

Seven years and more than one-half million dollars are gone from Robert Brace's life. He engaged in war with the United States government and emerged the victor. His farm was in jeopardy due to strict interpretation of wetland regulations.

Neither money nor property were the issue. This conflict was about government control of private property.

"I fought back because it was the right thing to do," declares an adamant Brace.

On the other hand, Jim Butch, multimedia compliance manager for the Pennsylvania Environmental Protection Agency, is just as adamant. He says, "When Congress passes a law, our job is to enforce it."

Lauren Cotter, official spokesperson for Congressman

Tom Ridge, (R-Pa.), says Congress has never passed a law regarding wetlands. "What Mr. Brace has dealt with over the past few years is a quagmire of regulations that were established by the EPA," she says. "This case had nothing to do with Congressional law."

This litigation involves a 33-acre site located on Brace's property. In 1975 he purchased 137 acres from his father that included the site. The property has been in the family since the 1930s. Today he owns approximately 600 acres in Erie County, Pa., near Waterford. In the late 1970s he developed gas wells on portions of his property to subsidize his farming operations. No wells were on the site in question.

At the time Brace purchased the property, the

site was covered with scrub brush and briars. His father and grandfather used it for pastureland. There are several headwater streams that converge on this property.

Ironically in the 1940s, as an experiment, the government introduced beavers from Wisconsin to the Brace property. The beavers built dams causing the streams to back up and create standing water.

In 1977 Brace consulted the Pennsylvania Game Commission to trap the beavers and remove the dams. He reestablished the streams' original flow. At about that same time he asked for advice and assistance from the Agricultural Stabilization and Conservation Service (ASCS) to develop an integrated farming operation on property

that includes the site because he wanted to raise row crops. The ASCS provided advice and assistance to Brace from 1977 to 1985.

The soil in Erie County requires continuous draining to be suitable for cultivation. Brace implemented the first stage of interconnected drainage plans that ASCS had recommended for the 137 acres. He reopened a channel to allow water to flow in its natural direction and installed tiling material on the site.

He continued to maintain the drainage system by removing soil, silt, sedimentation and vegetation growth. The site was dry by the end of 1979. For 10 years, whenever funds, time and equipment were available, he worked to improve the drainage system. He cleared, leveled and drained the formerly wooded and vegetated site. As a result, he was able to plant oats and alfalfa hay on the site in 1986.

The beavers eventually returned to the property and in 1986 Brace contacted the Game Commission again for assistance in trapping the beavers. A government official visited the site and suggested it might make a good sanctuary. Brace and the official argued. The official told him he "didn't know what trouble could be." The battle lines were drawn.

A few weeks later Brace began receiving visitors from various government agencies. They said his work had destroyed a key wetland.



ROBERT BRACE vs THE U.S. GOVERNMENT

Brace thought he was improving land that had been in his family a long time, not destroying it.

In 1987 federal EPA officials issued him three orders to refrain from further disturbing the land. Butch says they were looking for voluntary compliance which they did not get.

"I told Jim Butch it was not the 30 acres," says Brace. "It was the principle of the thing."

Strong sanctions were imposed. For two years Brace faced criminal charges. When the government chose to drop those charges, the fine had mounted to \$12 million.

In October 1988 he received an administrative complaint charging him with wetland violations. The \$125,000 fine was dropped when the complaint was dismissed prior to a hearing. Since the time of the cease and desist order, Brace has terminated all farming activity on the site with the exception of routinely cutting the hay.

However, to be in total compliance with the order, he would have to rebuild the beaver dams and recreate a swamp area. According to his attorney, the problem with that is eventually the water backs up and destroys other portions of the farm.

Butch disagreed and contended the 30-acre site could be contained with the current drainage system.

"What Bob did was normal farming practice for Erie County," says Hank Ingram*, Brace's attorney. "It was Bob's land and he felt he was entitled to farm it."

Brace says this dispute could have been settled in seven days, but it has taken seven years because the government has to take the defendant to court. The defendant cannot take the government to court.



The government's case was based on the Clean Water Act (CWA) section 404, which exempts agriculture. It states, "Existing agriculture under cultivation can continue to be farmed."

However, there is also a provision that says, "If the work has the effect of bringing an area not established in agriculture into agriculture, it requires a permit." It is called "Recapture."

EPA argued that the site was not being farmed and Brace made it farmable by draining and clearing it.

Brace believed he was working under exemptions granted to farmers and ranchers because of preexisting agricultural use of the property dating back to the 1930s.

U.S. District Judge,

Glenn Mencer, took the civil court matter under advisement after a four-day, non-jury trial. In his decision he wrote, "This case is not the type of case where a corporation takes control of a parcel of land and dramatically alters the composition of the land and runs roughshod over the requirements of the Clean Water Act. It is a case of a

legitimate factual dispute regarding the use of a parcel of land that has remained within the same family for over half a century."

Mencer further stated the "Recapture" provisions of CWA apply only when an area of navigable waters is brought "into a use to which it was not previously subject."

Under the exemption provisions of CWA, he found the activities of Brace did not require a permit because they were normal farming activities, soil and water conservation practices and maintenance of drainage ditches.

On December 16, 1993 Judge Mencer ordered, "In favor of the defendant, Robert Brace . . . and against the plaintiff, United States of America."

The Pennsylvania EPA will recommend there be an appeal.

"We believe the decision rendered was incorrect as a matter of law," says Butch. "We think it is worth our time and money to appeal because the opinion has the effect of allowing anyone who engages in farming, even one parcel of land, to bootstrap continuous wetland parcels into the ongoing exemption. You can

Robert Brace's Pennsylvania farm, site of a controversial wetlands violation charge.

interpret the opinion to mean anything within the confines of a farm is exempt from the CWA. In which case we are talking about huge expanses of our country's wetlands that would not be subject to regulation.

The government has spent a substantial amount of taxpayer's dollars trying to bring Brace into compliance. One reporter who attended the trial said our government should have better things to do.

"A lot of principles were involved in this case," said John Ward*, another of Brace's attorneys. "Brace could have bought and sold that 30-acre site several times with the amount of money he spent defending it."

There is a lesson here for all of us. Know the law. If you don't like the law, work to get it changed. We cannot swap our freedom for government control even though it may be the easy thing to do.

**Hank Ingram and John Ward are associated with the law firm of Buchanan Ingersoll, Pittsburgh, Pa. AJ*