

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
OFFICE OF ADMINISTRATIVE LAW JUDGES

IN THE MATTER OF: )  
) No.: CWA-07-2018-0095  
C&S ENTERPRISE, LLC. )  
)

Courtroom 145  
U.S. District Courthouse  
123 East Walnut Street.  
Des Moines, Iowa 50309  
Wednesday,  
October 3, 2018

The parties met, pursuant to the notice, at  
9:00 a.m.

BEFORE: HONORABLE SUSAN L. BIRO  
Administrative Law Judge

APPEARANCES:

For the Agency:  
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BRITT BIERI, Esquire  
U.S. Environmental Protection Agency  
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1 PROCEEDINGS  
 2 (9:00 a.m.)  
 3 JUDGE BIRO: Okay. Is there any preliminary  
 4 matters to address before we continue?  
 5 MR. BIERI: None from EPA, Your Honor.  
 6 MR. McAFEE: No, Your Honor. Thank you.  
 7 JUDGE BIRO: Okay, thank you, gentlemen.  
 8 Would the Agency like to call its next  
 9 witness?  
 10 MR. BIERI: Thank you. We call Pete  
 11 Stokely.  
 12 JUDGE BIRO: Mr. Stokely, would you please  
 13 stand in the witness box while the court reporter  
 14 swears you in?  
 15 Whereupon,  
 16 PETER STOKELY  
 17 having been duly sworn, was called as a  
 18 witness and was examined and testified as follows:  
 19 JUDGE BIRO: Please be seated.  
 20 THE COURT REPORTER: Could you state your  
 21 name and spell it for the record, please?  
 22 THE WITNESS: Okay. My name is Peter  
 23 McDonald Stokely, and the last name is S-T-O-K-E-L-Y.  
 24 THE COURT REPORTER: Thank you.  
 25 JUDGE BIRO: Please be seated, Mr. Stokely.

1 DIRECT EXAMINATION  
 2 BY MR. BIERI:  
 3 Q Good morning, Mr. Stokely.  
 4 A Good morning.  
 5 Q Can you tell us who you work for?  
 6 A I work for the Environmental Protection  
 7 Agency.  
 8 Q How long have you worked for the EPA?  
 9 A I've worked for EPA 30 years.  
 10 Q And what is your current position with EPA?  
 11 A I'm currently in headquarters in Washington,  
 12 D.C. and I work in the Office of Water Enforcement. I  
 13 am a technical staff person there.  
 14 Q How long have you been at headquarters?  
 15 A I've been at headquarters since 2006.  
 16 Q And where were you before that within EPA?  
 17 A I worked for EPA Region 3, which is in  
 18 Philadelphia.  
 19 Q Okay. And prior to Region 3, where did you  
 20 work?  
 21 A I worked for a contractor at EPA, the  
 22 BioMedics Corporation, and there I was a photo  
 23 interpreter.  
 24 Q Okay. And how long did you work for that  
 25 company?

1 A Eight years.  
 2 Q And would that take us back in time to about  
 3 the time you graduated college?  
 4 A Correct.  
 5 Q Okay. What's your current job title at EPA?  
 6 A The job title is environmental scientist.  
 7 Q Okay. Your CV, which is marked as AX-6,  
 8 says that you are also the Clean Water Act, Section  
 9 404 coordinator, is that right?  
 10 A Right. Yes, that's part of what I do --  
 11 Q Okay.  
 12 A -- at headquarters.  
 13 Q Can you describe your responsibilities  
 14 within or under that umbrella?  
 15 A Well, mainly it's running a monthly phone  
 16 call with regional staff in the Section 404  
 17 enforcement program, and also, you know, sending out  
 18 information, updates to my mailing list and, you know,  
 19 running the call, and I am most recently coordinating  
 20 a national meeting that we had in Chicago.  
 21 Q And these are all on 404 issues?  
 22 A Yes.  
 23 Q Okay. And what about your other  
 24 responsibilities within the Agency since you've been  
 25 at headquarters?

1 A Well, I continue to do technical case  
 2 support, case development, through photo  
 3 interpretation and mapping. That's Clean Water --  
 4 Section 404 enforcement mainly, and besides that  
 5 though there is always, you know, other duties at  
 6 headquarters; reviewing documents, briefs, you know,  
 7 things that come out that are affecting our program  
 8 from other sources, letters, things like that.  
 9 Q Do you consult with other EPA regions on  
 10 Clean Water Act matters?  
 11 A Yes.  
 12 Q Have you worked with every region throughout  
 13 your career?  
 14 A I've worked on an enforcement case in every  
 15 region, yes.  
 16 Q Okay. And how long have you been doing  
 17 mapping and photography interpretation?  
 18 A Well, I began as a photo interpreter in  
 19 1986, so I guess that's 38 years.  
 20 Q Okay. Have you done photo interpretation in  
 21 all of your positions for the last 38 years?  
 22 A Yes.  
 23 Q And we have your CV and Her Honor has read  
 24 this and I assume everyone else has so I don't want to  
 25 belabor it too much.

1 Where did you go to college?  
 2 A I went to West Virginia University.  
 3 Q All right. And did you take classes in  
 4 photo interpretation there?  
 5 A Yes. As part of the -- I was a forestry  
 6 major, so as part of the forestry curriculum there was  
 7 aerial photo interpretation classes.  
 8 Q All right. I think I know the answer to  
 9 this, but do you have any particular areas of  
 10 expertise, in your mind?  
 11 A Well, since -- I mean, more recently, I  
 12 mean, I guess over most of my career -- I started as a  
 13 photo interpreter for the Superfund Program, looking  
 14 at hazardous waste sites, but that was only for about  
 15 a year. Since then it's been primarily Clean Water  
 16 Act, Section 404, either mapping wetlands, mapping  
 17 streams, or helping develop enforcement cases, Section  
 18 404 enforcement cases.  
 19 Q Okay. How many Section 404 enforcement  
 20 cases do you think you've worked on over the past 30  
 21 years, ballpark?  
 22 A You know, a hundred maybe.  
 23 Q Okay. Are there matters touching on 404  
 24 issues that may not be enforcement cases that you've  
 25 worked on outside of those hundred?

1 A Yes.  
 2 Q Okay. In the course of your work for the  
 3 last 30 years at EPA, can you estimate or approximate  
 4 the number of images you've viewed or interpreted?  
 5 A Well, that would -- yeah, I mean, since 1980  
 6 when I graduated from college, it had to be thousands  
 7 of individual images.  
 8 Q All right. Do you teach any courses within  
 9 EPA or put on seminars within EPA related to your area  
 10 of expertise?  
 11 A I do, yes.  
 12 Q And how often do you do that?  
 13 A Oh, probably on average once every couple  
 14 years. There was a timeframe when I was doing it  
 15 every year, then I'd skip a few years, and I just did  
 16 one in Philadelphia, June of this year.  
 17 Q All right. Have you authored any  
 18 professional publications related to aerial  
 19 photography?  
 20 A I've authored -- I've authored a couple of  
 21 them, yes.  
 22 Q Okay. And can you just kind of describe  
 23 what you've done in that field?  
 24 A Well, the most recent ones, I'd have to look  
 25 back at my resume for the title, but I either wrote or

1 co-authored a couple articles that dealt with the use  
 2 of aerial photo interpretation, Geographic Information  
 3 Systems for environmental forensics or, you know,  
 4 discovering conditions that were -- that occurred in  
 5 the past and things like that.  
 6 Q Okay. Was that published in the -- by the  
 7 American Bar Association, or do you know?  
 8 A The most recent one was published by the  
 9 American Bar Association.  
 10 Q And can you describe the relationship  
 11 between Section 404 of the Clean Water Act and aerial  
 12 interpretation?  
 13 A Well, aerial photo interpretation is a tool  
 14 that can support multiple programs and multiple  
 15 disciplines. In terms of the Clean Water Act, Section  
 16 404, since we're regulating the discharge of dredge or  
 17 fill material into wetlands or other waters, the photo  
 18 interpretation aspect comes in handy for identifying  
 19 and mapping wetlands, streams, and -- streams, the  
 20 connections between the wetlands and the streams.  
 21 And then over time, you can see changes to  
 22 those wetlands or streams, either from manmade or  
 23 natural changes, through photo interpretation.  
 24 Q And you talked, when you were discussing one  
 25 of your publications, about GIS. What does GIS mean?

1 A GIS is Geographic Information Systems.  
 2 Q And what is that?  
 3 A Well, it's a -- that's a computer-based  
 4 system of organizing geospatial data, aerial photos,  
 5 georeference maps, other digital georeference data  
 6 such as streams, soils, wetlands. It's a way of  
 7 organizing all of that in a structure in the software,  
 8 viewing it, analyzing it.  
 9 Q Is there a software that you primarily rely  
 10 upon --  
 11 A Yes.  
 12 Q -- for photo interpretation?  
 13 A Yes. It's the ESRI ARC map software.  
 14 Q Okay. And how long have you been using ARC  
 15 map -- ARC map software, excuse me.  
 16 A Probably since around 2000 or 2001, I guess.  
 17 Q Okay. Have you testified in court before  
 18 like we're here today?  
 19 A Yes.  
 20 Q On, I think, your CV it looks like maybe 20,  
 21 24 or 25 times. Does that sound right?  
 22 A Correct.  
 23 Q And in each of those cases, were you  
 24 proffered as an expert?  
 25 A Yes.

1 Q Have you ever been disqualified by a court  
2 as an expert?

3 A No.

4 Q We're going to get into this in more detail,  
5 but can you just kind of generally describe how you  
6 use your expertise in aerial interpretation in  
7 analyzing water bodies with respect to the Clean Water  
8 Act? Kind of what you do.

9 A Well, I mean, the first -- the first step  
10 would be someone identifies a particular area that  
11 they're interested in looking at, a site or an area,  
12 and then I would -- and they ask me to get involved,  
13 then I would begin acquiring aerial photography and  
14 other maps and other data of the area.

15 So, you know, it sort of starts with the  
16 identification of a site, the acquisition of aerial  
17 photos and other information that's relevant, and then  
18 analyzing it.

19 When I use the Geographic Information System  
20 as my tool for viewing and analyzing the aerial photos  
21 and the other data -- so, you know, acquisition and  
22 analysis, you know, and frequently the analysis is  
23 were there wetlands, how -- you know, how long have  
24 they been there, how have they changed, are the  
25 hydrologically connected to other waters. And then,

1 A As my salary as a federal government  
2 employee.

3 Q Okay. Nothing extra?

4 A No.

5 Q I want to talk about some general terms that  
6 you use in your report and that we've been using in  
7 court the last day.

8 Can you describe the difference between an  
9 intermittent and ephemeral water body?

10 A Well, as a -- in terms of how I would define  
11 them, I guess starting with the ephemeral type of  
12 stream, it's a -- it's a stream or a water body that  
13 flows in response to rainfall events primarily. The  
14 rainfall stops, the ephemeral stream quits flowing.

15 Intermittent streams also respond to  
16 rainfall events but they have a groundwater component  
17 to it, at least for some parts of the year, so they  
18 would flow longer, they would flow as a result of  
19 rainfall events but also groundwater that would  
20 contribute flow when it's not -- in the periods when  
21 it's not raining.

22 Q Do ephemeral streams typically have  
23 interaction with groundwater?

24 A Yes. The groundwater table -- an ephemeral  
25 stream intersects the higher groundwater table, at

1 you know, have there been more recent changes or  
2 impacts to them, so that's typically what I'm asked to  
3 look for and analyze.

4 And then, you know, form opinions or results  
5 and draft a report.

6 Q And what is your mindset when you approach a  
7 new case or a new matter?

8 A Well, it's, you know, always with interest,  
9 and I'm interested in seeing what the photography can  
10 do and what the aerial photos say about the facts  
11 supporting a case.

12 Q Is your job to be neutral or in favor of the  
13 Agency or otherwise?

14 A Neutral.

15 Q And what kind of weight do you give to -- in  
16 a particular case if other people have drawn  
17 conclusions about a water body, what kind of weight do  
18 you give that?

19 A Well, if I'm provided somebody else's report  
20 or information, I review that. I look at their  
21 information. Sometimes it's geographic information I  
22 can put into my software and compare it to my own  
23 information.

24 Q How are you being compensated in this  
25 matter?

1 least at certain times of the year.

2 Q Okay. And then a perennial stream, what is  
3 that?

4 A A perennial stream is a stream that flows  
5 year-round. It also responds to rainfall events and  
6 snow-melt, but it has a groundwater component that  
7 keeps it flowing all year, whether there is -- in most  
8 years -- whether there is rainfall or not.

9 Q Can characteristics of water bodies,  
10 streams, tributaries, lakes, things like that, be  
11 observed through aerial imagery?

12 A Yes, some of the characteristics can. Yes.

13 Q All right. What characteristics can be seen  
14 on aerial imagery that are indicative of a seasonal  
15 intermittent tributary?

16 A Well, streams are identifiable from the  
17 aerial photography by their curvilinear shape, their  
18 dendritic sort of branching pattern, tree-like  
19 branching pattern. Frequently you can see them --  
20 they have a riparian zone or, you know, a vegetative  
21 zone that follows a stream corridor that helps you  
22 identify the network, the stream and the network of  
23 streams in an area.

24 Intermittent streams typically are, you  
25 know, pronounced geographic features. They express

1 themselves in the topography of land. They have water  
2 -- you know, you can determine watershed size and  
3 compare that.

4 Q What do you mean by curvilinear?

5 A Well, you know, streams are not -- unless  
6 they're ditches, are not linear. They curve, but I  
7 use this term "curvilinear". They're curving but  
8 linear, they go from point A to point B.

9 Q Okay. In your report, which we'll talk  
10 about quite a bit later, which is AX-31, you talk  
11 about dark photographic tones. How do those play into  
12 your analysis?

13 A Well, water exhibits dark photographic tones  
14 on aerial photography. Water, soil, moisture tend to  
15 have darker photographic tones. And so in terms of a  
16 stream, you -- you know, if there is water in there,  
17 you can see it, it could have a dark photographic  
18 linear tone. You know, shadow can also create a dark  
19 tone on an aerial photograph. But water tends to  
20 absorb light more and creates a dark signature.

21 Q Are wet areas on a photo typically darker as  
22 well?

23 A They are. Wet soils, moist soils are darker  
24 than dry soils.

25 Q All right. Are you able to observe features

1 of a bed and bank in a stream through aerial imagery,  
2 if you can see it?

3 A Right. So, aerial photography comes in  
4 varieties of scales and altitudes flown and times of  
5 year. But if the scale is correct, the resolution is  
6 correct, the time of year is correct, you can see the  
7 bed and bank features of a stream. You can see point  
8 bars, sandbars, the banks casting shadow, features  
9 like that.

10 Q Are you ever able to see actual water in  
11 streams on aerial imagery?

12 A Yes, on occasion, particularly the larger  
13 streams and rivers. Sometimes on the smaller  
14 tributaries, you can see water on occasion.

15 Q Okay. And if you're unable to see water,  
16 what does that tell you?

17 A Well, I mean, a lot of times these  
18 tributaries have dense vegetative cover, riparian  
19 cover or they're in the forest so you very seldom can  
20 see their channel anyway, and so but not being able to  
21 see water, it's not surprising. So, it's -- it's  
22 something that I -- you know, it's just not surprising  
23 if you can't see water in a vegetative stream.

24 Q And so I think I know the answer to this,  
25 but is the presence of or lack thereof of you being

1 able to see water in an aerial image definitive of  
2 what type of stream it would be?

3 A No.

4 Q The case we're here to discuss is the C&S  
5 Enterprise case. Do you remember how you first  
6 learned of this matter, sir?

7 A Yes. I received an email from Delia Garcia,  
8 you know, sending me a map, sending some other  
9 information, and asking me what I thought about this.

10 Q All right. And I think I have that. I'm  
11 going to show you what's been marked as AX-13. This  
12 is page 1.

13 Is that the email that you received?

14 A Yes.

15 Q Okay. I'm going to zoom out a little bit.  
16 Everyone here knows I messed this up yesterday, so  
17 sensitive about it.

18 Okay. Can you just kind of generally  
19 describe the contents of this email?

20 A So, the bottom part is her email to me,  
21 discussing this case, and she sent me some  
22 information. It looks like she's attached a  
23 PowerPoint presentation, which was -- contained aerial  
24 photographs.

25 Q Did you review that PowerPoint presentation?

1 A Yes.

2 Q All right. And was that the end of your  
3 analysis in this case?

4 A It was the end at this point in time, which  
5 is December of last year.

6 Q Okay. And between that time and coming here  
7 today, did you do anything else?

8 A Yes.

9 Q Okay. We're going to talk about that.

10 When you received this email, do you  
11 remember what you initially reviewed?

12 A I reviewed the PowerPoint that she sent. I  
13 believe I created an ARC map project; you know, opened  
14 up the software, loaded in some geospatial data,  
15 zoomed to the area, and looked at some basic  
16 information on the GIS, but not a lot at that time.

17 Q Okay. And you say you believe the  
18 information supports the tributary as an intermittent  
19 stream, which we have argued many times equals  
20 relatively permanent. Was that based upon your  
21 initial review?

22 A Yes.

23 Q Okay. Ultimately, did the work that you  
24 performed in this case lead itself to you creating a  
25 report?

1 A Yes.

2 Q Okay. And that's Exhibit 31. What did you

3 mean by relatively permanent in AX-13?

4 A Well, relatively permanent is, as I used it

5 then, it's a relatively permanent geographic feature.

6 You know, it's been around a long time. I could tell

7 by the aerial photos, and also mapped as intermittent

8 by the U.S. Geological Survey. You know, I put those

9 factors together and considered it to be relatively

10 permanent in flow as well, at least in terms of the

11 guidance that the Agency has put out interpreting what

12 relatively permanent is, which is seasonal flow.

13 Q And did anything you reviewed after the date

14 of this email change your opinion that this was a

15 relatively permanent water?

16 A No.

17 Q Can you describe for us what you mean by the

18 term in your report "watershed"?

19 A Watershed?

20 Q Yes.

21 A Watershed, watershed is the area of land

22 where when precipitation falls, it's the area that

23 gathers that moisture and rainfall and runoff and puts

24 it in a -- you know, points it downstream to a

25 tributary. It's the area of a -- that contributes to

1 a tributary.

2 Q Okay. Is that precipitation and groundwater

3 or both in a watershed?

4 A Well, water -- it's both, yes.

5 Q Okay. I want to talk a little bit about the

6 methods that you employed in this case. The first one

7 I believe was acquisition. Can you tell us what

8 acquisition is in your field?

9 A Well, again, it's researching public

10 databases for information, aerial photos, maps, other

11 data that covers the area of interest, and acquiring

12 that imagery, for instance, or other data. And

13 generally, when I'm acquiring the imagery or other

14 data, I'm using several federal sources. I also use

15 the, you know, state, state data warehouses, so it's

16 researching and acquiring data from repositories of

17 data.

18 Q And did you seek out images yourself using

19 that method in this matter or did you just rely upon

20 images sent to you by EPA?

21 A No, I sought out and acquired my own images.

22 Q Okay.

23 A Which happened to be a lot of the same

24 images but I acquired them myself.

25 Q Okay. And what's the purpose of acquiring

1 them yourself versus relying upon others?

2 A Well, I mean, in the case of a PowerPoint

3 presentation, for instance, it's -- the image that I

4 could acquire somewhere else has probably been clipped

5 to a smaller geographic area. I don't know what the

6 resolution preservation aspects of it would be in the

7 PowerPoint, so I like to go back to the original data

8 and get it; you know, the original resolution data.

9 Q Did you do that with every single photo --

10 with all of the photos that you were provided copies

11 of from EPA?

12 A Yes.

13 Q Can you tell us the sources that you recall

14 from which you -- you acquired images? Excuse me.

15 A Right. So, the primary sources would be the

16 U.S. Geological Survey, state data warehouses. In

17 this case it was Ohio State University -- Iowa State

18 University, I'm sorry. There is a private vendor of

19 satellite images called Digital Globe, and then

20 there's a private vendor of low-altitude oblique

21 aerial photography named Pictometry, called

22 Pictometry. And then -- so those are the sources I

23 used in this case.

24 Q Okay. And I know these terms are familiar

25 to you, but what does oblique mean?

1 A So, oblique is an aerial photograph that's

2 taken on an angle. Most aerial photographs are taken

3 vertically down from a camera point straight down.

4 Obliques are taken from an angle.

5 Q Okay. And how do you use oblique imagery?

6 A Well, I use it the same way as vertical

7 aerial photography. I interpret it for features of

8 interest.

9 Q Do you recall how many images,

10 approximately, you acquired related to this matter in

11 this case?

12 A Thirty-five or 37 images.

13 Q Okay. And are those images contained in AX-

14 10, Agency Exhibit 10, and Agency Exhibit 31, which is

15 your report?

16 A And AX-10 is the PowerPoint presentation?

17 Q It's kind of a catalogue of about 22 images.

18 A Yeah, I compared that to my own report, and

19 I believe if you combine the two -- I think I've

20 obtained some images that may not have been in AX-10

21 and AX-10 may have had an image or so that I didn't

22 obtain and didn't use in my report.

23 So, if you combine those, that would be the

24 data set.

25 Q Okay. In the course of your review in this

1 matter and preparing your report, did you look at  
 2 other information other than images?  
 3 A Yes.  
 4 Q What else did you look at?  
 5 A So, I looked at U.S. Geological Survey maps.  
 6 I looked at the National Hydrography database, which  
 7 is USGS's digital stream database. There was LIDAR  
 8 imagery available, and I looked at some of that.  
 9 There was also stream stats, which is another U.S.  
 10 Geological Survey application to map out the watershed  
 11 of this small tributary. I can't think of what other  
 12 off the top of my head.  
 13 Q And in your report did you try to include  
 14 everything that you -- referenced everything that you  
 15 reviewed?  
 16 A Yes.  
 17 Q All right. Did you look at any photographs  
 18 that appeared to you to be taken from the ground at  
 19 the facility or at this property?  
 20 A Yes.  
 21 Q You referenced, I think it was the National  
 22 Hydrog -- Hy --  
 23 A Hydrography.  
 24 Q -- Hydrography database. What is that?  
 25 A So, that's the U.S. Geological Survey's

1 digital steam mapping. So, it's --  
 2 Q How did that help you in this case?  
 3 A Well, whenever I'm looking at tributaries, I  
 4 like to see what the U.S. Geological Survey has said  
 5 about that stream or how they mapped it, and how they  
 6 characterize it. And so that's one source of  
 7 information.  
 8 In addition to their topo maps themselves,  
 9 which you can see the line drawn on the topo map, they  
 10 publish the digital lines, which then you can overlay  
 11 on your own aerial photography separate from the map.  
 12 Q All right. When you're looking at a 404  
 13 case, do you sometimes look at precipitation data?  
 14 A Yes.  
 15 Q Okay. And I think that was one of the  
 16 things that you suggested might be helpful in response  
 17 to Dr. Garcia's email. Do you recall that?  
 18 A Yes. I didn't see it when you put it up  
 19 there just then, but I recall mentioning that.  
 20 Q Okay. And what's the purpose of looking at  
 21 precipitation data when reviewing a 404 case?  
 22 A Well, I mean, there's a couple of things.  
 23 The total annual precipitation in an area is a factor  
 24 in terms of stream flow. Then the monthly  
 25 precipitation is also information that you can --

1 helps you understand stream flow. So, the  
 2 precipitation just helps you understand the area and  
 3 what you might expect in the way of stream flow.  
 4 Q Do you recall the average precipitation  
 5 based on the data you reviewed of the Deep River,  
 6 Iowa, area?  
 7 A Yes. In this case I believe it was 37  
 8 inches annually, on average.  
 9 Q And do you draw any conclusions from the  
 10 annual rainfall of approximately 37 inches and the  
 11 size of this watershed, how that plays into this  
 12 matter?  
 13 A Well, I've done this kind of comparison, you  
 14 know, throughout my career in terms of, you know,  
 15 watershed size and annual precipitation. So, that's  
 16 what I did here, and what I concluded is the  
 17 precipitation in this part of Iowa is similar to where  
 18 I live in Virginia. We get about 39 inches, so it's  
 19 fairly moist, fairly wet, consistent throughout the  
 20 months pretty consistent.  
 21 And then I factored that into the watershed  
 22 of approximately 100 acres and, you know, thought  
 23 about that and compared that to other sites and  
 24 streams that I've looked at, and that, you know,  
 25 helped form my opinion about this stream being an

1 intermittent stream.  
 2 Q Okay. Did you do a site visit in this case  
 3 to actual on-the-ground?  
 4 A No.  
 5 Q Okay. Was a site visit necessary in this  
 6 case to render your opinions?  
 7 A Not -- no, not the opinions I put in the  
 8 report.  
 9 Q Okay. Can you explain why it wasn't  
 10 necessary?  
 11 A Well, in my report I'm interpreting aerial  
 12 photographs and just describing what I see, and I'm  
 13 comparing it to other information like mapping, the  
 14 U.S. Geological Survey, and then comparing things like  
 15 watershed size and just relating that to my experience  
 16 in mapping streams.  
 17 Q And in your review of the photographs --  
 18 well, let me strike that.  
 19 EPA is alleging in this case that this  
 20 tributary was filled by the Respondent in this case.  
 21 Have you looked at aerial imagery before and after  
 22 2015?  
 23 A Yes.  
 24 Q Okay. And is it your understanding that the  
 25 conditions of the tributary have changed or are not

1 the same today versus what they were before 2015?

2 A Yes.

3 Q Okay. But you did look at photographs of

4 the ground that others took following the fill,

5 correct?

6 A Yes.

7 Q Did those ground photographs in any way

8 influence your opinions in this case?

9 A Well, they helped me -- I remember a couple

10 of them. You know, one showed some sort of drop inlet

11 where water would flow into a pipe system. I saw some

12 pictures of the tributary upstream from the impacts,

13 some of the conditions and features up there. So,

14 they helped me just get a better understanding of this

15 tributary and what happened.

16 Q I want to talk a little bit about USGS.

17 What is the USGS?

18 A The USGS is the U.S. Geological Survey.

19 Q All right. And what do they do with respect

20 to streams such as the one at issue here?

21 A Well, they -- you know, a long time ago they

22 were charged to create maps of the United States, and

23 -- topo maps, and they also included streams and

24 stream mapping on those maps. So, they map streams,

25 they map topography, they map features and they create

1 maps. It's one of the things they do.

2 Q Do you know if the USGS has mapped the

3 particular tributary at issue in this case?

4 A Yes.

5 Q Do you know how long they had mapped that?

6 A I think it was -- the first map that I found

7 was, I believe, 1968.

8 Q Okay.

9 A That was their first published map that I

10 found.

11 Q And do you know how the USGS classified this

12 stream?

13 A The mapped it as an intermittent stream.

14 Q All right. And in your experience working

15 for EPA, can streams that are classified as

16 intermittent streams by the USGS be jurisdictional

17 waters of the United States under the Clean Water Act?

18 A Yes, particularly in the eastern United

19 States. That doesn't apply as well out West where they

20 map intermittent streams in Arizona, for instance,

21 which don't have -- they don't have the flow

22 characteristics in the East. But it's my experience

23 in the East, if it's mapped as an intermittent stream,

24 it's frequently a seasonal flowing stream.

25 Q And what do you consider to be the West

1 geographically when you make that statement?

2 A Oh, west of the 100th parallel or whatever.

3 Q What states does that run through?

4 A Oh.

5 Q Sorry.

6 A You know, western Kansas where the

7 precipitation starts dropping off into the, you know.

8 10 to 15 inches a year and then less.

9 Q Are you able to pull up on your computer

10 your ArcGIS program and just kind of give us a little

11 run-through of how you use it?

12 A Yes.

13 Q Okay. Let's see if we can pull this up, and

14 once it gets set up, I'll ask you a couple questions,

15 okay?

16 A Okay. I mean, it's set up now. Maybe I'll

17 just zoom out a little bit so that there is sort of a

18 larger geographic area.

19 Q Okay. Can you just kind of just take us

20 through, it doesn't necessarily need to be specific to

21 this case 'cause I'm going to run through a lot of

22 these images with you, but can you just summarize for

23 us an abbreviated version of kind of what you do when

24 using ArcGIS to analyze an aerial image?

25 A Well, I mean, one of the first things -- I

1 guess you can see there's a table of contents on the

2 left which contains all the data, all the aerial

3 photographs and all the other maps, and then -- all

4 the other geospatial data. So, that's -- those layers

5 I can turn on and turn off.

6 This is a black-and-white satellite image

7 covering the general area of where this unnamed

8 tributary is located. You know, as a photo

9 interpreter, I mean, you can determine the presence of

10 roads, linear light-tone features, roads, road

11 networks. These dark areas, these dark features are

12 ponds. I mentioned that water tends to absorb light

13 and therefore they don't reflect a lot of light back

14 and they look dark.

15 You can see some of the -- well, you can see

16 this feature here is Deep Creek. It's sort of a

17 curvilinear feature that this tributary flows into,

18 and you can see -- you can actually see the tributary

19 -- I'm zoomed fairly far out right now, but you can

20 see the tributary and its branching pattern.

21 This is not a predominantly forested area.

22 It's predominantly an agricultural area. That's

23 another thing that's evident on this aerial

24 photograph. The only forested areas are, you know,

25 this sort of rough-textured area here. There is some



1 more over here to the lower right-hand corner.  
2 So, that's just sort of generally. And  
3 then, you know, I would use the tool to scroll around  
4 and search wider areas if I need to, and then I can  
5 also zoom in to areas of interest.

6 Q The photographs that you're looking at, do  
7 you know the date of that photo?

8 A This is July, I believe it's July 3, 2010.

9 Q Okay. And are you able to overlay layers on  
10 top of that photograph, or on top of photographs in  
11 ArcGIS?

12 A Yes.

13 Q And can you just kind of demonstrate for us  
14 -- and this is going to show up odd on the record, but  
15 I just want everyone to see kind of the methods that  
16 you employ?

17 A So, I mean, one of the things I could do  
18 would be overlay what I've already mentioned, the NHD,  
19 the National Hydrography Data, and I don't know if you  
20 can see that, but a blue line has now appeared where  
21 this tributary is located as well as the other  
22 tributaries, Deep Creek, and some of the others that  
23 are just on this image.

24 There's also a watershed boundary I could  
25 put on there which -- we'll see part of it, but not

1 all of it.

2 Q And where does the watershed boundary come  
3 from?

4 A So, this came from stream stats, which is a  
5 U.S. Geological Survey application that -- it covers  
6 most of the states in the United States.

7 Q Okay. And if I handed you a map that was  
8 scrolled out, or sorry, zoomed out a little bit more,  
9 would you be able to circle or outline approximately  
10 the watershed in this case?

11 A Yes.

12 MR. BIERI: Okay. Your Honor, may I  
13 approach?

14 JUDGE BIRO: Yes, you may.

15 BY MR. BIERI:

16 Q Thanks, and then I'll put this back up after  
17 you do it, Mr. Stokely.

18 I'm going to hand you what's been marked as  
19 Agency Exhibit 31. This is Appendix B to your report,  
20 Mr. Stokely, and it's page 28 of 38.

21 And if you don't mind, if you could outline  
22 the watershed and then I'll show it to everybody.

23 A I mean, this is approximate.

24 Q Sure.

25 A I think it may go up -- I think it may go

1 off the top of the photograph a little bit.

2 Q Okay.

3 (Pause.)

4 Okay, I am publishing this exhibit here,  
5 AX-31, Appendix B, page 28. You've outlined  
6 approximately the watershed. A little bit of it got  
7 cut off on the top, is that right?

8 A Yes.

9 Q All right. And if that was fully drawn and  
10 accurate, you believe that to be about 100 acres?

11 A Yes.

12 Q And where does that information come from?

13 A That comes from the stream stats  
14 application. I didn't explain it. The way that works  
15 is you can put a point -- on the web-based  
16 application, which is a map base, you can put a point  
17 on any tributary and it will then -- and you ask it to  
18 delineate the watershed, it will delineate the  
19 watershed above that point on any tributary.

20 In this case, I asked it to delineate the  
21 watershed where the unnamed tributary flows into Deep  
22 Creek.

23 Q Okay.

24 A And that's the product that comes out of it  
25 is that -- that purple line that I showed you earlier.

1 Q Okay. And this drawing that you made is  
2 intended to approximate the purple line, albeit the  
3 purple line is probably more accurate.

4 A Yes.

5 Q Okay. Can we go back to his -- thank you.

6 MR. BIERI: Judge, do you mind if I mark  
7 this, remark this exhibit?

8 JUDGE BIRO: No.

9 MR. BIERI: Okay, thank you.

10 JUDGE BIRO: What are we going to call it  
11 now?

12 MR. BIERI: Oh, it's going to have a long  
13 one. How about we call it AX-31, Appendix B, page  
14 28A? I would move to admit that, Your Honor.

15 MR. McAFEE: No objection, Your Honor.

16 JUDGE BIRO: So AX-31, Appendix B, page 25A?

17 MR. BIERI: 28A.

18 JUDGE BIRO: 28A is admitted into the  
19 record.

20 (The document referred to was  
21 marked for identification as  
22 Agency's Exhibit AX-31,  
23 Appendix B, 28A and was  
24 received in evidence.)

25 MR. BIERI: Thank you.

1 BY MR. BIERI:  
 2 Q And we're looking at a portion of the  
 3 watershed back on the ArcGIS, is that correct?  
 4 A Yes.  
 5 Q Okay. And so can you describe if -- there  
 6 we go. If rain falls in this area within that  
 7 watershed, what will happen?  
 8 A Well, that's the watershed that will collect  
 9 the runoff and send it to the tributary in question.  
 10 It's the watershed of the tributary.  
 11 Q Okay. Of the unnamed tributary?  
 12 A Yes.  
 13 Q Okay. And then how is that water then, or  
 14 is that water then conveyed to Deep Creek?  
 15 A Yes.  
 16 Q Okay. And how?  
 17 A Through a channel or through channelized  
 18 flow.  
 19 Q Okay. In the tributary?  
 20 A Yes.  
 21 Q Okay. Now, this was an abbreviated  
 22 demonstration. I want to ask you this. Did you do a  
 23 process similar to this with each and every photograph  
 24 that you reviewed in this case?  
 25 A Yes.

1 Q Okay. And how much time would you spend in  
 2 ArcGIS, would you think, with each one?  
 3 A Well, I mean, I probably spent, well, 40, 60  
 4 hours on this case.  
 5 Q Okay. And what portion of that do you think  
 6 was looking at GIS photos?  
 7 A Well, a good deal of it was. I mean, part  
 8 of it was report writing, but a good deal of it would  
 9 have been the analysis aspect.  
 10 Q All right. You looked at 35-plus  
 11 photographs. On how many of those photographs were  
 12 you able to observe at least a portion of this stream?  
 13 A Well, I was able to observe this tributary  
 14 on all, all of them.  
 15 Q Okay. And those 35-some odd photographs, do  
 16 you know what time period they span?  
 17 A They span all the seasons, summer, winter,  
 18 spring.  
 19 Q Okay. The first one you looked at was from  
 20 the '30s?  
 21 A Yes.  
 22 Q Do you remember -- from the 1930s?  
 23 A Yes.  
 24 Q And do you recall what the most recent image  
 25 you looked at was?

1 A 2018.  
 2 Q Okay. And so would the time period of the  
 3 photographs you reviewed have spanned from the '30s to  
 4 2018?  
 5 A Yes.  
 6 Q All right. Were you able to observe the  
 7 stream channel in every single image?  
 8 A No.  
 9 Q Okay. And I believe your report says, of  
 10 those 35 days, you were able to observe the stream  
 11 channel I think 18 times. Does that seem about right?  
 12 A Yes.  
 13 Q Okay. And do you recall of those 18 times  
 14 you were able to observe the streams how many times  
 15 you saw water?  
 16 A I believe it was 10 instances.  
 17 Q All right. And I have this -- so it's okay  
 18 if you can't remember, you don't have your report in  
 19 front of you, but do you recall what months of the  
 20 year of those images that you were able to observe  
 21 water?  
 22 A I believe it ranged March, April, June, and  
 23 July.  
 24 Q All right. Did you make an effort to  
 25 reflect some of your observations of water in the

1 channel and related things in your report?  
 2 A Yes.  
 3 Q All right. And I believe Appendix A to your  
 4 report talks a little bit about that, and in Appendix  
 5 A to your report, AX-31, starting on page 23, you have  
 6 listed image date, water in channel and notes, and  
 7 you've got three columns. Do you recall that?  
 8 A Yes.  
 9 (Pause.)  
 10 Q Okay. Okay, the column entitled "Water In  
 11 The Channel", you would use three terms: "no,"  
 12 "probable" and "yes". What did you mean by no in your  
 13 report?  
 14 A No meant that I couldn't see water in the  
 15 channel.  
 16 Q Okay. Does that mean that you're opining  
 17 that there was not water in the channel on that date?  
 18 A No, it's just that the -- that the  
 19 vegetation cover or the resolution of the imagery did  
 20 not allow me to see it.  
 21 Q All right, and I'm going to show you a  
 22 portion of your report from AX-31, page 23. Okay,  
 23 when you use the term "resolution" or "season  
 24 limiting" under the notes, what does that mean?  
 25 A That's when the resolution imagery and also

1 the time of year, heavily vegetated or what have you,  
2 would limit my ability to see the channel and see  
3 water in the channel.

4 Q Okay. And it looks -- under notes, you also  
5 included some notes about precipitation, is that  
6 right?

7 A Yes.

8 Q Okay. There was another phrase that I just  
9 wanted to make sure I knew what you were talking  
10 about, is "canopy limiting". You can see it where --  
11 right here under 423.94.

12 A Yes.

13 Q What does that mean?

14 A So, I think I was just using -- these were  
15 notes kind of like I was taking as I was doing  
16 analysis, so I was using the term "canopy" or "season"  
17 probably interchangeably.

18 Q Okay. And you used the term "yes" for water  
19 in the channel. What does that mean?

20 A Yes means I believe I actually saw water in  
21 the channel.

22 Q Okay. And the phrase "probable", what does  
23 that mean in your report on this table in Appendix A  
24 of Exhibit 31?

25 A So, probable is more of a -- you know, I

1 believe there is a good chance there's water in there.  
2 I didn't directly see it but I'm inferring it from  
3 other conditions in the area such as other  
4 tributaries, other tributaries looking like they may  
5 have water, and also the, you know, rainfall events,  
6 high rainfall for instance the week before. General  
7 moisture conditions in the area. I'm sort of  
8 inferring it even though I wasn't able to see it.

9 Q Okay. And did you cross-reference that or  
10 derive your notes from looking at actual weather data?

11 A Yes.

12 Q Okay. And the weather data, just for the  
13 record, is from -- I'm sorry -- is noted at AX-31,  
14 Appendix C. There's 165 pages of weather data.

15 Did you procure that weather data or did  
16 someone else?

17 A I procured my own -- I procured the weather  
18 data for the aerial photographs that I was analyzing,  
19 and I also believe the region procured the same data.

20 Q Okay. All right, I want to show you some  
21 images now and have you tell us what you see from your  
22 expertise. I'm going to start with AX-10, page 1.

23 MR. BIERI: Can we zoom out just a hair,  
24 sorry, so he can see the full -- thank you.

25 BY MR. BIERI:

1 Q Can you see that, Mr. Stokely?

2 A Yes.

3 Q This resolution may not be as good as what  
4 you're used to on a computer. What's the date of this  
5 image?

6 A This is the circa 1930s. I don't believe we  
7 know exactly what the year was, but circa 1930s.

8 Q Okay. And did you apply the labels?  
9 There's kind of a big label and then three other  
10 labels. Did you apply those?

11 A No.

12 Q Okay. In your review of this case, do you  
13 have any reason to dispute the accuracy of the  
14 location of any of the labels?

15 A No.

16 Q Okay. Can you describe the characteristics  
17 you see or what you see in this photo from an aerial  
18 interpretation perspective?

19 A Well, you can see the unnamed tributary in  
20 question -- and I can't point to this, can I?

21 Q You can draw -- actually, you can draw on  
22 that.

23 JUDGE BIRO: Yes, you can touch the screen.

24 THE WITNESS: I can touch the screen?

25 MR. BIERI: Yes.

1 THE WITNESS: Okay. Well, the unnamed  
2 tributary flows diagonally from the northwest to the  
3 southeast through here like that. And although you  
4 really can't see it very well, it flows down to Deep  
5 Creek. So, that's -- that's one thing.

6 I mean that's -- and there is generally, you  
7 can see agricultural land. Here is Deep Creek, and  
8 then this is -- this is B Avenue right there. This is  
9 sort of a clump of trees.

10 BY MR. BIERI:

11 Q All right. And the clump of trees you are  
12 pointing to would be underneath the label that says  
13 "Confinement Building Footprint", correct?

14 A Correct.

15 Q Okay. Is there any significance to being  
16 able to view this tributary all the way back to 1930?

17 A Well, yes. I mean, it's one of the -- it's  
18 one of the pieces of information that I used to  
19 determine that this tributary has been there a long  
20 time. It's been there historically, 1930s is as far  
21 back as we could go. But it gives me the idea that  
22 this is a, you know, permanent or relatively permanent  
23 feature.

24 Q Okay. I'm going to now show you AX-10, page  
25 2, looking at --

1 A So, how do we clear these, though?  
 2 Q Oh, I can clear them here. Sorry. Got it.  
 3 No, I got it.  
 4 We're now looking at AX-10, page 2. It  
 5 looks like we're skipping ahead three decades. What's  
 6 the date on this photo?  
 7 A This is circa 1960s.  
 8 Q All right. Can you tell us what you see in  
 9 this photograph?  
 10 A So, once again you can see the tributary  
 11 diagonally going from the northwest to the southeast.  
 12 I won't -- I'll try not to draw on top of it. And  
 13 then flowing to Deep Creek.  
 14 Now that clump of trees appears to have some  
 15 buildings where the -- the confinement building  
 16 footprint is, and you can see the road network and the  
 17 agricultural land, the fields.  
 18 Q And you had talked earlier about curvilinear  
 19 features and the riparian corridor, and things of that  
 20 nature. Do you see any of those features on this  
 21 photograph?  
 22 A Yes. So, the tributary itself is what I  
 23 describe as curvilinear. In places it's linear down  
 24 near the bottom of it. In other places it's curving,  
 25 and you can see the vegetation, the texture, the

1 rougher texture of the vegetation; the shadow being  
 2 cast by the vegetation, and so that's the curvilinear  
 3 feature that helps me identify that as a tributary.  
 4 Deep Creek is similar. You know, it's got a  
 5 riparian corridor, it's obscuring the creek channel,  
 6 and that's some of the areas in this photo. And you  
 7 sort of see how the branching pattern is with the  
 8 unnamed tributary running into Deep Creek and, you  
 9 know, it looks like it's forming a Y, but it's like a  
 10 branching pattern, typical of like dendritic drainage  
 11 patterns.  
 12 Q And the branching pattern that you're  
 13 noting, is that just to the north of the -- of the  
 14 flag that says "Approximate end point of impacted  
 15 stream segment"?  
 16 A Yes, that's where the tributary, the unnamed  
 17 tributary joins Deep Creek, and that's forming sort of  
 18 a branch in a tree, if you will.  
 19 Q Kind of like a mouth.  
 20 A A mouth? I'm not sure what you mean.  
 21 Q Oh, I said kind of like a mouth, but I could  
 22 be wrong. Okay.  
 23 I'm going to show you now AX-10, page 3, and  
 24 I will clear that off. What's the date of this image?  
 25 A It's -- again, it's the circa 1970s.

1 Q All right. And do you know where this one  
 2 was sourced?  
 3 A This says USDA, Department of Agriculture.  
 4 Q Okay. And can you describe for us what you  
 5 see in this photograph related to the tributary?  
 6 A Once again, you can see the unnamed  
 7 tributary flowing from northwest to southeast and into  
 8 Deep Creek, and you can see some of the same  
 9 buildings, roads, fields, Deep Creek. There's another  
 10 tributary coming into Deep Creek right about there.  
 11 JUDGE BIRO: And there?  
 12 THE WITNESS: I'm sorry. To the eastern  
 13 side or the right-hand side of the photograph.  
 14 BY MR. BIERI:  
 15 Q Just above the label that says AX-10?  
 16 A Yes.  
 17 Q Okay. Do you have any other observations of  
 18 that photograph?  
 19 A Well, I mean, you can see some of the  
 20 structures near the confinement building footprint,  
 21 the road network, but, you know, mainly it's the fact  
 22 that here you can see the tributary again.  
 23 Q Okay. And are you able to on this  
 24 photograph make out what you see to be a defined  
 25 channel or not?

1 A I can see -- I can't see the channel itself  
 2 with this resolution and the vegetation cover. You  
 3 can see the path where the channel would be underneath  
 4 the vegetation.  
 5 Q Okay. I'm going to flip this over to AX-10,  
 6 page 4. Excuse me. Now we're looking at April 22,  
 7 1994, is that right?  
 8 A Yes.  
 9 Q All right. Can you describe for us what you  
 10 see in that picture?  
 11 A Once again, the tributary flowing from the  
 12 northwest to the southeast. You can actually see on  
 13 this one -- in the far upper-right, you can see some  
 14 of the channel features of the tributary where the  
 15 vegetation covers a little bit less, and then you can  
 16 see the riparian corridor, the sort of dense trees and  
 17 shrubs that are lining that tributary, and it's sort  
 18 of demarcating the tributary.  
 19 Q And you said the far upper-right.  
 20 A I mean -- excuse me. Far upper-left. I'm  
 21 sorry.  
 22 Q Okay. And are you talking about kind of  
 23 just to the left of where it says BB Avenue (phonetic)  
 24 in the upper left-hand corner?  
 25 A Yes.

1 Q Okay. All right, I'm going to show you --  
2 now we're going to move into the 2000s, I believe.  
3 This is AX-10, page 5.

4 Okay. This appears to be from April 4,  
5 2009. The image source says Pictometry. What is that  
6 again?

7 A Yes. Pictometry is a vendor of oblique  
8 aerial photography, and this one is an oblique image.  
9 It's not perfectly -- it's not looking straight down  
10 on the ground. It's looking at an angle.

11 Q All right. And can you describe for us the  
12 conditions that you see in this photograph? And I'm  
13 probably going to have you actually mark this with a  
14 pen, but you can describe it first.

15 A Well, again you can see the tributary  
16 flowing from the northwest to the southeast. In this  
17 instance, being lower altitude and higher resolution,  
18 you can see some of the channel characteristics moving  
19 from the northwest to the southeast. So, sort of in  
20 the upper-central or upper left-central part of the  
21 photograph, you can see some of the meandering nature  
22 of the tributary.

23 And then you can see the connection, follow  
24 the tributary down to Deep Run, and it seems like  
25 there's -- there appears to be a lot of moisture in

1 the area in general. I'm circling an area in the far  
2 right-hand corner which appears to be moist. You can  
3 see some additional tributaries in the far upper  
4 right, Deep Run in the bottom left.

5 Q Are you able to see a defined channel in  
6 this photograph?

7 A Yes.

8 Q Okay. And does that extend all the way from  
9 the top of the photo all the way down to Deep Creek?

10 A It extends from the top, and this portion  
11 near the bottom, the straighter portion of the  
12 tributary, the channel is hidden by some -- it's not  
13 completely visible, it's hidden by some dense  
14 vegetation.

15 Q Okay.

16 A But you can see where it would be.

17 MR. BIERI: I think I'm going to have you  
18 mark a couple of things. Judge, may I approach?

19 JUDGE BIRO: You may.

20 MR. BIERI: Thank you.

21 JUDGE BIRO: Would you like Mr. Stokely to  
22 stand with you at the bench?

23 MR. BIERI: Yes.

24 JUDGE BIRO: Okay.

25 MR. BIERI: Okay. Can you come stand by me?

1 THE WITNESS: With a marker.

2 MR. BIERI: Thank you.

3 BY MR. BIERI:

4 Q Mr. Stokely, I think you've only done it  
5 once, but if you say "Deep Run", do you mean Deep  
6 Creek?

7 A Yes.

8 Q All right. Thank you.

9 Okay, I'm going to clear this screen. Okay,  
10 are you able to see this photograph okay?

11 A Yes.

12 Q All right. Kind of want to start that again  
13 and have you describe what you're talking about, and  
14 then if you make markings on them, I might instruct  
15 you to put some labels on what you're -- what you're  
16 marking.

17 A Okay.

18 Q Can you describe what you see here again?

19 A Right. So, here once again is the unnamed  
20 tributary flowing sort of diagonally across the center  
21 of the photograph largely.

22 Q All right.

23 A Up here in the upper parts where I'm drawing  
24 an arrow, that's sort of -- that's pointing to some of  
25 the channel, the meandering channel. Then it flows

1 through the wooded area to the south and east, and  
2 then it straightens out, and this is an interesting  
3 photo here because what I'm pointing to with that  
4 arrow in the lower center portion is where the channel  
5 is, but this is one of the photographs where I saw  
6 water flowing, at least what I believed to be water  
7 flowing right there where I'm putting that arrow.

8 Q All right. Can you write "water" next to  
9 that?

10 A And what's interesting is that it appears to  
11 me that the water is now for some reason not going  
12 underneath the culvert that's there, but has diverted  
13 itself around, it's flowing over the road and then  
14 flowing next to the channel. That's how I interpret  
15 that image.

16 So, the channel is where that lower arrow  
17 is, but the water seems to me to be flowing next to it  
18 in this instance.

19 Q And do you see whether there is a continuous  
20 connection to Deep Creek in that photograph?

21 A Well, you can see the channel in places, I  
22 believe, if you look further south and east, but  
23 what's always been a little difficult is in this  
24 densely wooded area that the channel is hard to make  
25 out, and so I wouldn't want to overreach and say I can

1 actually see it on this, you know, print right now.  
2 Q Okay. And when you're talking about the  
3 presence of water, how do you -- how do you delineate  
4 water versus shadows?

5 A Well, so, you know, shadow can definitely  
6 obscure the presence of water and can make it -- fool  
7 you to think there is water there. So, what I did --  
8 with that in mind, I look for other evidence of water.  
9 Like in this instance, I see it flowing across what I  
10 believe it to be water flowing across the road.  
11 That's not shadow. And I would also look at the  
12 direction the shadows have been cast in general when  
13 determining if I saw the presence of water.

14 So, it was a process of trying to eliminate  
15 other things like shadow and determining, well, hey, I  
16 think that in this instance that's water.

17 Q And are you ever able to compare what is  
18 easier to identify as water with, you know, what might  
19 be in a stream?

20 A I didn't understand.

21 Q Are you able -- like this feature that I'm  
22 pointing out, which is just north of the exhibit  
23 label, what do you believe that to be?

24 A Oh, right, right. So, that's an area that  
25 ponds frequently. It's like a shallow trench, and so

1 that -- it's exhibiting dark photograph tones, there's  
2 standing water in that. That feature appears with  
3 standing water on several aerial photographs.

4 Q Okay. And are you able to compare the color  
5 or the features of that with water in the channel to  
6 determine whether -- whether you see water in the  
7 channel?

8 A Well, it's generally dark photographic tone.  
9 In this case there is some other greens, light greens  
10 in there, but mainly it's the cl -- the linear,  
11 curvilinear dark-tone feature.

12 Q Okay. Do you have any other observations  
13 about this photograph?

14 A Those are the main ones. I mean, we can  
15 still see the different wooded areas and the  
16 confinement barn footprint and those type of things.

17 Q Okay. And is this an oblique image?

18 A Yes.

19 Q Okay. All right, I'm going to show you  
20 now --

21 MR. McAFEE: Excuse me. Excuse me, Britt.

22 MR. BIERI: Oh, sorry.

23 MR. McAFEE: Sorry to interrupt, Your Honor.  
24 There are some arrows on there that he has described  
25 things, but they're in his testimony and I'm not sure

1 it will show up in the transcript what -- how they  
2 relate to the arrows.

3 JUDGE BIRO: Right, they're just all arrows.

4 MR. McAFEE: Right.

5 JUDGE BIRO: So maybe you can mark them as A  
6 or B or put a written description on them.

7 MR. BIERI: Yeah.

8 MR. McAFEE: If you would. Thank you.

9 BY MR. BIERI:

10 Q Why don't you mark that as A and describe  
11 what it is again, the first one? Describe what you're  
12 marking as A.

13 A Right. What I'm marking as A is an arrow  
14 pointing to a meandering channel segment on the  
15 unnamed tributary. What I'm marking as B is an arrow  
16 pointing to the location of a channel within the sort  
17 of dense, herbaceous and shrubby vegetation that's  
18 in that area, and that's B.

19 And C, I believe what I was pointing to was  
20 my interpretation that there is water flowing next to  
21 the channel. There may be water in the channel, but  
22 there appears to be flowing in the channel or next to  
23 the channel as well for some reason in that date. And  
24 then D is just that sort of prominent ponded area,  
25 depression.

1 MR. BIERI: Thank you. Judge, I remarked  
2 this as AX-10, 5A. I would like to admit it into  
3 evidence.

4 JUDGE BIRO: We already have an AX-10, 5A.

5 MR. BIERI: B. Sorry. AX-10, 5B.

6 MR. McAFEE: No objection.

7 JUDGE BIRO: Okay.

8 MR. BIERI: Thank you.

9 JUDGE BIRO: AX-10, 5B is admitted into the  
10 record.

11 (The document referred to was  
12 marked for identification as  
13 Agency's Exhibit No. AX-10,  
14 5B, and was received in  
15 evidence.)

16 BY MR. BIERI:

17 Q Okay, Mr. Stokely, I am now handing you  
18 what's been marked as AX-10, page 7. Can you describe  
19 what we're looking at here?

20 A Yes, this is a vertical satellite image  
21 dated March 14, 2010.

22 Q All right. And what do you see with respect  
23 to the tributary in this photograph?

24 A Well, you can see it again flowing  
25 diagonally from the upper left to lower right. I'm

1 going to mark a -- and again, that curvy meandering  
2 channel is clear in that area. You can also -- you  
3 can also see that, you know, fairly well see the  
4 channel -- and this is just a paper print, by the way.  
5 You can still fairly well see the channel through the  
6 wooded area because the leaves are off, the leaves  
7 off, and you can make out the channel characteristics  
8 better in that case.

9 And you can see -- if you look closely you  
10 can see the connection. The channel in this case is  
11 right here, B. You can observe the channel as it  
12 connects to Deep Creek.

13 Q Okay. And were you able to observe water in  
14 this photograph when you looked at it on ArcGIS, at  
15 least?

16 A Yes. I'm trying -- you know, trying to  
17 differentiate between what could be shadow up in the  
18 upper part. I looked closely down the lower part, and  
19 I think in this instance -- and it's not super-clear  
20 from this print, but the water that I believe I saw is  
21 what I'm marking as C, and it's sort of a gray-tone  
22 signature similar to what Deep Run was exhibiting --  
23 Deep Creek was exhibiting at the same time. So, that  
24 was how I concluded water in this image.

25 Q All right.

1 A Present in this image.

2 Q And are you seeing what you would term to be  
3 a defined bed and bank in this photograph at this  
4 tributary?

5 A Yes.

6 Q And is that throughout?

7 A Yes.

8 Q Okay. So, from the approximate starting  
9 point of the impacted stream segment flag all the way  
10 to Deep Creek.

11 A Right, with, you know, the caveat that it's  
12 always been hard to see the actual channel in the  
13 wooded zone of Deep Creek.

14 Q Sure. If there is a defined bed and bank  
15 channel running from basically BB Avenue (phonetic)  
16 all the way to just before it enters into Deep Creek,  
17 would you expect that channel to go all the way  
18 through to Deep Creek?

19 A Yes.

20 Q Okay. All right, I'm going to mark this  
21 Exhibit as AX-10, 7B, and we would move to admit that  
22 into evidence, Your Honor.

23 MR. McAFEE: Your Honor, could I just see it  
24 quickly again?

25 MR. BIERI: Yes.

1 MR. McAFEE: I was making some notes here.  
2 I want to make sure.

3 MR. BIERI: Sure. Can you see that?

4 MR. McAFEE: Yes, thank you. No objection,  
5 Your Honor.

6 MR. BIERI: All right.

7 JUDGE BIRO: AX-10, 7B is admitted into the  
8 record.

9 MR. BIERI: Yes.

10 (The document referred to was  
11 marked for identification as  
12 Agency's Exhibit No. AX-10,  
13 7B and was received in  
14 evidence.)

15 BY MR. BIERI:

16 Q All right, I want to look now at AX-10,  
17 page -- excuse me. Page 8. What's the date of this  
18 photograph, sir?

19 A This is July 3, 2010.

20 Q All right. And can you describe for us what  
21 you're seeing in this photograph?

22 A Yes, there are some markings on here that  
23 I'm not sure how they got there.

24 Q Oh, those are -- bleeding through. Hold on.  
25 Hold on while we get that fixed.

1 (Pause.)

2 Sorry about that. Okay, that is a clean  
3 copy of AX-10, page 8. Can you describe for us what  
4 you're seeing there, Mr. Stokely?

5 A Yes. This is a digital blowup satellite  
6 image dated July 3, 2010.

7 Q Okay.

8 A The tributary is readily visible on this  
9 one. I'll point to some of the features again. At A,  
10 approximately A is the meandering section of the  
11 tributary in the upper wooded area.

12 Q And can you -- we have a clean copy of this  
13 already in the record. So, can you kind of draw in  
14 where you see the complete curvilinear section?

15 A Actually trace over it?

16 Q Yes. All right. What else do you observe?

17 A And you can see that, you know, that the  
18 channel doesn't stop there. It continues to flow in a  
19 straighter manner at B. There's the channel clearly  
20 visible at B. And you can almost make it out all the  
21 way to the Deep Creek in this particular instance.

22 Q All right. And do you see a defined bed and  
23 bank running all the way from the -- where you've  
24 marked A, pretty much all the way to Deep Creek?

25 A Yes.

1 Q All right. Does there appear to be less  
2 vegetation in the lower portion of that unnamed  
3 tributary in this photograph?

4 A Yes. This is not quite as heavily vegetated  
5 as it was historically.

6 Q Okay. Can you see a high, ordinary high-  
7 water mark on aerial imagery looking straight from  
8 above typically?

9 A No.

10 Q Okay. But if you see a defined bed and  
11 bank, would that be indicative that there probably is  
12 a high-water mark?

13 A Yes.

14 MR. BIERI: Judge, I've marked this as AX-  
15 10, 8B. Mr. McAfee, I'll show it to you again. I  
16 would like to move that into evidence, please.

17 MR. McAFEE: No objection.

18 JUDGE BIRO: Okay. Agency Exhibit 10 at  
19 page 8B is admitted into the record.

20 (The document referred to was  
21 marked for identification as  
22 Agency's Exhibit AX-10, 8B,  
23 and was received in  
24 evidence.)

25 MR. BIERI: Yes, thank you.

1 BY MR. BIERI:

2 Q I want to show you, Mr. Stokely, what's been  
3 marked as AX-26, page 2, which I believe to be a  
4 closeup of the last photograph that we looked at, but  
5 let me know if you agree.

6 A Yes, it is.

7 Q All right. And can you describe for us the  
8 features that you see in this photograph?

9 A Well, this is the -- this is the closeup of  
10 the lower end of the tributary where it enters into  
11 Deep Creek, and what -- what you can see is the  
12 defined channel A, where I'm annotating A, a linear  
13 straight channel. In this instance, I believe there  
14 is water. That's not shadow, that's water in there.  
15 You can make out, let's say B, where it appears that  
16 water is crossing that road crossing. That road  
17 crossing has been there historically and it was sort  
18 of a permanent feature and it looks like a road is --  
19 water is flowing across it at B.

20 And you can see the channel almost all the  
21 way to just before it hits the wooded area.

22 Q And that's what you marked as C?

23 A Yeah, that's C.

24 Q All right. And were it not for the wooded  
25 area, what would you expect to see with respect to

1 that channel?

2 A I would expect to see that channel flowing  
3 there, be flowing in there, yes.

4 Q Flowing into Deep Creek?

5 A Yes.

6 MR. BIERI: Okay. Judge, I've marked this  
7 as AX-26, 2A, and would move to admit it into  
8 evidence, please.

9 MR. McAFEE: No objection.

10 MR. BIERI: All right.

11 JUDGE BIRO: Okay. Agency Exhibit 26, 2A is  
12 admitted into the record.

13 (The document referred to was  
14 marked for identification as  
15 Agency's Exhibit No. AX-26,  
16 2A and was received in  
17 evidence.)

18 MR. BIERI: Thank you, Judge. Okay, I've  
19 got a few more to go through here.

20 BY MR. BIERI:

21 Q I'm going to show you now what's been marked  
22 as AX-10, page 9. Can you tell us the date of that  
23 image, please?

24 A This is December 18, 2010.

25 Q All right. And what are your observations

1 with respect to the tributary here?

2 A Well, the similar observations as before.  
3 There is -- the upper reach of the tributary is an  
4 area where I'm marking A. The little meanders are a  
5 little bit harder to make out on this particular  
6 print, but they're up there. You can see some more  
7 channel, I guess, characteristics at B. At C is that  
8 road crossing I mentioned. This time the water  
9 doesn't appear to be flowing over it. There must be a  
10 culvert there. And then you can see the straighter  
11 section of channel at D.

12 Q All right. Can -- sorry, go ahead.

13 A Yeah, that's it.

14 Q And can you see the channel all the way to  
15 Deep Creek there?

16 A With the exception of the, you know, the  
17 area that's hidden in the shadow and the dense trees  
18 along Deep Creek, yes.

19 MR. BIERI: Okay. All right, I'm going to  
20 mark this as AX-10, 9A, and move to place that into  
21 evidence, Judge.

22 MR. McAFEE: No objection, Your Honor.

23 MR. BIERI: Thank you.

24 JUDGE BIRO: AX-10 at 9A is admitted into  
25 the record.



1 (The document referred to was  
2 marked for identification as  
3 Agency's Exhibit No. AX-10,  
4 9A and was admitted in  
5 evidence.)

6 MR. BIERI: Do you mind if we take a five-  
7 minute break, Your Honor?

8 JUDGE BIRO: No, of course not. We'll stand  
9 in recess for five minutes.

10 MR. BIERI: Thank you.

11 (Whereupon, a short recess was taken.)

12 JUDGE BIRO: Okay, Mr. Bieri, please  
13 continue.

14 MR. BIERI: Thank you, Judge.

15 BY MR. BIERI:

16 Q Okay, Mr. Stokely, I am going to hand you,  
17 or display what's been marked as AX-10, page 12.  
18 What's the date of that image?

19 A This is June 28, 2013.

20 Q All right. And can you describe what you  
21 see in this photograph with respect to the tributary?

22 A Well, similar to previous photos, it's  
23 flowing from the northwest to the southeast across the  
24 middle portion of the photograph, fairly dense  
25 vegetation up in that area obscuring the channel

1 characteristics, except it may be right there at A.

2 But as you move further downstream where the  
3 vegetation becomes less, you can see the channel again  
4 at B, and again it's a defined channel visible at C.  
5 So, similar to some of the previous years.

6 Q All right. Is that a defined channel  
7 throughout, or can you tell from this picture?

8 A Right. You can't see it throughout because  
9 of the obscuring vegetation, but it's -- you know,  
10 it's my opinion that there is a defined channel  
11 throughout.

12 Q Throughout from the top of the photograph  
13 all the way to Deep Creek?

14 A Yes.

15 MR. BIERI: Okay. I'm going to mark it as  
16 AX-10, page 12A. Judge, I'd move to admit this into  
17 evidence.

18 MR. McAFEE: No objection, Your Honor.

19 JUDGE BIRO: Okay. AX-10 at 12A is admitted  
20 into the record.

21 (The document referred to was  
22 marked for identification as  
23 Agency's Exhibit No. AX-10,  
24 12A and was admitted in  
25 evidence.)

1 BY MR. BIERI:

2 Q Mr. Stokely, we're now looking at AX-10, 14,  
3 page 14. What's the date of this image?

4 A September 16, 2014.

5 Q All right. And do you have any observations  
6 about this one?

7 A Well, this is a, you know, growing season,  
8 mid-growing season aerial photograph, so everything is  
9 vegetated pretty well. The forest canopy in the upper  
10 reach is hiding the channel pretty well. That would  
11 be like at A. You can't really see it because of the  
12 trees, but where the trees diminish where I sort of --  
13 where I drew that line, you can pick up the defined  
14 channel once again at B and C, indicating the presence  
15 of a channel through that lower section of the  
16 tributary.

17 Q All right. And when you say the lower  
18 section, do you mean south of the line you drew all  
19 the way to Deep Creek?

20 A Yes.

21 MR. BIERI: All right. Judge, I've remarked  
22 this as AX-10, 14A, and would move to admit it into  
23 evidence.

24 MR. McAFEE: No objection.

25 JUDGE BIRO: AX-10 at 14A is admitted into

1 the record.

2 (The document referred to was  
3 marked for identification as  
4 Agency's Exhibit No. AX-10,  
5 14A and was received in  
6 evidence.)

7 BY MR. BIERI:

8 Q All right, I'm now showing you AX-10, page  
9 15, Mr. Stokely. What are we looking at here?

10 A This is a March 9, 2015, image from Google,  
11 Google Earth, and again this is a -- being March,  
12 early March, the leaves are not out on the trees and  
13 it is very -- the channel characteristics are very  
14 clear at this tributary. You can see them at A. You  
15 can see where I'm drawing at B, and all -- you know,  
16 down in the lower reach before it flows into Deep  
17 Creek at C. So, you can see the defined channel.

18 I also believe this is about the time when  
19 some of the vegetation is being cleared away from  
20 the -- the trees are being cut and cleared away from  
21 the channel.

22 Q And you're pointing kind of on the channel  
23 between A and B?

24 A Yeah, sort of in this area, it seems like --  
25 from looking at the image closer up, not this, you

1 know, paper print, it looked like you could see some  
2 of the vegetation being cleared at D.

3 Q At D?

4 A Yeah.

5 Q Okay. And can you just kind of describe for  
6 us the difference between looking at these maps here  
7 and drawing on them versus actually looking at them  
8 how you would normally do your work in ArcGIS?

9 A Yes. I mean, this is a paper print, a  
10 xerox. It's already -- you know, the resolution is  
11 diminished significantly. But when using the  
12 software, you can view -- you know, zoom in and zoom  
13 out, and you can zoom in to the point that -- beyond  
14 the resolution of the photograph and if that's not  
15 helpful you can zoom out. But zooming in, zooming out  
16 and just panning around is -- it's a better way of  
17 doing this than simply looking at this paper print.

18 Q But, again, you had done that with every  
19 single photo which led you to your conclusions?

20 A Yes.

21 MR. BIERI: Okay. All right. Judge, I  
22 marked this exhibit as AX-10, 15A. I would move that  
23 into evidence.

24 MR. McAFEE: No objection.

25 JUDGE BIRO: Agency Exhibit 10 at 15A is

1 admitted into the record.

2 (The document referred to was  
3 marked for identification as  
4 Agency's Exhibit No. AX-10,  
5 15A and was received in  
6 evidence.)

7 MR. BIERI: Thank you.

8 BY MR. BIERI:

9 Q All right, Mr. Stokely, we are getting down  
10 to the end here. Showing you what's been marked as  
11 AX-10, page 17. Is this one of those oblique images  
12 you were talking about?

13 A Yes. This is -- the source is Pictometry,  
14 the date is March 20, 2015.

15 Q Okay. Before you mark on that, let me ask  
16 you a couple questions, because there's a page on the  
17 other side. I don't know if I'm going to have you  
18 mark on it, so.

19 Can you just describe for us what you're  
20 seeing in this photograph?

21 A Yes. It's the channel in question. In the  
22 upper left-hand corner of the photograph, you can see  
23 the meandering channel through the -- you know, this  
24 area is being cleared of vegetation so it's helping  
25 view the channel, and you can see that meandering

1 channel as a clear defined feature all the way  
2 through, all the way down to the lower right. There's  
3 a road crossing where I'm pointing right now. There  
4 is a culvert underneath there, and then the defined  
5 channel picks up and goes to Deep Creek.

6 Q Okay. Do you see a defined bed and bank  
7 throughout the run of this tributary to Deep Creek in  
8 this photograph?

9 A Yes. Well, I'm seeing the channel very  
10 clearly, and that would be indicative of bed and bank  
11 feature.

12 Q Okay. Are you aware of any photographs,  
13 aerial photographs or other photographs that were  
14 taken between March 20, 2015, and the time of the fill  
15 later in 2015?

16 A I did not obtain any, so I don't know if  
17 there were --

18 Q Okay.

19 A -- any taken but probably not.

20 Q Did you look?

21 A Yes.

22 Q Okay. And so these would be the last  
23 photographs that we see existing before the tributary  
24 was filled?

25 A Yes. I would definitely -- I'd like to look

1 at my reference section to make sure that's the case,  
2 but that's my recollection.

3 Q Okay. Now I'm going to show you what's been  
4 marked as Exhibit 10, page 18.

5 A Yes.

6 Q So what are we looking at here?

7 A It's another Pictometry image. The  
8 characteristic of Pictometry is they fly every area  
9 from four different angles, so this is the same  
10 tributary, but instead of looking sort of obliquely up  
11 the tributary. we're now sort of looking obliquely  
12 down in the direction of flow.

13 So, the upper left in this instance is the  
14 junction with Deep Creek, and the lower right is the  
15 upper reaches of the tributary.

16 Q All right. And do you see a defined channel  
17 throughout in that photograph?

18 A Yes.

19 Q All right. And can you kind of -- can you  
20 draw an arrow where that defined channel starts and  
21 where it ends? It's okay, you can draw on this  
22 photograph.

23 A Okay. Well, I mean, I would mark -- I mean,  
24 I'm looking at this paper print again -- at A would be  
25 where it's -- you know, becomes apparent as it sort of

1 departs the trees, and then you can see it, you know,  
2 all the way down just meandering through the little  
3 valley and then --

4 Q You're pointing meandering through about to  
5 the middle of the photograph?

6 A Yeah, through the middle of the photograph  
7 on downstream following that dark linear feature  
8 underneath the road crossing and then down to Deep  
9 Creek.

10 Q All right. And would you expect there to be  
11 a defined bed and bank throughout this stretch from A,  
12 where you marked on A, all the way to Deep Creek?

13 A Yes.

14 Q And would you put a B where you believe the  
15 trib enters Deep Creek?

16 A Somewhere right in this general area.

17 Q Okay. Looking back at Exhibit, or AX-10,  
18 page 17, looking at the lower portion of the tributary  
19 south of the road crossing.

20 A Um-hmm.

21 Q Do you see any break or what you would deem  
22 to be a break in the physical connection of this  
23 tributary to Deep Creek?

24 A No, I see a dark curvilinear feature the  
25 entire length.

1 from the bottom right to the upper left, and you can  
2 see in this case a light-toned linear, curvilinear  
3 feature, which is the tributary, and it's clearly  
4 visible and you could also see Deep Creek as a light-  
5 toned feature clearly visible.

6 Q And does -- this portion of the tributary  
7 that's visible going into Deep Creek, does that  
8 exhibit the characteristics of an intermittent  
9 tributary on the photo?

10 A Well, after looking at all the photos and  
11 all the evidence, I conclude that this is an  
12 intermittent tributary.

13 Q Okay.

14 A So this is consistent with an intermittent  
15 tributary.

16 Q All right. And can you mark for us kind of  
17 the start of where the flow would be as A, and then  
18 where it would enter into Deep Creek as B, please?

19 A It becomes visible where I'm drawing the  
20 arrow A, it becomes visible on the frame of the  
21 photograph. And then it -- it looks to me like it  
22 flows into Deep Creek where I'm drawing that arrow at  
23 B.

24 Q All right. And do you see a continuous  
25 physical connection between A and B?

1 Q Okay, thank you.

2 MR. BIERI: Judge, I've remarked AX-10, page  
3 18 as AX-10, 18A, and would move to move that into  
4 evidence.

5 MR. McAFEE: I'm sorry, Britt. Could I see  
6 it one more time?

7 MR. BIERI: Certainly.

8 MR. McAFEE: I was taking a note.

9 MR. BIERI: Yes.

10 MR. McAFEE: So, the only marking is A and  
11 B. Okay. No objection, Your Honor.

12 JUDGE BIRO: Okay. AX-10 at 18A is admitted  
13 into the record.

14 (The document referred to was  
15 marked for identification as  
16 Agency's Exhibit No. AX-10,  
17 18A and was received in  
18 evidence.)

19 BY MR. BIERI:

20 Q Mr. Stokely, we are now looking at AX-10,  
21 page 19. What is that a photograph of?

22 A It's another oblique aerial photograph of  
23 the lower section of the tributary. In this instance,  
24 in the lower section of that tributary centered in the  
25 photograph and it's -- in this instance, it's flowing

1 A Yes. Yes. In this case, you can almost  
2 make out the whole connection through that wooded area  
3 where I'm indicating near B, to the right of the arrow  
4 B.

5 Q All right. What is this feature right here  
6 that I'm kind of circling?

7 A This is a road. This is that, you know,  
8 road crossing that's been there for quite some time.

9 Q Okay. And that's just -- just up the  
10 photograph from A, or up the tributary from A?

11 A Yes. Downstream.

12 Q Downstream. Thank you.

13 JUDGE BIRO: This would be AX-10 at 19B.

14 MR. BIERI: Correct. Move to move that into  
15 evidence, Judge.

16 MR. McAFEE: What was the letter now?

17 JUDGE BIRO: B.

18 MR. McAFEE: B. Okay, because we have an A,  
19 correct?

20 JUDGE BIRO: Right.

21 MR. McAFEE: Do we have an AX-10 --

22 MR. BIERI: We do.

23 MR. McAFEE: -- 19A? Okay. Thank you.

24 Sorry. No objection.

25 JUDGE BIRO: Okay. AX-10 at 19B is admitted

1 into the record.  
2 (The document referred to was  
3 marked for identification as  
4 Agency's Exhibit No. AX-10,  
5 19B and was received in  
6 evidence.)

7 BY MR. BIERI:

8 Q All right, Mr. Stokely, AX-10, page 20, is  
9 what I'm showing you. What is this image?

10 A It's another one of the series of Pictometry  
11 images of the tributary dated March 20, 2015. This  
12 one is looking, I guess, sort of from the southeast  
13 towards the northwest. It's an oblique image. And  
14 it's showing the tributary once again, very similar to  
15 those others.

16 Q You can draw on this one.

17 A Okay. I'll draw the channel as best I can  
18 but it's relatively distinct. There is places where,  
19 you know, you can't be certain whether it goes around  
20 that way or that way, but then it continues to flow or  
21 be distinct to the road crossing and then picks up  
22 again after the road crossing and down towards Deep  
23 Creek.

24 Q All right. So, these last few images we've  
25 seen, 17, 18, 19, and 20, have all been from the same

1 date but just different angles.

2 A Different angles.

3 Q All right, thank you.

4 MR. BIERI: Judge, I've marked this as AX-  
5 10, 20A. I would ask to move it into evidence.

6 MR. McAFEE: No objection.

7 MR. BIERI: Thank you.

8 JUDGE BIRO: AX-10 at 20A is admitted into  
9 the record.

10 (The document referred to was  
11 marked for identification as  
12 Agency's Exhibit No. AX-10,  
13 20A and was received in  
14 evidence.)

15 BY MR. BIERI:

16 Q All right, Mr. Stokely, we are now moving on  
17 to September 20th of 2015, and this is AX-10, page 21.  
18 Can you tell us what you are viewing in this  
19 photograph?

20 A Yes. This is the area of the tributary once  
21 again. Should I mark or not?

22 Q Sure.

23 A Okay. Up here where it says the approximate  
24 starting point of the impacted stream segment, is  
25 where we once saw the meandering patterns earlier,

1 even in this year of 2015, and historically. It's now  
2 -- this area has been leveled and smoothed where I put  
3 the letter A, and the tributary has been put  
4 underground, and likewise down here where I'm marking  
5 B, the defined channel that was once there is no  
6 longer present or visible.

7 Q All right. And can you -- where you marked  
8 A, what was that again?

9 A That's sort of the location of the former  
10 tributary.

11 Q Okay. And you said that had been smoothed?

12 A Yes, smoothed.

13 Q What does that mean?

14 A Well, it appears that the tributary has been  
15 buried and then, you know, equipment run on top of the  
16 land just to smooth it out.

17 MR. BIERI: Okay. Judge, I marked this as  
18 AX-10, 21B, and would like to move that into evidence.

19 MR. McAFEE: No objection.

20 JUDGE BIRO: AX-10 at 21B is admitted into  
21 the record.

22 MR. BIERI: Thank you.

23 //

24 //

25 //

1 (The document referred to was  
2 marked for identification as  
3 Agency's Exhibit No. AX-10,  
4 21B and was received in the  
5 evidence.)

6 BY MR. BIERI:

7 Q This photograph you don't need to mark on,  
8 it's already into evidence. This is AX-10, page 22.  
9 So, disregard the bleeding through, but I just want to  
10 have you describe what you're seeing on this  
11 photograph, which is June 8th of 2016.

12 A Yes. So, what's interesting about this  
13 photograph is it's after the initial piping and  
14 filling of the tributary. You can see, once again, a  
15 linear, dark-tone feature on the surface of the land  
16 in the area where the tributary had been filled and  
17 grading had occurred. And it -- I interpreted that to  
18 be the tributary, you know, sort of like trying to  
19 reestablish itself, daylighting, come back onto the  
20 surface because that light -- that dark-tone linear  
21 feature is likely water.

22 Q All right. I'm going to have you mark that  
23 up. I've got a clean copy of it. Can you mark on the  
24 map where you think the tributary appears to be  
25 reforming?

1 A Yes. At A it looks -- I probably marked  
 2 over it but in that area, also at B.  
 3 Q And this feature in the center, what is  
 4 that?  
 5 A What I'm indicating then with the arrow and  
 6 C is what I interpret to be what I call like a check  
 7 dam. It's a little berm that was placed on the  
 8 surface of the ground, and at times there is water  
 9 collecting behind it.  
 10 MR. BIERI: Okay. I'm going to move this  
 11 into evidence real quick. Judge, I've marked this as  
 12 AX-10, 22A, and would like to move it into evidence.  
 13 MR. McAFEE: No objection.  
 14 JUDGE BIRO: AX-10 at 22A is admitted into  
 15 the record.  
 16 (The document referred to was  
 17 marked for identification as  
 18 Agency's Exhibit No. AX-10,  
 19 22A and was received in  
 20 evidence.)  
 21 MR. BIERI: Thank you, Judge.  
 22 BY MR. BIERI:  
 23 Q Now, I'm showing you which is AX-31, this is  
 24 page 18. This is a part of your expert report, and I  
 25 believe is from the same or similar image, is that

1 right?  
 2 A Yes, Exhibit 16.  
 3 Q Okay. And can you describe for us what you  
 4 were indicating with the red arrows, first of all?  
 5 A Right. So, the red arrows are pointing to  
 6 what -- I'm interpreting it to be a surface water  
 7 drainage feature, you know. reappearing after  
 8 initially being buried on the surface, on the land.  
 9 Q All right. And there's two black arrows.  
 10 What are those?  
 11 A So, they're pointing to what looks like to  
 12 me to be surface flow coming from these little  
 13 ravines, these rough-textured areas or little shrubby,  
 14 woody ravines where it appears that water is flowing  
 15 out of them.  
 16 Q Okay. And those are each to the left of the  
 17 two black arrows?  
 18 A Yes.  
 19 Q All right. I'm showing you AX-31, page 17.  
 20 This is where you've actually identified the check  
 21 dam, is that right?  
 22 A Yes.  
 23 Q All right. And what do those red arrows  
 24 mean there?  
 25 A I don't remember how I described them off

1 the top of my head, but they appear to be pointing to  
 2 the filled stream channel.  
 3 Q Okay, and we can look in your report and  
 4 figure that out.  
 5 Now, in this figure AX-31, page 17, we  
 6 actually see the new barn, the confinement barn, don't  
 7 we?  
 8 A Yes.  
 9 Q All right. That was not superimposed,  
 10 correct? That just came from a -- from a photo?  
 11 A Yes, that's the photograph of the barn.  
 12 Q Okay.  
 13 A I labeled it new barn.  
 14 Q All right. All right, I'm handing you now,  
 15 placing on the Elmo what's been marked as AX-29, page  
 16 1. What's the date of this image, sir?  
 17 A This is March 20, 2018.  
 18 Q All right.  
 19 A I believe that was the most recent  
 20 photograph I've obtained.  
 21 Q Okay. Of 2018, you said?  
 22 A Yes.  
 23 Q All right. And do you have any observations  
 24 about this photograph? And we have a -- we have a  
 25 closeup on page 2, sorry, if you want to talk about

1 that as well, so.  
 2 A Well, first on page 1, you can see the --  
 3 this is sort of zoomed out now, and you can see a  
 4 longer length of the tributary from the upper reaches  
 5 through the wooded area and near the upper left of the  
 6 photograph, and then in the area where I'm indicating  
 7 now is where the disturbance begins, and the tributary  
 8 is not very evident in through that area because it's  
 9 piped and not a lot of surface flow on top, and the  
 10 old channel, the old tributary is obscured in this --  
 11 you know, actually being, you know, cropped.  
 12 But if you flip over to a closeup of that  
 13 lower section of the tributary.  
 14 Q This is AX-29, page 2?  
 15 A Yes.  
 16 Q All right.  
 17 A I believe the old tributary was located  
 18 maybe where I'm tracing my --  
 19 Q Do you want to mark just kind of  
 20 approximately where you thought it was?  
 21 A Yeah. It's a little hard to know for sure  
 22 with these oblique aerial photographs because they  
 23 don't overlay one on top of the other, but I believe  
 24 that the dotted area is where the old tributary was,  
 25 but what's interesting is there is a new surface

1 erosion drainage feature forming next to it, you know,  
2 as if, you know, the tributary is sort of like trying  
3 to reestablish itself again.

4 Q And what does the tributary trying to  
5 reestablish itself again tell you about the tributary?

6 A Well, you know, my view is it's been there  
7 since the 1930s and there were some impacts to it, but  
8 it's -- you know, it has enough flow that it wants to  
9 keep on, you know, coming out of its pipe maybe and  
10 reestablishing a flow on the surface.

11 MR. BIERI: Judge, I marked this exhibit as  
12 AX-29, 2A and would move to admit it into evidence.

13 MR. McAFEE: No objection.

14 JUDGE BIRO: AX-29 at 2A is admitted into  
15 the record.

16 (The document referred to was  
17 marked for identification as  
18 Agency's Exhibit No. AX-29,  
19 2A and was received in  
20 evidence.)

21 BY MR. BIERI:

22 Q All right, I want to show you, Mr. Stokely,  
23 another exhibit. Let me ask you a couple questions  
24 before, though. What is LIDAR?

25 A LIDAR is -- it's a laser mapping technique

1 where the landscape is -- an aircraft flies in the air  
2 shooting a laser beam down onto the ground and the  
3 laser beam bounces back up to the aircraft and the  
4 sensor records the returning laser.

5 Q All right. And did you view any LIDAR  
6 imagery in this case?

7 A Yes.

8 Q All right. And how many images did you  
9 review?

10 A There weren't -- there might have been two  
11 or so but they were basically the same data; just  
12 depicted in different ways.

13 Q Okay. And do you remember the date of that  
14 image?

15 A I believe the LIDAR was flown in 2008.

16 Q All right. And do you remember what month  
17 in 2008?

18 A May, possibly.

19 Q May. Do you remember -- how did you find  
20 out the month of the LIDAR image? Was that from Iowa  
21 State?

22 A Yeah, there was a reference to it on the  
23 Iowa State's webpage, I believe.

24 Q Okay. And you recall it being May.

25 A That's what I recall, yes.

1 Q Okay. I'm going to show you what's been  
2 marked as Agency Exhibit 24. This is that -- well,  
3 tell me, what is that?

4 A So, this is a -- this is a product of the  
5 LIDAR post-product, post-processing product of LIDAR.  
6 This is what we call digital elevation model or a  
7 bare- earth model where the LIDAR is -- the data is  
8 processed in such a way that it only depicts largely  
9 the ground surface, and then it's given sort of a  
10 hill-shaped effect of like a shadowy -- sun-angle  
11 effect and then shadow.

12 So, it's a digital elevation model, it's a  
13 rendering of what the ground surface looks like from  
14 the LIDAR data.

15 Q Are there resolution limitations with  
16 respect to LIDAR, or do you know?

17 A Yes.

18 Q Okay. And do you know what they are?

19 A I don't know what this is.

20 Q Okay.

21 A But, you know, it has to do with the height  
22 of the aircraft, the number of pulses, and then also  
23 the denseness of vegetation.

24 Q All right. And how did you view this image?  
25 You're looking at it on paper now, but did you look at

1 it in a different format before?

2 A Yes. This was also served up in Geographic  
3 Information System format from Iowa State, so I viewed  
4 it with my software.

5 Q Okay. And the portion that starts --  
6 approximate starting point of the impacted stream  
7 segment, if you follow the channel down to about the  
8 middle of the photo, it appears different as you go  
9 further towards Deep Creek. Do you see that?

10 A Yes.

11 Q Okay. And can you describe what your  
12 impressions are of that area?

13 A Well, it's similar to what we saw in the  
14 aerial photography.

15 Q You can draw on this.

16 A At least particularly the LIDAR aerial  
17 photography where I was able to point out the channel  
18 characteristics, the meandering channel at various  
19 places, at A and B, for instance. This is a  
20 topographic rendition of the channel.

21 And then as you get down towards the area  
22 I'm going to mark C, the channel becomes straighter.  
23 So, meandering and more deeply incised up by A and B  
24 and then straighter and not so deeply incised at C.

25 Q How does the resolution of this image AX-24,

1 page 1, compare with what you're able to look at on  
 2 your computer?  
 3 A Well, with the computer you can zoom in, get  
 4 a little bit closer look, and it's generally higher  
 5 resolution than a paper print.  
 6 Q And did you do that? Did you zoom in on the  
 7 portion downstream from C on this map?  
 8 A Yes.  
 9 Q Okay. And do you believe that the portion  
 10 of the LIDAR downstream from C towards Deep Creek  
 11 shows a lack of physical connection?  
 12 A No. In my mind, it's actually showing the  
 13 connection as a nice, straight line.  
 14 Q Okay. And if the tributary were  
 15 manipulated, the lower part of the tributary below C  
 16 towards Deep Creek were manipulated just before this  
 17 LIDAR image was taken, could that impact what the  
 18 LIDAR image would show?  
 19 A Yes. I mean, the LIDAR image is going to  
 20 show the condition at the time of the -- that it was  
 21 flown.  
 22 Q Okay. And if the conditions were changed,  
 23 then you would expect the LIDAR image to at least  
 24 reflect that.  
 25 A Yes.

1 Q Okay. Do you find this LIDAR image to be  
 2 definitive one way or another as to whether this is a,  
 3 you know, relatively permanent water?  
 4 A Well, it's what it is. The LIDAR image, to  
 5 me, is just another depiction of the same thing I've  
 6 been seeing in the aerial photography all this whole  
 7 time. It's just a different way of imaging.  
 8 Q All right. And did you see evidence prior  
 9 to the date of this letter, photo May of 2018, that  
 10 indicated to you that there was a defined channel?  
 11 A Yes.  
 12 Q Okay. And afterwards as well?  
 13 A Yes, from the series of photographs we've  
 14 been through.  
 15 Q Okay. I think you can return to the witness  
 16 stand, actually.  
 17 A Okay.  
 18 Q Thank you.  
 19 JUDGE BIRO: Could you write the date on  
 20 this document, this photograph was May 2018?  
 21 MR. BIERI: The date is not on the document,  
 22 but he looked it up.  
 23 JUDGE BIRO: Right, could you just write it  
 24 on there?  
 25 MR. BIERI: Yes, I'll write it.

1 JUDGE BIRO: Yes.  
 2 BY MR. BIERI:  
 3 Q May 2008, correct?  
 4 A Yes.  
 5 Q Okay. Sorry, I said 2018.  
 6 MR. BIERI: And, Judge, I've remarked this  
 7 LIDAR image, I've written May 2008 and remarked it AX-  
 8 24A, and would ask that that be moved into evidence.  
 9 JUDGE BIRO: Okay.  
 10 MR. McAFEE: No objection.  
 11 JUDGE BIRO: AX-24A is admitted into the  
 12 record.  
 13 (The document referred to was  
 14 marked for identification as  
 15 Agency's Exhibit No. AX-24A  
 16 and was received in  
 17 evidence.)  
 18 MR. BIERI: Thank you.  
 19 BY MR. BIERI:  
 20 Q Mr. Stokely, did you look at the report of  
 21 the Respondent's expert, Mr. Hentges?  
 22 A Yes.  
 23 Q Okay. And did you see the LIDAR image that  
 24 he produced with his report?  
 25 A Yes, but you can bring it, show it to me

1 again.  
 2 Q All right, I'm going to show it to you.  
 3 Showing you what's been marked as  
 4 Respondent's Exhibit 3.  
 5 A Yes.  
 6 Q Do you remember looking at this?  
 7 A Yes.  
 8 Q All right. And how does the resolution of  
 9 this image compare to what you were able to view on  
 10 your computer when you were analyzing this image?  
 11 A Well, this is -- you know, this is a xerox  
 12 print so it's -- the resolution is less.  
 13 Q Okay. So, do you agree with the conclusion  
 14 or the statement that was put on there? It says,  
 15 "Locations where channel is not apparent along grass  
 16 drainage way."  
 17 A No, I don't agree. I agree that the channel  
 18 isn't as apparent as it is in other places, but I  
 19 don't agree that there's not a channel there.  
 20 Q Okay. Mr. Stokely, did you map the flow  
 21 path from this unnamed tributary to Deep Creek and  
 22 then to other bodies of water?  
 23 A Yes.  
 24 Q All right. And that's shown as Figure 10 in  
 25 your report. We don't need to look at it.

1 Did you also look at other similar  
2 tributaries in your analysis of this case?

3 A I did.

4 Q All right. Can you kind of tell me what you  
5 concluded there?

6 A Well, I concluded that based on the length  
7 of the tributary in question, there's -- I don't know  
8 the exact numbers, but there was five or six hundred  
9 similar tributaries in number, five or six hundred  
10 similar tributaries like that one in the English River  
11 watershed.

12 Q All right. And what significance does that  
13 have with respect to your opinions in this case?

14 A That was just pointing out some factual  
15 information. One of the -- you know, one of the  
16 factors in jurisdiction is, you know, does this water  
17 body alone or in combination with others have the  
18 requisite nexus to a traditional amount of the water  
19 as I understand it. So, this was just factual  
20 information for you.

21 Q Okay. I want to just try to, as best we  
22 can, summarize your opinions and a brief summary of  
23 the basis for same because you've testified to a lot  
24 of this, but according to your report -- well, tell me  
25 what you concluded with respect to the permanency of

1 the geographic feature, that is, the tributary.

2 A Right. Well, based on all the aerial  
3 photographs I looked at from 1930 onwards, I see that  
4 tributary there. So, I'm concluding it's, you know,  
5 relatively permanent based on time feature.

6 I also observed the topography, the  
7 geomorphic characteristics of it, and the watershed  
8 size, the precipitation, and the amount of  
9 precipitation, the averaging of precipitation, and  
10 then the way the U.S. Geological Survey mapped it,  
11 along with my own experience looking at tributaries  
12 like this in size, that I concluded that it's a  
13 relatively permanent geographic feature. I agree with  
14 the U.S. Geological Survey's interpretation that it's  
15 intermittent, and as you can see in my report, I  
16 further concluded that it is likely a seasonal flow,  
17 relatively continuous seasonal flow.

18 Q All right. And you said flows continuously  
19 during the spring, and what do you mean by spring when  
20 you use that term in your report?

21 A You know, late February, March, April, May.

22 Q Okay. And then you said it would flow  
23 intermittently after that based on precipitation  
24 events.

25 A Yes.

1 Q All right. You talked about the geomorphic  
2 features and the impression in the landscape. Just  
3 briefly, can you summarize what you mean by that?

4 A Right. Once again, that's the -- you know,  
5 the curvilinear pattern of those -- of the meanders  
6 deeply incised. The deeply incised nature of that  
7 became apparent once we looked at the LIDAR. It  
8 enhanced that part of it, so that's the geomorphic  
9 characteristics incised into the landscape, you know,  
10 relatively permanent incised geomorphic features.

11 Q All right. And did anything else you  
12 reviewed other than aerial images support your  
13 conclusion that this is a seasonal tributary?

14 A Well, the U.S. Geological Survey mapping as  
15 intermittent, the watershed size, the rainfall, all of  
16 that together; the images, you know, consistently  
17 seeing it in the images, all of that combined.

18 MR. BIERI: All right. Thank you. I have  
19 nothing further.

20 JUDGE BIRO: Mr. McAfee, would you like to  
21 take a break or do you want to proceed on?

22 MR. McAFEE: Well, Your Honor, I guess as I  
23 could kind of sense Britt was -- Mr. Bieri was nearing  
24 the end of his direct, I guess we have several  
25 options. I think my cross-exam is going to be a

1 little longer than it has been of the previous  
2 witnesses. I could either start now -- I guess I'm  
3 laying out options for the Court, your discretion, or  
4 we could go to lunch early and maybe beat a few of the  
5 crowds, if there are crowds, and then be back here and  
6 then it will be a longer afternoon, or I could --  
7 anyway, I'm open to -- I guess you're asking me. I'm  
8 thinking if I start now, there will be a break, likely  
9 be a break in my cross-exam, which is okay with me  
10 too, or we could break for lunch now and then just  
11 start in.

12 JUDGE BIRO: Well, why don't we try going  
13 for another --

14 MR. McAFEE: Okay.

15 JUDGE BIRO: -- hour or so, so we don't have  
16 quite a continuous long afternoon as we otherwise  
17 might have.

18 MR. McAFEE: Okay. In that -- I'm sorry to  
19 interrupt.

20 JUDGE BIRO: So, let's move on if you're  
21 ready to start.

22 Mr. McAFEE: I am ready. Could I have just  
23 a few minutes to maybe --

24 JUDGE BIRO: Oh, of course. So, we'll take  
25 a five-minute break and come back.



1 MR. McAFEE: That would be great. Thank  
2 you.  
3 (Whereupon, a short recess was taken.)  
4 JUDGE BIRO: Okay, Mr. McAfee.  
5 MR. McAFEE: Thank you, Your Honor.  
6 CROSS-EXAMINATION  
7 BY MR. McAFEE:  
8 Q Mr. Stokely, I briefly introduced myself  
9 during the break. I'm Eldon McAfee. I represent C&S  
10 Enterprise, and I'd like to go through some questions  
11 with you.  
12 Let's start with, I guess, a basic question  
13 -- and I don't know that Mr. Bieri asked you this, but  
14 could you briefly give me your interpretation or  
15 definition of what is a jurisdictional water or water  
16 of the U.S.?  
17 A Well, the interpretation now is post-  
18 Rapanos, so it's a relatively permanent body of water  
19 or a wetland or water that has a significant nexus to  
20 traditional navigatable water, alone or in combination  
21 have a significant nexus.  
22 Q Okay, now you say now. As opposed to  
23 Rapanos, did you --  
24 A No, I meant that our -- currently we are  
25 operating under the post-Rapanos rule.

1 Q Post-Rapanos rule.  
2 A Yes.  
3 Q Okay, I just want to make sure we're all on  
4 the same page here. We're good with what --  
5 A Well, you know, post-Rapanos --  
6 Q Yes, please explain that.  
7 A -- it came out in 2006, and the agencies  
8 interpreted the Rapanos ruling with some agency  
9 guidance in 2006. I think it was revised in 2008.  
10 So, that's the rules we're operating under.  
11 Q Okay. We're not talking about the rule that  
12 is the subject of litigation currently in many courts  
13 in the country, is that --  
14 A That's my understanding, we are not talking  
15 about that.  
16 Q Right, we're not talking about that here  
17 today.  
18 A Yes.  
19 Q You're not. Okay. I'm sorry if I caused  
20 any confusion. Just wanted to make sure that we're  
21 all on the same page.  
22 Okay, could you tell me again what are the  
23 factors under that interpretation?  
24 A Well, as I understand it, there were two  
25 interpretations. One dealt with relatively permanent

1 geographic features, relatively permanent waters. And  
2 then the other dealt with bodies of water, wetlands,  
3 and waters that have a significant nexus to a  
4 traditional navigable water.  
5 Q Okay. And I think the factors that you have  
6 mentioned during your testimony today are -- what are  
7 they? I would call them factors anyway, a bed and a  
8 bank? Is that right?  
9 A I testified to the presence of a channel,  
10 defined channel which I believe if you -- if I went  
11 out there, I would see the bed and bank features.  
12 Q Are there any others? Ordinary high-water  
13 mark, is that part of your analysis, too?  
14 A An ordinary high-water mark is something you  
15 make in the field, not from aerial photography. But  
16 based on the signature that I've seen of the channel,  
17 I believe there would be an ordinary high-water mark.  
18 Q Okay.  
19 A Or would have been.  
20 Q Anything else?  
21 A Not in response to that question, I guess.  
22 Q Okay. I'll put your CV, which I believe  
23 is -- your CV, I'm looking here, is AX-6, and I just  
24 wanted to ask you not a lot of detail, but a question  
25 that Mr. Bieri asked you about one of your recent

1 publications, and I'll try and turn to that page.  
2 It's an ABA publication, is that right?  
3 A We talked about that earlier, yes.  
4 Q Okay. I'm putting up AX-6, page 4. Can you  
5 see that?  
6 A Yes.  
7 Q Okay. And is that publication that Mr.  
8 Bieri asked you about, is that on there?  
9 A Yes.  
10 Q And is that under Stokely, P.M., 2013?  
11 A Yes.  
12 Q Okay. And as I understand that publication,  
13 it's -- well, the title is "Using Aerial Photography,  
14 Geospatial Data in GIS to Support the Enforcement of  
15 Environmental Statutes". Is that correct?  
16 A Yes.  
17 Q And did you author that solely by yourself  
18 or did you have a co-author?  
19 A Solely by myself.  
20 Q Okay. And the procedures you've talked  
21 about today in going through your opinion, what led  
22 you to your opinion, did you utilize that publication?  
23 A Well --  
24 Q And maybe -- I'm sorry. Go ahead.  
25 A Not -- I didn't reference -- I haven't

1 referenced that publication in a while actually. I  
2 haven't looked at it in a while, so I didn't reference  
3 it during this work.

4 Q Okay. Maybe I should have asked that  
5 better. The procedures you used in your, formulating  
6 your opinions in this case, are they the same  
7 procedures you lay out in that article for enforcement  
8 actions?

9 A Well, it's been awhile since I've read that  
10 but they should be generally parallel to that.

11 Q Okay. All right, thank you.

12 (Pause.)

13 Mr. Stokely, I'm putting on the screen  
14 Agency Exhibit 18. Are you familiar with that? And  
15 I'll put on the second page if you need to see that.

16 A I am not familiar.

17 Q You have not reviewed it?

18 A No, I don't recall having read it.

19 Q Okay.

20 A Yeah.

21 Q All right, thank you.

22 I'd like now to put up your opinion, which  
23 is Agency Exhibit 31, your report, and I'd like to ask  
24 you a few questions about that, and then we may go  
25 into the specific photos through the exhibits and as

1 but you go into, for instance, third sentence -- well,  
2 second sentence, 17 of those dates you were precluded  
3 from seeing the stream channel, and then the remaining  
4 18 years, I could easily make out the channel.

5 And help me understand how that jibes with  
6 your statement on page 3 where you saw it  
7 continuously. I just want to make sure I understand.

8 A Okay. The distinction I am making there is  
9 that I was able to observe the tributary, what I  
10 interpret from all the evidence that I looked to be  
11 the tributary on all the dates of aerial photography.  
12 But as I think I said earlier, in some of those dates,  
13 17 of those dates, the tree canopy prohibits the --  
14 observing the stream channel in any detail, but that  
15 doesn't -- you know, it doesn't say that I couldn't  
16 see a tributary.

17 Q So, if you couldn't see the channel, you  
18 could still see the tributary.

19 A Yes. The location of the tributary, yes.

20 Q And how could you see it if you couldn't see  
21 the stream channel?

22 A The other signatures: the riparian  
23 vegetation, the consistent riparian vegetation, the  
24 curvilinear pattern of the vegetation, you know,  
25 coming down through the watershed.

1 you've testified to this morning.

2 First of all, I'm going to put up page 3 of  
3 your opinion, okay? I want to make sure I understand  
4 this page 3 where you have under Roman Numeral III,  
5 letter A, background data analysis. I won't read it  
6 all there. You state here, "I first observed the  
7 unnamed tributary to Deep Creek on the 1930, and  
8 that's Figure 2 imagery, and it was continuously  
9 present and visible on every date of aerial  
10 photography until the tiling."

11 A Yes.

12 Q Okay. And I believe you've testified to  
13 that this morning, correct?

14 A Yes.

15 Q You didn't see any images that you reviewed  
16 where the unnamed tributary was not present  
17 continuously from what you have often marked as point  
18 A on your maps today down to Deep Creek.

19 A Yes. I mean, the 1930 image, it's not quite  
20 as clear in that lower section, but every image after  
21 that, it was.

22 Q Okay. Now let's go to page 4 of your  
23 opinion, second, well, second full paragraph, okay?  
24 And you state, "I observed the unnamed tributary on 35  
25 dates," and you're welcome to explain some of this,

1 Q Okay. Let's go to -- I have a specific  
2 question up here, and maybe you've covered this. Some  
3 of this I have in my notes and there may have been  
4 testimony to that effect this morning, but I want to  
5 make sure I cover it.

6 Top of the page in your report, the first  
7 partial paragraph and the last sentence where it says,  
8 "The incised nature and topographic expression of the  
9 stream are clearly visible in the one-meter digital  
10 elevation model created from LIDAR CAX 24," and Mr.  
11 Bieri had you testify to that.

12 What do you mean if I -- the incised nature,  
13 what does that mean?

14 A Well, the tributary, particularly the upper  
15 part, was incised into the ground, cut into the  
16 ground.

17 Q I think I'll pull up 24 so we can look at it  
18 together. Okay, and I believe you just referred to  
19 the upper portion, is that correct?

20 A Yes.

21 Q And I know there's been testimony and you've  
22 looked at Mr. Hentges's report and you have a  
23 different opinion. But on the lower portion, are you  
24 testifying that there's a -- I want to use the right  
25 language here -- the incised nature there?

1 A Yes. In a general sense, my interpretation  
2 is that -- this LIDAR image is depicting the stream  
3 channel. As I mentioned earlier, it's not quite as  
4 clear, the incised nature isn't quite as clear in the  
5 lower reach, but that's generally what I was referring  
6 to in that sentence. This is how the tributary is  
7 being depicted on this LIDAR image, and it's deeply  
8 incised in the upper portion.

9 Q Okay. Also, you refer in that first  
10 sentence to the topographic expression of the stream.  
11 What do you mean by that?

12 A That's sort of a general term that I use.  
13 You know, streams cut themselves into the landscape  
14 and they create, you know, topographic expression.  
15 It's not flat, it's down into the landscape. And if  
16 you, you know, some of the map contour lines, you  
17 would see the contour lines follow the -- it would  
18 outline the stream course. And so that's what I mean  
19 by topographic expression.

20 Q Okay. Since we're talking about topographic  
21 expression, and if I can -- I believe in your report,  
22 you include a topographic map. This is AX-31, page  
23 13. Is that what that is?

24 A Yeah, that's in my report. That's a, you  
25 know, zoomed-in image of that part of the topo map,

1 the USGS topo map.

2 Q Okay. And there are lines on there that  
3 come from the top, and I'll quit using my finger if I  
4 can find my pen. I'm pointing to a line that comes  
5 from the top of the map, comes down and goes off to  
6 the right as you read the map. Is that the road?

7 A Yes, that's a road.

8 Q And did you -- you placed that there or does  
9 that come on the topographic map?

10 A It came with the topographic map.

11 Q Okay. So, I guess what I want to talk about  
12 briefly and have you explain what the lines mean. I  
13 know you understand this. I think a lot of us do,  
14 maybe. Maybe I don't. But what do the lines mean on  
15 this topographic map relative to the slope? Is that  
16 what those are about?

17 A So, the brown lines are lines of equal  
18 contour, and some of them have elevations associated  
19 with them like in the lower right-hand corner, 800  
20 feet above sea level. So, those are lines of equal  
21 elevation, and by mapping contour lines the way the  
22 USGS does, it helps you envision the topography and  
23 the landscape.

24 And we can see here fairly clearly is that  
25 this tributary is running down the valley between two

1 higher hills. That's what this is indicating. The  
2 contour lines that are, you know, let's say near the  
3 upper red arrow line, that contour line that's right  
4 next to that, so that's one elevation. I'm not sure  
5 what it is. And then each consecutive ring of  
6 contours moving north or moving west is a higher  
7 elevation. So, it's outlining these like, you know,  
8 small ridges with a valley in between.

9 The contour lines also point up the valley.  
10 The V of the contours point up the valley, and you can  
11 see that there, and that's generally what I refer to  
12 when I say the topographic expression of a stream.

13 Q Okay. So, as I understand it, the closer  
14 the lines are together, the steeper the hill.

15 A Correct.

16 Q All right. So, you have two red arrows on  
17 this exhibit, page 13 of AX-31. Do you see those?

18 A Yes.

19 Q And maybe you explain them in your report,  
20 and I don't have that section right in front of me,  
21 but could you tell us what those red arrows are?

22 A That's pointing to the U.S. Geological  
23 Survey's annotation of an intermittent stream -- the  
24 dash, dot, dot, dot, dash.

25 Q Okay. Also there, about in the area where

1 those red arrows are the lines, would you call them  
2 topographic lines? Is that what you call those?

3 A Or contour lines.

4 Q Contour lines. Much further apart, does  
5 that mean that's the flatter area of the farm?

6 A It means it's a more level area than the  
7 slopes that are adjacent.

8 Q Okay. And then the -- I'll point to it, but  
9 the line where you have your last red arrow, then  
10 there's three dots and then another solid line, and  
11 then there is what appear -- that would be Deep Creek,  
12 right?

13 A Yes.

14 Q Okay. Just so we have a reference here.  
15 So, this shows the depiction of the -- what we're  
16 calling the tributary as it goes across the farm to  
17 Deep Creek and the topographic lines that show the  
18 hillier portions and the flatter portions. Is that  
19 right?

20 A Yes.

21 Q Okay. Thank you.

22 Mr. Stokely, I believe you testified today  
23 that prior to the email from Ms. Garcia, Dr. Garcia,  
24 you hadn't done any work on this case prior to that,  
25 is that correct?

1 A Yes, the 2017 email, correct.

2 Q Yes. And why don't I make sure that we're  
3 looking at the -- okay, I put up AX-13, page 1 of 2,  
4 and that email is dated December 18th of 2017,  
5 correct?

6 A Yes.

7 Q And prior to that, were you aware of this  
8 case at all?

9 A Prior to the 14th, no, that's when I  
10 received the email from her.

11 Q Correct.

12 A Okay. Prior to the 14th, no. I don't have  
13 any recollection.

14 Q Okay. And as she indicates, they were in  
15 pre-filing status, I'll call it. Do you ever get  
16 involved in these cases prior to this or is this the  
17 normal time you would get involved in cases you've  
18 worked on for the EPA?

19 A I'm not sure what the pre-filing -- the pre-  
20 filing, you mean pre-complaint filing or --

21 Q I'm just referring to her --

22 A Yeah.

23 Q Down at the bottom where she -- her email to  
24 you on December 14th says, "Pete, we are in pre-filing  
25 with an individual out of Iowa County."

1 Do you know what that means?

2 A No, I don't really know exactly what that  
3 means, but I do get involved in cases across the  
4 spectrum from early on to sometimes, you know, post-  
5 complaint filing, so.

6 Q And I guess I'll submit to you that the  
7 record here shows that a letter was sent to my client,  
8 C&S Enterprise, with a proposed penalty on October  
9 11th of 2017. So, EPA -- what I'm trying to determine  
10 is were you involved in any decision, and by your  
11 testimony I take it you weren't, prior to receiving  
12 your email from Ms. Garcia?

13 A This December email --

14 Q Right.

15 A -- is what triggered my involvement.

16 Q I understand. I don't mean to beat that  
17 issue to death but, okay, thank you.

18 Okay, I think what we'll do now is I'd like  
19 to, if I can get my notes organized here -- well, I  
20 have a few general questions and then I think we'll  
21 start in through the photos, and I just wanted to ask  
22 you about a few things as we went along.

23 You testified, and I'm looking for my note.  
24 Well, several times during your testimony, you -- in  
25 looking at the exhibits, you talked about the unnamed

1 tributary flowing. Can you tell from an aerial or  
2 those photos if there is actual water movement or can  
3 you just tell, as you've testified, the presence?

4 I just know you used the term "flowing"  
5 several times, and I want to make sure I understood  
6 what you meant.

7 A Yes, I did not mean to imply that I could  
8 see water flowing, but I was referring to the  
9 direction of flow from the upper, you know, higher  
10 elevations to the lower.

11 Q Okay. Well, let's -- I may have some other  
12 general questions but I'll catch those as we go  
13 through each one. I'd like now to put up Agency  
14 Exhibit 10, and I want to go through those photos with  
15 you, okay?

16 (Pause.)

17 Okay, I'm sorry. I just need to get  
18 organized here a little bit before we start through  
19 them. I want to put up Agency Exhibit 10, page 1,  
20 okay?

21 You testified you didn't put those labels on  
22 there on any of these photos. I believe, and I  
23 don't -- maybe over lunch, I'll find and have the  
24 exhibits that you marked on, and if I have any  
25 questions about those. But here on Agency Exhibit 10,

1 page 1, I believe you indicated where you -- you  
2 thought where the channel was down here in the lower  
3 portion that I'm pointing to.

4 I believe you marked it somewhere to the  
5 left of this, what appears to be a white line. Do you  
6 see what I'm pointing to?

7 A Yes.

8 Q Do you know what that white line is?

9 A That white line, I interpret that to be a  
10 road, like a dirt road or a road through the field.

11 Q Pardon me?

12 A A road through the field.

13 Q Okay. And you don't believe it's any part  
14 of the channel or anything.

15 A No. No, I don't.

16 Q Okay. Let me ask a few general questions as  
17 I have found them in my notes here as I turn to this  
18 page.

19 You were not able to be there before the  
20 work was -- well, first of all, you haven't been to the  
21 site at all, is that correct?

22 A That's correct.

23 Q Okay. Is that common for the cases you work  
24 on that you don't go to the site?

25 A No, it's actually less common.

1 Q Explain. Be more common for you to go to  
2 the site?

3 A Yes.

4 Q And do you know why you didn't go to the  
5 site here?

6 A There were -- there were issues of, you  
7 know, timing and the ability to get out here before, I  
8 guess, court filings. But then, you know, in the end I  
9 wrote a report that I felt like it could stand on its  
10 own without me being out there.

11 Q Do you believe it would have helped you in  
12 your opinions had you been able to go to the site?

13 A It would have -- it would have given me, you  
14 know, the eyes on the ground to see some of these  
15 features for myself, although a lot of them are -- part  
16 of the tributary has been eliminated. So, I wouldn't  
17 have been able to really see the historical features as  
18 much. But I'm not going to tell you it's not helpful  
19 to go out in the field.

20 Q Sure.

21 A Yeah.

22 Q I understand, and I understand it wasn't  
23 possible for you to be there before the work was done.  
24 I'm just trying to get a sense of how you usually  
25 conduct your investigations.

1 And obviously, I may be stating the obvious  
2 here, but if you could have been there before any of  
3 the work was done by my client in 2015, would that have  
4 been very helpful?

5 A Well, it certainly would have enabled me to  
6 document and photograph in other ways what the  
7 tributary looked like.

8 Q And would you have been able to determine  
9 from being there even what -- you know, that's only one  
10 point in time, but would that have helped you to look  
11 at those other photographs of earlier years?

12 A Well, it would have informed me of the  
13 conditions of the tributary, and there are things you  
14 can learn about that tributary by looking at it in the  
15 field. But it wasn't necessary for me to, you know, do  
16 the report, write the report that I wrote.

17 Q Okay. You've been doing this for how many  
18 years you said? When I say "this", let me be fair to  
19 you. The work that you've testified to today, how many  
20 years have you been doing that?

21 A Since about 1988 is when I got involved in  
22 my first Clean Water Act case.

23 Q Okay.

24 A So, that's 30 years now. Yeah.

25 Q Thirty years on the nose.

1 How prevalent when you started were the  
2 tools that you had available to you on the internet or  
3 electronically? Give me a sense of when you -- how  
4 much different is it today with what you have available  
5 versus when you started.

6 A Well, yes. I mean, there was no internet.  
7 There were very few computers, and, yes, it's  
8 dramatically different today.

9 Q When did that change? I know it's evolved  
10 over time, just like my use of computers has, but was  
11 there a marked change in those 30 years where you had a  
12 lot more resources available to you?

13 A Well, I mean, for my own experience, I  
14 mentioned earlier, somewhere, I guess, around the year  
15 2000, let's just say 2001, I obtained the first copy of  
16 my Geographic Information System software. And that --  
17 that was a change. That was a helpful change  
18 particularly when it comes to viewing, annotating and  
19 making maps.

20 The way I used to do it would be to take a  
21 piece of acetate and overlay it on an aerial photograph  
22 and then Sharpies like that and annotate features and  
23 label the photograph. And with the advent of ARC-GIS, I  
24 was able to now create maps much easier, much faster.  
25 So, that was a marked change.

1 And then I guess more gradually after that  
2 until, you know, really now, it's just the vast  
3 availability of data on the internet that wasn't as  
4 easy to research and obtain when I first started out.

5 Q And that's kind of where my next question  
6 was going, availability of data which you've just  
7 testified to, but also like there -- I think you said  
8 you had the 1930s photos. Do we have a lot more photos  
9 now, you know, like for each year versus back then they  
10 weren't -- you don't have access to as near as many  
11 photos from the '30s. Is that correct?

12 A Correct.

13 Q And the quality is not as good.

14 A Correct.

15 Q Forties, I don't know that I saw anything in  
16 here from the '40s.

17 A Yes, I don't recall anything from the '40s  
18 either.

19 Q Okay. Fifties?

20 A There was an image, I believe.

21 Q Okay. And I guess what I'm trying to get at  
22 here, when we get to -- was it in the 2000s when we  
23 start seeing them about every year?

24 A I mean that's -- I mean that's a fair  
25 assessment, yeah.

1 Q I'm not going to hold you exactly --  
2 A Right.  
3 Q -- to the year. I guess what I'm trying to  
4 get, make sure I understand anyway, is that you -- when  
5 we don't see near as much information or photos from  
6 earlier years, it's because they are not available, is  
7 that correct?

8 A Yes.

9 Q And now do we have an aerial photo available  
10 of this farm just about every year?

11 A Yes.

12 Q Okay. And did you review -- let me ask it  
13 this way. Are there any that you reviewed from any of  
14 these years that you decided not to use in your report  
15 or in any discussion today that you can think of?

16 A No. I looked at every one of them, but  
17 since there were 35 or thereabouts I did not create 35  
18 figures. I didn't reproduce every single one of them  
19 in my report, but I looked at every single one of them  
20 in forming my opinions.

21 Q Do you recall in any of those that you  
22 observed and didn't use where there was -- you couldn't  
23 see a channel or you couldn't see water?

24 A Well, I've already mentioned, couldn't see  
25 water and couldn't see a channel on a lot of them, but

1 I used -- I'm going to discuss that in my report.

2 Q Okay. Maybe what I'm trying to ask is, what  
3 is your litmus test, so to speak, for what photo to use  
4 and what photo not to use?

5 A Well, again, I used them all. I looked at  
6 them all to form my opinion, but the litmus test in  
7 order for me to decide what to use like to make a  
8 figure out of it in my report is usually when it's  
9 showing something that is specific to the case that  
10 needs to be shown, you know -- particularly when it's  
11 been alleged violations, you know, I'll put a figure in  
12 my report that shows those.

13 But I don't usually -- like, the vast array  
14 of aerial photographs, I don't usually re-create them  
15 as figures in my report, but I looked at all of them.

16 Q If you saw photos like, as you just said  
17 here, or that show an alleged violation, if you saw  
18 photos that showed there was no violation, would you  
19 have included those?

20 A If this was an alleged filling of a stream  
21 and I never saw it because like -- you know, yes, I  
22 would -- that would be a big red flag for me, and I'm  
23 not sure where I would go with that.

24 Q Okay. Had you been able to make a site  
25 visit even after the work was done, but -- well, let me

1 rephrase that.

2 You know, this case is about whether this  
3 unnamed tributary, as we're calling it, is a  
4 jurisdictional water, right? That's what this case is  
5 about and whether my client violated Section 404,  
6 correct?

7 A Yes.

8 Q Okay. If you had been able to be there and  
9 at one point in time had not seen a channel or any  
10 water but your photos showed you something different,  
11 would that one time being there, seeing that have  
12 influenced your opinion?

13 A I'm sorry. I'm not exactly sure what you're  
14 asking.

15 Q What I'm asking is if you had been able to  
16 be there -- this is a hypothetical, I understand it,  
17 but you're an expert witness and expert witnesses deal  
18 with hypotheticals.

19 If you had been able to be there and at one  
20 point in time you saw -- you observed the conditions  
21 but the conditions were different than what you saw in  
22 your photos, historical photos that don't cover every  
23 year, would that have influenced your opinion?

24 A If you're asking me if I had seen something  
25 in the field that I couldn't see on the aerial

1 photography, would that influence my opinion?

2 Q Yes.

3 A Well, I would certainly factor that in, yes.

4 Q Okay. Has that occurred in any of the cases  
5 where you have been able to make a site visit, where  
6 you saw something that, hey, that didn't show up in the  
7 photos?

8 A Well, I mean, as a matter of course, you  
9 always can see more features in the field than you can  
10 on an aerial photograph; more detail, yes.

11 Q And I understand, and I'm asking you in any  
12 of your other cases, has your site visit changed your  
13 opinion?

14 A Well, there's been cases I've worked on  
15 where I provided wetland mapping and stream mapping,  
16 for instance. I went out in the field and we found  
17 more tributaries than I could -- than I initially saw  
18 on the aerial photography.

19 Q Has there been times where you saw less?

20 A Yes, actually there has been. I had a case  
21 in West Virginia where there was a tributary, you know,  
22 alleged, but I never saw it on the aerial photography  
23 so I didn't include it in my report.

24 Q But you did see it when you went out there?

25 A When I went out there, yeah.

1 Q Okay.

2 A It had been destroyed, but you could see the

3 valley.

4 Q I'm asking the other way, where if you saw

5 something -- when you went out there, something was not

6 there that you thought you saw in the aerial

7 photography.

8 A If that was ground truth and I was -- and I

9 was convinced that what I saw on the photography was in

10 error, I would have changed my view at that point,

11 yeah.

12 Q Yes, and I'm asking has that ever happened

13 with you?

14 A Oh, I don't know. You know, we adjust

15 boundaries for ground truth, wetland boundaries. Yeah,

16 I'm sure there has been times when I've overestimated

17 wetland boundaries, or got in the field and say, oops,

18 that little piece didn't meet the criteria so I

19 truncated. Yes, I mean, that's -- that's part of

20 business, part of doing the ground truth in the report.

21 Q So, is it fair to say ground truthing, as

22 you've called it, serves some purpose and some value in

23 cases like this?

24 A Yes.

25 Q Okay. Based on what you've reviewed and

1 your testimony, would you expect there to be times, not

2 necessarily shown in the photos, but would you expect

3 there to be times when there would be no water in this

4 channel that you say has been continuously present?

5 A Yes.

6 Q Okay. I'm now going to show you AX-10, I

7 think it's on the back side here, page 2, and I'm

8 looking at my notes from your testimony here. I think

9 you referred to a branching pattern at the creek.

10 A At some point in my testimony I did, yes.

11 Q Yes, and according to my notes, it was on

12 this one, but you may have said it several times. What

13 does that -- is that branching pattern an indication of

14 anything regarding the, as we're calling it, the

15 unnamed tributary regarding whether it exists or not?

16 A Well, I mean, it does in a sense. If you

17 zoom out and look at the landscape and look at the

18 dendritic and branching-like signature of the

19 tributaries in the area, and you can map them in a

20 larger area and sort of see their pattern, their

21 branching pattern, that's very common. Dendritic

22 drainage is a very, very common drainage pattern.

23 And in this case, you can see it at one

24 scale, you know, zoomed way out indicates sort of the

25 regional drainage pattern, and then more specifically

1 in this case, this tributary fits right into that

2 pattern, exhibits the same sort of branch-like pattern.

3 Q Does the branching indicate that the water

4 may not be channeled?

5 A Does the branching indicate the water may

6 not be channeled?

7 Q Correct.

8 A Yes, it can indicate that it's not

9 channelized.

10 Q And do you see that in this photo?

11 A I see both. You know, non-channelized and

12 then perhaps an historically channelized segment.

13 Q And I guess I'm referring specifically where

14 you noted the branching pattern by the creek.

15 A Oh, what I was referring to there is

16 basically how that -- how the unnamed tributary sort of

17 branches off a deep creek like a branch, and then

18 there's another tributary to the right of that image

19 that's straighter but it sort of branches off, and if

20 you zoomed out you would see that repeated, you know,

21 in the overall watershed.

22 Q Okay. So, by branching, you don't mean

23 widening out, is that --

24 A Yes, not widening out but like a branch-like

25 pattern, like dendritic, like trees, twigs --

1 Q Right.

2 A -- that, you know, all the twigs lead to a

3 larger stem and the larger stem leads to a trunk.

4 That's dendritic and that's a typical drainage pattern.

5 Q Okay. By branching, are you indicating like

6 one tributary is a branch and another tributary is a

7 branch?

8 A Yeah.

9 Q Versus what I was thinking you may have said

10 was it indicates where you noted there was a branching

11 pattern that I'm pointing to there, that this one

12 unnamed tributary we have been discussing today has

13 branched out and may not be centralized flow.

14 A No. I meant it was a branch on the Deep

15 Creek --

16 Q Okay.

17 A -- trunk.

18 Q All right, that's why I ask these questions.

19 Okay. Here is, I guess, another general question.

20 You've testified as to AX-10 and then also AX-26, these

21 aerial photos that you've seen the channel, I think, I

22 think you've said repeatedly or continuously, sometimes

23 water, sometimes not based on the photo, et cetera, but

24 can you tell from these photos if these -- this channel

25 has been altered by man, manmade activities? Can you

1 tell that?

2 A Yes, you can frequently tell that, yes.

3 Q Have you seen that here?

4 A This channel, the lower section is fairly

5 straight, which is kind of typical that it may have

6 been straightened at some point.

7 Q Okay. And do you have an opinion as to how

8 that affects a determination of jurisdictional waters

9 if that manmade activity occurred prior to the Clean

10 Water Act going into effect?

11 A You know, I guess my opinion is more based

12 as, you know, photo interpreter and working on sites

13 enforcement cases. It's hard to find a landscape that

14 there hasn't been some manmade straightening of

15 tributaries. So, it doesn't have an influence on the

16 jurisdiction. It's just a factor in the landscape.

17 Q Okay, and that's the opinion you're

18 testifying to, is that correct?

19 A The jurisdictional aspect doesn't have so

20 much to do with whether it was straightened or not,

21 it's just now we're looking at relatively permanent

22 flow and similar situated wetlands and significant

23 nexus. Those are the jurisdictional factors.

24 Q Okay, thank you.

25 Okay, we're going to AX-10, page 3. I

1 believe this is where you might have referred to

2 flowing, Several times you've used that term, but

3 you've clarified that for me. You didn't mean to

4 indicate water was flowing, you meant the tributary was

5 traversing the landscape? Is that the way to say it?

6 A Yeah, from higher elevation to lower, yes.

7 Q Okay, thank you. Okay, this is page 5 of

8 AX-10, and I'm looking at my notes here, but -- I

9 believe you may have testified to this later but we

10 have this straight line I would call it to what you

11 testified to being the channel. Do you know what I'm

12 referring to?

13 A No.

14 Q Do you see this dark area right here I'm

15 pointing to?

16 A Yes.

17 Q Okay. Does that appear to you to be water?

18 A Yes, that's my interpretation, that that's

19 water flowing. Yes.

20 Q And I believe to the right of that, you

21 testified what you thought looked like the old channel,

22 is that correct?

23 A Yes.

24 Q Okay. Do you have an opinion as to -- well,

25 first of all, do you see any water in the old channel?

1 A Well, I can't really make out the channel

2 that well because of the vegetation. But, no, so I

3 didn't see water in the old channel.

4 Q In the straight line I will call it where we

5 see the dark area, would that appear to you to be

6 manmade?

7 A Which you pointed to earlier -- that? What

8 I testified to is, what I think has happened right

9 before this image was taken was that the flow coming

10 down the watershed for some reason didn't go underneath

11 the culvert and down the channel. Maybe it was

12 blocked, and it sort of jumped over, jumped over the

13 road and then flowed parallel to the old channel.

14 That's my interpretation of what I'm seeing from this

15 one single photo.

16 Q Okay. And, again, do you have an opinion as

17 to whether -- you've just testified, I believe, that

18 you thought you had seen manmade activity in these

19 photos, right?

20 A I believe I testified that the straightened,

21 the tributary being straightened is consistent with

22 having been straightened by somebody --

23 Q Okay. And is that what --

24 A -- yes.

25 Q I'm sorry if I interrupted. Is that what

1 you see here in that straight line, is manmade

2 activity?

3 A What I'm seeing is the channel in 2009, I'm

4 not sure when it was straightened, but I don't -- the

5 manmade activity would have been previous, I'm

6 guessing.

7 Q Okay, thank you.

8 MR. McAFEE: Your Honor, I think it would be

9 helpful if I had those marked on exhibits that have

10 been entered into evidence. I think it may help some

11 of my questions here. Would now be a good time to

12 maybe break so I can have a chance to look at those

13 exhibits? I think it might speed things up a little.

14 JUDGE BIRO: Sure.

15 MR. McAFEE: It's up to you, Your Honor.

16 JUDGE BIRO: No. Of course. How much time

17 do you think you need in addition to like an hour for

18 lunch?

19 MR. McAFEE: Oh, that will be fine.

20 JUDGE BIRO: Okay. So, can we break for

21 lunch 'til 1:20?

22 MR. McAFEE: Sure.

23 JUDGE BIRO: Okay, we'll stand in recess

24 'til 1:20.

25 //



1 (Whereupon, at 12:20 p.m., the hearing in  
 2 the above-entitled matter recessed, to reconvene at  
 3 1:20 p.m. this same day, Wednesday, October 3, 2018.)  
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1 AFTERNOON SESSION  
 2 (1:30 p.m.)  
 3 JUDGE BIRO: Mr. McAfee.  
 4 MR. McAFEE: Thank you.  
 5 JUDGE BIRO: Did you have enough time to  
 6 prepare?  
 7 MR. McAFEE: I did. Thank you, Your Honor.  
 8 JUDGE BIRO: Okay, then let's proceed again.  
 9 Whereupon,  
 10 PETER STOKELY  
 11 having been previously duly sworn, was  
 12 recalled as a witness herein and was examined and  
 13 testified further as follows:  
 14 CROSS-EXAMINATION (Resumes)  
 15 BY MR. McAFEE:  
 16 Q Mr. Stokely, I want to, of course, move  
 17 forward with our review of exhibits in AX-10, but I  
 18 wanted to put back up for you -- I think we had  
 19 discussed AX-10, page 5, and we were looking at this,  
 20 what I'll call a straight line that's dark next to what  
 21 I believe you testified was the old channel. Is that  
 22 correct?  
 23 A Yes.  
 24 Q Is it possible -- maybe that's not a fair  
 25 question, a lot of things are possible -- but in your

1 opinion is it possible that that dark color is  
 2 something else other than water?  
 3 A Well, I mean, I've looked at it, I've looked  
 4 at the way the water seems to cross the road, and that  
 5 was -- that was just my finding. It looks to me like  
 6 it's water.  
 7 Q And the reason I ask, and I realize I  
 8 haven't been trained in aerial imaging analysis, but is  
 9 it similar to some of the color of the vegetation in  
 10 that photo also? It's in a straight line. Again, I  
 11 just thought while we were on it, I'd ask if there was  
 12 any doubt in your mind as to what that might be.  
 13 A Well, also it's hard to reexamine the issue  
 14 at all from this particular picture. But, no, I mean,  
 15 I looked at it for awhile and I went back and forth,  
 16 and I -- you know, I believe that that's a reasonable  
 17 explanation for that dark signature.  
 18 Q Okay. Then let's move to AX-10. Just a  
 19 minute. I believe when you testified this morning, you  
 20 went through AX-10, 5, with Mr. Bieri, but then I don't  
 21 believe we -- he looked at AX-10, 6, with you, which is  
 22 on the back side of that. Could you take a look at  
 23 that for me, since you didn't look at it this morning?  
 24 A Okay.  
 25 Q All right. Now, I'm sorry, I'm going to

1 flip it back. That has a date of April 4, 2009.  
 2 That's the same date as AX-10, page 5. Now that's a  
 3 different angle, is that correct?  
 4 A Yes.  
 5 Q Well, let's -- here I am interrupting  
 6 myself. Let's talk about those angles a minute. This  
 7 is what's called an oblique aerial, correct?  
 8 A Yes.  
 9 Q And it's done by Pictometry?  
 10 A Yes.  
 11 Q Is that the name of a -- tell me a little --  
 12 you testified this morning, I don't mean to repeat it,  
 13 but explain that a little more to me.  
 14 A Well, that's the name of their -- that's the  
 15 name of the firm, and they fly in the United States  
 16 various places, and they fly with a plane that  
 17 apparently has five cameras in it. They're looking out  
 18 the four cardinal directions and then straight down as  
 19 well, and that's how they get these angles.  
 20 Q Okay. And using Pictometry, is it -- do  
 21 they give us the time of day here when they take these  
 22 photos because of the -- due to the effect of the sun  
 23 on shadows?  
 24 A The time of day is not -- as far as I know,  
 25 is not something they would deliver to you when you get

1 your -- when you download the photos. They likely have  
2 that metadata somewhere as a record.

3 Q Okay. And would it be fair to say that the  
4 time of day would have an effect on shadows if the sun  
5 is out?

6 A Yes.

7 Q Okay. Also, is there some type of scale to  
8 these so we know, you know, when you take some at an  
9 angle, does it change the trajectory, the scale, et  
10 cetera?

11 A Yes, the scale varies across the image.

12 Q Okay. So, these aren't really -- well, are  
13 these to scale where you can take a ruler and say it's  
14 this far away or --

15 A Right. So, these prints, you wouldn't be  
16 able to, and I can't do it either viewing it in my GIS,  
17 but their website where they deliver these photographs,  
18 and they also allow you to view them, they have tools  
19 that allow you to make those measurements.

20 Q And have you done that in this case?

21 A No.

22 Q Okay. Now, to AX-10, page 6, that I have on  
23 the screen, do you see in the area, the lower portion  
24 of the unnamed tributary as we've been calling it, do  
25 you see water in that -- in this exhibit?

1 A Well, I don't see it on this print.

2 Q And that's what I'm asking.

3 A Yeah.

4 Q I understand.

5 A Nothing that I can be sure about.

6 Q Okay, thank you. Okay, then moving on to  
7 No. 7. Okay. In this photo, I guess the only question  
8 I have -- well, again, I think you testified this  
9 morning according to my notes that you did see water in  
10 this aerial, and I won't make you go back through that  
11 because I think you marked -- just to refresh your  
12 memory here, I'm showing you AX-10, 7B. Do you see  
13 that?

14 A Yes.

15 Q And you marked it A, B, and C, and according  
16 to my notes, you noted C is where you saw water.

17 A Yes.

18 Q Okay. And B is where you saw the channel to  
19 what would be east, the old channel I guess is what I'd  
20 call it.

21 A Yes, that seems to be my recollection of  
22 what I said about B.

23 Q Yes. Okay, on either one of these, I'll put  
24 the Exhibit AX-10, page 7, back up. Do you see those  
25 lines in the fields -- and I'll point to some of them,

1 do you see those lines I'm pointing to?

2 A Yes.

3 Q And for the record, I don't think we need to  
4 mark them. I think they're pretty apparent. They are  
5 lines throughout the fields both on the -- as you look  
6 at the photo on the left-hand side of the unnamed  
7 tributary and on the right-hand side, some of them are  
8 going straight north and south, some of them are at an  
9 angle it looks like with the slope of the field.

10 Do you know what those lines are?

11 A Well, they look like they're -- you know,  
12 they're made by passing machinery, and I wasn't sure if  
13 it was like a plow or maybe it was spreading manure,  
14 but I never really formed a final opinion about what  
15 those are, but it does look like to they're made by  
16 passing machinery.

17 Q Okay. And I'm just asking you if you know,  
18 and you see there is a line also kind of goes up on  
19 each side of the ditch of the tributary.

20 A Yes.

21 Q Do you see that?

22 A Um-hmm.

23 Q Okay. All right, thank you.

24 Moving on to AX-10, 8, I think you testified  
25 here in response to a question from Mr. Bieri that -- I

1 don't know if it was specific to this photo, but that  
2 if you -- you can't tell an ordinary high-water mark  
3 from these photos, correct?

4 A Correct.

5 Q Okay. All right, thank you.

6 At this point, I want to go to AX-26, page  
7 2, I believe is a closeup, and I believe, according to  
8 my notes anyway, this is a closeup of AX-10, 8, and I  
9 believe you testified that you can see water over the  
10 road crossing. Is that correct?

11 A Yes.

12 Q Okay. And again, that's based on the  
13 darkness, right?

14 A Yes, the dark-tone signature.

15 Q The question I have also -- and I think I'll  
16 ask this -- we'll see this in several of these photos,  
17 if that is in fact water, as you've testified, does it  
18 get broader and that would be the channel? Have you  
19 seen any of these photos where the channel showing the  
20 darkness gets wider as it gets closer to Deep Creek?

21 Now, I realize I -- I'll ask you the broad  
22 question at this point. Have you seen that in any of  
23 these photos that you can remember?

24 A Now, I sort of recall that the channel is  
25 narrow the way it appears on this one --

1 Q Okay.

2 A -- when it could be seen.

3 Q Pardon me?

4 A When it could be seen.

5 Q Right, I understand. Would that be typical

6 where you are draining an area like, I think you said

7 it's -- the watershed is about 100 acres?

8 A Yes, the watershed is about 100 acres.

9 Q And you've indicated there is the channel

10 upland and it comes down to Deep Creek. Would that be

11 typical for it to not get any wider? And I think in

12 this case, we can see it got narrower as more area is

13 drained.

14 A Well, I mean, so the 100 acres is from the

15 point where it enters Deep Creek. I mean, I guess to

16 answer it the other way, it's not -- it doesn't seem

17 unusual to me that this channel would be these

18 dimensions and all throughout. I mean, I wouldn't

19 necessarily expect it to widen to 10 feet wide or

20 something like that.

21 Q Okay. All right, thank you.

22 I'd like to move now back to AX-10, and

23 we'll go to AX-10, page 9, and again this photo has a

24 date of December 18, 2010. It is light-colored on the,

25 at least the farm ground portion, does that appear to

1 be snow-covered or do you know?

2 A That's what I thought it was, snow cover.

3 Q Okay. And there are -- the unnamed trib --

4 or I guess I don't need to keep saying "unnamed". The

5 tributary that we've been discussing, it is not white,

6 is it?

7 A Well, some of the banks are, but there is,

8 you know, sort of -- the dark-tone curvilinear feature

9 is still visible.

10 Q Okay. If there were a channel there, would

11 you expect there -- if there is snow on the farm

12 ground, would you expect there to be snow in the

13 channel?

14 A Well, I mean, I guess not necessarily if it

15 wasn't particularly cold and, you know, the water was

16 still flowing.

17 Q Okay.

18 A You know, snow wouldn't accumulate, or if it

19 was wet and above freezing, the snow wouldn't

20 accumulate.

21 Q Do you see water in this photo?

22 A I don't recall what I said about this photo.

23 Q Okay. I think you also -- I'm trying to

24 look at my notes. You indicated you saw the road

25 crossing but you didn't see any water over the road

1 crossing like we had seen in a previous photo.

2 A I said that earlier today?

3 Q I believe -- at least my notes indicate

4 that.

5 A Well, I mean, I would agree that looking at

6 this now, I don't see water going over that.

7 Q Okay. And I need to ask. Could that also

8 be because there is no water, you don't see anything

9 over the road crossing?

10 A Well, again, I don't remember what I said

11 specifically about this photo, and whether that

12 signature is shadow versus water. So, I mean, if you

13 showed my report, maybe that would clarify it, but I

14 interpret that to be the culvert is functioning there

15 in that particular image.

16 Q Pardon me? I'm sorry.

17 A I said I interpret that to be that the

18 culvert is functioning in that particular -- on that

19 particular date in that particular image.

20 Q Okay, thank you.

21 All right, now I want to move on to AX-10,

22 page 10, which is a photo you weren't shown this

23 morning, and I wanted you to take a look at that.

24 A Okay.

25 Q All right. First of all, do you see a

1 channel in that photo?

2 A Well, I see -- and, you know, again this is

3 like -- not the greatest quality image, but I can see

4 the meandering portion in the upper left a little bit

5 just like we've seen fairly often, and I can maybe see

6 pieces of channel as we go down, and even, I don't

7 know, below that road crossing there seems to be a

8 fairly linear dark-tone feature which, you know, could

9 be the channel.

10 Q Okay. Do you see -- let's see, this photo

11 is January 4, 2011. You see white areas that could be

12 snow?

13 A Yes.

14 Q And do you see any of those white areas in

15 what you have described as the channel?

16 A No.

17 Q All right. Then AX-10, page 11, you were

18 not shown this morning, and I'd like to have you take a

19 look at that. This has a date of July 19, 2011.

20 First of all, do you see this kind of white

21 line I'm pointing to that goes -- for purposes of the

22 record, I would describe it anyway as a -- it looks

23 like a white line from going straight south from what's

24 been superimposed as a confinement building footprint,

25 comes down to the what has been labeled as the

1 crossing, and then goes off to what would be the  
 2 southwest? Do you see that?  
 3 A I do.  
 4 Q Do you have an opinion as to what that would  
 5 be?  
 6 A I believe it's a road.  
 7 Q Okay. Now, looking at the portion of the  
 8 tributary, as we're calling it, to the -- between that  
 9 area that we just described and Deep Creek in this  
 10 photo, again which you did not see this morning, do you  
 11 see a channel?  
 12 A You mean downstream from the road crossing?  
 13 Q Yes, please.  
 14 A Well, what I see on this photo here, this  
 15 copy, the xerox copy, is again a dark-tone linear  
 16 feature extending from the road crossing. I would  
 17 interpret that to be the channel, the channel we've  
 18 seen before.  
 19 Q And do you see any water in that area?  
 20 A I don't recall what I said about this one  
 21 but I'm pretty sure I did not state that I saw water in  
 22 this image.  
 23 Q Yes. Well, again, according to my notes,  
 24 you were not shown this this morning, so.  
 25 A Well, I looked at it.

1 Q Oh.  
 2 A I mean, it's in part of my report.  
 3 Q I understand. Thank you. Okay.  
 4 Okay, I don't think I need -- here's No. 12  
 5 of AX-10. I don't think I have any further questions  
 6 and, unless you have something you want to add. All  
 7 right.  
 8 This is AX-10, page 13. This was another  
 9 one that was not shown to you this morning. Would you  
 10 take a look at that, please?  
 11 A Yes.  
 12 Q All right. This is dated July 12, 2013, and  
 13 tell me what you see here regarding the issues we've  
 14 been talking about, how's that?  
 15 A Well, so, you know, once again you can see  
 16 that vegetative riparian corridor diagonally coming  
 17 from the upper left towards the lower right. You can  
 18 see the road crossing near the middle, which is what we  
 19 were talking about just a few minutes ago, and then  
 20 below that road crossing is the more straightened part  
 21 of the tributary.  
 22 Q Okay. I don't mean to interrupt if you're  
 23 still looking.  
 24 A Well, I mean, that's all I was --  
 25 Q Okay. And then downstream from the road

1 crossing, what do you see?  
 2 A Well, I see the straightened channel. I see  
 3 a very dark-tone linear feature, sort of corresponds  
 4 with the culvert but -- and then I see, you know, the  
 5 riparian vegetation. And this, of course, is a leaf-  
 6 on, you know, mid-growing season aerial photo.  
 7 Q Do you see water in this photo?  
 8 A I don't believe I claimed there was water in  
 9 that photo from my analysis and in my report.  
 10 Q All right, thank you. I don't believe I  
 11 have any questions for you on AX-10, page 14.  
 12 Okay, AX-10, page 15, I believe you  
 13 testified this morning that, of course, this is March  
 14 9, 2015, and we're coming up on a series of photos  
 15 March 20th that we're going to spend some time with,  
 16 but here this is previous to that. I believe according  
 17 to my notes you did see water in this channel. Is that  
 18 correct?  
 19 A I would want to look back at my report to  
 20 see what I said.  
 21 Q Okay, I understand. I believe you testified  
 22 this morning, where I'm pointing with my pen is where  
 23 some clearing has occurred from trees that were  
 24 previously there.  
 25 A Yes.

1 Q Well, as you look at this photo now, do you  
 2 see water?  
 3 A I see dark-tone linear and curvilinear  
 4 feature, yes, which could be water, but I don't  
 5 remember, you know. I'm looking at this print and I  
 6 did a more thorough analysis and I wrote it in my  
 7 report what my conclusions are about this image.  
 8 Q Okay. Let's talk -- kind of take a step  
 9 back and talk in general. When you see water in the  
 10 photos you've testified that you have seen water, again  
 11 I think you had indicated you could not tell whether it  
 12 was flowing or not, correct?  
 13 A Correct.  
 14 Q And we've looked at the topography of these  
 15 farm fields and I think it's understood as you  
 16 testified they -- at least on both sides of this  
 17 tributary, the farm fields drain towards the tributary,  
 18 right?  
 19 A Yes.  
 20 Q Okay. If the water -- well, strike that.  
 21 Could the water that you've seen based on  
 22 these photos, could it be runoff from those farm fields  
 23 directly into that channel that's there instead of  
 24 water that's coming down from, as you've testified,  
 25 groundwater from up above?

1 A Well, I'm not sure that I testified that it  
2 was groundwater from above. But, no, I believe that  
3 it's a combination of both. It's water from the  
4 watershed both above and perhaps right next to that  
5 tributary.

6 Q Okay. All right, that's No. 15, and then  
7 let's go to 16, which is a photo you weren't shown this  
8 morning, and this is March 20. Now we're into the  
9 March 20, 2015, photos which are coming up. There's  
10 about four different angles to this one. This is  
11 Pictometry, right?

12 A Yes.

13 Q All right. Kind of have to get our bearings  
14 here because it's coming -- this is taken looking --  
15 well, would you tell me?

16 A It's looking eastward.

17 Q Okay. And the closest part of the photo is  
18 where -- is the upper portion of the tributary, right?

19 A Yes.

20 Q Tell me what you see here.

21 A In the upper portion?

22 Q Anywhere, please.

23 A Yeah, you can see -- I pointed this out  
24 earlier on the same year but, you know, a different  
25 angle. You can see the meandering channel in the upper

1 portion. You could also see the evidence of vegetation  
2 being cleared, the ground being, I guess, smoothed out  
3 a little bit, and you can see the straighter part of  
4 the channel down below the culvert.

5 Q In this photo, everything is brown, right?  
6 Is this black-and-white?

7 A No, it's a color.

8 Q Okay. All right. So, let's then go to AX-  
9 10. That was page 16. Here is page 17, same date.  
10 You testified about this photo this morning, correct?

11 A Yes, I believe so.

12 Q Okay. And I believe you testified, again  
13 page 17 according to my notes. Let's go to page 18. I  
14 seem to have better notes on that unless there is  
15 something you want to see there.

16 According to my notes on page 18, you see  
17 some dark areas in that channel, is that correct?

18 A Yes, you can see the signature, the  
19 curvilinear dark-tone signature of the channel.

20 Q And it's your testimony you believe that's  
21 water.

22 A I don't recall what I said about water.

23 Q Does it appear as you look at it here to be  
24 water?

25 A This is -- you know, again, it's not a very

1 good copy, it's a copy of an image, and my opinions  
2 were formed after more thorough analysis. They were  
3 written down, and I don't recall if I was, you know,  
4 thinking what I was seeing was water or shadow. In  
5 order for me to make a statement about water, I needed  
6 to rule out shadow, and I don't remember what I did  
7 with this one.

8 Q Okay. Let's go to the next one, AX-10, page  
9 19, which is the same date, a different angle. Is that  
10 correct?

11 A It's the same date, and I -- yeah, it  
12 probably is a different angle, slightly different  
13 angle.

14 Q I want to go -- and again, I don't mean to  
15 hide your report from you, I'll be glad to pull that  
16 up, because I believe in your report -- all right,  
17 where did I set your report? Okay, here it is.

18 In your report on page -- it's AX-31, page  
19 15 is Figure 5. Do you recognize that?

20 A Yes.

21 Q Okay. And there's no date on this figure.  
22 I think it is in your report, but that does appear to  
23 be the same photo, correct?

24 A The same one that you just had on there,  
25 yes.

1 Q Yes, AX-10, page 19. I guess my question is  
2 in your report, you indicated this appeared to be ice  
3 in the channel. Do you recall that?

4 A Yes.

5 Q Then my question is why, and here's AX-10,  
6 page 20, same date, different angle Pictometry, is dark  
7 there.

8 A Yes.

9 Q Okay.

10 A Yes. So, that was a puzzle, and, you know,  
11 when I first saw that white signature, to me it was  
12 like classic ice, you know, smooth, white-toned, you  
13 know, bright-toned, uniform. And then I saw these  
14 other pictures. You have to scroll around and zoom  
15 around with the software to capture these different  
16 images, and that one with what I called ice is like a  
17 barely -- it just appears at one scale, one instant.

18 But after reviewing all of this, I am not  
19 sure that that's ice or if it's actually sunlight  
20 reflection on the water.

21 Q Okay.

22 A So, it's either ice or sunlight, or sunlight  
23 reflection, and right -- I'm thinking that the -- you  
24 know, contrary to what I said in my report, I think  
25 maybe it's more plausible that it's reflection because

1 it's just the angle it was captured was perfect for  
2 reflecting the sun, and it was the only image in that  
3 series that was that way. So.

4 Q All right. Well, I guess I shouldn't feel  
5 bad I was puzzled by that, should I?

6 A Okay. No.

7 Q And I need to ask you this. Is it possible  
8 that it's something other than water?

9 A Well, I believe if it's -- if it's sunlight  
10 reflecting, it's reflecting off of water. So, no, it's  
11 either ice or sunlight reflecting, and either way to me  
12 it's indicating the presence of water pretty clearly.

13 Q Okay.

14 (Pause.)

15 Okay. Sorry. As I look through my notes  
16 here, I want to look at -- make sure I cover  
17 everything.

18 Oh, on these Pictometry photos, and that's  
19 the company that takes those, is that correct, versus  
20 the government?

21 A Correct.

22 Q Okay. Do you know how they decide what  
23 dates they take these photos or is it just random?

24 A No, I don't know. They are contracted by  
25 local governments to fly the area, and so there is

1 various places out in the field?

2 A I'm not 100-percent-sure about that. It  
3 kind of has the signature of maybe soil eroding down  
4 that slope or washing down that slope, but I didn't  
5 spend a lot of time trying to answer that question.

6 Q Okay. Okay, I think I'm done with dragging  
7 you through those photos again.

8 I now want to turn to your report. I think  
9 I just have a few questions, go through your report on  
10 some attachments. Let's go to AX-31, page 12.

11 Okay, do you recognize that photo, Figure 2  
12 from your report?

13 A Yes.

14 Q And it is the 1930 photo as I understand it,  
15 and there are two red arrows there that I don't believe  
16 I saw an explanation of. I just wondered -- in your  
17 report, and I may have missed it, but could you tell me  
18 what those arrows are depicting?

19 A Well, yeah, without the text in front of me,  
20 I think they're pointing to the channel.

21 Q Okay. The bottom red arrow is -- there's a  
22 white line, and maybe this is what you've testified  
23 before this afternoon or maybe this morning before  
24 lunch. There's a white line there that is -- the arrow  
25 is pointing over top of. Is that -- you don't believe

1 probably something in the specification with the local  
2 government -- scale, time, you know, that kind of  
3 thing.

4 Q So, by local government maybe, and if you  
5 don't know I understand, but the county or?

6 A County, cities, fire departments, various  
7 organizations contract them.

8 Q Okay.

9 A Tax assessors' offices.

10 Q Okay, thanks. I think I just want to go now  
11 to AX-10, page 22, and this is -- all right, this will  
12 be maybe a dumb question, but this is taken June 8,  
13 2016, and if I hadn't seen the date on that photo, I  
14 would think there was snow on the ground in places. Is  
15 that -- I'm pretty sure that didn't occur on -- we  
16 didn't have snow on June 8. Do you know what those  
17 light-colored areas are?

18 A Yes. This is a black-and-white photograph.  
19 So, it's -- everything is in gray-shade. That is very  
20 brightly reflecting, in the case of the area right  
21 around the confinement building is dry soil, just  
22 bright reflecting soil, bare soil.

23 Q And would that be the case also like, you  
24 know, down in the field, as you can see, there's some  
25 areas below the confinement building footprint and

1 that's the channel, correct?

2 A You know, this is the poorest resolution  
3 image and the one that depicts the channel the least  
4 clearly. So, it's difficult to know exactly where it  
5 is, but I believe I'm pointing to sort of the darker  
6 signature in between those white lines.

7 Q Okay. I'm just looking through your report  
8 here if I had any other questions. I think you've  
9 answered some of them previously with your -- when Mr.  
10 Bieri was asking you questions. I may just have one  
11 more.

12 I'd like to turn to -- maybe you can tell  
13 I'm used to -- I'm more used to trials where the  
14 witness has a witness book up there with him and we  
15 both --

16 A Right.

17 Q -- have to turn to the page at the same  
18 time. So, I realize you don't have to turn to anything.

19 Okay, I'm looking at RX-5 -- it's the wrong  
20 page. Okay, Mr. Stokely. Sorry for the delay. RX-5,  
21 which is Respondent's Exhibit 5, page 22. Now, I  
22 believe -- I will represent to you anyway that these  
23 photos are from the EPA's PowerPoint, and I believe it  
24 was the one that was provided to you initially. I  
25 can't say that for sure, but this is the PowerPoint we

1 have anyway. And this is -- 2014 it's dated, and I  
2 realize it's not very close, right?

3 A Right. It's zoomed out.

4 Q First of all, can you get your bearings as  
5 to where everything is?

6 A Yes.

7 Q If I can point, and maybe we can mark on  
8 this if we need to, but do you see this area my pen is  
9 pointing to that appears to be to the west of the main  
10 channel, we'll call it, do you see a little darker area  
11 there?

12 A Well, I do, yeah.

13 Q When you have the PowerPoint photos, you  
14 could probably enlarge them and take a closer look, but  
15 does that appear to you like that could be another area  
16 where drainage is channelizing?

17 A You know, I don't know. That wouldn't be my  
18 interpretation just because the way it's like dots,  
19 dots, and it's not a linear feature, but there is a  
20 series of dots and there is some more in that field to  
21 the north and east.

22 So, I didn't look at that very closely to  
23 try to figure out what that is, and so I also didn't  
24 look at in, you know, the original imagery that I have  
25 on my computer.

1 Q Okay.

2 A Not that particular issue that you're asking  
3 me right now.

4 Q Okay, thank you. Oh, I shouldn't have  
5 turned the page in my notes. I found a couple more  
6 questions, not about this; just a couple more general  
7 questions.

8 Deep Creek appears to be a fairly good-sized  
9 creek, right?

10 A Yes.

11 Q And would you anticipate it would -- I  
12 didn't see this in your report nor has it been  
13 discussed -- that it would flood at certain times of  
14 the year, or do you know?

15 A Well, I don't know, you know, specifically.  
16 But I would guess that it does flood.

17 Q Did any of the information you looked at  
18 regarding that creek, did it -- anything indicate that  
19 it has flooded or floods?

20 A I never saw an image that showed it over its  
21 banks or anything like that.

22 Q That's a better way to say it than flooding.  
23 If it did, and I think you indicated you had seen some,  
24 like -- I don't know if damage is the right word -- on  
25 the creek banks. If it did, could some of that be

1 caused by, you know, if it floods and comes back, it  
2 goes back in its banks, could some erosion be caused by  
3 that typically?

4 A Oh, yeah. When a stream floods, it  
5 typically moves sediment around, drops sediment in  
6 places, maybe erodes the bank a little in places.

7 Q Okay. Also, I don't believe I saw in your  
8 report or have heard you testify today about -- in any  
9 of the photos or anything about wetlands, is that  
10 correct?

11 A Correct.

12 MR. McAFEE: Thank you. No further  
13 questions.

14 JUDGE BIRO: Any redirect?

15 MR. BIERI: Just a few. Thank you.

16 MR. McAFEE: Do you want me to leave the  
17 exhibit book there?

18 MR. BIERI: Sure. Yes, if you don't mind.  
19 Thank you.

20 MR. McAFEE: Sure.

21 REDIRECT EXAMINATION

22 BY MR. BIERI:

23 Q Mr. Stokely, just a couple questions for  
24 you. Did you produce -- attach to your report every  
25 single photograph that you could acquire that was

1 related to this case?

2 A I produced a list of them all.

3 Q Okay.

4 A And I don't remember if I sent you like a  
5 copy of every single photo.

6 Q Okay, that's fair. You produced a list and  
7 it's referenced in your report, correct, of every  
8 single photograph you could acquire, is that right?

9 A Yes.

10 Q Okay. And that was regardless of what the  
11 photograph showed, correct?

12 A Yes.

13 Q All right. And it would be incorrect to  
14 state that you only referenced in your report  
15 photographs that, or that you cherry-picked  
16 photographs, correct?

17 A It's the complete list of aerial photos that  
18 I obtained.

19 Q All right, thank you. Did you review the  
20 photographs that Dr. Garcia took on her site visit in  
21 2018 from the ground?

22 A Right. I reviewed ground photographs, but I  
23 don't remember who took them.

24 Q Okay. And I realize that might not have  
25 been a perfect surrogate for being on the ground, but

1 did those assist you in seeing what the conditions  
2 looked like on the ground?

3 A Yes.

4 Q All right.

5 A As a photo interpreter, we can rely on other  
6 peoples' information, ground information.

7 Q All right. And did anything in those  
8 photographs make you question your opinions or  
9 conclusion you've reached in this case?

10 A No.

11 Q I want to just ask you briefly about AX-10,  
12 page 5. We've seen this a few times, and this will  
13 just take a second. This is a Pictometry image, sir,  
14 from April 4, 2009.

15 Mr. McAfee asked you if that dark signature  
16 here could be something different than water, and my  
17 question for you is, if that dark signature was not  
18 water, does that in any way change your ultimate  
19 opinions in this case?

20 A No.

21 Q Now, you talked a little bit about shadows  
22 and water, and I just want to be clear. Are there ways  
23 as a photo interpreter to tell, at least in some cases  
24 to tell the difference between what's a shadow and  
25 what's water?

1 A Yes.

2 Q Okay. Can you just describe that? We don't  
3 need to show a photo to do that, but can you just  
4 describe for us how you do that?

5 A Well, frequently the shadow is almost always  
6 black, and water can also be almost always black, but  
7 there are instances where the water with a color  
8 photograph for instance may not be black. It may be a  
9 greenish-brown color like, you know, somewhat like  
10 sediment-laden water, and you can distinguish that from  
11 shadow. That's one example.

12 There was a color infrared aerial photograph  
13 that I looked at where water that has some sediments in  
14 it appears to be more of a baby-blue color, and that --  
15 and the shadow will be black, and so you can  
16 distinguish water from shadow in that instance.

17 And then, also, if you see something that  
18 looks like patterns flowing across the land, that is  
19 more characteristic of water even though it's dark-  
20 toned, than shadow.

21 Q Okay. And sometimes can you look at a  
22 reference like a building and see where the shadow is  
23 pointed and be able to take that information to the  
24 tributary and tell whether something is a shadow or  
25 water?

1 A Yes. I factored in the sun angle, the time  
2 of day when I was concluding about the presence of  
3 water, and there are times when the sun angle is such  
4 that the shadow is casting clear across that tributary,  
5 and that would make it difficult for me to establish  
6 whether there is water in there.

7 There are other times when the shadows were  
8 pointing more in a northern direction, and I felt in  
9 that case, in those cases that the dark tone that I'm  
10 seeing, it may not be obscured by shadow; that that  
11 could be water.

12 Q Very good. Do you remember the photograph  
13 that Mr. McAfee showed you that was -- it was a --  
14 well, I'm just going to show it to you.

15 This is the black-and-white photograph from  
16 June 8, 2016, AX-10, page 22. Remember that one?

17 A Yes.

18 Q Could the white tones that we see around the  
19 confinement building footprint, could that be gravel  
20 too, or do you know?

21 A If it's reflecting -- if it's dry and it's  
22 bright, then it could be gravel, yes.

23 MR. BIERI: Okay. Just a moment. Nothing  
24 further, Mr. Stokely. Thank you for your time.

25 JUDGE BIRO: Any recross?

1 MR. McAFEE: I don't have anything further,  
2 Your Honor. Thank you.

3 JUDGE BIRO: Mr. Stokely, if you would just  
4 give me a minute, please.

5 THE WITNESS: Okay.

6 JUDGE BIRO: Mr. Stokely, you used the term  
7 "check dam". What's a check dam?

8 THE WITNESS: A check dam as I'm referring  
9 to it, it's a berm, you know.

10 JUDGE BIRO: I don't even understand that  
11 term.

12 THE WITNESS: Like a pile of soil across a  
13 swale or across a drainage-way. It could be gravel, it  
14 could be dirt, and it's a, you know, a linear pile or  
15 berm, if you will, across a drainage swale, and the  
16 purpose for them that I've seen in different places is  
17 to slow the water down that's coming down and slow it  
18 down and hold it and keep the velocity from getting too  
19 high so it erodes. That's the purpose, one of the  
20 purposes of a check dam.

21 JUDGE BIRO: Are they manmade or naturally  
22 made?

23 THE WITNESS: Manmade.

24 JUDGE BIRO: And if you want to slow down,  
25 what would be the purpose for building one of those on



1 farmland?  
 2 THE WITNESS: In this instance, I think I  
 3 would probably be speculating if I said why.  
 4 JUDGE BIRO: Just generally on farmland if  
 5 someone wanted to do that.  
 6 THE WITNESS: Well, so to slow the water  
 7 down, hold it back a little bit, reduce the velocity of  
 8 it so that it doesn't erode.  
 9 JUDGE BIRO: The farmland?  
 10 THE WITNESS: Yeah.  
 11 JUDGE BIRO: In a lot of these pictures,  
 12 they had a box labeled "farm containment area". On the  
 13 pictures, except for one, am I correct that that was  
 14 superimposed; that in fact the hog farm containment  
 15 area didn't exist in that location?  
 16 THE WITNESS: Historically. That's correct.  
 17 That was superimposed back onto the historical pictures  
 18 as I understand it.  
 19 JUDGE BIRO: Okay. And is that superimposed  
 20 by virtue of some program that you were able to use to  
 21 geographically locate it by latitude and longitude onto  
 22 all those other pictures?  
 23 THE WITNESS: I believe you're referring to  
 24 an exhibit from the region.  
 25 JUDGE BIRO: It was on all those photographs

1 you looked at.  
 2 THE WITNESS: Yes, yes. And I didn't create  
 3 that label that said "containment barn" or whatever the  
 4 words were. I did not create that. But I would be --  
 5 I'm guessing -- it is better than guessing -- that  
 6 exactly what you said is true. You can label something  
 7 in a mapping software and it retains its geographic  
 8 coordinates, so when you put an older image or  
 9 something underneath it, it will be -- the label will  
 10 be in the same place even though the -- even though the  
 11 object may not be there.  
 12 JUDGE BIRO: When you looked in your  
 13 software at those photographs, were those labels on it?  
 14 THE WITNESS: No.  
 15 JUDGE BIRO: There were a few questions  
 16 asked about a photograph where there seemed to be lines  
 17 running through the farmland. They appeared as sort of  
 18 dotted lines running either north to south or east to  
 19 west through the farmlands.  
 20 Can you give me an idea of what those would  
 21 be? Would they reflect water in the farmlands or --  
 22 THE WITNESS: Was that on the cross-  
 23 examination?  
 24 JUDGE BIRO: And I think you suggested they  
 25 were made by farm machinery.

1 THE WITNESS: Right.  
 2 JUDGE BIRO: But what was the farm machinery  
 3 doing that reflected, that created those exactly even  
 4 lines?  
 5 THE WITNESS: So, one of the explanations  
 6 would be that it was some sort of gang plow or plow  
 7 being pulled behind a tractor, and as it turns up the  
 8 soil and buries the thatch from the year before, it  
 9 creates a -- you know, sort of moist, wet soil  
 10 signature in behind the machine, which would create  
 11 these lines of tones that differ from the surrounding  
 12 area.  
 13 So, it could have been fresh soil that was  
 14 dug up by some sort of gang plow or -- you know, and  
 15 I've also seen it in other places, and I don't know if  
 16 these guys do it here, but they will spread manure over  
 17 their cornfields in patterns like that, and then that's  
 18 the manure you're seeing.  
 19 JUDGE BIRO: Okay. So, this dark would  
 20 reflect the moisture level.  
 21 THE WITNESS: Right, and the manure being  
 22 dark, you know, darker than the soil sometimes. But I  
 23 didn't really examine that to come to any type of  
 24 conclusion, but it's pretty clear that those are lines  
 25 made by machinery because you can even see where they

1 turn around at the tops of some of them.  
 2 JUDGE BIRO: Okay. Okay, I don't have any  
 3 further questions. Mr. Bieri, do you have any  
 4 questions?  
 5 MR. BIERI: None, Judge. Thank you.  
 6 JUDGE BIRO: Okay. Mr. McAfee?  
 7 MR. McAFEE: No, thank you, Your Honor.  
 8 JUDGE BIRO: Okay.  
 9 MR. McAFEE: Thank you.  
 10 JUDGE BIRO: Thank you, Mr. Stokely. You  
 11 may step down.  
 12 THE WITNESS: Yes. May I stay in the  
 13 courtroom?  
 14 JUDGE BIRO: It's up to your counsel.  
 15 THE WITNESS: Okay.  
 16 (Witness excused.)  
 17 JUDGE BIRO: Of course we can. We're going  
 18 to stand in recess for five minutes. Thank you.  
 19 MR. McAFEE: All right, thank you.  
 20 (Whereupon, a short recess was taken.)  
 21 JUDGE BIRO: Mr. Bieri, do you have another  
 22 witness you would like to call?  
 23 MR. BIERI: No other witnesses, Your Honor.  
 24 Plaintiffs rest.  
 25 JUDGE BIRO: Thank you.

1 MR. BIERI: And we may, if time permits  
2 today or tomorrow, we may want to do like a minute  
3 closing, but we would prefer to do that at the end of  
4 this.  
5 JUDGE BIRO: Okay.  
6 MR. BIERI: Thanks, Judge.  
7 JUDGE BIRO: Before we leave the hearing, I  
8 want to make sure we go over all the exhibits, that  
9 we're all on the same page of everything that's been  
10 admitted into the record so we know the whole universe  
11 of the documents that can be relied on.  
12 Okay, Mr. McAfee, would you like to call  
13 your first witness?  
14 MR. McAFEE: Yes, I would, Your Honor, and  
15 we call the Respondent, Scott Morrow.  
16 JUDGE BIRO: Good afternoon, Mr. Morrow.  
17 MR. MORROW: Good afternoon.  
18 THE NOTARY PUBLIC: Could you raise your  
19 right-hand, sir?  
20 Whereupon,  
21 SCOTT MORROW  
22 having been duly sworn, was called as a  
23 witness and was examined and testified as follows:  
24 THE COURT REPORTER: Can you spell and state  
25 your last name for the record?

1 THE WITNESS: Scott Morrow, M-O-R-R-O-W.  
2 THE COURT REPORTER: Thank you.  
3 JUDGE BIRO: Yes, please begin.  
4 MR. McAFEE: Okay.  
5 THE WITNESS: Pardon?  
6 JUDGE BIRO: I'm just talking to Mr. McAfee.  
7 Go ahead.  
8 MR. McAFEE: Just wanted to make sure  
9 everyone was ready.  
10 DIRECT EXAMINATION  
11 BY MR. McAFEE:  
12 Q Mr. Morrow, Scott, please would you give us  
13 your date of birth?  
14 A 8-7-1958.  
15 Q Okay. All right, I'm going to jump ahead  
16 and then come back. I have a habit of doing that.  
17 C&S Enterprises is the Respondent in this  
18 matter, correct?  
19 A That's correct.  
20 Q And I think I put an "s" on the end of it,  
21 but technically is it C&S Enterprise?  
22 A Yes.  
23 Q Who are members, it's an LLC, who are the  
24 members of C&S Enterprise?  
25 A My wife Carol and myself.

1 Q Okay. And your testimony today will be on  
2 behalf of C&S Enterprise, correct?  
3 A Correct.  
4 MR. McAFEE: I have to get out of cross-exam  
5 mode. Sorry, Your Honor. I'll try and be a little  
6 more open-ended in my questions.  
7 JUDGE BIRO: That's all right. These are  
8 preliminary questions. Go ahead.  
9 MR. McAFEE: All right, thank you.  
10 BY MR. McAFEE:  
11 Q Where did you go to school? Well, did you  
12 grow up in -- what area did you grow up in?  
13 A I grew up south of Victor, about 11 miles,  
14 in a little area on a farm.  
15 Q Okay. And what kind of farm?  
16 A Livestock, grain farm, poultry, we raised  
17 everything and made our own stuff, so.  
18 Q What did you do after high school at Victor?  
19 A I went into construction work for different  
20 employers, plus I helped my dad farm. In 1978, me and  
21 my wife got married -- and actually had a farm of my  
22 own at that time in the '70s, and I farmed with my dad  
23 up to 1986.  
24 Q Okay. And tell us a little bit about that  
25 farm.

1 A That farm there, we raised -- on my dad's  
2 farm, beef, confinement hogs, different livestock. On  
3 my farm, raised hogs, sold feeder pigs and market pigs,  
4 and then I grain-farmed also.  
5 Q About how many acres?  
6 A I farmed 150.  
7 Q And what crops did you raise?  
8 A Corn and beans.  
9 Q Have any hay?  
10 A Yup, we had hay occasionally after we had,  
11 we would have oats.  
12 Q Okay. What year did you graduate?  
13 A 1976.  
14 Q Okay. So, 1976 you graduated, did  
15 construction work if I understood you right, and then  
16 when you were farming, were you still doing  
17 construction work?  
18 A Yes, I've always did construction work when  
19 I was farming.  
20 Q At that time, what kind of construction  
21 work?  
22 A Concrete construction.  
23 Q Is that similar to what you in fact -- we'll  
24 get to that -- do today?  
25 A Yes.

1 Q And tell us about what kind of concrete  
2 construction work you do?  
3 A House foundations, footings, basements, the  
4 concrete portion of them, driveways, sidewalks,  
5 foundations for buildings.  
6 Q Okay. All right. So, we go '78 to '86, you  
7 farm with your dad, and then what in '86?  
8 A Back up a little bit. October 1st of 1983,  
9 I went out on my own in the construction world, and  
10 from then to even present day, I am a concrete  
11 contractor.  
12 Q Does C&S Enterprise do construction work?  
13 A No.  
14 Q Or is that a different company?  
15 A That's a different company.  
16 Q What's the name of that company?  
17 A Morrow Construction Company.  
18 Q Was that the name of the company when you  
19 started it in '83?  
20 A Yes.  
21 Q Okay. So, anything else before we get into  
22 what you did come 1986?  
23 A Not previous, no.  
24 Q All right. So, you quit farming in 1986?  
25 A In 1986, yes.

1 Q And then what did you do?  
2 A Did construction work full time until 2006  
3 and had the opportunity also to get back into the  
4 farming aspect and elected to do so.  
5 Q All right. So, that's a period, according  
6 to my math, of 20 years where you weren't actively  
7 farming, is that right?  
8 A That's correct.  
9 Q Were you helping anyone farm or --  
10 A No.  
11 Q Did your father farm at the time?  
12 A Yes.  
13 Q Okay. What changed that you wanted to get  
14 back into farming?  
15 A Time had healed, I guess, from the '80s, the  
16 recession time. I've always had the love to farm, but  
17 just had a bitter taste in my mouth, I guess, because  
18 of the '80s recession that -- about lost my shirt.  
19 Q Okay. In 2006, what did you do then as you  
20 got back into farming?  
21 A We had purchased a farm -- not C&S, another  
22 -- me and my wife and another guy and his wife had a  
23 chance to purchase a farm, so we did so.  
24 Q Maybe I should ask, when was C&S Enterprise  
25 formed? Do you remember?

1 A 1984.  
2 Q Okay.  
3 A Or '94. Excuse me. 1994.  
4 Q Okay. We'll come back to that maybe, but go  
5 ahead. You started farming again in 2006.  
6 A Yes, and then C&S purchased a farm in the  
7 fall also of 2006, another property, and got back into  
8 the farming aspect.  
9 Q We'll, of course, go through this in more  
10 detail, but what year did you, or did you buy the farm  
11 that we've been talking about for the last day and a  
12 half?  
13 A We took possession in March 1st of 2008.  
14 Q Before I move on from your background into  
15 more the details of this case, when you were growing  
16 up, did you have any interaction, I'll call it, or  
17 relationship -- I don't know if those are the right  
18 words -- with the farm that we've been -- again, I'll  
19 call it -- as we've been talking about for the last day  
20 and a half?  
21 A Yes, I did. Back in the mid-60s, my dad  
22 rented this farm for a couple years. This farm also  
23 adjoins my parents' farm. So, it was something that I  
24 was familiar with pretty much all my life, and from  
25 about 1974, it is a farm that -- I'm an avid hunter and

1 I hunted this farm every year.  
2 Q And by "avid hunter," what are you -- what  
3 do you hunt?  
4 A Deer, pheasants, squirrels, rabbits.  
5 Q And for those who aren't hunters, that  
6 involves walking?  
7 A Yes.  
8 Q Over the entire farm?  
9 A Farm, yes.  
10 Q Okay. So, while you were growing up, in  
11 addition to your dad farming for a couple of years, and  
12 how old were you then? Do you remember?  
13 A I would have been probably eight or nine.  
14 Q Okay. So, did you help him on this farm?  
15 Do you remember?  
16 A I'm sure I did. I can't remember  
17 specifically back to eight or nine years old what I did  
18 day to day.  
19 Q And that was in the '60s?  
20 A Yes.  
21 Q So, if I were to ask you did you ever see  
22 water in the -- okay, okay. If I were to ask you if  
23 you did, did you ever see water in the tributary here  
24 when you were eight or nine years old, what would your  
25 answer be?

1 A I can't answer that because I don't  
 2 recollect what I did day to day. It wasn't important  
 3 what I did day to day at eight, nine years old.  
 4 Q That was more tongue-in-cheek than anything.  
 5 I imagine an eight or nine-year old, you weren't paying  
 6 too close attention to --  
 7 A No.  
 8 Q But on a more serious note, when you hunted  
 9 this area over the years, as you've indicated, do you  
 10 have -- do you have any recollection of what we've been  
 11 talking about, and we'll go through this in more detail  
 12 maybe -- but do you have any recollection of the  
 13 condition of this tributary?  
 14 A Yes.  
 15 Q And tell us that.  
 16 A There would be water in it at times, not all  
 17 the time. In places, like I said, I would not call it  
 18 a bank or bed. You could walk through it, but other  
 19 than that, I mean, it was very neglected.  
 20 Q And who owned the farm at that time?  
 21 A Leonard Sims (phonetic) owned the farm.  
 22 Q Okay. And was he farming it himself?  
 23 A No, he rented it out.  
 24 Q Do you know who rented it? And I know I'm  
 25 talking about a span of years.

1 A Yeah. A neighbor back in the '70s, Bill  
 2 Kuesel (phonetic), and then his sons rented it from  
 3 then up to the time I bought it.  
 4 Q When you bought it in 2008.  
 5 A That's correct.  
 6 Q As a boy or even now, did you or anyone ever  
 7 fish in Deep Creek?  
 8 A No.  
 9 Q Have you ever seen anyone fishing there?  
 10 A No.  
 11 Q Does anyone trap it or trap -- you know,  
 12 trap for raccoons, et cetera?  
 13 A No.  
 14 Q I mean, if you know.  
 15 A Yeah. No, not to this day. Maybe years  
 16 ago, but we don't have really many people that do that  
 17 in our area.  
 18 Q Okay. All right. What interested you in  
 19 purchasing this farm in 2008?  
 20 A As I grew up, I had two to three farms that  
 21 -- I always knew some day I'd like to own a farm again.  
 22 From a young boyhood age even, this was one of the two  
 23 or three farms that I had interest in purchasing if I  
 24 was able to, and the timing was right. It came up for  
 25 sale. It was on the market for 18 months and I bought

1 it. It also adjoins my dad and mom's farm to the east,  
 2 so we could tie them together.  
 3 Q Are your parents still living?  
 4 A My mom is. My dad passed away two years ago  
 5 in February.  
 6 Q But the farm is still --  
 7 A Yes.  
 8 Q Does your mom still own that farm?  
 9 A Yes.  
 10 Q Okay. When it came up for sale, I think you  
 11 said you bought it from an estate. Mr. Sims had passed  
 12 away?  
 13 A Yeah, I bought it, purchased it from Leonard  
 14 Sims' estate.  
 15 Q Okay. Tell us what you did when you bought  
 16 it. I think you had just testified it was run-down.  
 17 First of all, what do you mean by run-down?  
 18 A They didn't do a whole lot of maintenance on  
 19 it. The landlord would not spend any money to maintain  
 20 this farm. The tenants that took care of it didn't  
 21 take care of it. If a tree fell down in a field that  
 22 was planted, they combined around it and the next year  
 23 they planted around it, and that continued.  
 24 So, after I bought it and got possession  
 25 March 1st of 2008, with approval of the NRCS, which I

1 worked with quite often, we did a lot of clearing of  
 2 scrub brush, trees, took out some fencerows and just  
 3 then cleaned the place up.  
 4 Q And you say "we". Who is that?  
 5 A C&S Enterprise.  
 6 Q Okay, but did you have help or --  
 7 A I have -- at that point -- I have two sons  
 8 so I would ask them to help me as much as I could and  
 9 then I hired a construction company or excavating  
 10 company to come in and help clean -- clean up the  
 11 trees.  
 12 Q Now, to farm people, cleaning up a farm  
 13 means something to, I'll say us, but explain a little  
 14 more about what you mean by cleaning up a farm.  
 15 A Two different things. Along all the fence-  
 16 rows from where the fence runs, trees are growing in  
 17 the fencerows. The trees were falling over out in the  
 18 fields. They were canopied over out into the fields to  
 19 the point of taking up valuable farm ground where by  
 20 just trimming the trees, you could gain 20 to 24 rows  
 21 of additional grain.  
 22 Other places we would -- we would clean up  
 23 areas where scrub brush had been growing out in the  
 24 middle of -- in the middle of a field. Also, it might  
 25 have a lot of little fields and to no avail I had -- I

1 had no livestock, so we would remove the fence, the  
 2 fencepost, and then remove the trees, and the fence-  
 3 rows to kind of open it up into bigger fields.  
 4 Q I'd like to show you what's been marked as  
 5 AX-10, page 4. Can you see it there in your monitor?  
 6 A Yes.  
 7 Q Now, as has been pointed out, there is some  
 8 text boxes or superimposed boxes here that aren't  
 9 really part of the photo, but are you talking about  
 10 like -- well, I think you can point -- you haven't  
 11 done this yet but I think you can point to it on that  
 12 monitor to show like taking out trees, what you're  
 13 talking about?  
 14 A Okay. For instance -- can I touch it?  
 15 Q Yes.  
 16 JUDGE BIRO: Yes.  
 17 BY MR. McAFEE:  
 18 Q Yes, you can touch it.  
 19 A Okay. This area like right here is a fence-  
 20 row that comes over, this right -- not that one, that  
 21 one is Deep Creek. But at that time, there was a  
 22 fencerow that come across there. There was another one  
 23 that come down here and across that we cleaned up.  
 24 Q Do you recall -- and again, it's been  
 25 discussed a lot, but the trees that are in the

1 tributary there, was that a fencerow too at any time  
 2 that you remember?  
 3 A There was a fencerow that was down here that  
 4 kind of come down like that.  
 5 Q Okay. And that was at the time you bought  
 6 it?  
 7 A Yes.  
 8 Q Okay.  
 9 A It was not a fencerow that would probably  
 10 hold anything in it, but portions of that old fence was  
 11 still there.  
 12 Q And maybe just for a little bit of  
 13 explanation -- it might not be central to the issues in  
 14 this case, but maybe you can explain why in the past  
 15 farms had more fences on them.  
 16 A They would have -- they might milk cows,  
 17 they may have what they call stock cow herds that  
 18 raised beef. They had some calves, some hogs, horses,  
 19 and they had smaller fields to move them around to  
 20 pasture them and to keep them out of their grain --  
 21 fields that they grained.  
 22 Q So, maybe one year, one field would be  
 23 pasture and the next year, or a couple years later a  
 24 different field would be pasture, and then they would  
 25 plant corn in the previous field.

1 A Yes.  
 2 Q Anyway, I don't mean to -- I just wanted to  
 3 explain or have you explain why we would see fields and  
 4 fencerows where maybe we don't today.  
 5 Also, while we have this photo up, up where  
 6 the -- where that yellow box is superimposed, what was  
 7 there when you bought it, the farm?  
 8 A Up by the curve, by the road there?  
 9 Q Well, over here where it says "confinement  
 10 building --  
 11 A Oh, up there. That is -- that's the old  
 12 homestead building site right there. When I bought it,  
 13 there was an old wire corncrib, a couple old concrete  
 14 foundations, dilapidated. There was a pole barn there.  
 15 Q Was there a house?  
 16 A No, the house had been removed previous to  
 17 my buying it.  
 18 Q And I think the question may have come up  
 19 also -- while we're on this subject. Across the road  
 20 just to the northwest is another farmstead, right?  
 21 A That is correct.  
 22 Q And that isn't associated with your place,  
 23 is it?  
 24 A No.  
 25 Q And is there a house there currently?

1 A No, there is not.  
 2 Q Has there been for since you can remember?  
 3 A No.  
 4 Q All right. Okay, so anything else you did  
 5 to clean up the farm at the time you bought it?  
 6 A No, just basically clean up trees and fence-  
 7 rows.  
 8 MR. McAFEE: Okay. Now, I'm not sure, how  
 9 does he erase that?  
 10 (Pause.)  
 11 BY MR. McAFEE:  
 12 Q You mentioned NRCS.  
 13 A Um-hmm.  
 14 Q Tell us about your involvement, discussions  
 15 working with, however you want to say it, with NRCS.  
 16 Start with when you bought the farm.  
 17 A I was in the NRCS and FSA office quite often  
 18 checking with them what I could do, seeing what  
 19 programs were available, and when I would go into one  
 20 of them, they're in the same building in Williamsburg,  
 21 Iowa, or Iowa County, they were in the same building.  
 22 So when I would stop at one, I would always stop at the  
 23 other one. But I worked with them a lot from when I  
 24 bought the farm going forward with other projects on  
 25 the farm.

1 Q Had you had -- let's see, you started  
2 farming again in 2006.

3 A Um-hmm.

4 Q Had you had interaction with NRCS between  
5 then and when you bought this farm on your other farms?

6 A Yes.

7 Q And what about back -- let's see. You  
8 farmed from '78 to '86. Was NRCS in existence then?

9 A Yes, they were but they weren't -- the  
10 programs weren't as available as they are today, I  
11 guess.

12 Q Okay. Now, you've mentioned FSA -- and I  
13 believe you said FSA, correct?

14 A Um-hmm.

15 Q And NRCS. Maybe just briefly explain what  
16 you understand to be the difference.

17 A NRCS, it is Natural Resources Conservation  
18 Service. The FSA is Farm Service Agency. The FSA,  
19 that's where we -- we work with what we plant every  
20 year because we have to certify our crop, sign up for  
21 programs, government programs there.

22 NRCS, they kind of handle the actual land  
23 part of agriculture along with FSA, because there has  
24 been times where I've went in to do a sod-bust, and I  
25 have to start that paperwork on the FSA side, and then

1 it would go to the NRCS, and it might come back to the  
2 FSA to get the approval.

3 Q Can you tell us what a sod-bust is?

4 A It is -- if you tear up to farm, something  
5 that's been grassed for a long period of time or if you  
6 tear out a fence -- the strip between two fields,  
7 believe it or not, that is a grass area, and you have  
8 to have the approval to farm that 10, 15, 20 foot, and  
9 they call that a sod-bust.

10 Q Okay. And have you gotten approval from  
11 NRCS to do that?

12 A Oh, yes, many times.

13 Q Who did you work with or correspond with at  
14 NRCS at the time you bought this farm?

15 A In the office, it would be Steven Johnson  
16 (phonetic) was the head person in the NRCS.

17 Q Do you know his title?

18 A Director maybe. I don't know.

19 Q Okay. Is he still there?

20 A No, he's not. He's retired.

21 Q Okay. Who else at that office have you  
22 worked with?

23 A I also worked with numerous field agents in  
24 that office. One in particular is a Regina Leer  
25 (phonetic) that I had worked with, and there are some

1 other ones also that I -- I don't remember their name.  
2 I worked with Regina a lot.

3 Q And I guess the reason I'm asking you those  
4 questions is the -- we're going to talk about the issue  
5 here in this case of the tiling and other work you did,  
6 and those names, I assume, will come up. But had you  
7 worked with them before this work in 2015 that's at  
8 issue in this case?

9 A Yes.

10 Q Okay. I think you've testified to, what,  
11 clearing brush, is that right?

12 A Yes.

13 Q Okay. Did you also at some point do some  
14 tiling work?

15 A Yes. Through working with the NRCS in  
16 November of 2009, we did some tiling in the area of  
17 what is south of the hog building across what we're  
18 calling it that unnamed tributary, up along that, and  
19 south on that hill. Those little --

20 Q If I can ask you.

21 A Okay.

22 Q Had you done any tiling on this farm before  
23 that?

24 A Yes. The fall before, we did tiling on the  
25 other side of Deep Creek.

1 Q And by -- well, a couple of questions here,  
2 make sure we understand what we mean by tiling.

3 A You place a tile, a tile with slots in it,  
4 it's a plastic tile. You place that tile anywhere from  
5 three to five-foot deep to drain, help drain the soils.  
6 It also adds a great -- enormous benefit to the crop  
7 and its growing. The other thing it does is it -- it  
8 dries out areas so that when it does rain, the soil is  
9 dry. A tile kind of works like a sponge. It absorbs  
10 it and then releases it, where wet soils stay wet, when  
11 it rains and you get your big rains, wet soils move  
12 easier.

13 So, we do this to -- I do this -- I consider  
14 myself a steward of my farm. I value the topsoils. I  
15 value my whole farm. So, I try to protect and keep  
16 what I have there because you can -- you can't make  
17 more of it or replace it. But you put that tile three  
18 to five-foot deep, depending on where you're at, to  
19 drain the soils.

20 Q First of all, do you do the tiling work  
21 yourself?

22 A I don't do it myself. I have helped do it  
23 before.

24 Q And on this farm, who did the tiling work  
25 that --

1 A Seaton (phonetic), Seaton Construction.  
 2 Q And do you know him pretty well?  
 3 A Yes.  
 4 Q Okay. So, you don't do that at least with  
 5 your own equipment.  
 6 A No.  
 7 Q Do you have any -- let me back up. Does  
 8 your construction business do what I'd call dirt work?  
 9 A No. The only dirt work we do is for ourself  
 10 of maybe rough backfilling a basement.  
 11 Q Related to your concrete work?  
 12 A Yes.  
 13 Q Do you have any equipment that you use on  
 14 your farm to do any of this work we've talked about?  
 15 A Yes. I mean, I use my skid-loader to do  
 16 what I can do to keep the cost as low as I can to  
 17 maintain it.  
 18 Q Okay, back to the tiling. I think you said  
 19 before this work we're going to talk about in 2009, you  
 20 tiled some other areas of the farm. Did you contact  
 21 NRCS first?  
 22 A Yes.  
 23 Q And tell me about that.  
 24 A Anytime we did, we'd go in and contact NRCS,  
 25 get the approval of what we're doing. So, I went in

1 and contacted them. A lot of what we did, too, if the  
 2 project started out smaller, we had the availability of  
 3 contacting them and they may send out a field agent to  
 4 okay something else out in the field.  
 5 Q And you've done that?  
 6 A Yes.  
 7 Q On this farm?  
 8 A Yes.  
 9 Q Okay. Fall of 2009, you said you decided to  
 10 do some tiling, and I'd like to show you what's been  
 11 marked as AX-10, Agency Exhibit 10, page 7.  
 12 Okay. I think you're going to be able to  
 13 solve a mystery for us. Could you tell us what you see  
 14 on Agency Exhibit 10, page 7?  
 15 A Are you talking about those little lines  
 16 that go all over?  
 17 Q Yes.  
 18 A Those are actually what you call pattern-  
 19 tiling a field. Those are the actual tile lines that  
 20 were installed.  
 21 Q Okay. And let's talk about this a minute.  
 22 First of all, the date on this aerial photo is March  
 23 14, 2010.  
 24 A Um-hmm.  
 25 Q Now, this tiling was done the fall before,

1 correct?  
 2 A That's correct.  
 3 Q Tell us specifically how the tile is placed  
 4 in the ground and what would make those lines we see.  
 5 A There's different methods to put tile in the  
 6 ground. We use a tile plow, which has a big knife on  
 7 it, the tile comes in the top and inserts the tile at  
 8 a certain level that you want to put it in at.  
 9 It's pulled with -- this one here is pulled  
 10 with a bulldozer, and that's what we do to put the tile  
 11 in the ground. It knifes it in, kind of lifts the soil  
 12 up and sets it in a bed down below into a V, and then  
 13 it just follows along and buries the tile.  
 14 Q And as Mr. Stokely noted, I don't know -- he  
 15 noted that these lines appear to be made by a machine  
 16 that has disturbed the soil. So, that would be  
 17 correct, right?  
 18 A Yes.  
 19 Q But that machine here is the tile plow and  
 20 the reason there are lines there like that is -- where,  
 21 every line, there is there's a tile underneath it.  
 22 A That is correct.  
 23 Q And in fact, do many people that -- farmers  
 24 you know use a photo like this as their tile map?  
 25 A Yes.

1 Q Okay. Now, these tiles, you use the term  
 2 "pattern tile". What do you mean by that?  
 3 A If you notice, the tile are put in in a  
 4 sequence pattern parallel to each other, spaced apart  
 5 evenly. It's called pattern tile. Otherwise you would  
 6 see lines going kind of all over in certain places.  
 7 Q And are these tile put everywhere or do you  
 8 put them in areas where you only need them? Explain  
 9 that.  
 10 A In this day and age, a lot of people are  
 11 putting them everywhere because one thing it does do,  
 12 it adds a great value to your farm. The productivity  
 13 level is much higher. The erodability is lower. Farm  
 14 auctions that I have went to that have had pattern-  
 15 tiling are much more valuable than ones that aren't.  
 16 Q Okay. Now, these tile have to release  
 17 somewhere, right, or outlet?  
 18 A That is correct.  
 19 Q And can you show us on this?  
 20 A Let me think. There are four -- three  
 21 different outlets. One is down in this area by the box  
 22 there for the hill. The one that goes up the southwest  
 23 side of the unnamed tributary outlet is right there.  
 24 The one on the other side that goes up along the  
 25 tributary and those -- the tile lines that come off of

1 it, an outlet right there. And then there is another  
 2 one, I believe, somewhere up in this area.  
 3 Q Okay. And there you marked up -- and maybe  
 4 we'll -- we'll decide. We might want to mark this  
 5 exhibit. I have a few more questions, so.  
 6 First of all, by outlet we mean --  
 7 JUDGE BIRO: Wait, wait. Wait, Mr. McAfee.  
 8 MR. McAFEE: Oh, I'm sorry.  
 9 JUDGE BIRO: Before we leave, we've got to  
 10 say the record reflects that they --  
 11 MR. McAFEE: Okay.  
 12 JUDGE BIRO: That the witness has imposed on  
 13 the Exhibit AX-10, page 7, four dots indicating four  
 14 outlet points. One directly on the termed "Deep Creek"  
 15 on the east side of the photograph. And another one on  
 16 the south termed "Deep Creek".  
 17 MR. McAFEE: Whoops, sorry. My mistake, I  
 18 didn't mean to do that.  
 19 JUDGE BIRO: One more or less on where it  
 20 says "approximate point of the impacted stream  
 21 segment", and then one in the lower right corner of the  
 22 reference box, adjacent to the lower right corner of  
 23 the reference box.  
 24 Am I correct, Mr. Morrow?  
 25 THE WITNESS: Yes.

1 JUDGE BIRO: Okay. Go on.  
 2 MR. McAFEE: Thank you, Your Honor. I  
 3 apologize for that. What I think we'll have him do is  
 4 do what we've -- I'll have him mark on this exhibit  
 5 here, actually put a mark on there, would that be okay?  
 6 JUDGE BIRO: Fine. He can come stand with  
 7 you. If you would like to do that, that's fine.  
 8 MR. McAFEE: Yes, I appreciate that.  
 9 BY MR. McAFEE:  
 10 Q Let me, and first of all, when I moved it  
 11 just now, did I change it much?  
 12 A No.  
 13 Q Okay. I apologize for that.  
 14 That was in 2009.  
 15 A Correct.  
 16 Q Are those tile outlets still in those  
 17 locations?  
 18 A Two of them may not be. The two off the  
 19 unnamed tributary.  
 20 Q And when did those change?  
 21 A In 2015.  
 22 Q When you did the tiling --  
 23 A Yeah.  
 24 Q -- that we'll be talking about.  
 25 A Correct.

1 Q Okay. While we're on this, if you see, it  
 2 appears there is two lines that go right alongside the  
 3 tributary on each side. Is that right?  
 4 A That's correct.  
 5 Q Okay. Tell me about your work with NRCS on  
 6 those and other tile lines.  
 7 A Those two tile lines, we were doing the  
 8 other pattern-tiling. We did -- this whole project was  
 9 not totally approved. They come out and approved some  
 10 more out in the field. These two lines were part of  
 11 that approval out in the field; as a matter of fact,  
 12 recommended by the field agent.  
 13 The one on the southwest side was  
 14 recommended to put in there for future use. I had  
 15 applied for Equip cost/share project with the NRCS, and  
 16 she said put those -- that in there for future use and  
 17 at that same time, we had talked about -- I asked a  
 18 question about this so-called unnamed tributary. We  
 19 discussed, and I said, is this area able to be closed  
 20 and put what we call basins or terraces in to make it  
 21 more manageable. And she said yes, it would be. Just  
 22 make sure that you have enough capacity to handle the  
 23 water to transfer it from top to bottom.  
 24 So, we did that one. The same way with the  
 25 one on the other side, was for future use.

1 MR. MUEHLBERGER: Objection, Your Honor.  
 2 Respondent has listed as a witness Regina Leer to whom  
 3 I think he is referring to right now in this  
 4 conversation where she's allegedly giving permission  
 5 for him to do this tiling work. They did not call Ms.  
 6 Leer as a witness, so Complainant has no opportunity to  
 7 cross-examine this conversation or anything that Ms.  
 8 Leer might have said in approving this project.  
 9 JUDGE BIRO: Yes.  
 10 MR. BIERI: And, Your Honor, just to add to  
 11 that. She was on their witness list up until the time  
 12 we learned yesterday when Mr. McAfee said, oh, we're  
 13 not going to call Ms. Leer. And so we had no  
 14 opportunity to call her ourselves. We had this  
 15 situation with Bert Noll,(phonetic) and we told the  
 16 other side, hey, we don't plan to call him. They said,  
 17 oh, we'd like to question him. It's like, okay, we'll  
 18 go ahead and call him.  
 19 So, I think this is going to get into an  
 20 area that we should have been able to cross her on, and  
 21 I understand hearsay rules over the last year, but I  
 22 really just want to make it known it would have  
 23 been -- I don't know when they found out that she  
 24 wasn't going to be called, but it would have been nice  
 25 to know before the eve of the hearing, especially if



1 Mr. Morrow is going to say the whole reason I did this  
2 is because a person that was on my witness list told me  
3 to, and, oh, by the way, we're not going to call her.

4 JUDGE BIRO: Okay. So, hearsay is  
5 admissible, so I'm going to overrule your objection,  
6 but I'll give you the opportunity to request a subpoena  
7 and we could subpoena her to appear.

8 MR. BIERI: Okay.

9 JUDGE BIRO: And if we can get her here  
10 while we're here this week, you know, we'll have her  
11 testify, and if not, we will either come back or do her  
12 testimony by video-conferencing if you feel the need to  
13 call her when we're done.

14 MR. BIERI: Okay, thank you.

15 MR. McAFEE: Your Honor, all I would add,  
16 and I wanted to check my -- the prehearing conference  
17 notes of Mr. Barnwells (phonetic), but I believe I  
18 indicated at that time that I didn't plan to call Ms.  
19 Leer or Mr. Seaton, but I need to check those notes  
20 just so I -- I don't believe I sprung this on him at  
21 the last minute.

22 JUDGE BIRO: Okay. Well, we'll check too.

23 MR. McAFEE: Yeah.

24 JUDGE BIRO: And we can revisit the issue if  
25 that turns out to be the case.

1 MR. McAFEE: Right. All right. Thank you.

2 JUDGE BIRO: Go ahead.

3 BY MR. McAFEE:

4 Q Okay, Mr. Morrow -- well, maybe we had  
5 better, if you would come back here with me, and let's  
6 mark this exhibit so we have those tile line outlets  
7 marked.

8 Okay, we're on the record here. Mr. Morrow,  
9 if you could place the -- similar to where you put them  
10 on the overhead up there, if you could mark them and  
11 make round dots with that pen, we'll see if it shows up  
12 okay.

13 (Pause.)

14 Okay, I better get a Sharpie and make them a  
15 little darker. I'm going to move this so I can check  
16 the back side. I don't think it will bleed through.  
17 Just a minute.

18 (Pause.)

19 Okay, Scott, maybe if you could -- you know  
20 where you just made a -- make a dot with that Sharpie.

21 MR. MUEHLBERGER: It's going to bleed  
22 through on that white thing, so --

23 MR. McAFEE: Okay.

24 MR. MUEHLBERGER: You can have the back.

25 MR. McAFEE: Here, we'll let him do it here.

1 MR. MUEHLBERGER: Okay.

2 BY MR. McAFEE:

3 Q Okay, and then maybe we should take this pen  
4 and draw a circle around each one of those, if you  
5 would.

6 And for purposes of the record could you, or  
7 I can do it for you, if we could write at the bottom  
8 here, and then I'll put it back up on the screen, "2009  
9 Tile Outlets". Would that be accurate?

10 A Yes.

11 Q Okay, those green dots are still there, so I  
12 hit "clear", I believe.

13 A Sure.

14 Q Did that get rid of them? All right. I'll  
15 let everybody take a look at that. I think you can go  
16 back to the stand, Scott.

17 MR. McAFEE: Let's see, to mark this as an  
18 exhibit, Your Honor, I think we are -- our last one was  
19 RX-5.

20 JUDGE BIRO: I don't know that we admitted  
21 any Respondent's exhibits up to now, but what have we  
22 numbered them as?

23 MR. McAFEE: Okay, Your Honor. We had  
24 stipulated to all of the Respondent's exhibits,  
25 correct?

1 JUDGE BIRO: Okay.

2 MR. MUEHLBERGER: That's right.

3 JUDGE BIRO: Okay, and how many were there?

4 MR. McAFEE: Five.

5 JUDGE BIRO: RX-1 to 5 is admitted in the  
6 record, and I think we -- that one in addition to the  
7 Agency's Exhibits 1 through 32.

8 MR. McAFEE: Correct.

9 JUDGE BIRO: Is that correct?

10 MR. MUEHLBERGER: That's correct.

11 JUDGE BIRO: Okay. Okay, those are all  
12 admitted.

13 (The documents referred to  
14 were marked for  
15 identification as  
16 Respondent's Exhibit RX-1  
17 through 5 and were received  
18 in evidence.)

19 JUDGE BIRO: Okay, so this would be  
20 Respondent's Exhibit 6?

21 MR. McAFEE: Yes.

22 JUDGE BIRO: Okay.

23 MR. McAFEE: I'll mark RX-6 on it.

24 JUDGE BIRO: And would you like to move that  
25 into evidence or are you going to continue working with

1 it first?

2 MR. McAFEE: I'm sorry, Your Honor?

3 JUDGE BIRO: Would you like to move that

4 into evidence now?

5 MR. McAFEE: Yes, I would. Yes.

6 JUDGE BIRO: Okay.

7 MR. McAFEE: I move to admit RX-6.

8 MR. MUEHLBERGER: No objection.

9 JUDGE BIRO: Okay, RX-6 is admitted into the

10 record.

11 (The document referred to was

12 marked for identification as

13 Respondent's Exhibit No. RX-6

14 and was received in

15 evidence.)

16 JUDGE BIRO: And just to go back to the

17 point we were making about the testimony, my staff

18 attorney in the interim has checked his notes, and in

19 fact Mr. McAfee was correct in his recollection. He

20 did indicate in the prehearing conference that he may

21 not call Ms. --

22 MR. McAFEE: Leer.

23 JUDGE BIRO: -- Leer as a witness, which

24 gave you a time to subpoena her if you wanted or list

25 her. You didn't do it.

1 MR. MUEHLBERGER: Your Honor, Mr. McAfee was

2 not clear during the prehearing conference as to which

3 witnesses. He said he may not call some witnesses, but

4 I don't --

5 JUDGE BIRO: Yes, he listed two he said he

6 was going to not call, may not call.

7 MR. BIERI: And listed them by name?

8 JUDGE BIRO: Yes.

9 MR. BIERI: And then was his response "I'll

10 let you know" or it's just "I may not call these

11 witnesses"? That was my recollection.

12 JUDGE BIRO: The notes we have, he indicated

13 he may not call these specific witnesses, including Ms.

14 Leer.

15 MR. MUEHLBERGER: So, Your Honor, I guess

16 the point is if someone says they may not call someone,

17 that wouldn't really prompt us to try to subpoena that

18 individual if it's a may or may-not appear. I just

19 want to make that clear for the record.

20 JUDGE BIRO: I understand that's how you may

21 view it, but that would give you an indication that he

22 might not call them, and then if you really wanted to

23 have them there, you needed to subpoena them.

24 MR. MUEHLBERGER: Understood.

25 JUDGE BIRO: If only as a backup measure.

1 MR. BIERI: Okay, thank you.

2 JUDGE BIRO: So, we're going to move on.

3 MR. BIERI: Sorry, I didn't mean to

4 misrepresent that conversation. That was different.

5 JUDGE BIRO: No problem. Okay, Mr. McAfee.

6 BY MR. McAFEE:

7 Q Okay. Mr. Morrow, after the tiling in the

8 fall of 2009, what -- I hate to just say what did you

9 do next, but did you do any further work in the farm

10 after that prior to the 2015 work?

11 A Yes. We did some tiling up to the -- clear

12 to the east part of the farm at a later date. We did

13 some clear -- tree-clearing straight south of this. I

14 believe it was in 2011. But, yes, we did other

15 projects.

16 Q Prior, and we'll get into your 2015 work and

17 what led up to it here in a minute, but did you -- I

18 guess we can use AX-10 while it's up there, and you've

19 marked the tile outlets. At any time prior to placing

20 the tile in that drainage-way in 2015, did you do any

21 work on that area at all?

22 A Yes. In the lower, where the crossing is,

23 from there upward probably 20-30 feet, and downward

24 from there, I did some reshaping, reshaping to --

25 maintenance of waterway on it a couple of different

1 times with the approval of the NRCS.

2 Q By approval, do you mean you asked them

3 ahead of time?

4 A Yes. The first time would have been, I'm

5 going to say in the spring of 2010, we shaped below it

6 a ways right before -- around planting time, threw some

7 seed on it. Did I make it very far down? No, but

8 that's the only times that I did some work on it.

9 Q And we're talking about the area, if we look

10 at AX-10, page 7, the area that would be below what's

11 been referred to as a crossing?

12 A Yes.

13 Q But not that entire area.

14 A No.

15 Q You did some shaping. Explain what you mean

16 by shaping.

17 A With the skid-loader, like we do on a

18 waterway, reshape it so the water drains into it from

19 the existing fields, can get into that area to drain it

20 and carry it on to Deep Creek.

21 Q Do you remember, did you do that work

22 yourself?

23 A Yes.

24 Q You actually ran the skid-loader and did it.

25 A Yes.

1 Q And do you remember was there water present  
2 when you did that work?

3 A The one time there was minimally. The one  
4 time there was not.

5 Q When you say -- were those two times close  
6 to each other?

7 A No, they were probably 18 to 20 months  
8 apart.

9 Q Okay. Okay, let's talk now about your work  
10 that you did in 2015. Did your planning for that work  
11 or -- did it start sometime previous, or explain the  
12 process?

13 A The plan was already in place actually in  
14 2009, but, yes, the planning was before that because  
15 one of the tile that is within this project is made up  
16 of center coils that come in a big roll of tile. I had  
17 collected a bunch of these to help save on cost, and I  
18 would put two of them together and they would make a  
19 longer tile of about 22 foot, 6 inches.

20 Starting in like 2013, I started putting  
21 these together, and as I would get them put together, I  
22 would bring them over to this pole barn here and store  
23 them into there to get enough to reach that distance.

24 Q I guess I find the center coil thing, how  
25 important that is to the issue here. I mean, is it

1 you heard about her testimony about the size of the  
2 tile.

3 A I heard that she had testified that the tile  
4 were undersized for the area that they drained, and  
5 that's what I heard.

6 Q And what's your thought about that?

7 A I believe they're very adequate. As a  
8 matter of fact, they are oversized for the area that  
9 those pipes drain.

10 Now, on a big rain, I'm not sure we make a  
11 big enough pipe to handle that or area, and we have  
12 some big rains anymore. But I can say this. To my  
13 knowledge, water has only went over that berm two times  
14 since it has been installed.

15 Q Okay. So, when did you actually start on  
16 the work then for this -- I think the aeriels show,  
17 and let's look at AX-10, 21. Excuse me. That's not  
18 the one I was looking for.

19 Let's look at AX-10, page 17, and that's  
20 dated March 20, 2015, and that's the -- is that the  
21 year you did the work?

22 A Yes.

23 Q And I believe there's been -- has been some  
24 testimony from various witnesses that it appears the  
25 trees have been removed in the upper portions. Is that

1 something that a lot of people do or why do you do  
2 that?

3 A No, a lot of people don't use them because  
4 they are only 7 foot, 7 foot, 6 long, approximately.  
5 So, they would rather purchase 20-foot lengths or  
6 whatever because they can lay them faster. I took the  
7 time to collect them and put together my own lengths of  
8 pipe. I collected these from people and they didn't  
9 cost me anything.

10 Q And what did you do with those once you had  
11 them put together?

12 A I took them -- hauled them over and stored  
13 them in the -- there's an old shed on the site up there  
14 along BB Avenue (phonetic), and I stored them in there.

15 Q Okay. I believe you just mentioned this a  
16 minute ago, but tell me how you decided how big a tile  
17 to put in there.

18 A I contacted a pipe and tile company, and --  
19 Midwest Pipe, and told them the area that was above,  
20 above the farm where the inlet was going to be and the  
21 actual area within my farm, behind the watershed area,  
22 and we kind of discussed on what size of tile to use  
23 and I actually increased it from there.

24 Q I believe you were present, of course,  
25 during the testimony of Dr. Garcia, and tell me what

1 what you heard?

2 A Yes.

3 Q Okay. Tell us, did you do that?

4 A Yes, I did.

5 Q And when did you do that?

6 A In March of 2015. May have started in  
7 February of cutting.

8 Q Did you do anything else besides cutting  
9 them up?

10 A We cut -- we cut the trees up once they're  
11 on the ground for firewood. I removed most of the  
12 trees with my skid-loader.

13 Q Okay. Then when did you actually do the  
14 tiling?

15 A The placement of the tile was done in April  
16 of 2015.

17 Q And tell us how you did that.

18 A I hired an excavator, the operator came with  
19 it. When I say "an excavator," that's a big backhoe,  
20 and they dug an area to place the tile in for the  
21 project.

22 Q And did that excavator then have to go the  
23 full length?

24 A Yes.

25 Q There's been testimony about some small

1 dams, I think they've been called. Did you do that  
 2 work, too?  
 3 A Yes.  
 4 Q Okay. Now I'd like to turn to -- I'd like  
 5 to go to -- I'll put on the screen RX-4.  
 6 Okay, Mr. Morrow, I've put up Respondent's  
 7 Exhibit 4, page 1 of 2. This has been discussed before  
 8 in this hearing. But before we get to that, I want to  
 9 ask you before doing this work that you've just talked  
 10 about, did you contact NRCS for a wetlands  
 11 determination?  
 12 A Yes, I did.  
 13 Q When did you do that?  
 14 A In the spring, I believe it was, of 2011.  
 15 Q And how did you make that contact?  
 16 A I went into their office and requested  
 17 wetland determination of the whole farm.  
 18 Q What did you get in return?  
 19 A They had -- they came out. It took awhile.  
 20 They come out the following -- it was probably six-  
 21 eight months maybe, come out and did the actual, look  
 22 over the farm and they made a comment we had to go to  
 23 an area and do a field test, take the probe of the  
 24 soil, and as such, I was there present when they did  
 25 this.

1 So, we went and did that. They said it  
 2 would be a while before I got the information back.  
 3 The young man and young lady, they came out of the  
 4 Fairfield office. I can't tell you their name, but  
 5 hadn't heard anything from them for quite some time.  
 6 So, I waited and waited, and I received this here in  
 7 the mail.  
 8 Q Okay. And by this here, you're pointing to  
 9 RX-4, page 1 of 2?  
 10 A Yes.  
 11 Q Now, you've heard the testimony of Mr.  
 12 Carrington (phonetic) that of course this came from  
 13 Farm Service Agency and not NRCS. At the time, did you  
 14 realize the difference?  
 15 A I know there's a difference between FSA and  
 16 NRCS, but they work hand-in-hand. Because like I said,  
 17 to start a wetland determination, I've had to start it  
 18 on the FSA side and then they hand the paperwork over,  
 19 relay it over to the NRSC side.  
 20 Q And did you receive -- well, do you see the  
 21 date on this?  
 22 A Yes.  
 23 Q And what's the date?  
 24 A December 13, 2013.  
 25 Q Did you have this in your hands before you

1 did the work in 2015?  
 2 A Yes, I did.  
 3 Q And you were aware of this determination  
 4 then?  
 5 A Yes.  
 6 Q Okay. Now, you're also aware that Mr.  
 7 Carrington has testified about this, and you're also  
 8 aware, aren't you, that there was a final wetlands  
 9 determination that found there was a wetlands along the  
 10 full length of this tributary, right?  
 11 A That's correct.  
 12 Q When did you get that determination?  
 13 A After the project was done.  
 14 Q Now, you've also appealed that and you lost,  
 15 right?  
 16 A That's correct.  
 17 Q What else did you do before you started the  
 18 work that spring? Who else did you contact?  
 19 A Where the inlets of this project start  
 20 actually is not private property. It is actually  
 21 county. So, I contacted the county, the supervisor for  
 22 secondary roads of Iowa County because I did not want  
 23 to do something that I shouldn't do to hurt something.  
 24 So, I contacted him, told him what my plan was, that I  
 25 was going to put the two inlets there to catch that,

1 put the cage in front of it, and the stand-pipes, and  
 2 as such like that.  
 3 Q All right. Well, let's take a look at AX-  
 4 10, page 7, and I've got the one -- it has been marked  
 5 as RX-6, and I think we'll have you come back and mark  
 6 it, but maybe explain it there first. Where's the area  
 7 you're talking about? Then we'll have you mark it so  
 8 everybody has a record of it.  
 9 A The area of the inlets are where that little  
 10 green dot is in the upper left-hand corner.  
 11 Q And is it where the yellow text box that you  
 12 didn't place there, but it says "Approximate starting  
 13 point of impact in stream segment"?  
 14 A Yes.  
 15 Q Now, the road there curves, right, coming  
 16 from the north?  
 17 A Yes.  
 18 Q And is there a triangle-shaped piece of  
 19 property there on the southwest side of the road?  
 20 A Yes.  
 21 Q Is that the area you're talking about?  
 22 A Yes.  
 23 Q And who owns that?  
 24 A Iowa County.  
 25 Q Is it your understanding that's where much

1 of the testimony has occurred during this hearing about  
2 the May 15, 2018, site visit and the stream photos?

3 A Yes.

4 Q And so that was actually on county property,  
5 not private property, is that your understanding?

6 A Correct.

7 Q Okay. All right, why don't you come back  
8 and mark that, outline it for the record so we're  
9 clear.

10 JUDGE BIRO: Maybe, Mr. Morrow, if you don't  
11 mind, you could also draw an outline of your -- no, no,  
12 no, it's fine. Draw an outline of all of your property  
13 so we know sort of the boundaries of what your property  
14 is since you've mentioned your adjacent parents'  
15 property, and county property.

16 MR. McAFEE: Okay. Your Honor, I'm not sure  
17 we can show all of where he -- we'll have him mark what  
18 he can on this, and then we'll find another exhibit  
19 that might be better, too.

20 JUDGE BIRO: Okay.

21 MR. McAFEE: All right. We'll remove it so  
22 he can write on it. Okay, why don't I give you this.  
23 First, he's going to mark the triangle piece as best he  
24 can. Part of it is not on there. That's good.

25 THE WITNESS: Mark my ground?

1 JUDGE BIRO: Yes, mark the boundaries that  
2 you can on that exhibit, if you would.

3 THE WITNESS: Draw through that?

4 MR. McAFEE: No, I wouldn't.

5 THE WITNESS: Okay.

6 MR. McAFEE: We'll show it and see if  
7 anybody wants you to do more.

8 THE WITNESS: And everything that is there.

9 MR. McAFEE: Yeah, we'll have you testify.  
10 If you want to go back up, I'll have you explain this,  
11 and then we'll see how we want to mark it.

12 JUDGE BIRO: I'm sorry, Mr. Morrow, for  
13 going back and forth.

14 BY MR. McAFEE:

15 Q Okay, Mr. Morrow, if there is -- the  
16 triangle piece of property that you've testified to,  
17 have you marked that in the upper left-hand corner?

18 A Yes.

19 Q And maybe I'll just mark that as county  
20 property?

21 A Yes.

22 Q Okay, and then the other lines you've drawn  
23 on here with a Sharpie are the -- at least what shows  
24 on this exhibit are the western boundary, is that  
25 correct?

1 A That would be the western boundary coming  
2 out.

3 Q And then the road is actually the northern  
4 boundary, is that right?

5 A Correct.

6 Q Except for the triangle piece, you've marked  
7 that.

8 A Yes.

9 Q And then the eastern boundary you can't see  
10 on here, is that right?

11 A That is correct.

12 Q And then what is the southern boundary that  
13 we can see on this map?

14 A The ground protrudes south further yet.

15 Q Okay. So, the creek is not the southern  
16 boundary.

17 A No.

18 Q Okay. So, you can't mark the southern  
19 boundary on this exhibit.

20 A No.

21 Q Okay. We'll find a better exhibit for you  
22 to mark your property. I think I saw one that someone  
23 had already marked for some other purpose, and I can't  
24 remember which exhibit that was.

25 JUDGE BIRO: Mr. Morrow, so the Deep Creek

1 is within your property.

2 THE WITNESS: That is correct.

3 JUDGE BIRO: It runs within your property.

4 THE WITNESS: Yes.

5 JUDGE BIRO: It's not the borderline.

6 THE WITNESS: It's not border.

7 JUDGE BIRO: Okay.

8 MR. McAFEE: I want to check one exhibit  
9 here, and then I think we'll move on to a different  
10 subject for now, but I want to check.

11 (Pause.)

12 BY MR. McAFEE:

13 Q I asked you about this already, Mr. Morrow,  
14 but just to make the record clear, AX-11, page 6, has  
15 been testified to here today as the NRCS wetland  
16 determination. Do you see a date on there? I know  
17 it's been testified to already.

18 A Yes.

19 Q What's the date?

20 A There's a couple different dates. 1-21 of  
21 2015, I believe it's 1-21. And 10-29 of 2015.

22 Q Okay, but what -- I see a request date here.  
23 What's that date?

24 A 7-20-2015.

25 Q Okay. And then where was the date you just

1 mentioned?

2 A On the determination date and then the

3 certification date.

4 Q Okay. And, again, did you have this

5 determination at the time you did the work?

6 A No.

7 Q What determination did you have?

8 A I had the one that we had on the screen

9 earlier there where it said there was not a wetland on

10 this tract.

11 Q Okay.

12 A I'm not sure what form it is.

13 Q While we're on that subject, since this

14 determination was made, what have you done in response

15 to this determination, other than appeal it, and it's

16 been noted by Mr. Carrington that appeal was denied?

17 A Since the latter?

18 Q Yes.

19 A I have basically tried to maintain my farm,

20 to be a good steward as well as I can.

21 Q What have you done -- I'm sorry to

22 interrupt, but what have you done regarding the area

23 that this -- in this determination, it determined 1.3

24 acres were a wetland, correct?

25 A Um-hmm.

1 Q And as you've seen, that wetland is --

2 pretty much follows the tributary. What have you done

3 with that area?

4 A Right now it's idle. It's a waterway. It's

5 flagged out and not being farmed.

6 Q Okay. This determination was received in, I

7 think, what did you tell me, June of '16 or sometime in

8 2016? Did you farm it that year, that area?

9 A Which year is that?

10 Q 2016 crop year.

11 A Yes.

12 Q And why did you farm it that year?

13 A I was not told until after the fact that I

14 shouldn't be farming that area, and then they offered

15 to come out in 2017 and flag it out for me.

16 Q And what do you mean, flag it?

17 A Kate Timmerman,(phonetic) who works for the

18 Iowa County, NRCS, says you should not be farming that.

19 We will come out and flag the area, and do not harvest

20 off of that area or farm it. And I said that would be

21 great.

22 Q And are those flags still there?

23 A Yes. Those flags aren't, but there are

24 flags there.

25 Q Okay, thank you.

1 JUDGE BIRO: Could we take a five-minute

2 break, please?

3 MR. McAFEE: Oh, sure.

4 JUDGE BIRO: Okay. We'll stand in a five-

5 minute recess.

6 Mr. Morrow, please don't discuss your

7 testimony with anyone.

8 (Whereupon, a short recess was taken.)

9 JUDGE BIRO: Please continue.

10 MR. McAFEE: Thank you.

11 BY MR. McAFEE:

12 Q Mr. Morrow, I want to now turn to an issue

13 that's received quite a bit of discussion during this

14 hearing, and that is the hog building, okay?

15 A Okay.

16 Q All right. When did you first plan to sell

17 off part of your farm, which the record shows you did,

18 for a hog building?

19 A The end of May.

20 Q Okay. Now maybe I need -- you know, again I

21 want to make sure I close the loop on when you -- yes,

22 you've testified as to when you did the work and that

23 was in, you testified when?

24 A April.

25 Q Okay. At the time you did the work that

1 we're talking about, had you planned to sell off any

2 land for a hog building?

3 A No, I had not.

4 Q Okay. Now, you've just testified end of May

5 you did -- a pretty short amount of time there. Tell

6 us what transpired.

7 A After I did the work of installing the tile,

8 a gentleman says to me in the end of May, latter part

9 of May, have you ever thought about selling a portion

10 of the ground off for a hog building.

11 Q I'm sorry to interrupt, but you just said a

12 gentleman. Anybody in particular or what kind of --

13 coffee shop discussion or?

14 A No. Mark Seaton, which owns Seaton

15 Construction. And I said I have not give a lot of

16 thought to it, and he says, well, there's no one that

17 lives back here. It's a dead-end road. You know, you

18 may look into that. And I says, well, I haven't really

19 looked into it. And he says, I have a person that

20 might be interested. And I says, well, fine. I says,

21 tell that person to give me a call and we'll see where

22 it goes.

23 Q And what happened then?

24 A The person was Mike Norman(phonetic).

25 Within a day or two, I had a phone call. Said he was

1 interested. We set a time to get together. Don't know  
2 exact date, but it was either the end of May or the  
3 first day or two of June, and we got together, set down  
4 and visited for probably about an hour, hour and a  
5 half, and when he left that day, we had a verbal  
6 agreement.

7 Q When did you actually sell the building --  
8 or the site?

9 A Around June 28th, end of June is when my  
10 wife and I met Mike Norman at his bank to do the  
11 closing.

12 Q And do you know the entity you actually sold  
13 it to?

14 A Don't quote me, but I think it's MCM Pork.

15 Q And is your understanding that's Mike  
16 Norman's entity?

17 A Yes.

18 Q Okay. Now let's turn to -- well, I want to  
19 put up AX-5. These are emails of Marlin Schaefer  
20 (phonetic). You were here during his testimony, and I  
21 guess it -- it does show on -- he received emails from  
22 a gentleman, I guess, is what I'm trying to say, and  
23 who is that?

24 A Who he received them from?

25 Q Yes.

1 A Lance Schaefer(phonetic).

2 Q Do you know Lance?

3 A Oh, yeah.

4 Q Had you ever had any discussions with Lance  
5 about your plans for this farm or a hog building or  
6 anything like that?

7 A No, I have not.

8 Q Then how did Lance know about it because I  
9 think he refers to it in this email?

10 A I'm not sure.

11 Q You don't have any knowledge how he found  
12 out about it.

13 A No.

14 Q Did you have knowledge of him sending these  
15 emails at the time he sent them?

16 A No.

17 Q He never came to talk to you.

18 A No.

19 Q Okay. I'm now going to put up AX-9, page 1  
20 of 2, and this has been introduced into evidence, and  
21 it's Mr. Schaefer's telephone notes. In the second  
22 paragraph, he says, "Scott explained that C&S sold the  
23 area to MCM who will build a hog confinement and that  
24 you installed the large tiles and tilled the channel  
25 because it was within the distance for a confinement

1 unit."

2 Let me ask you first. Did you clear that  
3 area within 500 feet for the hog building?

4 A I did not solely or particularly clear that  
5 area to gain 500 feet.

6 Q You had in fact -- I mean, I think you've  
7 testified you cleared it before you talked to anybody  
8 about selling it off for a hog building.

9 A That is correct.

10 Q But what about these notes, then? Did you  
11 tell Mr. Schaefer something about the distance?

12 A Yes, we discussed that for legal limits of a  
13 hog building, I may have also said something about the  
14 500 feet distance it's got to be from a water source.

15 Q And how did you know about that distance?

16 A I've heard that around for, I don't know,  
17 two or three years. I have friends that have hog  
18 buildings.

19 Q Have you ever -- had you at the time or have  
20 you since then ever talked to Bert Noll about this?

21 A I have never talked to Bert Noll about  
22 anything.

23 Q Did you request a DNR interpretation about  
24 that 500-foot distance?

25 A No.

1 Q While we're on the subject of the hog  
2 building, why did you sell off that ground for a hog  
3 building?

4 A For the economics of the -- I get the manure  
5 out of that hog building to put on the farm ground to  
6 raise crops which -- it is an organic fertilizer versus  
7 a commercial fertilizer, which helps the organisms in  
8 the ground.

9 Q There has been, I think, some question about  
10 how that manure is applied. Do you take care of that?

11 A The part I take care of is, I contact the  
12 people that actually apply the manure to my farm.  
13 That's the only part I take care of, and then I pay  
14 them for it. As far as -- and then they contact the  
15 manager of the facility for MCM Pork because fans have  
16 to be turned on at that time, but I take care of  
17 contacting them.

18 Q Can you explain how it is applied?

19 A They apply it by injecting it into the  
20 ground with a big toolbar and an umbilical cord that's  
21 attached on a swivel, and then they knife it in four to  
22 six inches into the ground.

23 Q By an umbilical cord, maybe explain that a  
24 little bit.

25 A It's a hose that attaches to this toolbar

1 with the knives, and on the other end is attached to a  
2 pump that pumps the manure out of the facility into the  
3 hose.

4 Q Has any manure, at least up to this point,  
5 been applied on the soil surface?

6 A No.

7 (Pause.)

8 Q Mr. Morrow, I've placed up what has been  
9 marked as AX-10, page 14, and that's just one I pulled  
10 here to take a look at. Do you see in that aerial, and  
11 it's dated September 16 of 2014, so that was after you  
12 owned the property, right?

13 A That is correct.

14 Q There appears to be, and what's been  
15 referred as a crossing over -- do you see where that  
16 is?

17 A Yes.

18 Q Explain what that is.

19 A That is the area that we follow to do the  
20 spring work, to harvest or anything. That is the path  
21 that we follow to get to the southern part of that --  
22 of the farm. I'm very adamant about following the same  
23 path all the time because of compaction levels and such  
24 like that. That is the area that we follow to get to  
25 the south part of the farm on the west side of Deep

1 Creek.

2 Q Could that crossing be in other places along  
3 that, what I would say the topo map shows as being  
4 relatively flat, the lower portion?

5 A Yes, we -- we have for a short time a little  
6 bit lower than that we crossed. I did not like the  
7 idea of having a crossing that was 30, 40-foot wide  
8 when we don't need it, or wider.

9 Q Does that crossing have a tube beneath the  
10 surface?

11 A At the time of this picture -- it has had a  
12 tube under it. It has been crushed before because of  
13 the loads, but at the time of this picture, I can't say  
14 whether the tube was round or flat.

15 Q What kind of tube was it? What was it made  
16 of?

17 A Plastic tile.

18 Q Okay. All right, let's talk a little bit  
19 about what -- you've seen the photos, the aerial photos  
20 regarding this portion here on, the lower portion.  
21 Have you ever seen water in there?

22 A In the lower part?

23 Q Yes.

24 A Yeah.

25 Q Have you seen times when there isn't water

1 there?

2 A Yes, I have.

3 Q Do you keep track of when there is water  
4 there and when there isn't?

5 A No.

6 Q This is a bad -- do you wish you would have?

7 A Yeah.

8 Q Okay. What about a channel, is there a  
9 channel there?

10 A I would not call it a channel, as in  
11 numerous places on a farm where sometimes -- we're not  
12 proud of them, but we have erosion spots. The past, I  
13 don't know how many years, it's been really tough  
14 trying to hold waterways or anywhere you do work, even  
15 visiting with the NRCS because of the big rains. You  
16 work your tail off to fix something to make it better,  
17 and then we get these big, what we call gully-washers  
18 that five to seven inches of rain in a short time that,  
19 you just can't control that much water no matter what  
20 the purpose is.

21 Q What about the upper portion that -- you  
22 know, above the crossing. You've seen the photos.  
23 Well, you've been there yourself. Are those photos  
24 correct of the portion above the -- that's on the  
25 county property?

1 I'm sorry. I didn't word that question very  
2 well. Let's start with you've seen the photos of  
3 the -- from the Complainant above what you've testified  
4 as county property.

5 A That's correct.

6 Q Have you walked up in there yourself?

7 A Yes.

8 Q And are those photos correct?

9 A Yes.

10 Q Okay. There is water there, is that --

11 A Yes.

12 Q Okay. Now let's talk about the upper  
13 portion on your land that, of course, you have, in  
14 2015, you removed trees and put the tile in. Prior to  
15 that, what did it look like?

16 A Like the pictures. At times there was water  
17 in that, in times there wasn't. I mean, I don't know  
18 what -- I don't know what you're looking for, but I  
19 mean, like I said, it just looked like the pictures.

20 Q I'm just asking you because I believe you're  
21 the only one who will testify who has seen that before  
22 you did the work on it.

23 A Um-hmm.

24 Q Just what your personal observations were.

25 A Like I say, sometimes it had water,



1 sometimes it didn't in areas. Yes, there was a bank.  
2 Some of it was from neglect. In places, there weren't.

3 Q Mr. Morrow, why did you do the work you did  
4 in 2015?

5 A I did it -- I consider myself as a farmer  
6 and a steward of the ground. I try to leave it in a  
7 better situation than when I got it. I did it to  
8 improve it economically and environmentally because,  
9 like I say, economically it's more farm-friendly.  
10 Environmentally I put in -- we call them basins, and  
11 the NRCS uses a lot of those.

12 I think I've been -- I've heard it referred  
13 to as a check dam, a dam, but they're actually called a  
14 terrace or a basin through the NRCS. They're very  
15 common. They put them in an area where water flows to  
16 catch water, to slow it down with stand-pipes up to  
17 drain it, to help drain it, to help stop erosion.

18 I also did it because I have seen with my  
19 own eyes on big rains coming off -- off of my property,  
20 corn stalks, bean stubble, and grasses that flow  
21 directly into Deep Creek. Since doing this, that has  
22 not been the case --, and even silt. Even with no  
23 till, you still get silt. Since doing this, my basins  
24 have caught all of this debris and silt where I can  
25 pick that up, take it back up onto the slopes on the

1 top of the hill where the bean stubble, the corn stalks  
2 can deteriorate on my property and pick the clean --  
3 you clean out dry ponds to maintain them. Take that  
4 and put it where it needs to be put back in place.  
5 Before, it was gone. It went into Deep Creek and  
6 wherever else on downstream.

7 MR. McAFEE: I have no further questions at  
8 this time.

9 JUDGE BIRO: Okay.

10 MR. MUEHLBERGER: Your Honor, may we just  
11 have five quick minutes to prepare for --

12 JUDGE BIRO: Sure.

13 MR. MUEHLBERGER: Thank you.

14 JUDGE BIRO: Of course, it's 4:20, and we  
15 can only stay until about five. So, yeah.

16 MR. MUEHLBERGER: Five minutes is all I  
17 need.

18 JUDGE BIRO: Okay. All right. Let's stand  
19 in recess five minutes.

20 (Whereupon, a short recess was taken.)

21 MR. McAFEE: Your Honor, I realized over the  
22 break that on RX-6, the witness marked out that county  
23 property after it was admitted. And so I just wanted  
24 the record to be clear. Should I re-admit now after he  
25 marked on it?

1 JUDGE BIRO: Well, unless there is any  
2 objection we --

3 MR. BIERI: Of course not.

4 JUDGE BIRO: -- will accept it as it was.

5 MR. McAFEE: Okay.

6 JUDGE BIRO: Okay, please proceed.

7 MR. MUEHLBERGER: Okay.

8 CROSS-EXAMINATION

9 BY MR. MUEHLBERGER:

10 Q Good afternoon, Mr. Morrow.

11 A Hello.

12 Q So, I'm putting up on the screen here Agency  
13 Exhibit 30, page 6. Was this your response to EPA when  
14 they sent you a Clean Water Act request for  
15 information?

16 A Yes.

17 Q Okay. And I'm going to read directly from  
18 this. It says, "Respondent's activities within the  
19 drainage-way on Respondent's property prior to July  
20 2015 were to conduct normal crop farming operations  
21 such as tillage, planting, and harvesting."

22 So, based on this document, at various  
23 points you have cropped over that portion of the  
24 tributary, correct?

25 A Yes.

1 Q Okay. I'm putting up on the screen Agency  
2 Exhibit 31, Appendix B, page 13.

3 MR. MUEHLBERGER: And, Britt, would you mind  
4 zooming in? It's pretty far out, so I'd like to zoom  
5 in a little bit closer.

6 MR. BIERI: Tell me when.

7 MR. MUEHLBERGER: Just go in a little bit  
8 more. Okay.

9 BY MR. MUEHLBERGER:

10 Q So, Mr. Morrow, you recognize this as your  
11 farm property.

12 A Yes.

13 Q Okay. And just for purposes --

14 JUDGE BIRO: I'm sorry to interrupt. When  
15 you say "this," you mean the whole page, or do you  
16 recognize your farm property within this photograph?

17 THE WITNESS: Yes, I recognize what's in  
18 this photograph.

19 JUDGE BIRO: Okay.

20 BY MR. MUEHLBERGER:

21 Q So, do you recognize that a portion of this  
22 image is your farm property?

23 A Yes.

24 Q And can you point out on the image where  
25 Deep Creek would be on this -- on this image?

1 A May I draw on the screen?

2 Q Yes, please.

3 (Pause.)

4 Thank you, and could you also draw on the  
5 screen here where that tributary that we've been  
6 talking about so much the last couple days, where that  
7 is located, please?

8 (Pause.)

9 Thank you. Okay, I'm going to -- and just  
10 for the record, the date of this image is September 14,  
11 2006. I'll go ahead and clear this.

12 Now I'm going to show Agency Exhibit 31,  
13 Appendix B, page 14. The colors are a little bit  
14 different but, Mr. Morrow, do you also recognize your  
15 farm property on this image?

16 A Yes, I see the outline of it, yes.

17 Q Okay. And once again, could you please re-  
18 draw where Deep Creek would be and where that tributary  
19 would be, and take your time?

20 A 'Cause this is not a very detailed map of  
21 the farm, so I'll do my best to draw what --

22 Q Sure. If it helps, I could zoom in a little  
23 bit more. Thanks.

24 JUDGE BIRO: What exhibit number is this  
25 again?

1 It's not detailed enough, even drawing Deep Creek was  
2 tough, let alone the tributary. If you can zoom it in,  
3 I might be able to draw.

4 Q Sure, we can do that. I'll clear the --  
5 that's good right there.

6 Okay, can you make it out a little bit  
7 better now?

8 A I'll -- I'll do my best.

9 Q Okay. All right. Is it safe to say -- so,  
10 the image here is from August 2008, and you testified  
11 that you purchased this property in March 2008, is that  
12 correct?

13 A We took possession.

14 Q Took possession of the property in March  
15 2008. So, is it safe to say that you began doing some  
16 of the work on the tributary pretty much right away? I  
17 mean, this was within months of you taking possession  
18 of the property and there doesn't seem to be hardly any  
19 vegetation as compared to two years prior, is that  
20 correct?

21 A I didn't -- I did not work on the tributary  
22 in 2008. I worked on the vegetation that came off the  
23 tributary and a fence line.

24 Q Okay. So, you cleared the vegetation around  
25 the tributary, correct?

1 MR. MUEHLBERGER: This is Agency Exhibit 31,  
2 Appendix B, page 14.

3 THE WITNESS: The tributary is not defined  
4 well enough for me to actually draw it in on this  
5 picture.

6 BY MR. MUEHLBERGER:

7 Q So, let me ask you a couple of questions  
8 about that. Is the reason why it's kind of difficult  
9 to point out the tributary on here because much of the  
10 vegetation has been cleared at this time?

11 A What -- I don't understand what you're --

12 Q Sure. Let me be a little more clear. I'm  
13 going to show you the previous image again which is  
14 dated September 2006, and this is roughly where you  
15 drew where Deep Creek is, and then you drew the  
16 tributary.

17 Would you say that there is a significant  
18 amount of vegetation on that tributary going into Deep  
19 Creek from this photo in 2006?

20 A Yes, there's vegetation.

21 Q Okay. And then is it safe to say -- in this  
22 photograph you're saying it was difficult to point out  
23 the tributary there. There comparatively is a lack of  
24 vegetation on the tributary going into Deep Creek?

25 A That's not the purpose why I can't draw it.

1 A Not on the tributary, but the fence line  
2 that came into it.

3 Q Okay. And then you also through your  
4 response to EPA's Clean Water Act request acknowledged  
5 that at some time, you did plow through the tributary  
6 and planted and cultivated on that area, correct?

7 A Plowed. What do you mean by plowed and  
8 cultivated.

9 Q Let's go back to the 3-08 response. So, on  
10 the response you said that you "conducted normal crop  
11 farming operations," and previous to that you said,  
12 "Within the drainage-way conducted normal crop farming  
13 operations such as tillage, planting, and harvesting."

14 So you tilled through the tributary and  
15 planted and harvested in that area, correct?

16 A I leveled off one time. Other than that,  
17 yeah, I planted through and harvested.

18 Q Okay, thank you. So, when you did that  
19 then -- when you leveled it off and planted it and  
20 harvested it, at least for that time period, there  
21 wouldn't have been a defined channel, correct?

22 A No.

23 Q Okay.

24 MR. MUEHLBERGER: I'm now showing the  
25 Respondent --

1 (Counsel confer.)

2 BY MR. MUEHLBERGER:

3 Q My co-counsel has just pointed out, when I  
4 asked the question "is that correct", and you said,  
5 "No." Just to clarify.

6 When I asked "is that correct", are you  
7 agreeing with that statement?

8 A What was the statement?

9 Q The statement was during the time period  
10 that you tilled through and planted and cultivated the  
11 crops, there would not have been a defined channel in  
12 that lower portion at that time, correct?

13 A There was not a defined channel.

14 Q Okay. There was not a defined channel  
15 because you plowed through the tributary and planted  
16 it, correct?

17 A I planted it.

18 Q Okay, thank you.

19 MR. MUEHLBERGER: I'm now showing the  
20 Respondent Agency Exhibit 8, page 1 of 1.

21 BY MR. MUEHLBERGER:

22 Q In the document you say, and I'm quoting  
23 here, "All of this is groundwater coming down to the  
24 property." Is that correct?

25 A Whereabouts am I saying that?

1 Q Let's see. Okay, it starts with  
2 "Therefore --

3 A Okay.

4 Q -- all of this is from groundwater coming  
5 down to this property." Is that correct?

6 A That's what I wrote in this letter.

7 Q Okay. So, you're saying that, you know, at  
8 least a source of the water that was coming through the  
9 tributary was groundwater, correct?

10 A What I call groundwater is drainage water  
11 from above me.

12 Q Okay.

13 A That's what I call groundwater.

14 Q Okay. And so one of the reasons why you put  
15 in drainage tiles was to divert the source of that  
16 water, correct, coming from above?

17 A To pick it up and carry it on.

18 Q Okay. So, you testified that after you took  
19 possession of the property, that you had done a lot of  
20 cleaning up of the trees, and you explained the  
21 cleaning up meant removing a lot of the trees and the  
22 shrub on the property, is that right?

23 A Correct.

24 Q Okay. Prior to doing any of that cleaning  
25 up, did you ever consult with the Corps of Engineers to

1 have them determine whether or not wetlands existed  
2 within any of those areas that you were cleaning up?

3 A No, I did not.

4 Q Okay. So, you said repeatedly that you have  
5 had a history of working with NRCS, and Mr. McAfee  
6 showed you the image of the wetland determination that  
7 was eventually made on your property, and that's Agency  
8 Exhibit 11, page 6.

9 Had you ever seen a document like this  
10 before?

11 A Prior to?

12 Q Right, prior to getting it for this portion  
13 of your property, had you ever seen a wetland  
14 determination from NRCS before?

15 A Not like this.

16 Q Okay. Had you seen any wetland  
17 determination before?

18 A Yes.

19 Q Okay. Had you received wetland  
20 determinations on any portions of your property or  
21 previous properties you owned before this?

22 A Yes.

23 Q Okay.

24 MR. MUEHLBERGER: I'm going to have you zoom  
25 in a little bit on that one.

1 BY MR. MUEHLBERGER:

2 Q So, could you read here -- there's a little  
3 box that says "Remarks" and then it begins with, "Other  
4 waters of the U.S." Could you read what that says  
5 there, please?

6 A "Other waters of the U.S. as defined in  
7 Section 404 of the Clean Water Act, may occur on a  
8 tract. Other waters include streams, lakes, ponds,  
9 rivers, and ditches that are not wetlands as defined in  
10 the Act. Other waters are subject to the WC provisions  
11 and are not labeled as such on certified wetland  
12 determinations."

13 Q Okay, thank you. So, just a couple quick  
14 questions about -- talking about the tiling work and  
15 what you did in 2015.

16 You said that you had worked with a company,  
17 that you had hired an excavator in order to place  
18 material to cover up the tributary after you had tiled  
19 it. Is that correct? Did I understand?

20 A I hired the excavator to install the pipe.

21 Q Okay. So, once the pipe was installed, how  
22 did the -- how did the channel get filled in after  
23 that?

24 A I covered up the pipe with my skid-loader.

25 Q With your skid loader. Okay. And what

1 exactly did you cover it up with?  
 2 A What do you mean covered it up with?  
 3 Q What did you push into the channel?  
 4 A Dirt.  
 5 Q Okay. All right, thanks.  
 6 So, in this whole discussion about all the  
 7 various tiles that were placed on your property, you  
 8 had talked about how tiles could be used to lower the  
 9 groundwater table, is that correct?  
 10 A That's correct.  
 11 Q Okay. But tiles can also be used to divert  
 12 surface flow, correct?  
 13 A Correct.  
 14 Q Okay. You talked about how you had spoken  
 15 with NRCS and you specifically identified Regina Leer;  
 16 that she told you that it was okay to go ahead and tile  
 17 the tributary. Is that correct?  
 18 A That's not exactly how I put it.  
 19 Q Okay.  
 20 A I had discussed at an earlier time with her  
 21 about doing what I was doing. She said it would be all  
 22 right, just make sure that you have enough capacity.  
 23 Q Okay.  
 24 A This was an early plan at that time.  
 25 Q Okay. So, NRCS didn't really give you

1 permission to do this formally, correct?  
 2 A What do you mean by formally?  
 3 Q Did you ever get anything in writing saying  
 4 that you were authorized to do this project?  
 5 A No. There's a lot of stuff we didn't get in  
 6 writing.  
 7 Q Okay. And to your knowledge, is Ms. Leer a  
 8 qualified -- is she qualified to make wetland  
 9 determinations?  
 10 A Not to my knowledge.  
 11 Q Okay. And is she authorized to provide  
 12 permission to landowners to do this kind of work?  
 13 A She must be, because she gave us permission  
 14 on a lot of different situations.  
 15 Q Okay. But you didn't get that from her in  
 16 this situation.  
 17 A Not in 2015. I mean, at an earlier time.  
 18 Q Okay. Okay, so you had testified that in  
 19 March 2015 that you had removed trees in the upper  
 20 portion of the tributary. Is that correct?  
 21 A Would you repeat that again?  
 22 Q Sure. That in March 2015, prior to doing  
 23 the tiling work, that you had removed a bunch of trees  
 24 and vegetation on the upper reaches of that tributary  
 25 on your property, correct?

1 A That's correct.  
 2 Q And did you contact the Corps of Engineers  
 3 at that time?  
 4 A No.  
 5 Q Okay. And I understand that you had asked  
 6 the NRCS in 2011 to make a wetland determination and  
 7 you didn't get that until after the work, but did you  
 8 contact NRCS right before you cleared that vegetation  
 9 in the upper part of the tributary?  
 10 A No.  
 11 Q Okay. One thing I wanted to make clear, you  
 12 said that you had talked to somebody from the county  
 13 because the county owned the property where you put in  
 14 the inlet tiles. Is that correct?  
 15 A Near where I put in the inlet tiles, yes,  
 16 the county owns above me.  
 17 Q Okay. And one thing that I wasn't clear  
 18 about is did the county give you permission to go ahead  
 19 and put in these tiles at that location?  
 20 A Yes.  
 21 Q Okay. Did you receive anything in writing  
 22 authorizing you to put in those tiles in that location?  
 23 A No.  
 24 Q Okay. So, you don't have anything in  
 25 writing to authorize the tiling work and the fill work

1 from NRCS, the Corps of Engineers, or the county,  
 2 correct?  
 3 A That's correct.  
 4 Q Okay. So, you testified also that when you  
 5 did the work, when you started doing the tile work, and  
 6 I believe you said it was April of 2008, that you  
 7 didn't know yet that you were going to -- that you were  
 8 going to sell a portion of your property to MCM Pork,  
 9 is that correct?  
 10 A You just said in 2008.  
 11 Q I'm sorry. I'm sorry. 2015. You said  
 12 that -- I'm sorry -- April 2015, that at the time you  
 13 did the tiling work that you weren't yet aware that you  
 14 were going to sell a portion of your property to MCM  
 15 Pork.  
 16 A No.  
 17 Q Okay.  
 18 MR. MUEHLBERGER: I'm showing the witness  
 19 Agency Exhibit 11, page 11.  
 20 BY MR. MUEHLBERGER:  
 21 Q Can you read this okay, Mr. Morrow? Should  
 22 we zoom in a little bit?  
 23 A Yup, I -- yup.  
 24 Q Okay. I'm pointing right here to a sentence  
 25 that said, "He stated". Could you please read what

1 that says on that sentence, please?

2 A "He stated he asked NRCS previously if the

3 gully could be closed as the DNR required and limit it

4 in order to put in the hog building, and the

5 percolation was okay."

6 Q Okay.

7 A "He would be interested in mitigation and

8 intends to put instructions on the label CW by shaping

9 and putting in the waterway."

10 Q Right. Okay. So, at this hearing you --

11 according to the NRCS document you testified that you

12 had closed in the gully, and we're referring to the

13 tributary here, correct?

14 A Um-hmm.

15 Q Because of the DNR setback regulations, is

16 that correct?

17 A That is not the total reason I filled it in,

18 no.

19 Q Okay. But did you testify to that at this

20 particular hearing?

21 A That that was the sole reason of doing it,

22 no.

23 Q Did you testify at the hearing that that was

24 a partial reason why you closed up the tributary?

25 A By the way the letter reads, I would say it

1 is.

2 Q Okay. So, you know, we get a person from

3 the Corps of Engineers and some folks from NRCS, they

4 both have it on their records that at some point you

5 talked to them about closing the gully because of Iowa

6 setback regulations. So, is it safe to assume that

7 that was at least a partial reason why you closed that

8 gully?

9 A I would have closed that gully even -- that

10 there wasn't a hog building involved.

11 Q Okay. Okay.

12 A And that was my intention.

13 Q Okay. And then to clarify a couple of

14 things about your work with the NRCS and this wetland

15 determination. So, Mr. Carrington testified that to

16 date you have not completed any restoration or

17 mitigation work that was requested by NRCS to change

18 that converted wetlands label. Is that correct?

19 A That's correct.

20 Q Okay. Did you ever look into how much it

21 would cost to restore or mitigate the converted

22 wetlands?

23 A Yes, I have.

24 Q Okay.

25 A And I'm working with the NRCS to date to

1 resolve that.

2 Q Okay. Is it safe to say that you made more

3 money off of selling the property to MCM Pork than it

4 would have cost in order to complete the mitigation or

5 restoration requirements?

6 A Would you rephrase that?

7 Q Sure. So, you sold a portion of your

8 property to MCM Pork, correct?

9 A That's correct.

10 Q Okay. And to date you still have not done

11 the restoration or mitigation work required by NRCS,

12 correct?

13 A That's correct.

14 Q Is it safe to say that the money you made

15 from selling the property to MCM Pork was more than

16 what you would have to have paid to restore or mitigate

17 the converted wetlands?

18 A It's not safe to say that from the

19 information I was told.

20 Q Okay. When you looked into how much it

21 would cost to restore or mitigate how much did they

22 tell you that it would cost?

23 A Forty to 45,000 dollars an acre.

24 Q Okay. And so I could ask the question. How

25 much money did you make from selling your property to

1 MCM Pork?

2 A I sold the land for 12,000, and 28,000 was

3 paid to Morrow Construction for cleaning up the site

4 upon it. I said clean up the site, the building, the

5 old foundations, I rock piles, and stuff like that.

6 Q Okay. And then you also testified that you

7 also get free manure from MCM Pork in addition to

8 whatever proceeds you received for selling the

9 property?

10 A I get the manure out of the building every

11 year.

12 Q Okay.

13 A It's not totally free.

14 Q Okay. So, just a couple more questions.

15 You know, you talked about that you had filled in the -

16 - partially that you had tiled the tributary in order

17 to protect it. Did you consult with any expert in

18 stream morphology or stream ecology before you filled in

19 that tributary?

20 A I was not aware I had to.

21 Q But if you're interested in protecting the

22 stream did you consult with any stream experts prior to

23 filling that in?

24 A I was not aware I had to. NRCS never

25 brought it forward to me.

1 Q Okay. But, you know, I'm just saying for  
2 purposes of protecting the tributary which you said was  
3 a goal of yours, you know, did you ever check with an  
4 expert in that area prior to tiling or filling it in?

5 A I -- I feel, yes, I did because I put a lot  
6 of trust in the NRCS. Us as farmers, that's who are  
7 experts are is the NRCS, the FSA offices. I and a lot  
8 of farmers put a lot of trust in them to lead us down  
9 the right trail. So, I thought I was talking to the  
10 experts that I needed to talk to.

11 Q Right. But you never got a formal approval  
12 from the NRCS to go ahead and do that work.

13 A I felt I did because I had the wetland form  
14 with no wetlands on it, and I had talked to them in  
15 previous years. So, I have other files on their -- in  
16 their office today to do other work that's already been  
17 discussed two-three years ago.

18 Q Okay. Are you yourself an expert in stream  
19 ecology --

20 A No.

21 Q -- or stream morphology?

22 A No.

23 MR. MUEHLBERGER: Thank you, Mr. Morrow. No  
24 further questions.

25 MR. McAFEE: I don't have any further

1 questions.

2 JUDGE BIRO: Okay. I have further  
3 questions.

4 How many acres was the property when you  
5 bought it?

6 THE WITNESS: How many acres?

7 JUDGE BIRO: Yes.

8 THE WITNESS: A hundred and ninety-nine  
9 point maybe something, 199 acres.

10 JUDGE BIRO: And I think you said you  
11 purchased it in 2008 or you took possession --

12 THE WITNESS: Yes.

13 JUDGE BIRO: -- in 2008. Did you purchase  
14 it formally like in 2007 but didn't take the --

15 THE WITNESS: Yeah, in the fall of 2007, I  
16 believe.

17 JUDGE BIRO: Okay.

18 THE WITNESS: Or early December, January, in  
19 that area but we closed March 1, 2008.

20 JUDGE BIRO: Of 2008. And is that because  
21 of crops somebody else was entitled to harvest or --

22 THE WITNESS: It just takes time for the  
23 legalities, to get the abstract up to date and as such  
24 like that, and a lot of farm ground that's sold, the  
25 old owner or tenant has it leased until March 1st, and

1 that's kind of when their lease ends, so they can't  
2 give it up 'til then.

3 JUDGE BIRO: And you didn't purchase it  
4 subject to lease?

5 THE WITNESS: Pardon.

6 JUDGE BIRO: You didn't purchase it subject  
7 to it being leased.

8 THE WITNESS: No.

9 JUDGE BIRO: Okay. And how much did you pay  
10 for the property in 2008?

11 THE WITNESS: I'm going to say \$400,000,  
12 approximately. That's just an approximate number. I  
13 don't know the exact, right.

14 JUDGE BIRO: Okay. And you purchased it in  
15 the name of the LLC?

16 THE WITNESS: Yes.

17 JUDGE BIRO: Okay. And have you and your  
18 wife been the only owners of the LLC?

19 THE WITNESS: Yes.

20 JUDGE BIRO: And I think you indicated that  
21 your parents owned the property to the east --

22 THE WITNESS: Yes.

23 JUDGE BIRO: -- of yours, is that correct?

24 THE WITNESS: Yes.

25 JUDGE BIRO: Okay. And what's the boundary

1 between your property and theirs? Is there --

2 THE WITNESS: Today?

3 JUDGE BIRO: Yes.

4 THE WITNESS: A partial of the property,  
5 with the permission of my dad and my mom, we took the  
6 fence out between us for accessibility for farm  
7 equipment.

8 JUDGE BIRO: Okay.

9 THE WITNESS: There is a portion still on  
10 the hill in the tree area where there is still a  
11 portion of fence. We have it marked where, if needed  
12 to be, the boundary fence could be put back in.

13 JUDGE BIRO: Okay. So, there's no natural  
14 boundary in there other than the fence or --

15 THE WITNESS: Right.

16 JUDGE BIRO: -- markers, boundary markers.

17 THE WITNESS: Right, yes.

18 JUDGE BIRO: Okay. So, how many acres is  
19 your parents' farm?

20 THE WITNESS: The farm is 240 taxable acres.  
21 It's 211 crop acres.

22 JUDGE BIRO: And is that going to be your  
23 farm one of these days?

24 THE WITNESS: I hope it to be but that's  
25 their decision.

1 JUDGE BIRO: Well.  
 2 THE WITNESS: Or my mother's now.  
 3 JUDGE BIRO: Are you the only child?  
 4 THE WITNESS: Oh, no. I have three other  
 5 siblings.  
 6 JUDGE BIRO: Okay. What crops were growing  
 7 there when you bought the property? What crops were  
 8 growing there when you bought the property?  
 9 THE WITNESS: Corn and beans, soybeans.  
 10 JUDGE BIRO: And did you continue growing  
 11 those crops?  
 12 THE WITNESS: Yes.  
 13 JUDGE BIRO: Okay. Did you increase the  
 14 size of the area where those crops were growing?  
 15 THE WITNESS: Yes.  
 16 JUDGE BIRO: Okay. So, how many acres of  
 17 corn and soybeans were there when you bought the  
 18 property?  
 19 THE WITNESS: I'm going to say, and this is  
 20 again, an approximate, 85, 85 to 90.  
 21 JUDGE BIRO: And when you first did your  
 22 first tiling on the property, was that 2009?  
 23 THE WITNESS: The fall of 2008.  
 24 JUDGE BIRO: Okay.  
 25 THE WITNESS: But it wasn't on the area that

1 we're talking about.  
 2 JUDGE BIRO: I understand.  
 3 THE WITNESS: It was on another area.  
 4 JUDGE BIRO: The first tiling was 2008.  
 5 THE WITNESS: Yes.  
 6 JUDGE BIRO: I'm just talking --  
 7 THE WITNESS: Yes.  
 8 JUDGE BIRO: -- about your old farm.  
 9 THE WITNESS: Yeah. Yup.  
 10 JUDGE BIRO: And how big an area did you  
 11 tile at that point?  
 12 THE WITNESS: Approximately 25 acres.  
 13 JUDGE BIRO: And if I were looking at your  
 14 property, would that be in the -- well, maybe you  
 15 should tell me where in --  
 16 THE WITNESS: It would be straight -- the  
 17 unnamed tributary that we're talking about, it would be  
 18 east of Deep Creek and then south a little bit.  
 19 JUDGE BIRO: On the other side of Deep  
 20 Creek.  
 21 THE WITNESS: Of Deep Creek, yes.  
 22 JUDGE BIRO: Okay. Did you get any type of  
 23 permit for that tiling because you were doing it  
 24 adjacent to Deep Creek?  
 25 THE WITNESS: No, I got the okay from the

1 NRCS.  
 2 JUDGE BIRO: And you then added that to your  
 3 farmland and you started farming on that property or  
 4 you were --  
 5 THE WITNESS: Yeah, I was already farming  
 6 that portion.  
 7 JUDGE BIRO: You were already farming.  
 8 THE WITNESS: Yeah.  
 9 JUDGE BIRO: Okay. Did you tile it the same  
 10 way as you tiled in this case?  
 11 THE WITNESS: Yes.  
 12 JUDGE BIRO: Okay. Then I think you said  
 13 you tiled again another year. Was it the next year,  
 14 2009?  
 15 THE WITNESS: That's what we did --  
 16 JUDGE BIRO: Okay.  
 17 THE WITNESS: -- in the area on the  
 18 photograph we had.  
 19 JUDGE BIRO: Okay. Where we saw all the  
 20 very -- lines --  
 21 THE WITNESS: Yes.  
 22 JUDGE BIRO: -- squiggly lines all across?  
 23 Okay.  
 24 And how many acres did you tile at that  
 25 time?

1 THE WITNESS: Approximately 35 acres,  
 2 because we did some also from where we're talking to  
 3 the east and to the north, on the east side of Deep  
 4 Creek, but more north, we did some more.  
 5 JUDGE BIRO: Right. Okay. And did you  
 6 accomplish tiling in the same way?  
 7 THE WITNESS: Yes.  
 8 JUDGE BIRO: Okay. As you did in 2015.  
 9 THE WITNESS: Um-hmm.  
 10 JUDGE BIRO: Okay. And were you already  
 11 farming that land?  
 12 THE WITNESS: Yes.  
 13 JUDGE BIRO: Okay. So, by 2015, before you  
 14 tiled in the tributary, how many acres were you  
 15 farming?  
 16 THE WITNESS: One hundred and forty-two,  
 17 approximately.  
 18 JUDGE BIRO: And what were you farming?  
 19 THE WITNESS: Soybeans and corn.  
 20 JUDGE BIRO: Okay. It's always the same  
 21 crops.  
 22 THE WITNESS: Yeah.  
 23 JUDGE BIRO: Okay. And essentially you had  
 24 tiled just about everywhere except the tributary, is  
 25 that correct?

1 THE WITNESS: Yes.  
 2 JUDGE BIRO: Okay. And in 2015, you had  
 3 additional tiling done through the tributary, and I  
 4 want to go over this fairly carefully. Before you did  
 5 that tiling, you said that you had had a discussion  
 6 with someone at the NRCS --  
 7 THE WITNESS: Um-hmm.  
 8 JUDGE BIRO: -- about the possibility of  
 9 tiling that area.  
 10 THE WITNESS: Yes.  
 11 JUDGE BIRO: And when exactly was that  
 12 conversation?  
 13 THE WITNESS: When?  
 14 JUDGE BIRO: When.  
 15 THE WITNESS: The first time was in fall of  
 16 2009. I had had that conversation once or twice after  
 17 that, and I don't know exactly, and the reason I know  
 18 of 2009 because I had that conversation at the same  
 19 time that I did the tiling that we've seen in the  
 20 diagram. But as far as the other ones, I can't give  
 21 you an exact date.  
 22 JUDGE BIRO: Okay. And the NRCS person that  
 23 you spoke to about this, what was her name?  
 24 THE WITNESS: Regina Leer.  
 25 JUDGE BIRO: Leer, okay. Was she the same

1 person you spoke to in subsequent years?  
 2 THE WITNESS: Yes.  
 3 JUDGE BIRO: Okay. So, you believe you had  
 4 about two or three conversations with her?  
 5 THE WITNESS: Yes.  
 6 JUDGE BIRO: About tiling the tributary  
 7 area?  
 8 THE WITNESS: Yes.  
 9 JUDGE BIRO: And in none of those  
 10 conversations, do you believe she ever told you to get  
 11 a permit?  
 12 THE WITNESS: No.  
 13 JUDGE BIRO: You said you requested a  
 14 wetlands delineation, is that correct?  
 15 THE WITNESS: Pardon?  
 16 JUDGE BIRO: You requested a wetlands  
 17 delineation?  
 18 THE WITNESS: Determination.  
 19 JUDGE BIRO: Determination. I'm sorry.  
 20 THE WITNESS: Yes.  
 21 JUDGE BIRO: Okay. And who did you make  
 22 that request to?  
 23 THE WITNESS: To the NRCS office in  
 24 Williamsburg, which is where the Iowa County office is.  
 25 JUDGE BIRO: In Williamsburg you said?

1 THE WITNESS: Yeah, to Steven Johnson.  
 2 JUDGE BIRO: And what triggered your  
 3 decision to make such a request for a wetlands  
 4 determination?  
 5 THE WITNESS: I had requested other small  
 6 ones for certain projects, and at that time, I made a  
 7 comment, I says instead of doing it for small projects,  
 8 let's just have a determination done of the whole farm.  
 9 JUDGE BIRO: So you had gotten some wetlands  
 10 determinations for other areas --  
 11 THE WITNESS: Yes.  
 12 JUDGE BIRO: -- on your farm?  
 13 THE WITNESS: Yes.  
 14 JUDGE BIRO: So what areas had you  
 15 previously gotten a wetlands determination?  
 16 THE WITNESS: I already had them for  
 17 everything east of Deep Creek.  
 18 JUDGE BIRO: Okay.  
 19 THE WITNESS: I had them for the area  
 20 directly south, that hillside in an area south of the  
 21 tributary. I had them for everything -- I felt the  
 22 tributary -- because everything to the north of the  
 23 tributary I had already had them on. The only place I  
 24 really needed them on was for an area clear to the  
 25 south of the tributary on the west side of Deep Creek

1 and north of the English River.  
 2 JUDGE BIRO: Okay. So, this tributary flows  
 3 into Deep Creek, Deep Creek flows into the English  
 4 River.  
 5 THE WITNESS: That's correct.  
 6 JUDGE BIRO: What does the English River  
 7 flow into?  
 8 THE WITNESS: I can't -- I'm not positive.  
 9 JUDGE BIRO: Okay.  
 10 THE WITNESS: If it would be the Mississippi  
 11 down the southern part of Iowa, I'm not sure.  
 12 JUDGE BIRO: Okay. Yes, the Iowa River, I  
 13 believe.  
 14 THE WITNESS: Okay, the Iowa and then the  
 15 Mississippi. Okay.  
 16 JUDGE BIRO: Okay. And does anybody use the  
 17 English River for boating, fishing?  
 18 THE WITNESS: Not that I'm aware of.  
 19 JUDGE BIRO: Okay. But the English River  
 20 flows perennially, right? It's always got water in it.  
 21 THE WITNESS: Yes.  
 22 JUDGE BIRO: Okay.  
 23 THE WITNESS: For the most part. There is  
 24 some years -- yes, there is always water in it, but  
 25 very low some years. You couldn't boat in it.



1 JUDGE BIRO: The English River?  
 2 THE WITNESS: Yeah.  
 3 JUDGE BIRO: Okay. And how about the Deep  
 4 Creek?  
 5 THE WITNESS: Most of the time. I have seen  
 6 it, in my time I have seen it actually dry twice.  
 7 JUDGE BIRO: And when was that?  
 8 THE WITNESS: 1988, and it's been within the  
 9 last 10-12 years here, whenever we had that drought  
 10 year.  
 11 JUDGE BIRO: Just at times of severe  
 12 drought?  
 13 THE WITNESS: Yup.  
 14 JUDGE BIRO: Were those also the times when  
 15 maybe you saw the tributary dry, the same kind of --  
 16 THE WITNESS: Oh, it was dry at the same  
 17 time plus some other times. It was dry. I mean, those  
 18 are the only two times I have ever seen Deep Creek dry,  
 19 but I'd seen the tributary dry quite often.  
 20 JUDGE BIRO: Okay. In terms of the tiling  
 21 you said you hired a company to do the tiling.  
 22 THE WITNESS: Um-hmm.  
 23 JUDGE BIRO: How much did you pay the  
 24 company?  
 25 THE WITNESS: Right offhand, I don't know.

1 I'm not sure. I'm going to say probably eight to ten  
 2 thousand dollars.  
 3 JUDGE BIRO: And did that --  
 4 THE WITNESS: It might have been -- it might  
 5 have been more.  
 6 JUDGE BIRO: Did that cover the -- buying  
 7 the tiles themselves?  
 8 THE WITNESS: No. I still had to pay for  
 9 the tile.  
 10 JUDGE BIRO: You had to pay for the tile.  
 11 How much did that cost?  
 12 THE WITNESS: It's in an invoice in the --  
 13 JUDGE BIRO: In evidence?  
 14 THE WITNESS: Yes.  
 15 JUDGE BIRO: Okay, so that's for the  
 16 purchase of the tile itself.  
 17 THE WITNESS: Of the one line of pipe, and  
 18 then I had the other pipe, it showed in that diagram.  
 19 There is two six-inches tile. I had them on hand  
 20 already.  
 21 JUDGE BIRO: Okay, so you didn't have to buy  
 22 them.  
 23 THE WITNESS: So them would have cost  
 24 probably another -- \$1,500 a roll, so there is two and  
 25 half. That would have been probably another \$4,500.

1 JUDGE BIRO: \$4,500 for tiles, and eight to  
 2 ten thousand dollars for the --  
 3 THE WITNESS: Well, that's just for the six-  
 4 inch tile.  
 5 JUDGE BIRO: Oh, for the six-inch tile.  
 6 THE WITNESS: Yeah. In evidence. there is  
 7 invoice for the 18-inch.  
 8 JUDGE BIRO: Okay. And then another eight  
 9 to ten thousand to have it installed.  
 10 THE WITNESS: Um-hmm.  
 11 JUDGE BIRO: And then after that, the only  
 12 work left to do was work you did yourself.  
 13 THE WITNESS: I hired him to come back in  
 14 for a day -- and not just there, I had some other work  
 15 around there, but shape everything up so I could work  
 16 it down and seed the waterway and farm it.  
 17 JUDGE BIRO: Okay. And what's a day of  
 18 labor for that?  
 19 THE WITNESS: Probably about 2,000.  
 20 JUDGE BIRO: Okay.  
 21 THE WITNESS: And like I say, these are just  
 22 approximates. I don't know the exact amounts.  
 23 JUDGE BIRO: Once you tiled essentially all  
 24 of your farmland, how much do you think it increased in  
 25 value?

1 THE WITNESS: That's hard to say because  
 2 farm -- farm ground has fluctuated so much in the past  
 3 three to five years.  
 4 JUDGE BIRO: Well, I'm basing that on the  
 5 fact you said that when you tile --  
 6 THE WITNESS: Tile. I'm going to say  
 7 probably increased it -- the tile itself, probably 20  
 8 percent. Maybe 30 percent.  
 9 JUDGE BIRO: So, maybe it went from the  
 10 whole property being worth 400,000 to 550 or?  
 11 THE WITNESS: Oh, yeah. I would say yeah,  
 12 at least.  
 13 JUDGE BIRO: Six hundred --  
 14 THE WITNESS: Especially with inflation, I  
 15 mean, in time. But just as the tile, to property  
 16 that's tiled to property that's not, you're probably in  
 17 that ballpark.  
 18 JUDGE BIRO: Okay. Well, that seems like a  
 19 worthwhile investment about -- from what I can tell,  
 20 maybe \$30- to \$50,000 to increase it 30 percent.  
 21 THE WITNESS: Yeah, because -- because the  
 22 crops respond to tile, and like I say, it helps the  
 23 ground work like a sponge. It absorbs the water and  
 24 then releases it, and so the water -- the ground isn't  
 25 staying wet, to erode as easy, either.

1 JUDGE BIRO: So it just makes it much more  
 2 valuable farmland.  
 3 THE WITNESS: Yes, environmentally and  
 4 economically.  
 5 JUDGE BIRO: Tell me about the application  
 6 of manure on farmland. I take it that these soybeans  
 7 and corn are not for human consumption?  
 8 THE WITNESS: Yeah. It can be, yes.  
 9 JUDGE BIRO: Even when you apply this manure  
 10 to it?  
 11 THE WITNESS: Oh, yeah. Yes. Manure is an  
 12 organic fertilizer. As a matter of fact, organic  
 13 farmers, that's one of the only things they can use,  
 14 it's one of the products they can use. Because it's  
 15 organic, it breaks down into it, but it's pumped out  
 16 and put on a farm with a toolbar and tractor with a  
 17 pipe hooked to it that's pumping it to this and  
 18 injecting it into the ground.  
 19 JUDGE BIRO: Okay. So, are you now an  
 20 organic farmer?  
 21 THE WITNESS: No, because you've got to be  
 22 certified.  
 23 JUDGE BIRO: Certified.  
 24 THE WITNESS: If you're organic, you cannot  
 25 spray with herbicides and insecticides.

1 JUDGE BIRO: Oh.  
 2 THE WITNESS: I mean, it's got to be all  
 3 organic.  
 4 JUDGE BIRO: So, do you use herbicides and  
 5 insecticides on your property?  
 6 THE WITNESS: We're forced to.  
 7 JUDGE BIRO: Okay. What kind of products do  
 8 you use?  
 9 THE WITNESS: You've probably heard of  
 10 Roundup, Dicamba, which is the new product. We use 2-  
 11 4D, and I'm not an expert on a lot of them. There are  
 12 different categories, but we use different -- some  
 13 Atrazine. We're being forced to use more and more  
 14 because we aren't allowed to till. So, to control the  
 15 weeds, the only other way you got to do it is to spray  
 16 herbicides and insecticides on the surface.  
 17 JUDGE BIRO: Tell me why you say you're not  
 18 allowed to till.  
 19 THE WITNESS: It's just kind of policy now.  
 20 JUDGE BIRO: Okay. So, you tilled about 1.3  
 21 acres, they say. Is that about correct, you believe?  
 22 THE WITNESS: That's what they say.  
 23 JUDGE BIRO: Do you believe that's correct  
 24 or is it more or less?  
 25 THE WITNESS: It's real close.

1 JUDGE BIRO: Okay. I'm a little confused as  
 2 to why it would cost so much to take out the tile when  
 3 it only costs about 15,000 to put it in.  
 4 THE WITNESS: Now, when you say "cost so  
 5 much to take it out".  
 6 JUDGE BIRO: Right.  
 7 THE WITNESS: To mitigate?  
 8 JUDGE BIRO: Yes, to mitigate. You said it  
 9 was going to cost forty to fifty thousand.  
 10 THE WITNESS: The mitigation that I checked  
 11 into was through the NRCS office, and where they  
 12 directed me, that's -- that's where I got the price.  
 13 JUDGE BIRO: Oh, so you weren't intending to  
 14 take out the tile. You were going to buy wetlands  
 15 credit somewhere else.  
 16 THE WITNESS: Right.  
 17 JUDGE BIRO: Okay.  
 18 THE WITNESS: Yes. That's one of the things  
 19 that I'm working with them now is trying to find a  
 20 solution to it.  
 21 JUDGE BIRO: So, is it my understanding you  
 22 can't take out the tiles because if you did, then they  
 23 couldn't operate their hog farm on your property, on  
 24 what used to be your property?  
 25 THE WITNESS: Right.

1 JUDGE BIRO: Right. So, you're, in essence,  
 2 between a rock and a hard place, right?  
 3 THE WITNESS: Um-hmm.  
 4 JUDGE BIRO: Is that what the situation is?  
 5 You can't take out the tile. What was your agreement  
 6 with MCM Pork in terms of being able to operate a hog  
 7 farm in --  
 8 THE WITNESS: I sold -- I just -- they  
 9 purchased this piece of ground from me.  
 10 JUDGE BIRO: How many acres did they  
 11 purchase, or what was the size of the purchase?  
 12 THE WITNESS: Approximately three acres.  
 13 JUDGE BIRO: Okay.  
 14 THE WITNESS: And then I get the manure. I  
 15 mean, that's where they build hog buildings normally is  
 16 where there is agricultural land available to apply the  
 17 manure to.  
 18 JUDGE BIRO: Okay. And do you know how many  
 19 hogs there are in their containment?  
 20 THE WITNESS: I can't tell you that.  
 21 JUDGE BIRO: Okay.  
 22 THE WITNESS: I don't want to -- I'm not  
 23 active with the hog building and I don't -- I've been  
 24 in that years ago and I don't care to do that.  
 25 JUDGE BIRO: You didn't build the building?

1 THE WITNESS: I had nothing to do with any  
2 of the building. All I did is sold them the land.

3 JUDGE BIRO: Okay. And did you make any  
4 representations about being able to use it for hog  
5 containment?

6 THE WITNESS: Pardon?

7 JUDGE BIRO: As part of your sale --

8 THE WITNESS: Yeah.

9 JUDGE BIRO: -- did you make any  
10 representations that they could use the property for a  
11 hog containment area?

12 THE WITNESS: I didn't make that as a  
13 representation, no. That was their purpose of buying  
14 it, though.

15 JUDGE BIRO: Okay. So, if it turns out that  
16 you take out the tiles and they are no longer more than  
17 500 feet from a waterway, is there any compensation  
18 you're going to owe MCM Pork?

19 THE WITNESS: I don't know. I can't -- I  
20 can't answer that. You're talking about taking the  
21 tile. I thought you meant taking out the tile  
22 someplace for a wetland, but you're talking about  
23 taking the tile out of the --

24 JUDGE BIRO: Out of the tributary.

25 THE WITNESS: Yeah.

1 JUDGE BIRO: Yes, if you take them out, and  
2 let's say it makes it so that the hogs -- the hog  
3 containment area can no longer operate there because  
4 they're not 500 feet, have you breached your contract  
5 with them?

6 THE WITNESS: I can't -- I can't say. I  
7 don't know.

8 JUDGE BIRO: Okay. So when, you know, I  
9 suggested you're between a rock and hard place, it's  
10 because you would no longer be entitled to get the  
11 manure for free?

12 THE WITNESS: Yeah.

13 JUDGE BIRO: Is that your economic loss --

14 THE WITNESS: Yeah.

15 JUDGE BIRO: -- if you take out the tile?

16 THE WITNESS: Yeah.

17 JUDGE BIRO: Okay. And how much does that  
18 save you, getting the manure?

19 THE WITNESS: That varies. It's not as  
20 cost-saving today as it was two years ago or three  
21 years ago because of where we're at in farm commodities  
22 right now, but I'm going to say probably -- probably  
23 this year \$10 - \$12,000 because I -- because I do have  
24 to pay for the application of it.

25 JUDGE BIRO: Right. So, what arrangement

1 did you make with MCM Pork regarding applying the  
2 manure? Would they continue to provide it to you for  
3 free indefinitely as long as they operated the hog farm  
4 there?

5 THE WITNESS: We have a -- I believe it's a  
6 10-year contract.

7 JUDGE BIRO: Is that separate from your sale  
8 with them?

9 THE WITNESS: Yes.

10 JUDGE BIRO: Okay. So, you have a 10-year  
11 contract.

12 THE WITNESS: Yeah. I don't know what they  
13 call it, a continuous 10-year contract where it's 10  
14 years. One year goes off this end and then another  
15 year is added to the other end.

16 JUDGE BIRO: Okay.

17 THE WITNESS: So it's a -- it's a continuous  
18 10-year contract.

19 JUDGE BIRO: And they agree under that  
20 contract to give you the manure for free.

21 THE WITNESS: Yeah, they --

22 JUDGE BIRO: And what do you promise them on  
23 the other end of the contract?

24 THE WITNESS: I've got to take the manure.

25 JUDGE BIRO: Oh, you have to take it.

1 THE WITNESS: Well, for the most part. They  
2 need that manure out of that building every year.

3 JUDGE BIRO: Okay.

4 THE WITNESS: To run under -- to run under  
5 the regulations.

6 JUDGE BIRO: So, do you apply that manure to  
7 any other farms or sell it?

8 THE WITNESS: No. My parents' farm we apply  
9 it to also.

10 JUDGE BIRO: Okay. Is there any other farms  
11 you apply it to?

12 THE WITNESS: Not at this time, no.

13 JUDGE BIRO: Okay. So, they are also saving  
14 about \$10 - \$12,000 a year?

15 THE WITNESS: No, that's -- that's total.

16 JUDGE BIRO: Oh, between --

17 THE WITNESS: Between, yeah, whoever gets it  
18 that year. We may split it. We have split it before  
19 but that's -- that's a total.

20 JUDGE BIRO: For both you and your parents'  
21 farm?

22 THE WITNESS: Yeah. Yup.

23 JUDGE BIRO: Because otherwise, did you buy  
24 fertilizer together?

25 THE WITNESS: Well, if you don't put that

1 on, you have to buy commercial fertilizer.  
 2 JUDGE BIRO: Okay. And did you used to  
 3 split that also with your parents?  
 4 THE WITNESS: No.  
 5 JUDGE BIRO: Oh, so how much did that cost  
 6 you?  
 7 THE WITNESS: Last year.  
 8 JUDGE BIRO: When you used regular  
 9 fertilizer instead of manure.  
 10 THE WITNESS: If I put hog manure on, I  
 11 don't need commercial fertilizer.  
 12 JUDGE BIRO: Right.  
 13 THE WITNESS: If I don't put it on, then I  
 14 need it.  
 15 JUDGE BIRO: And how much does that cost?  
 16 THE WITNESS: It would be that additional --  
 17 for one or the other, it's going to be an additional  
 18 \$10 - \$12,000 dollars.  
 19 JUDGE BIRO: Just for your farm.  
 20 THE WITNESS: Yeah.  
 21 JUDGE BIRO: Okay. So, if you remove the  
 22 tiles, let's say from the tributary, basically undid  
 23 what the government says you should not have done, you  
 24 would have the cost of removing it.  
 25 THE WITNESS: Um-hmm.

1 JUDGE BIRO: Do you know what that cost  
 2 would be?  
 3 THE WITNESS: No, I don't.  
 4 JUDGE BIRO: Okay. Is that something you  
 5 could just do yourself?  
 6 THE WITNESS: No, I don't have the equipment  
 7 to do that.  
 8 JUDGE BIRO: Okay. And you would also lose  
 9 the \$10 - \$12,000 of free manure and, you know,  
 10 fertilizer.  
 11 THE WITNESS: Um-hmm.  
 12 JUDGE BIRO: Okay. So, you said you've  
 13 talked to NRCS about mitigating. Other than buying  
 14 let's say credits, is there any other mitigation you  
 15 can offer them? Do you have other property that you  
 16 could offer to use in mitigation?  
 17 THE WITNESS: For that 1.3 acres?  
 18 JUDGE BIRO: Yes.  
 19 THE WITNESS: That is one thing I'm working  
 20 on, is I have a piece of ground that -- clear to the  
 21 southwest corner of my farm that we're going to --  
 22 we're looking into to see if that piece could qualify.  
 23 JUDGE BIRO: Okay. All right.  
 24 THE WITNESS: That doesn't have tile in it.  
 25 JUDGE BIRO: So, when you tiled over 1.3

1 acres, you said you could get in another 20 rows?  
 2 THE WITNESS: No, that's when we cleaned the  
 3 trees along the fencerow.  
 4 JUDGE BIRO: Oh. So, what do you get out of  
 5 tiling over 1.3 acres in terms of additional farmland?  
 6 THE WITNESS: Not so much more farmland, but  
 7 farmability, protecting the land I have by -- by  
 8 catching the residue, the corn stalks and the bean  
 9 stalks on big rains. If there's any washing of top-  
 10 soils, silt, I catch that, and can take that back.  
 11 JUDGE BIRO: And re-deposit it on your land.  
 12 THE WITNESS: On top of the hill or  
 13 wherever.  
 14 JUDGE BIRO: Okay.  
 15 THE WITNESS: Once it -- once it washes into  
 16 the creek and goes on down, I mean, it's gone.  
 17 JUDGE BIRO: Okay. So, really it's not  
 18 having the opportunity to farm on that particular  
 19 sliver of property.  
 20 THE WITNESS: No.  
 21 JUDGE BIRO: Okay, just give me a moment.  
 22 (Pause.)  
 23 What county is your property located in?  
 24 THE WITNESS: Iowa County. And when you  
 25 asked yesterday, it's Lincoln Township.

1 JUDGE BIRO: Lincoln Township, Iowa County.  
 2 THE WITNESS: County, yes.  
 3 JUDGE BIRO: Okay.  
 4 THE WITNESS: Lincoln Township is in Iowa  
 5 County.  
 6 (Pause.)  
 7 JUDGE BIRO: Okay, I don't think I have any  
 8 more questions. Mr. McAfee, did my questions raise any  
 9 questions for you that you would like to ask?  
 10 MR. McAFEE: No, Your Honor. Thank you.  
 11 JUDGE BIRO: Okay. Mr. Muehlberger?  
 12 MR. MUEHLBERGER: I've got about three quick  
 13 questions, Your Honor.  
 14 JUDGE BIRO: Go.  
 15 RE-CROSS-EXAMINATION  
 16 BY MR. MUEHLBERGER:  
 17 Q Mr. Morrow, so you just told the Judge that  
 18 if you took out the tiles that you would lose the  
 19 benefit of getting the manure from MCM Pork, is that  
 20 correct?  
 21 A I would assume that. I can't -- I don't  
 22 know what would happen, but yes.  
 23 Q So, you have a deal with MCM Pork concerning  
 24 the distance of the confinement barn to the -- what was  
 25 the tributary, correct?

1 A No.

2 Q Well, so I guess I don't understand. If you

3 would lose the benefit from MCM Pork by taking out the

4 tile, then there must have been some kind of agreement

5 between you and MCM Pork.

6 A I don't know what would happen to the

7 building if the tile came out. Your Honor asked me if

8 the building closed, I would lose the manure. And,

9 yes, I would.

10 Q Okay. But if you took out the tiles, then

11 you feel that MCM Pork would stop providing you the

12 free manure?

13 A No.

14 Q Okay.

15 A Not if the building is up and running, no.

16 Q Okay. So, there's no relationship between

17 the distant -- between the tributary and MCM Pork --

18 A No.

19 Q -- is what you're saying.

20 A No.

21 Q Okay. You talked a lot about how you've had

22 a lot of history with NRCS concerning wetland

23 determinations, correct?

24 A Um-hmm.

25 Q So, you knew that FSA wasn't the agency that

1 makes wetland determinations, right?

2 A Not -- they were -- until this day, I

3 consider them working hand in hand.

4 Q Okay. But you know that you've gotten

5 wetland determinations from NRCS in the past, correct?

6 A I have got a couple, yes, by just a letter

7 or even a verbal.

8 Q Okay. And just one last question. The

9 confinement barn, the plans that were submitted as

10 Morrow One site to DNR where the confinement barn was

11 going to be sited, the actual confinement barn is not

12 in that location, correct?

13 A I don't know.

14 Q Okay, but it was labeled as -- did you hire

15 Pinnacle in order to make the -- in order to do that

16 initial consultation to inform DNR where the

17 confinement barn was going to be located?

18 A No, I did not.

19 Q Even though it was listed as the Morrow One

20 site.

21 A No, I did not.

22 Q Okay. But is the confinement barn where the

23 original plans were supposed to be?

24 A I never seen no plans of any sort.

25 Q You never saw the plans from Pinnacle that

1 are listed as Morrow One site.

2 A No, I did not.

3 MR. MUEHLBERGER: Okay, no further

4 questions.

5 JUDGE BIRO: Okay, thank you very much, Mr.

6 Morrow.

7 (Witness excused.)

8 Okay, we're not going to end today.

9 (Laughter.)

10 MR. BIERI: I was too ambitious. I'm sorry.

11 JUDGE BIRO: I'm good until Friday. Come

12 Friday, we're done.

13 (Laughter.)

14 I have to go home. So what time would you

15 like to start tomorrow?

16 MR. BIERI: Can I speak with my cohort here.

17 JUDGE BIRO: Your cohort? Your colleague?

18 MR. BIERI: Colleague.

19 JUDGE BIRO: Yes.

20 MR. BIERI: How long do you think you will

21 go on direct? I'm not going to hold you to it. I just

22 kind of wondered.

23 MR. MUEHLBERGER: I can't see going more

24 than an hour and a half on direct.

25 MR. BIERI: Okay.

1 MR. MUEHLBERGER: Let me rephrase that. I

2 estimate I won't go more than an hour and a half.

3 MR. BIERI: Sure, sure, sure. I think if we

4 start at nine, we can -- I think that would give us

5 time and I'm going to --

6 MR. MUEHLBERGER: Do you want me to

7 estimate? You're not very good at it. I would think

8 we could be done by noon or less.

9 MR. BIERI: Yes.

10 JUDGE BIRO: Okay. You don't anticipate

11 calling any rebuttal witnesses?

12 MR. BIERI: Perhaps. It depends on what

13 this gentleman says, but it would be short, I would

14 imagine.

15 JUDGE BIRO: Okay. So, let's start again at

16 9:00, and I won't book any tickets home yet.

17 Okay, we'll stand in recess until then.

18 Thank you.

19 ALL: Thank you, Your Honor.

20 (Whereupon, at 5:30 p.m., the hearing in the

21 above-entitled matter adjourned, to reconvene at 9:00

22 a.m. the following day, Thursday, October 4, 2018.)

23 //

24 //

25 //

REPORTER'S CERTIFICATE

DOCKET NO.: CWA-07-2018-0095  
CASE TITLE: C&S Enterprise, LLC  
HEARING DATE: October 3, 2018  
LOCATION: Des Moines, Iowa

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the United States Environmental Protection Agency, Office of Administrative Law Judges.

Date: October 3, 2018

David W. Jones  
Official Reporter  
Heritage Reporting Corporation  
Suite 206  
1220 L Street, N.W.  
Washington, D.C. 20005-4018

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