

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

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

Hearing held, pursuant to notice, on Wednesday,
March 28, 2007 at the hour of 9:00 a.m. at Clinton
County Courthouse, 850 Fairfax, Carlyle, Illinois,
before THE HONORABLE WILLIAM B. MORAN, United States
Administrative Law Judge.

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A P P E A R A N C E S

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I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
GARY WARD LENZ				
By Mr. Martin			78/95	
By Mr. Northrup		12		93/97
By Mr. Small		50		93
By Judge Moran		85		
GREGORY CARLSON				
By Ms. Pellegrin	99		141	
By Mr. Small		134		
DANIEL HESER				
By Ms. Pellegrin	142			

EXHIBITS

COMPLAINANT'S	MARKED	ADMITTED
8C		212
12 (Bates 182-189)		118
14		109
C (Demonstrative exhibit)		127
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1 JUDGE MORAN: Good morning. We're
2 here today on March 28th.

3 Before we begin the proceeding,
4 continue the proceeding, I have a statement to make
5 about the case.

6 Last night, I had faxed to me the two
7 decisions that Mr. Bradley Small, co-counsel in this
8 case with respondent, alluded to, and I want to make
9 a statement about those two cases.

10 The two cases are, first, I'm
11 truncating the description, 3M Company v EPA, and
12 that is at 17 F.3d, 1453, decided March 4, 1994, and
13 the second decision is United States versus the
14 Telluride Company, and the citation for that is 884
15 F. Supp. 404 decided May 2, 1995.

16 Now, the first observation I want to
17 make about those two cases is in having very
18 quickly, I mean, less than a minute, looked over my
19 order on the motion to dismiss for lack of
20 jurisdiction which I issued before this proceeding
21 began some weeks or months ago, I forget when, but
22 the parties know what I'm referring to, I don't
23 believe having skimmed that rapidly that there was
24 any reference to these decisions, and that the focus

1 of that motion was interpretations of Rapanos, and
2 then I even had some other possible interpretation
3 as to what the essence of the respondents' motion
4 was.

5 In any event, the result was that I
6 denied the motion as you'll recall.

7 These are my comments about the two
8 decisions that Mr. Small has referred to.

9 First of all, I've long been aware
10 of, except the citation wasn't enough to jog my
11 memory, of the 3M case, and to my mind, there's no
12 real dispute about the applicability of the
13 five-year statute of limitations which I think is 28
14 U.S.C. 2462, I think that's the correction citation,
15 and the five-year statute of limitations, I believe
16 that to be a well-established rule for various EPA
17 environmental statutes including the Clean Water
18 Act.

19 The Telluride Company case, the F.
20 Supp. case which is by the United States District
21 Court for the District of Colorado, it is more
22 directly addressing though the question that I
23 alluded to.

24 I told the parties at the outset of

1 this proceeding when the hearing began that it was
2 my preliminary view that the statute of limitations
3 argument did not apply because this was a continuing
4 violation, but having read the Telluride Company
5 decision, I would want to make the following
6 comments about that case. I am making the following
7 comments about that case.

8 The first point I want to make, and
9 this is for the benefit of EPA in particular, I do
10 not consider the respondents' argument about the
11 statute of limitations to be a frivolous argument.
12 It is something that I will have to study more.

13 I will benefit, although I do my own
14 research in addition to what the parties submit, but
15 I expect the parties to fully brief this issue.
16 This is one Federal District Court opinion on the
17 subject, but it's pretty clear from that opinion
18 and, more importantly, the reasoning that underlies
19 it that I cannot be dismissive of the respondents'
20 argument about when a Clean Water Act violation,
21 this was a wetlands case, the Telluride case, you
22 know, when it begins, and it would be unwise for EPA
23 to be dismissive of the reasoning that Judge Kane
24 puts forward in that decision.

1 Now, I don't want anyone to start
2 going too far with this because it doesn't mean that
3 upon fuller research that I might not disagree with
4 the conclusions reached by Judge Kane, and, of
5 course, the only thing that would apply would be the
6 reasoning.

7 There's no precedential effect that
8 requires me to follow Judge Kane's reasoning here in
9 Illinois or even I believe maybe in that district.
10 I'm not sure how that operates.

11 The thing I'm clear about is if we
12 were in the district of a court of appeals decision
13 and if Illinois, this part of Illinois were covered
14 by whatever court of appeals applies to Illinois,
15 and I don't have my chart in front of me, then I'd
16 have to respect that, and EPA would have to respect
17 that.

18 So really, the importance of that
19 Telluride decision is the underlying reason. That's
20 what counts.

21 A few other comments. Like
22 Mr. Small, I've marked up my copy a little bit, but
23 I just want to note a few comments by the court.
24 That they say that on, it looks like it's on page

1 407, the court says, "The fact that a continuing
2 impact exists from Telco's past violations does not
3 render the violation continuing."

4 However, later on they also
5 acknowledge that it's undisputed the damage caused
6 by filling wetlands continues long after the actual
7 discharge, and I'm going actually out of order from
8 the way the court presents its arguments, its
9 rationale I should say.

10 In quoting another decision, Judge
11 Kane says that the critical question is whether any
12 present violation occurs.

13 Anyway, the upshot, the bottom line
14 for Judge Kane at least was in this wetlands case
15 that the five-year statute begins to run at the time
16 of the discharge.

17 Again, I'm not making any ruling on
18 that issue today, but I do think it's important for
19 EPA if they have such evidence, you know, as they
20 alluded to in Mr. Martin's opening statement -- it
21 could be important let's say -- about the allegation
22 that Lake Centralia, that there was an assertion in
23 the opening statement that somehow -- it had to be
24 by implication if not expressly -- this activity

1 that the Hesers engaged in has resulted in present
2 pollutional impact on Lake Centralia. I mean,
3 that's a difficult thing to show with all of the
4 potential sources.

5 I suspect that EPA, although I don't
6 know, I suspect the EPA does not have direct
7 evidence to show that discharges from this activity
8 resulted in a measurable increase and ending up in
9 lake Centralia. I don't know that it would have to
10 end up in Lake Centralia, but I don't know that they
11 have scientific evidence of a continuing violation.
12 That's yet to unfold. It hasn't been presented yet,
13 I can state that for certain.

14 MR. MARTIN: If I may, Your Honor.

15 JUDGE MORAN: No, you may not yet;
16 when I'm done.

17 So that is to alert the parties that
18 I did look this over. I don't consider it to be a
19 frivolous argument at all and one which I'll have to
20 resolve.

21 Okay. Now, Mr. Martin, you can make
22 your statement.

23 MR. MARTIN: Yes. I'm sorry.

24 In terms of significant impacts on

1 Lake Centralia, EPA is here to present evidence on
2 that and to address Rapanos issues.

3 In terms of any continuing impact
4 under the five-year statute of limitations, I would
5 expect that we could present evidence of impacts
6 around violations, not necessarily in Lake Centralia
7 which is more of a jurisdictional test.

8 JUDGE MORAN: Okay. And that's fine,
9 but that may not carry the day. I haven't resolved
10 this question. I mean, I might at the end of the
11 day agree with Judge Kane's reasoning and say the
12 critical point in time is when the forbidden
13 activity, the unpermitted filling of wetlands
14 occurred, and then all I have to do is the very
15 simple determination of moving that five years from
16 that point in time; then comparing that with when
17 the complaint was filed, and we know what the result
18 of that would be.

19 I'm not saying I'm going to do that,
20 and I'm also mindful of the fact that, and I'd have
21 to compare with this other environmental statutes,
22 but there's something to the effect, maybe it's in
23 the complaint, I think it is, about each day the
24 violation continues is considered to be a separate

1 violation it might say.

2 Anyway, that impacts the penalty, and
3 it could impact the outcome of how I rule and
4 whether other statutes have such a, whether other
5 environmental statutes have similar language. I
6 don't know.

7 Now, I gave Mr. Martin a chance to
8 say something. Do you have anything, Mr. Small or
9 Mr. Northrup, that you want to add at this time?

10 MR. NORTHRUP: I don't, Your Honor.
11 We'll see what the evidence is and make our
12 arguments afterwards.

13 JUDGE MORAN: Okay. All right. So
14 as promised, I read.

15 Okay. Now let's continue. Are you
16 ready, Mr. Martin, or we're continuing
17 cross-examination.

18 Okay. Mr. Lenz, you're back up here.

19 And as was the case yesterday,
20 Mr. Lenz, we don't swear you in again. You're still
21 under oath.

22 Mr. Northrup or Small?

23 MR. NORTHRUP: Good morning again,
24 Mr. Lenz.

1 GARY WARD LENZ
2 recalled as a witness herein, having been previously
3 sworn on his oath, was examined and testified as
4 follows:

5

6 CROSS-EXAMINATION

7 BY MR. NORTHRUP:

8 Q. Yesterday or in your earlier
9 testimony, you had talked about what types of
10 activities require a 404 permit.

11 Do you remember talking about that?

12 A. Yes, sir.

13 Q. Okay. If someone does something to a
14 stream that does not impair the flow or circulation
15 of that stream, does that still require a 404
16 permit?

17 A. The placement of fill material into
18 the waters of the United States is what triggers the
19 need for a permit, a 404 permit.

20 Q. So as far as you know, it doesn't
21 have anything to do with the impairment of the flow
22 or circulation of the water within the stream?

23 A. That has nothing to do with
24 jurisdiction. That's a permit review consideration,

1 not a jurisdictional.

2 Q. How does that come into play in a
3 permit review situation?

4 A. Well, we have to consider those
5 things when we're doing our permit review,
6 processing the permit, but as far as jurisdiction,
7 it does not.

8 Q. And what sort of weight do you give
9 those types of issues during a permit review?

10 A. That would be given considerable
11 weight.

12 Q. What do you mean by given
13 considerable weight?

14 A. Well, it could lead to a permit
15 denial.

16 Q. It could also lead to permit issuance
17 I presume?

18 A. Yes, sir.

19 Q. You indicated also earlier that the
20 Holton soil -- that was designated 3225?

21 A. Yes, sir.

22 Q. -- was not hydrant, but that
23 inclusions within Holton soil were hydrant, is that
24 correct.

1 A. Yes, sir.

2 Q. Now, those specific inclusions, and
3 the one I remember is the birds inclusion, those
4 aren't specifically identified on soil survey maps,
5 correct? There's no separate number for birds on
6 the maps?

7 A. No, sir, there's not on the maps.

8 Q. So the only way you'd find out if a
9 bird's soil is within the Holton soil is to go out
10 and sample it, correct?

11 A. Yes, sir; well, it's in the text.

12 Q. What do you mean it's in the text?

13 A. The soil survey manual itself.

14 Q. Okay. When you are in the field and
15 you are sampling say a Holton soil and you're coming
16 across these birds inclusions or any other
17 inclusion, how do you then identify the scope or
18 extent of the bird soil in the area?

19 Do you understand the question?

20 A. I'm not sure I do, sir.

21 Q. How do you know how far the bird soil
22 extends to?

23 A. You really don't. There's no way of
24 knowing really the extent unless you do a lot of

1 sampling.

2 Q. Okay. Because really, all you know
3 is the soil that you've sampled, that that's a bird
4 soil or any other inclusion, correct?

5 A. Yes, sir.

6 Q. When you were discussing your first
7 site visit to the Hesper site, you indicated or your
8 characterized them as being uncooperative. Do you
9 remember that?

10 A. Yes, sir.

11 Q. Okay. But at that time, they did not
12 impede your access to the site in any way, did they?

13 A. No, sir, they did not.

14 Q. You also said you were conducting
15 that first site visit to see if the Corps had
16 jurisdiction over the site for the waterway.

17 A. Yes, sir.

18 Q. And you referenced 33 CFR 328.

19 Now, whenever I hear the word
20 jurisdiction, that concerns me, so by that
21 testimony, you were not intending to be rendering an
22 opinion on whether or not the Hesper site falls under
23 the jurisdiction of the Clean Water Act as
24 interpreted by the U.S. Supreme Court, were you?

1 A. I was making a determination that it
2 was jurisdictional under the Clean Water Act.

3 Q. Okay. But you weren't considering
4 any particular U.S. Supreme Court precedent. You
5 weren't making a legal conclusion, were you?

6 MR. MARTIN: Your Honor, I object.
7 The question does call for a legal conclusion.

8 JUDGE MORAN: No. I overrule the
9 objection. He can say what he was basing it on.
10 That's a fine question to ask. It's an appropriate
11 question.

12 A. No, sir, I was not basing it on a
13 Supreme Court decision.

14 Q. Or any other court precedent?

15 A. No, I was using our jurisdictional
16 procedure.

17 Q. Okay. As set out in that CFR
18 section?

19 A. Yes, sir.

20 Q. Is there any guidance or policy
21 statements from the Corps on how to interpret that
22 CFR section?

23 A. There are a lot of regulatory
24 guidance letters. I can't point to any

1 specifically, no, but there is guidance on making
2 wetland determinations and stream determinations.
3 They're not things that we look at on a day-to-day
4 basis.

5 Q. Okay. Well, is there anything
6 specific that says this is what you look at to
7 determine jurisdiction?

8 A. If you look in that same 328
9 regulation, it speaks about the ordinary high water
10 mark in there.

11 Q. Okay. But is there anything other
12 than what's in that regulation? Is there anything
13 in a guidance or a policy statement?

14 A. Not really that I can recall.

15 Q. Let's see, we've talked about you'd
16 been to the site of that vicinity on three visits,
17 correct?

18 A. Yes, sir.

19 Q. On any of those visits, did you walk
20 along the channel upstream from the Heser property?

21 A. On the first site visit, I actually
22 took a couple data points upstream of the channel.

23 Q. Did you observe any fish in the
24 channel at the time?

1 A. No, sir, not upstream of the project.

2 Q. Are you aware of any permitted
3 projects upstream of that Heser channel?

4 A. No, sir.

5 Q. On any of your visits, did you
6 observe any upstream channel straightening or bank
7 modifications?

8 A. No, sir.

9 Q. Would you get your book out and look
10 at Bates number 112, no, 113.

11 A. Yes, sir.

12 Q. Okay. I just need it clarified. The
13 plants and trees and things like that that you've
14 identified, were these upstream and downstream of
15 the Heser channel?

16 A. On Bates 113?

17 Q. On 113.

18 A. These are species starting from the
19 upstream end of the channel on the left descending
20 bank on Bill Heser's property, starting from there
21 going downstream, yes.

22 Q. So going down south and then turning
23 east?

24 A. Yes.

1 Q. Okay. These trees, just looking at
2 the first one you've got, American elm, do you
3 recall how tall, well, not just the American elm,
4 any of these trees, do you remember how tall they
5 were?

6 A. These were mature trees, yes.

7 Q. Mature meaning anywhere from 20 to
8 50 feet tall?

9 A. I was looking at dominant trees, so I
10 was looking at pole size to bigger which pole size
11 would be probably greater than eight inches diameter
12 breast height.

13 Q. And how about height?

14 A. Height, they were the dominant over
15 story canopy such as you saw in some of those
16 photographs. I would guess maybe 60, 70 feet.

17 Q. And were there areas of trees
18 upstream and downstream of the Hesper channel?

19 A. Yes, sir.

20 Q. How would you characterize those
21 areas of trees?

22 A. I would consider this a mature woody
23 riparian corridor.

24 Q. Roughly similar to the things you've

1 got listed in 113?

2 A. Yes, sir.

3 Q. On any of your site visits, did you
4 observe any channels coming into the Hesper property
5 from adjacent properties?

6 A. No, sir.

7 Q. You also testified that one of the
8 purposes of your site visits, at least the first
9 one, was to see if the site could be restored.

10 Do you remember that?

11 A. Yes, sir.

12 Q. Does the Corps have the authority to
13 compel a property owner to restore his property?

14 A. Yes, sir.

15 Q. In what types of cases would you seek
16 restoration?

17 A. We would seek restoration if, well,
18 for one thing, if it was determined that the Corps
19 was the lead enforcement agency on a project, then
20 restoration would be one of the considerations that
21 we would look at.

22 The other thing that we would always
23 look at would be after the fact permit actions.

24 Q. What do you mean by that, after the

1 fact permit actions?

2 A. Well, if the Corps was the lead
3 enforcement agency, we'd look at the project and
4 look if this is something that we would have
5 permitted. Of course, that's always difficult
6 because you're looking after the fact at a
7 situation.

8 So you have to think about those
9 kinds of things, whether or not you'd process an
10 after the fact permit or require restoration of the
11 site.

12 Q. I assume then there are sites where
13 you don't seek restoration?

14 A. Yes, sir.

15 Q. Okay. And in what types of
16 circumstances do you not seek restoration?

17 A. Well, for instance, if somebody puts
18 in a driveway culvert, that would fall under a
19 nationwide permit. We would not deny somebody
20 access to their property. It would be minimal
21 impact, so there would be no thought of restoration.

22 Q. So when you're making this
23 restoration determination, you take into account the
24 level of impact the suspect activity has caused in

1 the area?

2 A. Yes, sir.

3 Q. You also testified that when you were
4 walking on the Hesper property, you observed --
5 strike that.

6 You'd previously testified about
7 roots, tree roots I believe, moderating stream flow
8 and collecting matter.

9 Do you remember that?

10 A. Yes, sir.

11 Q. Okay. Is that a good thing?

12 A. Yes, sir.

13 Q. And why is it a good thing?

14 A. This is because, and it sort of
15 dovetails a little bit into a question you asked
16 yesterday also on a bank steep. You're looking at a
17 meandering stream channel, a natural stream channel
18 which has meanders in its natural state meandering
19 through this wooded area.

20 You have mosaic habitats there within
21 that stream channel so you have vegetation growing
22 overhanging the channel, and within the channel, you
23 have tree roots from this vegetation that are poking
24 out of the banks in places, and this vegetation is

1 catching leaves and twigs and debris and creating
2 trash racks, and, you know, all this is habitat as
3 well.

4 And as a stream meanders, it scours
5 outside and in, and it deposits material on the
6 inside bends. You've got erosion occurring. You've
7 got deposition occurring, and then you've just got
8 this whole mosaic of activities and all this, and
9 the roots are all part of this mosaic.

10 It traps sediment. It traps leaves
11 and trash and debris, and you get habitat for
12 microorganisms which give you habitat for
13 invertebrates, and that's where you get the
14 breakdown of pollutants, and it just all works
15 together, so you can't just look at roots. You have
16 to look at the whole system.

17 Q. Okay. So the question I asked, at
18 least I thought I did, was you were talking about
19 how the roots moderate stream flow and whether that
20 was a good thing.

21 So is moderating stream flow a good
22 thing or a bad thing?

23 A. It's a good thing.

24 Q. Okay. And why?

1 A. For the reasons I said. It catches
2 material flowing through, and therefore, it catches
3 nutrients and debris, and you get biological
4 activity as a result.

5 I guess I don't understand the
6 question sir.

7 Q. Yeah, I guess my question with
8 respect to flow not so much deals with depositing
9 material but in terms of speed.

10 A. It would slow down flow. It would
11 reduce the velocity.

12 Q. And reduce the velocity, is that
13 better than greater velocity?

14 A. I'm not sure. It depends on the
15 stream. I would say for streams, if you have less
16 velocity, then you would have less erosion and
17 scour, but it depends on the streams, the gradient
18 of a stream, whether it's on bedrock or not and the
19 substrate. I mean, you have some types of stream
20 systems where you need velocity to aerate the water
21 as it goes over riffles.

22 Q. I assume there are other things in a
23 stream that moderate flow besides tree roots.

24 A. Yes, sir.

1 Q. Pretty much any vegetation will
2 moderate flow, correct?

3 A. Yes, sir.

4 Q. What about rocks?

5 A. Yes, sir.

6 Q. Rocks on banks of a stream, that
7 moderates flow?

8 A. Rocks on the bank can -- it depends
9 on how they're placed. Rocks on the bank can be a
10 good thing. Depending on how they're placed though,
11 they could actually increase velocity depending on
12 their surface.

13 If you have a rough surface, rocks,
14 riprap or slabs, sometimes people would stabilize
15 bank with rocks on one side and it increases erosion
16 on the other side, so it could be a good thing.

17 Q. Okay. Thank you.

18 All right. You talked a little bit
19 about erosion, and in general terms, erosion is
20 something to be avoided, is that correct?

21 A. Yes, sir.

22 Q. Do you have more erosion from a bare
23 channel than from a vegetated channel?

24 A. Yes, sir, generally you would.

1 Q. Is it also true that water will
2 travel at a greater velocity in a bare channel as
3 compared to a vegetated channel?

4 A. Given the same channel dimensions,
5 just because you would have less friction, yes.

6 Q. You also testified that the new Hesper
7 channel was functioning as a drainage ditch.

8 Do you remember that?

9 A. Yes, sir.

10 Q. Does a drainage ditch have a
11 particular term of art in your profession?

12 A. I suppose that was colorful language,
13 but my reasoning was it was a straight -- when I
14 think of a drainage ditch, I use that terminology
15 because it was a straight line linear channel.

16 Q. What's the purpose of a drainage
17 ditch?

18 A. Convey flow.

19 Q. From point A to point B?

20 A. Yes, sir.

21 Q. How else, if at all, does a drainage
22 ditch function?

23 A. It conveys flows. By virtue of
24 conveying flow, it probably reduces flooding. It

1 drains areas, and by virtue of the fact that the
2 flow is conveyed better than before, you end up
3 draining areas above it just because what water used
4 to go through there at a slower rate now goes
5 quicker, so areas dry up. Wetlands will dry up for
6 example.

7 Q. Have you ever heard the term grassed
8 waterway?

9 JUDGE MORAN: What is that, sir?

10 MR. NORTHRUP: Grassed waterway.

11 A. Yes, sir.

12 Q. Is that a term of art in your
13 profession?

14 A. It's not a term of art. It's a
15 technical term, sir.

16 Q. It has a specific meaning to your
17 profession?

18 A. Yes, sir.

19 Q. Okay. What is that meaning?

20 A. A grassed waterway is a constructed
21 grassed area that is put in the drainage normally in
22 like an agricultural area. It's constructed in
23 drainage ways to reduce erosion, to stop gully
24 erosion specifically.

1 Q. I'm sorry. To stop what kind of
2 erosion?

3 A. Gully erosion.

4 Q. What's gully erosion?

5 A. It's when you have a channel that
6 develops what we call a head cut, a drop-off in the
7 channel that eats its way backward into a field, and
8 you can't drive machinery or equipment over it
9 without breaking things, and you're losing soil at
10 the same time, and you would construct a grassed
11 waterway in that area as way of controlling that and
12 stabilizing that area.

13 It's just a grass strip within and
14 adjacent to that channel up into the field.

15 Q. Is there any -- can a grass waterway
16 be five feet or fifty feet? I mean, there's no
17 certain dimensions you have to have before something
18 is considered a grassed waterway, is there?

19 A. No, sir, there's not, unless it's a
20 cost shared practice with USDA or something.

21 Q. Well, what's that? What's a cost
22 share practice?

23 A. If USDA would provide funding for it,
24 then there is a specific size that shouldn't be

1 constructed because of the size of the watershed and
2 things.

3 Q. Could you consider the Hesper channel
4 a grassed waterway?

5 A. I would not consider that a grassed
6 waterway, sir.

7 Q. Okay. Why not?

8 A. Because it's a stream that has been
9 channelized or relocated.

10 A grassed waterway would be an
11 ephemeral channel in a field that only would convey
12 flow during storm events.

13 Q. What about the term conservation
14 buffer, is that a term of art in your profession?

15 A. It's a technical term.

16 Q. And what does that mean?

17 A. It would be a grassed strip adjacent
18 to a stream or adjacent to a wooded area but
19 generally adjacent to a stream or waterway.

20 Q. And what function does a conservation
21 buffer serve?

22 A. A conservation buffer, and it
23 confuses me a little bit because you also have grass
24 filter strips, and the terms are used

1 interchangeably, but it would just be a buffer from
2 a field to provide some filtering of nutrients,
3 fertilizer, sediments, things of that nature, from
4 entering a water course.

5 Q. What are the characteristics of a
6 conservation buffer, slope, vegetation, things like
7 that?

8 A. Well, generally, if it's installed as
9 a technical practice, there's a minimum width that's
10 recommended. For example, 15 feet wide might be the
11 minimum width to provide any benefit. I am not sure
12 of the exact width that would be required, but there
13 is a width that is recommended by USDA that must be
14 met to provide any benefit according to their
15 standards.

16 Then within that, they have
17 recommended species of grasses to plant, and this is
18 assuming it's going to be a grassed buffer strip and
19 not another type of buffer strip, seeding rate
20 recommendations, certain thickness.

21 Q. What about grade or slope, any
22 requirements with respect to that?

23 A. I'm not aware of any. There may be.
24 I'm not aware of any.

1 Q. Besides grass, are there other kinds
2 of filter strips? Other than vegetated. I
3 shouldn't say just grass.

4 A. Other than vegetated?

5 Q. It was a poorly asked question.

6 A few seconds ago, you talked about
7 conservation buffers are sometimes referred to as
8 grass filter strips, and you indicated I thought
9 that there were other types of filter strips besides
10 just grass.

11 Is that correct or did I not
12 understand you?

13 A. No. My reasoning was people would
14 confuse a grassed filter strip with a buffer strip,
15 and I believe those are two technically different
16 practices.

17 Q. Then what is a grassed filter strip
18 as opposed to the buffer?

19 A. That would be what I just described,
20 that would catch nutrient sediment, and it's
21 installed specifically for those purposes.

22 Q. Okay. Then what function does a
23 conservation buffer perform?

24 A. That would provide many of the same

1 benefits, but that is more loose in terms of
2 providing also habitat.

3 Q. Habitat in particular or anything in
4 specific?

5 When you use the term habitat, what
6 do you mean?

7 A. Depending on the buffer strip, the
8 conservation buffer that you would install, you may
9 want warm season grasses to provide a certain type
10 of habitat. You might want shrubs within there for
11 a different type of habitat. It depends. It
12 varies.

13 Q. Mr. Lenz, were you done with your
14 answer?

15 A. Yes, sir.

16 Q. When you were at the site on your
17 first visit, you took some measurements of the Hesper
18 channel, is that correct?

19 A. Yes, sir.

20 Q. Did you, in terms of width, did you
21 measure from property line to what point?

22 The question is, did you include in
23 your measurement of width the berm that was
24 constructed there?

1 A. When I did cross-section top width?

2 Q. Yes.

3 A. My measurements had no regard to
4 property lines or any other features than what I
5 consider to be top of bank.

6 Q. Okay. And what did you consider the
7 top of the bank? Did you include the berm in that?

8 A. In the newly constructed channel?

9 Q. Yes.

10 A. No, sir, not the entire berm. I had
11 to estimate what part of that berm that I considered
12 to be that top point. The berm would extend beyond
13 that just because of the need to slope it.

14 JUDGE MORAN: Just because of the
15 what did you say? The berm would extend beyond that
16 just because of the what?

17 THE WITNESS: It would have a front
18 slope and a back slope, so I would not include the
19 entire berm, just the part that was adjacent to the
20 channel to the point maybe where you could just
21 spill over the top, and then the rest of that would
22 not be considered.

23 Q. BY MR. NORTHRUP: Can you turn to
24 Bates number 147 and 148?

1 A. Yes, sir.

2 Q. Now, the first thing, my pictures are
3 not that clear.

4 Was there snow on the ground when you
5 were there on this date, do you recall?

6 A. No, sir.

7 Q. Had it snowed recently?

8 A. Not that I'm aware of.

9 Q. In 147 and 148, I believe those
10 pictures are of a ponded area at the north end of
11 the channel, is that correct?

12 A. Yes, sir.

13 Q. How big is that ponded area in terms
14 of square feet, if you can tell?

15 A. I would estimate that at perhaps a 10
16 by 10 foot area.

17 Q. And do you know how deep it was?

18 A. No, sir.

19 Q. I believe in your testimony you also
20 indicated that the berm was backing up water at that
21 location. Do you remember that?

22 A. I remember discussing that. I don't
23 know if I stated for sure that it did, but I think
24 what I said was that it appeared that it was at that

1 point, yes.

2 Q. Okay. But as you looked at these
3 pictures, particularly Bates number 149, you can see
4 flow going down the channel, correct?

5 A. Yes, sir.

6 Q. So apparently, the berm is not acting
7 to back up any of that water, isn't that correct?

8 A. Not at the flow rate that you see in
9 the channel, that's correct.

10 Q. Do you know how high that berm is
11 from the bottom of the channel? Did you take any
12 measurements on that.

13 A. I believe I did, sir.

14 Q. Are they in your exhibits?

15 A. Yes, sir.

16 Q. Could you locate that for me, please,
17 if you can?

18 A. On Bates number 112.

19 Q. Okay. And where is the height
20 reflected?

21 A. In that bottom section under new
22 channel where I have two measurement points there, I
23 have stadia rod readings where I provide depth.

24 Q. And on the point No. 1, it's 1. --

1 well, what is the depth there?

2 A. That's the rod reading.

3 Q. So what is it? What's the number?

4 A. 1.3 feet is what I read on the stadia
5 rod.

6 Q. Why don't you go back to photograph
7 No. 149.

8 Are you at that page?

9 A. Yes, sir.

10 Q. When you look down the channel -- and
11 you're looking south, correct?

12 A. Yes, sir.

13 Q. Maybe this is just the photograph,
14 the quality of the photograph, but it looks like
15 there is a point where there is no standing water.

16 Now, does that match up with what you
17 observed when you were there?

18 A. I do not see a point that doesn't
19 have water in it.

20 Q. Is it your recollection when you were
21 there, there was water in the stream the entire
22 length of the channel?

23 A. Yes, sir.

24 Q. Okay. And turn to photograph Bates

1 number 151?

2 A. Yes, sir.

3 Q. And here again, it looks like there
4 are portions -- well, this is inside the Hesper
5 channel, correct?

6 A. Yes, sir.

7 Q. And you were looking west?

8 A. Yes, sir.

9 Q. And the concrete, that is where the
10 channel turns and leaves the Hesper property,
11 correct?

12 A. Yes, sir.

13 Q. And when it turns and I leaves the
14 property, it's going south?

15 A. Yes, sir.

16 Q. Generally.

17 Okay. Now, in that photograph, to me
18 again it looks like there are areas of water, but it
19 also looks like there are areas where there is no
20 standing water.

21 Do you agree with that?

22 A. See, in this -- no, sir. In this
23 area here, you have to remember that this channel
24 has also been seeded, grassed, vegetated. It's very

1 difficult in this picture to see the flow through
2 the vegetation.

3 Q. Describe in a little bit more detail
4 what the vegetation was like at this point.

5 A. I believe there was a lot of grass in
6 the channel. They had seeded the grassed waterway
7 or whatever you want to call it now with grass.

8 Q. Do you know what particular seed they
9 used or what they planted it with?

10 A. No, sir.

11 Q. Now, I've got a few questions about
12 your data forms which begin, just general questions,
13 which begin at Bates number 114.

14 A. Yes, sir.

15 Q. On this front page under the box,
16 there's a big box marked vegetation. Do you see
17 that?

18 A. Yes, sir.

19 Q. And within that, there's remarks?

20 A. Yes, sir.

21 Q. And you've got or it is written, site
22 disturbed, no vegetation?

23 A. Yes, sir.

24 Q. And that essentially is carried on

1 throughout all of your data forms, correct?

2 A. Yes, sir.

3 Q. Okay. I just want to make it clear
4 that what you are describing are really two distinct
5 things. You are not saying because the site is
6 disturbed, there is no vegetation, or is that what
7 you are intending to convey?

8 A. No, sir. I'm intending to convey
9 that there was no natural vegetation. I believe
10 there may have been, well, at that time, there
11 wouldn't have been any vegetation anyway, but during
12 the growing season, there's probably wheat, beans.

13 Q. All right. So this was the middle of
14 February so you wouldn't normally expect to see
15 vegetation there, correct?

16 A. Yes, sir. I would expect to see
17 probably row crops.

18 Q. On the issue of disturbance, the only
19 evidence of any disturbance that appears on your
20 data forms is where you indicate there has been some
21 mixing, is that correct?

22 A. Yes, sir, other than my notes on the
23 vegetation section.

24 Q. Okay. And to be fair, you do have a

1 couple notes where you identified charcoal as well?

2 A. Yes, sir.

3 Q. Would that be an indication of some
4 disturbance?

5 A. Yes, sir.

6 Q. Now, isn't it also true that if you,
7 in fact, are sampling disturbed soils, that can't
8 tell you anything about what the conditions of the
9 soils were pre-disturbance?

10 A. No, sir, I would not agree with that.

11 Q. Okay. Why is that an incorrect
12 statement?

13 A. You still may have intact soil
14 horizons, so you would be able to make some
15 determination on what was there previously.

16 Q. Okay. And that would be based on
17 soil horizons?

18 A. Yes, sir.

19 Q. So on your data forms, and you've got
20 that identified, the various soil horizons.

21 A. Yes, sir.

22 Q. So you would be able to identify --
23 why don't you just turn to 115 just as an example.
24 You might be able to identify disturbance if there

1 were different matrix colors at the different
2 sampling levels, is that correct?

3 A. Yes, sir.

4 Q. Okay. Conversely, if you have a
5 matrix color or the model color, if those are all
6 the same and you've got your little carat symbols,
7 that shows that that is one -- it's the same
8 horizon, soil horizon as you go down in depths,
9 correct?

10 A. No, sir. It would actually mean that
11 those specific features are carried on through. You
12 may have a different horizon, but those particular
13 features, yes.

14 Q. I understand.

15 On the few data forms where you
16 identify charcoal, what was the size of the sample
17 that you were actually looking at to identify the
18 charcoal?

19 A. The size of the sample would be -- I
20 was using a hand soil probe which takes a sample
21 perhaps a diameter of an inch.

22 Q. And you have no personal knowledge of
23 any burning on the site, correct?

24 A. Only through the photographs that I

1 received with the complaint.

2 Q. Again, you have no personal knowledge
3 of any burning at the site?

4 A. That's true.

5 Q. This charcoal that you identify, high
6 school kids could have been having a bonfire out
7 there, correct?

8 A. Yes, sir.

9 Q. Why don't you turn to Bates number
10 152 and 153.

11 A. Okay.

12 Q. Again, where did you get these aerial
13 photos?

14 A. These are from the USDA Natural
15 Resources Conservation Service Office.

16 Q. And these are actually the same
17 photos, aren't they?

18 A. Yes, sir.

19 Q. They both bear the, well, 152, up in
20 the left hand corner it says, not to scale, 1998,
21 K7-1.

22 A. Yes, sir.

23 Q. And that identification is the same
24 on 153.

1 A. Yes, sir.

2 Q. Now, do you have any knowledge of
3 when this actual aerial photo was taken?

4 A. Only that it was taken in 1998.

5 Q. Okay. How do you know it was taken
6 in 1998?

7 A. From the date stamp.

8 Q. What about that date tells you that
9 this photo was taken in 1998?

10 A. My understanding with the USDA photos
11 is that the date they were taken is stamped on the
12 photos.

13 Q. You have no personal knowledge of
14 when this aerial photo was taken, correct?

15 A. No, sir.

16 Q. Do you see on that photo, well, on
17 Page 152 where you have written new channel, and
18 you've marked that out in red?

19 A. Yes, sir.

20 Q. And you also have old channel which
21 is sort of in blue and pink?

22 A. Yes, sir.

23 Q. On that photo at that location, there
24 are -- I don't know how to describe these. There

1 are certain, it looks like different colored rows on
2 the ground.

3 A. I'm not sure I understand.

4 MR. NORTHRUP: Can I approach, Your
5 Honor?

6 JUDGE MORAN: Yes. I'm not sure what
7 you're referring to either.

8 You're talking about markings. Could
9 you make it clear in your question whether you're
10 talking about markings added by Mr. Lenz or markings
11 which are apparently in the photo itself before the
12 markings were added?

13 MR. NORTHRUP: Right. I'm talking
14 about markings that are on the photo, not notations
15 made by Mr. Lenz.

16 JUDGE MORAN: Which page are you
17 having him look at?

18 MR. NORTHRUP: 152.

19 Do you see those lines where I'm
20 pointing?

21 THE WITNESS: Yes, sir.

22 Q. Sort of right underneath your
23 comments of old channel and new channel?

24 A. Yes, sir.

1 Q. How would you describe -- what are
2 those lines? What do they represent?

3 A. Those are constructed terraces.

4 Q. Constructed terraces. Okay.

5 JUDGE MORAN: And just I can
6 understand on the record since I didn't see exactly
7 where counsel was pointing to, are you talking, are
8 you referring, Mr. Northrup, to the horizontal lines
9 which there appear two groups of them, and they are
10 directly above the word "old" with a space dividing
11 them. There seems to be a clear space. Is that
12 what you're referring to?

13 MR. NORTHRUP: No, I'm not. I am
14 talking about these lines on the surface of the
15 earth, different colors.

16 JUDGE MORAN: I see. In other words,
17 it's below the words "old channel," and they are
18 large lines which are partly within where it says
19 HEL/NN/something else. That's what you're talking
20 about, those lines?

21 MR. NORTHRUP: Yes, sir.

22 JUDGE MORAN: And they alternate in
23 color between the dark and then the light, dark,
24 light, right?

1 MR. NORTHRUP: Yes, sir.

2 JUDGE MORAN: That's what you were
3 referring to, Mr. Lenz, when you answered that
4 question?

5 THE WITNESS: Yes, when I realized
6 what he was talking about, sir, yes.

7 JUDGE MORAN: Okay.

8 Q. BY MR. NORTHRUP: And you call those
9 terraces?

10 A. Yes, sir.

11 Q. All right. Now, take a look at what
12 has been marked as EPA Exhibit 14 which is Bates
13 number 191.

14 JUDGE MORAN: And which is not
15 admitted.

16 MR. NORTHRUP: Correct.

17 MR. MARTIN: I'm sorry, Mr. Northrup.
18 Which page number was that?

19 MR. NORTHRUP: 191 and 192.

20 THE WITNESS: Yes, sir.

21 Q. Now, Mr. Lenz, there's an aerial
22 photograph that accompanies Exhibit 14, correct?

23 A. Yes, sir.

24 Q. Okay. And the aerial photograph

1 appears on page 192?

2 A. Yes, sir.

3 Q. Now, the aerial photograph also
4 contains those same crop lines, correct?

5 A. Yes, sir.

6 Q. Okay. And would you look, can you
7 compare for me the aerial photo at 192 and 152 and
8 tell me if those look, if those appear to be the
9 same aerial photo?

10 A. Yes, sir.

11 Q. Okay. And the date, the purported
12 date of Bates number 192 which is reflected on Bates
13 191 is March 28, 1993, correct?

14 A. Yes, sir.

15 Q. You also indicated during your
16 testimony that when you were walking on the Hesper
17 site, not in the channel I believe but up on the
18 ground, you saw various roots in the soil?

19 I believe the context was you thought
20 those were roots, evidence of prior trees and woods,
21 things like that.

22 A. When I was discussing in the field?

23 Q. Correct.

24 A. Yes, sir, yes, sir.

1 Q. And you recall that testimony?

2 A. Yes, sir.

3 Q. Okay. Where did you see those roots?

4 A. This was out in the area where I was
5 conducting my transects.

6 Q. Where specifically? How big of an
7 area did you see these roots?

8 A. It would be throughout the area where
9 I conducted those three transects, so from the new
10 channel a couple hundred feet out. I'm not sure
11 acreage-wise.

12 Q. Okay. So you're telling me there
13 wasn't a distinct, you know, one area that you say
14 or two areas or three areas? They were throughout
15 the field?

16 A. It was scattered, sir?

17 Q. How many areas of these scattered
18 roots do you think you observed, do you recall
19 observing?

20 A. I couldn't really give it an area
21 because they were distributed over the site. There
22 weren't lots; just enough for me to identify the
23 disturbed area.

24 Q. How do you know they were tree roots?

1 A. Just because they were woody. If
2 they were herbaceous, they wouldn't be there.

3 Q. Were these on the surface? Were they
4 underground?

5 A. On the surface.

6 Q. Do you recall the diameter of any of
7 them, diameter or length?

8 A. No, sir. They would not have had any
9 great length.

10 Q. With respect to your transect No. 3,
11 that was the southernmost transect, is that correct?

12 A. Yes.

13 Q. How far north of the Hesper channel
14 was that transect?

15 A. I'm not sure, sir. It was north of
16 that east-west leg of the channel.

17 All three transects, I tried to make
18 them an equal distance apart with transect 2
19 directly in the center, so I'm not sure. I tried to
20 get an equal distance throughout that north-south
21 channel however.

22 Q. Okay. You can't tell me as you sit
23 there today how far north of that east-west channel?

24 A. No, sir.

1 Q. Did you take any of your samples
2 within the Hesper channel?

3 A. No, sir.

4 JUDGE MORAN: Let's go off the record
5 a second.

6 (Off the record.)

7 JUDGE MORAN: Now we'll go back on
8 the record.

9 MS. PELLEGRIN: Could we take a
10 couple minutes?

11 JUDGE MORAN: Let's make it a
12 ten-minute break.

13 (Recess taken.)

14 MR. NORTHRUP: Mr. Small has some
15 questions.

16 MR. SMALL: If it may please the
17 Court, Mr. Lenz, a few follow-up questions.

18 CROSS-EXAMINATION

19 BY MR. SMALL:

20 Q. I'd like you to refer to the
21 Plaintiff's Exhibit 8, No. CX 146, please.

22 A. Yes, sir.

23 Q. Now, I believe your prior testimony
24 was that this was a picture of the property or ditch

1 or creek that runs upstream from the Bobby and Andy
2 Hesel property, is that correct?

3 A. Yes, sir.

4 Q. And it would be upstream from the L
5 that was constructed, correct?

6 A. Yes, sir.

7 Q. Looking at that photograph, and
8 again, I've got a photograph that is a little
9 blurry, when you look to the bottom left hand corner
10 of that photograph, it looks to me as if that's
11 snow.

12 Do you recall that?

13 A. No, sir.

14 Q. So you can't tell me whether or not
15 that was snow at the time this photograph was taken?

16 A. Sir, I actually have a better
17 photograph than you do.

18 JUDGE MORAN: It's much better than
19 what I have. Why don't we just stop and allow
20 counsel for respondent to come up and look at that.
21 Mine is like Counsel Small's.

22 MR. MARTIN: Your Honor, if I may,
23 the government would like to object to this tag
24 teaming of cross-examination of our witness. It's

1 our understanding that only one counsel may
2 cross-examine the witness and not two.

3 JUDGE MORAN: Okay. And I overruled
4 that because it's not that Mr. Small -- if Mr. Small
5 were going over the same ground, no pun intended,
6 that Mr. Northrup was going over, then I would agree
7 with you. I'm not going to hear it twice.

8 So it's not tag team in that sense,
9 to use your amateur wrestling. They don't have tag
10 team in real wrestling, do they? Tag team,
11 actually, that's not real wrestling.

12 So I'm going to allow him to take a
13 look at that.

14 And we'll go off the record for a
15 second.

16 (Discussion held off the record.)

17 JUDGE MORAN: During a break,
18 Mr. Small came up and looked at a better photograph
19 than the respondents have and that I have.

20 And, Mr. Small, when you looked at
21 that photograph that Mr. Lenz had, that dispelled
22 your concerns about whether there was snow, right?

23 MR. SMALL: Yes, Your Honor. What
24 appears to be snow in my photograph looks like weeds

1 in the witness's photograph, so that does clarify
2 the matter.

3 Q. This was the middle of November of
4 2000 when you took this picture, is that right?

5 A. No, sir. This was in February.

6 Q. February of 2000?

7 A. Yes, sir.

8 Q. And this was the same time when you
9 took the probes of the soil, is that correct?

10 A. Yes, sir.

11 Q. Do you remember if the soil was moist
12 or contained water when you did these probes?

13 A. The soil was moist, but there was no
14 free water.

15 Q. All right. So it's possible there
16 could have been some precipitation that had seeped
17 down into the ground, is that correct?

18 A. At this time of the year, the soil is
19 going to be moist in February.

20 Q. Okay. And in this photograph 146, is
21 this the location which is upstream that contained
22 three inches deep of water in that pool?

23 A. Which page, sir?

24 Q. Page 146. Is that the location where

1 the measurement for the three-inch depth was taken
2 upstream?

3 A. No, sir, not necessarily. The photo
4 does not necessarily indicate where I took my cross
5 sections, but it would be near there.

6 Q. Near there. Okay.

7 I want you to refer to Exhibit 8
8 again and look at pages 147 and 148.

9 A. Yes, sir.

10 Q. And are these pictures, do these
11 pictures depict one area of water?

12 A. Yes, sir. The photo was taken very
13 close together, these two photos.

14 Q. All right. So you're taking a photo
15 of that pool of water one direction and then taking
16 a photo another direction, correct?

17 A. Yes, sir.

18 Q. I want to refer you to Exhibit 8,
19 page 149, if you'd refer to it.

20 A. Yes, sir.

21 Q. Okay. Now looking at that photo, and
22 it's approximately in the middle of that photo,
23 there appears to be a pool of water.

24 A. Yes, sir.

1 Q. And is that the pool of water that's
2 depicted on Exhibits 147 and 148?

3 A. Yes, sir.

4 Q. And that is the location, is it not,
5 where the upstream creek flows into the Bobby and
6 Andy Hesper property, correct?

7 A. Yes, sir.

8 Q. And I think you indicated previously
9 in your testimony that there was a lot of energy
10 that came down from that upstream location to the
11 connection with the Hesper property, is that correct?

12 A. Yes, sir.

13 Q. And again, referring to Exhibit 149,
14 if you know, the property that is located, or strike
15 that.

16 Do you know if Bobby and Andy Hesper
17 owned any property to the, and looking at that
18 photograph, it would be to the left of that ditch?

19 A. I believe they own property upstream
20 of that point north of the channel.

21 Q. My question is directly to the left
22 of that ditch which you see flowing on Page 149, do
23 you know or do you not know whether or not Bobby and
24 Andy Hesper were the owners of that property to the

1 left of that ditch?

2 A. No.

3 JUDGE MORAN: Your answer is no, sir,
4 you do not know?

5 THE WITNESS: No, sir.

6 JUDGE MORAN: You have to say it
7 louder.

8 THE WITNESS: No, sir.

9 JUDGE MORAN: I want to make sure,
10 counsel, you know, the direction left. You're
11 talking about the side of the -- when you say the
12 left side of 149, you mean the treed side?

13 MR. SMALL: The treed side of 149.

14 JUDGE MORAN: And your answer is
15 about the treed side, about who owns that lands?

16 THE WITNESS: On which -- north-south
17 of the channel.

18 Q. BY MR. SMALL: Looking at the
19 photograph, 149, when you look to the treed side of
20 that ditch which, looking at the photograph, it
21 would be on the left-hand side of that photograph,
22 do you know who owns those trees?

23 A. In that treed area?

24 Q. Yes.

1 A. Yes, sir. My understanding is Bill
2 Heser does.

3 Q. And how do you know that?

4 A. Just from the information that we've
5 collected.

6 Q. You don't know that personally, do
7 you?

8 A. What does that mean?

9 Q. Do you know personally whether or not
10 those trees are owned by Bobby or Andy Heser or Bill
11 Heser?

12 MR. MARTIN: I'd like to ask for
13 clarification.

14 Are you talking about the property or
15 the trees themselves?

16 It's unclear to me what you're asking
17 the witness to answer.

18 JUDGE MORAN: Well, I assume within
19 your question, you're talking about the land that
20 supports the trees as well.

21 MR. SMALL: That's correct, Your
22 Honor. The land would contain the trees, and that's
23 my question.

24 Q. You have no personal knowledge as to

1 the ownership of that treed area in photograph 149?

2 A. Only what I've been told.

3 Q. Okay. So you have no personal
4 knowledge?

5 A. That is correct.

6 Q. Looking at what I describe as a pool
7 of water in Exhibit 149, do you see the reflection
8 of trees in that pool?

9 A. Yes, sir.

10 Q. And so on a sunny day, these trees,
11 if they had leaf cover, could provide shade for that
12 stream, correct?

13 A. Yes, sir, during the morning hours.

14 Q. Okay. Now, talking about upstream
15 from photo 149, is it your understanding that Bill
16 Hesper owns property directly upstream from Robert
17 and Andrew Hesper's property that's in question here?

18 A. Yes, sir.

19 Q. Okay. And as a matter of fact, you
20 walked that stream channel, did you not, on several
21 occasions, on the three occasions that you were out
22 on the site?

23 A. Would you repeat that, please?

24 Q. Okay. On the first trip that you

1 came to the site being February 15 of 2000, I
2 believe your testimony was that you had walked
3 upstream from the Hesper L.

4 A. Yes, sir.

5 Q. And that is on the Bill Hesper
6 property, correct?

7 A. Yes, sir.

8 Q. And as you went up that stream, did
9 you notice that that stream had been straightened?

10 A. No, sir, but I did not go very far.

11 Q. Okay. Did you take any measurements
12 of velocity of the water on Bill Hesper's property?

13 A. No, sir.

14 Q. Now, referring to Exhibit 149 again,
15 do you see evidence of some concrete or large rocks?

16 A. Yes, sir.

17 Q. And your previous testimony was that
18 there was a lot of energy coming down from upstream
19 and connecting at this very point where those rocks
20 are located, correct?

21 A. Yes, sir.

22 Q. And would these rocks provide for
23 erosion control?

24 A. Yes, sir.

1 Q. And would these rocks slow down the
2 velocity of the water?

3 A. I'm not sure of that.

4 Q. If the water would hit something, it
5 would slow it down, wouldn't it?

6 A. Yes, sir.

7 Q. I'm going to refer you to Exhibit 8,
8 photo number 150.

9 A. Yes, sir.

10 Q. And again, the location of this site
11 was the connection between the L and the Bill Hesel
12 property, is that correct?

13 A. Yes, sir.

14 Q. And this is upstream again?

15 A. Yes, sir.

16 Q. And do you see that big wooded debris
17 pile in the middle of the stream?

18 A. Yes, sir.

19 Q. And so that debris pile is blocking
20 the flow of the water, is that correct?

21 A. Yes, sir.

22 Q. And are you aware that in Illinois,
23 it's allowable to remove that debris from the creek
24 or a ditch?

1 A. I would assume it's allowable, and
2 yes.

3 Q. Okay. Now, if there was a hard
4 enough rain or a big rain event or snow event that
5 melted and there was a large amount of water that
6 was coming in here, isn't it a fact that these trees
7 would basically cause flooding?

8 A. Yes, sir, they could.

9 Q. And if there was any farm ground that
10 contained any chemicals on that farm ground, those
11 chemicals could be washed away, could they not?

12 A. Yes, sir.

13 Q. Now, I want to refer you back to
14 photo 148.

15 Are you there?

16 A. Yes, sir.

17 Q. I've got a question about the berm.

18 First off, that berm didn't go all
19 the way up and down the L, did it?

20 A. That's correct.

21 Q. And do you have an approximation as
22 to how far that L was built or that the berm was
23 built? Excuse me.

24 A. I would estimate that it was built on

1 that north-south leg of the L approximately
2 one-third to half the length.

3 Q. And you say one-third to half the
4 length of a portion of the L, right?

5 A. Yes, sir.

6 Q. Now, can you give me an estimate of
7 the footage, how long that would be?

8 A. No, sir, I don't recall the total
9 length of that leg of the L.

10 Q. Okay. You never measured that L
11 ever?

12 A. Yes, sir, I would have measured it.
13 I just don't recall the length.

14 Q. You don't have any notations that
15 would refresh your recollection as to the length of
16 that L?

17 JUDGE MORAN: While he's checking his
18 notes to see if he has something to refresh his
19 recollection, I'd like you to be a little more
20 precise in your question, Mr. Small.

21 When you talk about a berm to this
22 witness, you know, berms can be created, earthen
23 berms, just from the fact that you're digging as in
24 offering a channel, but I think your questions are

1 really related to the rocks.

2 When you say berms, my understanding
3 is that you're actually referring to the concrete
4 slabs and not to earthen berms.

5 If that's not the case, either way,
6 you need to clarify that for me, so I understand
7 what you're asking this witness about.

8 MR. SMALL: Okay.

9 THE WITNESS: Sir, I don't have
10 enough notes here, but given enough time and a ruler
11 and this aerial photographs, I could determine that.

12 Q. Okay. I'm looking at photograph 148
13 now, and I'm referencing earthen berm.

14 A. Yes, sir.

15 Q. Okay. Now, the length you've
16 indicated -- can you make an estimate of what it is
17 length-wise?

18 JUDGE MORAN: And I should add to
19 this witness, if you don't field comfortable with
20 even making an estimate, then that should be your
21 answer.

22 If you do feel comfortable, then
23 offer your estimate.

24 THE WITNESS: No, sir, I really

1 can't.

2 MR. SMALL: Okay. That's fine.

3 Q. Now, referring to the earthen berm,
4 was it sloped on both sides of that berm?

5 A. Yes, sir.

6 Q. And so if it was raining, a certain
7 portion of it would go onto the field and a certain
8 portion of it would go towards the stream or ditch,
9 correct?

10 A. Yes, sir.

11 Q. And this berm would serve a purpose
12 of avoiding any water going out onto the field at
13 that particular corner, is that correct?

14 A. You mean during flood events?

15 Q. Yes, during flooding.

16 A. Yes, sir.

17 Q. Did you take any depth measurements
18 in the L that was constructed on the water?

19 A. No, sir.

20 Q. Did you take any measurements as to
21 any velocity or flow of the water in the L?

22 A. No, sir.

23 Q. Was there any, where the L connects,
24 where you form the L, was there any rocks or any

1 kind of concrete at the bend of that L?

2 A. No, sir, I don't recall any at that
3 point.

4 Q. That's a fairly sweeping general
5 bend, correct? It's not a sharp bend in that L?

6 A. I'm not sure I understand.

7 JUDGE MORAN: Well, that's how he
8 characterized it. You can say whether you agree
9 with that characterization or not.

10 A. I would still consider that a sharp
11 bend. It's an L-shaped channel.

12 Q. Now, your testimony previously was
13 that you first arrived on site in February 15 of
14 2000, correct?

15 A. Yes, sir.

16 Q. And by site, I'm talking about the
17 Bobby and Andy Hesel property.

18 Do you know who were the previous
19 owners of that tract of land?

20 A. No, sir.

21 Q. Do you know when the woods were
22 logged?

23 A. No, sir.

24 Q. Do you personally know who logged the

1 woods?

2 A. No, sir.

3 Q. Do you know what kind of work anybody
4 would have done on that site in the woods?

5 A. Only what I received in the
6 complaint, sir.

7 Q. You have no personal knowledge --

8 A. Sir, could you --

9 Q. -- of any work done in a wooded area
10 on the Bobby and Andy Hesser site?

11 A. Sir, since we're using that term so
12 much, could you tell me what you mean by personal
13 knowledge?

14 Q. Do you know for a fact --

15 A. What does that mean?

16 Q. -- of your own personal knowledge
17 without anybody helping you out as to who logged
18 that woods?

19 A. Does that mean -- I don't understand,
20 sir. Does that mean that I would have had to have
21 personally spoken to them or the fact that somebody
22 provided that?

23 Q. Somebody didn't just tell you that.
24 Didn't you see -- let me change the question.

1 Did you see Bobby Heser or Andy Heser
2 logging that woods?

3 A. No, sir.

4 Q. Okay. And you didn't see them doing
5 any other sort of work out there, did you?

6 A. No, sir.

7 Q. Now, are you aware that Bobby and
8 Andy Heser are not involved and never have been
9 involved in any governmental payment programs?

10 A. I'm not aware, sir.

11 Q. I'd like you to refer to Exhibit 8 on
12 Page 65.

13 JUDGE MORAN: 65 is not an admitted
14 exhibit; at least that's what my notes say.

15 MR. MARTIN: These are the pictures
16 that went along with the video.

17 MR. SMALL: We would strike that
18 question, Your Honor.

19 JUDGE MORAN: Okay.

20 Q. BY MR. SMALL: On February 15, 2000,
21 your first visit, it was the middle of February in
22 southern Illinois. Trees had not budded out yet,
23 correct?

24 A. That's correct, sir.

1 Q. And there wasn't any green lush
2 vegetation, was there?

3 A. No.

4 Q. Is it possible that as you walked
5 from upstream of the Hesper property down the L that
6 you may have not noticed certain plant life or
7 certain trees because of the time of the year?

8 A. Yes, sir.

9 Q. You've indicated earlier that it's a
10 common practice for farmers to avoid erosion by
11 placing rocks or concrete in areas, is that correct?

12 A. Yes, sir, stream bank erosion
13 practices.

14 Q. Okay. Because it helps avoid
15 pollution, correct? You don't have as much sediment
16 going into the stream?

17 A. Yes, sir.

18 Q. Now, I'd like to go into just general
19 terms about some of the probes that you took on
20 January 15, 2000, and in particular, would you
21 consider Marion County to be in southern Illinois?

22 A. Yes, sir.

23 Q. And in general, in southern Illinois,
24 can you find various types of soil within a very

1 limited space area?

2 A. Yes, sir.

3 Q. And the fact that you would make a
4 probe in a particular spot doesn't necessarily
5 indicate the width of or the length of that soil
6 type?

7 A. You would extrapolate your sample
8 based on landscape position.

9 Q. You take your sample based upon the
10 only sample that you've got, correct, at that
11 precise location?

12 A. Yes, sir, and that sample represents
13 an area.

14 Q. But you're sampling one precise
15 location, correct?

16 A. Yes, sir.

17 Q. And the way Illinois soil is, it's
18 possible that one foot away from it it could be a
19 different type of soil, correct?

20 A. Highly unlikely.

21 Q. I thought you just indicated that
22 there could be multiple types of soil in a limited
23 space, isn't that correct, in southern Illinois?

24 A. Yes, sir, but you didn't define the

1 space.

2 Q. Okay. A general question.

3 When you were taking these probes, I
4 notice that in some instances, your starting point
5 was a fence row.

6 A. Yes.

7 Q. And other points you used the top of
8 a stream bank.

9 A. Yes, sir.

10 Q. Is there any rationale why you'd use
11 one or the other or why you used both?

12 A. Sir, the only rationale that I had
13 was convenience of access where different points
14 were during the time of the visit.

15 Q. Referring to CX 114 through 145.

16 A. Yes, sir.

17 Q. If you would just look in general at
18 the column marked model abundant and contrast
19 column?

20 A. Sir, on which page?

21 Q. That would be on page 115, 117, 119,
22 121, 123, 125, 127, 129, 131, 133, 135, 137, 139,
23 141, 143, and 145.

24 Have you had a chance to go through

1 those as I was naming off those pages?

2 A. Yeah, I lost track. You're just
3 referring to that section on every other page?

4 Q. Yeah, the second page of each one of
5 those probes.

6 A. Yes, sir.

7 Q. Now, I note in there that there is
8 very seldom any comments whatsoever on the model
9 abundant or contrast column.

10 Is that because the quantities were
11 either not found or were so small that you didn't
12 notate them?

13 A. No, sir. The only reason is that
14 they were not necessary.

15 JUDGE MORAN: When you say they were
16 not necessary, I take it you mean, Mr. Lenz, they
17 were not necessary for you to reach your conclusions
18 about the soil?

19 THE WITNESS: Yes, sir.

20 Q. BY MR. SMALL: Now, referring back to
21 the area that you indicated was logged on the Bobby
22 and Andy Hesel property that you took these probes
23 from, your testimony yesterday I believe was that
24 the soil had been pushed around. You could tell

1 that.

2 A. Yes, sir.

3 Q. Would you know whether or not a
4 bulldozer pushing a tree down could create that kind
5 of pushing of soils?

6 A. Yes, sir, it could.

7 Q. And could that also mix soils?

8 A. Yes, sir.

9 Q. Now, when we're talking about these
10 probes, as I understand it, this is kind of an
11 inexact science. You've got paint chips, and you
12 kind of look, is that right? You try and compare
13 them?

14 A. I would not call it an inexact
15 science, sir, but, yes, sir, you do compare paint
16 chips to the soil.

17 Q. Okay. And what would you do if when
18 you're comparing these paint chips to a soil sample
19 it's between two colors? What would you do?

20 A. You are allowed to extrapolate in
21 between, but generally, there's enough paint chips
22 that it easily fits.

23 Q. And did you do so when you were
24 viewing the Hesper samples? Did you have any

1 situations where it was in between various colors?

2 A. No, sir, I generally don't have that
3 problem.

4 Q. I'm asking you specifically on the 16
5 probes that you made, did you have that situation
6 occur?

7 A. No, sir.

8 Q. Now, you also talked about silt
9 coats.

10 A. Yes, sir.

11 Q. And you indicated that was a flow of
12 water.

13 A. Yes, sir.

14 Q. And that flow could be vertical or it
15 could be horizontal, right?

16 A. Yes, sir.

17 Q. And in your first trip to the site
18 being in February of '02, middle of February, the
19 soil was sufficiently soft that you could get down,
20 in some instances, down to 20, 24 inches, correct,
21 with your probes?

22 A. Yes, sir.

23 Q. And so there would be, as you
24 indicated, there would be some water moisture in

1 that soil at that time that allowed you to do that?

2 A. Yes, sir.

3 Q. And yet downstream, you indicated
4 that you measured that, and that was only seven
5 inches, correct, of depth on a downstream location?

6 A. I don't follow, sir.

7 Q. When you're standing inside the
8 channel downstream from the Hesper property, I think
9 your testimony was that it was seven inches deep.

10 A. The water?

11 Q. Yes.

12 A. Yes, sir.

13 Q. And upstream it was three inches
14 deep, is that correct?

15 A. Yes, sir.

16 Q. And at the same time, you've got
17 seepage taking place through these silt coats,
18 correct?

19 A. Sir, the silt coats, would you -- I
20 guess I don't understand the question.

21 Q. Silt coats you indicated can run
22 horizontally or vertically, correct?

23 A. Silt coats are vertical features.
24 However, water would move vertically and laterally.

1 Q. So it could move both directions,
2 correct?

3 A. Yes, sir.

4 Q. So in some instances, these silt
5 coats could be draining into the ditch, correct?

6 A. Sir, I didn't want to give the
7 impression when I spoke about silt coats that that's
8 the only conduit for water flow. That's an
9 indicator for the entire soil profile.

10 Q. Is it possible that a silt coat could
11 run horizontally into the ditch.

12 A. Yes, sir, it is, but I'm not sure you
13 understand silt coats.

14 Q. And so would that contribute to the
15 overall amount of water in the ditch?

16 A. Yes, sir.

17 Q. Would bulldozing a wooded area be
18 considered altering a site?

19 A. Yes, sir.

20 Q. And that could be accomplished
21 through bulldozing of trees, correct?

22 A. Yes, sir.

23 Q. Now, you're going to have to help me
24 out because I'm not a scientist here. Can you tell

1 me what a hydrophytic vegetation is?

2 A. Hydrophytic vegetation?

3 Q. Yeah. Could you explain what that is
4 for me?

5 A. The Fish and Wildlife Service have
6 developed a plant species list, and they've
7 categorized vascular plants according to their
8 indicator status based on moisture, their adaptation
9 to live in wet environments, and they categorize
10 them, they've labeled them accordingly with the
11 percentage that they're found in wet environments,
12 100 percent, 60 percent, 50 percent, 10 percent, and
13 they label them in accordance with that fashion.

14 It's sort of a classification system
15 based upon vegetation's ability or adaptation to
16 live in moist conditions.

17 So hydrophytic vegetation would be
18 vegetation that falls in those categories that the
19 predominance of that vegetation would grow in wet
20 conditions.

21 Q. Did you list any of that hydrophytic
22 vegetation on any of your field notes that you show
23 at pages 114 through 145?

24 A. No, sir, I do not.

1 Q. Now, the other day you were talking
2 about sod busters and swamp busters.

3 A. Yes, sir.

4 Q. And that relates to government
5 programs, does it not, where there's paint?

6 A. Yes, sir.

7 Q. And I think your testimony was that
8 if somebody would use this equipment, swamp buster
9 or a sod buster, that that could affect their
10 government payments, is that correct?

11 A. No, sir. It has nothing to do with
12 equipment. It has to do with activities making you
13 ineligible.

14 Q. That activity of using equipment for
15 the purpose of sod busting or swamp busting would be
16 a violation of governmental programs, thereby
17 causing a person to lose payments from the
18 government, correct?

19 A. Yes, sir.

20 Q. And I believe that's what you were
21 testifying to yesterday, was it not?

22 A. Yes, sir.

23 Q. But at that time, you didn't know
24 that Bobby Hesper and Andy Hesper had never taken any

1 payments from the government?

2 A. No, sir, I have no knowledge of their
3 program benefits.

4 MR. SMALL: That's it for right now,
5 Your Honor.

6 JUDGE MORAN: Okay. We can either
7 take a five-minute break or you can take just right
8 up with redirect.

9 MR. MARTIN: Let's take a break.

10 (Recess taken.)

11 JUDGE MORAN: Now, you're done is
12 that right, Mr. Small?

13 MR. SMALL: Correct.

14 JUDGE MORAN: Redirect?

15 MR. MARTIN: Yes, Your Honor.

16 REDIRECT EXAMINATION

17 BY MR. MARTIN:

18 Q. Mr. Lenz, in this case, you observed
19 tree roots exposed in Martin Branch, is that
20 correct?

21 A. Yes, sir.

22 Q. How do you think these tree roots
23 became exposed?

24 A. The tree roots in Martin Branch?

1 Q. Yes.

2 A. These tree roots became exposed
3 through natural stream processes.

4 Q. Would that be related to the volume
5 of flow, water flow at Martin Branch?

6 A. Yes, sir.

7 Q. There was some talk about grass
8 filter strips.

9 Does the Corps of Engineers require
10 installation of grass filter strips as a condition
11 to permit issuance?

12 A. Sometimes we would require something
13 like that as a permit condition, yes.

14 Q. Is there any Corps of Engineers
15 guidance on minimum widths for grass filter strips?

16 A. Generally what we point to is USDA
17 Natural Resources Conservation Service in their
18 field office technical guide. They do provide
19 minimum widths and specifications on construction of
20 those, yes.

21 Q. Does the width of a grass filter
22 strip vary on a case by case basis?

23 A. Yes, sir.

24 Q. I'd like to turn your attention to

1 the aerial photos at Bates 152 and 153.

2 A. Yes, sir.

3 Q. For what purpose did you use these
4 photographs?

5 A. I used these photographs to orient
6 myself in the field to where I was to get an idea of
7 what the site looked like prior to my going out
8 there as well.

9 Q. Did this aerial photograph help you
10 in any way to conduct your soil sampling?

11 A. Yes, it did. It helped me as far as
12 locating myself on the surface of the earth.

13 Q. So this aerial photograph was used
14 strictly to plot the locations of soil samples that
15 you took at the site?

16 A. Yes, sir. I had a copy with me and
17 marked it on the map as I sampled.

18 Q. Did you employ any aerial photo
19 interpretation techniques of these aerial
20 photographs in your delineation of the site?

21 A. Well, yes, I had to just to determine
22 where I was in relation to other features on the
23 aerial photo in order to locate myself.

24 If the timbered area was not present

1 when I was there, then I would have to use other
2 features to orient myself.

3 Q. But you did not use the aerial
4 photograph to determine the presence of any positive
5 indicators of soil vegetation and hydraulic, is that
6 correct?

7 A. That's correct, sir.

8 Q. In general, are soil types associated
9 with landscape position and topography?

10 A. Yes, sir.

11 Q. Could you explain that, please?

12 A. Soils develop over time based on a
13 number of factors, slope, apparent material,
14 topography, all these interact, and this allows you
15 to map soils based on landscape position.

16 A soil in the floodplain is going to
17 have certain characteristics, so when you're in that
18 landscape setting, you can automatically rule out a
19 number of types of soils.

20 If you're on a ridge top, you can
21 automatically rule out a number of types of soils
22 just on landscape position because soils on a ridge
23 top develop differently than soils in a floodplain.

24 Q. Similarly, can soil type inclusions

1 be associated with landscape position and
2 topography?

3 A. Yes, sir.

4 Q. For the same reasons that you
5 mentioned?

6 A. Yes, sir.

7 Q. So then is it possible to observe the
8 extent of a soil type or an inclusion based on its
9 landscape position and topography?

10 A. Yes, sir.

11 Q. The question about the L-shaped
12 channel on the site, do you recall observing the
13 corner of the L-shaped channel?

14 A. Yes, sir.

15 Q. The north-south and east-west legs of
16 the channel?

17 A. Yes, sir.

18 Q. Did that corner have any rocks
19 similar to the rocks that are present on the outer
20 edges of the channelized stream?

21 A. No, sir, I don't recall any rocks at
22 that corner location.

23 Q. Do you recall any erosion control
24 efforts that were taken in the corner of the

1 L-shaped channel?

2 A. No, sir, other than the grassed
3 vegetation.

4 Q. And how would you characterize the
5 degree of angle of the corner of the L-shaped
6 channel?

7 A. I would call it a hard angle. I'm
8 not sure how to describe it, but I would say that
9 the beginning point of the channel was a hard angle.
10 That corner was a hard angle, and the exit point was
11 a hard angle.

12 Q. So you would characterize it as
13 similar to the angles on the north part of the
14 channel and the west part of the channel?

15 A. Yes, sir.

16 Q. Mr. Lenz, after your office sent its
17 May 1, 2002 enforcement referral to the EPA, did you
18 talk to anyone at the EPA about that referral?

19 A. Yes, prior to the referral, I did
20 confer with EPA.

21 Q. You conversed with EPA personnel
22 prior to the referral?

23 A. Yes, sir.

24 JUDGE MORAN: Prior to what, counsel?

1 You trail off sometimes.

2 MR. MARTIN: To the Corps of
3 Engineers referral that was sent on May 1, 2002.

4 Q. Who did you converse with?

5 A. Dave Schulenberg.

6 Q. And after that May 1, 2002 referral
7 was sent to EPA, did you converse with anyone from
8 the EPA office in Chicago about that referral?

9 A. Yes, quite a bit with Greg Carlson.

10 Q. And what did you talk about?

11 A. Discussed a violation in quite some
12 detail. I'm not sure of any particulars but we went
13 over the entire complaint and my site visit and my
14 field work.

15 Q. Did you talk about your soil sample
16 results and locations?

17 A. Yes, sir.

18 Q. On your second inspection of the
19 site, who was with you?

20 A. Mr. Carlson was with me as well as
21 Katherine Kelly at the Corps of Engineers.

22 Q. And what was the purpose of that site
23 visit?

24 A. The purpose of the site visit was to

1 conduct a delineation, a wetland delineation, and
2 look at stream impacts, the channel impacts.

3 More or less I was there as Greg
4 Carlson's assistant basically at that point.

5 Q. At that inspection, were you able to
6 locate the original location of your soil samples
7 that you took on your February 2000 inspection.

8 A. Yes, sir.

9 Q. And did you communicate those
10 locations to Mr. Carlson?

11 A. Yes, sir.

12 MR. MARTIN: Thank you. That's all
13 the questions I have, Your Honor.

14 JUDGE MORAN: Okay. Any recross?

15 MR. NORTHRUP: No, Your Honor.

16 MR. SMALL: Nothing.

17 JUDGE MORAN: Okay. I have to ask
18 just a few questions, and then if that, I'm not
19 suggesting it will, but if it does prompt some
20 questions, then each of you will have an opportunity
21 to do that.

22 EXAMINATION

23 BY JUDGE MORAN:

24 Q. Just to sort of back up a little

1 bit, Mr. Lenz, just to make sure I understand the
2 bigger view of this problem, is it your testimony
3 that this was a natural channel?

4 I'm not looking right now at the area
5 of alleged activity by the respondents here, the
6 Hesers, but was this channel above and below the
7 activity a natural channel, if you know, or was it a
8 man-made channel above and below the activity?

9 A. It was a natural channel.

10 Q. Okay. Because sometimes, I know
11 there are, in agricultural properties, there are
12 man-made channels?

13 A. Yes, sir.

14 Q. But that's not what these were above
15 and below this area?

16 A. That's correct. This is not a
17 man-made channel.

18 Q. Okay. And my understanding, again,
19 speaking from the big view of this matter, is that
20 you had a natural flowing channel above the activity
21 that's alleged in the complaint?

22 A. Yes, sir.

23 Q. Against these respondents, that was
24 the natural channel, right?

1 A. Yes, sir.

2 Q. And then we have this length of area
3 where the channel was disturbed and effectively
4 rerouted?

5 A. Yes, sir.

6 Q. And then my last understanding is
7 that at the end of the activity alleged by EPA, that
8 the channel then resumed in its natural course. Is
9 that true?

10 A. Yes, sir.

11 Q. All right. So we have a natural flow
12 of the channel, an interruption of the activity, but
13 then it does pick up with the natural channel as it
14 existed before the activity?

15 A. Yes, sir.

16 Q. Okay. I wanted to make sure I had
17 that straight.

18 Now, you had different
19 characterizations for stream flow, and my
20 understanding is that you have three categories,
21 maybe there are more, but you referred to perennial,
22 intermittent and ephemeral, is that right?

23 A. Yes.

24 Q. And my understanding is that you

1 called this channel -- which is also known as Martin
2 Branch, is that right?

3 A. Yes, sir.

4 Q. You categorized Martin Branch as an
5 intermittent flow, is that right?

6 A. Yes, sir.

7 Q. And that means that it flows for
8 parts of the year or seasonally?

9 A. Yes, sir.

10 Q. And so the basis for your
11 determination that this was an intermittent flowing
12 channel was essentially relying upon the soil
13 borings or was it more than that?

14 A. It's more than that, sir. We have
15 the soil borings that had the hydrology indicators,
16 the water table.

17 You also have just the watershed of
18 the channel and water flowing at the time of the
19 site visit when there was no rain that day and the
20 presence of fish, and unlike other critters in a
21 stream like frogs that can take dry periods, fish
22 have to have constant water. That's basically it.

23 Q. Okay. Now, if you would look at
24 Bates stamp 112 for me.

1 A. Yes, sir.

2 Q. And this is to eliminate questions
3 when I get back and I'm reviewing the transcript of
4 things I wished I had asked.

5 You have in front of you 112?

6 A. Yes, sir.

7 Q. Okay. And just to refresh my
8 recollection if you testified to this, were 1, 2, 3,
9 and 4 -- do you see those? Before you get to new
10 channel, you have listed field notes, and then you
11 have 1, 2, 3, 4.

12 A. Yes, sir.

13 Q. Were those notations relating to
14 undisturbed portions of the channel?

15 A. Yes, sir.

16 Q. And so that only on this same page
17 112 below the word new channel, 1 and 2, that's the
18 only part of that page where you're describing the
19 alter channel?

20 A. Yes, sir.

21 Q. All right. And I'm curious, when you
22 were on the site on any of the three occasions, were
23 you able to see the remnants of where the channel
24 had run prior to the alteration; in other words, in

1 its natural state during this...

2 We have this altered area, but were
3 you able to see the remnants of where the channel
4 used to run?

5 A. Yes, sir. It's real subtle on the
6 landscape, but at that time and even still today, I
7 believe you can see features of where the channel
8 originally ran.

9 Q. So if I were -- we hadn't discussed
10 whether this was going to happen at all, but if I
11 were to go out there, you'd be able to point out to
12 me where the channel used to run? I'd be able to
13 see that?

14 A. Yes, sir.

15 Q. And again, just to make sure, this
16 may already be in the record so forgive me for
17 asking, but would you define soil horizon for me
18 again?

19 A. Soil layer.

20 Q. It's that simple, soil layer?

21 A. Layer. It may be a different color,
22 different texture.

23 Q. That's what you mean by soil horizon?

24 A. Yes, sir.

1 Q. And there was a term that Mr. Small
2 referred to and I should have written it down. You
3 said you're not sure that he understands -- I have
4 it in my notes here if you'll hold on a second.
5 There was a term of art.

6 A. Silt coats.

7 Q. Yes, silt coats. Thank you.

8 Would you also define, as you just
9 did for soil horizons, define for the record silt
10 coats again?

11 A. Silt coats are a feature you find in
12 the soil that is present on the surface of a
13 structural unit of soil where water, there's
14 evidence of water flow.

15 You will find clay films in those
16 locations. You'll find silt coats in those
17 locations. Those are the quickest flow routes of
18 water through soil, and in those areas, if enough
19 water flows through those areas, clays are stripped
20 off of the individual soil grains, and it shows up
21 as almost a powdery feature in the soil. You're
22 looking at just stripped bare naked grains of soils
23 particles.

24 Q. And if you see that, that tells you

1 what.

2 A. That's an indicator of just a flow
3 through that area more so than others areas in the
4 soil. I just didn't want to give the impression
5 that that is the only flow route. You take a
6 section of soil and water is going to flow through
7 different parts at different rates. That's just an
8 area where it flows through with enough frequency
9 and duration that it makes its mark on that area a
10 little more so than other areas.

11 JUDGE MORAN: Okay. Those are the
12 only questions I have.

13 Now, since the EPA last asked
14 questions, I'm going to ask if either counsel for
15 respondent or both have any questions to ask in
16 light of my questions. This is your opportunity.

17 MR. MARTIN: Your Honor, I have just
18 one point of clarification for Mr. Lenz. May I?

19 JUDGE MORAN: You have something you
20 want to address to me?

21 MR. MARTIN: No, I have a
22 clarification question for Mr. Lenz.

23 JUDGE MORAN: Wait, but it's not your
24 turn yet.

1 MR. NORTHRUP: Oh, is it our turn?

2 JUDGE MORAN: Yes. I'm sorry. Maybe
3 I didn't make myself clear.

4 MR. NORTHRUP: Okay. Just a couple
5 of quick follow-ups.

6 RERROSS-EXAMINATION

7 BY NORTHRUP:

8 Q. When you talked about the basis
9 whether Martin Branch was intermittent, you talked
10 about soil borings, but you didn't actually take any
11 soil borings in the channel, either the Hesper
12 channel or the upstream or the downstream channel?

13 A. No, sir. All soil borings were
14 adjacent.

15 Q. Okay. And also, if you know, Martin
16 Branch is identified as intermittent on U.S.G.S.
17 topo maps, correct?

18 A. That is correct.

19 RECROSS-EXAMINATION

20 BY MR. SMALL:

21 Q. Mr. Lenz, when you say upstream from
22 the Bobby and Andrew Hesper property that is natural,
23 I think your testimony previously is you went up
24 that stream on three different occasions, but how

1 far up you went up that stream you were unable to
2 indicate to us that there had been a stream
3 straightening project. You're just not aware of
4 that because you didn't go that far upstream,
5 correct?

6 A. Yes, sir. I just, as far as I went,
7 I was looking at, in my opinion, natural conditions
8 or if --

9 Q. So you're testifying only as to what
10 you actually saw, and you're not aware of any other
11 stream straightening projects upstream but you're
12 not ruling that out either?

13 A. Yes, sir. If the area I was in had
14 been disturbed, over time it had recovered because
15 the location I was in, we had a meandering channel
16 with a nice riparian corridor.

17 Q. So that's a yes, correct?

18 A. Yes, sir.

19 MR. SMALL: That's all.

20 JUDGE MORAN: Okay. Now, I'm sorry I
21 made myself unclear. Go ahead, counsel for EPA.

22 MR. MARTIN: Thank you.

23

24

1 REDIRECT EXAMINATION

2 BY MR. MARTIN:

3 Q. Mr. Lenz, in your earlier testimony,
4 I believe you designated, based on your observations
5 of Martin Branch, the branch as an intermittent
6 stream with permanent pools, is that correct?

7 A. Yes, sir.

8 Q. What is a permanent pool?

9 A. Permanent pools would be areas that
10 during dry times of the year -- and even perennially
11 flowing streams can dry up at times. It's hard to
12 qualify or quantify this hydrology because of just
13 seasons and years and averages and things, but
14 intermittent stream with permanent pools, during dry
15 times, water may not flow through some of those
16 stretches, and over time, it just retreats into
17 pockets. I discussed mosaics of habitat. You got
18 these little pools, and that's where your
19 invertebrates and vertebrates and wildlife and that
20 will congregate in those areas just to keep to the
21 habitat.

22 Those pools, and then fish, that's
23 all the water that's there, and then even after,
24 because you've got base flow still coming into the

1 channel.

2 JUDGE MORAN: Well, wasn't your
3 question what is a permanent pool?

4 MR. MARTIN: Yes.

5 JUDGE MORAN: Would a permanent pool
6 be one that's there virtually all year or most of
7 the year?

8 THE WITNESS: Yes, sir.

9 JUDGE MORAN: Well, which is it, all
10 year, year round or most of the year? What's your
11 definition of a permanent pool?

12 THE WITNESS: It would be present in
13 most years.

14 JUDGE MORAN: Present in most years.

15 THE WITNESS: Yes, sir.

16 JUDGE MORAN: For what portion of
17 most years?

18 THE WITNESS: It would be most of the
19 year in most years.

20 JUDGE MORAN: So there could be, in
21 conditions of extreme drought, you could even lose a
22 permanent pool?

23 THE WITNESS: Yes, sir.

24 Q. BY MR. MARTIN: What is the source

1 for water for permanent pools in Martin Branch?

2 A. You would be relying on your base
3 flow, your groundwater at that point.

4 Q. The base flow from surrounding soils?

5 A. Yes, sir.

6 MR. MARTIN: That's all we have.

7 MR. NORTHRUP: Quick follow-up.

8 JUDGE MORAN: Yes.

9 RECROSS-EXAMINATION

10 BY MR. NORTHRUP:

11 Q. The permanent pool, you indicated
12 earlier you did observe a permanent pool in the
13 Martin Branch on your site visits?

14 A. There were pools scattered. We're
15 talking about not in the project area but upstream,
16 downstream. You had pools on both ends, and, of
17 course, you do have those pools at the beginning of
18 the project on those corners.

19 Q. How do you know those are permanent
20 pools?

21 A. It's best professional judgment.

22 Q. And did you observe any fish in any
23 of those pools?

24 A. No, I did not except on the

1 downstream end.

2 Q. Downstream side.

3 And how far away is that from the
4 Hesper channel from where it left their property?

5 A. I would say several hundred feet.

6 MR. NORTHRUP: Nothing further.

7 JUDGE MORAN: Anything else?

8 MR. MARTIN: No, Your Honor.

9 JUDGE MORAN: Okay. You're done.

10 Thank you.

11 (Witness excused.)

12 JUDGE MORAN: All right. It's 11:51.

13 It would make sense for us to take lunch. Do we all
14 agree?

15 Okay. We'll start back at 1 o'clock.

16 (Whereupon the lunch recess was
17 taken.)

18 MS. PELLEGRIN: I'd like to call

19 Mr. Greg Carlson to the stand.

20 JUDGE MORAN: Good afternoon.

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

23 JUDGE MORAN: Have a seat. Move up
24 close to the microphone. State your name and spell

1 it for us, please.

2 THE WITNESS: Gregory Thomas Carlson,
3 and that's G-r-e-g-o-r-y T-h-o-m-a-s C-a-r-l-s-o-n.

4 MS. PELLEGRIN: Good afternoon,
5 Mr. Carlson. I'm going to ask you a few questions.
6 I'm going to go into your background a little bit to
7 get a few of the documents into the record, and then
8 Mr. Martin will continue your testimony later, so
9 I'll just touch upon a little bit of your background
10 in order to establish your foundation for knowing
11 some of these exhibits we'll talk about.

12 GREGORY THOMAS CARLSON
13 called as a witness herein, having been first duly
14 sworn on his oath, was examined and testified as
15 follows:

16 DIRECT EXAMINATION

17 BY MS. PELLEGRIN:

18 Q. Mr. Carlson, are you currently
19 employed?

20 A. I am.

21 Q. And what is your current position?
22 What is your current employment?

23 A. I am a life scientist and enforcement
24 officer with the U.S. Environmental Protection

1 Agency in Region 5 based out of Chicago, Illinois.

2 Q. And what do your job duties include?

3 A. The majority, approximately 80
4 percent is involved with enforcement of Section 404
5 of the Clean Water Act from initial case
6 investigations through case management till the
7 cases are concluded.

8 Approximately 15 percent would be
9 special projects such as the success of wetland
10 litigation, the memorandum of agreement with the
11 agricultural department, advanced identification of
12 wetland projects, and then five percent of my time
13 is involved with reviewing public notices also under
14 Section 404 of the Clean Water Act.

15 Q. Okay. And as I said, Mr. Martin will
16 go into some more detail about your background, but
17 for my purpose, I'd like to hear a little bit more
18 about your role as a case investigator.

19 What does that entail?

20 A. That entails, on any particular case
21 or project, it concerns a particular geographical
22 area where there's an allegation from usually some
23 government source but often neighbors who are
24 complaining about something, and I investigate it to

1 determine whether or not the allegations are true in
2 the sense that has a person discharged a pollutant
3 from a point source into a water of the United
4 States, and we make that determination, and then we
5 need to decide if we are going to pursue an
6 enforcement action or not.

7 Q. And where do you go to make your
8 determination generally? You do it from your office
9 in Chicago?

10 A. Yes. From my office in Chicago, we
11 have reference materials that we would do a desktop
12 review. Then you generally would get out to the
13 site. I often go to -- there's a major resource in
14 local communities. Pretty much every county in the
15 midwest, U.S. Department of Agriculture has an
16 office with a Natural Resources Conservation Service
17 co-located with the Farm Service Agency. You've
18 heard earlier testimony about the swamp buster
19 provisions. They have a lot of resources in-house
20 of the local area, particularly aerial photography,
21 so that is generally a first stop for me before I
22 get to the site.

23 Q. Okay. And you said you get to the
24 site, so you do perform site inspections?

1 A. Yes.

2 Q. Now, Mr. Carlson, I know you were
3 here during Mr. Lenz's testimony, and we've been
4 mentioning the site of the alleged violations.

5 Are you familiar with the site of the
6 alleged violations in this case?

7 A. Yes.

8 Q. And how are you familiar with that
9 site?

10 A. Because I've gone through a process
11 of investigating it and making some conclusions
12 about it through the methods I just briefly went
13 over regarding case investigation.

14 Q. And have you been to the site in this
15 case?

16 A. I have.

17 Q. Okay. Let me focus on -- how many
18 times have you been to the site first of all?

19 A. I've been at the site on two
20 occasions, and on a third occasion, we were adjacent
21 to the site.

22 Q. Okay. And let me focus on your first
23 time on the site.

24 What, if anything, did you do to

1 prepare for your first site visit?

2 A. The desktop review of reference
3 materials, I would have had the Corps case file with
4 me. I would have talked to the Corps people. I
5 would have talked to the USDA NRCS office personnel
6 prior to coming down to arrange my visit and get
7 access to the, largely to the aerial photography,
8 but if say I didn't have the soil survey, I would
9 get it at that office, so that's primarily what I
10 did: Review of materials in-house, arrange a site
11 visit, arrange to get to the local resource office
12 of the USDA.

13 Q. Okay. And in this case, did you go
14 to the local resource office of the USDA?

15 A. I did.

16 Q. And what, if anything, did you do
17 while you were there?

18 A. Two major, well, one major activity
19 split into two parts. Interpretation of aerial
20 photography. The USDA office has generally two
21 types of topography. They have annual crop, what we
22 call annual crop slides. They are taken for
23 compliance purposes under the federal farm bills.
24 They are the basis for the ag personnel to

1 determine, you know, how many acres in wheat, how
2 many in corn, how many in beans, etc.

3 It's a year to year photography, and
4 it's done in the growing season so they can see what
5 crops are growing, and that gives you a good year to
6 year look on whatever land use changes are occurring
7 on that landscape.

8 And the second part of that is they
9 have reference aerial photography generally in
10 photographic prints that are like 2 by 2, 2 feet by
11 2 feet, and they are photographic prints, and they
12 are a variety of years. Generally it's every five
13 years. The particular set that I was looking at was
14 the 1993 photography at the site and any other
15 photography that they may have had at the site.
16 They had some 1955 photography also.

17 The soil survey has aerial
18 photography in it from 1984.

19 Q. And when you left the site, I'm
20 sorry, when you left that office, did you take any
21 aerial photographs with you?

22 A. I would have had the Corps's document
23 that was previously referenced, Bates 152, 153,
24 where Mr. Lenz had put his data points on. I would

1 have had that with me, and I would have had sketches
2 of the photography I had looked at in-house.

3 Q. Okay. And at any time after your
4 site inspection, did you request any other
5 photography?

6 A. I did.

7 Q. And what did you request?

8 A. I needed, since it was a disturbed
9 site and to determine where my wetland, if there
10 were wetland lines, where they were based on the
11 accumulated evidence, I needed something to show
12 where that was, and the best thing to use is get
13 photography prior to the site being disturbed.

14 I contacted the USDA Aerial
15 Photographic Office out of Salt Lake City, Utah and
16 purchased that 1993 photography that I had earlier
17 seen in the USDA's offices, but I got it enlarged
18 and paid for it, and it was certified so that it was
19 the original film, from the original film.

20 Q. Okay. Let me turn your attention to
21 Complainant's Exhibit 14, Mr. Carlson.

22 A. Okay.

23 Q. And do you recognize this document,
24 Mr. Carlson?

1 A. I do.

2 Q. Let's turn to the page Bates numbered
3 191.

4 A. I'm there.

5 Q. What is this document?

6 A. This is a certification cover letter
7 that came with the photography from the USDA Aerial
8 Photographic Office OUT of Salt Lake City. It
9 certifies that the attached enlargement was made
10 from the original film. It mentions the location,
11 Marion County, Illinois, where the film is on file,
12 in Salt Lake City; that it was a enlargement, and it
13 gives a code number that is on the photography.

14 NAPP stands for National Aerial
15 Photographic Program, and those are the ones that
16 are generally done on five-year cycles, and it's
17 dated March 28, 1993. It has a signature of a Linda
18 McDonald.

19 Q. And was this in response to a request
20 that you referred to for a document from USDA?

21 A. That's correct.

22 Q. And turning your attention to
23 complainant's exhibit, same exhibit but Bates number
24 192.

1 A. Okay.

2 Q. Do you recognize this aerial photo?

3 A. I do.

4 Q. And what is that?

5 A. This is a black and white copy from
6 the approximately two foot by two foot original
7 photographic print from March 28, 1993.

8 Q. Okay. And, Mr. Carlson, in your job
9 duties as a case investigator of wetlands issues, do
10 you have occasion to review aerial photos
11 frequently?

12 A. All the time.

13 MS. PELLEGRIN: All the time. Okay.

14 Let's see, Your Honor, at this time,
15 I would like to move to admit Complainant's
16 Exhibit 14 into the record.

17 JUDGE MORAN: But I have a question
18 to ask of this witness before I hear if there are
19 objections.

20 Mr. Carlson, you didn't expressly
21 state this, but tell me, looking at Bates 192, is
22 that the document that you received from Linda
23 McDonald that you refer to on Page 191 or is that an
24 enlargement of part of the document received from

1 her?

2 THE WITNESS: No, that's just an
3 original size photocopy.

4 JUDGE MORAN: In other words, when
5 you received the letter that's reflected on 191, is
6 192 a copy of what's referred to on 191?

7 THE WITNESS: That's correct.

8 JUDGE MORAN: It's no different.
9 It's not an enlargement. It's what you received
10 except it's a copy.

11 THE WITNESS: Correct.

12 JUDGE MORAN: Okay. Now, any
13 objections from respondents?

14 MR. SMALL: Your Honor, our only
15 response or objection would be, again, the timing,
16 this being 1993, outside the statute of limitations.

17 JUDGE MORAN: Okay. We got that one
18 down.

19 MR. SMALL: Continuing.

20 JUDGE MORAN: Okay. And so having
21 heard the objection, the exhibit is admitted,
22 Complainant's Exhibit 14 is admitted.

23

24

1 (Complainant's Exhibit 14 was
2 admitted into evidence at this
3 time.)

4 Q. BY MS. PELLEGRIN: And Mr. Carlson,
5 did you have occasion to request any other aerial
6 photographs of this site in this case?

7 A. I did.

8 Q. Okay. And what occasion was that?

9 A. In preparation for the initial
10 prehearing exchange, I contacted the USDA office to
11 obtain the crop slides that I mentioned earlier that
12 are on an annual basis, so I talked with Mr. Tony
13 Antonacci who I previously identified as the
14 district conservationist and head of the NRCS office
15 in Salem, Illinois and asked him to send me what he
16 had in a particular time frame.

17 Q. Okay. And what was that time frame?

18 A. 1997 through 2005 is what I asked
19 for.

20 Q. And did he send you those documents?

21 A. He sent me those documents as digital
22 files electronically, but he, for whatever reason,
23 wasn't able to get the 2000 photograph, so there's
24 no 2000 photograph.

1 Q. Okay. And you mentioned he sent you
2 an e-mail or he sent to you electronically. Was
3 that in e-mail form?

4 A. That's correct.

5 Q. Okay. And what was the specific
6 format that the documents were sent in via e-mail?

7 A. They were digital electronic files.

8 Q. Okay. And were you able to -- how
9 were you able to ascertain what dates he had sent
10 you?

11 A. Well, the files were dated by year.

12 Q. Okay. Let's see, turning your
13 attention to Complainant's Exhibit 12, Mr. Carlson.

14 Oh, first let me ask you, before you
15 do that, Mr. Carlson, when you received those
16 electronic files I believe you stated Mr. Antonacci,
17 what did you do next?

18 A. I printed them on our color printer.

19 Q. Okay. And did you provide those
20 documents in the initial prehearing exchange?

21 A. Could you repeat the question,
22 please?

23 Q. After you printed them out, at some
24 point after that, did you provide those documents or

1 were those documents provided in complainant's
2 initial prehearing exchange.

3 A. After I dated them, then they were
4 placed in the prehearing exchange in September 2006.

5 Q. Okay. And how did you know how to
6 date them?

7 A. Well, I compared the image of the,
8 well, they're dated electronic file, so I print the
9 1997, and I write 1997 on it.

10 Q. Okay. And now I'd like to turn your
11 attention to Complainant's Exhibit 12, and I would
12 like to focus your attention on Complainant's
13 Exhibit 182, Bates stamp 182 through 187, and do you
14 recognize those documents, 182 through 187?

15 A. I do.

16 Q. Okay. And are these the exact same
17 documents that were provided to respondent in the
18 initial prehearing exchange?

19 A. No.

20 Q. And why is that?

21 A. The initial electronic files, the
22 earlier years, 1997 through 1999, were scanned in
23 from a photographic slide, so they came out very
24 poorly on the copy, or excuse me, on the printing of

1 that file.

2 The later years, 2004 and 2005 came
3 out fine because they had switched to digital
4 photography, but the other ones were poor quality,
5 so what we did was we recontacted Mr. Antonacci,
6 told him about the problem of quality, discussed how
7 we could solve it, which was either he could get the
8 prints done from those slides and mail them to me
9 and I would have to pay, usually 2.50 a slide is
10 what I paid before, or whether he could just send me
11 the originals and I could make the prints and then
12 return them, and that's the option that we chose.

13 Q. Okay. And how did you make the
14 originals from the slides?

15 And when you're saying slides, are
16 you talking about like a slide, two inch by two inch
17 slide?

18 A. It's actually a little smaller than
19 two by two I think, but, yeah, these are just, if
20 you took, if you're in photography, if you get a
21 slide, it's about one inch by one inch I think with
22 a cardboard border with the film in between.

23 Q. Okay. And how did you convert the
24 slides to the prints?

1 A. I took them to a local commercial
2 photography place in downtown Chicago and had
3 photographic prints made. I think I asked for, oh,
4 I think they're about 8 by -- -I think 8 by 14 are
5 the photographic prints or close to it.

6 Q. And when did you receive them from
7 the local photo shop?

8 A. Sometime certainly after the initial
9 prehearing exchange. I think I probably got that
10 done sometime the fall of 2006.

11 Q. Okay. And when you received those
12 prints, did you compare them to the original
13 digital, or let me ask you this.

14 When you received the photos, prints,
15 were those prints dated?

16 A. Yes. THE NRCS or excuse me, the FSA
17 office puts the date on the border, the cardboard
18 border, and there's also other notations on that
19 border, but the date is one of them, and so, when I
20 get the photos...

21 Q. Let me clarify. By cardboard border,
22 you mean of the slides?

23 A. That's correct.

24 Q. Okay.

1 A. Okay. So, in any case, once I get
2 the photographic prints back from the commercial
3 shop, they don't put a date on them. They just give
4 me a photographic print.

5 So I have to check the slide with the
6 print to make sure I've got the right slide with the
7 right year.

8 So I project the original slide on a
9 screen, and I look at my print, and I make sure I've
10 got the right year and then put some notation on the
11 photograph of what year at what state.

12 Q. Okay. And turning your attention to
13 the bottom of the page Bates stamped 182, it says
14 182-1997?

15 A. Yes.

16 Q. And did you put that 1997 on this
17 document?

18 A. Not this particular 1997, no.

19 Q. And who put that, if you know?

20 A. Well, I gave these to Gloria Kilgore,
21 the legal administrative assistant, with the dates
22 on it, and I understand that she did that.

23 Q. Okay. And did you compare her dating
24 to the original either the slides or the digitized

1 photos to ensure that they're accurate?

2 A. Yes, I did.

3 Q. Okay. And are they accurate?

4 A. They are.

5 MS. PELLEGRIN: Okay. Your Honor, at
6 this time, I'd move to admit Complainant's
7 Exhibit -- well, actually, strike that.

8 Let's turn to -- we haven't talked
9 about the last two here. This is still in
10 Complainant's Exhibit 12, but now I'm looking,
11 Mr. Carlson, at Bates stamp 188 and 189.

12 A. Okay.

13 Q. And do you recognize these two
14 documents?

15 A. I do.

16 Q. And what are they?

17 A. These are the current high tech
18 images from the NRCS or, excuse me, FSA office
19 because they now have digital photography when they
20 fly these annually, and one is the 2004 image that
21 contains the site, and then 189 is the 2005 image
22 that contains the site at issue.

23 Q. And as you look at these two
24 documents today, where did you get these?

1 A. These came from Mr. Tony Antonacci.
2 I earlier mentioned that these two were part of the
3 original e-mail and electronic files.

4 Q. So is this a true, accurate, and
5 complete copy of the printout of the electronic file
6 then?

7 A. It is.

8 Q. Okay. And except for being a better
9 quality photo, are Exhibit 182 through 187 a true,
10 accurate, and complete copy of the prints of the
11 crop slides from USDA?

12 A. They are.

13 JUDGE MORAN: Didn't you mean to say,
14 counsel, through 189?

15 MS. PELLEGRIN: I believe I asked him
16 separately about 188 and 189, but I'll ask the whole
17 question.

18 JUDGE MORAN: No, that's fine, as
19 long as you're sure about that. I thought we were
20 summing up and you meant to include all of them.

21 MS. PELLEGRIN: Okay. I'll do that
22 now.

23 Q. Mr. Carlson, is this a true,
24 accurate, and complete copy or a print of

1 Exhibit 182 through 189?

2 A. It is.

3 Q. And, Mr. Carlson, let's look at --
4 actually that's it for now.

5 Your Honor, at this time, I'd like to
6 move to admit Complainant's Exhibit 12 into the
7 record.

8 MR. NORTHRUP: We would object, Your
9 Honor, primarily on the grounds that we don't know
10 when these pictures were taken, what particular date
11 they were taken or produced, so we would say that
12 there's no foundation for them.

13 JUDGE MORAN: Well, but Mr. Carlson
14 knows when they were taken based on the
15 representation from the person that sent them; isn't
16 that right, Mr. Carlson?

17 THE WITNESS: That's correct.

18 I also testified that they were taken
19 during the growing season, so they're summer
20 photographs.

21 JUDGE MORAN: Any other objection?

22 MR. NORTHRUP: Well, I mean, that's
23 the issue, and that's our concern.

24 JUDGE MORAN: That's a subject for

1 cross-examination, not as to admissibility it seems
2 to me.

3 MR. NORTHRUP: Well, we would still
4 object on foundation grounds.

5 JUDGE MORAN: Okay. It's my ruling
6 that a proper foundation was laid, and the documents
7 for EPA Complainant's Exhibit 12, they're admitted,
8 which is Bates numbers 182 through 189.

9 (Whereupon Complainant's Exhibit
10 12 was admitted into evidence at
11 this time.)

12 MS. PELLEGRIN: And, Your, Honor, at
13 this time, I think it will be a little bit
14 cumbersome, but what I would like to do, since these
15 are aerial photos that look like pink and green
16 boxes and splotches to me, I would like it if we
17 could get Mr. Carlson to circle, to encircle the
18 area including the site on each of these photos, and
19 if we need to do that for your copy and for
20 respondents' copy and for the witness's copy, I
21 think it would be a little cumbersome but I think it
22 would enhance our view of where the site is from
23 year to year.

24 MR. NORTHRUP: That's fine.

1 JUDGE MORAN: Okay. So what we're
2 going to do is we're going to go off the record
3 while he goes through this ministerial task.

4 (Discussion held off the record.)

5 JUDGE MORAN: We're back on the
6 record.

7 MS. PELLEGRIN: I'd like to state for
8 the record that during the break, Mr. Carlson put a
9 circle on each of the documents Bates stamped 182
10 through 189 indicating where the alleged site
11 violation was. The circle that he drew was
12 including the site, it was around and including the
13 site but not the exact acreage of the site.

14 At this time, respondent's counsel
15 should review the documents that Mr. Carlson has
16 marked to be sure that his copy, complainant's copy,
17 the judge's copy, the witness's copy, and the
18 regional hearing clerk's copy are substantially
19 similar.

20 MR. NORTHRUP: I know our copy is.

21 MS. PELLEGRIN: Your Honor, I
22 understand the witness's copy is the copy that goes
23 to the regional hearing clerk.

24 JUDGE MORAN: Okay.

1 (Pause)

2 JUDGE MORAN: Okay. And so now
3 counsel for the respondent, you had a chance to look
4 at these markings which Mr. Carlson made on all the
5 sets of exhibits?

6 MR. NORTHRUP: Yes, I have.

7 JUDGE MORAN: And do you agree with
8 the characterization of counsel for EPA that the
9 markings are substantially the same indicating the
10 area that's the subject of this litigation?

11 MR. NORTHRUP: Yes, I do.

12 JUDGE MORAN: At least as marked by
13 Mr. Carlson. Okay.

14 Q. BY MS. PELLEGRIN: Okay.
15 Mr. Carlson, I've just placed a blowup on the easel,
16 and I would like for you to turn to Complainant's
17 Exhibit 12 Bates numbered 189 and in looking at the
18 blowup on the easel, I'm looking at the document
19 Bates stamped 189.

20 Can you tell me if this is the true,
21 accurate, and complete blowup exhibit of the
22 document Bates stamped 189?

23 A. No, it's not.

24 Q. Okay. Can you tell me why it is not

1 or where it is not? And you can approach the
2 exhibit.

3 Your Honor, permission to approach?

4 JUDGE MORAN: Yes, sure.

5 A. If you look at 189, you can see the
6 bottom has a north arrow, a scale, and the Bates
7 number and then some other language regarding the
8 actual digital file, the shape file. The SHP at the
9 end, there's two lines. That designates a shape
10 file. That's just a designation for the electronic
11 file from which this came. Those things are not on
12 the blowup that's exhibited.

13 Q. Okay. And besides the scale and the
14 other file names and the north arrow, the Bates
15 number, is this a true, accurate, and complete
16 representation of document Bates stamped 189, the
17 blowup in front of you?

18 A. It is.

19 Q. Okay. And Mr. Carlson, I would like
20 for you to mark this blowup as Complainant's Exhibit
21 or Exhibit D, just Exhibit D, with one of the
22 markers you have in front of you.

23 Your Honor, permission for
24 Mr. Carlson to mark the exhibit?

1 JUDGE MORAN: Yes.

2 (Whereupon the witness made the
3 requested marking.)

4 JUDGE MORAN: Do you want him to stay
5 by the easel?

6 MS. PELLEGRIN: No, Your Honor. He's
7 fine having a seat.

8 Permission to approach and put up
9 another blowup document, Your Honor?

10 JUDGE MORAN: Yes.

11 Did you move for the introduction of
12 that?

13 MS. PELLEGRIN: No, Your Honor.

14 At this time, I'd like to move for
15 the introduction of Exhibit D.

16 MR. NORTHRUP: Can I just take a
17 look?

18 JUDGE MORAN: Sure.

19 MR. NORTHRUP: Ours is blue and
20 theirs has better color on it.

21 JUDGE MORAN: Sure.

22 (Pause)

23 MR. NORTHRUP: We don't have any
24 objection.

1 JUDGE MORAN: Okay. EPA's
2 demonstrative Exhibit D as in dog is admitted.

3 (Whereupon Complainant's
4 Demonstrative Exhibit D was
5 admitted into evidence at this
6 time.)

7 MS. PELLEGRIN: Your Honor, as I
8 understand, this document was Exhibit C but has not
9 been marked as such.

10 JUDGE MORAN: I don't recall. You
11 say this is Exhibit C from Mr. Lenz?

12 MS. PELLEGRIN: Right.

13 JUDGE MORAN: And he made those
14 markings on there?

15 MS. PELLEGRIN: Correct.

16 JUDGE MORAN: Did he make those
17 markings yesterday during the hearing?

18 MR. MARTIN: Yes. Those are the
19 locations of the --

20 MS. PELLEGRIN: -- transects.

21 JUDGE MORAN: Okay. I thought he
22 used different colors. Maybe that was for a
23 different exhibit.

24 All right. But counsel for the

1 respondent agrees that that's the same exhibit that
2 Mr. Lenz made markings on?

3 MR. SMALL: Your Honor, we were under
4 the understanding that Exhibit 8 was admitted except
5 for this Exhibit C.

6 MS. PELLEGRIN: I'm aware, and we'll
7 get to that through Mr. Carlson. I believe we
8 referred to the blowup as Exhibit C.

9 JUDGE MORAN: Okay. But this is the
10 same as Exhibit what, 8 did you say?

11 MR. SMALL: 8.

12 MS. PELLEGRIN: No. This is the same
13 as Complainant's Exhibit 14 that was just admitted.
14 I misspoke.

15 JUDGE MORAN: Okay. All right.
16 That's fine.

17 Your representation is that Mr. Lenz
18 yesterday marked on this even though it wasn't
19 admitted?

20 MS. PELLEGRIN: I believe so. It was
21 for demonstrative purposes, and I believe we
22 referred to it as Exhibit C. I just want to keep
23 the lettering consistent. I would like Mr. Carlson
24 to verify that it is a blowup, a true, accurate, and

1 complete blowup of Complainant's Exhibit 14, Exhibit
2 C.

3 JUDGE MORAN: Okay. And then unless
4 there's an issue which we have to call back
5 Mr. Lenz, you agree that those are the marks he
6 made, counsel for respondent, on this that's on the
7 easel right now and will soon be marked as Exhibit
8 C?

9 MR. NORTHRUP: Yes.

10 JUDGE MORAN: Okay. So go ahead and
11 proceed.

12 MS. PELLEGRIN: Okay.

13 Q. Mr. Carlson, is this document that
14 I've just, blowup document that I've just placed
15 here, turn to Complainant's Exhibit 14, document
16 Bates stamped 192.

17 A. Okay.

18 Q. And please tell me, is the document
19 that's on the blowup, is that a true, accurate, and
20 complete copy of the document that's in
21 Complainant's Exhibit 14 Bates stamped 192?

22 A. It is except, of course, where
23 Mr. Lenz did his markings.

24 MS. PELLEGRIN: Okay. And, Your

1 Honor, at this time since it hasn't been labeled, I
2 would like Mr. Carlson to approach and label it as
3 Exhibit C.

4 JUDGE MORAN: Yes, please do.

5 (Whereupon the witness made the
6 requested marking.)

7 MS. PELLEGRIN: And, Mr. Carlson,
8 please turn to...

9 JUDGE MORAN: Don't you want to move
10 for the introduction of this?

11 MS. PELLEGRIN: Sorry. I'd like to
12 move to introduce Exhibit C into the record.

13 MR. NORTHRUP: Foundation objection.
14 There's no date as to when this aerial photo was
15 taken.

16 MS. PELLEGRIN: This is a blowup of
17 Complainant's Exhibit 14 which was admitted.

18 JUDGE MORAN: This is the same
19 objection you made to the unenlarged version of
20 Exhibit 14?

21 MR. NORTHRUP: Correct.

22 JUDGE MORAN: Okay. And I make the
23 same ruling, so it's admitted, Exhibit C,
24 demonstrative Exhibit C.

1 (Whereupon Complainant's
2 Demonstrative Exhibit C was
3 admitted into evidence at this
4 time.)

5 MS. PELLEGRIN: Mr. Carlson, please
6 turn to Complainant's Exhibit 8, Bates stamp number
7 152.

8 THE WITNESS: Okay.

9 MS. PELLEGRIN: Now, this is a
10 document that Mr. Lenz used, but I would like to get
11 Mr. Carlson to compare Exhibit C to this document.

12 There's been some confusion over the
13 date, and I think Mr. Carlson can help to move
14 towards clarifying that, the date of this particular
15 blowup which is 1998 dated on this photo.

16 JUDGE MORAN: Sure. Go ahead and ask
17 your questions. If there are objections, I'll
18 listen to those.

19 MS. PELLEGRIN: Okay.

20 Q. Mr. Carlson, can you compare, it's a
21 little bit of juggling but either Complainant's
22 Exhibit 14 or the blowup in front of you, which you
23 testified was the same thing, with Complainant's
24 Exhibit 8, Bates stamp 152 that's in front of you?

1 JUDGE MORAN: Well, first of all, can
2 you compare that? That's the question on the table.
3 Can you compare? You answer yes or no. Then she
4 asks a follow-up.

5 THE WITNESS: Yes, I can compare.

6 Q. BY MS. PELLEGRIN: Okay. And remind
7 us, what is the date of the photo, the aerial photo
8 that's in Complainant's Exhibit 14 and also as
9 Exhibit C?

10 A. Its date is March 28, 1993.

11 Q. Okay. And please compare the Exhibit
12 C, March 28, 1993 aerial photo with Complainant's
13 Exhibit 8, Bates stamp 152.

14 And, Your Honor, permission for
15 Mr. Carlson to approach the exhibit if he needs to.

16 JUDGE MORAN: Yes.

17 (Pause)

18 THE WITNESS: Okay.

19 Q. BY MS. PELLEGRIN: And have you
20 compared those two documents, Mr. Carlson?

21 A. I have.

22 Q. And what did you find?

23 A. I believe the exhibit, or excuse me,
24 the two photographs with page numbers 152 and 153

1 which are the same photographs, different markings,
2 are indeed the 1993 photograph.

3 Q. Okay. And can you read into the
4 record at the top left hand corner of the page Bates
5 stamped 152 the white markings, white words in
6 markings?

7 A. Okay. Was that the upper left hand
8 corner?

9 Q. The upper left hand corner,
10 Mr. Carlson.

11 A. Okay. There's a Bates number
12 CX000152, and then to the right of that about a
13 quarter inch in capital letters is NOT TO SCALE.
14 Below NOT TO SCALE, separate line, is parentheses
15 (1998) K7-1.

16 Q. Mr. Carlson, you testified that this
17 appeared to be the same photo as Complainant's
18 Exhibit C which is a 1993 photo.

19 Can you explain why this is marked
20 1998?

21 A. Since it came from the USDA FSA
22 office, it's probably their markings with regard to
23 something happening in that particular year that
24 they were tracking. That's my best guess.

1 Q. Okay. And have you --

2 MR. SMALL: Well, I'm going to
3 object. It's a bit speculative.

4 MS. PELLEGRIN: Your Honor, I'm going
5 to continue...

6 JUDGE MORAN: You're a little late on
7 the objection, but I'm going to sustain the
8 objection because he's not up here to guess. I
9 mean, for instance, you can have him testify that in
10 his view having compared the two photographs and any
11 other reasons he wants to explain why he thinks
12 they're the same. Of course, they're not exactly
13 the same because the Exhibit C is obviously just a
14 blowup of a portion of 152, but he can explain the
15 reasons why.

16 Then on cross-examination, if counsel
17 for respondent wants to take that on, they can
18 attempt to challenge the basis for his conclusion
19 it's the same photograph. I don't know if there's
20 any interest in doing that or not, but that's the
21 way it will work.

22 Q. BY MS. PELLEGRIN: Mr. Carlson, have
23 you done anything to try to ascertain why there is a
24 1998 on the top of what you have testified is a 1993

1 photo?

2 A. Yes.

3 Q. And what did you do to try to
4 ascertain that?

5 A. Oh, I made some calls during previous
6 testimony to the USDA office in Salem to see if they
7 could explain to me what that designation was at the
8 top of the 1998 K7-1.

9 Q. And were you able to get a response?

10 A. Not yet.

11 Q. And do you hope or expect to get a
12 response during this proceeding?

13 JUDGE MORAN: Who proves that matter.
14 Yes, I hope, yes, I expect, but it doesn't...

15 MS. PELLEGRIN: Withdrawn.

16 He's attempted to ascertain why he
17 hasn't heard back from them yet.

18 JUDGE MORAN: I understand.

19 MS. PELLEGRIN: He's been calling
20 during the break.

21 JUDGE MORAN: Okay. Well, just
22 forget the other question.

23 MS. PELLEGRIN: Okay. I withdraw the
24 question.

1 Mr. Carlson, I think I have just one
2 more question.

3 Q. Prior to coming to court today, had
4 you had a reason to believe that the Complainant's
5 Exhibit 152 was not a 1998 photo?

6 A. Before today?

7 Q. Before today.

8 A. Yes.

9 Q. And what was that reason?

10 A. We met with, myself and counsel,
11 yourself and Mr. Martin, we, in talking to our
12 witnesses last night, Bill Hesper and Daniel Hesper,
13 he pointed out that he owns, he lives on this
14 photograph, his home you can see.

15 MR. NORTHRUP: Your Honor, we'd
16 object. It's hearsay.

17 JUDGE MORAN: And hearsay is
18 admissible but that's too problematic to have him go
19 into what... You can call Mr. Hesper.

20 MS. PELLEGRIN: We are, Your Honor.
21 I'll withdraw the question.

22 JUDGE MORAN: All right. Good.

23 MS. PELLEGRIN: No further questions,
24 Mr. Carlson.

1 JUDGE MORAN: Okay. Do you have any
2 cross on this limited testimony? Remember, this was
3 preliminary so that she could have other witnesses,
4 so that counsel could have other witnesses.

5 MR. SMALL: Your Honor, we're going
6 to first off object to Exhibit No. 152 because up in
7 the upper left-hand corner of that document, it says
8 not to scale. Then in brackets it says 1998 K7-1.
9 There's been no explanation of what that means.

10 JUDGE MORAN: Excuse me. Didn't I
11 already admit this document, 152? Isn't that
12 admitted already in the record?

13 MR. SMALL: If that's the case, Your
14 Honor, I'm sorry for that. I thought you admitted
15 the 1993 photograph.

16 JUDGE MORAN: My notations indicate
17 that this is part of Exhibit 8. Is that right,
18 counsel?

19 MR. MARTIN: Yes, it is, Your Honor.

20 JUDGE MORAN: Okay. And except for
21 Complainant's Exhibits 57 through 60 and 63 through
22 70 and the videotape, Exhibit 8 was admitted.

23 So in any event, even if it were not
24 admitted, which it is admitted, that's a subject for

1 your cross-examination.

2 MR. SMALL: Your Honor, we withdraw
3 our objection to that document. I apologize to the
4 court.

5 JUDGE MORAN: No offense taken.

6 CROSS-EXAMINATION

7 BY MR. SMALL:

8 Q. Mr. Carlson, referring to document
9 No. 152, do you have that in front of you?

10 A. I do.

11 Q. In the upper left hand corner of that
12 document, there is the words not to scale (1998)
13 K7-1.

14 Do you know who put those symbols
15 there?

16 A. Well, I believe it to be the USDA
17 office.

18 Q. Do you know that for a fact?

19 A. That's my understanding.

20 Q. Do you know that for a fact?

21 A. That's my understanding.

22 Q. Okay. Who did it? What's the name
23 of the party that put that representation there?

24 A. I don't know the individual name of

1 the person employed at that office who would have
2 done that.

3 Q. And so you're not certain who that
4 person is?

5 A. I don't know that person.

6 Q. And you don't know for a fact that
7 that was even put there by the entity that sent you
8 this document, do you?

9 A. Well, I have seen many of these
10 documents in the past, and that's my understanding.

11 Q. I'm not talking about other
12 documents. I'm talking about this document.

13 A. It's my understanding that that's
14 USDA FSA notations on their maps that they use
15 for --

16 Q. But you can't tell us who did that?

17 A. I cannot.

18 Q. And you can't tell us if it was a
19 member of that agency, can you?

20 A. I believe it was a member of that
21 agency.

22 Q. And you don't know if it was the
23 pilot that flew the flight that put those notations
24 there?

1 A. I'm pretty certain it would not be
2 the pilot, but I don't know for certain.

3 Q. You don't know that either, do you?

4 A. I don't know if the pilot wrote on
5 that photograph.

6 JUDGE MORAN: Counsel, let me stop
7 you for a second because I was focusing on something
8 else.

9 You're right now focusing simply on
10 the words not to scale and the 1998 K7-1? Is that
11 what you're directing this to?

12 MR. SMALL: I'm pointing that to the
13 truthfulness of that representation, Your Honor.

14 JUDGE MORAN: No, I understand, but
15 my question for you, is the one thing that you're
16 focusing on with this witness just what I referred
17 to and only that?

18 MR. SMALL: Yes.

19 JUDGE MORAN: All right. The fact
20 that it says not to scale (1998) K7-1, that's what
21 your question is focused on?

22 MR. SMALL: In particular, the 1998
23 K7-1.

24 JUDGE MORAN: Okay. All right.

1 Well, you've made your point about that, didn't you?

2 Q. BY MR. SMALL: Do you know when this
3 flight took place for Exhibit 152?

4 A. Yeah. I believe it's the March 28,
5 1993 photo flight.

6 Q. So you think this 152 is actually a
7 flight in 1993?

8 A. That's what I earlier testified to on
9 direct.

10 Q. It's got nothing to do with 1998?

11 A. It may have something to do with 1998
12 that's specific to the USDA office.

13 Q. But it's your understanding that
14 Exhibit 152 represents a flight that was taken in
15 1993?

16 A. That's correct.

17 Q. Mr. Carlson, when was your first
18 visit to the Andrew and Bobby Hesser site?

19 A. I was actually on the site first on
20 September 19, 2003.

21 Q. Could you say that again? I couldn't
22 hear you.

23 A. I was first on the actual site on
24 September 19, 2003.

1 Q. So you have no knowledge of anything
2 pertaining to that site personally prior to
3 September 19, 2003?

4 A. If by personally you mean that I was
5 actually there, no.

6 Q. That's what I want to know.

7 JUDGE MORAN: And he answered. He
8 said no.

9 Q. Referring to Exhibit 12, where did
10 you receive these photographs from?

11 A. I testified earlier that they were
12 sent to me by Mr. Tony Antonacci of the USDA NRCS
13 office in Salem, Illinois.

14 Q. Okay. And do you know where
15 Mr. Antonacci got these photographs?

16 A. These are, my understanding is these
17 are property of the Farm Service Agency which is
18 also part of the USDA, and they're co-located
19 together in pretty much every county in the Midwest.

20 Q. Specifically, do you know from whom
21 Mr. Antonacci received these photographs?

22 A. He would have received them from the
23 FSA office.

24 Q. Where?

1 A. Salem, Illinois.

2 Q. Mr. Antonacci works in that office,
3 is that not correct?

4 A. That's correct.

5 Q. Are you saying that Mr. Antonacci
6 produced these aerial photographs.

7 A. No. He obtained them and got them to
8 me.

9 Q. Okay. And where did he obtain these
10 photographs?

11 A. Just down the hall in the FSA part of
12 that office.

13 Q. Now, I didn't mean specifically the
14 location within the office, Mr. Carlson. What I
15 meant was where did Mr. Antonacci, if he didn't fly
16 these flights himself, were there any other people
17 within his office that flew these flights for him?

18 A. My understanding, FSA contracts out
19 and has a contractor fly those flights on an annual
20 basis.

21 Q. Okay. Who was that contractor?

22 A. I do not know.

23 Q. And do you know when each and every
24 one of these were flown?

1 A. I know the general time frame in
2 which they were flown.

3 Q. But you personally don't know when
4 these photos were taken, do you?

5 A. I don't know the exact date that the
6 photograph was taken without further...

7 Q. And again, you don't know who flew
8 them?

9 A. I do not.

10 Q. And you don't know when they were
11 taken, a specific date?

12 A. I do not know the specific date, no.

13 Q. And you don't know any specific date
14 when they were sent to Mr. Antonacci, do you?

15 A. Well, Mr. Antonacci obtained them
16 from me in August of 2006.

17 MR. SMALL: Nothing further at this
18 time.

19 JUDGE MORAN: Okay. You can if you
20 have any questions that you feel are necessary to
21 ask.

22 MS. PELLEGRIN: I just have one, Your
23 Honor.

24

1 REDIRECT EXAMINATION

2 BY MS. PELLEGRIN:

3 Q. Mr. Carlson, these aerial photos that
4 Mr. Small has been referring to in Complainant's
5 Exhibit 12, are these part of the government records
6 for the FSA?

7 A. Yes.

8 MS. PELLEGRIN: No further questions.

9 MR. NORTHRUP: Nothing further.

10 JUDGE MORAN: Okay. And does that
11 conclude Mr. Carlson's testimony for now?

12 MS. PELLEGRIN: For now, yes, sir.

13 JUDGE MORAN: Okay. Thank you,
14 Mr. Carlson.

15 (Witness excused.)

16 MS. PELLEGRIN: And, Your Honor, at
17 this time, if we could have a ten-minute break.
18 We're going to play the video, and I would like to
19 have that all set up and then ready to go.

20 JUDGE MORAN: Sure, that's fine.
21 This is the video that hasn't been admitted yet?

22 MS. PELLEGRIN: Right.

23 JUDGE MORAN: And you didn't need
24 Mr. Carlson to lay a foundation for that?

1 MS. PELLEGRIN: No, sir, I do not.

2 JUDGE MORAN: Okay. Sure. We'll
3 take a ten-minute break while you get this set up.

4 (Recess taken.)

5 MS. PELLEGRIN: Your Honor, at this
6 time, the complainant would like to call Daniel
7 Heser to the stand.

8 (Whereupon the witness was sworn
9 by Judge Moran.)

10 JUDGE MORAN: Have a seat.

11 I don't remember if I saw you in the
12 courtroom or not, but what we do is you first state
13 your name and then you spell it for us.

14 THE WITNESS: Daniel Joseph Heser
15 (H-e-s-e-r).

16 DANIEL JOSEPH HESER
17 called as a witness herein, having been first duly
18 sworn on his oath, was examined and testified as
19 follows:

20 DIRECT EXAMINATION

21 BY MS. PELLEGRIN:

22 Q. Good afternoon, Mr. Heser. Where do
23 you live?

24 A. 4109 Carter Road, Kell (K-e-l-l),

1 Illinois.

2 Q. And how long have you lived there?

3 A. Since '86 or '87.

4 Q. Okay. And before that, where did you
5 live?

6 A. Along State Route 37, Route 1, Salem,
7 if I remember correctly.

8 Q. Okay. And is that Salem, Illinois as
9 well?

10 A. Yes.

11 Q. So how long have you lived in or
12 around Salem, Illinois?

13 A. My parents moved out there when I was
14 in high school my senior year in '81, so I've lived
15 out there ever since.

16 Q. Mr. Hesel, what is your current
17 occupation?

18 A. Welder.

19 Q. And approximately how long have you
20 been a welder?

21 A. I started welding in February of '95.

22 Q. Okay. And before you were a welder,
23 what was your occupation?

24 A. I farmed full-time.

1 Q. Okay. And how long have you farmed
2 full-time or had you farmed full-time?

3 A. I farmed full-time from '85 to '94.

4 Q. Okay. And what kind of farming did
5 you do?

6 A. Row crop and had hogs for a short
7 period of time.

8 Q. And where do you farm or where did
9 you farm?

10 A. At my address where I'm at now.

11 Q. Okay. And that is in Salem,
12 Illinois?

13 A. It's Kell.

14 Q. I'm sorry?

15 A. Kell.

16 Q. K-e-l-l?

17 A. K-e-l-l.

18 Q. And how far is that from Salem,
19 Illinois?

20 A. Approximately five miles.

21 Q. Mr. Heser, do you own land?

22 A. Yes. My first wife and I owned 180
23 acres.

24 Q. And when you were farming, were you

1 farming land that you owned?

2 A. Farming the land that I owned plus
3 approximately 70 to 80 acres of rent ground.

4 Q. Of rent --

5 A. Rental ground.

6 Q. Okay. Mr. Heser, are you familiar
7 with the respondents, Andy and Bobby Heser?

8 A. Yes, I am.

9 Q. And how are you familiar with them?

10 A. They are my cousins.

11 Q. Are you familiar with what
12 respondents' occupations are?

13 A. They're farmers.

14 Q. And are you familiar with where they
15 farm generally?

16 A. They farm in the Salem area
17 generally.

18 Q. Can you tell me where they farm in
19 relation to where you have farmed or you own
20 property?

21 A. They farm the ground now that is
22 currently north of where I live, where I farmed.

23 Q. And how far is it north of where you
24 live?

1 A. Quarter mile.

2 Q. And when you say where you live now,
3 where your home is?

4 A. Yes.

5 Q. And can you see respondents' property
6 from your home?

7 A. Yes, I can.

8 Q. And how is your home situated so that
9 you can see that far?

10 A. I'm up on top of a hill that looks
11 down into it. If you look north from my house, you
12 can see their property.

13 Q. Okay. And, Mr. Hesper, we've been
14 using some terms in this hearing. When I use the
15 term site of the alleged violations, I'm referring
16 to the site of the disturbance that is at issue in
17 this case.

18 Do you know what I mean by the site
19 of the alleged violation?

20 A. Yes, I do.

21 Q. And do you know where generally is
22 the site of the alleged violation?

23 A. It's Section 11, Raccoon Township.

24 Q. And where is that in relation to your

1 home?

2 A. It's north.

3 Q. Okay. And can you see generally the
4 site of the alleged violation from where your home
5 is situated?

6 A. Yes.

7 Q. Can you sort of give me a guess,
8 estimate how far in feet or miles?

9 A. It's approximately a quarter mile.

10 Q. From your home to the --

11 A. From my home to the edge of the site,
12 yes.

13 Q. Okay. Now, how long have you been
14 familiar with the site of the alleged violation or
15 that site in general.

16 A. That site in general, ever since I've
17 lived there, you know, I have always seen that
18 ground, prior to and then after the alleged
19 violation.

20 Q. Okay. And how long, remind me, how
21 long has that been?

22 A. That was from the time I started
23 farming. That was '85.

24 Q. Now, I'm going to divide, I'm going

1 to ask you some questions, and I'm going to divide
2 that site into sort of a time frame of pre- and
3 post-alleged violations.

4 Do you understand what I mean by
5 that?

6 A. Yes.

7 Q. Okay. So are you familiar with the
8 site pre-alleged violation?

9 A. Yes.

10 Q. And how are you familiar with that
11 site?

12 A. I had on a couple occasions been down
13 through that area tracking a wounded deer and bow
14 hunting.

15 Q. So you personally walked through that
16 area?

17 A. Yes, yes.

18 Q. And can you describe what that
19 area -- well, first let me ask this.

20 Are you familiar with generally the
21 time frame that respondent purchased the area that
22 includes the site of the alleged violation?

23 A. Uh...

24 Q. The time that they owned that site.

1 A. This was prior to the time that they
2 owned it that I was there.

3 Q. Okay. And do you know generally what
4 year respondents purchased that site?

5 A. I believe it was '99.

6 Q. Okay. So actually, I'm going to
7 divide it into three time frames?

8 A. Okay.

9 Q. Can you tell me, can you describe the
10 site for me prior to, did you say 1998?

11 A. Yes.

12 Q. Okay. Can you describe the site for
13 me prior to 1998.

14 A. It was a woodland with Martin Branch
15 running through it.

16 Q. And was there any logging occurring
17 prior to 1998 to your knowledge?

18 JUDGE MORAN: Was there any what?

19 MS. PELLEGRIN: Logging of the site.

20 A. There was logging done, but I'm not
21 positive on what year. It was prior to their
22 purchase of it.

23 Q. Okay.

24 A. And I was through that area hunting

1 or, you know, tracking deer prior to the logging and
2 then the year that the logging had occurred.

3 Q. Okay. And now let me take you to the
4 time in 1998. From that time frame to the time of
5 the alleged violation, in that time frame, can you
6 please describe that site?

7 A. There was treetops from where the
8 logging had been. It was pretty much the same;
9 still a lot of big trees and everything still in
10 there.

11 Q. And did logging occur at the site
12 from the time that the respondents purchased it to
13 the time of the alleged violation?

14 A. It was prior to their purchase.

15 Q. Okay. And let's see, I'm sorry, did
16 any cutting down of trees occur from the time that
17 they purchased to prior to the alleged violation, if
18 you know?

19 JUDGE MORAN: Do you understand the
20 question?

21 THE WITNESS: No, I do not.

22 JUDGE MORAN: When you don't
23 understand it, just say I don't understand your
24 question, and she'll do a better job of asking you,

1 so just wait. Let her ask again.

2 MS. PELLEGRIN: Okay. I'm sorry.

3 Let me back up a little bit. Mr. Hesel.

4 Q. So you're familiar with the site,
5 with this area, prior to their purchase, and I think
6 you testified that their logging had occurred prior
7 to their purchase?

8 A. Yes.

9 Q. And from the time that respondents
10 purchased the property to the time before the
11 alleged violation occurred, to your knowledge, was
12 there any logging that occurred?

13 A. No, there was not.

14 Q. Okay. And can you describe the
15 condition of the property generally from the time
16 respondents purchased it to the time of the alleged
17 violation, describe the area or the amount of trees
18 on the site let's say?

19 A. There was still a lot of trees left
20 down in there. They had taken the largest ones out,
21 of course, for the logging, but there was still a
22 lot of trees left down in there. Of course, there
23 was the treetops also.

24 Q. Okay. Did you say tree trunks?

1 A. Treetops.

2 Q. Treetops. And what do you mean by
3 treetops?

4 A. Just the top part of the tree that
5 they don't use for the logs; the limbs and so forth.

6 Q. All right. And let me ask you, let's
7 see, are you familiar with what the site looked like
8 post alleged violation generally?

9 A. Yes.

10 Q. And what did and what does that site
11 look like post alleged violation.

12 A. It's barren of trees, and the Martin
13 Branch has been rerouted to follow the property
14 lines.

15 Q. And how are you familiar with what
16 the area looks like? Is that how it looks
17 currently? Is that the how the site of the alleged
18 violation looks today?

19 A. Yes, yes.

20 Q. Okay. And did you have occasion to
21 visit the site after the alleged violation?

22 A. Yes.

23 Q. And when did you visit the site after
24 the alleged violation?

1 A. It was right after they pretty well
2 had completed it. My brother and I took a video
3 camera down and videotaped it.

4 Q. Okay. Let's see, Mr. Hesel, did you
5 personally take the video?

6 A. No, I did not.

7 Q. And why didn't you?

8 A. My hands are not steady enough on a
9 camera.

10 JUDGE MORAN: They're steady enough
11 for welding, right?

12 THE WITNESS: Barely. A little
13 shaking doesn't hurt.

14 JUDGE MORAN: Oh, is that right?
15 Okay.

16 Q. BY MS. PELLEGRIN: And were you
17 present during -- who took the video?

18 A. My brother Trent did.

19 Q. And were you present during the
20 taking of the video?

21 A. Yes, I was.

22 Q. Okay. And were you present the whole
23 time?

24 A. Yes, the whole time.

1 Q. And where were you standing at in
2 relation to your brother who was taking the video?

3 A. Just back to the side so I'd stay out
4 of the way of the video camera.

5 Q. And where were you standing in
6 relation to the property line you talked about?

7 A. We followed dad's side of the
8 property line.

9 JUDGE MORAN: The what side?

10 THE WITNESS: My dad's side of the
11 property line.

12 JUDGE MORAN: Okay.

13 Q. BY MS. PELLEGRIN: Okay. And so it's
14 your testimony that the site of the alleged
15 violation abuts your dad's side of the property
16 line?

17 A. Yes.

18 Q. Okay. And for the record, can you
19 please state who your dad is?

20 A. William Ernest Hesper.

21 Q. Okay. And, Mr. Hesper, if I played
22 that video here today, could you tell me if it
23 fairly and accurately depicts what your brother took
24 while you were standing there adjacent to the site

1 of the alleged violations?

2 A. Yes, I could.

3 MS. PELLEGRIN: Your Honor,
4 permission to play the video for the court and have
5 Mr. Hesel talk about that for you.

6 JUDGE MORAN: Yes, but I want to ask
7 a question first.

8 Do you have any objection to the
9 video?

10 MR. SMALL: Objection. Foundation.
11 Chain of command. Chain.

12 JUDGE MORAN: Chain of custody?

13 MR. SMALL: Yeah.

14 JUDGE MORAN: Okay. Well, you can
15 ask a couple questions.

16 Do you know what Mr. Small is getting
17 at in terms of chain of custody issue?

18 MS. PELLEGRIN: Well, Your Honor, I
19 don't know if this is what he's getting at
20 particularly, but while you were out, we played, we
21 put the original on, and apparently there's a
22 basketball game and old movies, and the site is
23 somewhere in there, so instead I put a copy of that
24 site.

1 I believe through Mr. Hesar's
2 testimony, he will be able to authenticate that
3 that, even though it's a copy of the video, that
4 it's the same video he and his brother took,
5 notwithstanding we can't find the particular
6 location it is on the original video.

7 At some time in the future, we shall
8 find where it is on the original.

9 JUDGE MORAN: I can't read
10 Mr. Small's mind, but usually when they're talking
11 about chain of custody, you think of something like
12 a police lab or, in the EPA's case, if they took a
13 sample of something and then went from here to there
14 to there.

15 Is that what you're getting at?

16 MR. SMALL: That's right, Your Honor.

17 JUDGE MORAN: Okay. I don't know
18 that that's really going to be such an issue, but
19 what you would ask him is questions like, oh, so you
20 said you were with your brother during the time of
21 this, and you were walking and observing the same
22 things he was photographing? Yes.

23 And then you ask him, do you know
24 what happened to that tape after he was done? And

1 then he'll say, no, I don't know, or, yes, I do
2 know.

3 But the point is and what underlies
4 these chain of custody questions is whether some
5 other tape gets substituted.

6 MS. PELLEGRIN: Right.

7 JUDGE MORAN: That's the undercurrent
8 of that challenge, and that can be cured I believe
9 subject to the witness saying, when he views this,
10 to his recollection that that's exactly what he
11 observed at that time.

12 If you can't cure it the other way
13 which is to say, oh, no, we know exactly. The tape
14 was given to me after my brother was finished. I
15 put it in my closet, and then on this date, I gave
16 it to you or whatever.

17 So those are the ways to deal with
18 it.

19 MS. PELLEGRIN: We believe that the
20 former instead of the latter will be the case in
21 this particular case. My understanding is that his
22 father turned it over to the Corps of Engineers. My
23 understanding is that it wasn't labeled and put in a
24 sealed exhibit.

1 JUDGE MORAN: Right. So you would
2 try to demonstrate this once he views it?

3 MS. PELLEGRIN: Correct.

4 JUDGE MORAN: All right. So I'm
5 going to hold off on ruling until that happens.

6 But what I just want to ask before we
7 deal with that is, you said to Mr. Heser -- it's
8 Daniel Heser, right?

9 THE WITNESS: Yes.

10 JUDGE MORAN: You said that the
11 logging -- you're only a quarter mile away, and
12 you're up on a hill and you can see this land,
13 right, the land in question?

14 THE WITNESS: Correct.

15 JUDGE MORAN: And based upon your
16 years of being there, you know that the logging
17 occurred before Robert and Andrew Heser purchased
18 this land?

19 THE WITNESS: Correct.

20 JUDGE MORAN: And you live there now
21 still in the same --

22 THE WITNESS: Yes.

23 JUDGE MORAN: Okay. And so tell me
24 whether this is a fair characterization or not, and

1 then if you say no, I'll ask you to explain, but
2 here's my question.

3 From the time after the logging
4 occurred and when Robert and Andrew Hesel or
5 whatever entity was named as the purchaser of this
6 land that we're talking about, did that land from
7 your view remain substantially the same other than
8 like seasonal changes and so forth up until the time
9 of the alleged disturbance or did it change in other
10 ways?

11 THE WITNESS: No, it didn't change in
12 any other way.

13 JUDGE MORAN: So up until the time of
14 the disturbance, is it your testimony that -- and
15 this is after the logging -- it looked the same all
16 those years up until this dispute arose?

17 THE WITNESS: Yes.

18 JUDGE MORAN: Is that fair?

19 THE WITNESS: Yes, that's fair.

20 JUDGE MORAN: Okay. I wanted to make
21 that clear in my mind as to what he was testifying
22 as to the condition of the land.

23 MS. PELLEGRIN: And, Your Honor, I
24 have a clarification.

1 In my mind, I understood Mr. Heser to
2 state that some logging had occurred, but it's not
3 like the area was clear cut. There was still
4 logging, but there was still --

5 JUDGE MORAN: You can ask him about
6 that.

7 MS. PELLEGRIN: Okay.

8 Q. Mr. Heser, was the area, the site of
9 the alleged violations ever, prior to the time of
10 the alleged violations, was it ever barren of trees?

11 A. No, it was never clear cut.

12 MS. PELLEGRIN: Okay.

13 Your Honor, permission to start the
14 video, and I've tried to locate it in a way where
15 the witness and the court can see it. I don't know
16 if respondents want to move.

17 JUDGE MORAN: Yeah, there are chairs,
18 and the respondents' counsel can pull up a chair or
19 chairs, plural.

20 MS. PELLEGRIN: And, Your Honor, in
21 just a moment we'll play the video, but before we do
22 that, I would like for Mr. Daniel Heser to point on
23 the aerial photo, and I'll lay the foundation for
24 his knowledge of aerial photos in a second, but the

1 vantage point of where the video was taken.

2 JUDGE MORAN: Okay.

3 MS. PELLEGRIN: Okay.

4 Q. Mr. Hesper, have you ever seen your
5 property on an aerial photograph?

6 A. Yes, I have.

7 Q. Have you ever seen the site of the
8 alleged violation on an aerial photograph?

9 A. Yes, I have.

10 Q. Okay. If I showed you an aerial
11 photograph, would you be able to pick out the site
12 of the alleged violation?

13 A. Yes, I would.

14 MS. PELLEGRIN: Okay. Your Honor
15 permission for --

16 JUDGE MORAN: Yes.

17 MR. SMALL: Your Honor, we're going
18 to object. It's already circled over there.

19 MS. PELLEGRIN: It's not circled.
20 The large blowup is not circled. Exhibit D has no
21 circling.

22 JUDGE MORAN: Okay. So you withdraw
23 that objection?

24 MR. SMALL: Withdraw it.

1 THE WITNESS: Do you want this
2 circled or...

3 MS. PELLEGRIN: Yeah. I would like
4 for you, Mr. Hesel, to approach Exhibit D, and if
5 you could first put a large circle around the site
6 of the alleged violations.

7 (Whereupon the witness made the
8 requested marking.)

9 JUDGE MORAN: I can't see where he
10 marked it.

11 Can't you use a marker that is more
12 distinctive?

13 MS. PELLEGRIN: It's a very dark
14 image. It's pretty tough to see.

15 JUDGE MORAN: No, but just maybe if
16 you're going to have him mark two markings, have him
17 put his initials and 1 besides the first marking,
18 and then for the second marking put his initials and
19 put 2.

20 MS. PELLEGRIN: Okay. And maybe you
21 should try using this black marker.

22 THE WITNESS: Okay.

23 MS. PELLEGRIN: And as you're marking
24 or after you mark, tell us where on the map you've

1 marked.

2 (Whereupon the witness made the
3 requested marking.)

4 MS. PELLEGRIN: Okay. And can you
5 describe for the record where -- and we've been
6 referring to, Mr. Hesper, the corner of this property
7 as a backwards L, and perhaps you could refer to
8 where you have marked -- oh, I'm sorry. I believe
9 Mr. Hesper has put initials on the circle that he's
10 drawn.

11 JUDGE MORAN: Okay. And then we'll
12 put a number 1 besides that, please. Did you?

13 THE WITNESS: Yes, I put a 1 on the
14 first one and a 2 on the second one, Your Honor.

15 JUDGE MORAN: Okay. Thank you.

16 MS. PELLEGRIN: Since he's circled it
17 twice with two different markers, he's put a DH 1
18 and a DH 2, for the record.

19 JUDGE MORAN: And ask him what did he
20 just circle, described what he just circled.

21 MS. PELLEGRIN: Okay.

22 Q. Please, for the record, describe what
23 you've just circled.

24 A. I've circled the site of the alleged

1 violation.

2 Q. And you have circle it how many
3 times?

4 A. I have circled it twice.

5 Q. Okay. And what colors have you
6 circled it in?

7 A. First one is in green. Second one is
8 in orange.

9 Q. And how did you mark the circle in
10 green?

11 A. I put DJH 1.

12 Q. And how did you mark the circle in
13 red?

14 A. DJH 2.

15 Q. Okay. And now, Mr. Hesel, I would
16 like you to, if you could generally describe, I
17 don't believe we'll mark this yet, but if you could
18 just generally describe where you were, pointing to
19 this document, when you and your brother took the
20 video?

21 A. We started at the south or the
22 downstream end of the alleged violation and worked
23 upstream to the upper end.

24 JUDGE MORAN: Okay. And just so I

1 understand, when you talked about these different
2 circles and you've marked them twice, have you just
3 circled one area on the map?

4 THE WITNESS: It's probably not to
5 scale exactly.

6 JUDGE MORAN: No, I understand, but
7 you didn't circle your property on there.

8 THE WITNESS: No.

9 JUDGE MORAN: The only thing you've
10 marked is the area of the alleged violation?

11 THE WITNESS: It is a little below
12 the property line, yes.

13 JUDGE MORAN: Okay. I just wanted to
14 make sure the record showed that because we had
15 marking number 1 and 2 didn't you call it?

16 THE WITNESS: Yeah.

17 MS. PELLEGRIN: Yes.

18 JUDGE MORAN: But it's the same rough
19 area?

20 MS. PELLEGRIN: Yes, Your Honor, it's
21 the same rough area. He just tried to make it more
22 able to view it by using a different marker.

23 JUDGE MORAN: Okay. Did you want him
24 to mark where his property is on this map or no? I

1 thought you were asking him that.

2 MS. PELLEGRIN: Well, we can do that,
3 sure.

4 Let's take a different color. Well,
5 you can use the black. If you will circle where
6 your property is, Mr. Hesper, and you can put a DH 3
7 on that.

8 THE WITNESS: My personal property or
9 my father's property?

10 MS. PELLEGRIN: Why don't we start
11 with your personal property.

12 (Whereupon the witness made the
13 requested marking.)

14 MS. PELLEGRIN: And if you could put
15 a DH 3 there.

16 (Whereupon the witness made the
17 requested marking.)

18 Q. And is it your testimony that you
19 were standing on your father's property when you
20 took the video?

21 A. Yes.

22 MS. PELLEGRIN: And, Your Honor, I
23 could either have Daniel or his father circle his
24 father's property. I'm sure Mr. Hesper could

1 identify his father's property.

2 JUDGE MORAN: Well, you could ask
3 him, are you able to identify...

4 MS. PELLEGRIN: Okay.

5 Q. Mr. Hesper, are you able to identify
6 your father's property on this map?

7 A. Yes.

8 Q. Would you please circle your father's
9 property?

10 A. Okay.

11 JUDGE MORAN: You can use the same
12 pen. We're just going to mark this time 4 after it,
13 right?

14 THE WITNESS: Okay.

15 Would you like the whole property,
16 the whole 180 acres?

17 MS. PELLEGRIN: Well, whatever of it
18 is included on here, sure.

19 THE WITNESS: Okay.

20 (Whereupon the witness made the
21 requested marking.)

22 Q. And, Mr. Hesper, can you describe
23 roughly the area that you have -- well, first of
24 all, can you put a DH 4 under this line?

1 (Whereupon the witness made the
2 requested marking.)

3 Q. Okay. And can you describe roughly
4 the area that you have just outlined on Exhibit D?
5 Describe it. You can use roadways if you know.

6 A. I'm not understanding exactly what
7 you're wanting here.

8 Q. Okay. Do you know which road this
9 is? Can you describe where you've just outlined,
10 where you've just drawn this outline?

11 A. It borders Old Salem Road on the west
12 and Carter Road on the south.

13 MS. PELLEGRIN: Okay. I'm going to
14 go ahead and play the video.

15 JUDGE MORAN: Okay. We need the
16 lights down or will it work without it?

17 MS. PELLEGRIN: I don't know.

18 JUDGE MORAN: We'll try it. If we
19 can't see it, we'll dim them.

20 This is the first time I'm seeing
21 this by the way. I don't look at the prehearing
22 stuff unless there's an issue I have to deal with in
23 terms of a motion.

24

1 (Whereupon the video is being
2 played at this time.)

3 MS. PELLEGRIN: And throughout this,
4 I'll pause it and have you to explain what we're
5 seeing here, Mr. Heser.

6 Let me rewind it a little bit here .

7 Q. Mr. Heser, can you describe what's
8 depicted first of all here?

9 A. There's some logs laying in the
10 picture.

11 JUDGE MORAN: Some what, sir?

12 THE WITNESS: Some logs.

13 JUDGE MORAN: What are we looking at,
14 whose property?

15 THE WITNESS: This is the alleged
16 violation site.

17 JUDGE MORAN: Then we're looking at
18 the Robert Heser and Andrew Heser's land?

19 THE WITNESS: Yes. This is on the
20 downstream end of it before this starts.

21 JUDGE MORAN: Okay.

22 Q. BY MS. PELLEGRIN: Mr. Heser, can you
23 describe what's depicted here?

24 A. Well, there's one of the dozers they

1 had down here, and when the picture is clear, you
2 can see the edge of the new channel that was created
3 where it's been strawed.

4 Q. And, Mr. Hesper, can you describe
5 what's depicted here?

6 A. That's one of the brush piles that
7 had been burnt.

8 Q. Okay. And let me just stop it for a
9 second.

10 What do you mean by brush pile?

11 A. It's the treetops and the trees that
12 they pushed out and then burnt.

13 Q. Mr. Hesper, in this part of the video,
14 what are we looking at?

15 A. Well, you can see the property line
16 that runs north and south, and this is the edge of
17 the new channel right here.

18 Q. Okay. And as I said, we've been
19 describing it as a backwards L with a north-south
20 leg and an east-west leg.

21 A. Yes.

22 Q. In the foreground of this photo, what
23 leg of that channel --

24 A. This is the east-west leg.

1 Q. It's the east-west leg in the
2 foreground. Okay.

3 And can you see or sort of see where
4 the north-south leg is in this photo?

5 A. Yeah, you can see it by the tree on
6 the left, on dad's side of the property line.

7 Q. Okay. And so the trees that we're
8 seeing in the background of this photo are the trees
9 that are on your father's land?

10 A. That is correct.

11 JUDGE MORAN: Can we stop?

12 MS. PELLEGRIN: Sure.

13 JUDGE MORAN: Mr. Hesper, as you're
14 looking at this video so far, does this cause your
15 memory to recollect as to this is what you observed
16 on this particular date?

17 THE WITNESS: Yes, this is what I
18 observed, Your Honor.

19 JUDGE MORAN: Okay. And I notice on
20 the video there's a date on there. Do you see it
21 says September 4, 1998, is that right?

22 THE WITNESS: '99.

23 JUDGE MORAN: '99.

24 And is that the date, in fact, that

1 you were out there with your brother?

2 THE WITNESS: Yes, Your Honor.

3 JUDGE MORAN: And there's a time
4 reflected on there as well.

5 THE WITNESS: Yes, the time is
6 reflected on there.

7 I'm not positive if the time was
8 actually correct on the camera.

9 JUDGE MORAN: Okay. But you are
10 telling me you are sure this was the date you were
11 there with your brother?

12 THE WITNESS: Yes.

13 JUDGE MORAN: Okay.

14 Q. BY MS. PELLEGRIN: Mr. Hesper, I'm
15 going to stop here, and you can explain what this
16 image depicts.

17 A. This is the east-west leg of the new
18 channel, and if I'm seeing clearly, this is where it
19 crosses the property line onto my dad's property.

20 JUDGE MORAN: Okay. And you need to
21 help, you see, because if, for instance, this case
22 were appealed, someone else who's reading the
23 transcript will say, I don't know where he was
24 pointing to. They'll hear his words and they'll see

1 a picture, but if you can help him by saying, "And
2 you just pointed to the shaded area," or use your
3 own judgment on how to describe it. You can divide
4 it into quadrants, you know, upper left or upper
5 right, whatever, okay?

6 MS. PELLEGRIN: Certainly.

7 JUDGE MORAN: It will be better for
8 someone reviewing the record.

9 Q. BY MS. PELLEGRIN: And, Mr. Heser, I
10 believe you have just, when you testified that you
11 were looking at the east-west leg of the backwards
12 L-shaped channel and the portion you believed where
13 the channel entered or the stream began at your
14 father's property line, I believe you were pointing
15 to the lower right-hand corner of the video.

16 A. That is correct.

17 Q. And also, I believe when you were
18 referring to the channel, you were pointing in the
19 general direction of the, what looks like the lower
20 area where the trees in the right side of the frame
21 are casting a shadow on the, what looks like part of
22 a channel, a dry channel?

23 A. That is correct.

24 JUDGE MORAN: And let me stop you

1 again, okay? This is meant to be helpful. I don't
2 know whether you'll be able to do this.

3 On video cameras I have used, you can
4 even now add a number so that if someone were
5 reviewing this, they would also want to know at what
6 frame you stopped it at.

7 Can you push a button and make a
8 number appear, in other words, from the beginning of
9 the tape? You understand what I'm saying?

10 MS. PELLEGRIN: I'm not familiar with
11 the technology that enables me to put a number on
12 this permanent video that someone will be able to
13 depict later.

14 JUDGE MORAN: No. I mean, even if
15 you started it at the beginning of the tape, doesn't
16 it start at zero? Can't you put a sequence?

17 MS. PELLEGRIN: Oh, you mean for the
18 sequence.

19 JUDGE MORAN: Yeah.

20 MS. PELLEGRIN: Oh, yeah, I could try
21 to do that.

22 JUDGE MORAN: Wouldn't that be
23 helpful if someone were wondering, well, gee, yeah,
24 I know he was looking at a picture and he described

1 it very well but I don't know where on the video
2 that was other than maybe as the time changes. We
3 need another frame of reference.

4 MS. PELLEGRIN: That's a great idea.
5 Okay. Let's try to do that.

6 We should go off the record.

7 JUDGE MORAN: Yeah. Let's go off the
8 record.

9 (Discussion held off the record.)

10 MS. PELLEGRIN: Back on the record.

11 Okay. What we're doing now is we
12 wound the video to the beginning, and we have put
13 the counter function on the VCR. The beginning of
14 the VCR is at zero, and we're going to press play
15 now.

16 And for the record, we're looking at
17 the end of a Paramount picture movie that seems to
18 be previously taped.

19 Okay. Now, when the actual video
20 that Mr. Hesper and his brother took begins, the
21 memory number is, the counter number is on 16.

22 JUDGE MORAN: Okay. But you're not
23 going to be testifying, so ask him that.

24 MS. PELLEGRIN: Okay.

1 JUDGE MORAN: Mr. Heser, do you see
2 the counter in front of you?

3 THE WITNESS: Yes.

4 JUDGE MORAN: Tell us what that
5 number says.

6 THE WITNESS: The counter reads 16,
7 Your Honor.

8 JUDGE MORAN: Okay.

9 MS. PELLEGRIN: Your Honor, I don't
10 have a problem handing the remote control over to
11 Mr. Heser.

12 JUDGE MORAN: Well, you're the one
13 that's going to want to stop it though.

14 MS. PELLEGRIN: Okay.

15 JUDGE MORAN: He can tell you the
16 numbers. You just do the stopping and starting.

17 Q. BY MS. PELLEGRIN: Okay. Mr. Heser,
18 what does this scene depict?

19 A. It depicts logs laying where there
20 was logs cut out.

21 Q. Okay. And whose property is this
22 that we're looking at?

23 A. This is looking across Robert and
24 Andrew's property.

1 Q. Okay. And in the foreground, I'm
2 seeing what looks like light colored soil or grass.
3 What is that?

4 A. That's soil where they had done
5 bulldozer work.

6 Q. Okay. And in the background I'm
7 seeing perhaps crops.

8 A. Yes.

9 Q. And in the way background trees, is
10 that correct?

11 A. Yeah. There's soybeans behind the
12 logs and then behind that is the fence row.

13 Q. Okay. And whose property is the
14 soybeans that's in the middle of this picture?

15 A. That's on Robert and Andrew's.

16 Q. Okay. And I'm going to show you the
17 memory where this number is at.

18 A. The counter is on 25.

19 Q. In the picture you've just described?

20 A. In the last picture, yes.

21 Q. Okay. I'm going to press play.

22 Mr. Heser, can you please describe what is in the
23 middle of this screen between the lighter colored
24 and the dark green crops?

1 A. This is still ground that was clear.

2 Q. Okay. And in the middle, the left
3 corner, the dividing line between the lighter
4 colored and the green crops, can you tell me what is
5 depicted there? It's on from the left-hand side of
6 the...

7 A. I'm not understanding your question.
8 I'm sorry.

9 Q. The midline is what I'm referring to.

10 A. Yes.

11 Q. What are these things?

12 A. Those are the logs that are laying
13 there.

14 Q. Okay. And they're laying -- and I'm
15 calling it a dividing line between basically the
16 foreground which is the light colored soil and the
17 background which includes the crops and the forest
18 line and the way background.

19 A. That is correct.

20 Q. And what is the memory number of this
21 scene?

22 A. The counter is on 30.

23 Q. Okay. And I'm going to press play.

24 Mr. Heser, I've just paused it. What

1 is depicted in this scene, and before I do that, I'm
2 going to actually go to the counter number first.
3 Maybe that will make it easier to read into the
4 record.

5 What is the counter number on for
6 this scene?

7 A. The counter is on 34.

8 Q. Okay. And what is depicted in the
9 scene where the counter number is on 34?

10 A. In the center of the screen, you see
11 one bulldozer. In the foreground, you see, along
12 the bottom of the screen, you see straw where the
13 channel was rechanneled.

14 Q. Okay. And you said in the
15 foreground. Would that be the bottom of the screen?

16 A. That's the bottom of the screen,
17 that's correct.

18 Q. Okay. I'm going to press play.

19 I've just stopped it. Can you for
20 the record say what the counter is on?

21 A. The counter is on 39.

22 Q. Okay. And, Mr. Heser, can you please
23 describe what's depicted in the scene for counter
24 No. 39?

1 A. It's what's left of a brush pile
2 that's in the center of the screen.

3 Q. Okay. And can you tell me, can you
4 describe for the record what's emanating from that
5 brush pile?

6 A. That's smoke from where they burnt
7 the brush pile. It was still burning.

8 Q. Okay. And what is in the very bottom
9 of this screen? What's depicted there?

10 JUDGE MORAN: If you know, in the
11 foreground.

12 A. It looks like the edge of the new
13 channel. The picture is not clear enough to
14 definitely define it.

15 Q. Okay. I'm pressing play, and I'm
16 stopping at counter --

17 A. Counter No. 44.

18 Q. And what is depicted in the scene
19 that's counter No. 44?

20 A. This is still the same brush pile we
21 looked at previously.

22 Q. And since we're doing this again for
23 the record, I believe you testified about treetops
24 earlier. Is this the same place?

1 A. Yes. That's what left of the whole
2 trees and the treetops and the stumps that were
3 burnt.

4 Q. Okay. I'm going to press play.

5 Okay. Mr. Heser, can you please tell
6 me -- I've just stopped it. Can you tell me what
7 the counter number is?

8 A. The counter is on 54.

9 Q. And can you please tell me what's
10 depicted in the scene noted at counter No. 54?

11 A. In the foreground, you see the edge
12 of the new channel. The center of the screen is the
13 area that was cleared and in the background is the
14 property line of my dad's, the trees that are left
15 standing in the fence row.

16 Q. Okay. And you said the foreground
17 and the middle of the screen. Is there a color
18 change between the foreground and the middle of the
19 screen?

20 A. The foreground is just a little bit
21 darker than the middle of the screen.

22 Q. Okay. And is there ground cover at
23 all depicted in the middle of the screen?

24 A. It's bare ground.

1 Q. And what is the ground cover, if at
2 all, depicted in the foreground or the bottom of the
3 screen?

4 A. The channel had been strawed.

5 Q. Okay. I'm going to press play.

6 Mr. Hesper, I've just stopped it. Can
7 you please tell me what the counter number is?

8 A. The counter is 1:01.

9 Q. And can you please describe what's
10 depicted in the scene noted as counter number 1:01?

11 A. You can see the new channel running
12 up from approximately the lower left corner towards
13 the upper right corner.

14 Q. Okay. And, Mr. Hesper, we've been
15 describing this as a backwards shaped channel with a
16 north-south leg and an east-west leg.

17 Do you see either of those legs on
18 the screen depicted as counter 101?

19 A. This is the east-west leg and on the
20 south end, on the downstream end of it.

21 Q. Okay. And by this, you're pointing
22 to the area that is in the foreground that looks
23 like it's partially shaded by trees?

24 A. That is correct.

1 Q. And what is in the background of this
2 photo, Mr. Hesel?

3 A. You can see the fence row that runs
4 along the north-south leg of the...

5 Q. And the trees depicted in the
6 background, whose property is that?

7 A. Those are on my father's side.

8 Q. Okay. I'm going to press play.

9 Okay. What is the memory number now,
10 Mr. Hesel?

11 A. That counter number is on 1:07.

12 Q. Okay. And the camera has just panned
13 to an area, and I've stopped it at what might be the
14 middle or end of that pan.

15 Do you know what I mean by the word
16 pan?

17 A. Yes, I do.

18 Q. Okay. And can you explain for the
19 record what I mean by the word pan?

20 A. We were coming back downstream to the
21 point at which the channel had been, the end of the
22 rechanneling.

23 Q. Okay. So it's your testimony that
24 the camera was sort of panning down on the east-west

1 leg toward the downstream then?

2 A. Yes.

3 Q. Okay. Mr. Heser, what is the counter
4 number I've just stopped it at right now?

5 A. The counter is on 1:13.

6 Q. And what is depicted at 1:13?

7 A. This is the bottom of the channel on
8 the southern end, on the down flow end.

9 Q. Okay. And if I divide this picture
10 with a diagonal line starting at the lower left-hand
11 corner up to the upper right-hand corner, can you
12 tell me what is depicted on the lower half of this
13 screen?

14 A. This is part of the bank.

15 JUDGE MORAN: Part of the what?

16 THE WITNESS: Part of the bank.

17 JUDGE MORAN: Okay.

18 Q. BY MS. PELLEGRIN: Okay. And can you
19 tell me what is depicted on the upper half of the
20 screen?

21 A. That is the lower part of the bottom
22 part of the channel.

23 Q. Okay. Mr. Heser, the camera has just
24 panned and moved across a number of scenes. What

1 has it stopped at?

2 A. The counter is on 1:30.

3 Q. And what scene has the camera just
4 panned through or depiction? What's depicted there?

5 A. It panned across the area that was
6 cleared.

7 Q. And what is the camera at 1:30, where
8 is it facing?

9 A. It's facing east-northeast.

10 Q. Okay. Now, Mr. Hesper, I've just
11 stopped at -- can you read the counter number?

12 A. The counter is 1:36.

13 Q. And what's depicted in the scene at
14 1:36?

15 A. This the brush pile I believe that we
16 looked at in the earlier scene.

17 Q. Okay. And where is that in relation
18 to the backwards L if you know.

19 A. It is along the north-south leg down
20 towards the east-west leg.

21 Q. Okay. Mr. Hesper, I've just stopped
22 it at counter number --

23 A. 1:41.

24 Q. Okay. And if you can look at --

1 you've talked about the burning pile, and can you
2 tell me, it's in this scene although it's the tail
3 end of it it looks like at the middle of the screen
4 in the right-hand corner.

5 Can you tell me, was there any dirt
6 in that pile?

7 A. Yes, there is dirt in the pile.

8 Q. Okay. And I'm going to press play.

9 Mr. Hesper, I've just stopped at
10 counter number --

11 A. 1:44.

12 Q. And can you tell me what's depicted
13 in counter number 1:44?

14 A. This is one of the bulldozers that
15 was used.

16 Q. I'm pressing play.

17 Okay. Mr. Hesper, the camera has
18 panned through a series of what looks like a
19 close-up, a series of close-up shots, and I've
20 stopped it at counter number --

21 A. 2:09.

22 Q. And can you tell the court what was
23 depicted in the panned close-up that I referred to
24 that we've stopped at counter 2:09?

1 A. The panning was along the east-west
2 leg of the alleged violation.

3 Q. And what is the counter number
4 stopped at now, sir?

5 A. The counter is at 2:13.

6 Q. And, Mr. Hesel, if you know, is this
7 a crop depicted in this?

8 A. That's soybeans.

9 Q. That's soybeans. Okay.
10 And do you know whose property the
11 soybeans are growing on?

12 A. That is on Robert and Andrew's.

13 Q. Okay. Is this a different area that
14 we're looking at?

15 A. This is still the east-west leg, but
16 this is where it actually crosses the property line
17 on the downstream end.

18 Q. Okay. Let's get the counter number
19 for this. What's the counter number on?

20 A. The counter is on 2:15.

21 Q. And it's your testimony that this --
22 by this, do you mean the bottom corner or the bottom
23 part of the screen?

24 A. The shaded area is where the property

1 line would be at.

2 Q. And the shaded area in the bottom
3 part of the screen?

4 A. Yeah.

5 Q. Okay. And, Mr. Heser, I've just
6 stopped this at counter number -- can you say it for
7 the record?

8 A. Counter number 2:21.

9 Q. Okay. And what does counter number
10 2:21 depict?

11 A. This actually shows the vegetation
12 that is left on my dad's side of the property line
13 and where the channel actually crosses the property
14 line at.

15 Q. Okay. And what portion of the
16 backwards shaped L --

17 A. We are on the east-west leg.

18 Q. And is that upstream or downstream?

19 A. Downstream end.

20 Q. Okay. Mr. Heser, I've just stopped
21 it. Can you please say the counter number?

22 A. The counter number is 2:28.

23 Q. Okay. And what does the scene in
24 counter number 2:28 depict?

1 A. This is what the original part of
2 Martin Branch, and it's on my father's side, looked
3 like at the time that the alleged violation
4 happened.

5 Q. And what are we looking at? Is this
6 the downstream portion?

7 A. This is the downstream portion.

8 Q. Okay. And is this your father's
9 property?

10 A. This is my father's property.

11 Q. And can we see in this scene any of
12 the bank of Martin Branch if you know?

13 A. Yeah. The lighter color areas in
14 here, this is where Martin Branch is at. You can
15 see it in between the green growth.

16 Q. So if I were to say in sort of the
17 almost exact center, the lighter colored areas in
18 the center of the video?

19 A. That is correct.

20 Q. Is that part of the banks or part of
21 the channel, the stream?

22 A. This, the upper portion is what
23 appears from this still to be the bank, and this
24 appears to be the bottom of the channel.

1 Q. Okay. And by this, Mr. Hesper has
2 just pointed to sort of the middle of the screen
3 referring to the bank, and then by the channel,
4 Mr. Hesper has just pointed to directly below that
5 there's a lighter spot directly below that channel
6 that Mr. Hesper has just depicted as the stream area.

7 Is that correct, Mr. Hesper?

8 A. That's correct.

9 Q. Mr. Hesper, I've just stopped this at
10 counter number what?

11 A. The counter is at 2:35.

12 Q. Okay. And can you tell me what
13 counter number 2:35 depicts?

14 A. This is still more of the downstream
15 channel. That's on my dad's side of the property
16 line.

17 Q. Okay. And it's not that easy to see.
18 It's kind of blurry when we pause it, but can you
19 sort of describe generally where, if at all, you see
20 part of Martin Branch's banks?

21 A. It starts in the lower left corner,
22 arches up through the middle.

23 Q. Okay. Mr. Hesper, I've just stopped
24 the video at memory counter number...

1 A. 2:39.

2 Q. And what does this memory number 2:39
3 depict, counter number?

4 A. That pictures back out through the
5 fence row looking onto my father's side.

6 Q. Okay. And what is the lighter
7 colored area in sort of a little left of center in
8 this?

9 A. That is part of the field.

10 Q. Part of whose field?

11 A. Part of my father's field.

12 Q. Okay. Mr. Hesper, I've just stopped
13 the video at counter number...

14 A. 2:50.

15 Q. Okay. And what does this 2:50
16 depict?

17 A. That's still more footage on my dad's
18 property side. My brother forgot to shut the VCR
19 off or the recorder off.

20 Q. Okay. Well, I'll press play for a
21 little bit and we'll see what we can get here.

22 Let's see, is this something we've
23 already seen?

24 A. Yes.

1 Q. This looks like maybe a closer up
2 shot of something we've already seen but maybe we
3 can look a little.

4 A. Yes.

5 Q. Okay. Let's do a counter number?

6 A. The counter is on 3:20.

7 Q. And what does counter number 3:20
8 depict?

9 A. This is the bottom of Martin Branch
10 on my dad's side of the property line.

11 Q. Okay. And by this, if I divide the
12 screen into half vertically, is it on the lower left
13 half running diagonally through the left portion
14 of --

15 JUDGE MORAN: What kind of a line
16 have you drawn on this, vertical, diagonal, what was
17 it?

18 MS. PELLEGRIN: I'm drawing a
19 vertical line through the middle dividing it into
20 east and west.

21 JUDGE MORAN: Okay.

22 Q. BY MS. PELLEGRIN: And now, if you
23 look at the east, the lower part of the east
24 portion, is that a close-up of Martin -- what is it

1 a close-up of?

2 A. It's a close-up of the bottom of
3 Martin Branch on my dad's side of the line.

4 JUDGE MORAN: Are you talking about
5 the bottom half of this?

6 THE WITNESS: Yes.

7 JUDGE MORAN: The bottom left?

8 THE WITNESS: Bottom left corner.

9 JUDGE MORAN: Thank you.

10 MS. PELLEGRIN: Do you want to keep
11 going (referring to the playing of the video)?

12 THE WITNESS: Yes, please.

13 Q. Okay. I've just stopped the video at
14 counter number what?

15 A. 3:30.

16 Q. And what does counter number 3:30
17 depict?

18 A. This is the east-west leg looking
19 from the upstream looking downstream.

20 Q. Okay. And at the end of what looks
21 like the channel, you can see sort of a higher part
22 and in sort of the middle, a little above the middle
23 of the screen, what's depicted there?

24 A. This is the end of the channel where

1 it turns and crosses the property line on the
2 downstream end.

3 JUDGE MORAN: And just before he
4 continues, am I looking, sir, at what's up on the
5 screen right now with the counter number -- what is
6 it at right now?

7 THE WITNESS: 3:30.

8 JUDGE MORAN: Am I looking at the new
9 channel? Is that what I'm looking at?

10 THE WITNESS: Yes, Your Honor, yes,
11 Your Honor.

12 JUDGE MORAN: Okay.

13 Q. BY MS. PELLEGRIN: And the area in
14 this photo that is shaded, is that all part of the
15 new channel, Mr. Hesel?

16 A. Basically everything you see in the
17 foreground is all a new channel. You can see the
18 straw running along the bank on the right-hand side
19 of the screen.

20 Q. Okay. And the camera has just sort
21 of zoomed out a little bit and panned. Can you
22 please -- let's get the memory counter number first.

23 A. The counter is on 3:33.

24 Q. Okay. And what does counter number

1 3:33 depict?

2 A. This is still looking down the
3 east-west leg.

4 Q. Okay. And does the east-west leg in
5 this scene go from roughly the lower left-hand
6 corner of the screen up through roughly the upper
7 right-hand corner of the screen?

8 A. Yes, it does.

9 Q. Okay. I just stopped the video. Can
10 you please tell me the counter number?

11 A. The counter is on 3:36.

12 Q. And can you tell me what is depicted
13 in the left corner of the lower part of the screen
14 at 3:36?

15 A. The lower left corner is basically
16 the corner where the channel changes from
17 north-south leg to east-west leg.

18 Q. Okay. And so would that be, if we're
19 calling it an L, would that be where the two legs of
20 the L meet?

21 A. Yes, that would be where the two legs
22 of the L meet.

23 Q. Okay. I'm stopping the video, and
24 can you please tell me the counter number?

1 A. The counter is on 3:46.

2 Q. Okay. And at 3:36 we've just panned
3 through and stopped, what have we panned through,
4 Mr. Hesel?

5 A. We've panned through the corner of
6 the L.

7 Q. And we've stopped approximately...

8 A. You've stopped on the first part of
9 the north-south leg.

10 Q. Okay. I'm stopping the video. Can
11 you tell me the counter number?

12 A. The counter number is on 3:53.

13 Q. And can you tell me what's depicted
14 in counter number 3:53, and let's start with sort of
15 the bottom up into the right corner portion of the
16 scene.

17 A. Bottom what?

18 Q. The bottom part of the scene up into
19 the right corner.

20 A. Running from left hand, lower left
21 hand to the upper right hand is the new channel.

22 Q. Okay. And then what's depicted in
23 the upper left hand corner of the scene?

24 A. That's the remnants of a brush pile.

1 Q. And is that the same pile we were
2 looking at a close-up of earlier?

3 A. I am not positive on that.

4 Q. Okay. Mr. Heser, I have just stopped
5 the video. Can you tell me the counter number?

6 A. The counter is on 4:00.

7 Q. And what is depicted in this scene?

8 A. This is the north-south leg of the L,
9 and towards the upper part of the screen, you can
10 see the end of where the upstream, where the channel
11 was changed at the upstream end.

12 Q. And the right, upper right-hand
13 corner of the screen, the trees that are depicted
14 there, who owns that property?

15 A. This is my father's property on the
16 upper right-hand side.

17 Q. And if this is a backwards shaped L,
18 then what we're looking at is basically the top of
19 the north-south portion of the backwards shaped L?

20 A. Yes. This is a zoomed view of it.

21 Q. Okay. Zoomed in. Okay.

22 Mr. Heser, I've just stopped the
23 video. Can you me up please tell me the counter
24 number?

1 A. Counter is on 4:09.

2 Q. And I believe this is super zoomed.
3 Can you tell me what is depicted in this scene?

4 A. This shows the north end of the L
5 where the channel crosses the property line
6 upstream.

7 Q. Okay. And what is in the background
8 of this? The green at the top of the screen, what
9 is that?

10 A. I believe that to be the soybeans.

11 Q. Okay. And whose property is that?

12 A. That's on Robert and Andrew's.

13 JUDGE MORAN: And let me just ask you
14 to pause for a second.

15 Mr. Hesper, as you've been watching
16 this video, is this consistent with your memory when
17 you were walking along with your brother on this
18 particular day?

19 THE WITNESS: Yes, it is, Your Honor.

20 JUDGE MORAN: Okay.

21 Q. BY MS. PELLEGRIN: Okay. Mr. Hesper,
22 I've just stopped the video. Can you tell me the
23 counter number?

24 A. The counter is on 4:23.

1 Q. Okay. And I believe the camera has
2 just again gone through a panned shot, and can you
3 describe what area we've just panned through?

4 A. We've panned, from the north end of
5 the L of the north-south leg, we've panned partway
6 down the north-south leg looking out across the
7 ground that was cleared.

8 Q. Mr. Hesel, I've just stopped the
9 video. Can you tell me what the counter number is?

10 A. The counter is on 4:37.

11 Q. Okay. And what area is depicted in
12 counter number 437?

13 A. This is looking down the east-west
14 part of the L.

15 Q. Okay. And do you know who -- I see
16 structures in the background in this frame. Do you
17 know what those structures are?

18 A. Yeah. That's Mark Mercer's house.

19 Q. Okay. And in the center of the
20 screen, there are markings in the ground. Do you
21 happen to know what those markings are?

22 A. No, I do not. They appear to be tire
23 tracks.

24 Q. And I've just stopped the counter of

1 the video. Can you please tell me what the counter
2 number is?

3 A. The counter is on 5:01.

4 Q. And what does this mean or the pan
5 through now, where are we looking at here?

6 A. You are looking from the corner of
7 the L to the west-northwest out across the side that
8 had been cleared.

9 Q. Mr. Hesper, I've just stopped the VCR.
10 Can you please tell me what the counter number is?

11 A. The counter is on 5:16.

12 Q. And can you tell me what is depicted
13 in this scene at counter number 5:16?

14 A. This is the bank along the, what
15 appears to be the east-west leg of the L, and you
16 can see, it's hard to see, but the tree roots
17 sticking out from the bank from the trees that were
18 on my dad's side of the property line.

19 JUDGE MORAN: And where were you
20 pointing to on the screen?

21 THE WITNESS: In the upper half.

22 JUDGE MORAN: Right corner?

23 THE WITNESS: Upper right, lower
24 corner of the upper right corner.

1 JUDGE MORAN: Okay. Thank you.

2 Q. BY MS. PELLEGRIN: Okay. I'm
3 stopping the video, and can you please tell me the
4 counter number?

5 A. The counter is on 5:20.

6 Q. And can you please describe what this
7 scene depicts? I know it's blurry, but can you
8 describe what it depicts?

9 A. These are what appear to be the roots
10 off of trees running diagonally across the screen
11 roughly in the middle. They're darker than the
12 surrounding area.

13 JUDGE MORAN: Well, do you remember
14 seeing those roots when you were out there with your
15 brother?

16 THE WITNESS: Yes.

17 JUDGE MORAN: At that location?

18 THE WITNESS: At that location, yes.
19 The video still is a little hard to make out.

20 JUDGE MORAN: But even though it's
21 hard to make out, are you sure that you remember it
22 that way?

23 THE WITNESS: As it's actually
24 playing, I can make it out, Your Honor.

1 JUDGE MORAN: Okay.

2 MS. PELLEGRIN: Okay. I'll play it
3 then, Mr. Hesper.

4 Q. Okay. Mr. Hesper, I'm going to stop
5 the VCR. Can you tell me what the counter number
6 is.

7 A. The counter is on 5:39.

8 Q. And I've allowed it to play through a
9 series of pans back and forth across this area.

10 Can you describe what's depicted in
11 the area that the camera has just panned through?

12 A. The camera panned through the bank of
13 what appeared to be the east-west leg, and it showed
14 all the roots that were left sticking out of the
15 ground from where the dirt had been removed from the
16 top of them.

17 Q. And whose trees are those?

18 A. Those on my father's side.

19 Q. Okay. Mr. Hesper, I've just stopped
20 it. I'm not sure if this is the same scene we
21 stopped at before, but is there anything you want to
22 add to the depiction of the scene here?

23 Well, let's do the counter number
24 first. What's the counter number on, sir?

1 A. The counter is on 6:00.

2 JUDGE MORAN: Do you recognize that
3 scene there in front of you?

4 THE WITNESS: Yes. That's the
5 east-west part of the L, and you can see, Your
6 Honor, the roots sticking out of the bank along
7 that.

8 JUDGE MORAN: Okay. Can you tell us
9 what quadrant that's on?

10 THE WITNESS: It's in the lower half,
11 lower right.

12 JUDGE MORAN: If we divided the
13 screen into four, it's the lower right corner?

14 THE WITNESS: It is the lower right
15 corner, the upper half of that lower right corner.

16 JUDGE MORAN: Thank you.

17 Q. BY MS. PELLEGRIN: Okay. Mr. Heser,
18 I've just stopped the video. Can you tell me what
19 the counter number is?

20 A. The counter is on 6:31.

21 Q. Okay. And the camera has just gone
22 through another series of pans. Can you tell me
23 what this scene is?

24 A. The pan started at the upstream end

1 of the north-south L and it started panning to the
2 south.

3 Q. Okay. And what has been depicted
4 along the pan?

5 A. It's showing the new bank that was
6 created.

7 Q. Okay.

8 A. And that has been strawed.

9 Q. Okay. Mr. Heser, I have just stopped
10 the video. Can you please tell me the counter
11 number?

12 A. 6:39.

13 Q. And what's depicted in this scene at
14 6:39?

15 A. You can see the new part of the
16 channel with water standing in it in the middle of
17 the screen.

18 Q. And what part of the channel is this?

19 A. This is the upstream part of the
20 north-south hill.

21 Q. And is this the altered part of the
22 channel that you're seeing here?

23 A. Yes.

24 Q. With water in it?

1 A. Yes.

2 Q. Okay. Mr. Hesper, what is depicted in
3 this scene? And I've just stopped at counter
4 number...

5 A. Counter number 6:52. This is the
6 bottom of the new channel. You panned back upstream
7 from the previous counter number.

8 Q. Okay. And can you tell me on the
9 lower, on the far left side of the screen about
10 midway down and all the way down to the lower
11 left-hand corner of the screen if you know what
12 material is depicted there?

13 A. It looks to be dirt clots.

14 Q. Okay. Mr. Hesper, I've just stopped
15 the video, and can you please tell me the counter
16 number?

17 A. The counter number is 6:55.

18 Q. And what is depicted in the scene at
19 counter number 6:55?

20 A. This is water that was standing in
21 the upstream end of the north-south leg of the new
22 channel.

23 Q. Okay.

24 A. This is looking south.

1 Q. And, Mr. Hesper, the left-hand portion
2 of the screen, what is depicted there?

3 Let me have you read the counter
4 number first.

5 A. The counter number is 7:05.

6 Q. And what is depicted in the lower
7 left-hand portion of this screen?

8 A. In the lower left-hand corner there
9 is some green brush that is on my dad's side of the
10 property line.

11 Q. Okay. So is this, if we're looking
12 at the backward shaped L, is this the top of the L
13 where --

14 A. This is the top of the L.

15 Q. Okay. And it looks to me, and you
16 can confirm this, it looks like at the top of the L
17 it jogs a little over to the east or it makes
18 another turn to the east to enter your father's
19 property, is that correct?

20 A. Yes, that is correct.

21 Q. And by east in this photo, east --

22 A. It is the lower left-hand corner.

23 JUDGE MORAN: Do you want to pause
24 it?

1 MS. PELLEGRIN: Sure.

2 JUDGE MORAN: I notice Mr. Hesel,
3 that while through most of this video, there has
4 been occasional pools of water, mostly in this
5 channel there, there's been no water in it. Is that
6 fair?

7 THE WITNESS: It's a brand new
8 channel, Your Honor.

9 JUDGE MORAN: No, no, but I'm not
10 asking you, I didn't ask you how new it was. I'm
11 asking is that a correct characterization that there
12 was very little, if any, water in this channel at
13 the time you were there?

14 THE WITNESS: At the time I was
15 there, it was just at the upper end of the L, at the
16 upstream end of it that there was a pool.

17 JUDGE MORAN: I asked that because I
18 wanted to make sure that what I was viewing was
19 correct. For instance, you could have said no, no,
20 there is water. You just can't see it.

21 But you're telling me that what I'm
22 seeing is correct. There is very little water in
23 that channel.

24 THE WITNESS: That is correct, Your

1 Honor.

2 JUDGE MORAN: Okay.

3 MS. PELLEGRIN: Let me just stop and
4 ask you a question here, Mr. Hesel.

5 What is the counter number here?

6 MR. SMALL: Could you speak up? I'm
7 sorry. I didn't hear the question.

8 MS. PELLEGRIN: I'm just going to
9 stop here and ask what the counter number is.

10 THE WITNESS: Counter number is 7:50.

11 Q. Okay. And the counter, we've been
12 for a few counts I believe looking at the same or
13 similar photo. Can you describe what's depicted
14 here?

15 A. This is the remnants of the brush
16 pile. You can see in it, in the upper half, upper
17 right corner, lower half of that one of the stumps
18 depicted here, and then you see the smoke that's
19 still coming up out of what was burning still.

20 Q. Okay. And so about the middle of the
21 screen there, at the right end of that brush pile
22 looking at the screen, there's sort of a circular
23 object.

24 A. Yeah. That looks to be a remnant of

1 a stump.

2 Q. Okay. And do you remember when you
3 were there seeing remnants of stumps in that pile?

4 A. Yes, I do.

5 Q. Okay. And it appears to be
6 smoldering or smoking.

7 Do you remember the pile being --

8 A. Yes, it was still smoldering at the
9 time.

10 Q. Okay. Mr. Heser, I've just stopped
11 the video. Can you please tell me the counter
12 number?

13 A. The counter number is 8:30.

14 Q. Okay. And it just panned through a
15 series of scenes. I'm not sure if any are new to
16 us, but if they are, can you please describe what
17 we've just seen?

18 A. You've panned back to the north from
19 the previous counter, and this is the, in the lower
20 half of the screen, you can see the straw of the
21 dirt bank that was put up along the edge of the new
22 stream.

23 MS. PELLEGRIN: Okay. And I haven't
24 quite gotten it exactly, but I've paused it at a few

1 counts after the video has ended that --

2 JUDGE MORAN: Well, ask him if that's
3 correct.

4 MS. PELLEGRIN: Yes, Your Honor.

5 Q. Mr. Hesel, I've just stopped the
6 video. Can you tell me where in your video have I
7 stopped it?

8 A. The counter is on 8:49. It's just a
9 little past the end of the actual filming.

10 Q. Okay. And do you remember that being
11 the end of you and your brother's filming of the
12 site on that day?

13 A. Yes, I do.

14 JUDGE MORAN: Then why don't you ask
15 him one grand question about whether having viewed
16 this video if it fairly and accurately depicts what
17 he viewed on that particular day.

18 MS. PELLEGRIN: Yes, Your Honor.

19 I think Mr. Hesel can probably take a
20 seat now. I'm done with this.

21 JUDGE MORAN: Sure.

22 MS. PELLEGRIN: And, Mr. Hesel, that
23 water is for you if you would like. There's some
24 water on the witness stand.

1 Q. Mr. Hesper, we've just gone through a
2 video, we've just viewed a video of the site.

3 Was that video a true, accurate, and
4 complete depiction of the video that you and your
5 brother took while standing on your property but
6 looking at the alleged violation site?

7 A. Yes, it is.

8 MS. PELLEGRIN: Your Honor, at this
9 time, I'd like to move to admit the video which I
10 believe is part of Complainant's Exhibit 8. I
11 believe we denoted it as 8C in our prehearing
12 exchange, Your Honor.

13 JUDGE MORAN: Okay. And is there
14 only one videotape the EPA is offering?

15 MS. PELLEGRIN: Yes, Your Honor.

16 JUDGE MORAN: So you're calling the
17 videotape 8C?

18 MS. PELLEGRIN: 8C, yes, sir.

19 JUDGE MORAN: Or CX 8C.

20 MS. PELLEGRIN: Yes, Your Honor.

21 JUDGE MORAN: Okay. Any objection?

22 MR. SMALL: No objection, Your Honor,
23 subject to cross-examination.

24 JUDGE MORAN: Okay. Fine.

1 Then EPA Exhibit CX 8C is admitted.

2 (Whereupon Complainant's Exhibit
3 8C was admitted into evidence at
4 this time.)

5 MS. PELLEGRIN: I think this would be
6 a good time, Your Honor, to stop. I do have some
7 more questions for Mr. Heser that we can continue
8 tomorrow.

9 JUDGE MORAN: We're obviously going
10 to be coming back here which is fine, nice place.
11 In other words, you can't wrap it up in five
12 minutes?

13 MS. PELLEGRIN: Absolutely not, Your
14 Honor.

15 JUDGE MORAN: Good. That's good to
16 know.

17 MS. PELLEGRIN: It won't be another
18 hour, but it certainly won't be five minutes.

19 JUDGE MORAN: So this is a good point
20 to stop?

21 MS. PELLEGRIN: Yes, Your Honor.

22 JUDGE MORAN: Thank you all. We'll
23 resume tomorrow morning, same time, 9 a.m.

24 MR. NORTHRUP: Do you want to have a

1 discussion about the time and things like that now
2 or do you want to wait till tomorrow?

3 JUDGE MORAN: Are you ready to talk
4 about it?

5 MR. NORTHRUP: Well, we haven't
6 talked about it. Maybe we should do that first.

7 JUDGE MORAN: Right. Why don't you
8 talk about it, and then we'll figure it out when we
9 come back.

10 (Whereupon the hearing was
11 continued to March 29, 2007 at
12 9:00 a.m.)

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STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

CERTIFICATE

I, Laurel A. Patkes, Certified Shorthand Reporter in and for said County and State, do hereby certify that I reported in shorthand the foregoing proceedings and that the foregoing is a true and correct transcript of my shorthand notes so taken as aforesaid.

I further certify that I am in no way associated with or related to any of the parties or attorneys involved herein, nor am I financially interested in this action.

Dated this 4th day of April 2007.

Certified Shorthand Reporter