's
11 property is both north and south of yours?

12 THE WITNESS: Both east and north and south and
13 west.

14 JUDGE MORAN: All right. In the area of the
15 "L", the water comes from the north of that "L"
16 that's on Bill Heser's property?

17 THE WITNESS: More east and north, your Honor.

18 JUDGE MORAN: But on the top of the "L" --

19 THE WITNESS: Yes.

20 JUDGE MORAN: -- (continuing) that's Bill
21 Heser's property?

22 THE WITNESS: That all comes from Bill Heser.

23 JUDGE MORAN: And when it exits your property
24 at the end of the "L", does that go on to the Bill

1 Heser property?

2 THE WITNESS: Yes, your Honor. That's all Bill
3 Heser's area, property.

4 MR. NORTHRUP: Can you turn to Complainant's
5 Exhibit Volume 2.

6 JUDGE MORAN: I'm not sure which volume is two.
7 What Exhibit Number?

8 MR. NORTHRUP: It's Exhibit Number 47.

9 THE WITNESS: Exhibit Number what again?

10 MR. NORTHRUP: Forty-seven. And I'm going to
11 have you look at page 1387.

12 THE WITNESS: My Volume two only goes to
13 Exhibit Number 3two.

14 MR. NORTHRUP: Is it Volume two? Did I not say
15 volume two?

16 THE WITNESS: Volume two goes Complainant's
17 Exhibit Number 23 to Complainant's Exhibit
18 Number 3two.

19 JUDGE MORAN: Let's go off the record for a
20 second while we get this straightened out, okay.

21 MR. NORTHRUP: Thank you, your Honor.

22 (WHEREUPON, a short recess was
23 taken.)

24 JUDGE MORAN: All right. Now the witness has

1 been directed to EPA Exhibit 47, Complainant's
2 Exhibit 47 at Bates 1387.

3 Go ahead Mr. Northrup.

4 MR. NORTHRUP: Okay.

5 BY MR. NORTHRUP:

6 Q. Did you see those pictures on that page?

7 A. Yes, I do.

8 Q. Why don't you take a look at the one that
9 is handwritten marked 7361?

10 A. Yes.

11 Q. Okay. Is that what your property looks
12 like after a large rain?

13 A. If you're referring to the "L", that's what
14 it would look like after a large rain.

15 Q. What about -- did you see in the background
16 there appears to be a large area of water?

17 A. I'm not sure of that.

18 Q. Why don't you look at handwritten
19 photograph number 7359?

20 A. Yes.

21 Q. Can you tell me what that is a picture of,
22 if you know?

23 A. That looks like water out on the crop
24 field.

1 Q. Your crop field?

2 A. Yes. Yes.

3 Q. Now is that what your property looks like
4 after a large rain?

5 A. That would be a very large rain.

6 Q. How often during the year does your
7 property have this appearance in either of those two
8 photographs?

9 A. Not more than once a year.

10 Q. Looking at photograph 7359, in the
11 foreground, there's water, correct?

12 A. Correct.

13 Q. Now is that water that's in the "L"?

14 A. Yes.

15 Q. Then there is an area of what appears to be
16 grass or vegetation, correct?

17 A. Correct.

18 Q. And behind that, there's water, correct?

19 A. Correct.

20 Q. And that's water on your field?

21 A. Correct.

22 Q. When there is a large rain such as depicted
23 in that photograph, where does that water in the
24 field drain to?

1 A. It would drain to further west of the "L"
2 along the -- there's a place -- Martin Branch goes
3 along the property line for a few hundred feet west
4 of the "L".

5 And there's a place where it can drain
6 into Martin Branch and leave the field.

7 Q. I believe on Friday we were talking
8 about -- or you testified that there was a berm along
9 the "L"; is that correct?

10 A. That's correct.

11 Q. Is that berm along the north/south leg of
12 the leg?

13 A. Yes.

14 Q. Is there also a berm on the east-west leg
15 of the "L"?

16 A. No.

17 Q. Has the "L" had any effect on erosion on
18 your property?

19 A. Yes.

20 Q. And what effect is that?

21 A. It's saved a lot of topsoil from being
22 taken off the property.

23 Q. Do you own property downstream on Martin's
24 Branch?

1 A. Yes.

2 Q. About how far down?

3 A. I don't know exactly. Do you want me to

4 estimate?

5 Q. Just estimate, yes.

6 A. A mile, mile and a half.

7 Q. Now is your property that is downstream

8 immediately adjacent to Martin's Branch?

9 A. No, it is not.

10 Q. Characterize that property for me.

11 A. It's probably back away from Martin

12 Branch, something like 6 to 900 feet somewhere

13 between an eighth and a quarter of a mile back from

14 Martin's Branch.

15 Q. Is it cropland or woods or what is it?

16 A. It's a combination of both.

17 Q. Okay. And where are the woods on that

18 property?

19 A. They're at the northern end of the

20 property.

21 Q. That's closer to Martin's Branch?

22 A. That's correct.

23 Q. Have you observed wildlife on that

24 property?

1 A. Oh, yes.

2 Q. Have you observed any difference in the
3 wildlife on that property than what you've observed
4 at the "L"?

5 A. No.

6 Q. Has any downstream property owner ever
7 complained to you about flooding as a result of your
8 work at the "L"?

9 A. No, they have not.

10 Q. Now, other than the area where the water
11 enters your "L", have you observed any other areas
12 where water comes into the "L"?

13 A. Yes, I have.

14 Q. Okay, can you describe those for me,
15 please?

16 A. There are at least three areas that I know
17 of that come out of Bill Hesper's property.

18 Two are on the north/south leg of the
19 "L" and one is on the east-west leg.

20 Q. Can you tell if those areas are natural or
21 manmade?

22 MS. PELLEGRIN: Objection, foundation.

23 JUDGE MORAN: Why don't you ask a couple
24 foundation questions.

1 MR. NORTHRUP: Okay.

2 BY MR. NORTHRUP:

3 Q. You said there were two areas on the
4 north/south leg of the "L"?

5 A. That's correct.

6 Q. Let's talk about the northern-most area
7 first. Can you describe that for me?

8 A. The northern-most one I would describe it
9 as very natural. It's probably been -- been there.

10 It's not something I don't think -- to
11 the best of my knowledge, it's not something that he
12 did to drain it in there. It's where it drained.

13 Q. How far is this location from where
14 Martin's Branch enters the "L"?

15 A. It would just be an estimate. Two to
16 300 feet would be the best guess.

17 Q. South of where Martin's Branch enters the
18 "L", correct?

19 A. Yes.

20 Q. Is that a vegetative channel?

21 A. No, it is not.

22 Q. How wide is it?

23 A. Oh, it's probably two to three feet wide.

24 Q. And can you tell me where it comes from?

1 A. Bill Heser's crop field.

2 Q. Have you ever observed water in that

3 channel?

4 A. Just during an event like this.

5 You know, it would have been coming

6 from his crop fields.

7 Q. Where does that water go once it comes from

8 his crop field?

9 A. Into the "L".

10 Q. Which direction is that?

11 A. It's heading south.

12 Q. Where is the -- you said there was a second

13 area on the north/south leg of the "L"?

14 A. Yes. It would be further down to the

15 south. It was -- I don't know probably somewhere in

16 the range of 300 feet to 500 feet going south.

17 Q. How far north of the bend in the "L" would

18 this area be?

19 A. 150 or 200 feet north of the "L".

20 Q. Is that a vegetative channel?

21 A. No, it is not.

22 Q. How wide is it, if you know?

23 A. It's just a foot or two wide.

24 Q. Does that appear to you to be manmade or

1 natural?

2 MS. PELLEGRIN: Objection, foundation.

3 JUDGE MORAN: No. I overrule the objection.

4 THE WITNESS: It appeared to be manmade.

5 BY MR. NORTHRUP:

6 Q. And why do you say that?

7 A. We observed a lot of fescue and a tree that
8 someone from the Bill Hesper's property had pushed
9 over into the "L", cut it through the old barbed wire
10 fence.

11 Q. Are there trees along the "L"?

12 A. Yes, there are.

13 Q. And whose property are those trees on?

14 A. They would be on the property line.

15 Q. Are they mature trees?

16 A. I would say so, yes.

17 Q. How tall are the tallest ones that you've
18 observed?

19 A. Maybe fifty feet.

20 Q. Are there also trees on the east-west leg
21 of the "L"?

22 A. Yes, there are.

23 Q. And, again, are those trees on the property
24 line?

1 A. Yes, they are.

2 Q. Are those mature trees?

3 A. Yes.

4 Q. How tall are the tallest ones?

5 A. Probably in the same area, 50 feet, I

6 guess.

7 Q. Have you observed whether or not those

8 trees provided shade along the "L"?

9 A. Oh, yes.

10 Q. You've observed those trees during the

11 summer?

12 A. Yes.

13 Q. And they do provide shade along the "L"?

14 A. Yes, they do.

15 Q. You indicated there was also what appeared

16 to be a channel cut on the east-west leg of the "L";

17 is that correct?

18 A. Yes.

19 Q. Okay. Where is that channel located?

20 A. I would probably say somewhere around

21 halfway.

22 Q. And where does that channel come from?

23 A. The Bill Hesel property.

24 Q. Is that channel vegetative?

1 A. No, it is not.

2 Q. How wide is it?

3 A. Probably in that 2 to 3 feet wide.

4 Q. And do you know if it's natural or manmade?

5 A. Not for certain. But it looks to be
6 natural.

7 Just -- it's just that I observed
8 something being pushed through the fenceline there.

9 Q. When water comes through that channel
10 generally, what direction does it go?

11 A. It goes west.

12 Q. It enters the "L" and goes west?

13 A. Yes.

14 Q. Now it was either Mr. Carlson or
15 Miss Melgin who testified that they observed another
16 channel cut coming from your field into the "L" on
17 the east-west leg.

18 Do you recall that?

19 A. I recall testifying to that.

20 Q. Is there such a channel cut on the east to
21 west leg?

22 A. Absolutely not.

23 Q. Have you ever been adjudicated or violated
24 the Clean Water Act?

1 A. No.

2 Q. When you purchased the property in 1998,
3 did you have any indication that there may have been
4 wetlands on the property?

5 A. No.

6 Q. Now in this case you responded to certain
7 information requests from U.S. EPA, correct?

8 A. Correct.

9 Q. You responded through Counsel, correct?

10 A. Correct.

11 Q. As far as you know, were those responses
12 truthful and accurate?

13 A. Yes.

14 Q. Do you recall ever receiving any
15 correspondence back from the U.S. EPA once you sent
16 your information request responses in seeking
17 additional information?

18 A. No, I do not.

19 Q. When you did your work in the area of the
20 "L", did you gain any tillable ground?

21 A. No. As a matter of fact, we actually lost
22 some.

23 Q. How would you explain that?

24 A. The area of the "L" takes up somewhere in

1 the range of an acre or more.

2 Q. Do you have any idea how much it cost you
3 to do your work on the "L"?

4 A. No, not at this time. It's been too long.

5 Q. Needless to say, you've spent a lot of
6 money on lawyers and experts in this case, correct?

7 A. Oh, yes.

8 Q. Again, you were present when Mr. Carlson
9 testified in this case, correct?

10 A. Correct.

11 Q. Now Mr. Carlson as well as I believe others
12 testified that this past March he was denied access
13 to your property.

14 Do you remember that?

15 A. I remember him testifying and others
16 testifying to that.

17 Q. Now prior to that time, did you allow
18 access to Mr. Carlson or any other representative of
19 the Government?

20 A. Yes.

21 Q. Isn't it true, Mr. Hesel, that you've never
22 denied access to any representative of the Government
23 to your property, correct?

24 A. That's correct.

1 Q. Now you have denied access to other
2 individuals, correct?

3 A. Correct.

4 Q. And who might that be?

5 A. Bill Hesel.

6 Q. And for this specific March visit by the
7 Government representatives, you never denied access
8 to any Government representative?

9 A. Absolutely not.

10 Q. Have you ever been to Lake Centralia?

11 A. Yes.

12 Q. Do you fish there?

13 A. I have.

14 Q. Catch anything?

15 A. No, I don't think so. Maybe bluegill.

16 It's been a long time.

17 Q. Do you have friends or acquaintances that
18 own property around the lake?

19 A. Yes.

20 Q. Do they own property on the lake?

21 A. Yes.

22 Q. Have you ever observed septic systems on
23 those properties?

24 A. Yes.

1 Q. Have you observed septic systems on other
2 properties?

3 A. Yes.

4 Q. How did you observe those septic systems?

5 A. There were some for sale signs, and I was
6 interested in what some of these homes looked like
7 that were for sale. So I drove back in and followed
8 the signs and viewed the property.

9 And you could see where the septic
10 system was and where the laterals drained.

11 Q. And where did the laterals drain?

12 A. Down the slope towards the Lake.

13 Q. Now, you purchased this property in August
14 of '98, correct?

15 A. Correct.

16 Q. And you performed your work on the "L" in
17 August or September of '99, correct?

18 A. Correct.

19 Q. Why did you wait a year to do that?

20 A. Someone else was farming the ground. We
21 didn't have the farming rights the year that we
22 purchased the property.

23 Q. Would that have been the Mercers who were
24 farming the ground?

1 A. No, it was not.

2 Q. Was it an agent of the Mercers, if you
3 know?

4 A. Does agent mean someone else that was
5 farming it for them?

6 Q. That's good enough.

7 A. That's correct, yes.

8 Q. Now in your information request response to
9 U.S. EPA, you identified the Mercers?

10 A. Yes.

11 Q. And you had just purchased their property?

12 A. Yes.

13 Q. That the property had been logged?

14 A. Yes.

15 Q. Then you did this work in the "L"?

16 A. Yes.

17 Q. That you thought it was in part because of
18 the problems upstream?

19 A. Yes.

20 MS. PELLEGRIN: Objection, leading. He asks
21 questions instead of telling him what, he should let
22 him what (inaudible) should be.

23 JUDGE MORAN: I'm going to allow that question.

24 Why don't you see if in the future

1 your questions might be less leading.

2 MR. NORTHRUP: Thank you, your Honor.

3 BY MR. NORTHRUP:

4 Q. When we were talking about these cuts into
5 the "L", can you generally describe which way the
6 water flows from those cuts?

7 A. It flows south and west.

8 Q. Within the "L"?

9 A. Correct.

10 Q. If you could, Mr. Hesel, turn to exhibit
11 page 1230, which I believe is at Exhibit 41.

12 A. I'm on page 1230.

13 Q. And that's a letter from Patty Brough,
14 correct?

15 A. Correct.

16 Q. Now in the second paragraph of that letter,
17 she makes the statement we have been seeing farmland
18 sell in the range of 2500 to \$3,000 per acre, do you
19 see that?

20 A. I see that.

21 Q. Does that match up with your experience
22 with the sale price of farm ground in Marion County?

23 A. No, it does not.

24 Q. What is your experience or observations of

1 sale prices for farm ground in Marion County?

2 A. It would vary. We were attending a Finn
3 property auction at the fairgrounds. And they had it
4 broke down in various parcels and that would be above
5 the range that we observed.

6 Q. What did you observe?

7 A. It was fairly complicated what the
8 auctioneer was trying to achieve, so he had it broke
9 down to where you could bid on various tracts and
10 combination of tracts.

11 Q. And what was it about those tracts that
12 made a difference in price?

13 A. There were a couple of tracts that had some
14 drainage through them.

15 I'm not sure as to how much drainage,
16 but it was definitely drainage through them.

17 And that stuff was significantly lower
18 than the farmland that was tillable that did not have
19 the drainage through it.

20 Q. Can you tell me how much you mean by
21 significantly lower?

22 A. They couldn't get a bid on those two, a top
23 end bid on the combination of those two was in the
24 850 to 950 range.

1 A. Yes, I do.

2 Q. Okay. And is it page numbers 4 '03 through
3 4/11?

4 A. Yes.

5 Q. Can you turn to page 408?

6 A. Okay.

7 Q. All right, can you tell me what that is?

8 A. It's a listing of descriptions and acreage
9 of property that I own an undivided one half interest
10 in.

11 Q. What does that mean that you own an
12 undivided one half interest in?

13 A. That I only own half of the property.

14 Q. And who else do you own the property with?

15 A. My brother Andy.

16 Q. And is this your handwriting?

17 A. Yes, it is.

18 Q. Where did you get this information from?

19 A. My checking pass book and tax information,
20 real estate taxes.

21 Q. Why did you collect this information?

22 A. Because the EPA sent a request for this
23 information.

24 Q. Was this information readily available to

1 you?

2 A. It wasn't easy to put together because I
3 just don't put this together.

4 Q. Okay, that's -- strike that.

5 How long did it take you to prepare
6 this information?

7 A. Oh, gosh, I think I worked on it for a
8 couple of days.

9 Q. Now, this is a copy, correct?

10 A. Yes.

11 Q. Is it a true and accurate copy of the
12 original?

13 A. Yes.

14 Q. Why don't you turn to page 410?

15 A. (So complied with request.) Okay.

16 Q. Actually, sorry about that, go back to page
17 409.

18 A. Okay.

19 Q. Up in the right-hand corner, is there a
20 notation?

21 A. My initials B-H.

22 Q. Now, turn to page 410.

23 A. Okay.

24 Q. Can you tell me what this is?

1 A. They wanted some information about your
2 yearly expenses, and so this is yearly expenses.

3 Q. Yearly expenses of who?

4 A. For me.

5 Q. And you say they, who do you mean?

6 A. The EPA.

7 Q. And did you prepare this document?

8 A. Yes, I did.

9 Q. Where did you get the information that's
10 contained on this document?

11 A. I think it was from tax return information
12 and other information that I had to look up and find.

13 Q. And what types of information are you
14 talking about?

15 A. Well, some of it was available with the tax
16 return information.

17 And other stuff was stuff that
18 wouldn't have been connected with the tax return such
19 as personal expenses for the home.

20 Q. So that you had to recreate?

21 A. I had to look up documents to try and find
22 out how much it was for a year.

23 Q. What types of documents?

24 A. Like take for instance the dentist visits,

1 how much they were costing.

2 How much I was spending on the
3 orthodontics, the phone, the power bill.

4 Q. Those are documents you had available to
5 you?

6 A. Yes.

7 Q. Why don't you turn to page 411.

8 A. Yes, I'm there.

9 Q. And is that your name sort of in
10 handwriting in the middle of the page?

11 A. Yes, it's my signature.

12 Q. Your signature. What does this page
13 reflect?

14 A. It reflects the value of the equipment, the
15 value of my home.

16 Q. Let me stop you there. On the equipment
17 you've got a notation see Andy's?

18 A. Yes.

19 Q. What is that in reference to?

20 A. The equipment is owned jointly with Andy,
21 most of it, with the exception of a couple of items.

22 Q. So did you prepare that number or did Andy
23 prepare that number?

24 A. I just need to refresh my memory and look

1 at the figures.

2 I believe we worked on it together.

3 Yes, we both worked on it jointly.

4 Q. What types of information did you have to
5 look at to come up with that number?

6 A. We looked in "Farm Week" and different ads
7 from machinery companies.

8 Q. And why did you look at those ads?

9 A. So we could get accurate values.

10 Q. Okay, the next notation, plus 100,000 home?

11 A. Yes.

12 Q. What is that?

13 A. That's my home.

14 Q. Is that what the 100 percent Bobby

15 references?

16 A. Yes.

17 Q. What's the next number?

18 A. 256,750.

19 Q. And what does that represent?

20 A. A total of the two.

21 Q. Okay. Then there's a number below that?

22 A. Yes.

23 Q. What is that number?

24 A. That's the value of the property we own

1 together, and that's my undivided one half interest
2 in.

3 Q. How did you calculate the value of the
4 property?

5 A. I went parcel by parcel and tried to apply
6 what I saw at the Finn auction of what the better
7 property brought, what was some of the best cropland.

8 And then what I saw about the property
9 that had drainage wastes through it that no one
10 seemed to be very interested in.

11 And I tended to try to go parcel by
12 parcel and apply what we saw there because I
13 understand that's kind of what these appraisers do,
14 they look for comparable stuff.

15 Q. What's the number under that?

16 A. One million 155 thousand 6 hundred 65.

17 Q. And what does that number represent?

18 A. That's a total of equipment, home, and
19 property, real estate, land.

20 Q. And what's the number under that?

21 A. That's the debt that I'm 100 percent
22 responsible for.

23 Q. Now, how did you come up with that?

24 A. I got a list from the bank of what our loan

1 outstanding values were, of what we owed.

2 Q. Now, do you believe these figures
3 accurately represent your assets, Mr. Hesper?

4 A. Yes.

5 Q. Did you have any particular problem in
6 obtaining any of this information?

7 A. It took -- it took a lot of time to put
8 this all together.

9 Q. Do you have a CPA?

10 A. Yes.

11 Q. Did he have some of this information?

12 A. Yes, he had income tax information.

13 Q. Were there any problems in getting
14 information from him?

15 A. Oh, yeah. He called and it's days or weeks
16 at this time of year before you can even get a
17 response.

18 I had to call lots of times multiple
19 times to get a call back. And the secretary tells me
20 she puts a note on his desk.

21 But they are very, very busy this time
22 of year.

23 He's there lots of time working late
24 at night and Sunday mornings, you know, you'll see

1 him there trying to catch up on his work.

2 So I believe that he's swamped.

3 Q. What unique about this time of year?

4 A. Unique? He's got his whole pile of income
5 tax to do for all his customers.

6 Q. Back on page 410, do you believe this
7 accurately reflects your yearly expenses?

8 A. Yes, to the best of my ability, yes.

9 MR. NORTHRUP: Your Honor, at this point I
10 would go ahead and ask for the admission of at least
11 this portion of Exhibit 25, Exhibit pages 408 through
12 4/11.

13 JUDGE MORAN: You want -- are you seeking to
14 have the rest of it admitted?

15 MR. NORTHRUP: I am, and I'll do that through
16 Andy.

17 JUDGE MORAN: Okay. And so you want at this
18 point pages 408 through 4/11 admitted?

19 MR. NORTHRUP: Correct.

20 JUDGE MORAN: EPA, any objection to that?

21 MS. PELLEGRIN: No, your Honor.

22 JUDGE MORAN: Okay. Then Respondent's
23 Exhibit 25, pages 408 through 4/11 are admitted.

24

1 (WHEREUPON, Respondent's
2 Exhibit Number 25, pages
3 408 through 411 were
4 admitted into the
5 record.)

6 BY MR. NORTHRUP:

7 Q. I want to go back, Mr. Hesper, to this issue
8 of these channel cuts that you observed going into
9 the "L" from Mr. Bill Hesper's property.

10 If your "L" was not there, what
11 direction -- and water came from those channel cuts,
12 what direction would it flow?

13 A. South and west.

14 Q. Mr. Hesper, do you recall I believe it was
15 Mr. Carlson testified about a concentrated flow area
16 on your property.

17 Do you recall that testimony?

18 A. Yes.

19 Q. Do you have an understanding of where he
20 was talking about?

21 A. I believe it was the area that's where some
22 surface water leaves our property.

23 It would be west of the "L" where
24 Martin Branch runs along the property line on Bill

1 Heser's side.

2 Q. And the water that flows through that
3 concentrated flow area, where does that come from?

4 A. Our crop field.

5 Q. And have you observed this area, this
6 concentrated flow area?

7 A. Yes.

8 Q. Is it a depression at all? Can you
9 describe the area for me, if you can?

10 A. Where it's just where water would naturally
11 leave our property and enter Martin Branch.

12 MR. NORTHRUP: I don't have any further
13 questions.

14 JUDGE MORAN: Okay, thank you.

15 Are you ready for cross-examination?

16 MS. PELLEGRIN: Can I have ten minutes, your
17 Honor.

18 JUDGE MORAN: Let's just take five.

19 MS. PELLEGRIN: Your Honor, I'm doing this
20 without the help of Counsel, so I would appreciate
21 ten minutes?

22 JUDGE MORAN: No, you'll have to be ready for
23 your cross-examination in five minutes.

24 MS. PELLEGRIN: Okay.

1 (WHEREUPON, a short recess was
2 taken.)

3 JUDGE MORAN: On the record.

4 Counsel for Respondent, Mr. Northrup,
5 is there something you wanted to bring up?

6 MR. NORTHRUP: Yes, your Honor. I did forget
7 to move for Respondent's Exhibit 13.

8 JUDGE MORAN: Okay. And this was the exhibit
9 that there was some dispute about and I indicated my
10 views about that.

11 Does EPA still have an objection to
12 the admission of Respondent's Exhibit 13?

13 MS. PELLEGRIN: No objection, your Honor.

14 JUDGE MORAN: All right, Respondent's
15 Exhibit 13 is admitted.

16 (WHEREUPON, Respondent's
17 Exhibit Number 13 was
18 admitted into the
19 record.)

20 MR. NORTHRUP: Thank you, your Honor.

21 MS. PELLEGRIN: Good morning, Mr. Hesel.

22 THE WITNESS: Good morning.

23

24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

CROSS-EXAMINATION

BY MS. PELLEGRIN:

Q. First, let me ask you some questions to clarify the amount of property that you own and when you bought them.

I believe you said you bought the 60 acres from Max and Dorothy Mercer in August 1, '98?

A. I believe that's right. I believe it's August of 1998.

Q. Okay, early August, do you remember?

A. I would have to look it up to know for sure.

Q. Can you turn to Respondent's Exhibit 9? Mr. Hesel, if you could just tell me first of all what this document is?

A. It's a warranty deed from Max and Dorothy Mercer to Andy and I.

Q. And if you could take a moment to see if that document refreshes your recollection of when that warranty deed was recorded on?

A. Yes, this document was recorded on August 6th of '98.

Q. Okay. And do you know if you recorded on

1 the same day that you bought it or a different day?

2 A. It would have been very close.

3 Q. Okay. So it was some time close to the
4 beginning of August?

5 A. Yes. Yes.

6 Q. Okay. And I understand before you
7 purchased that property the -- the nearest property
8 that you owned was a half mile away about
9 approximately, if I understand your earlier
10 testimony?

11 A. Yes, I believe that's correct.

12 Q. And the property, the Mercer property, the
13 60-acre parcel you and your brother Andrew Hesel own
14 that together; is that right?

15 A. Yes.

16 Q. And the nearest property that's a half a
17 mile away, is that property that you and your brother
18 own together?

19 A. Yes.

20 Q. Do you and your brother own the -- I have
21 1331.7 acres that you and your brother own together;
22 is that correct?

23 A. That's correct.

24 Q. Okay. And do you own any other farmland

1 that you don't own with your brother?

2 A. No.

3 Q. So you own a home site that you own
4 yourself; is that correct?

5 A. Yes, I own a home.

6 Q. Okay. Now between the time that you bought
7 the 60 acres around August 6 of 1998 and the time of
8 the disturbance when you created the "L" on August or
9 September of 1999, did you buy any other property in
10 and around that area?

11 A. I don't know what you're trying to
12 characterize as an area.

13 Q. Okay.

14 A. And I don't know for sure what the timing
15 is when I brought certain pieces of property that are
16 in this information.

17 I don't have a memory of that. I
18 would have to do research.

19 Q. Okay, let me ask you this: I'll
20 characterize the area.

21 You said that before you bought the
22 60-acre parcel, you had property a half a mile away?

23 A. Yes, that was an estimate of the distance.

24 Q. Estimate, okay. So my question is:

1 Between the time that you bought the
2 property and the time that you constructed the "L",
3 did you buy any other property within that half mile
4 area?

5 A. I don't think so. But without doing
6 research, I cannot be 100 percent for sure.

7 Q. Okay. And let me ask you:

8 Right now you farm this 60-acre
9 property. Do you own any other area within a half
10 mile of that 60-acre property?

11 A. Yes.

12 Q. And first of all, where is that?

13 How close approximately?

14 A. It would be in the range of probably a
15 quarter to half a mile, and it would be -- what was
16 the question again?

17 Could you tell me --

18 Q. Yes. Yes, the question is:

19 Where generally within a quarter to a
20 half mile, and my next question is approximately
21 when?

22 A. I don't know without doing some research
23 and checking on the date when we bought it.

24 Q. Okay. Can you generally tell me, was it

1 this year?

2 A. No.

3 Q. Okay. Was it between 2005 and this year?

4 A. I don't know that.

5 Q. Was it after the year 2000?

6 A. Yes.

7 Q. Okay. And I believe you said that -- you

8 testified earlier that of the 1351.7 acres,

9 1175 acres was productive farmland; is that correct?

10 A. That was an estimate.

11 Q. Okay. And can you define productive for

12 me?

13 A. I don't think I said productive.

14 I think I said it was like, you know,

15 tillable, producing.

16 I don't think I used the term

17 productive.

18 Q. Okay, well, tillable and producing, can you

19 define that term for me?

20 A. It was for crops.

21 Q. I'm sorry, for?

22 A. For cropping. Corn, soybeans, and wheat.

23 Q. So somewhere between 1175 and 1351 is

24 non-crop land?

1 A. I don't know if I would characterize it
2 that way.

3 But it would be -- it would be land
4 that we don't have in the totals of our acreage that
5 we are cropping.

6 Q. Okay. So what is that land for?

7 A. I don't know.

8 There's lots of things, you know
9 there's road frontage. There's roads off of the
10 property. There's woods. Probably grass and
11 waterways.

12 Q. So somewhere between 1175 and 1351,
13 whatever that remainder is, that's not being
14 currently put into crops? That's not being currently
15 farmed?

16 A. Those are estimates.

17 Q. Right. Okay, can you answer my question
18 with an estimate?

19 Given that it's an estimate somewhere
20 between 1175 and 1351 acres estimated is not in
21 farmland?

22 A. Not in what land?

23 Q. Not in farmland.

24 A. In farmland?

1 Q. Or not cropped?

2 A. It would not be stuff that we're putting
3 corn, soybeans and wheat on.

4 JUDGE MORAN: When you say between 1175 and
5 1351, do you mean when you subtract --

6 MS. PELLEGRIN: Yes.

7 JUDGE MORAN: -- (continuing) when you subtract
8 1175 from 1351?

9 MS. PELLEGRIN: Yes.

10 JUDGE MORAN: Okay.

11 MS. PELLEGRIN: I said I wasn't going to do the
12 map, but I think it's easier if I do.

13 So, I'm getting 1351 minus 1175 is
14 approximately 236 acres.

15 BY MS. PELLEGRIN:

16 Q. And just assuming that it is somewhere
17 around there, just to be clear, that 236 acres does
18 not have -- doesn't have corn or soybean or wheat; is
19 that correct?

20 A. I don't agree with your map.

21 Q. Okay. You know, we have an easel, Mr.
22 Heser, if you would like to do the map?

23 A. No, I'm not interested in doing the map.

24 But, I mean, you can subtract 1175

1 from 1351.7, and I don't believe that comes up to
2 236.

3 JUDGE MORAN: I'm not going to make him do the
4 map. That is not part of this exercise to test his
5 mathematical skills.

6 But we can take notice without having
7 to put anyone through that, although putting him
8 through that -- that's quite an exaggeration to talk
9 about a simple subtraction.

10 But whatever it is --

11 MS. PELLEGRIN: Well, you -- your Honor --

12 JUDGE MORAN: Excuse me, Miss Pellegrin, I'm
13 speaking.

14 Thank you. And do not interrupt me
15 when I'm speaking.

16 MS. PELLEGRIN: I'm sorry, your Honor.

17 JUDGE MORAN: The point I wanted to make clear
18 was from some of your questions, it sounded unclear
19 to me as to whether you were indicating the amount of
20 acreage that was unused was in the order of over a
21 thousand acres.

22 And I want to make clear that you were
23 just talking about the difference between 1351 less
24 is 1175 which might be in the range of something like

1 276.

2 Go ahead, Miss Pellegrin.

3 BY MS. PELLEGRIN:

4 Q. Whatever number that is, Mr. Hesel, am I
5 understanding you correctly that that acreage is,
6 whatever number that was from my bad --

7 Anyway, but whatever number that is,
8 am I understanding correctly it's not corn, it's not
9 soybeans and it's not wheat, estimated generally?

10 A. That would be, if you use my estimates.

11 Q. Okay.

12 JUDGE MORAN: And by the way, I misspoke, I
13 meant to say 176, but go ahead.

14 MS. PELLEGRIN: Okay.

15 BY MS. PELLEGRIN:

16 Q. And, Mr. Hesel, how much of the 60 acres
17 that you bought from Max and Dorothy Mercer, how much
18 of that is in cropland?

19 A. I'm not really for sure. It's somewhere
20 under 60 acres.

21 Q. Is it over 50 acres?

22 A. Oh, yes.

23 Q. Is it between 55 and 60 acres?

24 A. Oh, yes.

1 Q. Okay. Is it between 58 and 60 acres?

2 A. Well, there's an acre or more that's out
3 for the "L", and I'm not for sure where the surveying
4 would take place with respect to the roadway.

5 Q. So would you agree with me it's somewhere
6 more than 55 acres but less than 60 acres that's in
7 cropland?

8 MR. SMALL: Asked and answered, your Honor.
9 I'm going to object.

10 JUDGE MORAN: Well, I'm going to let her go
11 through this exercise, Mr. Small.

12 If you know the answer.

13 THE WITNESS: The property wasn't surveyed, so
14 we don't know with respect to the roadway. It would
15 only be an estimate.

16 MS. PELLEGRIN: I see.

17 BY MS. PELLEGRIN:

18 Q. But it's over than 55 acres, you already
19 testified to that, so I'll move on.

20 And, let's see, do you have any
21 other -- Mr. Northrup asked you if you if any other
22 property adjacent to Martin Branch.

23 And I believe you testified between a
24 quarter and an eighth of a mile to Martin Branch you

1 had other property?

2 A. I didn't think he said adjacent.

3 I thought he said further downstream
4 or near.

5 I think, yes, it's further downstream,
6 and it was like I think I said a mile, mile and a
7 half.

8 Q. A mile, mile and a half downstream of the
9 "L"?

10 A. Downstream of the 60 acres we purchased
11 from Max and Dorothy Mercer.

12 Q. Does any of the property that you own have
13 wetlands on it currently?

14 A. I don't know.

15 I know that samples that the EPA took
16 at this site, they claim are hydric where they took
17 the samples at where they took the probes. That's
18 what they testified to.

19 Q. Okay.

20 JUDGE MORAN: Okay, let me just advice you when
21 you give an answer it is sufficient to say I don't
22 know but then to go into what other people testified
23 to --

24 THE WITNESS: I understand.

1 JUDGE MORAN: That's not what we're expecting
2 of you.

3 THE WITNESS: Okay.

4 BY MS. PELLEGRIN:

5 Q. Okay. Mr. Hesper, I believe you testified
6 that you're familiar with Martin Branch where it is
7 upstream of your site.

8 And I believe you testified generally
9 you're familiar with Martin Branch where it begins?

10 A. I understand that it begins in my mom and
11 dad's property upstream.

12 Q. Okay. Mr. Hesper, we've been using a lot of
13 different terminologies these past few days or ten
14 days.

15 But I'd like for you -- and people use
16 different terms for different things.

17 So I'd like to get your definition of
18 certain terms. How would you define just generally
19 in layman's terms, how would you define a stream?

20 A. A what?

21 Q. A stream.

22 A. A stream?

23 Q. Uh-huh.

24 A. I don't know.

1 Q. You said you don't know what a stream is?

2 JUDGE MORAN: No. The question was how would
3 you define a stream, and he wasn't able to come up
4 with a definition.

5 MS. PELLEGRIN: Okay.

6 BY MS. PELLEGRIN:

7 Q. Would you agree with this definition?

8 A stream generally has a bed and it
9 has banks.

10 A. I don't know that I know enough about it so
11 that I could characterize it in that manner.

12 Obviously I can't characterize it in
13 that manner so I don't know.

14 Q. Okay. Well, what about -- let's see the
15 term ditch.

16 Can you give me a definition of the
17 term ditch? How would you define ditch?

18 A. Well, they use ditches along roads.

19 I'm not for sure that I know the
20 definition of that either.

21 Q. Okay, what about a channel?

22 A. I don't think I know enough about the
23 definition of it to say either.

24 Q. Okay, Mr. Heser, you created an "L"-shaped

1 channel on your property; is that correct?

2 A. I wouldn't characterized it as that.

3 Q. Okay, how would you characterize it?

4 A. It's an area where water moves, and we
5 constructed this with grass so that the water would
6 move from south -- move south and west.

7 Q. Okay. And I believe you talked about the
8 slope of the sides of the channel; is that correct?

9 A. I don't know if we talked about it. But
10 there is slopes and there is sides there.

11 Q. Okay, now in that channel --

12 MR. SMALL: Your Honor, I'm going to object
13 because he said he didn't know what a channel was,
14 and then her next question was about the slope of a
15 channel.

16 And now here's another channel
17 question and he's already answered that he doesn't
18 know what it is.

19 JUDGE MORAN: Okay, I'll sustain the objection.

20 What you can do is describe it as the
21 area where the work was done without getting hung up
22 on the terminology of calling it channel.

23 MS. PELLEGRIN: Okay.

24 BY MS. PELLEGRIN:

1 Q. Let me ask, Mr. Hesper, how would you define
2 what the "L" shaped structure is on your property?
3 What would you call that?

4 A. I would call it an area where the water
5 comes from Bill Hesper's property into it and it goes
6 south and then it goes west.

7 Q. Okay. And, Mr. Hesper, I believe you
8 testified earlier that the water is contained within
9 that structure normally?

10 A. I'm not so sure that it is in every storm
11 event.

12 Q. Okay.

13 A. There is water other places during various
14 rain events.

15 Q. Okay. Let me get you to look at some of
16 these pictures, Complainant's Exhibit 47, I believe.

17 A. Okay, I think I'm there.

18 Q. Okay. So looking at 7361 --

19 A. Yes.

20 Q. -- (continuing) there is the water that's
21 within the "L" shaped structure. Do you see that?

22 A. Yes.

23 Q. And would you agree with me that there's
24 water inside the "L" shaped structure?

1 A. It looks to be in this photograph.

2 Q. Okay. And, Mr. Hesper, I believe you
3 testified -- you testified last week when
4 Mr. Northrup asked you a question about the water as
5 it flowed through the property before you created the
6 "L" shaped structure.

7 Do you remember that?

8 A. Yes -- or I'm not for sure, no. When was
9 it?

10 Q. It was last Friday when your attorney
11 Mr. Northrup asked you questions regarding how the
12 water flowed through the property that you purchased
13 before you created the "L" on that property?

14 A. Yes.

15 Q. And do you remember that testimony?

16 A. Kind of, yes.

17 Q. Okay. Did you testify that the water came
18 in from Bill Hesper's upstream and the water left at
19 Bill Hesper's -- at the other end of your property; is
20 that correct?

21 A. I don't believe I would characterize it as
22 the other end.

23 Q. Okay. Let's see?

24 A. There is the far most upstream to the "L"

1 and a far most downstream to the "L".

2 Q. I'm sorry, can you repeat that again?

3 A. There's the far most upstream end of the
4 "L" -- there's the top and bottom of the "L".

5 Q. All right. And when the property (sic)
6 came in at the top of the "L", it came if I'm
7 understanding from the northeast of the "L"; is that
8 correct?

9 A. Could you say that again, please?

10 Q. When the water came into the property, it
11 came into the northeast of the "L"; is that correct?

12 A. No, I wouldn't characterize it as that.

13 Q. Okay.

14 MS. PELLEGRIN: Your Honor, I think it would be
15 more clear if we could get sort of a picture of what
16 we're looking at and I'm not going to ask Mr. Hesper
17 to do that.

18 But if I could ask him to do a diagram
19 so we could be on the same page as to where the
20 water's coming in.

21 JUDGE MORAN: Well, with all of the exhibits,
22 the demonstrative exhibits, you can't use existing
23 diagram and have him work from that?

24 You need him to recreate a new

1 diagram?

2 MS. PELLEGRIN: Yes, your Honor.

3 JUDGE MORAN: I guess I will allow him to draw
4 a -- do you have an objection to that, Mr. Small?

5 You didn't say anything --

6 MR. SMALL: Your Honor, if this is supposed to
7 be cross, and we didn't add any new exhibits to look
8 at, then I don't think that's proper for
9 cross-examination.

10 JUDGE MORAN: As I expressed, I do have a
11 problem with that.

12 They didn't -- he didn't draw a
13 diagram.

14 Now you're having him draw on things
15 on which we've had endless number of documents,
16 demonstrative exhibits, and you're merely asking him
17 where the water came from above the "L", there are
18 lots of exhibits that you can turn to and have him
19 point to his understanding, if he knows, where the
20 water came from north of his property, rather than
21 turn him into an artist here.

22 MS. PELLEGRIN: Okay.

23 Can we go off the record so I can find
24 that exhibit, your Honor?

1 JUDGE MORAN: Yes, we'll go off the record.

2 (WHEREUPON, a short recess was
3 taken.)

4 JUDGE MORAN: Okay, a couple of observations:

5 I want to note on the record that
6 while EPA had some angst about my only giving five
7 minutes to prepare for cross-examination, the record
8 should reflect that the bulk of Mr. Bobby Hesel's
9 testimony occurred on Friday.

10 And so, in fact, EPA had all weekend
11 except for the 40 minutes or so of testimony that
12 occupied this morning before we resumed.

13 The second point I want to make is,
14 and this is directed to Mr. Bobby Hesel:

15 I understand, sir, your worry about
16 getting bogged down with definitions and worried
17 about what exactly is a definition of the channel, or
18 whatever.

19 But you did dig the "L", right, you
20 testified to that?

21 You or your brother used heavy
22 equipment, right?

23 THE WITNESS: We -- we cleaned out the area.

24 JUDGE MORAN: Right.

1 But in the course of doing that, I
2 mean, you had to dig -- you may not want to use the
3 term channel, but you had to dig some sort of a --
4 you dug the "L" so water would flow through it,
5 right?

6 THE WITNESS: We cleaned out an area basically
7 that we believed the water normally flowed through.

8 JUDGE MORAN: Okay.

9 Okay, go ahead, Miss Pellegrin.

10 We now have up on the easel EPA
11 Exhibit C.

12 MS. PELLEGRIN: Okay.

13 BY MS. PELLEGRIN:

14 Q. Mr. Hesper, being looking at Exhibit C, can
15 you --

16 MS. PELLEGRIN: Your Honor, permission for
17 Mr. Hesper to approach the exhibit?

18 JUDGE MORAN: Sure.

19 MS. PELLEGRIN: I'll get a marker.

20 BY MS. PELLEGRIN:

21 Q. Okay, Mr. Hesper, using the blue marker
22 there, can you please point to the area where the
23 water entered your property from upstream Bill
24 Hesper's property?

1 JUDGE MORAN: You're going to have to lay more
2 of a foundation.

3 You haven't identified whether this
4 witness understands this exhibit, whether it
5 reflects -- et cetera.

6 You're assuming that he's already
7 testified about this exhibit you.

8 Have to lay more of a foundation
9 before you can ask him to mark on this exhibit.

10 MS. PELLEGRIN: Okay.

11 BY MS. PELLEGRIN:

12 Q. Mr. Heser, have you seen your property in
13 an aerial photograph before?

14 A. Yes.

15 Q. And have you seen your property on an
16 aerial photograph before -- before -- I'm sorry
17 strike that.

18 Have you seen Mr. Bill Heser's
19 property on an aerial photograph before?

20 A. I don't know whether I have since before
21 the date and time when we were here.

22 Q. Okay.

23 But since the date and time of this
24 hearing, have you seen Mr. Bill Heser's property on

1 an aerial photo before?

2 A. Yes.

3 Q. And can you tell me looking at Exhibit C
4 where your property is on that exhibit?

5 A. Yes.

6 Q. And we've been talking about the "L"
7 property, or the site of the alleged violation.

8 Can you identify specifically that
9 property on Exhibit C?

10 A. I believe it to be in this area.

11 Q. Okay. And can you identify where the "L"
12 is on your property -- sorry.

13 Can you identify generally where the
14 "L" shaped structure is that is on your property that
15 is on this Exhibit C here?

16 A. It would be in this area.

17 Q. Okay. And can you please mark the area you
18 just pointed to?

19 Can you draw that with the blue marker
20 that you have in your hand?

21 A. I'm not for certain that I can do this
22 accurately, because I don't know where the property
23 boundaries are exactly on this.

24 Q. Okay.

1 A. And I don't know what scale it would be.

2 Q. Okay.

3 A. And I'm not an expert at drawing.

4 Q. Okay. And I understand that, but the area
5 that you just described where the "L" shape is
6 generally, can you, please, mark that in blue on
7 Exhibit C?

8 A. (So complied with request.)

9 Q. Okay. And can you please draw a line to
10 that and write your initials?

11 A. (So complied with request.)

12 Q. And the area you just described, can you
13 tell on Exhibit C where at the top of that "L" is
14 generally, where the upstream of Martin Branch comes
15 into that property at the top of the "L"?

16 A. It would be somewhere in this area.

17 Q. Okay. And can you please draw a line to
18 that area and put your initials.

19 A. (So complied with request.)

20 Q. Can you put a Number two next to that one
21 and a Number one next to the one you just drew.

22 A. (So complied with request.)

23 Q. Now the downstream end of that "L"-shaped
24 channel, can you tell me where generally the

1 downstream end of where that "L" is and where the
2 water comes into that structure and where it leaves
3 your property and goes into Mr. Bill Hesper's property
4 again?

5 A. (So complied with request.)

6 Q. And can you draw a line to that area and
7 put your initials and a Number three?

8 A. Number three?

9 Q. Yes.

10 A. (So complied with request.)

11 MR. NORTHRUP: Your Honor, can I come up and
12 look?

13 JUDGE MORAN: Sure.

14 I want to note on the record while
15 Counsel for Respondent and Miss Pellegrin, EPA
16 Counsel, are looking at these markings, that this is
17 for a very limited purpose.

18 That in no way do I take this as any
19 sort of endorsement by this witness as to anything
20 else that might be reflected on Exhibit C, including
21 any indication of dates or whether there was forest
22 or not.

23 He merely marked his best guess as to
24 where the "L" is on this property and the other

1 markings of where it ends, et cetera.

2 And I guess this goes towards
3 Miss Pellegrin's attempt to try and ask question
4 about where water comes from Mr. Heser's property,
5 Bill Heser's north of there; is that right?

6 MS. PELLEGRIN: Yes, your Honor.

7 JUDGE MORAN: Go ahead.

8 MS. PELLEGRIN: Okay.

9 BY MS. PELLEGRIN:

10 Q. And I believe the Court asked you about the
11 creation of the "L"-shaped channel.

12 And I believe you testified that you
13 did not create the "L" structure on the property, but
14 instead cleaned out an existing structure; is that
15 correct?

16 A. That's what it appeared to us that we were
17 cleaning out an area where water already drained.

18 Q. Okay. So it's your testimony then looking
19 at Exhibit C in that general area, water came
20 upstream, took a sharp left down the side of your
21 property, took a sharp right along the side of the
22 bottom of your property, and then exited your
23 property; is that correct?

24 A. I wouldn't characterize it as sharp, and

1 I'm not for sure -- if you could repeat that?

2 Q. Okay. My understanding is that you what
3 you drew was a backwards "L" shaped structure on
4 Exhibit C in the general area of where there's
5 currently a backwards "L"-shaped structure on your
6 property; is that correct?

7 A. That would be correct.

8 Q. And are you familiar -- strike that.

9 Okay. So looking at the structure you
10 drew, is it your testimony that that -- well, first
11 of all let me ask you:

12 Is that backwards shaped "L", is this
13 a fair characterization that it's sort of up against
14 your property line, the dividing line between your
15 property line and Mr. Bill Hesper's property line
16 along the north/south leg?

17 A. I don't know if I would characterize it in
18 that manner.

19 Up against, no, I don't think I would.

20 Q. Okay. And how about the east-west leg.
21 Would you characterize the east-west leg of the
22 "L"-shaped channel as a long side the property -- the
23 property line between you and Mr. Bill Hesper?

24 A. I don't know if I would characterize it in

1 that manner.

2 Q. Okay. In what way would you characterize
3 it?

4 A. I would characterize it as the water comes
5 from Bill Hesper's property in those multiple places,
6 and it flows south, and then it flows west.

7 Q. Okay. And when it flows south along your
8 property, does it flow along the edge of your
9 property?

10 A. I wouldn't characterize it in that manner.

11 Q. Okay. And when it flows west, does it flow
12 west along the edge of your property?

13 A. I wouldn't characterize it in that manner.

14 Q. The area that is the "L"-shaped structure
15 on your property, is it your testimony that that was
16 there in that way when you purchased your property?

17 A. The logging company left the area in a mess
18 is what the Mercers had told us.

19 It was a terrible mess. And so it was
20 difficult.

21 But there was water coming from Bill
22 Hesper's property, and it would cause sheet erosion
23 across our property taking off the topsoil.

24 Q. Okay. Can you please define what you mean

1 by sheet erosion, sheet erosion?

2 A. That's what I understand when water flows
3 across the top of the surface of a field and it takes
4 and removes soil, that's what I understand that
5 means.

6 Q. Okay. And by sheet erosion across the top
7 of a field, am I understanding that that's not
8 through a channel; is that correct?

9 A. Well, the logging company had disturbed the
10 site, so it was hard to tell what went on.

11 Q. Okay. My question -- that doesn't really
12 answer my question.

13 My question is: Sheet erosion flowing
14 across the surface of your property, contrast that
15 with water flowing through an area that has a bottom
16 and a top -- I'm sorry, a bottom and sides. Those
17 are two different things, correct?

18 A. I don't know if I would characterize it in
19 that matter.

20 I would say that water flows across
21 the field taking off topsoil would be what I would
22 call sheet erosion.

23 Q. And when water flows across a field taking
24 off topsoil, is it correct that it's not taking --

1 that it's going through a defined area where there is
2 a bottom and there are banks; is that correct?

3 A. I don't know if I would characterize it
4 that way.

5 Q. So is it your testimony that sheet erosion
6 can occur inside of an area that's confined to an
7 area that has a bed and banks?

8 A. I don't know if I can characterize it the
9 way you're putting it.

10 Q. Okay. Let me ask you, Mr. Heser, when you
11 purchased your property, was there a defined channel
12 across that property, the 60-acre property?

13 A. No, there was not.

14 Q. Okay. And how did water go from the top,
15 which is, I believe you've marked generally -- let's
16 see, the top of your -- the top left -- the top part
17 of the "L" -- I'm sorry, strike that.

18 How did water, when water came into
19 your property from the upstream landowner and water
20 left your property from the downstream landowner, is
21 it your testimony that that water did not go across a
22 defined channel?

23 A. It sort of diffused and it just kind of
24 went everywhere.

1 It came out of Bill Hesper's property
2 and then it went south and then it went west.

3 Q. It went south and went west, but it didn't
4 take a defined channel?

5 A. It kind of diffused and that's what was
6 causing the sheet erosion and taking the topsoil off
7 of the property.

8 Q. Okay. And contrast that with what water
9 does currently on the property.

10 Is it true that water currently takes
11 the defined channel or the "L"-shaped structure from
12 the upstream property to the downstream property
13 currently; is that correct?

14 A. I don't know if I would characterize it in
15 that manner.

16 But it does a very good job. It does
17 exactly what we intended it to do with respect to
18 cleaning that out.

19 And it appears to be working fine.
20 And it does a great job for the environment, I
21 believe.

22 Q. Okay, Mr. Hesper, my question is:

23 Does it currently more or less stay
24 within that "L"-shaped when the water comes in from

1 upstream and leaves downstream, currently?

2 A. I would say it intends to do exactly what
3 we intend it had do to do.

4 Q. Okay, and what is it that --

5 A. Reduce erosion.

6 Q. Okay. And how did you intend for water to
7 come into the property and exit the property; through
8 that "L"-shaped structure; is that correct?

9 A. Well there's -- this area accepts water
10 from Bill Hesper, who owns the upstream property, and
11 it does a very good job of its ability and what we
12 wanted it to do.

13 JUDGE MORAN: Wait, Mr. Hesper. Isn't it
14 true -- tell me if I have this wrong, but isn't it
15 true under most rain events now, excepting a very
16 large -- don't count a very large rain, but when it
17 normally rains, isn't it true that the water now
18 flows from Bill Hesper's property along this
19 "L"-shaped creation of yours and then exits the
20 property?

21 THE WITNESS: Yes.

22 JUDGE MORAN: Okay.

23 BY MS. PELLEGRIN:

24 Q. And, Mr. Hesper, isn't it true also that

1 when before the "L"-shaped structure, that water went
2 in a sheet flow from the upstream property owner to
3 the downstream property owner in a not defined
4 channel; is that correct?

5 A. No. It basically flowed in that area
6 before.

7 But there was more erosion without
8 anything there to protect the soil.

9 Q. Okay. Mr. Hesel, you said you didn't know
10 what a channel was.

11 Would you agree with that
12 characterization:

13 The "L" shape as it currently is now
14 would you agree that that's a defined channel?

15 A. I don't know the definition.

16 Q. Okay. Would you agree that it is a
17 drainage ditch?

18 A. It could be.

19 Q. And just generally speaking -- I'm just
20 trying to understand sort of the pre and post, how
21 large it was.

22 Is it my understanding that before
23 when water would come from upstream, it would take an
24 undefined way through sheet erosion, through

1 different courses and then exits your property
2 downstream, and that currently when water comes in it
3 more or less stays in this "L" and exits downstream;
4 is that my understanding?

5 A. No, that's not correct. That's not the way
6 I would characterize it.

7 Q. Okay. How would you characterize it?

8 A. I would characterize it as the water comes
9 in from the upstream property owned by Bill Hesper.
10 It comes into the "L", it flows south and it flows
11 west.

12 Q. Okay.

13 A. It comes into that "L" in multiple places
14 from Bill Hesper's property.

15 Q. Okay, once it's in the "L", in a normal
16 event when it doesn't exceed the banks of that "L",
17 does it take a north-south pathway along the
18 north/south leg and an east-west pathway along the
19 east-west leg?

20 A. I would characterize it as the water when
21 it comes into our property, it flows south and it
22 flows west.

23 Q. And when it flows south, does it flow along
24 generally along the north-south section of the "L"?

1 A. There is a north-south section to the "L".

2 Q. Okay. And when water comes to the top of
3 that section, it flows southward in a more or less
4 straight line?

5 A. It comes in multiple places.

6 Q. Okay. Let's talk about the water that
7 comes into the top of the "L", okay?

8 The water that comes into the top of
9 the "L" from the upstream property, does that flow in
10 a north/south manner from the north of the top of the
11 leg to the south of the leg?

12 A. It flows south.

13 Q. Okay. And does it flow north to south?
14 The water that comes into the north, it flows from
15 north to south, from upstream to downstream, correct?

16 A. There's water that comes from multiple
17 places from Bill Hesper's property that flows south.

18 Q. You are not answering my question.

19 My question is:

20 When the water comes from the north,
21 just the water that comes from the north, upstream of
22 the "L", does it flow north-south down the
23 north/south leg of the "L"?

24 A. Yes, I believe that's correct.

1 Q. Okay. And then what I'm going to refer to
2 as the elbow of the "L", the angle of the "L" where
3 the north-south and east-west leg meets; do you
4 understand that term?

5 A. Yes.

6 Q. When the water that comes in from the north
7 flows down the leg to the south to that elbow, does
8 it then take a westerly direction along the east-west
9 leg of the "L"?

10 A. There is an east-west leg of the "L".

11 JUDGE MORAN: No, but her question is doesn't
12 it then flow along the --

13 THE WITNESS: Yes, it would have to flow in
14 that direction.

15 JUDGE MORAN: Okay.

16 MS. PELLEGRIN: Okay.

17 BY MS. PELLEGRIN:

18 Q. And that is what currently happens when
19 water comes in from the north part of the "L" and it
20 is contained within the channel; in other words, it
21 doesn't overflow, what normally happens to the water
22 that comes in from the north is that it flows south
23 down the north/south leg and then it turns and flows
24 east along the east-west leg before it exits the

1 property; is that correct?

2 A. If you're talking about only the water that
3 comes in from the farther most north end of it, I
4 could agree with that --

5 Q. Okay.

6 A. -- (continuing) but there is other water.

7 Q. Now that's what happens currently to the
8 water that comes in from the north, correct?

9 A. Correct.

10 Q. Okay. Now when you bought the property
11 back in 1998, is it my understanding that when the
12 water came in from the north of what is now the top
13 of the northwest leg, when that water came in from
14 upstream, it flowed through your property in a sheet
15 erosion type fashion and exited your property where
16 it currently exits the property at the exit at the
17 east-west leg of the "L"; is that correct?

18 A. I wouldn't characterize like that.

19 Q. Okay. Whether you purchased the property
20 in 1998, characterize for me how the water flowed
21 through that area?

22 A. It appeared to us that the water was coming
23 from Bill Hesper's property, and it went south, and
24 then it went west.

1 And it was coming from the Bill Hesel
2 property on both sides of the "L". There's multiple
3 places.

4 Q. And when you bought the property, did that
5 water take the same exact pathway that it takes
6 currently which is: flows down the north/south leg
7 of the "L" and then flows east along the east-west
8 leg of the "L"?

9 A. As best as we could tell. There was a lot
10 of damage to the property by the logging company.

11 Q. Okay. So your testimony is that the water
12 generally, when you bought the property in 1998, that
13 water generally flowed in the exact same place it was
14 flows through the "L" now?

15 A. That appeared to be where the water had
16 flowed, and there was flow there. In the big rain
17 events, there was also the sheet erosion that I
18 talked about.

19 Q. Okay. So is it your that in the big rain
20 events that water would come out of that "L" that was
21 already there when you bought the property and cause
22 sheet erosion; is that correct?

23 A. We were losing topsoil and I define that
24 as -- claim that is what I understood would be sheet

1 erosion, when it would not stay in the area where it
2 looked like it had normally drained.

3 Q. Okay, my question is:

4 When you bought the property is it
5 your testimony that that "L"-shaped structure where
6 the water comes the top flows south, then flows east
7 along the east-west leg, is it your testimony that
8 that "L" shaped structure was where the water would
9 flow when you first bought the property?

10 A. You said east.

11 Q. Flows west, pardon me.

12 A. South and west.

13 Q. Okay. Is it your testimony -- in other
14 words, was that "L"-shaped -- is it your testimony
15 that that "L"-shaped structure was there when you
16 bought the property?

17 A. There was drainage there in that area. We
18 just cleaned it out so that we would not have the
19 sheet erosion.

20 We constructed the small berm, and the
21 water comes in from Bill Hesper's property in multiple
22 locations, and it flows south and it flows west.

23 That's how I would characterize it.

24 Q. Okay. I want to understand the time line

1 here: You bought the property in August of 1998,
2 correct?

3 A. Correct.

4 Q. Okay. And you testified earlier that there
5 was debris, there was a terrible mess as you
6 testified to earlier and that included debris, tree
7 tops, grass and weeds; is that correct?

8 A. Yes, that would be correct.

9 Q. Okay. And is it your testimony that you
10 cleared the tree tops, the grass, and the weeds in
11 August or September of 1999?

12 A. I don't think I would agree with the way
13 you're characterizing.

14 Q. Okay, how would you not agree?

15 A. We gathered the tree tops, the logging
16 debris, put it in a pile and we burned it.

17 Q. Okay. When did you do that?

18 A. I believe without looking it up it was in
19 August of '99.

20 Q. Okay. And the tree tops -- can you tell me
21 what a tree top is again?

22 A. It's an un useable portion that the logging
23 company didn't want.

24 Q. Okay. And why don't they want that, the

1 tree tops?

2 A. I don't know. I'm not in that business.

3 Probably because they didn't cut
4 lumber out of it. I don't know.

5 Q. Did that debris include any trunks of
6 trees?

7 A. How would you define a trunk?

8 Q. How would you define a trunk?

9 A. I don't know.

10 Q. You don't know what a trunk is of a tree?

11 A. I would assume normally that that's the
12 part they would take.

13 The tree tops would be what I would
14 call the section that they left, the stuff they did
15 not want.

16 Q. Okay. So the trunks -- my question is:

17 Were there any trunks left on the
18 property when you purchased it? I'm sorry.

19 Is the debris that you cleared, the
20 tree tops, the grass, and the weeds, did any of
21 that -- did you clear any trunks at that time?

22 JUDGE MORAN: I think this witness -- he wasn't
23 sure he could define a trunk.

24 So why are you asking about -- he said

1 he can't -- I'm not sure how I would define a tree
2 trunk myself. I'd have to look it up.

3 I mean, he already said what was left
4 from the trees, the tree tops, and what else was it?
5 Anything else besides the tree tops and limbs left?

6 THE WITNESS: There were some stumps that they
7 had pushed over. They were already out and laying on
8 the ground.

9 JUDGE MORAN: Okay, anything else besides
10 stumps and tree tops?

11 THE WITNESS: Weeds and grass. There appeared
12 to be fescue.

13 JUDGE MORAN: So that's what's left without
14 getting into what a trunk is exactly.

15 MS. PELLEGRIN: Okay.

16 BY MS. PELLEGRIN:

17 Q. Okay. So there were some stumps that I
18 believe you said were already out and they were lying
19 on the ground?

20 A. Yeah, just a few.

21 Q. Okay, a few.

22 And when you said you burned the tree
23 tops and the grass and the weeds, did you also burn
24 the stumps?

1 A. The ones that were on top of the ground
2 were in with the tree top pile, and we did burn them.

3 Q. Okay.

4 A. They were already on top of the ground.
5 They pushed them over.

6 JUDGE MORAN: Let me just interrupt with my
7 portable dictionary.

8 A trunk is defined, the first
9 definition is the main stem of a tree. That's the
10 definition of a trunk.

11 Let's take a five-minute break here.
12 It's 11 A.M.

13 Before we go off the record, I'm
14 guessing that EPA will have some rebuttal testimony
15 in this case?

16 MS. PELLEGRIN: Yes, your Honor.

17 JUDGE MORAN: Okay, so we're looking at
18 finishing this up Tuesday, not today, it looks like,
19 fair?

20 Because we're not going to stay past
21 four. I don't want to wear out my welcome, and we're
22 just not going to be doing that.

23 So at the rate that we're going, with
24 two more witnesses from Respondent, that's Andy Hesper

1 and Mr. Terry Lendy?

2 MR. NORTHRUP: Correct.

3 JUDGE MORAN: And rebuttal testimony. So make
4 your plans accordingly at local hotels, all right,
5 and we'll take a five-minute break.

6 (WHEREUPON, a short recess was
7 taken.)

8 JUDGE MORAN: Let's go back on the record.

9 BY MS. PELLEGRIN:

10 Q. Okay, Mr. Hesper, is it or is it not true
11 that in August or September of 1999, you and your
12 brother Andrew dug a small new storm water ditch at
13 the edge of the site that we've been referring to?

14 A. I wouldn't characterize it like that.

15 Q. Okay. Mr. Hesper, is it or is it not true
16 that you diverted the water from a small portion of a
17 eroded and debris filled intermittent drainage ditch
18 on the site?

19 A. I wouldn't characterize it like that
20 either.

21 Q. Okay. Is it or is it not true that you and
22 your brother Andrew then graded the area of the site?

23 A. No.

24 Q. Okay. And is it or is it not true that

1 debris was then removed from the former drainage
2 ditch?

3 A. I wouldn't characterize it like that,
4 either.

5 Q. Mr. Hesel, is it true that both you and
6 your brother were involved in the relocation of a
7 small portion of the intermittent drainage ditch on
8 the site?

9 A. I wouldn't characterize it like that
10 because the water always flows south and it flows
11 west.

12 And it was coming from Bill Hesel's
13 property and it went back to the Bill Hesel area
14 property.

15 Q. Mr. Hesel, Mr. Northrup asked you a
16 question about responding to an information request
17 from the U.S. EPA?

18 A. Yes.

19 Q. And you responded that you did respond; is
20 that correct?

21 A. Yes.

22 Q. And I believe he asked you if your response
23 was truthful and accurate; is that correct?

24 A. Yes.

1 Q. Okay. And, in fact, you responded twice:
2 once in October of 2002 and once in November of 2002;
3 is that correct?

4 A. I'm not aware of the dates and I'm not
5 aware of two responses. I would have to look that up
6 to know about dates and times. All right.

7 Q. Okay.

8 A. And twice, I don't know.

9 Q. Okay. Mr. Hesel, as a matter of fact, when
10 you responded, is it not true that you signed your
11 name and attested that the information is true and
12 complete to the best of your knowledge and belief; is
13 that correct?

14 A. I don't know if it said that above the
15 signature or not. It's been a long time since I've
16 seen that document.

17 Q. Okay. Well, let's take a look at that
18 document, Mr. Hesel.

19 Turn to Complainant's Exhibit 23a.

20 JUDGE MORAN: 23a is the beginning of the
21 second volume. Does it follow 23? I can't find 23a.

22 MS. PELLEGRIN: I believe it's at the beginning
23 of the second volume.

24 JUDGE MORAN: Okay.

1 BY MS. PELLEGRIN:

2 Q. Mr. Heser, please read the date of the
3 document at Bates stamp 287 in the record?

4 A. Page 287?

5 Q. Correct.

6 A. The date at the top of this is October 16,
7 2002.

8 Q. And the line that says R-E colon. Can you,
9 please, read that line into the record?

10 A. Oh, Andrew and Robert Heser.

11 Q. Okay, and the next line?

12 A. Request for information.

13 Q. Okay. And looking at document Bates
14 stamped 359.

15 A. Page 359?

16 Q. Correct.

17 JUDGE MORAN: I don't have a 359. Mine goes --
18 this is 23a?

19 MS. PELLEGRIN: Yes, your Honor.

20 JUDGE MORAN: The volume I have goes from CX
21 358 to CX 367.6.

22 Is that the same for other people?

23 MR. NORTHRUP: I'm sorry, your Honor. I was
24 talking to Mr. Small.

1 JUDGE MORAN: Well, what EPA Counsel has asked
2 about is Bates stamped 359, Counsel?

3 MS. PELLEGRIN: Yes, your Honor.

4 JUDGE MORAN: And I was noting that in my
5 volume, it goes from 358 to Bates 367.6. And I
6 certainly haven't touched these exhibits.

7 MR. NORTHRUP: This was in the supplemental
8 information that the EPA gave us.

9 MR. MARTIN: 359 was in the original as well.

10 JUDGE MORAN: It's in the brown volume? 23a?

11 MR. MARTIN: 359 occurs in 23 and 23a.

12 JUDGE MORAN: Occurs in 23 and 23a.

13 BY MS. PELLEGRIN:

14 Q. Turning back to Complainant's Exhibit 287,
15 Bates Number 287.

16 A. Okay.

17 Q. And looking at Complainant's Exhibit 287
18 through Complainant's Exhibit 358?

19 A. Where, 358?

20 Q. I'm sorry -- rather 367.3.

21 MR. SMALL: Could we clarify that?

22 JUDGE MORAN: I don't have a 367.3, Mr. Small.
23 That's about the last thing she said. I don't know
24 what page.

1 Now, I think I see which one.

2 Let's go off the record for a few
3 minutes, please.

4 (WHEREUPON, a short recess was
5 taken.)

6 JUDGE MORAN: On the record.

7 Complainant's Exhibit 23, not 23a,
8 let's just do this on the record.

9 For Complainant's Exhibit 23, I go up
10 to page CX 367, and that continues through 390
11 something, 396.

12 But then on this 23a, it goes from 358
13 and then jumps to 367.6.

14 Apparently, what happens here is after
15 you get 23 at 358, it then jumps in 367 and stops at
16 point and then .6 and goes all the way through 367
17 through 397 point something. It's just --

18 BY MS. PELLEGRIN:

19 Q. Well, let's turn to Exhibit 23 then to
20 avoid the decimal point confusion. I don't need
21 those pages.

22 JUDGE MORAN: I have to say on the record for
23 the -- for the life of me, I think this EPA case has
24 been awfully protracted.

1 I don't know how a five-day hearing
2 moves into nine and a half days and now I'm going to
3 allow cross-examination.

4 But it is entering my head about --
5 and I'm not saying this is the case, but with the
6 Respondents having to more than double their legal
7 fees just dealing with the hearing itself, I have
8 some concern here about exhausting the Respondents'
9 resources just from the trial itself.

10 You know, have your cross-examination,
11 but let's not take endless amounts of time to conduct
12 a relatively short direct examination,
13 Miss Pellegrin.

14 I'm concerned about how long this case
15 is taking in terms of EPA's time.

16 When I go back over this record and
17 think about all the exhibits that took forever to go
18 through and many of which there's no reference in the
19 record.

20 I don't recall anything relating to
21 for example, this larded up record of the Soil Survey
22 of Marion County which then has map after map after
23 map to which no witness refers to. I don't know what
24 's going with EPA and I have some concerns about

1 that.

2 Without making any conclusions about
3 it, it seems to be excessive on EPA's part.

4 I don't understand why this case has
5 taken more than double the length of time, and that
6 has to be ascribed to EPA, not to the Respondents.

7 So, proceed with your question.
8 You're asking us now about Exhibit -- not me, but
9 Respondent about Exhibit 23.

10 And if your whole point is that he
11 signed something at the time he submitted a document,
12 isn't that already in the record?

13 MS. PELLEGRIN: Yes, your Honor.

14 JUDGE MORAN: Isn't that there?

15 I'm sure he had to sign something
16 somewhere in this saying --

17 MS. PELLEGRIN: Okay, your Honor.

18 JUDGE MORAN: -- (continuing) it was true to
19 the best of his belief, and maybe Andy had to sign it
20 as well.

21 Is that what all of this is about to
22 show?

23 Is that what you're trying to show
24 right now, that he signed this?

1 MS. PELLEGRIN: That he signed it and, your
2 Honor, that the statements that he just made
3 completely contradict --

4 JUDGE MORAN: Well, that's a different
5 question.

6 MS. PELLEGRIN: And I'm getting to that one,
7 too.

8 JUDGE MORAN: Go ahead.

9 BY MS. PELLEGRIN:

10 Q. Okay, Mr. Heser, turning to exhibit --
11 document Bates stamped two95

12 JUDGE MORAN: Do you have a two95?

13 THE WITNESS: I'm there.

14 JUDGE MORAN: That's your signature there,
15 isn't it?

16 THE WITNESS: It is.

17 JUDGE MORAN: And do you see when you saw that
18 that it said this information is true and complete to
19 the best of my knowledge and belief?

20 THE WITNESS: Yes.

21 JUDGE MORAN: And you signed that and you're
22 aware of that statement?

23 THE WITNESS: Yes.

24 JUDGE MORAN: Okay, go ahead, Miss Pellegrin.

1 BY MS. PELLEGRIN:

2 Q. Okay, Mr. Hesper, let me ask you again:

3 Is it or is it not true that in August
4 or September of 1999 you and your brother Andrew dug
5 a small new storm water ditch at the edge of the
6 site?

7 A. I would not characterize it in that manner.

8 Q. Okay. Mr. Hesper, turn your attention
9 Complainant's Exhibit 292.

10 A. I'm there.

11 Q. Okay. And please read the first full
12 sentence in the very top paragraph into the record,
13 beginning in approximately August or September?

14 A. In approximately August or September of
15 1999, Andrew and Robert Hesper dug a small new storm
16 water ditch at the edge of the site which diverted
17 the water from a small portion of the eroding and
18 debris filled intermittent drainage ditch in order to
19 maintain the ditch, and they graded this area of the
20 site.

21 Q. Okay, Mr. Hesper, is it or is it not true
22 that both you and your brother were involved in the
23 relocation of a small portion of the intermittent
24 drainage ditch on the site?

1 A. I wouldn't characterize it in that manner.

2 Q. Okay, Mr. Hesper, would you please look down
3 on the page at your response to Number four and read
4 into the record beginning with both Andrew and Robert
5 Hesper?

6 A. Both Andrew and Robert Hesper were involved
7 in the relocation of the small portion of the
8 intermittent drainage ditch on the site and removing
9 tree stumps and debris.

10 Q. Okay.

11 JUDGE MORAN: Do you want him to continue
12 reading that?

13 MS. PELLEGRIN: I do.

14 Please continue reading after I do.

15 THE WITNESS: They used a couple bulldozers,
16 one of their own and one rented from Dale Henson,
17 Route 1, Box 92, Johnsonville, Illinois 62850 to
18 relocate the ditch.

19 They also rented a scraper and a
20 paddle wheel from Dale Henson.

21 Do you want me to keep going?

22 MS. PELLEGRIN: Please.

23 THE WITNESS: In addition, they used their own
24 chain saw to clear debris.

1 The Hesers retained Effingham Clay
2 Service Company, PO Box 985, Salem, Illinois, to
3 spread fertilizer, and Dean Jr. Francois Brothers -
4 it's supposed to be Dean Francois of Francois
5 Brothers, spread lime around the new portion of the
6 drainage ditch when completed.

7 BY MS. PELLEGRIN:

8 Q. Keep reading, please.

9 A. The Hesers hired Robert Prosise to help
10 line the bends in the incomplete new ditch with
11 concrete.

12 Q. Okay. Now looking back up above Number
13 four, can you please read the last sentence -- I'm
14 sorry.

15 Can you please read the second
16 sentence which begins the new ditch had?

17 A. The new ditch had concrete at the bends in
18 the ditch in order to combat further erosion
19 problems.

20 Q. Please keep reading.

21 A. Debris was removed from the former drainage
22 ditch and burned.

23 Q. Okay. Okay. And, Mr. Hesper, did you do
24 any logging on this property?

1 A. Not in the area of the site in question.

2 Q. Okay. Is it your testimony that Kauling
3 Wood Products logged that property?

4 A. Yes. All right.

5 Q. Okay.

6 A. Well, that's my best knowledge. There may
7 have been others involved in the transfers of those
8 timber rights.

9 Q. Okay.

10 A. I'm not for sure who all and what the
11 ownership and how it passed.

12 Q. Okay. Now, Mr. Heser, is it your testimony
13 that the property was clear cut when you purchased
14 it?

15 A. Meaning they cut all the trees, yes.

16 Q. Okay. And is it your testimony that there
17 were no trees on the 60-acre property in question?

18 A. The property lines have trees on them.

19 Q. Okay, and which property lines?

20 A. This has many sides to this piece of
21 property.

22 Q. Okay, the north most property line, did
23 that have trees?

24 A. That had trees.

1 Q. Does that still have trees?

2 A. The western portion of it does. There's a
3 section to the east that does not.

4 Q. Okay. The dividing line -- the north-south
5 dividing line between your property and Mr. Bill
6 Hesper's property, does that still have trees on your
7 side?

8 A. Would you repeat that? The
9 north-south what?

10 Q. The north-south dividing line between your
11 property and Mr. Bill Hesper's property, does that
12 still have trees on your property line?

13 A. There's more than one north-south property
14 line that adjoins Bill Hesper.

15 Q. And how many are there?

16 A. I believe two.

17 Q. Let's talk about the first one. Does that
18 have trees on your property?

19 A. There are trees. I thought we were talking
20 about property line?

21 Q. The trees on your property line.

22 A. There are trees on the property line.

23 Q. Okay. Are there trees on your property?

24 A. Where?

1 Q. That same place that we're talking about.

2 A. There are property line trees.

3 They're on the line or in that area

4 that I would consider to be the line.

5 Q. Other than the property line trees, are

6 there trees on that part of the property?

7 A. Which part?

8 Q. The part that we're discussing.

9 A. Which part is that?

10 Q. I believe we're discussing one part of the

11 property line between you and Mr. Bill Hesel?

12 A. Which part?

13 Q. Let's take the first part.

14 A. We don't know which we're talking about,

15 the first or second. There's two parts.

16 Q. Okay, where is the first part?

17 A. There would be one at the very east end of

18 the property.

19 Q. Okay. And at the very east end of the

20 property, are there trees besides property line

21 trees?

22 A. Yes, I would say there is.

23 Q. Okay. But it's your testimony that when

24 you purchased the property, other than -- that the

1 area was clear cut other than the property line type
2 trees?

3 A. In the area of the site that we were
4 talking about.

5 Q. Okay.

6 A. Not property wide. I didn't understand
7 that to be the question.

8 Q. Okay. In the area that we're talking
9 about, we're generally talking about the site of the
10 alleged violation, and we had it described before
11 backwards shaped "L" and if you draw a line
12 connecting the top of the "L" and the north-south leg
13 and the bottom of the east-west leg, it sort of
14 creates a triangle; would you agree with that?

15 A. I wouldn't characterize it in that manner.

16 Q. Okay, how would you characterize it?

17 A. What was the question again?

18 Q. How would -- how do you want to describe
19 the site of the alleged violation in terms of
20 location?

21 I like -- I think -- I understand it
22 to be there's a "L", there's a north/south leg and
23 there's an east-west leg that we've been talking
24 about and if you draw a line on the top of the

1 north/south leg and the western most portion of the
2 east-west leg, that creates a triangle.

3 And within that area my question is:

4 Was a whole area clear cut?

5 A. I might not characterize that as a
6 triangle.

7 What you're talking about is the area
8 in question where they took the samples, where
9 they've taken these probes and stuff.

10 I don't know that that's a triangle
11 shape. There's been lots of shapes and polygons and
12 stuff talked about.

13 What was the question again?

14 Q. The area within the site of the alleged
15 violation, where the soil probes were taken, that
16 we've been talking about, the site of the alleged
17 violation the way we've been characterizing it, was
18 that whole area clear cut when you purchased the
19 property?

20 A. Yes.

21 Q. Okay. So you didn't remove any trees in
22 the center portion of the site?

23 A. There were no live trees in there on the
24 site.

1 Q. Okay. Turning your attention to
2 Complainant's Exhibit 291.

3 JUDGE MORAN: Are you there?

4 THE WITNESS: Yes.

5 JUDGE MORAN: Okay.

6 MS. PELLEGRIN: Okay, let's see -- actually,
7 strike that.

8 JUDGE MORAN: You said you don't want to go to
9 that page?

10 MS. PELLEGRIN: Ah, no, your Honor, I'll move
11 on.

12 BY MS. PELLEGRIN:

13 Q. Okay, turning your attention to
14 Respondent's Exhibit 13.

15 JUDGE MORAN: This would be the exhibit that
16 you testified to on Friday, sir, where you have a
17 cover page with ten listed items and they matched up
18 with the photographs, do you remember?

19 THE WITNESS: Yes.

20 JUDGE MORAN: Okay, go ahead, Counsel.

21 MS. PELLEGRIN: Okay.

22 BY MS. PELLEGRIN:

23 Q. There's some letterhead on the top of this
24 page. Can you read that letterhead?

1 A. You mean where it says Frontier Herbicide?

2 Q. Yes.

3 A. Frontier Herbicide.

4 Q. And where is this letterhead from?

5 A. It's just a note pad that we got from
6 probably a chemical meeting or something of that
7 nature.

8 I'm not sure where.

9 Q. Okay. And I believe you testified that you
10 took these photos sometime after you wrote up the
11 description of these photos, the description that is
12 on Hesel Exhibit Number 88?

13 A. I took the photos.

14 What did you say, after I wrote this
15 up?

16 Q. Some time after you took the photos, you
17 wrote up this description on this page?

18 A. Yes.

19 Q. And when did you take these photos and
20 write up this description?

21 A. This would have been in the fall of 1997.

22 Q. Okay. You took the photos in the fall of
23 1997, and you wrote up the description in the fall of
24 1997; is that correct?

1 A. Yes, that would be my best recollection,
2 yes.

3 Q. Okay. And looking at the photos, Hesper
4 Exhibit 89 through Hesper Exhibit 98, I believe you
5 talked at length about these photos with your Counsel
6 on Friday.

7 And let me ask you, Mr. Hesper, why did
8 you take these photos?

9 A. Because it concerned me when I saw the big
10 dirt piles appearing, the large piles of dirt and the
11 big brush file.

12 Q. And why did it concern you?

13 A. Because it might speed up the water.

14 Q. Okay. And what could you mean by speed up
15 the water?

16 A. Well, there's a lot of dirt there coming
17 out of somewhere.

18 Q. And how would that speed up water?

19 A. Well, if they dug it all out, it might
20 speed up the water.

21 Q. Okay. And were you concerned that this
22 might be a violation of the law?

23 A. No, my concern was is -- my concern was
24 that it would send the water faster at our property.

1 Q. And you bought your property in August of
2 1998; is that correct?

3 A. That's correct.

4 Q. Okay. And these photos were taken in the
5 fall of 1997; is that correct?

6 A. That's correct.

7 Q. Approximately a year before you bought your
8 property?

9 A. Yes, or somewhere in that range.

10 Q. Okay.

11 A. Maybe less than a year.

12 Q. Okay, Mr. Heser, as a farmer you agree that
13 you want to conserve soil; is that correct?

14 A. Of course.

15 Q. Okay. And have you ever entered any
16 projects with a Government Agency for the purpose of
17 conserving soil on your property?

18 A. We've thought about it a few times.

19 Q. Okay. But you have not entered any
20 programs with Government agencies to conserve soil on
21 your property?

22 A. Not that I can recall.

23 Q. Have you ever entered any cost share
24 programs to build -- have you ever entered into any

1 cost projects -- Government cost share projects to
2 build filter strips?

3 A. No.

4 Q. Have you ever entered any Government cost
5 share programs to build quail habitat?

6 A. No.

7 Q. Have you ever entered any Government cost
8 share programs to conduct contour farming?

9 JUDGE MORAN: To conduct what?

10 MS. PELLEGRIN: Conduct contour farming.

11 JUDGE MORAN: Okay.

12 THE WITNESS: No.

13 BY MS. PELLEGRIN:

14 Q. And, Mr. Hesper, you're not involved in any
15 Government farm subsidy programs; is that correct?

16 A. No.

17 Q. Okay. And you never have been; is that
18 correct?

19 A. That's correct.

20 Q. Have you ever applied for any Government
21 farm subsidy programs, Mr. Hesper?

22 A. Not that I know of.

23 Q. Have you ever -- have you ever inquired
24 into applying for a Government farm subsidy program?

1 A. Can you define that?

2 Q. Inquired into asked, about asked about?

3 Asked the Government farm -- asked a
4 Government program if you were eligible for farm
5 subsidies?

6 A. I'm not sure.

7 Q. You're not sure if you've ever inquired
8 into it?

9 A. No. I've been interested in what they've
10 been involved in, and I've paid attention to it.

11 But I haven't applied for getting
12 those payments.

13 Q. Okay. Turn your attention to Complainant's
14 Exhibit 23.

15 JUDGE MORAN: This is back where you were a
16 moment ago when you were reading parts of that
17 exhibit, Mr. Hesel.

18 THE WITNESS: Okay, I'm there.

19 BY MS. PELLEGRIN:

20 Q. Okay. And turn your attention to
21 Complainant's Exhibit 389.

22 JUDGE MORAN: Tell us when you've found that
23 page.

24 THE WITNESS: Okay.

1 BY MS. PELLEGRIN:

2 Q. Mr. Heser, can you please read the name of
3 the person who this letter is to in the left-hand
4 corner of this document?

5 A. Robert Jeffery Heser.

6 Q. Okay, is that you?

7 A. Yes.

8 Q. And please read the date of this letter?

9 A. February 5, 1991.

10 Q. Okay. And can you, please, read into the
11 record the first line of this document?

12 A. This letter is in a response to your
13 inquiry on January 16th regarding certain wetlands
14 Conservation provisions.

15 Q. Okay, and read the next paragraph into the
16 record, please?

17 A. Per your request, a determination of
18 commenced wetlands determination was completed for
19 ASCS farm number 2998, tract number 504/1 and ASCS
20 farm Number 5085, tract number 5100. Our
21 determinations are as follows.

22 Q. Okay, and please read Number one of the
23 determinations?

24 A. The wetlands identified on ASCS farm number

1 2998, tract number 5041 were cleared and converted to
2 cropland prior to November 28, 1990.

3 Q. And can you please read Number four into
4 the record?

5 A. Wetlands affected by these conversion
6 activities have been reclassified as converted
7 wetlands.

8 Q. And can you please read the next paragraph
9 into the record?

10 A. Per your request, I also spoke to Harry
11 Slawter regarding your conversation with him on
12 January 16, 1991.

13 Mr. Slawter stated firmly that current
14 USDA wetland conservation rules do not exempt you
15 from obtaining a Corps of Engineers Section 404
16 permit and a State of Illinois permit for your
17 wetland conversions.

18 Q. Okay, and --

19 A. For further information on required permits
20 you will need to contact the following agencies.

21 Q. Is one of those agencies the Corps of
22 Engineers?

23 A. Yes.

24 Q. Now, please read the last paragraph, the

1 first two instances of that into the record?

2 A. I'm enclosing revised wetland
3 determinations for ASCS farm Number 5085 and ASCS
4 farm Number 2998.

5 If you do not agree with these
6 determinations --

7 MR. SMALL: Your Honor, if I may?

8 JUDGE MORAN: Yes.

9 MR. SMALL: I have an objection, and that is
10 multiple.

11 JUDGE MORAN: Okay.

12 MR. SMALL: Number one, we're dealing with
13 something that happened 16 years ago.

14 Number two, at least I haven't heard
15 that this has got anything to do with the property
16 that's in question in this case.

17 And I guess Number three, I'd say
18 well, look here, we've got Antonacci again. The guy
19 who is seemingly everywhere and in multiple parts of
20 this case.

21 JUDGE MORAN: Okay. Without hearing from EPA,
22 I'm going to overrule the objection.

23 Because what Miss Pellegrin is
24 attempting to do although - it's been done several

1 times I believe during the course of this hearing if
2 not through this witness that there was knowledge
3 about wetlands determination.

4 That doesn't to me say anything about
5 whether I had a wetland here or not.

6 Isn't that the intent behind your
7 questions, Miss Pellegrin?

8 MS. PELLEGRIN: Yes. And I have another that
9 will be clear in a few minutes, too.

10 JUDGE MORAN: So I'm allowing her, you know, to
11 show this is part of cross-examination in terms of
12 knowledge of wetland requirements.

13 That's my ruling.

14 Move on, Miss Pellegrin.

15 MS. PELLEGRIN: Okay. I'm not sure if you
16 finished reading those two lines, Mr. Hesel.

17 THE WITNESS: I think I stopped before I
18 finished.

19 The Request for Reconsideration must
20 be in writing and must state your reasons for the
21 request.

22 Requests for reconsideration should be
23 sent to me at 1550 East Main, Salem, Illinois 62881.

24 BY MR. NORTHRUP:

1 Q. And, Mr. Hesper, if you remember, did you
2 request reconsideration pursuant to this document?

3 A. I don't think I did, no.

4 Q. Okay. Let me turn your attention to I
5 believe it's the last two pages of this document.

6 JUDGE MORAN: Well, give us a number,
7 Miss Pellegrin.

8 MS. PELLEGRIN: 397.45 and 397.46.

9 JUDGE MORAN: It's in a different volume.

10 THE WITNESS: I'm there.

11 JUDGE MORAN: We'll go off the record for a
12 moment.

13 (WHEREUPON, a short recess was
14 taken.)

15 JUDGE MORAN: Back on the record.

16 BY MS. PELLEGRIN:

17 Q. And I believe, Mr. Hesper, you testified
18 earlier about a drainage meeting that you had
19 attended.

20 And I believe you testified that you
21 didn't remember the date, but if you could look at
22 the agenda that you could figure out the date; is
23 that correct?

24 A. Yes.

1 Q. Okay. Now, looking at the second page
2 which is 397.46, can you look at the bottom left
3 corner of the writing here which is 1two91?

4 A. That's the date that's on there, but there
5 are some dates on this in other places.

6 And it's been a long time ago. I
7 couldn't say for sure that that's when it was.

8 Q. Okay, that appears to be the date of this
9 agenda; is that correct?

10 A. That's the date on this page.

11 Q. Okay.

12 A. But there are other dates on it. So I
13 cannot be certain.

14 Q. And by other dates what are you referring
15 to specifically?

16 A. There's something about 1989 at the top,
17 and then there's 1974.

18 Q. Okay. And by 1989, are you referring to
19 the first line that says statutory references are to
20 Illinois Revised Statutes, comma, 1989?

21 A. Yes.

22 Q. And by 1974, are you referring to under
23 Roman numeral I, item B, Templeton versus Huss, 75
24 Ill. 2d 134 (1974)?

1 A. Yes.

2 Q. And then at the end of that line?

3 A. There's a lot of other numbers on this
4 page.

5 And this has been a long time ago.
6 And this has this H-W-H, slash, v-c-h above this down
7 here.

8 And it's kind of confusing. And then
9 it's -- at the bottom of the second page there's a
10 date.

11 And if there was a date for a meeting,
12 I would have expected it to be at the top of the page
13 instead of at the bottom like that.

14 Q. Okay. Thank you, Mr. Hesper.

15 Is it your testimony that you don't
16 remember when the meeting was then, the drainage
17 meeting?

18 A. Not exactly.

19 Q. Okay, how about generally?

20 A. Well, I think I testified earlier that I --
21 well, from the hip, 1990.

22 Q. Okay.

23 A. But that is only a best guess.

24 Q. Okay, Mr. Hesper, have you or your brother

1 hired RAPPS Engineering to perform wetlands
2 delineation on the site; is that correct?

3 A. We hired them. I'm not for sure what
4 they've done.

5 Q. Okay. And I believe you testified that
6 you -- that there was no one at the -- strike that.

7 Okay, turn your attention to
8 Respondent's Exhibit 25.

9 JUDGE MORAN: Respondent's Exhibit 25?

10 MS. PELLEGRIN: Yes, your Honor.

11 THE WITNESS: Okay, I'm there.

12 JUDGE MORAN: Can you give me a sense,
13 Miss Pellegrin, about how much longer you expect to
14 continue with your Cross?

15 MS. PELLEGRIN: After a few more questions, I
16 was going to ask for five minutes to look at my notes
17 to make sure there was nothing else I wanted to ask.

18 So I don't think that much longer.

19 JUDGE MORAN: Okay, go ahead.

20 BY MS. PELLEGRIN:

21 Q. And turning your attention to document
22 Bates stamped -- actually, strike that.

23 Your Honor, if I can just have five
24 minutes?

1 If I could just have five minutes now
2 to look over my notes?

3 JUDGE MORAN: Okay, I'll give you five minutes.
4 It's 11:56 on my watch.

5 (WHEREUPON, a short recess was
6 taken.)

7 JUDGE MORAN: Miss Pellegrin?

8 MS. PELLEGRIN: I have no further questions.

9 JUDGE MORAN: Okay.

10 Counsel for Respondents, do you intend
11 to have some Redirect?

12 MR. NORTHRUP: Yes, your Honor.

13 JUDGE MORAN: Are you ready to do that?

14 MR. SMALL: Yes.

15 I would -- we're back on the record?

16 JUDGE MORAN: Yes. We are on the record, yes.

17 BY MR. SMALL:

18 Q. I'd like to refer you to Complainant's
19 Exhibit 23, if you could get that, please?

20 A. I'm there.

21 Q. In particular I want to refer you to --
22 well, let's just start with page 287.

23 A. Okay.

24 Q. Do you see a footnote on that page?

1 A. Is that where the little number one is down
2 at the bottom?

3 Q. Does that appear to be a footnote to you?

4 A. Yes.

5 Q. Would you read that footnote, please?

6 A. Because the CWA does not specify a
7 limitations period for enforcement actions under 309,
8 33 U.S.C., 1319, the default limitations provisions
9 of 28 U.S.C. two462 apply.

10 Section two462 provides in pertinent
11 part, except as otherwise provided by act of
12 Congress, an action suit or proceeding for the
13 enforcement of any civil fine, penalty, or
14 forfeiture --

15 Can I have some help with that word?

16 JUDGE MORAN: That's fine, pecuniary.

17 THE WITNESS: Pecuniary or otherwise, should
18 not be entertained unless commenced within five years
19 from the date when the claim first occurred.

20 MR. SMALL: Okay.

21 BY MR. SMALL:

22 Q. Now, this was a letter to -- what was the
23 date of the letter?

24 A. October 16, 2002.

1 Q. And who was it directed to?

2 A. Gregory T. Carlson.

3 Q. And is that to the best of your knowledge
4 the Gregory T. Carlson who testified here in this
5 case?

6 A. Yes.

7 Q. And who is that letter signed by?

8 A. Tracy S. Perkins.

9 Q. And who's Tracy S. Perkins?

10 A. Our lawyer from Husch and Eppenberger, LLC.

11 Q. A former attorney?

12 A. Attorney, yes.

13 Q. And to the best of your knowledge, did you
14 receive any response back from Mr. Carlson to that
15 letter?

16 A. Not that I remember.

17 Q. Okay. I next want to direct you to again
18 Complainant's Exhibit Number 23. This is all with
19 Complainant's Exhibit 23 and we're now referencing
20 page two91?

21 A. Okay.

22 Q. Now, referring to the last paragraph -
23 well, I guess it would be under paragraph three - do
24 you see the paragraph that begins trees?

1 A. Yes.

2 Q. Okay. I'd like you to read that portion
3 that begins with trees down to the sentence that says
4 in approximately 1998, do you see that?

5 That's about four lines up from the
6 bottom of the page?

7 A. Yes.

8 Q. Okay, will you please read me that section
9 beginning with trees?

10 A. Did you say four lines?

11 JUDGE MORAN: Well, he can just read and you
12 can just tell him to stop.

13 MR. SMALL: Okay, I can just tell you when to
14 stop. How about that?

15 THE WITNESS: Trees have been cut down on this
16 property by Kauling Wood Products prior to their
17 purchase of the property.

18 Kauling had left heavy logging debris
19 in the former drainage ditch.

20 Work was also performed on the
21 drainage ditch upstream of the Heser's property by
22 adjoining landowner which straightened the ditch
23 upstream of the property and caused water to flow
24 more quickly through the site during storm events.

1 The combination of the higher water
2 flow during storm events and the logging debris
3 located in the drainage ditch began causing severe
4 erosion of the property.

5 The area was disturbed from logging
6 activities, without vegetation, and the soil was
7 being washed away.

8 Additionally, runoff from Highway 37
9 drains into the ditch prior to the Hesper's property.

10 A neighboring property owner had
11 previous problems with salt water kills in his field
12 from salt applied to the highway in winter months
13 that flowed through the ditch and back up on the farm
14 cropland.

15 BY MR. NORTHRUP:

16 Q. Okay. Thank you. Now I think your
17 previous testimony has been that you don't know the
18 exact definitions of a ditch, correct?

19 A. That's correct.

20 Q. Or what a stream is?

21 A. Correct.

22 Q. Or what a channel would be?

23 A. Correct.

24 Q. You're just a layman. You know that those

1 words mean that they may or may not be carrying some
2 kind of a flow of water; is that correct?

3 A. That's correct.

4 Q. And so in your response here to the
5 information request by the Government, was that
6 prepared by your attorney?

7 A. Yes.

8 Q. So that the exact language, if they said a
9 ditch, that might not ring a bell with you at that
10 time. It could have been a ditch, it could be a
11 stream it could be something else you didn't know the
12 nature of those terms at the time that you signed
13 this document either, did you?

14 A. No, I did not.

15 Q. Mr. Hesel, it is correct however, is it
16 not, that there was debris strewn throughout your
17 property?

18 A. That's correct.

19 Q. And your testimony then is that you're
20 having problems with water coming on to your property
21 in a variety of different spots?

22 A. That's correct.

23 Q. And in general, where did that water flow
24 from?

1 Let's start with Martin's Branch as it
2 came into your property. Where would that water go?

3 A. It would go south and then it would go
4 west.

5 Q. Okay. But there was no definite area where
6 you could say this is where it flows; is that
7 correct?

8 A. That's correct.

9 Q. But you could -- could you tell or could
10 you not tell the general direction of all flow of
11 water that came in from upstream from your property?

12 A. That's correct.

13 Q. And that's where you're saying it flowed
14 south and west?

15 A. Yes.

16 Q. And that flow along south and west, is that
17 in the approximate location where the "L" is now
18 located?

19 A. Yes.

20 Q. And so, I'm going to refer you to page 292
21 of this same exhibit?

22 A. Okay.

23 Q. And I want you to refer to paragraph four
24 that EPA had you read?

1 A. Okay.

2 Q. And so, would you agree with the
3 proposition that it was an intermittent drainage
4 ditch?

5 That it did drain water from time to
6 time, south -- south and west?

7 A. Yes.

8 Q. But is it a fact that you disagree with the
9 verbiage that it relocated the ditch.

10 You actually put the ditch, the "L",
11 where you saw the water flowing; is that not correct,
12 Mr. Hesel?

13 A. That's correct.

14 Q. Now, I'd like you to refer to Respondent's
15 Exhibit Number 13, please. Respondent's Exhibit
16 Number 13.

17 A. Okay.

18 Q. And this is -- again, these are pictures
19 that you had taken and your notations on the Bill
20 Hesel what I call the stream straightening project;
21 is that correct?

22 A. That's correct.

23 Q. And you took these I think your testimony
24 was in the fall of 1997; is that right?

1 A. That's correct.

2 Q. And you purchased your property where the
3 "L" is located in 1998; is that correct?

4 A. That's correct.

5 Q. But in 1997, you owned other land
6 downstream on Martin's Branch from the stream
7 straightening project, did you not?

8 A. I'm not for sure without checking the
9 records.

10 Q. Okay. Let me ask you: Had you undertaken
11 some verbal discussions with the Mercers about buying
12 the 60-acre tract that's the subject of this case by
13 1997?

14 A. Yes, I'm sure.

15 Q. And so it would be very important to you,
16 would it not, whether or not somebody upstream was
17 doing something to that location even though you were
18 not technically in title at that time?

19 A. That's for sure.

20 Q. I'd like you to refer to Complainant's
21 Exhibit Number 23, and I'd like you to refer to
22 page 389.

23 A. Okay.

24 Q. What is the date of that letter?

1 A. February 5, 1991.

2 Q. This is over 16 years old; is that correct?

3 A. That's correct.

4 Q. And if you could remember because that's a
5 long time ago, it references certain land and
6 questions concerning wetlands; is that correct?

7 A. That's correct.

8 Q. Does any of this letter pertain to the
9 60-acre tract that's involved in this case?

10 A. No.

11 Q. Who is the letter signed by?

12 A. Tony Antonacci.

13 Q. And to the best of your knowledge is
14 Mr. Antonacci listed as a possible witness against
15 you in this case?

16 A. Yes.

17 Q. And is that the same Mr. Antonacci that was
18 referred to in earlier testimony who has just now
19 decided to pursue an action against your father?

20 A. That's correct.

21 Q. It just happens to be in the middle of last
22 weeks's trial when that took place; is that correct?

23 A. Yes.

24 Q. Mr. Antonacci doesn't like you, does he?

1 A. That's correct.

2 Q. Well, we'll just leave it at that.

3 MR. SMALL: That's our Redirect at this time,
4 your Honor

5 JUDGE MORAN: Before I have any recross, just
6 tell me, Bobby Hesel, on that same page that we're
7 on, what does A-S-C-S stand for when it talks about
8 ASCS farm 2998, what does ASCS -- do you know what
9 that stands for?

10 THE WITNESS: That's Agricultural Stabilization
11 and Conservation Service it is what is now called the
12 FSA Farm Service.

13 JUDGE MORAN: Okay, thank you.

14 And I just had one other general
15 question about your testimony.

16 Going way back to Friday, did you tell
17 me the things that you do grow on your property you
18 grow corn, you grow soybeans; is that right?

19 THE WITNESS: Yes.

20 Q. But my understanding is that you grow this
21 for seed?

22 THE WITNESS: It's the grain. The seed is the
23 grain.

24 JUDGE MORAN: But my question is -- I need to

1 understand.

2 THE WITNESS: We grow it from seed, that's
3 right.

4 JUDGE MORAN: No, but here's my question -- in
5 other words, see I don't know much about farming.

6 But I had the sense that you were
7 telling me that when you did grow crops not to sell
8 for crops but for the seeds that those crops might
9 create, and then you sell the seed; is that true?

10 THE WITNESS: No, that's not true.

11 JUDGE MORAN: But when you said you grow for
12 seed, what do you mean?

13 THE WITNESS: The seeds are the grains that you
14 sell as grain.

15 JUDGE MORAN: I see.

16 THE WITNESS: But you also use some of your own
17 seed to replant.

18 JUDGE MORAN: Okay. I just needed to clear
19 that up. Thank you. It's just for my own
20 information.

21 Any Recross, Miss Pellegrin?

22 MS. PELLEGRIN: No, your Honor.

23 JUDGE MORAN: Okay. Then that concludes the
24 testimony of Bobby Heser. And it's 12:17. We can

1 begin with Andy Heser next. It's up to you.

2 MR. NORTHRUP: Let's go ahead and start.

3 JUDGE MORAN: Okay.

4 Come up here, please, Mr. Heser.

5 Raise your right hand, please.

6 (WHEREUPON, the Witness was
7 sworn by the Administrative Law
8 Judge.)

9 JUDGE MORAN: Be sure to keep your voice up.
10 And just like your brother did, state your name and
11 then spell your name for us.

12 THE WITNESS: My name is Andrew J. Heser.
13 First name A-N-D-R-E-W, J., Heser, H-E-S-E-R.

14 ANDREW J. HESER,
15 having been first duly sworn by the Administrative
16 Law Judge, witnesseth and saith as follows:

17 DIRECT EXAMINATION

18 BY MR. NORTHRUP:

19 Q. And where do you live, Mr. Heser?

20 A. 224 South Pine in Centralia.

21 Q. And you have a brother that's Bobby,
22 correct?

23 A. Yes.

24 Q. Are you married?

1 A. No.

2 Q. Where did you go to high school?

3 A. Centralia High School.

4 Q. When did you graduate?

5 A. In approximately 1990.

6 Q. Have you attended any college since you

7 graduated from high school?

8 A. Yes, I have.

9 Q. And where was that?

10 A. Kaskaskia College.

11 Q. Did you receive a degree?

12 A. Yes.

13 Q. What was that degree?

14 A. Ag business.

15 Q. When did you receive that degree?

16 A. Probably several years after I graduated

17 from high school approximately.

18 Q. Was it an Associate's Degree or a

19 Bachelor's Degree?

20 A. Just Associate's.

21 Q. Do you recall some of the courses you took?

22 A. Ag, finance, soils, crop judging, just the

23 basics like that in the ag business.

24 Q. Have you taken any college courses since

1 graduating from Kaskaskia college?

2 A. No, I have not.

3 Q. Have you attended any seminars or
4 continuing training?

5 A. No.

6 Q. Do you currently have any professional
7 licenses?

8 A. Chemical applicator's license.

9 Q. Okay what's that?

10 A. It's a license issued from the Illinois
11 Department of Agriculture to apply restricted use
12 pesticides.

13 Q. Is that something farmers in the area
14 typically have?

15 A. Yes, it is.

16 Q. And do you have to take a course to get
17 that license?

18 A. Yes, you do.

19 Q. Is that a license that is periodically
20 renewed?

21 A. Yes, it is.

22 Q. And do you have to take a test for that?

23 A. Yes.

24 Q. And you are currently licensed?

1 A. Yes.

2 Q. Can you describe for me your employment
3 history since graduating from Kaskaskia College?

4 A. I just work on the family farm and I'm self
5 employed.

6 Q. Did you have any employment other than
7 working on the family farm while you were attending
8 Kaskaskia College?

9 A. No, I did not.

10 Q. Do you know how many acres of ground you
11 currently own?

12 A. I believe it's approximately 1351 acres.

13 Q. And we've talked about that before,
14 correct?

15 A. Yes.

16 Q. Have you ever received any payments from
17 the Government for your farming?

18 A. No, I have not.

19 Q. Have you ever enrolled in any Government
20 programs for your farming?

21 A. No, I have not.

22 Q. You are aware that the Government has sued
23 you and your brother and an entity named Hesper Farms?

24 A. Yes, that's correct.

1 Q. Is there any legal entity named Hesper
2 Farms?

3 A. No, there's not.

4 Q. Now you understand we've been here at this
5 trial talking about an 60-acre parcel; is that
6 correct?

7 A. That's correct.

8 Q. And even within that a much smaller area, a
9 few acres in the southeast corner, correct?

10 A. Correct.

11 Q. Who did you purchase the 60 acres from?

12 A. Max and Dorothy Mercer.

13 Q. And when approximately was that?

14 A. I think it was in 1998. We were involved
15 in discussions in 1997.

16 Q. Before you purchased it, what did the
17 Mercers tell you, if anything, about the property?

18 A. That it had been messed up from logging
19 activities. It was a wreck.

20 Q. Anything more specific than that?

21 A. No, they did not.

22 Q. And when you purchased the property, did it
23 turn out that their description was correct?

24 A. Yes, it did.

1 Q. Now, when you purchased the property, can
2 you describe for me what the southeast corner of the
3 property looked like?

4 A. Mainly weeds, fescue, tree tops laying
5 down, thrown everywhere, stumps pushed out.

6 Q. Were there any standing trees in the
7 southeast corner?

8 A. No.

9 Q. Okay, let me have you refer to
10 Complainant's Exhibit 12, specifically page 183-1998,
11 okay?

12 JUDGE MORAN: And just as your brother did,
13 tell us when you get to 183-1998, okay?

14 THE WITNESS: Okay. I'm there.

15 BY MR. NORTHRUP:

16 Q. Okay, can you see a -- well, what does this
17 look like to you?

18 A. It looks like an aerial view of the
19 property.

20 Q. And is, as a matter of fact, is there an
21 orange or red circle around the property?

22 A. Yes, there is.

23 Q. If I were to -- or if you were to assume
24 that the dark portions within that circle represented

1 trees, was that the way the property looked like when
2 you purchased it?

3 A. No, it was not.

4 Q. Take a look at the next page which is
5 184-1999.

6 A. I'm there.

7 Q. Okay, do you also see a portion of the
8 property was circled?

9 A. Yes, I do.

10 Q. Again, if I were to tell you to assume that
11 that dark area represents trees, is that what the
12 property looked like when you purchased it?

13 A. No, it did not.

14 Q. Thank you.

15 When you purchased the property, was
16 there any evidence that you observed of any water
17 coming across the property?

18 A. Yes, there was.

19 Q. And again, we're talking about the
20 southeast corner?

21 A. Yes e.

22 Q. Can you describe that for me?

23 A. I was characterize it as sheet erosion
24 which was coming from that northern end of the "L"

1 and it was flowing south and it was flowing west and
2 it was eroding.

3 Q. Okay, what do you mean by sheet erosion?

4 A. Where it takes several inches off the
5 property and keeps cutting and cutting and cutting.

6 Q. Now, did you do anything in response to the
7 observations of that erosion?

8 A. Yes, we did.

9 Q. Okay, what did you do in general?

10 A. Cleaned out what I call the farmers
11 drainage ditch.

12 Q. Okay.

13 A. Because that's what I saw as evidence of
14 where the water had been flowing.

15 Q. Okay, what exactly did you do?

16 A. Just cleaned it out. Put a small berm up
17 around the lip of it.

18 Q. When you say cleaned out, can you tell me
19 what specifically did you do?

20 A. Used a scraper and cleaned it out.

21 Q. Were you removing debris?

22 A. Very little. There was some.

23 Q. And what kind of debris was that?

24 A. Woody.

1 Q. Tree tops?

2 A. Yes.

3 Q. And you indicated you constructed a small

4 berm?

5 A. Yes.

6 Q. Where was that constructed?

7 A. It was more towards the upper end of the

8 "L", a fairly lengthy section.

9 Q. Where did the dirt come from to construct

10 that?

11 A. Out of the channel or the ditch.

12 Q. Did you do anything to prevent erosion in

13 the "L"?

14 A. Yes, it was seeded with fescue.

15 Q. Okay. And why did you choose fescue?

16 A. Because it establishes well and holds the

17 ground well.

18 Q. Did you do anything else?

19 A. Strawed it out.

20 Q. How about placement of concrete?

21 A. Yes, we did that also.

22 Q. Where did you do that?

23 A. At the bends to protect from erosion.

24 Q. Did you put any concrete in what we have

1 referred to as the elbow of the "L"?

2 A. No, I don't believe so.

3 Q. Okay, why not?

4 A. It was a real gentle curve. It didn't
5 really need any.

6 Q. Was there any -- in this south east corner,
7 was there any woody debris from the prior logging
8 operations?

9 A. Yes there was.

10 Q. Can you describe that for me, please?

11 A. Scattered tops and woody debris.

12 Q. And what do you mean by tops?

13 A. Tree tops.

14 Q. And what did you do with it?

15 A. Put 'em in a pile and burned it.

16 Q. Do you recall the dimensions of the burn
17 pile?

18 A. It would just be a guess, you know, maybe
19 12 to 15 feet wide by 30 - 40 feet long.

20 Q. How wide would it have been?

21 A. You could see over it. I don't know, maybe
22 between 5 to 6 feet tall. You could see over the
23 top.

24 Q. How many piles were there, burn piles?

1 A. Just one.

2 Q. Now were you in the courtroom when the
3 Government presented a videotape?

4 A. Yes, I was.

5 Q. And was that a videotape of the activities
6 that you and your brother conducted at the site?

7 A. Yes.

8 Q. Do you recall in that videotape there was a
9 description of some logs?

10 A. Yes, I do.

11 Q. Do you recall where those logs came from?

12 A. Those had been brought from the upland.

13 Q. What you say upland, what do you mean by
14 that?

15 A. The remaining fence rows that used to be on
16 there.

17 Q. If you look at Exhibit C, can you tell me
18 where that upland area was, where those logs came
19 from?

20 A. Yes, I can.

21 Q. Okay, can you just go point that out for
22 me, please?

23 A. Approximately right up in here
24 (indicating).

1 JUDGE MORAN: I can't see, can you move a bit?

2 THE WITNESS: Right up in this here right here
3 (indicating).

4 MR. NORTHRUP: Is there a marker up there by
5 you?

6 THE WITNESS: Yes, there is.

7 BY MR. NORTHRUP:

8 Q. Would you please take that marker?

9 A. Okay.

10 Q. What color is it?

11 A. Purple.

12 Q. Can you just circle the area where you just
13 identified?

14 A. Yes.

15 Q. And can you put your initials by that?

16 A. Okay.

17 Q. Thank you. Now what did you do with those
18 logs?

19 A. I took them down to the lower end of the
20 property and set them where they would be close to
21 the burn pile.

22 Q. Okay. Did you ultimately burn those logs?

23 A. No, we did not.

24 Q. What did you do with them?

1 A. The straight sections were kept and the
2 crooked ones cut out and burned.

3 Q. So, did you make lumber out of those logs?

4 A. No, I did not.

5 Q. Did somebody come by and take them?

6 A. We ended up actually giving them away
7 because they were so few, and the quantity was poor
8 that nobody wanted to buy that few.

9 Q. Do you recall what kind of trees they were?

10 A. Not offhand, I don't know.

11 MR. NORTHRUP: We can stop here now.

12 JUDGE MORAN: Okay. Will you be asking
13 additional questions after the lunch break?

14 MR. NORTHRUP: Yes, your Honor.

15 JUDGE MORAN: Okay, I just wanted to be sure I
16 thought that was the case. So it's 12:33. We'll
17 resume at 1:33.

18 Before we go off the record, I would
19 assume that based on the testimony on Respondents'
20 part that rebuttal testimony would be essential for
21 EPA.

22 You do intend to have Rebuttal
23 witnesses?

24 MS. PELLEGRIN: Yes.

1 JUDGE MORAN: Can you identify anyone at this
2 point?

3 MS. PELLEGRIN: Um-mmm --

4 JUDGE MORAN: Don't know? You don't really
5 have to at this point.

6 MS. PELLEGRIN: Yeah, I don't really know at
7 this point.

8 JUDGE MORAN: So we'll pick up at 1:30, and
9 let's be prompt about that. That gives everyone
10 enough time for lunch, an hour, okay?

11 So we're off the record, and we'll see
12 you in an hour.

13 (WHEREUPON, a lunch recess was
14 taken.)

15 JUDGE MORAN: Okay, you were going to pick up
16 with your Direct, Mr. Northrup?

17 MR. NORTHRUP: Yes, sir.

18 BY MR. NORTHRUP:

19 Q. Remember, Mr. Hesel, when you talked about
20 sheet erosion coming cross the property?

21 A. Yes.

22 Q. Where was that water coming from?

23 A. It was coming from the Bill Hesel property.

24 Q. And where was it entering your property?

1 A. At the northern most part.

2 Q. And what direction was it taking across
3 your property?

4 A. It was going south and then it was going
5 west.

6 Q. At any time have you observed any other
7 areas where water is coming on to your property?

8 A. Just from the east out of Bill Hesper's
9 property.

10 Q. Okay. Tell me about those locations?

11 A. There's one that's a little bit south of
12 the northern most part of the "L".

13 There's another one more down on the
14 east side also, but more towards the elbow of the
15 "L".

16 And then there's the third one that's
17 on the south side of the east-west leg of the "L".

18 Q. Let's talk about the northern most one.
19 Describe that for me.

20 A. It's probably one of the deeper ones.

21 It's probably, you know, just
22 guessing, a couple feet wide, foot and a half
23 two-foot deep.

24 Q. And is it vegetative?

1 A. No, it's not.

2 Q. And we're talking about channels, correct?

3 A. Yeah.

4 Q. What about the next one further south, can
5 you describe that one for me?

6 A. It's the one that's more minor. It's the
7 one where he backed through and knocked the fence and
8 the tree down and made the cut.

9 Q. And how wide, how deep?

10 A. You know, a foot wide, eight inches deep.
11 Something like that.

12 Q. And is that one vegetative?

13 A. No, it's not.

14 Q. What about then the channel on the
15 east-west leg?

16 A. It's shallower, it's probably eight inches
17 deep and a foot wide.

18 Q. And is that vegetative?

19 A. No, it's not.

20 Q. Now your brother testified that there was a
21 small berm that ran north to south along the
22 north-south leg; is that correct?

23 A. Yes.

24 Q. Is there a berm on the east-west leg?

1 A. No, there's not. There might be a little
2 hump by the outlet where it leaves the property. But
3 other than that, that's it.

4 Q. Okay. Mr. Carlson I believe, referenced
5 what he referred to as a concentrated flow area, do
6 you recall that?

7 A. Yes, I do.

8 Q. Did you understand what he was talking
9 about?

10 A. Yes, I did.

11 Q. Okay, where that located on the property?

12 A. It's west a ways of the outer part of the
13 "L", and it was always a natural drainage in that
14 area, you know, that's about it.

15 Q. The water that drains through that, where
16 does to come from?

17 A. It comes off the farm field.

18 JUDGE MORAN: It comes off the what?

19 THE WITNESS: Farm field.

20 MR. NORTHRUP: Your farm field, okay.

21 THE WITNESS: Yes.

22 BY MR. NORTHRUP:

23 Q. Further west of where the "L" terminates?

24 A. Yes.

1 Q. And where does that water go?

2 A. It goes into Martin Branch.

3 Q. Now that you understand the Government
4 alleges that you performed work on your property
5 without appropriate permit, correct?

6 A. Yes, I do.

7 Q. Why didn't you go and obtain a permit?

8 A. Because I didn't think one was needed.

9 Q. Okay, why not?

10 A. Because I believe it's a ditch maintenance
11 issue.

12 Q. Anything else?

13 A. No.

14 Q. Did you attend this drainage meeting with
15 your brother that he referenced?

16 A. Yes, I did.

17 Q. Do you recall when that was?

18 A. It's been so long ago I'm not for sure. It
19 was probably sometime around 1990.

20 Q. Do you recall who made the presentations,
21 who put on the meeting?

22 A. No, I can't remember. That's been too long
23 ago.

24 Q. You wouldn't intentionally violate the law,

1 would you, Mr. Hesel?

2 A. No, I would not.

3 Q. Since you did your work in and around the
4 "L" in 1999, has it remained vegetative?

5 A. I'm sorry I couldn't hear you.

6 Q. Since you did your work around the "L" in
7 1999, has it always been vegetative?

8 A. Yes, it has.

9 Q. Have you ever mowed it?

10 A. On one occasion I believe.

11 Q. And what was the purpose of that?

12 A. It was to clip it real high so the fescue
13 would reseed itself.

14 Q. Have you ever fertilized it, the "L"?

15 A. I don't believe so unless it was right at,
16 maybe at seeding time. It's been so long, I can't
17 recall.

18 Q. And what do you mean by at seeding time?

19 A. When it was seeded for fescue.

20 Q. So when it was originally seeded?

21 A. Yes.

22 Q. So you don't do anything to the "L"?

23 A. No, just left natural.

24 Q. As far as you know has the grade in the

1 slopes remained the same since it was established?

2 A. Yes, they have.

3 Q. Since the -- have you observed any wildlife
4 in the area of the "L"?

5 A. Yes, I have.

6 Q. What kind?

7 A. Deer, turkey, frogs, rabbits, there's some
8 squirrel, even a little blue-tailed lizard.

9 Q. Do you know what kind of lizard it is?

10 A. No, it bit me on my hand.

11 Q. Are they common in that area?

12 A. I don't know. That's the first time I'd
13 ever seen it.

14 Q. How about any aquatic life?

15 A. No. No.

16 Q. Is there always water in the "L"?

17 A. No all right.

18 Q. Has any downstream property owner ever
19 complained to you about flooding as a result of your
20 work with the "L"?

21 A. No, they have not.

22 Q. Have you ever been adjudicated having
23 violated the Clean Water Act?

24 A. No, I have not.

1 Q. When you purchased the property, did you
2 have any idea that wetlands might be present?

3 A. No, I did not.

4 Q. Do you know how much tillable ground, if
5 any, you gained as a result of your work on the "L"?

6 A. No, I didn't gain anything. I lost.

7 Q. Have you ever denied access to your
8 property by any representative of the Government?

9 A. No, I have not.

10 Q. Have you ever been to Lake Centralia?

11 A. Yes, I have.

12 Q. Have you fished there?

13 A. Yes, I have.

14 Q. Have you ever caught anything?

15 A. Maybe a few bluegill.

16 Q. Did you eat them?

17 A. No.

18 Q. Did you have swim in it?

19 A. No.

20 Q. Do you know if there's like a public beach
21 area there?

22 A. There might be. I don't go to that park
23 there.

24 Q. Do you have friends or acquaintances that

1 live on the lake?

2 A. Yes, I do.

3 Q. Do you know if they have septic systems or
4 not?

5 A. Quite a bit of the club houses do, yes.

6 Q. And what do you mean by club house?

7 A. That's what usually the homes that are
8 around there where people live all the time.

9 JUDGE MORAN: I don't know what a club house
10 is.

11 MR. NORTHRUP: Houses, people live in them
12 year-round.

13 THE WITNESS: Most of them do, yes.

14 BY MR. NORTHRUP:

15 Q. So it's just a typical house on the lake?

16 A. Yes.

17 Q. How do you know if they have septic systems
18 or not?

19 A. Because I've seen them, I've seen the
20 laterals.

21 Q. Where have you seen the laterals?

22 A. Well, when I fished particularly on the
23 east side of the lake which would be north of where
24 the levee is the ones, you couldn't -- you can smell

1 them. It smells bad.

2 Q. Did you ever bring any soil on to the site?

3 A. No, I did not.

4 Q. Why don't you take look at what's been

5 marked Respondent's Exhibit 25?

6 JUDGE MORAN: That's going to be the

7 handwritten information. Do you have that? Is it in

8 the binder?

9 THE WITNESS: Here it is. I've got it.

10 BY MR. NORTHRUP:

11 Q. Do you have it?

12 A. Yes.

13 Q. Can you tell me what this is?

14 A. This is the financial information I put

15 together because the U.S. EPA requested it.

16 Q. And how many pages of this document did you

17 actually prepare?

18 A. Five.

19 Q. And would that be pages 403 through 407?

20 A. Yes, it would.

21 Q. Let's take a look at page 403. And again,

22 that is your handwriting?

23 A. Yes, it is.

24 Q. Do you see some initials down in the

1 left-hand corner?

2 A. Yes.

3 Q. Do you know whose initials those are?

4 A. Those are mine.

5 Q. You put them there?

6 A. Yes, I did.

7 Q. Tell me what this page 403 is?

8 A. Basically, it lists the assets, what my
9 share is of assets.

10 Q. Okay, what do you mean your share?

11 A. What my half at least it would be of the
12 value.

13 Q. Do you own this property that's listed here
14 with your brother?

15 A. Yes, I do.

16 Q. 50/50?

17 A. Yes.

18 Q. And is that what that notation is up at the
19 top? Is that what that is in reference to?

20 A. Yes.

21 Q. Although, I don't want to go into a whole
22 lot of detail, is there any significance to that J.D.
23 and then a number?

24 A. John Deere and then the model.

1 Q. And what is that a combine, the first one?

2 A. Yes.

3 Q. What's a combine?

4 A. It harvests the crop.

5 Q. Have you put a value on that combine?

6 A. Yes, I have.

7 Q. And what is that?

8 A. Ninety-eight thousand.

9 Q. And how did you come up with that number?

10 A. I looked in a farm magazine at several
11 similar models for sale and that was the value they
12 had on those.

13 Q. How old is your combine, do you know?

14 A. I'm not for sure the exact year model.

15 It's not that new.

16 Q. Why don't you take a look at the next line.

17 Can you read that for me?

18 A. John Deere 512 nine shank ripper.

19 Q. Okay. What's a shank ripper?

20 A. That's how many shanks the tool has.

21 Q. What is a ripper?

22 A. It's commonly to as a subsoiler.

23 Q. What does that do what function does that

24 serve?

1 A. It breaks up the compacts.

2 Q. And what's that number by that?

3 A. Are you are referring to the model or the

4 price?

5 Q. Price?

6 A. 15,000.

7 Q. And how do you know that is the value of

8 this particular piece of equipment?

9 A. Because I looked up several.

10 Q. Looking at the remaining equipment on that

11 page, you have assigned various prices to those,

12 correct?

13 A. Yes, I have.

14 Q. And how did you come up with those prices?

15 A. Like I said, I looked up the values of them

16 in the farm magazines where they were advertised.

17 Q. What kind of farm magazines?

18 A. Farm Week, Agri-News, stuff like that.

19 Q. Are those national farm magazines?

20 A. I'm not sure that Farm Week is, but I think

21 that Agri-News covers a multistate if not national

22 area.

23 Q. And Agri-News does that have a classified

24 section?

1 A. Yes, very large one.

2 Q. And that comes out every week?

3 A. Yes, it does.

4 Q. Why don't you look down where you've got
5 J.D. 200CLC excavator?

6 A. Yes.

7 Q. And you've got some writing to the right of
8 that. What is that?

9 A. It says Deere credit and the amount owed.

10 Q. And what is the amount owed?

11 A. One hundred eight thousand sixteen dollars
12 and ten cents.

13 Q. And where can you get that information?

14 A. That's what he currently owe on the
15 machine.

16 Q. And then you've got some notes under that?

17 A. Yes, there's no equity in it because it's
18 not worth more than that. It's depreciated it quite
19 a bit since I purchased it.

20 Q. Did you purchase it new or used?

21 A. Purchased it used.

22 Q. Why don't you turn to page 404?

23 A. I'm there.

24 Q. Let me first note these documents 403

1 through 407, they are not originals, are they?

2 A. No, they're not.

3 Q. It's a copy of something you prepared?

4 A. Photocopy.

5 Q. And is this a true and accurate copy of the
6 document that you originally prepared?

7 A. Yes, it is.

8 Q. Looking at page 404, again, there are some
9 handwritten initials down at the left-hand corner.

10 A. Yes, they're mine.

11 Q. And you put them on this?

12 A. Yes, I did.

13 Q. Okay, what's the title of this page?

14 A. Loans.

15 Q. And there's a notation Farmers State Bank?

16 A. That's correct.

17 Q. Where is Farmers State Bank?

18 A. It's located in Hoffman.

19 Q. Where is that?

20 A. A little bit to the south and east of here.

21 Q. In Marion County?

22 A. No, it's in Clinton.

23 Q. Now what's the number you have to the right
24 of that?

1 A. One million 82 thousand six dollars and
2 fourteen cents.

3 Q. And where did you get that number from?

4 A. That's the amount owed to the bank on the
5 real estate loans.

6 Q. How did you calculate that?

7 A. A lady at the bank prepared a list of all
8 the loans.

9 Q. And you reviewed that list?

10 A. Yes, I did.

11 Q. Was it accurate?

12 A. Yes, it was.

13 Q. Below Farmers State Bank, you have Deere
14 credit?

15 A. That's correct.

16 Q. What's that?

17 A. That's the credit department for John
18 Deere, and it's who has a loan on the excavator.

19 Q. Okay. And that's a reference to the
20 excavator that was listed on page 403?

21 A. Yes, it is.

22 Q. Can you turn to page 405?

23 A. I'm there.

24 Q. What is on this page? What does this page

1 represent?

2 A. It's a list of all of the property that me
3 and my brother own.

4 Q. And are those your initials on this page?

5 A. Yes, they are.

6 Q. And what's the total?

7 A. Thirteen hundred fifty-one point seven.

8 Q. And where did you get this information?

9 A. Looked it up off the tax bills and
10 double-checked with the plat book.

11 JUDGE MORAN: What's a plat book?

12 BY MR. NORTHRUP:

13 Q. What's a plat book?

14 A. It shows all the acres in the county.

15 Q. And can you turn to page 406?

16 A. I'm there.

17 Q. Can you tell me what that is?

18 A. It's the net worth page for me. It shows
19 assets and liabilities.

20 Q. Okay, you've got a number associated with
21 the word assets?

22 A. Yes, 216,750.

23 Q. Okay, and where did you get that number
24 from?

1 A. It would be the total of all of the
2 equipment.

3 Q. And is that back on page 403, is that what
4 you were referencing?

5 A. Yes.

6 Q. Now back there you've got an equipment
7 total of 313,500; is that right?

8 A. That's the total.

9 Q. So you own half of that?

10 A. Yes.

11 Q. What's the difference between that half
12 figure and the figure you've got on assets on page
13 406?

14 A. It's where down below the half figure says
15 100 percent Andy Hesel and that's the difference
16 there. That gets added on top of the half. That's
17 what I own.

18 Q. On this page 406, do you see some initials
19 on that page?

20 A. Yes, I do.

21 Q. Are those your initials?

22 A. Yes, they are.

23 Q. And did you put those on here?

24 A. Yes, I did.

1 Q. Take a look at page 407.

2 A. I'm there.

3 Q. Now is that your name apparently
4 handwritten out on this page?

5 A. Yes, it is.

6 Q. And that's your signature?

7 A. Yes, it is.

8 Q. And you put it this?

9 A. Yes.

10 Q. What does this page represent?

11 A. It shows living expenses, average monthly
12 expenses for land and machinery, and what I paid in
13 income tax for the amounts.

14 Q. Now is the information that appears on
15 pages 403 through 407 accurate to the best of your
16 knowledge?

17 A. Yes, they are.

18 MR. NORTHRUP: Your Honor, I would move for the
19 admission of pages 403 through 407 of Respondent's
20 Exhibit 25.

21 MS. PELLEGRIN: Your Honor, I know I didn't
22 object to the other part of this, but I would like to
23 object to this for lack of probative documents and
24 not being supported by documents.

1 JUDGE MORAN: But that goes towards weight not
2 admissibility.

3 Is that the extent of your objection?

4 MS. PELLEGRIN: That's the extent of my
5 objection.

6 JUDGE MORAN: I do note my concerns about the
7 weight that I would afford to Respondent's
8 Exhibit 25.

9 But I overrule your objection and
10 admit Respondent's Exhibit 25. That's all pages now,
11 pages 403 through page 411.

12 (WHEREUPON, Respondent's Exhibit

13 Number 25 was admitted

14 into the record.)

15 JUDGE MORAN: And that I would note, that is
16 appropriate if not gone on forever, that's an
17 appropriate area of cross-examination.

18 MR. NORTHRUP: That's all the questions I have,
19 your Honor.

20 JUDGE MORAN: Okay, any cross-examination?

21 MS. PELLEGRIN: Yes, your Honor.

22 CROSS-EXAMINATION

23 BY MS. PELLEGRIN:

24 Q. Mr. Heser, let's stay on Respondent's

1 Exhibit 25 which you were just looking at, document
2 Bates stamped 403 to 407.

3 And is my understanding correct that
4 these documents pages 403 through 407 is your
5 assessment of your assets and your liabilities in
6 this case for ability to pay purposes; is that
7 correct?

8 A. Yes, they are.

9 Q. Mr. Hesper, I believe you testified that
10 this is in response to a Request that EPA made that
11 you provide had type of information; is that correct?

12 A. That's my understanding, yes.

13 Q. And is your understanding that EPA also
14 requested documentation supporting statements such as
15 these?

16 A. No, I'm not aware.

17 Q. And do you have an understanding of whether
18 the EPA requested let's say supporting loan
19 documentation?

20 A. Not to my knowledge.

21 Q. And are you aware that EPA requested other
22 documentation including bank statements and the like
23 in this case?

24 A. No, I'm not aware of that.

1 Q. Okay. Looking at that document Bates
2 stamped 403 to 407, these are all handwritten; is
3 that correct?

4 A. That's correct.

5 Q. Okay, and you hand wrote them; is that
6 correct?

7 A. Yes, I did.

8 Q. And attached to 403 to 407, are there any
9 loan documents supporting any of the information
10 that's handwritten here?

11 A. No, there's not.

12 Q. Are there any bank statements attached to
13 this document?

14 A. No, there's not.

15 Q. And let's take -- I believe you say J. D.
16 stands for John Deere; is that correct?

17 A. That's correct.

18 Q. And some of those assets are John Deere and
19 some of these loans are Deere credit loans; is that
20 correct?

21 A. (No audible response.)

22 Q. I'm looking at 404 Deere credit?

23 A. Just the one loan.

24 Q. Now is the documentation of that loan

1 attached to this document?

2 A. Just where I have it written on the front.
3 There's no other documents.

4 Q. Okay. When you get a loan through like
5 John Deere, do you have any kind of documentation to
6 document that you've taken money from John Deere and
7 that you'll pay John Deere back, any kind of loan
8 documents?

9 A. No, we just get a payment book.

10 Q. Is there a payment book attached to that
11 document?

12 A. No, there's not.

13 Q. And the loan from Farmers State Bank, what
14 do you get to memorialize in writing a loan when you
15 get a loan from Farmers State Bank?

16 A. A copy of the loan agreement.

17 Q. And is there a loan agreement attached to
18 that document?

19 A. No, sir, there's not.

20 Q. Is there anything on the face of this
21 document that tells me what the interest on these
22 loans are?

23 A. No.

24 Q. Okay. And in fact, if you know, are there

1 any documents that support either the assets or the
2 liabilities contained in this document anywhere in
3 this record?

4 A. No, just my signature.

5 Q. Okay. I think you mentioned you went to
6 Farmers State Bank and obtained a list of the loans
7 that you had taken out; is that correct?

8 A. Yes, to a right of the totals.

9 Q. And is that list attached to this document?

10 A. No, it's not.

11 Q. I'm going to get back to the "L" here.

12 Mr. Hesel, is it or is it not correct
13 that you and your brother constructed an "L"-shaped
14 ditch?

15 A. I wouldn't say constructed. I wouldn't
16 characterize it that way.

17 Q. And why would you not characterize it as
18 constructed?

19 A. I would say maintained.

20 Q. Okay, you would say maintained, okay.

21 Mr. Hesel, would you say constructed
22 the "L"?

23 A. No, I don't believe so.

24 Q. Would you say maintained again, maintained

1 the "L"?

2 A. Yes, I think that's a fair
3 characterization.

4 Q. Okay. And would you say it took you maybe
5 a couple of weeks to construct the "L"; is that a
6 fair characterization?

7 A. Probably.

8 Q. Okay. And would you say -- and the "L"
9 that you constructed, did you keep the same entry an
10 exit points?

11 A. Yes, I did.

12 Q. Now I'm using the term constructed and
13 you're using the word maintained and you are agreeing
14 with me for some of the constructed but not all of
15 the constructed?

16 A. No, maintained.

17 Q. So you would say maintained and not
18 constructed?

19 A. Maintained, yes.

20 Q. Okay. Now Mr. Hesper, were you present
21 during the testimony of your brother Bobby Hesper?

22 A. Yes, I was.

23 Q. And present the whole time?

24 A. Yes, I was.

1 Q. And that includes the testimony today and
2 that includes the testimony on Friday; is that
3 correct?

4 A. Yes.

5 Q. And, Mr. Hesper, I'm reading from Friday's
6 transcript at page 181, okay.

7 This is a question from Mr. Northrup:

8 QUESTION: Now getting back to the
9 work that you performed in the
10 southeast corner of your property, I
11 believe you indicated you undertaken
12 some earth moving activities; is that
13 correct?

14 MR. BOBBY HESER: Yes.

15 MR. NORTHRUP: Now what
16 specifically did you do?

17 MR. BOB HESER: We cleaned up
18 the tree tops and burned them and we
19 also constructed an L-shaped ditch.

20 Mr. Andrew Hesper, do you disagree with
21 your brother's term that he stated on Friday that I
22 just read into the transcript that he constructed the
23 "L"-shaped ditch.

24 A. I would say maintained is a little more of

1 a fair characterization.

2 Q. Okay. Now I'm reading from a different
3 part of the transcript, I'm reading from page 189:

4 QUESTION: Okay, is that accurate date
5 of when you did the work on the
6 property, if you know?

7 ANSWER: Yes.

8 QUESTION: Now I believe you
9 indicated you also constructed the
10 "L", correct?

11 MR. BOBBY HESER: Correct.

12 Q. And, again, would you disagree with
13 Mr. Bobby Hesper's use of the word constructed there?

14 A. Would you repeat that for me.

15 Q. Sure. This is from a question from
16 Mr. Charlie Northrup.

17 I believe you indicated you also
18 constructed the "L", correct?

19 ANSWER: Correct.

20 A. I still say maintained.

21 Q. Okay. Let me ask you, I'm reading from
22 page 190 of the transcript, a question again by
23 Mr. Northrup.

24 MR. NORTHROP: Your Honor?

1 JUDGE MORAN: Yes.

2 MR. NORTHRUP: Can I raise a point?

3 Besides the fact that I object to the
4 question, I'm curious as to where she got a
5 transcript.

6 We certainly have not been provided
7 any transcript from last week's hearing and I
8 certainly didn't know they were available or being
9 made available to U.S. EPA and not Respondents.

10 JUDGE MORAN: There is a question of fairness
11 there.

12 Do you want to speak to that,
13 Miss Pellegrin?

14 MS. PELLEGRIN: Sure, your Honor. We just
15 requested what's called -- it's called a dirty copy
16 of the transcript from last Friday.

17 Now the reason that we did that we can
18 that there was that new information from Respondent's
19 Exhibit and attached photos that I was trying to
20 follow along just looking at the photos.

21 But basically without any information
22 where about where the photos were from, et cetera, et
23 cetera, so I wanted that transcript available so I
24 would be able to draft so cogent questions for this

1 morning.

2 JUDGE MORAN: And when did you ask this of the
3 court reporter?

4 MS. PELLEGRIN: I asked the court reporter at
5 the end of the day on Friday.

6 JUDGE MORAN: Okay. And I assume this would
7 have been available to Mr. Northrup and Mr. Small had
8 they asked for it as well.

9 MS. PELLEGRIN: I can't speak for the court
10 reporter, but I understand that that's their policy.
11 They make it available whoever asks.

12 We had to pay extra for it and we did.

13 JUDGE MORAN: I see nothing wrong with that
14 Mr. Northrup. There's no indication that you were
15 deprived of that opportunity to obtain the dirty.

16 Is that what you call it?

17 MS. PELLEGRIN: Yes, your Honor.

18 MR. NORTHRUP: I would note to that extent,
19 it's a dirty copy.

20 I'm not sure what that means or
21 whether it's accurate or not.

22 If it's a dirty copy, we don't know
23 the accuracy of the questions that she's asking in
24 terms of prior testimony.

1 JUDGE MORAN: Fair enough, but her question
2 was -- well, I guess she could rephrase it, but
3 assuming that that's accurate, do you have an issue
4 with it.

5 But he's already answered as to his
6 characterization and it departs from what was read at
7 least from the dirty copy transcript in the essence
8 that Andy would describe it differently.

9 So does that answer that for you?

10 MR. NORTHRUP: Yes, it does.

11 MS. PELLEGRIN: Okay.

12 I'm sorry, can I ask the court
13 reporter to read back the last question?

14 (WHEREUPON, the requested
15 portion of the record was read
16 back by the Reporter.)

17 JUDGE MORAN: Thank you.

18 BY MS. PELLEGRIN:

19 Q. Mr. Hesel, I'm reading from page 190 of the
20 unedited transcript, assuming that the transcript is
21 correct and that Mr. Northrup indeed asked the
22 question that I will read as follows:

23 QUESTION: How long did it take to
24 construct the "L"?

1 MR. BOBBY HESER'S ANSWER: I
2 don't remember for sure if this was
3 done in August of '99.

4 QUESTION: Well, in general,
5 did it take a day, two weeks, three
6 weeks, if you can remember?

7 ANSWER: Maybe a couple of
8 weeks.

9 Q. Mr. Andrew Heser, do you dispute the
10 terminology there, construct the "L" and how long it
11 took?

12 A. I don't dispute how long it took. But I
13 prefer the word maintained.

14 Q. Okay. I'm reading again from page 193?

15 QUESTION BY MR. NORTHRUP: You didn't
16 make any calculations or anything like
17 that in designing the "L"?

18 ANSWER BY MR. BOBBY HESER:
19 No, I did not.

20 QUESTION: How do you know
21 what size of slope to make?

22 ANSWER: You mean from right
23 or left in the channel?

24 QUESTION: In the channel of

1 the "L".

2 ANSWER: In the channel the
3 sides of the slope?

4 QUESTION: Yes.

5 ANSWER: Well, I just wanted
6 it gentle enough that it wouldn't have
7 the straight sides that erode that are
8 sometimes seen in ditches.

9 Q. And, Mr. Andrew Hesel, my question to you
10 is:

11 Is this your understanding of the
12 calculations or lack of calculations made in
13 designing the "L"?

14 A. Yes.

15 Q. So this is correct as far as you --

16 A. Yes.

17 Q. Your testimony is that this is correct?

18 A. Yes.

19 Q. Okay. And then I'm reading finally from
20 page 203 of the unedited transcript:

21 QUESTION: And the "L" that you
22 constructed, did you keep the same
23 entry and exit points?

24 ANSWER: Yes, as best as we

1 could tell it made a real important --
2 important to do that.

3 Q. And my question to you, Mr. Andrew Hesper,
4 is that in your -- is that -- is that -- and is it
5 your testimony today that Mr. Bobby Hesper was correct
6 in his response?

7 A. Yes, it was.

8 Q. The -- and Mr. Hesper you testified about
9 the size of the -- about the dimension of the burning
10 tree pile earlier; is that correct?

11 A. Yes, I did.

12 Q. And I'm reading from page 181 and 182 of
13 the unedited transcript:

14 Mr. Northrup asks describe the
15 dimensions of that tree pile for me.

16 And Mr. Bobby Hesper answers well, you
17 could see over it but it was probably 12 - 15 feet
18 wide, maybe 30 feet long along the new constructed
19 ditch?

20 Now my question to you, Mr. Bobby
21 Hesper is:

22 Was that pile indeed along the new
23 constructed ditch?

24 A. You mean Andrew Hesper.

1 Q. Oh, I'm sorry. Mr. Andy Hesel, is that
2 pile indeed along the new constructed ditch?

3 A. Fairly close, yes.

4 Q. Okay. Okay, now, Mr. Hesel, to your
5 knowledge has there been any wetlands determined to
6 be on any of your property in the past.

7 Besides the decided issue in this
8 case, any other property that you own have you ever
9 had a determination on that site that that property
10 contained wetlands?

11 A. I'm not aware of any except what
12 Mr. Antonacci has alleged.

13 Q. Okay, let me turn your attention to
14 Complainant's Exhibit 23.

15 Okay, and I'm looking at pages Bates
16 stamped 369 through 378.

17 A. They aren't in this book.

18 JUDGE MORAN: Let's go off the record so we can
19 find the right page. I have it in mine, but we'll go
20 off the record.

21 (WHEREUPON, a short recess was
22 taken.)

23 JUDGE MORAN: Back on the record.

24 BY MS. PELLEGRIN:

1 Q. Okay, Mr. Heser, have you found 369?

2 A. Yes, I have.

3 Q. Okay. And looking at from 369 to 378, now
4 when you just testified I believe your answer to my
5 question about whether there were any wetlands
6 determined to be on your property, none other than --
7 you mean, other than Mr. Antonacci's determination;
8 is that correct?

9 A. Yes, other than what he's alleged.

10 Q. And then 369 to -- to the pages that I had
11 told you, is that what you're referring to by
12 Mr. Antonacci --

13 A. 369 through 378? I can't hear you. You
14 need to speak up.

15 Q. Okay. 369 - I keep losing my place here -
16 I'm sorry, 369 to 384 it looks like.

17 A. I don't know that I've seen all of this.
18 This has been some time ago.

19 Q. Okay. Well, are you generally familiar
20 with the fact that Mr. Antonacci generally alleged
21 that you had wetlands on your property?

22 A. Just what I basically see here. I wasn't
23 aware of some this stuff, but it's been some time
24 ago.

1 Q. And if you remember, I'm reading on
2 page 369 and the second to last paragraph which
3 states:

4 Each person associated with this tract
5 who wishes to appeal the final determination to FSA
6 County Committee must do so individually.

7 Mr. Andrew Hesel, did you appeal if
8 you remember, this final determination?

9 A. I don't believe so.

10 Q. And I'm looking at the next page, the first
11 full paragraph on page 370, it states:

12 You also have the right to request a
13 good faith determination from the COC.

14 Did you request a good faith
15 determination, Mr. Hesel?

16 A. I don't believe so.

17 Q. And to your knowledge, did you appeal or
18 request a good faith determination for any of the
19 wetland tracts that Mr. Antonacci as you stated
20 alleged were wetlands?

21 A. Some of those don't ring a bell. So, no, I
22 don't think so.

23 Q. But to your knowledge, did you ever request
24 either a good faith determination or appeal a

1 determination that there were wetlands on your
2 property?

3 A. No, I did not.

4 MS. PELLEGRIN: Okay, I have no further
5 questions.

6 JUDGE MORAN: Okay, Redirect?

7 REDIRECT EXAMINATION

8 BY MR. SMALL:

9 Q. Referring again to Complainant's Exhibit
10 Number 23 and I want you to look at page 369.

11 A. 23a you mean?

12 JUDGE MORAN: Wherever you find 369. It's
13 where you just were. I've got it.

14 BY MR. SMALL:

15 Q. Okay, this is a December 9, 1996 letter; is
16 that right?

17 A. Yes.

18 Q. So it's a little over ten and a half years
19 ago this letter was issued?

20 A. Yes.

21 Q. And referring to the third paragraph of
22 that letter, would you read me the first sentence,
23 please?

24 A. This letter is to notify you that as of

1 this date, the preliminary technical determination
2 for converted wetlands on tract number 5041, field
3 number two has become final.

4 Q. Okay. Do you remember receiving any kind
5 of preliminary technical determination by the United
6 States Department of Agriculture?

7 A. Not that I remember.

8 Q. Okay. Now this letter was issued -- again,
9 who signed this letter?

10 A. Tony Antonacci.

11 Q. And have you heard the testimony of your
12 brother, Bobby, here today?

13 A. Yes, I have.

14 Q. And is this the same Tony Antonacci that
15 you seem to have issues with all of the time, you and
16 your family; is that correct?

17 A. That's correct.

18 Q. Now, I want to go back to Exhibit Number 25
19 and I'd like to refer you to page 404.

20 JUDGE MORAN: This is Respondent's Exhibit?

21 MR. SMALL: Yes, Respondent's Exhibit,
22 Respondent's Exhibit Number 25.

23 And referring to page 404, do you have
24 that?

1 THE WITNESS: Yes, I do.

2 BY MR. SMALL:

3 Q. Now indicated there were probably multiple
4 loans at Farmers State Bank?

5 A. Yes, I did.

6 Q. And were these all farm loans?

7 A. I believe so. There might have been one --
8 there might have been one equipment loan.

9 Q. Okay. If you could tell me, would these
10 loans be secured by mortgages on your real estate?

11 A. Yes.

12 Q. And if you know, if you looked at the
13 Marion County's Recorders Office, you would be able
14 to find these mortgages couldn't you?

15 A. Yes, you could.

16 Q. And the dollar amounts of those mortgages
17 would also appear in those documents, is that
18 correct?

19 A. Yes, they would.

20 Q. And likewise, if there were any liens on
21 any of your machinery at the time, they would have
22 shown up under the Uniform Commercial Code filings in
23 Marion County?

24 A. Yes, they would.

1 Q. Now I'd like you to refer to Respondent's
2 Exhibits 1 through 6 --

3 Well, let's just do one through three,
4 okay. Respondent's Exhibit 1 through six?

5 MR. SMALL: Can we go off the record, please?

6 JUDGE MORAN: Sure, we're off the record.

7 (WHEREUPON, a short recess was
8 taken.)

9 JUDGE MORAN: Back on the record.

10 BY MR. SMALL:

11 Q. And Mr. Hesel, referring to Respondent's
12 Exhibit Number 1, I want you to refer to what is
13 marked on the bottom of the page it says: Hesel
14 Initial Production number 18 I guess, and to the left
15 of it, it says Hesel Exhibit Number 4.

16 THE WITNESS: Yes.

17 BY MR. SMALL:

18 Q. And is that Schedule F of your 2003 tax
19 return?

20 A. Yes, it is.

21 Q. And that's your personal tax return?

22 A. Yes, it is.

23 Q. Under line 23b, does it show interest where
24 it says other?

1 A. Yes, it does.

2 Q. Okay. And would that mean to you that
3 that's interest that you paid on loans that were
4 deductible from your farming operations?

5 A. Yes, it would.

6 Q. Okay. Referring to Exhibit Number 2,
7 Respondent's Exhibit Number 2.

8 A. I'm there.

9 Q. Is this your 2004 personal income tax
10 return?

11 A. Yes, it is.

12 Q. And referring to Hesel Exhibit Number 14,
13 is that Schedule F?

14 A. Yes, it is.

15 Q. And Schedule F of your 2004 personal income
16 tax return; is that right?

17 A. That's correct.

18 Q. And on line 23b, does it show the sum of
19 \$6,624?

20 A. Yes, it does.

21 Q. And would this represent interest on your
22 farming operations that year --

23 A. Yes, it would.

24 Q. -- (continuing) that you paid?

1 A. Yes.

2 Q. That are deductible?

3 A. Yes.

4 Q. Now referring to Respondent's Exhibit
5 Number 3 --

6 A. I'm there.

7 Q. -- (continuing) is this your personal
8 income tax return for 2005?

9 A. Yes, it is.

10 Q. Referring to Hesel Exhibit Number 29, is
11 this your Schedule F for 2005 on your personal
12 return?

13 A. Yes, it is.

14 Q. Referring to line 23b, does that show
15 interest that you paid of \$8,381?

16 A. Yes, it does.

17 Q. And so, Mr. Hesel, your Respondent's
18 Exhibits 1 through 3 actually does show your interest
19 that you paid through your farming operations; is
20 that correct?

21 A. That's correct.

22 Q. And that is interrelated, is it not, with
23 Exhibit Number 25 on page 404 of that document?

24 A. Yes, it would be.

1 MR. SMALL: That's all our Redirect.

2 JUDGE MORAN: Anything on Recross?

3 MS. PELLEGRIN: Yes, your Honor.

4 RE CROSS EXAMINATION

5 BY MS. PELLEGRIN:

6 Q. Mr. Heser, can you turn to Complainant's
7 Exhibit 23, document Bates stamped 373.

8 JUDGE MORAN: 373?

9 MS. PELLEGRIN: Yes, sir.

10 THE WITNESS: I'm there.

11 MS. PELLEGRIN: Okay.

12 BY MS. PELLEGRIN:

13 Q. And, Mr. Heser, this document -- is this
14 attached?

15 MR. SMALL: Your Honor, I'm going to object
16 because it's not within the scope of my Redirect.

17 JUDGE MORAN: I agree.

18 Miss Pellegrin, how does that fit with
19 the Redirect?

20 MS. PELLEGRIN: I'll tell you --

21 JUDGE MORAN: Okay.

22 MS. PELLEGRIN: -- (continuing) when I get back
23 there.

24 Mr. Small asked him if he'd ever got a

1 preliminary wetland determination.

2 And this is the preliminary wetland
3 determination.

4 Looking at the third paragraph, the
5 first sentence in this letter is:

6 This letter is to notify you that as
7 of this date, I'm making a preliminary technical
8 determination that a wetland has been converted to
9 the extent that the production of agricultural
10 commodities is possible, et cetera.

11 JUDGE MORAN: I can't remember, did you ask
12 about that on your Redirect Mr. Small?

13 MR. SMALL: All I asked about was on page 369,
14 the letter, that it was December the 9th, that it was
15 ten and a half years ago old, and that Antonacci
16 signed it.

17 JUDGE MORAN: I will allow you to ask the
18 question, Miss Pellegrin. Go ahead.

19 This won't take long I take it?

20 MS. PELLEGRIN: It won't take too long, your
21 Honor.

22 And Mr. Small specifically on 369 the
23 document that he asked Mr. Hesel about mentioned
24 technical determination.

1 I believe and I think the record will
2 reflect that he asked him about that.

3 JUDGE MORAN: Are you still arguing after I
4 said you could go ahead and ask the question?

5 Is that what you just did?

6 MS. PELLEGRIN: I was just trying to clarify.

7 JUDGE MORAN: When I've made a ruling, ask your
8 question, please.

9 BY MS. PELLEGRIN:

10 Q. Look at 373 -- actually, let's look at 374,
11 the first full paragraph:

12 If you disagree with this preliminary
13 technical determination you have the right to review
14 the records and documentation in your file.

15 Mr. Heser, do you remember if you did
16 this?

17 Did you review the records and
18 documentation in your file?

19 Do you remember whether or not you did
20 that?

21 A. This doesn't look real familiar, but it's
22 been a long time ago.

23 Q. Okay. The next paragraph:

24 This preliminary technical

1 determination will become final within 30 days unless
2 you request either of the following options.

3 Do you remember if you requested
4 either of the following options, either Number 1 or
5 Number 2 on Document 374?

6 A. I don't remember. I don't remember doing
7 so.

8 Q. I'm sorry, I didn't hear you.

9 A. I don't remember doing so.

10 Q. And the last paragraph of this page:

11 The final technical determination may
12 be appealed to the Farm Service Agency.

13 Do you remember if you appealed it to
14 the Farm Service Agency, Mr. Hesel?

15 MR. SMALL: Your Honor, he already testified --

16 JUDGE MORAN: I agree. I sustain your
17 objection.

18 MS. PELLEGRIN: No further questions.

19 JUDGE MORAN: Okay. I have a question for you,
20 Mr. Hesel. And that's this:

21 I'd like you to turn again to CX 369.
22 This is the letter addressed to you dated December 9,
23 1996?

24 THE WITNESS: Yes.

1 JUDGE MORAN: Do you have that in front of you?

2 THE WITNESS: Yes, I do, your Honor.

3 JUDGE MORAN: Here's my question:

4 Apart from this dispute, let's call it
5 the Hesper "L", had you received any other letters
6 from either Mr. Antonacci or anyone else relating to
7 wetland determinations from 1996 up to the present,
8 again, excluding this December 9, 1996 letter?

9 THE WITNESS: I don't believe so.

10 JUDGE MORAN: Okay. Any more Redirect?

11 MR. SMALL: No, your Honor.

12 JUDGE MORAN: Okay. Thank you for your
13 testimony -- unless you have a question based upon
14 what I asked?

15 MS. PELLEGRIN: No, your Honor, I don't.

16 JUDGE MORAN: Okay, are you ready for your next
17 witness?

18 MR. NORTHRUP: Yes, Mr. Terry Lendy.

19 MS. PELLEGRIN: Can we take a break?

20 JUDGE MORAN: Sure. Let's all take a
21 five-minute break. Off the record.

22 (WHEREUPON, a short recess was
23 taken.)

24

1 (WHEREUPON, the Witness was
2 sworn by the Administrative Law
3 Judge.)

4 JUDGE MORAN: Mr. Lendy, you've been in here,
5 I've noticed you in the courtroom often.

6 THE WITNESS: Uh-huh.

7 JUDGE MORAN: State your name and spell it for
8 us.

9 THE WITNESS: Terry Lendy, T-E-R-R-Y,
10 L-E-N-D-Y.

11 TERRY LENDY,
12 having been first duly sworn by the Administrative
13 Law Judge, witnesseth and saith as follows:

14 DIRECT EXAMINATION

15 BY MR. NORTHRUP:

16 Q. Where do you work, Mr. Lendy?

17 A. Rapps Engineering in applied science.

18 Q. And where is that located at?

19 A. In Springfield, Illinois.

20 Q. What do you do there?

21 A. I'm an Environmental Specialist and also
22 Vice President of Operations.

23 Q. How long have you been as the Rapps?

24 A. Almost fifteen years. It will be in

1 January fifteen years.

2 Q. And how long have you done those two tasks
3 that you mentioned?

4 A. Well, the complete fifteen years as an
5 Environmental Specialist and about seven years as
6 Vice President of Operations.

7 Q. What's an Environmental Specialist do at
8 Rapps?

9 A. My position is we do a lot of leaking
10 underground storage tanks, asbestos, wetlands.
11 There's just a myriad of things that we work with.

12 Q. Can you describe for me your educational
13 background?

14 A. Yes. I graduated from the University of
15 Illinois at Champaign-Urbana with a degree in
16 agronomy with a crop protection option.

17 Q. What is a crop protection option?

18 A. Well, basically studying things that we
19 have to protect crops against.

20 The courses would be plant pathology,
21 entomology, insect pest management. It also entailed
22 soils, wheat science, things of that nature.

23 Q. What types of courses would you take to get
24 the agronomy degree?

1 A. As I just said a lot of soils, field crops.

2 I also took a fruit tree science
3 class, too.

4 Some of the courses dealt with
5 conservation, erosion and things like that.

6 But those are the specifics, besides
7 the normal courses, you know, like math or things
8 like that.

9 Q. When did you get your degree?

10 A. 1981.

11 Q. What was your first employment after you
12 obtained your degree?

13 A. It was Vigoro Industries. At the time it
14 was Kaiser(sp) Agricultural Counsel and they changed
15 to Kaiser S. Packing(sp) when they were bought out by
16 Vigoro Industries.

17 Q. And where was that?

18 A. That was in Litchfield, Illinois.

19 Q. Where's Litchfield in relation to us today?

20 A. Well, it's off of 55, I-55 and probably
21 about an hour and a half away to the northwest.

22 Q. What did you do at Vigoro Industries?

23 A. I started out as Assistant Manager, and
24 after four years moved to Manager of the retail

1 facility, retail ag facility.

2 Q. What were some of the specific things you
3 did in your job?

4 A. Specifically, I dealt with farmers a lot.
5 But I dealt with fertilizers and agri chemicals and
6 their application. So I was out in the field
7 applying these things.

8 I also dealt with environmental issues
9 related to farming. I also dealt with conservation
10 issues.

11 Also the effect of agri chemicals and
12 fertilizer on the environment.

13 Q. And would you be advising farmers in this
14 area?

15 A. Yes.

16 Q. And by area, I don't mean geographically, I
17 mean substantively?

18 A. Pertaining to that, yes.

19 Q. And what did you do after Vigoro
20 Industries?

21 A. I got with Rapps Engineering in applied
22 science in 1983.

23 Q. From time to time have you taken or
24 attended continuing education courses?

1 A. Yes. I took two classes or two course from
2 the Wetland Training Institute.

3 One of them was the basic wetlands
4 delineation course, and the other was plant
5 identification.

6 And I took training at the Citizen
7 Scientists with the Illinois River Watch which is
8 basically how to identify macroinvertebrates.

9 And I also learned about sampling
10 techniques, too.

11 Q. Describe a little bit in more detail the
12 Wetland Training Institute work that you did?

13 A. The course itself?

14 Q. Yes.

15 A. About half of the time was in the classroom
16 and half was out in the fielded. And we would learn
17 different techniques.

18 We learned about the ways to determine
19 wetland hydrology and hydro creek vegetation, hydric
20 soils things and like that and jurisdiction issues.

21 Q. When did you take this course?

22 A. Probably about thirteen years ago, twelve -
23 thirteen years ago.

24 Q. And where was it? Where did you take it?

1 A. That was in Chicago, Illinois.

2 Q. And it was put on by the Wetland Training
3 Institute?

4 A. Yes.

5 Q. What is that organization?

6 A. I think they're nationally known because
7 they have courses throughout the United States
8 including Alaska and Hawaii, too.

9 Q. Do you recall any of the particular
10 presenters at that course?

11 A. Charles Newling, and I can't think of the
12 other guy's name.

13 They had both -- I think both of them
14 had worked for the Corps of Engineers at one time.

15 Q. How long was the course work?

16 A. Five days.

17 Q. You also talked about a plant
18 identification course. Was that also put on by the
19 Wetland Training Institute?

20 A. Yes, and that was all in the field.

21 And it dealt with basically
22 identifying wetland plants, but also plants that
23 would be on the fringe of wetlands and some upland
24 plants, too.

1 But it mainly focused on wetland
2 plants.

3 Q. When did you take that course?

4 A. That was probably about nine years ago.

5 Q. And then you mentioned Illinois River Watch
6 Training?

7 A. Yes.

8 Q. What is that?

9 A. It's basically they want to get the
10 citizens involved in basically checking how the
11 quality of water or streams in a certain area.

12 And it's put on by the Illinois
13 department of natural resources and there was
14 actually somebody that worked at the same firm that I
15 did that had put it on in the past.

16 And she and another person did the
17 training. I went out there and we looked at some
18 streams and did sampling, and we identified a lot of
19 macroinvertebrate.

20 Q. How do you go about identifying
21 macroinvertebrate?

22 A. Well, you have to look at something and you
23 were given a identification booklet.

24 And you basically look at things --

1 you look at -- well, let's see how did that go.

2 You just basically are identifying.
3 You're looking at a key whether there's some legs on
4 an insect or what form they are in the water, and
5 then you match that up to what's in the
6 identification key.

7 Q. How does that work? Did you observe the
8 macroinvertebrates in the water or do you scoop out a
9 jar of water and --

10 A. You typically have to sample - unless you
11 come across a crayfish or something like that - you
12 look at leave packs, because that's where these
13 macroinvertebrates typically are.

14 Or just take -- if there's any rock on
15 the bottom, pebbles or things like that on the bottom
16 of the stream, you kind of would knock that with a
17 stick or something like that and you let whatever is
18 in there float into the net.

19 And then you pick that up, put it in
20 a jar, and take a look at those.

21 Q. And when did you do this training?

22 A. About eight years ago.

23 Q. At the Wetland Training Institute, were you
24 trained on the 1987 Corps of Engineers Wetland

1 Manual?

2 A. Yes.

3 Q. Were you here during some of Mr. Carlson's
4 testimony?

5 A. Yes.

6 Q. And he referenced this 1987 Wetland Manual?

7 A. Yes, that's standard.

8 Q. Is that still the standard manual in the
9 area?

10 A. Yes, it is.

11 Q. Is that what everybody uses?

12 A. If they want additional information on
13 soils, there's another booklet Field Indicators of
14 Hydric Soils in the United States, and I refer to
15 that too at times.

16 Q. This manual discusses various concepts such
17 as hydric soils?

18 A. Yes.

19 Q. Do you know what hydric soils are?

20 A. Yes.

21 Q. What are they?

22 A. Hydric soils are such that they have
23 certain characteristics that show that they have been
24 ponded or saturated for a certain length of time.

1 And usually that length of time allows
2 for establishment of wetland plants.

3 Q. Hydrophytic vegetation, do you know what
4 that is?

5 A. Yes. Those are plants that have affinity
6 for wet conditions.

7 Q. And hydrology, what's that?

8 A. Hydrology is basically related to water on
9 a site.

10 Q. Were you here when Mr. Carlson puts up a
11 chart where he talked about FAC up plants or FAC W
12 plants?

13 A. FAC wet, FAC up. Yeah, I know about that.

14 I was not, but I know about that.

15 Q. Okay. Those are all concepts that are
16 familiar to wetland delineators?

17 A. Correct.

18 Q. And are those concepts ones that you use
19 everyday in your job at Rapps?

20 A. Yes.

21 Q. What is your practical experience with
22 wetlands or wetlands delineations?

23 A. I've conducted thirty-seven wetland
24 delineations.

1 JUDGE MORAN: Three - seven?

2 THE WITNESS: Three - seven, thirty-seven, yes.

3 BY MR. NORTHRUP:

4 Q. What do you do in a typical wetland
5 delineation?

6 A. The whole process you're just out in the
7 field.

8 Because prior to going out in the
9 field, you try to gain as much information you can
10 using national wetlands inventory maps, quad maps,
11 aerial photographs from the Natural Resources
12 Conservation Service, whatever you can find.

13 And then you go out in the field and
14 determine whether there are hydric soils, a
15 predominance of hydrophytic vegetation and wetland
16 hydrology.

17 Q. It's essentially the same process that
18 Mr. Carlson talked about?

19 A. Yes.

20 Q. Who have you done these wetland studies
21 for?

22 A. Coal mining companies, municipalities,
23 utilities, developers, mainly the private sector.

24 Q. In addition to the three seven wetland

1 delineations and determinations that you talked
2 about, have you also provided project oversight to
3 others who are doing these studies?

4 A. Yes. Approximately ten.

5 Q. Do you know what a wetland mitigation plan
6 is?

7 A. Yes, it's a plan designed to compensate for
8 the intended impact of a wetland site by using
9 creation, restoration, and enhancement.

10 Q. Have you prepared any wetland mitigation
11 plans?

12 A. Yes.

13 Q. How many?

14 A. Approximately five.

15 Q. Have you participated in any monitoring of
16 mitigation sites?

17 A. Yes, I have.

18 Q. How many?

19 A. I believe two.

20 Q. What types of things do you do when you
21 monitor a mitigation site?

22 A. Basically, you're checking on the
23 establishment of vegetation that's there, and to make
24 sure it's hydrophytic and how it's coming along.

1 You're looking for invasive species
2 such as reekenarie(sp) grass or cattails or something
3 like that. And you're also checking on the hydrology
4 of the site.

5 Q. How do you check on the hydrology of the
6 site?

7 A. Basically, you can see if there's any water
8 out there.

9 If it's inundated, if it's saturated,
10 and at what level there actually is groundwater, too.

11 Q. Have you prepared written reports
12 documenting your evaluating monitoring of wetland
13 cites?

14 A. Yes.

15 Q. Do you know what an invasive plant species
16 management plan is?

17 A. Yes, I do.

18 Q. Okay, what's that?

19 A. Well, it relates a wetland mitigation site.

20 And the Corps of Engineers out of the
21 St. Louis District requested this because at a
22 mitigation site there was a predominance of cattails
23 and reekenarie grass through out.

24 So we had to come up with a plan to

1 manage or control those species. Because that
2 obviously was not wanted by the Corps, and it was not
3 a good situation either.

4 Q. You mentioned the St. Louis district, have
5 you dealt with other Corps districts?

6 A. Yes. Louisville, Chicago and Rock Island.

7 Q. And have you worked on wetland projects all
8 over Illinois?

9 A. Yes, throughout Illinois.

10 Q. Are you familiar with Federal wetland
11 permitting requirements?

12 A. Yes.

13 Q. Have you ever prepared any wetland
14 applications?

15 A. Yes.

16 Q. How many?

17 A. Approximately ten.

18 Q. Take a look at Respondent's Exhibit 17. Do
19 you know which book that is?

20 MR. NORTHRUP: Can I approach, your Honor?

21 JUDGE MORAN: Sure.

22 MR. NORTHRUP: Seventeen.

23 THE WITNESS: Seventeen, okay.

24 BY MR. NORTHRUP:

1 Q. Are you there?

2 A. Yes.

3 Q. Can you tell me what that is?

4 A. That's my resume.

5 Q. Is this a document that you prepared?

6 A. Yes, it is.

7 Q. Is it true and accurate to the best of your
8 belief?

9 A. Yes.

10 Q. And this is a copy, correct?

11 A. Yes it is.

12 Q. A true and accurate copy of the original?

13 A. Yes, it is.

14 Q. Is there anything in here that needs to be
15 changed or modified in any way?

16 A. No, not at this point.

17 MR. NORTHRUP: Your Honor, I would ask for the
18 admission of Respondents' Exhibit 17.

19 MS. PELLEGRIN: No objection.

20 JUDGE MORAN: Respondents' Exhibit 17 is
21 admitted.

22 MR. NORTHRUP: Thank you.

23

24

1 (WHEREUPON, Respondent's
2 Exhibit Number 17 was
3 admitted into the
4 record.)

5 MR. NORTHRUP: Your Honor, at this point I
6 would also ask that Mr. Lendy be qualified as an
7 expert in wetland delineation and general farming
8 erosion and conservation practices.

9 JUDGE MORAN: I didn't hear the last one.

10 MR. NORTHRUP: Agricultural erosion and
11 conservation practices.

12 MS. PELLEGRIN: Your Honor, we would have a
13 problem with that.

14 JUDGE MORAN: You have to be more articulate
15 that.

16 MS. PELLEGRIN: Well, what -- and, you know,
17 not to disparage Mr. Lendy, but he's participated in
18 I think thirty-seven wetland delineations and taken
19 five-day course.

20 I just don't think that qualifies him
21 as a expert in wetlands delineation.

22 JUDGE MORAN: Okay.

23 MS. PELLEGRIN: And then the other one, I'm not
24 sure exactly farm erosion -- what was that?

1 THE WITNESS: Farming erosion and conservation
2 practices.

3 MS. PELLEGRIN: And I don't feel like there's
4 been a farming erosion conservation practices -- I
5 don't see that there's been an appropriate foundation
6 laid for that expertise involved in this case.

7 JUDGE MORAN: Okay, is that it?

8 MS. PELLEGRIN: Yes, your Honor.

9 JUDGE MORAN: Okay, I'm overruling the
10 objection.

11 The test for an expert is as opposed
12 to cross-examination of the expert qualifications is
13 whether the individual possesses knowledge beyond
14 that that is within the ken of typical knowledge.

15 Certainly, Mr. Lendy -- am I
16 pronouncing that correctly?

17 THE WITNESS: Lendy, yes.

18 JUDGE MORAN: With an agronomy degree, and
19 agronomy being defined as the agricultural branch
20 dealing with the raising of crops and caring of the
21 soil.

22 And his other experience that he
23 outlined on direct examination by Mr. Northrup and as
24 evidenced by in addition to his testimony his resume

1 qualifies him as an expert for what Mr. Northrup
2 seeks to have him qualify as an expert.

3 So that is my ruling as to the
4 threshold of qualification as opposed to any
5 cross-examination.

6 MR. NORTHRUP: Thank you, your Honor.

7 BY MR. NORTHRUP:

8 Q. Now, Mr. Lendy, you've been retained by the
9 Hesers in this case, correct?

10 A. Yes.

11 Q. In general terms what's your understanding
12 of why we're here?

13 A. Well, I think the EPA has alleged that the
14 Hesers disturbed some wetlands.

15 Q. Have you met the Hesers before?

16 A. Yes.

17 Q. Have you been to the property at issue in
18 this case?

19 A. Yes.

20 Q. And do you understand the property at this
21 southeast corner of the 60-acre parcel that we're
22 talking about?

23 A. Yes.

24 Q. When was the first time you went to the

1 property?

2 A. August 10, 2006.

3 Q. Why were you asked to go?

4 A. To observe the Hesper "L" and also conduct a
5 wetland determination or delineation.

6 Q. What types of things did you do before you
7 went to the site?

8 A. Well, I really wasn't able to do much
9 because we met just outside of Centralia, and that's
10 Andy and Robert Sr. and Brad Small, and they didn't
11 provide any information at that time.

12 So that was basically at the site that
13 I got that. So I didn't really have much to do or
14 anything to do prior to going to the site.

15 Q. Okay. And did you go to the site?

16 A. Yes.

17 Q. Okay, tell me what you observed when you
18 were there?

19 A. I observed that the Hesper "L" was
20 vegetative. I also -- I noticed that the "L" or
21 channel was gently sloped.

22 I also noticed that it was dry except
23 for a few spots that had some isolated water in it.

24 Q. Okay. These isolated spots of water, can

1 you describe for me the extent of the water?

2 A. The water -- there was a couple spots
3 located in a sub channel, and I would say maybe
4 15 feet long and the channel was maybe 20 inches
5 deep.

6 And there was also a small ponded area
7 that was up towards the north of the site too, on the
8 north leg of the "L".

9 Q. And when you said the channel is 20 inches
10 deep, do you mean the channel or water in the
11 channel?

12 A. I'm sorry, the channel was 20 inches deep.
13 The water was probably a couple inches.

14 Q. You talked about the slopes being -- the
15 sides of the "L" being gently sloped.

16 Does that have any significance in
17 your mind?

18 A. Well, it does because if you've got a
19 gentle slope, you've got a less likelihood that
20 you've got erosion on any vegetation that is there.

21 Q. You talked about the "L" being vegetative?

22 A. Yes.

23 Q. Does that have any significance in terms of
24 erosion?

1 A. Yes, since it's vegetative, it would help
2 keep the area from eroding.

3 Q. What types of vegetation did you observe
4 there?

5 A. I saw tall fescue, water hemp, cattail
6 species, smart reed species, there was sand wand
7 willow, and I think that's probably about it.

8 There might have been clovers,
9 phagmites, too, Phagmites Australis.

10 Q. Mr. Carlson had mentioned that before?

11 A. Yes.

12 Q. Is that vegetation consistent with what you
13 might see in a wetland?

14 A. I would say most of it is. The phagmites
15 can adapt to just about any conditions.

16 And tall fescue I think is not
17 necessarily a wetland plant, but it can withstand wet
18 conditions.

19 Q. Do you know the length of the "L"?

20 A. It's over 800 feet. 840 or 850 feet.

21 Q. And that's from the top?

22 A. That's from the top all the way to the
23 bottom, too, yes.

24 Q. So that encompasses the north-south leg and

1 then the east-west leg?

2 A. That's correct.

3 Q. How about its width?

4 A. I estimated it at about 30 feet.

5 Q. And describe for me what that encompassed,
6 the 30 feet, from where to where?

7 A. That encompassed the bottom and also the
8 side slopes, too, and also there's a little bit of a
9 berm in certain areas.

10 Q. And did that 30 feet includes all of the
11 berm or did you go to the top of the berm?

12 A. Just to the top of the berm.

13 Q. Do you have any idea what the -- what the
14 acreage is inside the "L"?

15 A. Approximately .6 acres.

16 Q. Did you observe any wildlife?

17 A. The first time basically only I believe I
18 saw a frog or frogs and also deer and raccoon prints
19 in the mud.

20 Q. Would that be the sort of wildlife you
21 would expect to see in a wetland setting?

22 A. It wouldn't surprise me. Deer can be in
23 just about any type of habitat.

24 Many times a raccoon will stick in a

1 wetter area like that because they're looking for
2 fish and crayfish and things like that, and they like
3 to also wash their paws.

4 Q. Did you see any crayfish when you were
5 there?

6 A. I did not.

7 Q. What did you do at the site?

8 A. Well, since the site was disturbed and
9 basically was an atypical condition or situation, all
10 I could really do was look for hydric soils at the
11 site.

12 Because the wetland hydrology or
13 hydrology was no longer there since it was disturbed
14 and also there was no natural or native vegetation on
15 the site because it was in soybeans.

16 Q. And did you look for hydric soils when you
17 were there?

18 A. Yes, I did.

19 Q. All right. Explain that process. What did
20 you do?

21 A. I basically took soil probes either down --
22 at least 12 to 13 inches sometimes more, and would
23 look for the hydric soil characteristics such as a
24 dictative(sp) matrix.

1 Q. Was anybody else with you when you were
2 there?

3 A. The first day Brad Small and Andy Heser and
4 also Robert Heser, Sr.

5 Q. You say the first day?

6 A. Yes. It was only a half day the first day
7 because we met at noon.

8 Q. Okay. And this was on August 10th?

9 A. That's correct?

10 Q. And when did you go back then?

11 A. August 15, 2006.

12 Q. With respect to your soil probes or
13 borings, were you instructed by anyone to reach any
14 particular conclusions?

15 A. No.

16 Q. Were you told to sample in certain
17 locations and not in others?

18 A. No.

19 Q. How did you select where you took your
20 probes?

21 A. Well, the first day I was out there I
22 really didn't have any time to review what I was
23 given.

24 And so I just took soil probes in

1 certain areas, just to check to see what I could find
2 out.

3 Q. How many probes did you take when you were
4 there?

5 A. The first day?

6 Q. Yes, the first day.

7 A. Probably about six or seven.

8 Q. And did you make any determination at that
9 time by observing the probes?

10 A. At that time, all I noticed basically were
11 non-hydric soils. There were some soils that looked
12 close, but it was mainly non-hydric.

13 Q. Are your probe results reflected in any
14 kind of report or document?

15 A. Yes, they are.

16 Q. Take a look at Hesar Exhibit 18, which is
17 page Number 138?

18 A. I'm there.

19 Q. Is this the document you prepared that
20 reflects your soil probes?

21 A. Yes.

22 Q. You indicated you were there a second day
23 on August 15, correct?

24 A. Correct.

1 Q. What did you observe when you were on the
2 site that day?

3 A. The channel looked the same. There were
4 still water in isolated areas. The vegetation didn't
5 change, and I really wouldn't expect it to.

6 Conditions were relatively the same.

7 Q. Do you know if it rained recently at all?

8 A. I do not know that.

9 Q. Was anyone with you?

10 A. No.

11 Q. And, again, why did you go on the second
12 day?

13 A. Well, the first day I definitely did not
14 get enough information, and I needed time to review
15 things, other data information that I had been given
16 by Mr. Small and Andy Hesper.

17 And so once I had that information and
18 reviewed it, then I could actually set a course as to
19 what I was going to do.

20 Q. Okay. During this what appears to be a
21 five-day interval between your first and second
22 visits, what type of information did you review, if
23 any?

24 JUDGE MORAN: Did you what?

1 MR. NORTHRUP: Did you review, if any?

2 THE WITNESS: I reviewed the allegations by
3 EPA, and also aerial photographs, and also the
4 representation of the site that showed what EPA came
5 up with for uplands and wetlands.

6 BY MR. NORTHRUP:

7 Q. Is that the type of information you would
8 typically rely upon?

9 A. Yes.

10 Q. And, again, on this second visit, were you
11 told to take probes at any particular location?

12 A. Yes.

13 Q. Did you take probes on that visit?

14 A. Yes.

15 Q. How did you determine where to take those
16 probes?

17 A. Well, what I wanted to do after I looked at
18 the EPA document, the aerial that had the wetlands, I
19 thought the best course of action was to focus in on
20 the areas that the EPA had determined were wetland.

21 Q. And, again, you are at Exhibit 18; is that
22 correct?

23 A. Yes.

24 Q. And can you tell me what this is?

1 A. It's a wetland delineation report.

2 Q. And is it a wetland delineation report that
3 you prepared?

4 A. Yes.

5 Q. And this is a copy, correct?

6 A. Yes.

7 Q. Is this a true and accurate copy of the
8 original document that you prepared?

9 A. Yes.

10 MR. NORTHRUP: Your Honor, at this time I would
11 move for the admission of Hesel 18, and I believe we
12 have a stipulation to that.

13 MS. PELLEGRIN: Yes.

14 JUDGE MORAN: Thank you. Respondents' 18,
15 that's 1-8 is admitted. Thank you.

16 (WHEREUPON, Respondent's
17 Exhibit Number 18 was
18 admitted into the
19 record.)

20 BY MR. NORTHRUP:

21 Q. Now, again, is there any certain protocol
22 or guidance that you used when you performed your
23 wetland delineation?

24 A. The 1987 Wetland -- Corps of Engineers

1 wetland Delineation Manual.

2 Q. On page -- well, Exhibit Number 141, can
3 you turn to that page?

4 A. I'm there.

5 Q. The third paragraph, can you read that
6 first sentence?

7 A. Review of the 1987 National Wetlands
8 Inventory map does not indicate the presence of
9 wetlands.

10 Q. Okay. What is a National Wetlands
11 Inventory Map?

12 A. It's a map that was created by U. S. Fish
13 and Wildlife Service that indicates the presence and
14 the size and the type of wetlands in a certain area
15 throughout the United States.

16 Q. Did the fact that this area was not -- did
17 not indicate the presence of wetlands, was that
18 significant to you in any way?

19 A. In my experience, yes, because typically
20 the National Inventory Maps are conservative.

21 And from my field work, I've actually
22 found less wetlands on any site than are shown on any
23 NWI map.

24 Q. So did this affect in any way how you

1 performed your delineation on this site?

2 A. No, not really.

3 Q. Will you turn to page 157?

4 A. I'm there.

5 Q. Okay, can you tell me what that is?

6 A. That's just our figure two that shows a
7 National Wetlands Inventory Map.

8 Q. Do you see where it says site in a box
9 right in the middle there?

10 A. Yes.

11 Q. And to the left and right below that site,
12 there's a designation in caps P-U-B-G small case h;
13 do you see that?

14 A. Uh-huh.

15 Q. What is that in reference to?

16 A. That's basically a pond that was created to
17 foster an unconsolidated bottom, a pond that has
18 basically been diked or impounded(sp), and I believe
19 it's intermittently exposed.

20 Q. There are other designations on this --
21 your Figure Two.

22 One of them is R4SBF, do you know what
23 that means?

24 A. That's an intermittent river or stream bed,

1 that is semi permanently flooded I believe.

2 Q. And there are no particular designations on
3 or about the site, correct?

4 A. That's correct.

5 Q. Can you look at the next page which is page
6 158?

7 A. I'm there.

8 Q. Okay. Can you tell me what this is?

9 A. That's an aerial photograph of the Hesper
10 site, and I believe it's 1993.

11 Q. Okay. Did you rely on this for any
12 purpose?

13 A. Well, it gave an indication of what the
14 site looked like before it was disturbed.

15 Q. From this site, can you determine whether
16 there are any wetlands present?

17 A. No.

18 Q. Can you determine whether there are any
19 water courses?

20 A. Possibly. It looked like there was
21 something there. It's just not woods or forest, but
22 I couldn't tell for sure.

23 Q. You're not an expert in aerial photography?

24 A. No, I'm not.

1 JUDGE MORAN: You just indicated the date of
2 this photograph and you say 1993.

3 THE WITNESS: Yes.

4 I originally thought it was 1998, but
5 it turns out it was 1993. We got it off the
6 Internet.

7 JUDGE MORAN: And how did you determine that
8 the date of this photograph was 1993?

9 THE WITNESS: Because I have taken a look at
10 the same photograph that has been determined to be
11 1993.

12 JUDGE MORAN: Okay.

13 BY MR. NORTHRUP:

14 Q. Take a look at page 160.

15 A. I'm there.

16 Q. Can you tell me what that is?

17 A. I believe that's a 1994 aerial photograph
18 from the Natural Resources Conservation Service.

19 Q. And where did you obtain this map, this
20 aerial photo?

21 A. I believe I got this from the Hesers.

22 Q. Did you see what appears to be a
23 handwritten "W" on the site?

24 A. Yes.

1 Q. Do you know who put that there?

2 A. I believe it would be Natural Resources
3 Conservation Service or a representative of that
4 Agency.

5 Q. Turn to the next two pages, 161 and 162.

6 A. I'm there.

7 Q. Okay, can you tell me what Figure 6 is
8 which appears on page 161?

9 A. Figure 6 is the same aerial photograph. It
10 shows areas that the EPA and I take it the Corps of
11 Engineers found as wetlands where I did not find
12 hydric soils.

13 Q. Okay. Explain this to me again. There are
14 black dots all over the photograph?

15 A. That's correct. Those are my observation
16 points.

17 Q. They are your observation points?

18 A. That is correct.

19 Q. And they appear to be numbered 1 through
20 11?

21 A. Correct.

22 Q. Did you take probes at these sites?

23 A. Yes.

24 Q. Are the results of your probes reflected in

1 any other attachment to this report?

2 A. Yes, in the narrative and also data forms.

3 Q. And the data forms, where do those appear?

4 A. Number one is Exhibit 166. It starts with
5 Number one.

6 Q. So on page 166 -- what's that titled?

7 A. That's the data form Number one.

8 Q. Where do you see Number one?

9 A. Number one is by plot ID over towards the
10 right and to the top.

11 Q. Is this a form that you or Rapps has come
12 up with or do you get it from somewhere else?

13 A. We come up with that. It's a variant of
14 what's included in the manual, the 1987 Corps of
15 Engineers wetland delineation manual.

16 Q. And I see places for hydrology and
17 hydrophytic vegetation and vegetation.

18 And these are two page forms, correct?

19 A. Correct, typically on the front and back.

20 Q. And on page 167 you have areas for soils?

21 A. Yes.

22 Q. Now, does the designation by plot ID on
23 page 166 refer back to a location on Figure 6, page
24 161?

1 A. Yeah, that would be Number one. The boring
2 Number one on that figure.

3 Q. Okay. And you took a probe at this
4 location?

5 A. Correct.

6 Q. And what was the result of your probe?

7 A. I found that hydric soils were present.

8 Q. Were present.

9 How did you happen to come take a
10 probe at location Number one?

11 A. I believe that it was shown as being a
12 wetland on the EPA map or the aerial photograph.

13 Q. For U.S. EPA?

14 A. U.S. EPA, I'm sorry.

15 Q. Why don't you turn to page 162 figure six
16 a?

17 A. I'm there.

18 Q. Now it's the same photograph, correct?

19 A. Correct.

20 Q. It's got same dots and locations, probes?

21 A. Correct.

22 Q. What are some of these other numbers and
23 lines that are drawn on here? What do they
24 represent?

1 A. Well, I used a benchmark to start from.
2 And that benchmark was the joining of the two legs on
3 the Hesper "L" on the west side.

4 And I went from there and walked up so
5 many feet to the north and so many feet to the west.

6 And I just want to document what those
7 measurements were.

8 Q. Okay. So on Figure 6a, you see point
9 number three?

10 A. Yes.

11 Q. And to the right of that there's an X?

12 A. Yes.

13 Q. And that's where you began your
14 measurements from; is that correct?

15 A. Yes.

16 Q. So when you go towards the north on that
17 line, there's a 99 apostrophe N?

18 A. Yes.

19 Q. What does that mean?

20 A. That's 33 of my steps to the north, which
21 would be 99 feet.

22 One of my strides is approximately
23 three feet.

24 Q. Okay. And if you go a little further north

1 and look to the left, there's a 129 apostrophe W?

2 A. Yes.

3 Q. Now what does that mean?

4 A. That's how many feet that I had walked over
5 to the west.

6 Q. Why doesn't that line continue on to probe
7 point Number two?

8 A. Those probes are actually from the first
9 day -- no, actually, they're not from the first day.

10 Okay, I did take probes in that area
11 the first day and I went back the second day.

12 But I do not have any measurements on
13 those.

14 Q. Now on Figure 6a; there are certain probe
15 points that are included in misshapen circles or
16 polygons as we've been calling them, correct?

17 A. Yes.

18 Q. What is the significance of those polygons?

19 A. From what I could tell, those polygons or a
20 portion of those polygons were indicated on the
21 U.S. EPA map, but the areas, the actual polygons show
22 where I did not find hydric soils.

23 Q. Okay. For example, if we look in the
24 longer polygon that runs north and south that

1 encompasses probe points 7, 5, 6, those are probes
2 you took that did not show hydric soils?

3 A. Correct.

4 Q. Do you know what the area is inside those
5 two polygons?

6 A. Approximately three acres.

7 Q. Is that in both polygons or just the one?

8 A. Just the one.

9 Q. How about the other polygon that
10 encompasses probes points 8, 9, 10?

11 A. Approximately three acres.

12 Q. So .6 total?

13 A. Correct.

14 Q. And, again, if we wanted to explore the
15 specifics of those probes all that information is
16 included in the attachments, correct?

17 A. Correct.

18 JUDGE MORAN: Don't you call these things -- we
19 call them polygons, is that what you called them when
20 you drew these circles?

21 THE WITNESS: You can. I don't call them that.

22 JUDGE MORAN: What do you call them?

23 THE WITNESS: I just call them areas.

24 JUDGE MORAN: Okay.

1 BY MR. NORTHRUP:

2 Q. Take a look at Figure Number 7 which is on
3 page 163.

4 A. I'm there.

5 Q. Okay. Now were you present at a trial
6 where we've seen this marked as a demonstrative
7 exhibit?

8 A. Yes.

9 Q. Where did you get this Figure?

10 A. I got that from the Hesers.

11 Q. Did you rely on it in any way in conducting
12 your delineation?

13 A. Yes, I had to because this was an atypical
14 condition or situation.

15 And I was not granted access to
16 determine anything about vegetation.

17 Which typically in a atypical
18 situation you want to use adjacent property to
19 determine whether the area might have had a balance
20 of hydrophytic vegetation, and I didn't have that
21 access. So I had to rely on what was in this figure.

22 Q. So to be clear, you didn't have access to
23 Bill Hesel's property, correct?

24 A. Correct.

1 Q. You talk about atypical wetland situations.
2 Describe it for us what that is again.

3 A. Atypical is any situation or condition
4 where one or two of the parameters for determining
5 wetlands have been disturbed.

6 So it would be either the hydrology
7 and/or hydrology and hydrophytic vegetation too or
8 vegetation.

9 Q. And does that present to you as a wetland
10 delineator any particular problems?

11 A. Yes, it does.

12 Q. And then what are some of those problems?

13 A. Well, since it's not a typical situation
14 you've got to look at it completely different.

15 And you've got to actually try to find
16 as much information as you can about what the site
17 looked like previous to any type of disturbance.

18 And it basically creates many
19 problems.

20 Q. These wetland delineations, would you
21 consider them to be an exact science?

22 A. What's depicted here?

23 Q. Yes.

24 A. Yeah, I believe it's not an exact science.

1 JUDGE MORAN: When you say depicted here,
2 you're referring to Figure 7?

3 THE WITNESS: That is correct.

4 BY MR. NORTHRUP:

5 Q. On Figure 7 there appear to be written U's
6 and W's on the aerial photos?

7 A. Yes.

8 Q. Do you have an understanding what those
9 are?

10 A. "U" are the upland and the "W"s would be
11 wetlands.

12 Q. Now from the probes that you took can you
13 confirm any of those U's or W's?

14 A. I could. Yes, I could.

15 Q. And you would have to relate back to
16 Figure 6a?

17 A. Yes.

18 Q. Do you know how those U's and W's were put
19 on Figure 7?

20 A. Yes, I do.

21 Q. How is that?

22 A. I believe through stereoscopic examination
23 by Mr. Carlson.

24 Q. And you were present when he testified

1 about that?

2 A. Yes.

3 JUDGE MORAN: Let me just ask him a question:

4 Looking at Figure 7, Mr. Lendy, is
5 there any marking here where it says -- it shows the
6 symbol upland and wetland, correct?

7 THE WITNESS: Correct.

8 JUDGE MORAN: Is there any marking on this
9 Exhibit 7 which is different in terms of marking
10 something that's upland or wetland?

11 Anything different from the EPA
12 version of this exhibit or is it exactly the same?

13 THE WITNESS: It's exactly the same.

14 JUDGE MORAN: Okay. Because my copy is very
15 dark.

16 That's why it's difficult for me to
17 make out with certainty whether I'm looking at a "U"
18 for upland or a "W" for wetland.

19 That's why I asked that question.

20 So if I had any question I could refer
21 to the EPA exhibit if I had any question about this,
22 right?

23 THE WITNESS: Yes.

24 MR. NORTHRUP: And, again, the U's and W's on

1 this map are a result from U.S. EPA data forms,
2 correct?

3 THE WITNESS: Yes.

4 BY MR. NORTHRUP:

5 Q. Did you take any probes within the "L"
6 itself?

7 A. Yes.

8 Q. Okay. And when did you do that?

9 A. I did that on the first day, on
10 August 10th.

11 Q. And what were your findings with respect to
12 those probes?

13 A. The soil color was 10 YR 71 dry and 10 YR
14 4/1 wet and there were prominent and many
15 redoximorphic(sp) features with a color of 5 YR 56, I
16 believe.

17 Q. And does that lead you to any particular
18 conclusion?

19 A. For me, I concluded that it was a wetland
20 soil -- or a hydric soil within the channel.

21 Q. Where did you take your probes?

22 A. I took one about maybe 20 feet to the east
23 of where the channel exits the Hesper property, and
24 another probably 50 or 60 to the east of that.

1 Q. When was the next time you were on the
2 property? After I think it was August 15th?

3 A. That was August 30, 2006.

4 Q. And why did you go to the property on that
5 date?

6 A. To meet with representatives from the EPA,
7 Mr. Carlson and Mr. Martin, and there was also Jim
8 from the record department from EPA there.

9 Q. That was the day that I was also there?

10 A. That's correct.

11 JUDGE MORAN: What was that date again, sir?

12 THE WITNESS: August 30, 2006.

13 BY MR. NORTHRUP:

14 Q. And what did you observe when you were at
15 the site that day?

16 A. Within the channel, I observed several
17 frogs.

18 Mr. Carlson had found a water snake
19 within the channel. And I also noticed that there
20 were small fish or minnows within a couple of
21 isolated areas that were inundated.

22 Q. Where were those areas?

23 A. Those were in the sub channel. They were
24 along the south leg of the "L".

1 Q. Were your observations -- strike that.

2 Were your observations on that day
3 reflected in any written report?

4 A. Yes.

5 Q. And what is that?

6 A. That's the new channel observation
7 document.

8 Q. And that is marked as Hesel Exhibit 19; is
9 that correct, beginning on page 196?

10 MS. PELLEGRIN: Before we move to this can I
11 just take a two-minute break.

12 JUDGE MORAN: Sure. Counsel needs a break, so
13 we'll all take a five-minute break.

14 (WHEREUPON, a short recess was
15 taken.)

16 BY MR. NORTHRUP:

17 Q. Mr. Lendy, let me follow up back on exhibit
18 page 161.

19 A. I'm there.

20 Q. Okay, and you see the area that's
21 encompassed by a circle that has probe points 8, 9,
22 and 10?

23 A. Yes, I see that.

24 Q. That was an area where you observed through

1 your tests no hydric soils, right?

2 A. That is correct.

3 Q. And the area that was encompassed by 5, 6,
4 and 7, that was also non-hydric soils?

5 A. Right.

6 Q. When you performed your probes within the
7 "L", that of course was after the time the "L" was
8 either constructed or maintained whatever word you
9 used?

10 A. That's correct.

11 Q. Okay. Were you in the Courtroom when
12 Miss Melgin referred to the "L" as an emergent
13 wetland?

14 A. I don't think so.

15 Q. Does that term emergent wetland have any
16 significance to you?

17 A. Yes. Basically it's the onset of a wetland
18 as opposed to a forced wetland that's been there
19 many, many years.

20 Emergent plants would be such as
21 cattails and other non-woody plants which would be
22 there and start to establish themselves.

23 Q. Can you -- what would the emergence of a
24 wetland be attributed to, particularly in the "L"?

1 A. Well, you would need the proper wetland
2 hydrology to start things off.

3 The water does enter at some time and
4 either flows off or stays on in isolated pools
5 possibly.

6 Q. Can you please turn to -- I believe we
7 already talked about Hesel Exhibit 19. This was the
8 report --

9 A. Correct.

10 Q. -- (continuing) that was the result of your
11 August 30th visit.

12 A. Correct.

13 Q. And, again, can you tell me what this is on
14 page 196?

15 JUDGE MORAN: What was that page again,
16 Counsel?

17 MR. NORTHRUP: 196.

18 THE WITNESS: That was just a report
19 documenting the observations that I had over the
20 several visits that I made at the site.

21 MR. NORTHRUP: Okay.

22 BY MR. NORTHRUP:

23 Q. Can you turn to page 201, 202 and 203?

24 A. I'm there.

1 Q. Can you tell me what those are?

2 A. Those are photographs of the Hesper "L", and
3 also upstream and downstream conditions.

4 MR. NORTHRUP: Your Honor, if I could go off
5 the record for just a minute.

6 JUDGE MORAN: Yes.

7 (WHEREUPON, there was then had
8 an off-the-record discussion.)

9 JUDGE MORAN: Just explain on the record what
10 you just did Mr. Northrup, please.

11 MR. NORTHRUP: Let the record reflect that I
12 just handed color copies of the photographs that
13 appear in Hesper Exhibit 19, pages 201, 202, and 203.

14 I just handed color copies to the
15 Judge, Mr. Lendy, and two copies to the Government.

16 And I would ask that they be
17 substituted for the black and white ones.

18 JUDGE MORAN: Any objection?

19 MS. PELLEGRIN: No, your Honor.

20 JUDGE MORAN: And later on I've indicated off
21 the record that someone will put hole punches in
22 these.

23 And I will remove the black and white
24 photos at 201, 202 and 203 and substitute the color

1 photographs that were just handed up.

2 BY MR. NORTHRUP:

3 Q. All right, Mr. Hesel, can you look at page
4 201?

5 A. Yes.

6 Q. And there are two photographs there?

7 A. Yes.

8 Q. Look at the top photograph for me, can you
9 tell me what that is?

10 A. That's a photograph when I was standing at
11 the southeast corner of the "L" which would be where
12 the two portions of the "L" meet. And looking north,
13 I took a picture of that area.

14 Q. Okay, so you took this photograph?

15 A. That's correct.

16 Q. And on what date did you take this
17 photograph?

18 A. That was August 10, 2006.

19 Q. And does it accurately -- truly and
20 accurately reflect the conditions at the site at that
21 time?

22 A. Yes.

23 Q. Can you just describe for me what we're
24 looking at?

1 A. Basically, it's the vegetation within the
2 channel. And also you can kind of get a pretty good
3 idea what the slope is within the channel.

4 Q. The trees on the right, do those appear to
5 be mature trees. Do you know what kind they are?

6 A. No, I do not.

7 Q. Can you see the berm that we've talked
8 about on the "L"?

9 A. Yes.

10 Q. Where would that be?

11 A. Well, going from the right side of the
12 photograph about two-thirds over or one-third over
13 from the left side of the photograph.

14 Q. Okay, so the berm is on the left side?

15 A. That's correct.

16 Q. Which would be the west side?

17 A. Correct.

18 Q. Why don't you take a look at the photo --
19 the second photo on that page, can you tell me what
20 that is?

21 A. That's basically the vegetation that's in
22 the southeast corner of the "L".

23 Q. Can you identify that vegetation at all?

24 A. The only thing I can identify for sure is

1 cattail.

2 Q. And again, this was a picture that you
3 took?

4 A. Correct.

5 Q. Does it truly and accurately reflect how
6 the site looked on that day?

7 A. Yes.

8 Q. Can you turn to page 202.

9 A. I'm there.

10 Q. Okay, can you look at the top photograph?

11 A. Yes.

12 Q. What is that picture?

13 A. That's basically an isolated wet spot that
14 I mentioned earlier that's at the northern part of
15 the "L".

16 Q. Now, is it really that green, the water?

17 A. No. I don't know why it came out that way.

18 Q. What was the color of the water, if you
19 recall?

20 A. It was clear for the most part, just a
21 little bit dirty.

22 Q. Did you observe any aquatic life in the
23 pool?

24 A. No, I did not.

1 Q. I can't remember which witness testified
2 about it but they mentioned remnant pools.

3 Do you know what a remnant pool is?

4 A. Yes.

5 Q. Would this be a remnant pool?

6 A. I guess you could consider it a remnant
7 pool, yes.

8 Q. Okay, what is a remnant?

9 A. Well, after a flow has gone through a
10 channel or whatever, the flow is no longer there.

11 In certain isolated areas you may have
12 a pool and it may stay there for a while and it may
13 dry up, too.

14 Q. Now, did you observe some concrete slabs at
15 the site?

16 A. Yes.

17 Q. And is one of the areas where those slabs
18 were at the top of the "L", the northern portion of
19 the "L"?

20 A. Yes.

21 Q. Is that where you're standing approximately
22 when you're taking this photograph?

23 A. Approximately.

24 Q. So, when you look forward through the

1 picture, what are you looking at?

2 A. It would be the Bill Hesel property.

3 Q. And if you were to turn to your right and
4 look down, what would you be looking at?

5 JUDGE MORAN: Which photo are we looking at
6 now?

7 MR. NORTHRUP: The top one.

8 JUDGE MORAN: On 202?

9 MR. NORTHRUP: Correct.

10 THE WITNESS: I believe that's Bill Hesel's
11 channel.

12 To the right?

13 MR. NORTHRUP: To the right, yes.

14 No, let me strike that. It's an
15 in-artfully asked question.

16 BY MR. NORTHRUP:

17 Q. From where you're taking the top photo, if
18 you turn right and take a picture you're essentially
19 looking as the what's on the bottom photo; is that
20 correct?

21 A. That is not correct.

22 Q. Okay. What is the bottom photo?

23 A. The bottom photo is the bottom leg of the
24 "L", and I'm at the southeast corner of the "L"

1 looking to the west.

2 Q. To the west?

3 JUDGE MORAN: And it's 3:55, Counsel.

4 MR. NORTHRUP: We can stop here, your Honor.

5 JUDGE MORAN: Let me just ask a real quick
6 question.

7 You took these photographs, correct?

8 THE WITNESS: Yes.

9 JUDGE MORAN: Are you the one who took all six
10 photographs we're looking at here?

11 THE WITNESS: Yes.

12 JUDGE MORAN: Okay. And I take it you wrote
13 the description under each photograph as well?

14 THE WITNESS: Correct.

15 JUDGE MORAN: Okay. That's all I have to ask.

16 We will pick up tomorrow morning at
17 9 A.M. sharp, and let's go off the record.

18 (WHEREUPON, the hearing in this
19 matter is continued to Tuesday,
20 May 8, 2007 at 9:00 A.M. in
21 Carlyle, Illinois.

22

23

24